In the Matter of

CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING

Investigation No. 337-265

USITC PUBLICATION 2058

JANUARY 1988

United States International Trade Commission / Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

DOCKET

In the Matter of

CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING

Investigation No. 337-TA-266

NOTICE OF ISSUANCE OF TEMPORARY EXCLUSION ORDER

AGENCY: U.S. International Trade Commission.

ACTION: The Commission has determined to issue a general temporary exclusion order in the above-captioned investigation.

AUTHORITY: The authority for the Commission's action is contained in section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) and in sections 210.53-.58 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.53-.58).

SUMMARY: Having determined that the issues of remedy, the public interest, and bonding are properly before the Commission, and having reviewed the written submissions filed on remedy, the public interest, and bonding, as well as those portions of the record relating to those issues, the Commission has determined to issue a general temporary exclusion order prohibiting entry into the United States, except under bond or license, of (1) reclosable plastic bags and tubing manufactured according to a process which, if practiced in the United States, there is reason to believe would infringe claim 1 of U.S. Letters Patent 3,945,872, and (2) reclosable plastic bags and tubing with respect to which there is reason to believe they infringe U.S. Trademark Registration No. 946,120.

The Commission has further determined that the public interest factors enumerated in section 337(e) (19 U.S.C. § 1337(e)) do not preclude issuance of the aforementioned general temporary exclusion order and that the bond during the pendency of the investigation should be in the amount of 460 percent of the entered value of the articles concerned.

FOR FURTHER INFORMATION CONTACT: Paul R. Bardos, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-0350.

SUPPLEMENTARY INFORMATION: On March 25, 1987, Minigrip, Inc. (Minigrip) filed a complaint and a motion for temporary relief under section 337, alleging a violation of section 337 in the unlawful importation and sale of certain reclosable plastic bags and tubing manufactured abroad according to a process which, if practiced in the United States, would infringe claims 1-5 of U.S. Letters Patent 3,945,872 and bearing a color line mark infringing U.S. Trademark Registration No. 946,120, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

On August 31, 1987, the presiding administrative law judge issued an initial determination (ID) granting in part complainant's motion for temporary relief. On October 2, 1987, the Commission determined not to review the ID. Notice of the Commission's decision not to review the ID was published in the Federal Register, 52 F.R. 38284 (October 15, 1987). The parties and interested members of the public were requested to file briefs on remedy, the public interest, and bonding. Complainant, certain respondents, the Commission investigative attorney, and one nonparty submitted briefs. No other submissions were received.

Copies of the Commission's Action and Order, the Commission Opinion in support therof, 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. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: November 30, 1987

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	)	
CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING	)	Investigation No. 337-TA-266

COMMISSION ACTION AND ORDER

Background

On March 25, 1987, Minigrip, Inc. (Minigrip) filed a complaint and a motion for temporary relief under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), alleging a violation of section 337 in the unlawful importation and sale of certain reclosable plastic bags and tubing manufactured abroad according to a process which, if practiced in the United States, would infringe claims 1-5 of U.S. Letters Patent 3,945,872 and bearing a color line mark infringing U.S. Trademark Registration No. 946,120, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The Commission instituted an investigation and named as respondents 20 firms alleged by Minigrip to be manufacturers, importers, or sales agents for imported reclosable plastic bags and tubing.

On August 31, 1987, the presiding administrative law judge (ALJ) issued an initial determination (ID) granting in part complainant's motion for temporary relief under subsections 337(e) and (f). On October 2, 1987, the Commission determined not to review the ID. The parties and interested members of the public were requested to file briefs on remedy, the public

interest, and bonding. Notice of the Commission's decision not to review the ID was published in the Federal Register, 52 F.R. 38284 (October 15, 1987). Complainant, certain respondents, the Commission investigative attorney, and one nonparty submitted briefs. No other submissions were received.

Action

Having determined that the issues of remedy, the public interest, and bonding are properly before the Commission, and having reviewed the written submissions filed on remedy, the public interest, and bonding, as well as those portions of the record relating to those issues, the Commission has determined to issue a general temporary exclusion order prohibiting entry into the United States, except under bond or license, of reclosable plastic bags and tubing manufactured abroad according to a process which, if practiced in the United States, there is reason to believe would infringe claim 1 of U.S. Letters Patent 3,945,872, and reclosable plastic bags and tubing with respect to which there is reason to believe they infringe U.S. Trademark Registration No. 946,120.

The Commission has also determined that the public interest factors enumerated in section 337(d), 19 U.S.C. § 1337(d), do not preclude issuance of the aforementioned general temporary exclusion order and that the bond during the pendency of the investigation should be in the amount of 460 percent of the entered value of the imported articles concerned.

Order

Accordingly, it is hereby ORDERED THAT—

1. Reclosable plastic bags and tubing which are manufactured abroad according to a process which, if practiced in the United States, there is reason to believe would infringe claim 1 of U.S. Letters Patent 3,945,872 are excluded from entry into the United States during the pendency of the investigation, except under bond as provided in paragraph 3 below and except as may be licensed by the patent owner; 1/

2. Reclosable plastic bags and tubing with respect to which there is reason to believe they infringe U.S. Trademark Registration No. 946,120 are excluded from entry into the United States during the pendency of the investigation, except under bond as provided in paragraph 3 below and except as may be licensed by the trademark owner; 2/

3. The articles covered by this Order are entitled to entry under bond in the amount of 460 percent of the entered value of such articles during the pendency of the investigation;

1/ The Commission has determined that there is no reason to believe that Meditech International Co.; Polycraft Corp.; Euroweld Distributing; Chung Kong Industrial Co., Ltd.; Gideons Plastic Industrial Co., Inc.; Ideal Plastic Industrial Co., Ltd.; Lien Bin Plastics Co., Ltd.; Ta Sen Plastic Industrial Co., Ltd.; Teck Keung Manufacturing, Ltd.; Insertion Advertising Corp.; Ka Shing Corp.; Tracon Industries Corp.; Nina Plastic Bags, Inc.; Keron Industrial Co., Ltd.; or Daewang International Corp. are infringing claim 1 of U.S. Letters Patent 3,945,872.

2/ The Commission has determined that there is no reason to believe that Lim Tai Chin Pahathet Co., Ltd.; Teck Keung Manufacturing, Ltd.; Insertion Advertising Corp.; or Tracon Industries Corp. are infringing U.S. Trademark Registration No. 946,120.

4. Notice of this Order be published in the Federal Register and this Order and the Commission Opinion in support thereof be served upon each party of record to this investigation and upon the Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury; and

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

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: November 30, 1987

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	
CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING	Inv. No. 337-TA-266 TEMPORARY RELIEF PHASE OF INVESTIGATION

COMMISSION MEMORANDUM OPINION

Views of Chairman Liebeler, Vice Chairman Brunsdale, and Commissioner Lodwick

On August 31, 1987, the presiding administrative law judge (ALJ) issued an initial determination (ID) granting in part a motion for temporary relief filed by complainant Minigrip Inc. (Minigrip) under section 337(e) (19 U.S.C. § 1337(e)) of the Tariff Act of 1930. On October 2, 1987, the Commission determined not to review that ID. This opinion discusses the Commission's determinations regarding temporary relief, the public interest, and bonding.

Procedural History

On March 25, 1987, complainant Minigrip filed a complaint and a motion for temporary relief under section 337. Complainant alleged a violation of section 337 in the unlawful importation and sale of certain reclosable plastic bags and tubing manufactured abroad according to a process which, if practiced in the United States, would infringe claims 1-5 of U.S. Letters Patent 3,945,872 (the '872 patent) and bearing a color line mark infringing U.S. Trademark Registration No. 946,120 (the colorline trademark), the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

On April 21, 1987, the Commission instituted an investigation based on Minigrip's complaint. A notice of investigation was published in the Federal

Register, 52 F.R. 15568 (April 29, 1987). Twenty firms were named initially as respondents: Meditech International Co. (Meditech), Polycraft Corp. (Polycraft), Euroweld Distributing (Euroweld), Chung Kong Industrial Co., Ltd. (Chung Kong), Gideons Plastic Industrial Co., Inc. (Gideons), Ideal Plastic Industrial Co., Ltd. (Ideal), Lien Bin Plastics Co., Ltd. (Lien Bin), Ta Sen Plastic Industrial Co., Ltd. (Ta Sen), Teck Keung Manufacturing, Ltd. (Teck Keung), Insertion Advertising Corp. (Insertion), Ka Shing Corp. (Ka Shing), Tracon Industries Corp. (Tracon), Nina Plastic Bags, Inc. (Nina), Lim Tai Chin Pahathet Co., Ltd. (Lim Tai Chin), Siam Import-Export Ltd. (Siam), Rol-Pak Sdn Bhd (Rol-Pak), Chang Won Chemical Co., Ltd. (Chang Won), Hogn Ter Product Co., Ltd. (Hogn Ter), C.A.G. Enterprise Pte. Ltd. (C.A.G.), and Kwang Il. Subsequently, Keron Industrial Co., Ltd. (Keron) and Daewang International Corp. (Daewang) were added as respondents.

The presiding ALJ held an evidentiary hearing which commenced on July 6, 1987, and continued through July 10, 1987, at which complainant, respondents, and the Commission investigative attorney were afforded an opportunity to be heard. On August 31, 1987, the ALJ issued his ID granting in part complainant's motion for temporary relief. The ALJ determined that there was reason to believe that certain respondents and nonparties will violate section 337 in the interim period between the expiration on December 1, 1987, of the exclusion order issued at the conclusion of ITC Inv. No. 337-TA-110, Certain Methods for Extruding Plastic Tubing, and the conclusion of the current investigation. In particular, he found reason to believe that seven respondents 1/ and nonparty Harbona Ltd. (Harbona) will infringe claim 1 of

1/ The seven respondents as to which there was found reason to believe they infringe the '872 patent were Chang Won, Hogn Ter, Kwang II, Lim Tai Chin, Rol-Pak, Siam Import, and C.A.G.

the '872 patent, and that 16 of the 20 original respondents, 2/ plus respondents Keron and Daewang and nonparty Harbona will infringe the colorline trademark. On October 2, 1987, the Commission determined not to review that ID, and the ID thereby became the Commission's determination, with the exceptions noted in the Commission's notice of nonreview.

Notice of the Commission's decision not to review the ID was published in the Federal Register, 52 F.R. 38284 (Oct. 15, 1987). In that notice, the parties and interested members of the public were requested to file briefs on the issues of remedy, the public interest, and bonding. Complainant, certain respondents, the Commission investigative attorney, and one nonparty submitted briefs. No other submissions were received.

Discussion

I. Remedy

We have determined to issue a general temporary exclusion order (TEO), prohibiting the importation, except under bond, of (i) all reclosable plastic bags and tubing manufactured abroad according to a process which, there is reason to believe, would infringe claim 1 of the '872 patent if practiced in the United States; and (ii) all reclosable plastic bags and tubing which, there is reason to believe, infringe the colorline trademark.

The Commission set out standards for issuing general exclusion orders in Certain Airless Paint Spray Pumps and Components Thereof (Spray Pumps), Inv. No. 337-TA-90, USITC Pub. No. 1199, at 17-19. Under Spray Pumps, a general

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2/ The four respondents as to which there was found no reason to believe they infringe the colorline trademark are Lim Tai Chin, Teck Keung, Insertion, and Tracon.

exclusion order is appropriate when there is proof of (1) a widespread pattern of unauthorized use of the patented 3/ invention, and (2) "certain business conditions from which one might reasonably infer that foreign manufacturers other than respondents to the investigation may attempt to enter the U.S. market with infringing articles.".

In this investigation, we have found that there is reason to believe several respondents and a nonrespondent will import reclosable plastic bags which infringe the '872 patent and/or the colorline trademark, and that several firms have already imported and sold such bags despite the exclusion order issued at the conclusion of ITC Inv. No. 337-TA-110. The first element of Spray Pumps appears to be satisfied.

Complainant's sales and efforts to expand its capacity attest to the existence of an established demand for the product. As noted above, we have found that imports from respondents and a nonparty as to which there was found reason to believe they infringe the '872 patent and/or the colorline trademark have already been marketed in the United States. We have further found that significant foreign production capacity for producing infringing bags already exists, part of which was found to be controlled by a nonparty. Another nonparty has filed remedy comments. Thus the second element of Spray Pumps appears to be established and business conditions appear appropriate for the issuance of a general TEO.

Complainant also seeks the issuance of cease and desist orders, although such a request did not appear in complainant's motion for temporary relief.

3/ The Spray Pumps criteria are couched in terms of investigations involving patents, but they apply with equal validity to investigations involving trademarks.

We have determined not to issue such orders, since the existing exclusion order, issued at the conclusion of ITC Inv. No. 337-TA-110, should have limited the amount of importation and inventory buildup by importers. We do not believe it appropriate to adopt the position of one nonparty and issue only cease and desist orders, since the main sources of infringing bags are overseas producers rather than domestic importers' inventories. A TEO is a more appropriate and effective form of relief as to foreign manufacturers, considering the potential difficulty of enforcing a cease and desist order issued to a foreign entity.

II. Public Interest

The Commission may issue a TEO only after "considering the effect of exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." 19 U.S.C. 1337(e). We are aware of no public interest factors that would preclude issuance of the aforementioned general TEO.

Certain respondents and a nonparty argue that the public interest in fostering competition and the savings to U.S. consumers from lower plastic bag prices require the exclusion of noninfringing imports from the coverage of the relief. We believe that respondents' and nonparty's concern is adequately addressed in the proposed relief, since only infringing imports would be covered by such relief.

III. Bonding

In determining the amount of the bond, the Commission looks to the amount sufficient to "offset any competitive advantages resulting from the unfair

method of competition or unfair act enjoyed by persons benefitting from the importation." S. Rep. No. 1298, 93d Cong., 2d Sess. 198 (1974). We have determined to impose a bond of 460 percent of the entered value of the articles in question.

Our determination of the amount of the bond is based on calculation of an average of the amounts by which infringing imports undersell complainant's product, as calculated by the Commission investigative attorney. We note that the U.S. Customs Service has requested that bonds be calculated as a percentage of entered value.

Complainant argued for a bond of 850 percent of entered value, which would match the largest margin of underselling among the respondents. We have determined not to adopt complainant's position because a bond of 460 percent of entered value will generally offset the advantage of persons benefitting from importation. Although, unlike the higher bond recommended by complainant, it will not offset the underpricing of the most extreme underseller, it will also not require other, less extreme undersellers to post bonds greater than their underpricing warrants.

Certain respondents argued for a bond equal to 100 percent of the f.o.b. foreign port value of the affected imports, because that was the amount imposed in ITC Inv. No. 337-TA-22, Certain Reclosable Plastic Bags, and because imports have allegedly not yet established a market in the United States. We do not find this argument persuasive, since the bond in the more recent ITC Inv. No. 337-TA-110 was set at 400 percent, and respondents have advanced no other reason to support their argument.

DISSENTING VIEWS OF COMMISSIONER ECKES AND COMMISSIONER ROHR

We respectfully dissent from the views of our colleagues that the appropriate interim relief in this investigation is the issuance of temporary general exclusion orders. Our decision that limited exclusion orders are more appropriate is based on our review of the facts of this investigation, the interests of the parties, and practical problems associated with enforcing general exclusion orders in the context of this investigation.

