

In the Matter of

WOODWORKING MACHINES

Investigation No. 337-TA-174



USITC PUBLICATION 1979

MAY 1987

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Susan Liebeler, Chairman
Anne E. Brunsdale, Vice Chairman
Alfred E. Eckes
Seeley G. Lodwick
David B. Rohr

Address all communications to
Kenneth R. Mason, Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

NOTE REGARDING PUBLICATION DATE: The Commission reached its final determinations concerning the violation of section 337 of the Tariff Act of 1930 and the issues of remedy, the public interest, and bonding in this investigation on June 16 , 1985. However, as indicated on the front cover of this report, the report was not published until May 1987. Publication was delayed until after the Commission adjudicated a motion to modify the Commission's final action in this investigation and a petition for reconsideration of the Commissioners' final opinions. See 51 Fed. Reg. 28451 (Aug. 7, 1986) and 52 Fed. Reg. 7498 (Mar. 11, 1987).

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of)
)
CERTAIN WOODWORKING MACHINES)
)
_____)

Investigation No. 337-TA-174

NOTICE OF TERMINATION OF INVESTIGATION;
ISSUANCE OF GENERAL EXCLUSION ORDER
AND FIVE CONSENT ORDERS

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the U.S. International Trade Commission has issued five consent orders, has issued a general exclusion order, and has terminated the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: P.N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0350.

SUPPLEMENTARY INFORMATION:

Background. Investigation No. 337-TA-174 was conducted to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation or sale of certain woodworking machines by reason of alleged unfair acts and practices by Taiwan and U.S. companies. (See 48 F.R. 55786, Dec. 15, 1983; 49 F.R. 20767, May 31, 1984.) The complainant was Delta International Machinery Corp. (See 49 F.R. 23463, June 6, 1984.) The respondents and intervenors included 1 South African company, 29 Taiwan companies, and 21 U.S. companies. Most of the respondents settled with Delta or were dismissed for other reasons.

On February 7, 1985, the presiding administrative law judge (ALJ) issued an initial determination (ID) holding the remaining respondents in default and holding certain respondents in violation of section 337.

On April 1, 1985, the Commission determined to review portions of the ID concerning common-law trademark infringement (i.e., external design appearance marks), patent infringement, misappropriation, definition of the domestic industry, injury, and the alleged violation of section 337 by Taiwan respondent Leroy International Corp. The Commission also determined not to review portions of the ID concerning common-law trademark infringement (the term "Contractor's Saw"), registered trademark infringement, false and deceptive advertising, passing off, efficient and economic operation, default, and the dismissal of two respondents. To supplement the ALJ's discussion of those issues, the Commission adopted certain findings of fact proposed by Delta and the Commission investigative attorney. (See 50 F.R. 14172, Apr. 10, 1985.)

Between April 22 and 30, 1985, Delta and the Commission investigative attorney filed briefs on the issues under review and on the issues of remedy the public interest, and bonding. Although the Commission solicited written comments from the public and other Federal agencies concerning remedy, the public interest, and bonding (see 50 F.R. 14172, Apr. 10, 1985), no such comments were received.

On June 17, 1985, upon review of the ID, the record, and the arguments of the parties, the Commission affirmed the ID in part, and held that there is a violation of section 337 of the Tariff Act of 1930 in the importation or sale of certain woodworking machines. The Commission also reversed the ID in part—i.e., with respect to the issue of common-law trademark infringement (design appearance marks). (The Commission determined that there is no violation of section 337 by reason of the infringement of Delta's alleged common-law trademarks in the overall external designs of its 10-inch table saw and 14-inch band saw.) The Commission also determined that there is no violation of section 337 by Taiwan respondent Leroy International Corp.

Commissioners Eckes and Rohr also determined that there is no violation of section 337 in the importation or sale of the accused wood planing machines.

The Commission also determined that the appropriate remedy for the violation of section 337 found to exist in this case is a general exclusion order pursuant to section 337(d) and that public interest considerations do not preclude such relief. The Commission also determined that, during the Presidential review period provided for in section 337(g), the articles directed to be excluded would be permitted to enter the United States under a bond in the amount of 268 percent of the entered value of the articles.

Between March 28 and April 2, 1985, complainant Delta and the following Taiwan respondents moved to terminate the investigation as to those respondents on the basis of consent orders incorporated into settlement agreements signed by Delta and the following respondents: Formosan United Corporation, Good Will Mercantile Co., Show Soon Enterprises Co., Ltd., Fortune Development Corp., King Feng Fu Machinery Works Co., Ltd., and King Tun Fu Machinery Co. The motions were unopposed.

A notice soliciting written comments on the proposed consent orders was published in the Federal Register of May 30, 1985 (50 F.R. 23085), and was served on other Federal agencies. No comments were received.

Upon review of the consent order motions, the Commission determined that the content of each motion, settlement agreement, and proposed consent order complied with the Commission's rules. The Commission also did not find any indication that the parties' settlements were not in the public interest or that the public would be adversely affected by issuance of the proposed consent orders. The Commission accordingly granted the motions and issued the consent orders.

Termination of respondents Formosan United Corporation, Good Will Mercantile Co., Show Soon Enterprises Co., Ltd., Fortune Development Corp., King Feng Fu Machinery Works Co., Ltd., and King Tun Fu Machinery Co. on the basis of consent orders furthers the public interest by conserving the resources of the Commission and the parties.

Having disposed of all pending matters, the Commission terminated the investigation on June 17, 1985.

Public inspection. Copies of the consent order motions, the settlement agreements, the consent orders, the nonconfidential version of the ID, the Commission's Action and Order and Commission Opinion in support thereof, as well as all other nonconfidential documents on the record of the investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, Docket Section, U.S. International Trade Commission, 701 E Street NW., Washington, DC 20436, telephone 202-523-0471.

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: June 18, 1985

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

In the Matter of)
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CERTAIN WOODWORKING MACHINES)
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Investigation No. 337-TA-174

COMMISSION ACTION AND ORDER

Background

The subject investigation was conducted to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation or sale of various woodworking machines and integral components thereof, by reason of alleged patent infringement, registered and common-law trademark infringement, false representation of manufacturing source, passing off, and false and deceptive advertising, the alleged effect or tendency of which unfair acts and practices is to substantially injure an industry, efficiently and economically operated, in the United States. ^{1/}

The original complainant was Rockwell International Corp. Delta International Machinery Corp. was substituted as the complainant after Delta

^{1/} 48 Fed. Reg. 55786 (Dec. 15, 1983). See also 49 Fed. Reg. 20767 (May 16, 1984) and verified revised amended complaint.

acquired Rockwell's Power Tool Division and the subject patent and trademark rights. 2/ The respondents and intervenors included 1 South African company, 29 Taiwanese companies, and 21 U.S. companies. 3/ Most of the respondents settled with Delta or were dismissed for other reasons. 4/

On February 7, 1985, the presiding administrative law judge (ALJ) issued an initial determination (ID) holding the remaining respondents in default and finding certain respondents in violation of section 337.

On April 1, 1985, the Commission determined to review portions of the ID concerning common-law trademark infringement (i.e., external design appearance marks), patent infringement, misappropriation, definition of the domestic industry, injury, and the alleged violation of section 337 by Taiwan respondent Leroy International Corp. 5/

The Commission also determined not to review those portions of the ID concerning common-law trademark infringement (the term "Contractor's Saw"), registered trademark infringement, false and deceptive advertising, passing off, efficient and economic operation, default, and the dismissal of two respondents. To supplement the ALJ's discussion of those issues, the Commission adopted certain findings of fact proposed by Delta and the Commission investigative attorney. 6/

2/ 49 Fed. Reg. 23463 (June 6, 1984).

3/ See n. 1, supra and 50 Fed. Reg. 7969 (Feb. 27, 1985).

4/ Id.; 49 Fed. Reg. 32692 (Aug. 15, 1984); 49 Fed. Reg. 35874 (Sept. 12, 1984); 49 Fed. Reg. 39118 (Oct. 3, 1984); 49 Fed. Reg. 39928 (Oct. 11, 1984); 49 Fed. Reg. 40678 (Oct. 17, 1984); 49 Fed. Reg. 50314 (Dec. 27, 1984); 50 Fed. Reg. 1138 (Jan. 6, 1985); 50 Fed. Reg. 3423 (Jan. 24, 1985); 50 Fed. Reg. 9142 (Mar. 6, 1985); 50 Fed. Reg. 20303 (May 15, 1985).

5/ 50 Fed. Reg. 14172 (Apr. 10, 1985).

6/ Id.

Between March 28 and April 9, 1985, Delta and the following Taiwan respondents filed joint motions for consent orders directed to those respondents:

- | | |
|---|-------------------------|
| 1. Formosan United Corporation | (Motion No. 174-72"C"). |
| 2. Good Will Mercantile Co. | (Motion No. 174-73"C"). |
| 3. Show Soon Enterprises Co., Ltd. | (Motion No. 174-74"C"). |
| 4. Fortune Development Corporation | (Motion No. 174-75"C"). |
| 5. King Feng Fu Machinery Works Co., Ltd. | (Motion No. 174-77"C"). |
| 6. King Tun Fu Machinery Co. | (Motion No. 174-77"C"). |

Between April 22 and 30, 1985, Delta and the Commission investigative attorney filed briefs on the issues under review and on the issues of remedy, the public interest, and bonding. Although the Commission solicited written comments from the public and other Federal agencies concerning remedy, the public interest, and bonding, 7/ none were received.

This Action and Order provides for the Commission's final disposition of all matters pending in investigation No. 337-TA-174.

ACTION

1. Consent order motions

Inasmuch as the consent order motions are unopposed and raised no issue that requires findings of fact, the Commission determined on May 17, 1985, that certifying the motions to the administrative law judge for an ID would serve no useful purpose and would unnecessarily delay the final disposition of the motions. 8/ The Commission therefore decided to rule on the motions directly and waive the provisions of rules 210.51(b)(2) and 211.20(b) (19 C.F.R. § 210.51(b)(2), 46 Fed. Reg. 46123, Nov. 23, 1984, and 19 C.F.R. § 211.20(b)), which require that motions for termination and the entry of

7/ Id.

8/ See 50 Fed. Reg. 23085 (May 30, 1985).

consent orders be submitted to an administrative law judge for an initial determination.

The Commission also has determined that the content of each motion, settlement agreement, and proposed consent order complies with the Commission's rules. The Commission also has found that there is no indication that the parties' settlement is not in the public interest or that the public would be adversely affected by issuance of the proposed consent order. ^{9/} The Commission therefore has determined to grant the motions and to issue the consent orders.

2. Review of ID and violation of section 337

Having adopted portions of the violation ID and reviewed other portions thereof, and having considered the arguments of the parties and the record compiled in this investigation, the Commission has determined that there is a violation of section 337 in the importation or sale of certain woodworking machines and integral components thereof, by reason of the unfair acts of common-law trademark infringement (i.e., the term "Contractor's Saw"), patent infringement, registered trademark and logo infringement, passing off, and false and deceptive advertising, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States.

The Commission has determined that there is no violation of section 337 by Taiwan respondent Leroy International. The Commission also has determined

^{9/} Public inspection copies of the motions, settlement agreement, and proposed consent order, and a notice soliciting written comments thereon, were served on other Federal agencies on May 22, 1985. The aforesaid notice was published in the Federal Register of May 30, 1985 (50 Fed. Reg. 23085). No comments were filed.

that there is no violation of section 337 by reason of the infringement of Delta's alleged common-law trademarks in the overall external designs of its 10-inch table saw and 14-inch band saw.

Commissioners Eckes and Rohr also have determined that there is no violation of section 337 in the importation or sale of the accused wood planing machines.

The Commission has determined further that—

1. The appropriate remedy for the violation of section 337 in this case is a general exclusion order pursuant to subsection (d) of section 337;
2. The public interest considerations enunciated in subsections (d) and (f) of section 337 do not preclude such relief;
3. The bond during the Presidential review period shall be 268 percent of the entered value of the articles covered by the exclusion order.

ORDER

In accordance with the foregoing action, it is hereby ORDERED THAT—

1. Motions Nos. 174-72"C," -73"C," -74"C," -75"C," and -77"C" are granted; and
2. The proposed consent order appended to each motion shall be issued.

It is further ORDERED THAT—

1. Wood planing machines that infringe claims 1, 2, 3, 4, or 5 of U.S. Letters Patent 4,436,126 (such as those depicted in Exhibits N-P) are excluded from entry into the United States for the remaining term of the patent (i.e., until March 13, 2001), except under license from the patent owner;
2. Blade guard assemblies that infringe claims 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, or 14 of the U.S. Letters Patent 3,754,493 (whether imported individually or as part of a woodworking machine) are excluded from entry into the United States for the remaining term of said patent (i.e., until Aug. 28, 1990), except under license from the patent owner;

3. Adjustable height fences that infringe claims 1, 2, 3, or 4 of U.S. Letters Patent 4,174,100 (whether imported individually or as part of a woodworking machine) are excluded from entry into the United States for the remaining term of said patent (i.e., until Nov. 13, 1996), except under license from the patent owner;

4. Woodworking machines and their packaging, instruction and user manuals, and promotional material that infringe—

- a. complainant Delta International Machinery Corp.'s common-law trademark "Contractor's Saw" or colorable imitations thereof 10/; or
- b. the registered trademark "Unisaw" (Registration No. 369,416); or
- c. the registered trademark "Rockwell" (registration No. 765,006); or
- d. the registered "Rockwell" logo (registration No. 1,031,246), which is depicted in exhibit Q to this Action and Order—

are excluded from entry into the United States, except under license from the owner of the aforesaid trademarks and logo;

5. The articles ordered to be excluded from entry into the United States pursuant to paragraphs 1-4 above shall be entitled to entry under a bond in the amount of 268 percent of the entered value of the subject articles from the day after this order is received by the President pursuant to subsection (g) of Section 337 of the Tariff Act of 1930 (19 U.S.C. §1337(g)(2)), 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 receipt of this action;

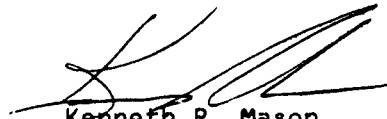
6. The Commission may amend the foregoing provisions of this order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57); and

7. The Secretary shall serve copies of this Commission Action and Order, the Commission Opinion in support

10/ E.g., "Contractor's Special."

thereof, and the attached notice upon each party of record to this investigation, and shall publish notice thereof in the Federal Register.

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: June 18, 1985

U. S. DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

October 26, 1984
(Date)

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office
of U.S. Patent 4,436,126.

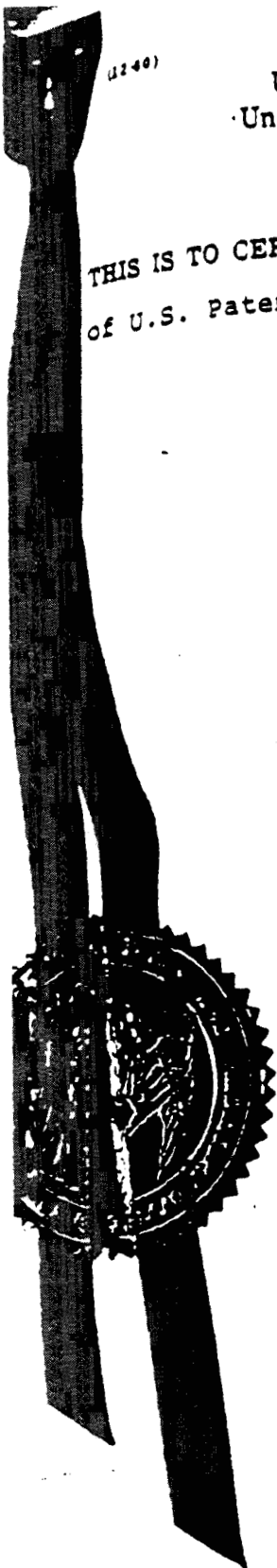


EXHIBIT
DELTA
3
ALL-STATE LEGAL SUPPLY CO.

By authority of the
COMMISSIONER OF PATENTS AND TRADEMARKS

F. E. Smith
Certifying Officer.

CA



4,436,126

THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME

Whereas, there has been presented to the
Commissioner of Patents and Trademarks

A PETITION PRAYING FOR THE GRANT OF LETTERS PATENT FOR AN ALLEGED
NEW AND USEFUL INVENTION THE TITLE AND DESCRIPTION OF WHICH ARE CON-
TAINED IN THE SPECIFICATIONS OF WHICH A COPY IS HEREUNTO ANNEXED AND
MADE A PART HEREOF, AND THE VARIOUS REQUIREMENTS OF LAW IN SUCH CASES
MADE AND PROVIDED HAVE BEEN COMPLIED WITH, AND THE TITLE THERETO IS,
FROM THE RECORDS OF THE PATENT AND TRADEMARK OFFICE IN THE
CLAIMANT(S) INDICATED IN THE SAID COPY, AND WHEREAS, UPON DUE EXAMI-
NATION MADE, THE SAID CLAIMANT(S) IS (ARE) ADJUDGED TO BE ENTITLED TO
A PATENT UNDER THE LAW.

NOW, THEREFORE, THESE Letters Patent ARE TO GRANT UNTO THE SAID
CLAIMANT(S) AND THE SUCCESSORS, HEIRS OR ASSIGNS OF THE SAID CLAIMANT(S)
FOR THE TERM OF SEVENTEEN YEARS FROM THE DATE OF THIS GRANT, SUBJECT
TO THE PAYMENT OF ISSUE FEES AS PROVIDED BY LAW, THE RIGHT TO EXCLUDE
OTHERS FROM MAKING, USING OR SELLING THE SAID INVENTION THROUGHOUT THE
UNITED STATES.

In testimony whereof I have hereunto set my
hand and caused the seal of the Patent and
Trademark Office to be affixed at the City
of Washington this thirteenth day
of March in the year of our Lord one
thousand nine hundred and eighty-four
and of the Independence of the United States
of America the two hundredth and eighth

(SEAL)

Lucas C. Mason
Acting Officer

James P. Thompson
Commissioner of Patents and Trademarks

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

PATENT NO : 4,436,126
DATE : March 13, 1984
INVENTOR(S) : Peter Lawson

Page 1 of 2

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

Please add claim 5 as follows:

- 5. A thickening machine for wood comprising:
- (a) an elongated bed over which the wood passes, said bed being fixed against movement in a vertical direction;
 - (b) an upper housing vertically spaced from, and movable up and down with respect to, said elongated bed;
 - (c) a cutter and a drive roller mounted in said upper housing for rotation about separate parallel axes, said cutter and said drive roller being adapted to respectively remove a thickness from wood passing over the bed and to move said wood along said bed past said cutter;
 - (d) motor means for driving said cutter and said drive roller, said motor means being supported by and being adapted to move up and down with said upper housing, thereby simplifying the driving of said cutter and said drive roller;

UNITED STATES PATENT AND TRADEMARK OFFICE
CERTIFICATE OF CORRECTION

Page 2 of 2

PATENT NO. : 4,436,126
DATED : March 13, 1984
INVENTOR(S) : Peter Lawson

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

(e) four hollow pillars, one being located at each corner of the machine and each containing a threaded shaft, for adjusting the vertical position of said upper housing on said hollow pillars with respect to said elongated bed; and

(f) means for so coordinating the movement of said threaded shafts as to cause said upper housing to overall remain in an accurately predetermined relationship relative to said bed as said upper housing is moved up and down relative to said bed.—

On the title page "4 Claims" should read --5 Claims--.

Signed and Sealed this

Twelfth Day of June 1984

(SEAL)

Attest:

Attesting Officer

GERALD J. MOSSINGHOFF

Commissioner of Patents and Trademarks

[54] WOOD PLANING MACHINE
 [75] Inventor: Peter Lawson, Campinas, Brazil
 [73] Assignee: Rockwell International Corporation, Pittsburgh, Pa.
 [21] Appl. No.: 383,318
 [22] Filed: Sep. 17, 1981
 [51] Int. Cl. B27C 1/00
 [52] U.S. Cl. 144/130; 144/117 R
 [58] Field of Search 144/114 R, 117 R, 116, 144/130, 373

Primary Examiner—W. D. Bray

[57] ABSTRACT

There is described a light, portable thickening machine for wood, which comprises a base part including a bed (1) over which wood to be thickened passes, and an upper housing (9) in which are mounted a cutter and feed rollers to advance the wood, the upper housing being slidably supported on a number of pillars (4) extending upwardly from the base part (2). At least two oppositely disposed pillars (4) have mounted coaxially therein threaded shafts which engage with lugs fixed to upper housing (9), the lugs passing through longitudinal slots in the pillars (4). The threaded shafts are interconnected so that they rotate together, by means of sprockets at their lower ends engaging an endless chain (6) rotation of the shafts thus effecting vertical movement of the upper housing (9) to adjust the height of the cutter above the bed.

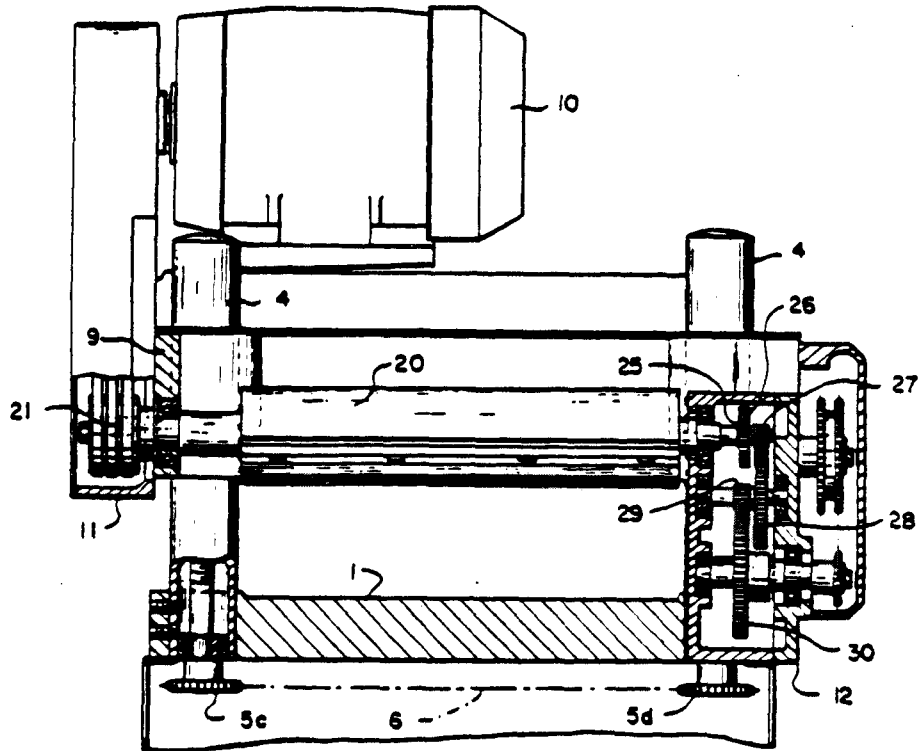
[56] References Cited
 U.S. PATENT DOCUMENTS

2,642,902 6/1953 Carey 144/117 R
 2,780,250 2/1957 Leonard 144/130
 2,873,776 2/1959 Butke 144/117 R

FOREIGN PATENT DOCUMENTS

1382457 1/1975 United Kingdom 144/130

4 Claims, 8 Drawing Figures



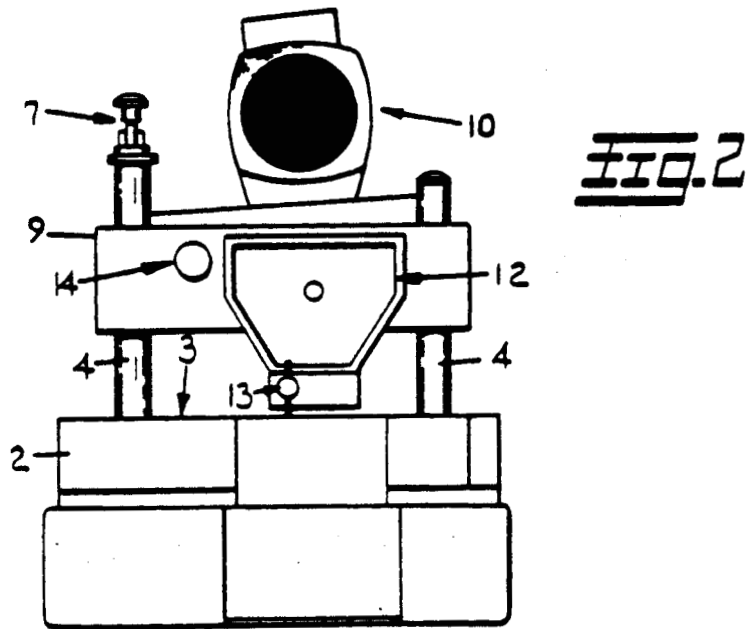
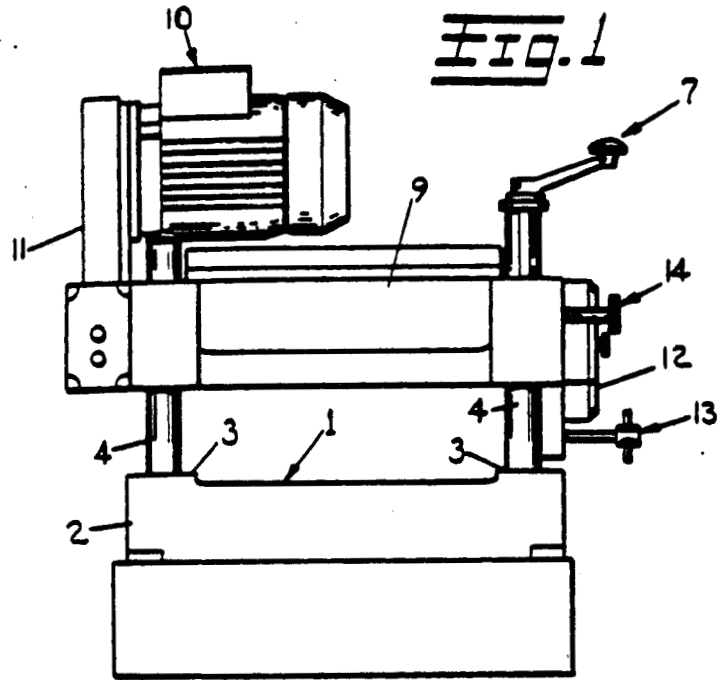


FIG. 3

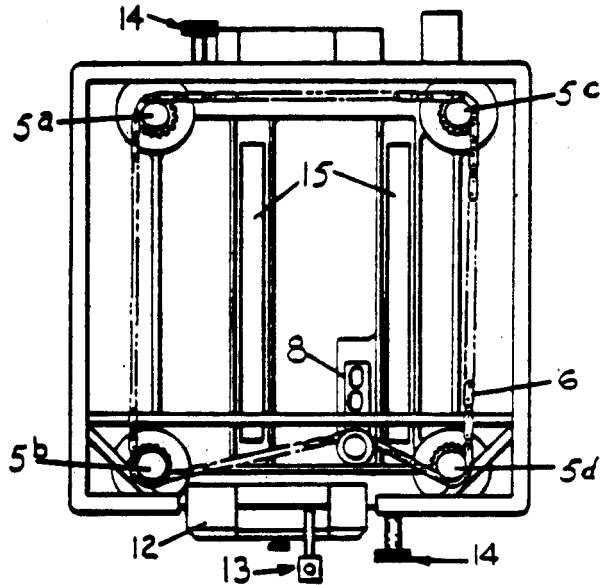
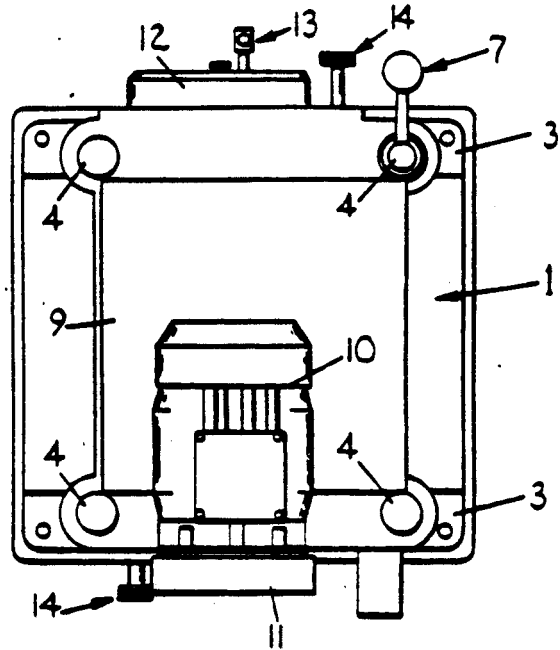


FIG. 4

Fig. 5.

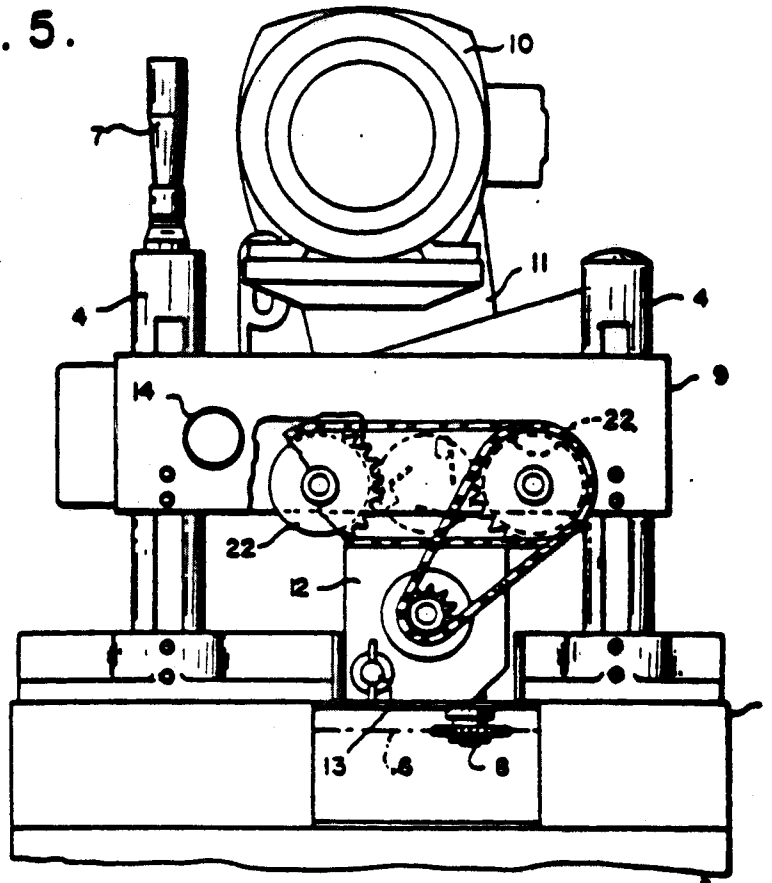


Fig. 6.

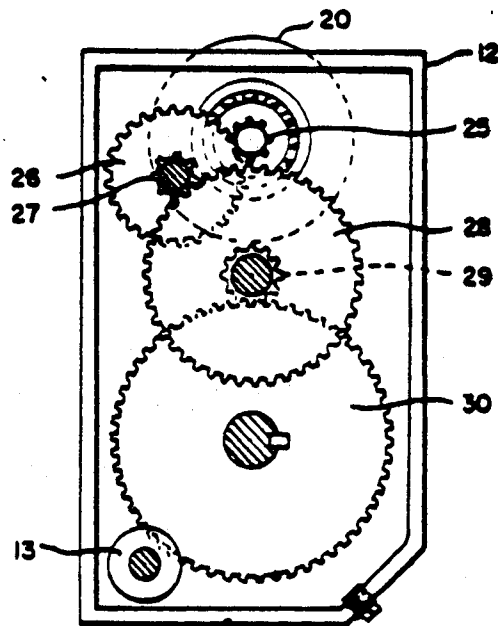


Fig. 7.

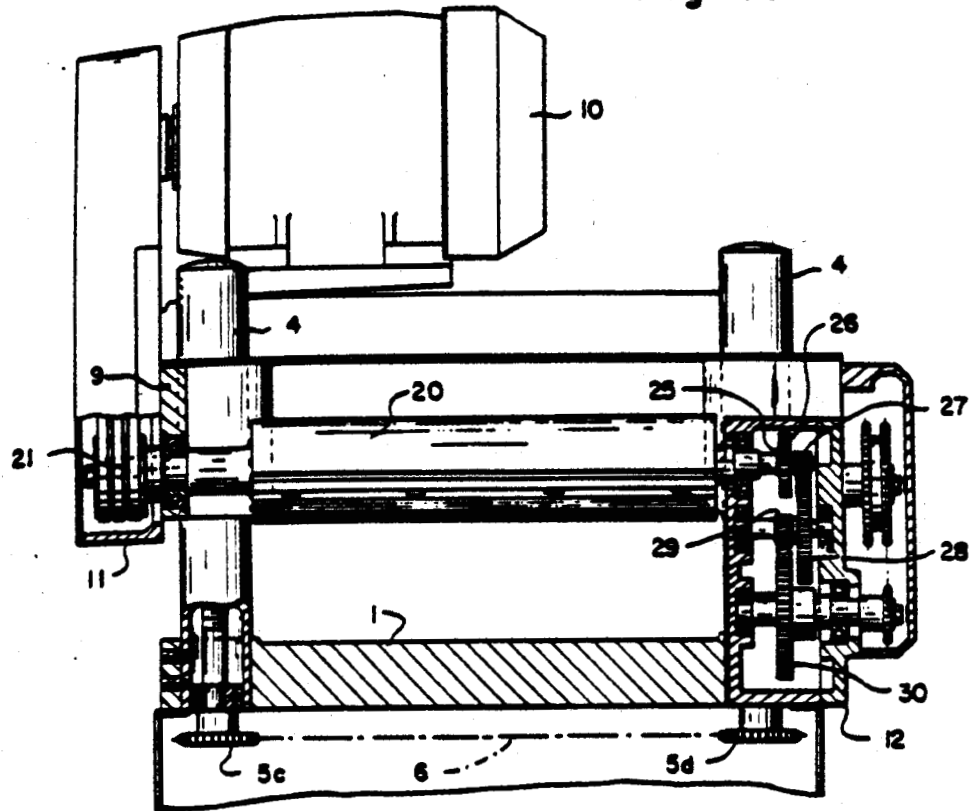
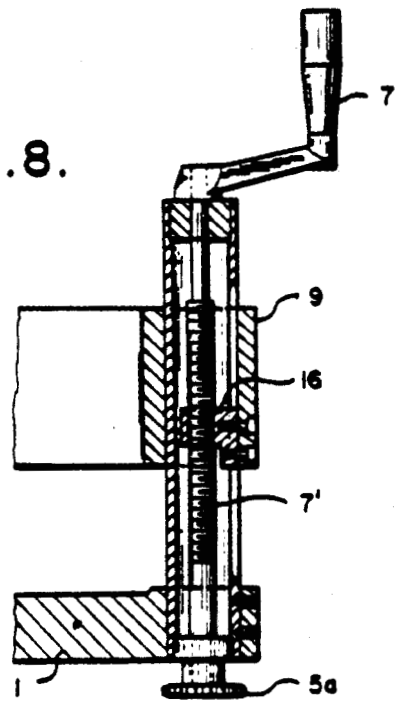


Fig. 8.



WOOD PLANING MACHINE

BACKGROUND OF THE INVENTION

The invention concerns a thickening machine for wood, and particularly a compact but durable machine which, although portable, will still serve for heavy duty work.

Hitherto, thickening machines or planers have been large, cumbersome machines which, once installed, remain in a single location for the duration of their working life. The disadvantages of cutting material to size and subsequently transporting it to the site where it will be used are apparent. With a machine actually on the site, the material can be produced as it is required, thus eliminating waste, and small adjustments to the required size can be simply and quickly effected.

SUMMARY OF THE INVENTION

The present invention provides a compact, light and portable planer which may easily be located at a succession of work sites.

According to the present invention, a thickening machine or planer for wood comprises a bed, on which wood to be shaped is slidable, feed rollers to advance the wood at a predetermined rate, a cutter positioned to contact the wood and a motor connected to the cutter and to the feed rollers by a speed reduction means, characterized in that the bed of the machine is fixed and the cutter and feed rollers and their connections to the motor are mounted on a housing which is movably supported above the bed, the housing being capable of movement towards and away from the bed.

BRIEF DESCRIPTION OF THE DRAWINGS

An embodiment of the present invention will now be described with reference to the accompanying drawings in which:

FIG. 1 shows an end view of the machine looking in the direction in which wood is fed into the machine;

FIG. 2 shows a side view of the machine from the right as seen in FIG. 1;

FIG. 3 shows a plan view of the machine;

FIG. 4 shows an underneath view of the machine; and

FIG. 5 is a side view of the machine with parts broken away to show certain operating parts;

FIG. 6 is an end view with parts broken away to show internal gearing and the vee-belt drive system;

FIG. 7 is an end view of FIG. 5 showing the gearing used to drive the feed rolls and the cutter; and

FIG. 8 is a view of the handle that changes the vertical position of the upper housing with parts broken away to show the lug that causes vertical motion when the handle is turned.

The thickening machine or planer of the present invention comprises a bed 1, over which wood to be shaped is passed. The bed 1 is on the upper surface of a base part 2 of the machine and is bordered on two sides by raised portions 3.

DESCRIPTION OF THE PREFERRED EMBODIMENT

Extending upwardly from the raised portions 3 are four pillars 4, which are hollow and each contain a threaded shaft accessible via a longitudinal slot in the pillar. The upper ends of three of the pillars are closed by end caps, and the upper end of the fourth pillar

carries an adjusting handle 7 connected to the threaded shaft 7 in that pillar.

Below the bed 1 of the machine, each threaded shaft is provided with a sprocket (5a, 5b, 5c, 5d seen in FIG. 4), and an endless chain 6 is passed over each of the sprockets so that rotation of the adjusting handle 7 causes its shaft to rotate, which rotates sprocket 5c and thus by means of chain 6 and sprockets 5a, 5c, 5d all the threaded shafts rotate equally in the same direction. In an upper housing 9 the holes through which the threaded shafts 7 extend there are internally threaded lugs 16 which upon rotation of shafts 7 cause vertical movement of housing 9 as shown in FIG. 7.

A chain adjuster 8 is provided to maintain alignment of the threaded shafts.

Slidably mounted on the pillars 4 is an upper housing 9, above which is situated a motor 10. Within the housing 9 is mounted a cylindrical cutter 20 on an axis parallel and transverse to the bed 1 of the machine. The cutter is driven by motor 10 via a single or multiple vee-belt drive 21 housed in the drive casing 11 as shown in FIG. 5.

Also mounted in upper housing 9 are a number, preferably two, of feed rollers. These rollers 22 (see FIG. 4) are driven via a reduction gear system, shown in FIG. 6 from the cutter drive 21, the reduction gear being housed in the reduction box 12. More specifically, the gear 25 on the end of the cutter shaft opposite the vee-belts 21 drives gears 26, 27, 28 and 29, the last gear 29 being engaged with the gear 30 that drives feed rolls 22. The feed rollers are mounted on axes parallel and transverse to the bed 1.

The reduction gear 30 for driving the feed rollers is equipped with a disengagement mechanism operated by interrupter lever 13 which can isolate the feed rollers from the motor.

The upper housing 9 is slidably mounted on the four vertical pillars 4 by receiving the pillars closely in bores penetrating the housing. Within the bores, there are formed lugs which each extend through the slot in their respective pillar and threadedly engage the threaded shaft therein.

The lugs are fixed to the upper housing 9, and thus, when the threaded shafts are rotated, the upper housing is raised or lowered depending on the direction of rotation of the shafts.

In this way, the height of the cutter and feed rollers above the bed is varied and the size of the finished product adjusted.

In order to fix the upper housing at any particular height, pinch screws 14 may be provided on one or more pillars to clamp the housing to that or those pillars.

The bed 1 may have idler moles set into it to reduce the friction of the wood as it passes over the bed.

I claim:

1. A thickening machine having a plurality of corners for wood comprising,
 - (a) an elongated bed over which the wood passes,
 - (b) an upper housing spaced from said elongated bed,
 - (c) cutter and drive rollers mounted in said upper housing for rotation about separate parallel axes,
 - (d) a plurality of hollow pillars each containing a threaded shaft for adjusting said upper housing, and locating the vertical position of said upper housing on said hollow pillars with respect to said elongated bed.

2. A claim as of said pillars is
3. A thickness wherein said cutter motor, a vee-belt is

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1. A claim as defined in claim 1 wherein the number of said rollers is 4, one on each corner of the machine.

1. A thickening machine as defined in claim 1 wherein said cutter and drive rollers are driven by a motor, a vee-belt takeoff from said motor to said cutter

and a reduction gear system connected to the cutter shaft to operate said drive rollers.

4. A thickening apparatus as defined in claim 3 wherein means is provided to disengage the drive rollers from the cutter shaft, vee-belt and drive motor.

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EXHIBIT N

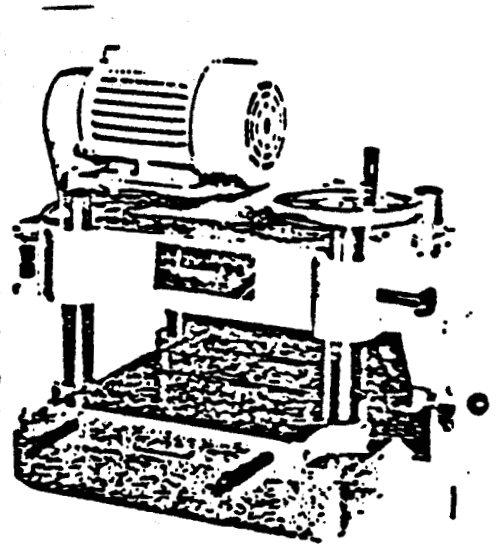
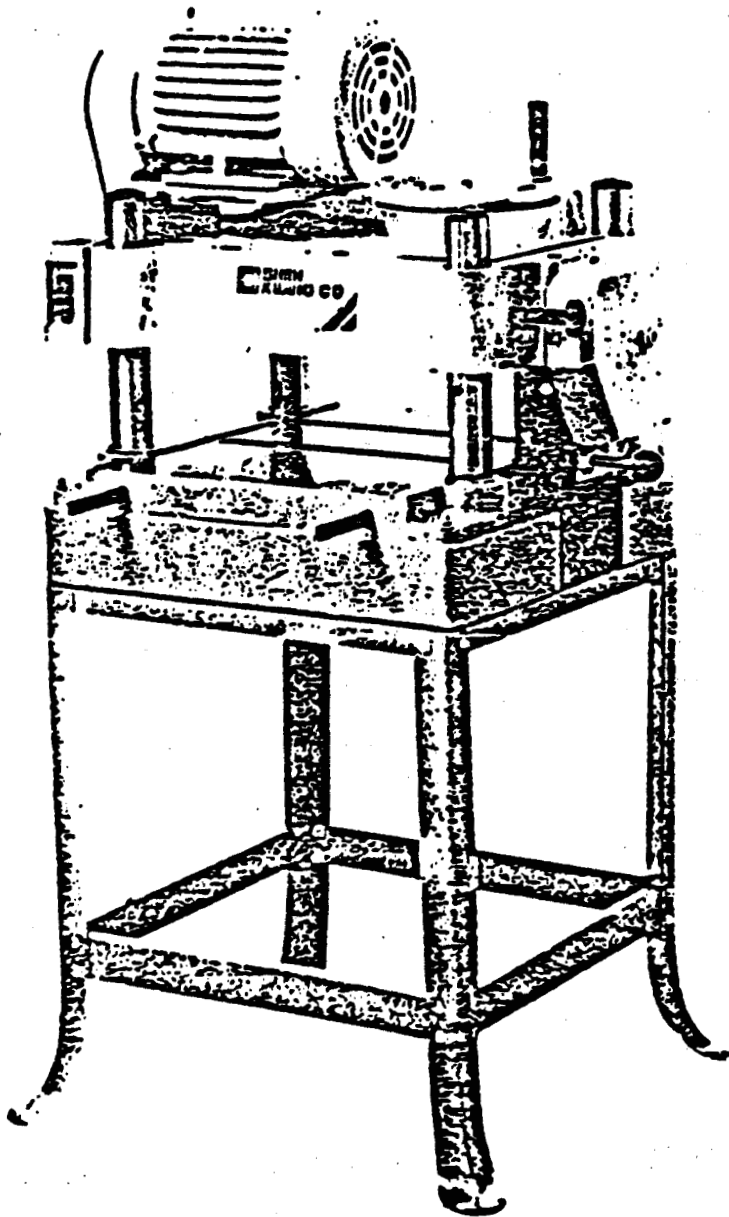


EXHIBIT O

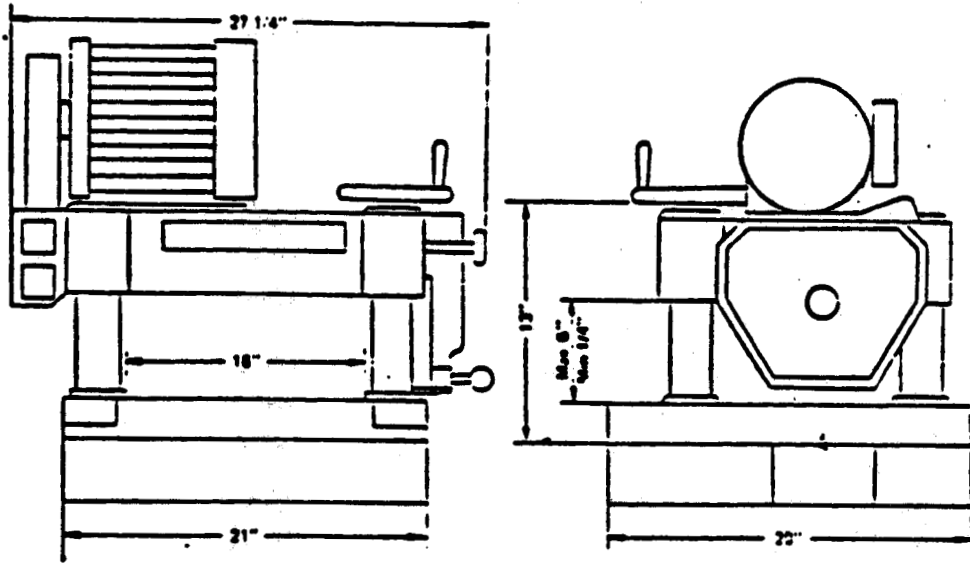
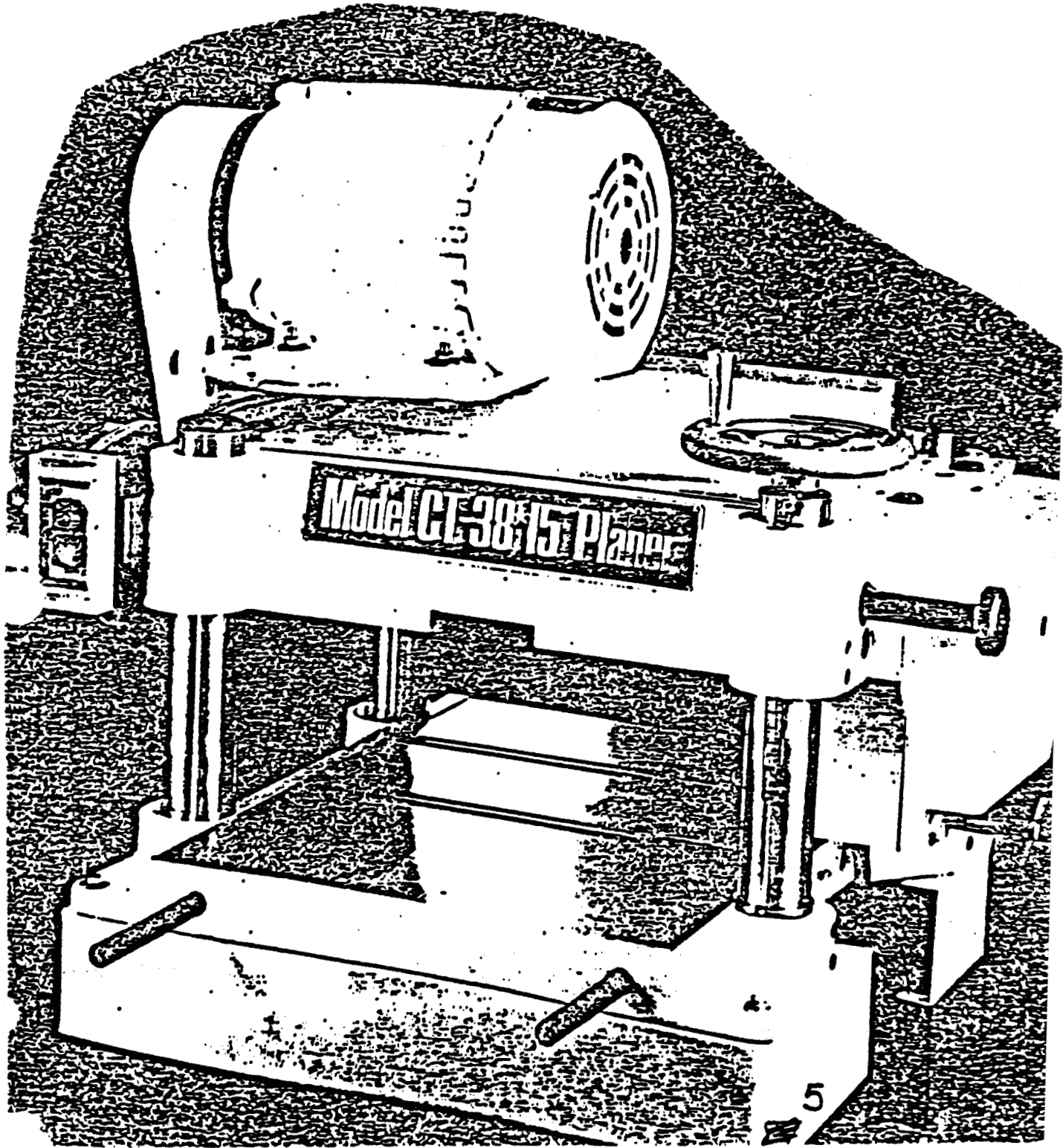


EXHIBIT P



- [54] CIRCULAR SAW BLADE GUARD
- [75] Inventors: Edward J. Niehaus; Harry D. Beasey, both of Tupelo, Miss.
- [73] Assignee: Rockwell Manufacturing Co., Pittsburgh, Pa.
- [22] Filed: Dec. 10, 1971
- [21] Appl. No.: 206,630
- [52] U.S. Cl. 83/478, 144/251 R, 83/508.2
- [51] Int. Cl. B27g 19/02
- [58] Field of Search 143/159 J, 159 T, 143/159 R; 144/251 R; 83/478, 477.2, 477.1, 477, 508.2; 30/390, 391

[56] **References Cited**

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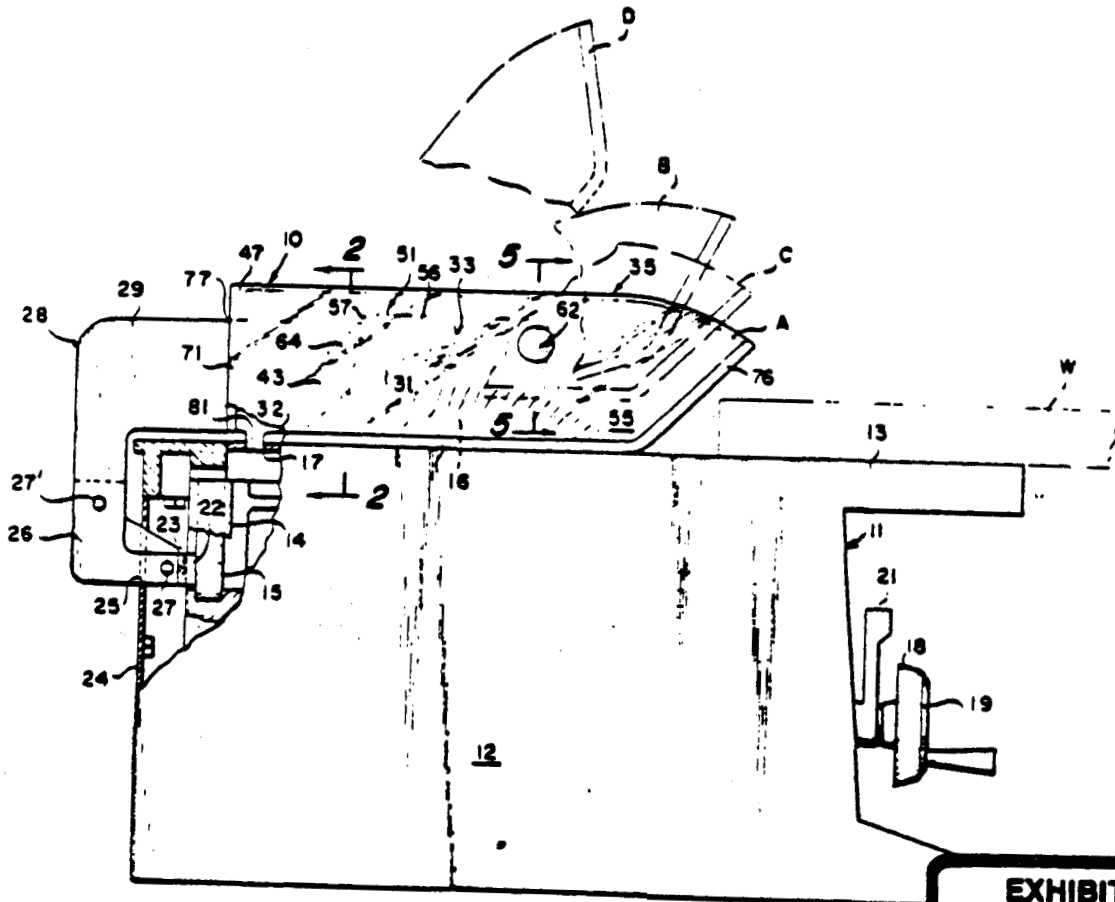
2,786,496	3/1957	Eachenburg.....	143/159 T
2,593,596	4/1952	Olson.....	143/159 T
2,781,067	2/1957	Kaley.....	143/159 J

Primary Examiner—Donald R. Schran
 Attorney—William A. Strauch, J. Matthews Neale et al.

guard and kerf splitter assembly wherein the guard is pivotally swingably mounted on the kerf splitter through a relatively short inverted U-shaped link pivoted at one end in straddling relation to the kerf splitter with the web at the one end notched out to dispose the notch end wall to engage the upper edge of the kerf splitter and limit its upward and rearward pivotal movement to maintain the link and guard pivoted at the other end in straddling relation to the link within the upper forward segment of the pivotal path of the link at all times to assure weight biased movement toward the saw table and guarding position. The kerf splitter is a plate of generally C-shaped configuration having attachment bolt passages in the forward and rear ends of the lower arm to provide at least one attachment bolt beneath and forward of the rear end of the table in a relatively inaccessible position when installed to prevent ready removal by the operator. The respective pivot connections include pivot pins fixedly connected to the link and fixedly connected to the guard respectively by end mounted press fitted washers and cap nuts to prevent ready disassembly of the pivot connections and removal of the link or guard. The assembly provides a non-removable safety guard.

[57] **ABSTRACT**
 A see through plastic U-shaped circular saw blade

14 Claims, 6 Drawing Figures



**EXHIBIT
 DELTA**

ALL-STATE LEGAL SUPPLY CO.

CIRCULAR SAW BLADE GUARD

BACKGROUND OF THE INVENTION

The present invention relates to blade guard assemblies for motor driven, table type, circular saws in which workpieces supported on the table workpiece support surface are hand fed into a high speed rotating saw blade which protrudes through a narrow blade passage formed in the table usually in centered relation to the side edges of the table. In such saws, the high speed rotating blade is a source of continuous danger to the operators and shop personnel whenever the saw is operating and many serious, even maiming injuries have resulted due to the carelessness of operators and shop personnel, particularly where no safety guards are provided, or ineffective safety guards typical of the prior art have been provided.

Ineffectiveness of the prior art safety guards provided results from several factors in the guard structures heretofore provided. One of the principal factors contributing to ineffectiveness has been the provision of guard structures which interfere with clear visibility of the saw blade during use and are so constructed that they may be readily removed or swung to an inoperative position by a seasoned operator who, because of an exaggerated sense of operating skill or his familiarity due to day-to-day use of such saws, discounts the imminent danger. A further contributing factor has been the flimsy linkage systems provided to mount the guard for its necessary rising and falling movement as the workpiece is fed to the saw blade or as the angular relative adjustment of the blade and table are effected to make bevel cuts.

Typical examples of such prior art guard assemblies are shown in U.S. Pat. Nos. 2,352,235 to H.E. Tautz, 2,623,555 to W.A. Eschenburg and 2,787,305 to T.A. Hess et al. (impairing visibility of the blade and readily swingable to an inoperative position depending at the back of the table).

Efforts to overcome these deficiencies have been made by providing (1) transparent guards as shown in U.S. Pat. Nos. 1,240,430 to P. Erickson, 2,876,810 to J.M. Peterson et al. and 3,105,530 to R.E. Peterson et al.; (2) a centrally pivoted guard as shown in U.S. Pat. No. 2,754,857 to H.A. Joslin; (3) a shortened side plate as shown in U.S. Pat. No. 2,786,496 to W.A. Eschenburg; (4) swing links internally of the guard mounted on a kerf splitter to limit movement of the guard as shown in U.S. Pat. No. 1,496,212 to S. French and 2,593,596 to G.V. Alson; and (5) a saw guard engageable with a portion of the kerf splitter to limit upward movement as shown by U.S. Pat. No. 1,381,612 to G.A. Anderson. None of these efforts, however, provide a wholly satisfactory guard or an inexpensive reliable structure which adequately prevents the operator from readily removing the guard or swinging it to an inoperative position.

SUMMARY OF THE INVENTION

The present invention has for its principal object the provision of a safety guard assembly for a circular table saw non-removably mounted on the kerf splitter which is fixedly secured through a mounting bracket at a relatively inaccessible point beneath and inwardly of the rear table edge to maintain a position in the plane of rotation of the saw blade in all angularly adjusted positions of the saw blade relative to the table of the saw.

A further object of the present invention resides in providing a blade guard assembly according to the principle object with a blade guard supporting link providing respective end pivotal connections to the kerf splitter and blade guard designed to resist lateral shifting movement of the link and guard relative to the kerf splitter and to limit pivotal movement of the guard between a normal position in which the guard is supported by the work support surface of the table in straddling relation to the blade passage and a limit position, determined by the supporting link which will prevent the blade guard from being swung to an inoperative position.

