

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN APPARATUS AND METHODS
OF OPENING CONTAINERS**

Inv. No. 337-TA-1255

**ORDER NO. 11: INITIAL DETERMINATION GRANTING COMPLAINANT'S
MOTION FOR SUMMARY DETERMINATION UNDER SECTION
337 OF THE TARIFF ACT OF 1930, AS AMENDED**

(December 20, 2021)

PUBLIC VERSION

TABLE OF CONTENTS

I.	INTRODUCTION	- 1 -
A.	Procedural History	- 1 -
B.	The Private Parties	- 2 -
1.	Complainant	- 2 -
2.	The Defaulting Respondents	- 3 -
a)	KKS Enterprises Co., Ltd.	- 3 -
b)	Kingskong Enterprises Co., Ltd.	- 3 -
c)	Du Zuojun	- 3 -
d)	WN Shipping USA, Inc.	- 3 -
e)	Shuje Wei	- 4 -
f)	Express Cargo Forwarded, Ltd.	- 4 -
g)	Hou Wenzheng	- 4 -
C.	The Products at Issue	- 4 -
1.	The Accused Products	- 4 -
2.	The Domestic Industry Product	- 5 -
II.	LEGAL STANDARDS	- 5 -
A.	Summary Determination	- 5 -
B.	Default	- 5 -
C.	Infringement	- 6 -
D.	Domestic Industry	- 7 -
1.	Technical Prong	- 7 -
2.	Economic Prong	- 8 -
III.	IMPORTATION	- 8 -
IV.	JURISDICTION	- 10 -
A.	Subject Matter Jurisdiction	- 11 -
B.	Personal Jurisdiction	- 11 -
C.	<i>In Rem</i> Jurisdiction	- 11 -
V.	THE '016 PATENT	- 12 -
A.	Overview	- 12 -
1.	Asserted Claim	- 12 -

PUBLIC VERSION

2. Claim Construction	- 13 -
B. Infringement.....	- 14 -
C. Technical Prong of the Domestic Industry Requirement.....	- 24 -
D. Validity	- 31 -
VI. ECONOMIC PRONG.....	- 31 -
A. Plant and Equipment.....	- 32 -
1. Investments	- 32 -
2. Significance.....	- 34 -
VII. REMEDY AND BONDING.....	- 35 -
A. General Exclusion Order.....	- 35 -
1. Circumvention of a Limited Exclusion Order	- 36 -
2. Widespread Pattern of Unauthorized Use.....	- 38 -
3. Conclusion	- 40 -
B. Bonding.....	- 40 -
VIII. INITIAL DETERMINATION.....	- 42 -

PUBLIC VERSION

I. INTRODUCTION

On August 20, 2021, Complainant Draft Top, LLC (“Draft Top”) moved (1255-005) for a summary determination of violation (“MSD”) by Respondents KKS Enterprises Co., Ltd. (“KKS”); Kingskong Enterprises Co., Ltd. (“Kingskong”); Du Zuojun; WN Shipping USA, Inc. (“WN Shipping”); Shuje Wei¹; Express Cargo Forwarded, Ltd. (“Express Cargo”); and Hou Wenzheng (collectively, the “Defaulting Respondents”), and requested entry of a general exclusion order and a bond during the Presidential review period of 300 percent of the entered value of the infringing goods. On September 17, 2021, Draft Top filed a supplement to its MSD (“Suppl. Mem.”). On the same day, the Commission Investigative Staff (“Staff”) filed her response, supporting Draft Top’s motion. To date, no other party has filed a response.

A. Procedural History

On January 28, 2021, Draft Top filed a Complaint alleging a violation of section 337 of the Tariff Act of 1930, as amended, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain apparatus and methods of opening containers by reason of infringement of a claim of U.S. Patent No. 10,519,016 (“the ’016 patent”). 86 Fed. Reg. 14,765 (Mar. 18, 2021). Supplements to the Complaint were filed on February 12 and 19 and March 1 and 2, 2021. *Id.* On March 15, 2021, the Commission voted to institute this Investigation. *Id.* Specifically, the Commission instituted this Investigation to determine whether:

[T]here is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of claim 12 of the ’016 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

¹ Draft Top’s spelling of Respondent Shuje Wei’s name differs from the Notice of Investigation (“NOI”). *Compare* Mem. at 1 (“Shujue Wei”), *with* 86 Fed. Reg. 14,765 (“Shuje Wei”). Consistent with the NOI, Respondent will be referred to herein as “Shuje Wei.”

PUBLIC VERSION

Id. The Notice of Investigation named nine entities as Respondents. *Id.* The Office of Unfair Import Investigations was also named as a party to the Investigation. *Id.*

On April 20, 2021, Draft Top and Respondent Tofba International, Inc. (“Tofba”) filed a joint motion to partially terminate the investigation based on withdrawal of the allegations in the Complaint directed to Tofba. On May 12, 2021, the undersigned granted the motion. Order No. 6, *not reviewed* by Comm’n Notice (May 27, 2021).

On July 12, 2021, the Defaulting Respondents were found to be in default. Order No. 8, *not reviewed* by Comm’n Notice (July 30, 2021).

On August 11, 2021, the undersigned issued an Initial Determination granting Draft Top’s motion to terminate the Investigation as to Respondent Mintiml based on withdrawal of the allegations in the Complaint directed to Mintiml.² Order No. 9, *not reviewed* by Comm’n Notice (Aug. 24, 2021).

None of the Defaulting Respondents have contested Draft Top’s allegations that they have violated and continue to violate section 337.

B. The Private Parties

1. Complainant

Draft Top is a New Jersey corporation with its principal place of business at 179 Riddle Avenue, Long Branch, New Jersey. Compl. ¶ 9. Draft Top manufactures and sells the “Draft Top” apparatus. *Id.*

² While Mintiml has been terminated from this Investigation, a few Defaulting Respondents sell, import, or sell after importation Mintiml branded can-opening products. *See, e.g.*, Compl. at ¶¶ 39, 44, 45.

PUBLIC VERSION

2. The Defaulting Respondents

a) KKS Enterprises Co., Ltd.

Respondent KKS Enterprises Co., Ltd., is a Chinese company with its principal place of business at Room 701, Xigang Xinje 7C, No. 206, Zhenhua Road, Sandun Town, Hangzhou 310030 China. *Id.* at ¶ 11. KKS allegedly manufactures and sells a “Go Swing Topless Can Opener Bar Tool” product via the Internet. *Id.* at ¶¶ 34-36, 42; Compl. Exs. 9, 13; Mem. at 15.

b) Kingskong Enterprises Co., Ltd.

Respondent Kingskong Enterprises Co., Ltd. is a Chinese company, having its principal place of business at 126 Zhaohui Rd, Hangzhou 310050, China. Compl. at ¶ 12. Kingskong is an affiliate of KKS. *Id.* Kingskong is alleged to sell in the United States the accused “Go Swing Topless Can Opener Bar Tool.” *Id.* at ¶¶ 34-36, 43; Compl. Exs. 9, 13; Mem. at 15.

c) Du Zuojun

Respondent Du Zuojun is a Chinese company with its principal place of business at Level 1, Shenzhen International Airport Cargo, Shenzhen, Guangdong 510810, China. Compl. at ¶ 13. Du Zuojun is alleged to sell in the United States an accused “Mintiml Go Swing Topless Can Opener Ez-Drink Opener” product via the Internet. *Id.* at ¶¶ 34-36, 44; Compl. Exs. 10, 13; Mem. at 15.

d) WN Shipping USA, Inc.

Respondent WN Shipping, USA, Inc. is a New York corporation with its principal place of business at 475 Doughty Blvd., Inwood, NY, 11096. Compl. at ¶ 14; *see also* EDIS Doc ID 733913 (2/12/21 Suppl. to Compl.) at 1-2. WN Shipping is alleged to sell in the United States an accused “Topless Can Opener” product via the Internet. *Id.* at ¶¶ 34-36, 38; Compl. Exs. 5, 13; Mem. at 15.

PUBLIC VERSION

e) Shuje Wei

Respondent Shuje Wei is a California company with its principal place of business at 2855 S. Reservoir Drive, No. 130, Pomona, CA, 91766. Compl. at ¶ 15. Shuje Wei is alleged to sell in the United States an accused “Multi opener tool” product, which is also referred to as the “Go Swing Topless Can Opener” and “Mintiml Can Opener,” via the Internet. *Id.* at ¶¶ 34-36, 39; Compl. Exs. 6, 13; Mem. at 15.

f) Express Cargo Forwarded, Ltd.

