

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN SELF-CLEANING LITTER
BOXES AND COMPONENTS THEREOF

Investigation No. 337-TA-625

2008 FEB - 2 PM 4: 14
COMMUNICATIONS SECTION

**NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL
DETERMINATION IN PART; GRANT A MOTION TO STRIKE; AND SET A
SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER
REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

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 final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on December 1, 2008, in the above-captioned investigation, and has granted Complainants’ motion to strike.

FOR FURTHER INFORMATION CONTACT: Mark B. Rees, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 205-3116. 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, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://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 December 28, 2007, based on the complaint of Applica Consumer Products, Inc. of Miramar, Florida (“Applica”) and Waters Research Company of West Dundee, Illinois (“Waters”). 72 *Fed. Reg.* 73884 (Dec. 28, 2007); 73 *Fed. Reg.* 13566 (Mar. 13, 2008). The complaint alleges violations of section 337 of the Tariff Act of 1930 (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 self-cleaning litter boxes and components thereof by reason of infringement of U.S.

Patent No. RE36,847 (“the ‘847 patent”). The respondents are Lucky Litter, L.L.C. of Chicago, Illinois (“Lucky Litter”) and OurPet’s Company of Fairport Harbor, Ohio (“OurPet’s”).

On December 1, 2008, the ALJ issued his final ID, finding that a violation of section 337 has occurred in the importation, sale for importation, or sale after importation of certain self-cleaning litter boxes and components thereof by reason of infringement of claim 33 of the ‘847 patent. His final ID also included his recommendation on remedy and bonding. Respondents Lucky Litter and OurPet’s, complainants Applica and Waters, and the Commission investigative attorney (“IA”) filed petitions (or contingent petitions) for review on December 16, 2008. All parties filed responses to the petitions on December 24, 2008. Complainants also filed a motion to strike on December 23, 2008, to which Lucky Litter and the IA filed oppositions on January 5, 2009.

Having examined the record in this investigation, including the ALJ’s final ID, the petitions for review, and the responses thereto, the Commission has determined to review the following issues: the construction of “comb drive” (asserted claims 8, 13, 31-33), “comb drive means” (asserted claims 27, 41-42), “drive means” (asserted claims 24-25), “discharge position adjacent the discharge end wall” (asserted claims 8, 13), “comb . . . coupled to the comb drive” (asserted claims 31-33), and “mode selector switch . . . moveable between a manual operation position . . . and an automatic operation position” (asserted claim 33); invalidity due to anticipation; invalidity due to obviousness; and direct and contributory infringement.

On review, the Commission requests briefing on the above-listed issues based on the evidentiary record. The Commission is particularly interested in responses to the following questions:

- (1) Did the ALJ err in finding that the specification of the ‘847 patent contains no disavowal that limits the claimed comb drive? If the patentee disavowed certain drives, what is the correct scope of the disavowal? Does it include, for example, worm drives of any configuration, or only the drive disclosed in the Carlisi prior art reference, which has a “worm” along the side of the litter box that turns and thereby drives the rake or comb on its path in the litter box?
- (2) What are the differences or similarities in the patent’s use of “comb drive” in asserted claim 8, “comb drive means” in asserted claim 27, and “comb drive” in asserted claim 33?
- (3) Is there a difference in function between the “guide” wheels and “guide” pins referenced in the specification in connection with figures 1-3 of the ‘847 patent and the “drive” wheels and “drive” pins referenced in claim 10?
- (4) What result should the Commission reach on infringement if it were to find that the ‘847 patent disavows all worm drives or that it disavows only the Carlisi drive?