Preliminarily, it should be noted that the Commission has concurred in the ALJ's factual conclusion that there is reason to believe that recloseable plastic bags imported by some, but not all, of the respondents in this investigation were manufactured abroad by a process which, if practiced in the United States, would infringe complainant's patent. However, it must also be noted that it has not been established that complainant's process results in a product easily distinguishable from products produced by other processes. Additionally, there is reason to believe that recloseable plastic bags imported by some, but, again, not all, respondents infringe complainant's registered "colorline" trademark. Finally, there are other manufacturers, who are not respondents, who manufacture recloseable plastic bags that are very similar in appearance to those imported by respondents and manufactured by complainant.

With these facts in mind, it is necessary to consider what remedy(ies) may be appropriate to provide adequate relief to complainant. First, we must consider how a general exclusion order directed toward bags that infringe the particular patent in controversy would operate. Commission exclusion orders are enforced by the Customs Service. In essence, the Commission recommends and the President may direct the Customs Service to prevent the importation of the articles specified in the order. The order itself is, and must be,

defined in terms of articles of commerce. If the patent in question is a product patent, this definition is provided by reference to the patent itself. Customs need only compare the imported product to the product described in the patent to determine whether it is encompassed by the order.

In a situation involving a process patent, however, the language of the order is similar, but the result is, of necessity, different. In its process patent exclusion orders, the Commission defines the scope of the order as articles manufactured abroad by the infringing process. Customs cannot, however, in practice, enforce an order in such terms unless it makes a determination in the case of each imported article that the process by which it was manufactured is the one covered by the patent. If the process produces an article that is unique, the order can be enforced by keeping out that unique article. In essence, the order is enforced as if it were a product patent.

If a process does not result in a product which specific characteristics, it is difficult, if not impossible, to determine whether a specific article is produced in accordance with the prohibited process. In such a situation there are only two alternatives for Customs. Either it can attempt to require certification from importers that a particular product is not produced according to a particular process, or it can rely on the Commission to provide it with a list of specific manufacturers who produce according to the proscribed method and enforce the order by prohibiting entry of their specific goods.

The first option is extremely burdensome to legitimate trade. It may, of course, be justified by the facts of a particular investigation. The second is the precise procedure which would be followed if the Commission were to issue a limited exclusion order. The questions which must be answered in this case

are: 1) does the particular process generate a product distinguishable from products made by other processes; and 2) could a general exclusion order be enforced in any manner other than by excluding the products of specific manufacturers.

With respect to the first question, it has not been established that there is only one process for producing recloseable plastic bags. Further, as evidenced by the Commission's experience with complainant's related process patents, it is extremely difficult to set forth any specific characteristics of bags produced by the patented process[1] that would distinguish them from bags produced by the processes of those manufacturers as to whom there is no reason to believe are violating the patent.[2]

In response to the second question, the only way in which this exclusion order could practically be enforced is in the form of a limited exclusion order.[3] We should not attempt to do more than the Commission and the

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[1]With respect to complainant's prior patents that are currently subject to an exclusion order, a five point test is employed by Customs to determine if the bags are produced in accordance with the patented method. It is not clear that this five point test can be applied in the present case to distinguish the current method of production.

[2]It may be suggested that the Commission in effect create a reverse exclusion order prohibiting all importation except for those from manufacturers as to whom there is no reason to believe that they violate the statute. Such an order stands the statute on its head. The Commission is not empowered to authorize importation but only to exclude it in accordance with the statute. We find no authority in the statute for such a reverse exclusion order.

[3]In other cases where it is clear that Customs will have difficultly enforcing a Commission order because of difficulty in determining whether or not goods are covered by the terms of the order, the Commission has noted the possibility of seeking advisory opinions. Such advisory opinions would, of course, be available under the terms of the Commission rules whether or not the possibility were noted in the order. In any event, such advisory opinions are in the nature of a Commission determination that particular goods infringe the relevant statutory rights. Because they involve a formal proceeding to determine the question of infringement, they are not practical (i.e. they would take too long) in the context of a temporary exclusion order, which extends

Customs Service are, as a practical matter, capable of, nor should we delude complainant into believing that it is getting more than it can, by statute and in reality, expect.

The proposed general exclusion order cannot be, and is not, phrased so that it can be enforced by Customs by merely denying entry to all recloseable plastic bags. The order denies entry only to those bags manufactured in accordance with the specific process. Customs must have some basis for determining if any particular importation is of products manufactured in accordance with that process. We can see no basis for such a determination that is workable as a temporary order other than to have Customs employ a list of specific manufacturers, provided in the order, whose goods are to be excluded. However, that is precisely what a limited exclusion order would accomplish. We, therefore, conclude that a limited exclusion order is the most appropriate remedy relating to complainant's patent.

The situation with respect to complainant's trademark is slightly different. As a practical matter, this trademark is easy to distinguish. For those respondents as to whom there is no reason to believe that they are infringing the trademark, that determination may be made by observing that there is no colorline on the imported bag. A general exclusion order directed to the trademark could, therefore be easily enforced.

In this investigation, complainant already has, irrespective of this proceeding, an exclusion of products violating that trademark under Customs' own statutes and regulations. Complainant owns a registered trademark. It is registered with the U.S. Patent and Trademark Office and, importantly, recorded with Customs. Customs is already under an obligation to

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only during the pendency of a Commission investigation.

permanently exclude any products violating that trademark. This exclusion operates in the same manner that a general exclusion order issued by the Commission would operate. Complainant, therefore, obtains nothing it doesn't already have if the Commission were to order a temporary exclusion of products, which, under its own authority, Customs must already generally and permanently exclude. On the other hand, a limited exclusion order, while not detracting from Customs' general obligation to exclude products imported by anyone violating the trademark, will provide Customs with a list of specific companies whose importations can be monitored.

Thus, in this investigation, only a limited exclusion order will provide the complainant with adequate relief that does not encompass goods whose importation does not violate section 337. For these reason, we determine that a limited order is appropriate.

CERTAIN RECLOSABLE PLASTIC
BAGS AND TUBING

Inv. No. 337-TA-266

Certificate Of Service

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF ISSUANCE OF TEMPORARY EXCLUSION ORDER, was served upon Cheri Taylor, Esq., and Jeffrey Gertler, Esq., and upon the following parties via first class mail, and air mail where necessary, on December 1, 1987.

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PUBLIC VERSION
INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	)	
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CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING	)	Investigation No. 337-TA-266
	)	
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Initial Determination

Paul J. Luckern, Administrative Law Judge

Pursuant to the Notice of Investigation in this matter (52 Fed. Reg. 15568, April 29, 1987), this is the administrative law judge's initial determination, under Commission Rule 210.53 (19 C.F.R. 210.53), with respect to complainant's Motion for Temporary under Rule 210.24(e) (Motion Docket No. 266-1). The administrative law judge hereby determines, after a review of the record developed, that there is a reason to believe that there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337) (section 337), in the alleged unauthorized importation into and sale in the United States of certain reclosable plastic bags and tubing with the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States.

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Cheri M. Taylor, Esq., and Jeffrey L. Gertler, Esq.,

August 31, 1987

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ABBREVIATIONS

CPF	Complainant's Proposed Finding
C Post	Complainant's Post Hearing Brief
C Post R	Complainant's Reply Brief
CPX	Complainant's Physical Exhibit
CX	Complainant's Exhibit
FF	Findings of Fact
RPF	Respondents Meditech's Proposed Finding
R Post	Respondents Meditech's Post Hearing Brief
R Post R	Respondents Meditech's Reply Brief
RPX	Respondents Meditech's Physical Exhibit
RX	Respondents Meditech's Exhibit
S Pre H	Staff's Prehearing Brief
SPF	Staff's Proposed Finding
S Post	Staff's Post Hearing Brief
S post R	Staff's Reply Brief
SPX	Staff's Physical Exhibit
SX	Staff's Exhibit
Tr	Transcript

PROCEDURAL HISTORY

On March 25, 1987, complainant Minigrip, Inc. (Minigrip) filed a complaint with the Commission under section 337. The complaint, as supplemented on April 9, 1987, alleged unfair methods of competition and unfair acts in the importation into and sale in the United States of certain reclosable plastic bags and tubing (1) manufactured abroad by a process which, if practiced in the United States, would infringe claims 1-5 of the U.S. Letters Patent 3,945,872 (the '872 patent), and (2) bearing a color line mark which infringes U.S. Trademark Registration No. 946,120 (the '120 trademark). It further alleged that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The complainant requested that the Commission institute an investigation, conduct temporary relief proceedings (Motion Docket No. 266-1) and issue a temporary exclusion order prohibiting importation of the articles in question into the United States, if an investigation instituted by the Commission extends beyond December 1, 1987.[1/] After a full investigation, the complainant requested

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1/ In January, 1977, the Commission issued an exclusion order based upon a complaint of Minigrip in Investigation No. 337-TA-22 excluding from entry into the United States reclosable plastic bags covered by claims of U.S. Patent No. Re 28,969. That exclusion order expired on August 3, 1982 with the expiration of said patent. In September, 1982, the Commission issued an exclusion order based upon a complaint of Minigrip in Investigation No. 337-TA-110 excluding from entry into the United States reclosable plastic bags made in accordance with methods covered by the claims of U.S. Patent Nos. Re 26,991 (the Luca patent which is involved in respondents Meditech's enforceablity allegation as to the '872 patent, and in their defense as to alleged infringement), Re 28,959 and Re 29,208. At the time Minigrip brought its action for that exclusion order, Minigrip did not own the '872 patent (FF 29) and hence while licensed thereunder, it did not have the right to institute any action under the '872 patent. The 337-TA-110 exclusion order expires on December 1, 1987,

(Footnote continued to page 2)

that the Commission issue a permanent exclusion order and a permanent cease and desist order.

A notice of investigation was published on April 29, 1987 (52 Fed. Reg. 15568). The scope of the investigation, as to subject matter, is defined as in the complaint.

The notice of investigation named the following respondents:

C.A.G. Enterprise Pte. Ltd. of Singapore (C.A.G.)

Chang Won Chemical Co., Ltd. of Korea (Chang Won)

Chung Kong Industrial Co., Ltd. of Hong Kong (Chung Kong)

Euroweld Distributing of New Jersey (Euroweld)

Gideons Plastic Industrial Co., Ltd. of Taiwan (Gideons Plastic)

Hogn Ter Product Co., Ltd. of Taiwan (Hogn Ter)

Ideal Plastic Industrial Co., Ltd. of Taiwan (Ideal Plastic)

Insertion Advertising Corp. of New York (Insertion)

Ka Shing Corp. of New York (Ka Shing)

Kwang Il of Korea (Kwang II)

Lim Tai Chin Pahathet Co. Ltd. of Thailand (Lim Tai)

(Footnote continued from page 1)
with the expiration of Re 28,959. Re 26,991 and Re 29,208 have already expired. Minigrip is now seeking a temporary exclusion order in view of the fact that the 337-TA-110 exclusion order, now in effect, will expire on December 1, 1987 with the expiration of Re 28,959. It was not expected that this investigation would be concluded until after December 1, 1987. The temporary exclusion order is said to be requested in order to maintain the status quo (i.e., exclusion of reclosable plastic bags) during the interim period, between the expiration of the 337-TA-110 exclusion order and any permanent exclusion order that may issue as a result of the present investigation. Complainant has argued that it is abundantly clear that once the 337-TA-110 exclusion order expires on December 1, 1987, there will be a deluge of infringing foreign manufactured reclosable plastic bags imported into the United States offered at prices substantially less than domestically produced bags (C Post at 7,8 and 28, FF 51, 52).

While "Meditech" refers to the 337-TA-110 exclusion order as "overly broad", (R Post at 2), the only issues before this administrative law judge are those raised by Motion No. 266-1.

Lien Bin Plastics Co., Ltd. of Taiwan (Lien Bin)

Meditech International Co. of Colorado (Meditech)

Nina Plastic Bags, Inc. of Florida (Nina Plastic)

Polycraft Corporation of California (Polycraft)

Rol-Pak Sdn Bhd of Malaysia (Rol-Pak)[2/]

Siam Import-Export Ltd. of Thailand (Siam Import)

Ta Sen Plastic Industrial Co., Ltd. of Taiwan (Ta Sen)

Teck Keung Manufacturing Ltd. of Hong Kong (Teck Keung)[3/]

Tracon Industries Corp. of New York (Tracon)

A hearing on complainant's Motion No. 266-1 commenced on July 6, 1987 and continued thru July 10, 1987. Complainant, the staff and respondents Euroweld, Meditech and Polycraft (collectively referred to as "respondents Meditech") appeared at the hearing. Posthearing submissions were submitted by said parties. Order No. 17 reopened the record and admitted into evidence respondents Meditech's RPX-2A identified as five still photographs of certain frames of the video cassette RPX-2, which was admitted into evidence at the

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2/ A letter dated May 5, 1987 from Rol-Pak to the "Trade Commission", stated that we have just received "a pile of papers" from the United States regarding the investigation; that "[w]e have absolutly no idea what all this is about as we have not exported our products to the United States in the past" and "[k]indly leave us out as RESPONDENTS."

3/ A letter dated July 14, 1987 to the Secretary from Teck Keung indicated that Teck Keung hoped that the Commission "will exceptionally grant us to be excluded from the Exclusion Order;" that if the "competition is too strong, I agree will damage the industry in U.S.A. But if allow some competition in the market, I feel this will assist the industry in the U.S.A. to grow." A letter dated August 12, 1987 to the Secretary from Teck Keung sent samples from "our production run" and stated we "do not think we are infringing the patent as our male and female profile is different" and that "the patent expired years ago." It further stated that if "you will finally decide to extend the Exclusion Order, we wish to be excluded from the Exclusion Order. We will limit ourselves to ship to U.S.A. maximum 30,000 kgs. of bags per month. Kindly approve this request"

hearing.[4/] Order Nos. 19, 20 and 21 which issued August 31, 1987, respectively have set a procedural schedule for any permanent exclusion order proceedings, found no violation of the protective order (Order No. 2) and denied respondents Meditech's Motion No. 266-14 insofar as it related to the admissibility of respondents RX 97.

This initial determination is based on the evidentiary record compiled at the hearing and the exhibits admitted into evidence. The administrative law judge has taken into account his observation of witnesses who testified live at the hearing. Proposed findings submitted by the parties participating at the hearing, but not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters. The findings of fact include references intended to serve as guides to the testimony and exhibits supporting the findings of fact. The references do not necessarily represent complete summaries of the evidence supporting each finding.

JURISDICTION

The Commission has in rem and subject matter jurisdiction (FF 1, 3). It has in personam jurisdiction over at least respondents Meditech, Polycraft and Euroweld (FF 2, 4).[5/]

OPINION

This opinion relates only to complainant's Motion No. 266-1 for temporary relief.

4/ The administrative law judge has accepted both uncorrected and corrected copies of posthearing briefs from respondents Meditech. See Order No. 16.

5/ See Asahi Metal Industry Co. v. Superior Court __ U.S. __, 107 S.Ct. 1026, 94 L.2d 92 (1987). See, also Order No. 9 which issued August 6, 1987 in Certain Minoxidil Powder, Salts and Compositions for Use in Hair Treatment, Inv. No. 337-TA-267.

Standard For Grant of Temporary Relief

Section 337(e) of the Tariff Act of 1930 governs the issuance of temporary relief requested by complainant. It provides:

> (e) If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry,. . .except that such articles shall be entitled to entry under bond determined by the Commission and prescribed by the Secretary. (Emphasis added).