Respondent Express Cargo Forwarded, Ltd. is a California company with its principal place of business at 10722 Blvd, Los Angeles, CA, 90304. Compl. at ¶ 16. Express Cargo is alleged to sell in the United States an accused “Go Swing Can Opener” product via the Internet. *Id.* at ¶¶ 34-36, 40; Compl. Exs. 7, 13; Mem. at 16.

g) Hou Wenzheng

Respondent Hou Wenzheng is a Kentucky corporation with its principal place of business at 1200 Worldwide Blvd., Hebron, KY, 41048. Compl. at ¶ 18; *see also* EDIS Doc ID 733913 (2/12/21 Suppl. to Compl.) at 1-2. Hou Wenzheng is alleged to sell in the United States an accused “Mintiml Go Swing Universal Topless Can Opener” product via the Internet. *Id.* at ¶¶ 34-36, 45; Compl. Exs. 11, 13; Mem. at 16.

C. The Products at Issue

1. The Accused Products

The products at issue in this Investigation are can-opening devices which are designed to be used for the purpose of creating an open drinking container by removing the lid off the can. Compl. at ¶ 31; *see also* 86 Fed. Reg. 14,765 (describing the accused products as “apparatus(es) and products which are used for opening canned beverages by removing the top of the can.”).

PUBLIC VERSION

2. The Domestic Industry Product

Draft Top's domestic industry product is known by the product name "Draft Top." *Id.* at ¶ 5; *see also id.* at n.1. Draft Top describes its device as "a can opener used to remove the top of a beverage can in a way that provides a smooth drinking surface around the top lid of the can, which would allow the consumer to drink from the can as if it were a glass or a cup." Mem. at 1.

II. LEGAL STANDARDS

A. Summary Determination

Summary determination is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a determination as a matter of law. *See* 19 C.F.R. § 210.18(b). In determining whether there is a genuine issue of material fact, "the evidence must be viewed in the light most favorable to the party opposing the motion with doubts resolved in favor of the non-movant." *Crown Operations Int'l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (citations omitted); *see also Paragon Podiatry Lab., Inc. v. KLM Labs, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993) ("In other words, '[s]ummary judgement is authorized when it is quite clear what the truth is, and the law requires judgment in favor of the movant based upon facts not in genuine dispute.'" (citations omitted).

B. Default

Commission Rule 210.16(b)(4) states: "A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation." 19 C.F.R. § 210.16(b)(4). Commission Rule 210.16(c) further provides that "[t]he facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent." 19 C.F.R. § 210.16(c).

PUBLIC VERSION

C. Infringement

In a section 337 investigation, the complainant bears the burden of proving infringement of the asserted patent claims by a preponderance of the evidence. *Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1349 (Fed. Cir. 2010). This standard “requires proving that infringement was more likely than not to have occurred.” *Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005).

“An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996) (citation omitted).

A complainant must prove either literal infringement or infringement under the doctrine of equivalents. Literal infringement requires the patentee to prove that the accused device contains every limitation of the asserted claim(s). *Frank's Casing Crew & Rental Tools, Inc. v. Weatherford Int'l, Inc.*, 389 F.3d 1370, 1378 (Fed. Cir. 2004). “If even one limitation is missing or not met as claimed, there is no literal infringement.” *Elkay Mfg. Co. v. EBCO Mfg. Co.*, 192 F.3d 973, 980 (Fed. Cir. 1999). Literal infringement is a question of fact. *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). Infringement under the doctrine of equivalents “requires proof of insubstantial differences between the claimed and accused products or processes.” *Fonar Corp. v. Gen. Elec. Co.*, 107 F.3d 1543, 1555 (Fed. Cir. 1997) (citing *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1521-22 (Fed. Cir. 1995)).

PUBLIC VERSION

D. Domestic Industry

A violation of section 337 can be found “only if an industry in the United States, relating to the articles protected by the . . . trademark . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Under Commission precedent, this “domestic industry requirement” of section 337 consists of an economic prong and a technical prong. *Certain Stringed Musical Instruments & Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 12-14, 2009 WL 5134139 (U.S.I.T.C. Dec. 2009). The complainant bears the burden of establishing that the domestic industry requirement is satisfied. *See Certain Set-Top Boxes & Components Thereof*, Inv. No. 337-TA-454, Final Initial Determination at 294, 2002 WL 31556392 (U.S.I.T.C. June 21, 2002) (unreviewed by Commission in relevant part).

1. Technical Prong

The technical prong of the domestic industry requirement is satisfied when the complainant in a patent-based section 337 investigation establishes that it is practicing or exploiting the patents at issue. *See* 19 U.S.C. § 1337(a)(2) and (3); *Certain Microsphere Adhesives, Process for Making Same & Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm’n Op. at 8, 1996 WL 1056095 (Jan. 16, 1996). “The test for satisfying the ‘technical prong’ of the industry requirement is essentially [the] same as that for infringement, *i.e.*, a comparison of domestic products to the asserted claims.” *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To prevail, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent. It is sufficient to show that the products practice any claim of that patent, not necessarily an asserted claim of that patent. *See Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 38 (Aug. 1, 2007).

PUBLIC VERSION

2. Economic Prong

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

Given that these criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Certain Integrated Circuit Chipsets & Prods. Containing Same*, Inv. No. 337-TA-428, Order No. 10, Initial Determination (May 4, 2000) (unreviewed).

III. IMPORTATION

Section 337(a)(1) prohibits, *inter alia*, “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that . . . infringe a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1)(B)-(C). Complainant need only prove importation of a single accused product to satisfy the importation element. *Certain DC-DC Controllers & Prods. Containing the Same*, Inv. No. 337-TA-698, Order No. 29 at 3 (June 18, 2010); *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17 at 5 (Sept. 23, 2004).

Draft Top asserts that each of the Defaulting Respondents have imported into the United States and/or sold after importation apparatuses for opening containers that allegedly infringe the ’016 patent. Mem. at 11-17. Draft Top explains that the Accused Products are imported into the United States in three ways: “1) sale on the website of the manufacturer, 2) sale on internet

PUBLIC VERSION

platforms like Amazon, Etsy, eBay, and the like, and/or 3) sent directly to the purchaser through freight forwarders.” Compl. at ¶ 34. In Staff’s view, Draft Top has demonstrated that the importation requirement is satisfied for each of the Defaulting Respondents. Staff Resp. at 10-14.

In its Complaint, Draft Top identified an instance of importation and/or sale after importation by each of the Defaulting Respondents of the accused can-opening devices. *See* Compl. at ¶¶ 36, 38-40, 42-47. This evidence is summarized below:

Respondent(s)	Evidence of Importation
Kingskong Enterprises Co., Ltd.	Compl. at ¶¶ 36, 43; Compl. Ex. 9 at 1-2 (receipt showing purchase of Accused Product from Kingskong’s website); <i>Id.</i> at 3 (photo of the packaging of the Accused Product with a sticker indicating “Made in China”); Compl. Ex. 13 at ¶ 8.
KKS Enterprises Co., Ltd.	Compl. at ¶¶ 36, 42; Compl. Ex. 9 at 2 (correspondence from KKS representative in response to Draft Top’s request for samples of the Accused Product); <i>Id.</i> at 3 ((photo of the packaging of the Accused Product with a sticker indicating “Made in China”); <i>Id.</i> at 6 (identifying KKS as “Audited Supplier” of the Accused Product); Compl. Ex. 13 at ¶ 8.
Du Zuojun	Compl. at ¶¶ 36, 44; Compl. Ex. 10 (receipt showing purchase of Accused Product from “Mintiml Living Store” on www.aliexpress.com); <i>Id.</i> at 3 (photo of package shows Accused Products were shipped by Respondent Du Zuojun in China via “CHINA POST”); Compl. 13 at ¶ 9.
WN Shipping, USA, Inc.	Compl. at ¶¶ 36, 38; Compl. Ex. 5 at 1-2 (receipt showing purchase of Accused Product from eBay website); <i>Id.</i> at 4 (packaging indicates that the Accused Product shipped from CS@Orangeconnex.com in Inwood, NY); <i>Id.</i> at 5-6 (NY address corresponds to WN Shipping, “freight forwarding service”); 2/12/21 Compl. Suppl. at 3; Suppl. Compl. Ex. 5 (stating “Shipping: \$2.85 Standard SpeedPAK from China/Hong Kong/Taiwan.”); Compl. Ex. 13 at ¶ 4.
Shuje Wei	Compl. at ¶¶ 36, 39; Compl. Ex. 6 (receipt showing purchase of Accused Product from “M-xiaxia Outdoor Store” on www.aliexpress.com); <i>Id.</i> at 4 (identifying Respondent Shuje Wei as the shipper); <i>Id.</i> (photo of the packaging of the Accused Product with a sticker indicating “Made in China”); Compl. Ex. 13 at ¶ 5.

