

In the Matter of

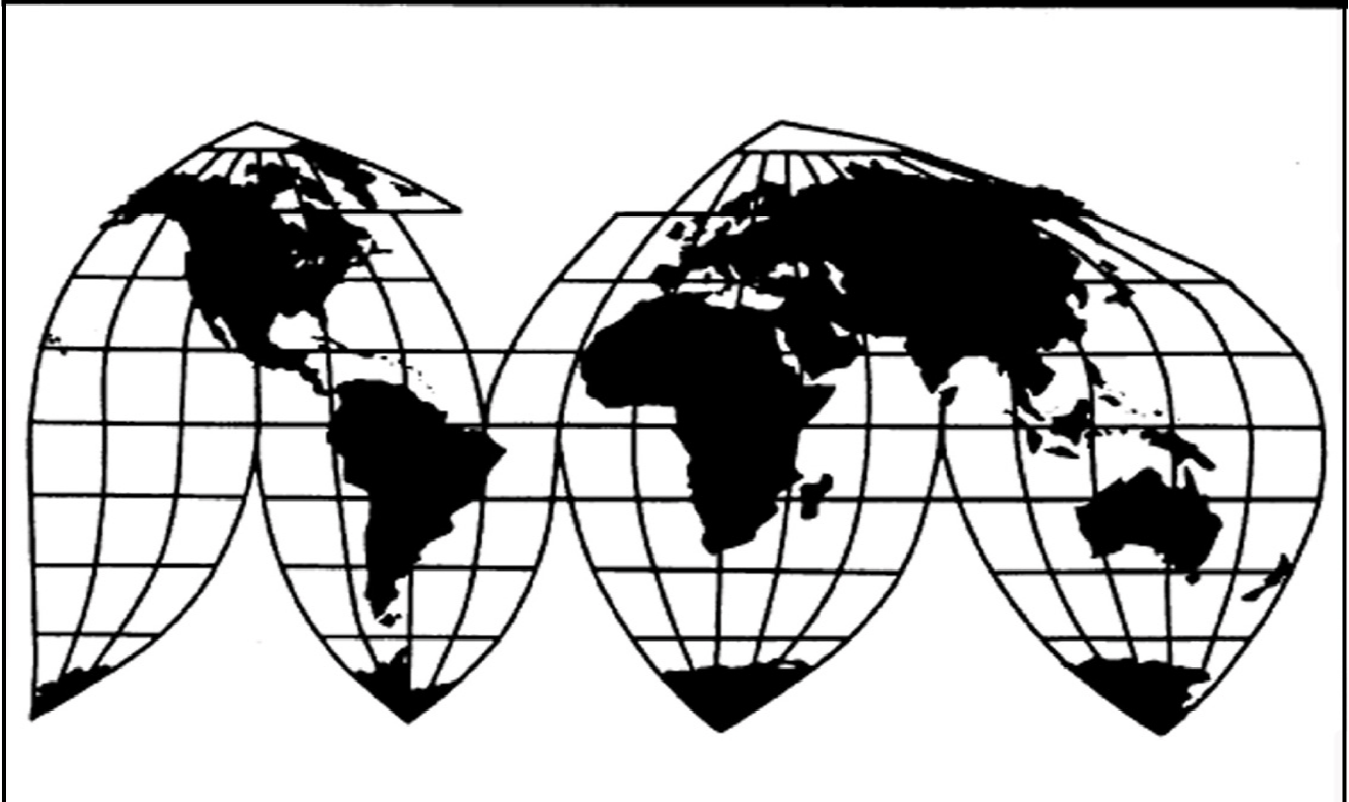
Certain Plastic Food Containers

Investigation No. 337-TA-514

Publication 3969

December 2007

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Daniel R. Pearson, Chairman
Shara L. Aranoff, Vice Chairman*
Deanna Tanner Okun
Charlotte R. Lane
Irving A. Williamson*
Dean A. Pinkert*

*Commissioner Shara L. Aranoff was sworn in on September 6, 2005, Commissioner Irving A. Williamson was sworn in on February 7, 2007, and Commissioner Dean A. Pinkert was sworn in on February 26, 2007; they did not participate in this investigation. Commissioner Marcia E. Miller, whose term ended on September 6, 2005, Commissioner Stephen Koplan, whose term ended on February 6, 2007, and Commissioner Jennifer A. Hillman, whose term ended on February 23, 2007, did participate in this investigation.

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

U.S. International Trade Commission

Washington, DC 20436
www.usitc.gov

In the Matter of

Certain Plastic Food Containers

Investigation No. 337-TA-514



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)
)

CERTAIN PLASTIC FOOD CONTAINERS)
)
_____)

Inv. No. 337-TA-514

NOTICE OF FINAL DETERMINATION OF VIOLATION OF SECTION 337
AND ISSUANCE OF GENERAL EXCLUSION ORDER;
TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission

ACTION: Notice

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to find a violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. Notice is also given that the Commission has issued a general exclusion order in the above-captioned investigation and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Michael Diehl, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 205-3095. Copies of 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. General information concerning the Commission may be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: By a notice published on June 22, 2004, the Commission instituted an investigation into alleged violations of section 337 in the importation and sale of certain plastic food containers by reason of infringement of certain claims of U.S. Patent No. 6,056,138 (the "138 patent"); of U.S. Patent No. 6,196,404 (the "404 patent"); and of U.S. Design Patent No. D 415,420 (the "420 patent"). 69 *Fed. Reg.* 34691 (June 22, 2004). Plastic food containers such as those claimed by the patents in issue are used for packaging foods from restaurants, food processors, and educational and government institutions with food service programs.

On August 19, 2004, complainant Newspring Industrial Corp. ("Newspring") moved for an order directing that each of the two respondents, Jiangsu Sainty Corporation, Ltd. ("Jiangsu") and Taizhou Huasen Household Necessities, Co., Ltd. ("Taizhou"), show cause as to why each should not be found in default for failure to respond to the complaint and notice of investigation. Newspring also requested an order finding the respondents in default if they failed to show cause. On August 27, 2004, the Investigative Attorney ("IA") filed a response in support of the motion for an order to show cause, but

opposed any finding that respondents are in default as premature. On August 30, 2004, the ALJ issued Order No. 5, directing respondents to show cause no later than September 17, 2004 why they should not be held in default.

On September 9, 2004, before the ALJ ruled on the motions for default, Newspring filed motions for summary determinations that there has been a violation of section 337 and that a domestic industry has been established with respect to each of the asserted patents. Newspring sought a recommendation for the issuance of a general exclusion order.

On September 23, 2004, the IA filed a response supporting the motions with respect to most but not all issues. He supported a summary determination that the domestic industry requirement had been satisfied as to each of the patents in issue. He also supported a summary determination that Jiangsu had violated section 337 with respect to each of the patents at issue. As to Taizhou, the IA supported a summary determination of violation as to the '420 patent, but not as to the '138 and '404 patents.

On October 12, 2004, the ALJ issued an ID (Order No. 7) with respect to Newspring's motion to find respondents in default. Noting that neither respondent responded to the notice to show cause, the ALJ found the respondents in default. The Commission determined not to review the ID.

On February 10, 2005, the ALJ issued the subject ID (Order No. 8), granting Newspring's motions for summary determinations with respect to most but not all issues. Consistent with the position of the IA, the ALJ determined that a domestic industry had been established with respect to each of the asserted patents, and that Jiangsu had violated section 337 with respect to each asserted patent as well. He determined that Taizhou had violated section 337 with respect to the '420 design patent, but found that a genuine issue of fact remained as to whether the accused Taizhou products infringed the '138 and '404 utility patents. Accordingly, he denied complainant's motion as to Taizhou in part. The ALJ also recommended the issuance of a general exclusion order and that the bond permitting temporary importation during the Presidential review period be set at 100 percent of the entered value of the infringing imported product. No party petitioned for review of the ID.

On March 18, 2005, the Commission issued a notice of its decision to review the ID. The notice indicated that the review "is for the limited purpose of examining possible formatting and typographical errors contained on one page of the ID." 70 *Fed. Reg.* 13206, 13206 (March 18, 2005). The notice indicated that the Commission sought comments from the parties to the investigation with respect to the issues under review. It also indicated that the Commission sought comments from the parties to the investigation, interested government agencies, and any other interested parties on the issues of remedy, the public interest, and bonding.

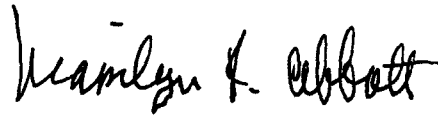
On March 28, 2005, the Commission received comments from Newspring and the IA. No reply submissions were received.

Having examined the relevant portions of the record in this investigation, including the ALJ's Order No. 8, and the written submissions on remedy, the public interest, and bonding, the Commission determined to adopt Order No. 8 as its determination, subject to two formatting and typographical modifications to page 15 of the Order. Further details as to the modifications are provided in Commission's opinion issued in connection with this final determination.

The Commission also determined to issue a general exclusion order prohibiting unlicensed entry for consumption of plastic food containers that infringe the claim of U.S. Design Patent No. D 415,420, claim 1 of U.S. Patent No. 6,056,138, or claim 1 of U.S. Patent No. 6,196,404. In so doing, the Commission determined that the public interest factors enumerated in section 337(g) do not preclude the issuance of the aforementioned remedial order and that the bond during the Presidential review period shall be 100 percent of the entered value of the articles in question. The Commission's order was delivered to the President on the day of its issuance.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(g)(2)), and sections 210.41 and 210.50 of the Commission's Rules of Practice and Procedure, (19 C.F.R. §§ 210.41 and 210.50).

By order of the Commission.

A handwritten signature in black ink that reads "Marilyn R. Abbott". The signature is written in a cursive style with a large initial 'M' and a distinct 'R'.

Marilyn R. Abbott
Secretary to the Commission

Issued: May 23, 2005

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

In the Matter of

**CERTAIN PLASTIC FOOD
CONTAINERS**

Inv. No. 337-TA-514

GENERAL EXCLUSION 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 of certain plastic food containers that infringe the claim of U.S. Design Patent No. 415,420 (“the ‘420 patent’”), claim 1 of U.S. Patent No. 6,056,138 (“the ‘138 patent’”), and claim 1 of U.S. Patent No. 6,196,404 (“the ‘404 patent’”). 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 general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing plastic food containers.

The Commission has also determined that the public interest factors referenced in 19 U.S.C. §§ 1337(g) do not preclude the issuance of the general exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of the articles in question.

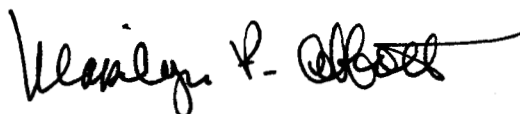
Accordingly, the Commission hereby **ORDERS** that:

1. Plastic food containers covered by one or more of claim 1 of the '420 patent, claim 1 of the '138 patent, or claim 1 of the '404 patent, or are excluded from entry for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption for the remaining term of the patents, except under license of the patent owner or as provided by law.
2. Notwithstanding paragraph 1 of this Order, the aforesaid plastic food containers are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption, under bond in the amount of 100 percent of the entered value of such articles, from the day after this Order is received by the President, pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended, until such time as the President notifies the Commission that he approves or disapproves this action, but no later than 60 days after the date of receipt of this Order by the President.
3. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to plastic food containers 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 Government.
4. The Commission may modify this Order 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).
5. The Commission 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 Bureau of Customs and Border Protection.

