

*In the Matter of*  
**Certain Asian-Style  
Kamaboko Fish Cakes**

Investigation No. 337-TA-378

96 OCT -8 P 2:29

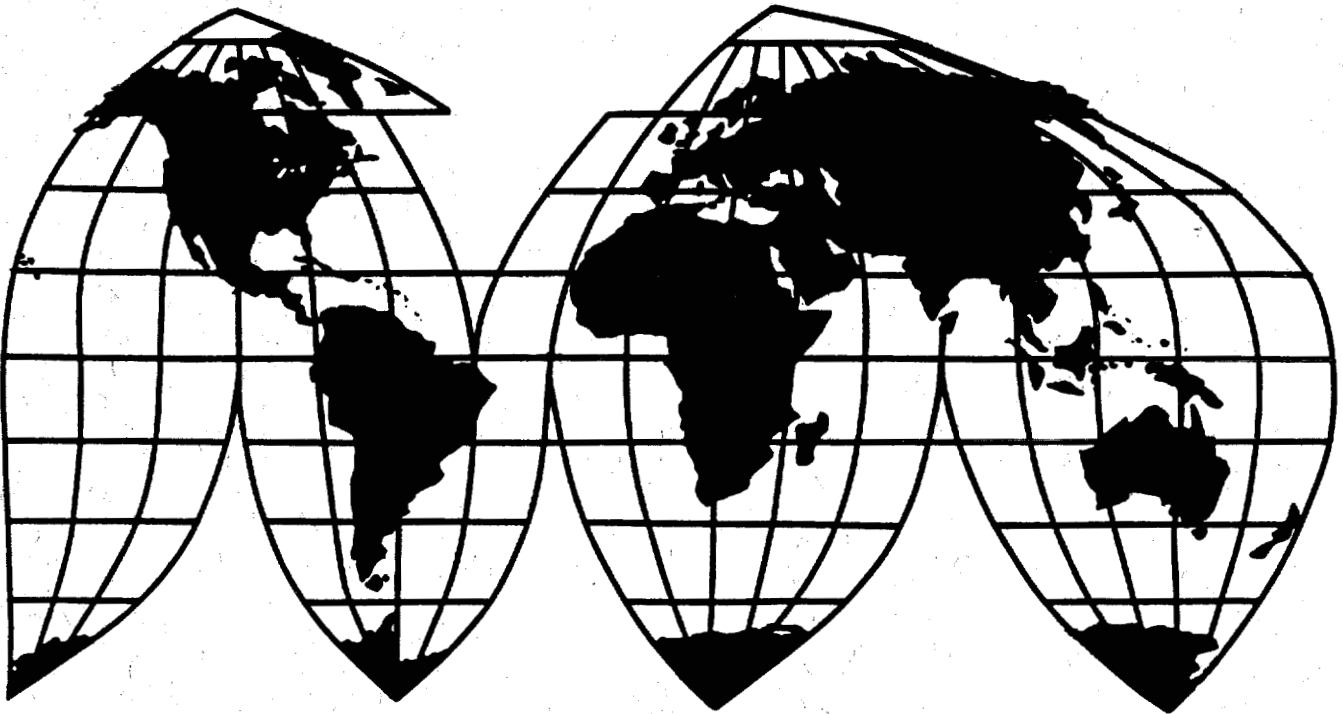
RECEIVED  
OFFICE OF THE SECRETARY  
U.S. INT'L TRADE COMM

000019

Publication 2998

September 1996

**U.S. International Trade Commission**



# **U.S. International Trade Commission**

## **COMMISSIONERS**

**Marcia E. Miller, Chairman**  
**Lynn M. Bragg, Vice Chairman**  
**Don E. Newquist**  
**Carol T. Crawford**  
**Janet A. Nuzum**  
**Peter S. Watson**

**Address all communications to  
Secretary to the Commission  
United States International Trade Commission  
Washington, DC 20436**

# **U.S. International Trade Commission**

Washington, DC 20436

*In the Matter of*  
**Certain Asian-Style  
Kamaboko Fish Cakes**



**Publication 2998**

**September 1996**

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

In the Matter of )  
)  
)

CERTAIN ASIAN-STYLE )  
KAMABOKO FISH CAKES )

) Investigation No. 337-TA-378  
)  
)

RECEIVED  
OFC OF THE SECRETARY  
US INT'L TRADE COMM  
96 SEP 13 P 3:37

NOTICE OF ISSUANCE OF LIMITED EXCLUSION ORDER  
AND CEASE AND DESIST ORDERS AND  
TERMINATION OF INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order and cease and desist orders to domestic respondents New Japan Food Corporation and Rhee Brothers, Inc. in the above-captioned investigation and terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Jay H. Reiziss, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3116.

SUPPLEMENTARY INFORMATION: Complainant Yamasa Enterprises filed a complaint with the Commission on August 15, 1995, and a supplementary complaint on September 6, 1995, alleging that certain respondents were importing, selling for importation, and selling in the United States after importation certain Asian-style kamaboko fish cakes bearing marks or logos that were infringing trademarks owned by Yamasa Enterprises. The complaint named six entities as respondents: Yamasa Kamaboko Co., Ltd. ("YKCL"), Alpha Oriental Foods, Inc. ("Alpha"), N.A. Sales, Inc., New Japan Food Corporation ("New Japan"), Rhee Brothers, Inc. ("Rhee Brothers"), and Rokko Trading Co., Inc. N.A. Sales, Inc. and Rokko Trading Co., Inc. were terminated from the investigation on the basis of a settlement agreement. Alpha was never served and is believed to be out of business.

The Commission voted to institute an investigation of Yamasa Enterprise's complaint on September 12, 1995. 60 Fed. Reg. 48722 (September 20, 1995). On December 6, 1995, the complaint was amended to reflect the issuance to complainant by the U.S. Patent and Trademark Office on September 12, 1995, of a registered trademark for the word "Yamasa."

