

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN CARBURETORS AND
PRODUCTS CONTAINING SUCH
CARBURETORS**

Inv. No. 337-TA-1123

**ORDER NO. 77: INITIAL DETERMINATION GRANTING RESPONDENTS'
MOTION FOR SUMMARY DETERMINATION THAT WALBRO
FAILS TO SATISFY THE DOMESTIC INDUSTRY ECONOMIC
PRONG AND STAYING THE PROCEDURAL SCHEDULE**

(August 12, 2019)

On June 25, 2019, Respondents Amazon.com, Inc., Cabela's LLC,¹ Lowe's Companies, Inc., Menard, Inc., Techtronic Industries Co. Ltd., The Home Depot, Inc., Thunderbay Products,² Tractor Supply Company, Walmart, Inc., and Zhejiang Ruixing Carburetor Manufacturing Co., Ltd. (collectively, "Respondents") moved (1123-053) for summary determination that Complainant Walbro, LLC ("Walbro") has failed to satisfy the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3). On July 12, 2019, Walbro opposed the motion. The Commission Investigative Staff did not submit a response.

Summary determination is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a determination as a matter of law. *See* 19 C.F.R. § 210.18(b). In determining whether there is a genuine issue of material fact, "the evidence must be viewed in the light most favorable to the party opposing the motion with doubts resolved in favor of the non-movant." *Crown Operations Int'l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir.

¹ Walbro and Cabela's LLC jointly moved to terminate the Investigation based on a settlement agreement on July 29, 2019. (Mot No. 1123-065.) The undersigned granted this motion. (Order No. 75 (Aug. 7, 2019).)

² Thunderbay Products moved to terminate this Investigation based on a consent order, which the undersigned granted. (Order No. 65 (July 10, 2019).) On July 23, 2019, the Commission determined not to review this decision. (Notice of Comm'n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Thunderbay Products Based on a Consent Order Stipulation (July 23, 2019).)

2002) (citations omitted); *see also Paragon Podiatry Lab., Inc. v. KLM Labs, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993) (“In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is, and the law requires judgment in favor of the movant based upon facts not in genuine dispute.’”) (citations omitted).

Respondents argue that there are several defects in Walbro’s domestic industry analysis.³ For purposes of summary determination, the undersigned will assume that Walbro’s calculations of its investments are correct. This decision therefore addresses only the question of whether Walbro established that its domestic industry investments are “significant” or “substantial.”

I. Legal Background

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development; or licensing.

19 U.S.C. § 1337(a)(3). Thus, section 337(a)(3) requires that investments be either “significant” or “substantial.” The Federal Circuit has clarified that a quantitative analysis must be performed in order to make this determination. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015) (“The plain text of § 337 requires a quantitative analysis in determining whether a [complainant] has demonstrated a ‘significant investment in plant and equipment’ or ‘significant

³ Respondents argue that: (1) Walbro’s sales-based allocation does not accurately reflect the investment in the domestic industry products; (2) Walbro lacks evidence of investment in employees directly working on domestic industry carburetors; (3) Walbro lacks evidence that equipment, such as water coolers and landscaping costs, relates to the domestic industry products; (4) Walbro’s facility investments improperly count areas used for other products; and (5) Walbro has no evidence of a nexus to the asserted patents under sub-prong (C). (Mem. at 12-16.)

employment of labor or capital.”). There is no threshold amount that a complainant must meet: *See Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“*Stringed Musical Instruments*”) (“We emphasize that there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the ‘substantial investment’ requirement of this section.”); *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 39 (Aug. 1, 2007) (“[T]here is no mathematical threshold test.”). Rather, the inquiry depends on “the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Certain Printing & Imaging Devices & Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011). As such, “[t]he determination takes into account the nature of the investment and/or employment activities, the industry in question, and the complainant’s relative size.” *Id.*

II. Quantitative Analysis

Respondents argue that Walbro has “failed to demonstrate that its investments are quantitatively significant or substantial.” (Mem. at 19.) According to Respondents, “Walbro [provided] limited information that can act as a benchmark.” (*Id.*) Specifically, Walbro failed to provide any evidence of its foreign-related investments and employment activities. (*Id.* at 20.)

Respondents also assert that Walbro’s investments are quantitatively insignificant when compared to its worldwide revenue for its domestic industry products. Respondents note that “Walbro’s alleged plant and equipment investment represents less than [REDACTED] of its worldwide carburetor revenue and less than [REDACTED] of its worldwide revenue for all products.” (*Id.* at 21-22.)