6. Notice of this Order shall be published in the *Federal Register* pursuant to section 337(j)(1)(A) of the Tariff Act of 1930 as amended (19 U.S.C. § 1337(j)(1)(A)) and section 210.49(b) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.49(b)).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott", with a long horizontal flourish extending to the right.

Marilyn R. Abbott
Secretary to the Commission

Issued: May 23, 2005

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF FINAL DETERMINATION OF VIOLATION OF SECTION 337 AND ISSUANCE OF GENERAL EXCLUSION ORDER; TERMINATION OF THE INVESTIGATION** was served upon the Commission Investigative Attorney, Michael Diehl, Esq., and all parties via first class mail and air mail where necessary on May 27, 2005.



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

ON BEHALF OF COMPLAINANT
NEWSPING INDUSTRIAL
CORPORATION:

David E. De Lorenzi, Esq.
Sheila F. McShane, Esq.
Clyde A. Shuman, Esq.
**Gibbons, Del Deo, Dolan, Griffinger
& Vecchione**
One Riverfront Plaza
Newark, New Jersey 07102-5496

Steven Lieberman, Esq.
Rothwell, Figg, Ernst & Manbeck
1425 K Street, NW Suite 800
Washington, DC 20004

RESPONDENTS:

Taizhou Huasen Household Necessities, Co., Ltd.
a/k/a China Huasen Daily Expenses Co., Ltd.
No. 13,247 Lane, YinShan Road
Huaugyan, Taizhou
People's Republic of China

Jiangsu Sainty Corporation, Ltd.
98 Jian Ye Road
Nanjing, People's Republic of China

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN PLASTIC FOOD
CONTAINERS**

Inv. No. 337-TA-514

**COMMISSION OPINION ON VIOLATION OF SECTION 337
AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

INTRODUCTION

This investigation is before the Commission for determination as to remedy, the public interest, and bonding. This opinion also corrects two formatting and typographical errors contained in the initial determination (“ID”), in which the presiding administrative law judge (“ALJ”) found a violation of section 337 of the Tariff Act of 1930, as amended.

BACKGROUND

By a notice published on June 22, 2004, the Commission instituted the present investigation into alleged violations of section 337 in the importation and sale of certain plastic food containers by reason of infringement of certain claims of U.S. Patent No. 6,056,138 (the “138 patent”); of U.S. Patent No. 6,196,404 (the “404 patent”); and of U.S. Design Patent No. D 415,420 (the “420 patent”). 69 *Fed. Reg.* 34691 (June 22, 2004). Plastic food containers such as those claimed by the patents in issue are used for packaging foods from food processors, restaurants, and educational and government institutions with food service programs.

On August 19, 2004, complainant Newspring Industrial Corp. (“Newspring”) moved for an order directing that respondents Jiangsu Sainity Corporation, Ltd. (“Jiangsu”) and Taizhou Huasen Household Necessities, Co., Ltd. (“Taizhou”) show cause as to why each should not be found in default for failure to respond to the complaint and notice of investigation. Newspring also requested an order finding

respondents in default if they failed to show cause. On August 27, 2004, the Commission Investigative Attorney (“IA”) filed a response in support of the motion for an order to show cause, but he opposed as premature any finding that respondents were in default. On August 30, 2004, the ALJ issued Order No. 5, directing respondents to show cause no later than September 17, 2004 why they should not be held in default.

On September 9, 2004, before the ALJ ruled on the motions for default, Newspring filed motions for summary determinations that there has been a violation of section 337 and that a domestic industry has been established with respect to each of the asserted patents. Newspring sought a recommendation for the issuance of a general exclusion order.

On September 23, 2004, the IA filed a response supporting the motions with respect to most but not all issues. He supported a summary determination that the domestic industry requirement had been satisfied as to each of the patents in issue. He also supported a summary determination that Jiangsu had violated section 337 with respect to each of the patents at issue. As to Taizhou, the IA supported a summary determination of violation as to the ‘420 patent, but not as to the ‘138 and ‘404 patents.

On October 12, 2004, the ALJ issued an ID (Order No. 7) with respect to Newspring’s motion to find respondents in default. Noting that neither respondent responded to the notice to show cause, the ALJ found the respondents in default. The Commission determined not to review the ID.¹ Although Jiangsu and Taizhou were the only named respondents in the investigation, the ID finding them in default did not terminate the investigation because complainant sought a general exclusion order. Issuance of a general exclusion order in a default investigation requires a finding of violation on the merits. 19 U.S.C. § 1337(g)(2).

On February 10, 2005, the ALJ issued the subject ID (Order No. 8), granting Newspring’s motions for summary determinations with respect to most but not all issues. Consistent with the position

¹The notice of the determination not to review issued on November 23, 2004.

of the IA, the ALJ determined that a domestic industry had been established with respect to each of the asserted patents, and that Jiangsu had violated section 337 with respect to each asserted patent as well. He determined that Taizhou had violated section 337 with respect to the '420 design patent, but found that a genuine issue of fact remained as to whether the accused Taizhou products infringed the '138 and '404 utility patents. Accordingly, he denied complainant's motion as to Taizhou in part. The ALJ also issued his recommendation on remedy and bonding along with his ID. He recommended the issuance of a general exclusion order and that the bond permitting temporary importation during the Presidential review period be set at 100 percent of the entered value of the infringing imported product. No party petitioned for review of the ID.

On March 18, 2005, the Commission issued a notice of its decision to review the ID "for the limited purpose of examining possible formatting and typographical errors contained on one page of the ID." 70 *Fed. Reg.* 13206, 13206. The Commission sought comments from the parties to the investigation with respect to the issues under review and written submissions from the parties to the investigation, interested government agencies, and any other interested parties on the issues of remedy, the public interest, and bonding.

On March 28, 2005, the Commission received submissions from Newspring and the IA. No reply submissions were received.

DISCUSSION

I. LIMITED MODIFICATION OF ORDER NO. 8

As noted, the current review is limited to the text and the figure appearing on page 15 of Order No. 8. In response to the Commission's notice of review, Newspring and the IA each indicated that the widths marked "A" and "B" on Figure 1 of page 15 of the ID are identified incorrectly.² The IA noted that Figure 1 of the ID is identical to a Figure 1 appearing on (coincidentally) page 15 of Complainant

²Newspring's Comments at 10, IA's Comments at 3.

Newspring Industrial Corp.'s Memorandum of Points and Authorities in Support of Its Motion for Summary Determination Regarding a Violation of Section 337 and Remedy.³ As Newspring and the IA noted, Newspring subsequently filed a replacement for page 15 of its Memorandum, which page contained a corrected Figure 1 in which the widths "A" and "B" were re-positioned. Newspring and the IA indicated that the widths should be marked as they appear in Newspring's corrected submission.⁴ Both parties agreed also that the reference to "Figure 1 of the '138 patent" in the text of page 15 of the ID should instead be a reference to "Figure 5 of the '138 patent."⁵

Consistent with the views of Newspring and the IA, we find that the widths marked "A" and "B" on Figure 1 of page 15 of the ID are identified incorrectly. We further find that widths "A" and "B" are marked correctly in the corrected page 15 of the Newspring Memorandum. The corrected Figure 1 is attached hereto and is labeled "Corrected Figure 1." We also find that the reference to "Figure 1 of the '138 patent" appearing on page 15 of the ID should instead refer to "Figure 5 of the '138 patent." Accordingly, the Commission modifies page 15 of the ID by replacing Figure 1 with Corrected Figure 1, attached to this Opinion. It further modifies page 15 by replacing the reference to "Figure 1 of the '138 patent" with a reference to "Figure 5 of the 138 patent."

II. REMEDY

A. Statutory Background and Criteria for Issuance of a General Exclusion Order

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. With respect to remedy, the Commission may issue a remedial order excluding the goods of the person(s) found in violation (a limited exclusion order) or, if certain

³IA's Comments at 3.

⁴Newspring's Comments at 10, IA's Comments at 3.

⁵Newspring's Comments at 10, IA's Comments at 4.

criteria are met, against all infringing goods regardless of the source (a general exclusion order).⁶

Depending on the circumstances, the Commission's authority to issue a general exclusion order may be found in section 337(d)(2) or 337(g)(2).

Section 337(d)(2) provides that:

The authority of the Commission to issue an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that--

- (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
- (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2).

Section 337(g)(2) provides that:

In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if--

- (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
- (B) such a violation is established by substantial, reliable, and probative evidence, and
- (C) the requirements of subsection (d)(2) of this section are met.

19 U.S.C. § 1337(g)(2).

Read together, section 337(g)(2) supplements the authority granted to the Commission under section 337(d)(2), empowering it to issue a general exclusion order when "no person appears to contest an investigation concerning violation of this section," if certain conditions are met. Given that no respondent has appeared to contest the current investigation, the Commission's authority to issue a

⁶The Commission also has authority to issue cease and desist orders and to sanction parties for certain conduct. See 19 U.S.C. § 1337(f) & (h).

general exclusion order in this investigation arises under section 337(g)(2).

The Commission has noted that the criteria of section 337(d)(2), which are incorporated into section 337(g)(2), “do not differ significantly” from the factors in *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. 337-TA-90, USITC Pub. 1199, 216 U.S.P.Q. 465 (USITC 1981) (“*Spray Pumps*”). *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm’n Op. at 5 (“*Neodymium Magnets*”). In *Spray Pumps*, the Commission held that a complainant seeking a general exclusion order must show both (1) a widespread pattern of unauthorized use of its patented invention and (2) certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles. *Spray Pumps*, 216 U.S.P.Q. 465, 473. The Commission stated that among the evidence which might be presented to prove a “widespread pattern of unauthorized use of the patented invention” would be:

- (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or
- (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue;
- (3) other evidence which demonstrates a history of unauthorized use of the patented invention.

Spray Pumps, 216 U.S.P.Q. 465, 473.

Among the evidence which might be presented to prove the “business conditions” referred to would be:

- (1) an established demand for the patented product in the U.S. market and conditions of the world market;
- (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;
- (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;

- (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented articles; or
- (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles.

Spray Pumps, 216 U.S.P.Q. 465, 473.

B. The ALJ's Recommended Determination

In regard to the “widespread pattern of unauthorized use” criterion of the *Spray Pumps* test, the ALJ found that both respondents have been shown to infringe the ‘420 design patent. ID at 24-25. As to the ‘138 and ‘404 utility patents, the ALJ found that the Jiangsu products infringe and that the available evidence indicates that the Taizhou products infringe as well. ID at 25. The ALJ noted also that Newspring has filed six lawsuits in federal court asserting infringement of the three patents in issue, including three actions involving imported products from China or Taiwan. He noted that, in each of the six cases, consent judgments were entered wherein defendants expressly acknowledged infringing the asserted patents. ID at 25.

With respect to the business conditions criterion of *Spray Pumps*, the ALJ noted that there is an established U.S. market for goods practicing the patents in issue, and that marketing and distribution networks are widely available in the United States. ID at 26. The ALJ also found it is difficult to determine the source of infringing goods. He noted evidence showing that foreign facilities engaged in plastic molding manufacturing can modify their operations to produce infringing containers at relatively little expense, and that molds can be created using Newspring’s own patented products. ID at 26.

