In the Matter of

CERTAIN NUT JEWELRY AND PARTS THEREOF

Investigation No. 337-TA-229

USITC PUBLICATION 1929

NOVEMBER 1986

United States International Trade Commission / Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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Washington, DC 20436

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

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	)	Investigation No. 337-TA-229

NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER,
FOUR CEASE AND DESIST ORDERS,
AND TWO CONSENT ORDERS

AGENCY: U.S. International Trade Commission.

ACTION: Determination of violation of section 337 of the Tariff Act of 1930 and issuance of a general exclusion order, four cease and desist orders, and two consent orders.

SUMMARY: The Commission has determined that a general exclusion order and cease and desist orders directed to respondents R. Baird & Co., Liven & Co., Pong Lai Coral Development Co., Ltd., and Ali Baba Import & Export pursuant to sections 337(d) and (f) of the Tariff Act of 1930 (19 U.S.C. §§ 1337(d) and (f)) are the appropriate remedies for violations of section 337 found to exist; that the public interest considerations enumerated in section 337(d) and (f) do not preclude such relief; and that the amount of the bond during the Presidential review period under section 337(g) shall be 157 percent of the entered value of the imported articles. The Commission has also determined to issue consent orders terminating the investigation as to respondents Blair, Ltd. and RDCO, Inc. Termination of the investigation as to respondents Blair, Ltd. and RDCO, Inc. based on consent orders furthers the public interest by conserving Commission resources and those of the parties involved.

FOR FURTHER INFORMATION CONTACT: Randi S. Field, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0261.

SUPPLEMENTARY INFORMATION: On July 30, 1986, the presiding administrative law judge (ALJ) issued an initial determination (ID) finding that there is a violation of section 337 in the unauthorized importation and domestic sale of certain nut jewelry and parts thereof by reason of inadequate designation of country of origin when the jewelry is sold with certain labels, with the effect or tendency to destroy or substantially injure an efficiently and economically operated industry in the United States. On September 22, 1986, the Commission determined to review the ALJ's ID on the definition of the domestic industry and his determination in the ID denying the joint motions of

Blair and RDCO to terminate the investigation as to them on the basis of consent orders. 51 Fed. Reg. 33935 (September 24, 1986). The Commission requested briefs on the issues under review and on the issues of remedy, the public interest, and bonding. Submissions were received from complainant Kukui Nuts of Hawaii, Inc, respondents Blair, Ltd., and RDCO, Inc., the Commission investigative attorney, and the U.S. Customs Service. No submissions from the public have been received.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) and sections 210.54-.56 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.54-.56).

Notice of this investigation was published in the Federal Register on October 30, 1985 (50 F.R. 45173).

Copies of the nonconfidential version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: October 31, 1986

Certificate of Service

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER, FOUR CEASE AND DESIST ORDERS, AND TWO CONSENT ORDERS, was served upon Juan Cockburn, Esq., and Steven H. Schwartz, Esq., and upon the following parties via first class mail, and air mail where necessary on October 31, 1986.

Kenneth R. Mason, Secretary
U.S. International Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

For Complainant Kukui Nuts Of Hawaii, Inc.:

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William H. Lawson, Esq.
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Suite 2902
Honolulu, Hawaii 96813

For Respondents Ali Baba Import and Export and Pong Lai Coral Development Co., Ltd.:

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Shigemura and Ching
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700 Bishop Street
Honolulu, Hawaii

For Respondent RDCO, Inc., dba Design Creations, (Hawaii) Ltd.:

Walter Davis, Esq.
Douglas H. Knowlton, Esq.
Davis, Reid and Richards
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1001 Bishop Street
Honolulu, Hawaii 96813

For Respondents Taiwan Kyoei, Inc.:

Charles Ya-Wen Chiu
Attorney at Law
Far East United Law Office
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Taipei 10023 Taiwan, R.O.C.

(Certificate of Service -- Page 2)

For Respondent R. Baird & Co., Inc.:

Michael F. Holland
Import Manager
80 Sand Island Road No. 206
Honolulu, Hawaii 96819

For Respondent Blair, Ltd.:

Robert J. Smolenski, Esq.
James W. Kaywell, Esq.
Smolenski and Wooddell
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841 Bishop Street
Honolulu, Hawaii 96813

RESPONDENTS:

Liven & Co.
2222 Kalakaua
Suite 1405
Honolulu, Hawaii 96815

Royal Design Creations
6A, No. 173, Sec. 2
Fushing S. Rd.
Taipei, Taiwan

Oriental Arts & Crafts
59-2, Chung Shan N. Rd.
Section 2
Taipei, Taiwan

Farlace Int'l Corp.
4F, 245, Ming Chuan E. Rd.
Taipei 104, Taiwan

Shine Land, Inc.
Fl. 8, No. 97
Sec. 2 Nan King E. Rd.
Taipei, Taiwan

Joey Pong & Co., Inc.
No. 3-5, Lane 145
Hsin Sheng South Rd.
Sec. 1
Taipei 106, Taiwan

GOVERNMENT AGENCIES:

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

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	Investigation No. 337-TA-229

COMMISSION ACTION AND ORDER

Background

On October 16, 1985, the Commission instituted Investigation No. 337-TA-229, Certain Nut Jewelry and Parts Thereof, to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into and sale in the United States of certain nut jewelry and parts thereof by reason of (1) false advertising, (2) failure to mark country of origin, (3) false designation of origin, and (4) false representation, the effect or tendency of which unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The investigation was based on a complaint filed by Kukui Nuts of Hawaii, Inc. (KHN) on September 16, 1985. The

following sixteen firms were named respondents in the Commission's notice of investigation:

1. RKG Enterprises (RKG);
2. Huang Hou Crafts (Huang Hou);
3. Royal Design Creations (Royal Design);
4. Oriental Arts & Crafts (Oriental Arts);
5. Farlace Int'l Corp. (Farlace);
6. Shine Land, Inc. (Shine Land);
7. Joey Pong & Co., Inc. (Joey Pong);
8. Ali Baba Import & Export (Ali Baba);
9. RDCO, Inc. (RDCO);
10. R. Baird & Co. (Baird);
11. Blair, Ltd. (Blair);
12. Taiwan Kyoei, Inc. (Taiwan Kyoei);
13. Betty's Import & Associates, Inc. (Betty's);
14. Paul's Imports (Paul's);
15. Pong Lai Coral Development Co., Ltd.(Pong Lai);
16. Liven & Co. (Liven).

On April 11, 1986, the ALJ issued an ID (Order No. 35) granting a joint motion by complainant, the Commission investigative attorney (IA), and respondent Blair for termination of the investigation as to Blair based on a consent order. On April 22, 1986, the ALJ issued another ID (Order No. 42) granting a joint motion by complainant, the IA, and respondent RDCO for termination of the investigation as to RDCO based on a consent order. The wording of the RDCO consent order agreement is identical to the wording of the Blair agreement.

By Orders Nos. 47, 48, 49, and 50, issued May 1, 1986, the ALJ denied joint motions by complainant, the IA, and respondents Baird, Ali Baba, Pong Lai, and Liven for termination of the investigation as to them on the basis of

consent orders. The ALJ found that it was not in the public interest to prohibit certain respondents, through consent orders, from using the words "genuine," "authentic," "guaranteed" and like-meaning words and further restricting those respondents in the use of the words "Hawaii" and any form or derivative thereof and the word "kukui" and any similar appearing and sounding word on advertising matter for imported nut jewelry. The ALJ stated that no exclusive rights to those words had been demonstrated by complainant. The ALJ also stated that he would find the consent order agreements acceptable if they were reworded to state only that the imported nut jewelry shall be marked, in a conspicuous place as legibly, indelibly, and permanently as the nature of the jewelry permits, to indicate to an ultimate purchaser in the United States the English name of the country of origin of the jewelry.

On May 15, 1986, the Commission issued notices of its decision to review and remand the IDs terminating the investigation as to Blair and RDCO on the basis of consent orders. The notices stated that the ALJ had denied apparently identical motions with respect to other respondents in the investigation and that, in light of the denial of those motions, the Commission was remanding the IDs pertaining to Blair and RDCO for reconsideration by the ALJ.

At the prehearing conference held on May 27, 1986, complainant and the IA orally moved that the IDs concerning Blair and RDCO be recertified to the Commission because the involved consent orders are in the public interest. The motion was denied.

On July 30, 1986, the ALJ issued his final ID finding a violation of section 337. On reconsideration of the joint motions (Motions Nos. 229-15 and 229-18) to terminate the investigation as to Blair and RDCO on the basis of consent orders, the ALJ denied the motions.

The ALJ found that respondents Blair, Huang Hou, Royal Design, Oriental Arts, Farlace, Shine Land, Ali Baba, RDCO, Baird, Taiwan Kyoei, Pong Lai, and Liven had each engaged in unfair acts under section 337 and were in violation of section 337. ID at 121, 122. Regarding RKG and Joey Pong, the ALJ found there was no evidence of any importation and sale. ID at 26. Accordingly, the ALJ found neither RKG nor Joey Pong to be in violation of section 337.

The ALJ defined the domestic industry as the operations of complainant KNH devoted to the production of kukui nut jewelry from Hawaiian-grown kukui nuts. He found that the domestic industry was efficiently and economically operated and that complainant had met its burden of showing present substantial injury as well as the requisite nexus between the injury

suffered and the unfair acts. Finally, the ALJ found that there exists a tendency to substantially injure the domestic industry by reason of respondents' imports.

On September 22, 1986, the Commission determined to review portions of the ID. Specifically, the Commission decided to review (1) the definition of the relevant domestic industry; and (2) whether the joint motions (Motions Nos. 229-15 and 229-18) to terminate the investigation as to respondents Blair and RDCO on the basis of consent orders should be granted. 51 Fed. Reg. 33935 (September 24, 1986).

Action

Having reviewed the written submissions filed regarding the issues under review, remedy, the public interest, and bonding and those portions of the record relating to those issues, the Commission has determined to grant the joint motions to terminate respondent Blair, Ltd. and respondent RDCO, Inc. based on consent orders directed at these two respondents and to vacate the ALJ's determinations of violation of section 337 as to those respondents. The Commission has also determined to issue a general exclusion order prohibiting entry into the United States of jewelry made from candlenuts of the genus "aleurites" and the species "moluccana", including all subspecies and varieties thereof, and/or any other jewelry

purporting to be made from "kukui nuts," unless a printed label meeting all the following requirements is attached thereto:

(1) the label, to the extent reasonably possible, shall be designed, made and attached in a manner to inhibit any person except the ultimate purchaser in the United States from destroying, removing, altering, covering, or obliterating the label or its contents;

(2) the label shall state, legibly, permanently, and conspicuously, the English language name of the country of origin in type size not smaller than the size of the largest type size appearing on the label;

(3) if the label contains the words "United States," "American," "Hawaii," "Hawaiian," the letters "U.S.A.," or any variation of such words or letters, or the name of any other city or locality in the United States, or the words "genuine," "authentic," or "guaranteed," or words of similar meaning, then the country of origin marking must be in close proximity to such words, letters, or names, and in at least a comparable type size to such words, letters or names;

(4) the label shall state in close proximity to the required country of origin marking and in at least the same type size: "Removal of this disclosure of

foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)"; and

(5) the label shall not bear any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii.

The Commission has also determined to issue cease and desist orders prohibiting respondents Ali Baba Import & Export; R. Baird & Co.; Pong Lai Coral Development Co., Ltd.; and Liven & Co. from representing, aiding, or encouraging other persons to represent, explicitly or by implication, orally or in sales, advertising, or promotional material for imported nut jewelry, that such jewelry was manufactured, processed, or strung in Hawaii or that the nuts were grown or processed in Hawaii. The cease and desist orders also prohibit respondents from marketing, distributing, selling, or offering to sell any imported nut jewelry unless an appropriate label which conforms to the specifications discussed above is attached thereto. Finally, the cease and desist orders prohibit respondents from removing, aiding, or encouraging others to remove the label which conforms to the specifications discussed above.

The Commission has determined that the public interest factors enumerated in subsections 337(d) and (f) (19 U.S.C. § 1337(d) and (f)) do not preclude issuance of the aforementioned consent orders, exclusion order, and cease and desist orders, and that the bond during the Presidential review period should be in the amount of 157 percent of the entered value of the article concerned.

Order

Accordingly, it is hereby ORDERED that --

1. Jewelry made from candlenuts of the genus "aleurites" and the species "moluccana", including all subspecies and varieties thereof, and/or any other jewelry purporting to be made from "kukui nuts," including all subspecies and varieties thereof, is excluded from entry into the United States unless a printed label meeting all the following requirements is attached thereto:

(A) The label, to the extent reasonably possible, shall be designed, made, and attached in a manner to inhibit any person except the ultimate purchaser in the United States from destroying, removing, altering, covering, or obliterating the label or its contents;

(B) the label shall state, legibly, permanently, and conspicuously, the English language name of the country of origin in type size not smaller than the size of the largest type size appearing on the label;

(C) if the label contains the words "United States," "American," "Hawaii," "Hawaiian," the letters "U.S.A.," or any variation of such words or letters, or the name of any other city or locality in the United States, or the words "genuine," "authentic," or "guaranteed," or words of similar meaning, then the country of

origin marking must be in close proximity to such words, letters, or names, and in at least a comparable type size to such words, letters or names;

(D) the label shall state in close proximity to the required country of origin marking and in at least the same type size: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)"; and

(E) the label shall not bear any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii.

2. Respondents Ali Baba Import & Export; R. Baird & Co.; Pong Lai Coral Development Co., Ltd.; and Liven & Co. are ordered to cease and desist from the conduct prohibited by the attached cease and desist orders.

3. The articles to be excluded from entry into the United States shall be entitled to entry under bond in the amount of 157 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;

4. The Secretary shall serve copies of this Commission Action and Order and 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 U.S. Customs Service;

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

6. The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57).

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: October 31, 1986

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

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	)	Investigation No. 337-TA-229

ORDER TO CEASE AND DESIST

It is hereby ordered that R. Baird & Co., Inc. cease and desist from engaging in false advertising, failure to mark country of origin, and false designation of origin with regard to certain nut jewelry products and parts thereof in violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as specified in section III of this Order.

I

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean R. Baird & Co., Inc., 80 Sand Island Access Rd., Honolulu, Hawaii 96819.

(C) "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 and assigns.

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

(E) "Hawaii" shall mean the State of Hawaii.

(F) "Imported Nut Jewelry" shall mean nut jewelry manufactured, processed, or strung, in whole or in part, in any country other than the United States, or nut jewelry produced from nuts that were grown, manufactured, processed, or produced in any country other than the United States.

II

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors and assignees, all 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

(Conduct Prohibited)

The following conduct of Respondent is prohibited by this Order:

1. Respondent will not in the United States represent, or aid or encourage other persons to represent, explicitly or by implication, orally or in sales, advertising or promotional material for imported nut jewelry, that such jewelry was manufactured, processed, or strung in Hawaii or that the nuts were grown, manufactured, processed, or produced in Hawaii.

2. Respondent will not in the United States market, distribute, sell, or offer for sale any imported nut jewelry unless an appropriate printed label is attached thereto:

(A) The label, to the extent reasonably possible, shall be designed, made, and attached in a manner to inhibit any person except the ultimate purchaser in the United States from destroying, removing, altering, covering, or obliterating the label or its contents;

(B) the label shall state, legibly, permanently, and conspicuously, the English language name of the country of origin in type size not smaller than the size of the largest type size appearing on the label;

(C) if the label contains the words "United States," "American," "Hawaii," "Hawaiian," the letters "U.S.A.," or any variation of such words or letters, or the name of any other city or locality in the United States, or the words "genuine," "authentic," or "guaranteed," or words of similar meaning, then the country of origin marking must be in close proximity to such words, letters, or names, and in at least a comparable type size to such words, letters or names;

(D) the label shall state in close proximity to the required country of origin marking and in at least the same type size: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)"; and

(E) the label shall not bear any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii.

3. Respondent shall not remove, or aid or encourage others to remove, the label required by paragraph 2 of this Order.

4. This Order is effective with respect to all imported nut jewelry whenever imported.

IV

(Compliance and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, or distribution of imported nut jewelry made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of five (5) years from the close of the fiscal year to which they pertain.

(B) For the purpose of securing compliance with this Order, Respondent shall retain at least one copy of each style or type of label and advertising and promotional material used

to market, distribute, sell or offer for sale imported nut jewelry, of a period of five (5) years from the close of the fiscal year to which they pertain.

(C) 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 written request 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, financial reports, and other records or documents, both in detail and in summary form as are required by Paragraph IV(A) and (B) above to be retained.

V

(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 the 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 imported nut jewelry in the

United States or for shipment or export to the United States of such jewelry for resale in the United States;

(B) Serve, within thirty (30) days after succession of any of the persons referred to in paragraph 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 person, as described in Section V(A) and (B) above, together with the date on which service was made.

(D) The obligations set forth in Section V(B) and (C) above shall remain in effect until January 1, 1991.

VI

(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)); or

2. An action for civil penalties in accordance with the provisions of Section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(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 as required by this Order.

VII

(Modification)

This Order may be modified by the Commission on its own motion or upon motion by any person pursuant to section 211.57 of the Commission's Rules of Practice and Procedure. 19 C.F.R. § 211.57.

BY ORDER OF THE COMMISSION

Kenneth R. Mason
Secretary

Issued: October 31, 1986

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

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	)	Investigation No. 337-TA-229

ORDER TO CEASE AND DESIST

It is hereby ordered that Ali Baba Import & Export cease and desist from engaging in false advertising, failure to mark country of origin, and false designation of origin with regard to certain nut jewelry products and parts thereof in violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as specified in section III of this Order.

I

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Ali Baba Import & Export, 2250 Kalakaua, Suite 309A, Honolulu, Hawaii.

(C) "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 and assigns.

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

(E) "Hawaii" shall mean the State of Hawaii.

(F) "Imported Nut Jewelry" shall mean nut jewelry manufactured, processed, or strung, in whole or in part, in any country other than the United States, or nut jewelry produced from nuts that were grown, manufactured, processed, or produced in any country other than the United States.

II

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors and assignees, all 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

(Conduct Prohibited)

The following conduct of Respondent is prohibited by this Order:

1. Respondent will not in the United States represent, or aid or encourage other persons to represent, explicitly or by implication, orally or in sales, advertising or promotional material for imported nut jewelry, that such jewelry was manufactured, processed, or strung in Hawaii or that the nuts were grown, manufactured, processed, or produced in Hawaii.

2. Respondent will not in the United States market, distribute, sell, or offer for sale any imported nut jewelry unless an appropriate printed label is attached thereto:

(A) The label, to the extent reasonably possible, shall be designed, made, and attached in a manner to inhibit any person except the ultimate purchaser in the United States from destroying, removing, altering, covering, or obliterating the label or its contents;

(B) the label shall state, legibly, permanently, and conspicuously, the English language name of the country of origin in type size not smaller than the size of the largest type size appearing on the label;

(C) if the label contains the words "United States," "American," "Hawaii," "Hawaiian," the letters "U.S.A.," or any variation of such words or letters, or the name of any other city or locality in the United States, or the words "genuine," "authentic," or "guaranteed," or words of similar meaning, then the country of origin marking must be in close proximity to such words, letters, or names, and in at least a comparable type size to such words, letters or names;

(D) the label shall state in close proximity to the required country of origin marking and in at least the same type size: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)"; and

(E) the label shall not bear any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii.

3. Respondent shall not remove, or aid or encourage others to remove, the label required by paragraph 2 of this Order.

4. This Order is effective with respect to all imported nut jewelry whenever imported.

IV

(Compliance and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, or distribution of imported nut jewelry made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of five (5) years from the close of the fiscal year to which they pertain.

(B) For the purpose of securing compliance with this Order, Respondent shall retain at least one copy of each style or type of label and advertising and promotional material used

to market, distribute, sell or offer for sale imported nut jewelry, of a period of five (5) years from the close of the fiscal year to which they pertain.

(C) 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 written request 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, financial reports, and other records or documents, both in detail and in summary form as are required by Paragraph IV(A) and (B) above to be retained.

V

(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 the 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 imported nut jewelry in the

United States or for shipment or export to the United States of such jewelry for resale in the United States;

(B) Serve, within thirty (30) days after succession of any of the persons referred to in paragraph 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 person, as described in Section V(A) and (B) above, together with the date on which service was made.

(D) The obligations set forth in Section V(B) and (C) above shall remain in effect until January 1, 1991.

VI

(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)); or

2. An action for civil penalties in accordance with the provisions of Section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(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 as required by this Order.

VII

(Modification)

This Order may be modified by the Commission on its own motion or upon motion by any person pursuant to section 211.57 of the Commission's Rules of Practice and Procedure. 19 C.F.R. § 211.57.

BY ORDER OF THE COMMISSION

Kenneth R. Mason
Secretary

Issued: October 31, 1986

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

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	)	Investigation No. 337-TA-229

ORDER TO CEASE AND DESIST

It is hereby ordered that Pong Lai Coral Development Co., Ltd. cease and desist from engaging in false advertising, failure to mark country of origin, and false designation of origin with regard to certain nut jewelry products and parts thereof in violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as specified in section III of this Order.

I

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Pong Lai Coral Development Co., Ltd., 2270 Kalakaua, Suite 1705, Honolulu, Hawaii.

(C) "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 and assigns.

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

(E) "Hawaii" shall mean the State of Hawaii.

(F) "Imported Nut Jewelry" shall mean nut jewelry manufactured, processed, or strung, in whole or in part, in any country other than the United States, or nut jewelry produced from nuts that were grown, manufactured, processed, or produced in any country other than the United States.

II

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors and assignees, all 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

(Conduct Prohibited)

The following conduct of Respondent is prohibited by this Order:

1. Respondent will not in the United States represent, or aid or encourage other persons to represent, explicitly or by implication, orally or in sales, advertising or promotional material for imported nut jewelry, that such jewelry was manufactured, processed, or strung in Hawaii or that the nuts were grown, manufactured, processed, or produced in Hawaii.

2. Respondent will not in the United States market, distribute, sell, or offer for sale any imported nut jewelry unless an appropriate printed label is attached thereto:

(A) The label, to the extent reasonably possible, shall be designed, made, and attached in a manner to inhibit any person except the ultimate purchaser in the United States from destroying, removing, altering, covering, or obliterating the label or its contents;

(B) the label shall state, legibly, permanently, and conspicuously, the English language name of the country of origin in type size not smaller than the size of the largest type size appearing on the label;

(C) if the label contains the words "United States," "American," "Hawaii," "Hawaiian," the letters "U.S.A.," or any variation of such words or letters, or the name of any other city or locality in the United States, or the words "genuine," "authentic," or "guaranteed," or words of similar meaning, then the country of origin marking must be in close proximity to such words, letters, or names, and in at least a comparable type size to such words, letters or names;

(D) the label shall state in close proximity to the required country of origin marking and in at least the same type size: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)"; and

(E) the label shall not bear any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii.

3. Respondent shall not remove, or aid or encourage others to remove, the label required by paragraph 2 of this Order.

4. This Order is effective with respect to all imported nut jewelry whenever imported.

IV

(Compliance and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, or distribution of imported nut jewelry made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of five (5) years from the close of the fiscal year to which they pertain.

(B) For the purpose of securing compliance with this Order, Respondent shall retain at least one copy of each style or type of label and advertising and promotional material used

to market, distribute, sell or offer for sale imported nut jewelry, of a period of five (5) years from the close of the fiscal year to which they pertain.

(C) 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 written request 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, financial reports, and other records or documents, both in detail and in summary form as are required by Paragraph IV(A) and (B) above to be retained.

V

(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 the 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 imported nut jewelry in the

United States or for shipment or export to the United States of such jewelry for resale in the United States;

(B) Serve, within thirty (30) days after succession of any of the persons referred to in paragraph 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 person, as described in Section V(A) and (B) above, together with the date on which service was made.

(D) The obligations set forth in Section V(B) and (C) above shall remain in effect until January 1, 1991.

VI

(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)); or

2. An action for civil penalties in accordance with the provisions of Section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(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 as required by this Order.

VII

(Modification)

This Order may be modified by the Commission on its own motion or upon motion by any person pursuant to section 211.57 of the Commission's Rules of Practice and Procedure. 19 C.F.R. § 211.57.

BY ORDER OF THE COMMISSION

Kenneth R. Mason
Secretary

Issued: October 31, 1986

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

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	Investigation No. 337-TA-229

ORDER TO CEASE AND DESIST

It is hereby ordered that Liven & Co. cease and desist from engaging in false advertising, failure to mark country of origin, and false designation of origin with regard to certain nut jewelry products and parts thereof in violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as specified in section III of this Order.

I

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Liven & Co., 2222 Kalakaua, Suite 1405, Honolulu, Hawaii.

(C) "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 and assigns.

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

(E) "Hawaii" shall mean the State of Hawaii.

(F) "Imported Nut Jewelry" shall mean nut jewelry manufactured, processed, or strung, in whole or in part, in any country other than the United States, or nut jewelry produced from nuts that were grown, manufactured, processed, or produced in any country other than the United States.

II

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors and assignees, all 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

(Conduct Prohibited)

The following conduct of Respondent is prohibited by this Order:

1. Respondent will not in the United States represent, or aid or encourage other persons to represent, explicitly or by implication, orally or in sales, advertising or promotional material for imported nut jewelry, that such jewelry was manufactured, processed, or strung in Hawaii or that the nuts were grown, manufactured, processed, or produced in Hawaii.

2. Respondent will not in the United States market, distribute, sell, or offer for sale any imported nut jewelry unless an appropriate printed label is attached thereto:

(A) The label, to the extent reasonably possible, shall be designed, made, and attached in a manner to inhibit any person except the ultimate purchaser in the United States from destroying, removing, altering, covering, or obliterating the label or its contents;

(B) the label shall state, legibly, permanently, and conspicuously, the English language name of the country of origin in type size not smaller than the size of the largest type size appearing on the label;

(C) if the label contains the words "United States," "American," "Hawaii," "Hawaiian," the letters "U.S.A.," or any variation of such words or letters, or the name of any other city or locality in the United States, or the words "genuine," "authentic," or "guaranteed," or words of similar meaning, then the country of origin marking must be in close proximity to such words, letters, or names, and in at least a comparable type size to such words, letters or names;

(D) the label shall state in close proximity to the required country of origin marking and in at least the same type size: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)"; and

(E) the label shall not bear any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii.

3. Respondent shall not remove, or aid or encourage others to remove, the label required by paragraph 2 of this Order.

4. This Order is effective with respect to all imported nut jewelry whenever imported.

IV

(Compliance and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, or distribution of imported nut jewelry made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of five (5) years from the close of the fiscal year to which they pertain.

(B) For the purpose of securing compliance with this Order, Respondent shall retain at least one copy of each style or type of label and advertising and promotional material used

to market, distribute, sell or offer for sale imported nut jewelry, of a period of five (5) years from the close of the fiscal year to which they pertain.

(C) 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 written request 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, financial reports, and other records or documents, both in detail and in summary form as are required by Paragraph IV(A) and (B) above to be retained.

V

(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 the 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 imported nut jewelry in the

United States or for shipment or export to the United States of such jewelry for resale in the United States;

(B) Serve, within thirty (30) days after succession of any of the persons referred to in paragraph 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 person, as described in Section V(A) and (B) above, together with the date on which service was made.

(D) The obligations set forth in Section V(B) and (C) above shall remain in effect until January 1, 1991.

VI

(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)); or

2. An action for civil penalties in accordance with the provisions of Section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(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 as required by this Order.

VII

(Modification)

This Order may be modified by the Commission on its own motion or upon motion by any person pursuant to section 211.57 of the Commission's Rules of Practice and Procedure. 19 C.F.R. § 211.57.

BY ORDER OF THE COMMISSION

Kenneth R. Mason
Secretary

Issued: October 31, 1986

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	)	Investigation No. 337-TA-229

VIEWS OF THE COMMISSION

I. PROCEDURAL HISTORY

On September 16, 1985, Kukui Nuts of Hawaii, Inc. ("KNH") filed a complaint with the Commission alleging unfair acts and unfair methods of competition in the importation and sale of certain nut jewelry products and parts thereof (polished/processed parts). On October 16, 1985, the Commission instituted this investigation and issued a notice of investigation covering four unfair acts: (1) false advertising, (2) failure to mark country of origin, (3) false designation of origin, and (4) false representation.

The alleged unfair acts were not based on any statutory intellectual property right (e.g., a patent or trademark) held by complainant. Rather, the gist of the allegations is that the imported kukui nut jewelry and/or polished (processed) kukui nuts (from which kukui nut jewelry is made) are sold in the United States with certain labels. These labels were alleged to be misleading

in that they cause a purchaser to believe that the kukui nut jewelry offered for sale is of Hawaiian origin in its entirety. 1/

The sixteen respondents named in the notice of investigation were:

1. RKG Enterprises (RKG);
2. Huang Hou Crafts (Huang Hou);
3. Royal Design Creations (Royal Design);
4. Oriental Arts & Crafts (Oriental Arts);
5. Farlace Int'l Corp. (Farlace);
6. Shine Land, Inc. (Shine Land);
7. Joey Pong & Co., Inc. (Joey Pong);
8. Ali Baba Import & Export (Ali Baba);
9. RDCO, Inc. (RDCO);
10. R. Baird & Co. (Baird);
11. Blair, Ltd. (Blair);
12. Taiwan Kyoei, Inc. (Taiwan Kyoei);
13. Betty's Import & Associates, Inc. (Betty's);
14. Paul's Imports (Paul's);
15. Pong Lai Coral Development Co., Ltd. (Pong Lai); and
16. Liven & Co. (Liven).

Service of the complaint and notice of investigation was perfected on 14 of the 16 respondents. Service was not perfected on RKG and Huang Hou and, therefore, the Commission lacks personal jurisdiction over those two respondents. 2/

Two of the respondents, Betty's and Paul's, were terminated from the investigation when the Commission decided not to review the ALJ's IDs (Orders Nos. 34 and 46, respectively) 3/ granting their motions for summary

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1/ ID at 10.

2/ ID at 10, 40, and 121.

3/ The following abbreviations will be used throughout this opinion: Administrative Law Judge (ALJ); initial determination (ID); Commission investigative attorney (IA).

determination and finding no violation of section 337 as to them. On April 8, seven of the respondents (Huang Hou, RKG, Shine Land, Joey Pong, Oriental Arts, Farlace, and Royal Design), were found in default by the Commission and were deemed to have waived their procedural rights to (1) appear in the investigation, (2) to be served with documents by any party, and (3) to contest the allegations at issue, when the Commission decided not to review the ALJ's ID (Order No. 24). 4/

On April 11, 1986, the ALJ issued an ID (Order No. 35) granting a joint motion by complainant, the IA, and respondent Blair for termination of the investigation as to Blair based on a consent order. Paragraph 4 of the consent order agreement required that a printed label be attached to all imported jewelry in such a manner as to inhibit retailers from changing or removing it. It further required that the label state, in a specified-size type, the English name of the country where the nuts were grown and the jewelry was made; that the label not bear any implication or representation that the nuts from which the jewelry is made are grown or manufactured in Hawaii, including depictions, symbols, characteristic features, or Hawaiian scenes; that no derivative of the word "Hawaii" may be used; that the phrase "Symbolic of Hawaii" may be used in a specified-size type; that the words "genuine," "authentic," "guaranteed" or like-meaning words could not be used; and that the word "kukui" could be used only if it was preceded by the English

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4/ These respondents, inter alia, failed to respond to the complaint and notice of the investigation, failed to file discovery statements, and failed to respond to the Commission investigative attorney's discovery requests.

name of the country where the nuts comprising the nut jewelry were actually grown.

On April 22, 1986, the ALJ issued an ID (Order No. 42) granting a joint motion by complainant, the IA, and respondent RDCO for termination of the investigation as to RDCO based on a consent order. The wording of the consent order agreement is identical to the wording in the Blair agreement.

By Orders Nos. 47, 48, 49, and 50, issued May 1, 1986, the ALJ denied joint motions by complainant, the IA, and respondents Baird, Ali Baba, Pong Lai, and Liven for termination of the investigation as to them on the basis of consent orders. The ALJ found that it was not in the public interest to prohibit certain respondents, through consent orders, from using the words "genuine," "authentic," "guaranteed" and like-meaning words and further restricting those respondents in the use of the words "Hawaii" and any form or derivative thereof and the word "kukui" and any similar appearing and sounding word on advertising matter for imported nut jewelry. The ALJ stated that no exclusive rights to those words had been demonstrated by complainant. He also stated that he would find the consent order agreements acceptable if they were reworded to state only that the imported nut jewelry shall be marked, in a conspicuous place as legibly, indelibly, and permanently as the nature of the jewelry permits, to indicate to an ultimate purchaser in the United States the English name of the country of origin of the jewelry (thereby tracking the language of the marking statute). No attempts were made by complainant to so amend the consent order agreements. 5/

5/ ID at 4.

On May 7, 1986, the IA filed a motion (Motion No. 229-29) for reconsideration of the joint motions to terminate the investigation as to respondents Baird, Ali Baba, Pong Lai, and Liven on the basis of consent orders. The IA argued that the ALJ should reconsider the joint motions because: (1) the consent order agreements do not give complainant any exclusive rights; (2) the consent order agreements are almost identical to agreements previously approved by the ALJ; and (3) there is no evidence to show that the consent order agreements are inconsistent with the public interest.

Regarding the first contention, the IA asserted that the consent order agreements prohibit imported jewelry from being labeled in such a way as to imply that the jewelry is from Hawaii by requiring clear and conspicuous disclosure of foreign origin. The IA also contended that the agreements would not have an adverse effect on the U.S. consumer but instead would have the beneficial effect of avoiding potential consumer confusion, that retailers in the U.S. market frequently use respondents' labels to affirmatively misrepresent the jewelry's origin, and that it is in the public interest for respondents to agree to change their labels to prevent future misrepresentations made at the retail level.

On May 15, 1986, the Commission issued notices of its decision to review and remand the IDs terminating the investigation as to Blair and RDCO on the basis of consent orders. The notices stated that the ALJ apparently had denied identical motions with respect to other respondents in the investigation and that, in light of the denial of those motions, the

Commission was remanding the IDs pertaining to Blair and RDCO for reconsideration.

On May 16, 1986, the ALJ issued an order (Order No. 52) denying the IA's motion for reconsideration of the joint motions to terminate the investigation as to the four respondents based on consent orders. Regarding the IA's contention that the consent order agreements do not give complainant any exclusive rights, the ALJ stated that the consent order agreements do preclude certain respondents from using the words "genuine," "authentic," "guaranteed," or like-meaning words on advertising matter for imported nut jewelry. The ALJ also stated that the consent order agreements further restrict those respondents in the use of the word "Hawaii" or any form or derivative thereof and in the use of the word "kukui" or any similar appearing or sounding word. He stated that such exclusion is for the benefit of complainant.