PUBLIC VERSION

Respondent(s)	Evidence of Importation
Express Cargo Forwarded, Ltd.	Compl. ¶¶ 36, 40 (noting that “[t]his ‘entity’ appears to be a ‘drop shipper,’ or freight forwarder.”); Compl. Ex. 7 (receipt showing purchase of Accused Product from “Life is Beautiful dropship Store” on www.aliexpress.com); <i>Id.</i> at 3 (photo of the packaging of the Accused Product with a sticker indicating “Made in China”); <i>Id.</i> at 4 (screenshot of shopping cart on aliexpress.com shows that at least two of the Accused Products would ship from China, stating “Ships From: China.”); Compl. Ex. 13 at ¶ 6.
Hou Wenzheng	Compl. ¶¶ 36, 45 (stating that the Accused Product was “marked to show the goods were made in China.”); Compl. Ex. 11 (receipt showing purchase of Accused Product ³ from “LT Tools Store” on www.aliexpress.com); <i>Id.</i> at 3 (return address on the shipment ⁴ indicates the Accused Product was shipped from Respondent Hou Wenzheng in Kentucky); Compl. Ex. 13 at ¶ 10.

The undersigned finds the above to constitute substantial, reliable, and probative evidence of importation by the Defaulting Respondents. In addition, the undersigned is not aware of any evidence to the contrary with respect to importation by the Defaulting Respondents.

Accordingly, the undersigned finds that Draft Top has satisfied the importation requirement of section 337.

IV. JURISDICTION

To have the power to decide a case, a court or agency must have both subject matter jurisdiction and jurisdiction over either the parties or the property involved. 19 U.S.C. § 1337; *Certain Steel Rod Treating Apparatus & Components Thereof*, Inv. No. 337-TA-97.

³ Staff notes: “The product received also bears the Mintiml branding and appears to be identical to the other Mintiml-branded devices discussed above, which the evidence shows were made in China and imported to the United States.” Staff Resp. at 13; *compare* Compl. Ex. 11, *with* Compl. Exs. 4, 6, 10.

⁴ The shipping label appears to have been placed on top of another shipping label with writing of a non-English language, suggesting the package was previously shipped from outside the United States. *See* Compl. Ex. 11 at 3.

PUBLIC VERSION

A. Subject Matter Jurisdiction

Section 337 confers subject matter jurisdiction on the Commission to investigate, and if appropriate, to provide a remedy for, unfair acts and unfair methods of competition in the importation, the sale for importation, or the sale after importation of articles into the United States. *See* 19 U.S.C. §§ 1337(a)(1)(C) and (a)(2). Draft Top filed a complaint alleging a violation of this subsection. Accordingly, the Commission has subject matter jurisdiction over this Investigation under section 337 of the Tariff Act of 1930. *Amgen, Inc. v. U.S. Int’l Trade Comm’n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990).

B. Personal Jurisdiction

Personal jurisdiction is not required so long as the products are being imported. *See Sealed Air Corp. v. U.S. Int’l Trade Comm’n*, 645 F.2d 976, 985-89 (C.C.P.A. 1981). The undersigned has determined hereinabove that the Accused Products have been imported into the United States. *See* Section III. Furthermore, by defaulting, the Defaulting Respondents have waived their right to contest that *in personam* jurisdiction exists. *See Certain Protective Cases & Components Thereof*, Inv. No. 337-TA-780, Initial Determination at 46 (June 29, 2012).

C. In Rem Jurisdiction

The Commission has *in rem* jurisdiction over the products at issue by virtue of the above finding that the Accused Products have been imported into the United States. *See Sealed Air Corp. v. U.S. Int’l Trade Comm’n*, 645 F.2d 976, 985 (C.C.P.A. 1981).

V. THE '016 PATENT

A. Overview

The '016 patent, entitled “Apparatus and Methods of Opening Containers,” issued on December 31, 2019 to Sean P. Kelly and Armand Joseph Ferranti, Jr. The '016 patent is exclusively assigned to Draft Top, LLC. Compl. at ¶ 22; Compl. Ex. 1. The '016 patent expires on May 16, 2040. *See* EDIS Doc ID 735592 (3d Suppl. Ltr. to Compl.).

The '016 patent generally relates to “the technical field of cutlery and bar utensils.” '016 patent at 1:16-17. More specifically, the '016 Patent is directed to “an apparatus and method for removing the entire planar top portion of a sealed container such as a sealed can.” *Id.* at 1:17-20.

1. Asserted Claim

The '016 Patent has 18 claims. Only independent claim 12 is asserted in this Investigation. The asserted claim reads as follows:

12. A device, comprising:
- a base having a first surface opposing a second surface and having an opening extending between the first and second surfaces, the opening having an inner face;
 - a plurality of arms, each of said plurality of arms rotatably coupled to the first surface of the base at a respective first end of each arm and comprising a respective blade disposed at a respective second end of each arm, each respective blade disposed within the opening of the base, wherein each of said plurality of arms is configured to rotate with respect to the base about a respective arm axis orthogonal to the first surface of the base, and each of the respective blades is configured to rotate about a respective blade axis orthogonal to the first surface of the base and parallel to the arm axes; and
 - a lever operatively coupled to the base such that, when the lever is in a first position, each respective second end is a first distance from the inner face of the opening and, when the lever is operated toward a second position, each respective second end is rotated outward toward the inner face of the opening such that each respective blade is configured to engage an object disposed between the inner face of the opening and each respective blade.

PUBLIC VERSION

2. Claim Construction

While Draft Top did not address the issue of claim construction in the MSD, Mr. Marcin, its expert on infringement and technical prong, did discuss “claim interpretation for claim 12” in his declaration. *See* Mot. Ex. 4 (hereinafter, “Marcin Decl.”) at ¶ 10; *see also id.* at ¶¶ 15-23. Mr. Marcin did not propose a special construction for any of the claim’s limitations; rather, he opined that “the claim terms of the ‘016 Patent can be interpreted with respect to the plain meaning of the claim terms and the description in the specification.” *Id.* at ¶ 15; *see also id.* at ¶¶ 16-23 (noting that the “the applicant only argued the plain meaning of the claim terms as described herein.”).

In Staff’s view, there is no evidence indicating that the limitations of claim 12 require a special construction. Staff Resp. at 15. Staff therefore believes that “all of the claim limitations in claim 12 of the ‘061 [*sic*] Patent should be given their plain and ordinary meanings.” *Id.*

Given the absence of any dispute, the undersigned agrees with Staff and Mr. Marcin that the claim language should be interpreted consistent with its plain and ordinary meaning. *See O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (“district courts are not (and should not be) required to construe every limitation present in a patent’s asserted claims,” but rather only “[w]hen the parties present a fundamental dispute regarding the scope of a claim term”) (emphasis added); *see also Hakim v. Cannon Avent Group, PLC*, 479 F.3d 1313, 1318-19 (Fed. Cir. 2007) (“Claim construction is directed to claims or claim terms whose meaning is disputed as applied to the patentee’s invention in the context of the accused device. When there is no dispute as to the meaning of a term that could affect the disputed issues of the litigation, ‘construction’ may not be necessary.”).

B. Infringement

Draft Top alleges that each of the Defaulting Respondents infringes claim 12 of the '016 patent. Mem. at 12-14. Specifically, Draft Top asserts that “all infringing products practice the '016 patent and utilize the technology covered by the claims of the '016 patent, including can openers and other opening devices.” *Id.* at 14. Staff agrees. Staff Resp. at 14-24 (“The Staff believes that the evidence supports a finding of infringement of claim 12 of the '061 [*sic*] Patent by each of the Defaulting Respondents and the Staff is unaware of any disputed material fact that would prevent such a summary determination.”).

In support of its allegations, Draft Top submitted two declarations with its MSD.⁵ The first declaration is from one of the named inventors of the Asserted Patent. *See* Mot. Ex. 1 (hereinafter, “8/9/21 Ferranti Decl.”). Mr. Ferranti explains that although not a patent lawyer, he “fully understand[s], and know[s] how to read the claims of the '016 Patent, as they relate to the Draft Top device.” *Id.* at ¶ 2. He states: “I am also completely aware, as the co-inventor, of every aspect and component of the Draft Top device and how they work.” *Id.* Mr. Ferranti further states that he studied each of the Accused Products in relation to claim 12. *Id.* at ¶ 5 (explaining that his examination included “a specific analysis of each of the accused devices, including taking apart the devices to analyze them in relation to each element of Claim 12”). Based on his analysis, Mr. Ferranti concluded that “[e]ach of the accused devices is essentially a direct copy of the Draft Top

⁵ Staff notes “that declarations from a co-inventor of the asserted patent and a patent attorney’s analysis of the accused products are not the types of expert testimony regularly encountered in patent infringement investigations.” SIB at 24 n.2. The Federal Circuit, however, has recognized that, “[i]n many patent cases expert testimony will not be necessary because the technology will be ‘easily understandable without the need for expert explanatory testimony.’” *Centricut, LLC v. The Esab Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004) (citing *Union Carbide Corp. v. Am. Can Co.*, 724 F.2d 1567, 1573 (Fed. Cir. 1984) and *Bernhardt, L.L.C. v. Collezione Europa USA, Inc.*, 386 F.3d 1371, 1384 (Fed.Cir.2004)). In Staff’s view, “this is just such a case.” *Id.* The undersigned agrees. The technology involved in this Investigation is not overly complex and thus, not beyond the comprehension of laypersons.