Based on these representations, the ALJ found the “widespread pattern” and “business conditions” criteria to be satisfied, and he recommended that the Commission issue a general exclusion order if its finds a violation of section 337.

C. Analysis and Determination

We determine that the requirements of section 337(g)(2) for the issuance of a general exclusion order have been met here. As to the widespread pattern of unauthorized use criterion, the record indicates that unauthorized uses occurred in the importation and sale of infringing products manufactured by Jiangsu and Taizhou. ID at 8-19, 24-25. In addition, Newspring has filed six federal lawsuits asserting infringement of the patents in issue. In each of the six, consent judgments were entered wherein defendants other than Jiangsu and Taizhou expressly acknowledged their infringement of the asserted patents. ID at 25. As to the certain business conditions criterion, the record shows an established U.S. market for goods practicing the patents in issue, and the availability of U.S. marketing and distribution networks for such goods. ID at 25-26. Moreover, the ALJ found it is difficult to determine the source of infringing goods, and there is evidence that foreign manufacturers of molded plastic goods can produce infringing products at relatively little expense, including using molds created from Newspring's own products. ID at 26.

The record also indicates that the remaining factors of 337(g)(2) are satisfied. Neither respondent has filed a response to the notice of investigation, complaint, or order to show cause why they should not be found in default. Because the respondents having made no filings of any kind, it is established that no person has appeared to contest the investigation.

With respect to the sole remaining factor, the record indicates that a violation of section 337 "is established by substantial, reliable, and probative evidence." 19 U.S.C. § 1337(g)(2). We briefly review that evidence as it relates to each element of a section 337 violation.

The ALJ found that there had been importations of the accused products, based in part on shipping, customs, and sales documentation obtained from Polyte, Inc., a customer of Jiangsu and Taizhou. ID at 5-6. The record also shows that Polyte and its owner entered into a consent judgment in a federal court action, in which Polyte acknowledged that it had sold imported products obtained from

Jiangsu and Taizhou that infringed each of the patents in issue. ID at 6. In addition, because no party challenged the patents, the ALJ reasonably found that the patents in issue are not invalid or unenforceable. ID at 8.

The record also supports the ALJ's conclusions as to infringement. As to the '420 design patent, the ALJ reasonably relied on the opinion of an expert and his own review in concluding that certain Jiangsu products are of substantially the same design as the one embodied in the '420 design patent, and that the novel features of the patent are found in the accused products as well. ID at 9. The ALJ reasonably relied on photographs of the Taizhou products on the company's website in determining that the Taizhou products infringe the design patent as well. ID at 9.

As to claim 1 of both the '138 and '404 utility patents, we find no reason to disagree with the ALJ's claim construction (as clarified by the previously discussed modifications to page 15 of the ID). See ID at 11-18. With respect to infringement, the ALJ reasonably concluded that the declaration of a Newspring witness (Dr. Druin) establishes that certain Jiangsu products infringe at least claim 1 of the '138 and '404 patents. ID at 18. The ALJ found that an inspection of the physical samples in conjunction with Dr. Druin's claim charts confirms infringement by the Jiangsu products of at least claim 1 of each of the utility patents. ID at 18. The ALJ reasonably found that there remained a genuine issue of material fact as to whether the Taizhou products infringe the '138 and '404 patents.

Finally, the record supports the ALJ's finding that the domestic industry requirement is satisfied. With respect to the technical prong of the test, the ALJ found that both the Druin declaration and his own comparison of Newspring's VERSAtainer products to Dr. Druin's claim charts indicate that Newspring is practicing the patents in issue. ID at 20-21. As to the economic prong of the test, the record shows that Newspring produces the patented VERSAtainer containers at two manufacturing facilities in the United States. ID at 21.

We determine that the uncontroverted records facts relied on by the ALJ are sufficient to satisfy

the requirement that a violation be shown by evidence that is “substantial, reliable, and probative.” Accordingly, we find that all the elements of section 337(g)(2) are satisfied, and determine to issue a general exclusion order.

We issue a remedy in the form of a general exclusion order that is narrower in scope than the general exclusion orders proposed by Newspring and the IA. Consistent with the infringement findings of the ALJ in Order No. 8, which we adopt as modified, our order bars from entry for consumption plastic food containers that infringe any of claim 1 of the ‘138 patent, claim 1 of the ‘404 patent, or claim 1 of the ‘420 patent. By contrast, Newspring and the IA proposed orders applying to imported goods that infringe any of claims 1-5 of the ‘138 patent, claims 1-2 and 4-9 of the ‘404 patent, or claim 1 of the ‘420 patent.

We decline to extend the scope of relief to products as to which the ALJ has not made a finding of infringement as the proposed orders would do. Because section 337(g)(2) requires a finding of a violation, we consider the scope of relief to be limited to the scope of the violation found, and therefore limit the scope of the exclusion order to goods that infringe any of claim 1 of each respective patent in issue.⁷

III. THE PUBLIC INTEREST

In addition to the factors discussed above, the Commission’s authority to issue any exclusion order is conditioned on consideration of the public interest. 19 U.S.C. § 1337(d). Specifically, in an investigation in which no party appears to contest the investigation, the Commission may issue a general exclusion order:

only after considering the effect of such order(s) upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, and concluding that the

⁷We note that this investigation is not decided under section 337(g)(1), which, if certain conditions are satisfied, directs the Commission to “presume the facts alleged in the complaint to be true” 19 U.S.C. § 1337(g)(1).

order(s) should still be issued in light of the aforementioned public interest factors.

Commission rule 210.16(c)(1) and (2). 19 CFR § 210.16(c)(1) and (2). The public interest analysis does not concern whether there is a public interest in issuing a remedial order, but whether issuance of such an order will adversely affect the public interest. *Certain Agricultural Vehicles*, Inv. No. 337-TA-487, Comm'n Op. at 17.

We are not aware of any evidence on the record indicating that the issuance of a general exclusion order would be contrary to the public interest. The proposed order would bar entry of infringing plastic food containers only, and would not extend to non-infringing plastic food containers or food containers made of other materials. Moreover, the record indicates that U.S. demand for food containers can be met by Newspring and U.S. manufacturers of non-infringing plastic food containers. Accordingly, we determine that the issuance of a general exclusion order will not adversely affect the public interest.

IV. BOND DURING PRESIDENTIAL REVIEW PERIOD

A. The Statute on Bonding During the Presidential Review Period

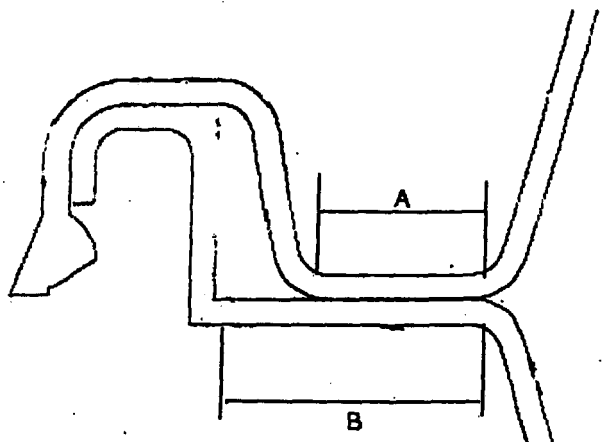
During the Presidential review period, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3). 19 U.S.C. § 1337(j)(3). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.*, 19 C.F.R. § 210.50(a)(3).

B. The ALJ's Recommended Determination

The ALJ noted that, in setting the amount of the bond during the Presidential review period, the Commission "typically has considered the differential in sales price between the patented product made by the domestic industry and the lower price of the infringing imported product."⁸ He noted also that,

⁸ID at 27 (quoting *Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24).

Corrected Figure 1

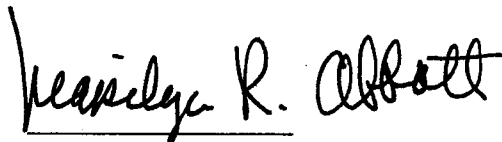


where pricing information is not available, the bond may be set at 100 percent of the entered value. ID at 27. In respect to the present investigation, the ALJ observed that there has been no discovery or participation by respondents and recommended a bond of 100 percent of the entered value of the infringing goods.

C. Analysis and Determination

As noted by the ALJ, the record lacks sufficient information to calculate the difference in price between the asserted plastic food containers and the infringing products. When the pricing information is insufficient, the Commission has set the amount of the bond at 100 percent of entered value.⁹ In accordance with the recommendation of the ALJ, we determine to set the bond at 100 percent of the entered value of infringing plastic food containers to prevent any harm to Newspring during the Presidential review period.

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

May 23 2005

⁹See *Neodymium Magnets*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm'n Op. at 15.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN PLASTIC FOOD CONTAINERS

)
)
) **Inv. No. 337-TA-514**
)
)
)

**NOTICE OF COMMISSION DECISION TO REVIEW AN INITIAL
DETERMINATION FINDING A VIOLATION OF SECTION 337 AND THAT THE
DOMESTIC INDUSTRY REQUIREMENT IS MET;
SCHEDULE FOR WRITTEN SUBMISSIONS**

AGENCY: U.S. International Trade Commission

ACTION: Notice

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination ("ID") (Order No. 8) issued by the presiding administrative law judge ("ALJ") finding a violation of section 337 and that the domestic industry requirement has been met in the above-captioned investigation. The review is for the limited purpose of examining possible formatting and typographical errors contained on one page of the ID.

FOR FURTHER INFORMATION CONTACT: Michael Diehl, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 205-3095. Copies of all 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. General information concerning the Commission may be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: By a notice published on June 22, 2004, the Commission instituted an investigation into alleged violations of section 337 in the importation and sale of certain plastic food containers by reason of infringement of certain claims of U.S. Patent No. 6,056,138; of U.S. Patent No. 6,196,404; and of U.S. Design Patent No. D 415,420. 69 *Fed. Reg.* 34691 (June 22, 2004).

On August 19, 2004, complainant Newspring Industrial Corp. (Newspring) moved for an order directing that respondents Taizhou Huasen Household Necessities, Co., Ltd. ("Taizhou") and Jiangsu Sainty Corporation, Ltd. ("Jiangsu") show cause as to why they should not be found in default for failure

to respond to the complaint and notice of investigation. Complainant also asked for an order finding respondents in default if they failed to show cause. On August 30, 2004, the ALJ issued Order No. 5, directing respondents to show cause no later than September 17, 2004, why they should not be held in default. Neither respondent responded to the order.

On September 9, 2004, before the ALJ ruled on the motions for default, Newspring filed motions for summary determinations that there has been a violation of section 337 and that a domestic industry has been established with respect to each of the asserted patents. Newspring sought a recommendation for the issuance of a general exclusion order. On September 23, 2004, the Investigative Attorney ("IA") filed a response in support of the motions, although he contended that a genuine issue of material fact exists as to whether certain accused products infringe two of the patents in issue.

On October 12, 2004, the ALJ issued an Initial Determination (ID) (Order No. 7), finding the respondents in default. No party petitioned for review of the ID. The Commission subsequently issued a notice of determination not to review the ID.

