

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN IN VITRO FERTILIZATION
PRODUCTS, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE SAME

Inv. No. 337-TA-1196

NOTICE OF COMMISSION FINAL DETERMINATION TO ISSUE
A LIMITED EXCLUSION ORDER AND A CEASE AND DESIST ORDER;
TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to issue a limited exclusion order (“LEO”) barring entry of certain in vitro fertilization products, components thereof, and products containing the same, that infringe Complainant’s asserted trademarks and that are imported by or on behalf of respondents FastIVF of Scottsdale, Arizona (“FastIVF”) and Hermes Ezcanesi of Istanbul, Turkey (collectively, the “Defaulting Respondents”). The Commission has further determined to issue a cease and desist order (“CDO”) directed to Defaulting Respondent FastIVF. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-4716. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: On April 16, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by complainant EMD Serono, Inc. of Rockland, Massachusetts (“Complainant”). See 85 FR 21267-68 (Apr. 16, 2020). The complaint, as amended and supplemented, alleges a violation of section 337 based on the importation into the United States, the sale for importation, and the sale within the United States after importation of certain *in vitro* fertilization products, components thereof, and products containing same (collectively, “Gray Market IVF Products”), by reason of infringement of U.S. Trademark Registration Nos. 4,689,651; 1,772,761; 3,777,170; 3,389,332; 3,816,320; 1,972,079; 3,604,207; and 3,185,427 (collectively, “the Asserted Trademarks”); unfair methods of competition and unfair acts in the

importation and sale of Gray Market IVF Products by reason of false designation of source; and unfair methods of competition and unfair acts in the importation and sale of the Gray Market IVF Products by reason of false advertising. *See id.* In addition to the Defaulting Respondents, the notice of investigation names General Plastik Drug Stores (“Unserved Respondent”) of Istanbul Suadiye, Turkey as a respondent in this investigation. *See id.* The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *See id.*

On September 1, 2020, the Chief ALJ issued an initial determination (“ID”) finding each of the Defaulting Respondents in default. *See* Order No. 6 (Sept. 1, 2020), *unreviewed by* Comm’n Notice (Sept. 24, 2020). On October 13, 2020, the Chief ALJ also issued an ID terminating Unserved Respondent from the investigation based on the withdrawal of the complaint allegations as to that respondent. *See* Order No. 8 (Oct. 13, 2020), *unreviewed by* Comm’n Notice (Oct. 26, 2020).

On April 16, 2021, the Chief ALJ issued an ID (Order No. 10) (“SD”) granting in part Complainant’s motion for summary determination of violation of section 337 by the Defaulting Respondents with respect to Complainant’s claim under section 337(a)(1)(C) (infringement of the Asserted Trademarks) but denied the motion with respect to Complainant’s unfair competition claims under section 337(a)(1)(A). In addition, the Chief ALJ recommended that the Commission issue a general exclusion order (“GEO”) and set a bond at 100 percent during the period of Presidential review.

On May 18, 2021, the Commission determined to review the SD (Order No. 10) in part. *See* Comm’n Notice (May 18, 2021). Specifically, the Commission determined to review the SD’s findings with respect to the economic prong of the domestic industry requirement. *See id.* The Commission determined not to review any other findings in the SD.

On October 6, 2021, the Commission determined to vacate the SD in part. Specifically, the Commission vacated the SD’s finding that Complainant has satisfied the economic prong of the domestic industry requirement. Consequently, the Commission also vacated the SD’s finding of a violation of section 337 and remanded the investigation to the Chief ALJ. Because Complainant requested a GEO, the Commission found that Complainant failed to establish a violation by “substantial, reliable, and probative evidence” and that genuine issues of material fact remained as to whether the economic prong of the domestic industry requirement was satisfied. *See* Comm’n Op. at 8 n.9, 25 (Oct. 6, 2021) (citing 19 U.S.C. 1337(g)(2)). Commissioners Karpel and Schmidlein dissented from the Commission’s decision that Complainant had failed to satisfy the economic prong of the domestic industry requirement and would have found a violation of section 337 based on substantial, reliable, and probative evidence.

After the Commission’s decision to vacate the SD, Complainant withdrew its request for a GEO and requested an LEO against the Defaulting Respondents and a CDO against FastIVF. On December 15, 2021, the Chief ALJ issued an ID partially terminating the investigation as to Complainant’s unfair competition claims under section 337(a)(1)(A). *See* Order No. 13 (Dec. 15, 2021), *unreviewed by* Comm’n Notice (Jan 10, 2022).

On December 15, 2021, the Chief ALJ issued a remand final initial determination (“FID”) finding a violation of section 337 based on the infringement by the Defaulting Respondents of Complainant’s Asserted Trademarks pursuant to section 337(g)(1), 19 U.S.C. 1337(g)(1). In addition, the Chief ALJ issued a Recommended Determination (“RD”) recommending that the Commission issue an LEO against the infringing articles imported by or on behalf of the Defaulting Respondents and a CDO against FastIVF.

On January 4, 2022, Complainant filed a statement on the public interest pursuant to Commission Rule 210.50, 19 CFR 210.50. On the same day, Complainant filed a declaration requesting relief against the Defaulting Respondents, namely, an LEO against the Defaulting Respondents’ infringing products and a CDO against FastIVF. No submissions were filed in response to the Federal Register notice requesting public interest comments. *See* 86 *Fed. Reg.* 72620-21 (Dec. 22, 2021).

On February 11, 2022, the Commission issued a notice determining not to review the remand FID and therefore affirmed the remand FID’s finding of a violation of section 337 pursuant to section 337(g)(1) (19 U.S.C. 1337(g)(1)). *See* 87 FR 9086-88 (Feb. 17, 2022) (“the Remedy Notice”). In default cases governed by section 337(g)(1), the Commission “presume[s] the facts alleged in the complaint to be true.” *See* 19 U.S.C. 1337(g)(1). The Remedy Notice also requested briefing on remedy, the public interest, and bonding from the parties and from any interested third party. *See id.*

On February 28, 2022, Complainant and OUII filed responses to the Commission’s Remedy Notice. On March 7, OUII filed a reply to Complainant’s submission.

Having examined the record of this investigation, including the FID, the RD, and the parties’ submissions in response to the Remedy Notice, the Commission has determined that the appropriate remedy in this investigation is: (1) an LEO prohibiting the unlicensed entry of certain in vitro fertilization products, components thereof, and products containing the same, that infringe Complainant’s Asserted Trademarks and that are imported by or on behalf of the Defaulting Respondents; and (2) a CDO directed to Defaulting Respondent FastIVF. The Commission has further determined that the bond during the period of Presidential review pursuant to section 337(j) (19 U.S.C. 1337(j)) shall be in the amount of 100 percent of the entered value of the imported articles that are subject to the LEO and/or CDO. Still further, the Commission has determined that the public interest factors enumerated in subsections 337(g)(1) (19 U.S.C. 1337(g)(1)) do not preclude the issuance of the LEO and CDO.

The Commission’s vote for this determination took place on April 6, 2022.

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 CFR part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: April 6, 2022