In Certain Coin-Operated Audiovisual Games and Components Thereof (Viz., Rally-X and Pac Man) Inv. No. 337-TA-105 USITC Pub. 1220 (February 1982), the Commission balanced the following four factors to determine whether temporary relief should issue:

> 1. Has the petitioner made a sufficient showing that it is likely to prevail on the merits?
>
> 2. Has the petitioner shown that without such relief it will suffer immediate and substantial harm?
>
> 3. Would the issuance of temporary relief substantially harm other parties interested in the proceedings?
>
> 4. Where lies the public interest?[6/]

6/ The four factors considered by the Commission in Rally-X have been incorporated into the Commission Rules. See Commission Rule 210.24(e)(1) which states that the motion for temporary relief inter alia shall contain a detailed statement of facts bearing on:

> (1) Complainant's probability of success on the merits;

(Footnote continued to page 6)

Id. p. 5.

In the later Certain Fluidized Supporting Appartus and Components Thereof 225 U.S.P.Q. 1211 (1984), the Commission in exercising its authority under section 337(e) undertook a two part analyses. The first part analysis is whether the complainant established a reason to believe that there is a violation of section 337. The second part analysis is whether, if there is a reason to believe that there is a violation, it is appropriate to exercise the Commission's discretion and award temporary relief. Id. at 1213.

A finding that the four factors indicate that temporary relief should or should not issue occurs only after there is a finding that there is a reason to believe a violation exists. Id. at 1213.

In balancing the four factors, an evaluation of the first factor, i.e. probability of success on the merits, is closely related to the substantive determination as to whether a reason to believe a violation exists. However while in the latter determination it is whether a threshold has been met, in the determination involving the first factor it is a measure of the extent to which that threshold has been exceeded. Moreover the first factor, viz the probability of success, does vary from case to case Id. at 1213, 1214.

(Footnote continued from page 5)

(ii) Immediate and substantial harm to the domestic industry in the absence of the requested temporary relief;

(iii) Harm, if any, to the proposed respondents if the requested temporary relief is granted; and

(iv) The effect, if any, that the issuance of the requested temporary relief would have on the public interest.

The practice of balancing complainant's probability of success on the merits with equitable considerations had been adopted by the Commission in Certain Apparatus For the Continuous Production of Copper Rod 214 U.S.P.Q. 892 (1980).

The fourth factor, i.e. the public interest, in Fluidized was said to refer at least to the enumerated public interest factors in sections 337(d)-(f), viz. the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. The legislative history indicates that those enumerated factors are "overriding considerations in the administration of this statute" and that if the effect of the issuance of relief would have a greater adverse impact on the public interest than would be gained by protecting the intellectual property holder, the relief should not be granted. Id. at 1214.

The two part analyses were followed by the Commission in the later In re Certain Floppy Disk Drives and Components Thereof, 227 U.S.P.Q. 982,984 (1985).

Reason to Believe A Violation Exists

I. Unfair Act

A. The '872 Patent

Complainant Minigrip argues that once the 337-TA-110 exclusion order expires on December 1, 1987 there is a reason to believe that there will be a deluge of imported foreign manufactured reclosable plastic bags infringing the '872 patent (C Post at 88). The '872 patent titled "Making Plastic Film With Profiles and Opening Means for Bags" issued on March 23, 1976 (FF 26). It was assigned to Minigrip in February 1984 (FF 29).

1. The Claimed Invention in Issue

The claimed invention in issue of the '872 patent relates to improvements in forming the profiles of plastic film such that the shape of the profiles can be more completely controlled at relatively high extrusion speeds and a precise shape thus maintained to interlock accurately and strongly with another mating profile. A key to the claimed invention is the discovery that

an important factor in maintaining the shape of the profile is controlling the cooling thereof after the profile has adhered to the film (FF 33). For this purpose a coolant jet mechanism is provided for directing a flow of coolant, preferably air, against the heated profile on the film, which profile is still in the somewhat warm, plastic, formative stage, to remove heat therefrom. It has been found that the coolant flow will influence the shape of the profile by controlling the location where the coolant flow is directed, the direction at which the flow engages the profile and the pressure or velocity at which the flow engages the profile (FF 34).

The sole independent claims 1 and 5 in issue read :

> 1. In the method of making plastic film with shaped profiles on the surface comprising the steps of: extruding a continuous length of an interlocking profiles from a die opening with the profile having a precise shape for interlockingly engaging with another profile; and directing a flow of coolant onto the extruded profile of warm plastic and adjusting the direction of flow of coolant relative to the direction of movement of the profile for controlling the cooling rate and shape of the profile.
>
> 5. In the method of making plastic film with shaped profiles on the surface comprising the steps of: extruding a continuous length of an interlocking profile from a die opening with the profile having a precise shape for interlockingly engaging with another profile; and directing a flow of coolant against the heated profile and adjusting the pressure of coolant flow for controlling the cooling rates and shape of the profile.

Remaining dependent claims 2 to 4 in issue and dependent on claim 1 read:

> 2. In the method of making a plastic film with shaped profiles on the surface in accordance with claim 1,wherein said direction is adjusted through an arc of 180 degrees.
>
> 3. In the method of making plastic film with shaped profiles on the surface in accordance with the steps of claim 1, wherein the flow of coolant is adjusted in an arc extending in the direction of travel of the profile length.
>
> 4. In the method of making plastic film with shaped profiles on the surface in accordance with the steps of claim 1, wherein the flow of coolant is adjusted in an arc

extending transversely of the direction of movement of the profile length.

(FF 31) -

On April 25, 1986 Minigrip filed for reexamination by the Patent Office of the '872 patent. Reexamination was requested of all of claims 1 to 8 of the '872 patent in view of several U.S. patents, including Luca Re 26,991 (FF 39). In the reexamination procedure the patentability of claims 1 to 5 was confirmed without amendment of those claims (FF 39 to 47). The reexamination certificate issued on May 5, 1987. (FF 48).

2. Enforceability of the '872 Patent

Under 35 U.S.C. Section 282 a patent duly issued by the Patent Office is entitled to a presumption of validity. The presumption of validity flows from "the basic proposition that a government agency such as the Patent Office was presumed to do its job." American Hoist & Derrick Co. v. Sowa & Sons. 725 F.2d 1350, 1359, 220 U.S.P.Q. 763, Fed. Cir. 1984) cert denied 224 U.S.P.Q. 520 (1984). Challengers of validity must overcome this presumption by "clear and convincing evidence." Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 894, 221 U.S.P.Q. 669, 672-673 (Fed. Cir. 1984); Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1516, 220 U.S.P.Q. 929, 934 (Fed. Cir. 1984). In addition, the burden to overcome the presumption of validity of a reexamined patent is an even heavier one. Fromson v. Advance Offset Plate, Inc., 775 F.2d 1549, 1555, 225 U.S.P.Q. 26, 33 (Fed. Cir. 1985); In re Certain Headboxes and Papermaking Forming Sections for the Continuous Production of Paper and Components Thereof, 213 U.S.P.Q. 291, 297 (1981).

In their posthearing submissions, respondents Meditech argued that it is textbook law that the invalidity of the patent can be established if a clear showing of inequitable conduct before the Patent Office is established and

that claim 5 of the '872 patent is unenforceable (R Post at 21). Thus it is argued that claim 5 specifically claims as the inventive method "adjusting the pressure of coolant flow for controlling the cooling rate and shape of the profile"; that complainant, before the Patent Office in arguing the patentability of claim 5 over Luca Re 26,991 patent, specifically stated in June 1986 that "Also, Luca fails to teach... adjust[ing] the pressure of the coolant as required by Claim 5"; that the Luca patent shows exactly the same type of valve control for the air coolant as the valve control of the '872 patent; and that the Luca patent specifically states that the cooling rate can be controlled by controlling the flow of air to the cooling pipes through the supply lines which are provided with flow control valves. Accordingly it is argued that Minigrip misled the Patent Office as to the critical feature of claim 5. (R Post at 21, 22).[7/]

Complainant, citing Atlas Powder Co. v. E. Du Pout de Nemours, 750 F.2d 1569, 1577-78, 224 U.S.P.Q. 409, 414-415 (Fed. Cir. 1984), argues that a party asserting inequitable conduct has a heavy burden to prove by clear and convincing evidence that there was an intentional misrepresentation or a withholding of a material fact from the Patent Office (C Post at 17). It is argued that respondents Meditech have not met their burden; that respondents Meditech do not argue that complainant did not disclose the Luca patent to the Patent Office examiner which complainant did; that instead, respondents Meditech argue that they, not the Patent Office, disagree with Minigrip's interpretation of the Luca patent. Complainant argues that while respondents Meditech purport to quote from Minigrip's arguments before the Patent Office on the patentability of the '872 claims over Luca, respondents omit Minigrip's

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7/ Respondents Meditech in their posthearing submissions do not argue that any claims in issue are invalid under 35 U.S.C. Sections 102 or 103.

principal argument which was that Luca fails to disclose "the concept of controlling the profile shape and cooling rate"; and that there is no question that the Luca patent is not concerned with controlling the profile shape and is only concerned with a cooling. It is argued that while respondents would have the administrative law judge believe that the Patent Office examiner did not have and/or did not read the Luca patent, the Patent office examiner refers at length to the Luca patent and correctly characterizes complainant's position on Luca, viz. "in other words, the cooling step in the instant claims is utilized to shape, not solidify, the profiles [Patent office action dated October 9, 1986 at 3]"; and that while respondents Meditech claim that the examiner was "misled" in that col. 4, lines 9-16 of the Luca patent was not pointed out to the examiner, in fact, the examiner in his June 13, 1986 Order Granting Request for Reexamination, at 3, lines 4-5 refers to col. 4 through line 20 of the Luca patent which would include col. 4, lines 9-16 (C Post R at 10).

Establishing that a patent was procured by fraud or with such conduct as to render it unenforceable requires clear, unequivocal, and convincing evidence of an intentional misrepresentation or withholding of a material fact from the Patent Office. Orthopedic Equipment Co. v. All Orthopedic Appliance, 707 F.2d 1376, 1383, 217 U.S.P.Q. 1281, 1286 (Fed. Cir. 1983); Square Liner 360, Inc. v. Chisum, 691 F.2d 362, 374, 216 U.S.P.Q. 666, 674-75 (8th Cir. 1982).

An applicant's misrepresentation will not in itself render a patent unenforceable. Rather fraud is to be determined only by a careful balancing of intent in light of materiality.[8/] American Hoist & Derrick v. Sowa & Sons, Inc. 725 F.2d at 1363, 220 U.S.P.Q. at 774.

8/ Inequitable conduct requires proof of a threshold intent. Simple negligence, oversight, or an erroneous judgement made in good faith is insufficient proof. J.P. Stevens & Co. v. Lex Tex Ltd., 747 F.2d 1553, 223 U.S.P.Q. 1089, 1092 (Fed. Cir. 1984); Orthopedic Equipment Co. v. All Orthopedic Appliance, 707 F.2d at 1383, 217 U.S.P.Q. at 1286.

The critical portion of claim 5 in issue reads:

> "and directing a flow of coolant against the heated profile and adjusting the pressure of coolant flow for controlling the cooling rates and shape of the profile." (Emphasis added)

(FF 31). Complainant in the reexamination proceeding before the Patent Office examiner did not argue merely that Luca Re 26,991 (which was brought to the examiner's attention by complainant in the reexamination proceeding (FF 39)) fails to adjust the pressure of the coolant which is taught by Luca at col. 4, lines 9-12 (FF 44). Rather complainant argued in the reexamination proceeding that Luca fails to teach (1) the concept of controlling the profile shape and cooling rate by adjusting the direction of coolant relative to the movement of the profile and also (2) the adjustment of the pressure of the coolant "as required by claim 5". (FF 45). Claim 5 requires "adjusting the pressure of coolant flow" which is directed against the profile "for controlling the cooling rate and shape of the profile." (FF 31). Moreover, as pointed out by complainant, the examiner in the reexamination procedure specifically referred to col. 4 through line 20 of the Luca patent (FF 43) which would include the portion of the Luca patent that respondents Meditech rely in their allegation that complainant committed inequitable conduct.

Based on the foregoing, the administrative law judge finds that respondents Meditech, on the present record, have not proved by clear, unequivocal and convincing evidence that the '872 patent is not enforceable due to any alleged inequitable conduct.

3. Infringement

Complainant requests a temporary exclusion order prohibiting importation of reclosable plastic bags from December 1, 1987 to April 29, 1988 (the interim period). Because complainant is the owner of the '872 patent, complainant has the burden of proving by a preponderance of evidence that

there is a reason to believe that infringing bags will be imported. Envirotech Corp. v. Al George, Inc., 730 F.2d 753, 221 U.S.P.Q. 473, 477 (Fed. Cir. 1984); Roberts Dairy Co. v. United States, 530 F.2d 1342, 1357, 182 U.S.P.Q. 218, 255 (Ct. Cl. 1976); See Chisum Patents Section 18.06, Vol. 4 (1982).

Relying on a Nocek affidavit, complainant argues that there is a reason to believe that each of the named manufacturer respondents is infringing at least claims 1 and/or 5 of the '872 patent and that at least manufacturer respondents Chang Won, Chung Kong, Hogn Ter, Kwang II, Lim Tai, Rol-Pak and Siam Import are believed to be infringing claims 2 to 4 of the '872 patent (C Post at 18).

The staff argues that there is a reason to believe that various respondent manufacturers produce reclosable plastic bags by the process which, if practiced in the United States, would infringe the '872 patent; that the staff's conclusion is based upon Mr. Nocek's discussions with, and inspections of the facilities of, foreign manufacturers of both reclosable plastic bags and equipment with which to make such bags, and upon evidence respecting the economic advantages associated with use of the process disclosed in the '872 patent. In the case of respondent Chung Kong,

is said also to support a finding that there is a reason to believe Chung Kong will use an infringing process. However, the staff argues that the evidence put forth by complainant, with respect to nonrespondents

is insufficient to establish a reason to believe that respondents Meditech will infringe through bags supplied by (S Post at 10).

In support of complainant's infringement allegations, Robert S. Nocek, who has been with complainant for 5 years and who for the last 3 years has been complainant's vice president of marketing and sales (FF 114), during the

period of August 25 to September 9, 1986 travelled through the Far East and surveyed the situation concerning the manufacture of reclosable plastic bags in Hong Kong, Taiwan, South Korea, Thailand, Malaysia, and Singapore and, when able to do so, toured actual manufacturing facilities, took pictures of the equipment being used, obtained samples of the product manufactured, and was provided with quoted prices for export to the United States (FF 115).

As for the named respondents which the record evidence shows are foreign manufacturers[9/] the record supports the following:

(a) Respondents Chang Won

Chang Won, who has not made an appearance in the investigation nor has provided any discovery,[10/] has a plant located near Seoul, Korea which produces about 5,000,000 reclosable bags monthly from sizes 2" x 3 1/2" to 12" x 18" and which is represented as only 50 percent of full capacity (FF 120). As evident from a trip report on Chang Won and photographs, an adjustable air jet on top of an air ring is used to blow air on the profiles (FF 120, 121).

The adminstrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by the Chang Won process in the interim period.[11/]

9/ While complainant in its complaint (para. 16) (CX-1) identified the following named respondents as foreign manufacturers: C.A.G., Chang Won, Chunk Kong, Gideons Plastic, Hogn Ter, Ideal Plastic, Kwang II, Lien Bin, Lim Tai, Rol-Pak, Siam Import, Ta Len and Teck Keung, it has asserted that C.A.G. is an agent of Siam Import and has offered no evidence that C.A.G. is a foreign manufacturer (CPF 67).