On February 10, 2005, the ALJ issued an ID (Order No. 8), granting Newspring's motions for summary determinations in part. He determined that a domestic industry had been established with respect to each of the asserted patents, and that respondent Jiangsu had violated section 337 with respect to each asserted patent as well. He determined that respondent Taizhou had violated section 337 with respect to the '420 patent, but denied the motion as to Taizhou with respect to the '138 and '404 patents. No party petitioned for review of the ID. The ALJ also recommended the issuance of a general exclusion order. He also recommended that the bond permitting temporary importation during the Presidential review period be set at 100 percent of the value of the infringing imported product.

The Commission has determined to review the subject ID (Order No. 8). The scope of the review is limited to possible formatting and typographic errors on page 15 of the ID. The Commission notes that the Complainant, on September 28, 2004, filed a corrected version of what is apparently the figure that appears on page 15 of the ID. The Commission requests comments from the parties regarding whether the widths labeled "A" and "B" in the figure in the ID correspond to the widths described in the text of the ID, and whether the indicated widths are incorrectly placed in the figure. Comments should also address what action, if any, the Commission should take if it finds the labeling incorrect and whether all references to "Figure 1" on page 15 of the ID should be changed to "Figure 5."

In connection with the final disposition of this investigation, the Commission may issue an order that could result in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, it should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider in this investigation include the effect that an exclusion order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with

those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.


If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the February 10, 2005, recommended determination by the ALJ on remedy and bonding. Complainant and the Commission's investigative attorney are also requested to submit proposed orders for the Commission's consideration. Complainant is further requested to state the expiration dates of the patents at issue. Main written submissions and proposed orders must be filed no later than close of business on March 28, 2005. Reply submissions, if any, must be filed no later than the close of business on April 5, 2005. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original document and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons that the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, and sections 210.16, 210.42, 210.44 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.16, 210.42, 210.44.

By order of the Commission.

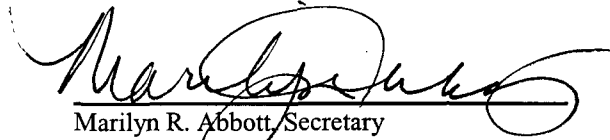


Marilyn R. Abbott
Secretary to the Commission

Issued: March 15, 2005

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION TO REVIEW AN INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337 AND THAT THE DOMESTIC INDUSTRY REQUIREMENT IS MET; SCHEDULE FOR WRITTEN SUBMISSIONS** was served upon the Commission Investigative Attorney, Michael Diehl, Esq., and all parties via first class mail and air mail where necessary on March 16, 2005.



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

ON BEHALF OF COMPLAINANT
NEWSPING INDUSTRIAL
CORPORATION:

David E. De Lorenzi, Esq.
Sheila F. McShane, Esq.
Clyde A. Shuman, Esq.
**Gibbons, Del Deo, Dolan, Griffinger
& Vecchione**
One Riverfront Plaza
Newark, New Jersey 07102-5496

Steven Lieberman, Esq.
Rothwell, Figg, Ernst & Manbeck
1425 K Street, NW Suite 800
Washington, DC 20004

REPSONDENTS:

Taizhou Huasen Household Necessities, Co., Ltd.
a/k/a China Huasen Daily Expenses Co., Ltd.
No. 13,247 Lane, YinShan Road
Huaugyan, Taizhou
People's Republic of China

Jiangsu Sainty Corporation, Ltd.
98 Jian Ye Road
Nanjing, People's Republic of China

PUBLIC VERSION

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

In the Matter of)	
)	
CERTAIN PLASTIC FOOD)	Investigation No. 337-TA-514
CONTAINERS)	
)	
)	

**Order No. 8: Initial Determination Granting Complainant's Motion Nos. 514-2 and 514-3
For Summary Determination To The Extent A Violation Is Found And A
Domestic Industry Exists And Further Recommending A General Exclusion
Order And A Bond**

On September 9, 2004, complainant Newspring Industrial Corp. (Newspring) filed motions pursuant to Commission rule 210.18 for summary determination that: (1) there has been a violation of section 337 and for a recommendation for issuance of a general exclusion order¹ (Motion Docket No. 514-2); and (2) a domestic industry has been established with respect to each of the asserted patents. (Motion Docket No. 514-3.)

The staff, in a filing dated September 23, 2004, while it argued that a genuine issue of fact exists as to infringement of certain products in issue, argued further that a violation of section 337 and a domestic industry should be found and that a general exclusion order and bond should issue.

No other party responded to Motion Nos. 514-2 and 514-3.

¹ Commission rule 210.42(a)(i)(ii), with respect to remedy, provides for an initial determination involving recommended determination on issues concerning permanent relief and bonding. Hence, the administrative law judge is treating the portion of Motion No. 514-2, as it relates to remedy, as a motion for a recommended determination.

On September 29, 2004, Newspring in a letter to the Secretary enclosed a Supplemental Declaration of Shelia F. McShane in support of Motion No. 514-2.

In a Section 337 investigation, a motion for summary determination is governed by Commission rule 210.18, which provides, inter alia:

Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation.

* * *

The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.

The moving party bears the burden of demonstrating the absence of any genuine issue of material fact and its entitlement to judgment as a matter of law. Vivid Tech. v. American Science and Engineering, 200 F.3d 795, 806-07, 53 USPQ2d 1289, 1297 (Fed. Cir. 1999); Continental Can Co. USA, Inc. v. Monsanto Co., 948 F.2d 1264, 1265, 20 USPQ2d 1746, 1747 (Fed. Cir. 1991).

In analyzing the moving party's case, the court views all evidence submitted in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of the non-moving party. Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles, Inv. No. 337-TA-334, Views of the Commission, USITC Pub. 2731 (Feb. 1994); see also Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986); Bayer A.G. v. Elan Pharmaceutical Research Corp., 212 F.3d 1241, 1247, 54 USPQ2d 1710, 1714 (Fed. Cir. 2000). Any doubt, as to the existence of a genuine issue of material fact, must be resolved in favor of the non-moving party. Lockwood v. American Airlines Inc., 107 F.3d 1565, 1569, 41 USPQ2d 1961, 1964 (Fed. Cir. 1997); Merck & Co. v. U.S. Int'l Trade Comm'n, 774 F.2d 483,

487-88 (Fed. Cir. 1985).

I. Procedural History

By notice, which issued on June 16, 2004 and stated “[i]nstitution of investigation pursuant to 19 U.S.C. § 1337,” the Commission instituted this investigation, 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)(B) of section 337 in the importation into the United States, the sale for importation into the United States, or the sale within the United States after importation of certain plastic food containers by reason of infringement of one or more of claims 1-5 of utility U.S. Patent No. 6,056,138 (‘138 patent), claims 1-2 and 4-9 of utility U.S. Patent No. 6,196,404 (‘404 patent) and the claim of design U.S. Patent No. D 415,420 (‘420 patent)² and whether an industry in United States exists as required by subsection (a)(2) of section 337. The complaint was filed on May 17, 2004 on behalf of Newspring. A supplement was filed on June 3, 2004. The complainant requested a “permanent exclusion order” and a “permanent cease and desist order.”

The following were named in the notice as respondents in the investigation and were served with the complaint:

Taizhou Huasen Household Necessities, Co., Ltd.
a/k/a China Huasen Daily Expenses Co., Ltd. (Taizhou)
No. 13,247 Lane, Tinsan Rd.
Huaugyan
Taizhou, China

² The faces of the patents in issue show that the ‘138 patent (Exh. 2 to Motion No. 514-2) issued on May 2, 2000 to Jeffrey Chen and is assigned to Newspring; that the ‘404 patent (Exh. 3) issued on March 6, 2001 to Jeffrey Chen and is assigned to Newspring; and that the ‘420 patent (Exh. 1) issued on October 19, 2000 to Jeffrey Chen and is assigned to Newspring. Exhibits 4, 5 and 6 to Motion No. 514-2 are recorded assignments of the patents in issue.

Jiangsu Sainty Corporation, Ltd. (Jiangsu)
98 Jian Ye Road
Nanjing, China

Order No. 3, which issued on July 21, 2004, set a target date of May 23, 2005 which means that any final initial determination on violation should be filed no later than February 23. Order No. 6, which issued on September 20, 2004, suspended a procedural schedule that had been set in Order No. 4.

Order No. 7, which issued on October 12, 2004, found each of respondents Taizhou and Jiangsu in default. On November 26 the Commission determined not to review Order No. 7.

By letter dated December 7, 2004 to the administrative law judge from complainant's counsel, the administrative law judge received a copy of a decision of Judge William H. Walls, from the Federal District Court for the District of New Jersey, entitled Newspring Industrial Corp. v. Sun Gem Plastics Enterprise Co. Ltd., Civil Action No. 02-2326 (Sun Gem).

Complainant's counsel in said December 7 letter represented:

In an effort to keep you apprised of decisions in related cases, Newspring hereby submits the decision of Judge William H. Walls, U.S.D.J., in the District of New Jersey action Newspring Industrial Corp. v. Sun Gem. Plastics Enterprise Co., Ltd., Civil Action No. 02-2326.

Judge Walls construed the claims of Newspring's United States Patent Nos. 6,068,138 and 6,136,404 B1 and found that the patents were willfully infringed by defendants Sun Gem Plastics Enterprise Co., Ltd., Biing Ron Hsiu, Sense Road Industrial Co., Ltd. and Great Barony Industrial Co., Ltd., by the manufacture, importation and sale of plastic food containers. Newspring is asserting the '138 and '404 patents in the above-referenced Section 337 action presently pending before the International Trade Commission. The infringing Sun Gem plastic containers were imported from Taiwan as discussed in the September 29, 2004, Supplemental Declaration of Sheila F. McShane, evidencing the widespread pattern of

unauthorized use by foreign manufacturers and exporters.³¹

II. Motion No. 514-2 As It Relates To Violation

Pursuant to section 337(a)(1)(B), a violation of section 337 occurs when the Commission finds that there has been: (1) the importation, the sale for importation, or the sale within the United States after importation of an accused product; (2) infringement by the product of a valid and enforceable United States patent; and (3) proof of domestic industry by the complainant. 19 U.S.C. § 1337(a)(1)(B), (a)(2).

A. Importation Of The Accused Products In Issue

Complainant Newspring learned in early November 2003 that Polyte, Inc., a customer of respondents Taizhou and Jiangsu, was selling knock-off versions of Newspring's VERSAtainer® products. (Motion No. 514-2, Chen Suppl. Decl. at ¶ 5.) A Complaint and Order To Show Cause With Temporary Restraints And Other Emergency Relief was filed by Newspring with the United States District Court for the Eastern District of New York against Polyte, Inc. and Li

³ The decision has the heading NOT FOR PUBLICATION LETTER ORDER ORIGINAL ON FILE WITH CLERK OF COURT. The attorney adviser in a telephone call to complainant's counsel asked for complainant's position in writing as to what use, if any, can be made of the decision in view of said heading. In a letter to the administrative law judge dated January 24, 2005, (Exh. A to this order), complainant's counsel provided recitation of the law on citing unpublished opinions and stated its position that "findings in the Sun Gem case clearly have precedential value in relation to the material issues in this case, namely claim construction and infringement and there is no published opinion that would serve as well." The January 24 letter concluded that nine of thirteen Federal Circuits allow citation of unpublished opinions by other courts. No precedent from the Federal Circuit Court of Appeals or from the Commission was cited in said letter.

The January 24 letter also reported that the status of Sun Gem is that summary judgment issued on December 2, 2004 and a hearing on damages costs and injunctive relief was scheduled for January 20, 2005.