The ALJ stated that a basis for his denial of the motion for reconsideration "is the apparent absence in the record of any right the complainant possesses to exclude and/or restrict certain respondents in the use of such words as 'Hawaii,' 'kukui,' 'genuine,' 'authentic,' and 'guaranteed.' He added that contrary to many settlements which involve a government-granted right to exclude others, the IA had not demonstrated that complainant has any proprietary right in the quoted terminology. The ALJ further stated that "[i]t is always in the public interest to preserve competition and competition should be restricted only when there is a legitimate private right as for example a patent, trademark, trade secret, copyright, and the like."

On May 19, 1986, Ali Baba and Pong Lai joined the IA's motion for reconsideration of the joint motions to terminate the investigation on the basis of consent orders. The ALJ ruled that this joinder was not timely filed and, therefore, it was not part of the record in this investigation. 6/

On May 27, 1986, an evidentiary hearing was held at which only complainant and the IA appeared. At the prehearing conference, complainant and the IA orally moved that the IDs concerning Blair and RDCO (Orders Nos. 35 and 42) be recertified to the Commission because the involved consent orders are in the public interest. The motion was denied. 7/

On July 30, 1986, the ALJ issued his ID finding a violation of section 337. On reconsideration of the joint motions (Motions Nos. 229-15 and 229-18) to terminate the investigation as to Blair and RDCO on the basis of consent orders, the ALJ denied the motions without explanation. 8/

The ALJ found that respondents Blair, Huang Hou, Royal Design, Oriental Arts, Farlace, Shine Land, Ali Baba, RDCO, Baird, Taiwan Kyoei, Pong Lai, and

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6/ According to the IA, the ALJ refused to consider the joinder of Ali Baba and Pong Lai filed on May 19 to the IA's motion for reconsideration of the joint motions to terminate the investigation based on consent order agreements because the joinder was not filed with the Secretary on May 16, 1986, the day the ALJ ruled on the motion for reconsideration. The IA asserted, however, that the joinder was filed on the due date for responses to the IA's motion.

7/ The IA also moved, inter alia, for discovery sanctions against respondents Royal Design, Oriental Arts, Farlace, Shine Land, and Joey Pong because of their failure to comply with the ALJ's order compelling discovery. Order No. 66, dated July 30, granted the IA's motion as to Royal Design, Oriental Arts, Farlace, and Shine Land by drawing adverse inferences against them. The ALJ denied the IA's motion insofar as it related to Joey Pong due to the absence of secondary evidence regarding the importation or sale of improperly labeled nut jewelry as to that respondent.

8/ ID at 7.

Liven had each engaged in unfair acts under section 337. 9/ Regarding RKG and Joey Pong, the ALJ found there was no evidence relating to any importation and sale. 10/ Accordingly, the ALJ found neither RKG nor Joey Pong to be in violation of section 337.

The ALJ found that Baird's labels #1, #2, #3, #4, and #5, Blair's labels #2 and #3, RDCO's label's #2 and #3, Liven label #1, Pong Lai label #1, and Ali Baba label #1 lack a conspicuous disclosure of the country of origin of the associated kukui nut jewelry and/or critical components (i.e., loose finished/polished/processed nuts) of associated kukui nut jewelry. He concluded that the absence of a conspicuous location of the country of origin, coupled with the language on the labels, and scenes on certain labels, associating the jewelry with Hawaii, has a tendency to deceive the purchasing public as to the country of origin of the jewelry and/or its critical components and is an unfair act under section 337 in view of section 304(a) of the Tariff Act of 1930 (19 U.S.C. § 1304(a)) coupled with section 43(a) of the Lanham Act (15 U.S.C. § 1125), and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)).

The ALJ defined the domestic industry as "the domestic facilities devoted to the production and sale of products that are 'the target of the unfair acts and practices.'" He found that in light of the unfair acts alleged in this investigation, the kukui nuts produced by the domestic industry must be grown

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9/ ID at 121.

10/ ID at 26.

in Hawaii and that the domestic industry consists of the operations of complainant KNH devoted to the production of kukui nut jewelry from Hawaiian-grown kukui nuts. The ALJ found the domestic industry to be efficiently and economically operated.

The ALJ found that complainant KNH had provided sufficient proof of direct competition, lost sales, and underselling by respondents to have met its burden of showing present substantial injury as well as the requisite nexus between the injury suffered and the unfair acts.

Finally, the ALJ found that complainant had presented a clear showing of relevant conditions or circumstances from which probable or likely injury in the future can be reasonably inferred and, therefore, there exists a tendency to injure the domestic industry by reason of imports.

On September 2, 1986, Blair and RDCO filed petitions for review of the final ID insofar as the ALJ determined not to reconsider and recertify for Commission review his prior IDs (Orders Nos. 35 and 42) terminating the investigation as to them on the basis of consent orders and instead found Blair and RDCO to have violated section 337. 11/

On September 8, 1986, complainant filed a response in opposition to the petitions for review of Blair and RDCO. On September 11, 1986, the IA filed a response to the petitions for review of Blair and RDCO. He opposed the petitions insofar as they requested issuance of modified consent orders

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11/ In its petition for review, respondent RDCO incorporated by reference the statement of facts, legal issues, argument, and requested relief set forth in respondent Blair's petition.

incorporating the ALJ's suggestions and concurred with them insofar as they requested issuance of the original consent orders.

On September 22, 1986, the Commission determined to review portions of the ID of the ALJ that there is a violation of section 337, 19 U.S.C. § 1337, in investigation No. 337-TA-229, Certain Nut Jewelry and Parts Thereof. 12/ Specifically, the Commission determined to review the definition of the relevant domestic industry and whether the joint motions (Motions Nos. 229-15 and 229-18) to terminate the investigation on the basis of consent orders should be granted.

II. THE CONSENT ORDER TERMINATIONS OF RESPONDENTS BLAIR AND RDCO 13/

Section 210.51(c) of the Commission's rules provides:

> An investigation before the Commission may be terminated as provided in paragraph (a) of this section on the basis of a consent order settlement under § 211.20(b) of this chapter. An order of termination based upon such a settlement shall not constitute a violation of section 337 of the Tariff Act. 14/

Consent order procedures are set forth in subpart B of part 211 of the rules. Section 211.20(b) governs the submission of proposed consent orders subsequent to institution of an investigation. It provides in pertinent part:

12/ The Commission's review was pursuant to Rules 210.54 and 210.56 of the Commission's Rules of Practice and Procedure. 19 C.F.R. §§ 210.54 and 210.56.

13/ Commissioner Rohr does not join in this portion of the opinion. He does not find it appropriate to overrule the ALJ's public interest finding or to interpret the Commission's rules as compelling complainant to abide by a consent order once such an order has been disapproved by the ALJ.

14/ 19 C.F.R. § 210.51(c)(1986).

> In investigations under section 337, a proposal to settle a matter by consent shall be submitted as a motion to the [ALJ] to terminate an investigation under section 210.51 together with a consent order agreement which incorporates a proposed consent order. . . .At any time prior to commencement of a hearing . . ., the motion may be filed jointly by all of the following: (1) All private complainants, (2) the Commission investigative attorney, and (3) one or more respondents. . . . However, upon request and for good cause shown, the [ALJ] may consider such a motion during or after a hearing. The filing of the motion shall not stay proceedings before the [ALJ] unless the [ALJ] so orders. The [ALJ] shall file with the Commission an initial determination regarding the motion for termination. . . . Pending disposition by the Commission of a consent order agreement, a party may not, absent good cause shown, withdraw from the agreement once it has been submitted pursuant to this section. (Emphasis added.)

In its petition for review, Blair contended that under Commission rule 210.58(b), only where the parties have filed statements addressing the impact of the proposed settlement on the public interest does the rule direct the ALJ to make appropriate public interest findings. Rule 210.58(b) provides:

> Unless otherwise ordered by the Commission, or permitted by this subsection, the administrative law judge shall not take evidence or other information or hear arguments from the parties and other interested persons with respect to the subject matter of paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this section. However, with regard to settlements by agreement or consent order under § 210.51(b) and (c), the parties may file statements regarding the impact of the proposed settlement on the public interest, and the administrative law judge may in his discretion hear argument, although no discovery may be compelled with respect to issues relating solely to the public interest. Thereafter, the administrative law judge shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers . . . .

Blair argued that the ALJ's role is limited to certifying appropriate public interest findings to the Commission in an initial determination. Blair concluded that the ALJ erred in this case when he made findings regarding the effect of the consent order termination on the public interest in the absence of party statements or other evidence of record addressing the impact of Blair's consent order termination on the public interest.

Blair's interpretation of our rules is incorrect. Under rule 210.58, the parties may choose to file public interest statements and the ALJ may, in his or her discretion, hear arguments on the public interest. After public interest statements have been filed and arguments have been heard, the ALJ is required to make findings regarding the public interest.

Public interest statements have not been filed in this investigation. Accordingly, the ALJ was not required to make findings with respect to the public interest (as distinguished from the findings he was required to make with respect to each element necessary to establish a violation of section 337). Nonetheless, there is nothing in the rule which precludes the ALJ from considering the public interest. Accordingly, we determine that the ALJ had discretionary authority under rule 210.58(b) to make public interest findings based solely on the facts of record.

Although the ALJ had the authority to make public interest findings we, nonetheless, determine that his findings are erroneous. In Order No. 52 (denying the IA's motion for reconsideration of the joint motions to terminate the investigation as to Ali Baba, Pong Lai, Liven, and Baird based on consent orders) the ALJ stated as a basis for denial "the apparent absence in the record of any right the complainant possesses to exclude and/or restrict certain respondents in the use of such words as "Hawaii," "kukui," "genuine,"

"authentic," and "guaranteed. He added that "[i]t is always in the public interest to preserve competition and competition should be restricted only when there is a legitimate private right as for example a patent, trademark, trade secret, copyright, and the like." 15/

Based on the record in this investigation, we determine that the ALJ erred in holding that KNH must establish an exclusive right. The error in the ALJ's determination was apparently based on a misconception regarding the nature of complainant's cause of action.

Section 43(a) of the Lanham Act imposes civil liability upon "any person who shall . . . use in connection with any goods . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same." It gives a cause of action to "any person doing business in the locality falsely indicated as that of origin . . . or by any person who believes that he is or is likely to be damaged by the use of any such false designation or representation." Accordingly, we believe that complainant does have a legitimate private right to preclude respondents from engaging in unfair trade practices irrespective of any statutory intellectual property rights. 16/

15/ Because the wording of the consent order agreements regarding Blair and RDCO are identical to three of the four consent order agreements discussed in Order No. 52, we assume that the ALJ's public interest findings in Order No. 52 provided the basis for denying the joint motions regarding Blair and RDCO on reconsideration of their joint motions.

16/ See Black Hills Jewelry Manufacturing Co. v. Gold Rush, Inc., 633 F.3d 746 (8th Cir. 1980) (manufacturers of jewelry marketed under the name "Black Hills Gold Jewelry" were entitled to protection against unfair competition by others using the same words to describe jewelry of similar style which was not manufactured in the Black Hills of South Dakota and fact that local manufacturers had not obtained a trademark was not controlling in an action brought under section 43(a)).

Further, the APA provides that agencies "shall" give all interested parties the opportunity to submit offers of settlement and "to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice . . . ." 17/ The mandatory language in the APA indicates that settlement is clearly a favored mode of resolving a dispute and a hearing is to be provided only if the parties are unable to resolve a dispute by settlement. In this investigation, the parties were able to resolve their dispute by settlement, but their efforts to do so were frustrated by the ALJ.

We note that in its response to the petitions for review, complainant KNH seems to indicate that it believes that it is no longer bound by the proposed consent orders. However, section 211.20(b) of the rules provides that "[p]ending disposition by the Commission of a consent order agreement, a party may not, absent good cause shown, withdraw from the agreement once it has been submitted pursuant to this section." The joint motions concerning Blair and RDCO are still pending before the Commission for a number of reasons. First, when the IDs granting the joint motions were first certified to the Commission, the Commission's determination to remand the IDs was made solely on procedural grounds (in light of the ALJ's contradictory orders denying identical motions) without instruction as to the substantive outcome of the motions. Accordingly, the Commission has not had the opportunity to substantively decide the joint motions and has not approved or disapproved the joint motions.

17/ 5 U.S.C. § 554(c)(1982).

Secondly, when the ALJ reconsidered Motions Nos. 229-15 and 229-19 in his final ID, the motions were certified to the Commission in the final ID. Moreover, Blair and RDCO petitioned for review of the ID insofar as it pertained to the joint motions. 18/ Thus, Motions Nos. 229-15 and 229-18 are still pending before the Commission by virtue of the final ID and Blair's and RDCO's petitions for review.

We also determine that complainant has not shown good cause why it should be permitted to withdraw from the consent order agreement. Indeed, complainant concedes that the form of remedy bargained for "seems correct." Inasmuch as complainant concedes that the remedy bargained for in the consent order agreement "seems correct," we fail to see how complainant would be prejudiced by granting the joint motions. In fact, granting the joint motions would provide complainant with the relief it seeks with respect to respondents Blair and RDCO.

Complainant's position is that, having won on the merits, the remedy should be based on a violation of section 337. As stated above, however, rule 210.51(c) provides that an order of termination based on a consent order settlement does not constitute a violation of section 337. 19/ Although complainant previously had a right to determinations of whether respondents Blair and RDCO have violated section 337, complainant waived that right when

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18/ See Respondent Blair, Ltd.'s Petition for Review of Initial Determination; Respondent RDCO, Inc.'s Petition for Review of Initial Determination.

19/ 19 C.F.R. § 210.51(c).

it signed the joint motions to terminate the investigations as to Blair and RDCO based on consent orders and invoked the Commission's consent order procedures.

Complainant argues that when the settlement failed to terminate the investigation prior to a hearing, there was a failure of consideration which dissolved the contract. 20/ Settlements proceed separate and apart from the ultimate disposition of complainant's claim. 21/ In light of all the above factors, Motions Nos. 229-15 and 229-18 requesting that this investigation be terminated as to respondents Blair, Ltd. and RDCO, Inc. is granted.

Further, in light of rule 210.51(c) which provides that an order of termination based on a consent order settlement does not constitute a violation of section 337, the ALJ's findings of a violation of section 337 with respect to respondents Blair and RDCO, Inc. are vacated.

III. THE DEFINITION OF THE DOMESTIC INDUSTRY

The ALJ stated that in patent, trademark, or copyright cases, the domestic industry is defined as the domestic operations of complainant devoted to exploitation of the intellectual property right at issue. 22/ Inasmuch

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20/ Complainant Kukui Nuts of Hawaii's Brief Addressing the Issues Under Review, Remedy, the Public Interest, and Bonding at 5.

21/ Rule 211.20(b) provides that the filing of the motion for termination based on a consent order "shall not stay proceedings before the [ALJ] unless the [ALJ] so orders.

22/ ID at 26; Certain Cloisonne Jewelry, Inv. 337-TA-195, USITC Pub. 1822, ID at 58 (1986); Certain Foam Earplugs, Inv. 337-TA-184, USITC Pub. 1671, ID at 110 (1985); Certain Drill Point Screws For Drywall Construction, Inv. 337-TA-116, USITC Pub.1365 at 11-12 (1983).

as this investigation does not involve intellectual property rights, the ALJ concluded that the appropriate definition of the U.S. industry is the domestic facilities of complainant devoted to the production and sale of products that are "the target of the unfair acts and practices." 23/ The ALJ defined the relevant domestic industry as the operations of complainant KNH devoted to the production of kukui nut jewelry from Hawaiian-grown kukui nuts. 24/

We disagree with the way the ALJ has defined the domestic industry. The unfair acts in this investigation do not focus on the origin of the nuts but rather on adequate disclosure of the origin of the nuts. The ALJ specifically found that the value of the raw kukui nut is quite small in relation to a finished, polished nut or in relation to finished, polished kukui nut jewelry. Complainant could have imported raw candlenuts, performed its production process on the raw nuts, and still have produced an article that is a product of the United States. Consequently, the origin per se of the nuts is not determinative of the definition of the domestic industry. We, therefore, define the domestic industry as the operations of KNH devoted to the manufacture, production, and/or processing of properly labeled kukui nut jewelry and parts thereof.

23/ ID at 26-27; Certain Airtight Cast-Iron Stoves, Inv. 337-TA-69, 215 U.S.P.Q. 963, 967 (1980).

24/ Complainant is the only commercial producer of kukui nut jewelry in Hawaii. ID at 105, Finding of Fact (FF) 259. Another company, Fantasia Pacific, has gone out of business. ID at 105, FF 260. The Little Hawaiian Craft Shop ("the Shop") makes kukui nut jewelry and sells the same in small quantities. ID at 106, FF 262. The Shop uses both Hawaiian grown and imported nuts. Id.

IV. REMEDY, THE PUBLIC INTEREST, AND BONDING

1. Remedy

The Commission determines that issuance of the following orders is appropriate in this investigation:

(1) a general exclusion order directing that nut jewelry bearing misleading labels, or without proper foreign origin markings, be excluded from importation into the United States; and

(2) cease and desist orders prohibiting respondents Baird, Liven, Pong Lai, and Ali Baba from (a) selling or marketing the jewelry which is improperly marked, and (b) misrepresenting or aiding or encouraging others to misrepresent the jewelry's origin. 25/

We believe that a general exclusion order is warranted for the following reasons. First, a widespread pattern of importation has been shown in this investigation. Six foreign suppliers and six domestic wholesalers have been found to be involved in the exportation, importation, and sale of the accused jewelry. 26/ Imported nut jewelry has captured a large share of the domestic market. Sales of imported nut jewelry by the respondents who participated in discovery accounted for 41.3 percent of total sales in the United States in 1984 and 31.2 percent of U.S. sales in 1985. 27/ These

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25/ Commissioner Eckes and Commissioner Lodwick do not agree that the appropriate remedies in this investigation should include cease and desist orders and believe that only an exclusion order should issue. The bases for this position are fully set forth in Certain Compound Action Metal Cutting Snips and Components Thereof, Inv. No. 337-TA-197, USITC Pub. 1831 at 6 n.14 (1986).

26/ ID at 25-26.

27/ FF 318.

percentages do not, however, reflect sales by five foreign respondents who refused to participate in discovery. As to four of those respondents, the ALJ drew adverse inferences finding that they manufactured kukui nut jewelry in substantial quantities and exported such jewelry to the United States with deceptive labels. 28/ Finally, there are other firms, in addition to the respondents named in the investigation, involved in the manufacture, importation into and sale in the United States of kukui nut jewelry.

Moreover, there exists certain business conditions from which we can infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with improperly labeled articles. For example, there is a substantial demand in the United States for the nut jewelry at issue as evidenced by the level of sales enjoyed by the domestic industry, as well as the evidence of numerous sales of imported nut jewelry. The record demonstrates that it is relatively easy to enter the nut jewelry market. Marketing and distribution networks for the jewelry at issue are readily available in the United States, as shown by the large number of domestic retailers who purchase the jewelry from respondents. The production of nut jewelry is labor intensive and can be done mostly by hand without special equipment or facilities. 29/ Moreover, in 1984, respondent Baird imported polished nuts for approximately 9.2 cents per nut and the foreign manufacturer's cost to process individual nuts is presumably lower. 30/

28/ Id. (citing ID at 120).

29/ FF 287.

30/ FF 325.

The general exclusion order applies to jewelry made from aleurites moluccana (candlenuts), all subspecies thereof, and any other jewelry that purports to be "kukui nuts". The proposed order excludes such jewelry unless it bears a foreign origin label that is attached as permanently as possible to inhibit retailers from removing it.

The ALJ specifically found that depictions on respondents' labels relating to Hawaii contributed to the labels' deception. 31/ Thus, the order prohibits the use of labels bearing any representation, including any depiction, symbol, characteristic feature, or scene of the State of Hawaii, such that the label suggests that the nuts are grown or processed in the State of Hawaii, or that the nuts or jewelry were processed, strung, or manufactured in the State of Hawaii. The ALJ also found that phrases like "Genuine Kukui Nuts" in conjunction with the other language on the labels added to the deceptiveness of the labels. 32/ Accordingly, the order prohibits such phrases unless the country of origin marking is in close proximity thereto and in at least a comparable type size.

Finally, to avoid exclusion under the order, the following would have to be printed on the label affixed to the imported jewelry: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)." This provision gives notice to retailers that removal of the foreign origin label may subject them to criminal penalties and

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31/ ID at 25.

32/ ID at 20, 25, FF 20.

may inhibit respondents from aiding or encouraging retailers to remove the foreign origin label. In view of the overwhelming evidence that retailers have removed the foreign origin markings and used respondents' labels to mislead consumers, this provision is necessary to give complainant effective relief.

A general exclusion order alone will not give complainant full relief in this investigation. Under the exclusion order, the accused product may continue to enter the United States as long as it is properly labeled, but without a cease and desist order the exclusion order may be evaded by respondents once the products enter the United States by, e.g., changing the labels on the imported jewelry, adding new labels, or encouraging retailers to remove the labels. Moreover, the cease and desist orders are necessary to preclude respondents from mislabeling or failing to label jewelry strung in Hawaii from imported processed nuts. Finally, the record indicates that there is substantial inventory of offending nut jewelry and offending labels already in the United States and that failure to prohibit further sale of these inventories would effectively deny a remedy for this potential injury. 33/

2. The Public Interest

Section 337 provides that the Commission shall issue a remedy unless, after considering the effect of such remedy upon (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the U.S.

33/ FF 153, FF 169, FF 186, and FF 240. Complainant has proposed that the
(Footnote continued on next page)

production of articles that are like or directly competitive with those which are the subject of the investigation, and (4) U.S. consumers, it finds that a remedy should not be issued. The legislative history indicates that the public interest must be paramount in the administration of the statute. 34/

The remedy will have no adverse effects on competitive conditions or U.S. consumers. Respondents will be able to continue to sell their nut jewelry in competition with complainant. Accordingly, there will continue to be competition in the U.S. market and the remedy will not cause a shortage of nut jewelry in the U.S. market.

Moreover, the remedy will help to insure that consumers are not confused about the origin of the jewelry they purchase. There was evidence in the record that some retailers have refused to carry any nut jewelry because of general consumer confusion over the variance in the jewelry's quality, origin, and price. The ALJ found that the presence of misleading labels in the marketplace had an adverse effect on competition. Accordingly, the remedy is likely to have a positive effect on competition and U.S. consumers.

(Footnote continued from previous page)
Commission's exclusion order and cease and desist orders restrict respondents from using the words "kukui nuts" to those instances in which the word "kukui" is immediately preceded by the English name of the actual country in which the nut jewelry is grown. Such a prohibition is at odds with the ALJ's finding, which we have adopted, that the words "kukui nuts" do not connote Hawaiian origin. Moreover, having failed to contest this finding in a petition for review, complainant is deemed to have abandoned it. See Commission Investigative Staff's Reply Brief to Complainant Kukui Nuts of Hawaii's Brief Addressing Issues Under Review, Remedy, The Public Interest, and Bonding at 3. Id. (citing 19 C.F.R. § 210.52(a)(1) and (2).

34/ S. Rep. 1298, 93d Cong., 193 (1974).

3. Bonding

Section 337(g) provides for the entry of infringing articles upon the payment of a bond during the 60-day Presidential review period. 35/ In determining the amount of the bond, the Commission establishes the bond in an amount sufficient to "offset any competitive advantage resulting form the unfair method of competition or unfair act enjoyed by persons benefitting from the importation." 36/

The articles subject to the remedial orders discussed above will be entitled to entry under bond set at 157 percent of the entered value of the articles. This figure was reached by comparing, as recommended by the IA, respondent Liven's wholesale price for a 30-nut lei with complainant KNH's wholesale price for a similar lei and determining the amount by which Liven undersold complainant's product. 37/

The level of bonding requested by complainant is 180 percent ad valorem. Complainant has recommended a comparison of respondent Baird's purchase price for a 30-nut lei which, in turn, must be adjusted upward to include a profit at the wholesale level, with complainant's wholesale price, which already includes a profit. Because we believe that the bond suggested by complainant does more than offset a "competitive advantage resulting from the unfair

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35/ 19 U.S.C. § 1337(g)(3).

36/ S. Rep. 1298, 93d Cong., 2d Sess. 198 (1974).

37/ Leis made with 30 nuts accounted for approximately 90 percent of the jewelry imported by respondents. FF 310.

method of competition or unfair act enjoyed by persons benefitting from the importation," we have determined to set the bond at 157 percent of the entered value of the articles concerned based on the difference between the wholesale price of a 30-nut lei from complainant KNH and the price of a similar lei from respondent Liven.

Certificate of Service

I, Kenneth R. Mason, hereby certify that the VIEWS OF THE COMMISSION, was served upon Juan Cockburn, Esq., and Steven H. Schwartz, Esq., and upon the following parties via first class mail, and air mail where necessary on November 6, 1986.

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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
CERTAIN NUT JEWELRY	)	Investigation No. 337-TA-229
AND PARTS THEREOF	)	

INITIAL DETERMINATION

Paul J. Luckern, Administrative Law Judge

Pursuant to the Notice of Investigation in this matter (50 Fed. Reg. 45173, October 30, 1985), this is the administrative law judge's initial determination under Rule 210.53 of the Rules of Practice and Procedure of this Commission, 19 C.F.R. § 210.53. The administrative law judge hereby determines, after a review of the record, that there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), hereinafter section 337, in the unauthorized importation into the United States, and in the sale of certain nut jewelry and parts thereof by reason of inadequate designation of country of origin when the jewelry is sold with certain labels, with the effect and tendency to destroy or substantially injure an industry efficiently and economically operated in the United States.

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Issued: July 30, 1986

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PROCEDURAL HISTORY

On September 16, 1985, under section 337 a complaint was filed on behalf of Kukui Nuts of Hawaii, Inc. (KNH). A supplement to the complaint was filed October 15, 1985. On October 18, 1985 the Commission issued a notice of investigation in which, pursuant to subsection (b) of section 337, an investigation was instituted to determine whether there is a violation of subsection (a) of section 337 in the unlawful importation of certain nut jewelry and parts thereof into the United States, or in its sale, by reason of alleged (1) false advertising; (2) failure to mark country of origin; (3) false designation of origin; and (4) false representation, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The notice was published on October 30, 1985 (50 Fed. Reg. 45173). Sixteen respondents were named in the notice of investigation.

The sixteen respondents, identified in the notice of investigation, were RKG Enterprises (RKG), Huang Hou Crafts (Huang Hou), Royal Design Creations (Royal Design), Oriental Arts & Crafts (Oriental Arts), Farlace Int'l Corp. (Farlace), Shine Land, Inc. (Shine Land), Joey Pong & Co., Inc. (Joey Pong), Ali Baba Import & Export (Ali Baba), RDCO, Inc. (RDCO), R. Baird & Co. (Baird), Blair, Ltd. (Blair), Taiwan Kyoei, Inc. (Taiwan Kyoei), Betty's Import & Associates, Inc. (Betty's Import), Paul's Imports, Pong Lai Coral Development Co., Ltd. (Pong Lai) and Liven & Co. (Liven).

Seven of the named respondents, viz. respondents Huang Hou, RKG, Shine Land, Joey Pong, Oriental Arts, Farlace and Royal Design, in an initial determination which issued March 11, 1986, were found in default and deemed to have waived their right (1) to appear in the investigation, (2) to be served

with documents by any party, and (3) to contest the allegations at issue. On April 8 the Commission decided not to review the initial determination.

On April 8, 1986 the administrative law judge issued an initial determination terminating the investigation, as to respondent Betty's Import, on the ground that Betty's Import was entitled to summary determination as a matter of law.

On April 11, 1986 the administrative law judge issued an initial determination granting a joint motion by complainant, the staff and respondent Blair for termination of the investigation based on a consent order agreement relative to respondent Blair. (Order No. 35).

On April 15, 1986 the administrative law judge denied the staff's motion, which complainant had supported, for a summary determination that respondents Baird, Taiwan Kyoei, Royal Design, Oriental Arts, Farlace, Shine Land, and Joey Pong had violated section 337. (Order No. 37). The administrative law judge found that neither the staff nor complainant had demonstrated that no genuine factural dispute exists.

On April 22, 1986 the administrative law judge issued an initial determination granting a joint motion by complainant, the staff and respondent RDCO for termination of the investigation, based on a consent order agreement relative to respondent RDCO. (Order No. 42).

On April 29, 1986, complainant and the staff filed a joint motion to postpone the prehearing conference and hearing to May 27 or to some date thereafter. In the supporting memorandum it was represented that by May 1 complainant would file a motion to withdraw its complaint as to the eight foreign respondents who had not signed settlement agreements; that with the "prospective" consent orders of the Commission governing the conduct of the domestic respondents, there was no need to proceed further against the

foreign respondents; that with respect to the only two domestic respondents who have not signed settlement agreements, viz. Betty's Import and Paul's Imports, there was no evidence to show those respondents have committed unfair acts; and that if the administrative law judge and the Commission approve the consent orders filed by the consenting respondents, complainant "will have all the relief it seeks in this forum; and hence the entire matter would be disposed of and there would be no need for any final adjudication by the Commission on the merits."

On May 1, 1986 the Commission decided not to review the initial determination terminating the investigation as to Betty's Import.

Order No. 51, which issued May 1, 1986, granted Motion No. 229-27 and reset the prehearing conference and commencement of the hearing dates to May 27, 1986.

On May 1, 1986, the administrative law judge issued an initial determination terminating the investigation as to respondent Paul's Imports on the ground that it was entitled to summary determination as a matter of law. (Order No. 46). On June 5, 1986, the Commission decided not to review that initial determination.

Order Nos. 47, 48, 49 and 50, which issued May 1, 1986, denied joint motions by the complainant, the staff and respondents Baird, Ali Baba, Pong Lai and Liven respectively, for termination of the investigation based on consent order agreements relative to said respondents. It was found that it was not in the public interest to exclude certain respondents, through the settlement agreements, from using the words "genuine," "authentic," "guaranteed" and like-meaning words and further restricting those respondents in the use of the words "Hawaii" and any form or derivative thereof and the word "kukui" and any similar appearing and sounding word on advertising

matter for imported kukui nut jewelry. It was stated that no exclusive rights to those words had been demonstrated by complainant. It has been denied that complainant has any such exclusive rights. Yet complainant had attempted to negotiate settlement agreements restricting the use of common language so that it "will have all the relief it seeks in this forum "(memorandum of complainant and staff in support of joint motion filed April 29, 1986).

In each of the Order Nos. 47, 48, 49 and 50 the administrative law judge stated that he would find the settlement agreements acceptable if the settlement agreements were reworded to state only that the imported nut jewelry shall be marked, in a conspicuous place as legibly, indelibly, and permanently as the nature of the jewelry will permit, to indicate to an ultimate purchaser in the United States the English name of the country of origin of the jewelry. The administrative law judge is unaware of any attempts by complainant to so amend the settlement and consent order agreements.

On May 1, 1986 the administrative law judge received a letter dated April 28 from Michael Holland, respondent Baird's Import Manager. The letter stated that Baird is not represented by counsel in the investigation;[1/] and that before signing the settlement agreement, which was the subject of Order No. 47, Baird had been confronted with the possibilities 1) that a summary determination would be granted against it; 2) that Baird would be found in default because Baird was not experienced with the intricacies of the Commission rules and did not know that it had to respond to the staff's motion for a summary determination; 3) that each and every one of Baird's retail

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1/ The record show that there has been no appearance of counsel for Baird. Also Baird has not subscribed to the Protective Order and hence only receives the public version of documents.

customers (under threat of further legal action in a state case) would be forced into agreements by complainant not to sell Baird merchandise regardless of the decision rendered by a judge in this investigation; and 4) that facing a hearing that had been scheduled for April 28, a) with no representation of counsel, b) at which hearing it would appear pertinent facts and points of view beneficial to Baird and disregarded by the staff would not be presented, and c) at which hearing the staff had assured Baird that because Baird had no attorney, arguments were merely a formality and Baird would be found "guilty in short order." Accordingly the April 28 letter stated that Baird "very reluctantly" decided it had little choice but to enter into the consent order agreement, which was the subject of Order No. 47, with complainant; that during discussions with the complainant's attorney on April 24, Baird was led to believe that a final decision on the settlement agreement had to be made on April 24; and that Baird was told that while the administrative judge was considering denying the staff's motion for summary determination, no decision had yet been rendered. The April 28 letter further stated that on April 28 Baird received Order No. 37, which issued April 15 and denied the staff's motion for summary determination; and that had Baird known of Order No. 37, it would not have signed the settlement agreement that was the subject of Order No. 47. Baird's April 28 letter was made of record by the administrative law judge.

The staff, by letter dated May 2, 1986, represented that respondent Baird's April 28 letter contained many misstatements and inaccuracies; that from the beginning of the investigation the staff was aware that respondent Baird did not plan to have an attorney notice an appearance; that the staff had made every effort to treat Baird as an active party and to assist Baird with procedural questions; that Baird throughout the investigation has been

counseled by its corporate attorney, Anson Rego; that the staff never assuredBaird that it would win or lose in this investigation; and that the staff had not ignored pertinent facts favorable to Baird.

By letter dated May 6, 1986, complainant's attorney represented that, contrary to Baird's representations in the April 28 letter, the settlement agreement between complainant and Baird was the well considered result of the negotiation efforts of Baird's corporate company's attorney, Anson Rego with the apparent assistance of Baird's insurance company's attorney Barry Kurren.

A letter dated May 9, 1986, from Baird's president to complainant's counsel stated that Baird understood from Order 47 that the joint motion for termination of the investigation relative to Baird had been denied; and that since the settlement agreement was subject to approval by the administrative law judge, Baird was withdrawing from that agreement and further considered the agreement null and void.

By letter dated May 29, 1986, Anson Rego, Baird's corporate attorney, stated that the staff's letter of May 2 contained various inaccuracies.

Mr. Rego represented that he never counseled Baird throughout the investigation nor had he made a formal appearance; that he had not heard or seen the complaint or responses to the complaint; and that because he has no expertise in the area of International Trade he could not represent Baird. Mr. Rego said that neither he, nor any Baird representative, had been informed, prior to receipt of Order No. 37, that the administrative law judge had denied the staff's summary determination motion. To avoid any misunderstanding, Mr. Rego suggested that the staff continue to discuss this matter only with Baird or its employees.

On May 5, 1986, complainant filed a motion to terminate the investigation as to the eight foreign respondents. That motion was orally withdrawn by

complainant on May 27.

On May 15, 1986, the Commission issued notices of the decision to review and remand the initial determinations terminating the investigation as to respondent Blair (Motion No. 229-15, Order No. 35) and respondent RDCO (Motion No. 229-18, Order No. 42). The notices stated that the administrative law judge, by Order Nos. 47-50, denied apparently identical motions with respect to other respondents in the investigation; that in light of the denial of those motions, the Commission was remanding the initial determinations pertaining to respondents Blair and RDCO for reconsideration; and that the remands did not constitute an instruction as to the outcome of such reconsiderations.