A further object of the present invention resides in the provision of a rigid metal, guard supporting link of inverted channel shaped configuration in cross section provided at its opposite ends with coaxially aligned, laterally spaced passages and an encompassing blade guard of inverted channel spaced configuration formed in the area of its pivotal connection to the guard supporting link with inwardly thickened wall portions laterally dimensioned to provide area bearing contact with the outer faces of the dependent link sidewalls to thereby eliminate side play between the pivotally related blade guard and supporting link and coaxially through apertured to provide opposed pivot pin mounting openings to press fittingly receive a pivot pin thereby relegating pivotal wear to the link passages and the portions of the pivot pin cooperating therewith.

Another object of the present invention resides in providing the pivot pin of the preceding object in the form of a headed pin having a shank of a length greater than the cross-sectional width of the blade guard whereby the shank end remote from the head will protrude beyond the outer side face of one guard sidewall when the head is seated against the other sidewall and providing the projecting shank end with a press fitted cap nut seated against the one guard sidewall thereby preventing ready removal of the blade guard.

A still further object of the present invention resides in providing the guard supporting link of the previous object with a pivotal connection to the kerf splitter in the form of a sleeve bushing fixedly supported in a through passage in the kerf splitter with its opposite ends projecting from the opposite faces of the kerf splitter sufficiently to fit between and have bearing contact with the opposite link sidewalls and a pivot pin dimensioned to have a journaled fit in the sleeve bushing with its opposite ends pressure fitted into and protruding beyond the coaxially aligned link passages to receive in press fitted engage spring washers bearing on the outer sidewall faces of the link thereby relegating pivotal wear to the bushing and the portion of the pivot pin cooperating therewith and preventing ready removal of the link.

BRIEF DESCRIPTION OF THE DRAWINGS

Further objects of the invention will appear from the following description and appended claims when read in conjunction with the accompanying drawings wherein:

FIG. 1 is a side elevational view of a table type circular saw illustrating the blade guard and kerf splitter assembly of the present invention in operative mounted position;

FIG. 2 is an enlarged sectional view taken substantially on line 2-2 of FIG. 1 to illustrate the details of

the pivotal connection provided to non-removably mount the blade guard support link and anti-kickback fingers on the kerf splitter;

FIG. 3 is a plan view of the blade guard supporting link employed to mount the blade guard on the kerf splitter;

FIG. 4 is a plan view of the blade guard;

FIG. 5 is an enlarged sectional view taken substantially on line 3—3 of FIG. 1 illustrating the details of the pivotal connection provided to non-removably mount the blade guard to the pivot pin journaled in the blade guard supporting link; and

FIG. 6 is a rear end view of the guard member showing the kerf splitter in dot-dash lines to illustrate the bearing engagement of the rear end of the guard member and kerf splitter in its normal guarding position in contact with the saw table.

DESCRIPTION OF THE PREFERRED EMBODIMENT

With continued reference to the drawings wherein the same reference numerals are employed throughout the several views to indicate the same parts, the blade guard and splitter assembly of this invention designated by numeral 10 is shown applied to a tilting arbor table saw 11 of the type shown and described in U.S. Pat. No. 3,581,784 issued June 1, 1971 to Edward C. Warrick et al. Saw 11 comprises a support base and cabinet 12 fixedly mounting a work support table 13 provided with dependent front and rear trunnions 14 (the rear trunnion only being illustrated) supporting a tilt bracket 15 mounting a drive motor, a blade arbor and drive means including a saw blade 16 arranged to project upwardly through the blade opening conventionally provided in table 13 by a slotted insert plate 17. Bracket 15 in the illustrated saw also carries the depth of cut and tilt controls (not shown) for raising and lowering the blade relatively to the table and tilting the blade relatively to the table, such controls being operable as disclosed in the aforesaid patent by operation of the respective hand wheels 18 and 19 and clamp lever 21.

The blade guard and splitter assembly 10 is in the form of unitary assembly as will be hereinafter described in detail and is fixedly secured to the end face of movable tilt bracket 15 through a mounting bracket 22 bolted to bracket 15 by bolt 23 and which is presently provided on some saws to mount existing splitters. As best seen in FIG. 1, the bolted end of bracket 22 lies within the rear cabinet wall 24 which is slotted at 25 through its upper edge to permit its assembly and removal after bracket 22 is bolted to bracket 15 and the dependent hooked shaped mounting arm 26 of blade guard and kerf splitter assembly 10, is bolted at 27 and 27' to bracket 22. It follows, therefore, that once rear cabinet wall 24 is in place bolts 23 and 27 are not readily accessible to an operator who may decide to remove the blade guard and splitter assembly from bracket 15. It also will be appreciated that mounting bracket 22 adapts the blade guard and splitter assembly 10 for ready mounting on the rear trunnion of other tilting arbor saws or even concealed portions of the support base of tilting table saws. Such concealed mountings provide reasonable assurance that irresponsible operators will not circumvent law or code regulations requiring an adequate guard during all sawing operations and further assurance in the saw illustrated can

be provided by applying wired tamper seals to prevent removal of the cabinet walls.

As best seen in FIGS. 1 and 2, hook shaped mounting arm 26 is an integral part of a plate-like kerf splitter 28 of general C-shaped configuration as viewed in FIG. 1, the hook shaped arm 26 comprising the depending stem and lower intumed end of the C-shape. The upper intumed end 29 takes the form of an elongated arm extending forwardly across the rear table edge in the plane of rotation of saw blade 16. The lower free end portion of arm 29 defines an arcuate forwardly and upwardly divider blade portion 31. Divider blade portion 31 extends arcuately upwardly and forwardly from a point 32 lying just above the work support surface of table 13 at the rear of the blade slot in insert plate 17 in the plane of rotation of the blade along an arcuate path generated around the rotational axis of the blade on a radius slightly greater than the radius of the outermost peripheral path of the blade when set at its maximum depth of cut. The upper free end of arm 29 is defined by a vertical full width end segment 33 bisected by the rotational plane of blade 16. This configuration of arm 29 assures an operative kerf splitter which will effectively enter the saw kerf in a workpiece as it passes rearwardly beyond the arcuate rear segment of blade 16 exposed above the table surface and an arm of maximum lateral stability to resist the side pressures in parting the portions of the workpiece defining the developing saw cut kerf.

To adapt the kerf splitter 28 to mount the blade guard 35 of this invention, a through circular passage 36 (FIG. 2) is provided in the upper free end portion of arm 29, rearwardly of end segment 33. Passage 36 closely receives, preferably through a press fit, the laterally centered circular step shoulder 37 of stepped bushing 38 having an axial through bore 39. As best seen in FIG. 2, step shoulder 37 is axially dimensioned to the exact thickness of the metal plate used to form kerf splitter 28 and at one end, the right end as seen in FIG. 2, is formed with a radial flange 40 abuttingly overlying the portion of arm 29 defining passage 36 to automatically position bushing 38 axially with respect to kerf splitter 28.

Bushing 38 is formed with oppositely directed step shoulders 41 of equal and lesser diameter than step shoulder 37 respectively extending axially from the end faces of step shoulder 37 and radial flange 39 to respective minor diameter end step shoulders 42 of equal diameter and length equidistantly axially spaced from the longitudinal center of bushing 38. It follows that the opposite end faces of bushing 38 define respective planes equidistantly spaced from and parallel to the side faces of kerf splitter 28 and the coincident plane of rotation of blade 16. This laterally centered relationship of bushing 38 and kerf splitter 28 relative to the plane of rotation of blade 16 adapts bushing 38 to journalingly support a pair of anti-kickback fingers 43 on the respective step shoulders 42 with a double end coil biasing spring 44 (FIG. 2) disposed therebetween. As best seen in FIG. 2, biasing spring 44 comprises respective end coils 45 loosely surrounding step shoulders 41 and joined at their adjacent inner ends by an integral connector run 46 formed midway between coils 45 with a bridging run 50 disposed to abuttingly engage the upper edge 47 of kerf splitter 28. The opposite outer ends of coils 45 are bent axially outwardly to form respective anchor hooks 48 engaged behind the respec-

tive anti-kickback fingers 43 as shown in FIG. 2 to normally bias fingers 43 to their dependent positions shown in FIG. 1 and yieldingly retain fingers 43 against axial shifting movement off of step shoulders 42. It will be appreciated that this assembly of bushing 38, kickback fingers 42 and biasing spring 44 on kerf splitter 38 provides a unitary subassembly 8c that can be constructed in advance of mounting the guard 35 and that the close fit of bushing 38 in passage 36 of kerf splitter 28 materially limits tilting of the journal mount provided for anti-kickback fingers 43 assuring their proper free operation at all times.

To assure a rigid non-tilting journalled mounting of guard 35 on kerf splitter 28, the present invention provides a blade guard supporting link 51 (FIGS. 1 through 3 and 5) of channel shaped configuration in cross-section as best seen in FIGS. 2 and 5. Referring for the moment to these latter figures, it will be seen that the spacing of the dependent sidewalls 52 of link 51 is such that the inner sidewall faces freely but closely engage the opposite end faces of bushing 38 while the outer sidewall faces freely but closely engage the opposing planar walls of inwardly protruding, integral lands 53 (FIGS. 4 and 5) formed on the inner faces of dependent sidewalls 54 and 55 of channel shaped guard 35.

As best seen in FIGS. 1 and 3, the connecting web 56 of link 51 terminates inwardly from one end of dependent sidewalls 52 to provide an abutment end face 57 lying in a plane inwardly offset relative to the aligned passages 58 provided in sidewalls 52 at said one end and extends forwardly terminating in the transverse plane defined by the opposite ends of sidewalls 52. A pair of aligned journal passages 59 are provided in sidewalls 52 inwardly of the opposite ends of sidewalls 52. Preferably the axes of the aligned passages 58 and 59 are disposed to lie in a common plane parallel to web 56 centered vertically relative to link sidewalls 52. Assembly of guard 35 with link 51 is preferably first completed to provide a unitary subassembly by inserting the link end containing journal passages 59 into position between lands 53 to align passages 59 with the aligned through guard passages 61 (FIGS. 4 and 5). Passages 61 are formed in the guard sidewalls at a point forwardly of the longitudinal center of guard 35 to impart a clockwise biasing weight component to the forward end of guard 35 for a purpose which will presently appear. Passages 61 are of a diameter slightly less than that of passages 59 and a headed pivot pin 62 having a tight, preferably press fit, with passages 61 and passing freely through link passages 59 is provided to journal link 51 for pivotal movement. Head 63 of pin 62 abuts the other face of guard sidewall 54 and shank 64 protrudes beyond guard sidewall 55. The protruding shank end is then capped with a press fitted cap nut 65 set home to firmly abuttingly engage the outer face of sidewall 55. This construction secures pivot pin in the thickened sidewall portions of guard sidewalls 54 and 55 while the cap nut assures a pivot connection that cannot be disconnected on the whim of an operator by driving pin 62 out of guard 35.

The unitary subassembly of guard 35 and link 51 is then assembled with the unitary subassembly of kerf splitter 28 and kickback fingers 43 to provide a unitary splitter-guard assembly that can be readily installed as a unit and packaged separately for marketing with the saw or as a replacement item for existing saws which

are provided with or can be adapted to receive the bracket 22. This final assembly operation is effected by grasping guard 35 permitting the free end of link 51 to depend below the guide sidewalls 54 and 55. The ends of bushing 38 carried by kerf splitter 28 are then entered between the depending end of link 51 and bore 39 is aligned with passages 58. A plain ended pivot pin 64 (FIGS. 1 and 2), dimensioned to closely fit passages 58 and have a journal fit in bore 39, is entered endwise into one passage 58 and passed through bore 39 and the opposite passage 58 to dispose its opposite ends protruding equidistantly beyond the opposed link sidewalls 52. The resulting structure provides free pivoting of pin 64 and link 51 relative to bushing 38 carried by splitter 28. Completion of this pivot connection is effected by press fitting respective spring washers 65 or, if desired, press fitted cap nuts onto the opposite ends into end butted engagement with the outer faces of link sidewalls 52 thereby providing a second pivot connection that cannot be disconnected on whim by an operator.

The resulting splitter-guard assembly is mountable as a unit on bracket 22. When once installed and the cabinet back wall 24 is secured in place to enclose at least the innermost bolt connection 27, a guard assembly is provided which cannot be readily removed or dismantled to enable the saw to be operated without a guard. In addition, the guard 35 cannot be grasped and swung upwardly and rearwardly to a non-guarding position at the rear of table 13 since the notch 57 in the web 56 which straddles kerf splitter 28 engages the upper edge of the kerf splitter to limit the rearward pivotal movement of guard 35 to a forwardly inclined position indicated by the dot-dash line position D of FIG. 1. From this position, the guard upon release will be weight biased to automatically swing forwardly and downwardly into full blade guarding position designated A in FIG. 1 with the lower edge of guard sidewall 55 in full length bearing engagement with table 13.

To further assure full guarding operation of the guard assembly of this invention, the rear end of guard 35 is provided with an end wall 71 (FIGS. 1 and 6) having a laterally centered vertical slot 72 formed at its lower end with a divergent entrance mouth 73 and delimited at its upper end by a thickened bridging end wall 74 spaced from top wall 75 a distance to assure full butting engagement with the upper edge of kerf splitter 28 when guard 35 is in its normal guarding position A (FIG. 1). Assuming a workpiece W (FIG. 1) is fed along table 13 into the saw, the upper leading corner of the workpiece will contact the 45° angular front edges 76 of guard sidewalls 54 and 55 forcing guard 35 and link 51 to swing upwardly more or less as a unit around a fulcrum point 77 (FIG. 1) formed by the engagement of the rear corner of bridging end wall 74 with the upper edge of kerf splitter 28 until the front end of guard 35 reaches position B of FIG. 1. At the time this position is reached the upper leading corner will have reached a position below and slightly forwardly of a vertical plane containing the pivot axis of pin 62. Guard 35 will be maintained in proper straddling relation to the saw blade by link 51 and the cooperative engagement of slot 72 and kerf splitter 28 during this movement to house the blade ahead of workpiece W which itself houses the descending blade segment within the developing saw kerf in the workpiece. Relative journaling movement of link 51 around pivots

62 and 64 takes place to permit this initial swinging movement. As the leading edge of the workpiece passes sufficiently close to the aforementioned plane containing the axis of pivot 62, the weight biasing component of the forward end of guard 35 becomes effective to swing guard 35 clockwise around pivot 62 to position C of FIG. 1. In this position, link 51 will occupy an upwardly and forwardly inclined position relative to the lower edge of guard sidewall 55 which assumes a position parallel to table 13 in edge bearing engagement with the upper surface of the workpiece. In this position, bridging end wall 74 of guard slot 72 will have moved upwardly out of engagement with the upper edge of kerf splitter 28 with the lower portion of slot 72 still in cooperative engagement with splitter 28 to aid link 51 in maintaining guard 35 in straddling guarding position relative to saw blade 16, the emerging saw teeth and the developing saw kerf. It follows therefore that the operator is fully protected against contact with the blade in this position of guard 35.

As the trailing end of the workpiece reaches the aforesaid plane, the biasing weight component of the forward end of guard 35 becomes effective to impart further clockwise swinging movement to the freely suspended guard 35 around pivot 62 causing guard 35 to assume a forwardly and downwardly inclined position across the trailing upper corner of the workpiece. In this position, the guard is still in straddling relation to the blade and developing saw kerf to fully protect the operator from the saw teeth emerging from the saw kerf developing in the upper end surface and trailing end of the workpiece. As the workpiece passes beyond the back end of sidewall 55, the rounded forward end of sidewall 55 will have contacted the work support surface of table 13 and the weight component of the guard 35 and link 51 will become effective to cause counter clockwise swinging movement of guard 35 around pivot 62 and clockwise swinging movement of link 51 around pivot 64 thereby lowering the rear end of guard 35 to its normal guarding position A of FIG. 1. During this lowering movement, a rolling action takes place between the rounded forward end of guard sidewall 55 and table 13 until guard 35 reaches position A of FIG. 1.

The relatively wide lateral spacing of link journal passages 58 and 59 along the respective pivot pins 64 and 62 will adequately resist the sidewise canting forces imposed on guard 35 and link 51 due to the canting forces applied to the longer guard sidewall 55 as a consequence of its supporting engagement with table 13 and the workpieces. Tilting of either the blade 16 or table 13 to effect a bevel cut in the workpiece takes place around an axis P (FIG. 6) lying along the intersection of the table work support surface and the plane of rotation of blade 16 in a clockwise direction as viewed from the rear of the saw and in FIG. 6. As a consequence, the guard and splitter assembly assume an angular relation to the work table as indicated by the inclined line 13 of FIG. 6 illustrative of the maximum 45° bevel angle. Since the operator stands at the front of the saw to the left side of the plane of rotation of the blade and the table support surface falls away from the longer side wall 55 relatively speaking in all angular adjustments the longer guard wall remains the supporting wall in all angular positions except for those approaching the maximum position to fully protect the operator's hands holding the workpiece. Even in the maximum angular

adjustment and adjustments approaching the maximum adjustment, the longer sidewall 55 assures greater protection than would be provided by sidewalls of equal length.

It will be appreciated from the preceding description that the present invention provides a blade guard assembly that assures maximum protection of the operator during all usage of such saws and in addition a blade guard assembly which can neither be flipped to an inoperative position nor readily removed by careless or thoughtless operators.

While these highly desirable advantages can be secured irrespective of the material employed in producing the guard 35 itself, it is preferable that guard 35 be made of a distinctively colored (preferable an alert orange color) see through plastic material, for example a thermoplastic polycarbonate resin such as General Electric Company's LEXAN, possessing a combination of toughness, impact strength, heat resistance, dimensional stability and good electrical properties. While in normal usage the metal mounting link 51 and its spaced journal passages cooperating with the respective fixedly mounted pivots 62 and 64 are adequate to resist any side thrusts applied to the guard 35 which might tend to shift guard 35 laterally relative to the kerf splitter 28 into the blade from either side, unusually heavy side thrusts applied to the splitter itself in performing its kerf parting function in heavy duty cutting operations could conceivably flex the kerf splitter arm 29 to an undesirable laterally inclined position. To guard against any such unusual operating conditions, the arm 29 rearwardly of divider blade portion 31 may be provided with a downwardly protruding lug 81 fitted into a suitable slot in table insert 17 or the table itself or its lower edge could be formed to engage in an upwardly opening slot (not shown) extending rearwardly in the table support surface in the plane of rotation of blade 16.

The invention may be embodied in other specific forms without departing from the spirit or essential characteristics thereof. The present embodiment is therefore to be considered in all respects as illustrative and not restrictive, the scope of the invention being indicated by the appended claims rather than by the foregoing description, and all changes which come within the meaning and range of equivalency of the claims are therefore intended to be embraced therein.

What is claimed and desired to be secured by Letters Patent is:

1. A safety blade guard for table type circular saws having a work support table providing an elongated blade passage and a motor driven saw blade arranged for depth of cut adjustment through the blade passage at varying angular adjustments relative to the plane of the table work support surface comprising a support bracket fixedly secured relative to the saw blade beneath the table and having a plate-like portion extending rearwardly beyond the rear edge of the work support table, a kerf splitter plate fixedly secured to said support bracket at a relatively inaccessible point beneath the rear edge of the table and including an upwardly and forwardly directed portion disposed to overlie the table in the plane of rotation of the saw blade at the rear of the saw blade and terminating at its forward end in an arcuate portion overhanging in radially spaced relation the rear segment of the blade exposed through the blade passage; link means pivotally

connected at one end to said portion of said kerf splitter inwardly from its forward end for limited swinging movement around an axis disposed at right angles to the plane of rotation of the blade between a forwardly extending guarding position overhanging the exposed blade and an upwardly and forwardly inclined guarding position overhanging the exposed blade, said pivot connection including pivot means non-removably fixed to said kerf splitter with its opposite ends projecting laterally therefrom to fixedly receive said link means; and an inverted U-shaped, elongated blade guard pivotally suspended from the other end of said link means in straddling relation to said pivot connection and the exposed portion of said saw blade in all swing positions of said blade guard, said pivotal suspension including a pivot pin non-removably fixed to said blade guard whereby a blade guard normally biased to operative blade guarding position on the work support table and incapable of being readily removed or swung to an inoperative position is assured.

2. The safety blade guard assembly of claim 1 wherein the blade guard rear end beyond said link pivot connection engages the upper edge of said kerf splitter preventing independent pivotal movement of said blade guard upwardly and rearwardly and the forward ends of said blade guard side walls extend forwardly of said exposed blade portion and are upwardly and forwardly inclined to provide camming surfaces engageable with the leading upper corner of a workpiece fed into the saw blade to pivot the blade guard and link means upwardly and rearwardly as a unit around the axis of the pivot connection to the kerf splitter until the leading upper corner of the workpiece reaches a position immediately forward of said pivotal suspension thereby permitting rapid retrograde pivotal movement of said blade guard around said pivotal suspension into bearing engagement with the upper surface of the workpiece in straddling relation to the developing saw kerf in the workpiece to guard the blade emerging through the workpiece.

3. The safety blade guard of claim 1 wherein the depending blade guard sidewall adjacent the blade face forming the acute angle with the table work support surface at the varying angular adjustments is vertically foreshortened relative to the opposite blade guard sidewall whereby said foreshortened sidewall is maintained out of contact with said work support table thereby eliminating side thrust forces on the blade guard when angular adjustments are effected to bevel cut workpieces.

4. The safety blade guard of claims 1 and 2 wherein the blade guard is formed of distinctively colored see through plastic to serve as a constant visual warning of the danger zone created by the exposed saw blade portion while permitting a clear view of the cutting action.

5. The safety blade guard of claim 1 wherein said kerf splitter is through apertured and bushed to journal said first pivot pin and said link means comprises a short, rigid metal, inverted channel member having respective axially aligned pairs of passages formed in the adjacently related sidewalls at one end to fixedly receive said first pivot pin thereby relegating pivotal wear to the bushing of said kerf splitter and the portions of the pivot pin enclosed thereby whereby canting forces applied to the blade guard during use of the saw will be torsionally resisted by said link means.

6. The safety blade guard of claim 5 wherein said bushing comprises a metal bushing having a center portion fitted to said kerf splitter through aperture, opposite end faces spaced apart to have light bearing engagement with the opposing areas of the adjacently related inner faces of the sidewalls of said channel member, and a centered longitudinal through bore coaxially related to the aligned pair of passages in said channel member one end.

7. The safety blade guard of claim 6 wherein the periphery of said metal bushing adjacent the opposite kerf splitter side faces is reduced in diameter to form a first pair of annular steps and the opposite ends are further reduced in diameter to form respective annular journals; respective anti-kickback fingers are journaled on said annular journals; and a torsion biasing spring is provided comprising a pair of axially spaced coils respectively encircling said first pair of annular steps with their adjacent ends interconnected in spanning relation to the upper edge of said kerf splitter and their outer ends drive connected to said anti-kickback fingers to bias them to dependent operative position, thereby forming a captive anti-kickback assembly.

8. The safety blade guard of claim 1 wherein said blade guard has dependent sidewalls which are inwardly thickened and coaxially through apertured at opposed points rearwardly offset from its longitudinal center to closely but freely receive said links means, said pivotal suspension includes a pivot pin fixedly carried in said blade guard side walls and journaling said link means, and said link means comprises a short rigid metal channel member having respective axially aligned pairs of journal passages formed in the adjacently related sidewall ends to journalingly receive said pivot pin of said pivot connection relegating pivotal wear to the link means and the portions of the pivot pin enclosed thereby and providing spaced bearings surfaces whereby canting forces applied to the blade guard during use of the saw will be torsionally resisted by said link means.

9. The safety blade guard of claim 8 wherein said pivot means comprises a headed pin having its head disposed in face butted engagement with one sidewall of said blade guard and a shank protruding through and beyond the opposite sidewall of said blade guard and a cap nut drive fitted to the protruding end of said pin shank into end butting engagement with the opposing blade guard sidewall operative to obviate ready removal of said headed pivot pin.

10. A splitter and safety blade guard assembly for a table type circular saw having a mounting bracket disposed below the rear table edge in fixed relation to the saw blade comprising a generally C-shaped splitter blade the lower arm of which is fixedly secured to said mounting bracket and the upper arm of which extends forwardly from the rear table edge in the plane of rotation of said saw blade to a point forwardly of a vertical plane containing the rotational axis of the saw blade, said splitter blade upper arm defining an arcuate knife edge disposed in radially spaced overlying relation to the rear segment of the exposed saw blade and having a laterally directed through passage adjacently related to its upper edge in a vertical plane offset rearwardly from its front end a distance less than half the longitudinal distance between the opposite ends of said knife edge; a journal bushing fixedly supported in said splitter blade passage with its opposite ends projecting

equidistantly beyond the opposite faces of said splitter blade; an inverted, U-shaped, elongated blade guard disposed in straddling relation to said portion of said splitter blade defining said arcuate knife edge and the front segment of the exposed saw blade, said blade guard rearwardly of its longitudinal center and adjacent its connecting web being provided with inwardly thickened, laterally spaced lands having respective laterally aligned through passages therein; a rigid channel shaped guard mounting link having dependent sidewalls the respective ends of which are spaced to receive and have bearing contact with said ends of said bushing and to be received between and having bearing contact with said lands of said guard and respective pairs of aligned through passages in said respective ends; a first pivot pin extending through said bushing and the cooperating aligned passages of said one link end and dimensioned to provide a pivotal fit with said bushing and fixed fit with said one link end; and a second headed pivot pin having a shank extending through said aligned guard passages and the cooperating aligned passages of said other link end, said shank being dimensioned to provide a fixed fit with said guard and a pivotal fit with said link.

11. The splitter and safety guard assembly of claim 10 wherein said headed pivot pin is positioned to establish a face butting engagement with one guard side wall and has a shank of sufficient length to protrude beyond said other guard wall and a cap nut is press fitted onto the protruding shank end into face butting engagement with the other guard side wall to thereby prevent the headed pivot pin from being driven out to effect removal of the guard.

12. The splitter and safety guard assembly of claim 10 wherein said first pivot pin is of a length to assure protrusion of its opposite ends beyond the opposite side

wall of said link and respective spring washers are press fitted on the opposed pin ends into face bearing contact with the opposite side walls of said link to thereby prevent the first pivot pin from being driven out to effect removal of said link.

13. The splitter and safety guard of claim 10 wherein the connecting link at said one link end is inwardly notched relative to the sidewall ends to provide an end abutment face adapted to abuttingly engage the upper edge of the splitter blade in relative pivotal movement of said link and bushing to limit the upward and backward swinging movement of said link to prevent the guard from being swung to an inoperative guarding position.

14. The splitter and guard assembly of claim 10 wherein said bushing between said link sidewalls is stepped to provide first and second pairs of annular journals, respective anti-kickback fingers are journaled on said first pair of journals in dependent relation to operatively cooperate with the upper surface of a workpiece at opposite sides of the developing saw kerf to prevent the workpiece and the severed segments of the workpiece from being kicked out of the saw by the rotating blade during a sawing operation and a double coil spring having an interconnecting bridging run engaging the upper edge of said splitter blade and respective hooked outer ends engaging said anti-kickback fingers has its coils mounted on said second pair of journals whereby said spring will be tensioned by rearward swinging movement of said anti-kickback fingers upon feeding a workpiece into the saw and against the kickback fingers to forcefully engage the kickback fingers with the workpiece during the sawing operation.

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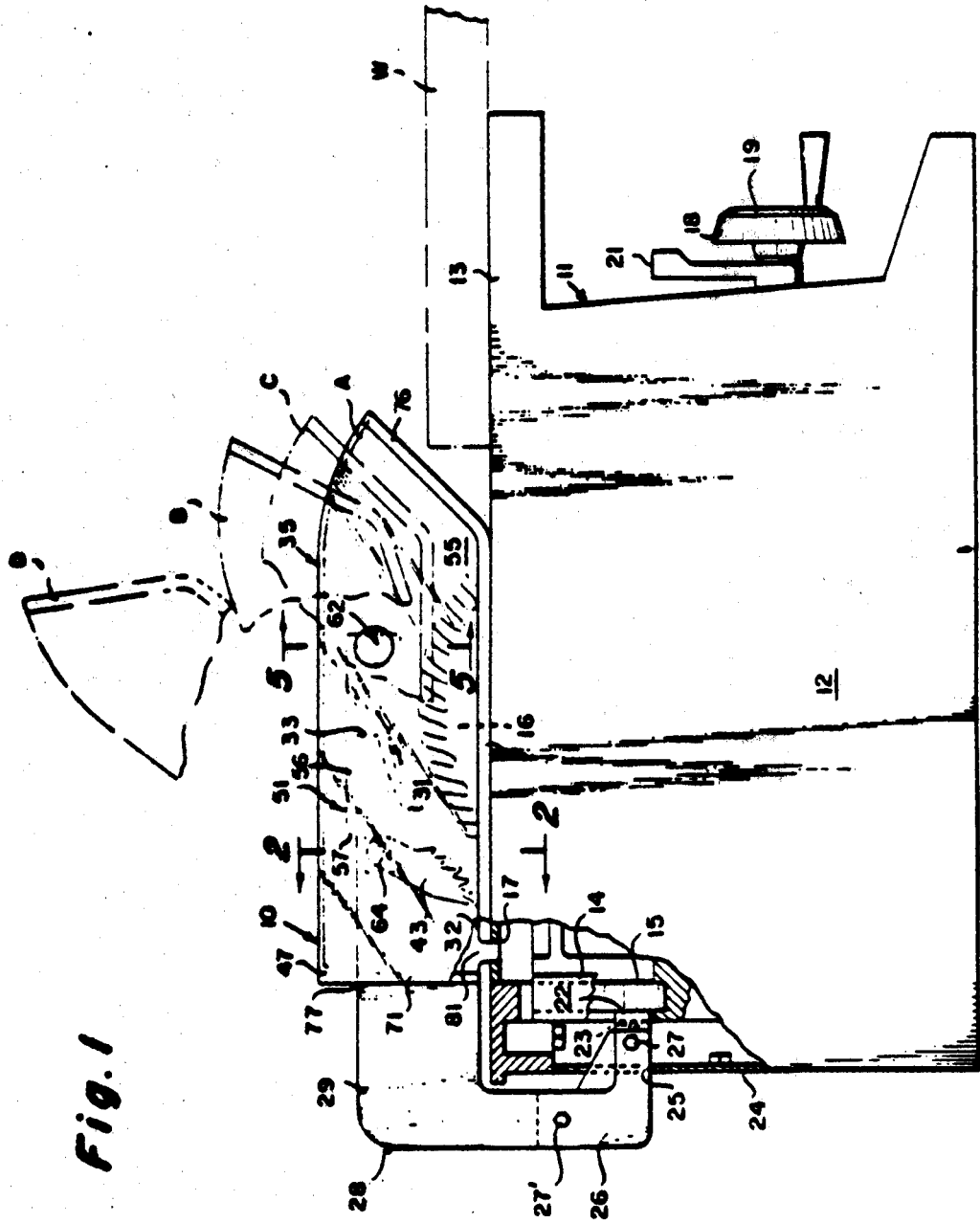


Fig. 1

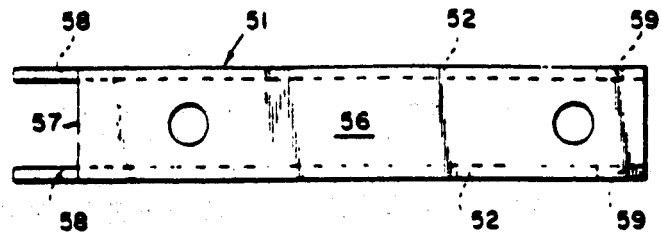
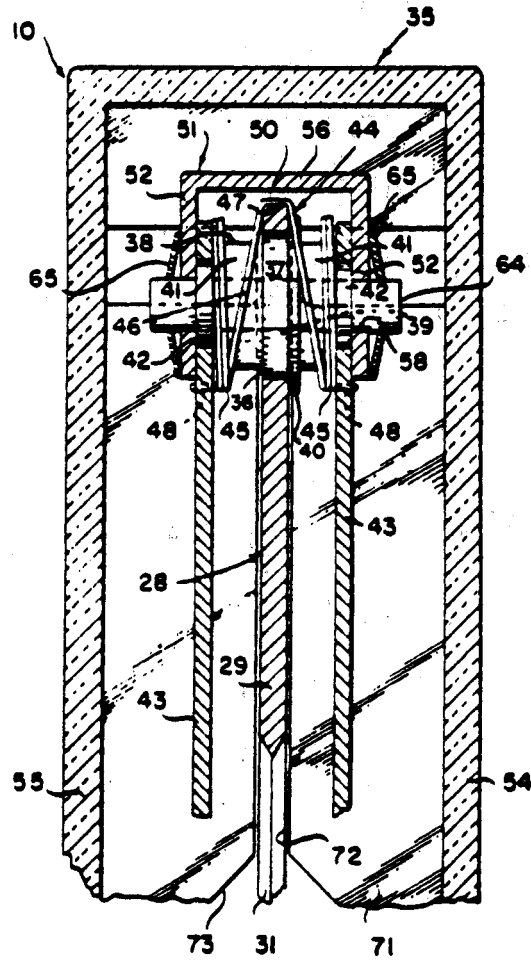


Fig. 3

Fig. 2



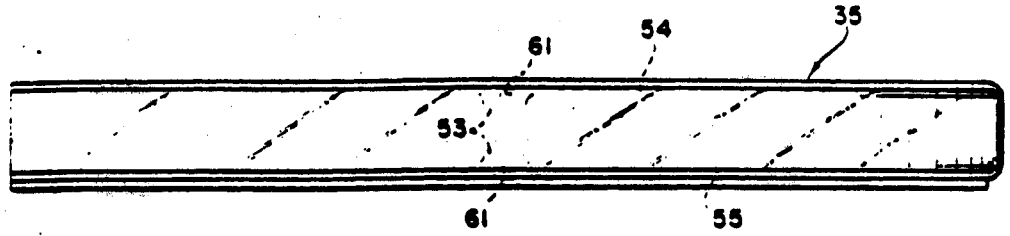


Fig. 4

Fig. 5

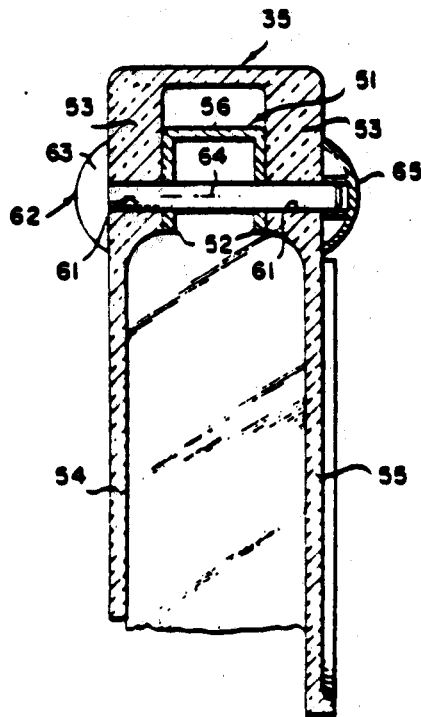
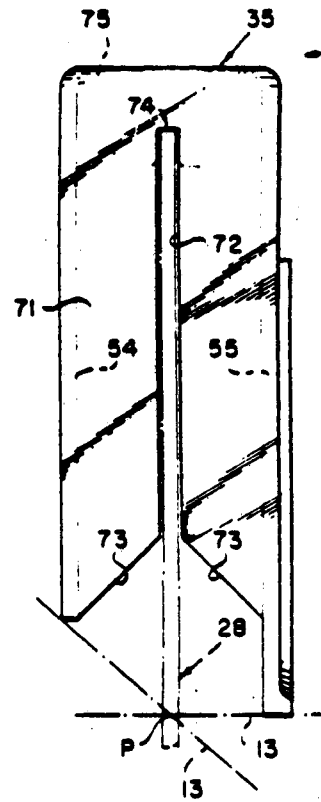


Fig. 6



[34] ADJUSTABLE FENCE

[75] Inventor: John H. Estess, Tupelo, Miss.

[73] Assignor: Rockwell International Corporation, Pittsburgh, Pa.

[21] Appl. No.: 890,148

[22] Filed: Mar. 27, 1978

[51] Int. Cl. B23Q 3/08

[32] U.S. Cl. 269/306

[38] Field of Search 269/297-301, 269/304-306, 315-320; 144/253 R, 253 G, 253 J; 83/467-468, 438, 446-447

[56]

References Cited

U.S. PATENT DOCUMENTS

2,129,133 9/1938 Iben 269/306
3,348,991 10/1967 Carrasco 269/297

FOREIGN PATENT DOCUMENTS

365831 1/1932 United Kingdom 144/253 J

Primary Examiner—Robert C. Watson

[57]

ABSTRACT

A rip fence for table saws extensively used in wood-working. The rail of the fence is made in two parts, the lower one being vertically adjustable to provide a minimum table clearance.

4 Claims, 3 Drawing Figures

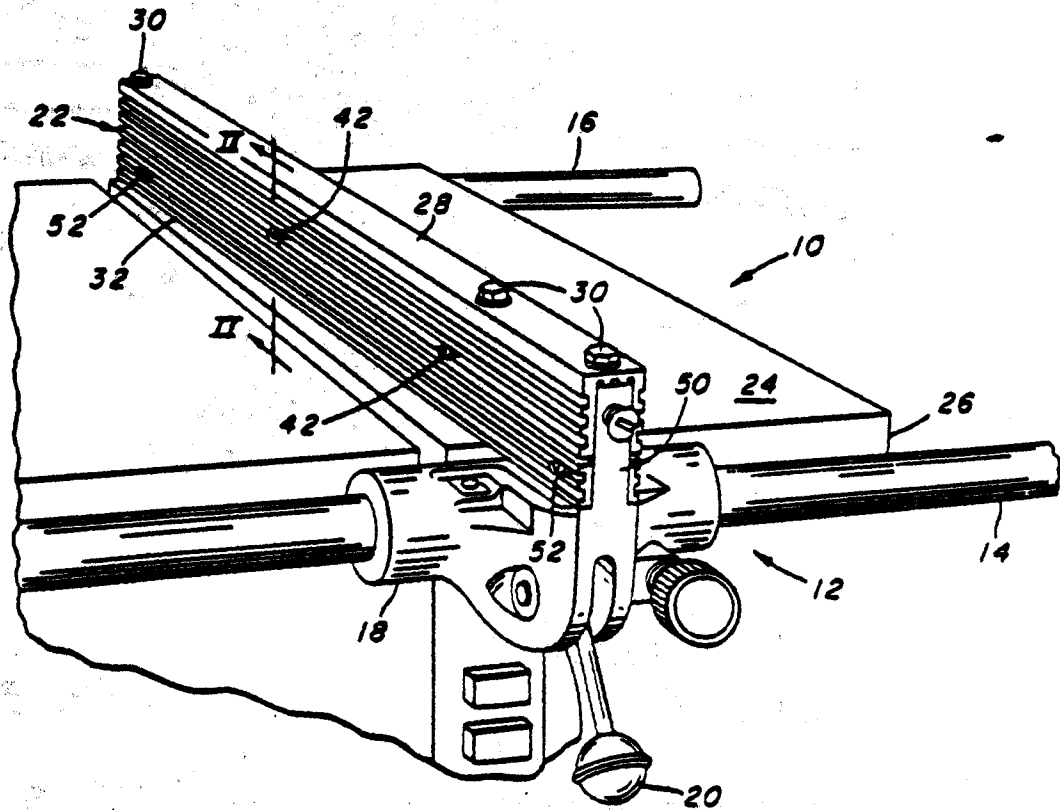


EXHIBIT
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FIG. 1.

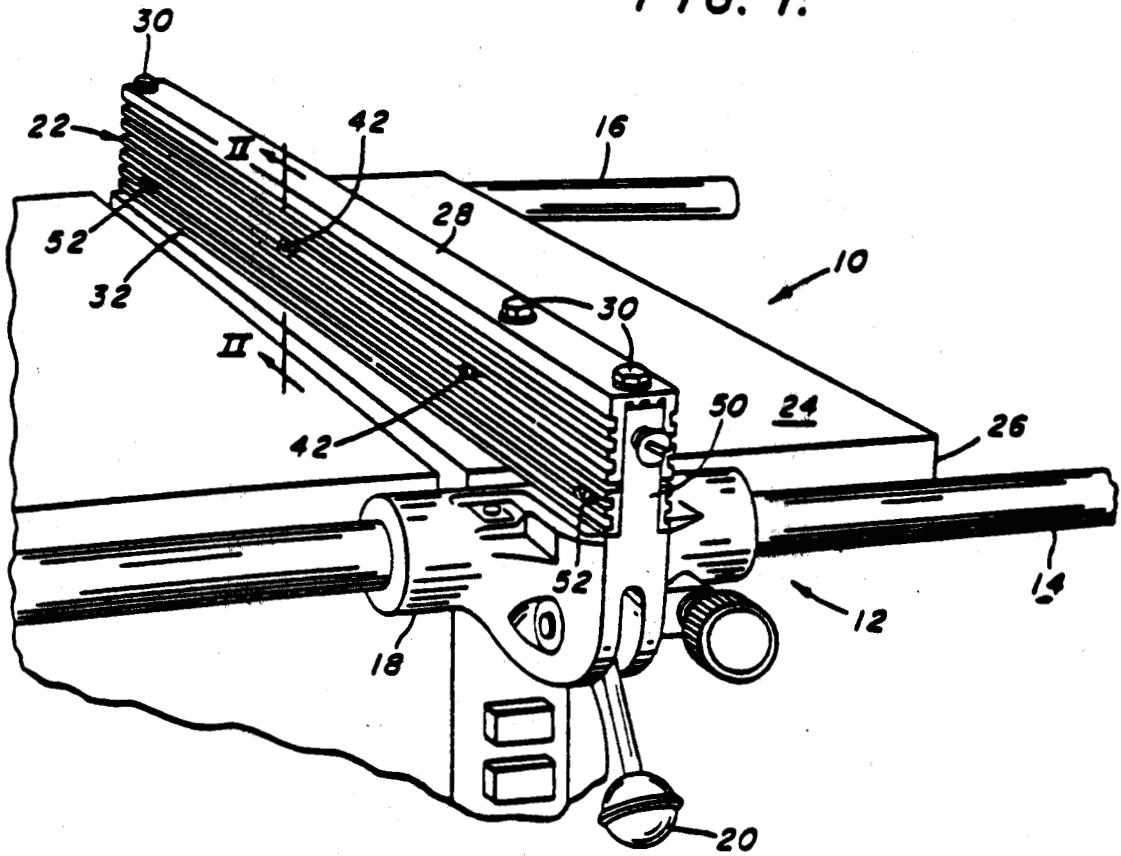


FIG. 2.

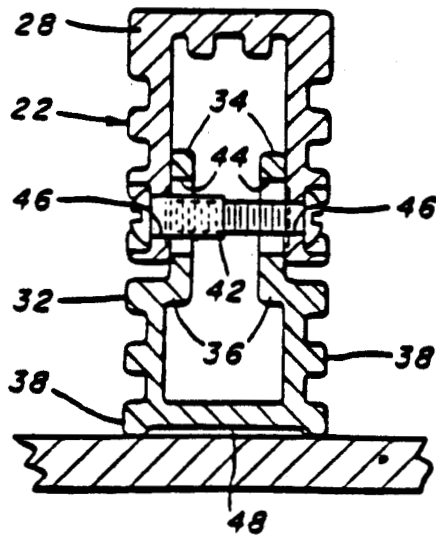
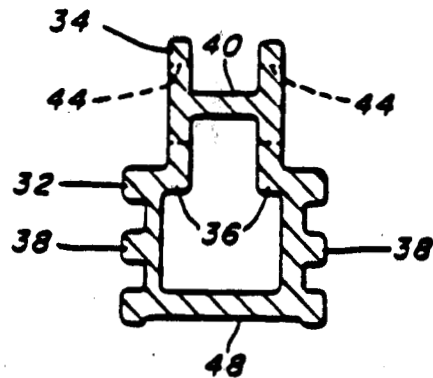


FIG. 3.



ADJUSTABLE FENCE

BACKGROUND OF THE INVENTION

This invention pertains to a work-guiding fence for use with mechanically driven tools, and more specifically finds extensive use with motor driven woodworking tools, such as circular saws, band saws, scroll saws, etc. Gauges (or fences) of this type have been used in varying degrees of sophistication for many years. One of the better examples is shown and described in U.S. Pat. No. 2,325,082.

With the greatly increased use of laminates and veneers in recent years, however, the clearance of the gauge above the worktable became critical. These new, thinner, pieces would find their way between the table surface and the bottom of the rail on some tools when the accumulated manufacturing tolerances all worked the wrong way.

SUMMARY OF THE INVENTION

Accordingly, it is a principal object of this invention to provide a rip fence (or work gauge) that has a bottom portion vertically adjustable to provide the capability of fixing the table abutting surface as close to the table surface as desired.

It is a further object of this invention to provide an adjustable fence for a woodworking tool to permit assembly of mass-produced items to be accomplished, leaving a precision accessory as the finished product.

BRIEF DESCRIPTION OF THE DRAWINGS

FIG. 1 shows the rip gauge in place on a saw table, only a portion of the table and base of the saw being shown;

FIG. 2 is a section along II—II of FIG. 1; and,

FIG. 3 is a section through the lower member of the two-part rail, showing the reinforcing cross rib.

DESCRIPTION OF THE PREFERRED EMBODIMENT

FIG. 1 shows a portion of a table saw 10 with a gauge 12 mounted on front and rear guide rails 14 and 16 respectively. Work gauges of this type have been used for many years, with the guide rails and clamping brackets being of many forms. These shown here are more fully described in U.S. Pat. No. 2,630,845, the specification of which may be referred to for a fuller understanding of the operation. The above-mentioned patent, assigned to a predecessor of the assignee of this application, is hereby incorporated by reference.

These gauges are most frequently used on table saws in the woodworking field, and are adjustably set (and fixed in place) varying distances from the saw blade to guide the workpiece past the saw blade. The gauge assembly 12 is most often used for ripping a long length, but can be used for a stop for cutting off, or for making bevel cuts. In all the operations, however, the front clamping bracket 18 and the rear clamping bracket (not shown) are locked in the clamped position by handle 20.

With the popularity of laminates and veneers, extremely thin sheets of material are being worked on by carpenters and others. This means that the elongated rail 22 of the gauge assembly 12 must have a minimum of clearance from the top 24 of table 26 of the saw 10. In the instant invention, rail 22 is made in two pieces. The top portion 28 has a channel-shaped configuration, with the open side facing the saw table 26. It is fixed to the

clamping brackets at the front and rear by machine bolts 30. The lower part 32 of rail 22 has the shape shown in FIG. 3, with upstanding legs 34 adapted to closely fit inside the downwardly depending legs of top 28. These upstanding legs are outwardly offset at 36 so that the outer faces 38 of the bottom portion of lower part 32 are co-planar with the vertical faces of the top part 28 of rail 22. A stiffening rib 40 runs horizontally longitudinally between legs 34, and suitable fasteners 42 extend through vertically elongated openings 44 in lower part 32. These fasteners snugly fit holes 46 in the downwardly depending legs of the top rail portion 28. When the fasteners 42 are drawn up tightly, they pull the depending legs of top 28 into snug frictional engagement with upstanding legs 34 of lower portion 32. From this description, it will be seen that the vertical positioning of the top 28 of rail 22 with respect to the table surface 24 depends on the manufacturing and assembly tolerances of the guide rails 14 and 16, the clamping brackets (only the front one, 18, is shown), and top 28 itself. Thus, the ability to adjust the lower part 32 of rail 22 becomes almost a necessity, with the increased use of extremely thin materials, as mentioned above. It should be observed here that the ribs and grooves shown on the external side faces of the two parts of rail 22 were merely selected to give a rigid section, yet with light weight for ease of moving the guide over the saw table. The exterior surfaces could just as well be planar, so long as the upper 28 and lower 32 parts of rail 22 are co-planar on each face. Also, the recess 48 in the bottom surface is a convenience to reduce frictional contact with the table top 24. The rib 40, however, is necessary to provide support to the legs 34.

At the ends of the lower part 32, where the flanges of the lower part embrace the upstanding leg 50 of front clamping bracket, and at the rear clamping bracket which is not shown, the upstanding legs 34, the stiffening rib 40, and the offset, or connecting portion 36 is removed, as is the bottom planar surface 48 of lower part 32. This leaves the two outer portions 38 to enclose the lower portion of leg 50. A fastener 52, similar to fasteners 42, is used to keep these outer portions in place. A similar construction is at the back end. These fasteners 52 do not engage the legs of the clamping brackets, merely keeping the portions 38 snug to the brackets.

From the above description it can be seen that, after initial assembly of the guard (or fence) in place over the saw table, or whenever it is desired to adjust the clearance of the rail 22 over the table top 24, the fasteners 42 and the fasteners 52 can be slightly loosened and the lower part 32 of the rail can be vertically positioned where desired. The fasteners are then snugged up, and the guide is ready for use. The accumulated manufacturing and assembly tolerances are accommodated, and an accurate guide suitable for exceptionally thin sheets of material is ready for use.

I claim:

1. A gauge adapted for use with a machine tool having a worktable, gauge supporting means separate from the table but secured thereto adjacent both the front and the rear edges thereof, said means providing gauge clamping surfaces therealong, said gauge being movable over said table, said gauge having front and rear clamping brackets, and a two-part rail member connecting said clamping brackets, said two-part rail member comprising, a downwardly open channel-shaped upper

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member fixed to said clamping brackets and a table-engaging lower member adjustably fixed to said upper member.

2. The gauge of claim 1 wherein said lower rail member has upwardly extending leg portions closely received within said downwardly open channel-shaped upper member.

3. A work-guiding gauge adapted for use with a machine tool having a worktable and movable thereover, said gauge comprising front and rear clamping brackets for engagement with table members for adjustably clamping said gauge in any of a plurality of desired locations over said table, said clamping brackets fixed one at each end of one part of a rail member, said one part having a downwardly-open channel shape in transverse cross-section, and the downwardly-extending legs of said one part closely engaging a second part of said

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rail member, said second part being vertically adjustable with respect to said first part, the two parts being adjustably fixed by releasable means.

4. In a woodworking machine having a work-receiving table and a work-guiding gauge movable thereover, means for adjusting the vertical clearance of the gauge with respect to the table, said means comprising a two-part rail member, one part of which is suspended above said table on front and rear clamping brackets, the other part of said rail member being vertically adjustably suspended from said one part, whereby said other part may be adjusted for a desired clearance from said table, said other part depending from said one part between said one part and said work-receiving table, said two parts presenting a co-planar work-engaging surface normal to the surface of said work-receiving table.

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Registered July 25, 1939

Trade-Mark 369,416

REPLISHED

RENEWED

Under Sec. 12 (c) 1946 Act OCT 10 1948

*Rockwell Mfg Co
Pittsburg, Pa.*

RECEIVED SEC. 8

RECEIVED SEC. 15
OCT 10 4 54

UNITED STATES PATENT OFFICE

Delta Manufacturing Company, Milwaukee, Wis.

Act of February 20, 1905

Application October 10, 1938, Serial No. 411,448

UNISAW

IV

STATEMENT

To the Commissioner of Patents:

Be it known that the Delta Manufacturing Company, a corporation duly organized under the laws of the State of Wisconsin and located at Milwaukee, Wisconsin, and doing business at 600-634 East Vienna Avenue, Milwaukee, Wisconsin, has adopted and used the trade-mark shown in the accompanying drawing, for CIRCULAR SAWS AND SAW TABLES, in Class 23, Cutlery, machinery, and tools, and parts thereof, and presents herewith five specimens showing the trade-mark as actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended.

The trade-mark has been continuously used in the business of said corporation since September 23, 1938.

The trade-mark is applied or affixed to the goods and/or the package containing the same by stamping, printing or stenciling the same thereon, or by affixing to the goods and/or the package a printed label, or by placing in the package a circular having the trade-mark thereon or by placing thereon decalcomania transfers or metal name plates bearing the mark.

DELTA MANUFACTURING COMPANY,
By HERBERT E. TAUTZ,
President.

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EXHIBIT
DELTA
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ALL-STATE LEGAL SUPPLY CO.

23

United States Patent Office

765,006
Registered Feb. 18, 1964

AFFIDAVIT SEC. 8
ACCEPTED

PRINCIPAL REGISTER
Trademark
Under Section 2 (f)

AFFIDAVIT SEC. 15
RECEIVED 10-13-69

Ser. No. 147,314, filed June 20, 1962

ROCKWELL

Rockwell Manufacturing Company (Pennsylvania corporation)
400 N. Lexington Ave.
Pittsburgh 6, Pa.

For: TOOLS FOR BORING, SAWING, SHAPING
AND SURFACE FINISHING MATERIALS, PARTS
THEREOF AND ATTACHMENTS AND ACCESSORIES
THERE TO, in CLASS 23.
First use Dec. 13, 1945; in commerce Dec. 13, 1945.
Owner of Reg. Nos. 533,232, 685,401, and others.

EXHIBIT
DELTA
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ALL-STATE LEGAL SUPPLY CO.
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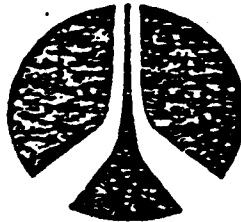
Int. CL: 7

Prior U.S. CL: 21, 23, 24

United States Patent Office

Reg. No. 1,031,246
Registered Jan. 27, 1976

TRADEMARK
Principal Register



Rockwell International Corporation (Delaware corporation)
600 Grant St.
Pittsburgh, Pa. 15219

For: SEWING MACHINES AND COMPONENT PARTS THEREOF; INTERNAL COMBUSTION ENGINES; POWER TOOLS FOR BORING, SEWING, SHAPING AND SURFACE FINISHING MATERIALS AND PARTS THEREOF; SHOP-TYPE VACUUM CLEANERS AND DUST COLLECTORS; GRASS TRIMMERS; LAWN EDGERS; HEDGE TRIMMERS; SEWER PIPE CLEANING MACHINES AND PARTS

THEREOF; LAUNDRY WASHING AND DRYING MACHINES AND PARTS THEREOF; DISHWASHERS AND PARTS THEREOF, AND GARBAGE DISPOSALS AND PARTS THEREOF, in CLASS 7 (U.S. CLS. 21, 23 and 24).

First use Feb. 19, 1973; in commerce Feb. 19, 1973.
Owner of Reg. Nos. 890,492, 961,532, and others.

Ser. No. 54,454, filed June 9, 1975.

CHARLES R. FOWLER, Supervisory Examiner
RICHARD A. STRASER, Examiner

particular machines so designated in Delta's Complaints and in issue in the Commission Investigation No. 337-TA-174.

2. Trading Company agrees that it has been directly or indirectly exporting or offering to export to the United States and/or selling to others for exportation to the United States one or more of the woodworking machines of the type identified in paragraph 1 above (hereafter called "exported machines") that Delta asserts are confusingly similar in trade dress to corresponding Delta woodworking machines of the type identified in paragraph 1. The exported 10 inch table saws have in certain instances been sold under the term "Contractor's Saw." Trading Company acknowledges that Delta alleges that such exported machines are confusingly similar in trade dress with such Delta machines and that Delta further alleges that the importation into the United States and marketing and/or sale of such machines in the United States infringes Delta's rights in and relating to the design appearance, shape and trade dress of such machines.

3. (a) Trading Company agrees that the blade guards incorporated on the 10 inch table saws and 10 inch tilting arbor saw herein are alleged by Delta to infringe Delta's United States Letters Patent No. 3,754,493.

(b) Trading Company agrees that the adjustable-height fence incorporated on the 10 inch tilting arbor saw herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,174,100.

(c) Trading Company agrees that the planer herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,436,126.

4. Trading Company further agrees that the use of the term "Contractor's Saw" is alleged to infringe Delta's asserted common law trademark rights in such term.

5. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any of the exported machines referred to in Paragraph 2 above or any other machines of the types subject to this investigation having allegedly confusingly similar trade dress. If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

(b) Delta agrees that Trading Company may supply such replacement parts and/or complete machines of the accused design as replacements to the extent necessary to satisfy Trading Company's obligations to United States importers regarding warranties granted to such importers and returns of machines from such importers, provided that no such replacements of the accused machines shall be exported from Taiwan after March 15, 1985. If

Trading Company exports more than fifteen (15) such replacement machines of the accused design, then Trading Company shall provide, through its attorney, notification to Delta's attorney of such export and the number of machines exported and shall, upon request, provide to Delta's attorney sufficient documentation showing the destruction of the accused machines for which such replacement machines have been provided.

6. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any further (a) blade guards that Delta alleges infringe Delta's United States Letters Patent No. 3,754,493 or fences that Delta alleges infringe Delta's United States Letters Patent No. 4,174,100 as part of or separate from a saw, or (b) planers that Delta alleges infringe Delta's United States Letters Patent No. 4,436,126.

(b) If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

7. Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any

other company for exportation to the United States any woodworking machines of the type identified in paragraph 1 above which are allegedly confusingly similar to Delta's woodworking machines of the type identified in paragraph 1 above, and will within thirty (30) days after signing this Agreement cease use of the term "Contractor's Saw" or any other allegedly confusingly similar term. Delta agrees that Trading Company can directly or indirectly export to the United States and/or sell to other companies for export to the United States those machines of new design obtained from the settling manufacturers with respect to which Delta has indicated that such settling manufacturers can export to the United States.

8. Trading Company represents that it has not used and agrees that it will not use any of the registered trademarks in issue including Delta's registered trademark Unisaw[®].

9. (a) Trading Company agrees that it will not in any way indicate or imply that any of the woodworking machines directly or indirectly exported, marketed and/or sold by Trading Company are manufactured by or under license from Delta or Rockwell or substantially identical or substantially similar in appearance, design and/or trade dress to woodworking machines made and/or sold by Delta or Rockwell or that any parts of accessories for woodworking machines made and/or sold by Rockwell or Delta will fit or can be used with the woodworking machines exported, marketed and/or sold by Trading Company. These restrictions shall not prohibit Trading Company, at its own risk, from indicating or communicating that any expendable parts such as saw blades for

woodworking machines made and/or sold by Delta will fit on or can be used with the woodworking machines exported, marketed and/or sold by Trading Company, providing such expendable parts do in fact fit. Such limitations shall include but not be limited to Trading Company's advertising and communications, both oral and written, with potential or actual customers. Nothing contained herein shall be construed as an admission by Trading Company that Trading Company has in any way indicated or implied that the subject machines are or were manufactured by or under license from Delta.

(b) Delta agrees that, in written or oral communication with present or potential customers or in its advertising or public statements, Delta will not state, discuss, or refer to its settlements in this action unless Delta also states conspicuously in the same communication that the terms of the settlement agreements prohibit the Taiwanese industry from exporting to the United States machines confusingly similar to Delta's products or which infringe Delta's patents but do not prohibit the Taiwanese industry from exporting machines that are not confusingly similar in appearance to Delta's products and do not infringe Delta's patents.