10/ While discovery requests by parties were apparently made on nonappearing respondents in this investigation, no party, pursuant to Commission rule 210.36 applied to the administrative law judge for an order compelling discovery and for an order requesting discovery sanctions.

11/ The determination of "infringement" concerns whether the respondents are producing bags according to the intellectual property right in

(Footnote continued to page 15)

(b) Respondents Gideons Plastic, Ideal Plastic, Lien Bin, Ta Sen and Teck Kong

While Nocek testified (1) that he is advised by a nonrespondent selling agent that nonappearing Gideons Plastic is a manufacturer of reclosable bags (FF 132), (2) that he attended a meeting in Taiwan along with respresentatives of nonappearing Ideal Plastic, Lien Bin, and Ta Sen which were said to be members of the Plastic Bag Union and manufacturers of reclosable plastic bags and that said companies indicated they wanted to sell reclosable plastic bags to the United States as soon as possible (FF 124) and (3) that in the spring of 1986 nonappearing Teck Kung exported over 700,000 reclosable bags to the United States (FF 133), Nocek did not tour any manufacturing facility of those respondents. The administrative law judge finds that complainant has not established a reason to believe that any claims in issue of the '872 patent will be infringed by those respondents in the interim period.

The staff argues that while in Taiwan and Hong Kong, Nocek visited Facit Industries, Lung Meng, Siusco and Harbona Ltd., manufacturers of extrusion equipment for reclosable plastic bags; that Nocek found that each of those manufacturers routinely provides adjustable air jets for cooling and shaping profiles as part of their equipment; that Nocek did not find any manufacturer of equipment for producing reclosable plastic bags which did not provide such air jets as part of its equipment; and accordingly that it "appears likely" that the equipment of Gideons Plastic, Ideal Plastic, Lien Bin, and Ta Sen (Taiwanese bag manufacturers which Nocek did not visit) and the equipment of Teck Keung (Hong Kong bag manufacturer which Nocek did not visit) include '872 air jets for cooling and shaping profiles (S Post at 11). The administrative law judge rejects this argument. There is no evidence that the bag

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(Footnote continued from page 14)
issue. Acts of infringement further entail importation into, or sale of such bags in, the United States. See, "II Importation and Sale" infra at 45.

manufacturers which Nocek did not visit did actually purchase air jets from those manufacturers of extrusion equipment whom Nocek visited. No testimony was given that all viable Far East suppliers of extrusion equipment were visited nor that extrusion equipment cannot be built by the reclosable bag manufacturers themselves. Moreover the administrative law judge has found, in view of the evidence infra presented by respondents Meditech as to nonrespondents that the record does not support a finding that there is a reason to believe that a reclosable plastic bag manufacturer, in the absence of any direct evidence, necessarily has to practice a claimed process in issue to produce reclosable plastic bags.

(c) Respondent Hogn Ter

On August 27, 1986, Nocek met with Mr. Chi-Jen Yeh, the General Manager of nonappearing Hogn Ter and was allowed to tour Hogn Ter's plant. The plant included at least fifteen extruders with ten operating at the time (FF 122). The Hogn Ter's extrusion lines included air lines directing air onto the profiles. A sketch made by Nocek immediately after Nocek's visit shows the air jet arrangement used by Hogn Ter (FF 122).

The administrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by Hogn Ter in the interim period.

(d) Respondent Kwang II

On September 1, 1986 Nocek met with Mr. Lee, president of nonappearing Kwang II and Mr. Yoo, its Sales Chief, at Kwang II's factory and observed its operation. At each extruder Nocek saw an air jet used to blow air onto the profile to control its shape (FF 127).

The administrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by Kwang II ir the interim period.

(e) Respondent Lim Tai

On September 4, 1986, Nocek met with Mr. Ti Kasen and toured the factory of nonappearing Lim Tai. He observed that each of the extruders for reclosable bags at the factory included adjustable air jets blowing air onto the profiles (FF 128).

The adminstrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by Lim Tai in the interim period.

(f) Respondent Rol-Pak

On September 8, 1986 Nocek toured the plant of nonappearing Rol-Pak. Each of the extruders for reclosable bags in the plant included air jets blowing air onto the profiles to control their shape (FF 129).

The administrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by Rol-Pak in the interim period.

(g) Respondent Siam Import

On September 4, 1986, Nocek toured the factory of nonappearing Siam Import. The factory had new extruders for manufacturing tubing for reclosable plastic bags, each of which used adjustable air jets to control the profile cooling and shape. Also Nocek observed a color line being applied to the product (FF 131).

The adminstrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by Siam Import in the interim period.

With respect to the remaining non-manufacturer respondents the record supports the following: 12/

12/ Respondent Chung Kong is a foreign manufacturer.

(h) Respondent Meditech

Meditech has exclusive agreements with

for importation of reclosable plastic bags (FF 4).

Complainant argues that Meditech respondents have furnished no proof whatsoever that the method they propose using from suppliers

can result in workable profiles for reclosable plastic bags; that to the contrary, Minigrip's Aufsnit testified to, and demonstrated, the effect of attempting to manufacture profile tubing without the use of an air jet to control the cooling rate and shape of the profile; that while there is no dispute that tubing can be extruded without the use of the '872 method, the question is whether such tubing can be made to be workable; that further the testimony of Meditech's Mr. Taheri, as corroborated by testimony of Polycraft's Mr. Bruno, establish that the extrusion equipment includes air jets to blow air on the profiles while they are in the formative stage, as set forth in the '872 patent. (C Post at 19).

Respondents Meditech argue that complainant has not met its burden in establishing that there is a reason to believe that respondents Meditech will infringe the '872 patent. It is argued that one of Meditech's potential suppliers, currently practices the method of extruding plastic tubing with profiles that

Respondents Meditech also argue that nonrespondent

another potential supplier of Meditech, currently relies on the use of

It is argued that nonrespondent

Thus respondents Meditech argue that there can be no infringement because in the processes of no adjustable air jets are used, in any form, to cool the extruded tubing and profiles, (R Post at 21,22).

(i) Respondent Chung Kong

Complainant's Nocek did not tour the plant of Chung Kong (FF 117). However, Wilson Ip., Managing Director of respondent Chung Kong (FF 141), testified at the hearing on July 9, 1987 that the process by which Chung Kong will be able to supply reclosable plastic bags

Neither complainant nor the staff take the position that the Chung Kong process, as described by Ip, infringes any claim of the '872 patent. Rather they argue that has not offered into evidence a single reclosable bag or an inch of profile tubing made by Chung Kong (C Post at 19, S Post at 12). While those representations are accurate with respect to what respondents at the hearing offered into evidence, there was received into evidence at the hearing as a staff exhibit with no objection from complainant, a June 25, 1987 letter (FF 175) from respondents counsel to the staff which stated in part:

> As requested, we are providing samples of reclosable plastic bags which respondents,
>
> is shipping samples from other possible suppliers, which will be provided on June 26, 1987. (Emphasis added).

Received into evidence, with no objection from complainant, were staff exhibits SPX-1 and SPX-2. Each of SPX-1 and SPX-2 was identified by the staff as a reclosable plastic bag sample SPX-1 and SPX-2 carry Bates Nos. 000324 and 000326 (FF 176) which Bates Nos. are identified in the June 25, 1987 letter.[13/]

13/ Respondents Meditech have moved to reopen the record for admissibility of RX-97 which consists of (1) a transmittal letter of June 26, 1987 from

(Footnote continued to page 21)

Ip's testimony that the old version of Chung Kong's process is shown in a photograph taken by Mr. in August 1986 (FF 145) and respondents counsel's unchallenged respresentation that samples SPX-1 and SPX-2 are samples of reclosable plastic bags which respondents is consistent with the conclusion that SPX-1 and SPX-2 are manufactured pursuant to the current process at Chung Kong testified to by Ip.

Regarding complainant's argument as to whether workable tubing can be extruded without the use of the '872 method, complainant's Ausnit testified that good tubing can be made by either the process of expired U.S. patent Re 29,208 or the process of expired Luca U.S. patent Re 26,991 (FF 74, 75).

Complainant has argued that the photograph which took in August 1986 when visited Chung Kong establishes that the current Chung Kong extrusion equipment which will be used to manufacture reclosable plastic bags includes

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(Footnote continued from page 20)
counsel for

The June 26, 1987 letter is of the same format as the June 25, 1987 letter which the staff offered into evidence. The only difference is that the June 26 letter relates to Each of complainant and the staff has objected to the admissibility of RX-97 because the sample bags referred to in the June 26 letter have not been authenticated. Yet there was no objection by the complainant or the staff regarding the authenticity of SPX-1 and SPX-2 and complainant and the staff did not examine concerning the authenticity of SPX-1 and SPX-2.

The administrative law judge finds that the testimony of

based on the photograph, is that Chung Kong had

14/

The staff, in arguing that the Chung Kong process infringes the '872 patent, refers to the conflicting testimony of Messrs. Taheri and Ip (S Post at 12).[15/] The administrative law judge does not find that the record supports a finding of conflicting testimony of Taheri and Ip.

In addition, the photograph taken in August 1986 shows the

(FF 168). Moreover, the expired Luca Re 26,991 patent

14/ Complainant's Ausnit has testified that in the '872 process,

(FF 87).

15/ The staff represented that Chung Kong has not responded to the complaint, did not answer interrogatories, and did not participate except in the form of testifying on behalf of respondent at the hearing; that the issue of whether Chung Kong has a new process that does not utilize the '872 air jets will be explored during the permanent relief phase of the investigation if Chung Kong agrees to an on-site inspection so that its process and product can be observed by the parties (S Post at 13). The record shows that Mr. Ip, Managing Director of Chung Kong was noticed as a witness by the respondents in view of the fact that that the staff did not discover Mr. Ip and waived its opportunity to cross examine Mr. Ip; and that the staff has filed no motion to compel Chung Kong to answer any interrogatories.

teaches that it is old in the art to remove excess heat and solidify the plastic of rib and groove elements by providing auxiliary cooling means to blow separate jets of air at the tube at the locations of the rib and groove elements (FF 169).

The record supports a finding that there are critical elements in the '872 process in issue. Mere cooling a profile is not shaping a profile (FF 95). Thus if too much air is blown onto the face of the profile even by an air jet, the desired shaping will not be achieved (FF 59). Moreover one cannot control the flow of air in a pipe where there are two or three one inch holes as compared to a pipe having one small 1/8 inch jet of air being delivered (FF 63). In addition a single jet could not achieve the desired shaping after the profile is no longer in the formative stage (FF 64). Also merely removing heat from profiles and cooling them does not acheive the desired shaping (FF 66); air jet openings as such cannot control the air of a jet (FF 67); adjusting air in a whole pipe with holes in it is not the same as adjusting air in individual jets (FF 68); it is important that the air jets be directional (FF 81); air that impinges on profiles from behind in a fairly broad area will not yield the desired shaping (FF 82); sizes of jet openings are critical (FF 91); and controlling air to an air pipe that impinges onto a profile would not achieve the desired shaping (FF 84). Complainant has not demonstrated that the Chung Kong process, as testified to by Chung Kong's Ip, nor even the process as testified to by has such critical elements of the '872 process.

The administrative law judge finds it significant that neither the complainant, who has the burden of proving that there is a reason to believe that the '872 patent will be infringed by Chung Kong nor the staff, cross-examined Chung Kong's Ip or even took discovery of Mr. Ip,

as was permitted by the administrative law judge, on any matter, including the processes by which the staff's SPX-1 and SPX-2 were made and the alleged inconsistency between Taheri's testimony and Ip's testimony argued in the posthearing submissions of complainant and the staff (See Tr. at 1057, 1058, 1061, 1062, 1065, 1067, 1155 and 1253).

Complainant argues that nonparty Harbona Ltd. of Hong Kong (Harbona), a manufacturer of extruders for profile tubing and bag making equipment, and a competitor of Chung Kong, has constructed the extruders for respondent Chung Kong which extruders includes air jets to shape or freeze the profiles (CPF 83). There was no testimony at the hearing from anyone from Harbona (FF 117). Moreover during Harbona's meetings with Nocek at which the alleged representation was made by Harbona, Harbona expressed an interest in exporting reclosable plastic bags to Minigrip and

(FF 118, 119). Absent testimony from Harbona and in view of the unchallenged testimony of Chung Kong's Ip, the administrative law judge finds the alleged respresentation of Harbona unpersuasive.

Based on the foregoing the adminstrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that the process proposed to be used by Chung Kong for manufacturing reclosable plastic bags for will infringe any claim in issue in the interim period.

(ii) Nonrespondent Keron

Daryl Chang testified that to show Keron's method of cooling tubing for making reclosable plastic bags he made a video tape on June 27, 1987 and that the video tape, which was observed at the hearing,

shows that

(FF 156).[16/]

Complainant's Nocek did not visit Keron. The staff, relying on Mr. testimony and the Keron videotape, takes the position that complainant has not provided sufficient basis to conclude that there is a reason to believe the process used by Keron will infringe the '872 patent (S Post at 13, 14).

Based on the testimony by Keron's Chang, which complainant did not take issue with, through cross examination, and the testimony of the administrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that the process proposed to be used by Keron for manufacturing reclosable plastic bags will infringe any claim in issue in the interim period.

(iii) Nonrespondent Daewong

testified that in May 1987 he visited Daewong in Seoul, Korea and met with its president S. Y. Lee; that based on

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16/ The complainant did not cross examine Mr. Chang. Moreover while complainant was given the opportunity by the administrative law judge to discover Mr. Chang, before any cross examination, complainant declined discovery of Mr. Chang (See Tr. at 1057, 1058, 1061, 1062, 1065, 1067 and (Footnote continued to page 26)

request, Lee took various photographs of Daewong's manufacturing equipment for reclosable plastic bags in presence; that the photos show a tube being extruded with

Complainant's Nocek did not visit Daewong. The staff, relying on testimony, takes the position that complainant has not provided sufficient basis to conclude that there is a reason to believe that the process for manufacturing reclosable plastic bags proposed to be used by will infringe the '872 patent in the interim period. (S Post at 13, 14). The administrative law judge agrees.

(i) Respondent C.A.G.

C.A.G. is an agent for Siam Import whose extrusion line Nocek observed. It has submitted an unsolicited quotation for ZIPLOC bags to one of complainant's customer. (FF 116).

As found with respect to Siam Import, the adminstrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by C.A.G. in the interim period.

(j) Respondent Euroweld

Complainant relies on price lists for reclosable bags offered by Euroweld as well as an invoice showing the actual sale in the United States of

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(Footnote continued from page 25)
1248). Earlier in the proceeding complainant objected to the admission of the direct testimony of nonrespondent Daewong's Mr. Lee (RX-54) because complainant did not have the opportunity to cross-examine Mr. Lee. That objection was sustained.

No. 6017 reclosable bags (FF 134). Complainant has not offered any evidence to establish what process Euroweld intends to have bags made after December 1, 1987. Conceivably there may be used a process as disclosed in expired U.S. patents Re 29,208 or Re 26,991, by which good tubing, according to complainant's Ausnit, can be made (FF 74, 75). Moreover because Euroweld has placed a

(FF 135), the record supports a finding that said bags will be made by

The administrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that respondent Euroweld will infringe any claims in issue in the interim period.

(k) Respondent Insertion

Complainat relies on the importation from September 1984 through September 1985 of approximately 18,000,000 reclosable plastic bags which were refused entry by U.S. Customs (FF 134). There is no evidence as to the process used for producing said bags or for producing any bags to be imported after December 1, 1987.

The administrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that respondent Insertion will infringe any claim in issue in the interim period.

(l) Respondent Ka Shing

Complainant relies on correspondence which indicates that Ka Shing was importing reclosable bags from Taiwan along with a sample of a reclosable bag (FF 134). There is no evidence as to the process used for producing said bags or for producing any bags to be imported after December 1, 1987.

The administrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that respondent

Ka Shing will infringe any claim in issue in the interim period.

(m) Respondent Nina Plastic

Complainant relies on promotional literature, including a price list, and a November 1985 import of reclosable plastic bags (FF 134). There is no evidence as to what process was used for producing said bags or for producing any bags to be imported after December 1, 1987.

The administrtive law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that respondent Nina Plastic will infringe any claim in issue in the interim period.

(n) Respondent Polycraft

For reason set forth with respect to respondent Meditech, the administrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that respondent Polycraft will infringe any claim in issue in the interim period.

(o) Respondent Tracon

Complainant relies on importation of reclosable bags (FF 134). There is no evidence as to what process was used for producing said bags or for any bags to be imported after December 1, 1987.

The administrative law judge finds that complainant has not sustained its burden in establishing that there is a reason to believe that respondent Tracon will infringe any claim in issue in the interim period.

Nonparty Harbona referred to earlier in the opinion, has five operating extruders working two 8-hour shifts per day and produce approximately 1,800 lbs. of reclosable bags per day that can be made with a color line. Also

Harbona has seven bag machines with two or more on order. As complainant's Nocek testified, the five reclosable tubing extruders had multiple air jets consisting of eight flexible pipes with each pair (one for the female and one for the male) being controlled by a separate valve. The air jets shape the profiles. Each flexible air jet is fully adjustable in both the vertical and horizontal direction. The air flow is adjustable as well (FF 136a, 263).

The administrative law judge finds that complainant has established a reason to believe that claim 1 of the '872 patent will be infringed by non-party Harbona in the interim period

Summarizing, the administrative law judge has found that complainant has established that there is a reason to believe that claim 1 of the '872 patent will be infringed, in the interim period, by nonappearing respondents Chang Won, Hogn Ter, Kwang II, Lim Tai, Rol-Pak, Siam Import and C.A.G. and also nonparty Harbona. Complainant has not so established as to respondents Gideons Plastic, Ideal Plastic, Lien Bin, Ta Sen, Teck Kong, Meditech, Chung Kong, Euroweld, Insertion, Ka Shing, Nina Plastic, Polycraft and Tracon.

B. The '120 Trademark

Complainant Minigrip argued that once the 337-TA-110 exclusion order expires on December 1, 1987, there is a reason to believe that there will be a deluge of foreign manufactured imported reclosable plastic bags infringing the '120 trademark (C Post at 28). The '120 trademark is the subject of complainant's incontestable Reg. No. 946,120 on the Principal Register of the U.S. Patent and Trademark Office for plastic bags (FF 177). The description of the mark in Reg No. 946,120 is as follows:

> The mark consists of a horizontal stripe adjacent the bag top lined for the color red. However, applicant makes no claim to any specific color apart from the mark as shown (FF 178).

The color line mark was first used by Flexigrip on zipper to be attached to film for reclosable bags in 1959, as indicated by the federal registration.

(FF 180). Minigrip registered the color line trademark on the Principal Register on October 31, 1972 (FF 179). The color line mark is in use and has been used since 1959 by Minigrip and its predecessor in interest (FF 181).

1. Validity

(a) Functionality

Respondents Meditech argued that the color line trademark is de jure functional and is invalid despite the incontestable status of its federal registration. Relying on In re Morton-Norwich Products Inc., 671 F 2d. 1332, 213 U.S.P.Q. 9 (C.C.P.A. 1982) they point to four factors which it is argued establish de jure functionality of the color line mark: 17/ (i) Minigrip's Kraus U.S. Letters Patent 3,380,481 (the '481 patent) which is said to be an admission of the utilitarian advantages of the color line mark in producing extruded plastic tubing; (ii) "advertising materials" which are said to tout the utilitarian advantages of the color line mark; (iii) alternative designs for reclosable bags which are said to be not "reasonably available to complainant's competition since the utilitatrian advantages of having the line at the top of the bags would be eliminated"; and (iv) referring to the consideration in Morton-Norwich of simple or less expensive design methods of manufacturing available to the competition, 671 F.2d at 135, 213 U.S.P.Q. at 16, the argument that the only evidence on the record concerning the manufacturing of goods with a color line was that presented by Meditech indicating the ease with which such line can be applied to bags (R Post at 23-27).

17/ Morton-Norwich refers to "de facto functionality" and "de jure functionality". De facto functionality is said to be the use of "functional" in the lay sense, indicating that although a feature is directed to performance of a function, it may be legally recognized as an indication of source. De jure functionality is said to be used to indicate the opposite, viz. that such feature may not be protected as a trademark. 671 F 2d at 133, 213 U.S.P.Q. at 13.

The staff argues that the color line mark is the subject of an incontestable federal registration on the Prinicpal Register which is conclusive evidence of complainant's exclusive right to use the mark under sections 15 and 33 of the Lanham Act and hence that the mark may not be attacked on the ground of functionality but can be attached on the grounds of fraud, abandonment, or genericness. (S Post at 15; S Pre H at 27-28).

Complainant argues that there is no evidence that the color line is functional and that, even assuming the mark has some incidental function, this is not fatal to the color line mark. Moreover it is argued that complainant has objected to and halted every instance of known objectionable language. (C Post at 20-22).

A federal trademark registration, though prima facie valid, may be invalidated on the basis of the functionality of the subject matter of the registration. Sylvania Electric Products v. Dura Electric Lamp Co., 247 F.2d 730, 114 U.S.P.Q. 434 (3rd Cir. 1957). There is precedent for invalidating an incontestable federal registration due to functionality. Schwinn Bicycle Co. v. Murray Ohio Manufacturing Co., 339 F.Supp. 973, 172 U.S.P.Q. 14 (D. Tenn.1971); aff'd., 470 F.2d 975, 176 U.S.P.Q. 161 (6th Cir. 1972). Also there is precedent for holding, in appropriate circumstances, that a color line mark applied to a product may be a de jure functional feature of that product. Baush & Lomb v. Univis, Inc., 132 U.S.P.Q. 213 (TTAB 1962) (color line on opthalmic lens). In addition the party claiming invalidity has the burden of proving functionality, although the registration is not conclusive evidence of the right to use the mark shown to be legally functional. Schwinn, supra.

Although the Court of Appeals for the Federal Circuit (including its predecessor courts), has not been presented with the precise question at issue it has repeatedly and uncategorically stated that de jure functional matter cannot receive trademark rights:

"...[s]uch a [de jure functional] design may not be protected as a trademark". In re Morton-Norwich Products, 671 F.2d at 1332, 213 U.S.P.Q. at 13. "[It is]...well settled that the configuration of an article having utility is not the subject of trademark protection". Id." [F]unctional shapes...are never capable of being monopolized, even when they become distinctive of the applicant's goods..." In re Deister Concentrator Co., Inc., 289 F.2d 496, 129 U.S.P.Q. 314, 321 (C.C.P.A. 1961). "A long established tenet of common law holds that trademark protection cannot be given to those product configurations deemed legally functional even if they would otherwise be so entitled". Textron, Inc. v. U.S.I.T.C., 753 F.2d 1019, 224 USPQ 625, 628 (Fed. Cir. 1985). "The public policy underlying the rule that de jure functional designs cannot be protected as trademarks is...the need to copy those articles, which is more properly termed the right to compete effectively." New England Butt Co. v. I.T.C, 759 F.2d 874, 225 U.S.P.Q. 260, 262 (Fed. Cir. 1985). (Emphasis added).

The legal functionality defense does not have a specific basis in the statutory provisions of the Lanham Act. However, it does have constitutional underpinnings. Without such a defense one could claim a monopoly of unlimited duration in the functional design of articles and this would tend to be in conflict with the constitutional grant (Article 1, Section 8) of only a limited time of protection to patents and copyrights. Consequently, the right to copy de jure functional matter, in the absence of patent or copyright protection, has been described as "a fundamental aspect of our law." In re Deister Concentrator Co., 289 F.2d at 501-502, 129 U.S.P.Q. at 319-320. The functionality defense is similar in nature to the genericness defense in that even if such subject matter has "de facto" secondary meaning as an indication of source, nevertheless no legal rights can attach because of the overriding

public policy of preventing the monopolization of that which is necessary for effective competition. Id. at 321-322.

Accordingly, the administrative law judge finds that the incontestability provision of section 33 of the Lanham Act does not prevent the assertion of the defense of de jure functionality. Although the defense of functionality is not specifically mentioned in the statute as a defense to an incontestable mark, the specific provision in section 33 for the protection of generic marks does demonstrate a policy inherent in the statute for preserving the right to compete effectively. While the incontestability provision has been held to preclude the assertion of defenses contesting whether a mark has acquired distinctiveness or secondary meaning, Park'N Fly v. Dollar Park and Fly, Inc., 105 S.Ct. 658, 224 U.S.P.Q. 327 (1985) (defense of descriptiveness unavailable against incontestably registered mark), and Tonka Corp. v. Tonka Phone Inc., F. Supp, 229 U.S.P.Q. 747 (D. Minn. 1985) (incontestable registration may not be attacked on the grounds of geographical descriptiveness), the defense of de jure functionality is unrelated to the issue of secondary meaning and applies regardless of whether there is a showing of secondary meaning or not. In re Deister Concentrator Co., supra. While subject matter that is descriptive or otherwise not inherently distinctive may with time acquire distinctiveness and can under some circumstances function as a trademark, a mark that is de jure functional is simply incapable at any time of functioning as a trademark. In re Pollak Steel Co., 314 F.2d 566, 136 U.S.P.Q. 651 (C.C.P.A. 1963) (functional mark not registrable on Supplemental Register because it is incapable of functioning as a trademark). Rather than merely "quieting title" to a mark which can be the subject of trademark rights, as the incontestability provision was intended, See, Hearings on H.R. 82, 78th Cong., 2nd Sess. 21 (1944) (Rep. Lanham), any use of incontestability to prevent the assertion of a functionality defense

would result in the grant of a right to subject matter which would otherwise be completely incapable of trademark function. The legislative history of the Lanham Act amply indicates that trademark protection should not foster "monopolies":

> This bill...has as its object the protection of trade-marks....This can be achieved without any misgivings and without fear of fostering hateful monopolies, for no monopoly is involved in trade-mark protection.
>
> Trade-marks are not monopolistic grants like patents and copyrights. S.Rep. No. 1333, 79th cong., 2nd Sess. (1946) at 2.

Furthermore, there is precedent for the assertion against an incontestable mark of defenses other than those specifically listed and referred to in section 33. See, e.g., Prudential Insurance Co. v. Gibraltar Financial Corp., 694 F 2d 1150, 217 U.S.P.Q. 1097 (9th Cir. 1982)(incontestably registered marks

are subject to equitable defenses); cf., Park'N Fly v. Dollar Park and Fly, Inc.,105 S.Ct. at 666, 224 U.S.P.Q. at 333, n.7.

The defense of de jure functionality requires a showing that the design of an article sought to be protected is superior in utility or economy of manufacture such that there is a competitive need to copy that design to compete effectively. In re Morton-Norwich, 671 F.2d at 1339, 213 U.S.P.Q. at 14. The mere fact that the design configuration may perform a function is insufficent. Rather it is the degree of design utility which results in de jure functionality. Id. at 14. A determination as to the issue of functionality takes into account factors such as possible alternatives to the design, whether the design results from a comparatively simple or cheap method of manufacture, whether the design is the subject of expired utility patent, and any advertising message concerning functionality. Id. at 15-16.

(i) The Kraus '481 Patent

Respondents Meditech argue that "the most compelling factor" concerning functionality is the existence of the Kraus '481 expired utility patent which is said to disclose "the highly utilitarian advantage of the Color Line Mark

in the production of extruded plastic tubing for reclosable bags and in the use of the reclosable bags by the buying public." It is argued that Kraus even claims that the color line is a functional element (R. Post at 24).

Complainant argues that the '481 patent application was filed in 1962, three years after complainant's first use of the mark in issue and that the '481 application did not issue as a patent until 1968 which is nearly ten years after Minigrip's first use of the color line mark. Thus it is argued that the facts in this investigation are clearly distinquishable from those in respondents Meditech's cited In Shenango Ceramics Inc., 362 F. 2d 287, 291, 150 U.S.P.Q. 115, 119 (C.C.P.A. 1966) wherein the utility patent application on the feature sought to be registered as a trademark was filed prior to the date of first use of the mark and the utility patent issued less than ten months later. Moreover, it is argued that the Shenango case specifically held that "the patent is taken only as some evidence ... that the involved ... configuration ... is functional." In addition it is argued that even if the Kraus '481 patent is read to set forth a function for a colored line in connection with reclosable plastic bags, the mere possession of a function (utility) is not sufficient reason to deny trademark protection (C. Post R at 14).

The staff contends that the claims of the '481 patent do not cover the color line as a functional element of a structure (S. Post R at 11).

The record shows that the Kraus '481 patent does not disclose that the color line mark has "highly utilitarian advantages" and does not claim the color line as a necessary functional element. Claims 1 and 2 of the expired Kraus '481 patent which issued in 1968 and is titled "Closed Tube With Fastener Members" (FF 182) read:

> 1. A structure of use in making a reclosable container comprising, an elongated closed flexible integral tube,

> a first interlocking element integral with he tube on this inner surfce thereof, and a second interlocking element integral with the tube on the outer surface thereof, said elements being shaped for cooperative pressure interengagement and forcible separation.
>
> 2. The structure as defined in claim 1 and including means defining a separational line extending longitudinally along the tube for separating the tube material between said interlocking elements.

(FF 183). Pertinent to dependent claim 2 is the following language of the '481 specification:

> In the arrangement of FIGURE 21, an elongated continuous flexible plastic tube 152 has fastener profiles 153 and 154 extending there along for forming closure elements. To separate the tube and form flanges at the top of the bag which is to be constructed, a knife blade 156 is run along between the fastener elements 153 and 154 along a line of severance 157. The tube is provided with an integral colored line 155 located between the male and female profiles 153 and 154. The colored line will be extruded simulutanously with the tube. With the line of severance 157 formed in the middle of the line, the opening flanges will each be marked with a colored outer edge. If desired, the colored line 155 and the line of severance 157 can be related so that the cut is along the edge of the colored line 155, and then only one of the flanges will be colored for ease of separation. It will be understood that any of the structures of FIGURES 2 through 20 may be provided with a colored line between the male and female interlock or profiles., and the tubes cut axially along the center of the colored line or lines, or along the edge or edges thereof.

(FF 184). From the above, it is seen that the "line of severance 157" is the claim 2 "means defining a separational line extending longitudinally along the tube for separating the tube material between said interlocking elements." It is also seen that the "colored line 155" is not necessarily the same as the line of severence 157. Thus only "[i]f desired" is the colored line 155 and the line of severance 157 related so that the severance cut is along the edge of the colored line.

Moreover FIG 21 of the '481 patent is only a view "showing another arrangement of tube structures" (Emphasis added). Also the "line of

severance", much less the "colored line" of FIG 21 is not disclosed as a "highly utilitarian" advantage as contended by respondents Meditech. In addition while physical samples of bags with color lines in evidence do include bags in which the line of severance is along the edge of the colored line, there are also several samples of bags in evidence with color lines, including respondents Meditech's bags, in which the color line is spaced from the edge of the bag (FF 192, 213).