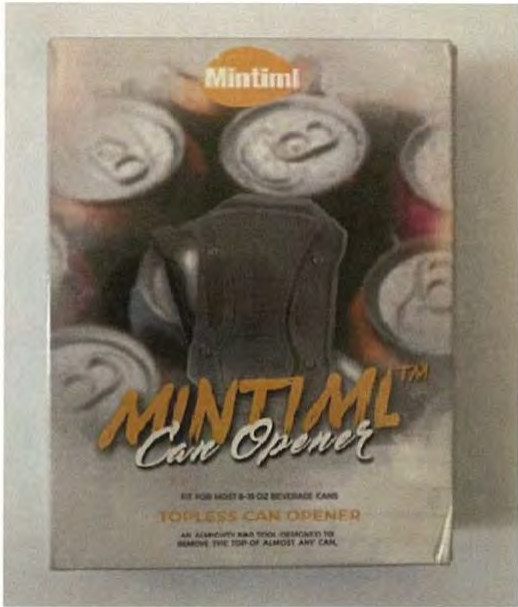
PUBLIC VERSION

device.” *Id.* at ¶ 6 (“[E]ven a cursory review of the accused device shows that they are substantially identical to the Draft Top device.”).

The second declaration is from Draft Top’s expert, Michael Marcin. *See* Marcin Decl. Mr. Marcin has been an attorney in good standing registered to practice in the State of New York, and in front of the U.S. Patent and Trademark Office. *Id.* at ¶¶ 1-2. Mr. Marcin has been engaged in the field of patent law since 1996, drafting, prosecuting, and analyzing many patents in that time.⁶ *Id.* at ¶ 3. Mr. Marcin conducted a detailed analysis of each of the Defaulting Respondents’ Accused Products. *Id.* at ¶¶ 7, 24-34; *see also* Marcin Exs. 3-5, 7-9. As part of his analysis, Mr. Marcin compared each of the Accused Products to the claim elements of claim 12 of the ’016 patent. *Id.* at ¶¶ 24-25. Mr. Marcin also prepared claims charts in which he explained how the Accused Products read on the elements of claim 12. *Id.* at ¶ 25; *see also* Marcin Exs. 2-9. Mr. Marcin’s analysis is essentially the same for each of the Accused Products. *Id.* at ¶¶ 7, 24-34; *see also* Marcin Exs. 3-5, 7-9; Compl. at ¶ 46; Compl. Ex. 13 at ¶ 11. An exemplary claim chart is set forth below:

⁶ Mr. Marcin represents that his “technical area of expertise as a patent attorney is in the electrical, software and mechanical arts,” and that he has been retained by Draft Top “as an expert in patent law” for this Investigation. Mot. Ex. 4 at ¶¶ 3, 5.

PUBLIC VERSION

U.S. Patent 10,519,016	Du Zuojun Can Opener
12. A device, comprising:	<p>Photo 1 shows a front view of the Du Zuojun can opener device in its original Mintiml packaging.</p>  <p>Photo 1</p>

PUBLIC VERSION

Photo 2 shows a top view of the Du Zuojun can opener device.



Photo 2

Photo 3 shows a bottom view of the Du Zuojun can opener device (the purpose of the pointer is described in the next claim element).



Photo 3

PUBLIC VERSION

a base having a first surface opposing a second surface and having an opening extending between the first and second surfaces, the opening having an inner face;

Photo 3 above showing the bottom view of the Du Zuojun can opener shows the base as including the portion being highlighted by the pointer. Compare Photo 3 to the base 354 shown in Fig. 30 of the '016 patent. The surface of the base shown in Photo 3 is the recited "second surface."

Photo 4 shows the base of the Du Zuojun can opener in a disassembled view. The pointer is highlighting the recited "first surface" that opposes the second surface shown in Photo 3.



Photo 4

Photo 5 shows the opposite surface (second surface) of the base of the Du Zuojun can opener in a disassembled view. The pointer is highlighting the recited "opening" extending between the first and second surfaces and the recited "inner face" of the opening. Compare Photo 5 to the opening 355 and inner face 355a shown in Fig. 30 of the '016 patent.



Photo 5

PUBLIC VERSION


a plurality of arms, each of said plurality of arms rotatably coupled to the first surface of the base at a respective first end of each arm

Photo 6 shows the same view as Photo 4 except in this Photo 6, one of the plurality of arms is highlighted by the pointer. As can be seen from the photo, there are a total of four (4) arms. Compare Photo 6 to the arms 332, 334, 336, 338 shown in Fig. 30 of the '016 patent.



Photo 7

PUBLIC VERSION

	<p>Photo 7 shows the arm highlighted in Photo 6 disassembled from the base. As can be seen in this photo, the arm has an opening (highlighted by the first pointer) at a “first end.” In an assembled state, a post that is integrally molded to the base (highlighted by the second pointer) extends through the opening of the arm to couple the arm to the base. Because the arms are coupled using the post/opening, the arms can rotate in the assembled state, i.e., the arms are “rotatably coupled” to the base. Compare Photo 7 to the “bolts 306, 308, 310, 312, which hold the arms 332, 334, 336, 338 in place but allow the arms 332, 334, 336, 338 to rotate” as stated in column 12, lines 8-10 and as shown in Fig. 30 of the ‘016 patent.</p>  <p>Photo 7</p>
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>and comprising a respective blade disposed at a respective second end of each arm, each respective blade disposed within the opening of the base,</p>	<p>Photo 5 (above) shows a blade disposed at a “second end” of each of the arms. Photo 3 (assembled view) and Photo 5 (disassembled view) show the blades disposed within the opening of the base. Compare Photos 3 and 5 to the blades 340, 342, 344, 346 shown in Fig. 30 of the ‘016 patent.</p>
<p>wherein each of said plurality of arms is configured to rotate with respect to the base about a respective arm axis orthogonal to the first surface of the base,</p>	<p>Photo 6 (above) shows the arms are rotatably coupled to the base via the post/opening coupling between the base and the arm. A longitudinal axis of the post is orthogonal to the first surface of the base (i.e., extends from the first surface at a 90 degree angle). The arms rotate about the longitudinal axis of the post, meaning the arms rotate about an axis that is orthogonal to the first surface.</p>
<p>and each of the respective blades is configured to rotate about a respective blade axis orthogonal to the first surface of the base and parallel to the arm axes;</p>	<p>Photo 6 (above) shows that each of the arms has a clip at the second end for attaching the blades. The clip extends through an opening on the second end of the arm from a first side to a second side where the blade is attached. The clip and blade are rotatably coupled to the arm. A longitudinal axis of the clip is orthogonal to the first surface of the base. The blades rotate about the longitudinal axis of the clip, meaning the blades rotate about an axis that is orthogonal to the first surface and parallel to the arm axes. Compare Photos 5 and 6 to the statement “[c]onnected to the top of each blade 340, 342, 344, 346 is a clip 316, 318, 320, 322 which holds the blade in place but allows each blade 340, 342, 344, 346 to rotate three hundred and sixty degrees” in column 11, line 67 – column 12, line 3 and as shown in Fig. 28 of the ‘016 patent.</p>

PUBLIC VERSION

and a lever operatively coupled to the base such that, when the lever is in a first position, each respective second end is a first distance from the inner face of the opening and

Photo 8 shows a view of the Du Zuojun can opener similar to Photo 4. However, in Photo 8, the pointer is highlighting a lever. The lever is coupled to the base in the same general manner as described above for the arms, i.e., in an assembled state, a post attached to the base extends through an opening of the lever to rotatably couple the lever to the base. Thus, the lever is “operatively coupled” to the base. Compare Photo 8 to the lever 328 shown in Fig. 30 of the ‘016 patent.



Photo 8

PUBLIC VERSION

Photo 9 shows a bottom view of the Du Zuojuncan opener that is similar to the view of Photo 3. However, in Photo 9, the lever is in an extended position (i.e., the recited “first position”) such that the second ends of the arms (e.g., the ends having the blades) are a “first distance” from the inner face of the opening.



Photo 9

PUBLIC VERSION

when the lever is operated toward a second position, each respective second end is rotated outward toward the inner face of the opening

Photo 10 shows a bottom view of the Du Zuojun can opener that is similar to the views of Photos 3 and 9. However, in Photo 10, the lever has been moved towards the base into a “second position.”¹ Comparing Photo 9 and Photo 10 (or Photo 3) it can be seen that the movement of the lever from the first position to the second position causes the second end of the arms to be rotated outward towards the inner face of the opening (i.e., the blades move closer to the inner face of the opening).



