In the Matter of

CERTAIN PLASTIC FOOD STORAGE CONTAINERS

Investigation No. 337-TA-152

USITC PUBLICATION 1563

AUGUST 1984

United States International Trade Commission / Washington, D.C. 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of CERTAIN PLASTIC FOOD STORAGE CONTAINERS	))))))	Investigation No. 337-TA-152

COMMISSION ACTION AND ORDER

Introduction

The United States International Trade Commission has concluded its investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, of alleged unfair methods of competition and unfair acts in the unauthorized importation of certain packaging for plastic food storage containers into the United States or in their sale by the owner, importer, consignee or agent of either, the alleged effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The Commission's investigation concerned allegations that importation or sale of certain packaging for plastic food storage containers by respondents (Jui Feng Plastic Mfg. Co., Ltd.; Famous Associates, Inc.; Lamarle Hong Kong, Ltd.; International Porcelain, Inc. d/b/a International Sources; Peter Marcar; Morris A. Lauterman; David Y. Lei; David Y. Lei, Morris A. Lauterman, Peter Marcar d/b/a Lamarle; Lamarle, Inc.; Lamarle B.V.; and Griffith Bros. Ltd.), constitute unfair methods of competition and unfair acts by reason of alleged (1) infringement of the registered trademarks "Tupperware", "Handolier", "Wonderlier", and "Classic Sheer"; (2) false

designation of source; (3) false advertising; and (4) passing off. The trademarks are owned by complainant Dart Industries, Inc.

This Action and Order provides for the final disposition of investigation No. 337-TA-152 by the Commission.

Background

A complaint was filed with the Commission on June 9, 1983, alleging, inter alia, the unfair methods of competition and unfair acts described above. On July 1, 1983, the Commission determined to institute an investigation into those allegations to determine whether there is a violation of subsection (a) of section 337 and published notice thereof. 48 Fed. Reg. 32095 (July 13, 1983).

On April 13, 1984, the Commission's presiding officer issued an initial determination finding a violation of section 337. The Commission determined not to review the initial determination and, accordingly, the initial determination became the Commission's determination. 19 C.F.R. § 210.53(h). Notice thereof was published in the Federal Register. 49 Fed. Reg. 21807 (May 23, 1984). In the same notice, the Commission requested submissions on the appropriate relief to be issued, on the public interest factors (19 U.S.C. §§ 1337(d) and (f)), and on the amount of bond during the 60-day Presidential review period (19 U.S.C. § 1337(g)).

Action

Having reviewed the record in this investigation, including the initial determination of the presiding officer and the submissions on relief, the public interest, and bonding, the Commission, on July 12, 1984, determined that --

1. The appropriate relief is —

    (a) an exclusion order pursuant to 19 U.S.C. § 1337(d), limited to the respondents, excluding from entry packaging for plastic food storage containers which bears the trademarks "Tupperware", "Handolier", "Wonderlier", and/or "Classic Sheer", or colorable imitations thereof, and

    (b) cease and desist orders to the respondents (i) prohibiting use of the aforementioned trademarks on respondents' packaging, (ii) prohibiting respondents from using the subject trademarks in advertising, (iii) prohibiting respondents from advertising the interchangeability of respondents' products with complainant's products, (iv) prohibiting respondents from aiding and/or encouraging others to use the subject trademarks in connection with respondents' products, and (v) prohibiting respondents from aiding and/or encouraging others to advertise the interchangeability of respondents' products with complainant's products;

2. The public interest factors enumerated in subsections (d) and (f) of section 337 of the Tariff Act of 1930 do not preclude the issuance of the exclusion order and the cease and desist orders referred to in paragraph 1 above; and

3. The bond provided for in subsection (g)(3) of section 337 of the Tariff Act of 1930 during the period this matter is before the President shall be in the amount of 100 percent of the entered value of the imported packaging, provided that if the imported packaging contains plastic food storage containers the bond shall be in the amount of 100 percent of the entered value of the imported packaging and containers.

Order

Accordingly, it is hereby ORDERED THAT —

1. Packages for plastic food storage containers (whether or not such packages contain plastic food storage containers) manufactured by or on behalf of, imported by or on behalf of, or consigned to Jui Feng Plastic Mfg. Co., Ltd.; Famous Associates, Inc.; Lamarle Hong Kong, Ltd.; International Porcelain, Inc. d/b/a International Sources; Peter Marcar; Morris A. Lauterman; David Y. Lei; David Y. Lei, Morris A. Lauterman, Peter Marcar d/b/a Lamarle; Lamarle, Inc.; Lamarle B.V.; and/or Griffith Bros. Ltd., or any successors, assigns, affiliated persons or companies, parents, subsidiaries or other related business entities of the aforementioned respondents, which bear the trademarks "Tupperware", "Handolier", "Wonderlier", and/or "Classic Sheer", or colorable imitations thereof, are excluded from entry into the United States, except where such importation is licensed by the owner of the trademarks;

2. Plastic food storage containers manufactured by or on behalf of, imported by or on behalf of, or consigned to any one or more of the aforementioned respondents, which are not imported in packages bearing the trademarks "Tupperware", "Handolier", "Wonderlier", and/or "Classic Sheer", or colorable imitations thereof, are not subject to exclusion under this Order;

3. The articles to be excluded from entry into the United States shall be entitled to entry under bond in the amount of 100 percent of the entered value of the imported articles from the day after this order is received by the President pursuant to 19 U.S.C. § 1337(g) until such time as the President notifies the Commission that he approves or disapproves this action, but, in any event, not later than 60 days after the date of receipt, provided that if the imported packaging contains plastic food storage containers the bond shall be in the amount of 100 percent of the entered value of the imported packaging and containers;

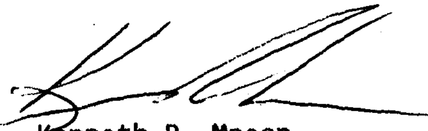
4. Jui Feng Plastic Mfg. Co., Ltd.; Famous Associates, Inc.; Lamarle Hong Kong, Ltd.; International Porcelain, Inc. d/b/a International Sources; Peter Marcar; Morris A. Lauterman; David Y. Lei; David Y. Lei, Morris A. Lauterman, Peter Marcar d/b/a Lamarle; Lamarle, Inc.; Lamarle B.V.; and Griffith Bros. Ltd., shall cease and desist from engaging in the United States in registered trademark infringement, false designation of source, false advertising, and passing off, as provided in the cease and desist orders attached hereto and made part hereof by reference;

5. The Secretary shall publish notice of this Action and Order in the Federal Register;

6. The Secretary shall serve a copy of this Action and Order and of the Commission opinion in support thereof 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 Secretary of Treasury; and

7. The Commission may amend this Order in accordance with the procedure described in 19 C.F.R. § 211.57.

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: July 13, 1984

S A M P L E

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN PLASTIC FOOD STORAGE CONTAINERS	)	Investigation No. 337-TA-152

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT (name and address of respondent) cease and desist from engaging in false and deceptive advertising, registered trademark infringement, false designation of source, and passing off with regard to certain plastic food storage containers.

I

(Definitions)

As used in this Order:

(A) "Commission" shall mean the U.S. International Trade Commission.

(B) "Complainant" shall mean Dart Industries, Inc., d/b/a Tupperware, 2211 Sanders Road, Northbrook, Illinois 60062.

(C) "Respondent" shall mean (Name and Address of respondent).

(D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation or other legal or business entity other than the above respondent or its majority owned and/or controlled subsidiaries, their successors or assigns.

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

(F) "Respondents' plastic food storage containers" shall mean plastic food storage containers manufactured in any country other than the United States by or on behalf of any of the following entities (including any successors, assigns, affiliated persons or companies, parents, subsidiaries or other related business entities of those entities) for shipment or export to the United States for resale in the United States:

(1) Lamarle, Inc. of San Francisco, California;

(2) Peter Marcar of Santa Rosa, California

(3) Morris A. Lauterman of San Francisco, California;

(4) David Y. Lei of Oakland, California;

(5) David Y. Lei, Morris A. Lauterman, Peter Marcar d/b/a Lamarle of San Francisco, California;

(6) International Porcelain, Inc. d/b/a International Sources of San Francisco, California;

(7) Lamarle Hong Kong, Ltd. of Kowloon, Hong Kong;

(8) Jui Feng Plastic Mfg. Co., Ltd. of Hsin Chu, Taiwan;

(9) Famous Associates, Inc. of Taipei, Taiwan;

(10) Lamarle B.V. of Netherlands Antilles; and

(11) Griffith Bros. Ltd. of Sydney, Australia.

(G) "Tupperware plastic food storage containers" shall mean plastic food storage containers manufactured by or on behalf of complainant.

(H) "Packaging" shall mean any box, wrapper, or other device for the containment of plastic food storage containers.

(I) "Plastic food storage containers" shall mean rubber or plastic containers principally used for preparing, serving, or storing food or beverages, or food or beverage ingredients, including bowls and covers of corresponding sizes, beverage servers (pitchers) and covers of corresponding sizes, and canisters or similar storage containers and covers of corresponding sizes.

II

(Applicability)

The provisions of this Cease and Desist Order shall apply to respondent and to its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority owned business entities, successors and assigns, all those persons acting in concert with them and to each of them, and to all other persons who receive actual notice of this Order by service in accordance with section V hereof.

III

(Individual Conduct Prohibited)

The following conduct of respondent in the United States is prohibited by this Order —

1. Respondent Shall not represent, or aid other persons to represent, orally, or in sales, advertising or promotional material for respondents' plastic food storage containers, that such containers are interchangeable with or equivalent to Tupperware plastic food storage containers.

2. Respondent shall not represent, or aid other persons to represent, orally, or in sales, advertising or promotional material for respondents' plastic food storage containers, that such containers are in any way manufactured, sponsored, authorized or approved by complainant.

3. Respondent shall not represent, or aid other persons to represent, that any of the entities listed in Section I(F) of this Order, or any successors, assignees, affiliated persons or companies, parents, subsidiaries or other related business entities to those entities, are affiliated with complainant.

4. Respondent shall not use, or aid or encourage other persons to use, any of the following terms or colorable imitations thereof in connection with the sale, advertisement or promotion of respondents' plastic food storage containers: "Tupperware", "Handolier", "Wonderlier", and "Classic Sheer".

5. Respondent shall not use, or aid or encourage other persons to use, any of the following terms or colorable imitations thereof on the packaging of respondents' plastic food storage containers: "Tupperware", "Handolier", "Wonderlier", and "Classic Sheer".

IV

(Individual Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, such specific conduct is licensed or authorized by complainant.

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if,

pursuant to a request for an advisory opinion under 19 C.F.R. § 211.54 regarding such specific conduct, the Commission determines that respondent's proposed new course of conduct would not violate section 337.

V

(Compliance and Inspection)

(A) For the purposes of securing compliance with this Order, respondent shall retain any and all records relating to the importation, sale or distribution of plastic food storage containers made and received in the usual and ordinary course of its business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain, and summary form, for a period of seven (7) years from the close of the fiscal year to which they pertain.

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

VI

(Service of Cease and Desist Order)

Respondent is ordered and directed to —

(A) Serve, within thirty (30) days after the effective date of this Order, a conformed copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the advertising, marketing, distribution or sale of plastic food storage containers in the United States or for shipment or export to the United States of such containers for resale in the United States;

(B) Serve, within thirty (30) days after the succession of any of the persons referred to in Section VI(A) above, a conformed copy of this Order upon each successor; and

(C) Maintain such records as will show the name, title and address of each such officer, director, managing agent, agent and employee upon whom the Order has been served, as described in Section VI(A) and (B) above, together with the date on which service was made.

The obligations set forth in Section VI(B) and (C) above shall remain in effect until December 31, 1989.

VIII

(Enforcement)

Violation of this Order may result in —

1. The revocation of this Order and the permanent exclusion of the articles concerned pursuant to Section 337(d) of the Tariff Act of 1930 (19 U.S.C. § 1337(d));

2. Temporary exclusion of impending importations of the articles concerned pursuant to Section 337(e); or

3. An action for civil penalties in accordance with the provision of Section 337(f) and such other action as the Commission may deem appropriate.

In determining whether Respondent is in violation of this Order the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

IX

(Modification)

This Order may be modified by the Commission in accordance with the procedure described in 19 C.F.R. § 211.57.

By order of the Commission:

Kenneth R. Mason
Secretary

Issued:

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN PLASITC FOOD STORAGE CONTAINERS	Investigation No. 337-TA-152

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

INTRODUCTION

On June 9, 1983, Dart Industries, Inc., d/b/a/ Tupperware, Northbrook, Illinois, (complainant) filed a complaint under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) alleging unfair methods of competition and unfair acts in the importation into the United States of certain plastic food storage containers, or in their sale, by reason of alleged infringement of registered trademark, false designation of source, passing off, and false advertising. On July 1, 1983, the Commission instituted an investigation into the allegations of the complaint and published notice thereof. 48 Fed. Reg. 32095 (July 13, 1983).

A Commission administrative law judge (ALJ) issued an initial determination (ID) on April 13, 1984, that there was a violation of section 337. The Commission determined not to review the ID and issued notice thereof. 1/ 49 Fed. Reg. 21807 (May 23, 1984). That notice also requested

1/ Certain respondents to the investigation twice attempted to file a petition for review of the ID. Because those respondents had entered a notice of default and had been found in default by the ALJ, the petitions for review were rejected pursuant to 19 C.F.R § 210.54(a).

public comments on remedy, the public interest, and bonding, the only issues remaining to be resolved in this investigation.

REMEDY

1. Form of Remedy.

We have determined that a limited exclusion order and cease and desist orders are the appropriate remedy in this investigation. The violation of section 337 found to exist can best be remedied by such orders.

At the outset, we note that the remedies are limited to the packaging for plastic food storage containers and to the prevention of certain oral or written representations regarding the containers. The remedy does not affect the importation or sale of respondents' food storage containers as such. 2/

2/ Complainant has urged the Commission to issue a remedy to prohibit the importation of respondents' food storage containers themselves. We decline to do so because the food storage containers themselves are not the subject of the investigation. That the scope of the investigation did not include the containers themselves is evident from the amended complaint.

31

> Respondents, by their actions described above, have deliberately represented and passed off their imitative LAMARLE plastic food storage containers as TUPPERWARE plastic food storage containers by leading customers to believe that they are buying a TUPPERWARE product. Respondents, by their distribution of advertising copy to retailers and by references to TUPPERWARE and the false statements of interchangeability on the LAMARLE packaging have induced and made it possible for retailers to pass off such imitative LAMARLE plastic food storage containers as TUPPERWARE plastic food storage containers and are responsible for such passing off. Such passing off is in violation of Section 337 of the Tariff Act of 1930.

Amended Complaint ¶ 31 (emphasis supplied).
(Footnote continued on page 3)

An exclusion order is the most effective means of ensuring that imported packaging that infringes the trademarks at issue does not find its way into commerce in the United States. Moreover, exclusion from entry of the infringing product is generally preferred to cease and desist orders in trademark cases. See Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137, USITC Pub. 1506 (1984); Certain Sneakers with Fabric Uppers and Rubber Soles, Inv. No. 337-TA-118, USITC Pub. 1366 (1983); Certain Cube Puzzles, Inv. No. 337-TA-112, USITC Pub. 1334 (1983).

2/ (Footnote continued from page 2)

The phrase "by their actions described above" refers to paragraphs 15 through 30 of the complaint, which set forth the unfair acts. Those acts include the use of complainant's word marks on respondents' packaging, representations as to interchangeability with the complainant's products, and alleged harm to the complainant deriving therefrom.

Even under the most liberal of readings, the complaint does not assert any proprietary rights in the product shape, color, or general configuration. There are no allegations that complainant has a utility, process, or design patent that has been infringed. There are no allegations of the existence of a registered trademark in the design, nor are there any allegations of a common-law trademark or of the elements necessary to establish such a trademark. See In Re Morton-Norwich Products, Inc., 671 F.2d 1332 (CCPA 1982) and cases cited therein; Certain Braiding Machines, Inv. No. 337-TA-130, USITC Pub. No. 1435 (1983) (unreviewed initial determination).

Complainant appears to rest its request for exclusion of the containers themselves on the ALJ's findings regarding passing off, particularly the finding that respondents copied complainant's containers. This finding, however, cannot support relief against the containers themselves in the absence of assertions of proprietary rights in the design, shape, and/or color of the containers. Moreover, the ALJ's finding, properly read, is a part of his analysis regarding respondents' intent, the essential element to the alleged unfair act of passing off. Certain Cube Puzzles, Inv. No. 337-TA-112, USITC Pub. 1334 at 25-26 (1983). Thus, he concluded that respondents have created confusion in the marketplace by their intentional copying of complainant's product "together with the misleading use of complainant's trademarks." ID at 72 (emphasis supplied). The ALJ did not find that complainant's goods themselves, as opposed to the packaging at issue in this case, are protectable under the trademark laws.

Although the apparent relative ease of producing plastic food storage containers overseas might favor a general exclusion order, Certain Molded-In Sandwich Panel Inserts and Methods for their Installation, Inv. No. 337-TA-99, USITC Pub. 1246 at 21-22 (1982), a limited exclusion order is more appropriate here. All respondents are related and there is no evidence of any other party infringing or about to infringe the subject trademarks. Thus, there is no "widespread pattern of unauthorized use" within the meaning of Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, USITC Pub. 1199 at 19 (1981). Compare Certain Personal Computers and Components Thereof, Inv. No. 337-TA-140, USITC Pub. 1504 (1984). Moreover, complainant has requested only an exclusion order limited to respondents, not a general exclusion order.

A limited order has several procedural advantages, at least insofar as dealing with importations themselves is concerned. A limited exclusion order is relatively straightforward and relatively simple to administer. As noted by the U.S. Customs Service, such an order would permit Customs personnel to "target" suspect imports without undue delays in the movement of the large volume of merchandise covered by the applicable classification of the Tariff Schedules of the United States. 3/ Thus, a limited exclusion order should not unduly burden legitimate trade and will permit closer monitoring of respondents' importations. Finally, complainant is apparently the dominant firm in this industry and has demonstrated that it is able to spot any attempt

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3/ Letter from the U.S. Customs Service dated May 7, 1984.

to introduce infringing products in the market and bring them quickly to the Commission's attention. Thus, whatever name appears on the import papers, complainant is likely to know the real source. Certain Steel Rod Treating Apparatus and Components Thereof, Inv. No. 337-TA-97, USITC Pub. 1210 at 64 (1982).

A limited exclusion order, however, will not remedy all the unfair acts found, particularly those acts which are not exclusively dependent on the packaging -- false advertising and passing off. Nor can an exclusion order remedy any unfair acts regarding trademark infringement and false designation of source arising from packaging that is already in the United States. 4/ Therefore, cease and desist orders should be issued to each named respondent -- the exact scope of the cease and desist orders is discussed below -- to provide complete relief. See Doxycycline, Inv. No. 337-TA-3, USITC Pub. 964 (1979); Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126 (1981); Certain Molded-In Sandwich Panel Inserts and Methods for their Installation, Inv. No. 337-TA-99, USITC Pub. 1246 (1982).

2. Scope of Remedy.

The question of the scope of the remedy requires a balancing of interests. On the one hand, complete relief should be given to complainant for the unfair acts found to exist. On the other hand, relief should not be so broad as to prohibit legitimate business activities. We believe that a

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4/ The quantity of such packaging currently in the United States is uncertain since respondents did not participate meaningfully in the investigation. The latest evidence of record is that there was a significant number of apparently prepackaged Lamarle containers in transit from Taiwan to the United States as of August 1983. ID at 35.

prohibition against respondents' use of complainant's trademarks, within certain strictures to be discussed below, best achieves these ideals.

Respondents assert that the Commission remedy in this case must be limited to the unfair acts which have been found to exist and that such remedy may not impinge upon respondent's "free speech" rights under the First Amendment to the U.S. Constitution, although respondents nowhere describe the extent of their perceived First Amendment rights. They point to a series of cases in which the courts have struck down limits on commercial speech. E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 478 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, rehearing denied, 434 U.S. 881 (1977). While those cases hold what respondents urge, they are not controlling here. Those cases involved speech that was truthful, not speech that amounted to false advertising, passing off, or trademark infringement. In fact, in each of the cases, there was no question of the truthfulness of the speech, so that the Supreme Court focused on the governmental and private interests at stake, not on any deceptive or misleading content of the speech itself.

The First Amendment does not preclude the regulation or prohibition of commercial speech that is either deceptive or misleading. 5/ Virginia State Board of Pharmacy, supra; Friedman v. Rogers, 440 U.S. 1, rehearing denied, 441 U.S. 917 (1979). The regulation of commercial speech may go beyond that

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5/ Even truthful speech is not completely unfettered. Commercial speech, like other types of speech is subject to regulation of time, place, and manner of expression if such regulation is done without regard to the content of the speech, if it serves a significant governmental interest, and if there are sufficient alternative channels for the speech. Virginia State Board of Pharmacy, supra.

permitted for noncommercial speech. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), rehearing denied, 439 U.S. 883 (1978).

With regard to the infringement of the complainant's trademarks, the "free speech" clause of the First Amendment does not authorize respondents to use those marks in a manner that will mislead or confuse the consuming public. Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2nd Cir. 1979); Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979).

