

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN LIP BALM PRODUCTS,
CONTAINERS FOR LIP BALM, AND
COMPONENTS THEREOF**

Inv. No. 337-TA-961

**ORDER No. 12: INITIAL DETERMINATION GRANTING MOTION TO
TERMINATE THE INVESTIGATION AND TO STAY**

(September 28, 2015)

I. INTRODUCTION

On September 23, 2015, Complainants eos Products, LLC and The Kind Group LLC moved: (1) pursuant to 19 C.F.R. § 210.21(b), to terminate the investigation as to Respondent Wuxi Sunmart Science and Technology Co., Ltd. a/k/a Wuxi Sunmart Group Co., Ltd. a/k/a Wuxi Shengma Science & Technology Co., Ltd., and Respondent Wuxi Sunmart Plastic Co., Ltd. (collectively, “Sunmart”), based on a settlement agreement; and (2) pursuant to 19 C.F.R. § 210.21(a), to withdraw the Complaint as to the remaining Respondents, namely, CVS Health Corporation, CVS Pharmacy, Inc., Five Below Inc., Walgreens Boots Alliance, Inc., and Walgreen Co. (collectively, “Remaining Respondents”) (*Motion*).¹ (Motion Docket No. 961-008.) Complainants also moved to stay all procedural schedule deadlines pending resolution of the *Motion*. None of the parties oppose Complainants’ *Motion*.

II. STANDARDS OF LAW

Under Commission Rule 210.21(a)(1),

[a]ny party may move at any time prior to the issuance of an initial determination on violation of section 337 of the Tariff Act of 1930 to

¹ Complainants filed a Corrected Motion on September 28, 2015. Any reference to the *Motion* relates to the Corrected Motion as filed on September 28, 2015.

terminate an investigation in whole or in part as to any or all respondents, on the basis of withdrawal of the complaint or certain allegations contained therein, or for good cause other than the grounds listed in paragraph (a)(2) of this section. A motion for termination of an investigation based on withdrawal of the complaint, or for good cause, shall contain a statement that there are no agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation

19 C.F.R. § 210.21(a)(2). In addition, Commission Rule 210.21(a)(2) provides that:

[a]ny party may move at any time to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement

19 C.F.R. § 210.21(a)(2).

Commission Rule 210.21(b)(1) further specifies that the motion to terminate must include: (1) copies of the licensing or other settlement agreement; (2) any supplemental agreements; and (3) a statement that there are no other agreements, written or oral, express or implied, between the parties concerning the subject matter of the investigation. *See* 19 C.F.R. § 210.21(b)(1). Pursuant to Commission Rule 210.50(b)(2), I must also consider and make appropriate findings regarding the effect of the proposed termination on the public interest. 19 C.F.R. § 210.50(b)(2).

III. DISCUSSION

A. Sunmart Respondents

Complainants' motion to terminate was publicly filed and included an un-redacted copy of the settlement agreement with the Sunmart Respondents (Exhibit 1, hereto). Complainants have also represented that "there are no other agreements, written or oral, express or implied, between Complainants and Sunmart concerning the subject matter of this Investigation." (*See Motion* at 2.) Accordingly, I find that the requirements of Commission Rule 210.50(b)(1) have been met.

With regard to the public interest, I do not find any information indicating that termination of this investigation on the basis of the settlement agreement is contrary to the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. To the contrary, I find that termination of the Sunmart Respondents is in the public interest and will conserve public and private resources. *See, e.g., Certain Consumer Elecs., Including Mobile Phones and Tablets*, Inv. No. 337-TA-839, Order No. 35, 2013 WL 453756, *2 (Feb. 4, 2013) (“[T]ermination of litigation under these circumstances as an alternative method of dispute resolution is generally in the public interest and will conserve public and private resources.”).

B. Remaining Respondents

I also find the requirements for terminating the Remaining Respondents under Commission Rule 210.21(a)(1) to be satisfied. Complainants’ *Motion* was filed before the issuance of an initial determination on violation of Section 337. In addition, Complainants represent that “there are no agreements, written or oral, express or implied, between Complainants and the Remaining Respondents concerning the subject matter of this Investigation.” (*See Motion* at 4.)

Furthermore, “the Commission has held that ‘in the absence of extraordinary circumstances, termination of an investigation will be readily granted to a complainant during the prehearing stage of an investigation.’” *Certain Mobile Elec. Devices Incorporating Haptics*, Inv. No. 337-TA-834, Initial Determination, Order No. 35, 2013 WL 1278075 at *1 (U.S.I.T.C. Mar. 27, 2013) (quoting *Certain Ultrafiltration Membrane Systems, and Components Thereof, Including Ultrafiltration Membranes*, Inv. No. 337-TA-107, Comm’n Action and Order, at 2 (U.S.I.T.C. Mar. 11, 1982)). I find no extraordinary circumstances in this case that prevent the

termination of this Investigation as to the Remaining Respondents. Rather, termination of the Investigation is in the public interest and will conserve public and private resources.

C. Request for Stay

Complainants' request for a stay of all procedural schedule deadlines pending resolution of the *Motion* is also warranted and will conserve the resources of the Commission and the parties. *See, e.g., Certain Earpiece Devices Having Positioning and Retaining Structure and Components Thereof*, Inv. No. 337-TA-912, Order No. 16, 2014 WL 5768589, *2 (U.S.I.T.C. Oct. 28, 2014).