10. Delta and Trading Company agree to join in a Motion in the Commission's investigation for entry of a Consent Order as between Delta and Trading Company and termination of the investigation as to Trading Company. This Consent Order shall be in a form such as the Consent Order attached hereto as Exhibit A incorporated by reference herein or in a form otherwise mutually

agreed upon by the respective attorneys for Delta and for Trading Company.

11. If at any time after October 15, 1984, Delta believes that woodworking machines, which Delta alleges infringe upon Delta's trademark and/or patent rights, being imported into the United States originated from and/or were sold by Trading Company, then Delta may inquire of Trading Company directly or through its present attorney in the United States if any such woodworking machines originated from and/or were sold by Trading Company and Trading Company shall respond to such inquiry, providing the information requested within 30 days of such request.

12. Any controversy or claim including but not limited to all claims for damages and/or any other relief arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association; such arbitration shall be held in Pittsburgh, Pennsylvania before a single arbitrator and judgment upon the award rendered by the Arbitrator may be entered in any Court and/or tribunal in any country having jurisdiction over any of the parties. This provision in this paragraph of this Agreement shall not in any way restrict and/or limit and/or prevent Delta or Trading Company from seeking any other appropriate relief and/or action from or by the Commission.

13. Delta releases and discharges Trading Company, together with its predecessors, successors and assigns, together with the officers, directors, agents and employees of any of them from any and all legal or equitable claims that Delta may have or may have

had with respect to Trading Company's sales of the woodworking machines or other unfair acts covered hereby for any conduct that may have occurred up to the date of the signing of this agreement by Delta. This release shall not in any way extend to any other manufacturer, trading company, exporter, importer, purchaser or customer from which Trading Company purchases or to which Trading Company sells any of the woodworking machines covered hereby and/or any portions thereof. If Trading Company breaches this Agreement, then this release by Delta to Trading Company shall become null and void. Trading Company releases and discharges Delta, together with its predecessors, successors, affiliated companies and assigns, together with its officers, directors, agents and employees of any of them, from any and all causes of actions and claims for damages that Trading Company may have against them relating to or arising out of the present investigation before the Commission and the matters raised therein. If Delta breaches this Agreement, then the release by Trading Company to Delta shall become null and void.

14. As to the subject matter of this agreement, this agreement sets forth the entire understanding and agreement of Delta and Trading Company, and there are no restrictions, promises, representations, warranties, covenants or understandings other than those expressly set forth or referred to herein. This agreement supersedes all prior agreements and understandings between the parties with respect to this subject matter.

15. This agreement shall be governed by the law of the Commonwealth of Pennsylvania as to all matters, including but not

limited to matters of validity, construction, effect and performance; provided however, that this paragraph does not apply to any matters under the United States patent laws and/or other laws of the United States with respect to which the Federal Courts have preemptive and exclusive jurisdiction.

16. This agreement may be executed in two or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. Subject to applicable law, this agreement may be amended or modified only by written agreement of Delta and Trading Company signed by both parties or by the party to be charged.

18. Nothing contained in this agreement nor the act of making this agreement nor the entry of the Consent Order pursuant hereto shall be deemed to constitute any admission by either party hereto as to the accuracy, or lack of accuracy, of (a) any allegation or

contention of Delta as set forth in any of the Complaints or of (b) any allegation or contention of Trading Company as set forth in its answer thereto.

IN WITNESS WHEREOF, this Settlement Agreement has been executed by the parties on the dates shown below.

DELTA INTERNATIONAL MACHINERY CORPORATION

Date: NOV. 08 1984

By [Signature] Formosan United Corporation

Signature of copy

Date: 2/20/85

By [Signature]

Notarize here ->

Taiwan } City of Taipei } American Institute in Taiwan, Taipei Office }

Stephen R. Fox Special Notary (PL 96-8), duly appointed and qualified, do hereby certify that on this date of NOV. 08 1984, before me personally appeared [Signature] to me personally known to be the individual(s) described in whose name(s) is/are subscribed to and who executed the within instrument and being informed by me of the contents of the said instrument he/she/they duly acknowledged to me that he/the/they executed the same freely and voluntarily for uses and purposes therein mentioned in witness whereof I have hereunto set my hand and official seal the day and year last about written.

Stephen R. Fox Special Notary (PL 96-8)

[Signature]

THE SUBSCRIBER DOES NOT APPEAR TO THE SPECIAL NOTARY TO BE THOROUGHLY CONVERSANT WITH THE ENGLISH LANGUAGE.

City of Pittsburgh, State of Pennsylvania, County of Allegheny, sworn to and subscribed before me this 20th day of Feb 1985

JAY E. KROGER, SR., NOTARY PUBLIC PITTSBURGH, ALLEGHENY COUNTY BY COMMISSION EXPIRES MAY 1, 1986 Member, Pennsylvania Association of Notaries

[Exhibit A]

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

In the Matter of)

CERTAIN WOODWORKING MACHINES)

) Investigation No. 337-TA-174
)

CONSENT ORDER TO CEASE AND DESIST
DIRECTED TO RESPONDENT ~~Formosan United Corporation~~

The complainant, Delta International Machinery Corporation (hereafter called "Delta"), and respondent ~~Formosan United Corporation~~ (hereafter called "Trading Company"), having entered into an agreement which resolves the dispute between Delta and Trading Company that is part of the subject matter of the current investigation, have jointly requested entry of this Consent Order with respect to the dispute between them. A copy of the agreement is submitted herewith

IT IS HEREBY ORDERED AND DECREED THAT AS BETWEEN DELTA AND TRADING COMPANY:

1. The United States International Trade Commission (hereafter called "Commission") has jurisdiction over the subject matter of the investigation including the dispute between Delta and Trading Company pursuant to 19 U.S.C. §1337 in that such

dispute involves claims of unfair competition and unfair acts in the importation of articles under 19 U.S.C. §1337. The Commission has jurisdiction over Trading Company for the purposes of issuing and enforcing this Consent Order to Cease and Desist. Further, this proceeding and settlement are in the public interest.

2. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the design appearance, shape and trade dress of Delta's woodworking machines in issue in the current investigation.

3. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the term "Contractor's Saw."

4. Delta has alleged, and Trading Company has denied, that Delta is the owner of the full right, title and interest in and to United States Letters Patents No. 3,754,493, No. 4,174,100, and No. 4,436,126.

5. Delta has alleged, and Trading Company has denied, that Trading Company has infringed Delta's rights in and relating to the design appearance, shape and trade dress of one or more of Delta's woodworking machines in issue and has infringed Delta's rights in and relating to the term "Contractor's Saw."

6. Delta has alleged, and Trading Company has denied, that Trading Company has unfairly competed with Delta by directly and/or indirectly participating in the exportation to the United States of woodworking machines that are confusingly similar to one or more of Delta's woodworking machines in issue and in the use of the term "Contractor's Saw."

7. Delta has alleged, and Trading Company has denied, that to the extent that Trading Company sells the subject 10 inch table saw, the 10 inch tilting arbor saw, and/or the planer, Trading Company has infringed Delta's United States Letters Patents No. 3,754,493, No. 4,174,100, and/or No. 4,436,126, and has thereby unfairly competed with Delta.

8. Consistent with the terms and conditions of the attached agreement between Delta and Trading Company, Trading Company, its affiliated and associated companies, their officers, directors, agents, servants, employees, or any of them, and all persons acting in concert or participation with them or with any of the foregoing, are hereby ordered to cease and desist from engaging in all of the unfair methods of competition and unfair acts here allegedly involved, as set forth above, to the extent provided in the attached agreement.

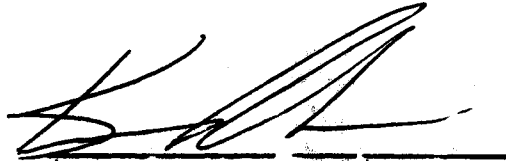
9. Delta and Trading Company hereby waive all rights to appeal or to otherwise challenge the validity of this Consent Order.

10. The rules and regulations of the Commission regarding enforcement and modification of final Commission actions are applicable to this Consent Order.

11. This investigation is hereby terminated with respect to

Formosan United Corporation

firm
name



Kenneth R. Mason
Secretary

Issued: June 18, 1985

[Exhibit A]

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

In the Matter of)
))
CERTAIN WOODWORKING MACHINES) Investigation No. 337-TA-174

CONSENT ORDER TO CEASE AND DESIST
DIRECTED TO RESPONDENT

The complainant, Delta International Machinery Corporation (hereafter called "Delta"), and respondent GOOD WILL MERCANTILE CO. (hereafter called "Trading Company"), having entered into an agreement which resolves the dispute between Delta and Trading Company that is part of the subject matter of the current investigation, have jointly requested entry of this Consent Order with respect to the dispute between them. A copy of the agreement is submitted herewith

IT IS HEREBY ORDERED AND DECREED THAT AS BETWEEN DELTA AND TRADING COMPANY:

1. The United States International Trade Commission (hereafter called "Commission") has jurisdiction over the subject matter of the investigation including the dispute between Delta and Trading Company pursuant to 19 U.S.C. §1337 in that such

dispute involves claims of unfair competition and unfair acts in the importation of articles under 19 U.S.C. §1337. The Commission has jurisdiction over Trading Company for the purposes of issuing and enforcing this Consent Order to Cease and Desist. Further, this proceeding and settlement are in the public interest.

2. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the design appearance, shape and trade dress of Delta's woodworking machines in issue in the current investigation.

3. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the term "Contractor's Saw."

4. Delta has alleged, and Trading Company has denied, that Delta is the owner of the full right, title and interest in and to United States Letters Patents No. 3,754,493, No. 4,174,100, and No. 4,436,126.

5. Delta has alleged, and Trading Company has denied, that Trading Company has infringed Delta's rights in and relating to the design appearance, shape and trade dress of one or more of Delta's woodworking machines in issue and has infringed Delta's rights in and relating to the term "Contractor's Saw."

6. Delta has alleged, and Trading Company has denied, that Trading Company has unfairly competed with Delta by directly and/or indirectly participating in the exportation to the United States of woodworking machines that are confusingly similar to one or more of Delta's woodworking machines in issue and in the use of the term "Contractor's Saw."

7. Delta has alleged, and Trading Company has denied, that to the extent that Trading Company sells the subject 10 inch table saw, the 10 inch tilting arbor saw, and/or the planer, Trading Company has infringed Delta's United States Letters Patents No. 3,754,493, No. 4,174,100, and/or No. 4,436,126, and has thereby unfairly competed with Delta.

8. Consistent with the terms and conditions of the attached agreement between Delta and Trading Company, Trading Company, its affiliated and associated companies, their officers, directors, agents, servants, employees, or any of them, and all persons acting in concert or participation with them or with any of the foregoing, are hereby ordered to cease and desist from engaging in all of the unfair methods of competition and unfair acts here allegedly involved, as set forth above, to the extent provided in the attached agreement.

9. Delta and Trading Company hereby waive all rights to appeal or to otherwise challenge the validity of this Consent Order.

10. The rules and regulations of the Commission regarding enforcement and modification of final Commission actions are applicable to this Consent Order.

11. This investigation is hereby terminated with respect to CORD WILL MERCANTILE Co.



Kenneth R. Mason
Secretary

Issued: June 18, 1985

SETTLEMENT AGREEMENT

date → This agreement is entered into this Second day of October, 1984 by and between Delta International Machinery Corporation (hereafter called "Delta") having its principal place of business at 400 North Lexington Avenue, Pittsburgh, Pennsylvania, 15208, GOLD WILL MERCANTILE Co. and P. O. Box 158 TAIPEI, TAIWAN (hereafter called "Trading Company"), *Firm name* → having its principal place of business at P. O. Box 158 TAIPEI, TAIWAN, *Firm address* → Taiwan, Republic of China.

WHEREAS, the United States International Trade Commission (hereafter called "Commission") has initiated an investigation under §337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337), based on a Verified Complaint and a Verified Revised Amended Complaint (hereafter collectively called "Complaints") filed by Delta seeking relief against certain alleged methods of unfair competition and alleged unfair acts of a number of respondents including Trading Company;

WHEREAS, Delta and Trading Company desire to resolve all of the matters between them raised by such Complaints and to resolve their claims and differences relating thereto;

NOW THEREFORE, Delta and Trading Company in consideration of the mutual promises and covenants herein set forth, do hereby agree as follows:

1. As used in this agreement, the terms 10 inch tilting arbor saw, 10 inch table saw, 14 inch band saw, 6 inch jointer, shaper, 8 inch bench saw, disk/belt finisher and planer shall mean those

particular machines so designated in Delta's Complaints and in issue in the Commission Investigation No. 337-TA-174.

2. Trading Company agrees that it has been directly or indirectly exporting or offering to export to the United States and/or selling to others for exportation to the United States one or more of the woodworking machines of the type identified in paragraph 1 above (hereafter called "exported machines") that Delta asserts are confusingly similar in trade dress to corresponding Delta woodworking machines of the type identified in paragraph 1. The exported 10 inch table saws have in certain instances been sold under the term "Contractor's Saw." Trading Company acknowledges that Delta alleges that such exported machines are confusingly similar in trade dress with such Delta machines and that Delta further alleges that the importation into the United States and marketing and/or sale of such machines in the United States infringes Delta's rights in and relating to the design appearance, shape and trade dress of such machines.

3. (a) Trading Company agrees that the blade guards incorporated on the 10 inch table saws and 10 inch tilting arbor saw herein are alleged by Delta to infringe Delta's United States Letters Patent No. 3,754,493.

(b) Trading Company agrees that the adjustable-height fence incorporated on the 10 inch tilting arbor saw herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,174,100.

(c) Trading Company agrees that the planer herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,436,126.

4. Trading Company further agrees that the use of the term "Contractor's Saw" is alleged to infringe Delta's asserted common law trademark rights in such term.

5. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any of the exported machines referred to in Paragraph 2 above or any other machines of the types subject to this investigation having allegedly confusingly similar trade dress. If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

(b) Delta agrees that Trading Company may supply such replacement parts and/or complete machines of the accused design as replacements to the extent necessary to satisfy Trading Company's obligations to United States importers regarding warranties granted to such importers and returns of machines from such importers, provided that no such replacements of the accused machines shall be exported from Taiwan after March 15, 1985. If

Trading Company exports more than fifteen (15) such replacement machines of the accused design, then Trading Company shall provide, through its attorney, notification to Delta's attorney of such export and the number of machines exported and shall, upon request, provide to Delta's attorney sufficient documentation showing the destruction of the accused machines for which such replacement machines have been provided.

6. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any further (a) blade guards that Delta alleges infringe Delta's United States Letters Patent No. 3,754,493 or fences that Delta alleges infringe Delta's United States Letters Patent No. 4,174,100 as part of or separate from a saw, or (b) planers that Delta alleges infringe Delta's United States Letters Patent No. 4,436,126.

(b) If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

7. Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any

other company for exportation to the United States any woodworking machines of the type identified in paragraph 1 above which are allegedly confusingly similar to Delta's woodworking machines of the type identified in paragraph 1 above, and will within thirty (30) days after signing this Agreement cease use of the term "Contractor's Saw" or any other allegedly confusingly similar term. Delta agrees that Trading Company can directly or indirectly export to the United States and/or sell to other companies for export to the United States those machines of new design obtained from the settling manufacturers with respect to which Delta has indicated that such settling manufacturers can export to the United States.

8. Trading Company represents that it has not used and agrees that it will not use any of the registered trademarks in issue including Delta's registered trademark Unisaw[®].

9. (a) Trading Company agrees that it will not in any way indicate or imply that any of the woodworking machines directly or indirectly exported, marketed and/or sold by Trading Company are manufactured by or under license from Delta or Rockwell or substantially identical or substantially similar in appearance, design and/or trade dress to woodworking machines made and/or sold by Delta or Rockwell or that any parts of accessories for woodworking machines made and/or sold by Rockwell or Delta will fit or can be used with the woodworking machines exported, marketed and/or sold by Trading Company. These restrictions shall not prohibit Trading Company, at its own risk, from indicating or communicating that any expendable parts such as saw blades for

woodworking machines made and/or sold by Delta will fit on or can be used with the woodworking machines exported, marketed and/or sold by Trading Company, providing such expendable parts do in fact fit. Such limitations shall include but not be limited to Trading Company's advertising and communications, both oral and written, with potential or actual customers. Nothing contained herein shall be construed as an admission by Trading Company that Trading Company has in any way indicated or implied that the subject machines are or were manufactured by or under license from Delta.

(b) Delta agrees that, in written or oral communication with present or potential customers or in its advertising or public statements, Delta will not state, discuss, or refer to its settlements in this action unless Delta also states conspicuously in the same communication that the terms of the settlement agreements prohibit the Taiwanese industry from exporting to the United States machines confusingly similar to Delta's products or which infringe Delta's patents but do not prohibit the Taiwanese industry from exporting machines that are not confusingly similar in appearance to Delta's products and do not infringe Delta's patents.

10. Delta and Trading Company agree to join in a Motion in the Commission's investigation for entry of a Consent Order as between Delta and Trading Company and termination of the investigation as to Trading Company. This Consent Order shall be in a form such as the Consent Order attached hereto as Exhibit A incorporated by reference herein or in a form otherwise mutually

agreed upon by the respective attorneys for Delta and for Trading Company.

11. If at any time after October 15, 1984, Delta believes that woodworking machines, which Delta alleges infringe upon Delta's trademark and/or patent rights, being imported into the United States originated from and/or were sold by Trading Company, then Delta may inquire of Trading Company directly or through its present attorney in the United States if any such woodworking machines originated from and/or were sold by Trading Company and Trading Company shall respond to such inquiry, providing the information requested within 30 days of such request.

12. Any controversy or claim including but not limited to all claims for damages and/or any other relief arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association; such arbitration shall be held in Pittsburgh, Pennsylvania before a single arbitrator and judgment upon the award rendered by the Arbitrator may be entered in any Court and/or tribunal in any country having jurisdiction over any of the parties. This provision in this paragraph of this Agreement shall not in any way restrict and/or limit and/or prevent Delta or Trading Company from seeking any other appropriate relief and/or action from or by the Commission.

13. Delta releases and discharges Trading Company, together with its predecessors, successors and assigns, together with the officers, directors, agents and employees of any of them from any and all legal or equitable claims that Delta may have or may have

had with respect to Trading Company's sales of the woodworking machines or other unfair acts covered hereby for any conduct that may have occurred up to the date of the signing of this agreement by Delta. This release shall not in any way extend to any other manufacturer, trading company, exporter, importer, purchaser or customer from which Trading Company purchases or to which Trading Company sells any of the woodworking machines covered hereby and/or any portions thereof. If Trading Company breaches this Agreement, then this release by Delta to Trading Company shall become null and void. Trading Company releases and discharges Delta, together with its predecessors, successors, affiliated companies and assigns, together with its officers, directors, agents and employees of any of them, from any and all causes of actions and claims for damages that Trading Company may have against them relating to or arising out of the present investigation before the Commission and the matters raised therein. If Delta breaches this Agreement, then the release by Trading Company to Delta shall become null and void.

14. As to the subject matter of this agreement, this agreement sets forth the entire understanding and agreement of Delta and Trading Company, and there are no restrictions, promises, representations, warranties, covenants or understandings other than those expressly set forth or referred to herein. This agreement supersedes all prior agreements and understandings between the parties with respect to this subject matter.

15. This agreement shall be governed by the law of the Commonwealth of Pennsylvania as to all matters, including but not

limited to matters of validity, construction, effect and performance; provided however, that this paragraph does not apply to any matters under the United States patent laws and/or other laws of the United States with respect to which the Federal Courts have preemptive and exclusive jurisdiction.

16. This agreement may be executed in two or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. Subject to applicable law, this agreement may be amended or modified only by written agreement of Delta and Trading Company signed by both parties or by the party to be charged.

18. Nothing contained in this agreement nor the act of making this agreement nor the entry of the Consent Order pursuant hereto shall be deemed to constitute any admission by either party hereto as to the accuracy, or lack of accuracy, of (a) any allegation or

contention of Delta as set forth in any of the Complaints or of
b) any allegation or contention of Trading Company as set forth
in its answer thereto.

IN WITNESS WHEREOF, this Settlement Agreement has been
executed by the parties on the dates shown below.

DELTA INTERNATIONAL MACHINERY
CORPORATION

Date: October 2, 1984

By GOODWILL MERCANTILE CO.

→ name →

He Yen Hsiang

←
Date:
1984

Date: DEC 21 1984

By Joseph H. Cole

DATE

2/14/85

City of Pittsburgh
State of Pennsylvania) SSN
County of Allegheny)
Subscribed and sworn to before
me this 20 day of Feb 1985
Jay E. Woodward

JAY E. WOODWARD, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 1, 1986
Member, Pennsylvania Association of Notaries

Taiwan
City of Taipei
American Institute in
Taiwan, Taipei Office

I, Allen Sung Hu Kong
Special Notary (PL 98-8), duly
appointed and qualified, do hereby certify that on this
day of 21 1984, before me personally appeared
HE YEN HSIANG to me personally known
to be the individual(s) described in whose name(s) is/are
subscribed to and executed the within instrument and
being advised by me of the contents of the said instrument
he/they acknowledged to me that he/they executed
the same for the purposes and purposes therein
mentioned and that he/they have hereunto set my hand and
official seal and the said instrument was lawfully written.
Allen Sung Hu Kong
Special Notary

[Exhibit A]

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

In the Matter of)	
)	
CERTAIN WOODWORKING MACHINES)	Investigation No. 337-TA-174

CONSENT ORDER TO CEASE AND DESIST
DIRECTED TO RESPONDENT FORTUNE DEVELOPMENT CORPORATION

The complainant, Delta International Machinery Corporation (hereafter called "Delta"), and respondent FORTUNE DEVELOPMENT CORPORATION (hereafter called "Trading Company"), having entered into an agreement which resolves the dispute between Delta and Trading Company that is part of the subject matter of the current investigation, have jointly requested entry of this Consent Order with respect to the dispute between them. A copy of the agreement is submitted herewith

IT IS HEREBY ORDERED AND DECREED THAT AS BETWEEN DELTA AND TRADING COMPANY:

1. The United States International Trade Commission (hereafter called "Commission") has jurisdiction over the subject matter of the investigation including the dispute between Delta and Trading Company pursuant to 19 U.S.C. §1337 in that such

dispute involves claims of unfair competition and unfair acts in the importation of articles under 19 U.S.C. §1337. The Commission has jurisdiction over Trading Company for the purposes of issuing and enforcing this Consent Order to Cease and Desist. Further, this proceeding and settlement are in the public interest.

2. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the design appearance, shape and trade dress of Delta's woodworking machines in issue in the current investigation.

3. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the term "Contractor's Saw."

4. Delta has alleged, and Trading Company has denied, that Delta is the owner of the full right, title and interest in and to United States Letters Patents No. 3,754,493, No. 4,174,100, and No. 4,436,126.

5. Delta has alleged, and Trading Company has denied, that Trading Company has infringed Delta's rights in and relating to the design appearance, shape and trade dress of one or more of Delta's woodworking machines in issue and has infringed Delta's rights in and relating to the term "Contractor's Saw."

6. Delta has alleged, and Trading Company has denied, that Trading Company has unfairly competed with Delta by directly and/or indirectly participating in the exportation to the United States of woodworking machines that are confusingly similar to one or more of Delta's woodworking machines in issue and in the use of the term "Contractor's Saw."

7. Delta has alleged, and Trading Company has denied, that to the extent that Trading Company sells the subject 10 inch table saw, the 10 inch tilting arbor saw, and/or the planer, Trading Company has infringed Delta's United States Letters Patents No. 3,754,493, No. 4,174,100, and/or No. 4,436,126, and has thereby unfairly competed with Delta.

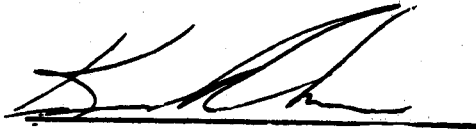
8. Consistent with the terms and conditions of the attached agreement between Delta and Trading Company, Trading Company, its affiliated and associated companies, their officers, directors, agents, servants, employees, or any of them, and all persons acting in concert or participation with them or with any of the foregoing, are hereby ordered to cease and desist from engaging in all of the unfair methods of competition and unfair acts here allegedly involved, as set forth above, to the extent provided in the attached agreement.

9. Delta and Trading Company hereby waive all rights to appeal or to otherwise challenge the validity of this Consent Order.

10. The rules and regulations of the Commission regarding enforcement and modification of final Commission actions are applicable to this Consent Order.

11. This investigation is hereby terminated with respect to FORTUNE DEVELOPMENT CORPORATION.

rm
LME



Kenneth R. Mason,
Secretary

Issued: June 18, 1985

SETTLEMENT AGREEMENT

te → This agreement is entered into this 30th day of October, 1984 by and between Delta International Machinery Corporation (hereafter called "Delta") having its principal place of business at 400 North Lexington Avenue, Pittsburgh, Pennsylvania, 15208, and FORTUNE DEVELOPMENT CORP (hereafter called "Trading Company"), 10th Floor, Fortune Building, 52, Sec. 2, Chang An E. Rd. Taipei having its principal place of business at Sec. 2, Chang An E. Rd. Taipei Taiwan, Republic of China.

WHEREAS, the United States International Trade Commission (hereafter called "Commission") has initiated an investigation under §337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337), based on a Verified Complaint and a Verified Revised Amended Complaint (hereafter collectively called "Complaints") filed by Delta seeking relief against certain alleged methods of unfair competition and alleged unfair acts of a number of respondents including Trading Company;

WHEREAS, Delta and Trading Company desire to resolve all of the matters between them raised by such Complaints and to resolve their claims and differences relating thereto;

NOW THEREFORE, Delta and Trading Company in consideration of the mutual promises and covenants herein set forth, do hereby agree as follows:

1. As used in this agreement, the terms 10 inch tilting arbor saw, 10 inch table saw, 14 inch band saw, 6 inch jointer, shaper, 8 inch bench saw, disk/belt finisher and planer shall mean those

particular machines so designated in Delta's Complaints and in issue in the Commission Investigation No. 337-TA-174.

2. Trading Company agrees that it has been directly or indirectly exporting or offering to export to the United States and/or selling to others for exportation to the United States one or more of the woodworking machines of the type identified in paragraph 1 above (hereafter called "exported machines") that Delta asserts are confusingly similar in trade dress to corresponding Delta woodworking machines of the type identified in paragraph 1. The exported 10 inch table saws have in certain instances been sold under the term "Contractor's Saw." Trading Company acknowledges that Delta alleges that such exported machines are confusingly similar in trade dress with such Delta machines and that Delta further alleges that the importation into the United States and marketing and/or sale of such machines in the United States infringes Delta's rights in and relating to the design appearance, shape and trade dress of such machines.

3. (a) Trading Company agrees that the blade guards incorporated on the 10 inch table saws and 10 inch tilting arbor saw herein are alleged by Delta to infringe Delta's United States Letters Patent No. 3,754,493.

(b) Trading Company agrees that the adjustable-height fence incorporated on the 10 inch tilting arbor saw herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,174,100.

(c) Trading Company agrees that the planer herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,436,126.

4. Trading Company further agrees that the use of the term "Contractor's Saw" is alleged to infringe Delta's asserted common law trademark rights in such term.

5. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any of the exported machines referred to in Paragraph 2 above or any other machines of the types subject to this investigation having allegedly confusingly similar trade dress. If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

(b) Delta agrees that Trading Company may supply such replacement parts and/or complete machines of the accused design as replacements to the extent necessary to satisfy Trading Company's obligations to United States importers regarding warranties granted to such importers and returns of machines from such importers, provided that no such replacements of the accused machines shall be exported from Taiwan after March 15, 1985. If

Trading Company exports more than fifteen (15) such replacement machines of the accused design, then Trading Company shall provide, through its attorney, notification to Delta's attorney of such export and the number of machines exported and shall, upon request, provide to Delta's attorney sufficient documentation showing the destruction of the accused machines for which such replacement machines have been provided.

6. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any further (a) blade guards that Delta alleges infringe Delta's United States Letters Patent No. 3,754,493 or fences that Delta alleges infringe Delta's United States Letters Patent No. 4,174,100 as part of or separate from a saw, or (b) planers that Delta alleges infringe Delta's United States Letters Patent No. 4,436,126.

(b) If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

7. Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any

other company for exportation to the United States any woodworking machines of the type identified in paragraph 1 above which are allegedly confusingly similar to Delta's woodworking machines of the type identified in paragraph 1 above, and will within thirty (30) days after signing this Agreement cease use of the term "Contractor's Saw" or any other allegedly confusingly similar term. Delta agrees that Trading Company can directly or indirectly export to the United States and/or sell to other companies for export to the United States those machines of new design obtained from the settling manufacturers with respect to which Delta has indicated that such settling manufacturers can export to the United States.

8. Trading Company represents that it has not used and agrees that it will not use any of the registered trademarks in issue including Delta's registered trademark Unisaw[®].

9. (a) Trading Company agrees that it will not in any way indicate or imply that any of the woodworking machines directly or indirectly exported, marketed and/or sold by Trading Company are manufactured by or under license from Delta or Rockwell or substantially identical or substantially similar in appearance, design and/or trade dress to woodworking machines made and/or sold by Delta or Rockwell or that any parts of accessories for woodworking machines made and/or sold by Rockwell or Delta will fit or can be used with the woodworking machines exported, marketed and/or sold by Trading Company. These restrictions shall not prohibit Trading Company, at its own risk, from indicating or communicating that any expendable parts such as saw blades for

woodworking machines made and/or sold by Delta will fit on or can be used with the woodworking machines exported, marketed and/or sold by Trading Company, providing such expendable parts do in fact fit. Such limitations shall include but not be limited to Trading Company's advertising and communications, both oral and written, with potential or actual customers. Nothing contained herein shall be construed as an admission by Trading Company that Trading Company has in any way indicated or implied that the subject machines are or were manufactured by or under license from Delta.

(b) Delta agrees that, in written or oral communication with present or potential customers or in its advertising or public statements, Delta will not state, discuss, or refer to its settlements in this action unless Delta also states conspicuously in the same communication that the terms of the settlement agreements prohibit the Taiwanese industry from exporting to the United States machines confusingly similar to Delta's products or which infringe Delta's patents but do not prohibit the Taiwanese industry from exporting machines that are not confusingly similar in appearance to Delta's products and do not infringe Delta's patents.

10. Delta and Trading Company agree to join in a Motion in the Commission's investigation for entry of a Consent Order as between Delta and Trading Company and termination of the investigation as to Trading Company. This Consent Order shall be in a form such as the Consent Order attached hereto as Exhibit A incorporated by reference herein or in a form otherwise mutually

agreed upon by the respective attorneys for Delta and for Trading Company.

11. If at any time after October 15, 1984, Delta believes that woodworking machines, which Delta alleges infringe upon Delta's trademark and/or patent rights, being imported into the United States originated from and/or were sold by Trading Company, then Delta may inquire of Trading Company directly or through its present attorney in the United States if any such woodworking machines originated from and/or were sold by Trading Company and Trading Company shall respond to such inquiry, providing the information requested within 30 days of such request.

12. Any controversy or claim including but not limited to all claims for damages and/or any other relief arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association; such arbitration shall be held in Pittsburgh, Pennsylvania before a single arbitrator and judgment upon the award rendered by the Arbitrator may be entered in any Court and/or tribunal in any country having jurisdiction over any of the parties. This provision in this paragraph of this Agreement shall not in any way restrict and/or limit and/or prevent Delta or Trading Company from seeking any other appropriate relief and/or action from or by the Commission.

13. Delta releases and discharges Trading Company, together with its predecessors, successors and assigns, together with the officers, directors, agents and employees of any of them from any and all legal or equitable claims that Delta may have or may have

had with respect to Trading Company's sales of the woodworking machines or other unfair acts covered hereby for any conduct that may have occurred up to the date of the signing of this agreement by Delta. This release shall not in any way extend to any other manufacturer, trading company, exporter, importer, purchaser or customer from which Trading Company purchases or to which Trading Company sells any of the woodworking machines covered hereby and/or any portions thereof. If Trading Company breaches this Agreement, then this release by Delta to Trading Company shall become null and void. Trading Company releases and discharges Delta, together with its predecessors, successors, affiliated companies and assigns, together with its officers, directors, agents and employees of any of them, from any and all causes of actions and claims for damages that Trading Company may have against them relating to or arising out of the present investigation before the Commission and the matters raised therein. If Delta breaches this Agreement, then the release by Trading Company to Delta shall become null and void.

14. As to the subject matter of this agreement, this agreement sets forth the entire understanding and agreement of Delta and Trading Company, and there are no restrictions, promises, representations, warranties, covenants or understandings other than those expressly set forth or referred to herein. This agreement supersedes all prior agreements and understandings between the parties with respect to this subject matter.

15. This agreement shall be governed by the law of the Commonwealth of Pennsylvania as to all matters, including but not

limited to matters of validity, construction, effect and performance; provided however, that this paragraph does not apply to any matters under the United States patent laws and/or other laws of the United States with respect to which the Federal Courts have preemptive and exclusive jurisdiction.

16. This agreement may be executed in two or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. Subject to applicable law, this agreement may be amended or modified only by written agreement of Delta and Trading Company signed by both parties or by the party to be charged.

18. Nothing contained in this agreement nor the act of making this agreement nor the entry of the Consent Order pursuant hereto shall be deemed to constitute any admission by either party hereto as to the accuracy, or lack of accuracy, of (a) any allegation or

contention of Delta as set forth in any of the Complaints or of (b) any allegation or contention of Trading Company as set forth in its answer thereto.

IN WITNESS WHEREOF, this Settlement Agreement has been executed by the parties on the dates shown below.

DELTA INTERNATIONAL MACHINERY CORPORATION

DATE: 2/12/85

Date: October 30th, 1984

* BY: Joseph R. Collier

By Wen yeh Lin

FORTUNE DEVELOPMENT CORPORATION

Date: Wen yeh Lin

By _____

THE SUBSCRIBER DOES NOT APPEAR TO THE SPECIAL NOTARY TO BE THOROUGHLY CONVERSANT WITH THE ENGLISH LANGUAGE.

Taiwan City of Taipei American Institute in Taiwan, Taipei Office

Subscribed and sworn to before me, Stephen R. FOX Special Notary (PL 86-8) at Taipei, Taiwan, duly appointed and qualified this DEC 9 1984 Stephen R. FOX Special Notary (PL 86-8)

[Handwritten signature]

* City of Pittsburgh Notary Public Jay E. Woodward sworn to and subscribed before this [Signature]

JAY E. WOODWARD, NOTARY PUBLIC PITTSBURGH, ALLEGHENY COUNTY BY COMMISSION EXPIRES MAY 1, 1986 Member, Pennsylvania Association of Notaries

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

In the Matter of
CERTAIN WOODWORKING MACHINES

Investigation No. 337-TA-174

CONSENT ORDER TO CEASE AND DESIST
DIRECTED TO RESPONDENTS KING FENG FU MACHINERY WORK CO., LTD.
AND KING TUN FU MACHINERY COMPANY

The complainant, Delta International Machinery Corporation (hereafter called "Delta"), and respondents King Feng Fu Machinery Works Co., Ltd. and King Tun Fu Machinery Company (hereafter jointly called "Exporter"), having entered into an agreement which resolves the dispute between Delta and Exporter that is part of the subject matter of the current investigation, have jointly requested entry of this Consent Order with respect to the dispute between them. A copy of the agreement is submitted herewith.

IT IS HEREBY ORDERED AND DECREED THAT AS BETWEEN DELTA AND EXPORTER:

1. The United States International Trade Commission (hereafter called "Commission") has jurisdiction over the subject matter of the investigation including the dispute between Delta and Exporter pursuant to 19 U.S.C. §1337 in that such dispute involves claims of unfair competition and unfair acts in the importation of articles under 19 U.S.C. §1337. The Commission

has jurisdiction over Exporter for the purposes of issuing and enforcing this Consent Order to Cease and Desist. Further, this proceeding and settlement are in the public interest.

2. Delta has alleged, and Exporter has denied, that Delta is the owner of common law trademark rights in the design appearance, shape and trade dress of Delta's woodworking machines in issue in the current investigation.

3. Delta has alleged, and Exporter has denied, that Delta is the owner of common law trademark rights in the term "Contractor's Saw."

4. Delta has alleged, and Exporter has denied, that Delta is the owner of the full right, title and interest in and to United States Letters Patents No. 3,754,493, No. 4,174,000, and No. 4,436,126.

5. Delta has alleged, and Exporter has denied, that Exporter has infringed Delta's rights in and relating to the design appearance, shape and trade dress of one or more of Delta's woodworking machines in issue and has infringed Delta's rights in and relating to the term "Contractor's Saw."

6. Delta has alleged, and Exporter has denied, that Exporter has unfairly competed with Delta by directly and/or indirectly participating in the exportation to the United States of woodworking machines that are confusingly similar to one or more of Delta's woodworking machines in issue and in the use of the term "Contractor's Saw."

7. Delta has alleged, and Exporter has denied, that Exporter has unfairly competed by infringing one or more of

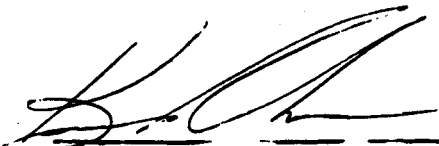
Delta's United States Letters Patents No. 3,754,493, No. 4,174,100, and No. 4,436,126.

8. Consistent with the terms and conditions of the attached agreement between Delta and Exporter, Exporter, its affiliated and associated companies, their officers, directors, agents, servants, employees, or any of them, and all persons acting in concert or participation with them or with any of the foregoing, are hereby ordered to cease and desist from engaging in all of the unfair methods of competition and unfair acts here allegedly involved, as set forth above, to the extent provided in the attached agreement.

9. Delta and Exporter hereby waive all rights to appeal or to otherwise challenge the validity of this Consent Order.

10. The rules and regulations of the Commission regarding enforcement and modification of final Commission actions are applicable to this Consent Order.

11. This investigation is hereby terminated with respect to King Feng Fu Machinery Works Co., Ltd. and King Tun Fu Machinery Company.



Kenneth R. Mason
Secretary

Issued: June 18, 1985

[sg/H]

SETTLEMENT AGREEMENT

This agreement is entered into this fifth day of September, 1984 by and between Delta International Machinery Corporation (hereafter called "Delta") having its principal place of business at 400 North Lexington Avenue, Pittsburgh, Pennsylvania, 15208, and King Feng Fu Machinery Works Co., Ltd. and King Tun Fu Machinery Co., being two separate corporations under common ownership and control (hereafter collectively called "Exporter") having their principal place of business, respectively, at 45, Section 1, Chung Ching Road, Taya, Taichung Hsien, Taiwan, Republic of China and 141 Sec. 1, Chunssan Road, Tantzsu, Taichung-Hsien, Taiwan, Republic of China.

WHEREAS, the United States International Trade Commission (hereafter called "Commission") has initiated an investigation under §337 of the Trade Act of 1930 as amended (19 U.S.C. §1337), based on a Verified Complaint and a Verified Revised Amended Complaint (hereafter collectively called "Complaints") filed by Delta seeking relief against certain alleged methods of unfair competition and alleged unfair acts of a number of respondents including Exporter.

WHEREAS, Delta and Exporter desire to resolve all of the matters between them raised by such Complaints and to resolve their claims and differences relating thereto:

NOW THEREFORE, Delta and Exporter, in consideration of the mutual promises and covenants herein set forth, do hereby agree as follows:

1. As used in this agreement, the terms 10 inch tilting arbor saw, 10 inch table saw, 14 inch bandsaw, 6 inch jointer, shaper, 8 inch bench saw, disk/belt finisher and planer shall mean those particular machines so designated in Delta's Complaints and in issue in the Commission Investigation No. 337-TA-174.

2. Exporter agrees that it has been directly or indirectly exporting to the United States and/or selling to others for exportation to the United States the following accused woodworking machines: 10 inch table saw, 10 inch bench saw, 6 inch jointer, 14 inch bandsaw and shaper (hereafter called "exported machines") that Delta asserts are confusingly similar in trade dress to Delta woodworking machines. The 10 inch table saw sold by Exporter is sold by Exporter under the term "Contractor's Saw." Exporter acknowledges that Delta alleges that such exported machines are confusingly similar in trade dress with such Delta machines and that Delta further alleges that the importation into the United States and marketing and/or sale of such machines in the United States infringes Delta's rights in and relating to the design appearance, shape and trade dress of such machines.

3. (a) Exporter agrees that the blade guards incorporated on the 10 inch table saws and 10 inch tilting arbor saw herein are alleged by Delta to infringe Delta's United States Letters Patent No. 3,754,493.

(b) Exporter agrees that the adjustable-height fence incorporated on the 10 inch tilting arbor saw herein is alleged

by Delta to infringe Delta's United States Letters Patent No. 4,174,100.

(c) Exporter agrees that planer herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,436,126.

4. Exporter further agrees that the use of the term "Contractor's Saw" is alleged to infringe Delta's asserted common law trademark rights in such term.

5.(a) Exporter agrees that upon the execution of this agreement by the parties hereto for the 10 inch table saw, upon execution of this agreement by the parties hereto for the 6 inch jointer, after November 1, 1984 for the shaper, upon execution of this agreement by Delta for the 14 inch bandsaw (subject to paragraph 12B, below), and after February 1, 1985 for the 10 inch bench saw, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States the 10 inch table saw, the 6 inch jointer, the shaper, the 14 inch bandsaw and the 10 inch bench saw referred to in Paragraph 2 above or any other machines of the types subject to this investigation having allegedly confusingly similar trade dress.

(b) Delta agrees that Exporter may supply such replacement parts and/or complete machines of the accused design as replacements to the extent necessary to satisfy Exporter's obligations to United States importers regarding warranties granted to such importers and returns of machines from such importers, provided that no such replacements of the accused machines shall be

exported from Taiwan after March 15, 1985. If Exporter exports more than fifteen (15) such replacement machines of the accused design, then Exporter shall provide, through its attorney, notification to Delta's attorney of such export and the number of machines exported and shall, upon request, provide to Delta's attorney sufficient documentation showing the destruction of the accused machines for which such replacement machines have been provided.

6. Exporter agrees that after February 1, 1985, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any further (a) blade guards that Delta alleges infringe Delta's United States Letters Patent No. 3,754,493 or fences that Delta alleges infringe Delta's United States Letters Patent No. 4,174,100 as part of or separate from a saw, or (b) planers that Delta alleges infringe Delta's United States Letters Patent No. 4,436,126.

7. Exporter agrees that after the respective dates set forth in paragraph 5(a) above, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States the 6 inch jointer, the 10 inch table saw, the shaper, the 14 inch bandsaw and the 10 inch bench saw, which are allegedly confusingly similar to Delta's 6 inch jointer, 10 inch table saw, shaper, 14 inch bandsaw, and 8 inch bench saw, respectively, and will within thirty (30) days after signing this Agreement cease use of the term "Contractor's Saw" or any other

allegedly confusingly similar term. Delta agrees that Exporter can directly or indirectly export to the United States and/or sell to other companies for export to the United States the 10 inch table saw as shown and described in attached Exhibit B, and the 10 inch bench saw as shown and described in attached Exhibit C, the .6 inch jointer as shown and described in attached Exhibit D, the 14 inch bandsaw as shown and described in attached Exhibit E, and the shaper as shown and described in attached Exhibit F.

8. Exporter agrees that the modifications made in the 10 inch table saw, 10 inch bench saw, 6 inch jointer, 14 inch bandsaw and shaper as shown in Exhibits B, C, D, E, and F will not affect the quality and/or performance of these machines.

9. Exporter represents that it has not directly or indirectly exported, marketed and/or sold and agrees that in the future it will not directly or indirectly export, market and/or sell woodworking machines confusingly similar in appearance to Delta's 10 inch tilting arbor saw, disk/belt finisher and planer, and Exporter further represents that it has not used and agrees that it will not use any of the registered trademarks in issue including Delta's registered trademark Unisaw[®].

10. (a) Exporter agrees that it will not in any way indicate or imply that any of the woodworking machines directly or indirectly exported, marketed and/or sold by Exporter are manufactured by or under license from Delta or Rockwell or substantially identical or substantially similar in appearance, design and/or trade dress to woodworking machines made and/or sold by Delta or Rockwell or that any parts or accessories for woodworking machines made and/or sold by Rockwell or Delta will fit or can

be used with the woodworking machines exported, marketed and/or sold by Exporter. These restrictions shall not prohibit Exporter, at its own risk, from indicating or communicating that any expendable parts such as saw blades for woodworking machines made and/or sold by Delta will fit on or can be used with the woodworking machines exported, marketed and/or sold by Exporter, providing such expendable parts do in fact fit. Such limitations shall include but not be limited to Exporter's advertising and communications, both oral and written, with potential or actual customers. Nothing contained herein shall be construed as an admission by Exporter that Exporter has in any way indicated or implied that the subject machines are or were manufactured by or under license from Delta.

(b) Delta agrees that, in written or oral communication with present or potential customers or in its advertising or public statements, Delta will not state, discuss, or refer to its settlements in this action unless Delta also states conspicuously in the same communication that the terms of the settlement agreements prohibit the Taiwanese industry from exporting to the United States machines confusingly similar to Delta's products or which infringe Delta's patents but do not prohibit the Taiwanese industry from exporting machines that are not confusingly similar in appearance to Delta's products and do not infringe Delta's patents.

11. Delta and Exporter agree to join in a Motion in the Commission's investigation for entry of a Consent Order as between Delta and Exporter and termination of the investigation

as to Exporter. This Consent Order shall be in a form such as the Consent Order attached hereto as Exhibit A incorporated by reference herein or in a form otherwise mutually agreed upon by the respective attorneys for Delta and for Exporter.

12. If at any time after November 30, 1984 for the 10 inch table saw and 6 inch jointer, December 15, 1984 for the shaper, March 30, 1985 for the 14 inch bandsaw, and March 15, 1985, for the 10 inch bench saw, Delta believes that woodworking machines, which Delta alleges infringe upon Delta's trademark and/or patent rights, being imported into the United States originated from and/or were sold by Exporter, then Delta may inquire of Exporter directly or through its present attorney in the United States if any such woodworking machines originated from and/or were sold by Exporter and Exporter shall respond to such inquiry, providing the information requested within 30 days of such request.

12A. Delta and exporter agree that the design for the table of the 10 inch bench saw shown in Exhibit C is acceptable hereunder as an interim design only. After November 30, 1985, exporter will cease production of 10 inch bench saws of said table design for the U.S. market. After November 30, 1985, exporter's 10 inch bench saws for U.S. market will have a table of either a solid configuration, without holes, or else of a configuration having hexagonal holes or other holes that are neither square nor rectangular.

12B. Notwithstanding any provisions hereof to the contrary, Delta and exporter agree that all 14-inch band saws subject hereto which KFF may export on or after April 1, 1985 shall be

fitted with a rear support cover of the type shown in Exhibit E, page 6; and they further agree that KFF shall not export more than 500 subject bandsaws without rear support covers between the date of Delta's execution hereof and March 31, 1985, inclusive ("interim bandsaws"); and they further agree that KFF shall provide to Delta's attorney, to be held in confidence, a list of the U.S. importers of interim bandsaws; and they further agree that KFF shall provide in a timely manner to the importers of the interim bandsaws a rear support cover of the type shown in Exhibit E, page 6, ready for installation, together with a letter to each importer stating that installation of the covers on the interim bandsaws is necessary to avoid infringing Delta's asserted rights herein.

13. Any controversy or claim including but not limited to all claims for damages and/or any other relief arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association; such arbitration shall be held in Pittsburgh, Pennsylvania before a single arbitrator and judgment upon the award rendered by the Arbitrator may be entered in any Court and/or tribunal in any country having jurisdiction over any of the parties. This provision in this paragraph of this Agreement shall not in any way restrict and/or limit and/or prevent Delta or Exporter from seeking any other appropriate relief and/or action from or by the Commission.

14. Delta releases and discharges Exporter, together with its predecessors, successors and assigns, together with the

officers, directors, agents and employees of any of them from any and all legal or equitable claims that Delta may have or may have had with respect to Exporter's sales of the woodworking machines or other unfair act covered hereby for any conduct that may have occurred up to the date of the signing of this agreement by Delta. This release shall not in any way extend to any other manufacturer, trading company, exporter, importer, purchaser or customer from which Exporter purchases or to which Exporter sells any of the woodworking machines covered hereby and/or any portions thereof. If Exporter breaches this Agreement, then this release by Delta to Exporter shall become null and void. Exporter releases and discharges Delta, together with its predecessors, successors, affiliated companies and assigns, together with its officers, directors, agents and employees of any of them, from any and all causes of actions and claims for damages that Exporter may have against them relating to or arising out of the present investigation before the Commission and the matters raised therein. If Delta breaches this Agreement, then the release by Exporter to Delta shall become null and void.

15. As to the subject matter of this Agreement, this Agreement sets forth the entire understanding and agreement of Delta and Exporter, and there are no restrictions, promises, representations, warranties, covenants or understandings other than those expressly set forth or referred to herein. This Agreement supersedes all prior agreements and understandings between the parties with respect to this subject matter.

16. This Agreement shall be governed by the law of the Commonwealth of Pennsylvania as to all matters, including but not limited to matters of validity, construction, effect and performance; provided however, that this paragraph does not apply to any matters under the United States patent laws and/or other laws of the United States with respect to which the Federal Courts have preemptive and exclusive jurisdiction.

17. This Agreement may be executed in two or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

18. Subject to applicable law, this Agreement may be amended or modified only by written agreement of Delta and Exporter, signed by both parties or by the party to be charged.

19. Nothing contained in this Agreement nor the act of making this Agreement nor the entry of the Consent Order pursuant hereto shall be deemed to constitute any admission by either party hereto as to the accuracy, or lack of accuracy, of (a) any allegation or contention of Delta as set forth in any of the Complaints or of (b) any allegation or contention of Exporter as set forth in its answer thereto.

IN WITNESS WHEREOF, this Settlement Agreement has been executed by the parties on the dates shown below.

DELTA INTERNATIONAL MACHINERY CORPORATION

Date: 3/15/85

By: Joseph R. Cobb

KING FENG FU MACHINERY WORKS CO., LTD.

Date: 3/25/85

By: [Signature]

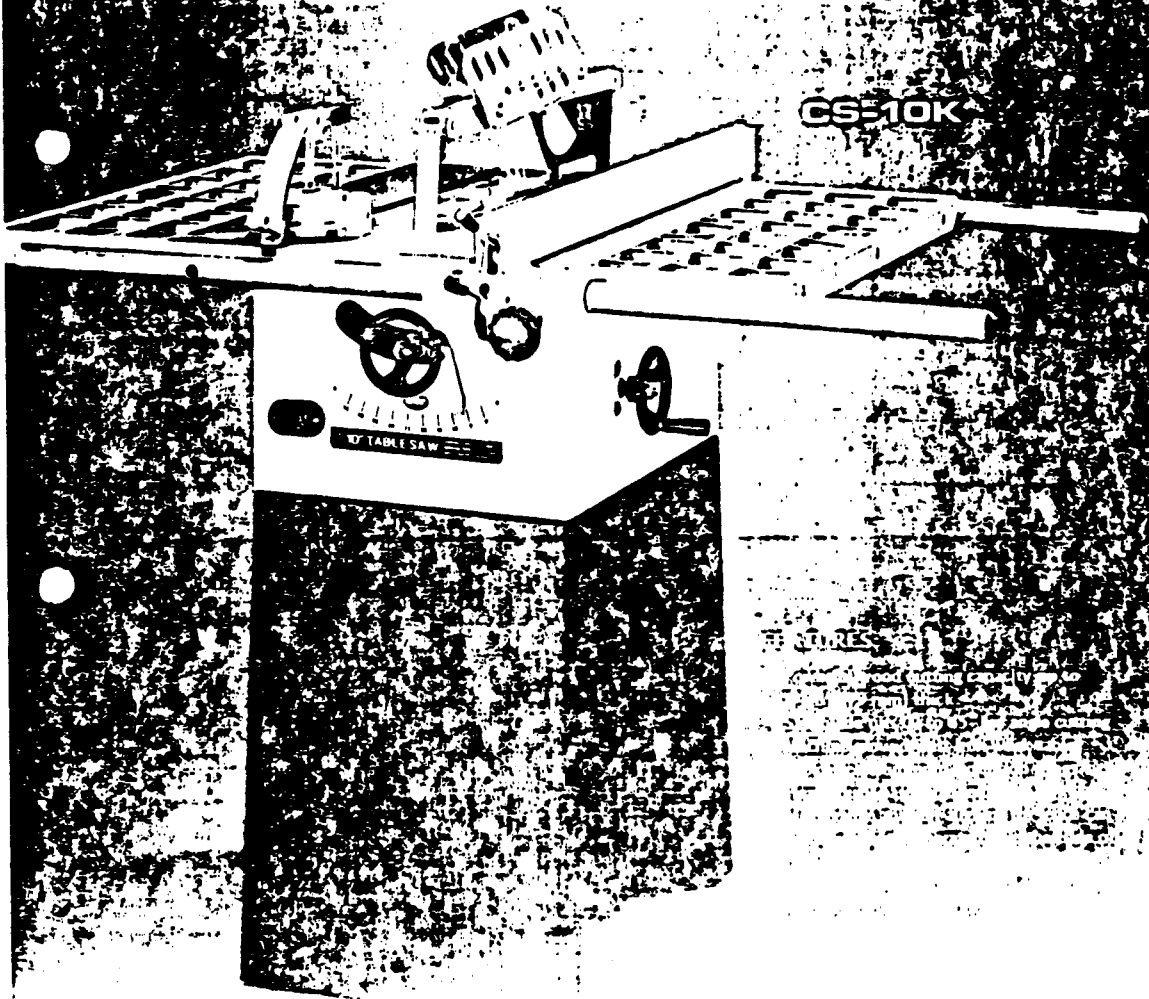
KING TUN FU MACHINERY WORKS CO., LTD.

Date: 3/25/85

By: [Signature]



10" TABLE SAW



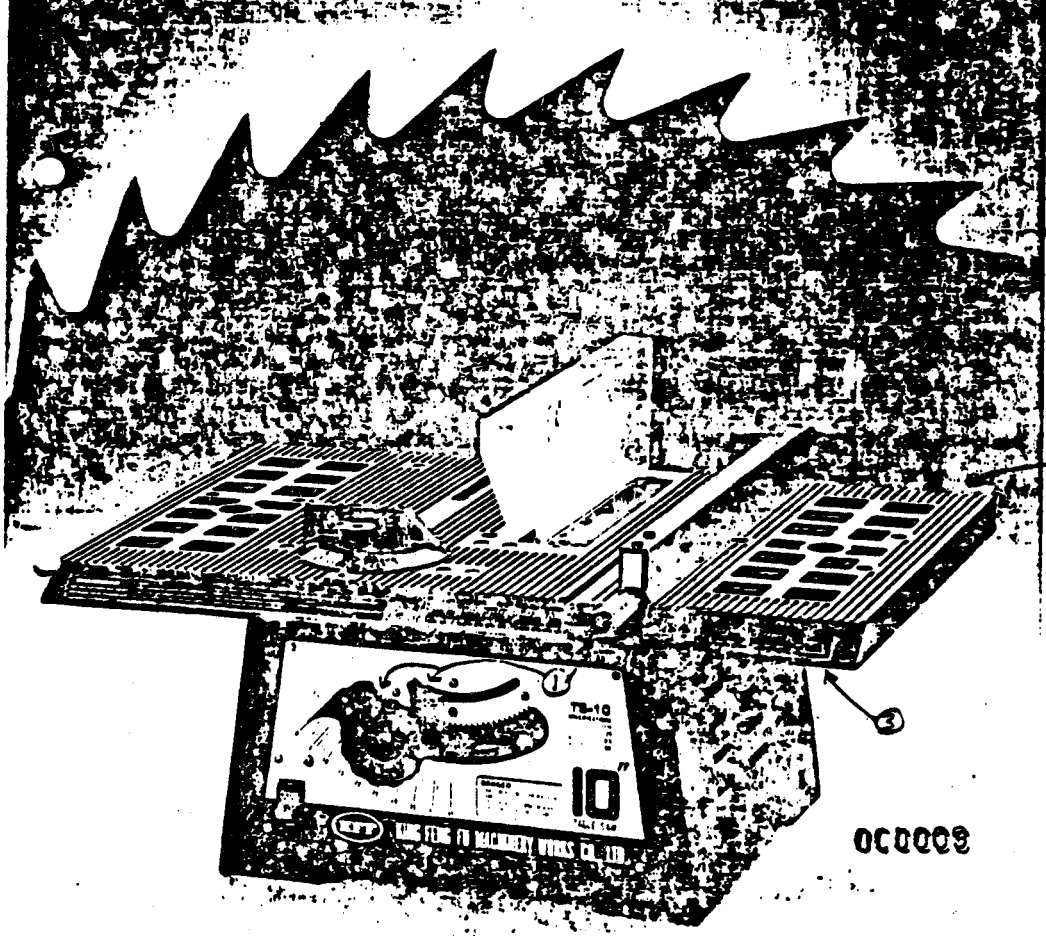
10" table saw.
Acceptable as depicted.
David Surr

KFF Settlement
Agreement Exhibit B

TABLE SAWS

Most Convenient Wood Cutting Machines for D.I.Y. Users

KFF



000008

EXH. 3-D

- 1) Handles to be changed per Exh. C, pg. 2
- 2) Table to be changed per Exh. C, pg. 3
- 3) Lettering on guide rail to be black on silver background.

KFF Settlement Agreement
Exhibit C, pg 1

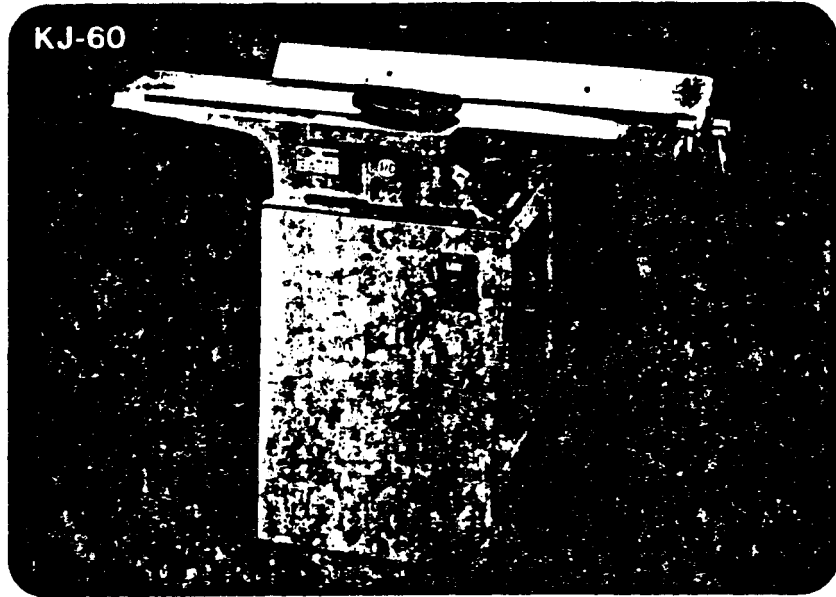
David Smith



6" 鉋木機 JOINTER

- 特 性：**
- 單軸調整切削量。
 - 直接調整及更換刀片設計。
 - 可左右傾斜45°切削。
 - 平面和楔形工件鉋平設計。

- FEATURES:**
- Adjust depth-of-cut with single spindle.
 - Delicately design to adjust and change knives directly.
 - Tilt-cutting 45° both right and left.
 - Special design for plane and wedge workpiece.