Apparently recognizing this, respondents argue that the First Amendment requires that any restraint on the content of their speech be narrowly focused to prohibit only the specific speech found to be deceptive or misleading. They would have the Commission fashion a remedy that prohibits only the specific usage of complainant's trademarks found to be unfair in this investigation, permitting respondents to otherwise utilize the marks. 6/ We decline this invitation. For both legal and practical reasons, we have

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6/ Respondents suggest that a proper remedy would be to require a disclaimer in proximity to complainant's trademarks on their packaging. They correctly note that in a number of cases, the placement of a disclaimer on the packaging was found to be an appropriate remedy. They appear to urge that the Commission limit its remedy with regard to trademark infringement and false designation of source to requiring a disclaimer of a size and type face equal to that of their use of complainant's marks. Given the ALJ's findings of likelihood of confusion arising from the unfair acts and the need to ensure that respondents do not continue to trade on complainant's goodwill, we cannot be reasonably certain that a disclaimer will accomplish these aims. Therefore, we have decided against such a remedy.

determined, with appropriate safeguards, to prohibit all use of the complainant's marks by the respondents. 7/

Having established that it is entitled to relief, complainant is entitled to effective relief. Independent Nail & Packing Co. v. The Stronghold Screw Products, 215 F.2d 434, 436 (7th Cir. 1954). A prohibition against all use of the mark is the only sure way that the trademark owner and the public can be protected. Gilson, Trademark Protection and Practice § 5.09[5]. This will ensure that respondents make no efforts to retain any part of the business goodwill misappropriated from complainant. Chevron Chemical Co. v. Voluntary Purchasing Group, Inc., 659 F.2d 695, 212 USPQ 904 (5th Cir. 1981), cert. denied, 457 U.S. 1126 (1982). See also American Rice, Inc. v. Arkansas Rice Growers Cooperative Association, 532 F. Supp. 1376 (S.D. Tex. 1982), aff'd, 701 F.2d 408 (5th Cir. 1983). Having crossed over the line dividing fair from unfair competition, respondents may now be ordered to keep a safe distance from it. Chevron Chemical, supra; Independent Nail, supra; American Rice,

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7/ The investigative attorney (IA) recommended that respondents be ordered not to use the terms "party brand" or "home party brand" or colorable imitations thereof in selling, advertising, or promoting their imported food storage containers. The IA believes that these prohibitions are necessary to ensure that respondents do not continue to pass off or cause others to pass off their products as those of complainant. The IA asserts that references to those terms are, in effect, references to the trademarks. We disagree.

First, as discussed infra, respondents are to be prohibited from advertising or aiding others to advertise the "interchangeability" of the products. Such a prohibition applies regardless of how respondents denominate their product or complainant's product. Second, there is no evidence of record that the terms "party brand" and/or "home party brand" are registered trademarks or have acquired common-law trademark status. Finally, the terms were not at issue in the investigation and there are no findings (nor have we found any underlying evidence) that these terms are either associated with complainant or that they are likely to cause confusion among the consuming public.

supra; Coca Cola Co. v. Gay-Ola Co., 200 Fed. 720, 724 (6th Cir. 1912), cert. denied, 229 U.S. 613 (1913).

The bar to respondents' use of complainant's marks will not hinder legitimate competition. There is no evidence of record that the trademarks have become generic. Nor is there evidence that respondents are unable to compete in the food storage container market without using complainant's marks. In fact, the presence in the market of other food storage containers suggests just the opposite.

Finally, it is not the province of the Commission to undertake the task of redesigning respondents' packaging. Gilson, supra. Any attempt to fashion a narrow remedy must take into account the myriad permutations and combinations of complainant's trademarks that could possibly be used on respondents' packaging. Such a task is obviously impossible for the Commission. In this context, the Commission's role must be limited to determinations of whether particular packaging is trademark infringing or whether particular advertising is false.

Nevertheless, we appreciate that it is theoretically possible for respondents to use complainant's trademarks in a noninfringing manner. Therefore, the ban on respondent's use of complainant's trademarks contains two exceptions. First, use of the marks by respondents will be allowed when complainant (through license or otherwise) has no objection to such use. Second, respondents may petition the Commission for a determination of whether a proposed package or advertisement using the marks infringes the marks. The Commission's determination will be rendered pursuant to the Commission's advisory opinion provision (rule 211.54(b)) or under the modification of orders provision (rule 211.57), as appropriate.

A prohibition on respondents' use of complainant's trademarks, however, is not complete relief. It cannot remedy the false advertising of the "interchangeability" of the respondents' food storage containers with those of the complainant. Moreover, it will not fully remedy the passing off that has been found.

With regard to the false advertising found in the investigation, we have determined to order respondents to cease and desist from representing that their imported plastic food storage containers are interchangeable with complainant's product.

Moreover, the record indicates that advertising material used by retailers was supplied and/or subsidized by respondents. Therefore, we further determine to prohibit respondents from aiding or encouraging others to make representations of interchangeability with complainant's plastic food storage containers. See Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 384 (7th Cir. 1976), cert. denied, 429 U.S. 830 (1976); Stewart Paint Mfg. Co. v. United Hardware Distributing Co., 523 F.2d 568, 575 (8th Cir. 1958), reh. denied, 259 F.2d 273 (8th Cir. 1958); Stix Products, Inc. v. United Merchants and Manufacturers, Inc., 295 F. Supp. 479, 495-98 (S.D.N.Y. 1968). The latter prohibition covers, for example, providing advertising copy or bearing part of the cost of such false advertising.

The remedies discussed above -- prohibiting the use of complainant's trademarks and prohibiting the advertising of interchangeability of products -- will not completely remedy the passing off that has been found to occur. Therefore, we believe that respondents must also be prohibited from representing and from aiding or encouraging others to represent, in any

fashion, that respondents' food storage containers are manufactured, sponsored, authorized, or approved by complainant. Respondents must also be prohibited from representing and from aiding or encouraging others to represent that respondents are affiliated with complainant.

PUBLIC INTEREST

We find no public interest factors, within the meaning of section 337(a), that preclude the issuance of relief in this case.

BONDING

Pursuant to section 337(g)(3), during the 60-day Presidential review period, respondents' products are entitled to entry under bond. That bond is to be set so as to offset any competitive advantage resulting from respondents' unfair methods of competition and unfair acts. S. Rep. 1298, 93rd Cong., 2d Sess. 198 (1974). The evidence shows that the retail price differential between the respondents' packaged food storage containers and complainant's food storage containers is 100 percent.

In this investigation, however, no party has suggested an appropriate bond for the packaging alone, even though this would be the appropriate measure in light of the unfair acts. Because of this and because the packaging is apparently not entered separately, we see no alternative but to set the bond for either the packaging imported separately or in conjunction with the containers.

We therefore establish the bond at 100 percent of the entered value as that represents the differential in retail selling prices between the domestic and imported packaged food storage containers.

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

253519 RECEIVED '84 APR 20 AM 8 59 OFFICE OF THE SECRETARY DOCKET/USITC

In the Matter of)
)
CERTAIN PLASTIC FOOD STORAGE) Investigation No. 337-TA-152
CONTAINERS)
)

INITIAL DETERMINATION

John J. Mathias, Administrative Law Judge

Pursuant to the Notice of Investigation in this matter (48 Fed. Reg. 32095-96, July 13, 1983), this is the Presiding Officer's Initial Determination under Rule 210.53(a) of the Rules of Practice and Procedure of this Commission. (19 C.F.R. 210.53(a)).

The presiding officer hereby determines that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337, hereafter Section 337), in the importation of certain plastic food storage containers into the United States, or in their sale. The complaint herein alleges that such importation or sale constitutes unfair methods of competition and unfair acts by reason of alleged: (1) infringement of complainant's federally registered trademarks; (2) false designation of source; (3) passing off; and (4) false advertising. It is further alleged that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

* * * * *

The following abreviations are used in this Initial Determination:

Tr.- Official Transcript, usually preceded by the witness' name and followed by the referenced page(s);
CX - Complainant's Exhibit, followed by its number and the referenced page(s);
CPX - Complainant's Physical Exhibit
SX - Staff Counsel's Exhibit

TABLE OF CONTENTS

	Page
PROCEDURAL HISTORY	1
FINDINGS OF FACT	7
I. Jurisdiction	7
II. The Parties	7
III. Default by Respondents in This Investigation	11
IV. Products in Issue	13
V. Respondents' Unfair Acts and Methods of Competition	15
A. The TUPPERWARE Trademarks	15
B. Respondents' Activities	16
1. Manufacturing and Importing	16
2. Product Packaging and Advertising	18
C. Lack of Interchangeability Between Lamarle and Tupperware Containers	19
D. Likelihood of Consumer Confusion	23
1. Brand Recognition of the Tupperware Trademark	23
2. The "Consumer Perception Survey"	26
3. Actual Confusion Among Consumers	32
VI. Importation and Sale	35
VII. Domestic Industry	36
VIII. Efficient and Economic Operation of The Domestic Industry	36
A. Manufacturing and Quality Control	36
B. Marketing and Advertising	41
C. Introduction of the Wonder Colors	43
IX. Injury	43

TABLE OF CONTENTS - con't

	Page
OPINION	
I. Introduction	51
II. Respondents' Unfair Acts	53
A. Trademark Infringement and False Designation of Source	53
B. False Advertising	66
C. Passing Off	70
III. Importation and Sale	75
IV. Domestic Industry	76
V. Efficient and Economic Operation	77
VI. Injury	80
A. Substantial Injury	80
B. Tendency To Substantially Injure	84
CONCLUSIONS OF LAW	86
INITIAL DETERMINATION AND ORDER	88

Appendix: Exhibit Lists

PROCEDURAL HISTORY

On June 9, 1983, Dart Industries, Inc., d/b/a Tupperware, 2211 Sanders Road, Northbrook, Illinois 60062, filed a complaint with the U.S. International Trade Commission pursuant to 19 U.S.C. §1337 (Section 337). The complaint alleged unfair methods of competition and unfair acts in the importation into the United States of certain plastic food storage containers, or in their sale, by reason of alleged (1) infringement of complainant's federally registered trademarks; (2) false designation of source; (3) passing off; and (4) false advertising. The complaint further alleged that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, economically and efficiently operated, in the United States. The complainant requested that the Commission institute an investigation, and, after a full investigation, issue both a permanent exclusion order and a permanent cease and desist order.

Upon consideration of the complaint, the Commission ordered on July 1, 1983, that an investigation be instituted pursuant to subsection (b) of Section 337 to determine whether there is a violation of subsection (a) of Section 337, as alleged in the complaint. The notice of institution of such investigation was published in the Federal Register on July 13, 1983 (48 Fed. Reg. 32095-96).

The following nine parties were named as respondents in the Notice of Investigation:

Jui Feng Plastic Mfg. Co., Ltd.
242 Ho Ping Road
Hsin Chu, Taiwan

Famous Associates, Inc.
6th Floor
Kuang Fu Mansion
35 Kuang Fu South Road
Taipei, Taiwan

Lamarle Hong Kong, Ltd.
Man on House
#224 Tai Hong Sai Estate
Kowloon, Hong Kong

David Y. Lei, Morris A. Lauterman,
Peter Marcar
888 Brannan Street
Suite 275
San Francisco, California 94103

David Y. Lei, Morris A. Lauterman,
Peter Marcar
d/b/a Lamarle, The Gift Center
888 Brannan Street
Suite 275
San Francisco, California 94103

David Y. Lei
975 Park Lane
Oakland, California 94610

Morris A. Lauterman
1053 DeHaro Street
San Francisco, California 94107

Peter Marcar
P.O. Box 212
San Rosa, California 94505

Lamarle, Inc.
888 Brannan Street
Suite 275
San Francisco, California 94103

Lynn I. Levine, Esq., Unfair Import Investigations Division, U.S. International Trade Commission was named as Commission investigative attorney, a party to this investigation.

By Order No. 1, issued July 8, 1983, Chief Administrative Law Judge Donald K. Duvall was designated as the Presiding Officer in this investigation.

On August 4, 1983, respondents Lamarle Hong Kong Ltd., Lamarle, Inc., and Lei, Lauterman and Marcar each filed a response to the complaint and notice of investigation. Respondents Jui Feng Plastic Mfg. Co., Ltd. and Famous Associates filed a response to the complaint and notice of investigation on August 12, 1983.

A preliminary conference was held in this matter before Administrative Law Judge Donald K. Duvall on August 16, 1983. Appearances were made on behalf of complainant, the Commission staff, and all of the above-named respondents.

On July 13, 1983, complainant filed a motion to amend the complaint and notice of investigation to join as a party respondent Griffith Bros. of Sydney, Australia. (Motion Docket No. 152-3). This motion was granted by Initial Determination, Order No. 5, issued July 28, 1983. Order No. 11, issued August 25, 1983, denied respondents' motion for reconsideration of Order No. 5. (Motion Docket No. 152-9). On September 27, 1983, the Commission determined not to review Orders No. 5 and 11 (48 Fed. Reg. 44942, September 30, 1983), with the effect of joining as a party respondent to this investigation

Griffith Bros. Ltd.
O'Connell House
15 Bent Street
Sydney, 2000 Australia

Order No. 8, issued August 5, 1983, denied respondents' motion to add Dart & Kraft, Inc. as a party complainant to this investigation. (Motion Docket No. 152-5). Order No. 10, issued August 11, 1983, denied respondents' motion to terminate this investigation. (Motion Docket No. 152-2).

On September 16, 1983, by Order No. 14, for reasons of judicial economy and administrative necessity Chief Administrative Law Judge Donald K. Duvall was relieved and Administrative Law Judge John J. Mathias was designated as Presiding Officer in this investigation.

On October 11, 1983, respondents filed with the Secretary of the Commission a Notice of Election To Default, requesting the Secretary to enter a default as to each respondent in this investigation.

By Order No. 18, issued November 1, 1983, complainant's motion to amend the complaint and notice of investigation was granted. (Motion Docket No. 152-13). The effect of this Initial Determination was to add as a party respondent:

Lamarle B.V.
Schottegatweg 9, Curacao
Netherlands Antilles

and to correct the original notice of investigation to delete as respondents:

David Y. Lei, Morris A. Lauterman
and Peter Marcar
888 Brannan Street
Suite 275
San Francisco, California 94103

and to replace them with the following:

International Porcelain, Inc.
d/b/a International Sources
888 Brannan Street
The Gift Center
Suite 275
San Francisco, California 94103

as party respondent. On November 25, 1983, the Commission issued a notice of its determination not to review Order No. 18. (48 Fed. Reg. 54140,

November 30, 1983). (See also Clarification of Notice Joining Respondents and Terminating Other Respondents, December 12, 1983).

Order No. 21, issued February 6, 1984, was an Initial Determination granting complainant's motion for an order of default and imposition of sanctions against respondents for failure to make discovery. (Motion Docket No. 152-14). Respondents Jui Feng Plastic Mfg. Co., Famous Associates, Lamarle Hong Kong Ltd., David Y. Lei, Morris A. Lauterman, Peter Marcar, Lamarle, Inc., and David Lei, Morris Lauterman, Peter Marcar d/b/a Lamarle, The Gift Center, and Griffith Bros. were each found to be in default, and certain sanctions were imposed. The Commission determined not to review this initial determination on March 6, 1984. (49 Fed. Reg. 9628, March 14, 1984).

By Order No. 23, issued March 5, 1984, complainant's supplemental motion for default and sanctions was granted. This Initial Determination found respondents Lamarle B.V. and International Sources to be in default, and imposed the same sanctions as had previously been imposed on all other respondents. On March 26, 1984, the Commission determined not to review Order No. 23 (49 Fed. Reg. 13442-43, April 4, 1984).

A prehearing conference was held in this matter on January 23, 1984. The hearing commenced immediately thereafter before Administrative Law Judge John J. Mathias to determine whether there is a violation of Section 337 as alleged in the complaint and set forth in the notice of investigation, as amended. Appearances were made on behalf of complainant and the Commission staff. No respondents appeared at the prehearing conference or hearing.

The issues have been briefed and proposed findings of fact and conclusions of law submitted by the participating parties. The matter is now ready for decision.

This initial determination is based on the entire record of this proceeding, including the evidentiary record compiled at the final hearing, the exhibits admitted into the record at the final hearing, and the proposed findings of fact and conclusions of law and supporting memoranda filed by the parties. I have also taken into account my observation of the witnesses who appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

FINDINGS OF FACT

I. JURISDICTION

1. Service of the complaint and Notice of Investigation was perfected on respondents Peter Marcar, Morris A. Lauterman and David Y. Lei, each individually and doing business as Lamarle, Lamarle (Hong Kong) Ltd., Lamarle, Inc., Famous Associates, Inc., Jui Feng Plastic Mfg. Co., Ltd., International Porcelain, Inc. d/b/a International Sources, Lamarle B.V. and Griffith Brothers Ltd. (SX 12).

2. Responses to the complaint and Notice of Investigation were filed by respondents Peter Marcar, Morris A. Lauterman, David Y. Lei, each individually and doing business as Lamarle, Lamarle, Inc. and Lamarle (Hong Kong) Ltd., on August 4, 1983, and the same appeared through counsel on July 1, 1983. (See Responses to complaint and Notice of Investigation, August 4, 1983; Letter of James S. Waldron, Esq. to Kenneth R. Mason, Secretary, USITC, July 1, 1983).

3. Respondents Famous Associates, Inc. and Jui Feng Plastic Mfg. Co., Ltd. responded to the complaint and Notice of Investigation on August 12, 1983, and appeared through counsel on July 1, 1983. (See Responses to complaint and Notice of Investigation, August 12, 1983; Letter of James S. Waldron, Esq. to Kenneth R. Mason, Secretary, USITC, July 1, 1983).

II. PARTIES

4. Complainant Dart Industries Inc. is a Delaware Corporation having its principal place of business at 2211 Sanders Road, Northbrook, Illinois 60062. Through its divisions, Tupperware Company and Tupperware Home Parties

(collectively "Tupperware"), complainant manufactures and sells plastic food storage containers under the trademark TUPPERWARE. (Complaint, ¶¶ 1-3; CX 91, pp. 3-4, 6).

5. Tupperware Manufacturing Company, a division of complainant, manufactures plastic products, including the seven Tupperware plastic food storage containers involved in this investigation, at plants located in Blackstone, Massachusetts; Halls, Tennessee; Jerome, Idaho; and Hemingway, South Carolina. (CX 20, p. 12; CX 91, interrogs. 1, 2; CX 94).

6. Tupperware Home Parties, a division of complainant, distributes and sells plastic products, including the eight Tupperware plastic food storage containers involved in this investigation, in the United States through approximately 100,000 independent Tupperware dealers. (CX 68, ¶ 3).

7. Respondent Lamarle, Inc., 888 Brannan Street, San Francisco, California 94103, is a California corporation engaged in the design, importation, promotion, and sale of Lamarle brand plastic food storage containers in the United States. (SX 2, interrogs. 2, 5; CX 47, p. 36; CX 54, p. 2; CX 54, p. 2; CX 59, pp. 5-6; CX 57, p. 10).

8. Respondent Peter Marcar, P.O. Box 212, Santa Rosa, California 94505, is a Stockholder, Incorporator, Director and Officer of respondent Lamarle, Inc. and Lamarle Hong Kong, Ltd. (SX 2, interrog. 1; SX 3, interrog. 2). He is also the Supervisory Director of respondent Lamarle B.V. (CX 100).

9. Respondent Morris Lauterman, 1053 De Haro Street, San Francisco, California 94107, is a Stockholder, Incorporator, Director and Officer

of respondents Lamarle, Inc. and Lamarle (Hong Kong) Ltd. (SX 2, interrog. 1; SX 5, interrog. 2). He is also affiliated with respondent International Porcelain, Inc. d/b/a/ International Sources. (CX 65).

10. Respondent David Y. Lei, 975 Park Lane, Oakland, California 94610, is a stockholder, incorporator, director and officer of respondents Lamarle, Inc. and Lamarle (Hong Kong) Ltd. (SX 2, interrog. 1; SX 4, interrog. 2).

11. Respondent David Y. Lei does business as respondent International Porcelain d/b/a/ International Sources ("International Sources"), 888 Brannan Street, San Francisco, California 94103. (CX 49, 50, pp. 3-4). Respondent International Sources is engaged in the importation, sale and distribution of Lamarle brand plastic food storage containers in the United States. (CX 117-4; CX 117-5, p. 10829; CX 127, p. 8). As of February 1983, respondent International Sources owned a 50% interest in respondent Lei, Lauterman and Marcar d/b/a Lamarle. (CX 40, p. 2).

12. On June 1, 1983, the partnership of respondent Lei, Lauterman and Marcar d/b/a Lamarle was dissolved and the assets and liabilities of that partnership were acquired by respondent Lamarle, Inc. (SX 2, interrog. 2; SX 6, interrog. 1).

13. Respondent Jui Feng Plastics Mfg. Co., Ltd. ("Jui Feng"), 242 Ho Ping Road, Hsin Chu, Taiwan, manufactures plastic food storage containers in Taiwan for respondent Lamarle, Inc., arranges for the printing of boxes for these containers in accordance with the instruction of respondent Lamarle, Inc., and exports the containers to respondents Lamarle, Inc. and International Sources in the United States. (SX 2, interrog. 2; SX 8, interrog. 2; CX 117; CX 120-18).

14. Respondent Famous Associates, Inc. ("Famous"), Kuang Fu Mansion, 35 Kuang Fu South Road, Taipei, Taiwan, supervises the shipping of plastic food storage containers manufactured by respondent Jui Feng from Taiwan to respondent Lamarle, Inc. in the United States. At the request of respondent Lamarle, Inc., respondent Famous periodically inspects both the containers to be shipped and . (SX 2, interrog. 2; SX 8, interrog. 2; SX 9, interrog. 21; CX 117-1-2).

15. Respondent Famous acts as agent for respondent International Sources. (CX 64, 65, 117-2, p. 10925; 117-5, pp. 10824-29). Respondents David Lei and Morris Lauterman are affiliated with respondent Famous. (CX 47, p. 37-8; CX 64, 65).

16. Respondent Lamarle (Hong Kong) Ltd. ("Lamarle, Ltd"), Man on House #224, Tai Hong Sai Estate, Kowloon, Hong Kong, to respondent Lamarle, Inc. for the . (SX 7, interrog. 2).

17. Both respondent Lamarle, Ltd. and respondent Lamarle B.V., Schottegatweg 9, Curacao, Netherlands Antilles, have filed applications, signed by respondent Peter Marcar, with the United States Patent and Trademark Office for registration of the name "LAMARLE" as a trademark for plastic containers. (CX 99, 100).

18. Respondent Griffith Brothers Ltd. ("Griffith"), O'Connell House, 15 Bent Street, Sydney, Australia, purchased, at a price of $1,250,000, a 40% interest in respondents Lamarle, Inc. and Lamarle, Ltd., effective July 1, 1983, with an option to buy the remaining 60% of the stock of these companies during the 1983/84 fiscal year. (CX 125, p. 3).