On reconsideration of Motion Nos. 229-15 and 229-18, those motions are denied.

On May 16, 1986, the administrative law judge denied the staff's motion for reconsideration of the joint motions to terminate the investigation, with respect to respondents Ali Baba, Baird, Pong Lai and Liven. (Order No. 52).

A prehearing conference was held on May 27, 1986. Following the prehearing conference, the hearing commenced and was concluded on May 27. Only complainant and the staff appeared at the hearing. Neither complainant nor the staff offered any live testimony.

On May 27, 1986, complainant and the staff orally moved that respondents Ali Baba, RDCO, Baird (which respondent has provided a considerable amount of information in discovery - see findings 20-81), Blair, Taiwan Kyoei, Pong Lai, and Liven, in view of their failure to appear at the hearing, be found in default and be found to have waived their rights to contest the allegations at issue in the investigation. Order No. 61, dated July 2, denied that motion.

On May 27, 1986, the Commission investigative attorney moved for

discovery sanctions against Liven, Ali Baba and Pong Lai because of their failure to comply with the administrative law judge's order compelling discovery which issued February 11. (Motion Docket No. 229-31). Order No. 65, dated July 30, denied Motion No. 229-31.

On May 27, 1986, the Commission investigative attorney moved for discovery sanctions against respondents Royal Design, Oriental Arts, Farlace, Shine Land, and Joey Pong because of their failure to comply with the administrative law judge's order compelling discovery which issued February 5. (Motion Docket No. 229-32). Order No. 66, dated July 30 granted in part Motion No. 229-32.

On May 27, 1986, the Commission investigative attorney and complainant orally moved that the initial determinations involving respondents Blair and RDCO (Order Nos. 35 and 42) be sent back to the Commission for their consideration because the involved consent orders are in the public interest. (Prehearing Tr. at 30-31). The motion was denied on May 27.

On May 22, 1986, the staff filed a motion to compel discovery requests from respondent Baird relating to the marking of the country of origin on imported kukui nut jewelry pursuant to Customs law. (Motion Docket No. 229-30). Order No. 64, dated July 8, denied Motion No. 229-30.

On May 27, 1986, during the prehearing conference, complainant identified its exhibits CX-3 (affidavit of Sallie Jacobsen), CX-4 (affidavit of Tom Swingle) and CX-5 (affidavit of Renalle Fernandez). Order No. 63, dated July 3, admitted the affidavits into evidence.

On June 5, 1986, the staff moved to reopen the evidentiary record to admit its Exhibit 88 (SX-88). (Motion Docket No. 299-34). Order No. 62, dated July 2, granted Motion No. 229-34, reopened the record and admitted SX-88 into evidence.

On June 16, 1986, respondent Blair moved to reopen the evidentiary record for admission of certain documents which Blair represented it had previouslytransmitted to the Commission investigative attorney in response to the staff's first request for production of documents and things from respondents. (Motion Docket No. 229-35). Order No. 63, dated July 3, granted Motion No. 229-35, reopened the record and admitted into evidence the documents marked as RB1X-1, RB1X-2, and RB1X-3.

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

This initial determination is based on the entire record of this proceeding including the exhibits admitted into evidence. 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.

JURISDICTION

The Commission has in rem and subject matter jurisdiction in this investigation under section 337, because the unfair methods of competition and unfair acts involve the importation into, and sale in, the United States of certain nut jewelry, the alleged effect or tendency of which is to destroy or substantially injure an industry, alleged to be efficiently and economically operated in the United States.

Service of the complaint and notice of investigation was perfected on fourteen of the sixteen respondents. Service was not perfected on respondents RKG and Huang Hou. (FF 1).[2/]

OPINION

Introduction

This investigation concerns the importation into Hawaii of certain kukui nut jewelry, and polished (processed) kukui nuts from which kukui nut jewelry is made, and the sale of said jewelry in the United States. The alleged unfair acts are not based on any intellectual property right, e.g. patent or trademark right, held by complainant KNH. Rather the gist of the allegations is that certain labels, under which imported kukui nut jewelry and/or jewelry with imported nuts are sold in the United States, are alleged to be misleading in that they cause a purchaser to believe that said kukui nut jewelry offered for sale in the United States is of Hawaiian origin in its entirety.

2/ Complainant has requested the Commission issue not only a permanent exclusion order but also permanent cease and desist orders.

A. Unfair Acts

The alleged unfair acts in this investigation involves importation of certain nut jewelry and parts thereof into the United States, or its sale and an alleged failure to mark country of origin, false designation of origin, false advertising and false representation.[3/]

A failure to make a clear and conspicuous disclosure of the country of origin of imported goods can constitute a violation of section 337. In Certain Swivel Hooks and Mounting Brackets, Inv. 337-TA-53, 207 U.S.P.Q. 669 (1978), the administrative law judge relied on Federal Trade Commission disclosure standards[4/] to support a finding that the respondents should disclose "clearly and conspicuously" the foreign country of origin of all imported swivel hooks, on the swivel hooks, as well as on the retail packages in which the swivel hooks were sold in the United States. (RD at 3, 4). The

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3/ In a state of Hawaii court action, involving complainant as plaintiff and some of the respondents as defendants, a state judge found that complainant had failed to present evidence that "kukui nuts" had acquired a secondary meaning. The state court refused to issue an injunction to prevent the distribution and retailing of kukui nut products. (FF 45, 80 and 81).

4/ Section 5 of the Federal Trade Commission Act (15 U.S.C. section 5 (a)(1)), declares that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful. A failure to disclose country of origin on imported goods has been found unlawful by the Federal Trade Commission. Manco Watch Strap Co., Inc., 60 F.T.C. 495 (1962).

The Federal Trade Commission may evaluate language to determine if there is a tendency to deceive without necessarily resorting to assessments of consumer perception or expert testimony. Manco at 509, 510; Niresk Industries, Inc. v. F.T.C., 278 F.2d 337, 342 (7th Cir. 1960); Bristol Myers Co., 102 F.T.C. 21, 319 (1983). Manco required that the place of origin of imported metal expansion watch bands, be clearly disclosed in a conspicuous place on the packages containing the imports. Manco at 509, 510. The Federal Trade Commission looks not to the most sophisticated but rather to the least sophisticated when evaluating the tendency of language to deceive. Exposition Press, Inc. v. F.T.C., 295 F.2d 869, 872 (7th Cir. 1961).

Commission adopted the administrative law judge's findings of fact and conclusions of law despite an exception to that portion which pertained to the sufficiency, clarity or conspicuousness of a "Japan" marking on respondents' swivel hooks. Id. 207 U.S.P.Q. at 670.[5/]

It is well settled that a violation of section 43(a) of the Lanham Act (15 U.S.C. section 1125(a))[6/] is an unfair act or method of competition within the meaning of section 337. Certain Vertical Milling Machines and Parts, Attachments and Accessories Thereto, Inv. 337-TA-133, 223 U.S.P.Q. 232 (1984), aff'd sub. nom. Textron, Inc. v. USITC, 753 F.2d 1019 (Fed. Cir. 1985).

In an International Trade Commission investigation involving section 43(a) of the Lanham Act a complainant need not submit survey evidence showing

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5/ Although the notice of investigation, in defining the scope of the investigation, did not state as an alleged unfair act a failure to make a clear and conspicuous disclosure of the country of origin, complainant has argued that respondents do not adequately disclose the foreign origin of their nut jewelry (CPost at 15). Evidence has been submitted in support thereof. In accordance with Commission rule 210.22 (b) it is appropriate to consider whether there has been a failure to make a clear and conspicuous disclosure of the country of origin on the imported nut jewelry when it is sold with certain labels to the retail purchaser. See Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366 (1st Cir. 1980) which held that a federal court is bound by applicable federal law, whether or not it is explicitly pleaded and a complainant's failure to invoke substantive provisions of a federal statute in its complaint does not determine how a case is to be decided.

6/ Section 43(a) of the Lanham Act reads in part:

> (a) Any person who shall affix, apply, or annex, or use in connection with any goods . . . , a false designation of origin . . . shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin. . . . (Emphasis added)

See Bohsei Ent. Co. v. Porteous Fastener Co., 441 F. Supp. 162 (C.D. Cal. 1977), where a motion to dismiss, which was grounded on the argument that omission of true country of origin on imported merchandise was not cognizable under the Lanham Act, was dismissed. See also Callman, Unfair Competition, Trademarks and Monopolies, section 5.04 (4th ed. 1981).

consumer confusion. Rather, the Commission may decide for itself whether certain language is unfair or deceptive. Certain Airtight Cast-Iron Stoves, Inv. 337-TA-69, USITC Publication No. 1126, CD at 5, RD at 14 (1981).

Courts have interpreted the Lanham Act to apply to situations where the misleading designation has only a tendency to deceive. American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160 (2nd Cir. 1978); Mortellito v. Nina of California, Inc., 335 F. Supp. 1288 (S.D.N.Y. 1972). In considering the question of whether there is a tendency to deceive, the buying public includes the unthinking and the credulous. The public is not expected to analyze or carefully weigh what is presented to them. Dallas Cowboys Cheerleaders v. Pussycat Cinema, 467 F. Supp. 366, 374, 201 U.S.P.Q. 740, 747 (S.D.N.Y. 1979), aff 604 F.2d 220, 203 U.S.P.Q. 161 (2d Cir. 1979).

Under section 43(a) of the Lanham Act, courts have required evidence of actual deception for awards of monetary damages. However, where a party seeks injunctive relief, as requested by complainant in this investigation, courts have appeared to be satisfied with proof which does not show actual deception. The rationale is that Congress desired this result because section 43(a) confers a right of action upon any person who "believes that he is or is likely to be damaged" by a defendant's practices. Parkway Baking Co. v. Freihoff Baking Co., 255 F.2d 641, 649 (3d Cir. 1958).

Failure to designate the place of origin of imported articles is a violation of section 304 of the Tariff Act of 1930 (19 U.S.C. §1304).[7/]

7/ Section 304(a) (19 U.S.C. section 1304(a)) provides in pertinent part as follows:

> every article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article . . . will permit in

(Footnote continued to page 14)

Section 304 is administered by the Bureau of Customs. While it is inappropriate to elevate a technical violation of section 304, standing alone, to an unfair method of competition within the meaning of section 337[8/] the

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(Footnote continued from page 13)
such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of the article.

Section 134.46 and 134.47 of the Customs Regulation (19 C.F.R. 134.46 and 134.47) promulgated under section 304 state:

> Marking when name of country or locality other than country of origin appears.
>
> In any case in which the words "United States,"or "American," the letters "U.S.A.," and variation of such words or letters, or the name of any city or locality in the United States, or the name of any foreign country or locality in which the article was manufactured or produced, appear on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.
>
> Souvenirs and articles marked with trademarks or trade names.
>
> When as part of a trademark or trade name or as part of a souvenir marking, the name of a location in the United States or "United States" or "America" appear, the article shall be legibly, conspicuously, and permanently marked to indicate the name of the country of origin of the article preceded by "Made in," "Product of," or other similar words, in close proximity or in some other conspicuous location.

These regulations have the force of law. United States v Mersky, 361 U.S. 431, 438 (1960).

8/ In Certain Caulking Guns, Inv. 337-TA-139, USITC Publication 1507, ID at 46-47, an administrative law judge found that while respondents, as well as other unnamed non-respondent importers, had violated 19 U.S.C. 1304(a) by failing to designate the country of origin of the subject caulking guns, complainant had not shown that the violation of 19 U.S.C. 1304(a) constituted a false designation of origin under section 43(a) of the Lanham Act and hence that the violation was an unfair act. The Commission in issuing an exclusion order in Caulking Guns observed that while the administrative law judge issued his initial determination finding a violation of section 337 on the basis of

(Footnote continued to page 15)

Commission has stated that the absence of markings on imports or their packaging as required by section 304, coupled with the simulation of the complainant's trade dress and/or marketing of imports under complainant's trademarks may constitute a misrepresentation of the geographical origin of the subject imports within the meaning of the Lanham Act. In re Certain Miniature Plug-In Blade Fuses, Inv. 337-TA-221 U.S.P.Q. 792, 806 (1983). Accordingly the Commission has not considered a violation of section 304 completely irrelevant to a section 337 investigation.

In light of the foregoing precedent the issue under consideration, is whether the importation of certain kukui nut jewelry and/or polished kukui nuts from which kukui nut jewelry is made and the sale of said jewelry, when associated with certain labels, are unfair acts under section 337 especially in view of section 304 of the Tariff Act, section 43(a) of the Lanham Act and section 5 of the Federal Trade Commission Act.

Respondent Baird's labels used with the kukui nut jewelry Baird has sold since January 1982 are reproduced in finding 20, and referred to in this opinion as Baird labels #1, #2, #3, #4, and #5. All of the labels have in bold black letters on the front cover the words, "KUKUI NUTS" and "Symbolic of Hawaii," and all are designed to be folded to form a booklet. The cover contains a descriptive scene of Hawaii (palm-trees, Diamond Head and beach).

(Footnote continued from page 14)
patent infringement, he did not find a violation on the basis of passing-off, false advertising or false designation of origin. Id. at 1-2. See also Initial Determination in Certain Trolley Wheel Assemblies, Inv. 337-TA-161 at 54, 55 (1984). See also Federal Trade Commission advisory opinion (16 C.F.R. § 15.29) where an American concern was informed by the Federal Trade Commission that it will not be necessary to disclose the English origin of the handles, assuming there is no affirmative representation they are domestic but was told that its advisory opinion does not relieve one from complying with any applicable statutes or regulations administered by the Bureau of Customs.

There is an English text in the center fold of the booklet relating kukui nuts to Hawaii. (FF 20). On the back cover of the booklet the English text is apparently in Japanese. It is undenied that the front of the labels, which is the portion of the label exposed to the prospective purchaser, has a Diamond Head-palm tree-beach scene characteristic of Hawaii. (FF 20). The English text, on the inside of the booklet, relates that kukui nuts are the fruit of the State tree of Hawaii, that the kukui tree is found on most mountain slopes in Hawaii, and that the kukui nuts are a lasting and beautiful symbol of Hawaii. The text also states how ancient Hawaiians used the kukui nuts, and how they made the kukui nuts into jewelry. (FF 20). The strong relationship of the text, in the inside of the label to Hawaii, is self evident.

Label #1 was used on bracelets Baird made in Hawaii from imported loose, polished kukui nuts. (FF 20, 150). The transformation in Hawaii of imported loose, polished kukui nuts into bracelets involves only stringing. See SPX-5. Most of the manufacturing process involves transforming raw kukui nuts into polished kukui nuts (FF 287) and this is done outside the United States. The administrative law judge finds that the stringing of loose polished kukui nuts in Hawaii, whether it be to make leis or bracelets, does not add sufficient value to the resultant product for the product to be considered of U.S. origin.[9/]

9/ A comparison of the cost of importing loose polished candlenuts (kukui nuts) relative to the cost of imported completed candlenut jewelry indicates that the loose polished nuts account for a major portion of the jewelry cost. Based on respondent Baird's sales price of $1.25 for a candlenut bracelet, the cost of the imported loose nuts was about 51 percent of the bracelet's sales value (based on seven nuts per bracelet). However, this percentage includes respondent Baird's markup over cost in the value of the bracelet. For imports of completed 30-nut leis, Baird's markup over import cost was over 50

(Footnote continued to page 17)

Labels #2, #3, #4 and #5 could have been used by Baird with all styles of imported nut jewelry. (FF 20).

Baird label #4 (multicolor scene) was used on two shipments of nut jewelry to Baird. Baird questioned the exporter about the origin of label #4 and was advised that label #4 was used in place of the pink tags (label #2, label #3) which were all gone. Baird then told the exporter that Baird needed its pink tags, because the pink tag identified Baird's merchandise, and to use the pink tag. However, jewelry with label #4 was sold by Baird. (FF 61). Baird label #5 showed up with a shipment of kukui nut jewelry and Baird's Holland testified that it is "possible" jewelry was sold to retailers with label #5. (FF 60).

There is no identification of the country of origin of the loose polished kukui nuts when bracelets are sold with label #1. (FF 20).

On Baird labels #4 and #5, the country of origin of the jewelry is in tiny black letters on a protrusion at the back cover of the booklet. The type for the country of origin on label #4 and label #5 is miniscule and barely perceptible. (FF 20). When folded, the country of origin is not even visible, unless one were to turn to the back cover.

(Footnote continued from page 16)
percent. Respondent Blair's cost for 7 loose imported polished candlenuts accounted for between 73 and 98 percent of the cost of a completed 7-nut bracelet, depending on whether a loose nut cost of 7.2 cents (1982) or 9.7 cents (1983) is used. Respondent Baird paid 6.6 cents per loose nut in 1984, and paid $2.59 for a completed 30 nut lei, its largest volume item. The loose nuts, therefore, would have accounted for approximately 76 percent of the cost of the completed lei. (FF 333). For respondent RDCO, the imported polished loose nuts would have accounted for over 90 percent of the cost of the completed imported leis. (FF 333).

Baird has also made earrings from imported loose, polished kukui nuts. However, sale of earrings by Baird are small relative to bracelet sales. (FF 150). The earrings also are apparently sold with no label. See SPX-8.

On Baird label #2 the country of origin is found on the front cover and consists of a gold foil sticker, with barely perceptible tiny black lettering comparable to the type for the country of origin found on Baird label #5. (FF 20). Baird label #3 also has a gold foil sticker with barely perceptible tiny black lettering for the country of origin. The sticker however is not attached to the label, but rather directly to the jewelry by means of a small string tag. (FF 20).[10/] The gold foil sticker on labels #2 and #3 is not a permanent part of either label and can be removed. Unrefuted evidence shows occasions when the country of origin had been removed from Baird's pink labels. (FF 56, 63, 64, 65, 66).[11/]

Imported kukui nut jewelry with the Baird labels has been and/or is sold at tourist areas throughout the State of Hawaii, including shopping centers, large department stores, gift shops and vending carts, at the International Market Place in Waikiki and duty free shops at the Honolulu International Airport. (FF 31, 63-66, 68, 69). Hence the jewelry is sold to the casual and less then discriminating purchaser. Moreover, tourists buy souvenirs in Hawaii to bring back something from Hawaii. (FF 67).

Customs action under section 304 of the Tariff Act on respondent Baird's imported jewelry has varied. A sample of a Baird's imported kukui nut

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10/ In Baird's answers to interrogatories the string tag was stapled to label #3 only for convenience in submitting the answers. (FF 59).

11/ The administrative law judge recognizes that Baird has asked its sales representatives to tell all customers that identification showing country of origin should be left in place (FF 26, 41, 45, 73), (FF 52, 53) and has no control over its jewelry once it leaves Baird. (FF 26). There is however no requirement in section 43(a) of the Lanham Act that an inconspicuous designation of origin occur willfully or with intent to deceive

(Footnote continued to page 19)

necklace containing a label was taken by Customs in August 1982 but there was no action by Customs. (FF 76). Furthermore, all of Baird's kukui nut entries since the inception of U.S. Customs' ACS (computerized entry) program in Hawaii have been designated "Intensive Exam" which apparently meant that U.S. Customs has inspected and scrutinized Baird's kukui nut jewelry at least six times within the last year. (FF 76). Entry No. 86-104626-1, which was the subject of a Customs Form 4627 dated April 1, 1986, was released to Baird in January 1986. (FF 76). Customs Form 4647, under a "Remarks" section, stated "All kukui nut necklaces with descriptive tags - KUKUI NUTS-SYMBOLIC OF HAWAII - must be stamped with country of origin in close proximity to HAWAII and in the same letter size as HAWAII." (FF 75). It would appear that nothing was done by Customs about entry no. 86-104626-1 because the entry was liquidated. (FF 77, 78). In June 1986 however, Customs stated that it informed respondent Baird that if future shipments were tagged with the "Symbolic of Hawaii" tags, Customs would require the marking to conform to the Customs Form 4667 "Remarks" section. (FF 78, 79). Apparently Baird understood that the imported nut jewelry is considered a souvenir by Customs and hence governed by Customs Regulation 19 C.F.R. § 134.47. (FF 76). Regulation 19 C.F.R. 134.47 eliminates the "comparable size" and "close proximity" requirements of 19 C.F.R. 134.46.[12/] Renalle Fernandez, a witness proffered by complainant, apparently agrees that kukui nut jewelry can be considered a souvenir of

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(Footnote continued from page 18)
when it appears from the circumstances that the conduct complained of has a natural tendency to deceive or confuse the public in the market involved. See Johnson & Johnson v. Quality Price, 484 F. Supp. 975, 207 U.S.P.Q. 1127 (D.N.J. 1979).

12/ 19 C.F.R. § 34,47 is reproduced in footnote 7 at 13, 14.

Hawaii because she states in an affidavit that "It is well recognized by all of us selling at Shop Pacifica that what tourists almost always are looking for -- and certainly prefer -- is an authentic, made-in-Hawaii, souvenir of their visit here." (FF 144). Tom Swingle, another witness proffered by complainant, stated in an affidavit that two women "brought Kukui Nuts of Hawaii's leis saying that they wanted a souvenir of Hawaii, not of Taiwan." (FF 143). Assuming kukui nut jewelry should be classified by Customs under section 134.47 there still has to be a "conspicuous location" of the country of origin on the jewelry which the administrative law judge finds is lacking on Baird's labels #1, #2, #3, #4 and #5.

In view of the lack of a conspicuous location of the country of origin and the language and scene on the Baird labels #1, #2, #3, #4 and #5, the administrative law judge finds that there is a tendency to deceive a prospective purchaser, making a casual inspection of kukui nut jewelry containing the labels, into believing that the kukui nut jewelry, in its entirety, originated from Hawaii. Hence the importation of kukui nut jewelry and/or its critical components and the sale of said jewelry by respondent Baird constitutes an unfair act within the meaning of section 304(a) of the Tariff Act coupled with section 43(a) of the Lanham Act and section 5 of the Federal Trade Commission Act.

Respondent Blair has used three different labels on imported kukui nut leis. (FF 83). These labels are identified in this opinion as Blair labels #1, #2 and #3 and reproduced in finding 83. A comparison of the three labels with respondent Baird's labels establishes that one of Blair's labels, identified as Blair label #2 is identical to Baird's label #2. (FF 20). Hence, Blair's sale of imported kukui nut leis with Blair's label #2 is found to be an unfair act for reasons set forth in connection with Baird's label

#2. Likewise the sale of kukui nut leis with labels, identified as Blair label #3 and which state "Hand Strung in Hawaii" but also refers to the kukui nut as worn by Hawaiian royalty and has no disclosure of the country of origin of the imported polished kukui nuts used in the jewelry is found to be an unfair act for the reasons set forth in connection with Baird's sale of bracelets with Baird's label #1 which bracelets were made in Hawaii but from imported polished kukui nuts.

A third label Blair has used in its sale of kukui nut leis is a heart shape label identified in this opinion as Blair label #1. (FF 83). On the front of the label in black letters is the following "MADE IN TAIWAN R.O.C." which is easily perceptible, especially when compared with other language on the front of the label. (FF 83). It is readily perceptible to tourists. (See FF 89, 97). The country of origin designation on the heart shape label is a part of the label. (FF 83). Based on the appearance of the label, the administrative law judge finds, contrary to complainant's and staff's contentions, that the sale by Blair of imported kukui nut leis with this heart shape label #1 does not have a tendency to deceive the purchasing public as to the country of origin of the imported leis even when coupled with the other language on the label. Hence the importation and sale of kukui nut leis with the heart shape Blair label #1 is found not to be an unfair act.

The administrative law judge rejects the contentions of complainant and staff that if respondents' labels have a clear and conspicuous disclosure of the country of origin, there still may be an unfair act because the labels still leave "the possibility that the nuts were grown in Hawaii and leaves

unqualified the impression that the nuts are from Hawaii" (Tr. at 97, 98) or because of the overall impression of the words "kukui nuts" in front of palm trees and Diamond Head along with language on the symbolism and the history of Hawaii. (Tr. at 95, 191). There is no evidence in the record to establish that the narrative on Baird #1 label, taken from the public library (FF 21), or on Blair label #1 is misleading. The palm tree - Diamond Head symbols on Baird's labels (FF 20) have been used for years, as a Baird logo, by Baird on its business cards. (FF 47, 48, 49, 50). It is also used on invoices. (FF 46). The staff argued that Baird abandoned its alleged palm tree - Diamond Head "logo" because Baird's most resent business cards have a different drawing. (SPost at 19). The administrative law judge finds the Baird business card in current use (FF 48) comparable to Baird's earlier business card. (FF 47). Moreover Baird's Holland is still using the earlier business card. (FF 50).

The administrative law judge also rejects complainant's contention that the kukui nuts grown in Hawaii should be the only nuts called "kukui nuts" (Tr. at 37) because while the aleurites moluccana or the candlenut is grown in places other than Hawaii, the "kukui nut is grown only in Hawaii, in the same sense that fromage is only made in French-speaking countries, or that the oranja is only an orange from a Spanish - speaking country." (Tr. at 61).[13/] The evidence establishes that the common name for "kukui nut" is "candlenut" (FF 131); that the candlenut tree is native to countries from Polynesia west to southern Asia; that it was brought to Hawaii by early

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13/ The staff admits that "kukui nuts" are grown in places other than Hawaii. It also states that there is no factual basis for believing that consumers in the market place assume that when "kukui nuts" is seen "standing alone" the product comes from Hawaii. (Tr. at 59, 60, 77).

settlers; and that it is distributed in the tropics and subtopics of the old world, West Indies, Brazil and other locations. (FF 135). There is nothing in the record that establishes that imported candlenuts grown in Hawaii have any characteristics which the candlenuts grown in locations other than Hawaii do not have. There is nothing in the record that establishes that when the word "kukui nut" is used, it is assumed that the nut has to be grown in Hawaii.[14/]

Respondent RDCO identified three labels "used" in connection with the marketing, sale or distribution of candlenut jewelry in the United States. These labels are identified in this opinion as RDCO labels #1, #2 and #3 and reproduced in finding 102. One of the labels, identified as RDCO label #1 is a "Made in Taiwan" string tag. The other two RDCO labels identified as RDCO labels #2 and #3, have in bold letters "Kukui Nuts" or "Kukui Nuts of the Hawaiian Royalty", and identify the kukui nut jewelry with Hawaiian royalty and/or talk about the kukui nuts as highly prized by the peoples of Hawaii. (FF 102). RDCO stated that the candlenut jewelry it sold was strung in Taiwan (FF 109) and marked with the country of manufacturer (FF 104) which presumably is with the string tag label #1. (FF 102). However RDCO has also indicated that the imported jewelry sold in the United States was associated also with RDCO's labels #2 or #3. (FF 102). There is unrefuted evidence that the string tag is easily removable. (FF 111).

The imported kukui nut jewelry sold by RDCO with RDCO labels #2 and #3 is found to be an unfair act for the reasons set forth in connection with the sale by respondent Baird of kukui nut jewelry with Baird label #3.

14/ The affidavits profferd by complainant are devoid of such evidence. (FF 142, 143, 144).

Respondent Liven identified one label used in connection with its imported candlenut (kukui nut) jewelry. This label is identified in this opinion as Liven label #1 and reproduced in finding 114. The front of the label has in bold letters the words "Kukui Nuts History of Hawaii." The inside of the label relates kukui nuts to Hawaiian royalty and states that the kukui nut is a symbol of Hawaii. The front of the label appears to have a small stick on label identifying the country of origin. (FF 114). Importation of kukui nut jewelry with Liven label #1 is found to be an unfair act for the reasons stated for respondent Baird's sale of imported kukui nut jewelry with Baird's label #2.

Respondent Pong Lai identified one label used in connection with its importation of kukui nut necklaces. This label is identified in this opinion as Pong Lai label #1 and reproduced in finding 117. An examination of Pong Lai label #1 shows that it is substantially identical to Baird label #4. (FF 20). Hence for the reasons stated in connection with the Baird label #4, importation by Pong Lai of necklaces with Pong Lai label #1 is found to be an unfair act.

Respondent Ali Baba identified one label used in connection with its importation of kukui nut necklaces. This label is identified in this opinion as Ali Baba label #1 and reproduced in finding 122. Ali Baba label #1 is identical to Pong Lai label #1. (FF 117). Hence importation of kukui nut jewelry with Ali Baba label #1 is found to be an unfair act for the reasons set forth for Pong Lai label #1.

In summary the administrative law judge finds complainant has met its burden of proof in establishing that Baird's labels #1, #2, #3, #4 and #5, Blair Labels #2 and #3, RDCO label's #2 and #3, Liven label #1, Pong Lai label

#1 and Ali Baba label #1 lack a conspicuous location of the country of origin of the associated kukui nut jewelry and/or critical components of associated kukui nut jewelry. Accordingly the absence of a conspicuous location of the country of origin, coupled with the language on the labels, and scenes on certain labels, associating the jewelry with Hawaii, have a tendency to deceive the purchasing public as to country of origin of the jewelry and/or its critical components and are unfair acts under section 337 in view of section 304(a) of the Tariff Act coupled with section 43(a) of the Lanham Act and section 5 of the Federal Trade Commission Act.

B. Importation and Sale

To invoke the subject matter jurisdiction of the Commission and to support a section 337 violation, complainant KNH must prove that the accused nut jewelry and parts thereof have been imported into and/or sold in the United States with the unfair labels.

The record establishes that each of the respondents Baird, Blair, RDCO, Liven, Pong Lai, and Ali Baba sold in the United States imported kukui nut jewelry or jewelry made from imported polished kukui nuts with unfair labels (FF 20-81, 145-170 for Baird; FF 82-101, 171-191 for Blair; FF 102-111, 215-228 for RDCO; FF 112-115, 192-205 for Liven; FF 116-121, 229-234 for Pong Lai; FF 122-126, 235-240 for Ali Baba). The record further establishes that respondent Shine Land exported kukui nut leis to Baird containing unfair labels (FF 20-81, 241, 242). Also as a result of sanctions there are

inferences that Royal Design knowingly exported kukui nut jewelry to RDCO for sale in Hawaii with RDCO unfair labels #2 and #3; that Oriental Arts knowingly exported polished kukui nuts to Blair for use in jewelry sold in Hawaii with Blair unfair label #3; and that Farlace knowingly exported polished kukui nuts to Blair for use in jewelry sold in Hawaii with Blair unfair label #3. (FF 334).

There is also evidence that Huang Hou made the nut jewelry and exported the jewelry to Liven with the Liven unfair label. (FF 247).

There is further evidence that Taiwan Kyoei exported nut jewelry to Baird with Baird unfair labels. (FF 127-130).

As to the other respondents named in the notice of investigation and remaining in the investigation, viz. RKG, and Joey Pong, there is no evidence relating RKG to any importation and sale. (FF 258). The record also shows that respondent Joey Pong has not exported nut jewelry to the United States since 1977. (FF 243). Accordingly, with the exception of respondents RKG and Joey Pong, the administrative law judge finds that complainant KNH has established that the named respondents remaining in the investigation have imported into and/or sold in the United States candlenut jewelry and parts thereof.[15/]

C. Domestic Industry

In patent, trademark, or copyright cases, the domestic industry is defined as the domestic operations of a complainant devoted to the intellectual property right at issue. See Certain Cloisonne Jewelry, Inv.

15/ The investigation was terminated with respect to respondents Betty's Import and Paul's Imports named in the notice because there was no evidence to show that they have committed an unfair act.

337-TA-195 ID at 58 (1985); Certain Foam Ear Plugs, Inv. 337-TA-184 USITC Publication 1671 (March 1985); Certain Drill Point Screws, Inv. 337-TA-116 USITC Publication 1365 at 11-12 (March 1983). This investigation does not involve intellectual property rights however, and thus the appropriate definition of the U.S. industry is the domestic facilities devoted to the production and sale of products that are "the target of the unfair acts and practices." See Cast Iron Stoves, Inv. 337-TA-69, 215 U.S.P.Q. 963, 967 (1980).

Complainant KNH and the staff take the position that the domestic industry should be defined as KNH's facilities devoted to the production and sale of kukui nut jewelry manufactured in Hawaii, from Hawaiian kukui nuts. (SPost at 29, CPost at 49). The staff argues that the kukui nuts themselves must be of Hawaiian origin because if complainant did not use Hawaiian kukui nuts it could not complain about others who represent foreign nuts as being Hawaiian. (Tr. at 165; See Complaint at 5).

Complainant argued that its products are made of the kukui nut grown and manufactured entirely in Hawaii;[16/] and that the relief it seeks is protection for this unique, domestic and distinctly Hawaiian industry, and not

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16/ Only once, in August 1979, did KNH use imported kukui nuts, when it purchased between 10,000 and 20,000 finished nuts at a U.S. Customs Auction. KNH sold the jewelry made from these nuts as imported. (FF 283, 284).

a monopoly or any exclusive right to market and sell kukui nut jewelry.[17/] Complainant further argued that it would not be the sole beneficiary of any relief granted by the Commission; and that any relief would benefit any manufacturer that uses Hawaiian grown kukui nuts, even providing an opportunity for participation in the market place by respondents. (CPost at 1, 2). Traditionally, the Commission has not required that raw materials or any specific production step be of U.S. origin, but rather has employed a value-added analysis to arrive at its definition of a particular domestic industry when a complainant's manufacturing process involves offshore activity. See Certain Airless Paint Spray Pumps, Inv. 337-TA-90, 216 U.S.P.Q.

17/ KNH is presently the only commercial producer of Hawaiian kukui nut jewelry although there are now and from time to time smaller scale operations making Hawaiian kukui nut jewelry. Fantasia Pacific and a man named Mr. Yuen hand made kukui nut jewelry in commercial quantities, but both went out of business. Fantasia, which imported some of their nuts, went out of business in 1983 or 1984. (FF 259-262). (CX-5). One other company, the Little Hawaiian Craft Shop, makes small quantities of kukui nut jewelry for the custom trade from Hawaiian kukui nuts. This company, however, is primarily a retailer, selling kukui nut jewelry manufactured by KNH as well as selling imported candlenut jewelry. Whether this company is included as part of the domestic industry or not, would have little bearing on the injury analysis. (FF 262)

465, 470 (1981); Certain Cube Puzzles, Inv. 337-TA-112, 219 U.S.P.Q. 335 (1982); Certain Products with Gremlins Character Depictions, Inv. 337-TA-201, views of Chairwoman Stern, Commissioners Eckes, Lodwick, and Rohr, at 5 (1986); and Certain Cloisonne Jewelry supra at 59. In the present case, the raw nut itself adds little value to the kukui nut jewelry, as KNH pays less than 1/2 cent for each raw kukui nut it purchases. (See FF 280). Based on its wholesale selling price of $9.00 for a black 30-nut let, the raw nuts add only about 1.5 percent to the value of the leis produced by KNH. (FF 286). Therefore, KNH's kukui nut jewelry would still likely be considered "Hawaiian" under Commission precedent, assuming an intellectual property right was involved, even if the kukui nut itself originated offshore.