規格 SPECIFICATIONS:

鉋切能力	Cutting capacity	width 6" depth 1/2" Speed 6000r.p.m 18000cuts./min 3800r.p.m 11400cuts./min
工作檯尺寸	Table surface	39 1/2" L x 7 1/4" W
導引板尺寸	Fence surface	34 1/2" L x 3 3/4" H
導引板可傾斜度	Fence tilting	0~45°
導引板可止動角度	Positive stops	at 45° and 90°
馬力動力	Motor	1/2 HP
淨 重	Net weight	69kgs
總 重	Gross weight	77kgs
包裝尺寸	Measurement	1080mm x 340mm x 435mm
包裝材料	Packing	polyfoam and carton

KING FENG FU MACHINERY WORKS CO., LTD.

No. 45 Sec. 1, Chung Chin Rd., Ta Ya, Tachung Hsien, Taiwan, R.O.C.
 Telex. 51215 KFFCO Tel. (045) 664316 8 • 663012 • 664435

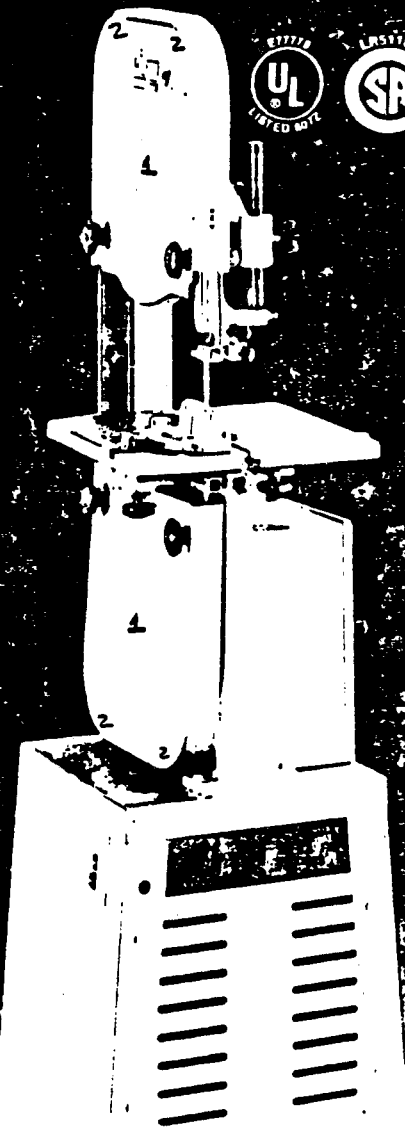
600007

6" jointer.
 Acceptable as depicted.
 David J. [Signature]

KFF Settlement
 Agreement
 Exhibit D

WOOD/CUTTING

14" BANDSAW



VBS-14 FEATURES:

- Balanced die-casting aluminum blade wheels
- Adjustable upper/lower blade guides to ensure operating safety
- 14" (355mm) square ground heavy duty casted table
- Ball bearings construction
- Smooth and quiet belt drive
- Stand, blade and miter gauge included as standard accessories

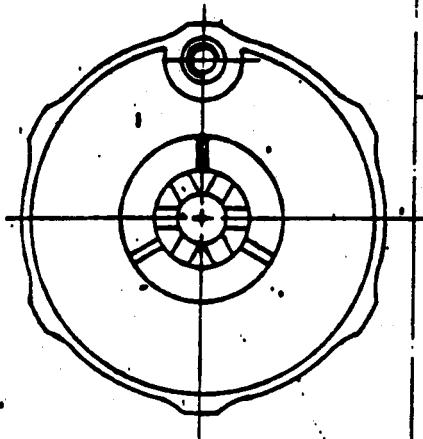
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- D. S.*
- Housings to have "Y" configuration, per Exh. E, pg. 3
 - Corners of housings to be 3-inch radius, per Exh. E, pg. 3
 - Miter rod (round bar beside upper blade guard cover on Exh. E, pg. 2) to have sheet-metal cover per Exh. E, pg. 4.
Label to be 7 inch x 7 inch with brand name in letters 1/4 inch high. One-third of label is warning/safety notice. Colors to contrast with background.
 - Rear support cover to be added per Exh. E, p. 6

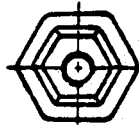
KFF SETTLEMENT AGREEMENT
Exhibit E, pg. 1

零件加工公差表					
尺寸	1~4	4~16	16~63	63~250	250~1000
mm	+0.10	+0.08	+0.06	+0.04	+0.03
mm	+0.10	+0.10	+0.08	+0.06	+0.04
mm	-0.05	-0.05	-0.04	-0.03	-0.02
mm	±0.10	±0.10	±0.08	±0.06	±0.04

blade
degree



Rip fence
handle



blade

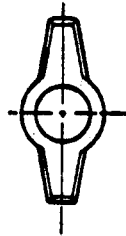
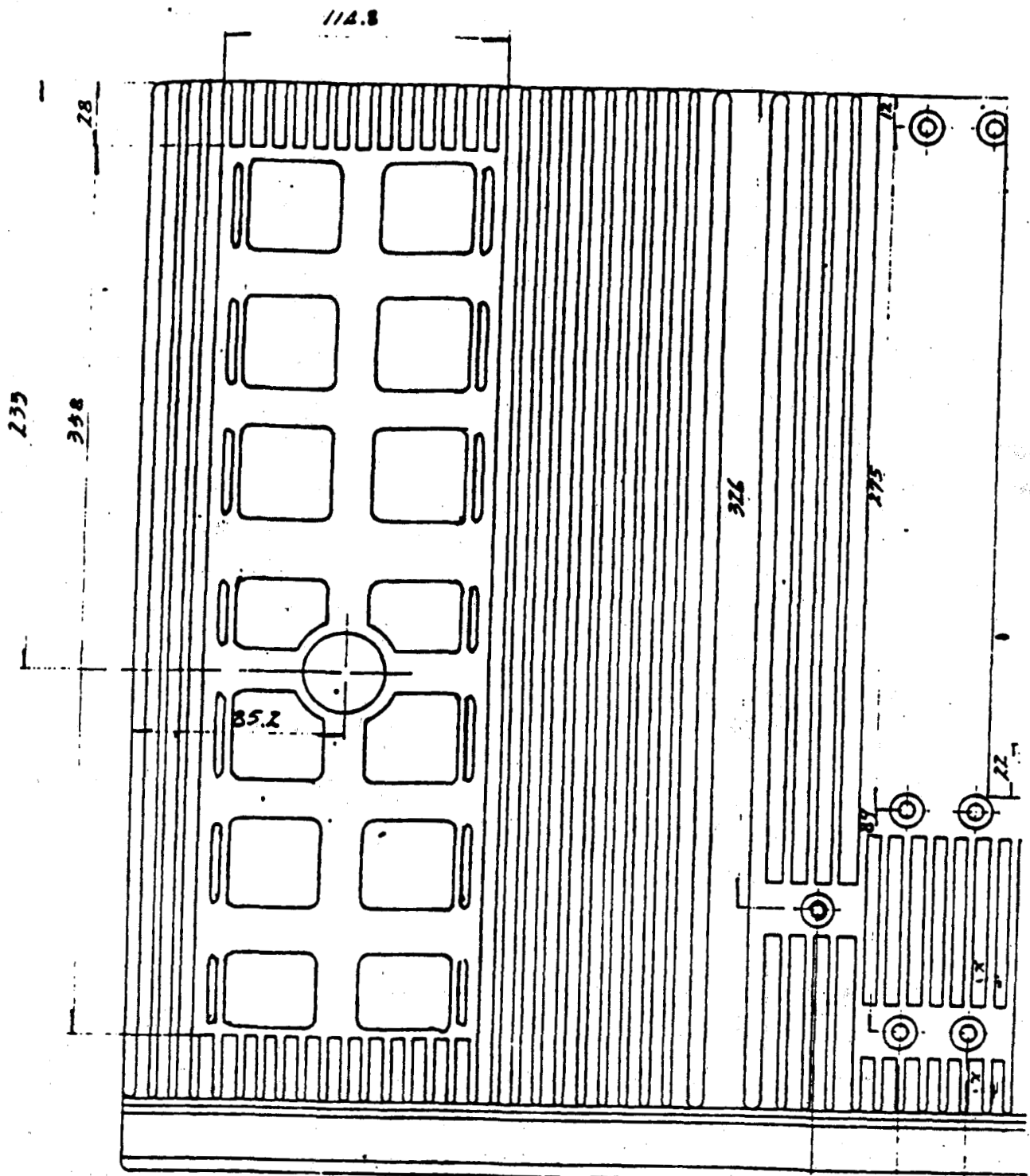


TABLE SAW TS-10

圖號	名稱	材料	數量	備註	製圖	審核	日期
TS-10	刀片	鋼	1				
金豐精密機械股份有限公司							

KFF Settlement
Agreement
Exhibit C, pg. 2

David Quinn



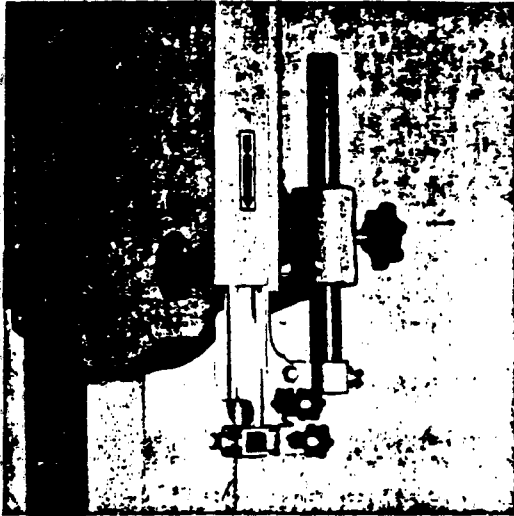
scale 1/2 KFF
 KFF

26

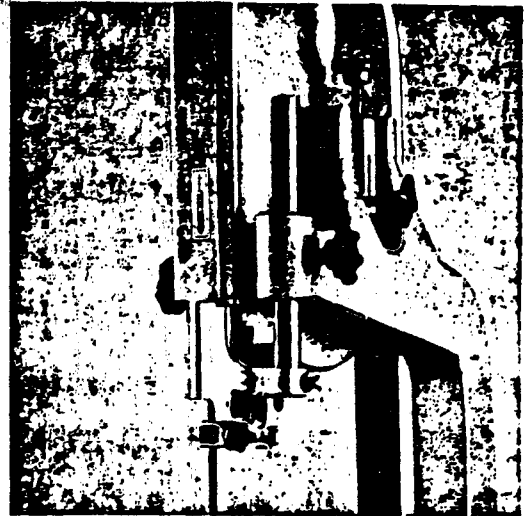
David Gunn

KFF Settlement Agreement
 Exhibit C, pg 3

WOOD METAL CUTTING 4" BANDSAW



Safety blade guard (upper)



Blade tracking and tension adjusting mechanism

SPECIFICATIONS:

Table tilts	left 10°, right 45°
Miter gauge tilts	left 45°, right 45°
Table size	14" x 14" (355mm x 355mm)
Blade size	0.35" x 0.02" x 91.7" (9mm x 0.5mm x 2330mm)
Motor	1/2HP or 1/2HP
Speed	Single: 2400 FPM (50 HZ) 2880 FPM (60 HZ)
	Double Low: 730 FPM (50 HZ) 880 FPM (50 HZ)
	High: 2640 FPM (50 HZ) 3170 FPM (60 HZ)
Weight	Net 87 Kgs (191 lbs) Gross 90 Kgs (198 lbs)

000061

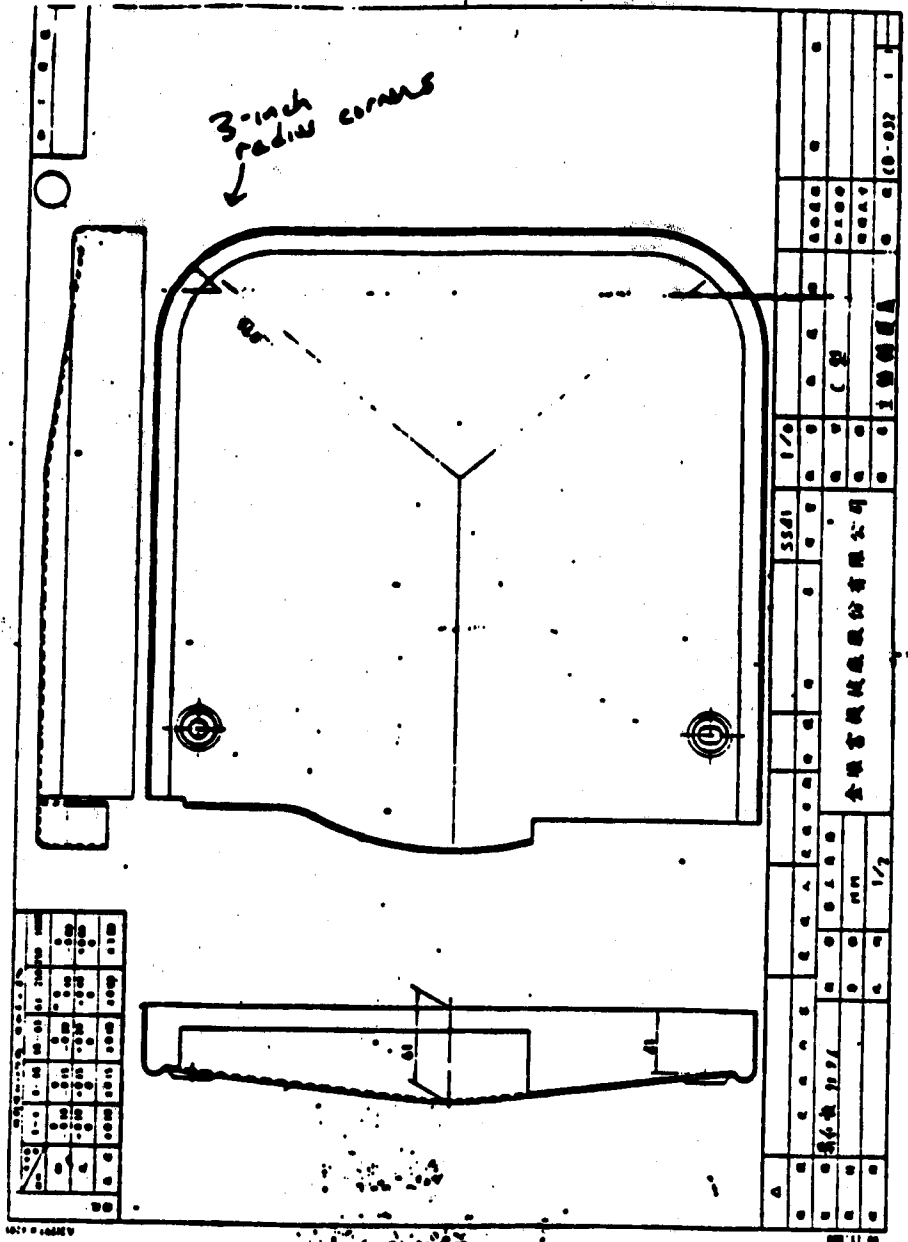
**Please refer to the manufacturer for detailed or special specifications requirements of UL, CSA or other criteria.*

KING FENG FU MACHINERY WORKS CO., LTD.

NO. 45 SEC 1, CHUNG CHIN RD., TA YA, TAICHUNG HSIEN, TAIWAN, R.O.C.
TEL. (045) 664318-8-663012-664435 TELEX 51215 KFFCO

D. Sun

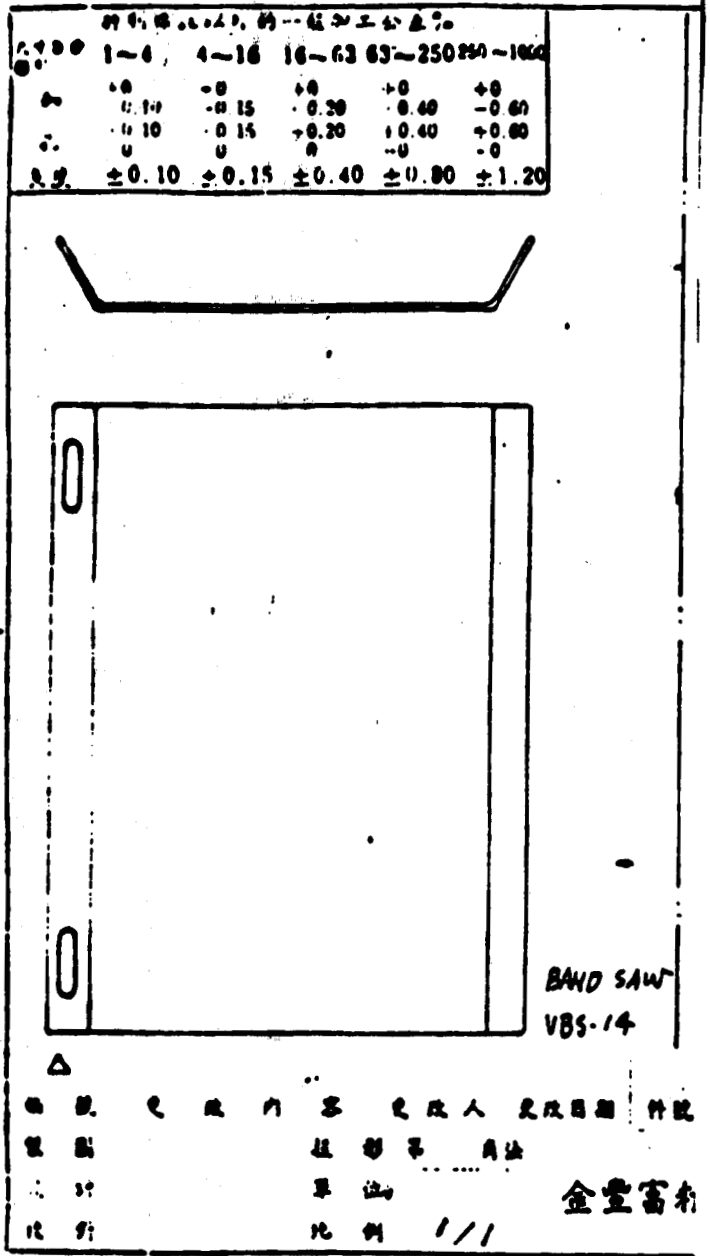
*KFF Settlement Agreement
Exhibit E pg 2*



KFF
Exh E-3

DS

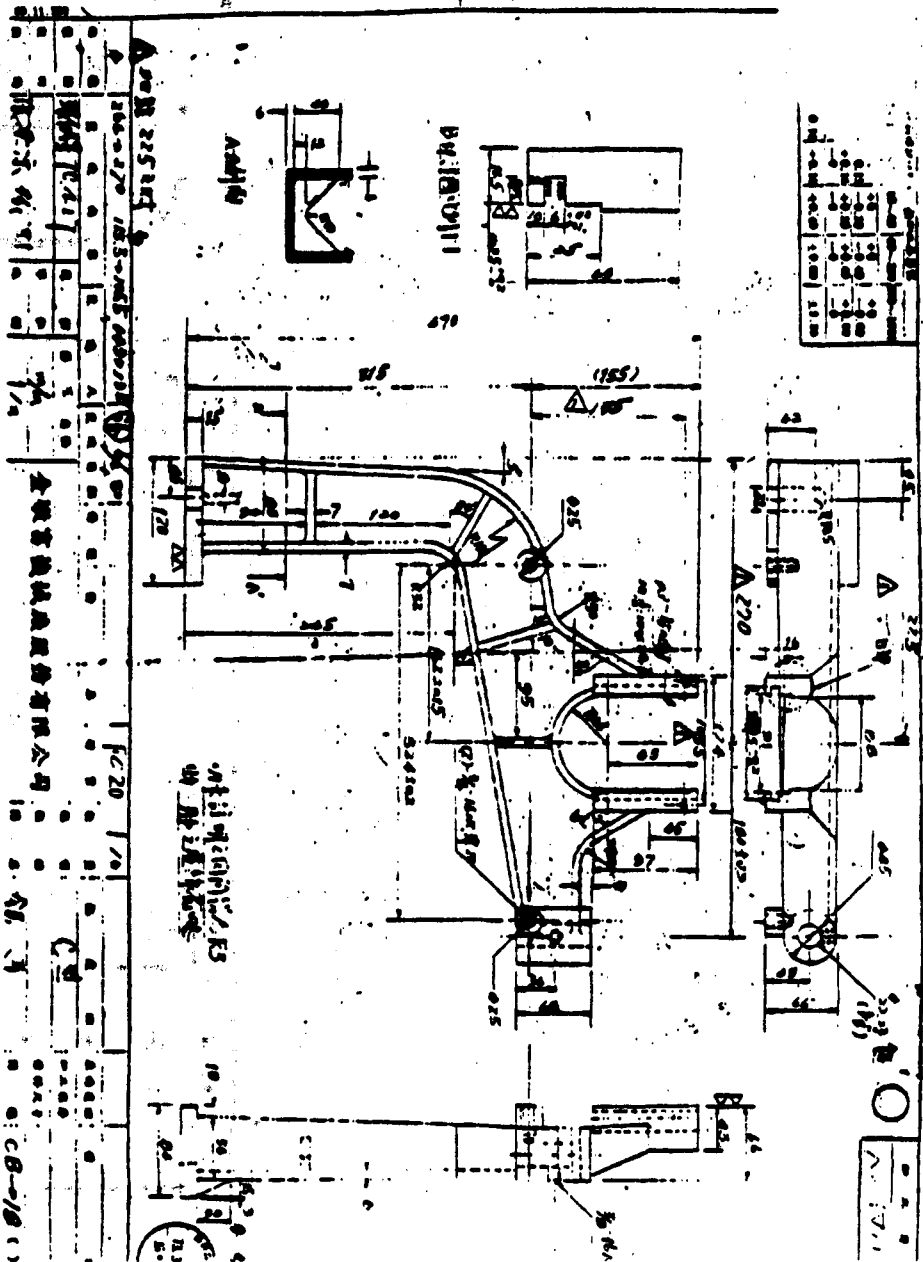
KFF Settlement Agreement
Exhibit E, pg. 3



Sheet metal cover
for miter
rod

KFF Settlement Agreement
Exhibit E, pg 4

D. S. [Signature]



D. Sina

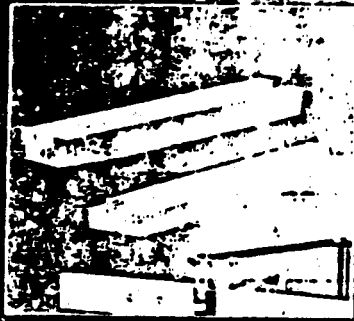
Rear support casting design.
Acceptable as is.

KFF Settlement Agreement

Exhibit E, pg. 5

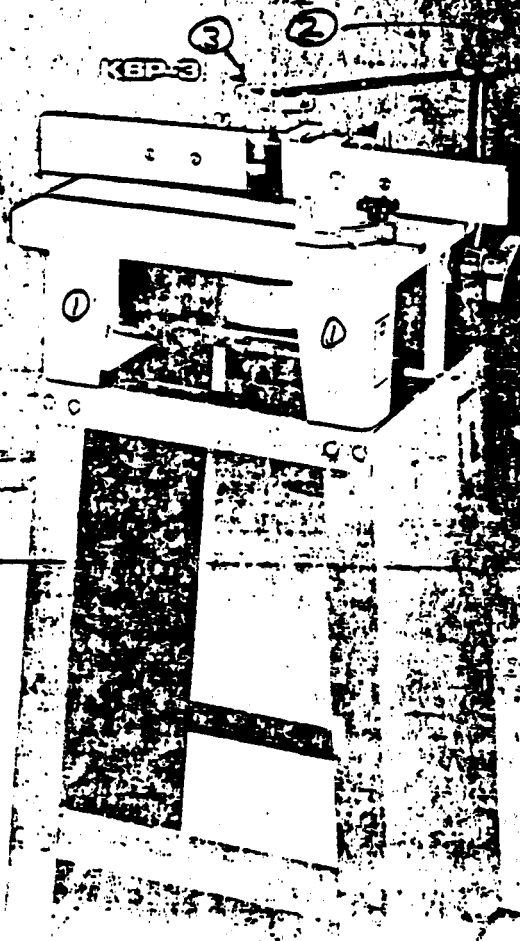


SINGLE SPINDLE WOOD WORKING SHAPER



FEATURES

- Safe motor pulley guard
- Adjustable safe ring to keep your hand away from the spindle
- Precise ground tables
- Independent motor
- Low-feed fence with
- Groove for mill base
- Smooth heavy metal top



D. S. ...

- ① Legs to be made straight per Exh. F, pg. 2.
- ② Ring guard stand to be moved to center location per Exh. F, pg. 2.
- ③ Ring to be thicker, per Exh. F, pg. 3

KFF Settlement Agreement
Exhibit F, pg 1

[Exhibit A]

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

In the Matter of)

CERTAIN WOODWORKING MACHINES)

Investigation No. 337-TA-174

CONSENT ORDER TO CEASE AND DESIST
DIRECTED TO RESPONDENT SHAW SECURITIES CO., LTD.

The complainant, Delta International Machinery Corporation (hereafter called "Delta"), and respondent Shaw Securities Co., Ltd. (hereafter called "Trading Company"), having entered into an agreement which resolves the dispute between Delta and Trading Company that is part of the subject matter of the current investigation, have jointly requested entry of this Consent Order with respect to the dispute between them. A copy of the agreement is submitted herewith

IT IS HEREBY ORDERED AND DECREED THAT AS BETWEEN DELTA AND TRADING COMPANY:

1. The United States International Trade Commission (hereafter called "Commission") has jurisdiction over the subject matter of the investigation including the dispute between Delta and Trading Company pursuant to 19 U.S.C. §1337 in that such

dispute involves claims of unfair competition and unfair acts in the importation of articles under 19 U.S.C. §1337. The Commission has jurisdiction over Trading Company for the purposes of issuing and enforcing this Consent Order to Cease and Desist. Further, this proceeding and settlement are in the public interest.

2. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the design appearance, shape and trade dress of Delta's woodworking machines in issue in the current investigation.

3. Delta has alleged, and Trading Company has denied, that Delta is the owner of common law trademark rights in the term "Contractor's Saw."

4. Delta has alleged, and Trading Company has denied, that Delta is the owner of the full right, title and interest in and to United States Letters Patents No. 3,754,493, No. 4,174,100, and No. 4,436,126.

5. Delta has alleged, and Trading Company has denied, that Trading Company has infringed Delta's rights in and relating to the design appearance, shape and trade dress of one or more of Delta's woodworking machines in issue and has infringed Delta's rights in and relating to the term "Contractor's Saw."

6. Delta has alleged, and Trading Company has denied, that Trading Company has unfairly competed with Delta by directly and/or indirectly participating in the exportation to the United States of woodworking machines that are confusingly similar to one or more of Delta's woodworking machines in issue and in the use of the term "Contractor's Saw."

7. Delta has alleged, and Trading Company has denied, that to the extent that Trading Company sells the subject 10 inch table saw, the 10 inch tilting arbor saw, and/or the planer, Trading Company has infringed Delta's United States Letters Patents No. 3,754,493, No. 4,174,100, and/or No. 4,436,126, and has thereby unfairly competed with Delta.

8. Consistent with the terms and conditions of the attached agreement between Delta and Trading Company, Trading Company, its affiliated and associated companies, their officers, directors, agents, servants, employees, or any of them, and all persons acting in concert or participation with them or with any of the foregoing, are hereby ordered to cease and desist from engaging in all of the unfair methods of competition and unfair acts here allegedly involved, as set forth above, to the extent provided in the attached agreement.

9. Delta and Trading Company hereby waive all rights to appeal or to otherwise challenge the validity of this Consent Order.

10. The rules and regulations of the Commission regarding enforcement and modification of final Commission actions are applicable to this Consent Order.

11. This investigation is hereby terminated with respect to

Shree Sona Ent. Co., Ltd.



Kenneth R. Mason
Secretary

Issued: June 18, 1985

SETTLEMENT AGREEMENT

This agreement is entered into this 20th day of December 1984 by and between Delta International Machinery Corporation (hereafter called "Delta") having its principal place of business at 400 North Lexington Avenue, Pittsburgh, Pennsylvania, 15206, and TAIPEI TRADING COMPANY, LTD. (hereafter called "Trading Company"), having its principal place of business at 5TH FL. NO. 41-4 HONG T NG ST. TAIPEI, TAIWAN, R.O.C. Taiwan, Republic of China.

WHEREAS, the United States International Trade Commission (hereafter called "Commission") has initiated an investigation under §337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337), based on a Verified Complaint and a Verified Revised Amended Complaint (hereafter collectively called "Complaints") filed by Delta seeking relief against certain alleged methods of unfair competition and alleged unfair acts of a number of respondents including Trading Company;

WHEREAS, Delta and Trading Company desire to resolve all of the matters between them raised by such Complaints and to resolve their claims and differences relating thereto;

NOW THEREFORE, Delta and Trading Company in consideration of the mutual promises and covenants herein set forth, do hereby agree as follows:

1. As used in this agreement, the terms 10 inch tilting arbor saw, 10 inch table saw, 14 inch band saw, 6 inch jointer, shaper, 8 inch bench saw, disk/belt finisher and planer shall mean those

particular machines so designated in Delta's Complaints and in issue in the Commission Investigation No. 337-TA-174.

2. Trading Company agrees that it has been directly or indirectly exporting or offering to export to the United States and/or selling to others for exportation to the United States one or more of the woodworking machines of the type identified in paragraph 1 above (hereafter called "exported machines") that Delta asserts are confusingly similar in trade dress to corresponding Delta woodworking machines of the type identified in paragraph 1. The exported 10 inch table saws have in certain instances been sold under the term "Contractor's Saw." Trading Company acknowledges that Delta alleges that such exported machines are confusingly similar in trade dress with such Delta machines and that Delta further alleges that the importation into the United States and marketing and/or sale of such machines in the United States infringes Delta's rights in and relating to the design appearance, shape and trade dress of such machines.

3. (a) Trading Company agrees that the blade guards incorporated on the 10 inch table saws and 10 inch tilting arbor saw herein are alleged by Delta to infringe Delta's United States Letters Patent No. 3,754,493.

(b) Trading Company agrees that the adjustable-height fence incorporated on the 10 inch tilting arbor saw herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,174,100.

(c) Trading Company agrees that the planer herein is alleged by Delta to infringe Delta's United States Letters Patent No. 4,436,126.

4. Trading Company further agrees that the use of the term "Contractor's Saw" is alleged to infringe Delta's asserted common law trademark rights in such term.

5. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any of the exported machines referred to in Paragraph 2 above or any other machines of the types subject to this investigation having allegedly confusingly similar trade dress. If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

(b) Delta agrees that Trading Company may supply such replacement parts and/or complete machines of the accused design as replacements to the extent necessary to satisfy Trading Company's obligations to United States importers regarding warranties granted to such importers and returns of machines from such importers, provided that no such replacements of the accused machines shall be exported from Taiwan after March 15, 1985. If

Trading Company exports more than fifteen (15) such replacement machines of the accused design, then Trading Company shall provide, through its attorney, notification to Delta's attorney of such export and the number of machines exported and shall, upon request, provide to Delta's attorney sufficient documentation showing the destruction of the accused machines for which such replacement machines have been provided.

6. (a) Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any other company for exportation to the United States any further (a) blade guards that Delta alleges infringe Delta's United States Letters Patent No. 3,754,493 or fences that Delta alleges infringe Delta's United States Letters Patent No. 4,174,100 as part of or separate from a saw, or (b) planers that Delta alleges infringe Delta's United States Letters Patent No. 4,436,126.

(b) If Trading Company has participated in the export of a particular machine that has been manufactured by a Taiwanese manufacturer (hereafter called a "settling manufacturer") who has settled with Delta and such agreement between such manufacturer and Delta sets forth a later date allowing export of such particular machine, then such later date shall be applicable as to Trading Company's sale as to that particular machine originating from such settling manufacturer.

7. Trading Company agrees that after October 15, 1984, it will not directly or indirectly export to the United States or directly or indirectly sell, provide, ship or transfer to any

other company for exportation to the United States any woodworking machines of the type identified in paragraph 1 above which are allegedly confusingly similar to Delta's woodworking machines of the type identified in paragraph 1 above, and will within thirty (30) days after signing this Agreement cease use of the term "Contractor's Saw" or any other allegedly confusingly similar term. Delta agrees that Trading Company can directly or indirectly export to the United States and/or sell to other companies for export to the United States those machines of new design obtained from the settling manufacturers with respect to which Delta has indicated that such settling manufacturers can export to the United States.

8. Trading Company represents that it has not used and agrees that it will not use any of the registered trademarks in issue including Delta's registered trademark Unisaw[®].

9. (a) Trading Company agrees that it will not in any way indicate or imply that any of the woodworking machines directly or indirectly exported, marketed and/or sold by Trading Company are manufactured by or under license from Delta or Rockwell or substantially identical or substantially similar in appearance, design and/or trade dress to woodworking machines made and/or sold by Delta or Rockwell or that any parts or accessories for woodworking machines made and/or sold by Rockwell or Delta will fit or can be used with the woodworking machines exported, marketed and/or sold by Trading Company. These restrictions shall not prohibit Trading Company, at its own risk, from indicating or communicating that any expendable parts such as saw blades for

woodworking machines made and/or sold by Delta will fit on or can be used with the woodworking machines exported, marketed and/or sold by Trading Company, providing such expendable parts do in fact fit. Such limitations shall include but not be limited to Trading Company's advertising and communications, both oral and written, with potential or actual customers. Nothing contained herein shall be construed as an admission by Trading Company that Trading Company has in any way indicated or implied that the subject machines are or were manufactured by or under license from Delta.

(b) Delta agrees that, in written or oral communication with present or potential customers or in its advertising or public statements, Delta will not state, discuss, or refer to its settlements in this action unless Delta also states conspicuously in the same communication that the terms of the settlement agreements prohibit the Taiwanese industry from exporting to the United States machines confusingly similar to Delta's products or which infringe Delta's patents but do not prohibit the Taiwanese industry from exporting machines that are not confusingly similar in appearance to Delta's products and do not infringe Delta's patents.

10. Delta and Trading Company agree to join in a Motion in the Commission's investigation for entry of a Consent Order as between Delta and Trading Company and termination of the investigation as to Trading Company. This Consent Order shall be in a form such as the Consent Order attached hereto as Exhibit A incorporated by reference herein or in a form otherwise mutually

agreed upon by the respective attorneys for Delta and for Trading Company.

11. If at any time after October 15, 1984, Delta believes that woodworking machines, which Delta alleges infringe upon Delta's trademark and/or patent rights, being imported into the United States originated from and/or were sold by Trading Company, then Delta may inquire of Trading Company directly or through its present attorney in the United States if any such woodworking machines originated from and/or were sold by Trading Company and Trading Company shall respond to such inquiry, providing the information requested within 30 days of such request.

12. Any controversy or claim including but not limited to all claims for damages and/or any other relief arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association; such arbitration shall be held in Pittsburgh, Pennsylvania before a single arbitrator and judgment upon the award rendered by the Arbitrator may be entered in any Court and/or tribunal in any country having jurisdiction over any of the parties. This provision in this paragraph of this Agreement shall not in any way restrict and/or limit and/or prevent Delta or Trading Company from seeking any other appropriate relief and/or action from or by the Commission.

13. Delta releases and discharges Trading Company, together with its predecessors, successors and assigns, together with the officers, directors, agents and employees of any of them from any and all legal or equitable claims that Delta may have or may have

had with respect to Trading Company's sales of the woodworking machines or other unfair acts covered hereby for any conduct that may have occurred up to the date of the signing of this agreement by Delta. This release shall not in any way extend to any other manufacturer, trading company, exporter, importer, purchaser or customer from which Trading Company purchases or to which Trading Company sells any of the woodworking machines covered hereby and/or any portions thereof. If Trading Company breaches this Agreement, then this release by Delta to Trading Company shall become null and void. Trading Company releases and discharges Delta, together with its predecessors, successors, affiliated companies and assigns, together with its officers, directors, agents and employees of any of them, from any and all causes of actions and claims for damages that Trading Company may have against them relating to or arising out of the present investigation before the Commission and the matters raised therein. If Delta breaches this Agreement, then the release by Trading Company to Delta shall become null and void.

14. As to the subject matter of this agreement, this agreement sets forth the entire understanding and agreement of Delta and Trading Company, and there are no restrictions, promises, representations, warranties, covenants or understandings other than those expressly set forth or referred to herein. This agreement supersedes all prior agreements and understandings between the parties with respect to this subject matter.

15. This agreement shall be governed by the law of the Commonwealth of Pennsylvania as to all matters, including but not

limited to matters of validity, construction, effect and performance; provided however, that this paragraph does not apply to any matters under the United States patent laws and/or other laws of the United States with respect to which the Federal Courts have preemptive and exclusive jurisdiction.

16. This agreement may be executed in two or more counterparts each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17. Subject to applicable law, this agreement may be amended or modified only by written agreement of Delta and Trading Company signed by both parties or by the party to be charged.

18. Nothing contained in this agreement nor the act of making this agreement nor the entry of the Consent Order pursuant hereto shall be deemed to constitute any admission by either party hereto as to the accuracy, or lack of accuracy, of (a) any allegation or

contention of Delta as set forth in any of the Complaints or of (b) any allegation or contention of Trading Company as set forth in its answer thereto.

IN WITNESS WHEREOF, this Settlement Agreement has been executed by the parties on the dates shown below.

DELTA INTERNATIONAL MACHINERY CORPORATION

Date: 2/12/85

By *Joseph R. Allen*

SHOW SOON ENT. CO., LTD.

Date: DEC. 20, 1984

By *[Signature]*

City of Pittsburgh
State of Pennsylvania)
County of Allegheny) SSN
Sworn to and subscribed before
on this 20 day of Feb 1985

Jay E. Woodard

JAY E. WOODARD, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES MAY 1, 1986
Member, Pennsylvania Association of Notaries

Taiwan
City of Taipei
American Institute in
Taiwan, Taipei Office

~~I, Allen Sung Hu KONG, Special Notary (PL 95-9), duly appointed and qualified, do hereby certify that on this day of DEC 20 1984 before me personally appeared CHAU YUNG-HUNG PHILIP to me personally known to be the individual(s) described in whose name(s) is/are subscribed to and who executed the within instrument and being informed by me of the contents of the said instrument he/they duly acknowledged to me that he/they executed the same freely and voluntarily for uses and purposes therein mentioned in witness whereof I have hereunto set my hand and official seal the day and year last aforesaid written.~~

~~Allen Sung Hu Kong
Special Notary (PL 95-9)~~

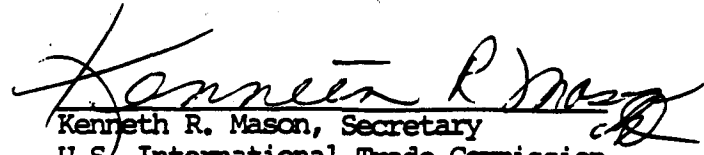
Taiwan
City of Taipei
American Institute in
Taiwan, Taipei Office

~~I, Allen Sung Hu KONG, Special Notary (PL 95-9), duly appointed and qualified, do hereby certify that on this day of DEC 20 1984 before me personally appeared CHAU YUNG-HUNG PHILIP to me personally known to be the individual(s) described in whose name(s) is/are subscribed to and who executed the within instrument and being informed by me of the contents of the said instrument he/they duly acknowledged to me that he/they executed the same freely and voluntarily for uses and purposes therein mentioned in witness whereof I have hereunto set my hand and official seal the day and year last aforesaid written.~~

~~Allen Sung Hu Kong
Special Notary (PL 95-9)~~

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Final Determination was served upon the following parties via first class mail, and air mail where necessary, on June 19, 1985.


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

Behalf of Complainant

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Arlington VA 22202

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1156 15th St. NW
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Behalf of Jet Equipment & Tools

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Griffin Branigan & Butler
P. O. Box 2326
Arlington VA 22202

Behalf of Respondent

Toolcoa International Inc.
377 N. Anaheim Blvd.
Orange CA 92668

Behalf of Respondent

Trend-Lines Inc.
170 Commercial St.
Malden MA 02148

Behalf of Respondent

Fort Bragg Rent-All Inc.
1855 North Highway 1
P. O. Box 1790
Fort Bragg CA 95437

Behalf of Respondent

Pro Shop Power Tools
313 North Route 83
Elmhurst IL 60126

Behalf of Big Joe Ind Tool Corp.

Leonard Z Finger Esq
Finger, Small Cohen & Forlano
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2001 Kirby Drive Suite 506
Houston TX 77019

Behalf of Mailing List

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Bellview WA 98005

Behalf of Mailing List

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Chief Counsel
U.S. Customs Service
1301 Constitution Avenue, N.W.
Washington, D.C. 20229

2.

the United States and sold to consumers. 2/ This evidence is sufficient to establish injury and tendency to injure for these industries. Similarly, there is evidence on the record that establishes that woodworking machines that infringe the three patents have been imported into the United States and sold to consumers. 3/ This is sufficient to establish injury and tendency to injure for these three industries.

Consequently, I find that the importation and sale of the subject woodworking machines (that is, certain band saws, table saws, tilting arbor saws, and planers) that infringe any of the seven intellectual property rights have the effect or tendency to substantially injure a domestic industry.

2/ See initial determination of Feb. 7, 1985 (ID) at 22-26 (adopted by the Commission—see 50 Fed. Reg. 14172 (Apr. 10, 1985); Commission investigative attorney's findings of fact 22-48; CFF 123-130.2, 146, 147.2.

3/ See ID at 26-27; Transcript of evidentiary hearing at 169-72; CX 37; CX 38; CFF 142-45.

PUBLIC INSPECTION

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

OCT 2 1985
OFFICE OF THE SECRETARY
U.S. INTL. TRADE COMMISSION

In the Matter of)
)
)
CERTAIN WOODWORKING MACHINES)
)

Investigation No. 337-TA-174

OPINION OF VICE CHAIRMAN LIEBELER, COMMISSIONER ECKES,
COMMISSIONER LODWICK, AND COMMISSIONER ROHR

Background

Investigation No. 337-TA-174 was conducted to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation or sale of certain 14-inch band saws, 10-inch table saws, tilting arbor saws, 8-inch motorized bench saws, 6-inch jointers, shapers, disk/belt finishers, wood-planing machines, blade guards, and vertically adjustable rip fences. 1/ 2/

The investigation was instituted on the basis of a complaint alleging unfair acts and unfair methods of competition in connection with the importation or sale of the subject articles, having the effect or tendency to

1/ 48 Fed. Reg. 55786 (Dec. 15, 1983); 49 Fed. Reg. 20767 (May 16, 1984).
Sec infra n.155 regarding elimination of the subject motorized bench saws, jointers, shapers, and disk/belt finishers from controversy.

2/ The following abbreviations will be used in this opinion:
CL—conclusion of law in the initial determination concerning the violation of section 337 in this investigation; CFF—complainant's proposed finding of fact; CPX—complainant's physical exhibit; CX—complainant's documentary exhibit; Exh.—exhibit; IAFF—Commission investigative attorney's proposed finding of fact; IAPX—Commission investigative attorney's physical exhibit; IAX—Commission investigative attorney's documentary exhibit; Tr.—transcript (of the evidentiary hearing, unless otherwise indicated); ¶—paragraph.
Citations to the record appearing in this opinion are representative but may not be complete listings of all evidence supporting the findings and conclusions discussed herein.

substantially injure a domestic industry. The unfair acts under investigation included alleged patent infringement, common-law and registered trademark infringement, false representation of manufacturing source, passing off, and false or deceptive advertising. 3/

Fifty-three firms were named as parties in the investigation. The original complainant was Rockwell International Corp. Delta International Machinery Corp. was substituted for Rockwell after Delta acquired Rockwell's Power Tool Division and the asserted patent and trademark rights. 4/ The following U.S. and foreign companies were named as respondents or were allowed to intervene in the investigation: 5/

- | | | |
|-----|---|----------|
| 1. | The Tool Guys | (U.S.A.) |
| 2. | Barrett Tool & Die Manufacturing Corp. | " |
| 3. | Sid Tool Co., Inc., d/b/a Manhattan Supply Co. | " |
| 4. | Industrial Industries International, Inc. | " |
| 5. | Conover Woodcraft Specialties, Inc. | " |
| 6. | Wilton Corp. | " |
| 7. | Wilke Machinery Co. | " |
| 8. | American Machine and Tool Co. | " |
| 9. | Harbor Freight and Salvage Co.,
d/b/a Central Purchasing, Inc. | " |
| 10. | CTT Tools, Inc. | " |
| 11. | C.O.M.B. Company | " |
| 12. | Equipment Importers, Inc.,
d/b/a Jet Equipment and Tools | " |
| 13. | Toolcoa International, Inc. | " |
| 14. | Big Joe Industrial Tool Corp. | " |
| 15. | Trend-Lines, Inc. | " |
| 16. | Fort Bragg Rent-All, Inc. | " |
| 17. | Pro Shop Power Tools Co. | " |
| 18. | The Liquidator, Inc. | " |
| 19. | Liquidation Bureau, Inc. | " |
| 20. | Grizzly Imports, Inc. | " |
| 21. | Astro-Pneumatic Tool Co. | " |
| 22. | Tops Equipment & Tools Co., Ltd. | (Taiwan) |
| 23. | Nu Way Machinery Corp. | " |
| 24. | Tien Chien Enterprises Co., Ltd. | " |

3/ 48 Fed. Reg. 55786 (Dec. 15, 1983); 49 Fed. Reg. 20767 (May 16, 1984); Verified Revised Amended Complaint; CFF 23-28.

4/ 49 Fed. Reg. 23463 (June 6, 1984). See also CFF 20-21, 24-25, 123-28, 131, 132, 133, 134, 135, and 136.

5/ 48 Fed. Reg. 55786 (Dec. 15, 1983); 49 Fed. Reg. 20767 (May 16, 1984); Verified Revised Amended Complaint; 50 Fed. Reg. 7969 (Feb. 27, 1985).

- | | | |
|-----|--|----------------|
| 25. | Yung Li Hsing Electric Works Co., Ltd. | (Taiwan) |
| 26. | Chiu Ting Machinery Co., Ltd.
(a/k/a Ju Ting Machinery Works Co., Ltd.) | " |
| 27. | Upsix Industrial Co., Ltd. | " |
| 28. | Shih Hsin Machinery Industrial Co., Ltd. | " |
| 29. | Dankey International Incorporated | " |
| 30. | Kuang Yung Machinery Co., Ltd. | " |
| 31. | Shen Kung Machinery Industrial Co., Ltd. | " |
| 32. | Taiwan Sheng Tsai Industrial Co., Ltd. | " |
| 33. | Rexon Industrial Corp. | " |
| 34. | Formosan United Corp. | " |
| 35. | Good Will Mercantile Co. | " |
| 36. | Show Soon Enterprises Co., Ltd. | " |
| 37. | Fortune Development Corp. | " |
| 38. | King Feng Fu Machinery Works Co., Ltd. | " |
| 39. | King Tun Fu Machinery Co. | " |
| 40. | Ju Ting Machinery Works Co., Ltd.
(a/k/a Chiu Ting Machinery Co., Ltd.) | " |
| 41. | Sheng Feng Woodworking Machines Co., Ltd. | " |
| 42. | Allied Manufacturers International Corp. | " |
| 43. | Tomita Enterprise Co., Ltd. | " |
| 44. | Soun Ping Machinery Co., Ltd. | " |
| 45. | Strophe Enterprise Co., Ltd. | " |
| 46. | Leroy International Corp. | " |
| 47. | World Wide Supplies Co., Ltd. | " |
| 48. | TUI Industrial Co., Ltd. (intervenor) | " |
| 49. | Mao Shan Machinery Industrial Co., Ltd. (intervenor) | " |
| 50. | Union Tool Exporters, Ltd. (intervenor) | " |
| 51. | Tauco Manufacturing Co., Ltd. | (South Africa) |

During the course of the investigation, the three intervenors and twenty-seven of the respondents settled with Delta and were terminated from the investigation on the basis of consent orders. 6/ Six other respondents

6/ Those respondents and intervenors included The Tool Guys, Barrett, Sid, Industrial Industries, Conover, Wilton, Wilke, American Machine and Tool, Harbor Freight, CTT, C.O.M.B., Tops, TUI, Mao Shan, Union, Nu Way, Tien Chien, Equipment Importers (Jet), Yung Li Hsing, Chiu Ting, Upsix, Grizzly, Shih Hsin, Dankey, Kuang Yung, Astro-Pneumatic, Shen Kung, Taiwan Sheng Tsai, Rexon, and Ju Ting. See 49 Fed. Reg. 35874 (Sept. 12, 1984); 49 Fed. Reg. 39118 (Oct. 3, 1984); 49 Fed. Reg. 39928 (Oct. 11, 1984); 49 Fed. Reg. 40678 (Oct. 17, 1984); 49 Fed. Reg. 50314 (Dec. 27, 1984); 50 Fed. Reg. 1138 (Jan. 9, 1985); 50 Fed. Reg. 3423 (Jan. 24, 1985); 50 Fed. Reg. 7969 (Feb. 27, 1985), as amended at 50 Fed. Reg. 10236 (Mar. 14, 1985); 50 Fed. Reg. 9141 and 9142 (Mar. 6, 1985); 50 Fed. Reg. 14172 (Apr. 10, 1985); 50 Fed. Reg. 20303 (May 15, 1985).

were dismissed for lack of evidence of a section 337 violation. 7/

During the final stage of the investigation, Delta and six more respondents filed joint motions for the entry of consent orders. 8/ In addition, Delta conceded that there was no evidence of a section 337 violation by one nonsettling respondent. 9/ Consequently, at the end of the investigation, Delta's allegations were focused on the activities of eight respondents:

- | | |
|--------------------------|----------|
| 1. World Wide | (Taiwan) |
| 2. Toolcoa International | (U.S.A.) |
| 3. Big Joe | " |
| 4. Trend-Lines | " |
| 5. Fort Bragg | " |
| 6. Pro Shop | " |
| 7. The Liquidator | " |
| 8. Liquidation Bureau | " |

An evidentiary hearing was conducted between December 5 and 7, 1984. No respondents appeared; Delta and the Commission investigative attorney (IA) were the only participants.

On February 7, 1985, the presiding administrative law judge (ALJ) issued an initial determination (ID) holding all remaining respondents in default and finding all remaining respondents except Strophe and Soun Ping to be in violation of section 337. The ALJ determined that Strophe and Soun Ping should be dismissed. 10/

On April 1, 1985, in response to a petition for review filed by the IA, the Commission decided to review portions of the ID concerning infringement of

7/ Those respondents included Tauco, Allied, Tomita, Sheng Feng, Strophe, and Soun Ping. See 49 Fed. Reg. 32692 (Aug. 15, 1984); 50 Fed. Reg. 3423 (Jan. 24, 1985); initial determination of Feb. 7, 1985, at 4; 50 Fed. Reg. 14172 (Apr. 10, 1985).

8/ Those respondents included Formosan, Good Will, Show Soon, Fortune, King Feng Fu, and King Tun Fu. The requested consent orders were not entered until the end of the investigation. See Commission Action and Order of June 17, 1985, at 3-5.

9/ That respondent was Leroy International. See infra n.134.

10/ ID at 4.

common-law trademarks in the external design appearance of complainant's 10-inch table saw and 14-inch band saw. The Commission also decided to review, on its own motion, portions of the ID concerning patent infringement, misappropriation, definition of the domestic industry, injury, and the alleged violation of section 337 by respondent Leroy International. 11/

The Commission determined not to review portions of the ID concerning infringement of the common-law trademark "Contractor's Saw," registered trademark infringement, false and deceptive advertising, passing off, efficient and economic operation of the domestic industry, default, and the dismissal of respondents Strophe and Soun Ping. 12/ Those portions of the ID have become the Commission's determination on the issues discussed therein. 13/ However, to supplement those portions of the ID, the Commission has adopted certain findings of fact proposed by Delta and the IA. 14/

Delta and the IA filed briefs on the issues under review and the issues of remedy, the public interest, and bonding. 15/ The Commission had requested such briefs from all parties, 16/ but the respondents did not file any.

11/ 50 Fed. Reg. 14172 (Apr. 10, 1985).

12/ Id.

13/ See 19 C.F.R. § 210.53(h).

14/ CFF 77-130.2, 146-47.4, 157-73; IAFF 1-17, 22-48, and 227-42. (50 Fed. Reg. 14172, Apr. 10, 1985).

15/ See Memorandum of Complainant Delta International Machinery Corp. in Response to the Notice of the Commission's Decision to Review (Delta's Review Brief); Memorandum of Complainant Delta International Machinery Corp. on Remedy, the Public Interest, and Bonding (Delta's Remedy Brief); Reply of Complainant Delta International Machinery Corp. to Briefs of the Commission Investigative Attorney (Delta's Reply Brief); Brief of the Commission Investigative Attorney on the Issue of Violation (IA's Review Brief); Brief of the Commission Investigative Attorney on the Issues of Remedy, Bonding, and the Public Interest (IA's Remedy Brief); Reply Brief of the Commission Investigative Attorney (IA's Reply Brief).

16/ 50 Fed. Reg. 14172 (Apr. 10, 1985).

The Commission also solicited written comments from the public and other Federal agencies concerning remedy, the public interest, and bonding. 17/ No comments were received.

This opinion sets forth our views concerning the issues under review, as well as the issues of remedy, the public interest, and bonding. 18/ 19/ 20/ 21/

Common-law trademark infringement

A trademark is defined at common law as it is under the Lanham Act: "any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured or sold by others." 22/ A trademark indicates origin or ownership, guarantees quality or constancy, and entitles the owner to advertise goods bearing the mark. 23/

A mark is deemed established and protectible upon proof that: (1) the complainant has a right to use the mark; (2) the mark is inherently distinctive or has acquired secondary meaning; (3) the mark is not primarily

17/ Id.

18/ See also the Additional Views of Vice Chairman Liebler.

19/ The Commission's decision to grant the six consent order motions pending at the end of the investigation is discussed in the Commission Action and Order of June 17, 1985. (See also 50 Fed. Reg. 16639, June 27, 1985.)

20/ The findings of fact adopted in support of this opinion are cited in the opinion.

21/ This is a default case, i.e., the named respondents did not appear at the evidentiary hearing to contest the allegations made by complainant. See Tr. at 1-2. As required in a default case, Delta has made a prima facie case of a violation of section 337. (See 19 C.F.R. § 210.25(b).) A default case may limit the precedential significance of the Commission's determination as compared with the precedential value of determinations made in a fully litigated case.

22/ 15 U.S.C. § 1127; 1 McCarthy, Trademarks and Unfair Competition, § 3:1 (2nd Ed. 1984); Certain Single Handle Faucets, Investigation No. 337-TA-167, USITC Publication 1606, ID at 34-35 (Nov. 1984) (Single Handle Faucets); Certain Trolley Wheel Assemblies, Investigation No. 337-TA-161, USITC Publication 1605, ID at 34-35 (Nov. 1984) (Trolley Wheel Assemblies).

23/ Note, supra, n.22.

functional; and (4) the mark is not generic. 24/ The basic test for infringement is the likelihood of confusion in the minds of a substantial number of reasonable buyers. 25/

The marks under review are the overall external designs of Delta's 10-inch table saw and 14-inch band saw. 26/ The ALJ determined that Delta had established common-law trademark rights in both designs. 27/ The Commission has reviewed portions of the ID concerning functionality and secondary meaning. We affirm the ALJ's conclusion that the designs in question are primarily nonfunctional but reverse the conclusion that the designs have acquired secondary meaning.

Functionality

The concept of functionality historically has been expressed in terms of utility. 28/ In that regard, the Commission has adopted the test enunciated in In re Morton-Norwich Products, Inc.—i.e., whether competition will be hindered by preventing others from copying the design or configuration in question. 29/

Morton-Norwich listed the following factors as relevant considerations in determining functionality: (1) whether the utilitarian advantages of the design are touted in advertising; (2) whether the particular design results from a comparatively simple or cheap method of manufacture; (3) whether there

24/ Single Handle Faucets at 35; Trolley Wheel Assemblies at 35.

25/ Single Handle Faucets at 47; Trolley-Wheel Assemblies at 35.

26/ See CFF 37-38.

27/ ID at 12-17 and CL 3.

28/ In re Dennison Mfg. Co., 39 F.2d 720 (C.C.P.A. 1930); Sparklets Corp. v. Walter Kidde Sales Co., 104 F.2d 396, 399 (C.C.P.A. 1939).

29/ See In re Morton-Norwich Products, Inc., 671 F.2d 1332 (C.C.P.A. 1982); Single Handle Faucets at 36; Trolley Wheel Assemblies at 36-37.

exists a utility patent which discloses the utilitarian advantage of the design for which production is sought; and (4) whether commercial alternatives are available. 30/ The foregoing factors are aids in determining functionality; 31/ no single factor is dispositive.

In the present investigation, the ALJ concluded that the configuration of each saw is overall nonfunctional because: (1) the design features of each saw are neither necessary nor utilitarian; (2) each saw can be produced more cheaply using other designs; and (3) alternative designs have been used in competitors' saws, without affecting the quality of performance. 32/

The ID lists the design features that the ALJ found to be nonfunctional. 33/ However, it does not discuss whether aspects of any feature are functional. The Commission reviewed the issue of functionality because, in this case, a mere listing of nonfunctional design features is not sufficient. 34/ Set forth below is our assessment of the functionality of the individual components of each asserted design mark.

30/ Morton-Norwich at 1340-41.

31/ Id. at 1340.

32/ ID at 16-17.

33/ Id. at 9-10.

34/ Recent decisions by the United States Court of Appeals for the Federal Circuit (CAFC) indicate that the best way of analyzing the de jure functionality of a complex overall design may be to do so from the standpoint of the design's de facto functional features. In *Textron, Inc. v. U.S.I.T.C.*, No. 84-1261, ___ F.2d ___ (Fed. Cir. 1985), the CAFC stated that—

[W]e do not retreat from the position that the determination of whether an overall design is functional should be based on the superiority of the design as a whole, rather than on whether each design feature is 'useful' or 'serves a utilitarian purpose.' [In re *Teledyne, Inc.*, 676 F.2d at 971; *Morton-Norwich*, supra, 671 F.2d at 1339.] We merely acknowledge, as this court did in similar circumstances in *Teledyne*, that the best way the Commission may have had to analyze the de jure functionality of a complex overall design was to do so from the standpoint of its de facto functional features.