IV. CONCLUSION

Accordingly, for good cause shown, it is my Initial Determination to GRANT Complainants' motion to terminate the Investigation (Motion Docket Nos 961-008). Additionally, Complainants' request for a stay of all procedural schedule deadlines, pending resolution of the *Motion* and the Commission's final disposition of the present Initial Determination, is also GRANTED.

This Initial Determination, along with any supporting documentation, is hereby certified to the Commission. 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 of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into and effective on the date of last signature hereof ("Effective Date") between **The Kind Group LLC** and **eos Products, LLC** (collectively, "EOS"), each a New York corporation having its principal place of business at 19 W. 44th Street, Suite 811, New York, New York 10036, **Sunmart Holdings Pte Ltd.**, a Singapore company having its registered office at 112 Robinson Road #12-04, Singapore 068902, **Wuxi Sunmart Science and Technology Co., LTD.**, a Chinese corporation having its principal place of business at No. 6, Feng Huang Road, Huangtang, Xuxiake Town, Jiangyin, Jiangsu, China and **Wuxi Sunmart Plastic Products Co., LTD.**, a Chinese corporation having its principal place of business at Huangtang Industrial Park, Huangtang, Xuxiake Town, Jiangyin, Jiangsu, China (all of the aforementioned Wuxi and Sunmart entities collectively, "Wuxi"). EOS and Wuxi are sometimes referred to individually as a "Party" and collectively as the "Parties."

WHEREAS, Wuxi provides certain manufacturing services for OraLabs, Inc. ("OraLabs"), a Colorado corporation having its principal place of business at 18685 East Plaza Drive, Parker, Colorado 80134;

WHEREAS, the Parties are presently involved in (i) *eos Products, LLC v. OraLabs, Inc.*, Civil Action No. 1:15-cv-00453-GMS (D. Del.) ("Delaware Litigation") and (ii) *Certain Lip Balm Products, Containers for Lip Balm, and Components Thereof*, United States International Trade Commission Investigation No. 337-TA-961 ("ITC Litigation") (collectively, "Litigations"), which Litigations are now pending;

WHEREAS, in connection with the Litigations, EOS and OraLabs entered into a Settlement Agreement effective August 16, 2015 ("EOS-OraLabs Settlement Agreement"); and

WHEREAS, the Parties hereto desire to settle the Litigations as between them and enter into this Agreement solely as a settlement between the Parties.

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, EOS and Wuxi agree to the following terms and conditions:

1. Discussion Purposes Only Until Executed. This Agreement is for discussion purposes only, and does not represent a final or binding agreement between the Parties to settle any of the disputes between them until signed and dated by all Parties. No rights or obligations accrue as a result of this Agreement until signed and dated by all Parties.

2. Definitions. As used in this Agreement:

- (a) "Mounded Lip Balm" means any lip balm packaging wherein the lip balm as sold extends above the top surface of the open container.
- (b) "Non-Mounded Lip Balm" means any lip balm packaging wherein the lip balm as sold is at or below the top surface of the open container.
- (c) "Primary Packaging" means the container that holds the lip balm.

- 1 -

Kind Group/EOS initials



Wuxi initials



- (d) **"Secondary Packaging"** means packaging in which the Primary Packaging is positioned for sale at retail.
- (e) **"Molds"** means all mold cavities and mold cores (and excluding mold bases) used exclusively to form Prohibited Items as defined below in Paragraph 4(a) or Allowed Items as defined below in Paragraph 4(b).

3. **Itemized List of Wuxi Molds.** Wuxi hereby represents and warrants that it was in possession of the following Wuxi Molds on August 16, 2015:

Table 1: Molds

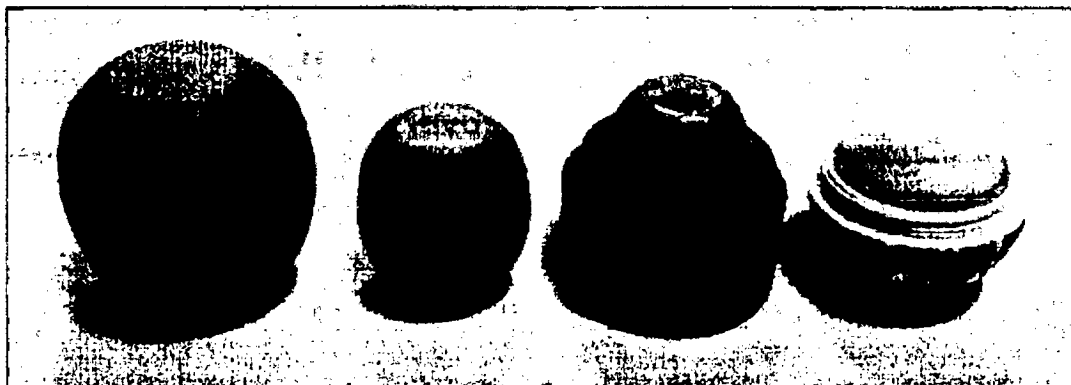
Component Made by Mold
Regular Revo top
Regular Revo bottom
Flat Diamond top
Flat Diamond bottom
Grid for Regular Revo, Flat Diamond, and Regular Octagon
Grid for Beehive and COVERGIRL
Mini Revo top
Mini Revo bottom
Mini Octagon top
Mini Octagon bottom
Plug for Mini Revo and Mini Octagon
Grid for Mini Revo and Mini Octagon
Twist & Pout forming cup
Twist & Pout bottom insert
Twist & Pout grid

