

Rhonda K. Schmidlein  
Commissioner



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## UNITED STATES INTERNATIONAL TRADE COMMISSION

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WASHINGTON, DC 20436

December 14, 2023

CO86-VV-003

### MEMORANDUM

TO: Secretary

FROM: Rhonda K. Schmidlein

SUBJECT: Complaint of R.J. Reynolds Tobacco Company and R.J. Reynolds Vapor Company Concerning Certain Disposable Vaporizer Devices and Components and Packaging Thereof (Docket No. 3700)

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I support the Commission's decision today to institute an investigation into alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), based on the above filed complaint. I also support the decision to decline institution as to the cause of action set out in paragraphs 120 through 136 and the cause of action set out in paragraphs 326 through 348 of the complaint. I write separately, however, because I do not join my colleagues' decision to decline to include in the investigation proposed respondent Shenzhen Pingray Technology ("Pingray"). Instead, I find that the complaint and supporting exhibits sufficiently allege unfair acts in the importation of accused articles by Pingray to include it as a party.

Commission Rule 210.12(a)(3) requires the complaint to "[d]escribe specific instances of alleged unlawful importations or sales." 19 C.F.R. § 210.12(a)(3). The complaint alleges that Pingray violated section 337 based on Lanham Act and Patent Act cause of action instituted today in connection with the accused Esco Bars disposable vaping devices. Complaint at ¶¶ 137-141; 214-228. Among other things, the complaint alleges that Pingray manufactures the accused Esco Bars disposable vaping devices, which include product packaging that allegedly contain statements that falsely represent that those products do not contain flavoring. *Id.* at ¶¶ 62, 138.

The complaint also alleges that Pingray sells for importation, imports, and/or sells after importation the accused Esco Bars disposable vaping devices. *Id.* at ¶ 362.

The exhibits provided with the complaint tend to support the complaint's allegation regarding the importation of the accused Esco Bars disposable vaping devices. Those exhibits include an FDA import alert document referred to as a "red list." Ex. 14 at 6. The "red list" states that the FDA Center for Tobacco Products "has determined" that Pingray "may be importing/manufacturing/shipping a new tobacco product (Esco Bar/Escobar) without marketing authorization." *Id.* at 6. The "red list" states that the FDA "may detain, without physical examination, the tobacco products identified" on the list. *Id.* at 2. In addition, the exhibits include receipts of purchase, overseas shipping information, and product packaging marked "Made in China" for accused Esco Bars disposable vaping devices. *See* Exs. 46 and 48.

I find that the complaint and the supporting exhibits sufficiently allege unfair acts in the importation of the accused articles by Pingray to include it as a respondent in the investigation.