19. Materials circulated by respondent Griffith to its stockholders concerning Griffith's acquisition of an interest in Lamarle, Inc. and Lamarle, Ltd. emphasized that the Lamarle firms were producing plastic containers for the United States that were equivalent to Tupperware products and that these firms were promoting the Lamarle containers as interchangeable with Tupperware products. (CX 125, p. 3; CX 127, pp. 7-8).

III. DEFAULT BY RESPONDENTS IN THIS INVESTIGATION

20. Following their entry of appearance and response to the complaint and Notice of Investigation (see Findings 2 and 3, supra), respondents Lamarle, Inc., Peter Marcar, Morris Lauterman, David Lei, Lamarle, Lamarle Ltd., Famous, and Jui Feng filed with the Secretary of the Commission on October 11, 1983, a Notice of Election To Default. (CX 128).

21. Orders No. 16 and 17, issued October 28, 1983 granted motions by the Commission investigative attorney and complainant to compel discovery from respondents Lamarle, Lamarle, Inc., Lamarle Ltd., Marcar, Lei, Lauterman, Famous and Jui Feng. (Motion Docket Nos. 152-11 and 12).

22. Respondent Griffith Bros. was joined as a party to this investigation by Orders No. 5 and 11, which became effective on September 27, 1983. (48 Fed. Reg. 44942). The complaint and Notice of Investigation were served by the Commission on September 28, 1983 and received by Griffith on October 7, 1983. (SX 12). Griffith did not enter an appearance or respond to the complaint and Notice of Investigation.

23. Order No. 21, issued February 6, 1984, granted complainant's motion for default and imposition of sanctions against respondents Lamarle, Lamarle, Inc., Lamarle Ltd., Marcar, Lei, Lauterman, Famous, Jui Feng,

and Griffith. (Motion Docket No. 152-16). The following sanctions were imposed on these respondents:

1. no objection will be heard to the introduction of secondary evidence to show what the discovery and evidence within the possession of the defaulting respondents would have shown;

2. the defaulting respondents and their representatives and counsel are hereafter denied access to any materials submitted in connection with this investigation that have been designated "Confidential" under the terms of Order No. 2, issued July 11, 1983;

3. the defaulting respondents have waived their right to appear and contest the allegations of the complaint and notice of investigation herein;

4. complainant and the Commission investigative attorney are relieved of any further obligation to serve notices, motions or other papers upon the defaulting respondents or their representatives;

5. all further proceedings conducted in connection with this investigation may proceed without further notice to defaulting respondents; and

6. the defaulting respondents may not introduce evidence, rely upon testimony of officers, agents or others, present witnesses or argument, or otherwise participate in the proceedings herein, in support of their respective positions, or any other matter, in this investigation.

On March 6, 1984, the Commission determined not to review this Initial Determination of default and sanctions. (49 Fed. Reg. 9628).

24. Order No. 18, issued November 1, 1983, granted complainant's motion to amend the complaint to add as a party respondent Lamarle, B.V. and to correct the original notice of investigation to delete the partnership of Marcar, Lauterman and Lei and to replace it with

International Porcelain, d/b/a/ International Sources. (Motion Docket No. 152-13). The Commission determined not to review this initial determination on November 25, 1983, and further clarified that the deletion of the partnership of Marcar, Lauterman and Lei did not affect their status as individually named respondents. (48 Fed. Reg. 54140; Clarification of Notice Joining Respondent and Terminating Other Respondents, issued December 12, 1983). The complaint and notice of investigation, as amended, were served on Larmarle B.V. and International Sources on December 20, 1983. There is no record of receipt of these documents by the parties. (SX 12).

25. Lamarle B.V. and International Sources did not enter an appearance or respond to the complaint and Notice of Investigation. Order No. 22, issued February 6, 1984, ordered Lamarle B.V. and International Sources to show cause on or before February 27, 1984 why they should not be found in default and why the sanctions requested by complainant should not be imposed. No response to this order has been received.

26. Order No. 23, issued March 5, 1984, granted complainant's supplemental motion for default and sanctions against respondents Lamarle B.V. and International Sources. This initial determination imposed the same sanctions as had been ordered against all other respondents. (See Finding 23 supra). On March 26, 1984, the Commission determined not to review this initial determination. (49 Fed. Reg. 13442-43, April 4, 1984).

IV. PRODUCTS IN ISSUE

27. The specific TUPPERWARE products involved in this investigation are the WONDERLIER bowls, HANDOLIER beverage server and CLASSIC SHEER canisters (the "affected products"). (CPX 135-155).

28. The accused product in this investigation is a packaged set of seven plastic food storage containers, imported into and marketed in the United States under the name Lamarle. This set consists of three plastic canisters with lids (in 7, 10, and 14 cup sizes), three plastic bowls with lids (in 2, 3, and 4 cup sizes), and one 48-ounce beverage server with lid. (CPX 101-15).

29. Lamarle plastic food storage containers are sold together in a box with pictures of the product on its sides, six references to the trademark TUPPERWARE, and line drawings of the products on the top flap under which appear Complainant's trademarks WONDERLIER, HANDOLIER and CLASSIC SHEER. (CPX 101).

30. The seven products in issue are manufactured in Taiwan by respondent Jui Feng. (CX 117-1, 117-3; SX 8, interrog. 2). These products have been distributed in the United States by the domestic respondents under the name "Lamarle" since November or December 1982. (CX 52, p. 2). The products are offered for sale in retail outlets, such as supermarkets. (SX 2, interrog. 16).

31. The external appearance of the seven Lamarle products in issue closely resembles the appearances of the following products in complainant's Tupperware product line: complainant's three-piece CLASSIC SHEER canister set (which consists of 7, 10 and 14-cup size canisters), complainant's WONDERLIER bowl set (which are now sold in a four-piece set of 3, 4, 8 and 12-cup size bowls), and complainant's 48-ounce HANDOLIER beverage server. (CPX 102-15; 135-50).

32. Complainant's WONDERLIER bowls have been among the 25 best selling items in the Tupperware line for over 30 years. (CX 68, ¶ 13). The HANDOLIER beverage server and CLASSIC SHEER canisters are also popular items in the Tupperware line. (CX 43, pp. 12-13; CX 44, pp. 9-10).

33. Complainant's Tupperware products are sold exclusively by Tupperware dealers who demonstrate the products at parties in the homes of customers. (CX 68, ¶ 3).

V. RESPONDENTS' UNFAIR ACTS AND PRACTICES

A. The Tupperware Trademarks

34. Complainant, and its predecessors in interest, have manufactured and sold plastic food storage containers under the trademark TUPPERWARE since 1950. (CX 91, pp. 3-4, 6; CX 88-1).

35. On August 28, 1956, the trademark TUPPERWARE was registered in the United States Patent and Trademark Office for plastic goods, including canisters, bowls and pitchers, by complainant's predecessor in interest, the Tupper Corporation, under registration number 633,394. Since that time, the trademark TUPPERWARE has been federally registered for goods and services as follows: No. 643,899, granted April 9, 1957; No. 765,844, granted March 3, 1964; No. 791,800, granted June 29, 1965; No. 991,025, granted August 13, 1974; No. 1,008,224, granted April 1, 1975; and No. 1,041,493, granted June 15, 1976. Complainant is the record owner of all of these TUPPERWARE registrations. (CX 88, 1-7).

36. Each of the TUPPERWARE registrations is in full force and effect and has become incontestable pursuant to 15 U.S.C. §1065. (CX 88, 1-7).

37. Complainant also owns several additional registered trademarks which it uses in conjunction with specific TUPPERWARE plastic food storage containers. (CX 88, 8-10).

38. The trademark WONDERLIER has been used for TUPPERWARE molded plastic bowls and seals since 1954. WONDERLIER was federally registered on December 22, 1959 under registration number 690,034; the trademark is in full force and effect and has become incontestable. (CX 88-9).

39. The trademark HANDOLIER has been used for various TUPPERWARE plastic goods, including beverage servers, since 1954. HANDOLIER was federally registered on November 8, 1955 under registration number 615,539; the trademark is in full force and effect and has become incontestable. (CX 88-8).

40. The trademark CLASSIC SHEER has been used for various TUPPERWARE plastic goods, including canisters, since 1979. CLASSIC SHEER was federally registered on September 29, 1981 under registration number 1,171,315. (CX 88-10).

B. Respondents' Activities

1. Manufacturing and Importing

41. In late 1982, respondents began manufacturing, importing into and marketing in the United States, under the name Lamarle, a boxed set of copies of complainaint's WONDERLIER bowls, HANDOLIER beverage server and CLASSIC

SHEER canisters. (Bradburn, CX 152, ¶ 3).

42. The Lamarle containers are manufactured, boxed and packaged in Taiwan by Jui Feng. (CX 120-2, p. 2; CX 120-15, p. 1; S. Rogers, CX 47, p. 40; CX 117-1, p. 10909; CX 117-6).

43. With the assistance of Famous, Jui Feng ships the packaged sets to Lamarle, Inc. and International Sources in the United States. (CX 120-2, p. 2; CX 120-15, pp. 1-2; CX 117-2, pp. 10923-24).

44. Respondents' containers are externally substantially the same as the TUPPERWARE originals. (Compare CPX 102-115 with CPX 135-151; compare CPX 90 with CPX 97).

45. Respondents have intentionally copied the shapes, sizes, and configurations of the TUPPERWARE containers and have used the same family of colors used by complainant on its TUPPERWARE containers. (CX 118, p. 4; CX 127, p. 7).

46. By an agreement, effective July 1, 1983, Griffith invested $1,250,000 in respondents Lamarle, Inc. and Lamarle, Ltd. and took a 40% interest with an option to purchase the remaining shares. (CX 125, p. 3).

47. In a circular to its shareholders regarding the acquisition of its interest in Lamarle, Griffith acknowledged that the Lamarle containers were "direct cop[ies] of TUPPERWARE" and that an "extremely valuable part of the promotional sales effort" is the packaging, with its prominent copy "describing the interchangeability with TUPPERWARE" products. (CX 127, pp. 7-8). Thus, Griffith made its investment knowing about Lamarle's activities and intending to further them.

48. Respondent Lamarle, Ltd. Lamarle, Inc. to for which it has sought in the United States. (CX 99; CX 120-1, p. 1; CX 120-2, p. 2).

49. In an application dated June 30, 1983, Lamarle B.V. sought to register as a trademark the name "Lamarle" for "molded plastic storage containers and molded plastic kitchen utensils in Class 21." (CX 100).

50. The Lamarle B.V. trademark application was signed by Peter Marcar as Supervisory Director. (CX 100).

2. Product Packaging and Advertising

51. Respondents' containers are imported and sold in boxes which display color photos of the containers and refer to TUPPERWARE six times and to WONDERLIER, HANDOLIER and CLASSIC SHEER two times apiece. (CPX 101; Findings 42-43).

52. Two of the references to TUPPERWARE are in the following statement which appears on two side panels of the Lamarle box:

LAMARLE LIDS AND CONTAINERS ARE
INTERCHANGEABLE WITH TUPPERWARE

These statements are followed by the following statement, which appears in markedly smaller type:

THIS IS NOT A TUPPERWARE PRODUCT

(CPX 101, side panels).

53. The top panel of the box bears the legend:

> LAMARLE LIDS AND CONTAINERS ARE
> INTERCHANGEABLE WITH THE FOLLOWING
> TUPPERWARE ITEMS:

The reference to CLASSIC SHEER, HANDOLIER and WONDERLIER items appears directly below purported line drawings of those products. (CPX 101, top flap).

54. The line drawings on the flap, however, are, with some exceptions, of Lamarle containers, not the seven specified TUPPERWARE containers. Compare drawings on CPX 101 with CPX 105-108 and with CPX 143, 145, CPX 147, 149; see also Findings 143-144, infra).

55. References to TUPPERWARE, and Lamarle's purported interchangeability with TUPPERWARE, are prominently displayed on point-of-sale displays used by respondents' retailers and in advertisements for Lamarle containers. (CPX 52-53; CX 94-4; CX 116).

56. The point-of-sale materials were supplied to the retailers by respondents. The advertisements are provided by respondents to retailers in the form of an advertising slick. Respondents subsidize retailer advertising with cooperative advertising allowances. Such advertising has prominently featured the phrase "WHY GO TO A TUPPERWARE PARTY?" (CX 120-2, p. 6; CX 56, p. 2; CX 116-41).

C. LACK OF INTERCHANGEABILITY BETWEEN LAMARLE AND TUPPERWARE CONTAINERS

57. The Lamarle and TUPPERWARE products have been subjected to tests by an independent expert, Dr. Lawrence J. Broutman of L. J. Broutman & Associates, Ltd. Dr. Broutman is a professor of Materials Engineering

at Illinois Institute of Engineers; he has extensive experience in the area of plastic material testing. (Broutman, Tr. 7-10; CX 23).

58. Dr. Broutman and his associates undertook to study the product performance of both the TUPPERWARE affected products and the Lamarle containers. (Broutman, Tr. 11).

59. Dr. Broutman also undertook to determine through his tests whether the Lamarle containers could be considered interchangeable with the TUPPERWARE containers. (Broutman, Tr. 11).

60. Interchangeable means that the products can be mutually substituted for one another without loss of function or suitability for a given application. (Broutman, Tr. 12).

61. This definition of "interchangeable" has also been accepted by respondents. (CX 119, pp. 2-3).

62. Dr. Broutman's tests cover all types of forseeable uses to which the containers are likely to be subjected and are

. (Broutman, Tr. 19-20; compare CPX 2-3 with CPX 25).

63. Dr. Broutman's tests reveal Lamarle products to be inferior to TUPPERWARE products with respect to their resistance to environmental stress cracking, their impact resistance, their liquid tightness and their dishwasher safety. (Broutman, Tr. 51-7; CX 25; pp. 32-33).

64. Environmental stress crack resistance testing measures the ability of the product to withstand the exposure to chemicals and food oils likely to occur during normal use in the home. (Broutman, Tr. 22, 55-6).

65. Dr. Broutman's tests reveal that TUPPERWARE products have between seven and one hundred times the resistance to environmental stress cracking possessed by Lamarle products. (Broutman, Tr. 55; CX 25, p. 32; CX 28).

66. Impact resistance testing measures the ability of the product to withstand being dropped during use without cracking or breaking open. (Broutman, Tr. 44-45; CX 25, pp. 4-6).

67. Dr. Broutman's tests reveal that TUPPERWARE products have four to fifteen times the impact resistance of Lamarle containers. (Broutman, Tr. 56; CX 25, p. 33; CX 29-33). However, he also found the Lamarle 2-cup bowl to be more impact resistent than the corresponding TUPPERWARE bowl. (CX 25, pp. 22-23).

68. Dr. Broutman and his associates subjected sample Lamarle and TUPPERWARE products to three dishwashing cycles in order to measure the effects, if any, of such dishwashing on the product. The Lamarle lids, in contrast to TUPPERWARE seals, warped severely, making them difficult to store and unsightly in appearance. (Broutman, Tr. 29-38; CX 25, p. 32; CX 27).

69. Leak testing was conducted to determine the liquid tightness of the Lamarle products as compared to that of the TUPPERWARE products, as well as the liquid tightness of combinations resulting when the products were interchanged (e.g., TUPPERWARE bowl with Lamarle lids and vice versa). (Broutman, Tr. 27-29; CX 26).

70. Dr. Broutman's leak testing reveals that nineteen out of seventy of the Lamarle containers tested failed the test and leaked, even when paired with their matching Lamarle parts, as opposed to only one out of the seventy TUPPERWARE products tested. (CX 26; Broutman, Tr. 52; CX 25, p. 32).

71. When the products were interchanged (i.e., Lamarle lids on TUPPERWARE containers, TUPPERWARE seals on Lamarle containers), thirty out of one hundred forty containers tested leaked. (Broutman, Tr. 52; CX 25, p. 32; CX 26).

72. Respondents' Lamarle containers were also subjected to tests by Mr. Jeffrey Parker, Laboratory Manager, Quality Control International, Tupperware Company. (Parker, CX 1, ¶¶ 24-30).

73. Mr. Parker subjected the Lamarle containers to a series of tests routinely used by complainant. (Parker, CX 1, ¶ 24).

74. In the test, several of the Lamarle samples , in contrast with the TUPPERWARE containers, which did not . (Parker, CX 1, ¶ 25).

75. In the comparative testing, all of the Lamarle lids indicated in contrast with the TUPPERWARE seals, which showed . (Parker, CX 1, ¶ 27).

76. Four tested sets of the Lamarle canisters and beverage server failed the test, in contrast with the TUPPERWARE containers, of which only one type of canister failed the test. (Parker, CX 1, ¶ 27).

77. When tested for , Lamarle lids in contrast with the TUPPERWARE seals, which exhibited (Parker, CX 1, ¶ 28).

78. Thus, Lamarle goods are significantly inferior to the TUPPERWARE products from which they were copied and are not interchangeable with TUPPERWARE, contrary to respondents' representations in their packaging and advertising. (Broutman, Tr. 57; Findings 64-84).

79. Respondents' representations of interchangeability, as stated on their packaging and in their point-of-sale materials and advertising, are thus literally false.

D. LIKELIHOOD OF CONSUMER CONFUSION

1. Brand Recognition of the TUPPERWARE Trademark

80. Dr. Robert C. Sorensen, President of Sorensen Marketing/Management Corporation and Robert C. Sorensen and Associates, Inc., who has substantial experience in research into consumer perception and behavior, including the conduct and analysis of consumer surveys, was hired to ascertain the level of brand name recognition of the TUPPERWARE trademark among consumers (Sorensen, Tr. 124-31; CX 134).

81. Brand name recognition signifies that consumers recognize the name in question as a source or brand designation (*e.g.*, Budweiser) rather than as a type of good or product category (*e.g.*, beer). (Sorensen, Tr. 131).

82. Dr. Sorensen conducted a national probability survey of women in the United States, 21 years of age or older, who came from households utilizing plastic food storage containers, to determine whether they

identified the trademark TUPPERWARE as a brand name or product category word. (Sorensen, Tr. 131; CX 129, p. 4).

83. The individual survey respondents were selected through the use of a highly organized random selection method designed to provide a statistically representative sample with every household in the United States having an equal or known chance of being included. (Sorensen, Tr. 132-33; CX 129, pp. 6-17).

84. The study, as designed, yielded results that are statistically projectable to results that would be obtained if a census of the whole relevant universe (e.g., all women in the United States, 21 years of age or older, who use plastic food storage containers) were taken. (Sorensen, Tr. 138-40).

85. The survey respondents were shown a series of cards, each bearing one word, either a brand name (e.g., Budweiser, Sunkist) or product category (e.g., cereal, radio); respondents were asked to identify, for each word, whether it was a brand name or a product category designation. (Sorenson, Tr. 144-46).

86. A substantial majority of the survey respondents, to wit, 84.7%, perceive TUPPERWARE to be a brand name word. (Sorenson, Tr. 147, CX 129, p. 33).

87. A substantial majority of women residing in households throughout the United States perceive TUPPERWARE to be a brand of plastic food storage containers rather than a word generally used to identify all plastic food storage containers. (Sorenson, Tr. 147; CX 129, p. 33).

88. This result was consistent with the responses given by the survey respondents to other trademarks used in the test. (Sorenson, Tr. 147-48).

89. Thus, the TUPPERWARE trademark is perceived as a brand name designating goods that originate with complainant and is not a descriptive or generic term for plastic food storage containers.

90.

. (SRX 1, pp. 3-4, Table 1, p. 12161).

91.

. (SX 2,

pp. 12005, 12015-16, 12052).

2. The "Consumer Perception Survey"

92. Dr. Sorensen also conducted a random intercept survey entitled "Consumer Perceptions of Lamarle Plastic Food Storage Containers." (Sorensen, Tr. 149; CX 130).

93. This "Consumer Perception" survey was conducted pursuant to a request that Dr. Sorensen determine whether, and to what extent, consumers of plastic food storage containers would, when viewing the Lamarle package and containers as they are generally displayed for sale, be confused as to the source of the Lamarle product. (Sorensen, Tr. 149; CX 130, p. 5).

94. The universe, or population, surveyed in the "Consumer Perception" study was women 21 years of age and over who are users of plastic food storage containers. (Sorensen, Tr. 151; CX 130, p. 6).

95. Consumer confusion is represented by the misidentification of source by consumers when viewing a product. (Sorensen, Tr. 152).

96. The survey questions were designed by Dr. Sorensen to eliminate any biased or leading questions in order to get responses from which accurate and measurable conclusions could be drawn. (Sorensen, Tr. 152-54; CX 130, p. 7, Exhibit A).

97. The intercept method was chosen in order to allow the survey respondents to view the Lamarle product as it was generally display when offered for retail sale. (Sorensen, Tr. 157-60).

98. The survey was conducted at four sites, each chosen for its high flow of consumer traffic and for the availability of an area free of any

other plastic food storage container displays or advertisements. (Sorensen, Tr. 160-61).

99. Independent interviewing agencies in the localities used were chosen for their ability and skills. (Sorensen, Tr. 161).

100. The interviewers and supervisors did not know the purpose of the study or the name of the client for which it was being done. (Sorensen, Tr. 161-62).

101. The survey was conducted in shopping malls in order to reach the marketplace where the Lamarle goods are being offered for sale. (Sorensen, Tr. 159; CX 130, p. 6).

102. The random intercept study designed by Dr. Sorensen called for 125 completed personal interviews in each of four shopping centers --three in California (Daly City, Oakland and Sacramento) and one at Boston, Massachusetts. A total of 503 interviews were actually completed at these four sites between February 25, 1983 and March 6, 1983. (CX 130, pp. 6, 8; Sorensen, Tr. 160).

103. Following a review of photographs of Lamarle displays in four supermarkets in northern California (CPX 52), Dr. Sorensen and complainant's counsel concluded that a fair exhibition of the Lamarle product would comprise Lamarle cartons piled up on one another and placement of the Lamarle product out of the box in proximity to the cartons. (Sorensen, Tr. 155-56, 249-51).

104. Each respondent in the Consumer Perception Study was shown to a table on which were stacked three Lamarle cartons, arranged so that the three different sides of the Lamarle carton faced

the respondent. A complete set of the Lamarle containers were placed to the left of the three Lamarle cartons. (CX 130, pp. 8-9, Exh. F).