Textron, slip opinion at 14.

1. Table Saw

Circular handwheels having three spokes. Several of Delta's "legitimate" competitors use circular handwheels having three spokes (webbs). 35/ However, there are commercially acceptable alternative designs available. 36/ Certain settling respondents, for example, have agreed to change the design of their handwheels to knobs or to solid wheels or to wheels having more or fewer than three spokes and have agreed that these modifications will not affect the quality or performance of their machines. 37/ The design of Delta's handwheels is therefore nonfunctional.

Appearance of the blade guard. The design of Delta's blade guard is disclosed and claimed in one of the patents under investigation—i.e., U.S. Letters Patent 3,754,493 ('493 patent). 38/ Under Morton-Norwich, the existence of a utility patent covering a design is evidence of its

(Footnote Continued)

The appropriateness of analyzing functionality from the standpoint of the individual design components was tacitly reiterated in New England Butt Co. v. U.S.I.T.C., No. 83-1402, slip opinion, ___ F.2d ___ (Fed. Cir. 1985). In affirming the Commission's conclusion of the functionality of the overall design mark at issue in that case, the CAFC made the following observations concerning the Commission's approach:

The ALJ did indeed examine the utilitarian nature of each of the twenty-two components claimed by New England Butt to constitute its trademark. However, the purpose of this examination was to determine the functionality of each feature as reflected in the machine's overall appearance. The Commission reviewed each of the relevant components and found that each component is functional or irrelevant for trademark purposes. [Footnote omitted.] The Commission then analyzed the braider's overall configuration to see if the particular design is functional, by turning to the analysis set forth in Morton Norwich, supra at 8-9.

New England Butt, slip opinion at 10.

35/ IAFF 60-63.

36/ IAFF 64.

37/ IAFF 65.

38/ CX 1. See also IAFF 110-11.

functionality. 39/ The specific shape of the blade guard used by Delta is not required by the '493 patent, however. 40/ Furthermore, Delta's legitimate competitors and the settling respondents use blade guards having a different shape than Delta's. 41/ The shape of Delta's blade guard is therefore nonfunctional.

The transparency of Delta's blade guard is functional, however, because it is a safety feature. The blade guard prevents the person using the saw from inadvertently contacting the saw blade 42/; the transparency of the blade guard permits the saw user to see the work in progress.

Appearance of the ribbed surface on the extension wings. Delta advertises that the ribbed surface prevents warping and distortion. 43/ Use of ribbed surfaces also results in lower production costs because of reduced surface areas to be machined. 44/

The appearance of the ribs (i.e., size and location) is nonfunctional, however. Although competitors place ribs on the extension wings of their saws, the appearance of the ribs on their saws differs from the appearance of the ribs on Delta's saws. 45/ Furthermore, the modifications agreed to in the various settlement agreements demonstrate that numerous other rib designs are available for use. 46/

Rounded guide bar. The table saw design in question has two bars: one in the front and one in the rear. The adjustable rip fence under

39/ 671 F.2d 1340-41.

40/ See CX 1; IAFF 112.

41/ See IAFF 113.

42/ IAFF 110.

43/ IAFF 66-67.

44/ IAFF 67.

45/ IAFF 68-72.

46/ IAFF 73.

investigation 47/ is attached to these guide bars. (The rip fence is adjustable from side to side, so that the person using the saw can set the width of the wood to be ripped.) Guide bars are necessary to keep the rip fence properly aligned, i.e., perpendicular to the front and rear of the machine. 48/

Delta's guide bars are cylindrical, and they are provided with an incremental scale on the top of the front bar in order to assist the worker in setting the desired cutting width. 49/ The guide bars on the machines of two legitimate competitors are similar to Delta's in appearance, and Delta has allowed settling respondents to retain the cylindrical guide bars with incremental scales having gradations similar to those found in a ruler. 50/ The guide bars on the table saws of two other competitors are angular with incremental scales. 51/ The cylindrical shape of the guide bars is nonfunctional. However, the placement of incremental scales on such guide bars is functional.

The design and appearance of the lever used to adjust and move the rip fence. Delta uses a single control lever (handle) that attaches the rip fence to the front and rear guide bars, tightens and straightens the fence in the desired position, and then locks the rear of the fence. 52/ Delta alleged only that the external configuration of the clamp and lever has trademark significance. The clamp is the component that attaches the rip fence to the front and rear guide bars and the locking mechanism using one lever. 53/

47/ See infra this opinion at 32.

48/ IAFF 88-89.

49/ IAFF 89.

50/ IAFF 90-92.

51/ IAFF 93-94.

52/ IAFF 95.

53/ Id.

Delta's clamps are round in contour, whereas the clamps of most of Delta's competitors are generally rectangular in contour. 54/ The configuration of the lever (or levers in the case of those using two levers) is also different from Delta's. 55/ The use of alternative configurations by other competitors, including settling respondents, 56/ indicates that the external configuration of the clamp and lever is nonfunctional.

Appearance of the miter gauge. Miter gauges are used to set the angle of the material to be cut as it hits the blade. 57/ The most commonly used angles are 90 degrees, 45 degrees left, and 45 degrees right. 58/ Delta's miter gauges have three small protrusions to enable the user to quickly set the gauge at the three most commonly used angles. 59/ The miter gauge also has a bar that is placed in grooves on either side of the saw blade. 60/ The size of this bar is set by industry standard. 61/

The miter gauges of all of Delta's domestic competitors and the settling respondents have the three small protrusions and a gauge bar. 62/ The primary difference between Delta's miter gauges and those used by other companies is the configuration of the handle (knob). Delta uses a short cylindrical handle and the others, including the settling respondents, use a long cylindrical handle. 63/

54/ IAFF 95.; 98-103.

55/ IAFF 98-104.

56/ IAFF 105.

57/ IAFF 83.

58/ Id.

59/ See Tr. at 97, 105-06.

60/ Id.

61/ Tr. at 106.

62/ Tr. at 96-97; CX 49 at 1-4, 7-8; SCX 34 at 27; CX 30, Exh. F; CX 32, Exh. B at 2; CX 34, Exh. C-7.)

63/ IAFF 84-87.

The only aspect of Delta's miter gauge that appears to be nonfunctional is the configuration of the handle. As stated previously, the three protrusions facilitates the setting of the miter gauge at the three most commonly used angles, and the configuration of the gauge bar is set by industry standard. Consequently, those aspects of the miter gauge are functional.

Location of the controls. The location of the controls was selected on the basis of ease of operation—a fact that Delta has advertised. 64/ This is evidence of the functionality of the location of the controls. The advertisements for other companies' machines depict similar locations for controls; the sole difference is that some are of a left-hand configuration, and the others, a right-hand configuration. (The right-hand configuration is the most commonly used.) 65/

Further evidence of the functionality of the location of the controls is the fact that Delta's agreements with the settling respondents permit the respondents to retain the location of the controls on their machines, although the respondents are required to change the appearance of the controls. 66/ The location of the controls is therefore functional.

Design, location, and color scheme of identification name plate and blade angle gauge at the front of the machine. There is no evidence on the record with respect to the color scheme of the identification name plate and blade angle guide for machines other than Delta's and one settling respondent. 67/ However, the color scheme used by Delta (black, white, and red) appears to be nonfunctional.

64/ IAFF 74-75.

65/ IAFF 76-80.

66/ IAFF 81.

67/ IAFF 109.

The location of the blade angle gauge at the front of the machine appears to be functional, however, for the same reasons that the location of the controls are functional. 68/

As indicated above, the following aspects of Delta's table saw are functional: (1) the transparency of the blade guard; (2) the configuration of the miter gauge (except the shape and size of the handle); and (3) the location of the controls (handwheels, gauges, and switches).

Nevertheless, we find the design of the table saw is overall nonfunctional, as evidenced by: (1) the appearance of handwheels; (2) the shape of the blade guard; (3) the appearance of the extension wings; (4) the rounded guide bars; (5) the appearance of the rip fence lever and the rounded configuration of the rip fence clamp; (6) the appearance of the handle on the miter gauge; and (7) the color scheme and design of the name plate and blade angle gauge. Moreover, most of the design features of the table saw are neither necessary nor utilitarian; Delta's table saw can be produced more cheaply using other designs; and alternative designs have been used in competitors' table saws without affecting the quality of performance.

We affirm the ALJ's conclusion that the external design of Delta's table saw is overall nonfunctional.

2. Band Saw

Delta's "slim line" design leaves most of the adjustment controls, the frame (including reinforcing webbs), and the blade guides exposed to view. 69/ The design uses four light castings as housings (two for the front and rear top housings and two for the front and rear bottom housings) and an external

68/ See IAFF 106-08.

69/ IAFF 124, 131, 132, 134.

"C" casting as the frame to join the top and bottom portions of the saw together. The tops and bottoms of each of the four housings are a near-perfect arc. 70/

The miter gauge for Delta's band saw is the same as that utilized on the table saw. Consequently, we find the appearance of the miter gauge to be functional in part. (As stated previously, the three protrusions on the miter gauge serve the purpose of facilitating the setting of the miter gauge at the three most commonly used angles. The configuration of the gauge bar is set by industry standard.) In addition, we also find the specific appearance (i.e., transparency) of the blade guide to be functional per se.

Nevertheless, we affirm the ALJ's conclusion that the external configuration of Delta's band saw is overall nonfunctional. We note that the table saw's overall design is not covered by a utility patent. Furthermore, the utilitarian advantages of the overall design are not touted in advertising.

In addition, band saws can be produced more cheaply using other designs, 71/ and alternative designs have been used in competitors' saws without affecting the quality of performance. 72/ The arbitrariness or nonfunctionality of Delta's slim line band saw design lies in the fact that the components of the saw are left exposed to view (whereas the nonaccused saw designs (e.g., "bathtub" designs) place the components within housings). 73/

The bathtub designs tend to be more massive, and the settlement designs are heavier and require more steps in production than the slim line design. 74/ There appears to be, however, effective competition from producers utilizing bathtub designs. Furthermore, settling respondents have

70/ IAFF 119.

71/ See IAFF 127.

72/ See IAFF 119-22, 128, 137.

73/ IAFF 119, 124, 131, 132, 134.

74/ See generally IAFF 119, 121-135.

agreed to modify their designs and have agreed that the specified modifications will not affect the quality or operation of the imported machines. 75/ These factors lead us to conclude that the design of Delta's band saw is overall nonfunctional.

Secondary meaning

Although nonfunctional, the designs in question are not entitled to trademark protection unless they have acquired secondary meaning. 76/ To establish secondary meaning, it must be shown that a substantial number of the relevant consumer group associates the mark with a single source. 77/ The party seeking protection for its proposed mark must show that there is substantial evidence of secondary meaning, not merely a remote possibility. 78/

Proof of secondary meaning may be shown by direct and/or circumstantial evidence. Direct evidence includes statements of buyers and also may include professionally conducted consumer surveys. 79/ Circumstantial evidence may include evidence of the nature and extent of the seller's advertising and promotional efforts, the size of the seller, number of sales made, amounts spent in advertising, length of use of the mark, and similar evidence tending to show wide exposure of the relevant buyer class to the mark in question. 80/ Such evidence is relevant but will not necessarily justify an inference that secondary meaning has been established. 81/

75/ IAFF 133, 137.

76/ See Single Handle Faucets at 40; Trolley Wheel Assemblies at 41; 1 McCarthy, supra, § 15:1.

77/ Single Handle Faucets at 40; Trolley Wheel Assemblies at 41; 1 McCarthy, supra, § 15:11.

78/ Note, supra, n.77.

79/ Single Handle Faucets at 41; Trolley Wheel Assemblies at 41-42; 1 McCarthy, supra, § 15.11.

80/ Note, supra, n.79.

81/ Trolley Wheel Assemblies at 42; 1 McCarthy, supra, §§ 15:11, 15:16.

In determining that the overall designs of Delta's table saw and band saw had acquired secondary meaning, the ALJ relied on: (1) a survey study in which a net unduplicated 25.8 percent of the total interviewees correctly identified photographs of Delta's band saw and a net unduplicated 29.9 percent correctly identified Delta's table saw; (2) evidence of the length and extent of Delta's use of the product configurations, sales of the machines, and advertising; and (3) evidence of respondents' intentional copying of the Delta's designs in controversy. 82/

We conclude that the factors cited by the ALJ do not provide adequate support for a finding that the designs in question have acquired secondary meaning.

1. Survey

To establish that the designs in question have acquired secondary meaning, Delta was required to show that a substantial number of persons in the relevant consumer group associate the designs in question with a single source. 83/ The relevant consumer group for the subject saws includes home craftsmen, home builders, tradespeople in factories and industrial arts classes, cabinet shops, and maintenance shops. 84/

The survey conducted by Delta in the present investigation defined the survey universe as consisting of males over 25 years of age who had used their

82/ ID at 13-15. (See also ID at 6 n.4; CFF 37-68, 78-79.1, 83; rebuttal CFF 37.1-38.2, 47.1-47.3, 55.2-55.4, 56.1-57.4, 62.1, 65.1, 66.1 .) The ALJ also commented that the fact that respondents have engaged in passing off is a further indication that the product configurations in question have acquired secondary meaning. ID at 35.

83/ Single Handle Faucets at 40; Trolley Wheel Assemblies at 41; 1 McCarthy, supra, § 15:11.

84/ CFF 77.

own band saw or table saw within the preceding six months. 85/ The universe did not expressly include persons who were contemplating the purchase of a table saw or band saw. Universes similar to this have been found by courts to be flawed because they were restricted to past purchasers and did not include "potential purchasers," i.e., persons contemplating purchase. 86/

In defense of the universe used, Delta pointed out that the "custom woodworker," "remodeler," and "other" categories made up more than 50 percent of the survey respondents and that it reasonably could be assumed that:

(1) home remodelers and owners of various industrial shops would be likely to own more than one band saw or table saw; (2) after a period of extensive use of a table saw or band saw, a saw owner would seek to replace the used saw with a newer model; and (3) it is likely that one who has extensively used a table saw or band saw eventually would become a purchaser of such a saw. 87/

These assumptions were intended to demonstrate that, in addition to being "owners," the survey respondents to whom the assumptions applied were also "potential purchasers." Delta did not cite any evidence on the record that would support its assumptions.

Even assuming, arguendo, that Delta's assumptions are well founded, they do not account for the other major category, home-users. In light of the

85/ Interviewers were told: "In order to qualify for interview, the man must either own his own tool or use it often enough to consider it 'his own'." CX 63 at 7.

86/ In *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, the plaintiff conducted a survey among persons who had purchased or leased the defendant's "Donkey Kong" game in order to determine whether they associated the game with the plaintiff, who owned the rights to "King Kong." The U.S. Court of Appeals for the Second Circuit held that the universe was too restrictive, because it was limited to past purchasers or lessees and did not include persons who were contemplating the purchase or lease of the product in question. 746 F.2d 112, 118 (2d Cir. 1984).

87/ Delta's Reply Brief at 4-5.

expense and durability of the saws in question, 88/ it reasonably can be inferred that once a home-user has purchased one of the saws in question, he is not likely to be in the market for a second saw of the same type. 89/ This inference is supported by the fact that those home-users deposed by Delta who offered testimony concerning the types and numbers of-woodworking machines that they owned did not own more than one 14-inch band saw or 10-inch table saw at the same time. 90/

Home-users account for a substantial portion of the market for the saws in question. Delta estimates that approximately ***** of the end-users of the subject table saw and band saw are home-users. 91/ In the survey, approximately 44.2 percent of the total respondents seeing photographs of the band saw and 44.8 percent of those seeing photographs of the table saw described themselves as "home craftsman." 92/

88/ The retail prices of Delta's table saw and band saw range from \$600 to \$800. Tr. at 240-41. See also IAFF 280, 282, 277 (on page 52 of the IA's proposed findings of fact), 284. See also CFF 160.

89/ Delta argued that in Certain Plastic Food Storage Containers, Investigation No. 337-TA-152, the Commission approved universe criteria similar to that used in the present investigation. The survey universe in that case consisted of women 21 years of age and over who were users of plastic food storage containers. USITC Publication 1563 at 80 (1984). Plastic Food Storage Containers is distinguishable from the present investigation, partly because the universe in that case was factually much broader than the universe in the present investigation. More importantly, it reasonably can be inferred that, given the nature of the product in question (plastic dishes), the relevant universe in the Plastic Food Storage Containers survey would be more likely to include potential purchasers of the articles in question than would the universe in the present investigation.

90/ CPX 11, Tr. at 5; CPX 13, Tr. at 5, 6, 8; CPX 15, Tr. at 3; CPX 22 at 4, 5. The only home-user deponents who reported purchasing more than one of the saws in question initially had purchased a Taiwan band saw or table saw, had been dissatisfied with the saw, and had returned it to the vendor or resold the saw and purchased a Delta saw as a replacement. CPX 11, Tr. at 5, 6, 7; CPX 13, Tr. at 6, 7, 8 10; CPX 22 at 4, 5, 11-13.

91/ CFF 77; Tr. 184-85.

92/ CX 63 at Fig. 8.

The universe used in Delta's survey in the present investigation skews the survey results because owners and extensive users of expensive machines such as the table saw or band saw at issue in this investigation have intimate knowledge of the appearance of the table saws and band saws and their components and are most likely to recognize the product configuration at issue. 93/

Delta cites Brooks Shoe Co. v. Suave Shoe Co. as support for the position that the survey universe was appropriately limited to owners of the saws in question. 94/ A survey universe defined as "owners-of-the-product" may be acceptable or unacceptable depending on the situation. Potential purchasers (i.e., persons contemplating purchase) must be included in a survey that is offered as evidence of secondary meaning. In the broad range of consumer goods, shoes are relatively short lived. (A person customarily owns more than one pair at a time, perhaps several types concurrently, and even duplicates within the same type.) Present owners of shoes generally, and owners of a particular type of shoe (such as athletic shoes), are likely in the future to purchase additional shoes generally or of a type previously purchased; there is a high coincidence of owners and potential purchasers. That coincidence may be sufficient to validate a survey even though the universe as defined did not expressly include potential purchasers.

93/ In Brooks Shoe Co. v. Suave Shoe Co., the plaintiff conducted a survey among spectators and contestants at a track meet to determine the degree of recognition of the "V" design used on the sides of Brooks shoes. The court held that the plaintiff's survey was not statistically random because the survey universe consisted of persons most likely to recognize the mark in question (i.e., spectators and contestants at the track meet) instead of those persons whose opinion would fairly represent the opinions of consumers of athletic footwear. 533 F. Supp. 75, 80 (S.D. Fla. 1980).

94/ In Brooks Shoe, the court accepted defendant's survey the universe of which consisted of owners of athletic shoes. 533 F. Supp. 75, 80-81 (S.D. Fla. 1980).

The opposite is to be expected when the product in question is comparatively expensive and relatively long lived, as are the woodworking machines that are the subject of this investigation. Present owners are not likely to purchase additional products of the same type or to soon purchase replacements; there is a low coincidence of owners and potential purchasers. (A low coincidence is particularly true as to owners who are home-users, as discussed above.) A survey universe defined as the owners of a product having these characteristics will effectively exclude potential purchasers to such a degree as to render the survey invalid.

The reliability of the survey is diminished further by the fact that the survey did not utilize control photographs—i.e., pictures of similar types of machinery manufactured by other companies. Although the survey contained internal controls (e.g., interviewees were asked the reason why they identified the saws in question as being a particular brand or the product of a particular manufacturer), control photographs should have been used to ascertain the extent to which the public associates woodworking machines with Rockwell/Delta exclusively. Delta's sales of the subject machines are second only to those of Sears, Roebuck, & Co. 95/ That circumstance increased the likelihood that an interviewee would answer "Rockwell" and/or "Delta" in response to the key question on the basis of familiarity with the brand names rather than recognition of the product configuration. 96/

95/ IAFF 164. (See also IAFF 165.)

96/ An additional consideration which diminished the reliability of the survey was the fact that the interviewers were not given sufficiently specific instructions about selecting persons to approach as possible interviewees. See CX 63 at 7 and Exh. B at 1. See also IAFF 149-50. The absence of such guidelines gave interviewers too much discretion. Such discretion has the potential for bias.

Yet another factor that leads us to conclude that the survey in this case is not entitled to substantial weight as direct evidence of secondary meaning is that, even accepted at face value, the percentages of correct responses are relatively low. There is no prescribed recognition rate for determining what weight a survey is entitled to as evidence of secondary meaning. However, the percentages of correct responses in this investigation—a net unduplicated 25.8 percent for the band saw and a net unduplicated 29.9 percent for the table saw—are relatively low in light of the narrowness of the universe and compared with survey recognition rates given substantial weight as evidence of secondary meaning in previous investigations. 97/

In Certain Heavy-Duty Staple Gun Tackers, the Commission accepted a survey as evidence of secondary meaning even though the recognition levels at the various survey locations were 14, 30, and 40 percent. 98/ Delta argued that those figures are similar to the percentages of correct responses in each

97/ In Single Handle Faucets, the Commission relied on a survey in which the responses were 63 percent correct (after adjustments for "good guessers") among plumbers, who accounted for 75 percent of the purchases of the products at issue. Single Handle Faucets at 41-44. The Commission also accepted a second survey in which correct responses amounted to 34 percent. However, the Commission viewed the second survey merely as an adjunct to the first one, since it corroborated the results of the first survey but did not have as high a degree of reliability. Id. at 43-44. In Certain Sneakers With Fabric Uppers and Rubber Soles, Investigation No. 337-TA-118 (Sneakers), the Commission similarly placed substantial reliance on a survey having a correct recognition rate of over 67 percent. USITC Pub 1366, Views of the Commission at 8-12 (Mar. 1983). See also Certain Cube Puzzles, Investigation No. 337-TA-112, (Cube Puzzles), in which the Commission accepted surveys having correct response rates of 33, 40, and 72 percent. USITC Publication 1334, Views of Chairman Eckes and Commissioner Haggart at 13-14, Views of Commissioner Stern at 1 (Jan. 1983).

98/ Certain Heavy-Duty Staple Gun Tackers, Investigation No. 337-TA-137, USITC Publication 1506, ID at 29-43 (Mar. 1984).

geographic area where the survey in the present investigation was conducted. 99/

Staple gun tackers are low-priced, relatively high-volume products, 100/ whereas the subject table saws and band saws are expensive items with a smaller volume of sales and a relatively sophisticated market. 101/ Consumers are less likely to make a purely random purchase of an expensive item and thus would be presumed to have more familiarity with the expensive item prior to purchasing it.

The universe in the present investigation was limited to persons who had used their own table saw or band saw within the last six months (or those who had used one often enough to consider it his own). These persons would have an intimate knowledge of the appearance of the table saws and band saws and their components. Consequently, it is more likely that they would correctly identify a table saw or band saw by its appearance as being a Delta product than would a more representative (i.e., broader) universe. Yet, only the net unduplicated 25.8 percent of the survey respondents correctly identified the band saw and a net unduplicated 29.9 percent correctly identified the table saw. 102/

99/ In the present investigation, recognition rates at the various locations were 37.3 (San Francisco, CA), 36 (Columbus, OH), 28 (Boston, MA) and 18 percent (Fairfax County, VA) for the table saw. CFF 60. For the band saw, the recognition rates were 33.3 (Fairfax County, Virginia) 25.6 (San Francisco), 34 (Columbus), and 14 percent (Boston). CFF 63.

100/ See USITC Publication 1506, findings of fact 17-19, 69, 129, 149-50.

101/ CFF 77; IAFF 158, 279-80, 282, 277 (on page 52 of the IA's proposed findings of fact), 284, 287.

102/ Staple Gun Tackers also is distinguishable from the present case because the 14 percent recognition rate at one survey location in that investigation (San Diego, CA) could have been attributed to the fact that the complainant's staple guns had been sold at that location only for a few months prior to the
(Footnote continued)

The net unduplicated 25.8 and 29.9 recognition rates in this case are low, considering that Delta's sales of the subject saws are second only to those of Sears, Roebuck & Co.; 103/ the product configurations in question have been used since 1945 and 1970 respectively; 104/ and the survey universe was limited, in effect, to those persons who would be most likely to give the correct response.

In sum, we conclude that the survey in this investigation is entitled to little weight as direct evidence of secondary meaning.

2. Extent of sales and advertising

Delta has engaged in extensive advertising and sales of the subject machines. Delta contends that the length of use of the marks, the volume of sales of the subject machines, and the nature and extent of its advertising supports a finding of secondary meaning. 105/

(Footnote continued)

survey. Staple Gun Tackers at 43. For that reason, the presiding ALJ stated that even if rates in excess of 25 percent were required, the 30 and 40 percent recognition rates at other locations satisfied that requirement and the 14 percent recognition rate in San Diego should not be discounted or used to discredit the reliability of the survey as a whole. Id.

Delta has been selling its table saw since 1970 and its band saw since 1945 throughout the United States. See CFF 39-40 and 42. Dr. Sorenson testified that in selecting various sites where the interviews were to be carried out, he sought geographic areas where Delta was doing well in terms of sales penetration, as well as areas where Delta was not doing so well. Tr. at 331-32; IAPX 18 at 36. He also testified that survey interviews in each geographic area were conducted outside stores and lumberyards where Delta's products were sold and presumably outside stores where Delta tools were not sold. Id. This was done to achieve the proper mix. Id. (See generally IAFF 141-48; rebuttal CFF 55.2-55.3.)

Delta did not cite any special or unusual circumstance that would account for the 14 and 18 percent recognition rates at particular geographic locations in this case, however.

103/ IAFF 164. (See also IAFF 165.)

104/ CFF 39-40 and 42.

105/ See Delta's Review Brief at 21-23; CFF 47-51.1; rebuttal CFF 47.1-47.3.

Mere length of use of the mark and the extent of promotional efforts is rarely dispositive. 106/ The issue is the effectiveness of such promotional efforts in establishing in the minds of the consuming public an association between the asserted mark and a single source. 107/

For the reasons discussed below, we find that the evidence of Delta's advertising, sales, and promotional efforts in this case are not sufficient alone or in concert with the other evidence in this investigation to establish secondary meaning.

Delta's advertisements and promotional materials—as well as the saws themselves—carry the registered mark "Rockwell" and the registered Rockwell logo. 108/ Delta's table saws and promotional materials therefore also contain the common-law word mark "Contractor's Saw." 109/ As Delta has pointed out, it is well settled that a product can utilize more than one trademark without diminishing the identity of each. 110/ However, when alleged configuration marks are used in connection with strong existing word marks, the alleged configuration mark must create a commercial impression separate and apart from the other existing marks in order to receive common-law trademark protection. 111/

106/ See Certain Vertical Milling Machines and Parts, Attachments, and Accessories Thereto, Investigation No. 337-TA-133, USITC Publication 1512, Views of the Commission at 19-20 (Mar. 1984) (Vertical Milling Machines); Certain Braiding Machines, Investigation No. 337-TA-130, USITC Publication 1435, ID at 61 (Oct. 1983) (Braiding Machines). See also Carter-Wallace, Inc. v. Proctor & Gamble Co., 434 F.2d 794 (9th Cir. 1970).

107/ Vertical Milling Machines at 19-20; Braiding Machines at 61.

108/ IAFF 176. (See also IAFF 177.)

109/ Note, supra, n. 108.

110/ See Proctor & Gamble Co. v. Keystone Automotive Warehouse Corp., 191 U.S.P.Q. 474 (TTAB 1976).

111/ See Certain Vacuum Bottles and Components Thereof, Investigation No. 337-TA-108, USITC Publication 1305, Commission Opinion at 10-14 (Nov. 1982) (Vacuum Bottles); Vertical Milling Machines at 28-29; Braiding Machines at 63; Petersen Manufacturing Co. v. Central Purchasing, Inc., 740 F.2d 1541; Application of McIlhenny Co., 278 F.2d 953 (C.C.P.A. 1960).

In the present case, in some instances, the size and placement of the strong word marks in promotional materials makes the product configuration obscure by comparison. The table saw and band saw are depicted in silhouette and, in some instances, certain features of Delta's table saw and band saw designs are not readily discernible. 112/ In addition, features in the rear of the saws are not depicted at all. 113/

Certain design elements that are most clearly distinguishable in some of Delta's advertisements (e.g., the handwheel elements, the identification plate, and rounded guide bars on the table saw) are the same as—or are very similar to—features used by Delta's legitimate competitors or certain settling respondents. 114/ Such similarities lessen the likelihood that Delta's advertisements foster an association between the product configurations depicted and a single source.

Furthermore, the mere presence or visibility of specific components of the asserted product configurations in Delta's advertising materials does not necessarily support a finding of secondary meaning. 115/ The materials in question must draw attention to the nonfunctional aspects of the product configuration. 116/ There is nothing in Delta's advertisements that highlights or focuses the consumer's attention specifically on the design features that are claimed to have trademark significance. 117/

112/ IAFF 179-81

113/ Id.

114/ CX 49; IACX 1 at 112-22; IACX 5 at 14-20, 23-30; IACX 34 at 17, 23, 27, 38-41. See also Exh. B to IA's Reply Brief; CX 32 at 4-5.

115/ See Trolley Wheel Assemblies at 48; New England Butt at 11; Textron at 17.

116/ Note, supra, n.115.

117/ Although Delta's vice president testified at the evidentiary hearing that Delta's advertising places emphasis on the appearance of the products in question, he also testified that the purpose of depicting the machines in Delta's advertisements is to "show the functions of the machine" (emphasis added) and "to discuss its features and benefits." Tr. at 196. (See also IAFF 177.)

In sum, we find that Delta's evidence of extensive advertising and prolonged use of the marks in question are not entitled to substantial weight as circumstantial evidence that the configurations in question have acquired secondary meaning.

3. Intentional copying

Although the ALJ concluded that the saw configurations are not inherently distinctive, the ID states that evidence of direct copying "strengthens the presumption of secondary meaning" in the designs of the saws at issue. (Emphasis added.) 118/

There is judicial precedent for the proposition that if respondents find it beneficial to trade on the appearance of an external product configuration, secondary meaning exists in that design. 119/ The ALJ's language also is not without Commission precedent. In Single Handle Faucets, the Commission stated that—

The Commission has recognized that intentional copying may also be probative of secondary meaning, and in those instances where there is a showing of deliberate and close imitation of the senior user's mark, may even give rise to a presumption of secondary meaning. 120/

However, the product configuration mark in Single Handle Faucets was strong and there was other substantial evidence of secondary meaning. 121/ Similarly, in other cases in which the Commission regarded evidence of

118/ ID at 14; see also ID at 33-34.

119/ See Truck Equipment Service Co. v. Freuhauf Corp., 536 F.2d 1210, 1220 n.13 (8th Cir. 1976), cert. denied 429 U.S. 861 (1976).

120/ Single Handle Faucets at 46.

121/ Id. at 40-46.

intentional copying as being probative of secondary meaning, the existence of both a strong mark and other substantial evidence of secondary meaning also supported the finding. 122/

In this case, evidence of intentional copying, absent a strong mark and other substantial evidence of secondary meaning, is not sufficient to support a finding of secondary meaning. 123/

Infringement

Under Commission rule 210.53(h) and pursuant to the Commission's notice of review published in the Federal Register of April 10, 1985, the Commission's decision not to review the portions of the ID concerning infringement would have caused those portions of the ID to become the Commission's determination on the issue of infringement. 124/ However, our

122/ See Staple Gun Tackers at 50-51; Sneakers at 8-12; Cube Puzzles, Views of Chairman Eckes and Commissioner Haggart at 14-15, Views of Commissioner Stern at 1; Vacuum Bottles at 17-19; Certain Novelty Glasses, Investigation No. 337-TA-55, USITC Publication 991 at 11 (July 1979). See also Trolley Wheel Assemblies at 48-49.

Similarly, in Truck Equipment Service Co. (note, supra, n.119), the court noted that there was other substantial evidence of secondary meaning, in addition to evidence of intentional copying. 536 F.2d at 1220, n.13.

123/ The ALJ commented that the fact that respondents have engaged in passing off is a further indication that the product configurations in question have acquired secondary meaning. ID at 35.

Under Commission precedent, secondary meaning is irrelevant to passing off, and each exists independently of the other. Vertical Milling Machines at 38; Braiding Machines at 64-65. In the present investigation, the evidence in the record shows that, in most instances, passing off (as well as false or deceptive advertising) was accomplished by the use of Delta's registered trademarks and logo and common-law word mark. See IAFF 227-39, 240-42; CFF 123-130.2, 146-147.4. Consequently, even if passing off were to constitute proof of secondary meaning, such secondary meaning in this case could not be imputed to the product configurations in question. Thus, we find that the ALJ erred in concluding that proof of passing off, in and of itself, proves that the configurations at issue have acquired secondary meaning.

124/ 19 C.F.R. § 210.53(h); 50 Fed. Reg. 14172 (Apr. 10, 1985). The Commission also adopted Delta's findings of fact 77-122 to supplement the discussion in the ID concerning the issue of infringement. 50 Fed. Reg. 14172 (Apr. 10, 1985).

reversal of the ALJ's finding of secondary meaning supercedes any finding of infringement.

Patent Infringement

The patent claims in controversy are—

claims 1-3 and 5-14 of the aforementioned '493 patent;
claims 1-4 of U.S. Letters Patent 4,174,100 (the '100 patent); and,
claims 1-5 of U.S. Letters Patent 4,436,126 (the '126 patent).

Patents are presumed valid. 125/ The burden of establishing invalidity rests on the party asserting such invalidity. 126/ The validity of the subject patents was not in dispute in this investigation, since the respondents defaulted and the IA did not take a position on the patent issues. The ALJ correctly determined that in the absence of clear and convincing evidence of invalidity, the statutory presumption of validity prevails. 127/

The unenforceability of a patent for equitable reasons must be proven by clear and convincing evidence. 128/ In the absence of such allegations and evidence, the ALJ correctly determined that each of the patents in controversy is in full force and effect. 129/

125/ 35 U.S.C. § 282.

126/ Id.

127/ Certain Apparatus for Installing Electrical Lines and Components Therefor, Investigation No. 337-TA-196, ID (Order No. 5) at 7 (Dec. 27, 1984) (50 Fed. Reg. 6072, Feb. 13, 1985); Certain Methods for Extruding Plastic Tubing, Investigation No. 332-TA-110, USITC Publication 1287 at 5 (Sept. 1982).

128/ See J. P. Stevens & Co., Inc. v. Lex Tex Ltd., Inc., 747 F.2d 1553, 1559 (Fed. Cir. 1984).

129/ ID at 26.

Our infringement findings are set forth below.

'493 patent

The '493 patent is directed to a safety blade guard assembly for a circular table saw. 130/ The patented blade guard assembly is nonremovable and is mounted on a kerf splitter that is fixed securely at a relatively inaccessible point beneath the rear table edge. The assembly has a blade-guard-supporting linkage connected to the kerf splitter and blade guard so as to limit pivotal movement of the guard between a normal operating position and a limit position determined by the supporting link, which prevents the blade guard from being swung to an inoperative position.

The record shows that settled domestic respondent Jet has imported into the United States and marketed Taiwan-manufactured table saws and tilting arbor saws incorporating a blade guard assembly that infringes claims 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, or 14 of the '493 patent. 131/ Nonsettling domestic respondents Pro Shops, Trend-Lines, and Fort Bragg sell Jet's saws incorporating an infringing blade guard. 132/ We affirm the ALJ's finding of

130/ CX 1. Delta uses the patented blade guard assembly on its table saw and its tilting arbor saw sold under the registered trademark "Unisaw." See CFF 131-32.

131/ Tr. at 169-72; CX 37-38. Subsequent to the issuance of the ID, Jet was terminated from the investigation on the basis of a consent order. See 50 Fed. Reg. 20303 (May 15, 1985). The portions of the ID concerning infringement of the '493 patent were still under review by the Commission, however. Our finding of infringement with respect to Jet is based on the evidence on the record and adverse inferences drawn by virtue of Jet having defaulted in this investigation.

132/ Tr. at 150; CPX 14 at 7 and Exh. 2; CX 28 at 6; CX 29 at 2, 4, 7, and 13; CPX 26 at 6.

infringement with respect to the these respondents and claims 1-3 and 5-14 of the '493 patent. 133/ 134/ 135/

133/ ID at 27.

The ALJ's conclusions of law listed additional domestic and foreign respondents as having imported or sold saws incorporating an infringing blade guard. CL 18. Infringement of the '493 patent by those additional respondents was not discussed in the text of the ID.

The evidence of record concerning infringement of the '493 patent by those respondents is sparse, and affirmation of the ALJ's conclusion of infringement with respect to those respondents would have to be based primarily on adverse inferences drawn by reason of the respondents having defaulted in this investigation. The Commission has stated previously, however, that—

[T]he effect of a finding of default is not necessarily to allow a complainant to rely solely upon the allegations in his complaint and require the presiding officer to make a finding of violation based upon those allegations. Rather, '[t]he effect of a finding of a default is to authorize the presiding officer to create certain procedural disabilities for the defaulting party and to entertain, without opposition, proposed findings and conclusions, based upon substantial reliable and probative evidence, which would support . . . a determination.'

Staple Gun Tackers at 13.

Our finding of infringement therefore is limited to respondents Jet, Pro Shops, Trend-Lines, and Fort Bragg.

134/ With regard to the effect of a finding of default, we note that neither the ID nor Delta's prehearing and posthearing submissions contained any information about alleged unfair acts and practices by Leroy in the importation or sale of the subject woodworking machines in the United States. Both Delta and the IA have conceded that there is no evidence of a section 337 violation by Leroy. Delta's Review Brief at 46; IA's Review Brief at 61. We therefore reverse the ALJ's holding that Leroy has violated section 337.

135/ The notice of investigation limited the '493 patent issues to claims 1-3 and 5-14. 48 Fed. Reg. 55786 (Dec. 15, 1983). The ID states, however, that all 14 claims of the '493 patent have been infringed. Although Delta in fact argued to the ALJ that all 14 claims of the '493 patent had been infringed, Delta's Review Brief states that the allegation of infringement with respect to claim 4 was inadvertent. Delta's Review Brief at 46, n.11. Our infringement findings thus are limited to the claims recited in the notice of investigation.

'100 patent

The '100 patent is directed to a rip fence having a bottom section that is adjustable in height with respect to the work table. 136/ The fence structure has supporting members separate from, but attached to, the table at the front and rear edges of the table. Although the fence structure is attached to the table, it can be moved over the surface of the table. The fence structure has 2 parts. The first part is a downwardly open channel-shaped upper member, and the second part is a table-engaging lower member adjustably fixed to the upper member.

The record shows that domestic respondents Fort Bragg and Trend-Lines have sold Jet tilting arbor saws that incorporate an adjustable height fence which infringes claims 1-4 of Delta's '100 patent. 137/ We therefore affirm the ALJ's finding of infringement with respect to the '100 patent. 138/

'126 patent

The '126 patent relates to a light, portable wood thickening machine (i.e., a wood planer). 139/ The planer has a bed, over which the wood is passed, and an upper housing. A cutter and feed rollers are located in the upper housing. The upper housing is slidably supported on a number of pillars extending from the base.

The record shows that settled Taiwan respondent Show Soon has exported to the United States a wood-planing machine that infringes claims 1-5 of

136/ CX 2. Delta uses the patented fence on its tilting arbor saw sold under the registered trademark "Unisaw". See CFF 133-34.

137/ CFF 142-44.

138/ CL 18.

139/ CX 3. Delta sells the patented machine as the "RC-33 Planer." See CFF 135-36.

the '126 patent. 140/ We therefore affirm the ALJ's finding of infringement with respect to the '126 patent. 141/

Misappropriation

The scope of a section 337 investigation is defined by the Commission's notice of investigation. 142/ The notice in this investigation lists "false representation of manufacturing source" as one of the unfair acts and practices to be investigated. 143/ False representation of manufacturing source was not mentioned in the ID, nor was it discussed in the parties' prehearing and posthearing submissions to the ALJ. Delta's submissions to the ALJ and the ID discussed "misappropriation." 144/

The question is whether misappropriation is within the scope of the investigation. Delta argued that misappropriation is within the scope of the investigation because the charge of false representation of manufacturing source is broad enough to encompass it and misappropriation was raised in the complaint. 145/ In the alternative, Delta requested that the Commission amend the notice to include misappropriation. 146/

The IA argued that misappropriation is not covered by the notice of investigation, and acceptance of Delta's arguments regarding that charge is unnecessary since misappropriation is simply redundant in light of the other unfair acts included in the notice. 147/

140/ Tr. at 177; CX 23, 37, 40.

141/ ID at 26-27; CL 16.

142/ 19 C.F.R. § 210.21.

143/ 48 Fed. Reg. 55786 (Dec. 15, 1983).

144/ ID at 27.

145/ Delta's Review Brief at 40-42.

146/ Id.

147/ IA's Review Brief at 58-60.

We have determined that misappropriation is not within the scope of the investigation and that the notice will not be amended to include it as an additional charge.

On the basis of Delta's arguments, the ID defines misappropriation as follows:

[A] property right which the complainant relies upon because of a substantial investment of time, effort, and money in the commercial creation. When that right is appropriated at little or no cost and the creator of the right is injured, a case of misappropriation exists. 148/

In contrast to the Delta and the ALJ's definition of misappropriation, the Commission has treated charges of false representation of source and false designation of source as inferred common-law trademark infringement. 149/

The ALJ's definition of misappropriation does not correspond exactly to the Commission's interpretation of false representation of source or false designation of source in previous investigations. Nevertheless, the activities found to constitute misappropriation overlap with the activities of the unfair acts and practices listed in the notice of investigation. 150/ In determining that certain respondents had engaged in misappropriation, the ALJ made the following findings:

1. Respondent Jet has appropriated the design and configuration of Delta's machines and the use of the name "Contractor's Saw," and has

148/ 1 McCarthy, supra, § 10.23; ID at 27.

149/ See, e.g., Trolley Wheel Assemblies at 53; Braiding Machines at 79; Sneakers at 21; Vacuum Bottles at 28. See also Certain Caulking Guns, Investigation No. 337-TA-139, USITC Publication 1507 at 43 (Mar. 1984). As such, complainants have been required to show a likelihood of confusion concerning the source of the subject products (as well as demonstrating the other elements of common-law trademark infringement). Id. Failure to establish the existence of a common-law trademark has precluded a finding of false designation of source. Id.

150/ See e.g., IAFF 227-42.

been distributing tilting arbor saws with copies of substantial portions of Delta's instruction and user manuals;

2. Respondents Fort Bragg and Trend-Lines have been selling the Jet machines; and

3. Other settled respondents [not identified in the ID] also have used various Delta instruction and user manuals in marketing their products. 151/

As indicated in the ID, some of the respondents charged with engaging in misappropriation have settled with Delta. Although Fort Bragg and Trend-Lines have not settled with Delta, the fact remains that the acts of alleged misappropriation overlap with other unfair acts listed in the notice of investigation. Delta thus would not gain additional relief if the notice were amended to include misappropriation. 152/ The notice therefore will not be amended.

Definition of the Domestic Industry 153/

The Commission has determined that there is a domestic industry. The Commission has reviewed the ALJ's definition of the domestic industry 154/ in order to clarify its scope.

The present investigation involves the importation of certain table saws, table saws, band saws, tilting arbor saws, and planers. 155/ In addition, it involves the following intellectual property rights:

151/ ID at 27-28; CL 23.

152/ See infra this opinion at 48-54.

153/ Vice Chairman Liebler finds seven separate domestic industries in this case. See Additional Views of Vice Chairman Liebler. She does not join the majority's discussion of domestic industry.

154/ See ID at 31 and CL 24, 26.

155/ Although the investigation also covered a disk/belt finisher, 8-inch motorized bench saw, shaper, and 6-inch jointer, Delta neither alleged nor proved unfair acts and unfair competition with respect to importations or sales of such machines. Delta's consent order settlements with various respondents (see supra nn. 6, 8) have removed those machines from contention.

- 2 registered trademarks—"Unisaw" and "Rockwell";
- 1 registered logo—the Rockwell logo;
- 1 common-law phrase trademark—"Contractor's Saw";
- 2 alleged common-law product configuration trademarks—table saw design and band saw design; and,
- 3 patents—'493 blade guard patent, '100 rip fence patent, and '126 planer patent.

In previous investigations involving patents or trademarks, the relevant domestic industry has been defined in terms of the exploitation of the patents or trademarks in controversy. 156/ In investigations involving other unfair methods of competition such as false advertising or passing off, the Commission has defined the domestic industry in terms of complainant's U.S. facilities devoted to the production and sale of the article that was the subject of the unfair act (e.g., false advertising or passing off). 157/ The Commission also has stated that the domestic industry should be limited to those products that are the subject of the unfair acts. 158/

156/ See, e.g., Staple Gun Tackers at 66; Trolley Wheel Assemblies at 56-57; Plastic Food Storage Containers at 76; Braiding Machines at 85; Vacuum Bottles at 29; Certain Miniature, Plug-In Blade Fuses, Investigation No. 337-TA-114, USITC Publication 1337, Commission Opinion at 34 (Jan. 1983) (Plug-In Blade Fuses); Apparatus for Installing Electrical Lines; Certain Softballs and Polyurethane Cores Therefor, Investigation No. 337-TA-190, ID at 63-64 (Feb. 19, 1985) (50 Fed. Reg. 16171, Apr. 24, 1985); Certain Bag Closure Clips, Investigation No. 337-TA-170, ID at 38 (Aug. 9, 1984) (50 Fed. Reg. 35872, Sept. 12, 1984) (Bag Closure Clips).

157/ See Plug-In Blade Fuses, Commission Opinion at 33-34 and Recommended Determination at 26-27.

158/ See Single Handle Faucets at 56; Staple Gun Tackers at 66; Plastic Food Storage Containers at 76.

If these guidelines are applied in the present investigation, the Commission conceivably could determine that there are multiple industries in this case. 159/

The intellectual property rights in controversy are exploited in the following manner:

<u>band saw</u>	<u>table saw</u>	<u>planer</u>	<u>tilting arbor saw</u>
"Rockwell" "logo" design mark	"Rockwell" "logo" design mark '493 patent "Contractor's Saw"	"Rockwell" "logo" '126 patent	"Rockwell" "logo" "Unisaw" '493 patent '100 patent

Both Delta and the IA argued, however, that the Commission should find that there is only one domestic industry. Delta argued that the domestic industry should be defined as—

Delta's United States operations involved in the manufacturing, testing, marketing, sales and servicing of the Delta 10 inch table saw, 14 inch band saw, tilting arbor saw, other machines marketed under the name

159/ The separate industries would be as follows:

- (1) "Rockwell" registered trademark: There would be one industry comprising all the articles of commerce that have the Rockwell mark and are the subject of the unfair import competition.
 - (2) '493 patent: This patent relates to the blade guard component used on the table saw and the bench saw. Therefore, the articles of commerce would be these two saws, and the industry would comprise the table saw and band saw.
 - (3) '100 patent: This patent relates to the adjustable height rip fences, which are integral components of the tilting arbor saw. Therefore, the article of commerce, and the domestic industry would be defined as being only the tilting arbor saw.
 - (4) '126 patent: Since this patent covers the planer, the industry would be defined as being only the planer.
 - (5) common-law trademark "Contractor's Saw": This is used only on the table saw. Therefore, the industry would be only the table saw.
 - (6) registered trademark "Unisaw": Since this is used only on the tilting arbor saw, the industry would be only the tilting arbor saw.
 - (7) alleged common-law configuration mark for the band saw: This alleged intellectual property right would result in one industry, i.e., the band saw.
 - (8) alleged common-law configuration mark for the table saw: This alleged intellectual property right would result in one industry, i.e., the table saw.
- See IA's Review Brief at 45-46.

"Contractor's Saw" or utilizing the "Rockwell" trademark or "Rockwell logo." Additionally, the domestic industry consists of those operations described herein devoted to the exploitation of Delta's three U.S. patents in issue. 160/

The IA argued that the industry should be defined more narrowly to encompass Delta's facilities devoted to the production and sale of the table saw, band saw, tilting arbor saw, and planer. 161/

For the reasons discussed below, we have defined the "domestic" industry as being one industry. 162/ 163/ 164/

160/ Delta's Review Brief at 32-33. (See generally Delta's Review Brief at 30-33.)

161/ IA's Review Brief at 47. (See generally IA's Review Brief at 43-47.)

162/ Commissioners Eckes and Rohr determine that planers are not a component of the domestic industry. It is our conclusion that in order to be considered a "domestic industry" in a section 337 investigation it is necessary for complainants to satisfy the "nature and significance of the business activities" test in Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles, Investigation No. 337-TA-122, USITC Publication 1300, Opinion of Chairman Eckes et al. at 8-11 (Oct. 1982). This standard should be met by each component of a domestic industry if the industry is to be defined, as it is here, as one industry comprising several component parts.

In this investigation, the brunt (exact figures are confidential) of the production costs for planers are associated with activities in Brazil. Moreover, the planer "activities" of complainant in the United States are unsubstantiated by quantifiable data in the record.

Complainant has stated that the motor and component parts and the molds, dyes and castings for planers are produced in the United States. Complainant has also stated that assembly and servicing takes place in the United States.

There is little or no quantifiable evidence of record to support the contention that these "activities" constitute a substantial portion of costs associated with the production of the planer. The fact that the major portion of the production costs are incurred in Brazil and the fact that other "activities" of the industry are based on broad but unsubstantiated assertions by complainant lead us to conclude that planers are not a component of this industry.

163/ Commissioner Lodwick finds that there is one domestic industry which comprises Delta's U.S. production, sale, and service of the subject table saw, band saw, tilting arbor saw, and planer.

The "nature and significance" test of Certain Miniature Battery Operated All Terrain Wheeled Vehicles, Investigation No. 337-TA-122, is not a

(Footnotes continued)

Delta's exploitation of the registered trademark "Rockwell" and the registered "Rockwell" logo relates to all of Delta's power tools. 165/ The table saw, band saw, and tilting arbor saw also have been the subject of passing off and false or deceptive advertising by certain respondents. 166/

The patented components in controversy—i.e., blade guard and adjustable height rip fence—apparently can be sold separately as replacement parts. However, there is no evidence that respondents have imported or sold such components individually, and there is no indication that they will be. Furthermore, data concerning sales by Delta of these components also appear to be scant, if not nonexistent. The IA reported that he was unable to find any information on the record concerning the price at which the subject components are, or would be, sold by Delta. 167/ In sum, the products that are in competition with the infringing imports and that are the subject of

(Footnotes continued)

mathematical standard. Therefore, the fact that the "major portion" of the production costs of the planer are incurred in Brazil does not in and of itself preclude finding in accord with that standard that the planer is part of a U.S. industry which produces a number of related (here, woodworking) machines. The record establishes that Delta's U.S. business activities pertaining to the planer include production at a level which, expressed as a percent of total production cost, ought not to be dismissed as insignificant. (Exact figures are confidential.) Other numbers would have helped the Commission. Hard facts, as forged in a well-tryed fully-litigated case, would have been useful. But a prima facie default case affords little tempering, and a finding must often be fashioned out of adequate, but softer evidence.

164/ The exclusion order covers planers because Chairwoman Stern also has included planers in her definition of a single industry and Vice Chairman Liebler included planers in three of the seven industries she found. See the Opinion of Chairwoman Stern at 36-43 and the Additional Views of Vice Chairman Liebler at 1.

165/ See CFF 126-29.

166/ See CFF 146-147.4; IAFF 227-42.

167/ See IA's Reply Brief at 14.

respondents' passing off and false or deceptive advertising are table saws, band saws, tilting arbor saws, and planers.

An additional factor supporting definition of a single industry is that Delta's exploitation of the subject trademarks and patents overlaps, to a certain extent, with respect to the woodworking machines in controversy.

A further reason for finding a single industry is the fact that the same facilities and resources are used in the manufacture of the products at issue. *****

*****. 168/ ****

*****. 169/ 170/

We determine that when several industries can be defined on the basis of the exploitation of various intellectual property rights and there is considerable overlap with respect to the products associated with the industries defined in terms of these intellectual property rights, it may be appropriate to define the industry in terms of the commonly shared property right that extends to a grouping of products. In this investigation, the registered trademark "Rockwell" and the registered Rockwell logo are used in connection with all of the products which remain as subjects of this investigation: band saw, table saw, tilting arbor saw, and planer. (None of the other intellectual property rights are used in connection with each of

168/ See IAFF 244; CFF 168; IAX 26 at 8.

169/ See generally CFF 148-154, 168-69; IAX 26 at 8.

170/ Note, supra, n.162.

those products.) We find, therefore, that the most appropriate definition of the domestic industry in this investigation is one industry. 171/ 172/

Complainant Delta manufactures three of the four products we have included in our definition of domestic industry completely within the United States, and virtually all of complainant's manufacturing costs for these products are domestically sourced. 173/ Thus, viewing the industry as a whole, it is clear that the domestically related operations are not only significant, but substantial. 174/ 175/

171/ See Plug-In Blade Fuses, in which the ALJ found two industries relating to two types of intellectual property rights or unfair methods of competition: (1) patent and (2) trademark and passing off. The patent definition included two products; the definition based upon passing off included only one. Recommended Determination at 26-27. The Commission, although acknowledging that the two technical definitions were acceptable, chose to define the industry according to the broader patent definition. As in this case, no argument was presented as to why any particular commercial realities argued in favor of adopting either the broader or narrower definitions: See USITC Publication 1337 at 33-34.

172/ Although it is possible that the "commercial reality" factors might militate in favor of defining separate industries by products despite the fact that they have a trademark in common, the record in this investigation provides no basis for applying the "commercial realities" test that was first articulated in Certain Apparatus for the Continuous Production of Copper Rod, Investigation No. 337-TA-52. The Copper Rod "commercial realities" test referred to the intrinsic interrelationships between certain of the separate design and production patents—and, ergo the potentially separate industries—involved in that investigation. Since all were viewed as part of the ultimate production and sales effort relating to one product, the Commission found that the separate patents constituted one industry. See USITC Publication 1017 (Nov. 1979), Commission Memorandum Opinion at 53-55. However, it is entirely possible that in another investigation strong "commercial reality" factors might well argue in favor of segmenting a broad group of fairly diverse products into groups of industries narrower than that arrived at by basing the definition on a commonly shared trademark alone. Thus, our finding is specifically limited to the facts of this investigation. 173/ The planer is produced in part in Brazil using components made in the United States. Tr. at 58, 114-15, 306; IACX 28 at 1-2; CFF 149, 169.

174/ Note, supra, n.162.

175/ Note, supra, n.163.

Injury 176/

The ID indicates that "the domestic industries for the Delta 10 inch table saw, 14 inch band saw, planer, blade guard assembly, and adjustable height fence are substantially injured and there exists a tendency to substantially injure these domestic industries." 177/ The issue of injury was reviewed because the ID does not reflect the fact that the Commission has separate standards for affirmative findings of present injury and a tendency to injure. The ID also does not discuss the issue of causation.

For the reasons discussed below, we determine that the record contains substantial evidence to support a finding that the effect or tendency of respondents' unfair acts is to substantially injure a domestic industry.

Effect

Evidence of present injury includes, but is not limited to, lost sales, declining sales volume, increased imports, decreased production profitability, and level of market penetration by imports. 178/

The record contains general information concerning lost sales. 179/ Many of Delta's distributors are carrying the subject imported machines. 180/

176/ Vice Chairman Liebeler does not join the Commission majority's discussion of effect or tendency to injure. See her Additional Views. Vice Chairman Liebeler joins in the discussion of causation only to the extent that it is consistent with her additional views.

177/ CL 26.

178/ Apparatus for Installing Electrical Lines at 23-25; Certain Cloisonne Jewelry, Investigation No. 337-TA-195, ID at 64-67 (Mar. 6, 1985) (50 Fed. Reg. 15235, Apr. 17, 1985) (Cloisonne Jewelry); Certain Softballs and Polyurethane Cores Therefor, Investigation No. 337-TA-190, ID at 79-80 (Feb. 19, 1985) (50 Fed. Reg. 16171, Apr. 24, 1985) (Softballs); Bag Closure Clips at 43; Single-Handle Faucets at 60; Trolley Wheel Assemblies at 61; Staple-Gun Tackers at 60; Certain Drill Point Screws For Drywall Construction, Investigation No. 337-TA-116, USITC Publication 1365 at 18 (March 1983).

179/ See IAFF 264-77; CFF 193-99.

180/ CFF 195, 197; IAFF 269-71.

Moreover, since the subject imports are substantially underselling Delta's machines, Delta has lost sales to corporations and State and local jurisdictions that purchase solely on the basis of price (provided that the product in question meets certain specifications). 181/ *****

*****. 182/ The planer was not introduced until 1981. 183/ *****

*****. 184/

Furthermore, the imported machines have been underselling Delta's machines by as much as 50 percent in some instances. 185/ *****

*****. 186/

The volume of Taiwan woodworking machines (including the accused machines) has increased from year to year since 1980. 187/ During *****

*****, it appears that Delta had substantial excess capacity for each of the machines at issue. 188/

*****. *****

181/ IAFF 272-75; CFF 190; Tr. at 280-81, 283, 289-91.

182/ IAFF 287.

183/ See CFF 193.

184/ Id.; IAFF 265-66.

185/ IAFF 278-80. See generally IAFF 278-86.

186/ Id.

187/ CFF 178; IAFF 293; Tr. at 250; CX 62. The precise volume of infringing importations and sales is not known. Since the respondents have defaulted, adverse inferences have been drawn, and the estimates prepared by Delta and the IA have been accepted.

188/ CFF 177.1; IAFF 290.

*****. 189/ Accordingly, we find that the subject imports have injured the domestic industry.

Tendency

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. 190/ Relevant conditions or circumstances include, but are not limited to, foreign cost advantages and production capacity, ability of the imported product to undersell the complainant's product, increased foreign capacity, and the intent to penetrate the U.S. market. 191/

The record contains evidence that foreign manufacturers and importers have lower costs for a number of reasons. By copying Delta's products from dies that can be used repeatedly, foreign manufacturers avoid development costs, and thus are able to keep their overhead costs low. The foreign manufacturers also have lower labor costs. 192/

The record indicates that many existing Taiwan manufacturers have the ability to increase production or to begin production of the accused machines if they desire. 193/ Furthermore, there are a substantial number of nonparty

189/ IAFF 289; CFF 192. Note, supra, nn.183-84 regarding the planer.

190/ The legislative history of section 337 indicates that "[w]here unfair methods and acts have resulted in a conceivable loss of sales, a tendency to substantially injure [a domestic industry] has been established." Trade Reform Act of 1973, Report of the House Committee on Ways and Means, H. Rep. No. 571, 93d Cong., 1st Sess. 78 (1973), citing In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). See also Bally/Midway Mfg. Co. v. U.S.I.T.C., 219 U.S.P.Q. 97, 102 (C.A.F.C. 1983).