4. **Prohibited Lip Balm Products and Components.**

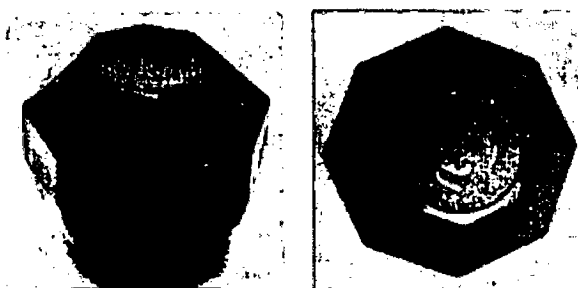
(a) Wuxi agrees that it shall not import into the United States or sell for importation into the United States (i) Mounded Lip Balm products or any substantially egg-shaped Primary Packaging ("Prohibited Products") or (ii) *components* intended for Mounded Lip Balm products or substantially egg-shaped Primary Packaging ("Prohibited Components"), including but not limited to the products depicted below (Prohibited Products and Prohibited Components are defined, collectively, as "Prohibited Items"):




Figure 1: Exemplary Prohibited Items



(LEFT TO RIGHT) (i) smooth shape Lip Revo regular size, (ii) smooth shape Lip Revo mini size, (iii) COVERGIRL® without upper portion and (iv) Twist & Pout® without upper portion;



(v) Flat Diamond Revo (two views)

(b) Notwithstanding the foregoing, Wuxi may make, cause to be made, use, sell, offer for sale, advertise, market, import, sell for importation, and export the spherical Twist & Pout lip balm Primary Packaging or components thereof intended for product with a Mounded Lip Balm (illustrated in Fig. 1, above, on the right) ("Allowed Items") until October 31, 2015. After that date, the Twist & Pout Primary Packaging or components thereof intended for product with a Mounded Lip Balm are Prohibited Items. For the sake of clarity, the Twist & Pout Primary Packaging or components thereof intended for product with a Non-Mounded Lip Balm are not Prohibited Items.

(c) Notwithstanding the above prohibitions, and despite their egg shape, Wuxi may make, cause to be made, use, sell, offer for sale, sell for importation, advertise, market, import, and export the two Mounded Lip Balm products pictured and shown schematically below in Figures 2 and 3, or components thereof, for OraLabs or any lawful successor to or assignee of OraLabs' rights under the EOS-OraLabs Settlement Agreement only ("Permitted Items"). For the sake of clarity, a Non-Mounded Lip Balm product in the Primary Packaging pictured below

constitutes a Prohibited Item. For the sake of clarity, Permitted Items are not Prohibited Products, Prohibited Components, or Prohibited Items.

Figure 2: Permitted Items (Primary Packaging)

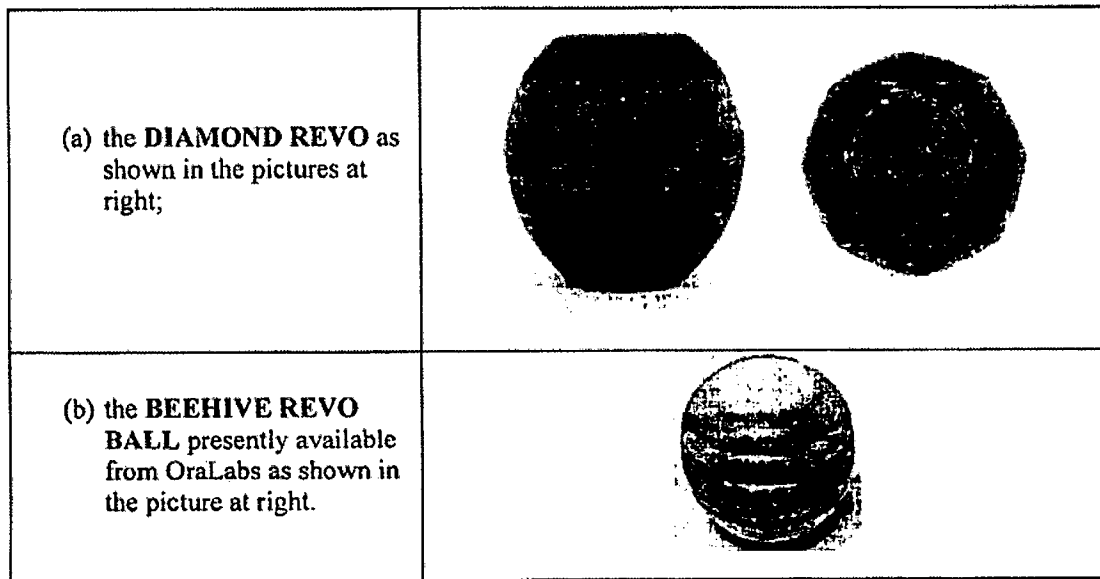
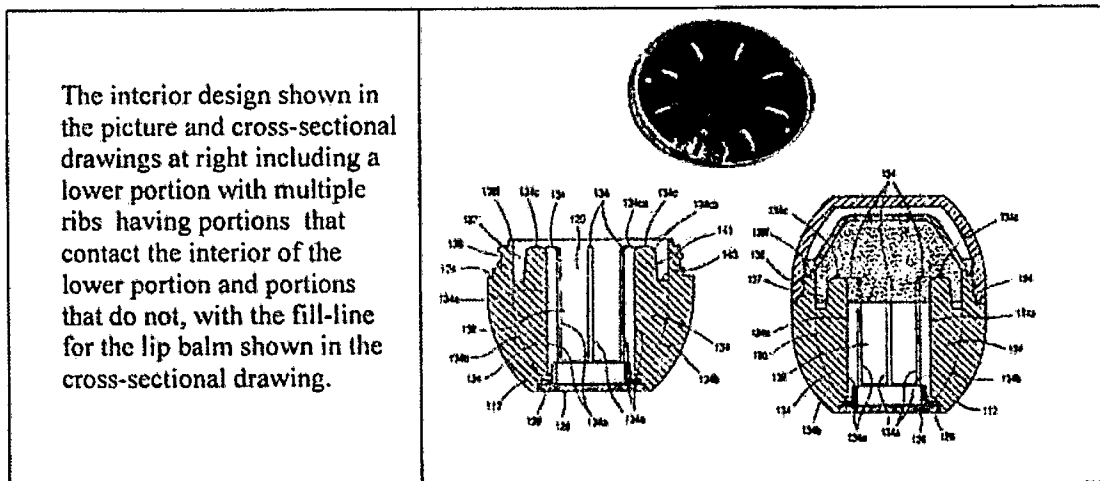