Based on the foregoing, the administrative law judge finds that the Kraus '481 patent does not support de jure functionality of the color line trademark.

(ii) Advertising Materials

Regarding respondents Meditech's arguments that "advertising materials" tout the utilitarian advantages of the color line trademark, there are exhibits of record which depict reclosable bags that have printed instructions near the color line as "Lift Color Line To Open" and thus relate to a functional use of the color line (FF 196). Those instructions however, while they indicate a functional use of the color line, do not tout the utilitarian advantages or comparative benefits of the color line. Such is in contrast to the advertising materials in Shenango 362 F.2d at 291, 150 U.S.P.Q at 119, which did tout the utilitarian advantages of the alleged trademark.

In addition the bags of record that have printed instructions which relate to a functional use of the color line, did not originate from complainant (FF 197) and there is no evidence that complainant authorized the use of such instructions on those bags. Moreover complainant has objected to customers and competitors who have used such functional color line instructions and in response those companies have stopped such use (FF 198).

Also, while complainant has used printed instructions on its bags, the instructions do not refer to the color line. Rather the instructions consist of the words "open" and "close" and have arrows pointing to the zipper profile

fastener (FF 200). Furthermore complainant has expressly promoted the color line as a trademark in advertising, stationery and on its price lists (FF 201).

Based on the foregoing the administrative law judge finds that respondents Meditech have not established that advertising materials bear on the issue of de jure functionality of the color line trademark in issue.

(iii) Availability of Alternative Designs

Respondents Meditech argue that alternative designs for reclosable bags are not "reasonably available" to complainant's competition since the utilitarian advantage of having the line at the top of the bags would be eliminated (R Post at 24.25).

As complainant has argued (C. Post R at 14), an alternative design to a reclosable bag with a color line is a reclosable bag without a color line. The record shows that reclosable bags, without a color line, are sold every year. Thus the largest sales of reclosable plastic bags are made by Dow, complainant's licensee, for consumer sales, using the well-known trademark ZIPLOC (FF 202). Yet Dow's bags do not contain a color line (FF 202). The commercial success of the Dow bags weakens the assertion of a competitive need to copy the color line. Moreover, while respondents Meditech argued that many consumers have difficulty opening and closing Dow ZIPLOC bags (R Post R at 12, n 2), the record is devoid of any evidence supporting this argument.

In addition

Complainant also has used printed instruction on its bags that consist of the words "open" and "close" and arrows pointing to the zipper profile fastener which words do not refer to the color line trademark (FF 200).

The administrative law judge finds that respondents Meditech have not established that alternative designs for reclosable bags are not "readily

available" to complainant's competition.

(iv) Alternative Methods

Respondents Meditech argue that the only evidence in the administrative record concerning the manufacture of bags with a color line was presented by Meditech,

However, Meditech's evidence also supported the same ease, at least, in manufacturing bags without a color line (FF 150, 172). Also additional special extruding machinery is needed to apply the color line to the bag (FF 205). While such color line machinery may be widely available, the requirement of additional machinery entails at least some additional expense in applying a color line to a bag as compared to making a bag without a color line. One respondent even charges a higher price for bags with a color line, as opposed to bags without a color line (FF 212).

Based on the foregoing the administrative law judge finds that the record does not establish that a reclosable plastic bag with a color line trademark results from a comparatively simple or cheap method relative to a reclosable plastic bag without a color line trademark.

For the above reasons, the administrative law judge finds that there is a reason to believe that the color line trademark is valid as against the allegations of de jure functionality, and that complainant has shown a probability of success on this issue.

(b) Abandonment

Respondents Meditech argue that abandoment is a recognized defense to incontestability under 5 U.S.C. 1115(b) and that complainant has abandoned the color line mark. Abandonment is asserted principally through complainant "allowing others to use the color line mark without complainant's authorization" (R Post at 26).

In response complainant argues that it regularly reviews the quality of use of customers and converters of its tubing, zippers and bags and in each

case, in which complainant has objected, the improper use has ceased. (C Post at 7).

The staff argues that the record shows that complainant has neither discontinued its use of the mark, nor engaged in a course of conduct that has caused the mark to lose significance as an indication of origin, but rather that complainant has engaged in letter campaigns to purchasers and competitors reminding them that the color line is a registered trademark of Minigrip, and that instructions relating to use of the bags should not refer to the color line (S Post at 17; SPF D14, D17-21).

Abandonment, being in the nature of a forfeiture, must be strictly proven. Only when all rights of protection are extinguished is there abandonment. Wallpaper Manufacturers Ltd. v. Crown Wallcovering Corp., 680 F.2d 755, 214 U.S.P.Q. 327, 332, 335 (C.C.P.A. 1982). Because, as shown in the Morton-Norwich case, supra, an incidental utility does not negate the trademark status of a mark, the use of instructions relating to a functional use of the color line does not necessarily negate the presumption that the color line also acts as an identifier of source. There is no direct evidence that the relevant consuming public fails to see the color line as an indication of source.

Complainant's express promotion of the color line as a trademark, both on its stationery and in media advertisements (FF 201), affirmatively indicates that the color line is promoted by complainant as a trademark, an indicator of source, and conflicts with respondents Meditech's allegations of abandonment.

In addition the instances of possible misuse of the mark through the use of functional instructions (FF 196) does not show that the instructions were placed on the bags by complainant or pursuant to its instructions (FF 197, 198). Moreover, there is no evidence of record concerning the duration

and extent of such possible misuses, and no evidence concerning any substantial delay by complainant in policing such misuses.[18/] In view of the uncontested evidence that complainant has objected to the misuses, and that said misuses have ceased, the administrative law judge finds that complainant has not failed to police its mark against the misuses involved, and no abandonment therefore is shown.

For the foregoing reasons, the administrative law judge finds that there is a reason to believe that the color line trademark is valid as against the allegation of abandonment, and complainant has shown a probability of success on this issue.

2. Infringement

(a) Confusing Similarity of Marks

Infringement of federally registered marks is governed by the test of whether the trademark owner has established that a respondent's use is "likely to cause confusion, or to cause mistake, or to deceive." (15 U.S.C. 1114), McCarthy Trademark and Unfair Competition, (2d Ed.) Section 23.1.

Complainant refers to the following four criteria set forth by the Restatement of Torts, Section 729 and adopted by the Commission in In re Coin Operated Audio-Visual Games, 214 U.S.P.Q. 217, 222 (1981) in determining likelihood of confusion:

> a) the degree of similarity between the designation and the trademark or trade name in
> (i) appearance;
> (ii) pronunciation of the words used;
> (iii) verbal translation of the pictures or designs involved;
> (iv) suggestion;
> b) the intent of the actor in adopting the designation;

18/ Failure to police a mark resulting in abandonment must be related to uses which are sufficiently numerous and widespread that purchasers learn to ignore the purported mark as a source indicator, and the trademark owner need not immediately act against every possible infringing use to avoid abandonment. Crown Wallcovering Corp., Id. at 336.

c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other;
d) the degree of care likely to be exercised by purchasers.

Complainant argues as to subpart (a), that the color line trademark applied by the foreign manufacturers is identical to the Minigrip registered trademark; as to subpart (b) that it is the clear intent of the foreign manufacturers to take a ride on the goodwill established by Minigrip; as to subpart (c), that while there is no marketing of the reclosable bags bearing the color line trademark by the respondents in view of the 337-TA-110 Exclusion Order presently in effect, for all practical purposes, if such marketing is allowed to occur, the products would compete head to head; and as to subpart (d), that since the product is relatively inexpensive, the buyers thereof could not be expected to exercise a great deal of care in the purchasing of the bags. (C Post at 23 to 25).

The appearing respondents Meditech do not take issue (See R Post at 23 to 26) with complainant's argument that confusion between complainant's registered trademark and the color line applied by foreign manufacturers to their reclosable plastic bags and tubing is not only likely but inevitable (C Post at 25). Complainant has further established that the following have used the color line trademark in issue on reclosable plastic bags: respondents Meditech, C.A.G., Polycraft, Chang Won, Euroweld, Gideons Plastic, Hogn Ter, Ideal Plastic, Ka Shing, Kwang II, Lien Bien, Nina Plastic, Rol-Pak, Siam Import, Ta Sen and nonrespondent Keron (FF 131, 191, 207, 208, 209, 210). In addition nonparty Harbona manufactures reclosable plastic bags with a color line (FF 263).

In addition, has ordered from reclosable plastic bags with a red line identical or similar to Minigrip's trademark. (FF 207). Also the record establishes that

Moreover,

While respondents argue that it has instructed that any reclosable plastic bags which are produced to fulfill its orders not to have the color line mark (RPF 175),[19] admit that their suppliers have the ability to produce reclosable plastic bags with color lines at or near the opening of the bag (RPF 150, 152, 172, 174, 206) and that any manufacturer of reclosable plastic bags can produce bags with a color line which process is quite (RPF 176, FF 211, 321).

Based on the foregoing, the administrative law judge finds that complainant has established that there is a reason to believe that respondents C.A.G., Chang Won, Chung Kong, Euroweld, Gideons Plastic, Hogn Ter, Ideal Plastic, Ka Shing, Meditech, Kwang II, Lien Bien, Nina Plastic, Polycraft, Rol-Pak, Siam Import and Ta Sen as well as nonparty Harbona will infringe complainant's '120 trademark in the interim period.[20]

(b) Fair Use

Respondents Meditech contend that they would "like to use a color line with the phrase printed on the bags, and that such a "functional use" would be a "fair use" because 15 U.S.C. 1115(b)(4) prevents complainant Minigrip from foreclosing another from using an alleged infringing mark when the mark is used in a descriptive manner. Respondents Meditech contend that such a use of the mark "in a descriptive manner" would be a fair

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19/ In the absence of a binding agreement such as one between Meditech and complainant trademark owner, there is insufficient assurance that the color line trademark will not be used by respondents Meditech in the interim period.

20/ The determination of infringement further depends on acts of importation or sale of bags or tubing using the color line.

use which is proper under the statute even against an incontestable mark. (R Post at 26-27).

Complainant argues that there is no need for respondents Meditech to use the color line mark if all respondents wish to do is indicate a closure area; that if respondents Meditech truly plan to print instructions on their bags, respondents could simply print "Lift here;" and that the real reason respondents Meditech wish to use the color line is not to describe a feature of their bags but to mislead the trade and consumers as to the source of their bags (C Post R at 15, 16).

The staff argues that one cannot cure an infringing use simply by making descriptive reference to the infringing mark (S Post R at 12).

A fair use is a non-trademark use which does not cause a likelihood of confusion. McCarthy, at Section 11.17. The pertinent terms of a fair use defense are set out in section 33(b) of the Lanham Act as follows:

> That the use of the ...device charged to be an infringement is a use, otherwise than as a trade...mark, of a ... device which is descriptive of and used fairly and in good faith only to describe to users the goods...of such party.

While respondents Meditech's proposed instructional wording on the bags would refer to the color line, the instructional wording is not the mark in issue. The "device" charged to be an infringement, viz. the color line mark in issue, does not "describe" the plastic bags even if instructional wording on the bags would refer to or describe a use of the color line. As such, the administrative law judge finds that the proposed use of instructional wording, in conjunction with the color line, is not a fair use of the color line trademark under the Lanham Act.

Additionally, because as Morton-Norwich holds an incidental utility does not negate the trademark status of a mark, respondents Meditech's proposed use of instructions relating to a functional use of the color line would not

necessarily negate the trademark function of the color line mark. Moreover, respondents Meditech's proposed use of the color red for its color line which complainant uses on the vast majority of its bags (FF 213) detracts from contentions of good faith and non-confusing use. Contentions of good faith also conflict with customer orders to Meditech which expressly refer to Minigrip's style of bags (FF 207).

Based on the foregoing respondents Meditech have not established that a use of instructions would result in a non-trademark use of the color line.

II. Importation and Sale

in 1985 imported reclosable plastic bags and cut tubing therefor from (FF 215). 21/

21/ Actual importation is affected before the entry and release of goods from U.S. Customs authority at least after cargo is shipped into U.S. waters with intent to unload the cargo. E.g., 19 CFR section 101.1(h). Thus section 337(d) states that "IF the Commission determines...that there is a violation...it shall direct that the articles concerned, improrted by any person violating...this section, be excluded from entry into the United States..., (Emphasis added). Consequently, even if subsequent U.S. sale of the imported articles is prevented by Customs enforcement action against imported articles, there has been importation sufficient for jurisdiction under section 337. See, Certain Trolley Wheel Assemblies, Inv. No. 337-TA-161 (Comm. Opin. 1984) (importation of samples without commercial value sufficient for jurisdiction even if not made for purposes of resale). Additionally the sale of product for importation ("imminent importation") affords jurisdiction under section 337. Thus shipments from constitute importations under section 337, even though those shipments were subjected to Customs enforcement of the current exclusion order imposed by Inv. No. 337-TA-110 and, after a Customs notice of redelivery, were exported back to

(FF 215).

Respondents Siam Import, a manufacturer exporter, and C.A.G., its agent, have exported reclosable plastic bags to the United States. Mr. Ng of C.A.G. confirmed to Nocek of Minigrip that C.A.G. had exported Siam Import made bags to the U.S. which had not been stopped by Customs (FF 216).

Foreign manufacturer Gideons Plastic has exported to the U.S. allegedly infringing reclosable plastic bags. Thus Gideons Plastic's exclusive selling agent, non-respondent Focus Taiwan Corporation, has exported to the U.S. in 1987 reclosable plastic bags and solicited sales of such bags, CIF New York. (FF 217).

Respondent domestic importer Nina Plastic imported to the U.S. reclosable plastic bags in 1984 through 1986. (FF 218). Respondent foreign manufacturer Hogn Ter has imported to the U.S. reclosable plastic bags. (FF 219). Respondent foreign manufacturer Teck Keung in 1986 imported to the U.S. 700,000 reclosable plastic bags which were subjected to a redilivery notice by U.S. Customs (FF 220). Respondent domestic importer Ka Shing in 1986 imported at least $39,096 worth of reclosable plastic bags into the U.S. (FF 221).

Respondent Euroweld has imported reclosable plastic bags and also has agreed to purchase imported reclosable plastic bags from (FF 222). Respondent domestic importer Insertion imported reclosable plastic bags in 1984 and 1985. (FF 223). Respondent Tracon from 1984 through 1986 has supported approximately $18,916 worth of reclosable plastic bags into the United States (FF 134a). Nonparty Harbona has exported reclosable plastic bags to the United States (FF 263).

There is insufficient probative evidence, on this record, for a reason to believe that respondents Chang Wong, Ideal Plastic, Kwang Il, Lim Tai, Lien

Bien, Ta Sen and Rol-Pak have imported or sold for importation to the U.S. reclosable plastic bags. Nocek testified that foreign respondents Ideal Plastic, Lien Bien and Ta Sen are members of the Plastic Bag Union set up for the sole purpose of exporting reclosable plastic bags and that at a meeting those companies wanted to sell reclosable plastic bags to the U.S. as soon as possible (FF 124), that Kwang II and Lim Tai indicated an interest in exporting bags to the United States (FF 127 and 128) and that Nocek received a communication from Rol-Pak stating that it was a pleasure meeting Nocek on his recent Far East trip and quoting prices of polyethylene finished blueline zipperbags, CIF New York (FF 129). Such testimony does not show past imports. Moreover while in the Far East, Minigrip's Nocek did solicit a potential supplier of reclosable plastic bags to Minigrip (FF 118, 119).