105. Dr. Sorensen did not include a Lamarle banner (pictured in CPX 53) in the display used for the Consumer Perception Study because he was not certain whether the banner was present at all of the Lamarle displays and he did not want the presence of the banner to bias the results of the study. (Sorensen, Tr. 156-57, 251-52).

106. The Lamarle product is shown out of the Lamarle box in two of the photographs of Lamarle displays that Dr. Sorensen reviewed in designing the product display for the Consumer Perception Survey. (CPX 52-1; CPX 52-2). The Lamarle product is not shown to be out of the Lamarle box in the other two photographs of Lamarle displays that Dr. Sorensen reviewed in designing the product display for the Consumer Perception Survey. (CPX 52-3; CPX 52-4; Sorensen, Tr. 250).

107. Potential survey respondents, once intercepted, were carefully screened to assure that they fell within the appropriate universe, i.e., women over 21 who are users of plastic food storage containers. (Sorensen, Tr. 167; CX 130, pp. 16-17).

108. Once a survey respondent passed through the screening, the interviewer followed a standardized interview procedure designed by Dr. Sorensen. (Sorensen, Tr. 167-69; CX 130, pp. 8-11).

109. The survey respondent was taken to the display table on which were arrayed packages of the Lamarle containers and the containers themselves. (Sorensen, Tr. 167, CX 130, p. 8).

110. The survey respondent was handed a box of containers and told to read what was on the sides and top. (Sorensen, Tr. 167; CX 130, p. 9).

111. The survey respondent was then asked the various questions contained in the questionnaire. (Sorensen, Tr. 169; CX 130, pp. 9-11).

112. The completed questionnaires were validated to insure that the surveys had actually been taken. (Sorensen, Tr. 162-63; CX 130, pp. 12-13, Exh. D).

113. The completed questionnaires were coded in order to quantify the various responses. (Sorensen, Tr. 173-74; CX 130, p. 13).

114. Eighty of the 503 respondents in the Consumer Perception Study answered "Lamarle," 14 answered "Rubbermaid" and 9 answered either a "French" or Taiwanese" company, when asked the question "who or what company do you believe makes or sells this set of plastic food storage containers?" (CX 130, Table 1).

115. One hundred twenty-one of the 503 respondents in the Consumer Perception Survey answered "Tupperware" or "Tupperware Co.," 7 answered "maybe Tupperware" and 9 answered "appearance makes me believe its Tupperware," when asked the question "who or what company do you believe makes or sells this set of plastic food storage containers?" (CX 130, Table 1).

116. The 121 respondents who answered "Tupperware" or "Tupperware Co." to the question "who do you believe makes or sells this set of plastic food storage containers," responded as follows to the question "Why do you say that Tupperware makes this":

Response	Number of Responses
It looks like Tupperware	40
General Appearance, e.g., style, quality	31
Lids/Sealers: Same Type/Design	29
Specific features, e.g., stackability, shape, colors, with circles	28
Lids/Sealers: Airtight/Can be "burped"	18
I own things just like it	17
Interchangeable with Tupperware	14
It says so on the package/box/lid	10
They are the only ones I am familiar with	6
They make plastics/ this kind of product	3
It says it's not Tupperware/it isn't Tupperware	1
They wouldn't be allowed to use the name Tupperware on the box	1

(CX 130, Table 1).

117. The Consumer Perception Survey determined that consumers of plastic food storage containers, when viewing the Lamarle package and containers as they are generally displayed for sale, are confused as to the source of the Lamarle product. (Sorensen, Tr. 180; CX 130, pp. 19-20).

118. Based solely on the tabulation of the questionnaire codes, 30.2% of the respondents confused the source of the Lamarle brand with TUPPERWARE. (CX 130, p. 34; Sorensen, Tr. 231-32).

119. Based on a review of each of the 503 completed questionnaires, Dr. Sorensen concluded that 127 of the respondents (25.7%) represented confused individuals who identified TUPPERWARE as the source of the Lamarle product. (Sorensen, Tr. 182-87, 232-34; CX 156).

120. The survey respondents' confusion results from their perceptions of the entire display of Lamarle--the package; the printing on the package including references to TUPPERWARE; the TUPPERWARE designations given to the containers (HANDOLIER, WONDERLIER and CLASSIC SHEER); the disclaimer concerning TUPPERWARE; and the appearance and characteristics of the Lamarle containers. (Sorensen, Tr. 180). A substantial number of survey respondents either picked up the Lamarle package or specifically referred to printed references to TUPPERWARE on the package. Thus, the Lamarle package represents one important source of the survey respondents' confusion. (CPX 132).

121. In contrast to the 127 respondents who identified TUPPERWARE as the source of the Lamarle goods, based upon the questionnaire codes, only 94 respondents (18.7%) gave an answer suggesting Lamarle as the brand or source of the goods. (Sorensen, Tr. 236-37; CX 130, pp. 20, 24).

122. The repeated references to TUPPERWARE on the package compelled the survey respondents not to answer Lamarle when viewing a package and containers where the name Lamarle was prominently displayed. (Sorensen, Tr. 180-82, 214-15, 244-46, 251-52, 285-89).

123. Although other factors may have contributed to the confusion expressed by survey respondents, the repeated references to TUPPERWARE contribute significantly to the level of confusion between the Lamarle package

and containers with TUPPERWARE by survey respondents. (Sorensen, Tr. 180-82, 214-15, 244-46, 251-52, 285-89; CPX 132C).

3. Actual Confusion Among Consumers

124. Ms. Brenda Damron of Virginia Beach, Virginia, testified that a hostess at one of her parties presented the Lamarle bowls and requested Ms. Damron to try a TUPPERWARE seal on a Lamarle bowl and fill it with water. When the combination leaked the hostess urged Ms. Damron to replace the Lamarle bowl with a TUPPERWARE bowl, free of charge, because she believed that the Lamarle goods were covered by the TUPPERWARE warranty. (Damron, CX 38, pp. 5-10).

125. Ms. Kimberly Donaldson encountered a guest at a TUPPERWARE party who cancelled $42.00 of a previously placed order after seeing Respondents' goods and reading the representation on the box that the goods were "Interchangeable with TUPPERWARE." (Donaldson, CX 39, pp. 5-7).

126. Ms. Jeannette Poole heard an announcement over the public address system at a Winn-Dixie store in Opelousas, Louisiana that "TUPPERWARE is now being sold in front of the store at half-price." Upon investigation, she found that the announcement referred to a display of Lamarle plastic food storage containers which she thought might be manufactured by a French affiliate of TUPPERWARE. (Poole, CX 40, pp. 6-11).

127. Ms. Linda Bryan of Berwick, Louisiana received a telephone call from a potential customer who wanted Ms. Bryan to replace a damaged Lamarle lid with a TUPPERWARE seal, free of charge, because she believed from the writing on the Lamarle box that the products were covered by the TUPPERWARE warranty. (Bryan, CX 41, pp. 6-7).

128. Ms. Barbara Johnson of Fresno, California was confronted at a party with an extremely disruptive guest who repeatedly insisted loudly that she just bought TUPPERWARE, referring to Respondents' goods, at a Safeway supermarket for less than Ms. Johnson was offering it. (Johnson, CX 42, pp. 6-11).

129. As a result of the disruption, Ms. Johnson's sales were lower than those she ordinarily would have for a party the size of the one in question. (Johnson, CX 42, pp. 11-12).

130. Ms. Deborah Worthley of San Jose, California encountered a guest at a party who said she could purchase TUPPERWARE at a store; the guest concluded this from seeing a box of plastic food storage containers, at the store, with TUPPERWARE printed on the box. (Worthley, CX 43, p. 5).

131. Ms. Jackie Horan of San Jose, California had a guest seek to return a cracked Lamarle lid to her, seeking free replacement because the box containing it said TUPPERWARE on it and so the guest "assumed it was a sister company" of TUPPERWARE. (Horan, CX 44, pp. 4-5).

132. Ms. Horan also noted that the confusion caused by the Lamarle product has hurt her sales. (Horan, CX 44, pp. 7-8).

133. Ms. Marsha Rogerts of Redding, California has encountered a few customers who were confused as to the source of the Lamarle goods. (Ms. Rogers, CX 45, pp. 4-8).

134. Ms. Rogers observed a customer in a Pay 'n Save store who, upon seeing the Lamarle display, exclaimed "Oh wow. Look, they are selling TUPPERWARE in the stores now." (M. Rogers, CX 45, p. 4).

135. A guest at one of Ms. Rogers' parties sought to return a defective Lamarle lid for replacement under the TUPPERWARE warranty because she had read in the advertisement for the containers that they were "Interchangeable with TUPPERWARE" and she "assumed it was part of TUPPERWARE." (M. Rogers, CX 45, p. 5).

136. The presence of this confusion has had a negative effect on Ms. Rogers' sales. (M. Rogers, CX 45, pp. 8-9).

137. Ms. Cathy Rankin of Concord, California, encountered a party guest who told her that she purchased the Lamarle products because "she saw the word TUPPERWARE on the box so she figured they were connected with TUPPERWARE." (Rankin, CX 46, pp. 5-6).

138. Taken together, the testimony of the witnesses to the actual confusion and the survey evidence show that the entire picture presented by respondents -- the use of the TUPPERWARE name and other trademarks on a box of look-alike plastic food storage containers -- is engendering confusion as to the source of those goods and is likely to cause further confusion by causing consumers to conclude that the goods originate with complainant or an affiliate of complainant. (Findings 92-137).

139. Respondents have admitted directly copying the TUPPERWARE products at issue -- the WONDERLIER bowls, HANDOLIER beverage server and CLASSIC SHEER canisters. (CX 118, p. 4).

140. Respondents chose to produce their knock-offs in the same family of colors as are used for the TUPPERWARE products. (Compare CPX 102-04 and CPX 109-11 with CPX 135-42).

141. Respondents originally had planned to market, under the name "Scanda," knock-off food storage containers in white or in shades similar to those used by TUPPERWARE prior to TUPPERWARE's changeover to the new Wonder Colors. (S. Rogers, CX 47, pp. 14-16; CX 116-7; CX 50, p. 3).

142. Thus, upon noting that TUPPERWARE was changing to a new color scheme, respondents chose to change their products to the same family of colors. (Findings 139-141).

143. The Lamarle box shows only two of the three bowls sold inside, the yellow and cranberry ones -- colors that are included in the TUPPERWARE set. (Compare CPX 101 with CPX 102-04, and with CPX 135-41).

144. The beverage server displayed on the Lamarle box is not a Lamarle beverage server, which has a wheat colored lid; rather, it is a TUPPERWARE HANDOLIER beverage server, which has a clear seal, as pictured. (Compare CPX 101-08 and CPX 115, and with CPX 133 and CPX 134).

VI. IMPORTATION AND SALE

145. In August 1983, respondent Jui Feng admitted having produced units for export to the United States and that units were in transit to the United States. (CX 120-15, p. 4).

146. Respondent Lei has admitted having sold between 160,000 and 180,000 units in the United States in November and December of 1982. (CX 50, p. 2; CX 54, p. 4; S. Rogers, CX 47, p. 13).

147. Evidence in the record indicates that, between December 1982 and July 1983, in excess of 270,000 units were exported from Taiwan to the United States. (CX 117-3).

VII. DOMESTIC INDUSTRY

148. The eight Tupperware containers involved in this investigation are manufactured at Tupperware plants in Jerome, Idaho; North Smithfield, Rhode Island; Hemingway, South Carolina; and Halls, Tennessee. (CX 94, Exh. B).

149. Complainant estimates that for the years 1980, 1981 and 1982, approximately man-years, man-years and man-years, respectively, of personnel and time have been expended in the manufacture and sale of the Tupperware plastic food containers involved in this investigation. (CX 24, Exh. B).

150. Complainant operates a metal mold and dye casting facility, TUPCO, where the molds used in the manufacture of Tupperware products are designed and produced. (CX 94, Exh. B).

151. Complainant's Tupperware Home Parties division, located in Orlando, Florida, is the marketing, administrative and sales promotion headquarters for distribution of Tupperware products. (CX 94, Exh. B).

152. The seven Tupperware containers involved in this investigation are sold exclusively through independent Tupperware dealers who demonstrate the products at parties in the homes of customers. (CX 68, ¶ 3).

VIII. EFFICIENT AND ECONOMIC OPERATION OF THE DOMESTIC INDUSTRY

A. Manufacturing and Quality Control

153. Complainant manufactures and sells high quality plastic products which are dishwasher safe and have a lifetime warranty against chipping, cracking,

breaking or peeling under normal noncommercial use. (CX 74, pp. 2, 46; CPX 72-18, pp. 2, 35; Parker, CX 1, ¶2).

154. Complainant performs a variety of laboratory tests to insure product performance in accordance with the lifetime warranty and to assure dishwasher safety. (Parker, CX 1, ¶ 2, see generally CPX 2 and CPX 3).

155. All of complainant's round-seal products, including the affected products herein, are tested . (Parker, CX 1, ¶¶ 2, 8; CPX 2, p. 34674; CPX 3, p. 2).

156. Tests performed on finished products include

. (Parker, CX 1, ¶¶ 4, 15).

157.

. (Parker, CX 1, ¶ 5).

158.

. (Parker, CX 1, ¶¶ 5-12).

159.

(Parker, CX 1, 5).

160.

. (Parker, CX 1, ¶ 5).

161.

. (Parker, CX 1, ¶ 6, Tr. 91-92; CPX 2, p. 34672; CPX 3, p. 1).

162.

. (Parker, CX 1, ¶ 7, CPX 3, p. 1).

163.

. (Parker, CX 1, ¶ 8; CPX 2, p. 34674; CPX 3, p. 2).

164.

. (Parker, CX 1, ¶ 15; CPX 2, pp. 34728-29; CPX 3, p. 10).

165.

. (Parker, Tr. 90; CPX 2, pp. 34728-29).

166.

. (Parker, CX 1, ¶ 15; Broutman, Tr. 22, 63-64).

167.

. (Parker,

CX 1, ¶¶ 13-23; Tr. 73-80).

168.

. (Parker,

CX 1, ¶ 16; Tr. 75; CPX 2, pp. 34711-14; CPX 3, p. 7-11).

169.

. (Parker, CX 1, ¶ 18; Tr. 78).

170.

. (Parker, CX 1, ¶ 23; Tr. 79-80).

171.

. (Parker, CX 1, ¶ 23, Tr. 79-80).

172.

. (Parker, CX 1, ¶ 23).

173.

. (Parker, CX 1, ¶¶ 17, 19-22).

174\. . (Parker, CX 1, ¶ 32; Tr. 71-72).

175\. . (Parker, CX 1, ¶ 32; Tr. 71-72).

176\. . (Parker, Tr. 72; CX 94, p. 9).

177\. . (Parker, CX 1, ¶¶ 34-37; Tr. 81-83, 85-86).

178\. . (Parker, Tr. 83).

179\. . (Parker, Tr. 83-84).

180\. . (Parker, CX 1, ¶¶ 38-39; Tr. 86).

181\. . (Parker, CX 1, ¶ 39).

182. In the opinion of Dr. Broutman, a professor and consultant in the field of materials science and engineering who has visited injection molding plants throughout the world, Tupperware's manufacturing and test facilities in Rhode Island are among the most advanced injection molding facilities in the world, in terms of automation and computerization. Dr. Broutman also concluded, based upon his visit to Tupperware's facilities, that the level of quality control exercised at the machines used for production of Tupperware containers is considerably greater than that normally encountered in similar operations of other companies. (Broutman, Tr. 15-17).

B. Marketing and Advertising

183. Complainant's products, including the affected products, are sold exclusively by independent Tupperware sales-people ("dealers") who demonstrate the products at parties held in the homes of customers. (Linn, CX 68, ¶ 3).

184. There are approximately 100,000 dealers in the United States holding approximately 100,000 parties per week, attended by approximately customers. (Linn, CX 68, ¶ 3).

185. TUPPERWARE parties are generally attended by women between the ages of eighteen and forty-nine who have two or more children. (Linn, CX 68, ¶ 3).

186. The woman who attends a TUPPERWARE party is the same person who is responsible for food purchases and does the grocery shopping for her family. (Linn, CX 68, ¶ 3).

187. Attendance at a TUPPERWARE party allows the customer to learn about the product and its uses in a personalized setting. (Linn, CX 68, ¶ 5; CX 68A).

188. All of complainant's sales, since at least 1950, have been made under the terms "TUPPERWARE Party," "TUPPERWARE Home Party" or "TUPPERWARE Home Parties," and have been made at parties. (CX 93, p. 5).

189. The word-of-mouth advertising that results from the home party method is complainant's most important means of communicating its sales message to consumers. (Linn, CX 68, ¶ 7).

190. In addition, complainant utilizes print advertising in magazines, catalog promotions, television and radio advertising to get its message to consumers. (Linn, CX 68, ¶¶ 8-9; CX 69-87; CPX 89).

191. Since 1978, complainant has spent the following amounts to advertise and promote its TUPPERWARE, WONDERLIER, HANDOLIER, and CLASSIC SHEER trademarks:

Year	Expenditures
1983 (through June)	
1982	
1981	
1980	
1979	

(CX 91, interrog. 26).

192. Also heavily emphasized in its advertising is the superior quality of complainant's products and the importance of the TUPPERWARE name as the indicator of TUPPERWARE quality. (Linn, CX 68, ¶ 11).

193. Complainant's promotional efforts also feature the TUPPERWARE lifetime warranty against breaking, chipping, cracking and peeling. (Linn, CX 68, ¶ 12).

194. Complainant's WONDERLIER bowls have consistently been among its top-selling products over the past thirty years. (Linn, CX 68, ¶ 13).

195. The CLASSIC SHEER canister set has also been featured frequently in advertising over the years. (Linn, CX 68, ¶ 13).

196. Both the CLASSIC SHEER canister set and the WONDERLIER bowl set are included in the sample kit given to new dealers at the start of their careers; the kit is used for product demonstrations at their initial parties. (Linn, CX 68, ¶ 13).

C. Introduction of the Wonder Colors

197. In mid-1981, complainant developed new contemporary colors for a number of products, including WONDERLIER bowls. (Linn, CX 68, ¶ 16).

198. Between December 28, 1981 and February 6, 1982, complainant released a set of the WONDERLIER bowls in the new colors as a promotion and sold nearly sets. (Linn, CX 68, ¶ 16; CX 77; CX 81; CX 153).

199. As a result of the success of that promotion, complainant proceeded to introduce the new colors on a variety of its products. (Linn, CX 68, ¶ 16).

200. On January 31, 1983, complainant introduced into its regular line of products the new WONDERLIER bowls in the new colors. (Linn, CX 68, ¶ 16; CX 86).

IX. INJURY

201. Advertisements for Lamarle containers stating that Lamarle containers are "interchangeable with Tupperware at almost half the price" have

appeared across the United States. (CX 166-2; 116-9 through 116-13; 116-19; 116-20; 116-23; 116-24; 116-26; 116-30 through 116-34; 116-40; 116-43; 116-56; 116-60; 116-64; 116-80).

202. A guest at a Tupperware party held by Kimberly Donaldson, a Tupperware manager who resides in Norfolk, Virginia, cancelled $42 of an order for Tupperware products because she had seen a product at the store that said "interchangeable with Tupperware" and, therefore, she could not see spending over $40.00 for Tupperware products that were supposed to be just as good as Tupperware for about $10.00. (Donaldson, CX 39, pp. 5-7).

203. A guest at a Tupperware party held by Deborah Worthley, a Tupperware dealer who resides in San Jose, California, stated that she had seen a box with the word "Tupperware" on it at the store and therefore, she did not have to attend a Tupperware party because she could buy Tupperware products in the stores. (Worthley, CX 43, p. 5).

204. A guest at a party held by Jackie Horan, a Tupperware dealer who resides in San Jose, California, stated that she had bought the Lamarle product because the box said Tupperware and she thought Lamarle was a sister company of Tupperware and Tupperware would honor the guarantee. (Horan, CX 44, pp. 4-5). Several guests at Tupperware parties have told Ms. Horan that "people don't have to go to a Tupperware party now" because they can buy Tupperware or a product just like Tupperware in the stores. (Horan, CX 44, pp. 7-9, 13-14).

205. A guest at a party held by Marsha Rogers, a Tupperware dealer who resides in Red Bluff, California, cancelled an order after another guest at the

party requested that Ms. Rogers replace a cracked seal from a container that was on sale at Pay'n Save for less than Tupperware and was advertised as "interchangeable" with Tupperware. Three other guests at the party that had begun to fill out Tupperware order forms, folded up their forms and said they were going to Pay'n Save to see what was available there. (M. Rogers, CX 45, pp. 5-6, 8-9).

206. A guest at a Tupperware party told Cathy Rankin, a Tupperware dealer who resides in Concord, California, that she had wanted to purchase Tupperware bowls, and when she saw the word "TUPPERWARE" on a box in a store, she thought the product was connected with Tupperware and purchased it. (Rankin, CX 46, pp. 5-6).

207. During the first nine months of 1982, estimated sales to customers of the HANDOLIER beverage server totalled . During the first nine months of 1983, estimated sales to customers of the HANDOLIER beverage server totalled only . (CX 94, Exh. D, pp. 5-6).

208. During the first nine months of 1982 estimated sales to customers of the three-piece CLASSIC SHEER canister set totalled . During the first nine months of 1983, estimated sales to customers of the three-piece CLASSIC SHEER canister set totalled only . (CX 92, Exh. D, pp. 5-6).

209. During the first nine months of 1982 estimated sales to customers of the small three-piece WONDERLIER bowl set totalled . The record does not specifically reveal total sales of the large three-piece WONDERLIER set during this period. During the first nine months of 1983 estimated sales to customers of the new four-piece WONDERLIER bowl set, adjusted to a three-piece basis, totalled . (CX 92, pp. 5-6; CX 94). The four-piece WONDERLIER bowl set replaced both the small three-piece and

large three-piece WONDERLIER bowl sets in 1983. (Bradburn, Tr. 301-03; 305-06).