191/ Apparatus for Installing Electrical Lines at 25-26; Cloisonne Jewelry at 67; Softballs at 83-84; Bag Closure Clips at 46; Single-Handle Faucets at 63; Trolley Wheel Assemblies at 63; Staple-Gun Tackers at 63.

192/ See generally CFF 158-58.1, 176-77, 179, 180.

193/ CFF 176-77; Tr. 152-53, 157.

companies that allegedly manufacture, export, import, or sell the accused machines. In fact, it appears that the sales of the named respondents constitute only a small percentage of the total sales of the accused Taiwan imports. 194/

The United States is the largest market for Taiwan woodworking machines. Approximately 85 percent of such machines are exported to the United States. 195/ In addition, there are numerous means of marketing the imported machines in the United States; an organized distribution network is not required. The imported machines are sold to domestic distributors (e.g., mail-order houses) in container load quantities. 196/ In addition, many of Delta's distributors carry the infringing imported machines. 197/ Moreover, as stated previously, the Taiwan machines have significantly undersold Delta's products. 198/ Thus, the record also establishes that there is a tendency to substantially injure the domestic industry.

Causation

Injury to complainant must be causally related to respondents' unfair acts. 199/ We find that the injury to the domestic industry in this case is causally related to respondents' unfair acts and unfair methods of competition.

194/ CFF 174-75; ID at 11; IAFF 299-303; CPX 19 at 56-57.

195/ IAFF 296; CFF 178.

196/ CFF 179.

197/ Note, supra, n.178.

198/ Note, supra, nn.185-86.

199/ 19 U.S.C. § 1337; see Softballs at 71; Roller Bearings at 84-90; Trolley Wheel Assemblies, Commission Opinion at 7-8; Certain Spring Assemblies and Components Thereof, Investigation No. 337-TA-88, USITC Publication 1172 at 43-44 (Aug. 1981); Certain Centrifugal Trash Pumps, Investigation No. 337-TA-43, USITC Publication 945 at 9, 21-22, and 24 (Feb. 1979); Certain Combination Locks, Investigation No. 337-TA-45, USITC Publication 943 at 8-12 (Feb. 1979).

The IA argued that there is no causal connection between the condition of the industry and respondents' infringement of the '100 adjustable rip fence patent and the '493 blade guard patent, for the following reasons: (1) those patents cover integral components of certain saws; (2) sales of saws are not made on the basis of whether or not they include the subject patented components; and (3) since there are no imports of these components other than as incorporated into the subject saws, there is no evidence of any head-to-head competition between the imported and domestically produced components. In the absence of such sales and competition, the IA argued, there can be no losses that are attributable to respondents' infringement of the component patents. 200/

We find that the requisite causal nexus exists between the condition of the industry and respondents infringement of the '100 and '493 patents. The patented components in question are integral components of articles in commerce—i.e., table saws and tilting arbor saws. U.S. consumers purchased the imported saws because they were led to believe that the imported saws were produced by Delta or were the equivalent of Delta's machines. Furthermore, there is no evidence on the record that supports the IA's contention that respondents' infringement of these components is totally irrelevant to their success in selling these saws. In fact, there is evidence on the record indicating that the addition of the adjustable-height rip fence to the imported tilting arbor saws enhanced the sales of the imported machine at the expense of at least one of complainant's saws. Indeed, the evidence on the record indicates that initially, the imported tilting arbor saws did not have the subject fences but subsequently incorporated them; and subsequent to that

time, the sales of the imported saws that incorporated the infringing fences increased over sales of those that did not. 201/

The other causation issue is whether the importation or sale of the accused woodworking machines by settling respondents should be taken into account in determining whether a domestic industry has been injured. In previous investigations, the Commission has taken the position that there must be a prima facie finding of an unfair act with respect to articles imported by a settled respondent before those articles may be considered in determining injury. 202/ In addition, the aggregation of such imports is discretionary, depending upon the facts in each case. 203/

In the present investigation, thirty-six parties have entered into consent order settlements with Delta. 204/ As discussed above and in the unreviewed portions of the ID and the supporting findings of fact, certain settling respondents have engaged in patent infringement, common-law trademark infringement ("Contractor's Saw"), passing off, or false or deceptive advertising. 205/

Since we have adopted the portion of the ID finding all respondents in default, we have drawn adverse inferences, finding that the effect or tendency

201/ Tr. at 246, 284.

202/ See Bag Closure Clips, 49 Fed. Reg. 35872 (Sept. 12, 1984) (notice of the Commission's decision not to review the ID).

203/ See Certain Food Slicers and Components Thereof, Investigation No. 337-TA-76, USITC Publication 1159 (June 1981), Commission Memorandum Opinion at 19 (even if imports of settled respondents aggregated, no effect or tendency to substantially injure); Softballs at 71-79; Trolley Wheel Assemblies at 10 (even though most of the imports came from the settled importer because the settlement agreement did not cover the exporter, the Commission in its discretion found a tendency to injure) Cf., Views of Chairwoman Paula Stern at 19 (dissenting).

204/ See supra nn.6, 8.

205/ See supra this opinion at 29-33; CFF 123-30.2, 146-147.4; IAFF 22-48, 227-42.

of presettlement importations or sales by those respondents for which there is a Commission finding of an unfair act is to substantially injure a domestic industry.

Remedy

Delta and the IA requested a general exclusion order pursuant to section 337(d) (19 U.S.C. § 1337(d)) and cease and desist orders pursuant to section 337(f) (19 U.S.C. § 1337(f)). For the reasons discussed below, we find that a general exclusion order alone is the appropriate remedy for the violation existing in this case.

General exclusion order

Since Certain Airless Paint Spray Pumps And Components Thereof, 206/ the Commission has determined whether to issue a general exclusion order by balancing complainants' interest in obtaining complete protection from all potential foreign infringers against the inherent potential of a general exclusion order to disrupt legitimate trade. Complainants have been required to prove (1) a widespread pattern of unauthorized use of its patented invention, and (2) the existence of business conditions from which it could be inferred that foreign manufacturers other than the respondents might attempt to enter the U.S. market with infringing articles, 207/ In assessing the potential disruption of lawful trade, the Commission has taken into account (1) the feasibility of administering and enforcing the proposed order, and (2) the possibility of a chilling effect upon foreign trade in noninfringing articles resulting from business uncertainties created by the order.

206/ Investigation No. 337-TA-90, USITC Publication 1199 at 17-20 (Nov. 1981).
207/ See, e.g., Cloisonne Jewelry; Single Handle Faucets; Staple Gun Tackers; Certain Amorphous Metal Alloys and Amorphous Metal Articles, Investigation No. 337-TA-143, USITC Publication 1664 (Nov. 1984).

The criteria articulated in Paint Spray Pumps have been met in the present investigation.

There is a pattern of widespread unauthorized use of the respondent's patents and trademarks. 208/ All the accused woodworking machines and apparatus were found to infringe the subject patents or trademarks. All current respondents and most of the former respondents have imported the accused machines into the United States or sold such machines in the United States. Furthermore, there are numerous nonparty companies that manufacture or import woodworking machines which allegedly infringe the subject patents or trademarks. In fact, sales of the named respondents constitute only a small percentage of the total sales of the accused Taiwan imports. 209/

Business conditions are such that it reasonably can be inferred that foreign manufacturers other than the respondents might attempt to enter the U.S. market with infringing articles. 210/ There is an established demand for

208/ In Paint Spray Pumps, the Commission said that among the evidence that might be presented to prove a widespread pattern of unauthorized importation use are: (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue; (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention. USITC Publication 1199 at 18-19.

209/ See Delta's Remedy Brief at 12. See also IAFF 299-303; CFF 174-75, 177.

210/ In Paint Spray Pumps, the Commission said that evidence of such business conditions included: (1) established demand for the patented product in the U.S. market and conditions of the world market; (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers; (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article; (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles. USITC Publication 1199 at 18-19.

the machines in controversy, as indicated by Delta's unit sales of the subject machines 211/ and the estimated volume of imports of the subject machines. 212/

The barriers to entry into the U.S. market by foreign manufacturers are low. An organized distribution network is not required. The imported machines are sold to domestic distributors in container-load quantities. 213/ Since many of the domestic distributors are mail-order houses, substantial overhead is not required. Moreover, many of Delta's distributors carry the infringing imported machines. 214/

The cost of production for foreign manufacturers of the infringing machines is relatively low, and foreign manufacturing facilities can easily be adapted to produce such machines. Many of the foreign manufacturers operate in "cottage" industries where they primarily assemble already manufactured parts purchased from suppliers. Following assembly, the manufacturers package the machines and arrange to export them to the United States. 215/

It appears that foreign manufacturers and importers are able to keep their costs down in a number of ways. Delta submits that, judging by the many direct copies of Delta's machines which the former and current respondents (and others) have marketed in the United States, the parts that the foreign manufacturers assemble are manufactured from dies developed through the direct copying of Delta's parts. By copying Delta's products, foreign manufacturers avoid development costs, and thus are able to keep their overhead down. 216/

211/ See IAFF 287 and 293.

212/ See Tr. at 250; CX 62; IAFF 293.

213/ CFF 179.

214/ CFF 195, 197; IAFF 269-71.

215/ CFF 158-58.1, 175-77, 179-80, 195.

216/ CFF 158-58.1, 166, 179-80.

In addition, since service networks for the imported machines are ineffective or nonexistent, importers are able to reduce their costs. 217/

Thus, by copying Delta's machines (i.e., infringing the patents in controversy) and engaging in passing off and false or deceptive advertising, respondents and other nonparty foreign manufacturers and U.S. importers can (1) trade on the goodwill established by Delta, and (2) sell the imported machines at prices that are significantly lower than Delta's because of their lower costs.

Therefore, foreign producers other than the respondents may reasonably be expected to attempt to enter the U.S. market with infringing materials. The Commission therefore finds that Delta has met its burden under Paint Spray Pumps.

The question then becomes whether Delta's interest in obtaining complete protection from all potential foreign infringers is outweighed by the inherent potential of a general exclusion order to disrupt legitimate trade. We find that it is not.

There is no indication that enforcement of the order will be unusually difficult or onerous. Infringement of Delta's common-law trademark "Contractor's Saw," the registered trademarks, and/or the registered logo can be determined by visual inspection of the imported machines in question.

Infringement of the '126 wood planer patent can be determined by visual inspection. Infringement of the '100 adjustable rip fence patent can be detected by visual inspection for correspondence with the patent claims in controversy and by testing the fence to see whether its height can be

adjusted. (If the elements of the claims are present in an imported fence and the height of the fence can be adjusted, the fence is infringing.)

Infringement of the '493 blade guard patent can be determined by visual inspection and by testing an imported blade guard to determine whether it rotates up to 90 degrees from its rotating position. (Blade guards that rotate more than 90 degrees are noninfringing. 218/)

The possibility of a chilling effect upon foreign trade in noninfringing articles is an important consideration, as the Commission noted in Paint Spray Pumps. 219/ However, we find that Delta has demonstrated a need for obtaining comprehensive relief and that the burden of proving noninfringement should be imposed on would-be importers of woodworking machines.

For the sum of the foregoing reasons, we determine that general rather than limited exclusion is warranted in this investigation.

Clarification of General Exclusion Order

Paragraph 4 of the general exclusion order issued in this investigation 220/ is intended to cover the types of imported woodworking machines that were found to be in violation of section 337 by reason of infringement of Delta's common-law or registered trademarks or the registered Rockwell logo. Paragraph 4 reads in pertinent part as follows:

4. Woodworking machines and their packaging, instruction and user manuals, and promotional material that infringe—

- a. complainant Delta International Machinery Corp.'s common-law trademark "Contractor's Saw" or colorable imitations thereof [footnote omitted]; or

218/ See Delta's Remedy Brief at 14; IA's Remedy Brief at 7.

219/ Paint Spray Pumps at 17-18.

220/ Commission Action and Order of June 18, 1985 at 6, ¶ 4.

- b. the registered trademark "Unisaw" (registration No. 369,416); or
- c. the registered trademark "Rockwell" (registration No. 765,006); or
- d. the registered "Rockwell" logo (registration No. 1,031,246), which is depicted in exhibit Q to this Action and Order—

are excluded from entry into the United States, except under license from the owner of the aforesaid trademarks and logo

To dispel any confusion regarding the scope of paragraph 4, we wish to clarify that the term "woodworking machines" as used in paragraph 4 refers only to the types of woodworking machines regarding which we have found a violation of section 337 on the basis of common-law or registered trademark infringement or infringement of the Rockwell registered logo—i.e., table saws, band saws, and tilting arbor saws.

Cease and Desist Orders

In some investigations, the Commission has issued both an exclusion order and cease and desist orders. 221/ In default cases, the complainant may allege that substantial inventories exist, and may attempt to obtain evidence on this point through discovery requests, but will be thwarted by the fact that the respondents either default or refuse to cooperate with discovery. In such cases, where the complainant both alleged that substantial inventories exist and there is evidence that complainant took steps to develop such information on the record, the Commission may find it appropriate to draw

221/ See, e.g., Certain Airtight Cast-Iron Stoves, Investigation No. 337-TA-69, USITC Publication 1126 (Jan. 1981); Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation, Investigation No. 337-TA-99, USITC Publication 1246 (May 1982) and USITC Publication 1297 (Oct. 1982), aff'd, Young Engineers, Inc. v. U.S.I.T.C., 721 F.2d 1305 (Fed. Cir. 1983); Plastic Food Storage Containers.

adverse inferences against the respondents on this issue. Accordingly, the Commission may find through adverse inferences that substantial inventories exist.

In the present default investigation, Delta and the IA argued that both remedies are necessary to provide relief from different unfair acts and practices: cease and desist orders would prohibit the domestic respondents from engaging in false or deceptive advertising and passing off, and a general exclusion order would prevent the importation and sale of articles that infringe complainant's patents and trademarks. 222/

Delta did not allege that the nonsettling domestic respondents have amassed substantial inventories of the woodworking machines in question. In fact, Delta characterized domestic respondents' mail-order operations as "low inventory" mail-order houses. 223/ Although Delta noted that no sales figures were available for most nonsettling domestic respondents, Delta did not argue that it had sought to obtain evidence on the specific issue of inventories, that the lack of such evidence was due to respondents' default, and that the Commission should draw adverse inferences concerning the level of inventories. Therefore, we do not find it appropriate to issue cease and desist orders in this investigation.

The Public Interest

Before issuing an exclusion order (or a cease and desist order), the Commission must consider the effect that such order would have on the public health and welfare, competitive conditions in the U.S. economy, the production

222/ Delta's Remedy Brief at 20; IA's Remedy Brief at 9-10 and Exh. B.

223/ See Delta's Remedy Brief at 17 and CFF 202.

of like or directly competitive articles in the United States, and U.S. consumers and determine whether the effect would be such that the proposed order should not be issued. 224/

We find that there are no overriding public interest considerations that warrant denial of relief in this investigation.

The public health and welfare

The legislative history of section 337 states that the public interest is paramount in the administration of section 337. The public health and welfare and the assurance of competitive conditions in the U.S. economy must be the overriding considerations. 225/

As the IA points out, the woodworking machines in controversy are not essential for the preservation of the public health and welfare. We note, however, that blade guards are safety features of certain woodworking machines. Nevertheless, the proposed relief does not present a significant risk of harm to the public, since blade guards are integral components of the subject saws; there is no indication that saws can be sold without blade guards; and Delta has the capacity to meet current and future domestic demand for its products. 226/

Competitive conditions

As stated, the effect of a proposed remedy on competitive conditions in the U.S. economy is one of the considerations that Congress intended to be

224/ 19 U.S.C. § 1337(d) and (f)(1); 19 C.F.R. § 210.58(a)(2) (49 Fed. Reg. 46123, Nov. 23, 1984).

225/ S. Rep. No. 1298, supra, at 193, 197.

226/ See CFF 168, 160-61, 170-71; IAFF 290.

overriding in the Commission's determination of whether to grant or deny relief under section 337. The legislative history of section 337 indicates further that exclusion of imported articles should not be ordered in cases where there is evidence of price gouging or monopolistic practices. 227/

A general exclusion order would not have an adverse impact on competitive conditions. There is no evidence of price gouging or monopolistic practices in this case. Delta is the second largest seller of the subject woodworking machines, but it experiences competition from domestic as well as foreign companies. A general exclusion order would eliminate only unfair acts and unfair methods of competition; it would not affect legitimate competition from Delta's U.S. or foreign competitors.

U.S. production of like or directly competitive articles

There is no indication that the proposed relief would have any effect on this aspect of the public interest.

U.S. consumers

U.S. consumers would not be adversely affected by issuance of a general exclusion order. Delta has the capacity to supply domestic demand for its machines, and it has an adequate distribution network. Moreover, the proposed relief will have no effect on the sale of domestic and imported machines that compete fairly with Delta's products. Consumers' choice of machines thus would not be constricted.

Bonding

Section 337(g) provides for the entry of infringing articles upon the payment of a bond during the 60-day Presidential review period. 228/ In determining the amount of the bond, the Commission generally establishes an amount sufficient to "offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefitting from the importation." 229/

Complainant Delta initially requested a bond in the amount of 258 percent of the entered value of the articles concerned. Delta arrived at that figure by taking into account the average landed cost for the infringing products versus the average price, f.o.b. warehouse, for the Delta machines. 230/ In its reply brief, however, Delta took the position that the Commission should impose bonds in the amounts recommended by the IA. 231/

The IA has requested a different bond for each of the machines in controversy:

band saws	325 percent (entered value)
table saws	212 percent "
tilting arbor saws	129 percent "
planers	120 percent "

The IA arrived at these figures by comparing the average selling price of each type of the accused machines to domestic importers and Delta's distributor prices for similar machines. 232/

The IA did not recommend bonds for adjustable height rip fences or blade guards, because there is no evidence from which he could determine what the

228/ 19 U.S.C. § 1337(g)(3).

229/ S. Rep. No. 1298, supra, at 198; 19 C.F.R. § 210.58(a)(3).

230/ Delta's Remedy Brief at 21-22.

231/ Delta's Reply Brief at 25.

232/ IA's Remedy Brief at 57 n.1.

appropriate bonds should be. (He noted that there is no evidence in the record of the price at which either respondents or Delta sell, or would sell, blade guards or rip fences. 233/) And there is no evidence in the record that allegedly infringing blade guards or rip fences are being imported separate and apart from saws.)

We have determined that a single bond should be in the amount of 268 percent of the entered value of the articles directed to be excluded. That amount represents an average of the various bond amounts proposed by the IA and is very close to the single bond amount originally proposed by Delta. 234/

233/ See IA's Reply Brief at 14.

234/ In determining to issue a single bond in the amount of 268 percent of the entered value of the articles concerned, we took into account the fact that this is a default case and that data concerning the exact volume of importations, sales, and prices of the accused imports are somewhat sparse. Since the precise volumes of importations of planers and tilting arbor saws are not known, we have not taken into account those machines in calculating an average amount for the bond.

In determining to issue a single bond, we took into account the fact that Customs' personnel previously have advised the Commission staff that a single bond would avoid a potential enforcement problem. In another investigation, however, the Commission may determine that multiple bonds are appropriate. Note, supra, n.21.

substantially injure a domestic industry. The unfair acts under investigation included alleged patent infringement, common-law trademark and registered trademark infringement, false representation of manufacturing source, passing off, and false or deceptive advertising. 3/

Fifty-three firms were named as parties in the investigation. The original complainant was Rockwell International Corp. Delta International Machinery Corp. was substituted for Rockwell after Delta acquired Rockwell's Power Tool Division and the asserted patent and trademark rights. 4/ The following U.S. and foreign companies were named as respondents or were allowed to intervene in the investigation: 5/

- | | | |
|-----|---|----------|
| 1. | The Tool Guys | (U.S.A.) |
| 2. | Barrett Tool & Die Manufacturing Corp. | " |
| 3. | Sid Tool Co., Inc., d/b/a Manhattan Supply Co. | " |
| 4. | Industrial Industries International, Inc. | " |
| 5. | Conover Woodcraft Specialties, Inc. | " |
| 6. | Wilton Corp. | " |
| 7. | Wilke Machinery Co. | " |
| 8. | American Machine and Tool Co. | " |
| 9. | Harbor Freight and Salvage Co.,
d/b/a Central Purchasing, Inc. | " |
| 10. | CTT Tools, Inc. | " |
| 11. | C.O.M.B. Company | " |
| 12. | Equipment Importers, Inc.,
d/b/a Jet Equipment and Tools | " |
| 13. | Toolcoa International, Inc. | " |
| 14. | Big Joe Industrial Tool Corp. | " |
| 15. | Trend-Lines, Inc. | " |
| 16. | Fort Bragg Rent-All, Inc. | " |
| 17. | Pro Shop Power Tools Co. | " |
| 18. | The Liquidator, Inc. | " |
| 19. | Liquidation Bureau, Inc. | " |
| 20. | Grizzly Imports, Inc. | " |
| 21. | Astro-Pneumatic Tool Co. | " |
| 22. | Tops Equipment & Tools Co., Ltd. | (Taiwan) |
| 23. | Nu Way Machinery Corp. | " |

3/ 48 Fed. Reg. 55786 (Dec. 15, 1983); 49 Fed. Reg. 20767 (May 16, 1984); Verified Revised Amended Complaint; CFF 23-28.

4/ 49 Fed. Reg. 23463 (June 6, 1984). See also CFF 20-21, 24-25, 123-28, 131, 132, 133, 134, 135, and 136.

5/ 48 Fed. Reg. 55786 (Dec. 15, 1983); 49 Fed. Reg. 20767 (May 16, 1984); Verified Revised Amended Complaint; 50 Fed. Reg. 7969 (Feb. 27, 1985).

24.	Tien Chien Enterprises Co., Ltd.	Taiwan
25.	Yung Li Hsing Electric Works Co., Ltd.	"
26.	Chiu Ting Machinery Co., Ltd. (a/k/a Ju Ting Machinery Works Co., Ltd.)	"
27.	Upsix Industrial Co., Ltd.	"
28.	Shih Hsin Machinery Industrial Co., Ltd.	"
29.	Dankey International Incorporated	"
30.	Kuang Yung Machinery Co., Ltd.	"
31.	Shen Kung Machinery Industrial Co., Ltd.	"
32.	Taiwan Sheng Tsai Industrial Co., Ltd.	"
33.	Rexon Industrial Corp.	"
34.	Formosan United Corp.	"
35.	Good Will Mercantile Co.	"
36.	Show Soon Enterprises Co., Ltd.	"
37.	Fortune Development Corp.	"
38.	King Feng Fu Machinery Works Co., Ltd.	"
39.	King Tun Fu Machinery Co.	"
40.	Ju Ting Machinery Works Co., Ltd. (a/k/a Chiu Ting Machinery Co., Ltd.)	"
41.	Sheng Feng Woodworking Machines Co. Ltd.	"
42.	Allied Manufacturers International Corp.	"
43.	Tomita Enterprise Co., Ltd.	"
44.	Soun Ping Machinery Co., Ltd.	"
45.	Strophe Enterprise Co., Ltd.	"
46.	Leroy International Corp.	"
47.	World Wide Supplies Co., Ltd.	"
48.	TUI Industrial Co., Ltd. (intervenor)	"
49.	Mao Shan Machinery Industrial Co., Ltd. (intervenor)	"
50.	Union Tool Exporters, Ltd. (intervenor)	"
51.	Tauco Manufacturing Co., Ltd.	(South Africa)

During the course of the investigation, the three intervenors and twenty-seven of the respondents settled with Delta and were terminated from the investigation on the basis of consent orders. 6/ Six other respondents

6/ Those respondents and intervenors included The Tool Guys, Barrett, Sid, Industrial Industries, Conover, Wilton, Wilke, American Machine and Tool, Harbor Freight, CTT, C.O.M.B., Tops, TUI, Mao Shan, Union, Nu Way, Tien Chien, Equipment Importers (Jet), Yung Li Hsing, Chiu Ting, Upsix, Grizzly, Shih Hsin, Dankey, Kuang Yung, Astro-Pneumatic, Shen Kung, Taiwan Sheng Tsai, Rexon, and Ju Ting. See 49 Fed. Reg. 35874 (Sept. 12, 1984); 49 Fed. Reg. 39118 (Oct. 3, 1984); 49 Fed. Reg. 39928 (Oct. 11, 1984); 49 Fed. Reg. 40678 (Oct. 17, 1984); 49 Fed. Reg. 50314 (Dec. 27, 1984); 50 Fed. Reg. 1138 (Jan. 9, 1985); 50 Fed. Reg. 3423 (Jan. 24, 1985); 50 Fed. Reg. 7969 (Feb. 27, 1985), as amended at 50 Fed. Reg. 10236 (Mar. 14, 1985); 50 Fed. Reg. 9141 and 9142 (Mar. 6, 1985); 50 Fed. Reg. 14172 (Apr. 10, 1985); 50 Fed. Reg. 20303 (May 15, 1985).

were dismissed for lack of evidence of a section 337 violation. 7/

During the final stage of the investigation, Delta and six more respondents filed joint motions for the entry of consent orders. 8/ In addition, Delta conceded that there was no evidence of a section 337 violation by one nonsettling respondent. 9/ Consequently, at the end of the investigation, Delta's allegations were focused on the activities of eight respondents:

- | | | |
|----|-----------------------|----------|
| 1. | World Wide | (Taiwan) |
| 2. | Toolcoa International | (U.S.A.) |
| 3. | Big Joe | " |
| 4. | Trend-Lines | " |
| 5. | Fort Bragg | " |
| 6. | Pro Shop | " |
| 7. | The Liquidator | " |
| 8. | Liquidation Bureau | " |

An evidentiary hearing was conducted between December 5 and 7, 1984. No respondents appeared; Delta and the Commission investigative attorney (IA) were the only participants.

On February 7, 1985, the presiding administrative law judge (ALJ) issued an initial determination (ID) holding all remaining respondents in default and finding all remaining respondents except Strophe and Soun Ping to be in violation of section 337. The ALJ determined that Strophe and Soun Ping should be dismissed. 10/

On April 1, 1985, in response to a petition for review filed by the IA, the Commission decided to review portions of the ID concerning infringement of

7/ Those respondents included Tauco, Allied, Tomita, Sheng Feng, Strophe, and Soun Ping. See 49 Fed. Reg. 32692 (Aug. 15, 1984); 50 Fed. Reg. 3423 (Jan. 24, 1985); initial determination of Feb. 7, 1985, at 4; 50 Fed. Reg. 14172 (Apr. 10, 1985).

8/ Those respondents included Formosan, Good Will, Show Soon, Fortune, King Feng Fu, and King Tun Fu. The requested consent orders were not entered until the end of the investigation. See Commission Action and Order of June 17, 1985, at 3-5; 50 Fed. Reg. 26639 (June 27, 1985).

9/ That respondent was Leroy International. See *infra* n.137.

10/ ID at 4.

common-law trademarks in the external design appearance of complainant's 10-inch table saw and 14-inch band saw. The Commission also decided to review, on its own motion, portions of the ID concerning patent infringement, misappropriation, definition of the domestic industry, injury, and the alleged violation of section 337 by respondent Leroy International. 11/

The Commission determined not to review portions of the ID concerning infringement of the common-law trademark "Contractor's Saw," registered trademark infringement, false and deceptive advertising, passing off, efficient and economic operation of the domestic industry, default, and the dismissal of respondents Strophe and Soun Ping. 12/ Those portions of the ID have become my determination on the issues discussed therein. 13/ However, to supplement those portions of the ID, I have adopted certain findings of fact proposed by Delta and the IA. 14/

Delta and the IA filed briefs on the issues under review and the issues of remedy, the public interest, and bonding. 15/ The Commission had requested such briefs from all parties, 16/ but the respondents did not file any.

11/ 50 Fed. Reg. 14172 (Apr. 10, 1985).

12/ Id.

13/ See 19 C.F.R. § 210.53(h).

14/ CFF 77-130.2, 146-47.4, 157-73; IAFF 1-17, 22-48, 227-42. (50 Fed. Reg. 14172, Apr. 10, 1985).

15/ See Memorandum of Complainant Delta International Machinery Corp. in Response to the Notice of the Commission's Decision to Review (Delta's Review Brief); Memorandum of Complainant Delta International Machinery Corp. on Remedy, the Public Interest, and Bonding (Delta's Remedy Brief); Reply of Complainant Delta International Machinery Corp. to Briefs of the Commission Investigative Attorney (Delta's Reply Brief); Brief of the Commission Investigative Attorney on the Issue of Violation (IA's Review Brief); Brief of the Commission Investigative Attorney on the Issues of Remedy, Bonding, and the Public Interest (IA's Remedy Brief); Reply Brief of the Commission Investigative Attorney (IA's Reply Brief).

16/ 50 Fed. Reg. 14172 (Apr. 10, 1985).

The Commission also solicited written comments from the public and other Federal agencies concerning remedy, the public interest, and bonding. 17/ No comments were received.

This opinion sets forth my views concerning the issues under review, as well as the issues of remedy, the public interest, and bonding. 18/ 19/ 20/

Common-law trademark infringement

A trademark is defined at common law as it is under the Lanham Act: "any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured or sold by others." 21/ A trademark indicates origin

17/ 50 Fed. Reg. 14172 (Apr. 10, 1985).

18/ My reasons for granting the six consent order motions pending at the end of the investigation are the reasons set forth in the Commission Action and Order of June 17, 1985 at 2-3. (See also 50 Fed. Reg. 26639, June 27, 1985.)

19/ The findings of fact adopted in support of this opinion are cited in the opinion.

20/ This is a default case. The named respondents did not appear at the evidentiary hearing to contest the allegations made by complainant. (See Tr. at 1-2.) In default cases, the Commission nevertheless requires that the complainant submit sufficient evidence and make sufficient argument to make out a prima facie case of a violation of section 337. See 19 C.F.R. § 210.25(b). Complainant Delta has done that here. The establishment of a prima facie case, though sufficient here, is not necessarily dispositive with respect to similar questions of law which may arise and be more fully litigated in contested cases.

21/ 15 U.S.C. § 1127; 1 McCarthy, Trademarks and Unfair Competition, § 3:1 (2nd Ed. 1984); Certain Single Handle Faucets, Investigation No. 337-TA-167, USITC Publication 1606, ID at 34-35 (Nov. 1984) (Single Handle Faucets); Certain Trolley Wheel Assemblies, Investigation No. 337-TA-161, USITC Publication 1605, ID at 34-35 (Nov. 1984) (Trolley Wheel Assemblies); Certain Heavy-Duty Staple Gun Tackers, Investigation No. 337-TA-137, USITC Publication 1506, ID at 16-17 (Mar. 1984) (Staple Gun Tackers); Certain Vertical Milling Machines and Parts, Attachments, and Accessories Thereto, Investigation No. 337-TA-133, USITC Publication 1512, Views of the Commission at 8-9 (Mar. 1984) (Vertical Milling Machines); Certain Cube Puzzles, Investigation No. 337-TA-112, USITC Publication 1334, Views of Chairman Eckes and Commissioner Haggart at 4, Views of Commissioner Stern at 1 (Jan. 1983) (Cube Puzzles); Certain Vacuum Bottles and Components Thereof, Investigation No. 337-TA-108, USITC Publication 1305, Commission Opinion at 4 (Nov. 1982) (Vacuum Bottles).

or ownership, guarantees quality or constancy, and entitles the owner to advertise goods bearing the mark. 22/

A mark is deemed established and protectible upon proof that: (1) the complainant has a right to use the mark; (2) the mark is inherently distinctive or has acquired secondary meaning; (3) the mark is not primarily functional; and (4) the mark is not generic. 23/ The basic test for infringement is the likelihood of confusion in the minds of a substantial number of reasonable buyers. 24/

The marks under review are the overall external designs of Delta's 10-inch table saw and 14-inch band saw. 25/ The ALJ determined that Delta had established common-law trademark rights in both designs. 26/ The Commission has reviewed portions of the ID concerning functionality and secondary meaning. I affirm the ALJ's conclusion that the designs in question are primarily nonfunctional but reject the conclusion that the designs have acquired secondary meaning.

22/ Note, supra, n.20.

23/ Single Handle Faucets at 35; Trolley Wheel Assemblies at 35; Staple Gun Tackers at 17; Cube Puzzles, Views of Chairman Eckes and Commissioner Haggart at 7, Views of Commissioner Stern at 1; Vacuum Bottles at 5.

24/ Single Handle Faucets at 47; Trolley-Wheel Assemblies at 35; Staple Gun Tackers at 52; Certain Sneakers With Fabric Uppers and Rubber Soles, Investigation No. 337-TA-118, USITC Pub 1366, Views of the Commission at 16 (Mar. 1983) (Sneakers); Cube Puzzles, Views of Chairman Eckes and Commissioner Haggart at 7 and 19, Views of Commissioner Stern at 1.

25/ See CFF 37-38.

26/ ID at 12-17 and CL 3.

Functionality

The concept of functionality historically has been expressed in terms of utility. 27/ In that regard, the Commission has adopted the test enunciated in In re Morton-Norwich Products, Inc.—i.e., whether competition will be hindered by preventing others from copying the design or configuration in question. 28/

Morton-Norwich listed the following factors as relevant considerations in determining functionality: (1) whether the utilitarian advantages of the design are touted in advertising; (2) whether the particular design results from a comparatively simple or cheap method of manufacture; (3) whether there exists a utility patent which discloses the utilitarian advantage of the design for which production is sought; and (4) whether commercial alternatives are available. 29/ The foregoing factors are aids in determining functionality; 30/ no single factor is dispositive.

In the present investigation, the ALJ concluded that the configuration of each saw is overall nonfunctional because: (1) the design features of each saw are neither necessary nor utilitarian; (2) each saw can be produced more cheaply using other designs; and (3) alternative designs have been used in competitors' saws without affecting the quality of performance. 31/

27/ In re Dennison Mfg. Co., 39 F.2d 720 (C.C.P.A. 1930); Sparklets Corp. v. Walter Kidde Sales Co., 104 F.2d 396, 399 (C.C.P.A. 1939).

28/ See In re Morton-Norwich Products, Inc., 671 F.2d 1332 (C.C.P.A. 1982); Single Handle Faucets at 36; Trolley Wheel Assemblies at 36-37; Staple Gun Tackers at 20-21; Vertical Milling Machines at 23; Certain Braiding Machines, Investigation No. 337-TA-130, USITC Publication 1435, ID at 42-43 (Oct. 1983) (Braiding Machines); Cube Puzzles, Views of Chairman Eckes and Commissioner Haggart at 9 n.25, Views of Commissioner Stern at 1; Vacuum Bottles at 19-21.

29/ Morton-Norwich at 1340-41.

30/ Id. at 1340.

31/ ID at 16-17.

The ID lists the design features that the ALJ found to be nonfunctional. 32/ However, it does not discuss whether aspects of any feature are functional. In this case, a mere listing of nonfunctional design features is not sufficient. 33/ Set forth below is my assessment of the functionality of the individual components of each asserted design mark.

32/ ID at 9-10.

33/ Recent decisions by the United States Court of Appeals for the Federal Circuit (CAFC) indicate that the best way of analyzing the de jure functionality of a complex overall design may be to do so from the standpoint of the design's de facto functional features. In *Textron, Inc. v. U.S.I.T.C.*, No. 84-1261, ___ F.2d ___ (Fed. Cir. 1985), the CAFC stated that—

[W]e do not retreat from the position that the determination of whether an overall design is functional should be based on the superiority of the design as a whole, rather than on whether each design feature is 'useful' or 'serves a utilitarian purpose.' [In *re* *Teledyne, Inc.*, 676 F.2d at 971; *Morton-Norwich*, *supra*, 671 F.2d at 1339.] We merely acknowledge, as this court did in similar circumstances in *Teledyne*, that the best way the Commission may have had to analyze the de jure functionality of a complex overall design was to do so from the standpoint of its de facto functional features.

Textron, slip opinion at 14.

The appropriateness of analyzing functionality from the standpoint of the individual design components was tacitly reiterated in *New England Butt Co. v. U.S.I.T.C.*, No. 83-1402, ___ F.2d ___ (Fed. Cir. 1985). In affirming the Commission's conclusion of the functionality of the overall design mark at issue in that case, the CAFC made the following observations concerning the Commission's approach:

The ALJ did indeed examine the utilitarian nature of each of the twenty-two components claimed by *New England Butt* to constitute its trademark. However, the purpose of this examination was to determine the functionality of each feature as reflected in the machine's overall appearance. The Commission reviewed each of the relevant components and found that each component is functional or irrelevant for trademark purposes. [Footnote omitted.] The Commission then analyzed the braider's overall configuration to see if the particular design is functional, by turning to the analysis set forth in *Morton Norwich*, *supra* at 8-9.

New England Butt, slip opinion at 10.

1. Table Saw

Circular handwheels having three spokes. Several of Delta's "legitimate" competitors use circular handwheels having three spokes (webbs). 34/ However, there are commercially acceptable alternative designs available. 35/ Certain settling respondents, for example, have agreed to change the design of their handwheels to knobs or to solid wheels or to wheels having more or fewer than three spokes and have agreed that the aforesaid modifications will not affect the quality or performance of their machines. 36/ The design of Delta's handwheels is therefore nonfunctional.

Appearance of the blade guard. The design of Delta's blade guard is disclosed and claimed in one of the patents under investigation—i.e., U.S. Letters Patent 3,754,493 ('493 patent). 37/ Under Morton-Norwich, the existence of a utility patent covering a design is evidence of its functionality. 38/ The specific shape of the blade guard used by Delta is not required by the '493 patent, however. 39/ Furthermore, Delta's legitimate competitors and the settling respondents use blade guards having a different shape than Delta's. 40/ The shape of Delta's blade guard is therefore nonfunctional.

The transparency of Delta's blade guard is functional, however, because it is a safety feature. The blade guard prevents the person using the saw

34/ IAFF 60-63.

35/ IAFF 64.

36/ IAFF 65.

37/ CX 1. See also IAFF 110-11.

38/ 671 F.2d 1340-41.

39/ See CX 1; IAFF 112.

40/ See IAFF 113.

from inadvertently contacting the saw blade 41/; the transparency of the blade guard permits the saw user to see the work in progress.

Appearance of the ribbed surface on the extension wings. Delta advertises that the ribbed surface prevents warping and distortion. 42/ Use of ribbed surfaces also results in lower production costs because of reduced surface areas to be machined. 43/

The appearance of the ribs (i.e., size and location) is nonfunctional, however. Although competitors place ribs on the extension wings of their saws, the appearance of the ribs on their saws differs from the appearance of the ribs on Delta's saws. 44/ Furthermore, the modifications agreed to in the various settlement agreements demonstrate that numerous other rib designs are available for use. 45/

Rounded guide bar. The table saw design in question has two bars: one in the front and one in the rear. The adjustable rip fence under investigation 46/ is attached to these guide bars. (The rip fence is adjustable from side to side, so that the person using the saw can set the width of the wood to be ripped.) Guide bars are necessary to keep the rip fence properly aligned, i.e., perpendicular to the front and rear of the machine. 47/

Delta's guide bars are cylindrical, and they are provided with an incremental scale on the top of the front bar in order to assist the worker in setting the desired cutting width. 48/ The guide bars on the machines of two

41/ IAFF 110.

42/ IAFF 66-67.

43/ IAFF 67.

44/ IAFF 68-72.

45/ IAFF 73.

46/ See infra this opinion at 33.

47/ IAFF 88-89.

48/ IAFF 89.

legitimate competitors are similar to Delta's in appearance, and Delta has allowed settling respondents to retain the cylindrical guide bars with incremental scales having gradations similar to those found in a ruler. 49/ The guide bars on the table saws of two other competitors are angular with incremental scales. 50/ The cylindrical shape of the guide bars is nonfunctional. However, the placement of incremental scales on such guide bars is functional.

The design and appearance of the lever used to adjust and move the rip fence. Delta uses a single control lever (handle) that attaches the rip fence to the front and rear guide bars, tightens and straightens the fence in the desired position, and then locks the rear of the fence. 51/ Delta alleged only that the external configuration of the clamp and lever has trademark significance. The clamp is the component that attaches the rip fence to the front and rear guide bars and the locking mechanism using one lever. 52/

Delta's clamps are round in contour, whereas the clamps of most of Delta's competitors are generally rectangular in contour. 53/ The configuration of the lever (or levers in the case of those using two levers) are also different from Delta's. 54/ The use of alternative configurations by other competitors, including settling respondents, 55/ indicates that the external configuration of the clamp and lever is nonfunctional.

49/ IAFF 90-92.

50/ IAFF 93-94.

51/ IAFF 95.

52/ Id.

53/ Id.; IAFF 98-103.

54/ IAFF 98-104.

55/ IAFF 105.

Appearance of the miter gauge. Miter gauges are used to set the angle of the material to be cut as it hits the blade. 56/ The most commonly used angles are 90 degrees, 45 degrees left, and 45 degrees right. 57/ Delta's miter gauges have three small protrusions to enable the user to quickly set the gauge at the three most commonly used angles. 58/ The miter gauge also has a bar that is placed in grooves on either side of the saw blade. 59/ The size of this bar is set by industry standard. 60/

The miter gauges of all of Delta's domestic competitors and the settling respondents have the three small protrusions and a gauge bar. 61/ The primary difference between Delta's miter gauges and those used by other companies is the configuration of the handle (knob). Delta uses a short cylindrical handle, and the others, including the settling respondents, use a long cylindrical handle. 62/

The only aspect of Delta's miter gauge that appears to be nonfunctional is the configuration of the handle. As stated previously, the three protrusions serve the purpose of facilitating the setting of the miter gauge at the three most commonly used angles, and the configuration of the gauge bar is set by industry standard. Consequently, those aspects of the miter gauge are functional.

Location of the controls. The location of the controls was selected on the basis of ease of operation—a fact that Delta has advertised. 63/ This is

56/ IAFF 83.

57/ Id.

58/ See Tr. at 97, 105–106.

59/ Id.

60/ Tr. at 106.

61/ Tr. at 96–97; CX 49 at 1–4, 7–8; SCX 34 at 27; CX 30, Exh. F; CX 32, Exh. B at 2; CX 34, Exh. C–7.)

62/ IAFF 84–87.

63/ IAFF 74–75.

evidence of the functionality of the location of the controls. The advertisements for other companies' machines depict similar locations for controls; the sole difference is that some are of a left-hand configuration and the others, a right-hand configuration. (The right-hand configuration is the most commonly used.) 64/

Further evidence of the functionality of the location of the controls is the fact that Delta's agreements with the settling respondents permit the respondents to retain the location of the controls on their machines, although the respondents are required to change the appearance of the controls. 65/ The location of the controls is therefore functional.

Design, location, and color scheme of identification name plate and blade angle gauge at the front of the machine. There is no evidence on the record with respect to the color scheme of the identification name plate and blade angle guide for machines other than Delta's and one settling respondent. 66/ The color scheme used by Delta (black, white, and red) appears to be nonfunctional.

The location of the blade angle gauge at the front of the machine appears to be functional, however, for the same reasons that the location of the controls are functional. 67/

As indicated above, the following aspects of Delta's table saw are functional: (1) the transparency of the blade guard; (2) the configuration of the miter gauge (except the shape and size of the handle); and (3) the location of the controls (handwheels, gauges, and switches).

64/ IAFF 76-80.

65/ IAFF 81.

66/ IAFF 109.

67/ See IAFF 106-08.

Nevertheless, I find the design of the table saw is overall nonfunctional, as evidenced by: (1) the appearance of handwheels; (2) the shape of the blade guard; (3) the appearance of the extension wings; (4) the rounded guide bars; (5) the appearance of the rip fence lever and the rounded configuration of the rip fence clamp; (6) the appearance of the handle on the miter gauge; and (7) the color scheme and design of the name plate and blade angle gauge. Moreover, most of the design features of the table saw are neither necessary nor utilitarian; Delta's table saw can be produced more cheaply using other designs; and alternative designs have been used in competitors' table saws without affecting the quality of performance.

I affirm the ALJ's conclusion that the external design of Delta's table saw is overall nonfunctional.

2. Band Saw

Delta's "slim line" design leaves most of the adjustment controls, the frame (including reinforcing webbs), and the blade guides exposed to view. 68/ The design uses four light castings as housings (two for the front and rear top housings and two for the front and rear bottom housings) and an external "C" casting as the frame to join the top and bottom portions of the saw together. The tops and bottoms of each of the four housings are a near-perfect arc. 69/

The miter gauge for Delta's band saw is the same as that utilized on the table saw. Consequently, I find the appearance of the miter gauge to be functional in part. (As stated previously, the three protrusions on the miter gauge serve the purpose of facilitating the setting of the miter gauge at the

68/ IAFF 124, 131, 132, 134.

69/ See IAFF 119.

3 most commonly used angles. The configuration of the gauge bar is set by industry standard.) In addition, I also find the specific appearance (i.e., transparency) of the blade guide to be functional per se.

Nevertheless, I affirm the ALJ's conclusion that the external configuration of Delta's band saw is overall nonfunctional. I note that the table saw's overall design is not covered by a utility patent and the utilitarian advantages of the overall design are not touted in advertising.

In addition, each saw can be produced more cheaply using other designs, 70/ and alternative designs have been used in competitors' saws without affecting the quality of performance. 71/ The arbitrariness or nonfunctionality of Delta's band saw design lies in the fact that the components of the saw are left exposed to view (whereas all of the nonaccused saw designs (e.g., "bathtub" designs) place the components within housings). 72/

The bathtub designs tend to be more massive, and the settlement designs are heavier and require more steps in production than the slim line design. 73/ There appears to be, however, effective competition from producers utilizing bathtub designs. Furthermore, settling respondents have agreed to modify their designs and have agreed that the specified modifications will not affect the quality or operation of the imported machines. 74/ These factors lead me to conclude that the design of Delta's band saw is overall nonfunctional.

70/ See IAFF 127.

71/ See IAFF 119-122, 128, 137.

72/ IAFF 124, 131, 132, 134.

73/ See generally IAFF 119, 121-135.

74/ IAFF 133, 137.

Secondary meaning

Although nonfunctional, the designs in question are not entitled to trademark protection unless they have acquired secondary meaning. 75/ To establish secondary meaning, it must be shown that a substantial number of the relevant consumer group associates the mark with a single source. 76/ The party seeking protection for its proposed mark must show that there is substantial evidence of secondary meaning, not merely a remote possibility. 77/

Proof of secondary meaning may be shown by direct and/or circumstantial evidence. Direct evidence includes statements of buyers and also may include professionally conducted consumer surveys. 78/ Circumstantial evidence may include evidence of the nature and extent of the seller's advertising and promotional efforts, the size of the seller, number of sales made, amounts spent in advertising, length of use of the mark, and similar evidence tending to show wide exposure of the relevant buyer class to the mark in question. 79/ Such evidence is relevant but will not necessarily justify an inference that secondary meaning has been established. 80/

In determining that the overall designs of Delta's table saw and band saw had acquired secondary meaning, the ALJ relied on: (1) a survey study in which a net unduplicated 25.8 percent of the total interviewees correctly identified photographs of Delta's band saw and a net unduplicated 29.9 percent

75/ See Single Handle Faucets at 40; Trolley Wheel Assemblies at 41; 1 McCarthy, supra, § 15:1.

76/ Single Handle Faucets at 40; Trolley Wheel Assemblies at 41; 1 McCarthy, supra, § 15:11.

77/ Note, supra, n.76.

78/ Single Handle Faucets at 41; Trolley Wheel Assemblies at 41-42; 1 McCarthy, supra, at § 15.11.

79/ Note, supra, n.78.

80/ Trolley Wheel Assemblies at 42; 1 McCarthy, supra, at §§ 15.11, 15.16.

correctly identified Delta's table saw; (2) evidence of the length and extent of Delta's use of the product configurations, sales of the machines, and advertising; and (3) evidence of respondents' intentional copying of the Delta's designs in controversy. 81/

I conclude that the factors cited by the ALJ do not provide adequate support for a finding that the designs in question have acquired secondary meaning.

1. Survey.

The proper survey "universe" is that segment of the population whose characteristics are relevant to the mental association at issue. A survey of the wrong universe is of little probative value in litigation. 82/

The relevant market for the subject saws includes home craftsmen, home builders, tradespeople in factories and industrial arts classes, cabinet shops, and maintenance shops. 83/ Evidence on the record indicates that many woodworkers (professionals as well as hobbyists) own or are familiar with a variety of woodworking tools. 84/

The universe of the survey conducted in the present investigation consisted of males over 25 years of age who had used their own band saw or table saw within the preceding six months. 85/ The IA argued, among other things, that: (1) the survey universe was too restrictive because it included

81/ ID at 13-15. (See also ID at 6 n.4; CFF 37-68, 78-79.1, 83; rebuttal CFF 37.1-38.2, 47.1-47.3, 55.2-55.4, 56.1-57.4, 62.1, 65.1, 66.1.) The ALJ also commented that the fact that respondents have engaged in passing off is a further indication that the product configurations in question have acquired secondary meaning. ID at 35.

82/ 2 McCarthy, supra, § 32.47.

83/ CFF 77.

84/ IAFF 158.

85/ Interviewers were told: "In order to qualify for interview, the man must either own his own tool or use it often enough to consider it 'his own'." CX 63 at 7.

only persons who already owned a saw (or those who used one often enough, based upon the interviewer's judgment, that they could be considered the equivalent of owners)—i.e., persons who would be most likely to give the correct answer, and it did not include all potential purchasers; (2) the survey involved an improper grant of discretion to the interviewers; and (3) the figures, even if accepted at face value, are not substantial enough to support a finding of secondary meaning. 86/

To establish that the designs in question have acquired secondary meaning, Delta was required to show that a substantial number of persons in the relevant consumer group associate the designs in question with a single source. 87/ Moreover, the relevant consumer group must include potential purchasers as well as past purchasers.

Delta estimates that approximately ~~*****~~ of the end-users of its table saw and band saw are home-users. 88/ In light of the expense and durability of the saws in question, 89/ it reasonably can be inferred that once a home-user has purchased one of the saws in question, he is not likely to be in the market for a second saw of the same type. This inference is supported by the fact that those home-users deposed by Delta who offered testimony concerning the types and numbers of woodworking machines that they owned did not own more than one 14-inch band saw or 10-inch table saw at the same time. 90/ The only home-user deponents who reported purchasing more

86/ IA's Review Brief at 22-42; IA's Reply Brief at 3-5. (See also IAFF 140-65.)

87/ Single Handle Faucets at 40; Trolley Wheel Assemblies at 41; 1 McCarthy, supra, § 15:11.

88/ CFF 77; Tr. 184-85.

89/ The retail prices of Delta's table saw and band saw range from \$600 to \$800. Tr. at 240-41. See also IAFF 280, 282, 277 (at page 52 of the IA's proposed findings of fact), 284. See also CFF 160.

90/ CPX 11, Tr. at 5; CPX 13, Tr. at 5, 6, 8; CPX 15, Tr. at 3; CPX 22 at 4, 5.

than one of the saws in question initially had purchased a Taiwan band saw or table saw, had been dissatisfied with the saw, and had returned it to the vendor or resold the saw and purchased a Delta saw as a replacement. 91/

Delta pointed out that more than 50 percent of the survey respondents came under categories other than home user—i.e., the "custom woodworker," "remodeler," and "other" categories. 92/ Delta argued that it reasonably can be assumed that (1) home remodelers and owners of various industrial shops would be likely to own more than one band saw or table saw; (2) after a period of extensive use of a table saw or band saw, a saw owner would seek to replace the used saw with a newer model; and (3) it is likely that one who has extensively used one of a table saw or band saw eventually would become a purchaser of such a saw. 93/

Delta did not cite any evidence on the record that would support its assumptions. Furthermore, even assuming, arguendo, that Delta's assumptions are well founded, the fact remains that home-users account for a substantial portion of the market for the saws in question (in the survey, 44.2 percent of total respondents seeing photographs of the band saw and 44.8 percent of those seeing photographs of the table saw described themselves as "home craftsman" 94/) and it reasonably can be inferred that saw owners in the home-user category are the least likely potential purchasers of a second saw of the same type.

91/ CPX 11, Tr. at 5, 6, 7; CPX 13, Tr. at 6, 7, 8 10; CPX 22 at 4, 5, 11-13. CPX 11, Tr. at 5, 7; CPX 13, Tr. at 10-11.

92/ CX 63 at Fig. 8.

93/ Delta's Reply Brief at 4-5.

94/ CX 63 at Fig. 8.

Courts have found universes similar to that in the present investigation to be flawed because they were restricted to past purchasers and did not include potential purchasers. 95/ In the present investigation, since the universe was limited to persons who had used their own table saw or band saw within the past six months, the universe was too restricted since it did not expressly include persons who were contemplating the purchase of a table saw or band saw.

An additional flaw in the survey universe in the present investigation is that it was restricted to past purchasers (or extensive users that were the equivalent of owners), a group which includes those who would be most likely to recognize the product configurations at issue. 96/ Owners and extensive

95/ In *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, the plaintiff conducted a survey among persons who had purchased or leased the defendant's "Donkey Kong" game in order to determine whether they associated the game with the plaintiff, who owned the rights to "King Kong." The U.S. Court of Appeals for the Second Circuit held that the universe was too restrictive, because it was limited to past purchasers or lessees and did not include persons who were contemplating the purchase or lease of the product in question. 746 F.2d 112, 118 (2d Cir. 1984).

96/ In *Brooks Shoe Co. v. Suave Shoe Co.*, the plaintiff conducted a survey among spectators and contestants at a track meet to determine the degree of recognition of the "V" design used on the sides of Brooks' shoes. The court held that the plaintiff's survey was not statistically random because the survey universe consisted of persons most likely to recognize the mark in question (i.e., spectators and participants at the track meet) instead of those persons whose opinion would fairly represent the opinions of consumers of athletic footwear. 533 F. Supp. 75, 80 (S.D. Fla. 1980).

Delta cites the Brooks Shoe decision as support for its position that the survey could appropriately be limited to owners of the saws in question. Although the court in Brooks Shoe accepted defendant's survey, the universe of which consisted of owners of athletic shoes (533 F.Supp. 80-81), the survey universe in this investigation is clearly distinguishable. In Brooks Shoe, the products that were the subject of the survey—shoes—obviously have a substantially shorter product lifespan than the woodworking machines that are the subject of this investigation. This is a critical distinction, because

(Footnote continued)

users of expensive machines such as the table saw or band saw at issue in this investigation would be among the group of persons having intimate knowledge of the appearance of the table saws and band saws and their components.

Consequently, owners and extensive users are obviously the most likely to recognize the Delta saws in question by their appearance.

The reliability of the survey is diminished further by the fact that the survey did not utilize control photographs—i.e., pictures of similar types of machinery manufactured by other companies. Although the survey contained internal controls (e.g., interviewees were asked the reason why they identified the saws in question as being a particular brand or the product of a particular manufacturer), control photographs should have been used to ascertain the extent to which the public associates woodworking machines with

(Footnote continued)

the difference between ownership and potential ownership of a relatively disposable consumer item is substantially less significant than the difference with respect to products that have a substantially longer product lifespan, such as saws.

Furthermore, there are numerous brands, makers, and types of athletic shoes. Consequently, the universe in Brooks Shoe consisting of owners of athletic shoes was very broad. In the present investigation, there are substantially fewer articles and producers of the articles in question (table saws and band saws), and the class of persons who have used their own table saw or band saw within the last six months is a small subgroup of the potential market of woodworkers and woodworking enthusiasts. Thus, in order to be comparable with the broad and representative universe in Brooks Shoe, the universe in the present case would have to have included all woodworkers and woodworking enthusiasts and not be limited to owners or frequent users.

Delta argued that in Certain Plastic Food Storage Containers, Investigation No. 337-TA-152, the Commission approved universe criteria similar to that used in the present investigation. The survey universe in that case consisted of women 21 years of age and over who were users of plastic food storage containers. USITC Publication 1563 (Aug. 1984) at 80.

Plastic Food Storage Containers is distinguishable from the present investigation, partly because the universe in that case was factually much broader than the universe in the present investigation. More importantly, it reasonably can be inferred that, given the nature of the product in question (plastic dishes), the relevant universe in the Plastic Food Storage Containers survey would be more likely to include potential purchasers of the articles in question than would the universe in the present investigation.

Rockwell/Delta exclusively. Delta's sales of the subject saws are second only to those of Sears, Roebuck & Co. 97/ That circumstance increased the likelihood that an interviewee would answer "Rockwell" and/or "Delta" in response to the key question, on the basis of his familiarity with the brand names rather than recognition of the product configuration.

An additional consideration that diminished the reliability of the survey was the fact that the interviewers were not given sufficiently specific instructions about selecting persons to approach as possible interviewees. 98/ For example, the decision regarding which nonowner saw users to interview was left to the discretion of the interviewer and was not based on any clear guidelines. Interviewers were told that "in order to qualify for interview, the man must either own one tool or use it often enough to consider it his own." 99/ Even if owners were the appropriate universe, there should have been guidelines for the interviewer to determine whether the potential interviewee's use of the saw in question reasonably could be considered the equivalent of ownership. The absence of such guidelines gave interviewers too much discretion. Such discretion has the potential for bias.

Yet another factor which leads me to conclude that the survey in this case is not entitled to substantial weight as direct evidence of secondary meaning is that, even accepted at face value, the percentages of correct responses are relatively low. There is no prescribed recognition rate for determining what weight a survey is entitled to as evidence of secondary meaning. However, the percentages of correct responses in this

97/ IAFF 164. (See also IAFF 165.)

98/ See IAFF 149-50.

99/ CX 63 at 7.

investigation—a net unduplicated 25.8 percent for the band saw and a net unduplicated 29.9 percent for the table saw—are relatively low in light of the narrowness of the universe and compared with survey recognition rates given substantial weight as evidence of secondary meaning in previous investigations. 100/

In Staple Gun Tackers, the Commission accepted a survey as evidence of secondary meaning even though the recognition levels at the various survey locations were 14, 30, and 40 percent. 101/ Delta argued that those figures are similar to the percentages of correct responses in each geographic area where the survey in the present investigation was conducted. 102/

Staple gun tackers are low-priced, relatively high-volume products, 103/ whereas the subject table saws and band saws are expensive items with a smaller volume of sales and a relatively sophisticated market. 104/ Consumers are less likely to make a purely random purchase of an expensive item and thus

100/ In Single Handle Faucets, the Commission relied on a survey in which the responses were 63 percent correct (after adjustments for "good guessers") among plumbers, who accounted for 75 percent of the purchases of the products at issue. Single Handle Faucets at 41-44. The Commission also accepted a second survey in which correct responses amounted to 34 percent. However, the Commission viewed the second survey merely as an adjunct to the first one, since it corroborated the results of the first survey, but did not have as high a degree of reliability. Id. at 43-44. In Sneakers, the Commission similarly placed substantial reliance on a survey having a correct recognition rate of over 67 percent. Sneakers at 8-12. See also Cube Puzzles in which the Commission accepted surveys having correct response rates of 33, 40, and 72 percent. Cube Puzzles, Views of Chairman Eckes and Commissioner Haggart at 13-14, Views of Commissioner Stern at 1.

