

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of

**CERTAIN SOFT PROJECTILE
LAUNCHING DEVICES, COMPONENTS
THEREOF, AMMUNITION, AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-1325

**ORDER NO. 13: ORDER DENYING RESPONDENT GEL BLASTER'S
MOTION FOR ENTRY INTO THE INTERIM INITIAL
DETERMINATION PILOT PROGRAM [MOTION DOCKET
NO. 1325-006]**

(November 23, 2022)

I. INTRODUCTION AND PARTY POSITIONS

On November 2, 2022, Respondent Gel Blaster, Inc. (“Gel Blaster”), filed a motion (“Motion”) together with a memorandum of law in support of its motion (“Memorandum”) for entry into the interim initial determination pilot program (“Pilot Program”) that the Commission announced in May 2021.¹ (Motion Docket No. 1325-006; Mot. at 1.). The issues which Gel Blaster would like addressed in an early initial determination as part of the Pilot Program are: (1) Complainant Hasbro, Inc.’s (“Hasbro” and with Gel Blaster (“the Private Parties”) and with Commission Investigative Staff (“Staff”) “the Parties”) alleged breach of contract of an August 1, 2021 Common Interest Agreement (“Common Interest Agreement”) between Gel Blaster and Hasbro; and (2) Hasbro’s “pre-Investigation business misconduct,” which would include Gel

¹ *Pilot Program Will Test Interim ALJ Initial Determinations on Key Issues in Sec. 337 Investigations* (May 21, 2021), https://www.usitc.gov/press_room/featured_news/-337pilotprogram.htm [*Program Announcement*].

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Blaster's defense of "unclean hands" and implied waiver of its intention to enforce its patents. (Mem. at 1, 13.).² Among other provisions, the Common Interest Agreement sets forth Gel Blaster and Hasbro's shared interest in defending against certain Complainant Spin Master, Inc.'s ("Spin Master") patents, including two (2) patents that Hasbro purchased and that are implicated as Asserted Patents in this Investigation, U.S. Patent Nos. 8,371,282 ("282 patent") and 8,640,683 ("683 patent" and with the '282 patent, "Asserted Patents"). There are a number of provisions in the Common Interest Agreement that Gel Blaster contends that Hasbro breached.

In its Motion, Gel Blaster provides a factual chronology of pre-Investigation interactions with Gel Blaster and Gel Blaster employees that Gel Blaster argues lays the predicate for Gel Blaster's Motion and a decision in its favor. (Mem. at 2-9.). Because of Hasbro's alleged misconduct and breaches of the Common Interest Agreement, Gel Blaster contends that the identified patents are unenforceable. (*Id.* at 17.).

Gel Blaster contends that if a finding were made that Hasbro breached its obligations under the Common Interest Agreement, such a decision would be dispositive between Gel Blaster and Hasbro and would eliminate that issue. As a result, according to Gel Blaster, Hasbro would be unable to enforce the Asserted Patents against Gel Blaster. (*Id.* at 19.). It appears that Gel Blaster asserts that its defenses also would individually be dispositive if a finding were made on either waiver or unclean hands. To that end Gel Blaster argues that by allowing its Motion, the evidentiary hearing would be more focused on infringement and invalidity that affect all of the Respondents. (*Id.* at 19.).

² Gel Blaster certifies that two (2) days before it filed its Motion, Gel Blaster attempted to resolve its Motion. (Mot. at 1.). Gel Blaster reports that Commission Investigative Staff ("Staff") would take a position when all papers have been filed. (*Id.*). Gel Blaster also reports that Complainants Hasbro and Spin Master opposed the Motion while Respondents Prime Time Toys, LLC and Splat-R-Ball, LLC took no position. (*Id.*).

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To that end, and in its request for entry into the early ID pilot program, Gel Blaster has proposed that: (1) discovery be completed on the issues of interest within 30 days of the date of an Order granting Gel Blaster's Motion; (2) "as soon as practicable" following discovery, that a hearing be held; and (3) Gel Blaster and Hasbro and Spin Master each be allowed at most (2) depositions; (4) within 10 days of the date of a hearing, that simultaneous, pos-hearing briefs be filed. (*Id.* at 20.).