210. The year-to-year percentage change in dollar sales (based upon the first nine months of sales for each year) from 1979 through 1983 of the indicated Tupperware products is as follows:

Product	1979 to 1980	1980 to 1981	1981 to 1982	1982 to 1983
HANDOLIER beverage server				
CLASSIC SHEER canister set				
WONDERLIER bowls				

The figures for the WONDERLIER bowls reflect

. (CX 152, ¶¶ 4, 5; Bradburn, Tr. 301-04, 307).

211. Mr. Bradburn, a Project Planning Analyst for Tupperware Home Parties, who monitors product sales, testified that the HANDOLIER beverage server, CLASSIC SHEER canister set and WONDERLIER bowls experienced

declines between 1979 and 1983. Mr. Bradburn believed the

for the CLASSIC SHEER canister set and HANDOLIER beverage server between 1979 and 1983 is similar to the for these items during these years. (Bradburn, Tr. 316). There was little change in the of the CLASSIC SHEER canister set

and HANDOLIER beverage server between 1982 and 1983. (Bradburn, Tr. 315-16). Since the for the WONDERLIER bowls was in 1983 than in 1982, as a result of the replacement of the small and large sets with the new four-piece set, the for WONDERLIER bowls between the first nine months of 1982 and 1983 would be somewhat greater than the for WONDERLIER bowls during this period. (Bradburn, Tr. 317-18).

212. Mr. Bradburn testified that when the small and large WONDERLIER bowls were replaced by the new four-piece WONDERLIER bowl set, Tupperware believed that

. (Bradburn, Tr. 305-06).

213. The year-to-year percent change in the average dollar sales of all products in the Tupperware line (based upon total product sales for the first nine months of each year) from 1979 through 1983 is as follows:

	1979 to 1980	1980 to 1981	1981 to 1982	1982 to 1983
Average of 11 Tupperware products				

(CX 1152, ¶ 6; Bradburn, Tr. 309).

214. The only factor common to these three products, and not common to other products in complainant's line, was the presence in the market-

place of the Lamarle goods. (Linn, Tr. 328-30; Bradburn, CX 152, ¶10, Bradburn, Tr. 310-14).

215. Indeed, in California, the first geographic area to be exposed to the Lamarle products, packaging and advertising, the sales decline suffered by complainant, with respect to the affected products, was even steeper. (Bradburn, CX 152, ¶ 8).

216. Thus, an appreciable portion of the sales decline suffered by complainant, with respect to the affected products, must be attributed to the presence of the Lamarle products, packaging and advertising in the marketplace. (Bradburn, CX 152, ¶10).

217. Mr. Bradburn testified that in his opinion, the sales decline experienced by WONDERLIER bowls in 1983 would have been if Tupperware had not

. (Bradburn, Tr. 314-15; CX 152, ¶ 10).

218. Jack Linn, Vice President of Advertising and Public Relations for Tupperware Home Parties since 1981, testified that during the past year or so he has received calls regarding the Lamarle product from Tupperware distributors who expressed concern that there might be some other way of selling Tupperware products under another name. (Linn, Tr. 331-32). Mr. Linn testified that apart from information regarding the Lamarle product, he had not received information during 1982 or 1983 indicating that any other product in the marketplace was having a negative impact upon sales of the

WONDERLIER bowls, HANDOLIER beverage server or CLASSIC SHEER canisters. (Linn, Tr. 328-29).

219. In March 1983, respondent Lei explained to , that the promotion of Lamarle at the low price of $9.99 presents serious competition for Tupperware. Respondent Lei also noted that comparable pieces of Tupperware were selling for $19.87. (CX 54, p. 4).

220. During 1983, Safeway stores promoted and sold the Lamarle set of containers for $9.99. (CX 50, p. 1; CX 54, pp. 3-4; CX 56, p. 3).

221. Since November 1982, the Lamarle product has been offered for sale at $9.99 in stores throughout the United States, including Sampson's in Maine, IGA and Kings in Pennsylvania, Wegman Foods in New York, Foodland in West Virginia and Pennsylvania, Stop & Save in Vermont, Dick's Finer Foods and Spaldings Market in Indiana, and Pay'n Save in California. (CX 116-4; 116-16; 116-19; 116-24; 116-26; 116-31; 116-37; 116-39; 116-52; 116-66; 116-67).

222. The wholesale price of a set of the Lamarle product purchased from International Sources is $7.50. (CX 50, p. 3; CX 127, p. 7).

223. Respondent Jui Feng has 17 new projection machines which are used to manufacture Lamarle products in Taiwan. Jui Feng's production lines are in operation 24 hours a day. Jui Feng has the capacity to readily adjust its manufacturing ability to meet market demand. (CX 117-1, p. 10911).

224. The Lamarle sets of plastic food storage containers imported into the United States are already packaged and ready for distribution to retail outlets in the United States. (S. Rogers, CX 47, p. 40; CX 117-1, p. 10909; CX 117-6).

225. Materials circulated by Griffith in May, 1983 to its stockholders regarding Griffith's proposed acquisition of 40% of respondents Lamarle, Inc. and Lamarle, Ltd. identified the retail marketplace in the United States as the target market for Lamarle plastic containers. (CX 127, p. 7).

OPINION

I. INTRODUCTION

This investigation concerns the importation into and sale in the United States by respondents of certain plastic food storage containers, the marketing of which is alleged by complainant to infringe four of its federally registered trademarks, and to constitute false advertising, false designation of origin, and passing off, in violation of section 43(a) of the Lanham Act. 15 U.S.C. §1125(a). It is further alleged that the activities of respondents have caused substantial injury or have the tendency to substantially injure an efficiently and economically operated domestic industry. Although certain respondents participated in the early stages of this investigation, all respondents have since been found to be in default, and the evidentiary hearing in this matter was conducted without the participation of any respondents. (See Procedural History, supra; Findings 1-3, 20-26).

Complainant's products in issue in this investigation include, currently, a four-piece bowl set marketed under the trademark WONDERLIER, a three-piece canister set marketed under the trademark CLASSIC SHEER, and a beverage server marketed under the trademark HANDOLIER. (Findings 27, 31). Each of these trademarks, as well as the trademark TUPPERWARE, is federally registered with the United States Patent and Trademark Office. In addition, all of the foregoing trademarks, with the exception of CLASSIC SHEER have become incontestable in accordance with the requirements of 15 U.S.C. §1065.

The actions of respondents which gave rise to this investigation consist of the importation and sale of plastic food storage containers which are close copies of the appearance of complainant's WONDERLIER, CLASSIC SHEER and HANDOLIER products in a package which displays numerous, prominent references

to the foregoing Tupperware trademarks, and proclaims the interchangeability of respondents' Lamarle products with the comparable Tupperware items. In addition to this packaging, advertisements and point-of-sale displays promote Lamarle with the slogan "Why Go To A Tupperware Party." (Findings 28-30, 51-56).

Complainant objects to this allegedly unfair method of competition on the basis that it is likely to cause, and in fact already has caused, confusion among consumers as to the source and origin of the Lamarle containers. In addition, complainant asserts that, since the appearance of respondents' products on the United States market, the effect or tendency of these allegedly unfair acts has been to destroy or substantially injure the relevant domestic industry.

In view of respondents' willful default in this investigation, sanctions have been imposed precluding them from coming forward with evidence contrary to complainant's secondary evidence. See, e.g., Sealed Air Corp. v. U.S. International Trade Commission, 209 U.S.P.Q. 469 (C.C.P.A. 1981). Nevertheless, complainant is required to bear the burden of establishing a prima facie case on all issues to support a finding of violation of Section 337. Certain Electric Slow Cookers, Inv. No. 337-TA-42, Commission Opinion in Support of Orders Terminating Certain Respondents, Declaring This Matter More Complicated and Remanding This Matters for Further Proceedings (March 15, 1979).

II. RESPONDENTS' UNFAIR ACTS AND METHODS OF COMPETITION

Complainant maintains that respondents' representation on their product packaging that Lamarle products are "interchangeable" with Tupperware products constitutes false representation and false advertising in violation of Section 43(a) of the Lanham Act. 15 U.S.C. §1125(a). Complainant also contends that respondents' use of complainant's federally registered trademarks, both on respondents' packaging, and in advertising by respondents and their retailers has caused, or is likely to cause, confusion as to the source of respondents' product, thus constituting trademark infringement and false designation of source violative of Sections 32(1) and 43(a) of the Lanham Act. 15 U.S.C. §§1114(1), 1125(a). Furthermore, it is alleged that respondents, by their use of complainants trademarks in conjunction with a line of look-alike imitations of complainant's products, have passed off their product, and caused their product to be passed off, as that of complainant.

The Commission staff essentially concurs with the foregoing contentions of complainant, with the exception that the staff limits its basis for support of these allegations to instances of actual confusion introduced into evidence. Staff specifically rejects complainant's "Consumer Perception Survey" as evidence of the likelihood of buyer confusion. However, the Commission staff supports the contention that respondents are passing off their products as those of complainant.

A. Trademark Infringement and False Designation of Source

1. Likelihood of Confusion

Likelihood of buyer confusion is the basic test of federal statutory

trademark infringement and false designation of source. 15 U.S.C. §§1114(1), 1125(a); Safeway Stores, Inc. v. Safeway Properties, Inc., 134 U.S.P.Q. 467 (2d Cir. 1962); 2 McCarthy, Trademarks and Unfair Competition §23.1 (1973).

Since August 1956, the trademark TUPPERWARE has been federally registered for goods and services seven times. Each of the Tupperware registrations is in full force and effect and has become incontestable under Section 15 of the Lanham Act. 15 U.S.C. §1065. (Findings 35, 36). Similarly, the trademarks WONDERLIER and HANDOLIER, both of which are used in conjunction with specific Tupperware plastic food storage containers, have also been federally registered and are incontestable under Section 15 of the Lanham Act. (Findings 38, 39). The trademark CLASSIC SHEER has been used for various Tupperware plastic goods since 1979. Although the CLASSIC SHEER trademark has been federally registered, it has not yet qualified for incontestability. (Finding 40). None of the foregoing trademarks has become generic. (Findings 85-91).

Complainant maintains that respondents' repeated references to each of these federally registered Tupperware trademarks on packaging and in advertising for Lamarle plastic food storage containers are likely to cause and have, in fact, caused confusion about the sponsorship or affiliation of Tupperware with Lamarle containers. Therefore, complainant contends that respondents' references to TUPPERWARE, WONDERLIER, CLASSIC SHEER and HANDOLIER constitute trademark infringement under Section 32(a)(1) of the Lanham Act, and a false designation of source under Section 43(a) of the Lanham Act. Complainant introduced into evidence instances of actual consumer confusion and a "Consumer Perception Survey" in order to establish likelihood of confusion.

Instances of Actual Confusion

Although evidence of actual confusion is not necessary to relief, where such evidence does exist it is persuasive, if not irrefutable, on the issue of likelihood of confusion. See Time Mechanisms, Inc. v. Qonaar Corp., 194 U.S.P.Q. 500 (D.N.J. 1976); Union Carbide Corp. v. Ever-Ready, Inc., 188 U.S.P.Q. 623, 638-39 (7th Cir. 1976); World Carpets, Inc. v. Dick Littrell's New World Carpets, 168 U.S.P.Q. 609 (5th Cir. 1971). There exists considerable evidence of record that customers were actually confused as to the source of respondents' food storage containers. Three Tupperware dealers testified that they have been approached by individuals who requested that they replace a damaged Lamarle lid with a new Tupperware seal. (Findings 124, 127, 131). In two of these instances, the person seeking to replace the Lamarle seal explained that she believed Tupperware guaranteed the Lamarle product or that Lamarle was in some way affiliated with Tupperware because of the reference to Tupperware on the Lamarle package. (Findings 127, 131). In the third instance, the person seeking a Tupperware replacement for a Lamarle lid explained that, based upon the advertisements she saw regarding Lamarle's interchangeability with Tupperware, she believed that Lamarle was part of Tupperware and that Tupperware guaranteed the Lamarle product. (Finding 124). Another Tupperware dealer stated that a guest at a Tupperware party explained that when she saw the reference to "Tupperware" while shopping at a local store, she purchased the Lamarle product in the belief that it was "connected with Tupperware." (Finding 126). Similarly, a fifth dealer indicated that a guest at a party stated that she could now purchase Tupperware in stores because she had seen a box with the word Tupperware on it in the store. (Finding 130).

Courts have found a likelihood of confusion where the proven instances of actual confusion are very few. See, e.g., Jellibeans, Inc. v. Skating

Clubs of Georgia, 716 F.2d 833, 845 (11th Cir. 1983) (three witnesses testified to actual confusion); Safeway Stores, Inc. v. Safeway Discount Drugs, Inc., 216 U.S.P.Q. 599, 604 (11th Cir. 1982) (two instances of actual confusion); Roto-Rooter Corp. v. O'Neil, 186 U.S.P.Q. 73, 74-75 (5th Cir. 1975) (four persons actually confused established likelihood of confusion); Grotian, Helfferich, Schulz v. Steinway & Sons, 186 U.S.P.Q. 436, 443-44 (2d Cir. 1975) (finding of confusion based upon evidence of only one dealer's erroneous characterization of his piano as a Steinway in conjunction with evidence that other dealers invited association between Steinway and their pianos in their advertisements and an erroneous telephone directory listing); National Van Lines v. Dean, 111 U.S.P.Q. 165, 168 (9th Cir. 1956) (finding of confusion based upon six instances of actual confusion). Proof of even a few examples of actual confusion is particularly probative of the likelihood of confusion when the items involved, as in the instant case, are relatively low-priced. This is so because purchasers of low-priced items may have little incentive to bring their confusion to the attention of manufacturers or distributors of the affected goods. RJR Foods, Inc. v. White Rock Corp., 201 U.S.P.Q. 578, 582 (S.D.N.Y. 1978), aff'd 203 U.S.P.Q. 401 (2d Cir. 1979); Union Carbide Corp. v. Ever-Ready Inc., 188 U.S.P.Q. at 638-39.

Based on the foregoing instances of actual buyer confusion as to the source of respondents' food storage containers, I find that there exists a likelihood of confusion as to the source of respondents products.

The Consumer Perception Survey

Complainant's second evidentiary basis to establish likelihood of confusion under Sections 32(1) and 43(a) of the Lanham Act is a "Consumer Perception Survey" conducted by Dr. Robert Sorensen. The Commission staff

rejects this survey as being of little probative valve on the issue of likelihood of confusion.

Courts have repeatedly held that properly conducted surveys are persuasive evidence of likelihood of confusion. See, e.g., James Burroughs Ltd. v. Sign of Beefeater, Inc., 192 U.S.P.Q. 555, 564-65 (7th Cir. 1976); Union Carbide v. Ever-Ready, Inc., 188 U.S.P.Q. at 640-41; Grotian Helfferich, Schulz v. Steinway & Sons, 186 U.S.P.Q. at 444; Scotch Whiskey Ass'n v. Consolidated Distilled Products, Inc., 210 U.S.P.Q. 639, 642-43 (N.D. Ill. 1981). As one court has stated: "Survey evidence is particularly useful since evidence of actual confusion is quite difficult to find." RJR Foods, Inc. v. White Rock Corp., 201 U.S.P.Q. at 581, fn.8.

The Commission staff contends that the Consumer Perception Survey fails to prove that survey respondents who identified TUPPERWARE as the source of the Lamarle product were substantially confused by the use of the TUPPERWARE trademarks on the Lamarle package. (Staff Post-Hearing Brief, pp. 19-21). Specifically, the staff suggests that the look-alike characteristics of the Lamarle product appear to have strongly influenced the TUPPERWARE identifications and that the survey should have focused on the package, rather than also allowing reference to the product. Additionally, the staff criticizes the format of the survey on the basis that the survey evokes guesses and that TUPPERWARE's high brand awareness caused respondents to guess that TUPPERWARE was the source of the Lamarle product.

The specific survey question with which the staff takes issue is question 2(a), which states "Who or what company do you believe makes or sells this set of plastic food storage containers?" In support of this position, the staff cites a commentator who posits that questions such as "Who do you think makes

this product?" may lead to guessing, since the question suggests that someone must have made the product. (Staff Posthearing Brief, p. 20, fn. 1).[1/]

Courts have affirmatively endorsed questions of this type as nonleading and open-ended. For example, in James Burroughs Ltd. v. Sign of the Beef-eater, Inc., 192 U.S.P.Q. at 564-65, the Court specifically approved the question "who do you believe is sponsoring or promoting this restaurant?" with the statement that the "questions, upon which the results [of the survey] are based do not appear slanted or leading." In Union Carbide Corp. v. Ever-Ready, Inc., 188 U.S.Q.P. at 640, surveys containing the questions "who do you think puts out the lamp here?" and "who do you think puts out these mini-bulbs?" were sustained. Similarly, in Wuv's International, Inc. v. Love's Enterprises, Inc., 208 U.S.P.Q. 736, 755 (D. Colo. 1980), the survey question: "4. What company or person do you believe owns or operates this restaurant?" was approved with the following remarks:

> "Question 4 is a valid, open-ended question which seeks to elicit 'top of the mind' beliefs about ownership and operation of 'WUV'S' restaurants.... Question No. 4 does not suggest or imply a relationship between WUV's restaurants and other parties which may not exist. Ownership and operation of business establishments is a fact of commercial life; the interrogatory merely requests the respondent's position as to that fact."

See also Scotch Whiskey Assn. v. Consolidated Distilled Products Inc., 210 U.S.P.Q. at 641-43 (approving "where do you think this liquor comes from?").

Even if the question at issue had not been repeatedly endorsed by the courts, the staff's premise that TUPPERWARE's high brand awareness caused people to "guess" TUPPERWARE is not fully supported by the evidence contained in the Consumer Perception Survey. Tupperware is recognized as a brand name by 84.7 percent of consumers. (Finding 86). Following staff's

1/ Significantly, this commentator recognized that this problem, which he perceived, has not been noted by the courts when considering such questions. 73 Trade-mark Rep. at 419.

premise, a question which provoked guessing would have provided few responses of "don't know" and would be expected to yield a high incidence of TUPPERWARE identification, given its high brand awareness. In fact, almost half of the respondents answered "don't know," and about 25 percent of the respondents to the Consumer Perception Survey identified TUPPERWARE in response to the question at issue. (CX 130, p. 24).[2/]

The staff's theory that the Consumer Perception Survey evoked guesses also is premised partially on the absence of the statement "this is not a test" at the beginning of the survey. As Dr. Sorénsen explained, a statement referring to a test is employed only in those situations where the survey structure itself may imply that the respondents are being tested or where a respondent reacts in a manner indicating that she believes a test is being conducted. In all other circumstances, Dr. Sorensen believes, it is preferable that the word "testing" not be mentioned in order to avoid suggesting a test and provoking guesses. (Sorensen, Tr. 226-29). Consistent with this view, during the Consumer Perception Survey the interviewers were required to state that the survey was not a test only if the respondent appeared to believe she was being tested. (Sorensen, Tr. 226-29).

Dr. Sorensen's credible and uncontroverted testimony, together with the fact that, despite TUPPERWARE's high brand awareness, only about 25 percent of the respondents identified TUPPERWARE, while almost half responded "don't know," lead me to find that the survey respondents did not guess in response to the challenged question, and that respondents did not view the Consumer Perception Survey as a test.

2/ Notably, only six respondents stated that they identified TUPPERWARE because it was the only brand with which they were familiar. (CX 130, Table 1).

The Consumer Perception Survey was conducted with a display in which both Lamarle containers and boxes of the containers were visible. Dr. Sorensen indicated that he chose the display format because a typical exhibition would show the boxes themselves as well as the product out of the box. (Sorensen, Tr. 156). He did not separate product and package in structuring his survey because he believed that would have run counter to the manner in which the Lamarle product was generally displayed. (Finding 103).

The staff criticizes the survey display based on reasoning which appears to be inconsistent. If, as the Staff's first criticism suggests, the survey display had separated package and containers, it would have been at variance with normal marketing conditions, as retailers generally do not display and market products totally divorced from their packaging. Yet, implicit in Staff's second criticism of the survey display is a recognition that a survey display should simulate market conditions, with the implication that Dr. Sorensen's survey did not.

The survey display, in which both the Lamarle containers and the package are visible, while not strictly conforming to actual point of sale displays, does approximate the conditions in the market place. (Finding 106). In any retail store where the Lamarle containers are not displayed outside the box, they are clearly visible on the box itself. (See CX 15). More significantly, it is reasonable to assume, and record evidence indicates, that a consumer would view the containers in making a purchasing decision. (Bryan, CX 41, pp. 5-6). The product and packaging were displayed separately in the survey because interviewers were expressly instructed not to allow respondents to open the Lamarle boxes, as the boxes were deemed difficult to close and would

have become damaged or worn.[3/] (CX 130, Exh. A, p. 3).

Based on the staff's foregoing critique of the Survey's methodology, the staff challenges the findings of the survey as failing to isolate the impact of the TUPPERWARE marks from that of the look-alike characteristics of the Lamarle containers. This challenge is based upon the survey respondents' references to the physical characteristics of the Lamarle products in identifying them as Tupperware products.

The staff suggests that a "control" survey in which respondents are exposed only to the Lamarle containers, would be necessary to identify the percentage of respondents whose confusion arose from the use of complainant's marks on the box rather than from the physical characteristics of the products. This suggestion presupposes that the confusion figure obtained in the control survey could simply be subtracted from that obtained in the Consumer Perception Survey to yield a net figure reflective of confusion based on respondents' use of complainant's marks on the packaging.

This presumption that the confusion engendered by the styling of the goods and the confusion engendered by the presence of complainaint's trademarks are mutually exclusive is not supported by the evidence. Dr. Sorensen, in uncontroverted testimony, concluded that:

> "The reason for this confusion apparently lies in respondents' perceptions of the entire display of Lamarle: the package, the printing on top of the package which includes references to TUPPERWARE

3/ Dr. Sorensen was concerned about securing unbiased responses to the survey. Therefore, the survey display did not include a large bright yellow banner featuring the TUPPERWARE trademark in large type. (CX 94-4). Although the banner was provided by the respondents to retailers and, in fact, was used in some retail displays, Dr. Sorensen refused to use it in the display based on his belief that such use would result in a substantially higher confusion rate. (Finding 105).