Figure 3: Permitted Items (Interior)



5. Dimensions of Permitted Items. The Permitted Items shall only be of a size that is identical to dimensions of prior, regular-sized products. Specifically, the Permitted Items shall only have the dimensions pictured and described below.

Figure 4: Dimensions of Permitted Items

H1: 43.60 mm \pm 0.6 mm	H6: 43.10 mm \pm 0.6 mm
H2: 23.00 mm \pm 0.3 mm	H7: 22.55 mm \pm 0.3 mm
H11: 27.40 mm \pm 0.3 mm	H12: 26.90 mm \pm 0.3 mm
W1: 41.60 mm \pm 0.3 mm (as measured from panel surface to panel surface);	W5: 41.50 mm \pm 0.3 mm

6. Allowed and Prohibited Wuxi Molds:

(a) Wuxi hereby represents and warrants that the following Wuxi Molds are used exclusively to make Prohibited Items ("Prohibited Wuxi Molds"):

Table 2: Prohibited Wuxi Molds

Component Made by Mold
Regular Revo top
Regular Revo bottom
Flat Diamond top
Flat Diamond bottom
Grid for Regular Revo, Flat Diamond, and Regular Octagon
Grid for Beehive and COVERGIRL
Mini Revo top
Mini Revo bottom
Mini Octagon top
Mini Octagon bottom
Plug for Mini Revo and Mini Octagon
Grid for Mini Revo and Mini Octagon

(c) Wuxi hereby represents and warrants that the following Wuxi Molds are used exclusively to make Allowed Items ("Allowed Wuxi Molds"):

Table 3: Allowed Wuxi Molds

Component Made by Mold
Twist & Pout forming cup
Twist & Pout bottom insert
Twist & Pout grid

7. Discontinued Activities by Wuxi. Wuxi shall immediately:

(a) discontinue importing into the United States or selling for importation into the United States or making for importation into the United States all Prohibited Items;

(b) destroy its existing inventory of Prohibited Items, and permit EOS to observe the foregoing destruction if such destruction has not already occurred, no later than seven (7) calendar days following the Effective Date. The Parties agree that Wuxi may comply with this provision by permanently repurposing the Prohibited Items;

(c) destroy any Prohibited Items that are not already in transit to the United States as of the Effective Date (i.e., that remain in China or another location awaiting export to the United States), and permit EOS to observe the foregoing destruction if such destruction has not already occurred, no later than seven (7) calendar days following the Effective Date. The Parties agree that Wuxi may comply with this provision by permanently repurposing the Prohibited Items; and

(d) destroy all Prohibited Wuxi Molds, and permit EOS to observe the foregoing destruction or, if such destruction has already occurred, to inspect the destroyed Prohibited Wuxi Molds, no later than seven (7) calendar days following the Effective Date. The Parties agree that Wuxi may comply with this provision by permanently repurposing the Prohibited Wuxi Molds.

For the sake of clarity, the Parties agree that the provisions of Paragraph 7 shall not apply to the Allowed Items or Molds used to make Allowed Items. The Parties further agree that the phrase "permanently repurposing," as used herein, does not permit use or sale of Prohibited Items or Prohibited Wuxi Molds in conjunction with Prohibited Products.