Walbro argues that its expenditures “are significant in absolute terms.” (Opp. at 18.) Walbro contends that its “expenditures are also quantitatively significant relative to Walbro’s overall operations.” (*Id.*) Walbro notes, for example, that for the ’546 patent, its expenses associated with processing the carburetors in the United States amount to [REDACTED] of sales. (*Id.*)

Walbro's domestic industry investments are as follows:

Chart A: Walbro's Domestic Industry Investments

Sections 337(a)(3)(A) and (B)	'424 Patent	'547 Patent	'173 Patent	'254 Patent
Plant & Equipment	██████████	██████████	██████████	██████████
Labor & Capital	██████████	██████████	██████████	██████████
Engineering, Research and Development	██████████	██████████	██████████	██████████
TOTAL	██████████	██████████	██████████	██████████

(Opp. at 18.) As shown in Chart A, Walbro's investments range from ██████████.

The undersigned first finds that it is inappropriate to rely on the numbers in their absolute terms. Walbro's investments include dollar amounts which may appear large,⁴ but these numbers must be viewed in their proper context. As the Commission has explained, "[t]he requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant's relative size." *Stringed Musical Instruments*, Comm'n Op. at 25-26. Thus, evidence to "substantiate the significance of [a complainant's] activities with respect to the [domestic industry products]" is required. *Certain Solid State Storage Drives, Stacked Elecs. Components, & Prods. Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 33 (June 29, 2018).

Here, context is particularly important. Walbro is a large, multinational company with worldwide revenue totaling ██████████ for the relevant timeframe. (Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶ 3.) Just as the Commission does not penalize a small business for making only small investments (in terms of dollar amounts), large multinational companies should be expected to invest larger dollar amounts in order for their investments to be deemed "significant" or "substantial."

⁴ As shown in Chart A, however, Walbro relies on an investment of ██████████ for plant and equipment for the '547 patent. In order for the word "significant" to have any meaning at all, this investment cannot qualify.

Here, there are two pieces of data to provide context for Walbro's investments and Walbro will not have a further opportunity to provide additional evidence.⁵ Discovery is closed and exhibits, including witness statements, have been submitted. (Order No. 36.)

The first piece of data is U.S. sales of the domestic industry products. Such sales amount to [REDACTED] and are allocated by patent as follows:

Chart B: U.S. Sales

'424 Patent	'547 Patent	'173 Patent	'254 Patent
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

(Opp. at 19; *see also* (Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶ 37).) Dividing Walbro's U.S. investments in Chart A by Walbro's U.S. sales in Chart B results in the following percentages:

Chart C: Percentage of U.S. Investments Compared to U.S. Sales

	'424 Patent	'547 Patent	'173 Patent	'254 Patent
Plant & Equipment	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Labor & Capital	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Engineering, Research and Development	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

As seen in Chart C, the majority of Walbro's investments are less than [REDACTED] of its U.S. sales of the products that practice each patent. The undersigned was unable to locate any opinion in the past four years in which the Commission has held that an investment amounting to less than 5% of

⁵ Walbro does not introduce evidence of its foreign-related investments for the patents-in-suit and does not appear to have this information. During his deposition, Walbro's 30(b)(6) witness [REDACTED] (Mot. Ex. A at 607:7-608:8; Ex. E at 1126:3-1132:14.) In its Responses to Respondents' Statement of Undisputed Facts, Walbro admitted that it "did not take into account monetary investments outside of the United States," including engineering activity, plant and facility expenses, equipment investments, and labor expenses. (Walbro's Responses to Respondents' Statement of Undisputed Facts at ¶¶ 39-57.)

sales qualified as “significant” or “substantial.” Accordingly, the undersigned finds that such investments are not significant or substantial.

Only Walbro’s investments in labor and capital are above [REDACTED] when compared to its U.S. sales and only one category – the [REDACTED] labor and capital investment for the ’547 patent amounting to [REDACTED] of U.S. sales – constitutes a percentage that the Commission has deemed significant in the past.⁶ The undersigned finds, however, that comparing Walbro’s domestic investments to its U.S. sales is misleading. When viewed in its proper context, Walbro’s [REDACTED] investment does not qualify as “significant.”

The context of the [REDACTED] investment is understood by reviewing the second piece of data in the record — Walbro’s worldwide sales of the domestic industry products. Such sales amount to [REDACTED] and are allocated by patent as follows:

Chart D: Worldwide Sales

'424 Patent	'547 Patent	'173 Patent	'254 Patent
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

(Walbro’s Responses to Respondents’ Statement of Undisputed Facts at ¶ 37.) Dividing Walbro’s U.S. investments in Chart A by Walbro’s worldwide sales in Chart D results in the following percentages:

Chart E: Percentage of U.S. Investments Compared to U.S. Sales

	'424 Patent	'547 Patent	'173 Patent	'254 Patent
Plant & Equipment	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Labor & Capital	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Engineering, Research and Development	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

⁶ Because the investment amounts and corresponding percentages are deemed confidential in these opinions, the undersigned cannot cite to any specific opinion to support this statement.