> and the designations given certain TUPPERWARE containers, the demurrer concerning TUPPERWARE, and the appearance and characteristics of the Lamarle plastic food storage containers themselves. (Sorensen, Tr. 180).

In reaching this conclusion, Dr. Sorensen noted that:

> "... perception, intangible as it is, is a complex process whereby people make what psychologists and scholars of consumer behavior refer to as 'gestalt perception.' They view the ingredients, the characteristics of the particular object in question as a whole and reach a conclusion." (Sorensen, Tr. 213).

Based on the record evidence, the Consumer Perception Survey alone does demonstrate confusion attributable to the use of the TUPPERWARE trademarks. Each survey respondent was instructed to read the tops and sides of the Lamarle box. (CX 130, Exh. B). In addition, a number of the respondents cited by staff counsel as identifying the products as Tupperware because of their look-alike characteristics or because of Tupperware brand awareness picked up the box and inspected it more closely while being surveyed. (CPX 132). This fact supports Dr. Sorensen's opinion that such answers, and the confusion of respondents, were the result of the total perception of respondents of the entire display, including the writing on the boxes.

Under normal circumstances, the purpose of a brand name, such as Lamarle, is to advise the public about the source of the goods. Upon being asked who or what company makes the goods, a substantial majority of the survey respondents would be expected to read back the brand name, in this case Lamarle. (Sorensen, Tr. 180-82, 244-46, 285-89). In fact, only about 18.7 percent specifically identified Lamarle. (Finding 121). It is clear from the results of the survey that the references to TUPPERWARE influenced the respondents who failed to identify Lamarle. Some remained uncertain when presented with conflicting and confusing evidence as to the source of the products and responded "don't know." (CX 130, p. 24). Yet, some 25.7 percent were convinced that Tupperware was the source and identified Tupperware. (Finding 119).

Dr. Sorensen explained respondents' reference to physical features of the product as resulting from their observation of the box, which referred to TUPPERWARE six times but also bore the name Lamarle and stated "this is not a Tupperware product." Due to these conflicting messages on the box, Dr. Sorensen explained, many respondents attempted to articulate a logical reason for their Tupperware identification. Thus, certain respondents referred to the fact that the containers resembled Tupperware in one respect or another. (Findings 122, 123).

Staff's criticisms of the Consumer Perception Survey's methodology and accuracy are not persuasive. No alternative or additional surveys were offered into evidence, nor was any countervailing evidence in the form of expert testimony offered into evidence. Such speculative attacks on survey evidence are commonly given no weight. For example, in U-Haul International Inc. v. Jartran, Inc., 212 U.S.P.Q. 49, 60-61 (D. Ariz. 1981), aff'd 216 U.S.P.Q. 49 (9th Cir. 1982), the court rejected numerous criticisms of a survey made both by opposing counsel and by an expert, where those criticisms were unsupported by contrary surveys. In discussing the criticisms, the court noted the ease with which virtually any survey can be criticized. Similarly, in National Football League v. Wichita Falls Sportswear, 532 F. Supp. 651, 657-58 (W.D. Wash. 1982), the court dismissed the defendant's efforts to challenge the plaintiff's survey, where as here, the results were essentially uncontroverted and no opposing surveys were offered.

In finding confusion, courts have relied upon surveys which demonstrated rates of confusion well below or in the order of those established by the present survey. See, e.g., James Burroughs Ltd. v. Sign of the Beefeater, Inc., 192 U.S.P.Q. at 565 (15 percent is evidence of likelihood of confusion); RJR Foods, Inc. v. White Rock Corp., 201 U.S.P.Q. at 581 (15 to 20 percent rate of confusion), See also Union Carbide Corp. v. Ever-Ready, Inc., 188 U.S.P.Q. at 641:

> We note these percentages are substantially higher than those held sufficient in other cases to support in part an inference that confusion is likely. Jockey International, Inc. v. Burkard, [185 U.S.P.Q. 201 (S.D. Calif. 1975)] (11.4%); Seven-Up Company v. Green Mill Beverage Co., 191 F. Supp. 32 (N.D. Ill. 1961), (25%); Humble Oil & Refining Co. v. American Oil Co., 259 F. Supp. (E.D. Mo. 1966), (18%); Simoniz Co. v. Stupmier, 117 U.S.P.Q. 130 (E.D. Ill. 1957), (18%, 24%).

In Grotian, Helfferich, Schulz v. Steinway & Sons, 180 U.S.P.Q. 506 (S.D.N.Y. 1973), the survey simply showed that persons believed there was an affiliation between plaintiff and defendant. In one survey, the results showed that 7.7 percent perceived a connection between the businesses, and 8.5 percent confused the names. The court found these percentages "strong evidence of the likelihood of confusion." Id. at 513. In the case of McDonough Power Equipment, Inc. v. Weed Eater, Inc., 208 U.S.P.Q. 676, 685 (T.T.A.B. 1981), it was found that an 11 percent recognition factor served "to support rather than negate a likelihood of confusion."

In the present case, two disclaimers, reading "this is not a TUPPERWARE product," appear in small type on the Lamarle boxes. These small type disclaimers are substantially outweighed by the other, significantly more prominent references to TUPPERWARE and the double references to HANDOLIER, WONDERLIER and CLASSIC SHEER. Cf. Cuisinarts, Inc. v. Robot-Coupe International Corp., 213 U.S.P.Q. 551, 558 (S.D.N.Y. 1981) (small-type footnote is insufficient to cure several misleading impressions which arise out of the prominent headline).

Courts have long recognized that a disclaimer may be ineffective to dissipate consumer confusion regarding the relationship between goods from different sources. See, e.g., Boston Pro Hockey Ass'n v. Dallas Cap & Emblem Mfg. Inc. 185 U.S.P.Q. 364,

370 (5th Cir. 1975) ("the unfair competition cannot, however, be rendered fair by the disclaimer . . ."); Edgar Rice Burroughs, Inc. v. Manns Theaters, 195 U.S.P.Q. 159, 162 (C.D. Cal. 1976) ("addition of a disclaimer by the defendants to the effect that it is in no way connected with plaintiff will not prevent a finding of likelihood of confusion"). See also Reliance Electric Co. v. Canova, 180 U.S.P.Q. 483, 485 (C.D. Cal. 1973); Volkswagenwerk A.G. v. Karadizian, 170 U.S.P.Q. 565, 567 (C.D. Cal. 1971); Phillips v. The Governor & Co. 27 U.S.P.Q. 229 (9th Cir. 1935); and Esso, Inc. v. Standard Oil Co., 38 U.S.P.Q. 295, 300-01 (8th Cir. 1938).

In this case, the instances of actual confusion and the survey results substantiate these courts' belief that a disclaimer may not obviate confusion arising from use of another's mark. Respondents' repeated use of TUPPERWARE, HANDOLIER, WONDERLIER, and CLASSIC SHEER suggests an association between Complainant and Lamarle; the suggestion is not vitiated by the disclaimer.

Accordingly, I find that the Consumer Perception Survey and actual instances of consumer confusion discussed above, both together and independently, establish, by a preponderance of the evidence, a likelihood of confusion and constitute trademark infringement and false designation of source in violation of Sections 32(1) and 43(a) of the Lanham Act, thereby representing unfair acts and methods of competition under Section 337.

B. False Advertising

Complainant's cause of action with respect to false advertising is based on Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), which allows a suit to be brought "by any person who believes that he is or is likely to be damaged by the use of any false description or representation." Thus, a cause of action exists under this statute when competitors make false statements comparing their goods to those of another competitor. In Skil Corp. v. Rockwell International Corp., 183 U.S.P.Q. 157 (N.D. Ill. 1974), the Court made clear that it was the intent of Congress in enacting Section 43(a) to "allow a private suit by a competitor to stop the kind of unfair competition that consists of lying about goods or services when it occurs in interstate commerce." Id. at 162.

It is alleged by complainant that respondents' representation that Lamarle products are "interchangeable" with Tupperware products constitutes a false representation and false advertising. Specifically, complainant asserts that Lamarle lids and containers are inferior to and do not perform as well as Tupperware products in several salient respects. Complainant also contends that because respondents' representation is literally false, relief may be granted "without reference to the reaction of the buyer or consumer of the product." American Brands, Inc. v. Reynolds Co., 413 F. Supp. 1352, 1356-57 (S.D.N.Y. 1976).

The purpose of the Lanham Act's prohibition of the use of a "false designation or representation" is to "insure truthfulness in advertising and to eliminate misrepresentations with reference to the inherent quality or characteristics of another's product." Coca Cola Co. v. Tropicana Products, Inc., 216 U.S.P.Q. 272, 276 (2d Cir. 1982). In the instant case, respondents

have admitted that they chose to refer to complainant's trademarks

(Findings 60, 61). Moreover, in a letter addressed to the Secretary of the Commission, counsel for various respondents herein asserted that the term "interchangeable," as used by respondents, should be defined in accordance with the definition set forth in Webster's Third New International Dictionary, i.e., as "mutual substitution without loss of function or suitability." (CX 119). In effect, respondents have admitted that their assertion of interchangeability constitutes a representation that Lamarle lids and containers exhibit characteristics and properties equivalent to those of Tupperware products and that Lamarle lids and containers may be substituted for Tupperware lids and containers without loss of function. The record evidence indicates that these representations made by respondents are literally false. (Findings 71, 79).

Tests conducted by complainant's expert, Dr. Lawrence Broutman, establish that the performance and quality of Lamarle lids and containers are clearly inferior to that of Tupperware lids and containers in several significant respects.[4/] (Findings 58-71). Specifically, based upon a series of

4/ Courts have relied upon scientific tests conducted by independent experts as proof of the falsity of representations that one product possesses characteristics or qualities equal to that of another. See, e.g., Sherrel Perfumes, Inc. v. Revlon, Inc., 205 U.S.P.Q. 250 (S.D.N.Y. 1980) (enjoining advertisements declaring defendent's copy cat fragrances to be "equivalent" to plaintiffs original fragrances on the basis of organoleptic and chromatographic tests and defendant's own laboratory comparisons); Chanel, Inc. v. Smith, 178 U.S.P.Q. 630 (N.D. Cal. 1973), aff'd, 528 F.2d 194 (9th Cir. 1976) (enjoining defendant from advertising that its fragrance "duplicated 100% perfect the exact scent of plaintiff's perfume" on the basis of chromatographic analysis).

laboratory tests on the Lamarle products in issue and corresponding Tupperware products, Dr. Broutman, an expert in the areas of materials science and engineering, concluded that:

(1) Lamarle products are clearly inferior to corresponding Tupperware products in terms of water seal quality, both before and after dishwashing on the top and bottom racks, and unlike Tupperware seals, Lamarle seals experience substantial warpage after dishwashing, which causes the sealing function to deteriorate; (Findings 68-71).

(2) Tupperware seals are substantially more resistant to stress cracking than Lamarle seals, and thus, Tupperware seals would have a longer life span than Lamarle seals; (Findings 64, 65).

(3) With the exception of one type of bowl, Tupperware products were more impact resistant than Lamarle products and Lamarle products would not survive forseeable impacts during common household use; (Findings 66, 67).

Dr. Broutman also found that when Lamarle and Tupperware containers were subjected to a

, 20 out of 35 Lamarle containers

, while only 5 out of 35 Tupperware containers . (Broutman, Tr. 47-49, CX 25, p. 6-7, 24-31). On the basis of his comparative laboratory tests, Dr. Broutman concluded that Lamarle containers and seals were inferior to and not interchangeable with Tupperware containers. (Finding 63).

Dr. Broutman's conclusion is reinforced by comparative testing conducted by Mr. Jeffrey Parker, Tupperware's laboratory manager at its Quality Control International laboratory. Mr. Parker's testing of Lamarle and corresponding Tupperware products encompassed "routine product performance quality control tests used by Tupperware." (Finding 73). Mr. Parker found the Lamarle products to be inferior to corresponding Tupperware products with respect to

. (Findings 74-77).

Significantly, although respondents claim that their products are "interchangeable" with the corresponding Tupperware products, they have conceded, in response to staff interrogatories, that they have

for the or

. (SX 2, interrog. 5; SX 7, interrog. 5; SX 8, interrog. 5; SX 9, interrog. 5).

Based on the record evidence, I find that respondents' representation that Lamarle products are "interchangeable" with Tupperware products constitutes false advertising in violation of Section 43(a) of the Lanham Act, and an unfair act under Section 337. This finding derives from the unrebutted objective tests which reveal that Lamarle and Tupperware products do not exhibit equivalent characteristics and qualities and are not mutually substitutable without loss of function." (Findings 60, 79). Indeed, the performance, and hence, the quality, of Lamarle products is consistently inferior to that of Tupperware products. When viewed in this context, it is clear that respondents' representation of interchange-

ability is literally false. (Finding 63). See Coco Cola Co. v. Tropicana Products Inc., 216 U.S.P.Q. at 275; American Brands, Inc. v. Reynolds Co., 413 F. Supp. at 1356-57.

C. Passing Off

Commission precedent clearly indicates that the essential element in establishing the unfair act of passing off is that respondent "is engaged in an intentional act that leads the customer to believe he is buying the goods of another." Certain Cube Puzzles, Inv. No. 337-TA-112, ID at 25, 219 U.S.P.Q. 322, 333 (1982) (Cube Puzzles). See also, Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137 at 58 (1984); (Staple Guns); Certain Braiding Machines, Inv. No. 337-TA-130, ID at 79-80 (1983); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, RD at 64 (1982); (Vacuum Bottles); Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 at 3, 215 U.S.P.Q. 965 (1981) (Stoves).

Complainant contends that by intentionally copying the external design of Tupperware products, and repeatedly stating on the packaging and in advertising that Lamarle lids and containers are "interchangeable with Tupperware," respondents have not only infringed complainant's registered trademarks, falsely represented the source of the Lamarle products and engaged in false advertising, but they have also committed the unfair act of passing off. In support of this contention, complainant stresses that consumers actually have been confused and deceived into believing that Lamarle is associated in some way with Tupperware and have purchased Lamarle goods on the basis of this misconception. (Findings 124-144). The Commission staff agrees that the evidence of record supports a finding of passing off.

Based on the record evidence, it is clear that respondents intentionally copied the appearance of popular items in the Tupperware line. (Finding 47; CPX 10-15, 135-150; SX 1-2). The colors and sizes of the Lamarle canisters and beverage server are the same as those of their Tupperware counterparts. Moreover, it is evident that respondents changed the color of the bowls in the Lamarle container set in response to Tupperware's introduction and promotion of new contemporary "warm" colors for its WONDERLIER bowls. These new warm colors were introduced in connection with Tupperware's WONDERLIER bowl line in early 1982, and then, following promotions throughout 1982, incorporated into the new Tupperware four-piece WONDERLIER bowl set in January 1983. (Bradburn, Tr. 302-04).

Respondents did not use the new "warm" colors in an earlier version of the Lamarle product, bearing the name "Scanda," which was displayed at a trade show in April 1982, several months prior to the trial introduction of the Lamarle container set in late 1982. (CX 116-117). The original "Scanda" bowls were pastel in color, similar to the pre-1983 line of WONDERLIER bowls. Thus, it appears that respondents altered their product design to incorporate Tupperware's recently introduced warm WONDERLIER colors, and possibly to capitalize upon the Tupperware promotions that supported the introduction of the new WONDERLIER bowls. (CX 47, pp. 14-16, 39-40).

The simulation of each feature of complainant's product by respondents, including the adoption of a family of colors quite similar to complainant's color combination, is indicative of respondents' intent to pass their products off as those of complainant. In two cases where, unlike the instant case, there was no use of the plaintiff's trademark on defendant's goods, such similarity was found to be decisive on the issue of intention to deceive.

See Teledyne Industries, Inc. v. Windmere Products, Inc., 195 U.S.P.Q. 354, 376-77 (S.D. Fla. 1977); Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc., 205 U.S.P.Q. 297 (2d Cir. 1980). In Perfect Fit, the court noted that "as there was intentional copying, the second comer will be presumed to have intended to create a confusing similarity of appearance and will be presumed to have succeeded." Id. at 301. There is no question in the instant case but that the respondents have, by their intentional copying of the configuration of complainant's product, together with the misleading use of complainant's trademarks, successfully created confusion in the marketplace. In the instant case, customers are being deceived "into thinking they are getting a high quality product when in fact they are buying an inferior Taiwanese" set of plastic food storage containers. See Stoves, supra, 215 U.S.P.Q. at 970.

Having copied the external appearance of the Tupperware containers, respondents then packaged their Lamarle products in boxes that display large color photos of Lamarle's look-alike products, with the exception of the beverage server, which appears to be a Tupperware HANDOLIER beverage server. (CPX 97, 98, 101). Faced with a box picturing products which appear to be Tupperware products, which refers to the name TUPPERWARE six times, and which has line drawings of respondents' bowls and canisters and the Tupperware HANDOLIER beverage server directly above complainant's trademarks WONDERLIER, CLASSIC SHEER, and HANDOLIER, it is not suprising that consumers have been and are likely to be deceived into believing that the Lamarle products are sponsored by or in some way connected with Tupperware.[5/] In Cube Puzzles, the Commission noted that, where a respondent sold products identical to the complainant's,

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5/ Respondents also placed line drawings on the top of the Lamarle box that purportedly depict interchangeable Tupperware items. However, the drawings outline the vertical striping that appears on Lamarle, but not on Tupperware items. (Finding 54). Thus, if a consumer were to compare these purported drawings of Tupperware items with corresponding Lamarle items, it certainly would appear that both products utilized transparent striping when in fact, genuine Tupperware products have no such striping.

the use of complainant's trademark or name in respondent's sales and advertising "indicates intent by these respondents to aid retailers in passing off" their products as those of the trademark owner. 219 U.S.P.Q. at 334.

Respondents have not limited their references to the alleged "interchangeability" of Lamarle products with Tupperware to the Lamarle package. Rather, respondents' large point-of-sale displays and advertisements, prominently featuring interchangeability with Tupperware products, have provided motivation and opportunity for retailers, such as the Winn-Dixie store in Opelousas, Lousiana, to announce to customers that "TUPPERWARE is now being sold at the front of the store on sale for half price." (Finding 126). As the court stated in Polo Fashions, Inc. v. Extra Spec Prods. Inc., 200 U.S.P.Q. 161, 168-69 (S.D.N.Y 1978), where there has been an instance of palming off, nothing else is needed to establish a cause of action for unfair competition. Since respondents are the instigators, and thus are responsible for these instances of palming off by their distributors, they bear responsibility for such unfair competition. Stix Products, Inc. v. United Merchants & Manufacturers, Inc., 154 U.S.P.Q. 477 (S.D.N.Y. 1968).

In addition to the repeated linkage of Lamarle containers with TUPPERWARE, respondents have also promoted their products in advertisements in various parts of the United States with the question "why go to a Tupperware Party?" (Finding 56). Indeed, respondents' basic method of promotion and marketing Lamarle has been by suggesting that one can now buy containers that are in some underlying way associated with Tupperware in retail stores at about half the normal price. As stated by the court in Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 211 U.S.P.Q. 154, 160 (S.D.N.Y. 1980), "[c]onfusion may also take the more subtle but no less

significant form of an association of the alleged infringer's mark with plaintiff's, through which the new product gains an unfair economic advantage."

The only inference which can reasonably be drawn from respondents' conduct is that respondents intended wrongfully to obtain "some advantage from the goodwill, good name, and good trade" associated with the Tupperware marks. See Fleishmann Distilling Corp. v. Maier Brewing Company, 136 U.S.P.Q. 508, 516 (9th Cir.1963), cert. denied, 374 U.S. 830 (1963); National Van Lines Inc. v. Dean, 111 U.S.P.Q. 165, 169-70 (9th Cir. 1956); Menley & Jones Laboratory v. Approved Pharmary. Co., 195 U.S.P.Q. 766, 770-71 (N.D.N.Y. 1977); Mortellito v. Nina of California, Inc., 173 U.S.P.Q. 346, 350 (S.D.N.Y. 1972). That respondents have successfully obtained this advantage is reflected in evidence of record with respect to the actual confusion caused by respondents' actions. (Findings 124-138).

In conclusion, I find that respondents have passed off their product, and caused their product to be passed off, as that of complainants. These actions in which respondents have engaged represent unfair acts and methods of competition within the meaning of Section 337.

III. IMPORTATION AND SALE

The record evidence establishes that the accused Lamarle containers and packaging are manufactured in Taiwan by Jui Feng, exported by Famous and imported into and sold in the United States by Lamarle, Inc. (Findings 7, 11, 13-15). Between December 1982 and July 1983, at least 270,000 units were imported into the United States. As of August 1983, Jui Feng indicated that units had been produced for export, and that units were in transit to the United States. (Findings 145, 147). From November to December 1982, Lamarle sold between 160,000 and 180,000 units of the accused product in the United States. (Finding 146).

IV. DOMESTIC INDUSTRY

When the unfair acts or methods of competition alleged under Section 337 are based on the infringement of trademark rights, the Commission has customarily defined the domestic industry to consist of the domestic operations of the complainant devoted to exploitation of the trademark rights at issue which are the target of the unfair acts or practices. Staple Guns, supra; Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-87, 214 U.S.P.Q. 217 (1981) (Games I); Stoves, supra.

In the present investigation, the registered trademarks at issue are complainaint's TUPPERWARE, WONDERLIER, HANDOLIER and CLASSIC SHEER marks. Complainant's TUPPERWARE mark is applied to its entire product line. However, the products affected by respondents' unfair acts consist of complainaint's WONDERLIER bowl set, CLASSIC SHEER canister set and HANDOLIER beverage server. (Findings 27, 31). Each of these seven products is manufactured at four Tupperware manufacturing plants in the United States, and distributed exclusively through complainant's Tupperware Home Party division. (Findings 148-152).

Thus, the domestic industry in this investigation consists of complainant's domestic operations devoted to the design, manufacture, distribution and sale of complainant's WONDERLIER bowls, CLASSIC SHEER canisters and HANDOLIER beverage server under the TUPPERWARE trademark.