000033

On May 21, 1996, the ALJ issued Order No. 15 comprising, *inter alia*, two initial determinations (IDs) in which he granted (1) complainant's motion for summary determination that its investments in the United States satisfy the domestic industry requirement of section 337, and (2) complainant's motion for summary determination on all issues (including domestic industry) necessary to establish a violation of section 337. Order No. 15 also granted complainant's motion that respondents Rhee Brothers and New Japan be found in default, and granted in part complainant's motion for evidentiary sanctions against respondent YKCL for its failure to provide discovery.

On June 21, 1996, the Commission determined not to review the IDs, thereby finding a violation of section 337, and issued a notice seeking submissions from the parties on the issues of remedy, the public interest, and bonding. Complainants and the IA filed briefs on the issues of remedy, the public interest, and bonding. None of the respondents filed any written submissions on these issues. No reply briefs were filed.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission made its determinations on the issues of remedy, the public interest, and bonding. The Commission determined that a limited exclusion order prohibiting the unlicensed importation for consumption of infringing Asian-style Kamaboko fish cakes produced and/or imported by YKCL is an appropriate remedy. In addition, the Commission issued cease and desist orders to domestic respondents New Japan and Rhee Brothers requiring them to cease and desist from the following activities in the United States: importing, selling, marketing, advertising, distributing, soliciting agents or distributors for, offering for sale, or otherwise transferring (except for exportation) in the United States infringing imported Asian-style kamaboko fish cakes.

The Commission also determined that the public interest factors enumerated in 19 U.S.C. §§ 1337(d) and (f) do not preclude the issuance of the limited exclusion order and the cease and desist orders, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the imported fish cakes.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and section 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.50).

Copies of the Commission's remedial orders, the Commission opinion in support thereof, and all other nonconfidential 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. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

By order of the Commission:



Donna R. Koehnke  
Secretary

Issued: September 13, 1996

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.**

	)	
<b>In the Matter of</b>	)	
<b>CERTAIN ASIAN-STYLE KAMABOKO FISH CAKES</b>	)	<b>Investigation No. 337-TA-378</b>
	)	



**ORDER**

The Commission has previously determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation and sale in the United States of certain Asian-style kamaboko fish cakes in packaging that bears federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or complainant's common law mark in the Japanese character logo appearing below. Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determinations on the issues of remedy, the public interest, and bonding. The Commission has determined that a limited exclusion order prohibiting the unlicensed importation of infringing Asian-style Kamaboko fish cakes produced and/or imported by Yamasa Kamaboko Company, Ltd. is an appropriate remedy. In addition, the Commission has issued cease and desist orders to domestic respondents New Japan Food Corporation and Rhee Brothers, Inc. requiring them to cease and desist from the following activities in

the United States: importing, selling, marketing, advertising, distributing, soliciting agents or distributors for, offering for sale, or otherwise transferring (except for exportation) in the United States infringing imported Asian-style kamaboko fish cakes.


The Commission has also determined that the public interest factors enumerated in 19 U.S.C. §§ 1337(d) and (f) do not preclude the issuance of the limited exclusion order and the cease and desist orders, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the imported fish cakes.

Accordingly, the Commission hereby **ORDERS** that:

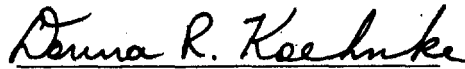
1. Asian-style kamaboko fish cakes in packaging that bears federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark , or colorable imitations thereof, that are manufactured and/or imported by or on behalf of Yamasa Kamaboko Co., Ltd. of Himeji, Japan, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related entities, or its successors or assigns, are excluded from entry for consumption into the United States for the remaining term of the trademarks, except under license of the trademark owner or as provided by law.
2. The aforesaid Asian-style kamaboko fish cakes in packaging that bears federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark , or colorable imitations thereof, that are manufactured and/or imported by or on behalf of the entities identified in paragraph 1 above, are entitled to entry for consumption into the United States under bond in the amount of one hundred (100) percent of the entered value of such items pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(j)), from



the day after this Order is received by the President until such time as the President notifies the Commission that he approves or disapproves this action but, in any event, not later than sixty (60) days after the date of receipt of this action.

3. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to Asian-style kamaboko fish cakes in packaging that bears federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark , or colorable imitations thereof, imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the United States Government.
4. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service.
5. The Commission may modify this Order in accordance with the procedure described in Rule 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.
6. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.



Donna R. Koehnke  
Secretary

Issued: September 13, 1996

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.**

<b>In the Matter of</b>	)	
	)	
<b>CERTAIN ASIAN-STYLE</b>	)	<b>Investigation No. 337-TA-378</b>
<b>KAMABOKO FISH CAKES</b>	)	
	)	

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT New Japan Food Corporation of 9505 Berger Road, Columbia, Maryland 21046, cease and desist from importing, or selling for importation into the United States, or marketing, advertising, distributing, soliciting agents or distributors for, offering for sale, selling in the United States, or otherwise transferring (except for exportation), certain Asian-style kamaboko fish cakes, as described below, in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

**I.**

**(Definitions)**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.


(B) "Yamasa Enterprises" and "Complainant" shall mean Yamasa Enterprises, 515 Stanford Avenue, Los Angeles, California 90013.

(C) "New Japan" and "Respondent" shall mean New Japan Food Corporation of 9505 Berger Road, Columbia, Maryland 21046.

(D) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, its successors, or assigns.

(E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term "covered product" shall mean Asian-style kamaboko fish cakes that are sold under, or that are contained in packaging that bears, federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark , or colorable imitations thereof.

## II.

### (Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority owned business entities, successors, and assigns, and to each of

them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

**III.**


**(Conduct Prohibited)**

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration of the trademarks identified in Section I(G) above, Respondent shall not:

- (A) import or sell for importation into the United States covered product; or
- (B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product; or
- (C) advertise imported covered product; or
- (D) solicit U.S. agents or distributors for imported covered product.

**IV.**

**(Conduct Permitted)**

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark  licenses or authorizes such specific conduct, or such specific conduct is related to the

importation or sale of Asian-style kamaboko fish cakes, by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period [date of issuance of this Order] through August 31, 1997. This reporting requirement shall continue in force until the expiration of the trademarks specified in Section I(G) herein unless, pursuant to subsection (j)(2) of section 337 of the Tariff Act of 1930, the President notifies the Commission within 60 days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, advertising, distribution or other transfer in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purposes of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the trademarks specified in Section I(G) herein.