Wan, an owner of Polyte, on November 19, 2003. (Complaint, CX-12.) Thereafter, an order was entered by Judge Gleeson which included, inter alia, a prohibition on Polyte attempting to sell or selling the knock-off containers. (Exh. 8 to Motion No. 514-2.) On November 25, Li Wan, representing Polyte, Inc. and himself, entered into a Consent Judgment to conclude that litigation. (Exh. 9 to Motion No. 514-2.) In the Consent Judgment, the defendants Polyte and Li Wan acknowledged the validity and enforceability of Newspring's '420, '138 and '404 patents, which are the patents in issue in this investigation. (See Exh. 9 at ¶ 1.) Further, it was acknowledged that the products sold by Polyte infringed the Newspring patents. (Id. at ¶ 2.)

Polyte, as part of the Consent Judgment, conveyed to Newspring's lawyers all sales receipts, invoices, purchase orders, shipping documents, bills of lading, customs documents, purchasing and receipt documents for the infringing plastic food containers. (See Exh. 9 at ¶ 8.) Li Wan of Polyte, who provided the documents related to the containers, stated that Polyte did not manufacture the plastic food containers, but rather, bought the containers from the manufacturers Taizhou and Jiangsu (respondents), who are located in the People's Republic of China and who imported the containers from the People's Republic of China into the United States using different importing companies and via different U.S. ports of entry. (Chen Suppl. Decl. at ¶ 10.) Li Wan also stated that Polyte's predecessor in interest was Wonder USA Corporation. (Chen Suppl. Decl. at ¶ 9.)

The documents conveyed to Newspring's lawyers included bills of lading, commercial invoices and packing lists for shipments demonstrating that respondent Taizhou sold for importation into the United States plastic food containers from the People's Republic of China. Exhibit 10 to Motion No. 514-2 contains examples of these shipping documents. The documents

also include a product catalog that contains photographs and descriptions of disposable plastic containers, which match those of the Polyte products that were being sold. Exhibit 11 to Motion No. 514-2 contains portions of the catalog. The back cover of the catalog identifies respondent Taizhou's internet website: <<http://www.chinahuasen.com>>. (See Exh. 11.) It also states that "Taizhou Hausen Household Necessities Our manufacturer is located in Huang Yan, Tai Zhou in Zhejiang province . . . We also have sales network in Australia, America, European and Southeast Asia." (Id.) Respondent Taizhou's website shows that Taizhou offered plastic food containers that were duplicates of Newspring's VERSAtainer® products for purchase through the internet. Exhibit 12 to Motion No. 514-2 contains printouts of some of the pages from the website: <<http://www.chinahuasen.com>>.

The documents produced by Polyte further included invoices, packing lists and bills of lading for the sale and importation of infringing goods into the United States by respondent Jiangsu, the other respondent named in this investigation. (See Exh. 10.) It is found that those documents show that respondent Jiangsu sold for importation and then shipped into the United States Style No. "Hong Wei" combo packs of 150 dome lids and 150 microwavable plastic food containers, bearing Model Nos. 9718, 9723, 9729, 8838, 8868 and 8888, from the People's Republic of China. (Id.) As part of the Consent Judgment, all infringing goods were seized and title was conveyed to Newspring. (See Exh. 9 at ¶ 6.) The seized goods were packed in cartons bearing an imprint of "Hong Wei" and bearing numbers such as 8868 and 9718. (See Exh. 13.) Exhibit 13 contains photographs of cartons of seized infringing goods.

Based on the foregoing the administrative law judge finds that there is no genuine issue of fact as to importation and that complainant has established that respondents imported and sold

for importation the accused plastic food containers.

B. Validity And Enforceability Of The '420, '138 And '404 Patents

The patents in issue are presumed valid by law. 35 U.S.C. § 282. Moreover, no party has challenged their validity or enforceability. Hence, validity and enforceability are not in issue.

See Lannom Mfg. Co., Inc. v. U.S. Int'l Trade Comm'n, 799 F.2d 1572 (Fed. Cir. 1986).

C. Infringement Of The '420 Patent

The '420 patent is a design patent. (Motion No. 514-2, Exh. 1.) To determine whether there is infringement of a design patent, a two-part test is applied. Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof, Inv. No. 337-TA-422, Final Initial and Recommended Determinations at 5, USITC Pub. 3332 (July 2000) (Faucets). First, the ornamental (i.e. non-functional) aspects of the accused product are compared to the patent design to determine if there is a visual similarity. Id. In making this comparison, the Gorham standard is applied and the test is whether to the eye of an ordinary observer, giving such attention as a purchaser usually gives, the two designs are substantially the same. Gorham Co. v. White, 81 U.S. 511, 528 (1871). In the second part of the infringement test, it must be determined whether the accused design appropriates the novel features (in relation to the prior art) of the patent. See Faucets at 5.

The '420 patent is entitled "Double Seal Rim Stackable Container" and includes six drawings of a round, two-piece food container from various angles. (Exh. 1.) Newspring provided physical samples of the accused Jiangsu products with the complaint. (See CP-4-6 to Complaint.) Newspring has also provided pictures of an exemplary Jiangsu product depicted

side-by-side with the patent drawings. (See Motion No. 514-2, Suppl. Decl. of Dr. Melvin L. Druin dated September 1, 2004, Figure 1.) Druin, in his supplemental declaration, and who has considerable experience with consumer reaction to plastic container design,⁴ opines that an ordinary observer would believe that the round Jiangsu products (Model Nos. 729, 723, 718) are of substantially the same design as the one embodied in the '420 patent and that the novel features of the '420 patent are found in those accused products. (See Druin Suppl. Decl. ¶¶ 11-12, Fig. 1 and Table 3; see also Staff's Response, Attachment A.) The administrative law judge gives those conclusions some weight in view of Druin's experience. Moreover, the conclusions are confirmed on a review of the Jiangsu products and comparison to the patent drawings. (Compare CP-4-6 to Complaint with Exhibit 1 to Motion No. 514-2.) Accordingly, the administrative law judge finds no genuine issue of material fact in dispute that respondent Jiangsu's products infringe the '420 patent.

With respect to respondent Taizhou's products, administrative law judge finds that the pictures of the accused Taizhou products on its actual website provide sufficient detail to conclude that the products infringe the '420 patent. See, e.g., http://www.chinahuasen.com/huasen/eproduct/path706/one_product_info2.asp?id=883 (last visited on January 10, 2005).

⁴ Druin, pursuant to his supplemental declaration, has been involved in plastic and plastic packaging design for more than 35 years, with extensive practical experience in a variety of research, design and manufacturing applications. He holds bachelors, masters and doctorate degrees in engineering from New Jersey Institute of Technology. He worked at Celanese Plastics as Technical Director and at Campbell Soup Company in a variety of positions related to packaging. Druin is presently employed in the positions of Director of Development for the Polymer Processing Institute at New Jersey Institute of Technology and President of PolyPlas Development L.L.C. (See ¶¶ 2-5 of Supplemental Declaration). A copy of Druin's resume is attached as Exhibit A to the declaration.

Based on the foregoing the administrative law judge finds that there is no genuine issue of fact as to infringement of the '420 design patent by the accused products and that complainant has established said infringement.

D. Infringement Of The '138 And '404 Patents

The determination of infringement of the '138 and '404 utility patents is a two-step process. The claim terms must be construed by the administrative law judge, then the claims as construed must be compared to the accused product to determine infringement. See Texas Instruments Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1563 (Fed. Cir. 1996).

Claim interpretation "is a matter of law exclusively for the Court." Markman v. Westview Instruments, Inc., 52 F.3d 967, 970-71 (Fed. Cir. 1995). In interpreting a claim, a court will first look to the words of the claim themselves in order to define the scope of the invention. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996). Claim terms are given their ordinary and customary meaning, unless there is explicit indication otherwise. See Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc., 326 F.3d 1215, 1220 (Fed. Cir. 2003); Allen Engineering Corp. v. Bartell Indus., Inc., 299 F.3d 1336, 1344 (Fed. Cir. 2002). "The terms in a claim are given their ordinary meaning to one of skill in the art unless it appears from the patent and file history that the terms were used differently by the inventors." Intellicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1387 (Fed. Cir. 1992). Courts may use dictionaries as sources of the ordinary meaning of terms in a patent claim. Inverness Medical Switzerland GmbH v. Princeton Biomediteck Corp., 309 F. 3d 1365, 1369 (Fed. Cir. 2002). Additionally, a court should look to the patent specification, and, if relevant, the file history of the prosecution of the patent application before the United States Patent and Trademark Office. Markman, 52 F.3d

at 979-980; Arachnid, Inc. v. Medalist Marketing Corp., 972 F.2d 1300, 1302 (Fed. Cir. 1992).

Infringement may be either literal or what is termed via the “doctrine of equivalents.”

Literal infringement exists when each and every limitation in an asserted claim is found in the accused device. See, e.g., Catalina Mktg., Int’l., Inc. v. Coolsavings.com, Inc., 289 F.3d 801, 812 (Fed. Cir. 2002); Riles v. Shell Exploration and Production Co., 298 F.3d 1302, 1308 (Fed. Cir. 2002).

1. Claim Construction Of The ‘138 Patent

The subject matter of the ‘138 patent is a triple seal for use in plastic food containers where the seals are designed to provide enhanced protection against spillage and spoilage. Claim 1 of the ‘138 patent (Exhibit 2 to Motion No. 514-2), with terms to be construed highlighted, states:

1. A container having three seals, comprising:
 - a base having
 - a substantially planar bottom,
 - a base perimeter wall extending substantially vertically upward from said bottom,

 - a base rim extending substantially horizontally outward from said base perimeter wall, and

 - a base sealing edge attached to said base rim; and
 - a lid having
 - a substantially planar top,
 - a lid perimeter wall extending substantially vertically downward from said top,

 - a lid rim extending substantially horizontally outward from said lid perimeter wall,

 - a lid sealing edge attached to said lid rim, and

 - a locking lip protruding from said sealing edge;

wherein said base sealing edge and said lid sealing edge are molded to be correspondingly mateable to each other and upon mating said base sealing edge and said lid sealing edge form a middle seal and an exterior seal and said base rim and said lid rim form an interior seal, wherein said interior seal has a surface area greater than said middle seal and said exterior seal, said base sealing edge further comprising an inner base edge extending generally vertically upward from said base rim; a middle base sealing edge extending substantially horizontally outward from said inner base edge; and an exterior base sealing edge extending substantially vertically downward from said middle base sealing edge; and said lid sealing edge further comprising an inner lid edge extending generally vertically upward from said lid rim; a middle lid sealing edge extending substantially horizontally outward from said inner lid edge; and an exterior lid sealing edge extending substantially vertically downward from said middle lid sealing edge, said locking lip protruding from said downward exterior lid sealing edge; wherein upon mating of said base and said lid, said base rim and said lid rim form said interior seal and said middle base sealing edge and said middle lid sealing edge form said middle seal and said exterior base sealing edge and said exterior lid sealing edge form said exterior seal.

(Exh. 2, col. 4, lns. 9-49 (emphasis added).)