V. EFFICIENT AND ECONOMIC OPERATION

In order to prevail under Section 337, complainant must establish that the relevant domestic industry is efficiently and economically operated. At the preliminary conference in this investigation, respondents' stipulated that complainant's domestic operations are efficient and economic. (Preliminary Conf. Tr. 68-69, August 16, 1983). Nevertheless, there is considerable evidence on this record to establish this issue conclusively in favor of complainant.

The traditional guidelines set forth by the Commission to assess efficient and economic operation include the use of modern equipment and facilities, effective quality control programs, profitability of the relevant product line, and substantial expenditures in advertising and promotion and development of consumer good will. Staple Guns, supra; Vacuum Bottles, supra; Certain Coin-Operated Audio Visual Games and Components Thereof, 337-TA-105, 216 U.S.P.Q. 1106 (1982) (Games II); Stoves, supra. An evaluation of the record evidence on this issue gives complainant high marks on each of the foregoing criteria.

Complainant's manufacturing facilities utilize state-of-the-art injection moulding equipment which is automated and computerized to the maximum extent possible, consistent with the maintenance of high quality standards. In the manufacturing process, complainant conducts quality control tests at

. (Findings 153-181). In the opinion of complainant's independent quality control expert, Tupperware's manufacturing and quality control facilities are at the leading edge in terms of modern technology, and exhibit a higher level of quality control than that normally encountered in comparable facilities. (Finding 182).

Since 1980, each of complainant's WONDERLIER, CLASSIC SHEER and HANDOLIER sets has been consistently profitable in terms of overall sales. (Findings 207-209). In 1983, the two three-piece WONDERLIER bowl sets were replaced by one four-piece WONDERLIER bowl set. (Findings 197-200, 209). The impact of this change on sales of this product, as well as complainant's trend of sales since the appearance of the accused imported goods on the market will be considered in Injury, _infra_. Nevertheless, from 1980-1982, sales of the products in issue generally increased, and each product line was consistently profitable. (Finding 210).

During at least the past several years, complainant has expended considerable amounts in advertising Tupperware products. These advertisements are directed primarily to women between the ages of 18 and 49 years, and appear on television, especially on day time soap operas and game shows, and late night programs, on specific radio programs, and in such magazines as _Better Homes and Gardens_, _McCalls_, _Redbook_, _Family Circle_, _Glamour_, and _Working Mother_. (Findings 190-191). Other important forms of advertising are through product catalogs and promotional literature distributed at parties, and by word of mouth from satisfied customers. In promoting its products, it is complainant's philosophy that marketing by the party plan allows personal demonstration of the full range of a product's features and uses, which promotes sales and results in greater customer satisfaction.

Tupperware advertising also emphasizes the high quality of the product and the lifetime warranty against breaking, chipping, cracking and peeling. (Findings 185-189, 192-193).

Tupperware advertising generally features its best selling products. Over the years, the WONDERLIER bowl set has been among the top selling items, and frequently figures prominently in Tupperware advertising. In addition, the CLASSIC SHEER canister set and WONDERLIER bowl set are part of the sample demonstration Opportunity Kit given to new dealers at the beginning of their careers. (Findings 194-196). The Tupperware Home Party sales plan has a nationwide network of approximately 100,000 Tupperware dealers who hold about 100,000 parties per week which reach approximately customers. (Findings 183, 184).

For the foregoing reasons, I find that the domestic industry is efficiently and economically operated.

VI. INJURY

An essential component in an action under Section 337 is proof that the unfair acts and practices have the effect or tendency to destroy or substantially injure the economically and efficiently operated domestic industry. This element requires proof separate and independent from proof of an unfair act. Further, complainant must establish a causal connection between the injury suffered and the unfair acts of respondents. Spring Assemblies and Components Thereof and Methods for Their Manufacture, Inv. No. 337-TA-88, at 43-44 (1981). (Spring Assemblies).

A. Substantial Injury

Relevant indicia of injury include lost customers, declining sales, volume of imports, underselling, and decreased production and profitability. Certain Drill Point Screws for Drywall Construction, Inv. No. 337-TA-116, at 18 (1982); Spring Assemblies, supra, at 42-49; Certain Flexible Foam Sandals, Inv. No. 337-TA-47, RD at 4 (1979); Certain Roller Units, Inv. No. 337-TA-44, at 10 (1979); Reclosable Plastic Bags, Inv. No. 337-TA-22, at 14 (1977).

The Lamarle seven-piece set of containers first appeared in retail outlets in California in late 1982, and beginning in 1983, both the product and advertisements appeared in numerous locations around the United States. (Findings 41-43, 143-147, 201, 215). This product is generally sold at locations such as Safeway, and other similar types of stores carrying related products. (Finding 220-221).

Since the time that Lamarle entered the United States market, complainant has received numerous reports from its distributors of customers cancelling,

reducing or not placing orders because they believed they could purchase an equivalent product at a lower price much more conveniently at a local grocery or department store. (Findings 202-206). The common theme to these reports of lost sales has been that these prospective customers believed that they would be purchasing either a Tupperware product or a product affiliated with Tupperware and would not have to attend a party. (Findings 202-206).

In studying the trend of sales of all Tupperware products and the products in issue, complainant has established that it has experienced significantly declining sales for at least the CLASSIC SHEER canisters and HANDOLIER beverage server. During the first nine months of 1983, the estimated dollar value of sales of these two products was more than lower than for the same period of 1982. (Findings 207, 208). This dramatic reduction in sales volume is particularly significant when compared to sales from 1979-1982, which, for each of the WONDERLIER, CLASSIC SHEER and HANDOLIER lines, generally reflected a rise in value. (Finding 210).

In 1982-1983, Tupperware products in general experienced a decline in volume of sales, in contrast to the growth in sales of the preceding two years. (Finding 213). The record indicates that from 1980-1982, sales of the CLASSIC SHEER, WONDERLIER and HANDOLIER lines increased by a percentage than the average increase of Tupperware's other products. By contrast, the decline in sales experienced by CLASSIC SHEER, HANDOLIER and WONDERLIER during 1982-1983 was of a significantly higher percentage than the general decline in Tupperware's other products. (Findings 210, 213). The Product Planning Analyst for Tupperware Home Parties was not aware of any significant factor in the marketplace, other than the entry of Lamarle, which would account for the disproportionate impact on the HANDOLIER,

WONDERLIER and CLASSIC SHEER lines, which are usually among Tupperware's top sellers. (Findings 214, 216, 218).

The impact of the importation of Lamarle containers on the WONDERLIER bowl set is more difficult to quantify, due to other marketing factors. Before 1983, Tupperware marketed both a small and a large three-piece WONDERLIER bowl set. In 1983, Tupperware introduced a new four-piece WONDERLIER bowl set to replace the earlier two sets. The introduction of this new set, in the new "warm" colors, was heavily promoted. (Findings 210-212). For this reason, as well as a concomitant increase in price, it is difficult to make a direct comparison between the sales volume of the new four-piece set and the previous two three-piece sets. The marketing personnel at Tupperware felt that the high level of promotion of the new WONDERLIER bowl set prevented the decline in sales from 1982-1983 from equalling that of the CLASSIC SHEER and HANDOLIER lines. (Finding 217). Regardless of the difficultly in specifying the unit or dollar decline in sales of the WONDERLIER bowls, it is still clear from the record that the decline was larger than the average for all Tupperware products, and appears to be related to the presence of the similar Lamarle product on the market. (Findings 210, 213-218).

To the extent that figures are available to indicate the level of respondents' importations into and sales in the United States, they appear to be significant. The record shows that from December 1982 through June 1983, Jui Feng had exported approximately 270,000 sets of Lamarle containers to International Sources in California. As of August 1983, Jui Feng had produced units for export. By the end of March 1983, about

180,000 sets of the Lamarle containers had been sold. (Findings 145-147). Although this volume of imports is significant, it is probable that the default of respondents in this investigation, and the resulting lack of complete information about their activities, creates an out-of-date and understated indication of their actual penetration of the United States market. (Findings 20-26).

As indicated by several prospective Tupperware customers who were inclined to purchase the Lamarle products, price is a significant factor in deciding which product to buy. The Lamarle set is offered for sale in retail outlets for a price of $9.99. The comparable Tupperware items would be sold at the price of $19.87. (Findings 219-222). Thus, many customers believe that they are purchasing Tupperware or its equivalent at about half the price.

The detriment to complainant caused by the presence of respondents' knock-off product on the market goes beyond the tangible and quantifiable elements of injury noted above. The accumulated evidence on this record establishes that Tupperware has a high brand awareness among American consumers, and that it expends a great deal of effort in producing a consistently high quality product and in cultivating satisfied customers. (Findings 80-91, 153-196). It appears that these factors were prominent in respondents' decision to copy Tupperware products. In view of the demonstrated inferior quality of a product that is confusingly similar to Tupperware, and the instances of dissatisfaction with Lamarle products by confused Tupperware customers, the overall impact of respondents' presence and marketing

scheme can only be detrimental to the intangible, but important, good will of the Tupperware name. See Games II, 216 U.S.P.Q. at 1112-13.

On the basis of the factors enumerated above, I find that the unfair acts and methods of competition by respondents have substantially injured the relevant domestic industry.

B. Tendency To Substantially Injure

When an assessment of the market in the presence of the accused imported product demonstrates relevant conditions or circumstances from which probable future injury can be inferred, a tendency to substantially injure the domestic industry has been shown. Certain Combination Locks, Inv. No. 337-TA-45, RD at 24 (1979). Relevant conditions or circumstances may include foreign cost advantage and production capacity, ability of the imported product to undersell complainant's product, or substantial manufacturing capacity combined with the intention to penetrate the United States market. Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110 (1982); Reclosable Plastic Bags, supra; Panty Hose, Tariff Commission Pub. No. 471 (1972). The legislative history of Section 337 indicates that "[w]here unfair methods and acts have resulted in conceivable loss of sales, a tendency to substantially injure such industry has been established." Trade Reform Act of 1973, Report of the House Comm. on Ways and Means, H. Rep. No. 93-571, 93d Cong., 1st Sess. at 78 (1973), citing In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). See also Bally/Midway Mfg. Co. v. U.S. International Trade Commission, 219 U.S.P.Q. 97, 102 (C.A.F.C. 1983).

The evidence on this record pertaining to respondents' activities demonstrate both the capacity and intent to penetrate the United States market. Respondent Jui Feng uses seventeen new projection-type injection molding machines to manufacture Lamarle products in Taiwan, and is capable of operating these machines twenty-four hours a day. Thus, the level of output can readily be adjusted to meet any increase in demand. (Finding 223). Although the Lamarle sets were originally available primarily in California, the marketing network has since extended nationwide. (Findings 201, 215, 221). Jui Feng manufactures both the containers and the packaging, so that the product apparently arrives in the United States immediately available for retail sale. (Findings 13, 224).

By an agreement entered into in July 1983 between Lamarle and Griffith Bros., Griffith invested over $1,000,000 in Lamarle and acquired a 40 percent interest in Lamarle with an option to purchase the remaining shares. When Griffith notified its shareholders of the proposed acquisition, it emphasized that the Lamarle product is a direct copy of Tupperware, and that an important element of Lamarle's promotional effort was the prominent copy on its packaging describing its interchangeability with Tupperware. (Findings 18, 19, 47, 225).

From the limited facts available concerning respondents' activities, it is clear that they are engaging in an intentional and concerted program to penetrate the United States market and capture a significant share of the market occupied by Tupperware. As indicated above, this effort has already had a detrimental effect on complainant's relevant operations. The evidence also shows that this injury is likely to continue into the future. Thus, I find that respondents' unfair acts and methods of competition have the tendency to substantially injure the domestic industry.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this investigation. 19 U.S.C. §1337.

2. The packaging of the Lamarle plastic food storage containers imported into and sold in the United States by respondents which refer to TUPPERWARE, WONDERLIER, CLASSIC SHEER and HANDOLIER infringes complainant's federally registered trademarks, in violation of §32(1)(a) of the Lanham Act. 15 U.S.C. §1114(1)(a).

3. Trademark infringement is an unfair act or method of competition under 19 U.S.C. §1337(a).

4. Respondents' marketing and sale of Lamarle plastic food storage containers in packaging which bears complainant's TUPPERWARE, WONDERLIER, CLASSIC SHEER and HANDOLIER federally registered trademarks consitutes false advertising and false designation of origin under §43(a) of the Lanham Act. 15 U.S.C. §1125(a).

5. False advertising and false designation of origin are unfair acts or methods of competition under 19 U.S.C. §1337(a).

6. Respondents have passed off their Lamarle plastic food storage containers as complainant's TUPPERWARE, WONDERLIER, CLASSIC SHEER and HANDOLIER plastic food storage containers.

7. Passing off is an unfair act or method of competition under 19 U.S.C. §1337(a).

8. The domestic industry consists of complainant's domestic operations devoted to the design, manufacture, distribution and sale of TUPPERWARE, WONDERLIER, CLASSIC SHEER and HANDOLIER plastic food storage containers.

9. The relevant domestic industry is efficiently and economically operated.

10. The relevant domestic industry is substantially injured and there is a tendency to substantially injure the domestic industry.

11. There is a violation of Section 337.

INITIAL DETERMINATION AND ORDER

Based on the foregoing findings of fact, conclusions of law, the opinion, and the record as a whole, and having considered all of the pleadings and arguments presented orally and in briefs, it is the Presiding Officer's DETERMINATION that there is a violation of Section 337 in the unauthorized importation into and sale in the United States of the accused plastic food storage containers.

The Presiding Officer hereby CERTIFIES to the Commission the Initial Determination, together with the record of the hearing in this investigation consisting of the following:

1. The transcript of the hearing, with appropriate corrections as may hereafter be ordered by the Presiding Officer; and further,

2. The Exhibits accepted into evidence in the course of the hearing as listed in the Appendix attached hereto.

The pleadings of the parties are not certified, since they are already in the Commission's possession, in accordance with the Commission's Rules of Practice and Procedure.

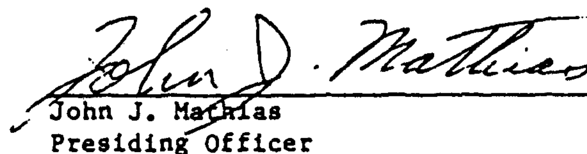
Further, it is ORDERED THAT:

1. In accordance with Rule 210.44(b), all material heretofore marked _in camera_ by reason of its status as business, financial and marketing data found by the Presiding Officer to be cognizable as confidential business

information under Rule 201.6(a) is to be given five-year in camera treatment from the date this investigation is terminated;

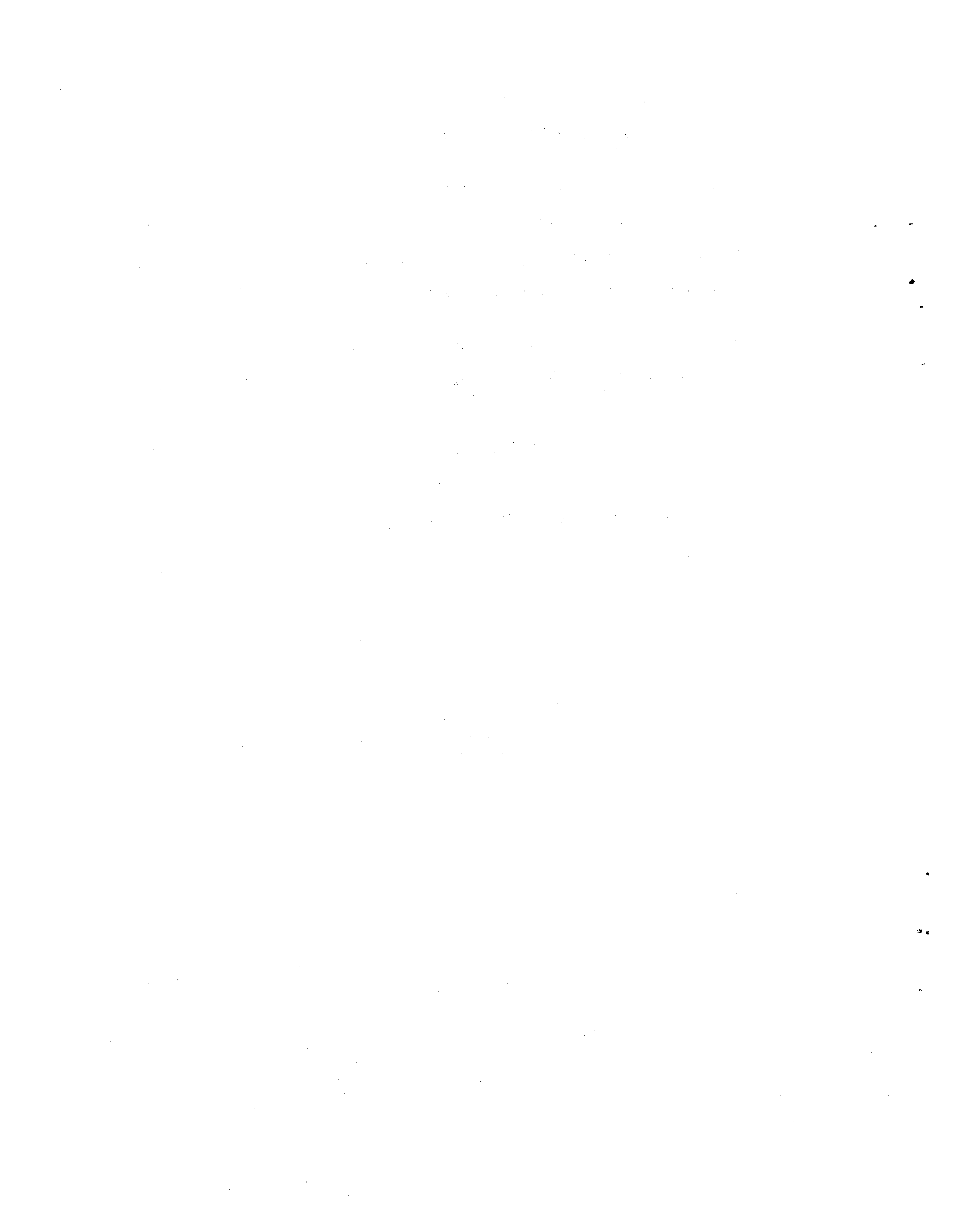
2. The Secretary shall serve a public version of this Initial Determination upon all parties of record and the confidential version upon counsel for complainant who is signatory to the protective order issued by the Presiding Officer in this investigation, and upon the Commission investigative attorney;

3. This Initial Determination shall become the determination of the Commission thirty (30) days after the service thereof, unless the Commission, within thirty (30) days after the date of filing of this Initial Determination shall have ordered review of the Initial Determination or certain issues therein pursuant to 19 C.F.R. 210.54(b) or 210.55 or by order shall have changed the effective date of the Initial Determination.



John J. Mathias
Presiding Officer

Issued: April 13, 1984



BEFORE THE
UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In The Matter Of: CERTAIN PLASTIC FOOD STORAGE CONTAINERS	Investigation No. 337-TA-152 Before John J. Mathias Administrative Law Judge

COMPLAINANT'S MASTER LIST OF EXHIBITS

Number	Description	Sponsor
CX-1-C	Witness Statement: Jeffrey Parker	Jeffrey Parker
CPX-2-C	Tupperware Quality Control Manual	Jeffrey Parker
CPX-3-C	Tupperware (updated) Quality Control Manual	Jeffrey Parker
CX-4-C	Weight Standard Chart	Jeffrey Parker
CX-5-C	Action Slips	Jeffrey Parker
CX-6-C	Color Concentrate Log Book Sample Page	Jeffrey Parker
CX-7-C	Opacity Test Report	Jeffrey Parker
CX-8-C	Masterbatch Setting Sheet	Jeffrey Parker
CX-9-C	Quality Control Lab Material Evaluation Report	Jeffrey Parker
CX-10-C	Potential Supplier's Guide	Jeffrey Parker
CX-11-C	Melt Flow Logbook Sample Page	Jeffrey Parker
CX-12-C	Notes of J. Parker Lamarle Test Observations	Jeffrey Parker
CPX-12A-C	J. Parker Test Photographs	Jeffrey Parker
CPX-13-C	Lamarle and Tupperware Color Chips	Jeffrey Parker
CX-14-C	Withdrawn	

Number	Description	Sponsor
CX-15-C	Scrap Reports	Jeffrey Parker
CX-16-C	INTERMETRICS System Sample Report	Jeffrey Parker
CX-17-C	Hold Production Slips	Jeffrey Parker
CX-18-C	Carton Drawings	Jeffrey Parker
CX-19-C	Quality Control Audit Report	Jeffrey Parker
CX-20	"Our World" Magazine February 1983	Jeffrey Parker
CX-21	Tupperware Catalog	Jeffrey Parker
CX-22-C	Quality Control Material Evaluation Form	Jeffrey Parker
CX-23	VITAE, Dr. L.J. Broutman	Dr. L.J. Broutman
CX-24-C	Detailed Work Plan	Dr. L.J. Broutman
CX-25-C	Test Report, L.J. Broutman & Associates, Ltd.	Dr. L.J. Broutman
CPX-25A-C	Broutman Test Photographs	Dr. L.J. Broutman
CX-26-C	Leak Testing Observation Notes	Dr. L.J. Broutman
CX-27-C	Seal Warpage Test Observation Notes	Dr. L.J. Broutman
CX-28-C	Environmental Stress Crack Resistance Test Observation Notes	Dr. L.J. Broutman
CX-29-C	Drop Weight Impact Test Handwritten Observation Notes - 75°F Test	Dr. L.J. Broutman
CX-30-C	Drop Weight Impact Test Results Computer Report - 75°F Test	Dr. L.J. Broutman
CX-31-C	Drop Weight Impact Test Observation Notes - 40°F Test	Dr. L.J. Broutman
CX-32-C	Drop Weight Impact Test Results Computer Report - 40°F Test	Dr. L.J. Broutman
CX-33-C	Drop Weight Impact Test Results Typed Summary	Dr. L.J. Broutman
CX-34-C	Probability Plot Graphs	Dr. L.J. Broutman
CX-35-C	Pneumatic Impact Test (Observation Notes)	Dr. L.J. Broutman