The administrative law judge finds that the unfair act allegations in this investigation play a role in defining the U.S. industry definition in that the alleged unfair acts involve the origin of the kukui nuts of the jewelry in issue. Accordingly, it is found that the U.S. industry definition requires that the kukui nuts be grown in Hawaii and that the domestic industry consists of the operations of KNH devoted to the production of kukui nut jewelry from Hawaiian grown kukui nuts.

D. Efficient and Economic Operation

In order to prevail under section 337, a complainant must establish that the domestic industry is efficiently and economically operated. The guidelines set forth by the Commission to assess whether a domestic industry is efficiently and economically operated include: (1) use of modern equipment and manufacturing facilities; (2) investment in research and development; (3) profitability of the relevant product line; (4) substantial expenditures in advertising, promotion, and development of consumer goodwill; (5) effective

quality control programs; and (6) incentive compensation and fringe benefit programs for employees. See Certain Methods for Extruding Plastic Tubing, Inv. 337-TA-110, 218 U.S.P.Q. 348 (1982); Certain Coin Operated Audio visual Games, Inv. 337-TA-105, 216 U.S.P.Q. 1106 (1982); and Certain Slide Fastener Stringers and Machines, Inv. 337-TA-85, 216 U.S.P.Q. 907 (1981).

Complainant KNH began manufacturing kukui nut jewelry in 1970, and incorporated in 1972. (FF 263). KNH is jointly owned by Mr. Bunzie Ringer and his wife Emma, each of whom own 50 percent of the 28,000 outstanding shares of stock in KNH. (FF 269). For current production of kukui nut jewelry, KNH leases 10,000 square feet, of which 6,500 are used for production purposes and 1,500 square feet are for office space and retail sales. (See FF 264-268). This facility is located in Waialu, Oahu, Hawaii. (FF 264). Although KNH presently employs 14 workers (including Bunzie and Emma Ringer), only 8 full time and 1 part time are devoted to the production and sale of kukui nut jewelry. (FF 272-278). KNH's kukui nut oil production employs one part time and one full time employee. (FF 276, 278).

KNH's production process for kukui nut jewelry involves several steps. First, KNH purchases kukui nuts from independent pickers who gather the raw nuts from trees that grow wild in Hawaii on private and state lands. (FF 279). KNH pays less than 1/2 cent per nut to these pickers. (FF 280). After purchasing the raw nuts, KNH sorts the nuts for defects and dries them. (FF 287(a)). The kukui nuts are then tumbled to rough down the nuts, and

drilled. The meat is then removed from the kukui nuts and the nuts dried and shorted by color. (FF 287(c)). For imperfections not removed with the initial tumbling, the kukui nuts are trimmed by hand with a sander, and then tumbled again with a special compound to remove sanding marks. (FF 287(e)). Thereafter the kukui nuts are polished in a special tumbler, sorted as to size, and strung. The sorting and stringing operation are done concurrently and take about 10 to 15 minutes for a 30-nut lei. (FF 287(f,g)). The finished jewelry are touched up, which involves buffing and polishing. (FF 287(j)). Each of the tumbling operations take between 4 and 36 hours. (FF 287(a-j)). KNH's faceted kukui nut jewelry involves an extra step of diamond-cutting the kukui nuts. (FF 287(j)). KNH has the capacity to produce 500,000 finished nuts per month. (FF 282). In FY (fiscal year) 1985, KNH finished 550,000 nuts for use in jewelry, well below its annual capacity. (FF 305). Due to competition in the kukui nut jewelry business, KNH began to produce products using kukui nut oil, and KNH has been profitable in this business since 1984. (FF 302, 303).

The manufacturing process at KNH is labor intensive because 47 percent of the cost of production of kukui nut jewelry was accounted for by direct labor costs in FY 1985. (FF 288). Most of KNH's employees have been employed by KNH for five to ten years. (FF 293). Some of these employees, formerly employed in sugar or pineapple fields, have been retrained by KNH to work on kukui nut jewelry and KNH pays them above minimum wage, even during training. (FF 294-295). Until approximately one year ago, KNH offered its employees

medical insurance, paid vacation and holidays, and a bonus system. However, these benefits have been temporarily suspended due to KNH's financial situation. (FF 296). KNH is in bankruptcy proceedings. (FF 300-302).

KNH has expended between $15,928 and $91,136 on advertising and promotion, although since at least FY 1982, these expenditures also included advertising and promotion for kukui nut oil, which KNH advertises jointly with its kukui nut jewelry. (FF 290-291; FF 297). In addition to advertising and promoting its products through advertisements, KNH places its own special display racks in its customer's stores. (FF 298). KNH offers free factory tours to the public, and an average of 60 people visit the factory daily. (FF 299).

KNH has 100 percent quality control. During the manufacturing process, the nuts are sorted for color and size, and are inspected for quality at the end of the manufacturing process. (FF 292). Approximately 12 kukui nut leis are returned to KNH each month, for an estimated return rate of less than 1 percent in FY 1985, based on a sales price of $9.00 for a 30-nut lei and total sales of $203,628. (FF 289, 286, 300).

KNH operated profitably before FY 1981. (FF 300-301). In FY 1983, KNH's losses were $91,876, or 35 percent of its sales, and on May 9, 1984, KNH filed for bankruptcy under Chapter 11 of the Bankruptcy Code. (FF 300-302). However, negative profitability *per se* does not lead to the conclusion that an industry is inefficient and uneconomic, as it is only one factor to be considered among others. (*See Aramid Fibers*, Inv. 337-TA-194, ID at 83-85 (1985)). Additionally, negative profits can in part reflect the effects of competition from imports, rather than inefficient and uneconomic behavior internal to the industry. Although other economic factors also adversely affected the industry, in its bankruptcy statement KNH attributes its poor

financial situation in part to import competition, and the injury analysis below supports a determination that imports contributed to KNH's financial problems. (FF 302).

For the above reasons, KNH's kukui nut industry is found to be efficiently and economically operated.

E. Substantial Injury

Under section 337 complainant KNH bears the burden of establishing that the importation and sale of the accused product has "...the effect or tendency... to destroy or substantially injure the domestic industry...". This element requires proof, separate from and independent of, proof of the unfair acts. Certain Foam Earplugs supra at 114. When the unfair trade practice is based upon false advertising, or something other than a patent, trademark or copyright, the burden of proof with respect to injury is greater because of the absence of any exclusive rights. Textron v. U.S. International Trade Commission, 753 F.2d 1019, 1028, 224 U.S.P.Q. 625, 631 (Fed. Cir. 1985). Hence KNH must meet a stricter standard of proof to establish injury than that usually required by the Commission in patent, trademark or copyright based investigations. Certain Compound Action Metal Cutting Snips, 337-TA-197, Id. at 107 (1985).

The Commission may examine several factors to determine whether the domestic industry has been "substantially injured" including, but not limited to: (1) significant reduction in sales; (2) loss of market share; (3) decrease in employment; (4) lost customers; (5) decreased production and profitability; and (6) volume of imports and capacity to increase imports. Large Video Matrix Display Systems, Inv. 337-TA-75, CD at 23 (1979); Certain Drill Point Screws for Drywall Construction, supra at 18; Certain Spring Assemblies, Inv. 337-TA-47, RD at 4 (1979) and Certain Cloisonne Jewelry, supra, Id. at 64.

Proof of substantial injury alone is not enough to find a violation of section 337. There must be evidence that a causal relationship exists between the alleged unfair acts and the injury suffered by the domestic industry. Foam Earplugs supra at 114. If the unfair acts by respondents are not shown to have caused the domestic industry's economic loss there can be no violation of section 337. Video Matrix Display, supra RD at 133.

(1) Industry Condition

Complainant KNH's gross sales of kukui nut jewelry have declined steadily from $646,782 in FY (fiscal year) 1980 (June 1, 1979 to May 31, 1981) to $203,628 in fiscal year 1985. (FF 300). For the last seven months of 1985 (June-December), KNH's kukui nut jewelry sales totaled $101,802. (FF 304). Concurrent with KNH's decline in sales was a decline in employment. KNH's production and sales workforce declined from 36 employees in 1981 to about 9 employees in 1985. (FF 278). Although KNH has the capacity to finish 6 million nuts per year for use in kukui nut jewelry, it finished a total of only 550,000 kukui nuts in FY 1985, well below its capacity. (FF 282, 305).

After having its most profitable year for kukui nut jewelry in fiscal year 1980, KNH sustained net losses from FY 1981 to FY 1985. (FF 300-301). KNH filed for bankruptcy in May 1984, and attributed its losses to competition from tung nut[18/] jewelry imported from Taiwan and to recessionary pressures. (FF 302). One response of KNH to its losses in the kukui nut jewelry business was to diversify into the production of kukui nut oil products, which has earned positive profits since FY 1982. (FF 303). Since

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18/ Mr. Ringer testified that after September 1984, it became his understanding that the imported nuts were of the species, aleurities moluccana or candlenut, and not aleurities trisperma or tung nut as he believed at the time KNH filed for bankruptcy. (FF 302).

FY 1983 KNH has managed to reduce absolute losses and the ratio of net losses to net sales, due to its kukui nut oil business. (FF 300-303). However, this sector of KNH's business is not considered part of the domestic industry in this investigation.

KNH's kukui nut jewelry business lost $22,702, or about 11 percent of its net sales in FY 1985. (FF 300). From FY 1981 through FY 1985 KNH has suffered a net loss of $233,480.00 in its jewelry business. (FF 300).

(2) Market Share

The total kukui nut jewelry market (based on KNH sales and sales of the four largest wholesalers Baird, Blair, RDCO and Liven of imported kukui nut jewelry) declined from $590,895 in 1981 to $296,042 in 1985, or by 50%, providing some indication of the severity of the overall decline in the kukui nut jewelry market.[19/] (FF 318). Although this decline has not been shown to be due solely to imports, there is evidence that the imported nut jewelry had an adverse impact on the general kukui nut jewelry market. Mr. Ringer testified at deposition that several of his largest customers stopped purchasing any kukui nut jewelry because of customer confusion over the variance in price, quality and origin of the different kukui nut jewelry being sold by retailers. (FF 324). Mr. Ringer's testimony has not been rebutted.

Based on KNH's sales and sales of Baird, Blair, RDCO, and Liven of imported candlenut jewelry to the retail market, import market share increased from about 4 percent in 1981 to 41 percent in 1984, and then declined to 31

19/ Baird, Blair, RDCO and Liven are focused on in this analysis as representative of the various other respondents. Baird imported jewelry and loose nuts from Shine Land and Taiwan Kyoei; RDCO imported directly from Royal Design; Liven imported jewelry from Haung Hou; and Blair imported loose nuts from Oriental Arts and Farlace and purchased imported leis from Ali Baba and Pong Lai. (See supra, at 25). Thus the market share analysis, while it focuses only on four of the respondents, covers the market activity of all of the respondents.

percent in 1985. (FF 318, See FF 168, 189, 205, 227). Import figures include only imports of finished jewelry, and not imports of finished loose nuts that are strung in Hawaii and then sold.[20/]

The value of loose candle nut imports was small relative to finished candlenut lei imports. (Compare FF 318 and 322). Although there are no exact figures with respect to the value added by the stringing operation in Hawaii, the record shows that most of the value of candlenut jewelry occurs in transforming the raw nut to a finished nut, rather than in the stringing operation. (See FF 287(a-j)). The record also indicates that the loose imported nuts that are strung into jewelry in Hawaii had already been polished, cleaned, and drilled offshore. (FF 148, 172). Therefore, sales of candlenut jewelry strung in Hawaii from loose foreign nuts should also be included in the market share analysis. Because imports of loose nuts are small relative to imports of completed jewelry such inclusion would have the effect of increasing the above import penetration percentages by a few percentage points at most. (FF 318, 322).

(3) Prices and Lost Sales

The 30-nut lei accounted for about 90 percent of the wholesale value of imported candlenut leis sold by Baird, Blair, Liven, and RDCO during the 1981-85 period. (FF 319). Price comparisons for this particular product are therefore representative of overall price competition. In 1984-85, the import

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20/ Sales by Blair would include kukui nut jewelry bearing Blair label #1 determined not to constitute an unfair act. The record contains no evidence that would allow a breakout to be made for Blair's sales. Nonetheless, even if all of Blair's sales are excluded for the market share analysis, import market share would still be significant. (FF 189, 318).

wholesale price ranged from $2.50 to $4.74, compared to KNH's wholesale price of $9.00 for its lowest-priced 30-nut necklace (black, unfaceted). (FF 286). KNH has not raised its wholesale price for kukui nut jewelry over the last 17 years. (FF 321).

(4) Lost Sales, Common Customers

Complainant KNH's sales to its largest customers have steadily declined over the last five years. (FF 334). For instance, in 1980 Duty Free Shoppers purchased over worth of KNH's candlenut jewelry products. In 1985 they purchased only worth of KNH's nut jewelry, which amounts to an decline. (FF 334). Liven has made sales of nut jewelry to (FF 315). Similarly, the purchases of nut jewelry products from KNH have declined more than from 1980 to 1985. (FF 334). Baird admitted selling imported nut jewelry to the (FF 315). Overall there is evidence of record that respondents have sold imported nut jewelry to at least ten of KNH's major customers. (FF 315). There is also evidence that imported nut jewelry products have been sold to at least 25 other retail outlets and numerous vending carts. (FF 316).

The record shows that the actual quantity of imports of kukui nut jewelry and polished kukui nuts is unknown because several of the respondents have failed to make discovery or participate in the investigation. Adverse inferences have been drawn against each of the respondents Royal Design, Oriental Arts, Farlace and Shine Land. (FF 335). Those adverse inferences establish that said respondents have knowingly exported a substantial amount of loose polished kukui nuts or finished kukui nut jewelry to the United

States; that each have the capacity and intent to further penetrate the U.S. kukui nut jewelry market and that each of the kukui nut jewelry products of Royal Design, Oriental Arts, Farlace and Shine Land are directly competitive with complainant's kukui nut jewelry. (FF 335). See Certain Composite Diamond Coated Textile Machinery Components, Inv. 337-TA-160, Order No. 43 at 7-8, issued March 29, 1984; Certain Amorphous Metal Alloys and Amorphous Metal Articles, Inv. 337-TA-143, USITC Publication 1664, Finding of Fact 446 at 127-128 (November 1984); Certain Multicellular Plastic Film, Inv. 337-TA-54, Order No. 3, issued October 31, 1978; Certain Steel Rod Treating Apparatus, Inv. 337-TA-97, Order No. 22, issued May 20, 1981; Certain Miniature Hacksaws, Inv. 337-TA-237, Notice of Commission Decision Denying Court Enforcement of Subpoena, issued June 12, 1986.

KNH has provided sufficient documentation of direct competition, lost sales and underselling by respondents. See Cloisonne Jewelry supra at 66 (1981). Accordingly, the administrative law judge finds that complainant has met its burden of showing injury as well as the requisite nexus between the injury suffered and the unfair acts.

F. Tendency to 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. 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, and the potential and intention to penetrate

the United States market. Certain Methods for Extruding Plastic Tubing, Inv. 337-TA-110, 218 U.S.P.Q. 348 (1982); Reclosable Plastic Bags, 337-TA-22 192 U.S.P.Q. 674. The legislative history of section 337 indicates that "where 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, 93 Cong. 1st Sess. at 78 (1973), citing In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). Although this legislative history suggests a low threshold with respect to the "tendency" language of section 337, the injury has to be of a substantive and clearly foreseen threat to the future of the industry, not based on allegation, conjecture, or mere possibility. Certain Braiding Machines, Inv. 337-TA-130, USITC Publication 1435 (October 1983); Expanded Unsintered Polytetraflouroethylene in Tape Form, Inv. 337-TA-4, USITC Publication 769, (April 1976).

Based on the above criteria, there exists a tendency to injure the domestic kukui nut jewelry industry by reason of imports. Respondents have demonstrated their willingness and capacity to actively compete in the U.S. market. First, imports represent a significant share of the candlenut jewelry market, even though import market share has decreased in 1985. (FF 318). Respondents Baird and Liven continued to sell imported candle nut jewelry in 1985. (FF 166, 169, 197, 198).[21/] Wholesalers of imported candlenut jewelry have purchased from several respondents, indicating their sources of imported candlenut jewelry are quite broad. For example, Baird's sources of supply include respondents Taiwan Kyoei and Shine Land. (FF 146). Blair has purchased loose finished candlenuts from Oriental Arts, and Farlace, and has

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21/ Although RDCO has stated that it is not projecting any further sales of candlenut jewelry in the United States (FF 113), the record does not show anything to prevent RDCO from importing kukui nut jewelry in the future.

purchased finished candlenut jewelry from Ali Baba and Pong Lai. (FF 174, 175). Liven imports directly from Liven & Company in Taiwan. (FF 193). RDCO has imported directly from Royal Design in Taiwan. (FF 215-216).

Respondents' continued ability to compete in the domestic kukui nut jewelry market is demonstrated by their price competitiveness relative to complainant KNH, as respondents' wholesale prices are generally about half of KNH's wholesale price. (FF 320). Additionally, respondents' Baird and Blair held 47,800 units of candlenut jewelry in inventory as of November 1985. (FF 169,186). Respondent Baird held 23,000 loose nuts in inventory as of November 1985. (FF 153). Finally it has been found that each of the respondents Royal Design, Oriental Arts; Farlace and Shine Land have exported a substantial amount of loose polished nuts or finished nut jewelry to the United States and have the capacity and intent to further penetrate the U.S. nut jewelry market. (FF 335).

Complainant's burden is to present "a clear showing of relevant conditions or circumstances from which probable or likely injury in the future can be reasonably inferred." Combination Locks at 24. Complainant has met this burden and accordingly has shown that there exists a tendency to injure the domestic kukui nut industry.

FINDINGS OF FACT

I. Jurisdiction

1. Service of the complaint and Notice of Investigation was perfected on fourteen of the sixteen respondents. The respondents not served were RKG and Huang Hou. (SX-8).

II. The Parties

2. Complainant KNH has been engaged in the manufacture and production of kukui nut jewelry since 1970. (Ringer, SPX-11 at 7).

3. KNH was incorporated in 1972. (Ringer, SPX-11 at 6).

4. Respondent Baird, 80 Sand Island Road #206 Honolulu, Hawaii, has imported candlenuts or candlenut jewelry since December, 1974. (SX-17, SX-24 Ans. to Int. Nos. 1 & 4(a)).

5. Respondent Blair, 404-A Ward Avenue, Honolulu, Hawaii 96814, has imported candlenuts or candlenut jewelry since 1973 or 1974. (SX-78, Ans. to Int. Nos. 1 & 4(a)).

6. Respondent Liven, 2222 Kalakaua Avenue, Suite 1405, Honolulu, Hawaii, has imported candlenuts or candlenut jewelry since approximately September, 1983. (SX-17, SX-80, Ans. to Int. Nos. 1 & 2(a)).

7. Respondent Taiwan Kyoei, P.O. Box 46-366 Fl. 6, No. 137, Sec. 4, Nan King East Road, Taipei, Taiwan, R. O. C., has exported candlenuts or candlenut jewelry to the United States since 1975. (SX-17, SX-75, Ans. to Int. Nos. 1 & 3).

8. Respondent RDCO, 2170 Kalakaua Avenue, Ste. 234 Honolulu, Hawaii, began importing and wholesaling candlenuts or candlenut jewelry in October 1978. (SX-17, SX-6, Ans. to Int. Nos. 1 & 4).

9. Respondent Pong Lai 2270 Kalakaua Ave. Suite 1705, Honolulu, Hawaii, began importing and wholesaling candlenuts or candlenut jewelry in approximately 1982. (SX-81, Ans. to Int. Nos. 1 & 4).

10. Respondent Ali Baba, 2250 Kalakaua Ave., Suite 309-A Honolulu, Hawaii, states that it began importing candlenut or candlenut jewelry in approximately 1982. (SX-83, Ans. to Int. Nos. 1 & 4).

11. Respondent Baird stated that respondent Shine Land, Fl. 8, No. 97 Sec. 2, Nan King E. Rd., Taipei, Taiwan exported some of the candlenuts or candlenut jewelry it imported into the United States. (SX-17, SX-24, Ans. to Int. No. 12(b)).

12. Respondent Baird has purchased candlenut jewelry leis from respondent Joey Pong Inc., Taipei, Taiwan. (SX-23 at 3, Ans. to Int. No. 10, Ex. A).

13. Respondent RDCO states that "all candlenut purchases made by RDCO, Inc. have been from [respondent] Royal Design Creations", Taipei, Taiwan. (SX-76, Ans. to Int. No. 14).

14. Respondent Taiwan Kyoei states that respondent Huang Hou, Chi-Tu City, Kee Lung, Taiwan, "supplied" the candlenuts or candlenut jewelry it exported to the United States. (SX-17, SX-75, Ans. to Int. Nos. 2(a) & 3(a)).

15. Respondent Liven states that respondent Huang Hou manufactured the candlenuts or candlenut jewelry it imported into the U.S. (SX-17, SX-80, Ans. to Int. No. 12(d).

16. Respondent Blair states that respondent Oriental Arts, Taipei Taiwan, exported some candlenuts. (SX-78, Ans. to Int. No. 10(a)).

17. Respondent Blair states that respondent Farlace, Taipei Taiwan, exported some of the candlenut jewelry. (SX-78, Ans. to Int. No. 10(a)).

18. Respondent Pong Lai states that respondent Farlace, exported some of the candlenuts or candlenut jewelry. (SX-81, Ans. to Int. No. 12(b)).

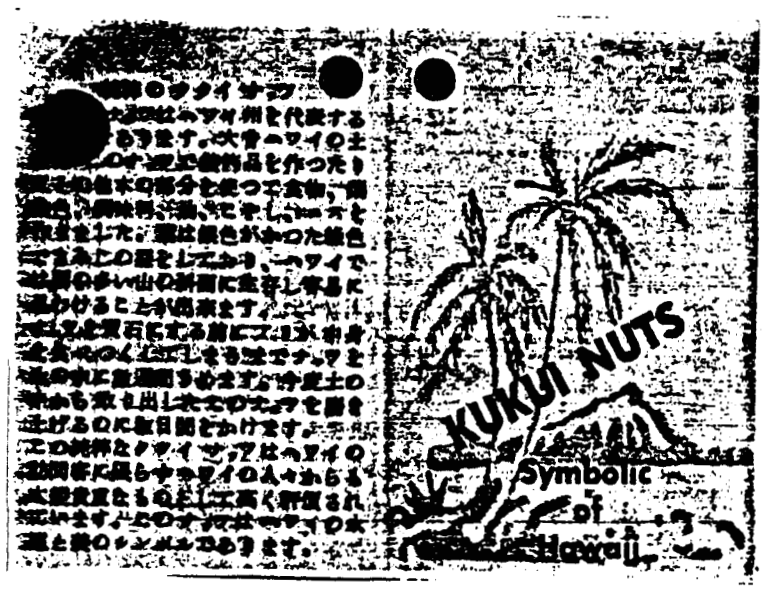
III. Products In Issue

19. Products in issue are certain nut jewelry and parts thereof.

IV. Unfair Acts

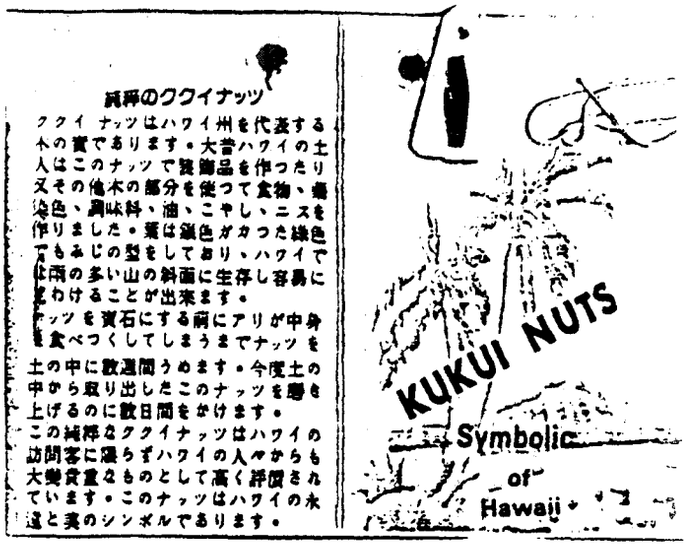
Respondent Baird

20. The following are samples of each of the outside (front and back) of the labels used to Baird's knowledge in conjunction with the "kukui nuts" which Baird has sold since January 1, 1982 (In use the labels are folded):

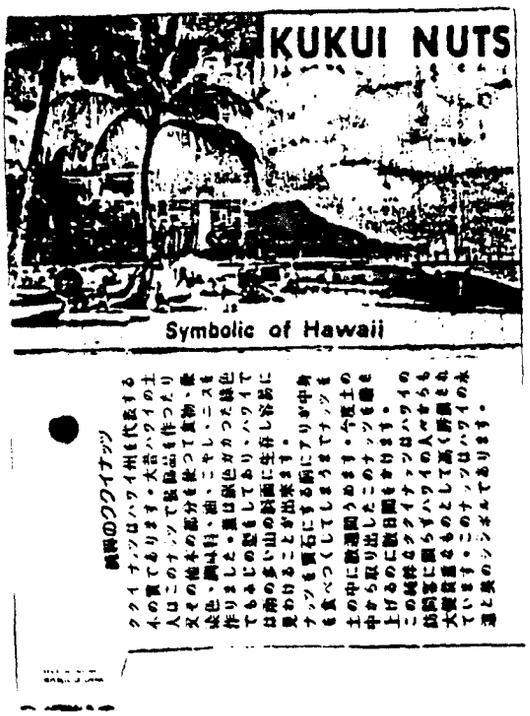


Baird Label #1

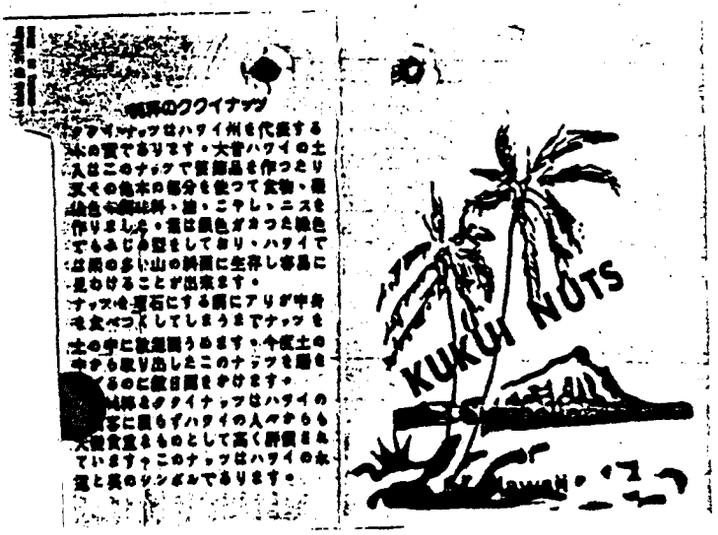
Baird Label #2



Baird Label #3



Baird Label #4



Baird Lable #5

With the exception of label #4, the background color of each of the labels is pink. Label #2 in the upper right hand corner has a gold foil sticker which states in black letters: "Made in Taiwan Republic of China". Label #3 in the upper right hand corner has a string label that has a gold foil sticker which in black letters states "Made in Taiwan Republic of China." The beach scene in label #4 is multi-color. Each of label Nos. 4 and 5 in the upper left hand corner has a protrusion with the writing in black letters "Made in Taiwan Republic of China." Except for Label #1, as far as Baird knows all of the above labels could have been used with all styles of jewelry except for a miniscule number of bracelets manufactured by Baird in Hawaii. Then only Label #1 was used. The inside of each of the above labels reads:

GENUINE KUKUI NUTS

> Kukui Nuts are the fruit of the State Tree of Hawaii. The ancient Hawaiians used these nuts for ornamentation and, along with other parts of the Kukui Tree, for food, medicine dye, spices, oil, fertilizer, varnish etc. The tree is easily identified by its silvery green, maple-shaped leaves, and is found on most mountain slopes in Hawaii.
>
> Before making the nuts into jewelry, they were buried for weeks to allow time for the ants to eat out the meat. It would take the ancient Hawaiians several days to sand and polish a single nut.
>
> These "Genuine Kukui Nuts" are prized by local residents and visitors alike. They are a lasting and beautiful symbol of Hawaii.

(SX-26, SX-45, Ans. to Int. Nos. 1 & 3, Attachment A to SX-45, SPX-4).

21. Michael Holland, import Manager for respondent Baird wrote the text on the inside of the pink label (label #2, above) and obtained the information from the public library. The language encourages the ultimate customer that the item has some value; that the item is truly a symbolic item of Hawaii; that the item is a remembrance of Hawaii; and that the item is an appropriate souvenir. The information is true. What is written in Japanese on the label is the same text that is in the center of the label. Holland doesn't know whether it states in Japanese that the item is made in Taiwan. (Holland, SPX-12 at 5, 162-164).

22. Cost, color and size of the labels in finding of fact 21), their wording educate the public as to why kukui nuts are symbolic of Hawaii. (SX-26, SX-45, Ans. to Int. No. 5(a).

23. Baird wanted to have its merchandise identified as Baird's merchandise, as opposed to merchandise from other wholesalers, so Baird selected for its labels the logo used on Baird's business cards and invoices as the background design. The word "genuine" was added to the Baird labels to separate real nuts from plastic nuts which had shown up on the market from time to time. (SX-26, SX-45, Ans. to Int. No. 6(a).

24. Baird's Holland testified that there have been times in the past when others have imported merchandise which is made of plastic, and confused the visitors. Visitors on occasion thought that they were the real nut, and so Baird was anxious to let the visitors know that the merchandise which the visitors were purchasing was a real natural product and not a plastic phony article. Holland has not seen plastic nuts or plastic nut jewelry in the

market for some time. Holland would guess it's been six or eight years ago when he saw plastic nut jewelry and it was sometime after Baird made up its label. (Holland, SPX-12 at 99, 158, 159).

25. Baird obtained its labels from the exporter. (SX-26, SX-45, Ans. to Int. No. 11).

26. Baird has asked Baird sales representatives orally to be sure to tell all customers that labels showing country of origin should be left in place. Baird has also sent a letter to its customers reminding them not to remove "Made in Taiwan" labels. Baird has no control over its merchandise once it leaves Baird. (SX-45, Ans. to Int. No. 12; Holland, SPX-12 at 165).

27. It is not and never has been Baird's position that the nuts used in Baird's kukui nut jewelry are grown in Hawaii. (SX-45, Ans. to Int. No. 21).

28. To Baird's knowledge Baird has never received any inquiry or complaint regarding the quality or origin of the nut jewelry Baird has manufactured, imported, distributed, marketed or sold in the United States. (SX-26, SX-45, Ans. to Int. No. 23).

29. To Baird's knowledge Baird took no action for the purpose, or with the result, of learning of the behavior of retail sellers of nut jewelry for which Baird is in the chain of importation or distribution. (SX-26, Ans. to Int. No. 25, SX-45, Ans. to Int. No. 25).

30. Baird's sales people call on retail outlets 1 to 4 or more times per month with the intent of obtaining orders for merchandise, to service as needed, to discuss and resolve problems, and to take care of damaged merchandise or items to be returned. (SX-45, Ans. to Int. No. 27).

31. With respect to the manner in which Baird distributes, markets or sells candlenut jewelry in the United States Baird distributes the jewelry wholesale only through sales representatives to any and all retail outlets, including department stores, chain stores and gift shops. Baird distributes, markets or sells its candlenut jewelry in the tourist areas of the State of Hawaii. (SX-17, SX-24, Ans. to Int. Nos. 12(d) & 15).

32. Baird uses no trade or brand name under which Baird sells, markets, imports, exports and/or distributes candlenut jewelry. (SX-17, SX-24, Ans. to Int. No. 6).

33. Respondents Shine land and Taiwan Kyoei have exported to the United States the candlenut or candlenut jewelry that Baird imported or caused to be imported into the United States. (SX-17, SX-24, Ans. to Int. No. 12(b)).

34. Baird's candlenut jewelry was made in Taiwan but it is unknown who made it. Also Baird itself made a few bracelets and earrings. (SX-17, SX-24, Ans. to Int. No. 12(c)).

35. Baird stated that it has purchased, acquired, or caused to be purchased or acquired candlenuts or candlenut jewelry from respondent Design Creations for inventory. (SX-17, SX-24, Ans. to Int. No. 14).

36. Baird stated that it has never failed to comply with the law regarding marking of country of origin on kukui nut jewelry and that it has not marked country of growth of the nuts on its kukui nut jewelry as Baird is not required to do so under the circumstances. (SX-17, SX-24 Ans. to Int. No. 7).

37. Baird has labeled its nut jewelry as "Kukui Nuts" & "Genuine Kukui Nuts". It is not known where the candlenuts of the candlenut jewelry were grown. (Baird's Holland in an affidavit submitted to the Circuit Court of the First Circuit of the State of Hawaii stated that Baird imports leis made in

Taiwan from kukui nuts (aleurites moluccana) which Holland believed are grown in the Philippines (SX-36)). The candlenuts of Baird's jewelry was strung in Taiwan with a few strung in Honolulu, Hawaii. The jewelry was advertised in the telephone yellow pages, Aloha Island (Telephone) Directory (1 year), Hawaii Gift Show Buyer's Guide Book (1 year) and Hawaii Gift Show Postal Mailer (1 year). There are no other promotional efforts, actual or proposed, for sale of nut jewelry in the United States. The labels on each article of merchandise were a pink label describing "Kukui Nuts", and a Gold "Stick On" label showing "Made in Taiwan" or a String Tag showing "Made in Taiwan". (SX-17, SX-24, Ans. to Int. No. 17, SX-28, Ans. to Int. No. 22).

38. The physical exhibits received into evidence include:

a Baird 36 nut lei which has a label that is identical to #2 of attachment A of SX-45 (SPX-4);

a Baird bracelet that has a pink label identical to the label associated with SPX-4 (SPX-5);

a Baird 30-nut lei that has a pink label identical to the label associated with SPX-4 (SPX-6);

a Baird 16-nut lei that has a pink label identical to the label associated with SPX-4 (SPX-7); and

a set of Baird earrings that has no label identifying origin of the earrings other than a string tag, one side of which states "R. Baird". The other side of the label states "5035/E Earrings" (SPX-8).

39. There are no written or oral agreements between Baird and its sales people, except an oral agreement to represent Baird and sell all merchandise in return for a paid commission. (SX-28, Ans. to Int. No. 21(b)).

40. Baird knows of no instances where nut jewelry imported, sold, or marketed by any other entity was ever returned to Baird for any reason. (SX-28, Ans. to Int. No. 24).

41. Minutes from Baird's June 28, 1985 sales meeting stated in part:

(SX-40).