(a) The terms “mateable” and “mating”

The terms “mateable” and “mating” are used in claim 1, but are not explicitly referenced in the ‘138 specification. A dictionary definition of “mate” is: to join or fit together. Merriam Webster's Collegiate Dictionary, 10th Edition, 2001. This definition is taken to be the term's ordinary and customary meaning in lieu of an alternative definition in the specification. In light of the ordinary and customary use of the term “mate” and since no alternative definition exists in

the specification, the administrative law judge construes “mateable” as capable of being joined or fitted together and “mating” as the act of being joined or fitted together.

(b) The term “middle seal”

A middle seal in claim 1 of the ‘138 patent is formed “upon mating said base sealing edge and said lid sealing edge” “wherein said base sealing edge further comprising . . . middle sealing edge extending substantially horizontally outward from said inner base edge” and “said lid sealing edge further comprising . . . a middle lid sealing edge extending substantially horizontally outward from said inner lid edge.” (Exh. 2, col. 4, lns. 26-40.) As further provided in claim 1, “then upon mating of said base and said seal . . . said middle base sealing edge and said middle lid sealing edge form said middle seal....” The specification alternatively describes the “middle seal” as the “second seal” which is formed by the “[c]ontact of outwardly extending lid region 14 with base sealing edge 15.” (Exh. 2, col. 3, lns. 20-21.) Therefore, in light of the claim language itself and the specification, the administrative law judge construes the “middle seal” as the structure formed by the mating of the middle base sealing edge and middle lid sealing edge.

(c) The term “exterior seal”

Claim 1 of the ‘138 patent describes the “exterior seal” as formed upon “mating said base sealing edge and said lid sealing edge to form . . . and an exterior seal” wherein “said base sealing edge further comprising . . . an exterior base edge extending generally vertically downward from said middle base rim” and “said lid sealing edge further comprising . . . an exterior lid sealing edge extending substantially vertically downward from said middle lid sealing edge.” (Exh. 2, col. 4, lns. 26-42.) Further, upon “the mating said base and said seal . . . said exterior base sealing edge and said exterior lid sealing edge form said exterior seal.” (Exh. 2, col.

4, ln. 79.)

The specification refers to the “exterior seal” as the “first seal” which is formed by “contact[ing] of downwardly extending lid region 16 to outwardly extending base sealing edge 24 of extending base sealing edge 26.” (See, e.g., Exh. 2, col. 3, lns. 18-20.) Therefore, in light of the claims and specification, the administrative law judge construes the term “exterior seal” as the structure formed by the mating of the exterior base sealing edge and said exterior lid sealing edge.

(d) The term “interior seal”

According to claim 1 of the ‘138 patent, the “interior seal” is formed “upon mating said base sealing edge and said lid sealing edge” where “said base rim and said lid rim form an interior seal.” (Exh. 2, col. 4, lns. 26-28.) Also, “upon mating of said base and said lid, said base rim and said lid rim form said interior seal...” (Exh. 2, col. 4, lns. 44-46.) The specification, which refers to the “interior seal” as the “third seal,” states that the “third seal” is “formed as horizontally extending rim 10 of the lid 1 is pressed against horizontally extending base rim region 28 of the base 3.” (Exh. 2, col. 3, lns. 25-27.) Therefore, in light of the claim language and specification, the administrative law judge construes the term “interior seal” as the structure formed by the mating of the base rim and lid rim.

(e) The term “surface area”

The term “surface area,” referenced in claim 1 of the ‘138 patent and within the specification, is found to refer to a property of the interior, middle and exterior seals. The word “area” is a measure of the extent of a surface and is the product of the length multiplied by the width of a projected rectangular surface. Hence, the administrative law judge finds “surface

area” to refer to a shared surface of the respective seals (i.e., the area of mating of one edge with another edge). Referring to Figure 1 of the ‘138 patent, infra, the seal surface area, by example of the interior seal, would be determined by using the smaller of widths “A” or “B,” because the mated surface area is governed by the smaller dimension.

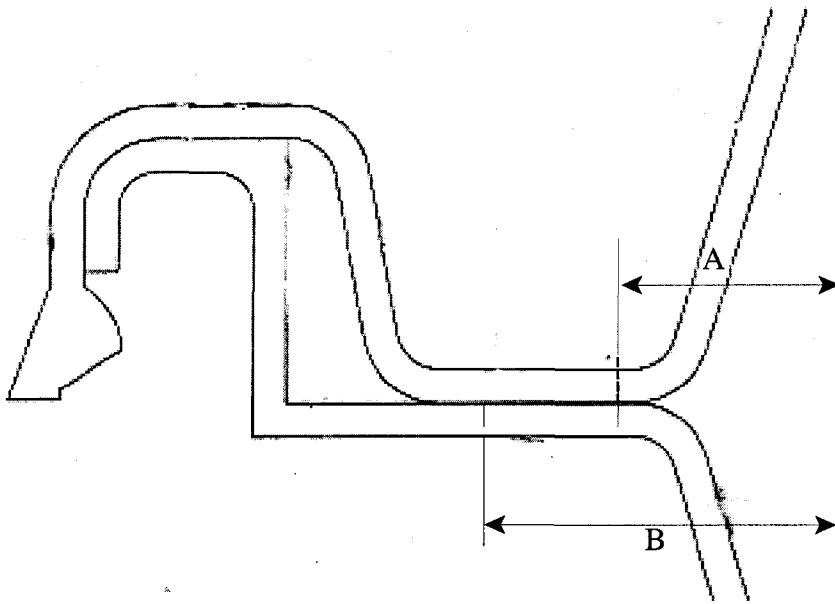


FIGURE 1

Therefore, as ordinarily used in the context of its application, the administrative law judge

construes term "surface area" as - - the shortest dimension of the width of one of the mating surfaces multiplied by its length.

2. Claim Construction Of The '404 Patent

The subject matter of the '404 patent is a triple seal with protrusions for use in plastic food containers, where the seals are designed to provide enhanced protection against spillage and spoilage. Claim 1 of the '404 patent, with terms to be construed highlighted, reads:

1. A container having three seals, comprising:
 - a base having
 - a substantially planar bottom,
 - a base perimeter wall extending substantially vertically upward from said bottom,
 - a base rim extending substantially horizontally outward from said base perimeter wall, and
 - a base sealing edge attached to said base rim; and
 - a lid having
 - to a substantially planar top,
 - a lid perimeter wall extending substantially vertically downward from said top,
 - a lid rim extending substantially horizontally outward from said lid perimeter wall,
 - a lid sealing edge attached to said lid rim,
 - a protrusion attached to said lid sealing edge, and
 - a locking lip protruding from said sealing edge;
 - wherein said base sealing edge and said lid sealing edge are molded to be correspondingly mateable to each

other and upon mating said base sealing edge and said lid sealing edge form a middle seal and an exterior seal and said base rim and said lid rim form an interior seal and further wherein said protrusion pushes said base sealing edge against said lid sealing edge.

(Exh. 3 to Motion No. 514-2, col. 4, ln. 49 to col. 5, ln. 5 (emphasis added).)

(a) The term “protrusion”

The term “protrusion” is not explicitly defined in the specification of the ‘404 patent. A dictionary defines the verb “protrude” as:

To cause to project ~ v.i. to jut out from the surrounding surface or context.

Merriam-Webster’s Collegiate Dictionary, 10th Ed., 2001. Hence in its ordinary and customary use, lacking any alternative definition within the patent, the administrative law judge construes the term “protrusion” as a projection from a surrounding surface.

(b) The terms “mateable” and “mating”

The analysis of the construction of this term in the ‘404 patent parallels that of the ‘138 patent. Hence, the administrative law judge adopts the same construction.⁵

(c) The term “middle seal”

The analysis of the construction of this term in the ‘404 patent parallels that of the ‘138 patent. Hence, the administrative law judge adopts the same construction.

(d) The term “exterior seal”

The analysis of the construction of this term in the ‘404 patent parallels that of the ‘138

⁵ As indicated in the Procedural History, supra, the ‘138 and ‘404 patents have the same named inventor, viz. Jeffrey Chen.

patent. Hence, the administrative law judge adopts the same construction.

(e) The term “interior seal”

The analysis of the construction of this term in the ‘404 patent parallels that of the ‘138 patent. Hence, the administrative law judge adopts the same construction.

3. Infringement Of The Utility Patents

Newspring’s infringement analysis is based upon the information contained in the Druin Suppl. Decl. and the physical features of respondents’ products, which are summarized in the Statement of Material Facts attached to Motion No. 514-2.

The administrative law judge finds that the Druin Suppl. Decl. (including the claim charts provided as Tables 1 and 2) establishes that the Jiangsu products with Model Nos. 718, 723, 729, 838, 868 and 888 infringe at least claim 1 of the ‘138 and ‘404 patents. (See Druin Suppl. Decl. ¶ 9, Exhibits 1-5 and B thereto; CP-1-6 to complaint.⁶) In addition, inspection of the physical samples in conjunction with Druin’s claim charts confirms Jiangsu’s infringement of claim 1 of each of the utility patents. However, with respect to the Taizhou products, there are no physical samples. Examination by the administrative law judge of the photos of the accused containers in the submitted catalog as well the depiction of the containers appearing on Taizhou’s website does not provide a sufficiently detailed view of the containers’ seal such that it can be determined whether said Taizhou products infringe the ‘138 and ‘404 patents. (See Exh. 11-12 to Motion No. 514-2.)

⁶ The staff in its response at 9 stated that it has confirmed with counsel for Newspring that the Jiangsu products referred to by Druin as Model Nos. 888, 868 and 838 are those physical samples with the designation “8888”, “8868” and “8838” on their base that were submitted with the complaint. (CP-1-3 to complaint.)

Based on the foregoing, the administrative law judge finds that there is no genuine issue of facts as to infringement of the '138 and '404 patents by the Jiangsu accused products and that complainant has established literal infringement as to those products. However, the administrative law judge finds a genuine issue of fact exists as to infringement of the '138 and '404 patents by the Taizhou accused products and hence he denies Motion No. 510-2 as to said products.

III. Motion No. 514-3

Complainant argued that undisputed facts demonstrate that Newspring's economic activity meet all the criteria of 19 U.S.C. § 1337(a)(3) for establishment of a domestic industry and that Newspring's economic activities have: (1) included significant investments in plant and equipment to manufacture its VERSAtainer® plastic food containers; (2) resulted in the employment of a significant number of employees; and (3) included substantial investments made in research and development and engineering related to its VERSAtainer® products.

(Motion at 1.)

To prove a violation of section 337, a complainant must demonstrate that a domestic industry exists or is in the process of being established. 19 U.S.C. § 1337(a)(2); Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 8 (January 1996) (Microsphere Adhesives). A complainant may show that a domestic industry exists or is in the process of being established under any of the three statutory grounds set forth in Section 337 (a)(3), which provides:

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 . . . 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). Given that said three criteria are in the disjunctive, satisfaction of any one of the them will be sufficient to meet the domestic industry requirement. Certain Variable Speed Wind Turbines and Components Thereof, Inv. No. 337-TA-376, USITC Pub. 3003, Comm’n Op. at 15 (November 1996). There is no requirement in the statute that an industry must be of any particular size. Id.

The Commission has held that to meet the domestic industry requirement, a complainant must satisfy two distinct aspects generally referred to as the “economic prong” and the “technical prong.” Microsphere Adhesives Comm’n Op. at 8. The economic prong relates to whether the investments by the complainant are a “significant” or “substantial,” while the technical prong relates to whether those investments pertain to products protected by the patents at issue. Id.