8. Discontinued Activities by Wuxi Regarding the Allowed Items. For the Allowed Items, Wuxi shall as of October 31, 2015:

(a) discontinue importing into the United States or selling for importation or making for importation into the United States all Allowed Items;

(b) destroy any inventory of Allowed Items existing as of October 31, 2015, and permit EOS to observe the foregoing destruction if such destruction has not already occurred, no later than seven (7) calendar days following October 31, 2015. The Parties agree that Wuxi may comply with this provision by permanently repurposing the Allowed Items;

(c) destroy any Allowed Items that, as of October 31, 2015, are not already in transit to the United States (i.e., that remain in China or another location awaiting export to the United States), and permit EOS to observe the foregoing destruction if such destruction has not already occurred, no later than seven (7) calendar days following October 31, 2015. The Parties agree that Wuxi may comply with this provision by permanently repurposing the Allowed Items; and

(d) destroy all Allowed Wuxi Molds, and permit EOS to observe the foregoing destruction or, if such destruction has already occurred, to inspect the destroyed Allowed Wuxi Molds, no later than seven (7) calendar days following October 31, 2015. The Parties agree that Wuxi may comply with this provision by permanently repurposing the Allowed Wuxi Molds by October 31, 2015.

The Parties agree that the phrase "permanently repurposing," as used herein, does not permit use or sale of Allowed Items or Allowed Wuxi Molds in conjunction with Prohibited Products.

9. Certifications. Wuxi shall certify to EOS (a) the dates on which all commercial shipments of Prohibited Items from Wuxi took place between August 1, 2015 and the Effective Date, and the details of those shipments (i.e., bills of lading), (b) the date on which the first commercial shipment of Permitted Items (excluding the Allowed Items) from Wuxi took place and the details of shipment (i.e., bill of lading), and (c) that all actions required in paragraphs 7 and 8 have been taken. The certification from Wuxi shall state, *inter alia*, that "Wuxi certifies, represents, and warrants" the foregoing and shall be made in writing by an affidavit signed and dated by a corporate officer of Wuxi.

10. Manufacture of Filled Lip Balm. Wuxi agrees that it shall not manufacture for importation into the United States Prohibited Items or Permitted Items that are filled with lip balm unless it fills a Permitted Item with a lip balm mound that is identical in shape and size to the mound presently included in the regular-sized versions of the Permitted Items as shown by the images below and the dimensions relating to the lip balm mound provided below in Figure 5a, and further agrees that such lip balm shall be a color other than white or off-white (e.g., the off-white color shown below with the BEEHIVE REVO BALL is not permitted):



Figure 5: Shape of Lip Balm Mound

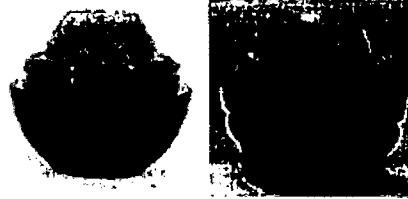


Figure 5a: Dimensions of Lip Balm Mound

H5: 11.5 mm \pm 0.3 mm	H10: 11.3 mm \pm 0.3 mm
W3: 26.5 mm \pm 0.3 mm	W7: 26.5 mm \pm 0.3 mm

11. No IP Challenges. Wuxi agrees not to challenge in the United States the validity, enforceability, ownership or rights of or in any EOS intellectual property ("IP") (e.g., granted/registered, pending, or common law; patent, trademark, copyright, trade secret, or other) related in any way to Mounded Lip Balm, or egg-shaped Primary Packaging for lip balm, or components thereof, or methods of using, manufacturing, or packaging the same, except in the event that EOS, or any successor, assignee, licensee, or other owner of EOS IP asserts in the United States, separate and apart from any claim of breach of this Agreement, that Wuxi has infringed or misappropriated any EOS intellectual property related in any way to Mounded Lip Balm, or egg-shaped Primary Packaging for lip balm, or components thereof, or methods of using, manufacturing, or packaging the same. For the sake of clarity, a non-exhaustive list of EOS's IP includes: the validity and enforceability of EOS's United States Patent No. 8,888,391, EOS's United States Design Patent No. D644,939, and any other applications or patents, United States or foreign, claiming any common priority therewith; and the validity and enforceability of EOS's Trade Dress (including, but not limited to, TM Reg. No. 3,788,970, as product packaging and/or in connection with the promotion, marketing, advertising, offer for sale, and sale of products) or any colorable imitation thereof, or any similar trade dress, with EOS's Trade Dress defined as the overall appearance or image of the combination of a generally egg-shaped plastic container composed of interlocking portions which join around the middle to encase a product with a Mounded Lip Balm.

12. No Cooperation. Wuxi agrees not to assist or cooperate with any third party in challenging in the United States or defending in the United States against claims of infringement,

validity, enforceability, ownership or rights of or in any EOS IP related in any way to Mounded Lip Balm, or egg-shaped Primary Packaging for lip balm, and shall not disclose to any such third party any material or information that Wuxi or its attorneys obtained, or that Wuxi or its attorneys developed through the Litigations, aimed at or concerning the same, other than as required by law, except in the event that EOS, or any successor, assignee, licensee, or other owner of EOS IP asserts in the United States, separate and apart from any claim of breach of this Agreement, that Wuxi has infringed or misappropriated any EOS intellectual property related in any way to Mounded Lip Balm, or egg-shaped Primary Packaging for lip balm or that a customer of Wuxi has infringed or misappropriated any EOS intellectual property related in any way to Mounded Lip Balm or egg-shaped Primary Packaging for lip balm based on the customer's importation, use, sale, or offer for sale of products or components manufactured by Wuxi. If any of Wuxi or its counsel is served with a subpoena about the same, they shall provide reasonable notice to EOS concerning the subpoena and EOS shall assume the obligation to challenge the subpoena, including but not limited to requesting a protective order.