Photo 10

¹ The lever has not been moved to its closest allowable position with respect to the base because in this position the lever retracts into the device and is not visible. The fully retracted position of the lever is shown in Photo 4.

such that each respective blade is configured to engage an object disposed between the inner face of the opening and each respective blade.

The Du Zuojun can opener is designed to be placed on top of a beverage can with the lever in the first position such that a lid of the beverage can is within the opening of the base. As the lever is moved to the second position and the blades move toward the opening, the blades will engage with the lid of the beverage can such that the lid of the beverage can is disposed between the inner face of the opening and the blades.

Marcin Ex. 4 (comparing one of the Mintiml-branded products from Du Zuojun to claim 12 of the '016 patent). Based on his analysis, he concluded that the Accused Products infringe the '016 patent. Marcin Decl. at ¶ 7.

In addition, Draft Top provided a claim chart with its Complaint “reading Claim 12 of the '016 patent on respondents’ devices.” Compl. at ¶ 46; *see also* Compl. Ex. 12. The claim chart analyzes the Mintiml devices sold by several of the Defaulting Respondents. *Id.* According to Draft Top, “[t]he devices from the other Chinese suppliers, KKS Enterprises, Kingskong Enterprises, and Du Zuojun are identical, or substantially identical, in their operative parts covered by Claim

PUBLIC VERSION

12 of the '016 patent, and the Mintiml Claim Chart reads completely on these devices.” *Id.*; *see also* Compl. Ex. 13 at ¶ 11.

For convenience, the totality of the evidence is summarized below:

Respondent(s)	Evidence of Infringement
Kingskong Enterprises Co., Ltd.	2/19/21 Suppl. Compl. Ex. 20; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 28; Marcin Ex. 3
KKS Enterprises Co., Ltd.	2/19/21 Suppl. Compl. Ex. 20; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 28; Marcin Ex. 3
Du Zuojun	2/19/21 Suppl. Compl. Ex. 21; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 29; Marcin Ex. 4
WN Shipping, USA, Inc.	2/19/21 Suppl. Compl. Ex. 16; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 30; Marcin Ex. 5
Shuje Wei	2/19/21 Suppl. Compl. Ex. 17; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 32; Marcin Ex. 7
Express Cargo Forwarded, Ltd.	2/19/21 Suppl. Compl. Ex. 18; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 33; Marcin Ex. 8
Hou Wenzheng	2/19/21 Suppl. Compl. Ex. 22; 8/9/21 Ferranti Decl. at ¶¶ 5-8; Marcin Decl. at ¶¶ 24-25, 34; Marcin Ex. 9

The undersigned finds the above to constitute substantial, reliable, and probative evidence of infringement by the Defaulting Respondents. The undersigned therefore finds that the Accused Products of the Defaulting Respondents infringe claim 12 of the '016 patent.

C. Technical Prong of the Domestic Industry Requirement



Draft Top asserts that the Draft Top practices claim 12 of the '016 patent. Mem. at 16; Statement of Material Facts (“SMF”) at ¶ 29. Staff agrees and submits that “there is no dispute as to any material fact that Complainant’s domestically manufactured Draft Top domestic industry product practices claim 12 of the '016 Patent.” Staff Resp. at 27.

Like with infringement, Draft Top again submits declarations from Mr. Marcin and Mr. Ferranti to support its MSD. Mem. at 16-17; Marcin Decl.; 8/9/21 Ferranti Decl. Mr. Marcin performed a limitation-by-limitation analysis of claim 12. *See* Mem. at 16; Marcin Decl. at ¶¶ 7,

PUBLIC VERSION

9-23, 24-26; SMF at ¶¶ 8-10. Mr. Marcin’s declaration also included a claim chart, which “provided a listing of each of the claim elements of claim 12 of the ‘016 Patent and the corresponding structure of the [Draft Top] that reads on the listed claim element, including an explanation of how the structure reads on the claim element.” Marcin Decl. at ¶¶ 25-26; SMF at ¶ 9. Based on this analysis, he concluded that the Draft Top practices claim 12 of the ‘016 patent.⁷ Marcin Decl. at ¶ 24; SMF at ¶ 29. The undersigned agrees.

As the claim chart below demonstrates, the Draft Top meets the limitations of claim 12 of the ‘016 patent.⁸

U.S. Patent 10,519,016 12. A device, comprising:	Draft Top Can Opener ¹ Photo 1 shows a front view of the Draft Top can opener device in its original packaging. Photo 2 shows a back view of the Draft Top can opener device in its original packaging.
	
Photo 1	Photo 2

¹ The Draft Top can opener is described with reference to the embodiment of Figs. 28-31 of the ‘016 patent. This is merely for illustrative purposes because the actual Draft Top can opener closely resembles the shape and contour of this embodiment. However, reference to this embodiment of the ‘016 patent is neither an explicit nor implicit admission that claim 12 does not encompass other embodiments described in the ‘016 patent or other infringing devices that have different shapes and/or contours.

⁷ Mr. Ferranti’s declaration supports Mr. Marcin’s conclusions. See 8/9/21 Ferranti Decl. Mr. Ferranti stated that “the claims [of the ‘016 patent], including claim 12 were specifically written to cover the Draft Top device.” *Id.* at ¶ 3. Mr. Ferranti also incorporated by reference the statements and conclusions in Exhibit 3 to the Complaint, which is similar to the claim chart attached to Mr. Marcin’s declaration. *Id.* at ¶ 4.

⁸ The claim chart from Exhibit 3 to the Complaint is reproduced here. As previously noted, it is similar to the claim chart attached to Mr. Marcin’s declaration. Compare Compl. Ex. 3, with Marcin Ex. 1.

PUBLIC VERSION

Photo 3 shows a top view of the Draft Top can opener device.



Photo 3

Photo 4 shows a bottom view of the Draft Top can opener device (the purpose of the pointer is described in the next claim element).



Photo 4

PUBLIC VERSION

a base having a first surface opposing a second surface and having an opening extending between the first and second surfaces, the opening having an inner face;

Photo 4 above showing the bottom view of the Draft Top can opener shows the base as including the portion being highlighted by the pointer. Compare Photo 4 to the base 354 shown in Fig. 30 of the '016 patent. The surface of the base shown in Photo 4 is the recited "second surface."

Photo 5 shows the base of the Draft Top can opener in a disassembled view. The pointer is highlighting the recited "first surface" that opposes the second surface shown in Photo 4.

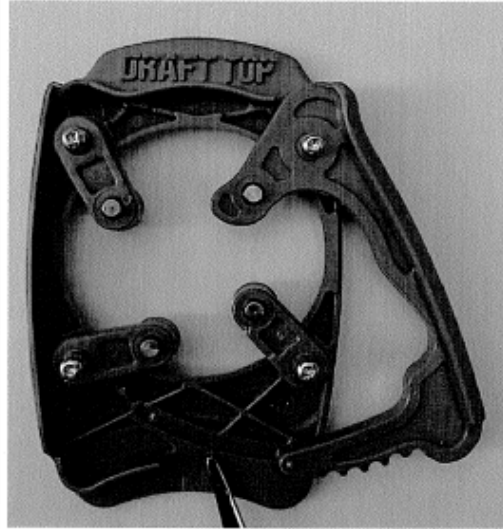


Photo 5

Photo 6 shows the opposite surface (second surface) of the base of the Draft Top can opener in a disassembled view. The pointer is highlighting the recited "opening" extending between the first and second surfaces and the recited "inner face" of the opening. Compare Photo 6 to the opening 355 and inner face 355a shown in Fig. 30 of the '016 patent.



Photo 6

PUBLIC VERSION

a plurality of arms, each of said plurality of arms rotatably coupled to the first surface of the base at a respective first end of each arm

Photo 7 shows the same view as Photo 5 except in this Photo 7, one of the plurality of arms is highlighted by the pointer. As can be seen from the photo, there are a total of four (4) arms. Compare Photo 7 to the arms 332, 334, 336, 338 shown in Fig. 30 of the '016 patent.



Photo 7

Photo 8 shows the arm highlighted in Photo 7 disassembled from the base. As can be seen in this photo, the arm has an opening at a "first end." In an assembled state, a bolt attached to the base (shown in the photo) extends through the opening of the arm to couple the arm to the base. Because the arms are coupled using the bolt/opening, the arms can rotate in the assembled state, i.e., the arms are "rotatably coupled" to the base. Compare Photo 8 to the "bolts 306, 308, 310, 312, which hold the arms 332, 334, 336, 338 in place but allow the arms 332, 334, 336, 338 to rotate" as stated in column 12, lines 8-10 and as shown in Fig. 30 of the '016 patent.

