

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN SMART THERMOSTAT
SYSTEMS, SMART HVAC SYSTEMS,
SMART HVAC CONTROL SYSTEMS,
AND COMPONENTS THEREOF**

Inv. No. 337-TA-1258

**ORDER NO. 25: DENYING COMPLAINANT ECOFACTOR INC.’S MOTION FOR
SUMMARY DETERMINATION OF LACK OF JURISDICTION
OVER GOOGLE’S ALLEGED REDESIGN THAT HAS NOT BEEN
IMPORTED AND GRANTING COMPLAINANT’S MOTION TO
WAIVE THE TWO-DAY NOTICE REQUIREMENT**

(November 1, 2021)

Complainant EcoFactor, Inc. (“EcoFactor”) moves for summary determination that the Commission lacks jurisdiction to adjudicate the infringement of an alleged redesigned product identified by Respondent Google LLC (“Google”). As part of this motion, EcoFactor further moves for waiver of the two-day notice requirement of Ground Rule 3.2. Motion 1258-018 (“Mot.”) at 1. Respondent Google LLC (“Google”) timely filed an opposition to both the motion for summary determination and the waiver of the two-day notice requirement of Ground Rule 3.2. (“Opp.”). Since Google was informed prior to the filing of this motion for summary determination and fully briefed its opposition, EcoFactor’s motion to waive the two-day notice requirement is granted. However, genuine issues of material fact remain with respect to the Commission’s jurisdiction to adjudicate the infringement of Google’s alleged redesign product, and therefore, the motion for summary determination is denied.

EcoFactor alleges that Google has a planned redesign product [REDACTED], which has never been imported into the United States, and thus EcoFactor does not “have any basis on which to

[REDACTED]

determine if any alleged redesign is ‘sufficiently fixed in design.’” Mot. at 2. EcoFactor further alleges that it learned during the deposition of Google’s expert, Dr. Callaway, on October 13, 2021, that [REDACTED] has been imported and that “[REDACTED]” *Id.* at 3. Thus, EcoFactor submits that the Commission’s test for determining whether the burden for adjudication of a redesigned or alternative product has not been met. *Id.* at 2, citing *Certain Two-Way Radio Equipment and Sys., Related Software and Components Thereof*, Inv. No. 337-TA-1053, Comm’n Op. at 8 (Dec. 18, 2018). And while EcoFactor asserts that Google has failed to meet the second, third, and fourth factors of the Commission’s test, the focus of the present motion is on Google’s failure to import the alleged redesign.

The Commission has held:

that the test for determining whether a respondent has met its burden for adjudication of a redesigned or alternative product includes four factors: (1) whether the product is within the scope of the investigation; (2) whether it has been imported; (3) whether it is sufficiently fixed in design; and (4) whether it has been sufficiently disclosed by respondent during discovery. *See Two-Way Radio*, 2018 WL 8648379 at *13-14.

Certain Human Milk Oligosaccharides and Methods of Producing the Same, Inv. No. 337-TA-1120, Comm’n Op. at 18 (June 8, 2020) (“*Oligosaccharides*”). Moreover, the Commission clarified that it has a standing “policy in favor of adjudicating redesigns to prevent subsequent and potentially burdensome proceedings that could have been resolved in the first instance in the original Commission investigation” (*id.*) and, despite factor (2) in the excerpt above, redesigns do not actually need to be imported at all (*id.* at 18 n. 21). *See also Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof*, Inv. No. 337-TA-910, Order No. 46 at 29 (November 3, 2014) (citing *Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Comm’n Op. at 20-21 (Jul. 23, 2014) (a dispute concerning importation of a redesigned product does not preclude an ALJ from considering whether a particular product infringes)).

[REDACTED]

Therefore, whether Google's alleged redesigned product has been imported is not dispositive to the issue of whether Google meets its burden for adjudication of the product.¹ Moreover, Google raises material issues of fact regarding its planned importation of the [REDACTED] (Opp. at 3-4, 6) and also regarding whether [REDACTED] is sufficiently fixed in design and whether Google produced sufficient evidence of the design during discovery (Opp. at 3-5, 9-10).

Accordingly, EcoFactor's Motion for summary determination that the Commission lacks jurisdiction to adjudicate the infringement of Google's alleged redesigned product (Mot. 1258-018) is DENIED and the motion to waive the two-day notice requirement of Ground Rule 3.2 is GRANTED.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

SO ORDERED.



Cameron Elliot
Administrative Law Judge

¹ Google also argues that its [REDACTED] is not a "planned redesign" but simply the [REDACTED] [REDACTED] Opp. at 7. This is not relevant as the Commission's four-part test applies equally to an "alternate product." *Oligosaccharides*, Comm'n Op. at 18.