42. Minutes from Baird's January 25, 1985 sales meeting stated in part:

(SX-41).

43. Minutes from Baird's January 4, 1985 sales meeting stated in part:

(SX-42).

44. Minutes from Baird's September 14, 1985 sales meeting stated in part:

(SX-43).

45. A December 28, 1984 Baird letter to its customers stated:

> RE: THE RECENT LAWSUIT OVER KUKUI NUT JEWELRY
>
> As you may know, a competitor of ours began a lawsuit several months ago and named various distributors and retailers of kukui nut jewelry, including R. Baird & Co., Inc. In addition, that same competitor has been making unsupported public statements that we sell fake kukui nut jewelry.

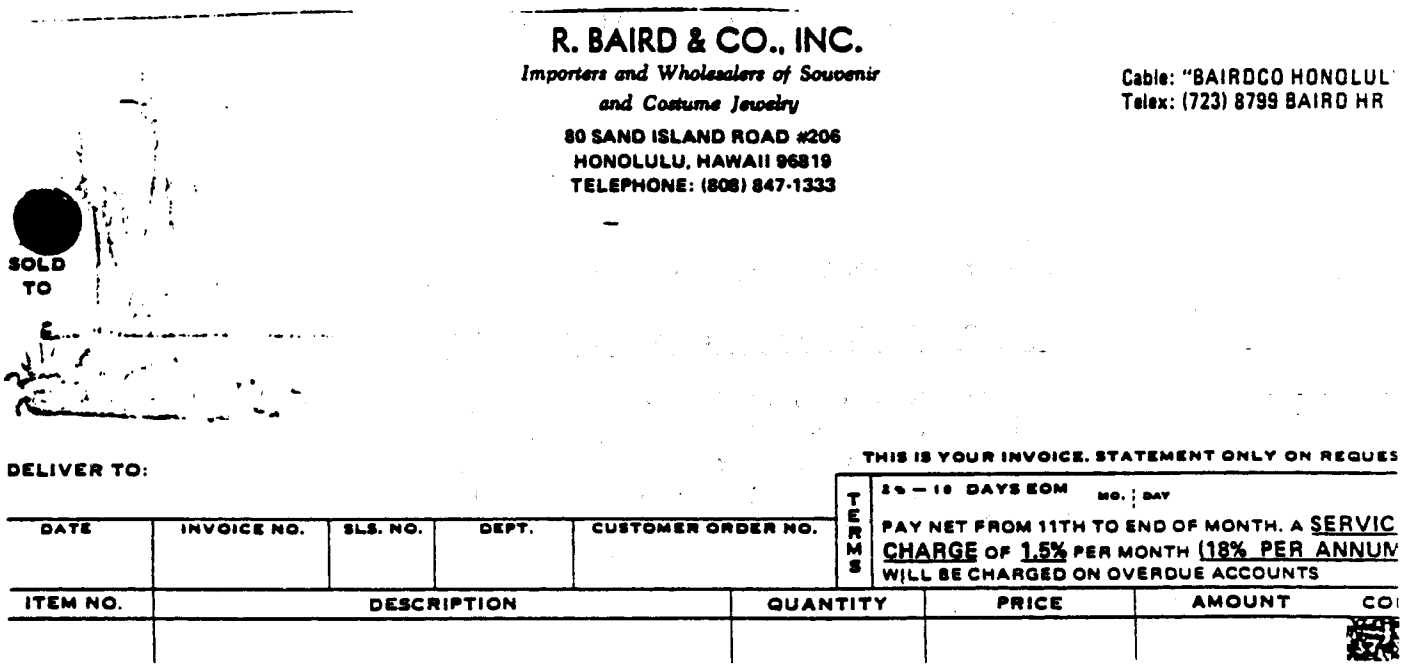
R. Baird & Co., Inc. is proud of its reputation as an importer and distributor of souvenirs, jewelry, and gifts at competitive prices. At great expense, we have consulted with botanical experts, who have verified to our satisfaction that R. Baird & Co., Inc. has been selling products made from genuine kukui nuts, otherwise known scientifically as aleurites moluccana. We also have learned that the expert for the company that has brought the lawsuit has also concluded and stated under oath that R. Baird & Co. is probably selling aleurites moluccana - - in other words, kukui nuts.

We have won a major victory in the pending lawsuit. The court has refused to issue an injunction to prevent the distribution and retailing of imported kukui nut products. We intend to proceed onward in that lawsuit to obtain final judicial recognition that our products belong to a market place. Nevertheless, lawsuits take a long time to bring to a conclusion. Meanwhile, you can reduce the likelihood of being harassed by unfair practices of our competitor, by insuring that the "Made in Taiwan" labels on our kukui nut products are not removed before sale to the consumer and that your employees do not misrepresent the imported kukui nut products as being made in Hawaii or made from nuts grown in Hawaii.

We appreciate your past business, and trust that you will continue to purchase our quality merchandise at our competitive prices.

(SX-44).

46. A sample of a Baird invoice which identifies "R. Baird & Co., Inc." as importers and wholesalers of souvenir and costume jewelry has a palm tree and Diamond Head logo. The logo on the invoice is represented as follows:



R. BAIRD & CO., INC.
Importers and Wholesalers of Souvenir and Costume Jewelry
80 SAND ISLAND ROAD #206
HONOLULU, HAWAII 96819
TELEPHONE: (808) 847-1333

Cable: "BAIRDCO HONOLUL
Telex: (723) 8799 BAIRD HR

SOLD TO

DELIVER TO:

THIS IS YOUR INVOICE. STATEMENT ONLY ON REQUES

DATE	INVOICE NO.	SLS. NO.	DEPT.	CUSTOMER ORDER NO.

TERMS: 2% — 10 DAYS EOM NO. DAY
PAY NET FROM 11TH TO END OF MONTH. A SERVIC CHARGE OF 1.5% PER MONTH (18% PER ANNUM WILL BE CHARGED ON OVERDUE ACCOUNTS

ITEM NO.	DESCRIPTION	QUANTITY	PRICE	AMOUNT	CO

(SX-46).

47. The business card of Michael Holland, who is employed by respondent, Baird has a palm tree and Diamond Head logo. It is represented as follows:

PHONE: (808) 847-1333
TELEX: (723) 8799 BAIRD HR
CABLE: "BAIRDCO" HONOLULU

R. BAIRD & CO., INC.
Importers & Wholesalers

MICHAEL F. HOLLAND
IMPORT SPECIALIST

80 SAND ISLAND RD., #206
HONOLULU, HAWAII 96819

(SX-47).

48. A business card of Rouse Baird shows that Baird is president-treasurer of Baird and further has a palm tree and Diamond Head logo. It is represented as follows:

PHONE: (808) 847-1333
TELEX: (723) 8799 BAIRD HR
CABLE: "BAIRDCO" HONOLULU

R. BAIRD & CO., INC.
Importers & Wholesalers

ROUSE BAIRD
PRESIDENT-TREASURER

80 SAND ISLAND RD., #206
HONOLULU, HAWAII 96819

(SX-49).

49. Holland's Baird testified that the Diamond Head and palm tree symbol or background decoration on the Baird label is a Baird logo which Baird has used on its business cards and invoices for years. Holland does not know of any other occasions when Baird has used the logo but it is possible Baird has put it on other items. (Holland, SPX-12 at 149, 150).

50. Baird testified that he has been using his business card (SX-47) for ten years, "I guess. Nine, something like that. Nine or ten, I would say." As of today the style is a little different although Holland still has the cards with the original style and believes he is still handing them out. The latest bunch of business cards that were printed up looks a little different than SX-47. The latest card is the same thing except that Holland thinks the logo portion has a little different style. It is represented by Rouse Baird's card. (SX-48). Holland guesses that the printer has an inventory of some of the cuts and the printer stuck the one that is on the latest bunch of Baird's cards. There possibly may be other people who have business cards with the latest emblem. (Holland, SPX-12 at 154, 155).

51.

(SX-29 at 3).

52.

(SX-32).

53.

(SX-33).

54. In answer to whether Baird is aware of any instance in which country of origin designation was removed from Baird's candlenuts or candlenut jewelry, Baird answered "Unknown." (SX-26, SX-45, Ans. to Int. No. 7).

55. In answer to whether Baird ever received a complaint regarding the quality of the candlenut jewelry that Baird has manufactured, exported, distributed, marketed or sold in the United States, including but not limited to complaints regarding false or misleading claims concerning such product, Baird answered "None". (SX-17, SX-24, Ans. to Int. No. 16).

56. Ron Ramie's company, Island Investigative services, conducted an investigation in 1984 related to purported "kukui nut" products on behalf of plaintiff (complainant in this investigation) in Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc., et al., Civil No. 84-0632, in the Circuit Court of the First Circuit, State of Hawaii. In the course of the investigation Ron Ramie visited the showrooms and wholesale outlets of Baird, Blair and certain Hawaii retailers. During the course of his visits, he saw large numbers of jewelry products purporting to be made of kukui nuts as stated on the labels. Such products were found with four different styles of label in the course of the visits. A 30 nut lei, sample A, with a pink label, and with Ramie's identifying marks "I-090-84 8-2-84 1 pm - RJR" was purchased by Ramie at the wholesale outlet of Baird on August 2, 1984. This style of label was said by Ramie to have been found more frequently than any other label throughout the course of his investigation. Ramie stated that at most of the locations where he found this label, it did not have the tiny gold sticker appearing in the corner of the label of Sample A and had no other designation of foreign origin; and that labels that were found without the tiny gold sticker were frequently seen to be frayed at the point where the sticker presumably would

otherwise be found. Label of Sample A was represented by Ramie as follows:

GENUINE KUKUI NUTS

Kukui Nuts are the fruit of the State Tree of Hawaii. The ancient Hawaiians used these nuts for ornamentation and, along with other parts of the Kukui Tree, for food, medicine, dye, spices, oil, fertilizer, varnish etc. The tree is easily identified by its silvery green, maple shaped leaves, and is found on most mountain slopes in Hawaii.

Before making the nuts into jewelry, they were buried for weeks to allow time for the ants to eat out the meat. It would then take the ancient Hawaiians several days to sand and polish a single nut.

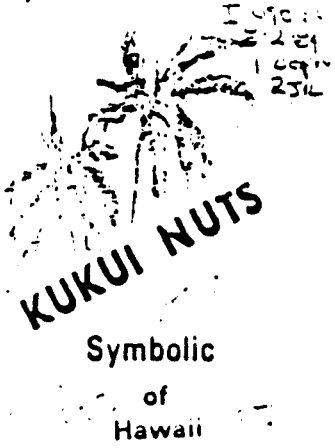
These "Genuine Kukui Nuts" are prized by local residints and visitors alike. They are a lasting and beautiful symbol of Hawaii.

純粋のククイナッツ

ククイナッツはハワイ州を代表するトの木であります。大昔ハワイの土人はこのナッツで装飾品を作ったり又その他木の部分を使って食物・薬・染色・調味料・油・こやし・ニスを作りました。葉は銀色がかった緑色でもみじの型をしており、ハワイでは山の多い山の斜面に生存し容易に見つけることが出来ます。

ナッツを宝石にする前にアリが中身を食べつくしてしまうまでナッツを土の中に数週間うめます。今度土の中から取り出したこのナッツを磨き上げるのに数日間をかけます。

この純粋なククイナッツはハワイの訪問客に限らずハワイの人々からも大変貴重なものとして高く評価されています。このナッツはハワイの永遠に美のシンボルであります。



Black print on glossy gold sticker "Made in Taiwan Republic of China"

(CX-9).

57. Baird has sold nut jewelry at least since 1974. In 1973 Holland started to work for Baird. When Holland first came to Baird, he did not believe that there was any label with the jewelry except for the country of origin "Made in Taiwan" gold foil label which was stuck on one of the nuts. The first label that Baird began to use on its nut jewelry, besides the gold foil label, was the pink label which Baird installed on its leis as the leis were tied before sending them out. The pink label was first used about 1976. The pink label was very similar to what Baird uses today. Then the pink label did not have the gold foil "Made in Taiwan" sticker. The sticker was elsewhere. (Holland, SPX-12 at 9, 136-139).

58. In 1977 Baird imported loose nuts and leis from respondents Taiwan Kyoei, and Joey Pong. In 1978 and 1979 Baird imported loose nuts and leis from Taiwan Kyoei. (SX-23, Exhibit A).

59. In 1978 or 1979, Baird sent the pink label to Taiwan Kyoei and asked it to print up the label. The resulting label is like #3 label identified earlier in the findings. The string tag was fastened to the lei or looped over it as one would do with any string tag. The string tag is stapled to label #3 only for convenience in submitting Baird's answers to the interrogatories. Baird today may be still selling some leis with label #3. (Holland, SPX-12 at 143).

60. It's possible that Baird used label #5 identified earlier in the findings on its nut jewelry. It was without specific instruction or any specific request. The label merely showed up with the shipment. It's possible jewelry was sold to retailers with that label. Today Baird's supplier sends Baird nut jewelry with different labels on it and Baird is not always sure what it is going to get. So long as the nut jewelry complies with Baird's request that the jewelry be marked with the country of origin, Baird has not specifically indicated anything in particular. (Holland, SPX-12 at 145-146).

61. Label #4 (beach scene) above, was used on two shipments to Baird. Baird questioned exporter Shineland about the origin of the label with beach photo. Baird was advised that the pink tag had been used up. Baird then told Shineland that Baird definitely needed pink tags as before because the pink tag identified Baird's merchandise although Baird knows that the pink tag has been copied by some of Baird's competitors. Shineland was told to use the pink tag on future orders. (SX-29; SX-30; Holland, SPX-12 at 71-74).

62. Merchandise with the label #4 and which Shineland had sent Baird was sold by Baird. (Holland, SPX-12 at 74). However subsequent to the exchange between Baird and Shineland (SX-29), Baird began to receive from Shineland nut jewelry with the pink labels although it's possible that there have been a couple of slight variations of that pink label and it's only some of the merchandise that has been coming in with a slightly different label. (Holland, SPX-12 at 74).

63. Ron Ramie reported on November 27, 1984 that he arrived at the Ala Moana Shopping Center and entered the Woolworth's Department store and observed the kukui nut leis being displayed above the counter of the jewelry department; that an oriental male was asked about the leis and stated that the leis were Hawaiian kukui nuts; that the leis were made in Hawaii; and that the leis displayed a pink tag which had been seen on leis of respondent Baird. Ramie further reported that on November 27, 1984 at 11:00 a.m. he arrived at the International Market Place in Waikiki and the first shop he stopped at was called "Hawaiian Panorama". He observed kukui nut leis being displayed along with other gift type jewelry. A female sales clerk related that the leis were Hawaiian kukui nuts and that the nuts were Hawaiian kukui nuts and that the nuts were from Hawaii and that the lei was made in Hawaii. The clerk also referred Ramie to the part of the label which had literature about the kukui nuts. The investigator then stopped at a shop called "First Class Fine Collectables"; that he observed several leis on the display at the entrance of the shop; that the leis were tagged with pink colored tags known to be from respondent Baird; that the female sales clerk was asked about the leis and she reported that they were Hawaiian kukui nut Leis and that the leis were made in

Hawaii. Ramie reported that the next stop on November 27, 1984 was "Sue's Jewelry and Gift Shop" where he observed brown and black kukui nut leis bearing Baird's label on display within the shop; that an oriental looking female clerk was asked about the leis and she stated that they were Hawaiian kukui nut leis and that they were made in Hawaii. It was reported that the next stop was at a shop within the market place area called "Parkoh." Brown and black kukui nuts were hanging on a display at the entrance of the shop; that a young oriental female employee of the shop was asked about the leis and she indicated that they were Hawaiian kukui nut leis and stated that they were made in Hawaii. Ramie next stopped at a cart within the International Market Place; that what appeared to be a sales clerk was asked about leis and he stated that that were Hawaiian kukui nuts and referred the investigator to the literature within the tag and that the clerk stated that the leis were made in Hawaii. Ramie reported that the last stop on November 27, 1984 was at "Helen's Gift Shop;" that kukui nut leis was observed hanging from the corner of the shop; that the leis displayed the Baird label; that a sales person stated that the leis were Hawaiian Kukui Nuts, that the leis were made in Hawaii and referred the investigator to literature printed on the inside of a Baird label. Ramie reported that on November 28, 1984 he returned to the area of the International Market Place and proceeded to check the area known as "Dukes Lane;" that a female clerk was asked about the nut leis on display at the Gemma Gift Shop; that the leis had the pink Baird tag; that the investigator was informed that the nuts were Hawaiian kukui nuts and that the leis were made in Hawaii. Ramie then stopped at a cart called "My Jewelry Shop;" that he observed strands of kukui nut leis with the pink Baird label on the leis; that a male sales clerk stated that the leis were Hawaii kukui nuts

and that the leis were made in Hawaii; that he opened the pink Baird tag and referred the investigator to the literature printed on the inside of the tag. A similar occurrence was had at the F&M Gift Shop. At a cart called "Aloha III" Ramie was informed that leis were made in Hawaii and the nuts were Hawaiian kukui nuts although the labeling on the leis were the same pink type of Baird's labels. At a cart called "Yoon's Gift's" the investigator was informed that black and brown nut leis with the pink Baird label were made in Hawaii and that the leis were Hawaiian Kukui nut leis. At a cart called "H. S. Jewelry," leis with pink tags of the same type as used by Baird were observed. The investigator was told by a clerk that the leis were made in Hawaii. At a cart called "J&J Gift Shop" the investigator was told by a clerk that the leis observed were Hawaiian kukui nut leis; that she opened up the pink labels on the tags and showed the investigator the literature written on the inside portion of the tag; and that the investigator was told that the leis were made in Hawaii. It was reported that in the Duke's Lane area other carts displayed kukui nut leis with the pink Baird label and no visible notation on the pink label to indicate if the nuts were imported (cart number 15, 100 and 937). At cart number 266 pink tags, used by Baird, were observed on about 20 kukui nut leis. Two of the pink tags had a gold gum label attached to the tag. The gold gummed labels indicated that the leis were imported from Taiwan. (SX-59).

64. On November 28, 1984 Moonlight Shop at the International Market Place was visited by the investigator. Leis bearing the Baird pink tag were observed. A clerk stated that the leis were kukui nut leis and that the kukui nut leis were made in Hawaii. Leis at a "Gold Cart" were labeled with the pink Baird label. There were no markings on the labels to indicate whether

the leis were imported. A sales clerk stated that the leis were kukui nut leis and that they were made in Hawaii. She opened the label and referred the investigator to the literature written on the inside of the label. At "Bee's Gift Shop/Hibiscus Village A" black and brown kukui nut leis were on display with the pink Baird label. One Baird label had a gold gummed label which indicated that the lei was made in Taiwan. A clerk identified the leis as being kukui nut leis and stated that they were Hawaiian Nuts and that the leis were made in Hawaii. At "Nahenahe/Bee's Shop" a sales clerk stated that leis were Kukui Nut leis but that they were imported. It was said that there was no indication on the lei to verify whether the lei was imported. At another place identified as "Cart Mauka From Cock's Roost", a clerk identified leis as being kukui nut leis; said that the leis were Hawaiian nuts and made in Hawaii and opened the pink label to show the literature on the inside of the label. At a cart located by the "Haggan-Daz Dessert Shop", a clerk did indicate kukui nut leis were imported. (SX-59).

65. On December 4, 1984 "Pachi's Gift Shop" in an alley adjacent to 2270 Kalakawa Avenue was visited by the investigator. Nut leis at Pachi's had pink labels similar to the labels used by Baird. There were no markings on the label to indicate that the leis were imported. A clerk stated that the leis were kukui nut leis and when asked if the leis were made in Hawaii stated "Of course" and instructed the investigator to read the inner portion of the label. Ali Baba's stores had kukui nut leis on sale with pink labels as used by Baird. There were also gold gum labels which indicated that the leis were made in Taiwan and a sales clerk stated that the leis were imported. Kukui nut leis were on display at Watumull's store. There were no labels on the leis. A lei displayed on a shirt did have a pink Baird label. The investigator was told that the leis were imported. (SX-59).

66. In a follow-up investigative report, Ronald Ramie, investigator for complainant, on December 12, 1984 while walking through the Royal Hawaiian Shopping Center observed that black and brown kukui nut leis on display near the entrance of a gift shop; that the leis were labeled with a pink tag that is similarly used by respondent Baird; that a gold gummed label which said "Made in Taiwan" was attached to the upper right hand corner of the pink label; that a female clerk stated that the leis were Hawaiian kukui nuts; that when the gold label was referred to the clerk stated that the nuts were Hawaiian kukui nuts but that the nuts had been processed in Taiwan. On December 12, 1984 kukui nut leis drapped over aloha shirts were on display at the "Watumull's Store" located ar the Royal Hawaiian Shopping Center. Those leis displayed pink labels which also had the yellow gummed labels which indicated that the leis were made in Taiwan. A rack was located which displayed kukui nut leis which did not have any labels on them. A small gummed label was attached to one of the nuts which were on the leis. The gummed label indicated that the lei was made in Taiwan. A clerk said that the leis were kukui nut leis. As for the gold gummed label, the clerk stated that it was her understanding that the nuts were Hawaiian kukui nuts but that the nuts were shipped to Taiwan where they were processed; that the process included burying the leis or something of that nature and that there were no facilities in Hawaii for processing kukui nuts. Later, on December 12, 1984, the investigator entered the "Hawaiian Gift Treasures Store" located in the Royal Hawaiian Shopping Center. A kukui nut display of about 10 leis, which were labeled with a pink colored label, was located. There was seen no indication that the leis were imported. A sales clerk stated that the leis were Hawaiian nuts and that the leis were made in Hawaii and further instructed the investigator to look at the inside of the label for more

information about the leis. Still later on December 12, 1984 the investigator arrived at the Honolulu International Airport and located a gift and apparel shop near Gate 13 which had kukui nut leis on display. The kukui nut leis had a pink label with a gold sticker on the label which indicated that the leis were imported. A sale clerk stated that she did not believe that the leis had real kukui nuts because she had a real kukui nut lei herself; that the leis were imported and that she thought they might be plastic. At another gift and apparel store in the airport terminal complex there were kukui nut leis on display which were labeled with a pink tag. Attached to the pink label was a gold gummed label which indicated that the leis were made in Taiwan. A sales clerk stated that the nuts of the leis were real Hawaiian kukui nuts but that they were shipped to the orient for processing. The investigator concluded that, as a result of his investigation that on December 12, 1984, three shops were located which continue to sell the kukui nut leis with the pink labels "suspected" to be the product of respondent Baird; that these pink labels have gold gummed labels attached to them which indicate that the leis are made in Taiwan; that the leis are being represented as being Hawaiian kukui nuts which are shipped to Taiwan for processing and later returned to the state for sale; that as there was also located a shop called "Hawaiian Gift Treasures" which is selling the leis without any markings to indicate that the product was imported and the shop is representing the leis to be Hawaiian kukui nuts made and processed in Hawaii. (SX-60).

67. Tourists buy souvenirs in Hawaii to have something to remember their trip by, or to bring back something from Hawaii. (Holland, SPX-12 at 26).

68. Waikiki is practically wall to wall with gift shops of one sort or another. If one excludes the night clubs it's a big shopping area and all of the shops would be considered gift shops. (Holland, SPX-12 at 29). In Waikiki there are areas that have small carts right next to each other. These carts are considered gift shops. (Holland, SPX-12 at 31).

69. Baird wholesales jewelry to retail stores i.e. to any stores that sell to the consuming public, such as Sears, Penny's, ABC Stores, gift shops in Wakiki and hotels. An ABC Store is a chain of drug-discount stores which have many items for sale, including souvenirs, health and beauty aids, and liquor. It generally caters to the tourist market. (Holland, SPX-12 at 27-28).

70. Baird imports souvenirs and costume jewelry and wholesales the items to retail stores, which has been Baird's business since Holland started working for Baird. Today Baird's business is two thirds imported and the other one third is domestic merchandise from the mainland. Baird makes earrings in Hawaii which it sells. (Holland, SPX-12 at 15, 16).

71. Baird has some plastic jewelry that does not have a Hawaiian motif or Hawaiian design and therefore it would appeal to the general population. Hawaiian design or Hawaiian motif means that it has a Hawaiian symbol, Hawaiian emblem, such as pineapple or a coat of arms, such that it would appeal to tourists as opposed to local people. Tourists buy souvenirs in Hawaii to have something to remember their trip by, or to bring back something from Hawaii. Coffee mugs, hula dolls, playing cards, jewelry, and kukui nut leis are examples of "souvenirs." (Holland, SPX-12 at 25-26).

72. It is correct that Baird's suppliers sends Baird nut jewelry products with different labels on the products and Baird is not always sure what it is going to get. However, the labels are conditioned on Baird's request that the merchandise be marked with the country of origin. (Holland, SPX-12 at 146).

73. Baird's Holland guesses that there have been instances where Baird's sales representatives have come back and said perhaps a retailer had removed the country of origin label but he could not think of any specific instance although some of Baird's sales people have told Holland that they know of circumstances where a retailer has removed the country of origin label. Holland's response to the sales representative was "Tell them not to do it." Holland does not know if his instruction was related through Baird's independent sales people. (Holland, SPX-12 at 81-82 & 129).

74. On March 4, 1986 when Baird's Holland was asked whether a Customs official ever told him that the gold foil sticker on the Baird label was sufficient for nut jewelry products, with respect to country of origin markings, Holland answered that they never specifically told me that they were but that they never specifically told me that they were not. (Holland, SPX-12 at 156-157).

75. Customs Form 4647 dated April 1, 1986 to respondent Baird stated that kukui nut necklaces must be marked within 30 days from its date and that if Baird needed an extension, a written request should be submitted. Under the subheading "Remarks" it was stated "All kukui nut necklaces with descriptive tags - KUKUI NUTS - SYMBOLIC OF HAWAII - must be stamped with country of origin in close proximity to HAWAII and in same letter size as HAWAII." (SX-86).

76. A letter dated May 28, 1986 from respondent Baird's Holland stated that Holland on May 27, 1986 visited Ms. Matsushita (Customs Import Specialist who issued to Baird on April 1, 1986 the Customs form 4647 for entry no. 6-10 4626-1 on Jan. 14, 1986) to see if perhaps there was a misunderstanding regarding the status of the marking notice; that Baird has talked about this notice with its Customs Broker after receiving the notice in early April and then that after a couple of discussions with Ms. Matsushita, Baird's broker informed Baird that the notice had been cancelled with entry 86-104626-1 released to Baird in January. Entry no. 86-104626-1 was liquidated February 14, 1986 which Baird understood precludes any further action on U.S. Custom's part or Baird's part. In the May 28, 1986 letter it was represented that Ms. Matsushita on May 27 stated to Baird's Holland that there had been no misunderstanding, that the notice had been cancelled and that she had mentioned that to the Commission investigative attorney on the telephone; and that she offered to note the cancellation on Baird's copy of the marking notice which is attached to the May 28, 1986 letter. Holland in the May 28 letter further represented that the only other paper Baird has from U.S. Customs is a form #6423 dated August 2, 1982 (copy attached to the May 28 letter) which showed that a sample of a "kukui nut" necklace (Entry No. 82-110276-3) was taken from one of Baird's entries almost four years ago by U.S. Customs and Holland is certain that Customs examined it in detail. It was represented that there was no reply to this notice on Baird's part because none was required; there has been no correspondence from Customs complaining of any violation; and that in the absence of such a complaint, Baird considered this tacit approval of the marking. Holland, in the May 28 letter stated that Baird's marking has not changed since 1982; that Baird had already submitted samples of each label which could have been sampled by Customs in

conjunction with Baird's answer to complainant's first set of interrogatories; that under the circumstances, Baird believed that the marking notice for entry 86-104626-1 should not have issued in the first place; and that Baird continued to believe that the kukui nuts as Baird imports them are marked correctly according to Customs Regulations section 134.47. (See footnote 7 of opinion). Holland further represented in the May 28 letter also that Baird has reviewed all kukui nut entries since the inception of U.S. Customs ACS (computerized entry) program in Hawaii; that since this program began, every one of Baird's kukui nut entries has been designated "Intensive Exam" which Baird understood meant that U.S. Customs had inspected and scrutinized Baird's kukui nut jewelry at least six times within the last year and that U.S. Customs would have inspected entry 86-104626-1 before it was released to Baird in January. (ALJ Exh. 1).

77. In a letter dated June 4, 1986, Holland's Baird represented:

> We enclose a photocopy of Customs regulations 141.113 which indicates Customs may not make a demand for marking more than 30 days after the date of entry.
>
> We believe that "statute of limitation" exists because, to require a business to redeliver merchandise beyond this point in time, would require that stock be held in "limbo" for unknown and indefinite periods of time, pending requests by Customs to redelivery - which in fact may never occur. In our case, most of the merchandise had been sold and it would have been impossible to produce the merchandise at this late date: the marking notice was received some 75 days after the merchandise was released to us, and some 45 days after Customs' own deadline for requiring redelivery.
>
> Also, we had understood that this entry had been liquidated by the U.S. Customs Service - which we understand to mean that the entire transaction is "put to rest" and is not available for further review either by U.S. Customs or us. We understand this is the technique used by the Customs service to keep the paperwork flowing and to prevent tremendous backlogs and insuramountable problems which would occur if old entries were allowed to be constantly reexamined, questioned, and disputed by importers or Customs officials alike without cessation.

We discussed the matter of the marking notice with our customhouse broker, and with him discussed the entire "picture" with the Customs official involved (Ms. Gladys Matsushita). It was our understanding that she said she would check with her superiors and look into the ramifications of her request to us (in light of our comments to her regarding the Customs regulation 141.113 and the fact that this entry was liquidated) and would get back to us.

The only other comment we have ever heard in this matter (before the commission investigative attorney sent his letter of May 15th) was a verbal statement from our broker, - that Ms. Matsushita had told him that the marking notice had been cancelled.

Frankly, we do not know for sure what Ms. Matsushita's reasoning was in this matter and we could only suggest that perhaps she should be contacted for a more direct explanation of what happened or why. . . .

(ALJ Exh. 2).

78. In a memorandum dated June 2, 1986 Ms. Matsushita of Customs stated:

Customs Form 4647, "Notice of Redelivery, Marking. Etc." covering CE 86-104626-1 dated 1/14/86 was issued on 4/01/86. After "Marking Notice" was issued, R. Baird's customhouse broker, American Customs Brokerage Co., Inc. cited section 141.113(a), Customs Regulations, which states:

> "If such merchandise is found after release to be not legally marked, the district director may demand its return to Customs custody for the purpose of requiring it to be properly marked or labeled. The demand for marking or labeling shall be made not later than 30 days after the date of entry in the case of merchandise examined in public stores, and places of arrival, such as docks, wharfs, or piers. Demand may be made no later than 30 days after the date of examination in the case of merchandise examined at the importer's premises or such other appropriate places as determined by the district director."

In view of the above citation, "Marking Notice" was cancelled as the 30-day period had lapsed since examination and release of the shipment by the Customs Service. R. Baird was notified that if future shipments were tagged with these descriptive tags "Symbolic of Hawaii", Customs would require marking as stated on the Customs Form 4647 "Remarks" section.

(SX-88).

79. An internal Customs memorandum dated March 31, 1986 from Ms. Matsushita to "DIC" stated in part:

> Gaylord Virden, Attorney for Kukui Nuts of Hawaii informs that, during a hearing in the Court of International Trade regarding importations of kukui nut necklaces, R. Baird & Co. testified that his products are being imported with printed descriptive tags indicating the kukui nuts as being symbolic of Hawaii and Customs has cleared his shipments as being in compliance with marking requirements. Marking Regulations require that, if these printed tags are attached to the imported necklaces, the country of origin must be conspicuous and in the same letter size as HAWAII. Also, any descriptive literature stating HAWAII must have the country of origin in close proximity to HAWAII and in letter size comparable to HAWAII.

Please ensure that all cargo inspectors are aware of these marking requirements.

(SX-88).

80. On October 18, 1985 there was filed in the Circuit Court of the First Circuit, State of Hawaii in Civil No. 84-0632 (Kukui Nuts of Hawaii, Inc., (plaintiff) v. R. Baird & Co., Inc., et al., (defendants), Blair, Ltd., (defendant and third-party plaintiff) v. Alie A. Hyssein, dba Ali Baba Imports, et al., (third -party defendants) (state action) an order granting motions: for summary judgment and to dismiss action as to defendant R. Baird & Co., Inc., for dismissal of action as to defendant Blair Ltd., and for summary judgment and for dismissal of action as to defendant Design Creations, Inc. Defendant Liven & Co. (Hawaii), Ltd. joined in said motions by oral joinder. The state judge Richard Y. C. Au found that plaintiff had failed to present evidence that "kukui nuts" had acquired a secondary meaning. (RB1X-2).

81. In a partial transcript of proceedings before the Honorable Richard Y. C. Au in the state action on September 20, 1985, the Court stated in part:

> I think this case is much ado about nothing. Plaintiff argues, of course, that the phrase "kukui nuts" has a secondary meaning as Aleurites Moluccana only grown in Hawaii, and by reason of the defendant's misrepresentations, negligence, and the like, plaintiff has been damaged. But I think that were there this matter to go to the jury based upon the court's view of the evidence in the light most favorable to the plaintiff. reasonable minds cannot differ as to that critical issue as to whether or not there was such misrepresentation and like.
>
> And it is clear that the large part of the evidence indicates that in respect to Baird, their product bears gold labels indicating that their nuts or leis were made in Taiwan. And Mr. Raimy himself admitted that the Baird sticker made it clear to him that the Baird products were imported from Taiwan.
>
> As the defendant Baird argues, the great bulk of the relevant consuming market, namely, tourists coming to Hawaii, probably not knowing, indeed, not really caring what a kukui nut is, and it stretches the imagination to suggest that kukui nuts has a secondary meaning as only kukui nuts grown in Hawaii of that nature, Aleurites Moluccana.
>
> And for the many reasons that the defendant Baird suggests and has argued, and for the reasons as counsel for Design Creations and Blair, Limited, and Levin, and co-joins that there has not been compliance with the court's order re discovery, the motion for summary judgment is granted; likewise, the motion to dismiss under Rule 37, and let it be so ordered.

(RB1X-2).