With respect to the technical prong, a complainant generally seeks to prove that it is practicing the patents in controversy. Microsphere Adhesives, Comm’n Op. at 8. Druin’s declaration analyzes claim 1 of the ‘138 and ‘404 patents and concludes that the Newspring VERSAtainer type of containers satisfies each claim element. (Druin Suppl. Decl. ¶ 13.) Moreover, Druin opined that an ordinary observer would believe that the round VERSAtainer products are the same as the product claimed in the ‘420 patent. (Id.; see, e.g., CP-11-13 to the complaint.) A visual inspection of the VERSAtainer products by the administrative law judge in conjunction with the patent and Druin’s claim charts yields the same conclusion. Hence, the

administrative law judge finds no genuine issue of material fact remaining in dispute that Newspring has established a domestic industry as to the '138, '404 and '420 patents with respect to the technical prong.

Referring to the economic prong, the evidence shows that Newspring produces patented VERSAtainer containers at its two manufacturing facilities in the United States located in Kearny, New Jersey and Mount Carmel, Pennsylvania. (Motion No. 514-3, Chen Suppl. Decl. ¶ 4.) Approximately square feet in these plants are dedicated to manufacturing the patented product and an additional square feet are dedicated to warehousing and distribution. (Id.) As of August 2004, Newspring's full-time employees in the United States numbered . (Chen Suppl. Decl. ¶ 3.) In addition, Newspring estimates that it has accrued in expenses in connection with the research and development for the patented VERSAtainer containers. (Id. at ¶ 2.) Through the end of 2003, the VERSAtainer products have produced revenues in excess of . (Id. at ¶ 1.) Hence, the administrative law judge finds no genuine issue of material fact in dispute remaining that complainant satisfies the economic prong of the domestic industry requirement and that complainant has established a domestic industry.

IV. Motion No. 514-2 As It Relates To Remedy

Complainant argued that it is entitled to a general exclusion order. (Motion at 19.) Section 337(d)(2) authorizes the Commission to issue a general exclusion order if it determines that:

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of the infringing products.

The Commission has held that those standards are, for all intents and purposes, the same as those that the Commission articulated (prior to the enactment of the current version of Section 337(d)(2)) in Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, Comm'n Op., USITC Pub. 1199 (November 1981) (Spray Pumps). See Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same, Inv. No. 337-TA-372, Comm'n Op. at 5-6, USITC Pub. 2964 (May 1996) (Magnets) (holding that the test articulated in Spray Pumps should still be applied).

In Spray Pumps, the Commission held that for issuance of a general exclusion order a complainant must establish: (1) “a widespread pattern of unauthorized use of [the] patented invention,” and (2) that “business conditions” exist from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles. Spray Pumps, Comm'n Op. at 18-19. With respect to the “widespread pattern” of unauthorized use, the Commission stated that such a pattern could be demonstrated by:

- (1) a Commission determination of unauthorized importation of the infringing article into the United States by numerous foreign manufacturers; or
- (2) the pendency of foreign infringement suits based on foreign patents corresponding to the U.S. patent; [or]
- (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.

Id. With respect to the “business conditions” prong, the Commission in Spray Pumps enumerated five factors that are relevant to whether such conditions exist:

- (1) the existence of an established demand for the article in the U.S. market and conditions of the world market;
- (2) the availability to foreign manufacturers of U.S. marketing and distribution networks;
- (3) the cost for foreign entrepreneurs whose facilities could be converted to manufacture the patented articles;
- (4) the number of foreign manufacturers whose facilities could be converted to manufacture the patented article; and
- (5) the foreign manufacturers cost to convert a facility to produce the patented articles.

Spray Pumps, Comm'n Op. at 19.

In assessing whether a complainant can establish that there is a widespread pattern of unauthorized use, it is important to note that a formal finding of infringement by foreign companies other than the respondents need not be established. Instead, evidence that certain foreign-made products may infringe appears sufficient. For example, in Certain Chemiluminescent Compositions and Components Thereof and Methods of Using, and Products Incorporating, the Same, Inv. No. 337-TA-285, Comm'n Op., USITC Pub. 2370 (1991) (Chemiluminescent), the Commission issued a general exclusion order in an investigation where a violation was found against only one respondent. In analyzing the factor concerning a widespread pattern of unauthorized use, the Commission stated as follows:

There is some evidence adduced in this investigation with regard to a widespread pattern of unauthorized use. Although the ALJ's ID considered infringement with regard to only a single respondent, during the remedy phase complainant submitted affidavits of additional instances of unauthorized foreign use and U.S. imports. On the basis of these affidavits, it appears that several additional products manufactured in Japan, Korea, Taiwan, and Belgium may be covered by the patent claims at issue However, we are hesitant to determine that the evidence establishes the existence of additional unauthorized infringing use,

without the benefit of an ALJ finding (which was not made because the evidence concerned non-respondents) and without any other independent verification, such as a finding of infringement in another judicial proceeding.

Chemiluminescent, Comm'n Op., at 9-10 (emphasis added). The Commission also concluded that the "business conditions" factor strongly favored the issuance of a general exclusion order because "the technology is well known and the manufacturing process is relatively simple, [and the] costs of starting production from scratch are minimal." Id. at 11. As a result, the Commission found that a general exclusion order was appropriate. Id.

Similarly, in Certain Battery-Powered Ride-On Toy Vehicles and Components Thereof, Inv. No. 337-TA-314, Comm'n Op., USITC Pub. 2420 (1991) (Toy Vehicles), the Commission issued a general exclusion on two design patents at issue even though the sole respondent to the investigation was the sole entity found to have violated section 337. As to the widespread pattern of unauthorized use, the Commission noted the following:

[T]he record contains information suggesting that there is a pattern of use of the design patents at issue. [Complainant] has submitted documents purporting to show that five foreign manufacturers, in addition to [the respondent], produce vehicles alleged to infringe the '666 patent, and that two foreign manufacturers, in addition to [the respondent] produce vehicles that arguably infringe the '009 patent.

Toy Vehicles, Comm'n Op. at 6-7 (emphasis added). The Commission concluded that this evidence in combination with the business conditions that existed warranted the issuance of a general exclusion order. Id. at 8.

A. Widespread Pattern Of Unauthorized Use

In this investigation, evidence of widespread unauthorized use of the asserted patents consists of the following. First, with respect to the '420 design patent, both respondents have

been shown to infringe. With respect to the '138 and '420 utility patents, the evidence shows that the Jiangsu products infringe. Moreover, the information provided with respect to Taizhou suggests that its accused products infringe. For example, the administrative law judge finds from their exterior, that the Taizhou products appear nearly identical to Newspring's VERSAtainer products, thus suggesting that Taizhou has simply "knocked-off" Newspring's design.

Accordingly, the administrative law judge finds that there is a strong probability that the seal of the Taizhou products closely resembles the VERSAtainer seal such that those products are likely to infringe the utility patents. The conclusion that the Taizhou products are "knock-offs" of the VERSAtainer line is further supported by the fact that the Taizhou products use the same model numbers as Newspring (with the exception of an additional initial "8" in the numbers). (Compare Exh. 10 to Motion No. 514-2 at p. 1 with CP-11-13 to complaint (model nos. are imprinted on outer circumference of lid).) Newspring has also filed six federal lawsuits asserting infringement of the patents at issue, three of which involved goods imported from China or Taiwan. (See McShane Suppl. Decl., at ¶¶ 2-3, 6-9, 10-11.) In each of the six lawsuits, consent judgments were entered wherein the defendants expressly acknowledged their infringement of the asserted patents. (See CX-20, 22, 24 to complaint.) Thus, the administrative law judge finds that Newspring has demonstrated that a widespread pattern of unauthorized use by foreign manufacturers and exporters exists.

B. Business Conditions Exist Whereby It Is Reasonable To Infer That Additional Foreign Manufactures Will Enter The Market

With respect to the factors considered in assessing whether business conditions are present such that other foreign manufacturers may enter the U.S. market with infringing goods,

Newspring's revenues from the patented products since their introduction to the marketplace in 1996, which exceed _____, indicate that there is an established U.S. market for goods practicing the patents. (Motion No. 514-2 at 23; Chen Suppl. Decl. ¶ 1.) Also, marketing and distribution networks for infringing products are already widely available in the United States. (Motion No. 514-2 at 23; Chen Suppl. Violation Decl. ¶ 11.) In addition, the source of infringing goods is difficult to determine as the infringing goods found to date do not indicate their source and end users are reluctant to reveal such information. (Motion No. 514-2 at 24; Chen Suppl. Violation Decl. ¶ 13.) Moreover, the evidence shows that foreign facilities engaged in plastic molding manufacturing could modify their operations with relatively little expense to produce infringing containers. (Motion No. 514-2 at 24-25.) Also, the evidence shows that the VERSAtainer containers themselves could be used to make molds with the necessary dimensions and that such molds could be made for around \$10,000 to \$20,000. (Chen Suppl. Decl. 14.) Thus, the administrative law judge finds that Newspring has demonstrated that business conditions are present such that other foreign manufacturers may enter the U.S. market with infringing goods.

Accordingly, in light of Spray Pumps factors, the administrative law judge recommends issuance of a general exclusion order for protecting complainant's intellectual property rights from infringing imports.⁷

V. Bond

Pursuant to Commission rules 210.36(a) and 210.42(a)(1)(ii), the administrative law

⁷ While Newspring in its complaint requested issuance of a cease and desist order, the record does not support any such issuance.

judge is to issue a recommended determination on bonding since the accused products are entitled to entry under bond during the 60-day Presidential review period. See 19 U.S.C. § 1337(j)(3). To the extent possible, the bond should be an amount that would be sufficient to protect a complainant from an injury. See Commission rule 210.50(a)(3). In setting a bond amount, “the Commission typically has considered the differential in sales price between the patented product made by the domestic industry and the lower price of the infringing imported product.” See, e.g., Microsphere Adhesives, Comm’n Op. at 24. However, where the available pricing information is inadequate, the bond may be set at 100 percent of the entered value. See, e.g., Comm’n Op. at 15.

Newspring has not addressed the bonding issue. The staff however argued that, in light of the lack of discovery from or other participation in this investigation by the respondents, a bond of 100 percent of the entered value of the infringing goods is appropriate, citing Certain Oscillating Sprinklers, Sprinkler Components, and Nozzels, Inv. No. 337-TA-448, Limited Exclusion Order at 4-5, USITC Pub. 3498 (March 2002). (SBr at 19-20.) Based on the present record, the administrative law judge recommends a bond of 100 percent of the entered value of the infringing goods.

VI. Conclusions

Based on what the administrative law judge has found in sections II, III, IV and V, he concludes, with respect to Motion Nos. 514-2 and 514-3, the following:

1. Motion No. 514-2 is granted in part and denied in part. Motion No. 514-3 is granted.
2. Complainant has established that the named respondents imported and sold for importation accused plastic food containers.

3. The validity and enforceability of the '420, '138 and '404 patents, which are involved in this investigation, are not in issue.

4. Complainant has established infringement of the '420 design patent by Jiangsu and Taizhou.

5. Complainant has established infringement of the '138 and '404 utility patents by respondent Jiangsu.

6. Complainant has not established that any of respondent Taizhou's accused products infringes any claim of the '138 and '404 utility patents.