**VIII.**

**(Confidentiality)**

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

**IX.**

**(Enforcement)**

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.



X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond in the amount of one hundred (100) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after [the date of issuance of this Order] is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on [date of issuance], and is not subject to this bond provision.

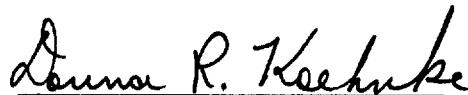
The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be

provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of [date of issuance], or any subsequent final order issued after the completion of Investigation No. 337-TA-378, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.



Donna R. Koehnke  
Secretary

Issued: September 13, 1996

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**

	)	
In the Matter of	)	
CERTAIN ASIAN-STYLE	)	Investigation No. 337-TA-378
KAMABOKO FISH CAKES	)	
	)	

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Rhee Brothers, Inc. of 9505 Berger Road, Columbia, Maryland 21046, cease and desist from importing, or selling for importation into the United States, or marketing, advertising, distributing, soliciting agents or distributors for, offering for sale, selling in the United States, or otherwise transferring (except for exportation), certain Asian-style kamaboko fish cakes, as described below, in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

**I.**

**(Definitions)**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.


(B) "Yamasa Enterprises" and "Complainant" shall mean Yamasa Enterprises, 515 Stanford Avenue, Los Angeles, California 90013.

(C) "Rhee Brothers" and "Respondent" shall mean Rhee Brothers, Inc. of 9505 Berger Road, Columbia, Maryland 21046.

(D) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, its successors, or assigns.

(E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term "covered product" shall mean Asian-style kamaboko fish cakes that are sold under, or that are contained in packaging that bears, federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark , or colorable imitations thereof.

## II.

### (Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority owned business entities, successors, and assigns, and to each of

them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

**III.**


**(Conduct Prohibited)**

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration of the trademarks identified in Section I(G) above, Respondent shall not:

- (A) import or sell for importation into the United States covered product; or
- (B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product; or
- (C) advertise imported covered product; or
- (D) solicit U.S. agents or distributors for imported covered product.

**IV.**

**(Conduct Permitted)**

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally registered U.S. trademark "YAMASA" (Reg. No. 1,918,197) and/or the common law mark  licenses or authorizes such specific conduct, or such specific conduct is related to the

importation or sale of Asian-style kamaboko fish cakes, by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period [date of issuance of this Order] through August 31, 1997. This reporting requirement shall continue in force until the expiration of the trademarks specified in Section I(G) herein unless, pursuant to subsection (j)(2) of section 337 of the Tariff Act of 1930, the President notifies the Commission within 60 days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, advertising, distribution or other transfer in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purposes of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the trademarks specified in Section I(G) herein.



**VIII.**

**(Confidentiality)**

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

**IX.**

**(Enforcement)**

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond in the amount of one hundred (100) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after [the date of issuance of this Order] is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on [date of issuance], and is not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**

\_\_\_\_\_ )  
**In the Matter of** )

**CERTAIN ASIAN-STYLE** )  
**KAMABOKO FISH CAKES** )  
\_\_\_\_\_ )


**Investigation No. 337-TA-378**

**COMMISSION OPINION ON REMEDY, THE  
PUBLIC INTEREST, AND BONDING**

We have previously determined to adopt the presiding administrative law judge's (ALJ's) initial determination (ID) concluding that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation, sale for importation, or sale in the United States after importation of the accused Asian-style kamaboko fish cakes. Specifically, we adopted the ALJ's finding that certain firms, identified below, are importing, selling for importation, and selling in the United States after importation certain Asian-style kamaboko fish cakes bearing marks or logos that infringe two common law and one registered trademark owned by complainant Yamasa Enterprises.

Having determined that relief is warranted, we also determined that a limited exclusion order and cease and desist orders directed to respondents New Japan Food Corporation and Rhee Brothers, Inc. are the appropriate forms of relief. We have further determined that the statutory public interest factors do not preclude the issuance of such relief, and that respondents' bond during the period of Presidential review shall be in the amount of one hundred (100) percent of the entered value of infringing imported Asian-style kamaboko fish cakes. This opinion explains the bases for our determinations.

**I. PROCEDURAL BACKGROUND**

Complainant Yamasa Enterprises filed a complaint with the Commission on August 15, 1995, and a supplementary complaint on September 6, 1995, alleging that certain firms were importing, selling for importation, and selling in the United States after importation certain Asian-style kamaboko fish cakes bearing marks or logos that were infringing two common law trademarks owned by complainant. These common law marks were the Japanese character logo  and the "Yamasa" mark.

The complaint named six entities as respondents: Yamasa Kamaboko Co., Ltd. ("YKCL"), Alpha Oriental Foods, Inc. ("Alpha"), N.A. Sales, Inc., New Japan Food Corporation ("New Japan"), Rhee Brothers, Inc. ("Rhee Brothers"), and Rokko Trading Co.,

Inc. The Commission voted to institute an investigation of the complaint on September 12, 1995.<sup>1</sup> On December 6, 1995, the complaint was amended to reflect the issuance to complainant by the U.S. Patent and Trademark Office on September 12, 1995, of a registered trademark for the word "Yamasa."<sup>2</sup>

On May 21, 1996, the ALJ issued Order No. 15 comprising, *inter alia*, two IDs in which he granted (1) complainant's motion for summary determination that its investments in the United States satisfy the domestic industry requirement of section 337, and (2) complainant's motion for summary determination on all issues (including domestic industry) necessary to establish a violation of section 337. Order No. 15 also granted complainant's motion that respondents Rhee Brothers and New Japan be found in default,<sup>3</sup> and granted in part complainant's motion for evidentiary sanctions against respondent YKCL for its failure to provide discovery. Respondent YKCL filed a petition for review of both IDs on June 4, 1996. Complainant and the IA filed oppositions to YKCL's petition on June 6 and 7, 1996, respectively.