101/ Staple Gun Tackers at 29-43.

102/ In the present investigation, recognition rates at the various locations were 37.3 (San Francisco, CA), 36 (Columbus, OH), 28 (Boston, MA) and 18 percent (Fairfax County, VA) for the table saw. CFF 60. For the band saw, the recognition rates were 33.3 (Fairfax County) 25.6 (San Francisco) 34 (Columbus), and 14 percent (Boston). CFF 63.

103/ See Staple Gun Tackers supra at findings of fact 17-19, 69, 129, 149-50.

104/ CFF 77; IAFF 158, 279-80, 282, 277 (on page 52 of the IA's findings of fact), 284, 287.

would be presumed to have more familiarity with the expensive item prior to purchasing it.

The universe in the present investigation was limited to persons who had used their own table saw or band saw within the last six months (or those who had used one often enough to consider it his own). These persons would have an intimate knowledge of the appearance of the table saws and band saws and their components. Consequently, it is more likely that they would correctly identify a table saw or band saw by its appearance as being a Delta product than would a more representative (i.e., broader) universe. Yet, only the net unduplicated 25.8 percent of the survey respondents correctly identified the band saw and a net unduplicated 29.9 percent correctly identified the table saw. 105/

The net unduplicated 25.8 and 29.9 percent recognition rates in this case are low considering that Delta's sales of the subject saws are second only to

105/ Staple Gun Tackers also is distinguishable from the present case because the 14 percent recognition rate at one survey location in that investigation (San Diego, California) could have been attributed to the fact that the complainant's staple guns had been sold at that location only for a few months prior to the survey. Staple Gun Tackers at 43. For that reason, the presiding ALJ stated that even if rates in excess of 25 percent were required, the 30 and 40 percent recognition rates at other locations satisfied that requirement, and the 14 percent recognition rate in San Diego should not be discounted or used to discredit the reliability of the survey as a whole. Id.

Delta has been selling its table saw since 1970 and its band saw since 1945 throughout the United States. CFF 39-40 and 42. Dr. Sorenson testified that in selecting various sites where the interviews were to be carried out, he sought geographic areas where Delta was doing well in terms of sales penetration, as well as areas where Delta was not doing so well. Tr. 331-32; IAPX 18 at 36. He also testified that survey interviews in each geographic area were conducted outside stores and lumberyards where Delta's products were sold and presumably outside stores where Delta tools were not sold. Id. This was done to achieve the proper mix. Id. (See generally IAFF 141-48; rebuttal CFF 55.2-55.3.)

Delta did not cite any special or unusual circumstance that would account for the 14 and 18 percent recognition rates at particular geographic locations in this case, however.

those of Sears, Roebuck & Co.; 106/ the product configurations in question have been used since 1945 and 1970, respectively; 107/ and the survey universe was limited, in effect, to those persons who would be most likely to give the correct response.

In sum, I conclude that the survey in this investigation is entitled to little weight as direct evidence of secondary meaning.

2. Extent of sales and advertising

Delta has engaged in extensive advertising and sales of the subject machines. Delta contends that the length of use of the product configurations, the volume of sales, and the nature and extent of its advertising supports a finding of secondary meaning. 108/

Mere length of time and the extent of promotional efforts are rarely dispositive. 109/ The issue is the effectiveness of Delta's prolonged use of the marks and promotional efforts in establishing in the minds of the consuming public an association between the asserted mark and a single source. 110/

For the reasons discussed below, I find that the evidence of Delta's advertising, sales, and promotional efforts in this case are not sufficient alone nor in concert with the other evidence in this investigation to establish secondary meaning.

Delta's advertisements and promotional materials—as well as the saws themselves—carry the registered mark "Rockwell" and the registered Rockwell

106/ IAFF 164. (See also IAFF 165.)

107/ CFF 39-40 and 42.

108/ See Delta's Review Brief at 21-23; CFF 47-51.1; rebuttal CFF 47.1-47.3.

109/ See Vertical Milling Machines at 19-20; Braiding Machines at 61. See also Carter-Wallace, Inc. v. Proctor & Gamble Co., 434 F.2d 794 (9th Cir. 1970).

110/ Vertical Milling Machines at 19-20; Braiding Machines at 61.

logo. 111/ Delta's table saws and promotional materials therefor also contain the common-law word mark "Contractor's Saw." 112/ As Delta has pointed out, it is well settled that a product can utilize more than one trademark without diminishing the identity of each. 113/ However, when alleged configuration marks are used in connection with strong existing word marks, the alleged configuration mark must create a commercial impression separate and apart from the other existing marks in order to receive common-law trademark protection. 114/

In the present case, in some instances, the size and placement of the strong word marks in promotional materials makes the product configuration obscure by comparison. The table saw and band saw are depicted in silhouette, and in some instances, certain features of the table saw or band saw are not readily discernible. 115/ In addition, features in the rear of the saws are not depicted at all. 116/

Certain design elements that are most clearly distinguishable in some of Delta's advertisements (e.g., the handwheel elements, the identification plate, and rounded guide bars on the table saw) are the same as—or are very similar to—features used by Delta's legitimate competitors or certain settling respondents. 117/ Such similarities lessen the likelihood that

111/ IAFF 176. (See also IAFF 177.)

112/ IAFF 176. (See also IAFF 177.)

113/ Proctor & Gamble Co. v. Keystone Automotive Warehouse, Inc., 191 U.S.P.Q. 474 (TTAB 1976).

114/ See Vacuum Bottles at 10-14; Milling Machines, *supra*, at 28-29; Braiding Machines at 63; Petersen Manufacturing Co. v. Central Purchasing, Inc., 740 F.2d 1541; Application of McIlhenny Co., 278 F.2d 953 (C.C.P.A. 1960).

115/ IAFF 179-81.

116/ *Id.*

117/ See IA's Reply Brief at 5-7 and Exh. B at 1-38; CX 32 at 4-5; CX 49; IACX 1 at 112-22; IACX 5 at 14-20, 23-30; IACX 34 at 17, 23, 27, 38-41.

Delta's advertisements foster an association between the product configurations depicted and a single source.

Furthermore, the mere presence or visibility of specific components of the asserted product configurations in Delta's advertising materials does not necessarily support a finding of secondary meaning. 118/ The materials in question must draw attention to the nonfunctional aspects of the product configuration. 119/ There is nothing in Delta's advertisements which highlights or focuses the consumer's attention specifically on the design features that are claimed to have trademark significance. 120/

In sum, I find that Delta's evidence of extensive advertising and prolonged use of the marks in question is not entitled to substantial weight as circumstantial evidence that the configurations in question have acquired secondary meaning.

3. Intentional copying

Although the ALJ concluded that the saw configurations are not inherently distinctive, the ID states that evidence of direct copying "strengthens the presumption of secondary meaning" in the designs of the saws at issue. 121/

There is judicial precedent for the proposition that if respondents find it beneficial to trade on the appearance of an external product configuration,

118/ See Trolley Wheel Assemblies at 48; New England Butt at 11; Textron at 17.

119/ Note, supra, n. 118.

120/ Although Delta's Vice President testified at the evidentiary hearing that Delta's advertising places emphasis on the appearance of the products in question, he also testified that the purpose of depicting the machines in Delta's advertisements is to "show the functions of the machine" (emphasis added) and "to discuss its features and benefits." Tr. at 196. (See also IAFF 177.)

121/ ID at 14 (emphasis added); see also 33-34.

secondary meaning exists in that design. 122/ The ALJ's language also is not without Commission precedent. In Single Handle Faucets, the Commission stated that—

The Commission has recognized that intentional copying may also be probative of secondary meaning, and in those instances where there is a showing of deliberate and close imitation of the senior user's mark, may even give rise to a presumption of secondary meaning. 123/

However, in Single Handle Faucets, the mark was strong and there was other substantial additional evidence of secondary meaning. 124/ Similarly, in other cases in which the Commission regarded evidence of intentional copying as being probative of secondary meaning, the existence of both a strong mark and other substantial evidence of secondary meaning also supported the finding. 125/

In this case, evidence of intentional copying, absent a strong mark and other substantial evidence of secondary meaning, is not sufficient to support a finding of secondary meaning. 126/

122/ See Truck Equipment Service Co. v. Freuhauf Corp., 536 F.2d 1210, 1220 n. 13 (8th Cir. 1976), cert. denied 429 U.S. 861 (1976).

123/ Single Handle Faucets at 46.

124/ Single Handle Faucets at 40-46.

125/ Staple Gun Tackers at 50-51; Vacuum Bottles at 17-19; Sneakers at 20; Certain Novelty Glasses, Investigation No. 337-TA-55, USITC Publication 991 at 11 (July 1979). See also Trolley Wheel Assemblies at 48-49.

Similarly, in Truck Equipment Service Co. (note, supra, n.122), the court noted that there was other substantial evidence of secondary meaning, in addition to evidence of intentional copying. 536 F.2d at 1220, n.13.

126/ The ALJ commented that the fact that respondents have engaged in passing off is a further indication that the product configurations in question have acquired secondary meaning. ID at 35.

Under Commission precedent, secondary meaning is irrelevant to passing off, and each exists independently of the other. Vertical Milling Machines at 38; Braiding Machines at 64-65. In the present investigation, the evidence in the record shows that, in most instances, passing off (as well as false or

Infringement

Under Commission rule 210.53(h) and pursuant to the Commission's notice of review published in the Federal Register of April 10, 1985, the Commission's decision not to review the portions of the ID concerning infringement caused those portions of the ID to become the Commission's determination on the issue of infringement. 127/

Patent Infringement

The patent claims in controversy are—

claims 1-3 and 5-14 of the aforementioned '493 patent;

claims 1-4 of U.S. Letters Patent 4,174,100 (the '100 patent); and,

claims 1-5 of U.S. Letters Patent 4,436,126 (the '126 patent).

Patents are presumed valid. 128/ The burden of establishing invalidity rests on the party asserting such invalidity. 129/ The validity of the subject patents was not in dispute in this investigation, since the respondents defaulted and the IA did not take a position on the patent issues. The ALJ correctly determined that in the absence of clear and

(Footnote Continued)

deceptive advertising) was accomplished by the use of Delta's registered trademarks and logo and common-law word mark. See IAFF 227-39, 240-42; CFF 123-130.2, 146-147.4. Consequently, even if passing off were to constitute proof of secondary meaning, such secondary meaning in this case could not be imputed to the product configurations in question. Thus, I find that the ALJ erred in concluding that proof of passing off, in and of itself, proves that the configurations at issue have acquired secondary meaning.

127/ 19 C.F.R. § 210.53(h); 50 Fed. Reg. 14172 (Apr. 10, 1985). The Commission also adopted Delta's findings of fact 77-122 to supplement the discussion in the ID concerning the issue of infringement. 50 Fed. Reg. 14172 (Apr. 10, 1985).

128/ 35 U.S.C. § 282.

129/ Id.

convincing evidence of invalidity, the statutory presumption of validity prevails. 130/

The unenforceability of a patent for equitable reasons must be proven by clear and convincing evidence. 131/ In the absence of such allegations and evidence, the ALJ correctly determined that each of the patents in controversy is in full force and effect. 132/

My infringement findings are set forth below.

'493 patent

The '493 patent is directed to a safety blade guard assembly for a circular table saw. 133/ The patented blade guard assembly is nonremovably mounted on a kerf splitter that is secured fixedly at a relatively inaccessible point beneath the rear table edge. The assembly has a blade-guard-supporting linkage connected to the kerf splitter and blade guard so as to limit pivotal movement of the guard between a normal operating position and a limit position determined by the supporting link which prevents the blade guard from being swung to an inoperative position.

The record shows that settled domestic respondent Jet has imported into the United States and marketed Taiwan manufactured table saws and tilting arbor saws incorporating a blade guard assembly that infringes claims 1, 2, 3,

130/ Certain Apparatus for Installing Electrical Lines and Components Therefor, Investigation No. 337-TA-196, ID (Order No. 5) at 7 (Dec. 27, 1984) (50 Fed. Reg. 6072, Feb. 13, 1985); Certain Methods for Extruding Plastic Tubing, Investigation No. 332-TA-110, USITC Publication 1287 at 5 (Sept. 1982).

131/ See J.P. Stevens & Co., Inc. v. Lex Tex Ltd., Inc., 747 F.2d 1553, 1559 (Fed. Cir. 1984).

132/ ID at 26.

133/ CX 1. Delta uses the patented blade guard assembly on its table saw and its tilting arbor saw sold under the registered trademark "Unisaw." See CFF 131-32.

5, 6, 7, 8, 9, 10, 11, 12, 13, or 14 of the '493 patent. 134/ Nonsettling domestic respondents Pro Shops, Trend-Lines, and Fort Bragg sell Jet's saws incorporating an infringing blade guard. 135/ I affirm the ALJ's finding of infringement with respect to the aforesaid respondents and claims 1-3 and 5-14 of the '493 patent. 136/ 137/ 138/

134/ Tr. 169-72; CX 37-38. Subsequent to the issuance of the ID, Jet was terminated from the investigation on the basis of a consent order. See 50 Fed. Reg. 20303 (May 15, 1985). The portions of the ID concerning infringement of the '493 patent were still under review by the Commission, however. My finding of infringement with respect to Jet is based on the evidence on the record and adverse inferences drawn by virtue of Jet having defaulted in this investigation.

135/ Tr. 150; CPX 14 at 7 and Exh. 2; CX 28 at 6; CX 29 at 2, 4, 7, and 13; CPX 26 at 6.

136/ ID at 27.

The ALJ's conclusions of law listed additional domestic and foreign respondents as having imported or sold saws incorporating an infringing blade guard. CL 18. Infringement of the '493 patent by those additional respondents was not discussed in the text of the ID.

The evidence of record concerning infringement of the '493 patent by those respondents is sparse, and affirmation of the ALJ's conclusion of infringement with respect to those respondents would have to be based primarily on adverse inferences drawn by reason of the respondents having defaulted in this investigation. The Commission has stated previously, however, that—

[T]he effect of a finding of default is not necessarily to allow a complainant to rely solely upon the allegations in his complaint and require the presiding officer to make a finding of violation based upon those allegations. Rather, '[t]he effect of a finding of a default is to authorize the presiding officer to create certain procedural disabilities for the defaulting party and to entertain, without opposition, proposed findings and conclusions, based upon substantial reliable and probative evidence, which would support . . . a determination.'

Staple Gun Tackers at 13.

My finding of infringement therefore is limited to respondents Jet, Pro Shops, Trend-Lines, and Fort Bragg.

137/ With regard to the effect of a finding of default, I note that neither the ID nor Delta's prehearing and posthearing submissions contained any information about alleged unfair acts and practices by Leroy in the importation or sale of the subject woodworking machines in the United States. Both Delta and the IA have conceded that there is no evidence of a section 337 violation by Leroy. Delta's Review Brief at 46; IA's Review Brief at 61. I therefore find, contrary to the ALJ's holding, that Leroy not has violated section 337.

138/ The notice of investigation limited the '493 patent issues to claims 1-3 and 5-14. 48 Fed. Reg. 55786 (Dec. 15, 1983). The ID states, however,

(Footnotes continued)

'100 patent

The '100 patent is directed to a rip fence having a bottom section that is adjustable in height with respect to the work table. 139/ The fence structure has supporting members separate from, but attached to, the table at the front and rear edges of the table. Although the fence structure is attached to the table, it can be moved over the surface of the table. The fence structure has two parts. The first part is a downwardly open channel-shaped upper member, and the second part is a table engaging lower member adjustably fixed to the upper member.

The record shows that domestic respondents Fort Bragg and Trend-Lines have sold Jet tilting arbor saws that incorporate an adjustable height fence that infringes claims 1-4 of Delta's '100 patent. 140/ I therefore affirm the ALJ's conclusion of infringement with respect to the '100 patent. 141/

'126 patent

The '126 patent relates to a light, portable wood thickening machine (i.e., a wood planer). 142/ The planer has a bed over which the wood is passed and an upper housing. A cutter and feed rollers are located in the

(Footnotes continued)

that all 14 claims of the '493 patent have been infringed. Although Delta in fact argued to the ALJ that all 14 claims of the '493 patent had been infringed, Delta's Review Brief states that the allegation of infringement with respect to claim 4 was inadvertent. Delta's Review Brief at 46, n.11. My infringement findings thus are limited to the claims recited in the notice of investigation.

139/ CX 2. Delta uses the patented fence on its tilting arbor saw sold under the registered trademark "Unisaw". See CFF 133-34.

140/ CFF 142-44.

141/ CL 18.

142/ CX 3. Delta sells the patented machine as the "RC-33 Planer." See CFF 135-36.

upper housing. The upper housing is supported on a number of pillars extending from the base.

The record shows that settled Taiwan respondent, Show Soon, has exported to the United States a wood-planing machine that infringes claims 1-5 of the '126 patent. 143/ I therefore affirm the ALJ's finding of infringement with respect to the '126 patent. 144/

Misappropriation

The scope of a section 337 investigation is defined by the Commission's notice of investigation. 145/ The notice in this investigation lists "false representation of manufacturing source" as one of the unfair acts and practices to be investigated. 145/ "False representation of manufacturing source" was not mentioned in the ID, nor was it discussed in the parties' prehearing and posthearing submissions to the ALJ. Delta's submissions to the ALJ and the ID discussed "misappropriation." 147/

The question is whether misappropriation is within the scope of the investigation. Delta argued that misappropriation is within the scope of the investigation because the charge of false representation of manufacturing source is broad enough to encompass it and misappropriation was raised in the complaint. 148/ In the alternative, Delta requested that the Commission amend the notice to include misappropriation. 149/

143/ Tr. 177; CX 23, 37, 40.

144/ ID at 27-28, CL 23.

145/ 19 C.F.R. § 210.21.

146/ 48 Fed. Reg. 55786 (Dec. 15, 1983).

147/ ID at 27.

148/ Delta's Review Brief at 40-42.

149/ Id.

The IA argued that "misappropriation" is not covered by the notice of investigation, and acceptance of Delta's arguments regarding that charge is unnecessary since misappropriation is simply redundant in light of the other unfair acts included in the notice. 150/

I determine that "misappropriation" is not within the scope of the investigation and that the notice will not be amended to include it as an additional charge.

On the basis of Delta's arguments, the ID defines "misappropriation" as follows:

[A] property right which the complainant relies upon because of a substantial investment of time, effort, and money in the commercial creation. When that right is appropriated at little or no cost and the creator of the right is injured, a case of misappropriation exists. 151/

In contrast to the Delta and the ALJ's definition of "misappropriation," the Commission has treated charges of false representation of source and false designation of source as inferred common-law trademark infringement. 152/

The ALJ's definition of "misappropriation" does not correspond exactly to the Commission's interpretation of false representation of source or false designation of source in previous investigations. Nevertheless, the activities found to constitute "misappropriation" overlap with the activities

150/ IA's Review Brief at 58-60.

151/ 1 McCarthy, supra, § 10.23; ID at 27.

152/ See, e.g., Trolley Wheel Assemblies at 53; Braiding Machines at 79; Sneakers at 21; Vacuum Bottles at 28. See also Certain Caulking Guns, Investigation No. 337-TA-139, USITC Publication 1507 at 43 (Mar. 1984). As such, complainants have been required to show a likelihood of confusion concerning the source of the subject products (as well as demonstrating the other elements of common-law trademark infringement). Id. Failure to establish the existence of a common-law trademark has precluded a finding of false designation of source. Id.

the unfair acts and practices listed in the notice of investigation. 153/ In determining that certain respondents had engaged in "misappropriation," the ALJ made the following findings:

1. Respondent Jet has appropriated the design and configuration of Delta's machines and the use of the name "Contractor's Saw," and has been distributing tilting arbor saws with copies of substantial portions of Delta's instruction and user manuals;
2. Respondents Fort Bragg and Trend-Lines have been selling the Jet machines; and,
3. Other settled respondents [not identified in the ID] also have used various Delta instruction and user manuals in marketing their products. 154/

As indicated in the ID, some of the respondents charged with engaging in misappropriation have settled with Delta. Although Fort Bragg and Trend-Lines have not settled with Delta, the fact remains that the acts of alleged misappropriation overlap with other unfair acts listed in the notice of investigation. Delta thus would not gain additional relief if the notice were amended to include misappropriation. 155/ I find that the notice therefore should not be amended.

Definition of the Domestic Industry 156/

The present investigation involves the importation of certain table saws, band saws, tilting arbor saws, and planers. 157/ In addition, it involves the following intellectual property rights:

150/ See e.g., IAFF 227-42.

154/ ID at 27-28; CL 23.

155/ See infra, this opinion at 49-54.

156/ See ID at 31 and CL 24, 26.

157/ Although the investigation also covered a disk/belt finisher, 8-inch motorized bench saw, shaper, and 6-inch jointer, Delta neither alleged nor proved unfair acts and unfair competition with respect to those machines. Delta's consent order settlements with various respondents (see supra, nn. 6, 8,) have removed those machines from contention.

- 2 registered trademarks—"Unisaw" and "Rockwell";
- 1 registered logo—the Rockwell logo;
- 1 common-law phrase trademark—"Contractor's Saw";
- 2 alleged common-law product configuration trademarks—table saw design and band saw design; and,
- 3 patents—'493 blade guard patent, '100 rip fence patent, and '126 planer patent.

In previous investigations involving patents or trademarks, the relevant domestic industry has been defined in terms of the exploitation of the patents or trademarks in controversy. 158/ In investigations involving other unfair methods of competition such as false advertising or passing off, the Commission has defined the domestic industry in terms of complainant's U.S. facilities devoted to the production and sale of the article that was the subject of the unfair act (e.g., false advertising or passing off). 159/ The Commission also has stated that the domestic industry should be limited to those products that are the subject of the unfair acts. 160/

I have dissented from decisions in which this approach has resulted in an artificially narrow and arguably result-oriented definition of domestic industry. 161/ On the other hand, in some cases—particularly those involving

158/ See, e.g., Staple Gun Tackers at 66; Trolley Wheel Assemblies at 56-57; Plastic Food Storage Containers at 76; Braiding Machines at 85; Vacuum Bottles at 29; Certain Miniature, Plug-In Blade Fuses, Investigation No. 337-TA-114, USITC Publication 1337, Commission Opinion at 34 (Jan. 1983) (Plug-In Blade Fuses); Apparatus for Installing Electrical Lines; Certain Softballs and Polyurethane Cores Therefor, Investigation No. 337-TA-190, ID at 63-64 (Feb. 19, 1985) (50 Fed. Reg. 16171, Apr. 24, 1985); Certain Bag Closure Clips, Investigation No. 337-TA-170, ID at 38 (Aug. 9, 1984) (50 Fed. Reg. 35872, Sept. 12, 1984) (Bag Closure Clips).

159/ See Plug-In Blade Fuses, Commission Opinion at 33-34 and Recommended Determination at 26-27.

160/ See Single Handle Faucets at 56; Staple Gun Tackers at 66; Plastic Food Storage Containers at 76.

161/ See Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, And Components Thereof, Investigations Nos. 337-TA-82 and 82A, Dissenting Opinion of Commissioner Paula Stern, USITC Publications 1138 (Apr. 1981) and 1197 (Nov. 1981) (exploitation of patent resulted in production of two attachments for papermaking machine, only one of which was subject to import competition).

trademarks—the number of products related to exploitation of the intellectual property right may be very great, and there may be so little interrelationship between the various products that segmentation into more than one industry may be appropriate. 162/ In such cases, I believe that a more narrow demarcation of the industry in terms of commercial realities—such as the different markets in which the various products are sold—may be appropriate.

In previous investigations involving patented components of an article of commerce that arguably are themselves separate articles of commerce, the Commission has found that if (1) the components are integrally related to the article of commerce in which they are incorporated and (2) the components are not marketed to a significant degree as separate articles, it will define the domestic industry in terms of the larger article of commerce. 163/

In this case, the "Rockwell" trademark and registered logo are common to all of the domestically-produced articles of commerce that are the counterparts to the imports under investigation, as well as to other products regarding which no complaints of unfair import competition have been raised. Thus, I have examined the issue of whether the industry should be defined to include all operations related to the "Rockwell" trademark and logo. The record contains little, if any, information regarding the similarities, if any, with respect to the characteristics and marketing of these other machines. In future investigations, the IA should develop a record on this

162/ See, e.g., Certain Portable Electronic Calculators, Investigation No. 337-TA-198, Unreviewed ID of Apr. 18, 1985; Certain Gremlin Character Depictions, Investigation No. 337-TA-201, Unreviewed ID of Dec. 10, 1984.

163/ See, e.g., Certain Personal Computers and Components Thereof, Investigation No. 337-TA-140, USITC Publication 1540 (Mar. 1984) at 41-43; C.f. Certain Modular Structural Systems, Investigation No. 337-TA-164, USITC Publication 1668 (June 1984), Commission Memorandum Opinion at 8-15.

issue. However, as a practical matter, much of the data on the industry's economic performance was provided for all "Rockwell" machines as opposed to only those that correspond to the imports under investigation. 164/

As the IA points out, the Commission conceivably could determine that there are multiple industries in this case. 165/ The separate industries would be as follows:

- (1) "Rockwell" registered trademark: There would be one industry comprising all the articles of commerce that have the Rockwell mark and are the subject of the unfair import competition.
- (2) '493 patent: This patent relates to the blade guard component used on the table saw and the bench saw. Therefore, the articles of commerce would be these two saws, and the industry would comprise the table saw and band saw.
- (3) '100 patent: This patent relates to the adjustable height rip fences, which are integral components of the tilting arbor saw. Therefore, the article of commerce and the domestic industry would be defined as being only the tilting arbor saw.
- (4) '126 patent: Since this patent covers the planer, the industry would be defined as being only the planer.
- (5) common-law trademark "Contractor's Saw": This is used only on the table saw. Therefore, the industry would be only the table saw.
- (6) registered trademark "Unisaw": Since this is used only on the tilting arbor saw, the industry would be only the tilting arbor saw.
- (7) alleged common-law configuration mark for the band saw: This alleged intellectual property right would result in one industry, i.e., the band saw.

164/ See CX 18, 66-70.

165/ See IA's Review Brief at 45-46.

(8) alleged common-law configuration mark for the table saw: This alleged intellectual property right would result in one industry, i.e., the table saw. 166/

Both Delta and the IA argued that the Commission should find that there is only one domestic industry. Delta argued that the domestic industry should be defined as—

Delta's United States operations involved in the manufacturing, testing, marketing, sales and servicing of the Delta 10 inch table saw, 14 inch band saw, tilting arbor saw, other machines marketed under the name "Contractor's Saw" or utilizing the "Rockwell" trademark or "Rockwell logo." Additionally, the domestic industry consists of those operations described herein devoted to the exploitation of Delta's three U.S. patents in issue. 167/

The IA argued that the industry should be defined more narrowly to encompass Delta's facilities devoted to the production and sale of the table saw, band saw, tilting arbor saw, and planer. 168/

Delta's exploitation of the registered trademark "Rockwell" and the registered "Rockwell" logo relates to all of Delta's power tools. 169/ The table saw, band saw, and tilting arbor saw also have been the subject of passing off and false or deceptive advertising by certain respondents. 170/

166/ The intellectual property rights in controversy are exploited in the following manner:

<u>band saw</u>	<u>table saw</u>	<u>planer</u>	<u>tilting arbor saw</u>
"Rockwell"	"Rockwell"	"Rockwell"	"Rockwell"
"logo"	"logo"	"logo"	"logo"
design mark	design mark	'126 patent	"Unisaw"
	'493 patent		'493 patent
	"Contractor's Saw"		'100 patent

167/ Delta's Review Brief at 32-33. (See generally Delta's Review Brief at 30-33.)

168/ IA's Review Brief at 47. (See generally IA's Review Brief at 43-47.)

169/ See CFF 126-29.

170/ See CFF 146-47.4; IAFF 227-42.

The patented components in controversy—i.e., blade guard and adjustable height rip fence—apparently can be sold separately as replacement parts. However, there is no evidence that respondents have imported or sold such components individually, and there is no indication that they will be. Furthermore, data concerning sales by Delta of these components also appear to be scant, if not nonexistent. The IA reported that he was unable to find any information on the record concerning the price at which the subject components are, or would be, sold by Delta. 171/

The vast majority of the patented components in controversy are utilized in the production of their respective saws as original equipment. In addition, these components are integrally related to the functioning of the saws in which they are used. 172/ They were specifically designed for the subject Rockwell saws and apparently cannot be used or are not used in saws other than the saws that they were designed for.

An additional factor supporting the definition of a single industry is that Delta's exploitation of the subject trademarks and patents overlaps, to a certain extent, with respect to those machines. Further, the same facilities and resources are used in the manufacture of the products at issue. *****

*****. 173/ *****

*****. 174/

171/ See IA's Reply Brief at 14.

172/ CFF 131.1-31.2; CX 1 and CX 12; SX 40, 46 at 2-5, 48 at 3, item (g).

173/ IAFF 244; CFF 168; IAX 26 at 8.

174/ See generally CFF 148-56.1, 168-69; IAX 26 at 8.

When several industries can be defined on the basis of the exploitation of various intellectual property rights, and there is considerable overlap with respect to the products associated with the industries defined in terms of these intellectual property rights, it may be appropriate to define the industry in terms of the commonly shared property right that extends to a grouping of products. In this investigation, the registered trademark "Rockwell" and the registered Rockwell logo are used in connection with all of the products that remain as subjects of this investigation: band saw, table saw, tilting arbor saw, and planer. None of the other intellectual property rights are used in connection with each of those products. Therefore, the most appropriate definition of the domestic industry in this investigation is one industry comprising the machines which bear the "Rockwell" trademark and logo. 175/

175/ See Plug-In Blade Fuses, in which the ALJ found two industries relating to two types of intellectual property rights or unfair methods of competition: (1) patent and (2) trademark and passing off. The patent definition included two products; the definition based upon passing off included only one. Recommended Determination at 26-27. The Commission, although acknowledging that the two technical definitions were acceptable, chose to define the industry according to the broader patent definition. As in this case, no argument was presented as to why any particular commercial realities argued in favor of adopting either the broader or narrower definitions. See USITC Publication 1337 at 33-34.

It is possible that the "commercial reality" factors might militate in favor of defining separate industries by products despite the fact that they have a trademark in common, the record in this case provides no basis for applying the "commercial realities" test that was first articulated in Certain Apparatus for the Continuous Production of Copper Rod, Investigation No. 337-TA-52. The Copper Rod "commercial realities" test referred to the intrinsic interrelationships between certain of the separate design and production patents—and, ergo the potentially separate industries—involved in that case. Since all were viewed as part of the ultimate production and sales effort relating to one product, the Commission found that the separate patents constituted one industry. See USITC Publication 1017 (Nov. 1979), Commission Memorandum Opinion at 53-55. However, it is entirely possible that in another case strong "commercial reality" factors might well argue in favor of segmenting a broad group of fairly diverse products into groups of industries narrower than that arrived at by basing the definition on a commonly-shared trademark alone.

Complainant Delta manufactures three of the four products I have included in my definition of domestic industry completely within the United States, and virtually all of complainant's manufacturing costs for these products are domestically sourced. 176/ Thus viewing the industry as a whole, it is clear that the domestically related operations are not only significant, but substantial. 177/

I therefore find that there is a single domestic industry consisting of Delta's U.S. facilities dedicated to the exploitation of the "Rockwell" trademark and logo.

Injury

The ID indicates that "the domestic industries for the Delta 10 inch table saw, 14 inch band saw, planer, blade guard assembly, and adjustable height fence are substantially injured and there exists a tendency to substantially injure these domestic industries." 178/ The issue of injury was reviewed because the ID does not reflect the fact that the Commission has separate standards for affirmative findings of present injury and a tendency to injure. The ID also does not discuss the issue of causation.

For the reasons discussed below, I determine that the record contains substantial evidence to support a finding that the effect or tendency of respondents' unfair acts is to substantially injure a domestic industry.

176/ The planer is produced in part in Brazil using components made in the United States. Tr. 58, 114-15, 306; IAX 28 at 1-2; CFF 149, 169.

177/ Even standing alone, the planer passes the "domesticity" test articulated in Certain Miniature All-Terrain Battery Operated Wheeled Vehicles, Investigation No. 337-TA-122, USITC Publication 1300, at 5-11 (Oct. 1982), aff'd sub nom, Schaper Mfg. Co. v. U.S.I.T.C., 717 F.2d 1368 (Fed. Cir. 1983). However, future records on the "nature and significance" issue should be developed with greater specificity and clarity.

178/ CL 26.

Effect

The record contains general information concerning lost sales. 179/ Many of Delta's distributors are carrying the subject imported machines. 180/ Moreover, since the subject imports are substantially underselling Delta's machines, Delta has lost sales to corporations and state and local jurisdictions that purchase solely on the basis of price (provided that the product in question meets certain specifications). 181/ *****

*****182/ The planer was not introduced until 1981. 183/ *****

*****184/ The volume of Taiwan woodworking machines (including the accused machines) has increased from year to year since 1980. 185/

Furthermore, the imported machines have been underselling Delta's machines by as much as 50 percent in some instances. 186/ *****

*****187/

179/ See IAFF 264-77; CFF 193-99.
180/ CFF 195, 197; IAFF 269-71.
181/ IAFF 272-75; CFF 190.
182/ IAFF 287.
183/ See CFF 193.
184/ Id.; IAFF 265-66.
185/ CFF 178; IAFF 293; Tr. at 250; CX 62. The precise volume of infringing importations and sales is not known. Since the respondents have defaulted, adverse inferences have been drawn, and the estimates prepared by Delta and the IA have been accepted.
186/ IAFF 278-80. See generally IAFF 278-86.
187/ Id.

Importantly, during *****
substantial excess capacity for each of the machines at issue. 188/ *****

*****189/ Accordingly, I find that the subject imports
have injured the domestic industry.

Tendency

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 may be found. Relevant conditions or circumstances include, but are not limited to, foreign cost advantages and production capacity, ability of the imported product to undersell the complainant's product, increased foreign capacity, the intent to penetrate the U.S. market, and the likely impact of such penetration on the domestic industry. 190/

The record contains evidence that foreign manufacturers and importers have lower costs for a number of reasons. By copying Delta's products from dies that can be used repeatedly, foreign manufacturers avoid development costs, and thus are able to keep their overhead costs low. The foreign manufacturers also have lower labor costs. The record indicates that many existing Taiwan manufacturers have the ability to increase production or to begin production of the accused machines if they desire. 191/

188/ CFF 177.1; IAFF 290.

189/ IAFF 289; CFF 192. Note, supra, nn.183-84 regarding the planer.

190/ Apparatus for Installing Electrical Lines at 25-26; Cloisonne Jewelry at 67; Softballs at 83-84; Bag Closure Clips at 46; Single-Handle Faucets at 63; Trolley Wheel Assemblies at 63; Staple-Gun Tackers at 63.

191/ See generally CFF 158-58.1, 176-77, 179, 180.

The United States is the largest market for Taiwan woodworking machines. Approximately 85 percent of such machines are exported to the United States. 192/ In addition, there are numerous means of marketing the imported machines in the United States; an organized distribution network is not required. The imported machines are sold to domestic distributors (e.g., mail-order houses) in container-load quantities. 193/ In addition, many of Delta's distributors carry the infringing imported machines. 194/ Moreover, as stated previously, the Taiwan machines have significantly undersold Delta's products. 195/ Thus, the record establishes that having already substantially injured the domestic industry at current levels of importation there is clearly a tendency to substantially injure the domestic industry in the future.

Causation

I find that the injury to the domestic industry in this case is causally related to respondents' unfair acts and unfair methods of competition.

The IA argued that there is no causal connection between the condition of the industry and respondents' infringement of the '100 adjustable rip fence patent and the '493 blade guard patent for the following reasons: (1) those patents cover integral components of certain saws; (2) sales of saws are not made on the basis of whether or not they include the subject patented components; and (3) since there are no imports of these components other than as incorporated into the subject saws, there is no evidence of any head-to-head competition between the imported and domestically produced components. In the absence of such sales and competition, the IA argued,

192/ IAFF 296; CFF 178.

193/ CFF 179.

194/ CFF 195, 197; IAFF 269-71.

195/ IAFF 278-80. See generally IAFF 278-86.

there can be no losses that are attributable to respondents' infringement of the component patents. 196/

The IA makes an interesting and good argument. However, in this investigation I find that the requisite causal nexus exists. The patented components in question are integral components of articles in commerce—i.e., table saws and tilting arbor saws. U.S. consumers purchased the imported saws because they were led to believe that the imported saws were produced by Delta or were the equivalent of Delta's machines. Furthermore, there is no evidence on the record that supports the IA's contention that respondents' infringement of these components is totally irrelevant to their success in selling these saws. In fact, there is evidence on the record indicating that the addition of the adjustable height rip fence to the imported tilting arbor saws enhanced the sales of the imported machine at the expense of at least one of complainant's saws. Indeed, the evidence on the record indicates that initially, the imported tilting arbor saws did not have the subject fences, but subsequently incorporated them; and subsequent to that time, the sales of the imported saws that incorporated the infringing fences increased over sales of those that did not. 197/

The other causation issue is whether the importation or sale of the accused woodworking machines by settling respondents should be taken into account in determining whether a domestic industry has been injured. In previous investigations, the Commission has taken the position that there must be a prima facie finding of an unfair act with respect to articles imported by

196/ See IA's Review Brief at 50, 52; IA's Reply Brief at 7-10.

197/ Tr. at 246, 284.

a settled respondent before those articles may be considered in determining injury. 198/ Further, the aggregation of such imports is discretionary, depending upon the facts in each case. 199/

In the present investigation, thirty-six parties have entered into consent order settlements with Delta. 200/ As discussed above and in the unreviewed portions of the ID and the supporting findings of fact, certain settling respondents have engaged in patent infringement, common-law trademark infringement ("Contractor's Saw"), passing off, or false or deceptive advertising.

Since I have adopted the portion of the ID finding all respondents in default, I draw adverse inferences and find that the effect or tendency of presettlement importations or sales by those respondents with respect to which I have found an unfair act is to substantially injure a domestic industry. 201/

Remedy

Delta and the IA requested a general exclusion order pursuant to section 337(d) (19 U.S.C. § 1337(d)) and cease and desist orders pursuant to section 337(f) (19 U.S.C. § 1337(f)). For the reasons discussed below, I find that a general exclusion order alone is the appropriate remedy for the violation existing in this case.

198/ Bag Closure Clips, 49 Fed. Reg. 35872 (Sept. 12, 1984) (notice of the Commission's decision not to review the ID).

199/ See Certain Food Slicers and Components Thereof, Investigation No. 337-TA-76, USITC Publication 1159 (June 1981), Commission Memorandum Opinion at 19 (even if imports of settled respondents aggregated, no effect or tendency to substantially injure); Softballs at 71-79;

200/ See supra nn.6, 8.

201/ See supra this opinion at 30-34; CFF 123-30.2, 146-147.4; IAFF 22-48, 227-242.

General exclusion order

Since Certain Airless Paint Spray Pumps And Components Thereof, 202/ the Commission has determined whether to issue a general exclusion order by balancing complainants' interest in obtaining complete protection from all potential foreign infringers against the inherent potential of a general exclusion order to disrupt legitimate trade. Complainants have been required to prove (1) a widespread pattern of unauthorized use of its patented invention, and (2) the existence of business conditions from which it could be inferred that foreign manufacturers other than the respondents might attempt to enter the U.S. market with infringing articles. 203/ In assessing the potential disruption of lawful trade, the Commission has taken into account (1) the feasibility of administering and enforcing the proposed order and (2) the possibility of a chilling effect upon foreign trade in noninfringing articles resulting from business uncertainties created by the order.

The criteria articulated in Paint Spray Pumps have been met in the present investigation.

There is a pattern of widespread unauthorized use of the respondent's patents and trademarks. 204/ All the accused woodworking machines and apparatus were found to infringe the subject patents or trademarks. All

202/ Investigation No. 337-TA-90, USITC Publication 1199 at 17-20 (Nov. 1981).

203/ See, e.g., Cloisonne Jewelry; Single Handle Faucets; Staple Gun Tackers; Certain Amorphous Metal Alloys and Amorphous Metal Articles, Investigation No. 337-TA-143, USITC Publication 1664 (Nov. 1984).

204/ In Paint Spray Pumps, the Commission said that among the evidence that might be presented to prove a widespread pattern of unauthorized importation use are: (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue; (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention. USITC Publication 1199 at 18-19.

current respondents and most of the former respondents have imported the accused machines into the United States or sold such machines in the United States. Furthermore, there are numerous nonparty companies that manufacture or import woodworking machines that allegedly infringe the subject patents or trademarks. 205/ In fact, it appears that the sales of the named respondents constitute only a small percentage of the total sales of the accused imports from Taiwan. 206/

Business conditions are such that it reasonably can be inferred that foreign manufacturers other than the respondents might attempt to enter the U.S. market with infringing articles. 207/ There is an established demand for the machines in controversy, as indicated by Delta's unit sales of the subject machines 208/ and the estimated volume of imports of the subject machines. 209/

The barriers to entry into the U.S. market by foreign manufacturers are low. An organized distribution network is not required. The imported machines are sold to domestic distributors in container-load quantities. Since many of the domestic distributors are mail-order houses, substantial overhead is not required. Moreover, many of Delta's distributors carry the infringing imported machines. 210/

205/ See Delta's Remedy Brief at 12. See also IAFF 299-303; CFF 174-75, 177.

206/ Id.

207/ In Paint Spray Pumps, the Commission said that evidence of such business conditions included: (1) established demand for the patented product in the U.S. market and conditions of the world market; (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers; (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article; (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles. USITC Publication 1199 at 18-19.

208/ See IAFF 287, 293.

209/ See Tr. at 250; CX 62; IAFF 293.

210/ See generally CFF 179, 195, 202; IAFF 269-71.

The cost of production for foreign manufacturers of the infringing machines is relatively low, and foreign manufacturing facilities can easily be adapted to produce such machines. Many of the foreign manufacturers operate in "cottage" industries where they primarily assemble already manufactured parts purchased from suppliers. Following assembly, the manufacturers package the machines and arrange to export them to the United States. 211/

In addition, since service networks for the imported machines are ineffective or nonexistent, importers are able to reduce their costs. 212/

Foreign producers other than the respondents may reasonably be expected to attempt to enter the U.S. market with infringing materials. I therefore find that Delta has met its burden under Paint Spray Pumps.

The question then becomes whether Delta's interest in obtaining complete protection from all potential foreign infringers is outweighed by the inherent potential of a general exclusion order to disrupt legitimate trade. I find that it is not.

There is no indication that enforcement of the order will be unusually difficult or onerous. Infringement of Delta's common-law trademark "Contractor's Saw," the registered trademarks, and/or the registered logo can be determined by visual inspection of the imported machines in question.

Infringement of the '126 wood planer patent can be determined by visual inspection. Infringement of the '100 adjustable rip fence patent can be detected by visual inspection for correspondence with the patent claims in controversy and by testing the fence to see whether its height can be adjusted. (If the elements of the claims are present in an imported fence and

211/ See generally CFF 158-58.1, 175-77, 179, 180, 195; IAFF 269-71.
212/ See CFF 158.1.

the height of the fence can be adjusted, the fence is infringing.)
Infringement of the '493 blade guard patent can be determined by visual inspection and by testing an imported blade guard to determine whether it rotates up to 90 degrees from its rotating position. (Blade guards that rotate more than 90 degrees are noninfringing. 213/)

The possibility of a chilling effect upon foreign trade in noninfringing articles is an important consideration, as the Commission noted in Paint Spray Pumps. 214/ However, I find that Delta's demonstrated need for obtaining comprehensive relief outweighs the potential burden on trade in this situation.

For the sum of the foregoing reasons, I determine that general rather than limited exclusion is warranted in this investigation.

Clarification of General Exclusion Order

Paragraph 4 of the general exclusion order issued in this investigation 215/ is intended to cover the types of imported woodworking machines that were found to be in violation of section 337 by reason of infringement of Delta's common-law or registered trademarks or the registered Rockwell logo. Paragraph 4 reads in pertinent part as follows:

4. Woodworking machines and their packaging, instruction and user manuals, and promotional material that infringe—
 - a. complainant Delta International Machinery Corp.'s common-law trademark "Contractor's Saw" or colorable imitations thereof [footnote omitted]; or
 - b. the registered trademark "Unisaw" (registration No. 369,416); or

213/ See Delta's Remedy Brief at 14; IA's Remedy Brief at 7.

214/ Spray Pumps at 17-18.

215/ Commission Action and Order of June 18, 1985 at 6, ¶ 4.

- c. the registered trademark "Rockwell" (registration No. 765,006); or
- d. the registered "Rockwell" logo (registration No. 1,031,246), which is depicted in exhibit Q to this Action and Order—

are excluded from entry into the United States, except under license from the owner of the aforesaid trademarks and logo

To dispel any confusion regarding the scope of paragraph 4, I wish to clarify that the term "woodworking machines" as used in paragraph 4 refers only to the types of woodworking machines regarding which we have found a violation of section 337 on the basis of common-law or registered trademark infringement or infringement of the Rockwell registered logo—i.e., table saws, band saws, and tilting arbor saws.

Cease and Desist Orders

In some investigations, the Commission has issued both an exclusion order and cease and desist orders. 216/ However, the Commission has generally issued cease and desist orders only where there is evidence on the record of substantial inventories. 217/ In default cases, the complainant may allege that substantial inventories exist and may attempt to obtain evidence on this point through discovery requests, but will be thwarted by the fact that the respondents either default or refuse to cooperate with discovery. In such cases, where the complainant both alleged that substantial inventories exist and there is evidence that complainant took steps to develop such information

216/ See, e.g., Certain Airtight Cast-Iron Stoves, Investigation No. 337-TA-69, USITC Publication 1126 (Jan. 1981); Plastic Food Storage Containers.

217/ See Cloisonne Jewelry at 6; Staple Gun Tackers, Commission Opinion at 5; Certain Molded-In Sandwich Panel Inserts and Methods For Their Installation (Molded-In Sandwich Panel Inserts), Investigation No. 337-TA-99, USITC Publication 1246 (May 1982), Commission Opinion at 21-23; Molded-In Sandwich Panel Inserts, supra, (Modification Proceeding), USITC Publication 1297 (Oct. 1982), Commission Opinion at 18-19.

on the record, it may be appropriate to draw adverse inferences against the respondents on this issue. 218/ Accordingly, the Commission may find through adverse inferences that substantial inventories exist and issuance of a cease and desist order is appropriate.

In the present default investigation, Delta and the IA argued that both remedies are necessary to provide relief from different unfair acts and practices: cease and desist orders would prohibit the domestic respondents from engaging in false or deceptive advertising and passing off, and a general exclusion order would prevent the importation and sale of articles that infringe complainant's patents and trademarks. 219/

Delta did not allege that the nonsettling domestic respondents have amassed substantial inventories of the woodworking machines in question. In fact, Delta characterized domestic respondents' mail-order operations as "low inventory" mail-order houses. 220/ Although Delta noted that no sales figures were available for most nonsettling domestic respondents, Delta did not argue that it had sought to obtain evidence on the specific issue of inventories or that the lack of such evidence was due to respondents' default and that the Commission should draw adverse inferences concerning the level of inventories. Therefore, I do not find it appropriate to issue cease and desist orders in this investigation.

The Public Interest

Before issuing an exclusion order (or a cease and desist order), the Commission must consider the effect that such an order would have on the

218/ See Cloisonne Jewelry, Commission Opinion, Chairwoman Stern's n.17.

219/ Delta's Remedy Brief at 20; IA's Remedy Brief at 9-10 and Exh. B.

220/ See Delta's Remedy Brief at 17 and CFF 202.

public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers and determine whether the effect would be such that the proposed order should not be issued. 221/

I find that there are no overriding public interest considerations that warrant denial of relief in this investigation.

The public health and welfare

The legislative history of section 337 states that the public interest is paramount in the administration of section 337. The public health and welfare and the assurance of competitive conditions in the U.S. economy must be the overriding considerations. 222/

As the IA points out, the woodworking machines in question are not essential for the preservation of the public health and welfare. I note, however, that blade guards are safety features of certain woodworking machines. Nevertheless, the proposed relief does not present a significant risk of harm to the public, since blade guards are integral components of the subject saws; there is no indication that saws can be sold without blade guards; and Delta has the capacity to meet current and future domestic demand for its products. 223/

Competitive conditions

As stated, the effect of a proposed remedy on competitive conditions in the U.S. economy is one of the considerations that Congress intended to be

221/ 19 U.S.C. § 1337(d) and (f)(1); 19 C.F.R. § 210.58(a)(2) (49 Fed. Reg. 46123, Nov. 23, 1984).

222/ S. Rep. No. 1298, supra, at 193, 197.

223/ See CFF 168, 10-61, 170-71; IAFF 290.

considered in deciding whether the public interest should override the Commission's determination to grant relief under section 337. The legislative history of section 337 indicates further that exclusion of imported articles should not be ordered in cases where there is any evidence of price gouging or monopolistic practices. 224/

A general exclusion order would not have an adverse impact on competitive conditions. There is no evidence of price gouging or monopolistic practices in this case. Delta is the second largest seller of the subject woodworking machines, but it experiences competition from domestic as well as foreign companies.

U.S. production of like or directly competitive articles

There is no indication that the proposed relief would have any effect on this aspect of the public interest.

U.S. consumers

U.S. consumers would not be adversely affected by the issuance of a general exclusion order. Delta has the capacity to supply domestic demand for its machines, and it has an adequate distribution network. Moreover, there are domestic and imported machines that compete with Delta's products that are not affected by this determination. Consumers' choice of machines thus would not be constricted.

Bonding

Section 337(g) provides for the entry of infringing articles upon the payment of a bond during the 60-day Presidential review period. 225/ In

224/ Id. at 197.

225/ 19 U.S.C. § 1337(g)(3).

determining the amount of the bond, the Commission generally establishes an amount sufficient to "offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation." 226/

Complainant Delta initially requested a bond in the amount of 258 percent of the entered value of the articles concerned. Delta arrived at that figure by taking into account the average landed cost for the infringing products versus the average price, f.o.b. warehouse, for the Delta machines. 227/ In its reply brief, however, Delta took the position that the Commission should impose bonds in the amounts recommended by the IA. 228/

The IA has requested a different bond for each of the machines in controversy:

band saws	325 percent (entered value)
table saws	212 percent "
tilting arbor saws	129 percent "
planers	120 percent "

The IA arrived at these figures by comparing the average selling price of each type of the accused machines with domestic importers and Delta's distributor prices for similar machines. 229/

The IA did not recommend bonds for adjustable height rip fences or blade guards, because there is no evidence from which he could determine what the appropriate bonds should be. 230/ And there is no evidence in the record that

226/ S. Rep. No. 1298, supra, at 198; 19 C.F.R. § 210.58(a)(3) (49 Fed. Reg. 46123, Nov. 23, 1984).

227/ Delta's Remedy Brief at 21-22.

228/ Delta's Reply Brief at 25.

229/ IA's Remedy Brief at 57 n.1.

230/ There is no evidence in the record of the price at which either respondents or Delta sell, or would sell, blade guards or rip fences. See IA's Reply Brief at 14.

allegedly infringing blade guards or rip fences are being imported separate and apart from saws.

I determine that a single bond should be in the amount of 268 percent of the entered value of the articles directed to be excluded. 231/ That amount represents an average of the various bond amounts proposed by the IA, and is very close to the single bond amount originally proposed by Delta. 232/

231/ The single bond would avoid a potential enforcement problem. In Paint Spray Pumps, the Commission ordered bonds in different amounts for each article covered by the exclusion order in that case. See USITC Publication 1199, Commission Action and Order at 3. Customs subsequently advised the Commission of its objection to multiple bonds. See Letter of Dec. 9, 1981, from Richard R. Rosettie, Director, Customs Duty Assessment Division to Commission Investigative Attorney Harold Brandt.

232/ In calculating an average amount for the bond, I ignored the 120 percent bond proposed for planers, since the precise volume of importations of planers is unknown. I also did not take into account the 129 percent bond proposed for tilting arbor saws, since the actual volume of importations of such saws is not known.

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Commission Opinion was served upon Juan Cockburn, Esq. and upon the following parties via first class mail and/or air mail on October 2, 1985.



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[Investigation No. 337-TA-204]

Certain Pull-Type Golf Carts and Heels Therefor; Commission Decision Not To Review Initial Determination Terminating Respondents on The Basis of a Settlement Agreement**AGENCY:** International Trade Commission.**SUMMARY:** Decision not to review initial determination terminating two respondents on the basis of a settlement agreement.**ACTION:** The Commission has determined not to review the administrative law judge's initial determination (ID) (Order No. 7) terminating the above-captioned investigation with respect to respondents Diversified Products Corporation and Glotex International, Incorporated, on the basis of a settlement agreement.**FOR FURTHER INFORMATION CONTACT:** Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0079.**SUPPLEMENTARY INFORMATION:** On February 5, 1985, complainants Ajay Enterprises Corporation and Spherex, Inc., and respondents Diversified Products Corp. (DP) and Glotex International, Inc. (Glotex), filed a joint motion to terminate the investigation as to respondents DP and Glotex on the basis of a settlement agreement. The administrative law judge (ALJ) issued an ID granting the joint motion for termination on March 5, 1985. No petitions for review or comments from Government agencies or the public were received.

Copies 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, DC 20436, telephone 202-523-0161.

Issued: April 3, 1985.

By order of the Commission.

Kenneth R. Mason,
Secretary.

R. Doc. 85-8625 Filed 4-9-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-192]

Certain Spring Balance Arm Lamp Heads; Commission Decision Not to Review Initial Determination; Termination of Investigation**AGENCY:** International Trade Commission.**ACTION:** Termination of certain respondents on the basis of settlement agreements; termination of the investigation.**SUMMARY:** The U.S. International Trade Commission has determined not to review an initial determination (ID) (Order No. 9) terminating seventeen respondents on the basis of settlement agreements. The ID granted the following joint motions filed by complainant Luxo Lamp Corp. and named respondents: Motion to terminate BC Imports, Inc. (Motion No. 192-4), and motion to terminate Prestigeline, Inc. (Motion No. 192-5), filed October 19, 1984; motion to terminate Fleco Industries, Inc., Lite-Tron, Light World Inc., and Light Fantastic of Texas (Motion No. 192-7); motion to terminate Sansui Industries Co., Ltd. (Motion No. 192-8), and motion to terminate J.K. Gill (Motion No. 192-9), filed October 26, 1984; motion to terminate Associated Graphics, Inc. (Motion No. 192-10), filed October 31, 1984; motion to terminate City Electric, Inc. (Motion No. 192-11), filed November 9, 1984; motion to terminate Pay 'n Pak Stores, Inc. (Motion No. 192-12), filed November 23, 1984; motion to terminate Advanced Tool Technology, Inc. (Motion No. 192-14), filed December 3, 1984; motion to terminate Lightways, Inc. (Motion No. 192-15), filed January 14, 1985; motion to terminate Sternlite Corp. (Motion No. 192-18), motion to terminate Lighting Bug, Ltd., Inc., and Lighting Resource (Motion No. 192-19), and motion to terminate J&D International (Motion No. 192-20), filed January 20, 1985. Complainant Luxo also filed Motion No. 192-13, November 28, 1984, withdrawing the complaints as to respondents Lighting Sources, Charming Products Corp., and Golden H&Y Co. The administrative law judge issued the ID granting the aforementioned motions for termination on February 22, 1985. There being no remaining respondents, the ID also terminated the investigation.**FOR FURTHER INFORMATION CONTACT:** Tim Yaworski, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0311.**SUPPLEMENTARY INFORMATION:** This action is taken under the authority of section 337 of the Tariff Act of 1930 (19

U.S.C. 1337) and Commission rule § 210.51 (19 CFR 210.51). Notice of the ID was published in the Federal Register of March 6, 1985 (50 FR 9141). No petitions for review of the ID were filed nor were any comments received from Government agencies or the public.

Copies of the nonconfidential version of the 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, DC 20436, telephone 202-523-0161.

Issued: April 1, 1985.

By order of the Commission.

Kenneth R. Mason,
Secretary.

[FR Doc. 85-8623 Filed 4-9-85; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-174]

Certain Woodworking Machines; Commission Decision to Review Initial Determination; Schedule for Filing of Written Submissions on Review Issues and on Remedy, the Public Interest, and Bonding**AGENCY:** International Trade Commission.**ACTION:** Notice is hereby given that the Commission has determined to review portions of the administrative law judge's initial determination that there is a violation of section 337 of the Tariff Act of 1930 in the above-captioned investigation.**Authority:** The authority for the Commission's disposition of this matter is contained in section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and in §§ 210.53-.56 of the Commission's Rules of Practice and Procedure (49 FR 46123 (Nov. 23, 1984) to be codified at 19 CFR 210.53-.56)**FOR FURTHER INFORMATION CONTACT:** P.N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0350.**SUPPLEMENTARY INFORMATION:** On February 7, 1985, the presiding administrative law judge issued an initial determination (ID) holding that there is a violation of section 337 in the importation and sale of certain woodworking machines. The Commission investigative attorney petitioned for review of certain parts of the initial determination pursuant to § 210.54(a) of the Commission's rules.

After examining the petition for review and the response thereto, the Commission has concluded that the following issues warrant review:

1. Whether the overall design appearances of the complainant's 10-inch table saw and 14-inch band saw are nonfunctional and have acquired secondary meaning;
2. The definition of the domestic industry;
Whether there is an effect or tendency to substantially injure the domestic industry;
4. Whether the Commission should entertain the complainant's arguments concerning misappropriation, in light of the fact that misappropriation is not one of the alleged unfair acts and practices listed in the notice of investigation;
5. Patent infringement, including the question of whether the Commission should entertain the complainant's arguments concerning the alleged infringement of claim 4 of U.S. letters Patent 3,745,493, in view of the fact that claim 4 is not listed in the notice of investigation; and
6. Whether respondent Leroy International Corp. should be found to be in violation of section 337.

The Commission's review will be limited to the above issues. No other issues will be considered.

In connection with the portions of the ID that the Commission determined not to review, the Commission has adopted the following findings of fact proposed by the parties:

1. Common-law trademark infringement (i.e., the overall design of the 10-inch table saw and the 14-inch band saw), likelihood of confusion—the complainant's proposed findings 77-122;
2. Common-law trademark infringement (i.e., the term "Contractor's Saw")—the Commission investigative attorney's proposed findings 22-48;
3. Registered trademark infringement—the complainant's proposed findings 123-130.2, 146, and 147.2
4. False and deceptive advertising—the complainant's proposed findings 146-147.4 and the Commission investigative attorney's proposed findings 227-239;
5. Passing off—the Commission investigative attorney's proposed findings 240-242;
6. Efficient and economic operation—the complainant's proposed findings 157-173; and
7. The parties—the Commission investigative attorney's proposed findings 1-17.