<u>Respondents Blair, Oriental, Huang Hou, Farlace, Pong Lai and Ali Baba</u>

82. Blair markets its kukui nut leis under the common or generic name "kukui nuts." (SX-78, Ans. to Int. No. 6).

83. Photocopies of the three types of labels describing the kukui nut leis marketed by Blair are:

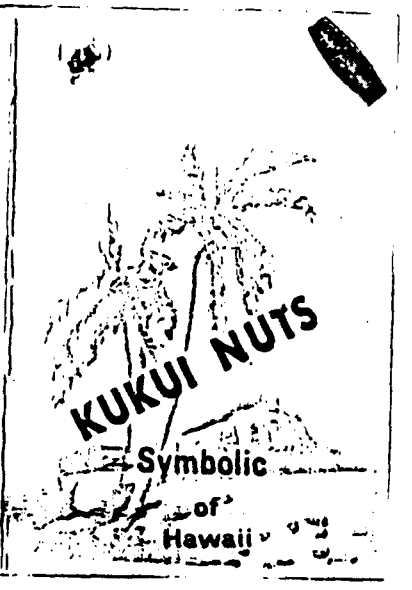
Blair Label #1

純粋のククイナッツ

ククイ ナッツはハワイ州を代表する木の實であります。大昔ハワイの土人はこのナッツで装飾品を作つたり又その他木の部分を使つて食物、薬染色、調味料、油、こやし、ニスを作りました。葉は銀色がかった緑色でもみじの型をしており、ハワイでは雨の多い山の斜面に生存し容易に見わけることが出來ます。

ナッツを貴石にする前にアリが中身を食べつくしてしまうまでナッツを土の中に數週間うめます。今度土の中から取り出したこのナッツを磨き上げるのに數日間をかけます。

この純粋なククイナッツはハワイの訪問客に限らずハワイの人々からも大變貴重なものとして高く評價されています。このナッツはハワイの永遠と美のシンボルであります。



GENUINE KUKUI NUTS

Kukui Nuts are the fruit of the State Tree of Hawaii. The ancient Hawaiians used these nuts for ornamentation and, along with other parts of the Kukui Tree, for food, medicine, dye, spices, oil, fertilizer, varnish etc. The tree is easily identified by its silvery green, maple-shaped leaves, and is found on most mountain slopes in Hawaii.

Before making the nuts into jewelry, they were buried for weeks to allow time for the ants to eat out the meat. It would then take the ancient Hawaiians several days to sand and polish a single nut.

These "Genuine Kukui Nuts" are prized by local residints and visitors alike. They are a lasting and beautiful symbol of Hawaii.

Blair Label #2

GENUINE AND AUTHENTIC

KUKUI NUT

Hand strung in Hawaii

THE KUKUI NUT

Kukui is pronounced "koo-koo-ee" by the Hawaiians. This KUKUI NUT LEI has been prepared and given a polished satin lustre reminiscent of the Kukui Nut worn by Hawaiian Royalty as a symbol of good luck and prosperity.

Blair Label #3

One of these labels is identical to Baird's pink label #2. Another of the these labels has no marking of foreign origin on the leis. This label was used on leis that were hand strung by Blair in Hawaii. Blair used nuts grown in the Phillippines and processed in Taiwan to make these leis. The third label is a heart shape label which has on the front of the label in black letters "MADE IN TAIWAN R.O.C." which is easily perceptible especially when compared with the other language (with the exception of "KUKUI NUTS") in the label. The country of origin designation on the heart shape label is a part of the label. (SX-78, Ans. to Int. Nos. 6-7 & 12, Exh. B).

84. Blair has imported both loose, polished candlenuts and completed candlenut leis. Candlenuts are the species scientifically named aleurites moluccana. The Hawaii Revised Statutes Section 5-8, states:

> State tree. The kukui tree, also known as the candlenut tree (Aleurites Moluccana), is adopted, established, and designated as the official tree of the State, to be effective so long as the legislature of the State does not otherwise provide. * * *

(SX-78, Ans. to Int. No. 5, Exh. A).

85. Blair has sold, distributed or marketed in the United States five different lengths of kukui nut leis, depending upon the number of nuts strung on each lei viz. the lei contains either 36, 32, 30, 24 or 16 nuts. The kukui nuts are either black or brown in color, strung on a ribbon, the ribbon knotted between each nut, and the ribbon ends tied in a bow. Blair has also sold a bracelet containing 7 kukui nuts. (SX-78, Ans. to Int. No. 5).

86. Blair has no trade or brand name as such in marketing kukui nut leis. (SX-78, Ans. to Int. No. 6).

87. The completed kukui nut leis which Blair purchases from local Honolulu, Hawaii importers are all marked "Made in Taiwan." The labels do not distinguish between where the nuts are grown and where they are processed. The labels are already attached to the leis when Blair receives them. Blair also buys loose, polished imported kukui nuts. Blair then manufactures the leis by hand stringing the loose kukui nuts with ribbon. Blair sell these nut leis with Blair's own label describing them as "kukui nuts" that are "Hand Strung in Hawaii." (SX-78, Ans. to Int. No. 7).

88. Blair does not export candlenuts or candlenut jewelry into the United States. Blair stated that it usually purchases its imported candlenut jewelry from local importers doing business in Honolulu, Hawaii; that however, from time to time, a local importer will direct the exporter to ship the goods directly to Blair and that one exporter who has done so is

Blair has made its candlenuts into candlenut jewelry. (SX-78, Ans. to Int. Nos. 8(d) & 12).

89. As to any instance in which a country of origin designation was removed from Blair's candlenut jewelry, Blair is aware of one such instance. A Blair employee, Donna Kotake, was taking out of stock some imported kukui nut leis to put onto the sales rack in Blair's showroom. Another Blair employee, Lorna Nakasone, had just sold a number of kukui nut leis to a Japanese tourist who asked to have the "Made in Taiwan" cut from the label. Ms. Nakasone then asked Ms. Kotake to comply with the tourist's request. Miss Kotake misunderstood and mistakenly cut off the labels "Made in Taiwan" notations from the entire group of approximately 20 leis. Those leis that were not sold to the Japenese tourist were put on the sale rack with the cut labels. The one time that the labels were cut happened to coincide with the

first time Ronald J. Ramie, the private investigator hired by complainant visited Blair's showroom. Mr. Ramie purchased one of Blair's leis having a cut label. In an effort to prove that the cut label was more than just an accident, complainant sent Mr. Ramie to the Blair showroom for a second time on August 3, 1984 to purchase a package of fifteen (15) kukui nut leis. All of the leis that Mr. Ramie bought from Blair on his second visit had complete, uncut labels. (SX-78, Ans. to Int. No. 7(b)).

90. Respondents and have exported the candlenuts or candlenut jewelry Blair manufactured to the United States. Respondents and have imported the candlenuts or candlenut jewelry Blair manufactured the United States. Honolulu, Hawaii and Honolulu, Hawaii have sold, distributed or marketed in the United States the candlenut jewelry Blair manufactured. (SX-78, Ans. to Int. No. 10).

91. Blair has sold its kukui nut jewelry in its own showroom in Honolulu, Hawaii and at gift and trade shows in New York, New York, Dallas, Texas and Los Angeles, California. (SX-78, Ans. to Int. Nos. 10(c) & 15(b)).

92. Blair wholesales to two major accounts. One wholesale account is , an independent distributor, which caters to tourists throughout the Hawaiian Islands from its many outlets. Blair's other major wholesale account is a discount, department store chain. (SX-78, Ans. to Int. No. 15(a)).

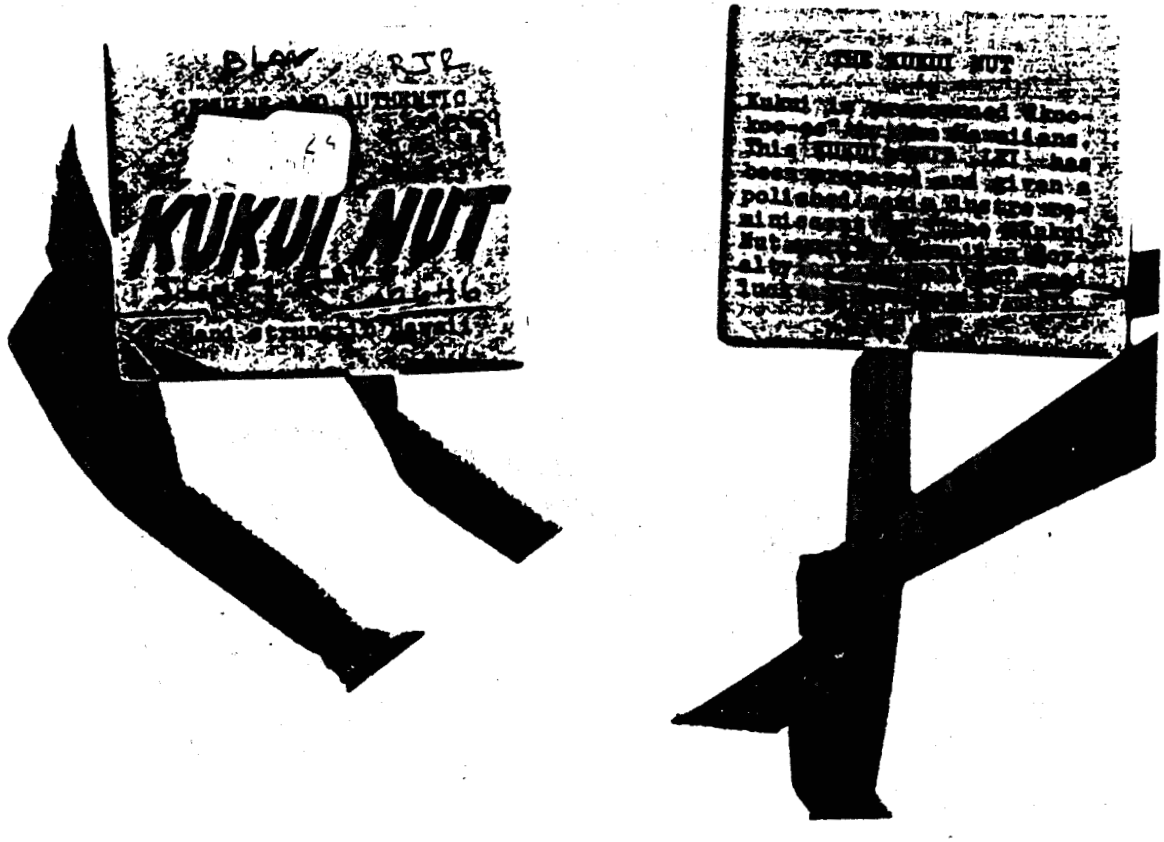
93. Blair distributes, markets and sells its candlenut jewelry from its retail showroom and wholesale office located at 404-A Ward Avenue, Honolulu, Hawaii. (SX-78, Ans. to Int. No. 15(b)).

94. Except for complainant's, Blair has not had a single complaint concerning the quality of its kukui nut products, nor has it had a single complaint concerning false or misleading claims about its products. Complainant's accusations subsequently led to the institution of a lawsuit against Blair, Ltd., among others, filed September 13, 1984, and captioned Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc., et al., Civil No. 84-0632, Circuit Court of the First Circuit, State of Hawaii. On October 18, 1985, the Hawaii state court judge dismissed Civil No. 84-0632 as a sanction for complainant's repeated discovery abuses. (SX-78, Ans. to Int. No. 16).

95. In answer to whether Blair has ever labeled, marketed, advertised, or made representation that its candlenuts or candlenut jewelry are (1) "Kukui Nuts," Blair answer Yes; (2) "Genuine Kukui Nuts,", Blair answered Yes; (3) grown in Hawaii, Blair answered No; (4) strung in Hawaii, Blair answered Yes. Blair further stated that it believed the candlenuts were grown in the Philippines; and that Blair's candlenut jewelry bearing the label "Hand Strung in Hawaii" were strung at Blair's facilities located at 404 A Ward Avenue, Honolulu, Hawaii. (SX-78, Ans. to Int. No. 17).

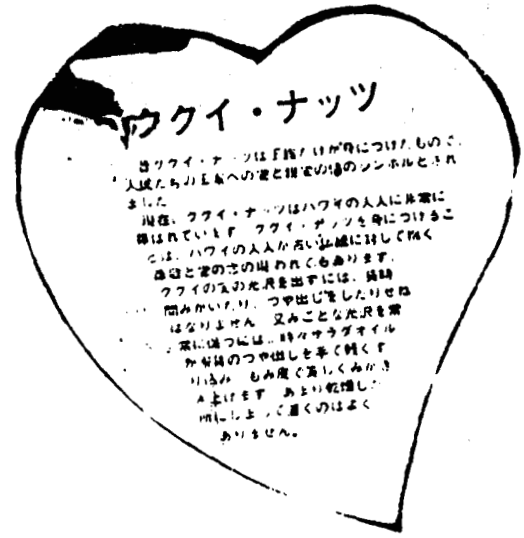
96. Ron Ramie in his 1984 investigation referred to above under Respondent Baird purchased a partial lei with 17 nuts remaining, sample C, with a rust colored label, and Ramie's identifying marks "RJR I-090-84 7-2-84 1:50 pm" at Blair's wholesale-retail outlet on July 2, 1984. It was said by Ramie that the style of the label was found on a few occasions in the course of Ramie's investigation and at no time was this style ever found with any designation of foreign origin; that some nuts from Sample C were removed for

the purposes of laboratory analyses, one laboratory affixing its identifying marks "Item #1 IAL #12646." Sample C is represented as follows:



Sample C is also represented as physical exhibit SPX-14. (CX-9, SPX-14).

97. Ron Ramie in his 1984 investigation referred to above under Respondent Baird, purchased a Sample D, a 30 nut lei, with a white label, and with Ramie's identifying marks "I090-84 8-3-84 11:45 pm RJR" at the wholesale outlet of respondent Blair on August 3, 1984. It was said by Ramie that this style of label was found by Ramie only at Blair's wholesale outlet and at the retail showroom of Blair although it "may be found" elsewhere. Ramie said that at the retail showroom of Blair Ramie found lots of this style of label, every single one of which had the designation of Taiwan origin eliminated from the label by cutting it off. Sample D is represented as follows:



Sample D is also represented as physical exhibit SPX-15.

(CX-9, SPX-15).

98. Blair has imported loose, polished kukui nuts from respondent Blair understands that obtains the nuts from respondent Huang Hou, 98-8 Ming Tahin Road, Chitau, Kilung, Taiwan, Republic of China. Blair understands that , in turn, obtains the raw nuts from the Phillippines. Blair does not know with certainty who actually "manufactures" the candlenuts and candlenut jewelry that it receives from local importers. One exporter, respondent , has shipped completed kukui nut leis directly to Blair upon instructions from the local Hawaiian importer. Blair has made its candlenuts into candlenut jewelry. (SX-78, Ans. to Int. Nos. 10 & 12).

99. Respondent has imported the candlenuts or candlenut jewelry Blair manufactured in the United States. (SX-78, Ans. to Int. No. 10).

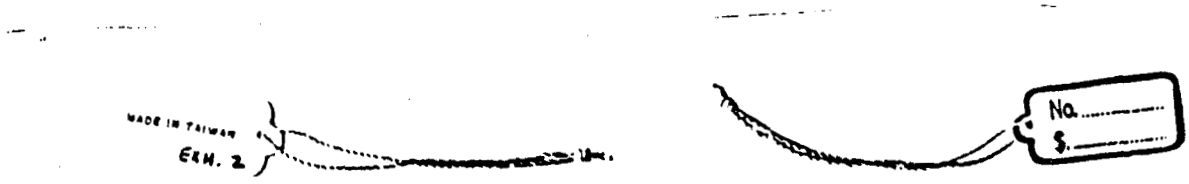
100. Respondent has imported the candlenuts or candlenut jewelry Blair manufactured in the United States. (SX-78, Ans. to Int. No. 10).

101. Local Hawaii retailers, and made wholesale purchases of Blair's candlenut jewelry. Local Hawaii residents and tourists made retail purchases of Blair's candlenut jewelry from Blair's Honolulu showroom. Other persons purchased Blair's candlenut jewelry at mainland trade shows. (SX-78, Ans. to Int. No. 13).

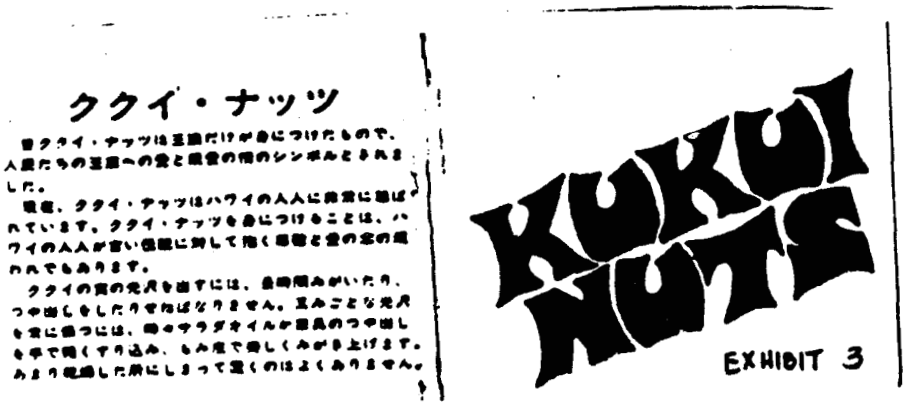
Respondents RDCO and Royal Design Creations

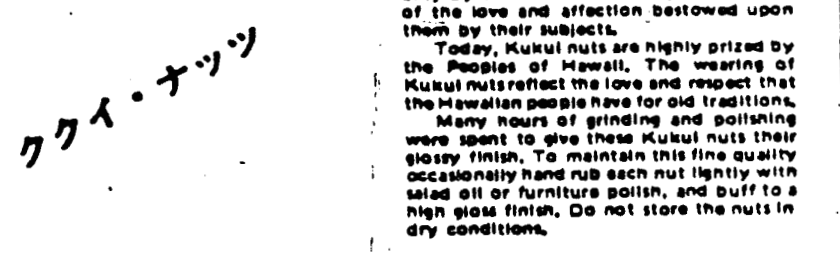
102. With respect to all documents that refer or relate to the type, nature or content of packaging, advertisements and promotional, materials used by RDCO in connection with the marketing, sale or distribution of candlenuts

or candlenut jewelry in the United States, RDCO produced the following "three labels":

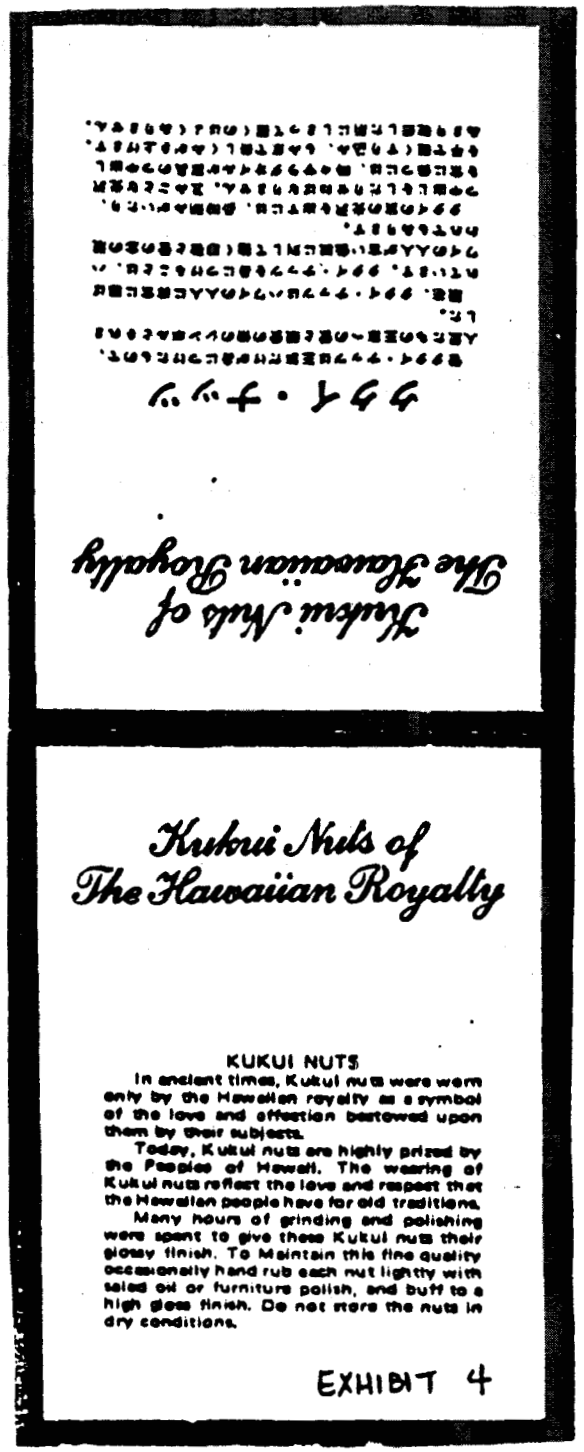


RDCO Label #1





RDCO Label #2


Kukui Nuts of
The Hawaiian Royalty
KUKUI NUTS
In ancient times, Kukui nuts were worn only by the Hawaiian royalty as a symbol of the love and affection bestowed upon them by their subjects.
Today, Kukui nuts are highly prized by the Peoples of Hawaii. The wearing of Kukui nuts reflect the love and respect that the Hawaiian people have for old traditions.
Many hours of grinding and polishing were spent to give these Kukui nuts their glossy finish. To Maintain this fine quality occasionally hand rub each nut lightly with salad oil or furniture polish, and buff to a high gloss finish. Do not store the nuts in dry conditions.
EXHIBIT 4
Kukui Nuts of
The Hawaiian Royalty

RDCO Label #3

One of the above labels has a "Made in Taiwan" string tag. There is no foreign origin marking on the remaining two labels above. However those two labels identify the kukui nut jewelry with Hawaiian royalty and/or talks about the kukui nuts as highly prized by the peoples of Hawaii. (SX-17, SX-77, Exhibit 2, Exhibit 3, Exhibit 4).

103. With respect to projected sales of candlenuts or candlenut jewelry in the United States, RDCO answered "None. We are not projecting any further sales of these items." (SX-17, Request 9, SX-77, Ans. to Request No. 9).

104. Candle nut jewelry imported by RDCO was marked with the country of manufacturer. Imported loose candlenuts which were manufactured into jewelry in Hawaii by RDCO were not marked with foreign identification. RDCO is not aware of any instance in which a country of origin designation was removed from RDCO's candlenuts or candlenut jewelry. (SX-76, Ans. to Int. No. 7).

105. Respondent Royal Design Creations, GA No. 173, sec. 2, Fushing S. Road, Taipei, Taiwan, R.O.C. has exported the candlenut jewelry RDCO. (SX-76, Ans. to Int. Nos. 10 & 12).

106. The manufacturer of the candlenuts or candlenut jewelry that RDCO has imported or caused to be imported to the United States is unknown. (SX-76, Ans. to Int. No. 12.)

107. With respect to the manner in which RDCO distributes, markets or sells candlenuts or candlenut jewelry in the United states, RDCO answered that "We no longer 'distribute' at present" and "We did 'distribute' in Honolulu and Hilo, Hawaii." (SX-76, Ans. to Int. No. 15).

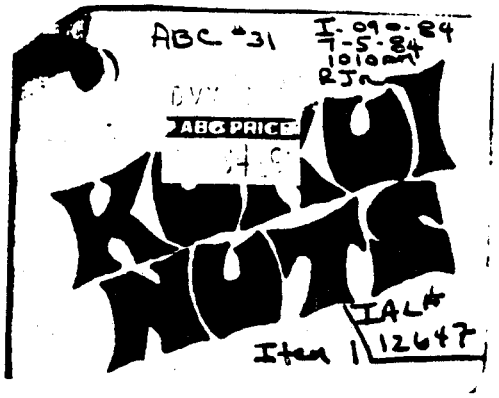
108. When asked to identify each complaint that RDCO has received regarding the quality of the candlenuts or candlenut jewelry that RDCO has manufactured, exported, distributed, marketed or sold in the United States, including but not limited to complaints regarding false or misleading claims concerning such product, RDCO answered "None." (SX-76, Ans. to Int. No. 16).

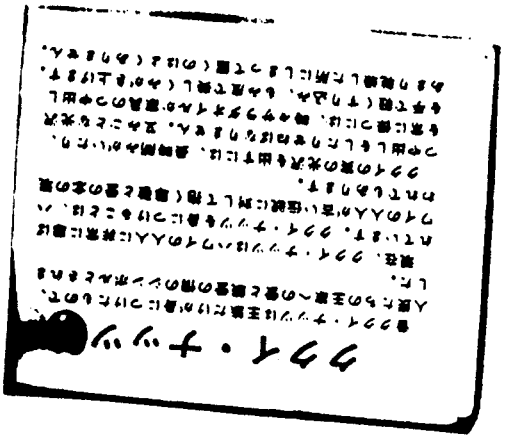
109. When asked to state whether RDCO has ever labeled, marketed, advertised, or made any representation that RDCO's candlenuts or candlenut jewelry are; 1. "Kukui Nuts", RDCO answered Yes; 2. "Genuine Kukui Nuts", RDCO answered No; 3. grown in Hawaii, RDCO answered No; and 4. strung in Hawaii, RDCO answered No. When asked to state where the candlenuts or candlenut jewelry was grown, RDCO answered "Unknown." When asked to state where the candlenuts or candlenut jewelry were strung, RDCO answered "Imported, completed strands were strung in Taiwan." RDCO also stated that imported strands were sold under the phrase "Kukui Nuts of The Hawaiian Royalty". (SX-76, Ans. to Int. No. 17).

110. RDCO has stated that the manufacturer of its imported candlenut jewelry was unknown; that it has imported the candlenuts of candlenut jewelry that it has sold, distributed or marketed in the United States; that it has made its candlenuts into candlenut jewelry and that ABC Stores, THY & Associates, F.W. Woolworth, Paul's Imports, others in insignificant amount have purchased the candlenuts or candlenut jewelry that RDCO has sold, distributed or marketed in the United States. (SX-76, Ans. to Int. No. 13).

111. Ron Ramie in his 1984 investigation referred to above under Respondent Baird purchased a Sample B, a partial lei with 11 nuts remaining, with a yellow label and with Ramie's identifying marks "I-090-84 7-5-84 10:10 pm RJR" at ABC Store #31 on July 5, 1984. This style of label was said to be found in significant portion of the time throughout the course of Ramie's investigation, and was said at no time ever found with any designation of foreign origin. Ramie stated that Sample B at the time it was purchased by Ramie was an 18 nut lei; that its partial state was due to the removal of seven nuts for the purposes of laboratory analyses, one laboratory affixing

its identifying marks "IAL #12647 Item 1". The label of sample B is represented as follows:





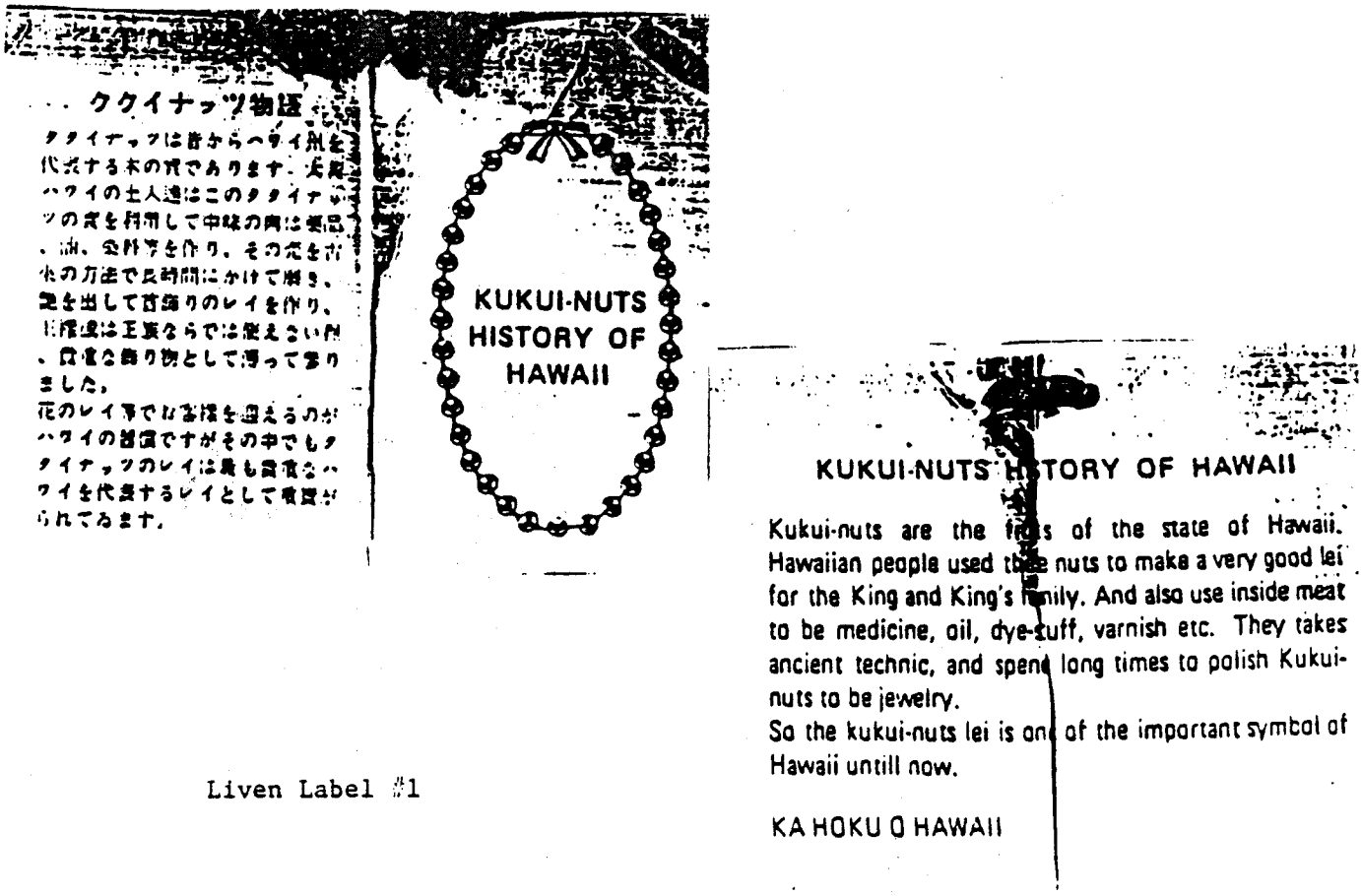
Sample B is also represented as physical exhibit SPX-16. The staff represented that SPX-16 was attached to RDCO's responses to the staff's interrogatories. (CX-9, para. 7; Tr. of prehearing conference at 114).

Respondent Liven

112. Respondent Huang Hou, No. 98-8 Min-Do 1 Rd., Chi-Tu City, Kee Lung Taiwan has manufactured the candlenuts or candlenut jewelry that Liven imported or caused to be imported into the United States. Liven & Co., Ltd., a corporation duly organized under the laws of the country of Taiwan has exported to the United States the candlenuts or candlenut jewelry that Liven imported or caused to be imported into the United States. These included candlenut leis of varying lengths, consisting of 9, 15, 18, 24, 30 and 36 nuts per lei. Liven & Co., Ltd., is related to Liven. (SX-17, SX-80, Ans. to Int. Nos. 2, 5b & 12).

113. The candlenut jewelry sold by Liven are sold through commission sales and orders to small independent retailers. All sales are made in Honolulu, Hawaii. (SX-17, SX-80, Ans. to Int. No. 15).

114. Liven sold, marketed, imported, and/or distributed candlenut



Liven Label #1

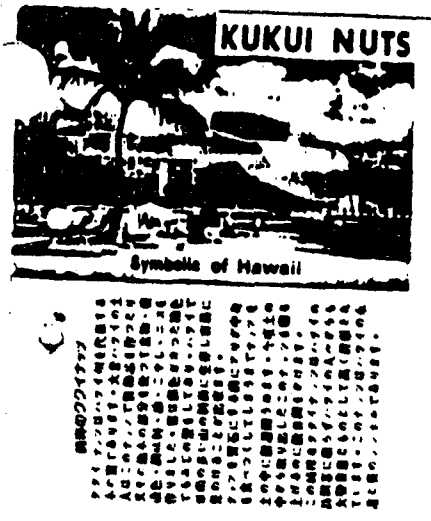
This label has in bold letters "Kukui Nuts History of Hawaii". The inside of the label relates the kukui nuts to Hawaiian royalty and states the kukui nut is a symbol of Hawaii. There appears to be a sticker in the upper right hand corner of the label which indicates country of origin. (SX-17, SX-80, Ans. to Int. Nos. 6 & 17, first exhibit).

115. It is unknown to Liven where the candlenuts of the candlenut jewelry imported by Liven are grown. It is also unknown to Liven where the candlenut jewelry imported by Liven is strung. (SX-80, Ans. to Int. No. 17).

Respondent Pong Lai and Farlace

116. The only style of candlenut jewelry Pong Lai imported into the United States was the kukui nut necklace. The only style Pong Lai sold, distributed or marketed in the United States was the kukui nut necklace. (SX-80, Ans. to Int. No. 5).

117. There was no trade or brand name under which Pong Lai sold, marketed, imported, exported and/or distributed candlenut jewelry. It was only identified as "Kukui Nut." The label attached to the necklace was:



Pong Lai
Label #1

GENUINE KUKUI NUTS

Kukui Nuts are the fruit of the State Tree of Hawaii. The ancient Hawaiians used these nuts for ornamentation and, along with other parts of the Kukui Tree, for food, medicine, dye, spices, oil, fertilizer, varnish etc. The tree is easily identified by its silvery green, maple-shaped leaves, and is found on most mountain slopes in Hawaii.

Before making the nuts into jewelry, they were buried for weeks to allow time for the ants to eat out the meat. It would then take the ancient Hawaiians several days to sand and polish a single nut.

These "Genuine Kukui Nuts" are prized by local residents and visitors alike. They are a lasting and beautiful symbol of Hawaii.

The necklace on which the label was placed was manufactured in Taiwan, R.C. by ALI BABA IMPORT & EXPORT. "Made in Taiwan" protrudes from the label. (SX-8, Ans. to Int. No. 6, SX-82, response to request No. 1 & 7 (Exhibit B)).

118. Pong Lai has stated that it has never failed to mark its candlenuts or candlenut jewelry with the country where they were grown, manufactured, or prepared for sale and that it is aware of no instance in which a country of origin designation was removed from its candlenuts or candlenut jewelry. (SX-8, Ans. to Int. No. 7).

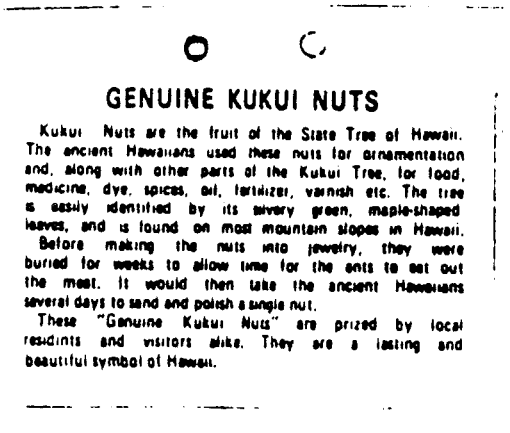
119. Respondent Farlace has exported to the United States the candlenuts or candlenut jewelry that Pong Lai imported or caused to be imported into the United States. Respondent has sold, distributed or marketed in the United States the candlenuts or candlenut jewelry that Pong Lai imported into or caused to be imported into the United States. (SX-81, Ans. to Int. No. 12).