- (5) What result should the Commission reach on infringement if it were to find that the synonyms for “adjacent” cited in the ID at 143-44 incorrectly narrow the limitation “discharge position adjacent the discharge end wall” in asserted claim 8?
- (6) Is the limitation “comb . . . coupled to the comb drive” in asserted claims 31-33 met in OurPet’s SmartScoop under a broader construction that includes, as Complainants argue, an “indirect” connection? Should the infringement analysis that follows from the correct construction of this limitation be different in claim 31 than it is in claim 33? Did the ID err in finding claim 33 infringed on the one hand and, on the other, that the same limitation is not met for purposes of claim 31?
- (7) How does a finding of disavowal of all worm drives, or the Carlisi drive, impact the consideration of obviousness under § 103 and anticipation under § 102? Do the broader constructions of “discharge position adjacent the discharge end wall” and “comb . . . coupled to the comb drive” advocated by Complainants impact either validity analysis?
- (8) Did the ID err in finding that the Strickland prior art reference does not disclose a “mode selector switch” to one of ordinary skill in the art?
- (9) Please describe and analyze the intrinsic evidence of record that is pertinent to the construction of “mode selector switch . . . moveable between a manual operation position . . . and an automatic operation position” of claim 33. Please identify record evidence of whether each accused device contains a “mode selector switch” which is “moveable between a manual operation position . . . and an automatic operation position.” In addition, please address the relevance of *Overhead Door Corp. v. Chamberlain Group, Inc.*, 194 F.3d 1261 (Fed. Cir. 1999), to the claim construction, infringement and invalidity analyses of the “mode selector switch” limitation.

The Commission has also granted Complainants’ motion to strike the Declaration of Alan J. Cook that was submitted by Lucky Litter along with its petition for review. The declaration and its exhibits are not part of the record on violation in this investigation. References to such information in Lucky Litter’s petition for review are also therefore stricken. This action is taken without prejudice to Lucky Litter submitting any information contained in the declaration and exhibits that is relevant to the remedy and bonding issues in this investigation at the appropriate time.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in respondents 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 are likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (Dec. 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 and/or cease and desist orders 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 President has 60 days to approve or disapprove the Commission's action. 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.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation. 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. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to provide the expiration date of the '847 patent and state the HTSUS number under which the accused articles are imported. The written submissions and proposed remedial orders must be filed no later than the close of business on February 20, 2009. Reply submissions must be filed no later than the close of business on February 27, 2009. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6.

Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

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 sections 210.42-.46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-.46).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

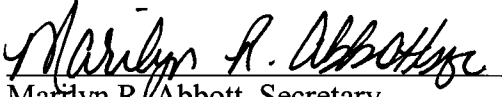
Marilyn R. Abbott
Secretary to the Commission

Issued: February 9, 2009

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| CERTAIN SELF-CLEANING LITTER BOXES AND COMPONENTS THEREOF | 337-TA-625 |
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PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL DETERMINATION IN PART; GRANT A MOTION TO STRIKE; AND SET A SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING** hand upon the Commission Investigative Attorney, Vu Q. Bui, Esq., and the following parties as indicated, on February 10, 2009.


 Marilyn R. Abbott, Secretary
 U.S. International Trade Commission
 500 E Street, SW
 Washington, DC 20436

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| <u>COUNSEL FOR COMPLAINANTS APPLICA INCORPORATED, APPLICA CONSUMER PRODUCTS, INCORPORATED AND WATERS RESEARCH COMPANY:</u> | |
| Jeffrey D. Mills, Esq. BAKER BOTTS LLP 1500 San Jacinto Center 98 San Jacinto Blvd. Austin, TX 78701 P-512-322-2500 F-512-322-2501 | <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____ |
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| <p><u>ON BEHALF OF RESPONDENT LUCKY LITTER LLC:</u></p> | |
| <p>Justin L Krieger, Esq. KATTEN MUCHIN ROSENMAN LLP 2900 K Street, NW, Suite 200 Washington, DC 20007-5118 P-202-625-3500 F-202-298-7570</p> | <p>() Via Hand Delivery (<input checked="" type="checkbox"/>) Via Overnight Mail () Via First Class Mail () Other: _____</p> |
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