Number	Description	Sponsor
CPX-36	Photograph of Lamarle Carton	Dr. L.J. Broutman
CPX-37	Photograph of Tupperware Carton	Dr. L.J. Broutman
CX-38	Deposition of Brenda Damron	Waived
CX-39	Deposition of Kimberly Donaldson	Waived
CX-40	Deposition of Jeannette Poole	Waived
CX-41	Deposition of Linda Bryan	Waived
CX-42	Deposition of Barbara Johnson	Waived
CX-43	Deposition of Deborah Worthley	Waived
CX-44	Deposition of Jackie Horan	Waived
CX-45	Deposition of Marsha Rogers	Waived
CX-46	Deposition of Cathy Rankin	Waived
CX-47-C	Deposition of Stephanie Rogers	Waived
CX-48-C	Rogers 1/22/83 Report	S.J. Rogers
CX-49-C	Rogers 1/22/83 Report w/Handwritten Notes	S.J. Rogers
CX-50-C	Rogers 2/10/83 Report	S.J. Rogers
CX-51-C	Rogers 2/10/83 Report w/Handwritten Notes	S.J. Rogers
CPX-52	Photographs of Lamarle Displays	S.J. Rogers
CPX-53	Photograph of Lamarle Display	S.J. Rogers
CX-54-C	Rogers 3/30/83 Report	S.J. Rogers
CX-55-C	Rogers 3/30/83 Report w/Handwritten Notes	S.J. Rogers
CX-56-C	Rogers 6/19/83 Report	S.J. Rogers
CX-57-C	Rogers 6/19/83 Report w/Handwritten Notes	S.J. Rogers
CPX-58	Cassette Tape of KQED Auction of Lamarle Containers	S.J. Rogers
CX-58A	Transcript of CPX-58	S.J. Rogers

Number	Description	Sponsor
CX-59-C	Rogers 7/16/83 Report	S.J. Rogers
CX-60-C	Rogers 7/16/83 Report w/Handwritten Notes	S.J. Rogers
CPX-61	Photographs of MB Center	S.J. Rogers
CPX-62	Photographs of Country Club Centre Mall	S.J. Rogers
CPX-63	Photograph of International Sources' Entrance	S.J. Rogers
CX-64	David Lei Business Card	S.J. Rogers
CX-65	Morris Lauterman Business Card	S.J. Rogers
CX-66	Affidavit of Stephanie Rogers	Waived
CPX-67	Photographs of Fairmont Mall	Waived
CX-68-C	Witness Statement: Jack Linn	Jack Linn
CX-68A	Tupperware Guide	Jack Linn
CX-69	Scrapbook of Tupperware Advertisements	Jack Linn
CX-70	Tupperware 1959 Catalog	Jack Linn
CX-71	Tupperware 1960 Catalog	Jack Linn
CPX-72	Historical Collection of Tupperware Catalogs	Jack Linn
CX-73	Tupperware February 1983 Catalog	Jack Linn
CX-74	Tupperware May 1983 Catalog	Jack Linn
CX-75	Tupperware Guide to Use of Seals	Jack Linn
CX-76	Sample Tupperware Price List	Jack Linn
CX-77	Tupperware Promotional Material, 4 pc. WONDERLIER (1-82 Special)	Jack Linn
CX-78	Tupperware Promotional Material, 4 pc. WONDERLIER (1-83 Intro.)	Jack Linn
CX-79	Tupperware Promotional Flyer, October 1-27, 1979	Jack Linn

Number	Description	Sponsor
CX-80	Tupperware Promotional Flyer, July 27 - August 29, 1981	Jack Linn
CX-81	Tupperware Promotional Flyer, January 4-30, 1982	Jack Linn
CX-82	Tupperware Promotional Flyer, November 1-27, 1982	Jack Linn
CX-83	Tupperware Promotional Flyer, November 29, 1982 - January 1, 1983	Jack Linn
CX-84	Tupperware Promotional Flyer, January 4-16, 1982	Jack Linn
CX-85	Tupperware Promotional Flyer, January 3-15, 1983	Jack Linn
CX-86	Tupperware Promotional Flyer, January 31 - March 5, 1983	Jack Linn
CX-87	Tupperware Promotional Flyer, 1983	Jack Linn
CX-88	Tupperware Trademark Registrations	Waived
CPX-89	Tupperware Sample Advertise-ments 1981, 1982, 1983	Jack Linn
CPX-90	Photographs of TUPPERWARE Containers	Waived
CX-91-C	Complainant's Responses to Respondents' Interrogatories	Waived
CX-92-C	Complainant's Responses to the Commission Staff's First Interrogatories	Waived
CX-93-C	Complainant's Responses to the Commission Staff's Second Interrogatories	Waived
CX-94-C	Confidential Exhibits to Verified Complaint	Waived
CX-95	Dart & Kraft Annual Reports, 1980, 1981, 1982	Waived
CX-96	Lamarle Promotional Materials	Waived
CPX-97	Photographs of Lamarle Containers	Waived

Number	Description	Sponsor
CPX-98	Photographs of Lamarle Box	Waived
CX-99	Lamarle Ltd. Trademark Application	Waived
CX-100	Lamarle B.V. Trademark Application	Waived
CPX-101	Lamarle Box	Waived
CPX-102	Lamarle 4-cup Bowl	Waived
CPX-103	Lamarle 3-cup Bowl	Waived
CPX-104	Lamarle 2-cup Bowl	Waived
CPX-105	Lamarle 14-cup Canister	Waived
CPX-106	Lamarle 7-cup Canister	Waived
CPX-107	Lamarle 10-cup Canister	Waived
CPX-108	Lamarle 48 oz. Beverage Server	Waived
CPX-109	Lamarle 2-cup Lid (for 2-cup Bowl)	Waived
CPX-110	Lamarle 3-cup Lid (for 3-cup Bowl)	Waived
CPX-111	Lamarle 4-cup Lid (for 4-cup Bowl)	Waived
CPX-112	Lamarle 7-cup Lid (for 7-cup Canister)	Waived
CPX-113	Lamarle 10-cup Lid (for 10-cup Canister)	Waived
CPX-114	Lamarle 14-cup Lid (for 14-cup Canister)	Waived
CPX-115	Lamarle Beverage Server Lid	Waived
CX-116	Lamarle Advertisements and Related Correspondence	Waived
CX-117-C	Taiwanese Investigators' Reports	Waived
CX-118	Excerpt from Respondents' Motion to Terminate	Waived
CX-119	Waldron Letter, June 30, 1983	Waived
CX-120-C	Complainant's First Set of Interrogatories and Respondents' Responses Thereto	Waived

Number	Description	Sponsor
CX-121	Complainant's First Request for Production and Respondents' Responses Thereto	Waived
CX-122-C	Memorandum and Lauterman Affidavit	Waived
CX-123	Excerpt of August 16, 1983 Hearing Transcript	Waived
CX-124	_Your Money Monthly_ Article re: Griffiths	Waived
CX-125	Griffiths Annual Report	Waived
CX-126	Unused	
CX-127	Griffiths Brothers Material re: Lamarle Acquisition	Waived
CX-128	Notice of Election to Default	Waived
CX-129-C	Brand Name Study Report	Dr. R.C. Sorensen
CX-130-C	Consumer Perception Survey Report	Dr. R.C. Sorensen
CPX-131-C	Brand Name Study Questionnaires	Dr. R.C. Sorensen
CPX-132-C	Consumer Perception Survey Questionnaires	Dr. R.C. Sorensen
CX-133-C	Consumer Perception Survey Briefing Materials	Dr. R.C. Sorensen
CX-134	VITAE: Dr. Robert C. Sorensen	Dr. R.C. Sorensen
CPX-135	WONDERLIER Bowl, 3-cup Size	Waived
CPX-136	TUPPERWARE Seal for 3-cup WONDERLIER Bowl	Waived
CPX-137	WONDERLIER Bowl, 4-cup Size	Waived
CPX-138	TUPPERWARE Seal for 4-cup WONDERLIER Bowl	Waived
CPX-139	WONDERLIER Bowl, 8-cup Size	Waived
CPX-140	TUPPERWARE Seal for 8-cup WONDERLIER Bowl	Waived
CPX-141	WONDERLIER Bowl, 12-cup Size	Waived

Number	Description	Sponsor
CPX-142	TUPPERWARE Seal for 12-cup WONDERLIER Bowl	Waived
CPX-143	HANDOLIER Beverage Server	Waived
CPX-144	TUPPERWARE Seal for HANDOLIER Beverage Server	Waived
CPX-145	CLASSIC SHEER 7-cup Canister	Waived
CPX-146	TUPPERWARE Seal for CLASSIC SHEER 7-cup Canister	Waived
CPX-147	CLASSIC SHEER 10-cup Canister	Waived
CPX-148	TUPPERWARE Seal for CLASSIC SHEER 10-cup Canister	Waived
CPX-149	CLASSIC SHEER 14-cup Canister	Waived
CPX-150	TUPPERWARE Seal for CLASSIC SHEER 14-cup Canister	Waived
CPX-151	Set of Four Small WONDERLIER Bowls (2-cup) (Thank You Gift Set), with Seals	Waived
CX-152-C	Witness Statement: Thomas A. Bradburn	Thomas A. Bradburn
CX-153-C	Schedule of Shipments Wonder Color Products	Jack Linn
CX-154-C	Product Use Chart	Jack Linn
CPX-155	Five Pastel WONDERLIER Bowls, with Seals (discontinued)	Waived
CX-156-C	List of Survey Sheets	Dr. R.C. Sorensen

BEFORE THE
UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

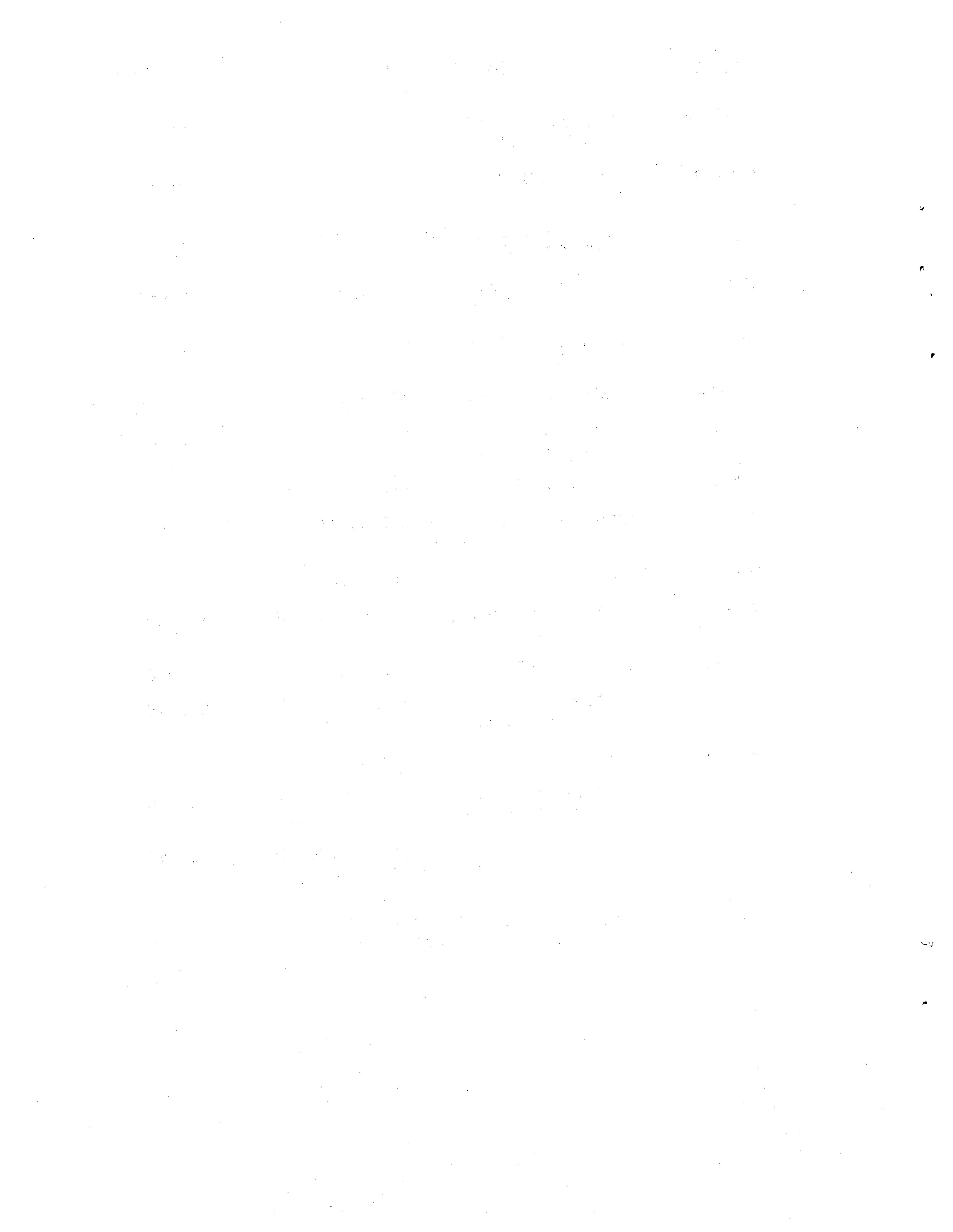
In The Matter Of: CERTAIN PLASTIC FOOD STORAGE CONTAINERS	Investigation No. 337-TA-152 Before John J. Mathias Administrative Law Judge

COMPLAINANT'S LIST OF PHYSICAL EXHIBITS

Number	Description	Sponsor
CPX-2-C	Tupperware Quality Control Manual	Jeffrey Parker
CPX-3-C	Tupperware (updated) Quality Control Manual	Jeffrey Parker
CPX-12A-C	J. Parker Test Photographs	Jeffrey Parker
CPX-13-C	Lamarle and Tupperware Color Chips	Jeffrey Parker
CPX-25A-C	Broutman Test Photographs	Dr. L.J. Broutman
CPX-36	Photograph of Lamarle Carton	Dr. L.J. Broutman
CPX-37	Photograph of Tupperware Carton	Dr. L.J. Broutman
CPX-52	Photographs of Lamarle Displays	S.J. Rogers
CPX-53	Photograph of Lamarle Display	S.J. Rogers
CPX-58	Tape Cassette	S.J. Rogers
CPX-61	Photographs of MB Center	S.J. Rogers
CPX-62	Photographs of Country Club Centre Mall	S.J. Rogers
CPX-63	Photograph of International Sources' Entrance	S.J. Rogers
CPX-67	Photographs of Fairmont Mall	Waived
CPX-72	Historical Collection of Tupperware Catalogs	Jack Linn

Number	Description	Sponsor
CPX-89	TUPPERWARE Sample Advertisements 1981, 1982, 1983	Jack Linn
CPX-90	Photographs of TUPPERWARE Containers	Waived
CPX-97	Photographs of Lamarle Containers	Waived
CPX-98	Photographs of Lamarle Box	Waived
CPX-101	Lamarle Box	Waived
CPX-102	Lamarle 4-cup Bowl	Waived
CPX-103	Lamarle 3-cup bowl	Waived
CPX-104	Lamarle 2-cup bowl	Waived
CPX-105	Lamarle 14-cup canister	Waived
CPX-106	Lamarle 7-cup canister	Waived
CPX-107	Lamarle 10-cup canister	Waived
CPX-108	Lamarle 48 oz. beverage server	Waived
CPX-109	Lamarle 2-cup lid (for 2-cup bowl)	Waived
CPX-110	Lamarle 3-cup lid (for 3-cup bowl)	Waived
CPX-111	Lamarle 4-cup lid (for 4-cup bowl)	Waived
CPX-112	Lamarle 7-cup lid (for 7-cup canister)	Waived
CPX-113	Lamarle 10-cup lid (for 10-cup canister)	Waived
CPX-114	Lamarle 14-cup lid (for 14-cup canister)	Waived
CPX-115	Lamarle beverage server lid	Waived
CPX-131-C	Brand Name Study Questionnaires	Dr. R. C. Sorensen
CPX-132-C	Consumer Perception Survey Questionnaires	Dr. R. C. Sorensen
CPX-135	WONDERLIER Bowl, 3-cup Size	Waived

Number	Description	Sponsor
CPX-136	TUPPERWARE Seal for 3-cup WONDERLIER Bowl	Waived
CPX-137	WONDERLIER Bowl, 4-cup Size	Waived
CPX-138	TUPPERWARE Seal for 4-cup WONDERLIER Bowl	Waived
CPX-139	WONDERLIER Bowl, 8-cup Size	Waived
CPX-140	TUPPERWARE Seal for 8-cup WONDERLIER Bowl	Waived
CPX-141	WONDERLIER Bowl, 12-cup Size	Waived
CPX-142	TUPPERWARE Seal for 12-cup WONDERLIER Bowl	Waived
CPX-143	HANDOLIER Beverage Server	Waived
CPX-144	TUPPERWARE Seal for HANDOLIER Beverage Server	Waived
CPX-145	CLASSIC SHEER 7-cup Canister	Waived
CPX-146	TUPPERWARE Seal for CLASSIC SHEER 7-cup Canister	Waived
CPX-147	CLASSIC SHEER 10-cup Canister	Waived
CPX-148	TUPPERWARE Seal for CLASSIC SHEER 10-cup Canister	Waived
CPX-149	CLASSIC SHEER 14-cup Canister	Waived
CPX-150	TUPPERWARE Seal for CLASSIC SHEER 14-cup Canister	Waived
CPX-151	Set of Four Small WONDERLIER Bowls (2-cup) (Thank You Gift Set), with Seals	Waived
CPX-155	Five Pastel WONDERLIER Bowls, with Seals (discontinued)	Waived



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Before John J. Mathias
Administrative Law Judge

In the matter of CERTAIN PLASTIC FOOD STORAGE CONTAINERS	Investigation No. 337-TA-152

LIST OF STAFF EXHIBITS

	SX-0.	List of Staff Exhibits
	SX-1.	Complainant's First Set of Interrogatories to Respondents */
	SX-1A.	Complainant's First Request For Production of Documents to Respondents */
(C)	SX-2.	Supplemental Answers of Respondent Lamarle, Inc. to Complainant's First Set of Interrogatories
	SX-2A.	Supplement Response of Respondent Lamarle, Inc. to Complainant's First Request for Production of Documents
	SX-3.	Answers of Respondent Peter Marcar to Complainant's First Set of Interrogatories
	SX-3A.	Supplemental Response of Respondent Peter Marcar to Complainant's First Request for Production of Documents
	SX-4.	Supplemental Answers of Respondent David Lei to Complainant's First Set of Interrogatories
	SX-4A.	Supplemental Response of Respondent David Lei to Complainant's First Request for Production of Documents
	SX-5.	Supplemental Answers of Respondent Morris Lauterman to Complainant's First Set of Interrogatories
	SX-5A.	Supplemental Response of Respondent Morris Lauterman to Complainant's First Set of Interrogatories

*/ Through its First Set of Interrogatories and First Request for Production complainant directed identical interrogatories and document requests to each of the following respondents: Lamarle, Inc.; Peter Marcar; David Lei; Morris Lauterman; Marcar, Lei and Lauterman d/b/a Lamarle: Lamarle Hong Kong, Ltd.; Jui Feng Plastic Mfg. Co., Ltd.; and Famous Associates, Inc.

SX-6. Answers of Respondent Marcar, Lei and Lauterman d/b/a Lamarle to Complainant's First Set of Interrogatories

SX-6A. Supplemental Response of Respondent Marcar, Lei and Lauterman d/b/a Lamarle to Complainant's First Request for Production of Documents

(C) SX-7. Supplemental Answers of Respondent Lamarle, Ltd. to Complainant's First Set of Interrogatories

SX-7A. Supplemental Response of Respondent Lamarle, Ltd. to Complainant's First Request for Production of Documents

(C) SX-8. Supplemental Answers of Respondent Jui Plastic Mfg. Co., Ltd. to Complainant's First Set of Interrogatories

SX-8A Supplemental Response of Respondent Jui Feng Plastic Mfg. Co., Ltd. to Complainant's First Request for Production of Documents

(C) SX-9. Supplemental Answers of Respondent Famous Associates, Inc. to Complainant's First Set of Interrogatories

SX-9A. Supplemental Response of Respondent Famous Associates, Inc. to Complainant's First Request for Production of Documents

Withdrawn---SX-10. Advertising/Promotional material for SUPERSEAL containers (produced by Respondent Lamarle, Inc.)

(C) SX-11. Summary of Discussions with Consumers About Tupperware Home Parties' Image in the Market Place, dated December, 1981 (produced by complainant)

SX-12. Commission Secretary's Record of Service of the Complaint in Investigation No. 337-TA-152

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Before John J. Mathias
Administrative Law Judge

In the Matter of CERTAIN PLASTIC FOOD STORAGE CONTAINERS	)))))	Investigation No. 337-TA-152

LIST OF STAFF REBUTTAL EXHIBITS

C)	SRX-1	Attitudes Toward Tupperware Products and Parties, January, 1982 (produced by complainant) -- Rebuttal to CX-130
(C)	SRX-2	Tupperware Advertising Tracking Study, June, 1982 (produced by complainant) -- Rebuttal to CX-130

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached INITIAL DETERMINATION (BUSINESS CONFIDENTIAL VERSION) was served upon Lynn Levine, Esq., and upon the following parties via first class mail, and air mail where necessary, on April 16, 1984.

Kenneth R. Mason, Secretary
U. S. International Trade Commission
701 E Street, N.W.
Washington, D. C.

FOR COMPLAINANT Dart Industries, Inc. d/b/a Tupperware:

Thomas V. Heyman, Esq.
John F. Collins, Esq.
Theresa M. Gillis, Esq.
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10002

and

Martha J. Talley, Esq.
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached INITIAL DETERMINATION (PUBLIC VERSION) was served upon Lynn Levine, Esq., and upon the following parties via first class mail, and air mail where necessary, on April 23, 1984.

Kenneth R. Mason, Secretary
U. S. International Trade Commission
701 E Street, N.W.
Washington, D. C.

FOR COMPLAINANT Dart Industries, Inc. d/b/a Tupperware:

Thomas V. Heyman, Esq.
John F. Collins, Esq.
Theresa M. Gillis, Esq.
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10002

and

Martha J. Talley, Esq.
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