13. Covenant Not To Sue. EOS hereby unconditionally and irrevocably grants to Wuxi (which does not run to or otherwise inure to the benefit of any third party) a covenant not to sue Wuxi under EOS's past, present and future IP regarding Wuxi making, using, selling, offering for sale, importing, selling for importation, or exporting the Permitted Items to or for OraLabs or any lawful successor to or assignee of OraLabs' rights under the EOS-OraLabs Settlement Agreement only. EOS also hereby unconditionally and irrevocably grants to Wuxi (which does not run to or otherwise inure to the benefit of any third party) a covenant not to sue Wuxi under EOS's past, present and future IP regarding Wuxi making, using, selling, offering for sale, importing, selling for importation, or exporting before October 31, 2015 the Allowed Items to or for OraLabs or any lawful successor to or assignee of OraLabs' rights under the EOS-OraLabs Settlement Agreement only. Nothing in this paragraph should be construed as restricting EOS's right to sue Wuxi for breach of this Agreement or any other cause of action not subject to the Covenant Not to Sue.

14. No Assignment of this Agreement. Wuxi shall not assign, transfer, license, or pledge any rights or obligations in this Agreement to any third party, except that this Agreement may be assigned or transferred by Wuxi, without the prior written consent of EOS, to a third party that succeeds to all or substantially all of the business or assets of Wuxi whether by sale, merger, operation of law, other transaction involving a change of control of Wuxi's business, or otherwise, and provided that such assignee or transferee promptly agrees in a signed writing delivered to EOS to be bound by the terms and conditions of this Agreement. For the sake of clarity, all rights granted by EOS herein are limited to Wuxi only.

15. Dismissal of Litigations. Upon complete execution of the Agreement, EOS shall within three (3) business days (a) dismiss all claims without prejudice against Wuxi in the Delaware Litigation and (b) terminate Wuxi from the ITC Litigation as appropriate in view of any instructions from the ITC concerning how to remove Wuxi as a respondent in the ITC Litigation. The Parties agree to provide any necessary consent to achieve these dismissals.

16. Disposal of Discovery and Other Materials from Litigations: In addition to the applicable provisions and requirements in protective orders entered in the Litigations, the Parties agree further to return or destroy, at the option of the adverse Party, all copies of discovery



materials and information provided by the adverse Party in the Litigations. Notwithstanding the foregoing, counsel for the Parties are permitted to retain discovery materials and information in accordance with the applicable provisions and requirements in protective orders entered in the Litigations.

17. Release. Each Party, for itself, its successors and assigns, and all persons or entities claiming by, through or under them, shall, upon execution of the Agreement, forever and irrevocably release, absolve and discharge the other Party, its past, current and future subsidiaries, parents, affiliates, and past, current and future officers, directors, employees, shareholders, attorneys, agents, representatives and heirs, successors and assigns from any and all claims, demands, charges, complaints, actions, suits, causes of action, damages, judgments and liabilities of whatever kind or nature, in law, equity or otherwise, whether known or unknown, whether suspected or unsuspected, foreseen or unforeseen, which the respective Party now has, owns or holds, or claims to have or hold or which the respective Party at any time heretofore had, owned or held, or claimed to have, own or hold, against the other Party relating to any event, act or omission or claim occurring prior to or as of the Effective Date of the Agreement arising out of or relating to any of the Parties' claims pled or that could have been pled in the Litigations or otherwise. For the sake of clarity, EOS shall, upon execution of the Agreement, release Wuxi from any damages for past infringement relating to OraLabs products. Notwithstanding the foregoing, EOS retains all rights to assert that (a) any of Wuxi's present or future products sold to parties other than OraLabs or any lawful successor to or assignee of OraLabs' rights under the EOS-OraLabs Settlement Agreement; or (b) any of Wuxi's future sales to OraLabs of products other than (i) Permitted Items or (ii) Allowed Items sold before October 31, 2015, infringe EOS's IP rights ("Future Claims") and/or breach this Agreement.

18. Injunctive Relief for Material Breach. In the event EOS brings suit as permitted by Paragraph 20 for a material breach, EOS shall also have a right to seek temporary, preliminary and permanent injunctive relief from that breach. In the event of a material breach by Wuxi, irreparable injury will result from lost sales which are difficult to quantify, the threat of continued actual confusion as to source in the marketplace, and EOS's loss of control over its trade dress identity.

19. Costs and Attorney's Fees. The Parties shall bear their own costs and attorneys' fees relating to the Litigations and negotiation of settlement. In the event that any Party brings suit as permitted by Paragraph 20, the prevailing Party shall be entitled to recover from the non-prevailing Party, in addition to any other relief awarded, all reasonable attorneys' fees and costs incurred by the prevailing Party in such suit.