7. Complainant has established a domestic industry.

8. Complainant has established a violation of section 337.

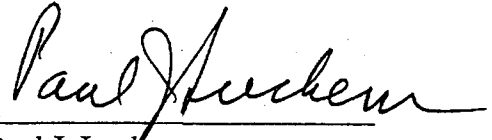
9. The administrative law judge recommends issuance of a general exclusion order.

10. The administrative law judge recommends a bond of 100 percent of the entered value of the infringing goods.

This initial determination, pursuant to Commission rule 210.42(c), is hereby CERTIFIED to the Commission. Pursuant to Commission rule 210.42(h)(3), this initial determination which involves violation of section 337 and establishment of a domestic industry shall become the determination of the Commission within thirty (30) days after the date of service hereof unless the Commission grants a petition for review of this initial determination pursuant to Commission rule 210.43, or orders on its own motion a review of the initial determination or certain issues therein pursuant to Commission rule 210.44. The recommended determination portion of this initial determination, issued pursuant to Commission rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission

rule 210.50(a).

Any bracketed confidential version of this order should be received by the administrative law judge no later than the close of business of February 25, 2005.

A handwritten signature in black ink, appearing to read "Paul J. Luckem". The signature is written in a cursive style with a horizontal line underneath it.

Paul J. Luckem
Administrative Law Judge

Issued: February 10, 2005

LAW OFFICES
ROTHWELL, FIGG, ERNST & MANBECK

A PROFESSIONAL CORPORATION

1425 K STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20005
TELEPHONE (202) 783-6040
FACSIMILE (202) 783-6031
www.rothwellfigg.com

MARTHA CASSIDY, Ph.D.
ROBERT H. CAMERON
THOMAS E. McKIERNAN
ANNE M. STERBA
LISA N. PHILLIPS
LEIGH Z. CALLANDER
C. NICHOLE GIFFORD
MONICA S. DAVIS
PATRICK T. SKACEL
BRIAN S. ROSENBLOOM
MONICA C. KITTS
BRIAN A. TOLLEFSON
JOO MEE KIM*
CHRISTOPHER M. DURKEE
STEVEN M. GIOVANNETTI
HYUNKWEON RYU
R. ELIZABETH BRENNER

G. FRANKLIN ROTHWELL
E. ANTHONY FIGG
BARBARA C. ERNST
HARRY F. MANBECK, JR.
GEORGE R. REPPER
STEVEN LIEBERMAN
VINCENT M. DELUCA
JOSEPH A. HYNDY
ELIZABETH A. LEFF
RICHARD WYDEVEN
MARTIN M. ZOLTICK
MINAKSI BHATT
MICHAEL G. SULLIVAN
SHARON L. DAVIS
ROBERT B. MURRAY
CARLA C. CALCAGNO
JEFFREY L. IHNEN
GLENN E. KARTA

January 24, 2005

OF COUNSEL

STEPHEN B. PARKER
JOHN A. McCAHILL
BARBARA WEBB WALKER, Ph.D.

* NOT ADMITTED IN D.C.

Honorable Paul J. Luckern
U.S. International Trade Commission
Office of Unfair Import Investigations
500 E Street, S.W.
Washington, D.C. 20436

RE: In the Matter of Certain Plastic Food Containers
Investigation No.: 337-TA-514

Dear Judge Luckern:

Complainant Newspring Industrial Corp. (hereafter, "Complainant" or "Newspring") writes this letter regarding the issue of the use of unpublished decisions from United States Courts in other actions. In this investigation, Newspring provided the Commission and Your Honor with a copy of the Letter Order in Newspring Industrial Corp. v. Sun Gem, et al., C.A. No. 82-2326 (D.N.J., Judge William H. Walls, December 2, 2004), which was marked "Not for Publication." In that Order, Judge Walls provided construction of claim terms from U.S. Patent Nos. 6,056,128 (the "138 Patent") and 6,196,404 B-1 (the "404 Patent"), and then performed an infringement analysis comparing the claims of the patents to the accused products. The Court then determined that the Newspring patents were infringed.

This letter presents United States court practices on the use of unpublished decisions, related U.S. Judicial Conference actions and case law. Newspring then provides its position as to the citation of this unpublished opinion and presents an updated status of the Sun Gem case.

United States Court Practices. The overwhelming majority of Federal Circuits allow citation of unpublished opinions by other courts. Nine of the thirteen of these courts allow citation. These courts are:

- **1st Circuit** - The 1st Circuit permits citation if "(1) the party believes that the opinion persuasively addresses a material issue in an appeal; and (2) there is no

ROTHWELL, FIGG, ERNST & MANBECK

Honorable Paul J. Luckern

January 24, 2005

Page 2

published opinion from this court that adequately addresses the issue.” See 1st Cir. R. 32.2(a)(2).

- **3rd Circuit** - The 3rd Circuit permits citation.
- **4th Circuit** - The 4th Circuit allows citation “if counsel believes ... that an unpublished disposition ... has precedential value in relation to material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited.” See 4th Cir. R. 36(c).
- **5th Circuit** - In the 5th Circuit unpublished opinions issued before January 1, 1996 are precedential. Citation is permitted based on “persuasive” value. See 5th Cir. R. 47.5.3 and 47.5.4.
- **6th Circuit** - The 6th Circuit permits citation “if counsel believes ... that an unpublished disposition ... has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited.” See 6th Cir. R. 28(g).
- **8th Circuit** - In the 8th Circuit, unpublished decisions “are not precedential and parties generally should not cite them,” but parties may do so if the opinion has “persuasive value on a material issue and no published opinion of this or another court would serve as well.” See 8th Cir. R. 28(A)(i).
- **10th Circuit** - The 10th Circuit also permits citation for the opinions “persuasive value with respect to material issues that has not been addressed in a published opinion” and if it would “assist the court in its disposition.” See 10th Cir. R. 36.3.
- **11th Circuit** - In the 11th Circuit unpublished opinions are “not considered binding precedent” but may be cited as persuasive authority. See 11th Cir. R. 36-2.
- **D.C. Circuit** - The District of Columbia Circuit permits citation under D.C. Cir. R. 28(c)(12)(B) for unpublished decisions issued on or after January 1, 2002, where the opinion may be cited as precedent.

Only the 2nd, 7th, 9th, and the Federal Circuits continue to ban citation of unpublished opinions.

U.S. Judicial Conference. The issue of the use of unpublished decisions was recently an issue before the U.S. Judicial Conference. In April, 2004, the U.S. Judicial Conference Advisory Committee approved a proposal permitting the citation of opinions, orders or other judicial dispositions that are designated as “not for publication,” “non-precedential” or the like, where

ROTHWELL, FIGG, ERNST & MANBECK

Honorable Paul J. Luckern

January 24, 2005

Page 3

the rule would supercede any limitation imposed on such citation by Circuit Rules. This Rule change was placed before the Committee on Rules of Practice and Procedure in June, 2004. The key concern raised about the proposal by several Courts of Appeal was limited to the potential increased workload upon the courts, because presumably the judges would then spend more time drafting these opinions. In view of this concern, the Committee decided to defer approval of the proposal pending receipt of empirical study results analyzing the effect on the workload in the nine circuits that now permit citation. See Report of the Judicial Conference, Committee on Rules of Practice and Procedure, September, 2004, pp. 7-13. A key justification for allowing citations of unpublished decisions are concerns relating to recurring issues being decided differently by different courts. *Id.* at 9.

Case Law. In Anastasoff v. United States, 223 F.3d. 898 (8th Cir. 2000), a party argued that an 8th Circuit decision that was squarely on point was not controlling because it was marked as an unpublished decision and under the Circuit's Local Rule it was not precedential. The Court of Appeal disagreed. In an opinion by Circuit Judge Richard S. Arnold, the court held that the Local Rule was "unconstitutional under Article III of the Constitution, because it purports to confer on the federal court's power that goes beyond 'judicial.'" Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000). The decision further stated that every judicial decision inherently interprets the general principle or law of the rule which then must be applied in later cases to similarly situated parties. *Id.* at 899-900. Allowing the court to avoid the precedential effect of prior decisions thereby expands the judicial power beyond the limits of Article III. *Id.* But in an *en banc* rehearing, the court held the underlying issue moot and therefore vacated the decision, thus leaving this an open question in the 8th Circuit. Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000).

Newspring's Position On the Use of the Unpublished Letter Opinion. In the recent Newspring v. Sun Gem Letter Order on summary judgment, the District Court of New Jersey considered the same utility patents, namely the '138 patent and the '404 patent that are at issue in this investigation. That Court construed the same claims that are at issue in this investigation. That Court then performed an infringement analysis for an accused product that was an attempted "design-around" having fewer similarities to the claims of patents than the products in this investigation, but the Court nonetheless found that the claims of the Newspring patents were clearly infringed. That Court used the same controlling law for claim construction and infringement analysis as that which will be used in this investigation, namely Federal Circuit law. Therefore, findings in the Sun Gem case clearly have precedential value in relation to the material issues in this case, namely claim construction and infringement and there is no published opinion that would serve as well. Newspring, therefore, respectfully requests that the findings of the Sun Gem's Letter Order be considered precedential in this Investigation.

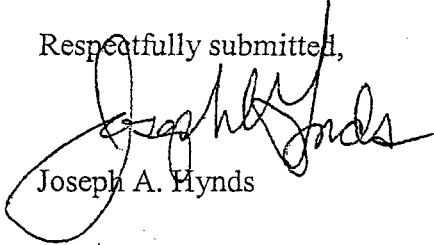
ROTHWELL, FIGG, ERNST & MANBECK

Honorable Paul J. Luckern
January 24, 2005
Page 4

Status of the Sun Gem Case. The status of the Sun Gem action is that summary judgment issued on December 2, 2004. A hearing on damages, costs and injunctive relief is scheduled for January 20, 2005.

We thank Your Honor for your consideration of this matter and, to the extent Your Honor would like to speak to counsel regarding this issue, we will certainly make ourselves available at Your Honor's convenience.


Respectfully submitted,



Joseph A. Hynds

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Order** was served by hand upon Commission Investigative Attorney Rett Snotherly, Esq. and upon the following parties via first class mail, and air mail where necessary, on MAY 23 2005.


Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW - Room 112
Washington, DC 20436

For Complainant Newspring Industrial Corporation:

David E. De Lorenzi
Sheila F. McShane
Clyde A. Shuman
**Gibbons, Del Deo, Dolan,
Griffinger & Vecchione**
One Riverfront Plaza
Newark, New Jersey 07102-5496

Steven Lieberman
Joseph A. Hynds
Rothwell, Figg, Ernst & Manbeck
1425 K Street, NW, Suite 800
Washington, DC 20005

CERTIFICATE OF SERVICE page 2

Respondents :

Taizhou Huasen Household Necessities, Co., Ltd.
a/k/a China Huasen Daily Expenses Co., Ltd.
No. 13,247 Lane, Yinshan Rd.
Huaugyan
Taizhou, China

Jiangsu Sainty Corporation, Ltd.
98 Jian Ye Road
Nanjing, China

PUBLIC MAILING LIST

Sherry Robinson
LEXIS-NEXIS
8891 Gander Creek Drive
Miamisburg, OH 45342

Ronnita Green
West Group
Suite 230
901 Fifteenth Street, NW
Washington, DC 20005

(PARTIES NEED NOT SERVE COPIES ON LEXIS OR WEST PUBLISHING)