On June 21, 1996, the Commission determined not to review Order No. 15 thereby finding a violation of section 337, and issued a *Federal Register* notice seeking submissions from the parties on the issues of remedy, the public interest, and bonding. Complainant and the Commission investigative attorney (IA) filed briefs on the issues of remedy, the public interest, and bonding. None of the respondents filed any written submissions on these issues. No reply briefs were filed.

## I. **REMEDY**

### A. **Limited Exclusion Order**

To remedy a violation of section 337, the Commission has the authority to issue either a *general*<sup>4</sup> or a *limited*<sup>5</sup> exclusion order. However, the Commission can issue a general

---

<sup>1</sup> 60 *Fed. Reg.* 48722 (September 20, 1995).

<sup>2</sup> Notice of Commission Decision to Extend Deadlines and Notice that Three Initial Determinations Have Become Final (January 23, 1996).

<sup>3</sup> N.A. Sales, Inc. and Rokko Trading Co., Inc. were terminated from the investigation on the basis of a settlement agreement. Initial Determination Terminating Investigation as to Respondents N.A. Sales and Rokko Trading Co. (February 27, 1996) (unreviewed). Alpha was never served and is believed to be out of business. See Order No. 15, at 12 n.10 (citing Complainant's Memorandum in Support of Motion No. 378-12 at 3 n.1).

<sup>4</sup> A general exclusion order directs the U.S. Customs Service to exclude from entry all articles  
(continued...)

exclusion order only where it is "necessary to prevent circumvention of an exclusion order limited to products of named persons; or there is a pattern of violation of this section and it is difficult to identify the source of infringing products."<sup>6</sup>

On June 6, 1996, the ALJ issued a recommended determination ("RD") in which he recommended that the relief in this investigation include a limited exclusion order directed to YKCL's infringing fish cakes. Both complainant and the IA support issuance of such a limited exclusion order against respondent YKCL.<sup>7</sup> Accordingly, since no evidence has been presented in this investigation that would provide a basis for issuance of a general exclusion order, and since respondents have not contested the ALJ's recommendation or the positions of complainant and the IA on this issue, we have determined to issue a limited exclusion order

---

<sup>4</sup>(...continued)

which infringe the involved patent, trademark, or copyright, without regard to source. Thus, a general exclusion order applies to persons who were not parties to the Commission's investigation and, indeed, to persons who could not have been parties, such as persons who decide to import after the Commission's investigation is concluded. A general exclusion order is the broadest type of relief available from the Commission.

Because of its considerable impact on international trade, the Commission balances the complainant's interest in obtaining complete relief against the public interest in avoiding the disruption of legitimate trade that a general exclusion order might cause. For these reasons, the Commission exercises caution in issuing general exclusion orders and requires that certain conditions be met before one is issued. As the Commission stated in *Certain Devices for Connecting Computers Via Telephone Lines*, although the Commission's remedial authority is quite broad, it has applied this authority "in measured fashion and has issued only such relief as is adequate to redress the harm caused by the prohibited imports." Inv. No. 337-TA-360, Commission Opinion (Dec. 12, 1994) at 9.

<sup>5</sup> A limited exclusion order directs the Customs Service to exclude from entry all articles which infringe the involved patent, trademark, or copyright and that originate from firms that were respondents in the Commission investigation.

<sup>6</sup> 19 U.S.C. §1337(d)(2); *see also* 19 C.F.R. §210.50(c)(incorporating the statutory standard into the Commission's Rules of Practice and Procedure). The legislative history of the Uruguay Round Agreements Act ("URAA") amendments to section 337 indicates that these new statutory limitations "do not differ significantly" from the Commission's traditional framework for analyzing the appropriateness of a general exclusion order. *See* S. Rep. No. 412, 103rd Cong., 2d Sess. 120 (1994); H.R. Rep. No. 826, 103rd Cong., 2d Sess., pt. 1, at 141 (1994).

<sup>7</sup> Complainant seeks to exclude only entries intended for consumption in the United States.

prohibiting YKCL from entering into the United States for consumption kamaboko fish cakes in packaging that bears the Yamasa trademarks or colorable imitations thereof.<sup>8</sup>

## **B. The Cease and Desist Order**

Under section 337(f)(1), the Commission has discretion to issue cease and desist orders in addition to, or in lieu of, an exclusion order.<sup>9</sup> The Commission traditionally has issued cease and desist orders only when commercially significant inventories of infringing goods are present in the United States.<sup>10</sup>

Because domestic respondents New Japan and Rhee Brothers, both importers of infringing goods, refused to provide any reliable information regarding their actual U.S. inventory levels, the ALJ recommended that the Commission issue cease and desist orders

---

<sup>8</sup> We note that respondents did not file any written submissions on the issues of remedy, the public interest, and bonding. Therefore, they can be deemed not to have objected to any of the ALJ's, complainant's, or the IA's proposals for relief.

<sup>9</sup> Section 337(f)(1) provides:

In addition to, or in lieu of, taking action under subsection (d) . . . of this section, the Commission may issue and cause to be served on any person violating this section . . . an order directing such person to cease and desist from engaging in the unfair methods or acts involved [unless precluded by consideration of enumerated public interest factors.]

19 U.S.C. § 1337(f)(1)(emphasis added). The Commission's purpose in issuing cease and desist orders typically has been to afford complete relief to complainants where infringing goods are already present in the United States, and thus cannot be reached by issuance of an exclusion order. *See, e.g., Certain Compound Action Metal Cutting Snips*, Inv. No. 337-TA-197, Commission Opinion at 5-7. Unlike an exclusion order, which is enforced by the U.S. Customs Service, a cease and desist order is an *in personam* order typically directed to a party in the United States and is enforced by the Commission, not Customs.