20. Disputes. The Parties shall endeavor to amicably settle any dispute that may arise under this Agreement. Disputes under this Agreement ("Dispute") shall be referred first to senior management of the respective Parties who have applicable decision making authority for good faith dispute resolution. The Party's senior management will be required to discuss the Dispute via telephone or in-person (the "Initial Meeting") within ten (10) days of receiving written notice of the Dispute. If senior management is unable to resolve the Dispute within a reasonable time not less than ten (10) business days after the Initial Meeting, the Parties agree (a) that all disputes and litigation regarding this Agreement, its construction and matters connected with its performance be subject to the exclusive jurisdiction of the federal court in the

Southern District of New York (the "Court"), and (b) to submit any disputes, matters of interpretation, or enforcement actions arising with respect to the subject matter of this Agreement exclusively to the Court. The Parties hereby waive any challenge to the jurisdiction or venue of the Court over these matters.

21. EOS Representations and Warranties. EOS represents and warrants that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individual executing this Agreement is authorized to sign on behalf of EOS.

22. Wuxi Representations and Warranties.

(a) Wuxi represents and warrants that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individual executing this Agreement is authorized to sign on behalf of Wuxi.

(b) Wuxi represents and warrants that it has destroyed its existing inventory of Prohibited Items and Allowed Items.

(c) Wuxi represents and warrants that it has destroyed the following components:

Component	Estimated Quantity
Grid for Regular Revo, Flat Diamond, and Regular Octagon	151,000
Regular Octagon bottom	151,000
Grid for Beehive and COVERGIRL	339,000
Mini Octagon top	307,000
Mini Octagon bottom	307,000
Plug for Mini Revo and Mini Octagon	307,000
Grid for Mini Revo and Mini Octagon	307,000

(d) Wuxi represents and warrants that it has destroyed the Prohibited Wuxi Molds and Allowed Wuxi Molds.

(e) Wuxi represents and warrants that it has destroyed the following molds:

Component Made	Number of Sets of Mold Cavities and Mold Cores
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Regular Revo top	1
Regular Revo bottom	1
Flat Diamond top	1
Flat Diamond bottom	1
Grid for Regular Revo, Flat Diamond, and Regular Octagon	1
Grid for Beehive and COVERGIRL	1
Mini Revo top	1
Mini Revo bottom	1
Mini Octagon top	1
Mini Octagon bottom	1
Plug for Mini Revo and Mini Octagon	1
Grid for Mini Revo and Mini Octagon	1
Twist & Pout forming cup	1
Twist & Pout bottom	1
Twist & Pout grid	1

(e) Wuxi further represents and warrants that no drafts of any petition or request for Inter Partes Review, Post Grant Review, or Reexamination concerning any EOS patent, or portion of such petition or request, have been disclosed by Wuxi or its attorneys to any third party, and that no such petitions or requests have been filed by Wuxi or its attorneys with the United States Patent and Trademark Office.

23. Affiliates. As used in this Agreement, "EOS," "Wuxi," and "OraLabs" each shall include Affiliates thereof, and the term "Affiliate(s)" shall mean any corporation, partnership or other business organization which EOS, Wuxi, or OraLabs as the case may be, directly or indirectly controls, or any corporation, partnership or other business organization by which EOS, Wuxi, or OraLabs, respectively, is controlled or is under common control with.

24. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be delivered by hand, or if dispatched by prepaid air courier with package tracing capabilities or by registered or certified airmail, postage prepaid, addressed as follows:

If to EOS:

Jonathan Teller, Managing Partner
The Kind Group LLC and eos Products, LLC
19 W. 44th Street, Suite 811
New York, New York 10036

with a copy to

Louis S. Mastriani, Esq.
Adduci, Mastriani & Schaumberg LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
mastriani@adduci.com

If to Wuxi:

Sun Bing Zhong, President
Sunmart Holdings Pte Ltd.
Sunmart Building
No. 268 Huan Dong Road
Huangtang, Xuxiake Town
Jiangyin, Jiangsu, China

Murphy Wang, Export Manager
Wuxi Sunmart Science and Technology Co., LTD.
Sunmart Building
No. 268 Huan Dong Road
Huangtang, Xuxiake Town
Jiangyin, Jiangsu, China

Lily He, Export Executive
Wuxi Sunmart Plastic Products Co., LTD.
Sunmart Building
No. 268 Huan Dong Road
Huangtang, Xuxiake Town
Jiangyin, Jiangsu, China

with a copy to:

Jeremy A. Younkin, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
JYounkin@foleyhoag.com



Such notices shall be deemed to have been served when received by addressee. Either Party may give written notice of a change of address and, after notice of such change has been received, any notice or request shall thereafter be given to such Party as above provided at such changed address.

25. Governing Law. This Agreement and matters connected with the performance thereof shall be construed, interpreted, applied and governed in all respects in accordance with the laws of the United States of America and the State of New York, without reference to conflict of laws principles.

26. No Partnership. This Agreement shall not be construed as creating any partnership, joint venture or other legal relationship between the Parties.

27. Document Jointly Drafted. This Agreement was jointly drafted by each of the Parties and their counsel.

28. Sophisticated Parties Represented by Counsel. The Parties each acknowledge, accept, warrant and represent that (i) they are sophisticated Parties represented at all relevant times during the negotiation and execution of this Agreement by counsel of their choice, and (ii) they and their counsel have determined through independent investigation and robust, arm's-length negotiation that the terms of this Agreement shall exclusively embody and govern the subject matter of this Agreement. Each Party acknowledges that it has entered into this Agreement freely and voluntarily and that it had the opportunity to seek the benefit of counsel in entering into this Agreement.