As shown in Chart E, Walbro investment of [REDACTED] for labor and capital for products practicing the '547 patent is clearly minimal, as it amounts to only [REDACTED] of Walbro's worldwide sales for these products. Walbro's labor and capital investments for its other patents are also all below [REDACTED]. The undersigned finds that Walbro's labor and capital investments therefore do not qualify as either "significant" or "substantial."

2. Qualitative Analysis

Walbro argues that the undersigned should consider other factors, such as the declining carburetor industry and the fact that Walbro's investments "are critical to the [sic] Walbro's Domestic Industry Products and represent significant added value indeed." (Opp. at 18-19.) Likewise, Walbro asserts that the activity it performs in the United States – calibration – is necessary for a sellable carburetor. (*Id.* at 24-25.) The Federal Circuit has held, however that "[q]ualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment." *Lelo*, 786 F.3d at 885. Because the undersigned has concluded that Walbro's investments are quantitatively insignificant, the qualitative factors need not be addressed.

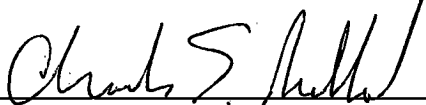
For the reasons stated above, Respondents' motion (1123-053) is hereby granted. In light of this finding, the procedural schedule in this Investigation is hereby stayed, pending review of this Initial Determination.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall be the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion

of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

SO ORDERED.



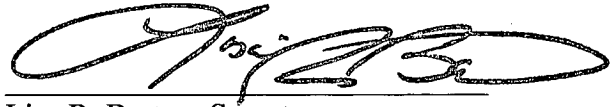
Charles E. Bullock
Chief Administrative Law Judge

**CERTAIN CARBURETORS AND PRODUCTS
CONTAINING SUCH CARBURETORS**

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Certificate of Service – Page 1

I, Lisa R. Barton, hereby certify that the attached **PUBLIC VERSION ORDER NO. 77** has been served by hand upon the Commission Investigative Attorney, Vu Bui, Esq., and the following parties as indicated, on **September 12, 2019**.



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

<u>On Behalf of Complainant Walbro, LLC:</u>	
Richard W. Hoffmann, Esq. REISING ETHINGTON, PC 755 W. Big Beaver Rd., Suite Troy, MI 48084	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<u>RESPONDENTS:</u>	
<u>On Behalf of Lowe's Companies, Inc.:</u>	
Joshua B. Pond, Esq. KILPATRICK TOWNSEND & STOCKTON LLP 607 14 TH Street, NW, Suite 900 Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<u>On Behalf of Respondent Amazon.com, Inc.:</u>	
Stefani E. Shanberg, Esq. MORRISON & FOERSTER LLP 425 Market Street San Francisco, CA 94105	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<u>On Behalf of Respondents Techtronic Industries Co. Ltd. of Hong Kong d/b/a Techtronic Industries Power Equipment and Home Depot Product, Inc. and Home Depot U.S.A., Inc.:</u>	
Sean C. Cunningham, Esq. DLA PIPER LLP (US) 401 B Street, Suite 1700 San Diego, CA 92101	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____

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<p><u>On Behalf of Respondents Kmart Corporation and Sears, Roebuck and Company:</u></p>	
<p>Eric S. Namrow, Esq. MORGAN, LEWIS & BOCKIUS LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004-2541</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
<p><u>On Behalf of Respondent Zhejiang Ruixing Carburetor Manufacturing Co., Ltd.:</u></p>	
<p>P. Andrew Riley, Esq. MEI & MARK LLP 818 18th Street, NW, Suite 410 Washington, DC 20006</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
<p><u>On Behalf of Respondent Walmart Inc.:</u></p>	
<p>Rett Snotherly, Esq. LEVI & SNOTHERLY, PLLC 1101 Connecticut Avenue, NW, Suite 450 Washington, DC 20036</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
<p><u>On Behalf of Respondent Tractor Supply Company:</u></p>	
<p>Daniel E. Yonan, Esq. STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C. 1100 New York Avenue, NW Washington, DC 20005</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
<p><u>On Behalf of Respondent Menards, Inc.:</u></p>	
<p>Jeffrey L. Eichen, Esq. DRINKER BIDDLE & REATH LLP 222 Delaware Avenue, Suite 1410 Wilmington, DE 19801</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>

**CERTAIN CARBURETORS AND PRODUCTS
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On Behalf of Respondent MAT Industries, LLC:	
Paul M. Bartkowski, Esq. ADDUCI, MASTRIANI & SCHAUMBERG, LLP 1133 Connecticut Ave., NW, 12 th Floor 100 Washington, DC 20036	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
Fuding Youyi Trade Co., Ltd. No. 176, Yuhu Community, Taimushan Town, Fuding, Ningde, Fujian, 355203 China	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
Feldmann Eng. & Mfg. Co., Inc. 520 Forest Avenue Sheboygan Falls, WI 53085	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____