<sup>10</sup> *See, e.g., Certain Pressure Transmitters*, Inv. No. 337-TA-304, USITC Pub. 2392 (June 1991) ("Pressure Transmitters"); *Certain Strip Lights*, Inv. No. 337-TA-287 (October 3, 1989) (Unpublished opinion); *Certain Nonwoven Gas Filter Elements*, Inv. No. 337-TA-275, USITC Pub. 2129 (September 1988); *Certain Compound Action Metal Cutting Snips*, Inv. No. 337-TA-197, USITC Pub. 1831 (March 1986); *Certain High Intensity Retroreflective Sheeting*, Inv. No. 337-TA-268, USITC Pub. 2121 (September 1988); *Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293 (March 1990) ("Cefadroxil").

against them. Complainant and the IA support this recommendation, arguing that the Commission should take adverse inferences against respondents New Japan and Rhee Brothers on this issue in light of their refusal to participate meaningfully in this investigation.

Respondents New Japan Food and Rhee Brothers have not participated in the investigation. As a consequence, it has not been possible to gather information concerning either firm's inventory levels of the infringing articles. However, the record reveals that respondents have sold hundreds of thousands of dollars worth of infringing fish cakes. In addition, there is evidence that the infringing fish cakes may be imported in bulk and packaged later in the United States in packages bearing the Yamasa trademarks. Thus, cease and desist orders are necessary in this investigation to afford complainant complete relief.

Moreover, the Commission has in the past inferred the existence of "commercially significant" domestic inventories where a respondent has failed to provide evidence to the contrary, and we believe it is appropriate to do so in this investigation.<sup>11</sup> In this case, although complainant has not submitted evidence that respondents New Japan and Rhee Brothers have any significant inventories of infringing fish cakes, absent facts to the contrary, it is reasonable to draw the adverse inference that they are stocking infringing product. For this reason as well we have determined to issue cease and desist orders against respondents New Japan and Rhee Brothers.

## **II. THE PUBLIC INTEREST**

Before granting relief, the Commission must consider the effect that such relief would have on "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers."<sup>12</sup> Complainant and the IA both argued that entry of permanent relief in the form

---

<sup>11</sup> See *Cefadroxil* Comm'n Op. at 41-42; *EPROMs*, Inv. No. 337-TA-276, USITC Pub. 2196 (May 1989)(while the existence of significant inventories was not conclusively proven, it could be reasonably assumed from the record that such inventories were present).

<sup>12</sup> 19 U.S.C. §§ 1337(d) and (f). See also *Rosemount v. United States Int'l Trade Comm'n*, 15 U.S.P.Q.2d at 1572, 910 F.2d 819 (Fed. Cir. 1990)(*Rosemount*). In *Rosemount*, the Federal Circuit, in affirming the *Pressure Transmitters* decision, stated:

We also agree with the Commission's rejection of the view that the public interest inevitably lies on the side of the patent owner because of the public interest in protecting patent rights . . . other public interest factors are delineated in the above-quoted section 1337(e)(1) and must be taken into account.

(continued...)

of a limited exclusion order directed to the infringing fish cakes and cease and desist orders directed to respondents New Japan and Rhee Brothers would not raise any public interest concerns under subsections 337(d) or (f). In this regard, complainant and the IA note that there is no evidence that the U.S. demand for such products could not be supplied by complainant, in the absence of the infringing products. They also note that there are no public health concerns in this case.

The issuance of a limited exclusion order and cease and desist orders in this investigation would not have an adverse effect on the public interest. First, the public interest favors the protection of U.S. intellectual property rights.<sup>13</sup> Second, the evidence indicates that the U.S. market for kamaboko fish cakes could be supplied by complainant or by noninfringing alternatives. Finally, kamaboko fish cakes are not the type of product that has in the past raised public interest concerns (such as, for example, drugs or medical devices) and we are not aware of any other public interest concern that would militate against entry of the proposed remedial orders. Accordingly, we agree with complainant and the IA that the statutory public interest factors do not preclude issuance of relief in this investigation and determine that issuance of the requested relief would have no adverse effect on the public interest.

### **III. RESPONDENTS' BOND**

If the Commission enters an exclusion and/or cease and desist order, respondents may continue to import and sell their products during the pendency of Presidential review under a bond in an amount determined by the Commission to be "sufficient to protect the complainant from any injury."<sup>14</sup> The bond should not be set so high as to effectively prevent importation during the Presidential review period. However, the period of Presidential review is relatively short, and the consequences of any bond are therefore likely to be short-lived.

The ALJ found that there was no reliable and accurate evidence as to the difference in price between complainant's and respondents' fish cakes. He found, however, that respondents' wholesale prices are "significantly below" complainant's wholesale prices and that respondents have sold "at least hundreds of thousands of dollars worth of infringing products in the United States." Thus, to protect complainant from injury, he recommended that the excluded articles be entitled to enter the United States during the Presidential review period

---

<sup>12</sup>(...continued)

*Rosemount*, 910 F.2d at 822, 15 U.S.P.Q.2d at 1572.

<sup>13</sup> See *Rosemount*, 15 U.S.P.Q.2d at 1572 (Fed. Cir. 1990)(patent protection is a dominant factor in determining the public's interest in granting relief).

<sup>14</sup> 19 U.S.C. §§ 1337(e) and (j)(3), Commission rule 210.50(a)(3).



under a bond in the amount of at least 50 percent of their entered value. Complainant and the IA urge that the bond during the 60-day Presidential review period should be set at 100 percent of the entered value of the imported fish cakes, citing prior Commission investigations in which such a bond was set because there did not exist sufficient information in the record regarding price comparisons.

We agree with the ALJ, complainant, and the IA that it is not possible in this investigation to conduct direct price comparisons between complainant's and respondents' products in light of the paucity of information regarding respondents' pricing practices. In light of respondents' extensive sales of infringing products in the United States and the statutory requirement that respondents' bond be set at a rate sufficient to protect complainant from any injury, we have determined to set respondents' bond at 100 percent of entered value.<sup>15</sup> A 100 percent bond rate is consistent with the ALJ's recommendation that the bond be set at a rate of *at least* 50 percent and with the rate set in past investigations where pricing data were not available to form the basis for establishing respondent's bond rate.<sup>16</sup>

---

<sup>15</sup> We reiterate that (1) respondents did not contest complainant's or the IA's submissions on this issue and (2) the lack of pricing data is a result in large measure of respondents' failure to participate meaningfully in this investigation.