120. Pong Lai distributes candlenuts or candlenut jewelry primarily to wholesalers in Honolulu, Hawaii. (SX-81, Ans. to Int. No. 15).

121. Pong Lai has never labeled, marketed, advertized, or made any representation that its candlenuts or candlenut jewelry are "Kukui Nuts." "Genuine Kukui Nuts" grown in Hawaii or strung on Hawaii. (SX-81, Ans. to Int. No. 17).

Respondent Ali Baba

122. The only style of candlenut jewelry imported by Ali Baba was the kukui nut necklace and the only style distributed in the United States by Ali Baba was the kukui nut necklace. No trade name or brand name was use. The kukui nut necklace was only identified as "Kukui Nut." The label used on the necklace was:



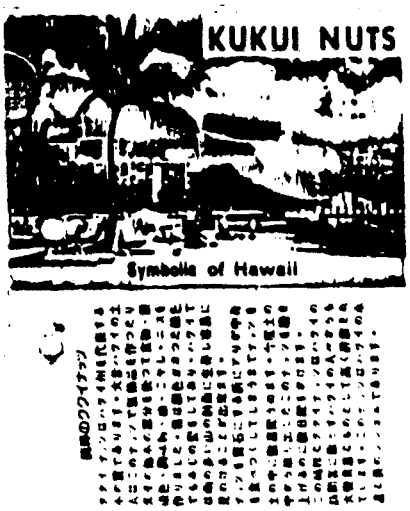
GENUINE KUKUI NUTS

Kukui Nuts are the fruit of the State Tree of Hawaii. The ancient Hawaiians used these nuts for ornamentation and, along with other parts of the Kukui Tree, for food, medicine, dye, spices, oil, fertilizer, varnish etc. The tree is easily identified by its silvery green, maple-shaped leaves, and is found on most mountain slopes in Hawaii.

Before making the nuts into jewelry, they were buried for weeks to allow time for the ants to eat out the meat. It would then take the ancient Hawaiians several days to sand and polish a single nut.

These "Genuine Kukui Nuts" are prized by local residents and visitors alike. They are a lasting and beautiful symbol of Hawaii.

Ali Baba
Label #1



The above label is placed on the necklace when it was manufactured in Taiwan, R.C. by ALI BABA IMPORT & EXPORT. A "Made in Taiwan" tag protrudes from the label. (SX-83, Ans. to Int. Nos. 5 & 6, SX-84, Response to Request 1 and 7 (Exhibit B)).

123. Ali Baba never failed to mark its candlenuts or candlenut jewelry with the country where they were grown, manufactured, or prepared for sale. Ali Baba is aware of no instance in which a country of origin designation was removed from its candlenuts or candlenut jewelry. (SX-83, Ans. to Int. No. 7).

124. Machteck Engineering Corp., P.O. Box 87-278 Taipei exported to the United States the candlenuts of candlenut jewelry that Ali Baba imported or caused to be imported into the United States. Respondent sold, distributed or marketed in the United States the candlenuts or candlenut jewelry that Ali Baba imported into or cause to be imported into the United States. (SX-83, Ans. to Int. No. 12).

125.

(SX-83, Ans. to Int. No. 15).

126. Ali Baba has received no complaint regarding the quality of the candlenuts or candlenut jewelry that Ali Baba has manufactured, exported, distributed, marketed or sold in the United States, including but not limited to complaints regarding false or misleading claims concerning such product. (SX-83, Ans. to Int. No. 16).

Respondents Taiwan Kyoei and Huang Hou

127. Respondent Huang Hou of No. 98-8 Min-Do 1 Rd., Chi-Tu City, Kee Lung, Taiwan, R.O.C. "supplied" the candlenuts or candlenut jewelry for Taiwan Kyoei to export. Huang Hou is not a subsidiary, affiliate, joint venture or subcontractor of Taiwan Kyoei. (SX-17, SX-75, Ans. to Int. No. 2).

128. Taiwan Kyoei always marked its candlenuts or candlenut jewelry with "Made in Taiwan." It is aware of no instance in which a country of origin designation was removed from its candlenuts or candlenut jewelry. (SX-17, SX-75, Ans. to Int. No. 7).

129. Respondent Baird imported into the United States the candlenuts or candlenut jewelry Taiwan Kyoei exported to the United States. (SX-17, SX-75, Ans. to Int. No. 11(b)).

130. Taiwan Kyoei received an order from respondent Baird which described the products as "Kukui Nuts." Taiwan Kyoei made inquiry to local suppliers who supplied the products as "Kukui Nuts." Taiwan Kyoei was only concerned about documentation (invoices, etc.) which clearly stated that the products were "Kukui Nuts" and were "Made in Taiwan." (SX-17, SX-75, Ans. to Int. No. 17).

V. Kukui

131. The common name for "kukui nut" is "candlenut". The word "kukui" is the Hawaiian name for "candlenut". (SX-16 at 2).

132. The only thing special about the term "kukui" is that it is the Hawaiian name for light. The only reason kukui is used in connection with *Aleurites moluccana* is because the nuts could be burned to produce light. One cannot tell that the nut grown in the Philippines is a different subspecies from the varieties of nuts grown in Hawaii. *Aleurites moluccana* grown in places other than Hawaii are properly called candlenuts. (Krause ALJ Exh. - at 35, 62, 66).

133. The kukui nut tree is Hawaii's official state tree. (SPX-1).

134. The kukui nut was brought to Hawaii by early Polynesian settlers and is considered an important part of Hawaii's early history. Ancient Hawaiians used to string kukui nuts together and burn them for light. The nuts were polished and made into leis to be worn by ancient Hawaiian royalty. Kukui nuts were also used for animal feed, medicine and dyes. (SPX-1; SX-16; SX-18).

135. The candlenut tree is native to countries from Polynesian west to southern Asia. It was brought to Hawaii by early settlers. It is distributed in the tropics and subtropics of the old world, West Indies, Brazil and other locations. (SX-16 at 2).

136. The fruit of the candlenut tree is called popularly "nut." The fruit is roundish if containing one seed (nut), or more ellipsoidal if containing two seeds. Forty to fifty years ago, two-seeded fruits were rare; now they may be found rather frequently. The outer part of fruit consists of a hard, green covering, about 1/4 inch thick when immature; with maturity, this turns a dark greyish-black and softens, especially after the fruit has fallen. In fact, this portion of the fruit decays rapidly under conditions under which this tree grows, after it reaches the ground. Inside this "husk" is found a thin, whitish, crust-like "shell" which is known as the "parchment" (which it resembles); this layer is most easily visible after fruit is partly decayed since it is much longer persistent than fleshy husk. The parchment surrounds the seed or nut. When young, the shell of nut is whitish (white kukui nut leis are made of nuts at this stage of maturity. When mature, the nut's shell is black, This shell is very hard, stone-like, thick, and "wrinkled." The shell is called seed-coat. The seed-coat is grooved or furrowed. Inside the seed-coat is the seed "proper,' the "meat," or kernal. This portion of seed consists of two fleshy cotyledons (first "leaves" of seedlings) which are rich in oil. (SX-16 at 2-3).

137. The hard shell of the nut has been used to make leis. For such use ridges of the shell are rubbed away with stone, and then buried in marshy area to season and blacken. Shells are then polished with stipules of breadfruit tree and oiled. The kernels of the nut are important because of the quality and quantity of contained oil. (SX-16 at 3).

138. The scientific name for candlenut is Aleurites moluccana. The Hawaiian name for Aleurites moluccana is "Kukui. "Aleurites" is the genus name and "moluccana" is the species name. (Krause ALJ Exh- at 13, 20).

139. Plants native in Hawaii today, such as kukui (candlenut) were brought to Hawaii by early settlers. (Krause - RB1X-1 at 5-6).

140. It is well known that kukui nuts came from other lands than Hawaii. (Krause RB1X-1 at 33).

141. Listings under "kukui at page 328 of the white pages of the February 1, 1985 telephone directory for the Island of Oahu, State of Hawaii, show the word "kukui" being used for "Kukui Mortuary," Kukui Plaza Medical Associates," "Kukui Sales Inc.," Kukui Sausage Factory," "Kukui Meat," and "Kukui Health Building." (RB1X-3).

Affidavits of Jacobsen, Swingle and Fernandez

142. Sallie Jacobsen is and has been for over 15 years, the owner and resident operator of a shop now called The Little Hawaii Craft Shop located in a shopping mall in Waikiki. The shop has as its principal business the sale of crafts made in Hawaii. Among the Hawaiian products sold are Hawaiian kukui nut products, primarily the shop's own custom crafted Hawaiian kukui nut jewelry items. Also complainant's kukui nut products are offered for sale.

It is the experience of Ms. Jacobsen that the impression of a large portion of tourists with whom she speaks that because the kukui nut jewelry is labeled "Kukui Nut" that the product is from Hawaii, and that in the case of the "pink label" this impression appears to have been reinforced by the general content of the pink label including the label's statements about the significance of the kukui nut in Hawaiian history, usage and culture. She stated that one of the kukui nut jewelry products she has seen for a number of years in Honolulu is offered for sale and sold in substantial numbers with the pink label attached to her affidavit as Exhibit A. This label appears to be the Baird label #2. She stated that the tourist cannot understand why prices vary significantly for what the tourist perceives as essentially the same items. (CX-3).

143. Tom Swingle is an independent sales representative representing complainant in complainant's sale to retailers. He describes three encounters where he has observed confusion and misunderstanding among buyers of kukui nut jewelry based on the Baird label. In one of the encounters he stated that ultimately two women bought complainant's nut leis saying "they wanted a souvenir of Hawaii, not of Taiwan." With respect to foreign origin on any of the labels associated with the tags, Swingle staed that "When we looked at the product tag together and examined it very closely I was of course proven correct [that the Baird leis were imported]." Swingle does not state if any foreign origin tags are on any jewelry in the other two encounters. (CX-4).

144. Renalle Fernandez is manager of Shop Pacifica, the gift shop owned and operated by the Bernice Pauahi Bishop Museum and she has held that job for three years. She stated that the Bishop Museum Gift Shop is an integral part

of the Bishop Museum and is operated consistently with the high ethics and principles of the museum, and that the museum is recognized as the principal museum of the Pacific and is acclaimed worldwide; that in the course of her employement there have been numerous occasions on which visitors to the museum, including both tourists and residents of Hawaii, have questioned the place of origin of the Hawaii kukui nut jewelry products the shop sells and the similar but less expensive nut jewelry items they have found generally in tourist-oriented outlets, particularly in Waikiki; and that it is well recognized by all of us selling at Shop Pacifica that "what tourists almost always are looking for - - and certainly prefer - - is an authentic, made-in-Hawaii, souvenir of their visit here." There is nothing said in the affidavit with respect to whether the leis sold in locations other than the Bishop Museum has a foreign origin designation. (CX-5).

VI. Importation & Sale

R. Baird & Company, Inc.

145. Baird has been an importer and wholesaler of kukui nut jewelry since December 1974. (SX-17, SX-24 at 1, Ans. to Int. Nos. 4(a) & (b)).

146. Since 1977, Baird has imported candlenuts or candlenut jewelry from Taiwan from Joey Pong, Shine Land and Taiwan Kyoei. However, Baird has not purchased any candlenuts or candlenut jewelry from Joey Pong since April 12, 1977. (SX-17, SX-24 at 6 & 7, Ans. Int. No. 12(b); Holland, SPX-12 at 57; SX-23, Exh. A; SX-23, Ans. to Int. No. 10).

147. Baird has also purchased imported candlenut leis from Design Creations, Inc., Honolulu, Hawaii. (SX-17, SX-24 at 7, Ans. to Int. No. 13(c)).

148.

(Holland, SPX-12 at 108-109).

149. Baird has manufactured earrings, pendants, and bracelets using imported candlenuts. (SX-23, Ans. to Int. Nos. 23 & 26).

150. Baird's sales of earrings and bracelets from 1982 to 1985, using imported candlenuts, was as follows:

	Bracelets	Earrings
1982--------	$ 750	$180
1983--------	1,250	180
1984--------	1,500	150
1985--------	3,884	219

(SX-24, Ans. Int. No. 8(e); SPX-5; SPX-8).

151. Some time prior to 1978 Baird sold "a few, very few" kukui nut pendants, imported from overseas. (Holland, SPX-12 at 38-39).

152. Baird's sales of candlenuts or candlenut jewelry were made in tourist areas of the State of Hawaii. (SX-17, SX-24 at 7, Ans. to Int. No. 15(b)).

153. Between 1980 and 1985 Baird imported approximately 72,700 loose candlenuts which were manufactured into kukui nut earrings and bracelets. Of the 72,700 loose candlenuts imported 23,800 were inventoried in November 1985. (SX-23 at 6, Ans. to Int. No. 21, Exh. A, at 2-5; SX-17, SX-24 at 4-6, Ans. to Int. No. 8(d) & (e); Holland, SPX-12 at 108).

154. Baird's wholesale prices for candlenuts and candlenut jewelry for 1982 through 1985 were as follows:

	1982	1983	1984	1985
LOOSE	.11	.15	.15	.15
EARRINGS	.75	.75	.75	1.25
BRACELETS	1.25	1.25	1.25	1.25
16 NUT LEIS	N/A	N/A	2.25	2.75
24 NUT LEIS	N/A	N/A	3.25	3.75
30 NUT LEIS	3.25	3.75	3.75	4.25
36 NUT LEIS	3.90	4.50	4.50	5.25

(SX-24, Ans. to Int. No. 5(e); Holland, SPX-12 at 87-88).

155. These prices are F.O.B. customers door for customers on the Island of Oahu and F.O.B. Baird's warehouse for customers on other islands. Baird's payment terms are generally 2%/10 net 30. (SX-28, Ans. to Int. No. 23(c)).

156. Baird offers a $0.25 discount on 30 nut necklaces for quantities of 100 or more. (SX-28, Ans. to Int. No. 23(a)).

157. Baird imported 30,000 loose candlenuts and 9000 candlenut leis in 1977. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 1).

158. Baird imported 35,000 loose candlenuts and 6300 candlenut leis in 1978. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 1).

159. Baird imported 10,000 loose candlenuts and 17,760 candlenut leis in 1979. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 1 & 2).

160. Baird imported 5,000 loose candlenuts and 14,440 candlenut leis in 1980. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 2).

161. Baird imported 10,000 loose candlenuts and 14,015 candlenut leis in 1981. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 2 & 3).

162. Baird states that it imported 25,000 loose candlenuts and 16,400 candlenut leis in 1982. (SX-17, SX-24 at 4-6, Ans. to Int. No. 8(d)). However, in previous litigation between KNH and Baird, Baird admitted to importing 40,000 loose nuts for this same year. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 3 & 4).

163. Baird states that it imported 2,700 loose candlenuts and 4200 candlenut leis in 1983. (SX-17, SX-24 at 4-6, Ans. to Int. No. 8(d)). However, in previous litigation between KNH and Baird, Baird admitted to importing 7,604 candlenut leis for this same year. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 2 & 3).

164. Baird states that it imported 35,000 loose candlenuts and 23,780 candlenut leis in 1984. (SX-17, SX-24 at 4-6, Ans. to Int. No. 8(d)). However, in previous litigation between KNH and Baird, Baird admitted to importing 18,400 loose nuts for this same year. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 4).

165. Baird imported 1000 candlenut bracelets in 1984. (SX-23 at 6, Ans. to Int. No. 21, Exh. A at 5).

166. Baird states that it imported zero loose candlenuts and 21,395 candlenut leis in 1985. (SX-17, SX-24 at 4-6, Ans. to Int. No. 8(d)).

167. Baird's sales of candlenuts or candlenut jewelry were made wholesale only, through sales representatives, to any and all retail outlets. (SX-17, SX-24 at 7, Ans. to Int. No. 15(a)).

168. Baird's gross sale of kukui nut leis was $37,439 in 1982.
Baird's gross sale of kukui nut leis was $28,855 in 1983.
Baird's gross sale of kukui nut leis was $73,594 in 1984.
Baird's gross sale of kukui nut leis was $52,434 in 1985.

(SX-24 at 4-6, Ans. to Int. No. 8).

169. Between 1980 and 1985 Baird imported approximately 84,160 units of candlenut jewelry. As of November 1985, Baird had an inventory of over 24,000

units of nut jewelry. (SX-24, Ans. to Int. No. 8(f); Holland, SPX-12 at 58, ls. 21-25; SX-23 at 6, Ans. to Int. No. 21, Exh. A at 2-5; SX-17, SX-24 at 4-6, Ans. to Int. Nos. 8(d) & (e); Holland, SPX-12 at 108; FF 17-22).

170. Baird's estimated gross sale of candlenut jewelry from 1982 to 1985 was approximately $192,322.00. (SX-24 at 6, Ans. to Int. No. 8).

Blair, Ltd.

171. Blair has been a importer and wholesaler of candlenuts or candlenut jewelry since 1973 or 1974. (SX-78 at 2, Ans. to Int. Nos. 4(a) & (b)).

172. Blair imports loose, polished candlenuts with holes drilled in the ends and the kernel taken out. (SX-78 at 7, Ans. to Int. No. 8(d), Exh. F at 11).

173. Blair has made the loose candlenuts into candlenut jewelry, including leis. (SX-78 at 5, Ans. to Int. Nos. 7(a) & 12(d)).

174. Blair states that and exported some of the candlenuts they manufactured into candlenut jewelry in the U.S. (SX-78 at 10, Ans. to Int. No. 10(a)).

175. Blair purchases completed candlenut jewelry from local Hawaiian importers including; (SX-78 at 7, Ans. to Int. Nos. 8(d) & 10(b)).

176. Blair Ltd. sold, distributed, or marketed candlenuts or candlenut jewelry imported into the United States by

and (SX-81, Ans. to Int. No. 12(d); SX-83, Ans. to Int. No. 12(d)).

177. Blair imported loose, polished candlenuts in 1982. (SX-78 at 7, Ans. to Int. No. 8(d)).

178. Blair purchased candlenut leis in 1982. (SX-78 at 8, Ans. to Int. No. 8(d)).

179. Blair imported loose, polished candlenuts in 1983. (SX-78 at 7, Ans. to Int. No. 8(d)).

180. Blair purchased candlenut leis and candlenut bracelets in 1983. (SX-78 at 8, Ans. to Int. No. 8(d)).

181. Blair did not import any loose candlenuts in 1984. (SX-78 at 7, Ans. to Int. No. 8(d)).

182. Blair purchased candlenut leis and candlenut bracelets in 1984. (SX-78 at 8, Ans. to Int. No. 8(d)).

183. Blair has not purchased candlenuts or candlenut jewelry in 1985. (SX-78 at 8, Ans. to Int. No. 8(d)).

184. Blair has not sold any candlenut jewelry since December 15, 1984. (SX-78 at 9, Ans. to Int. No. 8(f)).

185. Between 1982 and 1985 Blair purchased loose, polished imported candlenuts, 4,284 imported candlenut leis and imported candlenut bracelets. (SX-78 at 6-7, Ans. to Int. No. 8(d)).

186. Blair presently has units of nut jewelry in inventory. (SX-78 at 9, Ans. to Int. No. 8(f)).

187. The total import value of the loose candlenuts imported by Blair is (SX-78 at 7, Ans. to Int. No. 8(d)).

188. The total value of the candlenut jewelry purchased by Blair was

(SX-78 at 8, Ans. to Int. No. 8(d)).

STYLE	1982	1983	1984	1985
BRACELETS	N/A			N/A
16 NUT LEIS	N/A			N/A
24 NUT LEIS			N/A	N/A
30 NUT LEIS				N/A
32 NUT LEIS		N/A	N/A	N/A
36 NUT LEIS		N/A	N/A	N/A

(SX-78 at 4, Ans. to Int. No. 5(e)).

189. Blair's sales of imported kukui nut jewelry at the wholesale level were as follows:

1982-------- $
1983--------
1984-------- *

* Sales estimated by multiplying the number of leis purchased by Blair its wholesale price. Where the wholesale price given by Blair was a range, a simple average price was used. (SX-78, Ans. to Int. Nos. 5(e) & 8(e)).

190. Blair's purchases of completed candlenut jewelry is as follows:

1982--------- $
1983---------
1984---------

(SX-78 at 8, Ans. to Int. No. 8(d)).

191. These purchases do not include candlenut jewelry strung by Blair from loose finished candlenuts, which have the label "Hand Strung in Hawaii". (SX-78 at 5-8, Ans. to Int. Nos. 7(a) & 8(d). See FF 28, 29).

Liven & Company, Ltd.

192. Liven has been an importer and wholesaler of candlenuts or candlenut jewelry since approximately September,1983. (SX-17, SX-80 at 1, Ans. to Int. Nos. 2(a) & (b)).

193. Liven & Company, Taipei, Taiwan, exported the candlenuts or candlenut jewelry Liven imported into the U.S. (SX-17, SX-80 at 1 Ans. to Int. Nos. 2(b) & 12(b)).

194. Liven imported 240 candlenut leis in 1983. (SX-17, SX-80 at 2, Ans. to Int. No. 8(d)).

195. Liven imported 100 loose candlenuts in 1984. (SX-17, SX-80 at 2, Ans. to Int. No. 8(d)).

196. Liven imported 13,540 candlenut leis in 1984. (SX-17, SX-80 at 2, Ans. to Int. No. 8(d)).

197. Liven imported 11,495 candlenut leis in 1985. (SX-17, SX-80 at 2, Ans. to Int. No. 8(d)).

198. Between 1983 and 1985 Liven imported 25,275 candlenut leis and 100 loose candlenuts. (SX-17, SX-80 at 2, Ans. to Int. No. 8(d)).

199. As of January 1986 Liven had no candlenut jewelry in inventory. (SX-17, SX-80 at 2, Ans. to Int. No. 8(f)).

200. In 1983 Liven's gross sales of imported candlenut leis were between $780.00 and $840.00. (SX-17, SX-80 at 2, Ans. to Int. Nos. 5(e) & 8(d)).

201. In 1984 Liven's gross sales of imported candlenut leis were between $44,005.00 and $50,775.00. (SX-17, SX-80 at 2, Ans. to Int. Nos. 5(e) & 8(d)).

202. In 1985 Liven's gross sales of imported candlenut leis were between $37,358.00 and $40,232.50. (SX-17, SX-80 at 2, Ans. to Int. Nos. 5(e) & 8(d)).

203. Liven's total gross sale of candlenut jewelry from 1983 to 1985 was between $82,143.00 to $91,847.50. (FF 200-202).

204. From 1982 through November 1985, Liven's wholesale price for candlenut leis ranged from $3.25 to $3.50 depending on the length of the lei. Since November 1985 the wholesale price for candlenut leis ranged from $3.75 to $4.00. (SX-80 at 2, Ans. to Int. No. 5(e)).

205. Liven's gross sale of kukui nut leis was $840 in 1983.

Liven's gross sale of kukui nut leis was $47,245 in 1984.

Liven's gross sale of kukui nut leis was $39,980 in 1985.*

*Gross sale estimated by multiplying the number of leis purchased by the average wholesale price of leis given in Int. No. 5(e). (SX-80 at 2, Ans. to Int. Nos. 5(e) & 8(d).

Taiwan Kyoei, Inc.

206. Taiwan Kyoei has exported candlenuts or candlenut jewelry to the United States since 1975. (SX-17, SX-75 at 1, Ans. to Int. No. 3).

207. Taiwan Kyoei exported 10,000 loose candlenuts to Baird in 1982. (SX-17, SX-75 at 1 & 2, Ans. to Int. Nos. 5(b) & (i)).

208. Taiwan Kyoei exported zero candlenuts in 1983. (SX-17, SX-75 at 1, Ans. to Int. Nos. 5(b) & (ii)).

209. Taiwan Kyoei exported 2,500 candlenut leis to Baird in 1984. (SX-17, SX-75 at 1 & 2, Ans. to Int. Nos. 5(b) & (iii)).

210. Taiwan Kyoei sold the 2,500 candlenut leis it exported to Baird in 1984 for $6,450.00. (SX-17, SX-75 at 2, Ans. to Int. No. 8(ii)).

211. Taiwan Kyoei sold the 10,000 loose nuts it exported to Baird in 1982 for $659.00. (SX-17, SX-75 at 2, Ans. to Int. No. 8(i)).

212. Taiwan Kyoei's gross sales of candlenuts or candlenut jewelry from 1982 to 1984 were $7,109.00. (SX-17, SX-75 at 2, Ans. to Int. Nos. 8(i) & (ii)).

213. Baird supplied the following information regarding Baird's purchases of candlenuts or candlenut jewelry from Taiwan Kyoei. (SX-23 at 3, Ans. to Int. No. 10, Ex. A).

YEAR	LOOSE	LEIS	BRACELETS
1977	30,000	7,000	
1978	25,000	6,300	
1979	10,000	14,560	
1980	5,000	14,400	
1981	10,000	11,415	
1982	15,000	2,600	
1984		2,500	

214. Taiwan Kyoei states that its sales of candlenuts and candlenut jewelry were made to R. Baird & Co. (SX-17, SX-75 at 3, Ans. to Int. No. 11(b)).

RDCO, Inc.

215. RDCO began importing and wholesaling candlenuts or candlenut jewelry in October 1978. (SX-76 at 2, Ans. to Int. No. 4).

216. Royal Design Creations exported the candlenuts or candlenut jewelry RDCO sold in the U.S. (SX-76 at 5, Ans. to Int. No. 10(a)).

217. RDCO states that "all candlenut purchases made by RDCO have been from Royal Design Creations." (SX-76 at 7, Ans. to Int. No. 14).

218. [illegible] (SX-76 at 6, Ans. to Int. No. 13(a)).

219. RDCO imported 9,860 loose candlenuts in FY (Fiscal Year) 1982. (SX-76 at 7, Ans. to Int. No. 14, Ex. 1).

220. RDCO imported 11,111 candlenut leis in FY (Fiscal Year) 1982. (SX-76 at 7, Ans. to Int. No. 14, Ex. 1).

221. RDCO imported 64,800 loose candlenuts in FY 1983. (SX-76 at 7, Ans. to Int. No. 14, Ex. 1).

222. RDCO imported 15,248 candlenut leis in FY 1983. (SX-76 at 7, Ans. to Int. No. 14, Ex. 1).

223. RDCO imported 7,200 loose candlenuts in FY 1984. (SX-76 at 7, Ans. to Int. No. 14, Ex. 1).

224. RDCO imported 11,610 candlenut leis in FY 1984. (SX-76 at 7, Ans. to Int. No. 14, Ex. 1).

225. Between October 1981 and March 1984 RDCO imported 81,860 loose candlenuts and 37,969 candlenut leis. (SX-76, Exh. I).

226. RDCO's wholesale prices for 1982 and 1983 were as follows:

15 Nut Strands	$2.00
18 nut Strands	3.00
30 Nut Strands	3.75
Bolo Ties	1.00
Key Chains	.45
Pendants	.45

(SX-76 at 2, Ans to Int. No. 5(e)).

227.

*Gross sales estimated by multiplying the number of leis purchased by the wholesale price of leis stated in Int. No. 5(e).
(SX-76, Exh. 1; Ans. to Int. No. 5(d)).

228. Baird supplied the following information regarding its purchases of candlenuts or candlenut jewelry from Design Creations. (SX-23 at 3, Ans. to Int. No. 10, Ex. A).

YEAR	LOOSE	LEIS	BRACELETS
1983		3,404	

Pong Lai Coral Development Co., Ltd.

229. Pong Lai began importing and wholesaling candlenuts or candlenut jewelry in approximately 1982. (SX-81 at 2, Ans. to Int. No. 4).

230. Farlace exported the candlenuts or candlenut jewelry Pong Lai imported into the U.S. (SX-81 at 5, Ans. to Int. No. 12(b)).

231. Pong Lai states that its records regarding the quantity and dollar value of candlenuts imported into the U.S. for 1982-84 are either in storage or with the customs broker. (SX-81 at 3, Ans to Int. No. 8(d)).

232. Pong Lai imported zero candlenuts or candlenut jewelry in 1985. (SX-81 at 3, Ans. to Int. No. 8(d)).

233. Pong Lai states that its records regarding the quantity and dollar value of candlenuts imported into the U.S. for 1982-84 are either in storage or with the customs broker. (SX-81 at 3, Ans. to Int. No. 8(d)).

234. Pong Lai distributed candlenuts or candlenut jewelry primarily to wholesalers in Hawaii. (SX-81 at 6, Ans. to Int. Nos. 15(a) & (b)).

Ali Baba Import & Export

235. Ali Baba began importing candlenuts or candlenut jewelry in approximately 1982. (SX-83 at 2, Ans. to Int. No. 4).

236. Machteck Engineering Corp., Taipei, Taiwan, exported the candlenut or candlenut jewelry Ali Baba imported into the U.S. (SX-83 at 5, Ans. to Int. No. 12 (b)).

237. Ali Baba imported candlenut leis in 1985. (SX-83 at 3, Ans. to Int. No. 8(d)).

238. Ali Baba does not provide information regarding the quantity of candlenuts or candlenut jewelry it imported from 1982 to 1984. (SX-83).

239. Ali Baba wholesale price was " each necklace." (SX-83 at 2, Ans. to Int. No. 5(e)).

240. Ali Baba had an inventory of units of candlenut jewelry in January 1986. (SX-83 at 3, Ans. to Int. No. 5(f)).

Shine Land, Inc.

241. Baird states that Shine Land exported some of the candlenuts or candlenut jewelry Baird imported into the U.S. (SX-17, SX-24 at 6 & 7, Ans. to Int. No. 12(b)).

242. Baird supplied the following information regarding its purchases of candlenuts or candlenut jewelry from Shine Land. (SX-23 at 3, Ans. to Int. No. 10, Ex. A).

YEAR	LOOSE	LEIS	BRACELETS
1981		5,200	
1982	25,000	13,800	
1983	2,700	4,200	
1984	35,000	15,900	

Joey Pong & Co.

243. Baird supplied the following information regarding its purchases of candlenuts or candlenut jewelry from Joey Pong. (SX-23 at 3, Ans. to Int. No. 10, Ex. A).

YEAR	LOOSE	LEIS	BRACELETS
1977		2,000	

Royal Design Creations

244. RDCO states that "all candlenut purchases made by RDCO, Inc. have been from Royal Design Creations", Taipei, Taiwan. (SX-6 at 7, Ans. to Int No. 14).

245. RDCO states that it purchased the following quantities of candlenuts or candlenut jewelry. (SX-76 at 7, Ans. to Int. No. 14, Exh. 1 at 1).

FISCAL-YEAR	LOOSE	LEIS	BRACELETS
1982	9,860	11,111	
1983	64,800	15,248	
1984	7,200	11,610	

Huang Hou Crafts

246. Taiwan Kyoei states that Huang Hou "supplied" the candlenuts or candlenut jewelry Taiwan Kyoei exported to the United States. (SX-17, SX-75 at 1-3, Ans. to Int. Nos. 2(a) & 3(a)).

247. Liven states that Huang Hou manufactured the candlenuts or candlenut jewelry it imported into the United States. (SX-17, SX-80 at 3, Ans. to Int. No. 12(d).

Oriental Arts and Crafts

248. states that Oriental Arts exported some of the candlenuts manufactured in the U.S. (SX-78 at 10, Ans. to Int. No. 10(a)).

249. On 10/26/82 Oriental Arts sold to 5000 loose candlenut 'beads'. (SX-78 at 13, Exh. C).

250. On 12/05/83 Oriental Arts sold to 5000 loose candlenut 'beads'. (SX-78 at 15, Exh. C).

Farlace International Corporation

251. states that Farlace exported some of the candlenut jewelry they sold in the U.S. (SX-78 at 10, Ans. to Int. No. 10(a)).

252. On 12/30/83 Farlace sold to 695 Kukui Nut Leis. (SX-78 at 10, Exh. C).

253. On 01/12/84 Farlace sold to 1660 Kukui Nut Leis. (SX-78 at 10, Exh. C)

254. Pong Lai states that Farlace exported some of the candlenuts or candlenut jewelry Pong Lai sold in the U.S. (SX-81 at 5, Ans. to Int. No. 12(b)).

Betty's Import and Associates

255. states that Betty Wong d/b/a as Betty's Import and Export imported some of the candlenuts or candlenut jewelry it sold in the U.S. (SX-78 at 10, Ans. to Int. No. 10(b)).

256. states that Betty's Import and Associates, Inc. imported some of the candlenuts or candlenut jewelry sold in the U.S. (SX-78 at 10, Ans. to Int. No. 10(b)).

Paul's Imports

257. states that Paul's imported some of the candlenuts or candlenut jewelry it sold in the U.S. (SX-78 at 10, Ans. to Int. No. 10(b)).

RKG Enterprises

258. No information is supplied in regard to RKG Enterprises, Ovezon, Philippines.

VII. Domestic Industry

259. Ringer states that KNH is the only commercial producer of kukui nut jewelry in Hawaii. (Ringer, SPX-11 at 71).

260. On September 10th, 1984, Island Investigators reported that "There is a company called FANTASIA PACIFIC INC. located in Hilo, Hawaii, which also manufactures Kukui Nut leis". However, Fantasia Pacific has gone out of business. (SX-57 at 2; CX-5).

261. Ringer states that a man named Yuen made kukui nut jewelry and sold it to the tourist trade, but that he is no longer in business. (Ringer, SPX-11 at 28, 29).

262. The Little Hawaiian Craft Shop makes kukui nut jewelry and sells the same in small quantities. They use both Hawaiian grown and imported kukui nuts. (CX-1).

263. Kukui Nuts of Hawaii, which was incorporated in 1972, has engaged in the manufacture and production of kukui nut jewelry since 1970. (Ringer, SPX-11 at 6 & 7).

264. KNH leases 10,000 square feet, "under roof", plus a 5,000 square foot parking lot. Approximately 6,500 square feet are used for production purposes, 1,500 sq. feet for office and retail sales. and the remaining 2000 sq. feet for storage purposes. KNH moved to this facility, located in Waialua, Oahu, Hawaii in 1979. (Ringer, SPX-11 at 21-24, 27).

265. The term of the lease is for twenty years from the date of execution in 1978 and is has an estimated value of approximately $200,000. (SX-6 at 14).

267. Monthly rent on the lease is $750.00 and will increase to $1,000.00 per month in 1988. (SX-6 at 14).

268. Between approximately 1970 and 1979 KNH operated out of the "Bank Building" in Waialua, Hawaii. (Ringer, SPX-11 at 26).

269. Ringer and his wife, Emma Ringer, own 50% each of the 28,000 outstanding shares of stock in KNH. (Ringer, SPX-11 at 16, 20).