29. Severability. If any provision of this Agreement is held to be illegal or unenforceable, such provision shall be limited or eliminated to the minimum extent necessary so that the remainder of this Agreement will continue in full force and effect and be enforceable. The Parties agree to negotiate in good faith an enforceable substitute provision for any invalid or unenforceable provision that most nearly achieves the intent of such provision.

30. Entire Agreement. This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any prior agreements between them as related to the subject matter of this Agreement. This Agreement can only be amended or altered in a writing signed by the Parties. The failure of any Party to insist on the performance of any obligation hereunder shall not act as a waiver of such obligation. No waiver, modification, release or amendment of any obligation under this Agreement shall be valid or effective unless in writing and signed by the Parties hereto.

31. Interpretation and Successors-in-Interest. This Agreement is for the benefit of and is binding on the Parties and their respective heirs, administrators, representatives, agents, successors, assigns and Affiliates. The language of all parts of this Agreement will in all cases be interpreted as if each Party were the drafter of this Agreement, and according to its fair meaning.

32. Delay. No Party to this Agreement shall be liable for delay or failure in the performance of any of its obligations hereunder if such delay or failure is due to causes beyond its reasonable control, including, without limitation, acts of God, fires, earthquakes, strikes and

labor disputes, acts of war, civil unrest, or intervention of any governmental authority, but any such delay or failure shall be remedied by such Party as soon as is reasonably possible.

33. Headings. Titles or headings of paragraphs contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or prescribe the scope of this Agreement or the intent of any provision.

34. Counterparts. This Agreement may be executed in counterparts or duplicate originals, all of which shall be regarded as one and the same instrument, and which shall be the official and governing version in the interpretation of this Agreement. This Agreement may be executed by facsimile signatures and such signatures shall be deemed to bind each Party as if they were original signatures.

35. Settlement as Compromise; No Admission of Liability or Lack Thereof. The Parties agree that settlement of the Litigations and any rights granted herein are intended solely as a compromise of disputed claims, counterclaims (if any) and defenses. On the one hand, such compromise and settlement shall not be taken as any Party's agreement, admission, or concession that the intellectual property asserted in the Litigations is not infringed, is invalid, or is unenforceable. On the other hand, such compromise and settlement shall not be taken as an agreement, admission, or concession of liability on the part of any Party to this Agreement, but rather, any such liability is expressly denied. Neither this Agreement nor any of the terms hereof shall be offered or received in evidence in any action or proceeding, or be otherwise used, as an agreement, admission, or concession of the lack of liability or wrongdoing or an agreement, admission, or concession of liability or wrongdoing, of any nature on the part of any of the Parties.

Dated: _____

Dated: Sep. 18, 2015

The Kind Group LLC and eos Products, LLC:

By _____
Signature

Jonathan Teller
Managing Partner

Sunmart Holdings Pte Ltd., Wuxi Sunmart Science and Technology Co., LTD. and Wuxi Sunmart Plastic Products Co., LTD.:

By _____
Signature

SUN BING ZHONG
Printed Name

President
Printed Title

labor disputes, acts of war, civil unrest, or intervention of any governmental authority, but any such delay or failure shall be remedied by such Party as soon as is reasonably possible.

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Dated: _____

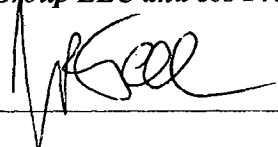
9/17/15

Dated: _____

The Kind Group LLC and eos Products, LLC:

By _____
Signature

Jonathan Teller
Managing Partner

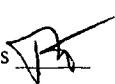


**Sunmart Holdings Pte Ltd., Wuxi Sunmart
Science and Technology Co., LTD. and Wuxi
Sunmart Plastic Products Co., LTD.:**

By _____
Signature

Printed Name

Printed Title



**IN THE MATTER OF CERTAIN LIP BALM PRODUCTS,
CONTAINERS FOR LIP BALM, AND COMPONENTS THEREOF**

337-TA-961

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER No. 12** has been served upon the **Commission Investigative Attorney, Peter Sawert, Esq.**, and the following parties as indicated on SEP 28 2015.



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

FOR COMPLAINANTS EOS PRODUCTS, LLC & THE KIND GROUP LLC:

Louis S. Mastriani, Esq.
ADDUCI, MASTRIANI & SCHAUMBERG, LLP
1133 Connecticut Avenue, N.W., 12th Floor
Washington, DC 20036

() Via Hand Delivery
(☒) Via Express Delivery
() Via First Class Mail
() Other: _____

**FOR RESPONDENTS ORALABS, INC., CVS HEALTH CORPORATION, CVS
PHARMACY, INC., WALGREENS BOOTS ALLIANCE, INC., WALGREEN CO.,
WUXI SUNMART SCIENCE AND TECHNOLOGY CO., WUXI SUNMART PLASTIC
CO., LTD., & FIVE BELOW INC.**

Jeremy Younkin, Esq.
FOLEY HOAG LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210

() Via Hand Delivery
(☒) Via Express Delivery
(☒) Via First Class Mail
() Other: _____