<sup>16</sup> See, e.g., *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA- 3666, Com. Op. at 25 (January 16, 1996); *Certain Wire Electrical Discharge Machining Apparatus and Components Thereof*, Inv. No. 337-TA-290, Com. Op. at 20 (March 16, 1990); *Certain Erasable Programmable Read-Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories*, Inv. No. 337-TA-276, Com. Op. on Violation, Remedy, Bonding and the Public Interest at 132-34 (May 25, 1989), *aff'd*, *Hyundai Electronics Industries Co. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204 (Fed. Cir. 1990).

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

In the Matter of )  
 )  
CERTAIN ASIAN-STYLE KAMABOKO )  
FISH CAKES )  
 )

Investigation No. 337-TA-378

**Order No. 15:**

- (1) INITIAL DETERMINATION Granting Complainant's Motion No. 378-12 for Summary Determination, and Motion No. 378-10 Partial Summary Determination
- (2) Granting in Part Complainant's Motion No. 378-9 for Sanctions
- (3) INITIAL DETERMINATION Finding Two Domestic Respondents in Default
- (4) Canceling the Scheduled Hearing

---

**I. Procedural Background**

On March 19, 1996, Complainant Yamasa Enterprises, Inc. filed a Motion for Default Judgment or, in the Alternative, for Sanctions. Motion Docket No. 378-9.

A briefing schedule for Complainant's motion for default judgment or sanctions was set in Order No. 12. An opposition to Complainant's motion was received from respondent Yamasa Kamaboko Co., Ltd. ("Respondent"). The Commission Investigative Staff of the Office of Unfair Import Investigations ("OUII") filed a response supporting the imposition of several sanctions against Respondent.

Respondents further requested leave to submit an additional response directed specially toward OUII's response to Complainant's motion. Respondents also submitted a supplemental response, which has been considered by the Administrative Law Judge.

Complainant's motion requesting the Administrative Law Judge to disregard Respondent's supplemental response (Motion Docket No. 378-11) is DENIED.

On March 22, 1996, Complainant filed a Motion for Partial Summary Determination. Motion Docket No. 378-10. Complainant seeks a determination that its investments and activities in the United States satisfy the domestic industry requirement of section 337. On March 29, 1996, Complainant filed a supplement containing copies of the documents referred to in the memorandum in support of its motion for partial summary determination.

An opposition to Complainant's motion for partial summary determination was received from Respondent. OUII filed a response in support of Complainant's motion.

On April 30, 1996, Complainant filed a Motion for Summary Determination. Motion Docket No. 378-12. Complainant's motion addresses each substantive issue in this investigation. With respect to the domestic industry requirement of section 337, Complainant's motion for summary determination (Motion No. 378-12) incorporates Complainant's motion for partial summary determination (Motion No. 378-10), i.e., on the domestic industry issue.

An opposition to Complainant's motion for summary determination was received from Respondent. OUII filed a response in support of Complainant's motion.

## II. Discussion

### A. Complainant's Motions for Summary Determination

The Commission's Rules provide that any party may move with any necessary

supporting affidavits for a summary determination of all or any of the issues to be determined in an investigation. The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.<sup>1</sup> 19 C.F.R. § 210.18 (a)-(b). This rule is analogous to Federal Rule of Civil Procedure 56 under which summary judgment is proper if there is a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Evidence must be viewed in a light most favorable to the nonmovant, and all reasonable inferences must be drawn in the nonmovant's favor. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). However, if the nonmovant's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

This investigation was instituted pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, to determine whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States or in the sale within the United States after importation of certain Asian-style kamaboko fish cakes by reason of infringement of the alleged common law trademark "YAMASA" and a Japanese character logo, the threat or effect of which is to destroy or substantially injure an industry in the United States. 60 Fed.

---

<sup>1</sup> The Commission's Rules provide that the Administrative Law Judge shall grant motions for summary determination by initial determination, and deny such motions by order. 19 C.F.R. §§ 210.18(f), 210.42(c).

Reg. 48722 (1995)(Notice of Investigation). The Complaint and Notice of Investigation were amended to include allegations of violation of subsection (a)(1)(C) of section 337, based on infringement of Complainant's U.S. Registered Trademark No. 1,918,197, which was obtained after the institution of this investigation. Order No. 5 (Initial Determination); 61 Fed. Reg. 3462-3463 (1996).

Complainant's motions for summary determination seek a determination on each of the matters at issue in this investigation. Complainant's motions for summary determination conform to the requirements of the Commission's Rules, and specifically address every substantive matter at issue between Complainant and Respondent as supported by affidavits, admissions and other evidence. See 19 C.F.R. § 210.18 (a)-(c).

Complainant's Memorandum in support of Motion No. 378-12 for summary determination and the exhibits thereto establishes the material facts necessary to grant summary determination on all issues in this investigation, including the following:

1. On September 12, 1995, the United States Patent and Trademark Office issued to Complainant Trademark Registration No. 1,918,197 covering the word "YAMASA." Such registration is *prima facie* evidence that the mark is not confusingly similar to other marks and has acquired secondary meaning. See Complainant's Mem. at 10-11 (citing, inter alia, Mem. Ex. H (Letter from Respondent to the Administrative Law Judge); 2 McCarthy Trademarks and Unfair Competition, §19.05 (3d ed.)). See also OUII's Resp. at 6-7 (citing, inter alia, Complainant's Mem. Ex. A (Kanawa Aff.), F (Takemura Aff.), and K (Certificate of Registration)).

2. Complainant owns the common law rights to the "YAMASA" mark and the

Japanese character logo, both of which have acquired secondary meaning. See Complainant's Mem. at 11-15 (citing, inter alia, Mem. Exs. A (¶¶ 8, 9, 11, 15), B (Kaplan Aff., ¶ 8, 9), D, F (¶¶ 6, 8), G (Sagano Aff., ¶¶ 6, 8), H). See also OUII's Resp. at 7-14, and the exhibits and cases cited therein.