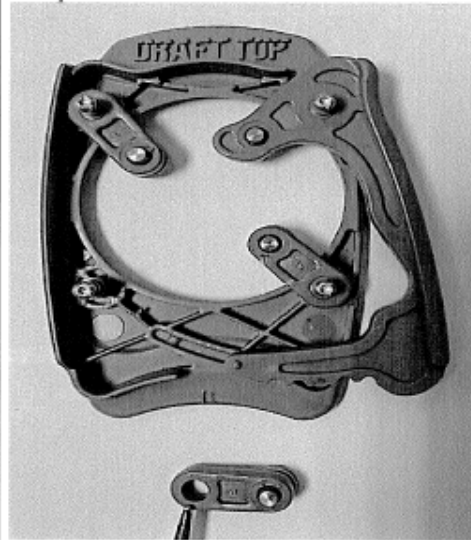
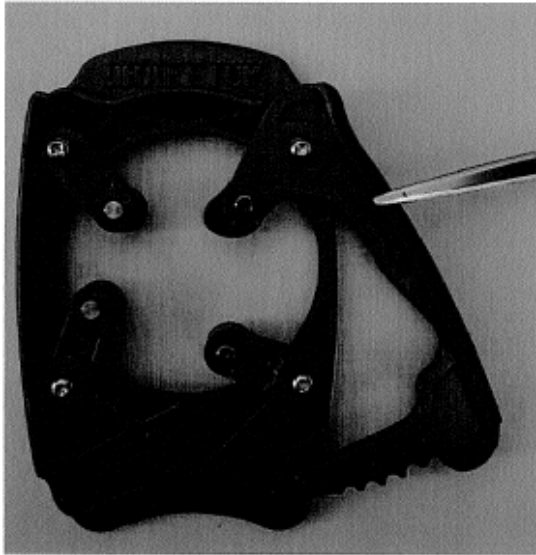


Photo 8

PUBLIC VERSION

and comprising a respective blade disposed at a respective second end of each arm, each respective blade disposed within the opening of the base,	Photo 6 (above) shows a blade disposed at a “second end” of each of the arms. Photo 4 (assembled view) and Photo 6 (disassembled view) show the blades disposed within the opening of the base. Compare Photos 4 and 6 to the blades 340, 342, 344, 346 shown in Fig. 30 of the ‘016 patent.
wherein each of said plurality of arms is configured to rotate with respect to the base about a respective arm axis orthogonal to the first surface of the base,	Photo 7 (above) shows the arms are rotatably coupled to the base via the bolt/opening coupling between the base and the arm. A longitudinal axis of the bolt is orthogonal to the first surface of the base (i.e., extends from the first surface at a 90 degree angle). The arms rotate about the longitudinal axis of the bolt, meaning the arms rotate about an axis that is orthogonal to the first surface.
and each of the respective blades is configured to rotate about a respective blade axis orthogonal to the first surface of the base and parallel to the arm axes;	Photo 7 (above) shows that each of the arms has a clip at the second end for attaching the blades. The clip extends through an opening on the second end of the arm from a first side to a second side where the blade is attached. The clip and blade are rotatably coupled to the arm. A longitudinal axis of the clip is orthogonal to the first surface of the base. The blades rotate about the longitudinal axis of the clip, meaning the blades rotate about an axis that is orthogonal to the first surface and parallel to the arm axes. Compare Photos 6 and 7 to the statement “[c]onnected to the top of each blade 340, 342, 344, 346 is a clip 316, 318, 320, 322 which holds the blade in place but allows each blade 340, 342, 344, 346 to rotate three hundred and sixty degrees” in column 11, line 67 – column 12, line 3 and as shown in Fig. 28 of the ‘016 patent.
and a lever operatively coupled to the base such that, when the lever is in a first position, each respective second end is a first distance from the inner face of the opening and	<p>Photo 9 shows a view of the Draft Top can opener similar to Photo 5. However, in Photo 9, the pointer is highlighting a lever. The lever is coupled to the base in the same general manner as described above for the arms, i.e., in an assembled state, a bolt attached to the base extends through an opening of the lever to rotatably couple the lever to the base. Thus, the lever is “operatively coupled” to the base. Compare Photo 9 to the lever 328 shown in Fig. 30 of the ‘016 patent.</p>  <p style="text-align: center;">Photo 9</p>

PUBLIC VERSION

Photo 10 shows a bottom view of the Draft Top can opener that is similar to the view of Photo 4. However, in Photo 10, the lever is in an extended position (i.e., the recited “first position”) such that the second ends of the arms (e.g., the ends having the blades) are a “first distance” from the inner face of the opening.



Photo 10

when the lever is operated toward a second position, each respective second end is rotated outward toward the inner face of the opening

Photo 11 shows a bottom view of the Draft Top can opener that is similar to the views of Photos 4 and 10. However, in Photo 11, the lever has been moved towards the base into a “second position.”² Comparing Photo 10 and Photo 11 (or Photo 4) it can be seen that the movement of the lever from the first position to the second position causes the second end of the arms to be rotated outward towards the inner face of the opening (i.e., the blades move closer to the inner face of the opening).

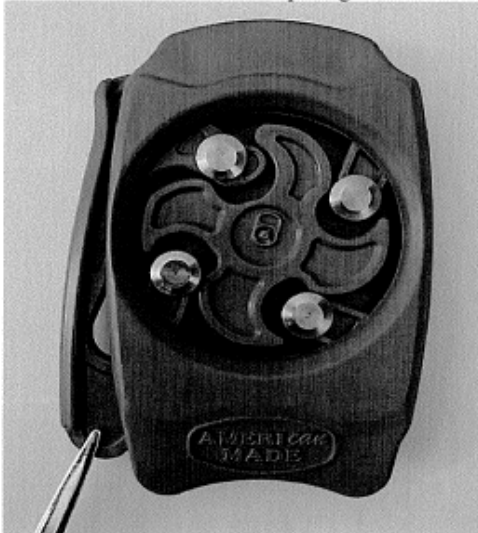


Photo 11

² The lever has not been moved to its closest allowable position with respect to the base because in this position the lever retracts into the device and is not visible. The fully retracted position of the lever is shown in Photo 4.

PUBLIC VERSION

such that each respective blade is configured to engage an object disposed between the inner face of the opening and each respective blade.	The Draft Top can opener is designed to be placed on top of a beverage can with the lever in the first position such that a lid of the beverage can is within the opening of the base. As the lever is moved to the second position and the blades move toward the opening, the blades will engage with the lid of the beverage can such that the lid of the beverage can is disposed between the inner face of the opening and the blades.
---------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Compl. Ex. 3.

Accordingly, for the reasons stated above, the undersigned finds that the technical prong of the domestic industry requirement is satisfied.

D. Validity

A patent is presumed valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011). In the instant matter, no party has challenged the validity of the '016 patent. Staff is therefore of the view that “there is no issue of disputed material fact relating to the validity of the Asserted Patent.” Staff Resp. at 14. The undersigned agrees. *See Lannom Mfg. Co., Inc. v. U.S. Int’l Trade Comm’n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986.) (“We conclude, therefore, that Congress did not authorize the Commission to redetermine patent validity when no defense of invalidity has been raised.”)

VI. ECONOMIC PRONG

Draft Top asserts that it meets the economic prong under 19 U.S.C. § 1337(a)(3)(A), (B), and (C).⁹ Mem. at 17. Staff agrees that the economic prong is met under subsections (A) and (B), but that the evidence is insufficient to establish that the economic prong is met under subsection (C). Staff Resp. at 28, 33.

⁹ As Staff notes, Draft Top also “appears to contend that there is a domestic industry in the process of being established.” Staff Resp. at 28 n.4. Draft Top did not, however, plead a domestic industry in the process of being established in its Complaint. *See* Compl. at ¶¶ 49-56; *see also* 86 Fed. Reg. 14,765 (Mar. 18, 2021) (instituting an investigation to determine “whether an industry in the United States exists as required by subsection (a)(2) of section 337”).

PUBLIC VERSION

A. Plant and Equipment

1. Investments

Draft Top asserts that it “has made numerous investments in plant and equipment in the United States, both directly and through its manufacturer,” Daystar Manufacturing (“Daystar”). Mem. at 19. Draft Top explains: “Since 2018, Complainant has directly spent \$36,000 on initial tooling molds, \$25,000 to purchase interim short run molds, \$26,000 to purchase an assembly pin machine, \$27,000 to purchase an assembly heat stake machine, and approximately a few thousand dollars for other miscellaneous pieces of equipment.” *Id.* Draft Top also notes that Daystar “has added injecting molding equipment at a cost of \$16,000” to manufacture the Draft Top. *Id.* at 20.