(FF 123, 300, 301) Hence the administrative law judge finds that a mere interest by Far East manufacturers in exporting reclosable bags to the United States, without some indication as to who the importer is or will be, does not establish a reason to believe that there have been and will be exports from said manufacturers.

Based on the foregoing, the administrative law judge finds that there is a reason to believe that there will be imports of reclosable plastic bags relating to respondents Chung Kong, Meditech and its agent Polycraft, Siam Import, C.A.G., Gideons Plastic, Nina Plastic, Hogn Ter, Tech Keung, Ka Shing, Euroweld, Insertion and Tracon and also nonparty Harbona.

III Domestic Industry

Respondents Meditech argue that there is no domestic industry because complainant in its domestic production does not practice the '872 patent since the coolant jets in complainant's process are directed to the base of the profiles rather than to the profiles themselves. Further, respondents

Meditech argue that

as the '872 patent directs. If there is a domestic industry respondents Meditech propose at a minimum that it comprises those facilities of complainant and those facilities of complainant's licensee, Dow Chemical Company (Dow), dedicated to the manufacture, sale, and distribution of reclosable plastic bags and profile tubing (RPF 215). However respondents Meditech also propose that there is presently a successful and thriving domestic industry manufacturing, selling and distributing reclosable plastic bags and profile tubing bearing the color line trademark (RPF 228).

Complainant argues that there is a domestic industry involving the '872 patent because the '872 patent covers use of coolant jets directed at the base of the profiles. If the domestic industry is to be defined in terms of those practicing the '872 patent complainant contends that the industry should include Minigrip and Dow. Complainant also proposes that Minigrip is part of the U.S. industrial reclosable bag industry which includes in addition to Minigrip, Minigrip's franchisees, KCL and Millhiser; that Minigrip is a part of the extruded tubing for industrial reclosable plastic bags industry,

(CPF 53). However complainant further proposes that there is a successful and thriving doemstic industry manufacturing and selling reclosable plastic bags and profile tubing bearing the color line trademark which domestic industry comprises that portion of Minigrip concerned with the manufacturing of profile tubing and the formation of such tubing into reclosable plastic bags (CPF 54).

The staff argues that Dow is not included in the domestic industry because there is insufficient evidence of record as to Dow's alleged practice of the '872 patent (S Post 23, 24).[22/]

22/ The staff acknowledges that Dow is a licensee under the '872 patent and notes in general that a domestic industry would include domestic production

(Footnote continued to page 49)

The administrative law judge finds that respondents Meditech's contention that complainant does not employ the technology of the '872 patent conflicts with the testimony of complainant's Ausnit. Thus in the Minigrip process

regular basis (FF 58, 108, 227, 228). Moreover in the Minigrip process air is blown on the "base of the profiles" (FF 58, 101, 102, 103, 227, 228). Hence air has to be blown "onto the profiles" as called for by claim 1 in issue.

Presumably relying on the testimony of Prof. Garris, respondents Meditech argue that directing air flow from the coolant jets to the base of the profiles would not control the shape of the profile (R Post at 19,20). Prof. Garris was qualified as an expert in fluid mechanisms and heat and mass transfer (FF 109). He has never seen an extrusion line of extruding tubing (FF 110). He learned from one of the patents the approximate temperature polyethylene would exit from an extruder (FF 111). Otherwise he would have to guess (FF 112). In contrast complainant's Ausnit has had several years experience with a process for making plastic reclosable bags (FF 49 to 108). Moreover tests have shown the effectiveness, in the Minigrip process, of directing air flow from the coolant jets to the profiles for controlling the shape of the profiles (FF 59).

Based on the foregoing the adminsitrative law judge finds that complainant, in its current process, has established that it follows the teachings of the '872 patent.

With respect to the definition of a domestic industry, in section 337 patent-based actions the domestic industry includes the domestic

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(Footnote continued from page 48)
activities of the patent holder and its licensees under the patent. The staffstated that it does plan to request information from Dow during discovery for the permanenet relief phase of the hearing. The staff argued that complainant practices the '872 patent in its domestic production because the patent covers coolant jets directed at the profile base. (SPost at 20-24).

production-related exploitation of the patent in issue by the patent holder and its licensees. See, e.g., Certain Methods for Extruding Plastic Tubing, 218 USPQ 348, 353 (Comm. Opin. 1982). The Commission has expressly held that the scope of the domestic industry in intellectual property actions cannot be delimited by the scope of market competition relating to the subject property:

> "The use of competition between domestic production and imports to define the domestic industry is not the proper analysis of the domestic industry requirement of section 337. Similarly, the Commission determines that competition between various domestically produced products should not be used to define separate domestic product industries. Certain Products with Gremlins Character Depictions, Inv. No. 337-TA-201 (Comm. Opin. 1986).

The Commission went on to state that the lack of competition between products is a proper consideration for the analysis of the injurious impact of imports on the industry. Accord, Certain Soft Sculpture Dolls, Inv. No. 337-TA-231 at 103-104, 117 (Comm. Opin. 1986) (although larger and more expensive dolls produced by Original Appalachian Artworks was found not to compete with imports, they were included in the domestic industry); Certain Methods for Extruding Plastic Tubing, 218 USPQ 348 (Comm. Opin. 1982) (domestic industry held to include both Dow and Minigrip despite contention of sales in different markets).

Consequently, the domestic industry under the '872 patent must include the domestic production by complainant's licensee Dow, regardless of whether Dow competes in the same market as complainant, if there is proof that Dow manufactures tubing and/or bags in the United States according to a claim in issue.

The administrative law judge finds the evidence inconclusive on whether Dow manufactures tubing and/or bags according to a claim in issue. Paragraph 20 of the complaint merely states on "information and belief" that a Dow reclosable plastic bag is made in accordance with the '872 process. Moreover the (FF 230) and it is known

that reclosable plastic bags can be made by a process other than by the process of the '872 patent (FF 74, 75).[23/]

With respect to the '120 trademark, Minigrip uses the '120 color line trademark near the top of its domestically produced reclosable plastic bags.[24/] The color line is extruded onto tubing between the profiles so that when the tubing is converted into bags the color line will appear at the top of the bags. (FF 185, 187, 203, 237). The vast majority of Minigrip's reclosable plastic bags and tubing contain the color line, with the exception of tubing and bags made by Minigrip for sales to Dow. The '120 trademark registration is not limited to the use of any specific color and Minigrip does use colors other than the red color shown in the '120 registration. The vast majority of Minigrip's sales of color line products however do use the color red (FF 213, 214, 240).

Based on the foregoing, the administrative law judge finds that the record establishes two domestic industries: (1) complainant's facilities dedicated to the manufacture (under the '872 patent), sale and distribution of reclosable plastic bags and profile tubing (which would include profile tubing and bags made by complainant for Dow that does not carry a color line trademark), and (2) complainant's facilities dedicated to the manufacture

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23/ The contention that converters of tubing into bags such as KCL and Millhiser should be included in the domestic industry is without merit since the '872 patent relates to a method in the production of profiled tubing and Dow and Minigrip are the only domestic producers of tubing (FF 229, 231). See, Certain Methods for Extruding Plastic Tubing, 218 U.S.P.Q. at 353 (domestic industry includes only Dow and Minigrip which exploit process patents in issue directed to tubing extrusion).

24/ Minigrip has no licensees under the '120 color line trademark. Purchasers of Minigrip's profiled tubing have merely an "implied license" to use the color line only to the extent of using that tubing for its intended purpose -- converting it into reclosable plastic bags with a color line. Bag converters such as KCL or Millhiser have no independent right thereby to put a color line on a product which does not come from Minigrip.

sale and distribution of reclosable plastic bags and tubing which carry the color line trademark.

IV Efficient and Economic Operation

In order to prevail under section 337, a complainant must establish that the domestic industry is efficiently and economically operated. The guidelines set forth by the Commission to assess whether a domestic industry is efficiently and economically operated include: (1) use of modern equipment and manufacturing facilities; (2) investment in research and development; (3) profitability; (4) substantial expenditures in advertising, promotion, and development of consumer goodwill; (5) effective quality control programs; and (6) incentive compensation and fringe benefit programs for employees. See, e.g., Certain Methods for Extruding Plastic Tubing, 218 U.S.P.Q. 348 (Comm. Opin. 1982); Certain Coin Operated Audio Visual Games and Components Thereof, 216 U.S.P.Q. 1106 (Comm. Opin. 1982); Certain Slide Fasteners Stringers and Machines and Components Thereof, 216 U.S.P.Q. 907 (Comm. Opin. 1981).

Complainant Minigrip's plant at Orangeburg, New York, operates 24 hours a day, thereby avoiding the costs and inefficiency to start up the extruders. The resin used in the plant is delivered by rail to the plant's own railroad siding, thus minimizing the cost of transportation. Machines are dedicated to , thereby maximizing the efficiency of their use (FF 241). have been installed on a number of extruders at Minigrip's Orangeburg facility to insure on the extruder lines. The plant is air-conditioned to improve extruder speeds and create a working environment that maximizes employee alertness and efficiency especially under summer conditions. The Minigrip plant has its own machine shop which is using the latest technology to There is an active research and development program There are which permit the

purchase of resin in efficient bulk quantities.

aid in the production of the products at issue. Minigrip has an active research and development program to introduce new (FF 242). Minigrip's economic performance from 1977 to the present has shown a steady increase, in terms of sales, profits, capacity, and capacity utilization (FF 243).

Minigrip's sales per employee in tubing and bag production has increased from in 1982 to (first quarter annualized). The productivity of Minigrip's tubing and bag employees has increased since 1982, by measure of sales per employee, a basic measure of operating efficiency (FF 244). To provide enough manufacturing space and machinery to meet anticipated demand, Mingrip has increased its plant capacity on four different occasions. Minigrip is now in the process of building a square foot plant in Sequin, Texas, which will start production in the first quarter of (FF 245). Minigrip has a complete R&D facility that includes It also has a for designing and programming (FF 246). Minigrip has an effective Quality Assurance Program, as well as fringe benefits and compensation programs for its employees (FF 247). Reclosable plastic bags and tubing have been a profitable product line for Minigrip (FF 248).

Based on the foregoing, the administrative law judge finds that there is a reason to believe that complainant's operations devoted to the manufacture, sale and distribution of reclosable plastic bags and profile tubing with and without the color line trademark are efficiently and economically operated.

V Injury: Immediate and Substantial Harm

Complainant has argued that it is abundantly clear that once the 337-TA-110 Exclusion Order expires on December 1, 1987, there will be a deluge

of foreign manufactured infringing reclosable plastic bags imported into the U.S. offered at prices substantially less than domestically produced bags; and that the influx of cheap foreign reclosable bags will not only take sales directly away from Minigrip, but will also destroy the credibility of Minigrip's distributors with their customers. It is argued that to compete effectively, Minigrip itself will have to look to having its product manufactured abroad, all to the detriment of the domestic industry; that this is in addition to the fact that such foreign made bags bearing Minigrip's trademark will destroy the good will established by Minigrip since the manufacturer respondents will literally be in a position to dump vast quantities of inferior quality bags on the market; and that the color line trademark would therefor no longer indicate Minigrip as the source of origin of the goods, or that the product is of the high quality that Minigrip established. (C Post at 28 to 30)

Complainant further argued that if Minigrip does not obtain temporary relief it will be destroyed by foreign low wage competition; that foreign manufacturers, that upon learning that temporary relief would not issue, would begin to produce to take advantage of the opportunity that will exist; and that because the lead time from the placing of an order to clearance through United States Customs and delivery in the U.S. is about 12 weeks, a flooding of the market and a stockpiling of inventories are real. It is argued that foreign competitors, who enjoy a massive cost advantage, would accumulate large inventories that would hang over the market and would lead to erosion and collapse of prices and markets; that the only way Minigrip could compete is to import from low wage countries and, in essence, become a distributor; that with stock bags, price is the most important consideration to the industrial buyer; and that in the absence of the protection of a temporary exclusion order, Minigrip's production will have to relocate to the

low cost, low wage countries in order to compete. Without the temporary exclusion order, complainant argues that there will result immediate harm to Minigrip and

, aside from the economics, will once again relegate the American worker to a second class existence and truly irreparably damage the relationship that Minigrip prides itself with having with its employees. (C Post at 28 to 30).

While respondents admit that to date Meditech has made importation into the United States of reclosable plastic bags and that importation is imminent "once legal clearance of importation is obtained" (RPF 212), it argued that assuming Meditech began immediate importations on December 1, 1987, its annual sales

that this constitutes a market penetration of percent against the total yearly sales of Minigrip and Dow or less than percent for the first year of importation; that this assumes that no lead time is required to produce and import reclosable plastic bags; that assuming a more realistic 2 to 3 month lead time to receive orders from the Far East, Meditech's market penetration during the first year of importation following December 1, 1987, would be between and percent of the total annual sales of Minigrip, and Dow (RPF 262). It further argues that the U.S. market penetration to the domestic industry of imports from Meditech is estimated to be no more than .53 to .8 percent for the first full year of importation (RPF 283).

The staff argues that there is a reason to believe that impending importation will substantially injure the domestic industry; that the foreign respondents have manufactured and exported, or attempted to export, to the

United States substantial quantities of allegedly infringing bags, notwithstanding the present exclusion order; that complainant has provided evidence regarding 21 instances where firms have attempted to import a total of approximately 60,000,000 allegedly infringing bags into the United States; and that data recently provided by the United States Customs Office to the staff shows 48 instances of importations of reclosable plastic bags by respondents Nina Plastics, Ka Shing, Insertion, Tracon, Meditech, Chung Kong and Euroweld; that information gathered by complainant's representatives during a 1986 trip to the Far East indicates that various foreign respondents have sufficient manufacturing capacity to flood the U.S. market with their allegedly infringing bags; that the alleged annual production capacity of three of the eight foreign respondents is 612,000,000 units; and that one manufacturer, Hogn Ter, has at least fifteen extruders which is

the number of extruders presently on line at Minigrip. (S Post at 25 to 27).

For the issuance of a temporary exclusion order, complainant must show that without a temporary exclusion order for the period of December 1, 1987 to April 29, 1988, complainant will suffer immediate and substantial harm. Traditionally a tendency to injure under section 337 involves a showing of circumstances from which probable future injury can reasonably be inferred. Corning Glass v. U.S. ITC, 230 U.S.P.Q. 822, 828 (Fed. Cir. 1986). Relevant circumstances include foreign cost advantage and production capacity, ability of the imported product to undersell complainant's product, and the potential and intention to penetrate the U.S. market. Certain Methods for Extruding Plastic Tubing, 218 U.S.P.Q. 348 (Comm. Opin. 1982). Although the quantum of injury is lower in investigations involving infringement of intellectual property, the injury indicated must be shown to be both substantial in degree and to occur as a result of the infringing imports. Corning Glass Works

v. ITC, 799 F.2d 1559, 230 U.S.P.Q. 822, 829 (Fed. Cir. 1986).