On November 14, 2022, Hasbro filed its response ("Hasbro Response") to Gel Blaster's Motion. (Doc. ID No. 784442 (Nov. 14, 2022); Hasbro Resp. at 1.). Among other arguments, Hasbro notes that the timing of Gel Blaster's Motion is a problem because entry into the Pilot Program would not save time or resources for any party concerned. As part of the timing and resource problem that Hasbro identifies, Hasbro notes that Hasbro filed its Complaint on or about July 17-23, 2022 yet Gel Blaster waited some 83 days after the Complaint was filed to file its Motion. (*Id.* at 2.). In that same vein, Hasbro notes that fact discovery is scheduled to be completed by December 14, 2022. (*Id.* at 3.). Hasbro argues that with the deadline for fact discovery, the grant of Gel Blaster's Motion would create a dual discovery track that would not save time but rather would add a complicated litigation schedule for the Parties and thereby defeat the purposes of the Pilot Program. (*Id.* at 8, 9.). Other problems with timing include that the Pilot Program discovery would occur in the middle of summary determination filings and expert discovery. To that end, Hasbro notes that a number of administrative law judge opinions only allowed entry into the Pilot Program when the request has been made within days of filing. (*Id.* at 10 (citing *Certain Replacement Automotive Lamps*, Inv. No. 337-TA-1291, 2022 WL 2952192, at *3 (July 1, 2022) (ALJ Cheney); *Certain Electrolyte Containing Beverages*, Inv. No. 337-TA-1269, 86 Fed. Reg. 35532, 35532-33 (July 6, 2021) (other citation omitted))).

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Substantively, Hasbro relayed different terms of the Common Interest Agreement and other arrangements which the Private Parties terminated. (Hasbro Resp. at 2-8.). Additionally, Hasbro argues that the issues Gel Blaster seeks to have adjudicated in the Pilot Program are germane only to Gel Blaster and Hasbro and would not be dispositive with respect to any of the other Respondents. (*Id.* at 13.). Ultimately, Hasbro argues that allowing Gel Blaster’s entry into the Pilot Program would not save time or resources and it would be unfair to Hasbro because of the double track scheduling. According to Hasbro, it is not clear that the Commission’s remedy is a correct one. (*Id.* at 12-18.)

On November 14, 2022, Staff filed his response (“Staff Response”) to Gel Blaster’s Motion. (Doc. ID No. 784425 (Nov. 14, 2022); Staff. Resp. at 1.). Staff notes that when the Pilot Program was instituted, the Commission indicated that it “expected that interim ID issues will be case-dispositive, or will resolve significant issues in advance of the main evidentiary hearing, and could facilitate settlement or otherwise resolve the entire dispute between the parties.” (*See* Staff Resp. at 2.). Staff also notes that the ALJs have discretion to “to put issues within the program as they deem appropriate.” (*Id.*). Staff argues that while Gel Blaster argues the resolving the identified issues would eliminate Gel Blaster from this Investigation, that is not necessarily so because the “record is mixed” as to whether Gel Blaster would prevail. (*Id.*). Therefore, according to Staff, allowing Gel Blaster’s Motion would not necessarily preserve resources or save time. (*Id.*). Ultimately, Staff opposes Gel Blaster’s Motion because even resolving Gel Blaster’s defenses would not be case dispositive, or even necessarily eliminate Gel Blaster from the Investigation, and would not necessarily preserve judicial resources. (*Id.* at 4.).

II. DISCUSSION

On balance, Hasbro’s and Staff’s arguments appear to be correct that it is not clear, based

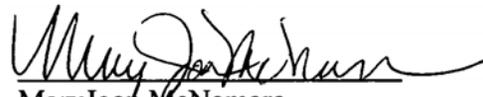
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on the evidence, that Gel Blaster's entry into the Pilot Program would conserve either Party resources or judicial resources. More likely, the time that it would take for additional briefing and two-track schedule could theoretically add time, and at best, might be equivalent to the time that otherwise might be spent on additional or remaining discovery and briefing. Additionally, it is not at all clear, based upon the additional information/evidence that Hasbro submitted, that a disposition on the Common Interest Agreement would necessarily resolve in Gel Blaster's favor. On balance, it is not clear that Gel Blaster's entry into the Pilot Program would fulfill the Commission's purpose for instituting the Pilot Program, as described above.

For the foregoing reasons, Respondent Gel Blaster's Motion, Motion Docket No. 1325-006, is *denied*.

Within fourteen (14) business days of the date of this document, each party shall submit to the Office of the Administrative Law Judges through McNamara337@usitc.gov a statement whether it seeks to have any confidential portion of this document. That is the courtesy copy pursuant to Ground Rule 1.3.2. Any party seeking redactions to the public version must submit to this office through McNamara337@usitc.gov a copy of a proposed public version of this document pursuant to Ground Rule 1.10 with yellow highlighting clearly indicating any portion asserted to contain confidential business information.

SO ORDERED.


MaryJoan McNamara
Administrative Law Judge