Staff agrees that “the evidence establishes that Complainant and its domestic manufacturer have made significant investments and expenditures in plant and equipment to manufacture the Draft Top domestic industry product.” Staff Resp. at 29. Staff credits \$211,000 in investments made directly by Draft Top. *Id.* at 30. Staff also explains that Daystar “has independently made investments in plant and equipment” of \$16,000. *Id.* at 30-31.

PUBLIC VERSION

The evidence shows that Draft Top has made the following investments in prototyping and manufacturing¹⁰:

Description	Amount	Evidence
Initial tooling molds	\$36,000	8/18/21 Ferranti Decl. at ¶ 15; Ferranti Supp. Decl. Ex. B ¹¹
Interim short run molds	\$25,000	8/18/21 Ferranti Decl. at ¶ 15; 8/18/21 Ferranti Ex. B at 2
Assembly pin machine	\$26,000	8/18/21 Ferranti Decl. at ¶ 15; 8/18/21 Ferranti Ex. B at 4-6
Assembly heat stake machine	\$27,000	8/18/21 Ferranti Decl. at ¶ 15; 8/18/21 Ferranti Ex. B at 3
Blade tooling	\$34,000	Ferranti Supp. Decl.; 8/18/21 Ferranti Ex. B at 1.
Multi-cavity production molds	\$63,000	Ferranti Supp. Decl.; 8/18/21 Ferranti Ex. B at 7
Total	\$211,000	

Such investments are properly considered in the domestic industry analysis. *See Certain Loom Kits for Creating Linked Articles*, 337-TA-923, Comm’n Op. at 6 (June 26, 2015) (“*Loom Kits*”) (finding that development work, the purchase of prototype materials, and expenditures to domestically manufacture prototypes are properly considered domestic industry investments).

The evidence also demonstrates that Draft Top contracts with Daystar to manufacture the Draft Top in the United States. Mot. Ex. 2 at ¶ 2. The evidence shows that Daystar added injection molding equipment costing \$16,000 to manufacture the Draft Top. *Id.* at ¶ 4. The undersigned

¹⁰ Draft Top also claims investments of \$5,000 from each of its founders as well as “thousands of hours in time developing a prototype of the product.” *See* Mem. at 19; Mot. Ex. 3 at ¶ 12 (hereinafter, “8/18/21 Ferranti Decl.”). Because Draft Top did not produce any corroborating evidence to support these investments, did not provide specifics on what the money was used for, and did not provide additional details on the “hours in time” spent, the undersigned declines to consider these investments. Additionally, Draft Top asserts that it is in the process of investing in a set of new molds costing \$88,000. *See* Mem. at 19; 8/18/21 Ferranti Decl. at ¶ 16. The Commission has stated, however, that the “appropriate date for determining whether a domestic industry exists or is in the process of being established is the date of filing of the complaint.” *Certain Video Game Sys. & Controllers*, Inv. No. 337-TA-743, Comm’n Op. at 5 (Jan. 20, 2012). The undersigned is unaware of any circumstances that would require departure from this general policy. *See Certain Collapsible Sockets for Mobile Elec. Devices & Components Thereof*, Inv. No. 337-TA-1056, Comm’n Op. at 15 (July 9, 2018) (declining to credit expenditures made after the filing of the complaint because the complainant did “not identify any specific facts or circumstances, much less a significant and unusual development, to warrant considering [such] expenditures”).

¹¹ On September 17, 2021, Draft Top submitted a supplement to the 8/18/21 Ferranti Declaration and its accompanying Exhibit B (hereinafter, “Ferranti Suppl. Decl.”).

PUBLIC VERSION

finds that such an investment is also properly considered in the domestic industry analysis. *See Certain Cold Cathode Fluorescent Lamp (“CCFL”) Inverter Cirs. & Prods. Containing the Same*, 337-TA-666, Initial Det. at 5 (Sept. 22, 2009) (“Work performed in the United States by contractors and subcontractors hired by a complainant is also properly considered as part of an investment in the domestic industry”).

Accordingly, the undersigned finds that Draft Top has invested \$227,000 in plant and equipment for the Draft Top.

2. Significance

Draft Top submits that its investments are significant. Mem. at 19-20. Staff agrees that Draft Top’s investments are “quantitatively and qualitatively significant.” Staff Resp. at 31. Staff notes that “[t]he Draft Top domestic industry product is Complainant Draft Top’s only product.” *Id.* Staff also notes that “100% of the manufacture of the Draft Top product occurs domestically.” *Id.* Thus, “[i]n other words, 100% of the value-add for the Domestic Industry product occurs in the United States.” *Id.* Staff further asserts: “[A]bsent the domestic investitures Draft Top and its domestic manufacturer the Draft Top domestic product would not exist.” *Id.*

The undersigned agrees with Staff that Draft Top’s investments are significant. The Commission has explained that “‘significance’ as used in the statute denotes an assessment of the relative importance of the domestic activities.” *Certain Carburetors & Prods. Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 19 (Oct. 28, 2019). Here, the evidence shows that “[t]he Draft Top was conceived in the United States, was developed in the United States, was prototyped in the United States, [and] is manufactured in the United States.” 8/18/21 Ferranti Decl. at ¶ 7. As Draft Top notes: “[A]ll of the economic activity relating to the Draft Top product subject of the ’016 Patent takes place within the United States.” Mem. at 2. Thus, Draft Top’s investments

PUBLIC VERSION

in plant and equipment in the United States are critical to the Draft Top and qualitatively significant.

Additionally, Draft Top introduced evidence that it received approximately \$2,500,000 in income since 2018. 8/18/21 Ferranti Ex. C at 6-11; *see also* 8/18/21 Ferranti Decl. at ¶ 8. Thus, Draft Top's investment of \$227,000 in plant and equipment amounts to approximately 9% of this income. The undersigned finds that this is quantitatively significant. *See Certain Bone Cements, Components Thereof & Prods. Containing the Same*, Inv. No. 337-TA-1153, Comm'n Op. at 35 (Jan. 25, 2021) (assessing significance by comparing qualifying domestic activities to gross sales).

Accordingly, no genuine issue of material fact remains and a summary determination that the economic prong of the domestic industry requirement is satisfied under 337(a)(3)(A) is appropriate.¹²

VII. REMEDY AND BONDING¹³

A. General Exclusion Order

Section 337(d)(2) grants the Commission the authority to issue a general exclusion order ("GEO") when a complainant shows that: (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) there is a widespread pattern of violation of section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). Section 337(d) also requires the Commission to consider the public interest factors before issuing a GEO. 19 U.S.C. § 1337(d)(1).

¹² The undersigned has already determined that Draft Top has met the economic prong under section 337(a)(3)(A). Accordingly, the undersigned need not decide whether Draft Top meets the economic prong under sections 337(a)(3)(B) or (C).

¹³ Draft Top did not request a limited exclusion order or cease and desist orders against any of the Defaulting Respondents. *See* Mot. at 1; Mem. at 23; Staff Resp. at 44.

PUBLIC VERSION

The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Comm’n Op. at 18-19, USITC Pub. 119 (Nov. 1981) (“*Spray Pumps*”). See *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, Inv. No. 337-TA-372 (“*Magnets*”), Comm’n Op. on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards “do not differ significantly” from the standards set forth in *Spray Pumps*). In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: (1) a “widespread pattern of unauthorized use;” and (2) “certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” *Id.* The focus now is primarily on the statutory language itself and not an analysis of the *Spray Pump* factors. *Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 9, 2009).

Draft Top and Staff both submit that a GEO is appropriate in this Investigation.

A GEO is appropriate if a complainant can prove by “substantial, reliable, and probative evidence” that the requirements of section 337(d)(2) are satisfied. The undersigned finds that Draft Top has done so.

1. Circumvention of a Limited Exclusion Order¹⁴

Staff argues that “there is ample direct evidence that Defaulting Respondents have operated using multiple identities and are selling what appear to be identical products through different storefronts on multiple different Internet platforms.” Staff Resp. at 37. Staff therefore contends that the evidence “shows that a general exclusion order is necessary to prevent the circumvention of an exclusion order limited to the named Respondents.” *Id.*

¹⁴ Draft Top does not argue that a GEO is warranted based on the circumvention of a limited exclusion order. See Mem. at 24.

PUBLIC VERSION

“In determining whether conditions are ripe for circumvention, the Commission has considered whether it is difficult to identify sellers or manufacturers, whether previous attempts to address infringement have been unsuccessful, and whether infringing operations could be easily replicated.” *Certain Toner Cartridges, Components Thereof, & Systems Containing Same*, Inv. No. 337-TA-1174, Comm’n Op. at 16 (Dec. 17, 2020). The undersigned finds that such conditions are present here.

