

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

**NOTICE OF COMMISSION DECISION TO GRANT MOTIONS TO INTERVENE;
COMMISSION DECISION TO REVIEW AN INITIAL DETERMINATION GRANTING
DEFAULT AND SANCTIONS; REQUEST FOR WRITTEN SUBMISSIONS ON ISSUES
UNDER REVIEW, 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 granted motions by Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (“Finnegan”) and Ömür Yarsuvat (“Yarsuvat”) to intervene in this investigation for a limited purpose. The Commission has further determined to review an initial determination (“ID”) (Order No. 27) issued by the presiding administrative law judge (“ALJ”) finding respondents Organik Kimya San. ve Tic. A.Ş. of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; and Organik Kimya US, Inc., of Burlington, Massachusetts (collectively, “Organik Kimya”) to be in default as a sanction for discovery abuse and ordering monetary sanctions. Accordingly, the Commission requests written submissions, under the schedule set forth below, on certain issues under review and on the issues of remedy, public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2661. 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, S.W., 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 TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 21, 2013, based on a complaint filed by the Dow Chemical Company of Midland, Michigan, and by Rohm and Haas Company and Rohm and Haas Chemicals LLC, both of Philadelphia, Pennsylvania (collectively, “Dow”). 78 *Fed. Reg.* 37571 (June 21, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain opaque polymers that infringe certain claims of four United States patents: U.S. Patent Nos. 6,020,435; 6,252,004; 7,435,783; and 7,803,878. The notice of investigation named five respondents: the three Organik Kimya respondents noted above; Turk International LLC of Aptos, California (“Turk”); and Aalborz Chemical LLC d/b/a All Chem of Grand Rapids, Michigan (“Aalborz”). The complaint and notice of investigation were amended to add allegations of misappropriation of trade secrets. 78 *Fed. Reg.* 71643 (Nov. 29, 2013). The Office of Unfair Import Investigations is not a party to this investigation.

On December 13, 2013, the Commission determined not to review an initial determination (Order No. 11) terminating the investigation with respect to U.S. Patent Nos. 7,435,783; and 7,803,878.

On May 19, 2014, Dow filed a motion for default and other sanctions against Organik Kimya for discovery abuse. On May 21, 2014, Organik Kimya filed a motion to terminate based upon a consent order stipulation. On July 8-9, 2014, the ALJ conducted a hearing on the pending motions. On October 20, 2014, the ALJ issued an ID (Order No. 27) finding Organik Kimya in default, under Commission Rule 210.42(c), and ordering monetary sanctions jointly and severally against Organik Kimya and its counsel. Organik Kimya is represented by Finnegan, a law firm in Washington, DC, and by Yarsuvat, an attorney in Istanbul, Turkey. The ALJ denied Organik Kimya’s motion to terminate the investigation based upon a consent order stipulation.

On October 28, 2014, Organik Kimya filed a petition for review of the sanctions ID. The same day, Finnegan and Yarsuvat filed separate motions before the Commission to intervene in the investigation for the purpose of contesting joint liability for the monetary sanction. Finnegan and Yarsuvat also filed provisional petitions for review of the sanctions ID. On November 10, 2014, Finnegan filed a motion for leave to file a reply in support of its motion to intervene, which Dow opposed. The Commission extended the time for determining whether to review the sanctions ID until December 16, 2014.

On October 30, 2014, Dow filed an unopposed motion to withdraw the amended complaint as to the two remaining asserted patents, U.S. Patent Nos. 6,020,435 and 6,252,004, and to withdraw all allegations against Turk and Aalborz. On November 3, 2014, the ALJ granted the motion in an ID (Order No. 29), and on December 1, 2014, the Commission determined not to review the ID. Accordingly, the only remaining respondents in the investigation are the Organik Kimya respondents. The only remaining issues are Dow’s claims based on trade secret misappropriation and the sanctions ID.

The Commission has determined to grant the motion by Finnegan for leave to file a reply in support of its motion to intervene and has considered the reply. The Commission has further determined to grant the petitions by Finnegan and Yarsuvat to intervene in this investigation for the limited purpose of disputing joint and several liability for the monetary sanctions imposed in the sanctions ID. The Commission has considered the petitions for review filed by Finnegan and Yarsuvat, in addition to the petition for review filed by Organik Kimya and the oppositions thereto filed by Dow.

In light of the intervention by Finnegan and Yarsuvat, the Commission has determined to review the sanctions ID. In connection with its review, the Commission requests responses only to the following questions. The parties are to brief their positions with reference to the applicable law and citations to the existing evidentiary record. No new evidence will be considered.

1. Please brief the law governing what types of notice and opportunity to present evidence and argument must be provided to counsel before imposing sanctions on the counsel based on the types of conduct cited on page 112 of the ID. Please also brief how that governing law applies to Organik Kimya's counsel in this investigation, based on the existing record in this investigation. In answering this question, please specifically address whether and when Organik Kimya's counsel was or should have been on notice that counsel might be subject to sanctions and whether they were given adequate opportunity to present evidence and argument on any issue of which they had notice.

2. Please discuss duties that counsel may have under ITC rules, ethics rules, case law, and any other relevant sources with respect to the conduct cited on page 112 of the ID, including duties relating to the implementation of a litigation hold, a duty to investigate before making a representation to the tribunal, a duty to avoid willful blindness, or a duty to preserve or take possession of evidence. In answering this question, please also address any duties that may arise when counsel has received notice of allegations that the counsel's client has intentionally spoliated evidence. Please also explain with citation to the existing record whether Organik Kimya's counsel satisfied any such duties in this investigation.

Other issues on review are adequately presented in the parties' existing filings. The parties are not to brief the sanction finding Organik Kimya in default nor Organik Kimya's liability for monetary sanctions.

In connection with the final disposition of this investigation, the Commission may: (1) issue an order that could result in the exclusion of articles manufactured or imported by the respondents; and/or (2) issue a cease and desist order that could result in the 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 likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (December 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors that the Commission will consider include the effect that the exclusion order and/or cease and desists 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 U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). 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 if a remedy is ordered.

WRITTEN SUBMISSIONS: 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. Complainants are requested to submit proposed remedial orders for the Commission's consideration. Complainants are further requested to state the date upon which the patents expire and the HTSUS numbers under which the accused products are imported and to provide identification information for all known importers of the subject articles.

Written submissions and proposed remedial orders must be filed no later than the close of business on December 30, 2014. Reply submissions must be filed no later than the close of business on January 7, 2015. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadline stated above and submit eight true paper copies to the Office of the Secretary pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-883") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment.

See 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted nonconfidential version of the document must also be filed simultaneously with any confidential filing. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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 Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton". The signature is fluid and cursive, with the first name "Lisa" being the most prominent part.

Lisa R. Barton
Secretary to the Commission

Issued: December 16, 2014