3. Respondent sells fish cakes bearing the trademarks at issue for importation into the United States. Furthermore, importations of the accused products have occurred. See Complainant's Mem. at 15-16 (citing, inter alia, Mem. Exs. H, I (Letter from Respondent to counsel for Complainant), L, M, N). See also OUII's Resp. at 19 (citing Answer to Supp. Compl., ¶ 7; Complainant's Mem. Ex. L, ¶ 10; Staff Ex. A).

4. The trademarks at issue are infringed. A likelihood of confusion exists. See Complainant's Mem. at 17-19 (citing, inter alia, Mem. Exs. A (¶¶ 16-19, 22), D, F (¶¶ 6, 8), G (¶¶ 6, 8) M, N). See also OUII's Resp. at 12-14 (citing, inter alia, Certain Coin Operated Audio Visual Games, Inv. No. 337-TA-87, Comm'n Op. at 8-9 (1981); Certain Heavy Duty Staple Gun Tackers, Inv. No. 337-TA-133, Unreviewed Initial Determination at 56 (1983)).

5. Respondent's imported and infringing products have substantially injured, or threaten substantially to injure, the domestic industry.<sup>2</sup> Complainant's Mem. at 20-27 (citing, inter alia, Mem. Exs. A (¶¶ 23-26), B (¶¶ 8, 11- 15, 17), C, D, F (¶ 7), G (¶ 7), M, N, O). See also OUII's Resp. at 14-19, and the cases cited therein.

Furthermore, it has been established with respect to Complainant's Motion No.

---

<sup>2</sup> Although a complainant need not show injury or threat of injury with respect to a registered trademark, that element must nevertheless be established with respect to a common law trademark. See 19 U.S.C. § 1337(a)(1)(A); Notice of Investigation (quoted, supra).

378-10 for partial summary determination, which is incorporated by reference into Complainant's Motion No. 378-12 for summary determination, that there exists a domestic industry, as required by section 337. See 19 U.S.C. § 1337(a)(3); Notice of Investigation (quoted above).

It has been established that: Complainant engages in domestic production of products bearing the trademarks at issue; Complainant has made significant investments in plant and equipment for the production of said products; and there has been significant employment of labor and capital in the United States for the production of said products. See Complainant's Mot. No. 378-9, "Statement of Material Facts as to Which There Is No Genuine Issue," Nos. 1-12, and the documents cited therein. See also OUII's Resp. at 14-17.

Respondent's oppositions to Complainant's motions for summary determination consist entirely of denials and arguments. They contain no affidavits or citations to other evidence which may be relied upon pursuant to the Commission's Rules. See 19 C.F.R. § 210.18(c).

The Commission's Rules provide for such situations as follows:

**When a motion for summary determination is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of the opposing party's pleading, but the opposing party's response, by affidavits, answers to interrogatories, or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue of fact for evidentiary hearing under § 210.36(a)(1) or (2). If the opposing party does not so respond, a summary determination, if appropriate, shall be rendered against the opposing party.**

19 C.F.R. § 210.18(c) (emphasis added).<sup>3</sup>

Summary determination in this investigation is appropriate given the timeliness and sufficiency of Complainant's motions as to matters of fact and law, and the insufficiency of Respondents' oppositions thereto.<sup>4</sup> Consequently, summary determination in Complainant's favor is required pursuant to the Commission's Rules, as quoted above.

Therefore, it is found that a violation of section 337 has occurred in the sale for importation of accused products that infringe Complainant's registered trademark and Complainant's common law trademarks, and further that Respondent's infringing products have substantially injured or threaten substantially to injure a domestic industry, as required by section 337.

**B. Complainant's Motion for Default Judgment or Sanctions**

Complainant's Motion No. 378-9 for default judgment or sanctions is based upon an alleged course of dilatory conduct, including noncompliance with two orders compelling discovery, i.e., Order No. 7 and Order No. 9.

---

<sup>3</sup> The requirements of the Commission's Rules are similar to those of the Federal Rules, under which the party opposing a motion for summary judgment must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient. Barmag Barmer Maschinefabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 836 (Fed. Cir. 1984).

<sup>4</sup> Furthermore, there is reason to believe that little if any evidence contrary to Complainant's and OUII's position could be adduced at a hearing. Respondent has submitted a prehearing statement which states that "Respondent does not intend to call witnesses." (Respondent also reserved the right to call rebuttal witnesses "as such witnesses become necessary."). In addition, in its statement, Respondent also makes a belated request that the hearing be held in Japan and that any hearing not exceed one day. Given these requests and Respondent's failure to provide adequate and compelled discovery (as discussed below), there is doubt as to whether Respondent intends to attend the hearing scheduled in this investigation.



Respondents oppose the entry of any sanction.

OUII supports the entry of specific sanctions tailored to respond to Respondent's failure to provide compelled discovery.

The Commission Rule concerning a failure to make or cooperate in discovery and related sanctions, is 19 C.F.R. 210.33.<sup>5</sup>

---

<sup>5</sup> Commission Rule 210.33(b)(c) provides as follows:

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery.* If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or

(6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure. Any such action may be taken by written or oral order issued in the course of the

Pursuant to 19 U.S.C. § 1337(h), Commission Rule 210.33 is based on Federal Rule of Civil Procedure 37. The prior Commission Rule was similarly largely analogous to F.R.C.P. 37. 57 Fed. Reg. 52842 (1992). Indeed, Commission Rule 210.33 provides that

---

investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) *Monetary sanctions for failure to make or cooperate in discovery.* (1) If a party, or an officer, director, or managing agent of the party or person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge or the Commission may make such orders in regard to the failure as are just. In lieu of or in addition to taking action listed in paragraph (b) of this section and the extent provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25, may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge or the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(2) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under this section to reimburse the Commission for attorney's fees.

19 C.F.R. § 210.33 (b)-(c).

in addition to the sanctions enumerated therein, the Administrative Law Judge may order any other non-monetary sanction available under F.R.C.P. 37(b). 19 C.F.R. § 210.33(b)(6). Thus, jurisprudence under the Federal Rules of Civil Procedure as well as the Commission's Rules may serve to guide the application of Commission Rule 210.33.