First, the evidence shows that it is difficult to identify sellers and manufacturers. As Staff notes, the evidence shows that one of the originally named Respondents¹⁵, Mintiml, may not be a legal entity, but is instead “a trade name relating to many businesses.” Staff Resp. at 37 (citing EDIS Doc. ID 746512 at 2). The evidence suggests that Mintiml “operates through shell corporations, uses trade names, provides false or non-existent addresses to U.S. vendors, and takes steps to obscure its actual operational locations, its actual corporate names, its actual corporate officers and directors, and other current contact information.” *Id.* Draft Top attempted to serve Mintiml at four separate addresses, including a false address that Mintiml provided to Amazon. *Id.* Additionally, the evidence shows that the products of at least three of the other Defaulting Respondents appear identical to the Mintiml accused product and include Mintiml branding. *See* Compl. Exs. 4, 6, 10, 11.

There is also evidence that other Defaulting Respondents are not the manufacturer or primary source of the Accused Products, but “instead are various freight-forwarders and drop-shippers used to deliver the products listed on numerous different storefronts on different Internet platforms.” Staff Resp. at 38. The evidence shows, for example, that the Shuje Wei Accused

¹⁵ Draft Top moved to terminate Mintiml from this Investigation, stating that it was not “able to obtain sufficient evidence that Respondent Mintiml is an entity that can be served or has a duty to respond to the Complaint.” *See* EDIS Doc. 746512 at 2-3.

PUBLIC VERSION

Product was bought on the M-xiaxia Outdoor Store storefront on aliexpress.com, but was shipped from Respondent Shuje Wei. Compl. Ex. 6. The evidence further shows that three other Defaulting Respondents sold their goods on other storefronts. *See* Compl. Ex. 7 at 1 (indicating that Respondent Express Cargo's product was sold on the "Life is Beautiful dropship Store"), *id.* (indicating that Respondent Hou Wenzheng's product was sold on the "LT Tools Store"); *id.* at Compl. Ex. 5 (indicating that Respondent WN Shipping's product was sold on eBay and shipped from organeconnex.com). Thus, the evidence shows that the Defaulting Respondents would be able to easily replicate their infringing operations by selling at other online stores.

Finally, the fact that the Defaulting Respondents have ignored proceedings in this Investigation (which resulted in them being found in default) suggests that they would not abide by the terms of any limited exclusion order the Commission may impose.

For these reasons, the undersigned finds that a general exclusion order is necessary to prevent circumvention of a limited exclusion order directed to the Defaulting Respondents.

2. Widespread Pattern of Unauthorized Use

Draft Top asserts that there is "a pattern of violation [where] it is difficult to identify the source of infringing products." Mem. at 24. Draft Top explains: "There are numerous companies from around the world, predominately from China, which have imported and sold the can-openers which are the subject of this investigation and which infringe upon the '016 patent." *Id.* According to Draft Top, "[m]any of these companies use false or non-existent addresses in the marketing and sale of the infringing products or use non-existent, non-registered tradenames . . . on the internet which makes finding them difficult and impossible." *Id.*

Staff agrees that the evidence shows a widespread pattern of violation. Staff Resp. at 42. Staff notes that "at least six products from the Defaulting Respondents infringe the '016 patent"

PUBLIC VERSION

and Draft Top has also “identified more recent examples of allegedly infringing ‘knockoff’ products.” *Id.* Staff also explains that “the evidence shows that multiple entities are involved in the manufacture, sale, and distribution of the accused products.” *Id.* According to Staff, “the evidence establishes that the Defaulting Respondents engage in a number of practices that mask the source of the accused product and that as a result there is difficulty in identifying the source of the infringing products.” *Id.* at 43.

The undersigned finds that there is a widespread pattern of unauthorized use. In addition to the products sold by the Defaulting Respondents, the evidence shows that there are other entities that sell the Accused Products online. *See* Mem. at 25; 8/18/21 Ferranti Decl. at ¶ 47 (identifying companies with the names BNS Promo Inc., Amax Promo Inc., and ADA Promo Inc. that sell a product named “Bamboo Topless Can Opener”). These entities appear to sell their products under fictitious names and do not list their addresses. *See* Mem. at 25; 8/18/21 Ferranti Decl. at ¶ 49. Additionally, as noted above, the evidence shows that the Accused Products are sold through online storefronts associated with multiple different companies and that some of the Defaulting Respondents are freight-forwarders or drop-shippers of the Accused Products.

The undersigned further finds that identifying the seller and importer of the Accused Products has proven to be difficult. First, as the Commission recognized in *Loom Kits*, “[a] large number of anonymous infringing sales on the Internet . . . supports a determination that it is difficult to identify the source of infringing products under subparagraph (B). Comm’n Op. at 13; *see also Certain Pumping Bras*, Inv. No. 337-TA-988, Comm’n Op. at 11 (Apr. 7, 2017) (“by conducting transactions through the Internet, on Amazon.com for example, suppliers of infringing products are able to hide their true identities”). The evidence shows that some of the Defaulting Respondents use generic and non-descript packaging that omits their names. For example, the

PUBLIC VERSION

evidence shows that Accused Products from Respondents WN Shipping, Express Cargo, KKS, and Kingskong were sold in plain cardboard boxes that do not identify the manufacturer of the product. *See* Compl. Ex. 5 at 4; Compl. Ex. 7 at 3; Compl. Ex. 9 at 3.

Finally, the evidence shows that at least one entity has attempted to obscure its identity by falsely identifying itself as a different entity. Specifically, the evidence shows that an unidentified entity used the address of Respondent Tofba when shipping its products. *See* Mem. at 25-26 (citing EDIS Doc. IDs 740375 and 740378). Tofba introduced a declaration, however, that stated it never imported or forwarded the infringing products. *Id.* Thus, the identity of the seller and importer of these products remains unknown.

For these reasons, the undersigned finds there is a widespread pattern of violation of section 337.

3. Conclusion

For the above reasons, the undersigned recommends that, in the event the Commission finds a violation of section 337, the appropriate remedy is a GEO that encompasses the Accused Products.

B. Bonding

Pursuant to section 337(j)(3), the Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product.

PUBLIC VERSION

See Microsphere Adhesives, Processes for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, USITC Pub. 2949, Comm’n Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecomm. Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm’n Op. at 41, 1993 WL 13033517, at *24 (U.S.I.T.C. June 22, 1993). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm’n Op. at 26-27 (July 1997) (imposing a 100% bond when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimus* and without adequate support in the record).

Draft Top requests a bond of 300%. Mem. at 27. Draft Top asserts that its “product retails as [sic] \$24.99 per product”, while “[t]he infringing product(s) retail at various prices, as low as \$7.99 per product.” *Id.*

Staff asserts that a bond of 100% is appropriate. Staff Resp. at 47. Staff notes: “Given the state of the evidentiary record, and the fact that all of the affected Respondents have defaulted rather than provide discovery, the Staff believes that a bond of 100 percent of the entered value of infringing apparatus and products which are used for opening canned beverage containers by removing the top of the can is appropriate in the circumstances of this investigation.” *Id.* at 46-47.

With little information on pricing or royalty rates, it is impossible to calculate a bond rate based on the average price differential between the Draft Top and the Accused Products. The undersigned therefore agrees with Staff that the Commission set the bond value at 100%. *See Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-

PUBLIC VERSION

TA-807, Comm’n Op. at 17, U.S.I.T.C. 4549 (July 2015) (“The Commission finds that there is little or no evidence in the record of this investigation as to pricing of the defaulting respondents’ products. . . . The Commission has traditionally set a bond of 100 percent of the entered value of the products under these circumstances.”).

VIII. INITIAL DETERMINATION

For the foregoing reasons, it is the Initial Determination of the undersigned that Draft Top has shown by reliable, probative, and substantial evidence that a violation of section 337 has occurred with respect to U.S. Patent No. 10,519,016, and that the domestic industry requirement is satisfied for the Asserted Patent. Accordingly, Draft Top’s motion for summary determination of violation (1255-005) is hereby granted.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review 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 therein.

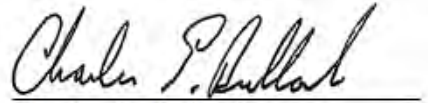
Within ten days of the date of this document, the parties must jointly submit a statement to Bullock337@usitc.gov stating whether they seek to have any portion of this document redacted from the public version. The parties shall attach to the statement a copy of a proposed public version of this document indicating with red brackets any portion asserted to contain confidential business.¹⁶ To the extent possible, the proposed redacting should be made electronically, in a PDF of the issued order, using the “Redact Tool” within Adobe Acrobat, wherein the proposed

¹⁶ If the parties submit excessive redactions, they may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

PUBLIC VERSION

redactions are submitted as “marked” but not yet “applied.” The parties’ submission concerning the public version of this document should not be filed with the Commission Secretary.

SO ORDERED.


Charles E. Bullock
Chief Administrative Law Judge