The Commission also hereby amends conclusions of law 10-11 in the ID to include the activities of the respondents

as indicated in the discussion on pages 24-26 of the ID and in the findings of fact adopted listed hereinabove in connection with registered trademark infringement.

If, at the conclusion of the review, the Commission finds that a violation of section 337 has occurred, it may issue (1) an order that could result in the exclusion of the subject articles from entry into the United States and/or (2) cease and desist orders that could result in one or more respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered.

If the Commission concludes that a violation of section 337 has occurred and contemplates some form of remedy, it must consider the effect of that remedy upon the public interest. The factors that the Commission will consider include the effect that an exclusion order and/or cease and desist orders should have upon (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the U.S. production of articles that are like or directly competitive with those that are the subject of the investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions concerning the effect, if any, that granting a remedy would have on the public interest.

If the Commission finds that a violation of section 337 has occurred and orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving written submissions concerning the amount of the bond that should be imposed.

Written Submissions

The parties to the investigation and interested Government agencies are encouraged to file written submissions on the legal issues under review and on the issues of remedy, the public interest, and bonding. The complainant and the Commission investigative attorney are also requested to submit a proposed exclusion order and/or a proposed cease and desist order for the Commission's consideration. Persons other than the parties and Government agencies may file written submissions addressing the issues of remedy, the

public interest, and bonding. The filing deadlines are as follows:

Tuesday, April 16, 1985—written submissions on the review issues;

Tuesday, April 23, 1985—written submissions concerning remedy, the public interest, and bonding; and

Tuesday, April 30, 1985—reply submissions on the review issues and reply submissions on remedy, the public interest, and bonding.

Commission Hearing

The Commission does not plan to hold a public hearing in connection with the final disposition of this investigation.

Additional Information

Persons submitting written submissions must file the original document and 14 true copies thereof with the Office of the Secretary not later than the close of business on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment by the administrative law judge. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Documents containing confidential information approved by the Commission for confidential treatment will be treated accordingly. All nonconfidential written submissions will be available for public inspection in the Office of the Secretary to the Commission.

Notice of this investigation was published in the *Federal Register* of December 15, 1983 (48 FR 55786). See also 49 FR 20767 (May 16, 1984).

Copies of the nonconfidential version of the administrative law judge's initial determination 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, DC 20436, telephone 202-523-0161.

Issued: April 3, 1985.

By order of the Commission.

Kenneth R. Mason,

Secretary.

[FR Doc. 85-8626 Filed 4-9-85; 8:45 am]

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INTRODUCTION

This is an investigation under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). The complainant alleges that in the last five years woodworking machines began to arrive in the United States from Taiwan and that those machines are copies of machines made by Delta and its predecessor Rockwell.

The initial complaint in the present investigation was filed on November 10, 1983, by Rockwell International Corporation ("Rockwell") and named 22 proposed respondents. The complainant's woodworking machines in issue were then made by the Power Tool Division of Rockwell. On December 12, 1983, the Commission issued a Notice of Investigation instituting the present investigation.

On February 13, 1984, Rockwell submitted its Amended Complaint adding 22 proposed respondents and allegations relating to two patent infringement claims. Rockwell submitted a motion seeking to add four more respondents to bring the total number of proposed respondents to 48. Three additional Taiwanese companies have since intervened in the action, bringing the total number of named respondents to 51.

In Order No. 12, issued on April 4, 1984, an initial determination was made granting Complainant's Motion to Amend the Complaint and Notice of Investigation and thereby adding the patent infringement issues raised in Rockwell's Amended Complaint. On April 6, 1984, Rockwell submitted to the Commission the Verified Revised Amended Complaint.

On April 9, 1984, both the original Taiwanese respondents as well as the newly added Taiwanese respondents filed a motion seeking to declare the present investigation more complicated. On April 24, 1984, Order No. 13 granted the Motion. The initial determination on the merits is therefore due February 15, 1985.

The Power Tool Division of Rockwell International Corporation has been sold to Delta International Machinery Corporation ("Delta")^{1/} a newly constituted corporation incorporated under the laws of the State of Minnesota. On May 9, 1984, Order No. 16 granted Complainant's Motion to Amend the Complaint and Notice of Investigation to substitute Delta for Rockwell as the named complainant.

On May 8, 1984, a notice was issued by the Commission indicating its determination not to review the initial determination granting

^{1/} Delta and its predecessors will be referred to as "Delta."

Complainant's Motion to Amend the Complaint and Notice of Investigation. On May 22, 1984, a notice was issued by the Commission determining not to review the initial determination designating the present investigation as being more complicated.^{2/}

I. ALLEGATIONS

The amended complaint alleges that the 51 respondents, and unnamed manufacturers, trading companies and importers have engaged in unfair competition by common law trademark infringement in the copying the configuration of Delta's machines; infringement of the registered trademarks for Unisaw, Rockwell, and the Rockwell logo, and the common law trademark "Contractor's Saw"; misappropriation; passing off; false advertising; and patent infringement.

II. RESPONDENTS

The remaining respondents against whom Delta is pursuing its case are:

^{2/} Abbreviations: dep. = Deposition; CX = Complainant's exhibit; CPX = Complainant's physical exhibit; SX = Staff exhibit; SPX = Staff physical exhibit; Tr. = Transcript.

World Wide Supplies Co., Ltd. ("World Wide");
Show Soon Enterprises Co., Ltd. ("Show Soon");
Leroy International Corporation ("Leroy");
Toolcoa International, Inc. ("Toolcoa");
Big Joe Industrial Tool Corporation ("Big Joe");
Trend-Lines, Inc. ("Trend-Lines");
Fort Bragg Rent-All, Inc. ("Fort Bragg");
Pro Shop Power Tools Company ("Pro Shop");
Fortune Development Corporation ("Fortune");
Goodwill Mercantile Co. ("Goodwill");
Formosan United Corporation ("Formosan");
The Liquidator Inc. ("The Liquidator");
Liquidation Bureau, Inc. ("Liquidation Bureau");
King Feng Fu Machine Works Co., Ltd. ("KFF"); and
King Tun Fu Machinery Co. (owned by KFF and also referred to as
"KFF").^{3/}

Respondents Strophe Enterprise Co. Ltd. and Soun Ping Machinery Co. Ltd. were accused in the complaint of unfair acts involving machines which were taken out of issue by Delta and the Commission investigative attorney at the Prehearing Conference. See Tr. 85-86. No evidence was offered and no argument is being made to show that Strophe and Soun Ping violated Section 337. Accordingly, the investigation is terminated as to Strophe and Soun Ping. Initial determinations have been issued terminating the investigation as to all of the other respondents, either on the basis of consent orders, or for other reasons.

Delta was held in default

In Order No. 40, a motion for default was granted in part. Five domestic respondents were found to be in default, but no sanctions were imposed. Delta

3/ At the Prehearing Conference, Counsel for KFF and Delta represented that a settlement agreement between KFF and Delta had been reached, but the settlement still has not been resolved and hence KFF is still a respondent in this investigation. See Order No. 54.

has not sought any specific evidentiary sanctions, but is entitled to a finding of default as to these respondents. Commission Rule 210.53(c) requires that a finding of default be made by initial determination. Accordingly, it is hereby determined that the following parties are in default:

Toolcoa International, Inc.
Fort Bragg Rent-All, Inc.
Pro Shop Power Tools Company
The Liquidator, Inc.
Liquidation Bureau, Inc.

On the final day of the hearing, Delta made an oral motion to find in default the remaining respondents. No respondents were present at the evidentiary hearing. The motion was granted without opposition (Tr. 381). However, the Commission's new default rule, effective November 23, 1984 (19 C.F.R. §210.25), apparently requires that an order to show cause be issued prior to a finding of default. If any respondent wishes to attempt to show cause why it should not be found in default, it may do so by filing a petition for review of this initial determination. It is found that the remaining respondents are in default. Again, no specific sanctions have been requested or imposed.

Whether any respondent is found formally to be in default would not change the outcome of the investigation. Whether complainant's burden is defined in terms of putting on a prima facie case of violation or carrying each issue by

a preponderance of the evidence, complainant wins, as explained herein. No respondent offered any evidence.^{4/}

III. BACKGROUND

A. Delta's History

Delta, a wholly-owned subsidiary of Pentair Corporation, acquired the Power Tool Division of Rockwell International Corporation in April of 1984. (Collins, Tr. 5, 24).^{5/} Delta is primarily involved in the manufacturing and sale of woodworking machines. (Collins, Tr. 6, 13-14, 25-26; Boucheron, dep., p. 4; Mueller, dep., p. 5). Its corporate headquarters are located in Pittsburgh, Pennsylvania, and it has plants in Tupelo, Mississippi, and Limeria, Brazil. (Comp. para. 4; Commission Determination, May 31, 1984).

Delta has been making woodworking machines for over 50 years. The Delta Manufacturing Company, was started in Milwaukee, Wisconsin, by a man named

4/ Except for the several issues raised by the staff attorneys, *infra*, this was essentially a default case. While Complainant presented a solid *prima facie* foundation for this opinion, through probative documents and credible witnesses, the record has not been elucidated by the searchlight of cross-examination and argument by opposing counsel. Since extensive findings are therefore unnecessary and undesirable, I adopt the findings proposed by complainant which are consistent with this opinion (e.g., complainant's proposed findings 30-36.1, 86, 90.1, 201).

5/ Delta's saws are referred to as "Delta," "Delta/Rockwell," or "Rockwell."

Tautz. About 1929, Mr. Tautz began marketing a jigsaw. Rockwell purchased Delta Manufacturing Company in 1945 and used the Delta name until it sold its Power Tool Division to Delta International Machinery Corporation. (Collins, Tr. 5, 24).

Rockwell assigned to Delta all common law and registered trademarks relating to woodworking machines as well as the three patents in issue in this investigation. (Collins, Tr. 27-29; CX 7, 8, 9, 10). Additionally, Rockwell gave Delta a license to use the registered trademark "Rockwell" as well as the registered trademark for the "Rockwell logo" for use in marketing these woodworking machines for a two year transition period. (Collins, Tr. 26-27; CX 5, 6, 7).

B. Delta's Business

Delta has been a major force in the woodworking machinery industry. (Collins, Tr. 6-7, 10-11, 39-45; CX 101, p. 1; CX 1; CX 2; CX 3; CX 68; Day, Tr. 299). It develops new machines and improves the safety of existing products. (Wheatley Tr. 430-44; Collins, Tr. 55; Brickner, Tr. 117-18).

During the past five years Delta spent \$[] per year on advertising its woodworking machines. (Jodkin, Tr. 387; Bair, Tr. 263; CX 67). As part of its effort to support its distribution network, Delta also actively participates in national, regional and local trade shows. (Bair, Tr. 189; CX 53). (C

Delta has a reputation for manufacturing fine quality, durable products and providing reliable service. (Collins, Tr. 6, 13-14, 25-26; CPX 30, Boucheron, dep., p. 4; CPX 28, Mueller, dep., p. 5). Delta maintains a nationwide network of service centers through which its woodworking machines can be serviced. (Collins, Tr. 15, 20-21; CX 15, 57, 58). It maintains an extensive inventory of replacement parts for all of its woodworking machines at Delta's parts supply centers in Memphis, Tennessee, and Van Nuys, California. (Collins, Tr. 18-19, 21-22). - Delta stocks parts for its newer as well as its older models which are either no longer manufactured or have been modified, in order to ensure that parts will be available to users for the expected life of the machines. (Collins, Tr. 45-46). These parts are shipped to the customer's location within 24 hours of placing the order. (Collins, Tr. 18-19, 21-22).

Delta maintains a national telephone hotline which receives approximately 8,000 calls per month inquiring about parts, accessories or technical advice. (Collins, Tr. 18-19, 21-22).

C. Delta's Products

Delta introduced its 10 inch table saw in 1970 and its 14 inch band saw in 1945. (Collins, Tr. 8-11; CX 1, 2, 4).

The external configurations of the Delta 10 inch table saw and 14 inch band saw are distinctive. (Brickner, Tr. 73-74, 93-95; SX 1, pp. 5-6, 7-8). Delta has sold over [] of each of these machines over the past five (C) years. (CV 47, 48; Collins, Tr. 12; Brickner, Tr. 110; CPX 12, Wyman, dep., pp. 8-9; Bair, Tr. 199-200).

Since the early 1970's, Delta has used the mark "Contractor's Saw" for its 10" table saw. (Bair, Tr. 199-200; CX 47) It is recognized by consumers as an identification for a Delta table saw. (CPX 28, Mueller, dep., p. 6). In addition, Delta has used the registered trademarks Unisaw, Rockwell and the Rockwell logo with its woodworking machines. (Collins, Tr. 27; CX 4-7).

The following is a summary of the distinctive, nonfunctional appearance features of each of these two Delta machines:

(i) Delta's 10 Inch Table Saw:

the design of the tabletop and extension wings; the design, location and colors of the handles and adjustment knobs; the design of the fence of the saw; the design and appearance of the miter gauge; and the design of the guide rails for the fence mounted on the front and back of the machine and extending along the tabletop. (Brickner, Tr. 93-95; SX 1, pp. 5-6).

(ii) Delta's 14 Inch Band Saw:

the curved covers and the design of the casting and the slim appearance that they provide; the design of the bracing support; the appearance of the miter gauge; and the design of the guide for the blade. (Brickner, Tr. 73-74; SX 1, pp. 7-8).

D. Patents in Issue

The three United States patents assigned to Delta which are in issue in the present investigation are United States Letters Patent No. 3,754,493 ("493 Patent") entitled "Circular Saw Blade Guard" issued August 28, 1973; United States Letters Patent No. 4,174,100 ("100 Patent") entitled "Adjustable Fence" issued November 13, 1979; and United States Letters Patent No. 4,436,126 ("126 Patent") entitled "Wood Thicknessing Machine" issued March 13, 1984. (Collins, Tr. 10-11; CX 1-3).

E. Unnamed Importers and Manufacturers

After filing of the Amended Complaint, Delta became aware of additional parties who manufacture, import and/or distribute into the United States the imitation woodworking machines in issue. (Bair, Tr. 236; SX 50; CX 78; CX 65;

CX 59). Since these entities have only recently been discovered, the names of these additional importers and manufacturers have not been added as named respondents in this investigation.

The following is a partial list of the currently known manufacturers, importers and distributors of the woodworking machines in issue who are not part of this investigation: Royal Unitco International; Test-Rite Tool Co.; Benchmark Tool Co.; AC Sales Company, Inc.; TAB Merchandising; Foreign Enterprise USA, Inc.; Nevada Equipment Wholesalers; Foremost Tool Co.; Trade Associates, Inc.; Tools Unlimited; Rockwald Machine Tool Corp.; Sante Fe Tool; Post Tool and Supply Co.; Wholesale America, Inc.; Power Tool Specialists; TWS Machinery; CFS; Gabriel Overseas Corp.; Lennon and Snoap Co.; Limemack Corp.; Longitude Training, Co., Ltd.; Machine World, Inc.; and World Sunshine Enterprise. (Brickner, Tr. 158; CPX 19, Ruffner, dep., pp. 54-58; CX 78; SX 50).

IV. COPYING OF EXTERNAL DESIGN OF DELTA'S WOODWORKING MACHINES

Over the past few years, a rapidly increasing flow of imitation 10 inch table saws and 14 inch band saws from Taiwan have been imported and sold in the United States. (CPX 20, Booth, dep., p. 93; CX 62; Brickner, Tr. 148-150; CX 82; CX 78; CX 29, pp. 2, 3, 22-24, 28; CX 29, pp. 3, 4, 11-13, 20, 23). These imitation machines have created confusion with Delta's machines which

have common law trademark rights with respect to their nonfunctional design appearances. As a result, these imported imitation machines have violated Delta's trademark rights.

A. Common Law Trademarks in External Design

In order to establish a common law trademark in the design of the woodworking machines in issue, Delta must show that the design is either inherently distinctive or has acquired a secondary meaning with the consuming public.

1. distinctive appearance

Delta's 14 inch band saw and 10 inch table saw have overall design appearances different from the designs of their domestic brand competitors' machines. For example, the band saws sold by Powermatic and Sears, Delta's two largest competitors, have parts enclosed in thick covers. Similarly, the table saws sold by Powermatic, Sears and DeWalt are different from the Delta 10 inch table saw. (Brickner, Tr. 73-104; CPX 29, Navestead, dep., p. 8; CPX 9, 10; CPX 1, 2; CX 49, 50).

Even if product shapes may be inherently distinctive, however (see Textron, Inc. v. USITC (CAFC January 24, 1985), slip opinion at n.5, p. 15),

the record here does not establish that the designs were "arbitrary or fanciful, devised for the sole purpose of functioning as a trademark." Ibid. pp. 15-16.

2. secondary meaning

Secondary meaning exists when the public associates a particular design or configuration with certain products or associates them with a single source. Miniature Plug-In Blade Fuses, Inv. No. 337-TA-114, 218 U.S.P.Q. 792, 803, (USITC, 1982).

a. advertising

Extensive advertising campaigns and promotional efforts have exposed these products to the purchasing public. (Bair, Tr. 196-98, 204-05, 266; CPX 30-33; Jodkin, Tr. 387; CX 53-55; CX 67). The advertisements placed by Delta have emphasized the design of Delta's 14 inch band saw and 10 inch table saw. Many of these advertisements use pictures, silhouettes or line type drawings of these machines in which neither "Rockwell" nor "Delta" appear on the machine illustrations. (Bair, Tr. 204-05, 266, 270-71; CX 55; CPX 30-33). Consequently, the advertising efforts of Delta cause users to associate the machines, based on their designs, with Rockwell/Delta. (CPX 12, Wyman, dep., p. 6; CPX 15, Johnson, dep., pp. 4-5; CPX 28, Mueller, dep., p. 12; CPX 11, Weber, dep., p. 4).

b. intentional copying

Direct evidence of intentional copying strengthens the presumption that there is secondary meaning in the designs of the machines. Single-Handle Faucets, Inv. No. 337-TA-167 (1984), at 46. Delta's 14 inch band saw and 10 inch table saw were intentionally copied by Jet. (CPX 21, Piccioni, dep. ex. 128; Brickner, Tr. 105-07, 150; SX 1, p. 23; CX 28, 29; CPX 14, Black, dep. p. 2, ex. 1, 2).^{6/} Because respondents trade on the appearance of Delta's machines, there is an inference that secondary meaning exists in these designs. See, Truck Equipment Service Co. v. Freuhauf Corp., 536 F.2d 1210, 1220 n. 13 (8th Cir.), cert. denied, 492 U.S. 861 (1976); McCarthy, Trademarks and Unfair Competition (1973) § 15:12 at 688.

c. survey study

A survey study by Dr. Robert Sorensen shows secondary meaning exists in the design and appearance of the Delta 14 inch band saw and 10 inch table saw. (Sorensen, Tr. 322; CX 63, p. 5). Under the results of the survey, the

6/ The Jet 10 inch table saw is sold by Pro Shop, Trend-Lines, and Fort Bragg. Trend-Lines advertised the band saw and the table saw as "Rockwell-style" and Pro Shop advertised that the machines closely resemble Rockwells.

Delta 14 inch wood cutting band saw and the Delta 10 inch table saw were correctly identified as a Rockwell or Delta by a significant number of persons who regularly use wood cutting band saws or table saws. (CX 63, p. 19): 25.8% identified the band saw correctly and 29.9% identified the table saw correctly. (Sorensen, Tr. 352, 355-58; CX 87; CX 100). With both power saws, appearance was the most significant reason given for the "Delta" or "Rockwell" identifications. (CX 63, p. 32).

Only a few interviewees identified one of Delta's competitors as the source or brand of the band saw; hence it can be concluded that guessing was not a factor in the results since many other brands sell as well or better than Delta. (Sorensen, Tr. 352; CX 63, p. 19).

This study shows that Delta's wood cutting 14 inch band saws and Delta's 10 inch table saws do possess secondary meaning among the individuals who regularly use these two power tools. Based on this study and the other evidence, secondary meaning has been established in the design and configuration of Delta's 10 inch table saw and 14 inch band saw.

B. External Appearance of Machines Not Generic

The presence in the market of a substantial number of competing product designs shows that the public does not associate one configuration with this

product. Heavy-Duty Staple Gun Tackers, at 19-20. Here, there are several competing configurations such as those from Powermatic, Sears and DeWalt. (Brickner, Tr. 73-104; CX 49; CX 50). The designs of the 14 inch band saw and 10 inch table saw are, therefore, not generic.

C. Nonfunctionality of External Appearance

Trademark rights in the configuration of a product only can be established if it is not functional. The question is "whether competition will be hindered by preventing others from copying the design or configuration." Single-Handle Faucets, at 36.

Delta has intentionally not redesigned its 14 inch band saw, and has intentionally designed the 10 inch table saw, to look like its earlier models, because these designs distinguish the Delta machines from competitors' products. (Collins, Tr. 11-12; CX 47, 48; Brickner, Tr. 64, 180; Bair, Tr. 258). Other designs would have been cheaper to mass produce, but Delta wanted to keep the distinctive design of both machines. (Brickner, Tr. 80).

Delta's legitimate competitors in the United States (e.g. Sears, Powermatic, and DeWalt) use different configurations on the 10 inch table saw and 14 inch band saw. (Brickner, Tr. 73-104; CPX 29, Navestead, dep., p. 8; CPX 9; CPX 10; CPX 1; CPX 2; CX 49, 50). The competing band saws have a

thicker appearance. (Brickner, Tr. 74-76; CX 50). The competing table saws have different table, rib guard and handle designs, and different labeling plates and fence guide mechanisms. (Brickner, Tr. 98-104; CX 49, pp. 1, 6, 7). These competitive machines, with their different configurations, have been successfully marketed for years. (Brickner, Tr. 73-104).

Settlement agreements between respondents and Delta provide that those respondents will redesign the external configurations of their machines. This is additional evidence of the existence of feasible alternative designs. (Brickner, Tr. 151-154; CX 30-36, 97-99).

The design of the Delta 14 inch band saw and 10 inch table saw are nonfunctional. Vacuum Bottles, 219 U.S.P.Q. 637, 648 (U.S.I.T.C. 1982); Braiding Machines, Inv. No. 337-TA-130, at 43-44 (1983). The design features are neither necessary nor utilitarian. (CPX 29, Navestead, dep., p. 8). The saws can be produced more cheaply using other designs. (Brickner, Tr. 20). Moreover, numerous other competitive designs have been used in marketing both of these saws without affecting the quality of performance.

D. Infringement of Delta's Trademarks in External Design

The exactness in appearance is an indication that the respondents intentionally copied the Delta machines. (Brickner, 81-85, 105-107; CX 29,

Ruffner, dep., pp. 6-12; CX 28, 29; CPX 6). Respondents' 10 inch table saws are identical in design and appearance to Delta's 10 inch table saw.

(Brickner, Tr. 105-107, 150; CX 28, p. 8; CPX 29, Ruffner, dep., p. 6-12; CX 28, 29, 45, 95; SX 19; CPX 28, Mueller, dep., pp. 5-6; SX 3).

Both the Jet 10 inch table saw and Jet 14 inch band saw sold by Pro Shop, Fort Bragg, Trend-Lines and Liquidation Bureau were intentionally copied from Delta designs. (CPX 21, Piccioni, dep. ex. 128; SX 1, p. 23). The Jet 14 inch band saw contains castings identical to those on the Delta machine indicating that the Taiwanese manufacturer used copies of Delta molds and dies. This is evidenced by small protrusions on the Jet machines which are nonfunctional there but which are used on the Delta machine for micro-adjustment gauges. (CPX 21, Piccioni, dep. ex. 128; SX 1, p. 23). Intentional copying provides additional support for a finding of likelihood of confusion because it supports the inference that the mark's copiers intended to cause confusion. Sneakers, Inv. No. 337-TA-118 (1983), at 20; Heavy-Duty Stapler Guns, at 55.

Trend-Lines advertised the 10 inch table saw and 14 inch band saw in one catalog as "Rockwell-style." (Brickner, Tr. 150; CX 28, 29; CPX 14, Black, dep., p. 2, ex. 1, 2). One of Toolcoa's distributors, Marketing Tool Trends, characterized Taiwanese manufactured band saws and table saws as having the same design as the Rockwell machines. (Bair, Tr. 248; CX 95). Other

distributors, such as Liquidation Bureau, have informed their customers that these machines are as good as a Rockwell/Delta. (Brickner, Tr. 165-167; CX 90).

Consumers and even Delta distributors have been confused as to the origin, brand or sponsorship of Taiwanese products. (CPX 28, Mueller, dep., pp. 5-6; CPX 29, Witham, dep., p. 4-8; CPX 12, Wyman, dep., pp. 5-8; CX 89; Brickner, Tr. 163-67; CPX 15, Johnson, dep., pp. 4-9; CPX 30, Boucheron, dep., pp. 4-7; CX 90; Collins, Tr. 47-48; O'Neil, Tr. 395, 406, 418-421; King, Tr. 277; Bair, Tr. 209-211; CPX 29, Navestead, dep., pp. 1-12, 14-18). Only a very few incidents are needed to prove likelihood of confusion. Plastic Food Storage Containers, Inv. No. 337-TA-152 (1984), at 55. Here, confusion existed among even experienced woodworkers who purchased machines through mail or phone order companies. Confusion existed at showroom locations among consumers. (O'Neil, Tr. 395, 418-421; CPX 29, Navestead, dep., pp. 10-12, 14, 18). Confusion was evidenced by warranty service requests to Delta for Taiwanese machines. (Collins, Tr. 47-48; King, Tr. 277; Bair, Tr. 209; O'Neil, Tr. 395). Delta's distributors and sales representatives were confused when the Taiwanese imitations first were introduced into the market. (O'Neil, Tr. 418-421; Bair, Tr. 211).

Advertisements of the respondents and many unnamed parties invite an association between the imitation machines and the Delta machines. (Brickner,

Tr. 150; CX 28, 29; CPX 14, Black, dep., p. 2, 15 ex. 1, 2; CPX 16, Pollack, dep., pp. 26-28, 46-47; Bair, Tr. 232-235; CPX 17, Mauger, dep., p. 28; Wheatley, Tr. 457-58, 463; CX 103; CX 28, pp. 22, 23; CX 29, pp. 9-11, 20, 23). These advertisements contain little indication of the brand or source of the products. (CPX 14, Black, dep., p. 15; CX 28, 29; CPX 16, Pollack, dep., pp. 26-28, 46-47; Bair, Tr. 232-235).

Respondents' band saws and table saws have been sold through mail or phone orders. (Brickner, Tr. 148-150). The customer sees only the advertisement or catalog and never the actual machine prior to purchase. (CPX 17, Mauger, dep., p. 28). These advertisements rarely display a manufacturer's name and rarely, if ever, relate that the machine is "made in Taiwan." Many of these companies represent themselves to be "liquidators" or "salvage companies," selling overstocks of authorized distributors, inventories of distressed companies and other salvage or unclaimed merchandise at low prices, thus fostering impressions that these machines are, in reality, authorized Delta machines. (Wheatley, Tr. 448-50; CX 103; CX 29, pp. 10, 11).

Many of the showroom businesses advertise the same way as mail order houses. They neither display labels nor indicate the origin of the products but emphasize the appearance of the product. (Wheatley, Tr. 463). Even when the machines are displayed side-by-side in the showrooms with Delta machines, customers have been misled. (O'Neil, Tr. 395, 406).

These machines are sold to a wide variety of consumers: beginning do-it-yourselfers, more experienced home craftsmen, and light industrial users. (Bair, Tr. 252). "When prospective purchasers are in part discriminating, and in part casual, however, the latter group should be the measuring rod." 3A Callman, Unfair Competition, Trademarks and Monopolies (4th ed. 1984) § 20.09, p. 44. Even so, some of the more experienced, and thereby discriminating buyers, in this investigation have been confused as to the source or brand of the Taiwanese imitations. (CPX 28, Mueller, dep., pp. 5-6; CPX 29, Witham, dep., pp. 4-8; CPX 12, Wyman, dep., pp. 5-8; CX 89; Brickner, Tr. 163-64; CPX 15, Johnson, dep., pp. 4-9; CPX 30, Boucheron, dep., pp. 4-7; O'Neil, Tr. 418-21; King, Tr. 277; Bair, Tr. 209, 211).

Some customers base purchases of these machines on recollections of the design of Delta products from their childhood or youth. Delta band saws have been used in school shop classes for years. (King, Tr. 285, 286).

When two products create essentially the same commercial impression, as here, an infringement has occurred. Likelihood of confusion may even result if different labels are used on the products. T&T Manufacturing Company v. A.T. Cross Co., 197 U.S.P.Q. 763, 771 (D.R.I. 1978), aff'd. 587 F.2d 533 (1st Cir. 1978); Truck Equipment Service Co. v. Freuhauf Corporation, 536 F.2d 1210, 1220-21 (8th Cir.) cert. denied, 429 U.S. 861 (1976).

Many band saws and table saws imported from Taiwan, which are identical in appearance to Delta's machines, have inconspicuous labeling. (CX 28; CX 29; CPX 6). Even for those that do have legible labels, use of those labels does not dispel the confusion. The identity of the shapes, even with different labels, is likely to lead to confusion as to origin because of the consumers' recognition of Delta's design.^{7/} Source Ferrier, S.A. v. Waters of Saratoga Springs, Inc., 217 U.S.P.Q. 617, 620 (S.D.N.Y. 1982).

Delta's domestic competitors in the woodworking industry including the largest domestic marketer, Sears, sell machines manufactured in Taiwan. (Brickner, Tr. 159-60; Bair, Tr. 237, 242-43). It is not unreasonable for customers to think, upon seeing the Taiwanese imitations, that Delta is doing the same. (O'Neil, Tr. 395, 400-04; King, Tr. 276; CPX 12, Wyman, dep., pp. 5-8; CX 89; Brickner, Tr. 163-64).

V. COMMON LAW INFRINGEMENT OF TRADE NAME "CONTRACTOR'S SAW"

Delta has used the trademark "Contractor's Saw" with its 10" table saw since 1970. (Bair, Tr. 199-200; CX 47). Pro Shop, Trend-Lines, Fort Bragg,

^{7/} Litton Systems, Inc. v. Whirlpool Corp., 227 U.S.P.Q. 97 (C.A.F.C. 1984), does not preclude a finding of likelihood of confusion. Little evidence of the likelihood of confusion was found. Defendant's trade name was so recognizable in the market that there would be little chance that the consumer, in seeing that label, would think it was other than a Whirlpool product.

Big Jce and Show Soon have infringed upon Delta's rights in that common law trademark by identifying their own table saws as "Contractor's Saw" in advertising, sales literature and instruction manuals. (Brickner, Tr. 148-51; CX 28, p. 6; CX 29, pp. 2, 13, 25; CPX 14, Black, dep., p. 2; CX 2, 29, p. 7; SX 19; CX 45, p. 24; CPX 28, Mueller, dep., pp. 5-6).

"Contractor's Saw" is a distinctive name and deserves trademark protection. [] units of the Delta 10 inch (C)
"Contractor's Saw" have been sold per year. None of Delta's competitors have ever used the name except to identify a Taiwanese imitation 10 inch table saw. (Bair, Tr. 199-200; CX 47).

"Contractor's Saw" has an established secondary meaning. Consumers associate the name with Delta. (Bair, Tr. 199-200; CX 47). Even if the mark is determined to be "descriptive" of the product, a common law trademark may exist if secondary meaning is established in the mark. McCarthy, supra, at § 11.5.^{8/}

^{8/} A substantial portion of these units are sold to home craftsmen and do-it-yourselfers. (Bair, Tr. 184-85; CPX 29, Navestead, dep., p. 7).

The respondents who have used the name "Contractor's Saw" or "Contractor's Special" have done so with machines which are similar in appearance to Delta's 10 inch "Contractor's Saw." (Brickner, Tr. 148-51; CX 28, pp. 6, 37, 41, 219; CX 29, pp. 2, 25; CPX 14, Black, dep., p. 2, ex. 1, 2; CX 2, 13, 29, p. 7; SX 19; CX 45, p. 24; CPX 28, Mueller, dep., pp. 5-6; SX 6, 7, 14). These circumstances prove secondary meaning and a likelihood of confusion. Consequently, the respondents' use of the mark "Contractor's Saw" or "Contractor's Special" has infringed Delta's rights in such mark.

VI. INFRINGEMENT OF REGISTERED TRADEMARKS

A. Unisaw

Delta has owned and used the federally registered trademark "Unisaw," with the 10 inch tilting arbor saw since 1938. (CX 4). Federal registration of a trademark gives rise to a rebuttable statutory presumption of ownership of the mark. It provides "prima facie evidence of the validity of the registration, the registrant's ownership of the mark of the registrant's exclusive right to use the mark." 4A Callman, supra, § 25.05 at 20. The use of the mark for five years after registration converts the rebuttable presumption of ownership into an incontestable right to use the mark. 15 U.S.C. § 1064. The test for infringement of a federally registered trademark is likelihood of confusion. McCarthy, supra, at § 23:23.

Fort Bragg has used the Unisaw trademark in advertising a Taiwanese imitation 10 inch tilting arbor saw. (CX 28, 29; Brickner, Tr. 151). As a result of Fort Bragg's exact use of the trademark, this federally registered trademark has been infringed.

B. Rockwell and Rockwell Logo

Delta has an exclusive license to use the federally registered "Rockwell" trademark and the federally registered Rockwell Logo trademark on the machines in issue and in advertising, sales literature and instruction manuals for a period of two years. (CX 5, 7; Collins, Tr. 27). Big Joe and Fort Bragg have used these federal trademarks or close imitations of the trademarks with the sale of their machines and have, therefore, infringed Delta's rights. (CPX 28, Mueller, dep., pp. 5-6; CX 80; 15-U.S.C. § 1127).

Big Joe, in its advertisements, displays a blurred label on its 10 inch table saw which looks like it says Rockwell and looks like it has the Rockwell logo on it. (CPX 28, Mueller, dep., pp. 5-6; CX 80). The labeling on the machine is not distinguishable from the Rockwell trademark or Rockwell logo and, therefore, there is an infringement. Pro Shop also has been using the name "Rockwell" in its advertisements thereby infringing upon Delta's rights. (CX 28, p. 6).

Additionally, the early Jet instruction manuals for the Taiwanese 10 inch tilting arbor saw included pictures of the Rockwell machine with the Rockwell trademarks and "Rockwell logo." These manuals were supplied by Fort Bragg and Trend-Lines with the sale of Jet tilting arbor saws which Fort Bragg sold under Delta's Unisaw trademark. (CPX 14, Black, dep. ex. 2; CX 29, p. 7; SX 39; CX 79). These actions, also, constitute infringements of the registered trademark.

VII. INFRINGEMENT OF DELTA'S PATENTS

A patent is presumed valid and in absence of evidence establishing invalidity, the right to prevent others from infringing the patent claims is established. 35 U.S.C. § 282. The validity of the patents here has not been contested. All three patents are in full force and effect. (CX 1-3; Collins, Tr. 10-11).

Anyone who, without authority, "makes, uses or sells any patented invention within the United States" during the term of the patent, therefore, infringes the patent. 15 U.S.C. § 271(a). Additionally, anyone who either actively induces the infringement of a patent claim or sells a patented product knowing that the product will be used in an infringement of the patent claim shall be liable for "inducement of infringement" or "contributory

infringement." 15 U.S.C. § 271(b)(c). Thus, foreign manufacturers and trading companies who induce patent infringement through manufacture and export are liable though they have not committed any acts in the United States. See, e.g., Molded-In Sandwich Panel Inserts, Inv. No. 337-TA-99, 218 U.S.P.Q. 832 (USITC 1982).

Pro Shop, Trend-Lines, Fort Bragg and Big Joe sell 10 inch table saws and tilting arbor saws which incorporate a blade guard which infringes upon every claim of Delta's 493 patent. (Brickner, Tr. 150, 169-72; CX 37, 38; CX 28, p. 6; CPX 14, Black, dep. p. 7, ex. 2; CX 29, pp. 2, 4, 7). Show Soon exports into the United States a wood planing machine which infringes upon Delta's '126 patent. (Brickner, Tr. 177; CX 37; CX 40, CX 23).

VIII. MISAPPROPRIATION AND UNFAIR COMPETITION

A. Misappropriation

The basis of the misappropriation doctrine is the property right which the complainant relies upon because of a substantial investment of time, effort and money in the commercial creation. When that right is appropriated at little or no cost and the creator of the right is injured, a case of "misappropriation" exists. 1 McCarthy, supra, § 10:23. Jet has appropriated the design and configuration of Delta's machines and the use of the name

"Contractor's Saw." Jet has been distributing 10 inch tilting arbor saws with copies of substantial portions of Delta instruction and user manuals. Fort Bragg and Trend-Lines have been selling these Jet machines. (CPX 14, Black, dep., ex. 2; CX 29, p. 7; SX 39; CX 79). Other settling respondents have also used various Delta instruction and user manuals in marketing their products.

B. False and Deceptive Advertising

Big Joe has published specifications in advertisements which were identical to Delta machine specifications when, in fact, respondents' machines did not have those identical specifications. (CPX 28, Mueller, dep., pp. 7, 10). Various respondents have provided false motor specifications, e.g., providing a 1 hp (horsepower) label when the actual horsepower of the motor was only 1/2. (SX 3). Liquidation Bureau, as well as many other distributors, has falsely represented the "interchangeability" of Delta replacement parts with parts on their own machines. (Brickner, Tr. 155-156; CX 90). Liquidation Bureau has advertised that it is an "authorized liquidator" of consumer products thereby attempting to deceive customers into thinking their products are brand names. (CX 90).

Liquidation Bureau, Big Joe and other companies using liquidation type-marketing have used advertising which gives misleading impressions to purchasers. (CX 28, pp. 10, 22, 23; CX 29, pp. 9, 20, 23). Similarly,

Trend-Lines has, in one catalog, advertised its band saw and table saw as "Rockwell-style." (Brickner, Tr. 148-50; CX 28, p. 6; CX 29, pp. 2, 25). It is clear that respondents' actions have a tendency to mislead. Vertical Milling Machines, Inv. No. 337-TA-133 (1984), at 41; Airtight Cast-Iron Stoves, 215 U.S.P.Q. 963, 966 (USITC 1980).

IX. PASSING OFF

Liquidation Bureau, Trend-Lines, Pro Shop and Big Joe intended to deceive customers through the use of representations that the machines were, in fact, Delta machines, that the machines were made in Delta plants or that they were just like Delta machines. (Brickner, Tr. 148-50; CX 28, p. 6; CX 29, pp. 2, 25; CPX 14, Black, dep., p. 2, ex. 1, 2; SX 19; CX 45, p. 24; CPX 28, Mueller, dep., pp. 5-7, 10; Wheatley, Tr. 448-50; CX 103; CX 29, pp. 10, 11). Trend-Lines advertised the machines as "Rockwell-style." (Brickner, Tr. 150; CX 28, 29; CPX 14, Black, dep., p. 2, ex. 1, 2). Jet and its distributors, Fort Bragg and Trend-Lines, contributed to the "passing off" of the tilting arbor saw by packaging the machines in issue with Delta instruction manuals and literature. (CPX 14, Black, dep. ex. 2; CX 29, p. 7; SX 39; CX 79). These acts constitute the unfair act of "passing off." Plastic Food Storage Containers, at 70; Cube Puzzles, 219 U.S.P.Q. at 334.

X. INJURY TO DOMESTIC ECONOMY

A. Domestic Industry

Delta's 10 inch table saw, 14 inch band saw, the patented blade guard, the patented adjustable height fence and a portion of the patented planer are manufactured at Delta's facilities at Tupelo, Mississippi (Brickner, Tr. 114; Day, Tr. 292). Parts for these products are purchased from domestic vendors by Delta. (Day, Tr. 294). Additionally, almost all of the machines and tools at the Tupelo plant are domestically produced. (Day, Tr. 298). The plant employs [] people. (Day, Tr. 296, 307-308). (C)

Delta has two distribution centers, in Memphis, Tennessee, and Van Nuys, California, and corporate headquarters located in Pittsburgh, Pennsylvania. (CX 100). These domestic facilities are involved in the design, manufacture, assembly, packaging, quality control, repair, marketing and sales of the Delta machines, parts and accessories. (Brickner, Tr. 120-126; Day, Tr. 294; CX 19). Delta also maintains a nationwide network of approximately 1,000 dealers and distributors and an extensive domestic service network for all of its products. (Collins, Tr. 20; Bair, Tr. 184). The facilities are involved in the distribution and sale of all Delta products.

Though a portion of its RC-33 planer is manufactured in Brazil, between 30 and 40% of the dollar value of the machine is produced in the United States.

(Brickner, Tr. 114-115; Collins, Tr. 58; Day, Tr. 305-306). Additionally, the domestic engineering and distribution systems are used in the design, marketing and sale of the RC-33 planer.

The domestic industry affected is Delta's United States operations involved in the manufacturing, testing, marketing, sales and servicing of the Delta products in issue. Heavy-Duty Staple Gun Tackers, at 66.

B. Efficient and Economic Operation

Delta has an efficient and economic operation in the domestic industry. Over the past several years it modernized its plant at Tupelo with state of the art manufacturing equipment. (Day, Tr. 305; Collins, Tr. 43; CX 70). The investments have reduced costs, increased capacity, and increased the efficiency of the manufacturing operation. (Collins, Tr. 39-45; Day, Tr. 299-303). From 1982 to 1985, Delta has invested []% of its annual gross revenues on such improvements. (Day, Tr. 299-303). This investment will increase to []% of its gross revenues in the next four years. (C)

Delta has retained General Electric to study Delta's capital expenditure program to improve Delta's operations. (Day, Tr. 305-306). Delta is an innovative company which has introduced seven new machines in the last two years and has invested over []% of its annual gross revenue in new product (C)

development and improvement. (Collins, Tr. 18-19; Bair, Tr. 184-185, 253; CPX 29, Navestead, dep., at 7). Delta emphasizes customer service by a national network of service facilities having readily available repair and replacement parts. (Brickner, Tr. 120-126; Day, Tr. 294; CX 19; Collins, Tr. 18-19, 21-22). Except for declining sales in the products in issue due to the infringements, the operation has been profitable and has a significant upturn in the last two fiscal years. (Jodkin, Tr. 389-390; CX 74; CX 76; Bair, Tr. 244-247; King, Tr. 284; Bair, Tr. 246, 253).

The industry has an efficient and economic operation. Methods for Extruding Plastic Tubing, 218 U.S.P.Q. 348, at 353 (USITC 1982).

C. Injury to Domestic Industry

Delta's market share in all of the products in issue has been severely eroded. (CX 71 revised; King, Tr. 284-285; Bair, Tr. 244-247, 253, 268). Many of Delta's distributors have purchased Taiwanese imitations in place of Delta machines. (Bair, Tr. 245; King, Tr. 277, 284-285; O'Neil, Tr. 407; CX 96). Twenty of the largest woodworking machine distributors in the United States met and decided that they would import "Delta look-alike" 10 inch table saws, 14 inch band saws, planers and other machines. Each distributor agreed to purchase at least 50 of each machine. (O'Neil, Tr. 409-413).

Respondents have injured the domestic market. Heavy-Duty Staple Gun Tacker, at 73; Drill Point Screws for Drywall Construction, Inv. No. 337-TA-116, at 18 (1982).

XI. COMMISSION STAFF ATTORNEYS' ARGUMENTS

All of the respondents have entered into consent settlements or are in default. Commission staff counsel have, however, raised several arguments.

A. Common Law Configuration Trademarks

The Commission staff attorneys join issue with Delta, asserting that it does not have common law trademark rights in the design and configuration of its 10 inch table saw and its 14 inch band saw. They argue that the two Delta machines are not inherently distinctive in that all band saws are the same and all table saws are the same.

Especially with the 14 inch band saws, the machines are quite different from the machines of the legitimate competitors. Supra, at pp. 9-10, 12. The record does not show, however, that the design of the machines is "arbitrary or fanciful, devised for the sole purpose of functioning as a trademark." Textron, Inc. v. USITC (CAFC January 24, 1985), slip opinion at pp. 15-16.

The staff attorneys also argue that Delta's advertising of its machines is not evidence that their configurations have acquired secondary meaning. The advertisements show, however, that most if not all of the design features are

visible on all of the illustrations for both of the saws and that each feature is visible on at least some of the advertisements. (CPX 30; CX 47; CX 48; SX 36).

The staff attorneys argue that the presence of a brand name in an advertisement of a machine precludes establishment of secondary meaning in the design and configuration of the product. On this record, however, the use of a brand name does not preclude a finding of common law trademark in a design. Monsieur Henry Wines, Ltd. v. Duran, 204 U.S.P.Q. 601, 606 (TTAB 1979).

The staff attorneys argue that one of the features on complainant's 10 inch table saw--the see-thru blade guard--is functional and generic. Even assuming that is so, however, the test is whether the appearance of the entire machine is identified by potential customers with one source, not the lack of distinctiveness of one of several features. Estate of P.D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 533, 545-46 (1920).

The staff attorneys argue that deliberate copying does not raise a presumption of secondary meaning. Proof of intentional copying is clearly probative evidence on the secondary meaning issue.^{9/} Brooks Shoe

^{9/} Staff counsel rely on Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) for the proposition that respondents are, without more, entitled to copy the exterior design of complainant's machines. That case focused on preemption of state action. Lear, Inc. v. Atkins, 395 U.S. 653, 668 (1969); Truck Equipment Service Co. v. Fruehauf Corp. 191 U.S.P.Q. 79, 82 (8th Cir. 1976).

Manufacturing Co. v. Suave Shoe Corp., 716 F.2d 854, 860 (11th Cir. 1983).

Moreover, the staff attorneys agree that some of the respondents have engaged in passing off (Brief pp. 39-41), and proof of passing off is sufficient, in itself, to prove secondary meaning. J.T. McCarthy, Trademarks and Unfair Competition, § 15:4-5 (1973).

B. The Survey

The staff attorneys find fault with the survey by Dr. Sorensen, arguing that the universe is too narrow;^{10/} that the survey did not use "controls" (pictures of competing machines); that the percentage of those interviewed who correctly identified the design of the Delta machines is too low to be probative; and that the interviewers had discretion in choosing those to interview.

The survey was properly directed at potential purchasers of 10 inch table saws and 14 inch band saw. General Motors Corp. v. Cadillac Marine & Boat

^{10/} Staff counsel assume, without record citation, that one who owns and uses his own 10 inch table saw or 14 inch band saw is not likely to purchase another, and that the universe of the survey excludes potential purchasers. The record shows, to the contrary, that witnesses typically may buy more than one saw. (CPX 11, Weber dep., p 5; CPX 13, Molitor dep., p. 10; CPX 15, Johnson dep., p. 4). Even if there were proof in the record that the saws are a lifetime purchase, the universe of the survey included those who used a saw owned by someone else as well as those who owned the saw.

Co., 226 F. Supp. 716, 737 (W.D. Mich. 1964); S.C. Johnson & Son, Inc. v. Johnson, 266 F.2d 129, 138 (6th Cir. 1959). The interviews were conducted outside stores and lumber yards where men who would be concerned with these tools could be expected to be found. (Sorensen, Tr. 326-327; CX 63 at 7).

In selecting interviewees, a screening process was used: a male at least 25 years of age who in the last six months had used a 14 inch wood cutting band saw or a 10 inch table saw. (Sorensen, Tr. 329-330; CX 63 at 7, 10). In order to qualify for interview, the man had to either own the tool or use it often enough to consider it "his own." (Sorensen, Tr. 333-334; CX 63 at 7). Since the number of people who qualified was low, there was no need for the interviewers to be given instructions to approach randomly selected potential interviewees such as every third person. (Sorensen, Tr. 325, 332; SPX 18, Sorensen, dep. at 22).

The requirement that the interviewee had used his own saw or one he used often enough to consider his own was used in the survey study to avoid guessing. (SPX 18, Sorensen, dep., at 28). Dr. Sorensen wanted the interviewers to talk with people who had a direct knowledge of the product because this survey was a study in secondary meaning. (Sorensen, Tr. at 338).

This universe, based on interviews of those who have owned or used the product, has precedent. Plastic Food Storage Containers, Inv. No. 337-TA-152

(Finding 94); Brooks Shoe Co. v. Suava Shoe Co., 716 F.2d 854, 861 n.16 (11th Cir. 1983); Grotzian v. Steinway & Sons, 523 F.2d 1231, 1340-42 (2d Cir. 1975).

Dr. Sorensen found it unnecessary to use pictures of similar types of machines manufactured by other companies as controls since there are several other brands that sell very well and could be mentioned just as well as Delta. Control photographs need to be used only where there is a single brand with high visibility and high sales penetration with all of the other brands way behind. (SPX 18, Sorensen, dep., p. 32). Only a very small percentage of the interviewees identified a source or brand of the table saw or the band saw other than Rockwell/Delta. (CX 63 at 23, 26, 27).

The percentages of those who correctly identified the Delta machines (25.8% for the band saw and 29.9% for the table saw) were persuasive evidence of secondary meaning. James Burrough, Ltd. v. Beefeater, Inc., 540 F.2d 266, 279 (7th Cir. 1976) (Markey, J.) (15% was held "not small" percentage); Jockey International, Inc. v. Burkard, 185 U.S.P.Q. 201, 205 (S.D. Cal. 1975) (11.4%); Fumble Oil & Ref. Co. v. American Oil Co., 259 F. Supp. 559, 564 (E.D. Mo. 1966) (18%); Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137 (citing case where 25% rate was held strong evidence of secondary meaning).

C. Likelihood of Confusion

The staff attorneys argue that complainant has failed to prove likelihood of confusion. The record, however, is replete with evidence that the imitation machines imported from Taiwan are almost identical to complainant's in external design, and often are sold by mail order houses advertising only a picture of look-alike machine, without showing the brand name or place of manufacture. (Wheatley Tr. 448-450, 457-458, 463; Brickner, Tr. 148-150; CX 28; CX 29; CX 78; CX 82, CPX 17, Mauger dep., at 28; King Tr. 279-290).^{11/} Furthermore, even if they know that the look-alike machines have different brands, or are imported from Taiwan, the purchasers are likely to conclude that the machines are made by or for Delta under license. (Brickner, Tr. 159-160; Bair, Tr. 237, 242-243; O'Neil, Tr. 400-404; King, Tr. 276). See A.T. Cross Co. v. Jonathan Bradley Pens, Inc., 176 U.S.P.Q. 15, 17 (2d Cir. 1972). And, statements by respondents and others that the look-alike machines from Taiwan are the same design, use the same parts, or are as good as Delta's, certainly add to this likelihood of confusion. Supra, at pp. 18, 28.

^{11/} The staff attorneys argue that the cost of the nonfringing saws (\$300) would cause a higher degree of care by purchasers eliminating the likelihood of confusion. In Grotrian v. Steinway & Sons, Inc. 523 F.2d 1331 (2d Cir. 1975), the price of the pianos (\$5,000 to \$13,000) and the degree of care by sophisticated buyers did not eliminate the confusion. 523 F.2d at 1339, 1341. The harm was not that a customer would buy a cheap piano thinking it was a Steinway. Rather, the harm was that potential purchasers thought there was some connection with Steinway. 523 F.2d at 1342. Similarly, here, many purchasers thought that there was some connection between the Taiwanese saws and those made by complainant.

The staff attorneys argue that the proof of actual confusion in the record is insufficient and unreliable. In addition to the deposition testimony of customers who, based on the similarity of design of the Taiwanese saws, thought they were buying saws made by or licensed by complainant, the record also contains letters from such customers and credible testimony of complainant's employees concerning frequent contact with confused customers. The evidence adduced by complainant of customer confusion meets and exceeds the prima facie standard. (CPX 28, Mueller dep., at 5-6; CX 89; Brickner, Tr. 163-167; CPX 15 Johnson dep., at 4-9; CPX 30 Boucheron dep., at 4-7; CX 90; Collins, Tr. 47-48; O'Neil, Tr. 395, 406, 418-421; King, Tr. 277; Bair, Tr. 209-211; CPX 29, Navastead dep., at 10-12, 19; CPX 11 Weber dep., at 6, 8, 17; CPX 22, Compton dep., at 7, 10). This evidence was reliable and material. Lawlor v. Loewe, 235 U.S. 522, 536 (1914).

XII. CONCLUSION

In summary, respondents have committed unfair acts and unfair methods of competition in connection with the importation and sale in the United States of the woodworking machines in issue. The effect of these unfair acts and methods is to substantially injure Delta's efficient and economically operated domestic industry for the manufacture, sale, distribution and service of these machines.

XIII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this investigation. 19 U.S.C. § 1337(b).
2. The Commission has personal jurisdiction over respondents, World Wide Supplies Co., Ltd., Show Soon Enterprises Co., Ltd., Toolcoa International, Inc., Big Joe Industrial Tool Corporation, Trend-Lines, Inc., Fort Bragg Rent-All, Inc., Pro Shop Power Tools Co., Fortune Development Corp., Goodwill Mercantile Co., Formosan United Corp., The Liquidator, Inc., The Liquidation Bureau, Inc., Leroy International Corporation, and King Feng Fu Machine Works, Co., Ltd.
3. Complainant, Delta International Machinery Corporation, has established a common law trademark in the overall appearance of 14 inch band saws and 10 inch table saws (marketed as 10 inch Contractor's Saws).
4. The 14 inch band saws imported and/or sold by respondents, Pro Shop, Trend-Lines, Fort Bragg, Big Joe, Liquidation Bureau, Toolcoa, World Wide, Formosan United, Goodwill and King Feng Fu infringe complainant's common law trademark rights.
5. The 10 inch table saws imported and/or sold by respondents, Pro Shop, Trend-Lines, Fort Bragg, Big Joe, Liquidation Bureau, Toolcoa, Fortune, Formosan United, Show Soon, and King Feng Fu infringe complainant's common law trademark rights.

6. Complainant has established a common law trademark right in the name "Contractor's Saw."

7. The table saws imported and/or sold by respondents, Pro Shop, Trend-Lines, Fort Bragg, Big Joe and Show Soon, incorporating the name "Contractor's Saw" or "Contractor's Special" infringe complainant's common law trademark rights.

8. Common law trademark infringement is an unfair act or method of competition under 19 U.S.C. § 1337(a).

9. Complainant has a federally registered trademark, Unisaw, and has an exclusive license to use the federally registered trademarks, Rockwell, and the Rockwell logo on its woodworking machines.

10. The tilting arbor saw imported, marketed and sold by respondent, Fort Bragg, which bears the name Unisaw, infringes complainant's federally registered trademark rights, in violation of 15 U.S.C. § 1114(1)(a).

11. The table saws imported and/or sold by respondents, Big Joe and Pro Shop, marketed with advertisements containing imitations of the name, Rockwell, and/or the Rockwell logo, infringe complainant's federally registered trademark rights, in violation of 15 U.S.C. § 1114(1)(a).

12. Registered trademark infringement in violation of 15 U.S.C. § 1114(9) is an unfair act or method of competition under 19 U.S.C. 1337(a).

13. Complainant's United States Patent No. 3,754,493 directed to a "Circular saw blade guard" is in full force and effect.

14. Complainant's United States Patent No. 4,174,100 directed to an "Adjustable Height Fence" is in full force and effect.

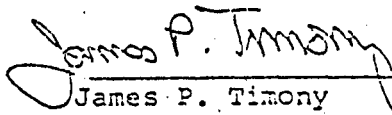
15. Complainant's United States Patent No. 4,436,126 directed to a "wood planing machine" is in full force and effect.
16. Show Soon imported and/or sold a wood planing machine which infringes complainant's patent rights.
17. Pro Shop, Trend-Lines, Fort Bragg, Big Joe, Liquidation Bureau, Toolcoa, Fortuna, Show Soon, Formosan United and King Feng Fu import and/or sell table saws which incorporate a blade guard assembly infringing complainant's patent rights.
18. Fort Bragg and Trend-Lines import and/or sell table saws which incorporate an adjustable height fence infringing complainant's patent rights.
19. United States Patent infringement is an unfair act or method of competition under 19 U.S.C. § 1337(a).
20. Respondents, Fort Bragg and Trend-Lines, have misappropriated Delta's tilting arbor saw instruction and user manuals.
21. Respondents, Big Joe, Liquidation Bureau and Trend-Lines, have falsely and/or deceptively advertised their imported 14 inch band saws and 10 inch table saws so as to tend to mislead customers.
22. Respondents, Trend-Lines, Pro Shop and Fort Bragg have passed off their imported 14 inch band saws and 10 inch table saws as Delta machines.
23. Misappropriation, passing off and false and/or deceptive advertising are unfair acts or methods of competition under 19 U.S.C. § 1337(a).
24. There is a relevant domestic industry in complainant's operation - devoted to the design, manufacture, distribution, packaging, and sale of the Delta 10 inch table saw, 14 inch band saw, Unisaw, planer, blade guard assembly and adjustable height fence.

25. The relevant domestic operation is efficiently and economically operated.

26. The domestic industries for the Delta 10 inch table saw, 14 inch band saw, planer, blade guard assembly and adjustable height fence are substantially injured and there exists a tendency to substantially injure these domestic industries.

27. The following respondents are in violation of § 337: World Wide Supplies Co., Ltd., Show Soon Enterprises Co., Ltd., Toolcoa International, Inc., Trend-Lines, Inc., Fort Bragg Rent-All, Inc., Pro Shop Power Tools Co., Formosan United Corporation, Fortune Development Corp., Goodwill Mercantile Co., The Liquidator, Inc., Liquidation Bureau, Inc., Leroy International Corp., Big Joe Industrial Tool Corp., and King Feng Fu Machine Works Co., Ltd.

The record in this case consists of all exhibits identified in the following exhibits of the parties: CX 102, SX 0, and SX 0-1, and the transcript of the testimony at the hearing, and all papers and requests filed in this proceeding.^{12/}

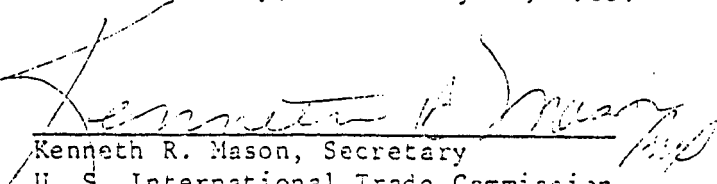

James P. Timony
Administrative Law Judge

Issued: February 6, 1985

^{12/} Pursuant to 19 C.F.R. §210.53(h), this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to §210.54, or the Commission pursuant to §210.55 orders on its own a review of the initial determination or certain issues therein. For computation of time in which to file a petition for review, refer to §§210.54, 201.14, and 201.16(d).

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Determination (Public Version) was served upon Juan Cockburn, Esq., and upon the following parties via first class mail, and air mail where necessary, on February 20, 1985.


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