The precise form of a sanction under the Federal Rules is a matter of discretion for the District Court. Similarly, application of the proper sanction is a matter of discretion for the Administrative Law Judge. Certain Internal Mixing Devices and Components Thereof, 337-TA-317 (Remand), Order No. 8 at 14 (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)).

Sanctions under the Federal Rules, as well as the Commission Rule, must be applied in accordance with the dual standard set forth in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 707 (1982), that: 1) any sanction must be "just"; and 2) the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery.

Although it is not necessary that a party willfully disobey a discovery order in order for sanctions to be applied, entry of a default judgment requires a finding of willfulness or bad faith. Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

Certain of the sanctions requested by Complainant, such as default judgment or the preclusion of evidence at a hearing, are moot in light of the granting herein of Complainant's

motions for summary determination.<sup>6</sup> Furthermore, Complainant has not provided sufficient information to determine whether and to what extent monetary sanctions are appropriate.

However, upon consideration of the pleadings submitted by the parties in connection with Complainant's Motion No. 378-9, and the facts of this case, the Administrative Law Judge has determined that several sanctions proposed by OUII shall be entered with minor modifications. The sanctions address issues still relevant to this investigation, such as the issue of remedy.<sup>7</sup>

Each of the sanctions imposed herein results from Respondent's failure to provide discovery specifically required by an Order compelling discovery. Although Respondent attempted to provide explanations as to why it could not provide some of the discovery sought, Respondent did not provide an adequate explanation for failure to provide the discovery underlying each of the sanctions imposed.<sup>8</sup> Each of the sanctions imposed herein is necessary to remedy prejudice suffered by Complainant, and OUII, due to a lack of information provided by Respondent.

Therefore, pursuant to 19 C.F.R. § 210.33(b), it is hereby ORDERED that the following facts are deemed established in this investigation:

---

<sup>6</sup> For the reasons stated in note 4, *supra*, Respondent is already precluded from calling witnesses at any hearing in this investigation, and there is doubt as to whether Respondent would attend a hearing as previously scheduled in this investigation.

<sup>7</sup> The sanctions imposed herein may serve as alternate grounds for the determinations made above in connection with the motions for summary determination.

<sup>8</sup> It is believed that at least some of the underlying discovery requests were made when Respondent was represented by counsel. In any event, the Administrative Law Judge has attempted to accommodate Respondent since the time that it commenced to represent itself, *pro se*.

1. Respondent maintains a significant inventory of products in Japan bearing Complainant's trademarks asserted in this investigation.
2. Respondent's wholesale prices for its accused products that are exported to the United States are significantly below Complainant's U.S. wholesale prices for similar products.
3. Respondent's products bearing the trademarks asserted in this investigation are sold throughout the United States.<sup>9</sup>
4. Respondent has sold its products bearing the trademarks asserted in this investigation to various entities for export to the United States.
5. Respondent has sold at least hundreds of thousands of dollars worth of accused products in the United States.

### III. The Two Remaining Domestic Respondents Are in Default

In addition to the foreign Respondent (subject to the motions for summary determination and sanctions, discussed above), there remain two domestic respondents, Rhee Brothers, Inc. ("Rhee Bros.") and New Japan Food Corp ("New Japan").<sup>10</sup>

Order No. 8 granted Complainant's motion for an order to show cause why Rhee Bros. and New Japan should not be found in default. Neither of said respondents provided

---

<sup>9</sup> This fact was belatedly admitted by Respondent. See Respondent's Resp. to OUII's Resp. to Complainant's Mot. for Sanctions at 3.

<sup>10</sup> The Commission originally named three additional domestic respondents, i.e., N.A. Sales, Inc. ("NA Sales"), Rokko Trading Co., Inc. ("Rokko"), and Alpha Oriental Foods, Inc. ("Alpha"). NA Sales and Rokko were terminated pursuant to a settlement agreement with Complainant. See Order No. 11 (unreviewed initial determination). Service could not be properly effected on Alpha. Complainant believes that Alpha has ceased doing business. See Complainant's Mem. in Support of Mot. No. 378-12 at 3 n.1.

an answer to the Complaint and Notice of Investigation, as required by the Commission's Rules.

No response to Order No. 8 was received from either Rhee Bros. or New Japan within the time permitted by Order No. 8, or at any time thereafter.

Accordingly, pursuant to 19 C.F.R. §§ 210.16(a) and (b), it is the initial determination of the Administrative Law Judge that Rhee Bros. and New Japan are in default.<sup>11</sup>

Consequently, Rhee Bros. and New Japan have waived their right to appear, to be served with documents, and to contest the allegations at issue in this investigation. See 19 C.F.R. § 210.16(b)(3).

#### IV. Conclusion

Accordingly:

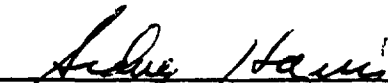
- (1) Complainant's Motion No. 378-9 for sanctions is GRANTED IN PART.
- (2) It is the Initial Determination of the Administrative Law Judge that Complainant's Motion No. 378-10 for summary determination on the domestic industry issue is GRANTED.
- (3) It is the Initial Determination of the Administrative Law Judge that Complainant's Motion No. 378-12 for summary determination is GRANTED.
- (4) It is the Initial Determination of the Administrative Law Judge, for the reasons discussed above, that respondents Rhee Brothers and New Japan are in default.
- (5) No issues remain to be determined in this investigation. The hearing previously

---

<sup>11</sup> The Commission's Rules require that an Administrative Law Judge find a respondent in default by initial determination for failure to respond to the Complaint and Notice of Investigation. 19 C.F.R. § 210.16(b)(1).

scheduled in this investigation, see Order No. 13, is hereby canceled. All pending motions not ruled upon in this Order and Initial Determination are denied as moot. As discussed above, a violation of section 337 has occurred due to the sale for importation by Respondent of products that infringe Complainant's registered and common law trademarks, which products have substantially injured or threaten to injure a domestic industry.

Pursuant to 19 C.F.R. § 210.42(h), the Initial Determinations contained herein shall become the determinations of the Commission unless a party files a petition for review of the Initial Determinations 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 Determinations or certain issues therein.

  
\_\_\_\_\_  
Sidney Harris  
Administrative Law Judge

Issued: May 21, 1996