270. Ringer is the president and his wife the Secretary-treasurer of KNH. (Ringer, SPX-11 at 20, 21).

271. Ringer, Emma Ringer, and Wilfred Yuasa, KNH's accountant, are the directors of KNH. (Ringer, SPX-11 at 20, 21).

272. KNH employs 14 people. (Ringer, SPX-11 at 12).

273. Included in the fourteen is Ringer, whose primary role is overseeing production, purchasing, sales and delivery and his wife who is involved primarily in retail sales. (Ringer, SPX-11 at 11, 15).

274. One and one half persons hold office and clerical positions. (Ringer, SPX-11 at 16).

275. One person works part time in sales. (Ringer, SPX-11 at 16).

276. One person works part time in oil production and part time in jewelry production. (Ringer, SPX-11 at 95).

277. One person works exclusively in oil production. (Ringer, SPX-11 at 95).

278. KNH provides the following information regarding its jewelry production work force:

JEWELRY PRODUCTION WORKFORCE

1979	1980	1981	1982	1983	1984	1985
21	30	30	18	13	12	8
JEWELRY SALES PERSONELL						
5	6	6	3	1	1 pt.tm	1 pt. tm

(SX-15 at Exh. AA).

279. KNH purchases kukui nuts from independent pickers who gather the nuts from trees that grow wild on private and state lands. (Ringer, SPX-11 at 46-51).

280. Prices paid by KNH for raw kukui nuts range from 18 to 20 cents per pound, and there are approximately 45 kukui nuts per pound. The average price paid by KNH for kukui nuts during 1984-1985 was .4 cent per nut. (Ringer, SPX-11 at 18, 132, 159; SX-10).

281. KNH purchased 6,927,920 kukui nuts from 1/84 through 11/85. (SX-10).

282. KNH has the capacity to produce 500,000 finished nuts per month at full capacity. (Ringer, SPX-11 at 77, 78).

283. On 08/04/79 KNH purchased between 10,000 and 20,000 unstrung, unknown and unidentified nuts from Indonesia at a U.S. Customs auction. (Probably tung nuts.) (SX-27 at 6, Ans. to Int. No. 11(a) & (c)).

284. The imported tung nuts that KNH had purchased from U.S. Customs in 1979 were finished nuts. KNH sold the the jewelry made from these nuts as imported. (Ringer, SPX-11 at 21, 59-60).

285. KNH has two lines of kukui nut jewelry, the "Regular" line and the "Faceted" line, and sells several different styles and colors of kukui nut jewelry. (Ringer, SPX-11 at 31, SX-1, SX-2).

286. KNH's list price for unfaceted 30-lei kukui nut jewelry is $9.00 for the black nut lei, and $15.00 for the multi-colored or brown nut lei. (Ringer, SPX-11 at 48; SX-14).

VIII. Efficient and Economic Operation

287. KNH's production process for kukui nut jewelry follows the following steps:

a) the raw kukui nuts are sorted out for defects, and dried. (Ringer, SPX-11 at 62-63; Exh. 3, picture 1).

b) the kukui nuts are tumbled for 36 hours to rough down the nuts. (Ringer, SPX-11 at 63, 65; Ex. 3, picture 2).
c) the kukui nuts are drilled and the meat from the inside is ground up and removed. (Ringer, SPX-11 at 64; Ex. 3, pictures 3, 4).
d) the kukui nuts are dried and sorted by color. (Ringer, SPX-11 at 64-65; Ex. 3, picture 4A).
e) the kukui nuts are trimmed, which takes off the imperfections that were not removed in the tumbling process. This step is done by hand for each nut on a sanding wheel, and the process for each nut nut is quite rapid. (Ringer, SPX-11 at 66; Ex. 3, picture 5).
f) the kukui nuts are tumbled again with a special compound that removes the sandpaper marks left by the trimming operation. This operation takes about 4 or 5 hours. (Ringer, SPX-11 at 67; Ex. 3, picture 6).
g) the kukui nuts are polished in a special tumbler. This operation takes 24 hours. (Ringer, SPX-11 at 67-68; Ex 3, picture 7).
h) the kukui nuts are sorted as to size and quality and strung into jewelry. A 30-nut lei would take approximately 10 to 15 minutes to string. (Ringer, SPX-11 at 68-69, Ex. 3, picture 8).
i) the nuts are touched up, which involves buffing and polishing. (Ringer, SPX-11 at 69-71; Ex. 3, picture 9).
j) the faceted jewelry involves an extra step of diamond cutting the kukui nuts. (Ringer, SPX-11 at 69-70; Ex. 3, picture 10).

288. In FY 1985, materials accounted for about 39 percent of KNH's cost of goods sold, and direct labor accounted for 47 percent. If salaries and wages are included in the cost, labor's share would increase to about 55 percent. (SX-7).

289. KNH has about 12 items of kukui nut jewelry returned a month for defects. (Ringer, SPX-11 at 73, ls. 20-25).

290. KNH has spent between $15,000 and $90,000 per year to advertize and promote its Kukui Nut products. (SX-6, SX-7, SX-53, Ringer, SPX-11 at 103).

290(a). KNH Advertising & Promotional Expenditures 1978-1985

1978	$ 15,928.47	(SX-6, Ex. I, p. 1)
1979	$ 19,136.42	(SX-6, Ex. II, p. 3)
1980	$ 74,098.78	(SX-6, Ex. III, p. 3)
1981	$ 91,935.81	(SX-6, Ex. IV, p. 3)
1982	$ 67,847.97	(SX-6, Ex. V, p. 3)
1983	$ 59,832.15	(SX-6, Ex. VI, p. 3)
1984	$ 39,570.41	(SX-53, p. 1)
1985	$ 24,583.96	(SX-7, p. 1)

291. KNH's advertising and promotional expenditures since at least 1983 refer to both jewelry and oil "and all the products [sold by KNH] up to that point". Jewelry and oil are advertised jointly because they are compatible items, both made from the kukui nut. (Ringer, SPX-11 at 103, 155).

292. KNH has 100% quality control. During the twenty two step manufacturing process the must are sorted by hand for color and size. They are inspected for quality at the end of the manufacturing process. (SX-15 at 2; Ringer, SPX-11 at 65-73).

293. Most of KNH's employees have been employed by KNH for five to ten years. (Ringer, SPX-11 at 74, ls. 14-22).

294. Some of KNH's employees formerly were employed in the sugar or pineapple fields and have been retrained by KNH to work on kukui nut jewelry. (Ringer, SPX-11 at 7-80; SX-15 at 6).

295. KNH pays new employees above the minimum wage even when they are being trained. (Ringer, SPX-11 at 81, ls. 2-14).

296. Until approximately one year ago, KNH offered its employees medical insurance, paid vacation and holidays, and a bonus system. However, these benefits have been temporarily suspended due to KNH's financial condition. (Ringer, SPX-11 at 81-82).

297. In fiscal years 1983 through 1985, KNH spent between $25,000 and $60,000 per year to advertise and promote its kukui nut jewelry. (SX-7, SX-53, SX-6, at Ex. VI).

298. KNH places its own special display racks in some of its customers stores. (Ringer, SPX-11 at 147).

299. KNH offers free factory tours to the public. An average of 60 people visit the factory daily. (Ringer, SPX-11 at 185-86, SX-20).

IX. Injury

300. KNH's profitability for kukui nut jewelry from Fiscal Year 1982 (June 1, 1981 to May 31, 1982) to Fiscal year 1985 was as follows:

	FY1981	FY 1982	FY 1983	FY 1984	FY 1985
Sales-------	$569,353	$376,572	$265,033	$207,483	$203,628
Gross Profit-	299,947	267,944	184,621	148,841	194,842
Net Profit (Loss)	(26,041)	(66,854)	(91,876)	(25,775)	(22,702)

(SX-15).

301. KNH had its most profitable year for kukui nut jewelry during Fiscal Year 1981. (SX-6 at 10; SX-15).

302. KNH attributed its decline in profitability beginning in late 1980 to competition from tung nut jewelry imported from Taiwan and to recessionary pressures. (SX-6 at 10-12). KNH filed for bankruptcy under Chapter 11 of the Bankruptcy code on May 9, 1984. (SX-6 at 2). Mr. Ringer testified that after Sept. 1984, it became his understanding that the imported nuts were of the species aleurites moluccana or candlenut and not aleurities trisperma or thing nut as he believed when he filed for bankruptcy. (Ringer, SPX-11 at 88-89).

303. KNH's profitability for kukui nut oil from Fiscal Year 1982 (June 1, 1981 to May 31, 1982) to Fiscal year 1985 was as follows:

	FY1982	FY 1983	FY 1984	FY 1985
Sales--------	$ 73,587	$ 70,477	$ 62,984	$169,726
Gross Profit-	47,942	45,888	40,914	92,423
Net Profit---	8,825	11,429	19,149	48,462

(SX-15).

304. KNH's sales of kukui nut jewelry for the last seven months of 1985 (June-December) was $101,802. (SX-54).

305. The number of kukui nuts that KNH finished between FY 1982 and FY 1985 was as follows:

FY 1981--------2.1 million
FY 1982------- 1.5 million
FY 1983------- 0.7 million
FY 1984------- 0.6 million
FY 1985------- 0.55 million

(SX-15).

306. KNH's gross sale of kukui nut jewelry was $646,782 in FY 1980.

KNH's gross sale of kukui nut jewelry was $569,353 in FY 1981.
KNH's gross sale of kukui nut jewelry was $376,572 in FY 1982.
KNH's gross sale of kukui nut jewelry was $265,033 in FY 1983.
KNH's gross sale of kukui nut jewelry was $207,483 in FY 1984.
KNH's gross sale of kukui nut jewelry was $203,628 in FY 1985.
KNH's gross sale of kukui nut jewelry was $113,511 from 6/85 to 1/86.

(SX-15 at Exh. AA; SX-54).

307. Blair sold the candlenuts or candlenut jewelry imported into the U.S. (SX-81 at 5, Ans. to Int. No. 12(d)).

308. ABC Stores, THY Associates, F.W. Woolworth, Paul's Imports and others in insignificant amounts purchased the candlenuts or candlenut jewelry RDCO sold in the U.S. (SX-76 at 6, Ans. to Int. No. 13(e)).

309. Blair and small shops in the International Market Place and Duke's Lane sold the candlenuts or candlenut jewelry imported into the U.S. (SX-83 at 5, Ans. to Int. No. 12(d)).

310. Baird has has admitted selling candlenut jewelry to the following retail outlets in Hawaii;

(Holland, SPX-12 at 115-117).

311. While Baird admits to "selling" to Sears and Penny's, (Holland, SPX-12 at 30),

(Holland, SPX-12 at 114).

312. Pomare, Ltd.,Honolulu and Long Drug Stores,Honolulu, sold to consumers the candlenuts or candlenut jewelry Blair imported or strung. (SX-78 at 11, Ans. to Int. No. 10(b)).

313. Blair's sales of candlenut jewelry were also made in its own showroom in Honolulu, Hawaii, and at trade shows in Dallas, Texas, New York, New York, and Los Angeles, California. (SX-78 at 11, Ans. to Int. No. 10).

314. Liven's candlenut jewelry are sold through commission sales and orders to small independent retailers. All sales are made in Honolulu, Hawaii. (SX-17, SX-80 at 2, Ans. to Int. No. 15).

315. Below is a chart of common customers of KNH and some of the respondents.

KNH'S LARGEST CUSTOMERS*	SALES BY RESPONDENTS**

* SX-51
** SX-58-60; FF 307-314

316. Island Investigators reported that it purchased imported kukui nut jewelry from the following stores in Hawaii: (SX-57, SX-58, SX-59).

Pomare Ltd	ABC Stores	Ritz Dept. Stores
Arwakawa's	Island Camera & Pago's	Kalos Polynesian
Gift ShopThe Toy Shop	Handicraft	Moon Lite Shop
Star Hawaii	Woolworth's	Hawaiian Panorama
First Class Fine	Parkoh Theresa's	Collectibles
Sue's Jewelry	Gemma Gift Shop	Helen's Gift Shop & Gift Shop
Aloha III	Yoon's Gifts	H.S. Jewelry
J&J Gift Shop	Moonlight Shop	Bee's Gift Shop
Waikiki Gifts	Several Vending Carts	

317. On at least one occasion, an imported nut lei was returned to KNH by a customer who mistakenly believed that KNH manufactUred the lei. (Ringer, SPX-11 at 189, 190).

318. Total sales of KNH's kukui nut jewelry, sales or purchases of imported candlenut jewelry, strung offshore, and import penetration ratios, are shown below:

	KNH sales*	Import Sales	Total Sales	Import Penetration
1981------	$569,353	$21,542	$590,895	3.6
1982------	376,572	62,158	438,730	14.2
1983------	265,033	105,203	370,236	28.4
1984------	207,483	145,719	353,202	41.3
1985------	203,628	92,414	296,042	31.2

* KNH's sales data are for fiscal years (June 1 to May 31), and import sales data are for calendar years, so the data are not exactly comparable. Nonetheless, the information above provides an indication of the importance of import sales relative to KNH sales in the market. (See FF 168, 189, 205, 277).

319. The 30-nut lei accounted for about 90 percent of the wholesale value of imported candlenut leis, already strung, sold by Baird, Blair, Liven and RDCO during the 1981-1985 period. (See SX-24, Ans. to Int. Nos. 5(e) & 8(e); SX-76, Ans. to Int. Nos. 5(e) & 8(d); SX-80, Ans. to Int. Nos. 5(e) & 8(d); SX-78, Ans. to Int. Nos. 5(e) & 8(e)).

320. Wholesale sales prices during 1984-85 for KNH and for the major suppliers of imported candlenut jewelry are as follows for 30-nut candlenut leis:

	1984	1985
KNH*-------	$9.00	$9.00
Baird------	3.75	4.25
RDCO-------	3.75	-
Liven------	3.50	3.50 to 4.00
Blair------		-

---

* Price for the black, unfaceted lei, which is KNH's lowest priced 30-nut lei. (SX-14; SX-24, Ans. to Int. No. 5(e); SX-76, Ans. to Int. No. 5(e); SX-80, Ans. to Int. No. 5(e); SX-78, Ans. to Int. No. 5(e)).

321. KNH has not raised prices for most of its kukui nut jewelry for 17 years. (Ringer, SPX-11 at 105-06).

322. Baird, Blair, Liven, and RDCO also imported loose candlenuts, already finished, which were strung into jewelry in Hawaii. The number and value of such nuts imported by these companies was as follows:

	1982		1983		1984		1985	
	Number	Value	Number	Value	Number	Value	Number	Value
Baird----	25,000	$1,648	2,700	$ 178	35,000	$3,211	*	*
Blair----					*	*	*	*
Liven----	*	*	*	*	100	9	*	*
RDCO-----	*	*	72,000	3,600	*	*	*	*
Total--	40,000	$2,733	79,700	$4,263	35,000	$3,211	*	*

---

* No importation of loose candlenuts.

(SX-24, Ans. to Int. No. 8(d); SX-78, Ans. to Int. No. 8(d); SX-80, Ans. to Int. No. 8(d); SX-76, Exh. 1, Ans. to Int. No. 14(c); See SX-75).

323. The estimated value of KNH's equipment, machinery and display racks for both jewelry and oil operations was about $182,000 as of May 31, 1985. (SX-7, Financial Statement for period ending May 31, 1985).

324. Ringer testified that several of his customers stopped selling any nut jewelry because consumers were confused by the different prices of the imports and domestic jewelry. (Ringer, SPX-11 at 143-144; 149-152).

325. Baird's purchase price for loose imported polished loose nuts was as follows (cents per nut):

1982	1983	1984
6.6 cents	6.6 cents	9.2 cents

(SX-24 at 4-5, Ans. to Int. No. 8(d))

326. Baird's purchase price for completed imported leis was as follows (dollars per lei):

	1982	1983	1984	1985
24 nut lei------	-	-	$2.00	$1.88
30 nut lei------	$1.98	$2.59	$2.43	$2.66
36 nut lei------	$2.15	-	$3.10	$2.84

327. Baird's sales price in 1984 for a candlenut bracelet was $1.25. (SX-24 at 5-6, Ans. to Int. No. 8(e)).

328. Baird's markup over cost for sales of imported completed candlenut jewelry was over 50 percent for the 30 nut candlenut lei. (SX-24 at 4-6, Ans. to Int. Nos. 8(d) & 8(e)).

329. Blair's purchase price for imported polished loose candlenuts was as follows (cents per nut):

1982	1983
7.2 cents	9.7 cents

(SX-78 at 8, Ans. to Int. No. 8(d)).

330. Blair's cost of completed candlenut jewelry it has purchased from importers is as follows (dollars per piece of jewelry):

	1982	1983	1984
7-nut bracelets----	-		
16 nut lei---------	-		
30 nut lei---------			

(SX-78 at 6-7, Ans. to Int. No. 8(d)).

331. RDCO's purchase price for loose finished imported candlenuts was as follows (cents per nut):

1982	1983
6 cents	5 cents

(SX-76 Ans. to Int. No. 14(c)).

332. R.D.C.O.'s purchase price for completed imported candlenut leis was as follows (dollars per lei):

	1982	1983
15 nut lei----------	$0.80	$0.75
18 nut lei----------	0.90	0.90
24 nut lei----------	1.20	1.25
30 nut lei----------	1.50	1.60

(SX-76 at 15, Ans to Int. No. 14(c)).

333. A comparison of the cost of importing loose polished candlenuts relative to the cost of imported completed candlenut jewelry indicates that the loose polished nuts account for a major portion of the jewelry cost. For example, Blair's cost for 7 loose imported polished candlenuts accounted for between and percent of the cost of a completed -nut bracelet, depending on whether a loose nut cost of cents (1982) or cents (1983) is used. (FF 5-6). Baird paid 6.6 cents per loose nut in 1984, and paid $2.59 for a completed 30 nut lei, its largest volume item. (FF 1, 2). The loose nuts, therefore, would have accounted for approximately 76 percent of the cost of

the completed lei. Based on Baird's sales price of $1.25 for a candlenut bracelet, the cost of the imported loose nuts was about 51 percent of the bracelet's sales value (based on seven nuts per bracelet). (FF 1, 3). However, this percentage includes Baird's markup over cost in the value of the bracelet--for imports of completed 30-nut leis, Baird's markup over import cost was over 50 percent. (FF 4). For R.D.C.O., the imported polished loose nuts would have accounted for over 90 percent of the cost of the completed imported leis. (FF 7-8).

334. KNH"S Sales to 10 of its largest Customers:

(SX-51).

X. Sanctions

335. The following sanctions were issued in Order No. 66 against Royal Design Creations (Royal Design), Oriental Arts and Crafts (Oriental Arts), Farlace Int's Corp. (Farlace) and Shine Land, Inc. (Shine Land) because of their failure to comply with an order compelling discovery:

> (1) Inferences that each of Royal Design, Oriental Arts, Farlace and Shine Land manufacture kukui nut jewelry and/or polished kukui nuts in substantial quantities and exported a substantial amount to the United States.
>
> (2) Inferences that each of Royal Design, Oriental Arts, Farlace and Shine Land purchased the kukui nuts for the imported kukui nut jewelry from outside of Hawaii.
>
> (3) Inferences that Royal Design knowingly sold polished kukui nuts to RDCO for use in jewelry sold in Hawaii with RDCO lables #2 and #3; Oriental Arts knowingly sold polished kukui nuts to for use in jewelry sold in Hawaii with label #3; Farlace knowingly sold polished kukui nuts to for use in jewelry sold in Hawaii with lable #3; Shine Land knowingly sold kukui nut jewelry to Baird for sale in Hawaii with Baird labels #2, #3, #4 and #5.
>
> (4) Inferences that each of Royal Design, Oriental Arts, Farlace and Shine Land have the capacity and intent to further penetrate the U.S. kukui nut jewelry market.
>
> (5) Inferences that each of the nut jewelry products of Royal Design, Oriental Arts, Farlace and Shine Land are directly competitive with complainant's kukui nut jewelry.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the allegations involved in this investigation.

2. The Commission lacks in personam jurisdiction over respondents RKG and Huang Hou (See supra p. 10).

3. Each of respondents' Huang Hou, Royal Design, Oriental Arts, Farlace, Shine Land, Ali Baba, RDCO, Baird, Blair, Taiwan Kyoei, Pong Lai and Liven has engaged unfair acts under section 337 in view of section 304(a) of the Tariff Act, coupled with section 5 of the Federal Trade Commission Act and section 43(a) of the Lanham Act section 5 of the Federal Trade Commission Act.

4. There is a domestic industry in the manufacture of kukui nut jewelry from Hawaiian grown kukui nuts which is efficiently and economically operated.

5. Importation of kukui nuts jewelry and parts thereof and sale of said jewelry and jewelry from said parts with certain labels have substantially injured the domestic industry.

6. Importation of kukui nut jewelry and parts thereof and sale of said jewelry and jewelry from said parts with certain labels have the tendency to substantially injure the domestic industry.

7. Each of respondents' Huang Hou, Royal Design, Oriental Arts, Farlace, Shine Land, Ali Baba, RDCO, Baird, Blair, Taiwan Kyoei, Pong Lai and Liven is in violation of section 337.

8. Respondents Joey Pong, Betty's Import, Paul's Imports and RKG are not in 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, as well as proposed findings of fact and conclusions of law, it is the administrative law judge's determination that there is a violation of section 337 in the unauthorized importation and sale in the United States of certain kukui nut jewelry and parts thereof.

The administrative law judge hereby CERTIFIES to the Commission the initial determination, together with the record of the hearing in this investigation consisting of the following:

1. The transcipt of the hearing, with appropriate corrections as may hereafter be ordered by the administrative law judge;
2. The exhibits admitted into evidence; and
3. The administrative law judge's exhibits 1, 2 and 3.

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

Further it is ORDERED that:

1. In accordance with Rule 210.44(b), all material heretofore marked in camera because of business, financial, and marketing data found by the Administrative Law Judge to be cognizable as confidential business information under Rule 201.6(a), is to be given in camera treatment from the date this investigation is terminated; and further

2. Counsel for the parties shall have in the hands of the administrative law judge those portions of this initial determination which contain confidential business information to be deleted from the public version initial determination no later than Friday August 8, 1986. If no comments are received from a party it will mean that the party has no objection in removing the confidential status, in its entirety, from this initial determination.

3. Motion Nos. 229-15 and 229-18, on reconsideration are denied.

4. This initial determination shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within forty-five (45) days after the date of filing of the Initial Determination shall have ordered review of the Initial Determination or certain issues therein pursuant to 19 C.F.R. 210(b) or 210.55 or by order shall have changed the effective date of the initial determination.

Paul J. Luckern
Administrative Law Judge

Issued: July 30, 1986

APPENDICES

ADMINISTRATIVE LAW JUDGE'S EXHIBITS

ALJ-1 May 28, 1986 letter from Michael Holland to ALJ, Paul J. Luckern

ALJ-2 June 4, 1986 letter form Michael Holland to ALJ, Paul J. Luckern

COMPLAINANT KNH'S EXHIBITS

CX-1 Witness statement of Bunzie Ringer

CX-2 Witness statement of Ronald J. Ramie

CX-3 Affidavit of Sallie Jacobsen

CX-4 Affidavit of Tom Swingle

CX-5 Affidavit of Renalle Fernandez

CX-6 Page 2316 of Webster's Third New Int'l. Dictionary Unabridged (1967)

CX-7 Page 948 of Webster's Third New Int'l. Dictionary Unabridged (1967)

CX-8 Affidavit of Bunzie Ringer

CX-9 Affidavit of Ron Ramie

CX-10 Article on Kukui Tree from Aloha Aina., April 1970

CX-11 News photo from Star Bulletin

RESPONDENT BLAIR'S EXHIBITS

RBX-1 Deposition of Beatrice H. Krauss

RBX-2 Partial Transcript of Proceedings in Circuit Court, 1st Cir. Hawaii

RBX-3 Page From Honolulu White Pages

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Before Paul J. Luckern
Administrative Law Judge

In the Matter of CERTAIN NUT JEWELRY AND PARTS THEREOF	)))))	Investigation No. 337-TA-229

COMMISSION INVESTIGATIVE ATTORNEY'S
EXHIBIT LIST DATED JUNE 6, 1986

Documentary Exhibits

Staff Exhibit	Description	Sponsoring Witness
SX-1	Brochure of Kukui Nuts of Hawaii, Inc. ("KNH")	Ringer Dep. at 23
SX-2	KNH price lists for retail-regular line and wholesale-faceted line	Ringer Dep. at 28
SX-3	Photos of KNH manufacturing facilities	Ringer Dep. at 62
SX-4	Photo of KNH manufacturing facilities	Ringer Dep. at 70
SX-5	Photo of KNH manufacturing facilities	Ringer Dep. at 70
SX-6	KNH's Voluntary Petition Under Chapter Eleven	Ringer Dep. at 82
SX-7	KNH's Financial Statements For Fiscal Year-June 1, 1984 to May 31, 1985	Ringer Dep. at 92
SX-8	Record of Certified or Registered Mail for Foreign Respondent's From U.S.I.T.C. Secretary's Office	
SX-9	KNH's Contract for sale of Kukui Nuts to Military PX	Ringer Dep. at 12
SX-10	KNH's purchases of kukui nuts for period -- Jan. 1984 thru Nov. 1985	Ringer Dep. at 12
SX-11(C)	KNH's monthly average sales of kukui nut jewelry.	Ringer Dep. at 13

*/ Exhibits designated with (C) are confidential.

Staff Exhibit	Description	Sponsoring Witness
SX-12(C)	KNH's sales to its largest customers	Ringer Dep. at 136
SX-13(C)	KNH's sales to its largest customers	Ringer Dep. at 138
SX-14	KNH's price list for wholesale-regular line	Ringer Dep. at 168
SX-15	Supplement to Complaint	
SX-16	Excerpts of articles describing the Hawaiian kukui nuts and Philippine lumbang nut.	Ringer Dep. at 171
SX-17	First Set of Interrogatories of the Commission Investigative Attorney Propounded to Respondents	
SX-18	Excerpts from Here in Hawaii magazine dated Dec. 7-13, 1985	Ringer Dep. at 177
SX-19	Photo of President Reagan wearing a KNH kukui nut lei	Ringer Dep. at 181
SX-20	Excerpts from Here in Hawaii magazine dated Mar. 1-7, 1986	Ringer Dep. at 181
SX-21	Excerpt from Key to the Islands magazine, dated March, 1986	Ringer Dep. at 182
SX-22	KNH Advertisements	Ringer Dep. at 183
SX-23	Answers to Plaintiff's First Request for Answers to Interrogatories of Defendent R. Baird & Co., Inc. filed with the Circuit Court of the First Circuit, State of Hawaii	Holland Dep. at 51
SX-24	Baird's Answers to Commission Investigative Attorney's First Set of Interrogatories Propounded to Respondents	Holland Dep. at 56
SX-25	Commission Investigative Attorney's Second Set of Interrogatories to Respondents	
SX-26	Complainant Kukui Nuts of Hawaii's First Set of Interrogatories to Respondents	

Staff Exhibit	Description	Sponsoring Witness
SX-27	Answers to First Set of Interrogatories of the Commission Investigative Attorney Propounded to Complainant Kukui Nuts of Hawaii, Inc.	
SX-28	Baird's Answers to the Commission Investigative Attorney's Second Set of Interrogatories Propounded To Respondents	Holland Dep. at 56
SX-29(C)	Telexes between respondents Shine Land and Baird	Holland Dep. at 68
SX-30	Baird's Multicolored Label	Holland Dep. at 70
SX-31(C)	Baird's nut jewelry inventory for 1982 thru 1984	Holland Dep. at 93
SX-32(C)	Baird purchase order to Shine Land	Holland Dep. at 102
SX-33(C)	Baird purchase order to Shine Land	Holland Dep. at 101
SX-34(C)	Baird's nut jewelry inventory for 1984	Holland Dep. at 101
SX-35(C)	Examples Baird's Cardex inventory control cards	Holland Dep. at 102
SX-36	Affidavit of Michael Holland filed in the Circuit Court of the First Circuit, State of Hawaii	Holland Dep. at 110
SX-37(C)	Minutes from Baird's October 11, 1985 sales meeting	Holland Dep. at 119
SX-38(C)	Minutes from Baird's August 9, 1985 sales meeting	Holland Dep. at 121
SX-39(C)	Minutes from Baird's July 19, 1985 sales meeting	Holland Dep. at 126
SX-40(C)	Minutes from Baird's June 28, 1985 sales meeting	Holland Dep. at 128
SX-41(C)	Minutes from Baird's January 25, 1985 sales meeting	Holland Dep. at 129
SX-42(C)	Minutes from Baird's January 4, 1985 sales meeting	Holland Dep. at 131

Staff Exhibit	Description	Sponsoring Witness
SX-43(C)	Minutes from Baird's September 14, 1985 sales meeting	Holland Dep. at 132
SX-44	Letter sent to Baird customers	Holland Dep. at 134
SX-45	Baird's Answers to Kukui Nuts of Hawaii's First Set of Interrogatories	Holland Dep. at 140
SX-46	Sample of Baird invoice	Holland Dep. at 149
SX-47	Michael Holland's business card	Holland Dep. at 149
SX-48	Baird's advertisements	Holland Dep. at 153
SX-49	R. Baird's business card	Holland Dep. at 155
SX-50	KNH labels prepared for Liberty House	Ringer Dep. Vol II at 38
SX-51(C)	KNH's sales to its largest customers through Feb. '86	Ringer Dep. Vol II at 39
SX-52	KNH price list for retail-faceted line	Ringer Dep. Vol II at 41
SX-53	KNH financial statements for fiscal year ending May 31, 1984	Ringer Dep. Vol II at 42
SX-54	KNH monthly jewelry sales for June 1985 thru Jan. 1986	Ringer Dep. Vol II at 42
SX-55	Correspondence between KNH and The White House	Ringer Dep. Vol II at 43
SX-56	Letter from Harvey Thomas, Consultant to Honorable Margaret Thatcher to KNH	Ringer Dep. Vol II at 43
SX-57	Ronald J. Ramie's report, dated Sept. 10, 1984	Ramie Dep. at 13
SX-58	Ronald J. Ramie's report, dated Oct. 9, 1984	Ramie Dep. at 13
SX-59	Ronald J. Ramie's report, dated Dec. 7, 1984	Ramie Dep. at 16

Staff Exhibit	Description	Sponsoring Witness
SX-60	Ronald J. Ramie's report, dated December, 1984	Ramie Dep. at
SX-61	Photo taken at International Market Place	Ramie Dep. at
SX-62	Photo taken at International Market Place	Ramie Dep. at
SX-63	Photo taken at International Market Place	Ramie Dep. at
SX-64	Photo taken at International Market Place	Ramie Dep. at
SX-65	Photo taken at International Market Place	Ramie Dep. at
SX-66	Photo of a sign displaying the name of shop -- "Paradise Gems"	Ramie Dep. at
SX-67	Photo taken at International Market Place	Ramie Dep. at
SX-68	Photo taken at International Market Place	Ramie Dep. at
SX-69	Photo taken at International Market Place	Ramie Dep. at
SX-70	Photo of a sign displaying the name of shop -- "Jane's Gift Shop"	Ramie Dep. at
SX-71	Photo taken at International Market Place	Ramie Dep. at
SX-72	Photo taken at International Market Place	Ramie Dep. at
SX-73	Photo taken at International Market Place	Ramie Dep. at
SX-74	Photo taken at International Market Place	Ramie Dep. at
SX-75	Taiwan Kyoei, Inc.'s Answers to the Commission Investigative Attorney's First Set of Interrogatories	
SX-76	RDCO's Answers to First Set of Interrogatories Propounded by Commission Investigative Attorney	
SX-77	Respondent RDCO, Inc.'s response to the Commission Investigative Attorney's First Request for Production of Documents and Things	
SX-78(C)	Respondent Blair, Ltd.'s Answer's to First Set of Interrogatories of the Commission Investigative Attorney Propounded to Respondents	

Staff Exhibit	Description	Sponsoring Witness
SX-79(C)	Liven & Co. (Hawaii) Ltd. nut jewelry customers	
SX-80	Respondent Liven & Co. (Hawaii), Ltd.'s Answers to First Set of Interrogatories	
SX-81(C)	Respondent Pong Lai Coral Development Co.'s Answers to the First Set of Interrogatories of the Commission Investigative Attorney	
SX-82	Response to Request for Production by Attorneys for Ali Baba Import and Export and Pong Lai Coral Development Co., Ltd.	
SX-83(C)	Respondent Ali Baba Import & Export's Answers to the First Set of Interrogatories of the Commission Investigative Attorney	
SX-84	Response to Request for Production by Attorneys for Ali Baba Import & Export and Pong Lai Coral Development Co., Ltd.	
SX-85	U.S. Department of Commerce study entittled, Study of Problems and Possible Remedies Concerning Imported Native American-Style Jewelry and Handicrafts, dated July 1985	
SX-86	Notice of Redelivery-Marking, Etc. issued to R. Baird and Co. on April 1, 1986	
SX-87	Federal Trade Commission brochure entittled, Facts for Consumers - Buying Native American Jewelry	
SX-88	Memorandum, dated June 2, 1986 from U.S. Customs to the Commission Investigative Attorney and Attachments	

Physical Exhibits

Staff Physical Exhibit	Description	Sponsoring Witness
SPX-1	Hawaii Dept. of Education video tape	Ringer Dep. at 9
SPX-2	KNH kukui nut lei	Ringer Dep. at 2
SPX-3	Nut Lei sold by April Fair, Inc.	Ringer Dep. at 1
SPX-4	Baird 36 nut lei	Holland Dep. at
SPX-5	Baird bracelet	Holland Dep. at
SPX-6	Baird 30 nut lei	Holland Dep. at
SPX-7	Baird 16 nut lei	Holland Dep. at
SPX-8	Baird earrings	Holland Dep. at
SPX-9	Nut lei produced by Ali Baba and Pong Lai	Ramie Dep. at 30
SPX-10	Nut lei purchased by Ron Ramie during March 5, 1986 investigation	Ramie Dep. at 40
SPX-11A	Deposition of Bunzie Ringer Vol I	
SPX-11B(C)	Deposition of Bunzie Ringer Vol I -- confidential	
SPX-11C	Deposition of Bunzie Ringer Vol II	
SPX-12A	Deposition of Michael F. Holland	
SPX-12B(C)	Deposition of Michael F. Holland -- confidential	
SPX-13	Deposition of Ronald J. Ramie	
SPX-14	Nut lei purchased from Blair by Ron Ramie	Ramie Dep. at 2 CX-9
SPX-15	Nut lei purchased from Blair by Ron Ramie	Ramie Dep. at 25-26, CX-9
SPX-16	Nut lei with label used by RDCO	Ramie Dep. at 24-25, CX-9

Dated: June 6, 1986

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Order was served upon Juan Cockburn, Esq., and Steven H. Schwartz, Esq., and upon the following parties via first class mail, and air mail where necessary, on August 21, 1986.

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

FOR COMPLAINANT KUKUI NUTS OF HAWAII, INC.

Gaylord A. Virden
P.O. Box 2603
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