With respect to the domestic industry that is defined by the '872 patent, the administrative law judge has found that there is a reason to believe that respondents Hogn Ter and Siam Import (as well as its agent C.A.G.) and nonparty Harbona will import infringing reclosable plastic bags in the period of December 1, 1987 to April 29, 1988 (interim period).[25/] The foreign capacities of respondent Hogn Ter, nonparty Harbona and respondent Siam Import are substantial. Hogn Ter has fifteen extruders with only ten in operation upon Nocek's visit in late 1986 and has produced million low-priced bags for export (pursuant to specifications) to the United States which evidences its production capacity. Also Hogn Ter confirmed to Minigrip's Nocek its excess capacity (FF 255, 305). Non-respondent Harbona has the capacity to produce 1-2 containers per month for export, with one container containing 12.6 million bags (FF 269, 270). For a five month period this would amount to 68-136 million bags.

The reclosable plastic bags involved, those of Siam Import, Hogn Ter and Harbona, are sold in particular sizes, number of sizes, quantities (sold in units of one thousand) as comparably used by Minigrip for sale in the industrial reclosable plastic bag market. Additionally, such bags are offered with white block printing thereon suitable for printing information on the bag about the product to be sold in that packaging. Apart from certain sample imports from Chung Kong of its Pleasure Loc boxes, imports in this investigation have not been distributed in boxes, packages, or small quantities suitable for consumer use (FF 321a). In addition there is expert

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25/ The infringing imports of nonparty Harbona are considered relevant to the determination of injury under section 337 due to the in rem nature of the relief. E.g., Certain Roller Units, Inv. No. 337-TA-44 (RD 1978) at 31-32. Harbona has admitted to past importations of reclosable plastic bags (FF 263).

opinion evidence that import entry in the consumer market would be far more difficult than entry into the consumer market (FF 232).

Siam Import produces a total 750 million bags per year, with 300 million bags a year produced for exportation. Siam Import has modern facilities with 9 extruders and 20 bag converting machines, and has confirmed its ability to increase production and exports (FF 324).

The record amply supports complainant's Dr. Keegan's testimony that foreign manufacturers have a "tremendous cost advantage" in manufacturing reclosable plastic bags. Thus foreign manufacturers prices undersell complainant's prices in a range of (FF 249, 250, 253, 255 to 267). It is uncontroverted that the industrial market for "stock bags" which makes up of complainant's business is primarily price sensitive in a market populated by industrial distributor customers who have an incentive to obtain lower priced reclosable plastic bags for their customers (FF 251). Respondents submitted no contrary persuasive evidence that imports do not undersell by a wide margin Minigrip's prices.

Additionally, Keegan's testimony concerning the applicability of prevailing wage rates (FF 249) similarly is uncontroverted and persuasive and the price of extrusion equipment used in the Far East is far less than the cost to Minigrip (FF 263, 295, 315). Foreign manufacturers would not eliminate the cost advantage from foreign manufacture because of the high value to weight ratio of reclosable bags shipment and the fact that more than 13 million bags can be shipped in one 20 foot container (FF 252, 255, 266). There is also evidence that warehousing bags to build up an inventory, which the foreign manufacturers can do in the interim period,

involves only minimal costs and that the cost advantages are sufficient for importers to build up such inventory (FF 252, 302).[26/]

In addition due to the great disparity in pricing of imported bags as compared to Minigrip's prices for domestic bags (FF 249, 250, 253, 255 to 267), imported bags would have a much greater dollar effect on Minigrip's sales than their own selling price. One container of Harbona's imports priced at . is comparable to in Minigrip sales at its current prices. Consequently, five to ten Harbona container loads would effectually approximate in Minigrip sales at its current prices. (FF 269, 270). Minigrip's price sensitive sales of stock bags for a comparable five month period would approximate million dollars and million units (FF 306). The foreign capacity thus amounts to for the relevant time period. Intent and ability to export is shown in the excess capacity and past exports of the respondents Hogn Ter and Siam Import and nonparty Harbona.

In addition to price differential and price sensitivity, there is yet another reason for finding immediate and substantial harm. Minigrip is presently in the process of adding further domestic capacity to satisfy demand for reclosable plastic bags and tubing by building a manufacturing plant for reclosable plastic bags and tubing in Seguin, Texas. This facility is scheduled to begin production in the first quarter of and will initially employ about production workers. This is testimony that if a

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26/ Although there can be a lead time of about 12 weeks between the bags leaving the foreign exporter and arriving at U.S. Customs, there is no assurance that foreign importers will delay shipment until the beginning of December 1987. As the record establishes (FF 322), there has been a number of imports which have been subjected to exclusion action by U.S. Customs under the order issued in 337-TA-110.

temporary exclusion order does not issue the facility will have to be

In the event that no temporary exclusion order issues and in order to be competitive and retain its market position, Minigrip plans to sell the reclosable plastic bags in the U.S. market (FF 52, 253, 254, 302 to 304). A patentee should be able to profit from patented technology and this includes the ability to expand domestic capacity and sales to exploit the patent. Minigrip's ability to expand would be foreclosed by the substantial entry of low priced competitive infringing imports particularly at this time period, and there would be a need to obtain low cost product rather than higher priced added capacity. Minigrip's intended sales of reclosable plastic bags not detract from future injury to the domestic industry because those

Despite respondents Meditech's contrary contention, Minigrip's plans to build the Texas manufacturing plant do not indicate Minigrip's belief that it will not be injured.

(FF 52, 253, 254, 302 to 304).

Because there is a reason to believe that imports of respondents Meditech in the interim period will not infringe the '872 patent, the question is raised whether the imports of respondents Meditech will affect the causation of injury to complainant by Siam Import, Hogn Ter and Harbona. See, Certain Drill Point Screws Inv. No. 337-TA-116 (Comm. Opin. 1983) at 20-21.

For the above reasons, the administrative law judge finds that there are circumstances indicating substantial and immediate injury to the domestic industry under the '872 patent in the interim period due to the price sensitivity of stock reclosable plastic bags and the large capacities and low priced infringing imports of Hogn Ter, Siam Import and Harbona.

With respect to the domestic industry defined by the '120 color line trademark, the majority of the respondents in this investigation have been shown to be involved in the importation of reclosable bags with an infringing color line, including the following: Meditech (through at least , Polycraft, C.A.G., Gideons Plastic, Nina Plastic, Siam Import, Hogn Ter, Teck Keung, Ka Shing, and Euroweld. Additionally, nonparty Harbona applies the color line to its manufactured bags and has exported reclosable plastic bags to the United States (FF 263). With the addition of still more foreign imports and manufacturers and their manufacturing capacity, the conclusion of injury found above with respect to the '872 patent applies with even greater force to the domestic industry producing reclosable bags and tubing under the '120 color line trademark.

This contention with respect to the industry defined by the '120 trademark ignores the fact that the cumulative impact of all of the infringing importations of record presents circumstances indicating the substantial and immediate injury to complainant. It is uncontroverted that

the infringing importers substantially undersell complainant and that there is foreign manufacturing production capacity whose cumulative imports will amount to more than a substantial share of the domestic market. Intent and capacity to export are amply demonstrated by the numerous imports of record (FF 321), despite the exclusion order entered in Inv. 337-TA-110 which is still in effect.

Respondents Meditech rely (R Post at 1) on the following language in the prior investigation Certain Reclosable Plastic Bags, 192 U.S.P.Q. 674, 680-681 (1977):

> The Commission agrees with the recommended determination of the presiding officer, excepted to by complainant Minigrip, that the effect or tendency of any infringement of complainant's trademark is not to substantially injure or destroy the relevant industry. In the absence of the patent infringement which we have found to exist, imports of bags which may infringe complainant's trademark have not been shown to have the injurious effect required by the statute, and we are not prepared to infer such an effect. The primary, if not the sole, success of the imports under consideration would seem to derive from the inclusion of the patented invention (the reclosable device) in them, and not from the inclusion of the trademark.

However in contrast to that investigation, the administrative law judge in this investigation does find immediate and substantial harm related to the trademark infringement based on the evidence of color line imports and capacity to produce articles with the color line. Moreover the Commission has repeatedly found a section 337 violation where the unfair act merely involved infringement of a trademark See, Certain Cast Iron Stoves, 215 U.S.P.Q. 963 (1980); Certain Cube Puzzles, 219 U.S.P.Q. 322 (1982); Certain Sneakers with Fabric Uppers, 223 U.S.P.Q. 536 (1983). In addition, evidence of record establishes that the color line is widely used and extensively promoted by Minigrip as an indication of origin and is recognized in the industry as representing Minigrip and its quality products (FF 201). Hence imports with that color line will affect the domestic industry.

Based on the foregoing, the administrative law judge finds immediate and substantial harm to the domestic industry producing under the '120 color line trademark during the interim period.

VI Conclusion (Reason To Believe a Violation Exists)

From the foregoing the administrative law judge finds that complainant has established a reason to believe a violation exists, requiring a balancing of the four factors governing the discretionary grant of temporary relief to determine whether such relief should be granted, particular consideration being given to the public interest.

Factors Governing Discretionary Grant of Temporary Relief

VII Probability of Success on the Merits

Based on the previous sections, it is clear that there is a substantial probability complainant Minigrip will succeed in showing a violation of section 337. This probability is less than that in Smith International, Inc. v. Hughes Tool Co., 718 F. 2d 1573, 1581, 219 U.S.P.Q. 686, 692 (Fed. Cir. 1983) See, Fluidized 225 U.S.P.Q. at 1213, n 7.

VIII Immediate and Substantial Harm to Complainant

As noted above, it does appear that complainant will suffer immediate and substantial harm during the interim period of December 1, 1987 to April 29, 1988, in the absence of temporary relief.

IX Harm, If Any To Respondents

The staff argues that the harm to respondents, if any, has not figured prominently in temporary relief proceedings because respondents can always import the articles in issue by posting a bond which is returnable if respondents prevail in the permanent relief stage. The staff further argues that the monies were for the purposes other than the importation of reclosable plastic bags; that the purpose of the loan, as stated in the loan agreement,

Based on the foregoing, the administrative law judge finds lacking and the entry of any temporary exclusion order.

X Public Interest

As noted in the foregoing section "Standard For Grant of Temporary Relief", if the effect of the issuance of a temporary exclusion order would have a greater adverse impact on the public interest than would be gained by protecting the intellectual property holder, the temporary relief should not be granted.

Complainant argues that the U.S. trademark laws have as their goal both the protection of the consumer from deception and the protection of property rights and that the consumer will therefore benefit in this regard. It maintains that a temporary exclusion order would not be detrimental to the public interest because the order would simply extend the status quo for a short period, viz. December 1, 1987 to April 29, 1988 and the domestic industry can fulfill the domestic demand for that period (C Post at 35).

Respondents Meditech argue that the public interest favors legitimate competition; that complainant has presented no proof of any infringement; and that to the contrary Meditech has presented "proof positive" that imports from its potential supplier would not be infringing (R Post at 35).

The staff argues that there are no public interest factors which would preclude the grant of temporary relief. It is argued that the issuance of a temporary exclusion order will not have a detrimental effect on public health and welfare since the effect of the temporary exclusion order would be to maintain the status quo for a five month interim period. Additionally it is argued that there is evidence that the domestic industry is able to satisfy total United States demand for the reclosable bags in issue, and that there is no indication that responents' reclosable plastic bags offer any advantage over those manufactured by the domestic industry. (S Post at 38, 39).

The legislative history of section 337(e) indicates congressional intent that public interest factors play an important role in determining the appropriateness of the requested relief.

> The Committee believes that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute. Therefore, ...
>
> the Commission must examine ... the public health and welfare before such an order is issued. Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare ... than would be gained by protecting the patent holder ... then the Committee feels that such exclusion order should not be issued.

(S. Rep. No. 93-1298, at 197, 93d Cong., 2d Sess. (1974)).

The administrative law judge finds that it has not been shown that the public interest factors listed in section 337(e), viz. effect upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive article in the United States, and United States consumers should preclude the issuance of the requested temporary exclusion order.

Although respondents Meditech have argued that complainant has presented no proof of any infringement, the administrative law judge has found that there is a reason to believe that certain respondents will infringe the color line trademark and the '872 patent in the interim period. The Commission and the courts have often held that it is in the public interest to preserve the integrity of laws protecting the domestic industry's rights to intellectual property, including the patent system of the United States. See, Copper Rod 214 U.S.P.Q. at 849. In Certain Coin Operated Audio-Visual Games and Components Thereof, Inv. No. 337-TA-87 (Commission Action and Order) (1981),

the Commission made it clear that:

> Because the unfair competition laws of the United States have as their goal both the protection of the consumer from deception practices and the protection of property rights inherent in valid trademarks, the public interest is best served by the issuance of an exclusion order.

Id. at 30

Moreover in considering the public interest, employment in the United States has been given weight. See, Copper Rod 214 U.S.P.Q. at 899. The record establishes that operation of complainant's plant in Texas will result in recurring jobs in the critical period which could last through importation of bags with the infringing color line trademark (FF 253, 254, 302 to 304).

Based on the foregoing, the administrative law judge finds that the issuance of a temporary exclusion order would not have a greater adverse impact on the public interest than would be gained by protecting complainant as the intellectual property holder complainant.

XI Balancing The Factors

Balancing the factors, the administrative law judge finds that temporary relief should be granted.

FINDINGS OF FACT

I. Jurisdiction

1. The Commission has subject matter jurisdiction and *in rem* jurisdiction.

2. The Commission has in *personam* jurisdicition over respondents Meditech, Polycraft and Euroweld who personally appeared and actively participated at the hearing.

3. Service of the complaint and notice of the investigation was perfected on each of the respondents identified in the notice of investigation.

4. Respondents Meditech admits that the Commission has jurisdiction over Meditech,

II. Parties and Products In Issue

Complainant

5. Complainant Minigrip, Inc. (Minipgrip) is a Delaware corporation with a manufacturing facility in Orangeburg, New York for manufacturing profile tubing and reclosable plastic bags therefrom which bags are the products in issue in this investigation. (CX 180 at 4, 5, 15; CX 1 at 3).

Respondents

6. Rspondent C.A.G. located at 60 1B Hillview House, Jalan Remaja, Singapore 2366. (CX 1 at 11; Nocek CX 179, Exh. A at 3).

7. Respondent Chang Won is located at Roon 301 Korean Express Bldg., 36-7, Hannam-Dong, Yongsan-Ku, Seoul, R.O. Korea. (CX 1 at 11; Nocek CX 179, Exh. A at 4-5).

8. Respondent Chung Kong is located at Wah Shun Ind. Bldg., Blk B., 2/F4 Cho Yuen Street, Yau Tong Bay, Kowloon, Hong Kong. (CX 1 at 12; Nocek CX 179, Exh. A at 4).

9. Respondent Euroweld is located at P.O. Box 5102, Hazlet, New Jersey 07730. (CX 1 at 13; Nocek CX 179, Exh. A at 8-9).

10. Respondent Gideons Plastic is located at No. 22, Lane 59, Ti Eng North St., Tou Liu, Taiwan, Republic of China. (CX 1 at 12; Nocek CX 179, Exh. A at 8).

11. Respondent Hong Ter is located at No. 12 Lane 122 Street Chiang Nan, Village New HWU, Taipei, Taiwan. (CX 1 at 12; Nocek CX 179, Exh. A at 6).

12. Respondent Ideal Plastic located at 81, Lane 59, Ha Mi St., Taipei, Taiwan. (CX 1 at 12; Nocek CX 179, Exh. A at 5-6).

13. Respondent Insertion is located at 132 West 24th Street, New York, New York 10011. (CX 1 at 13; Nocek CX 179, Exh. A at 9).

14. Respondent Ka Shing is located at 150 S. 4th Avenue, Mount Vernon, New York. (CX 1 at 13; Nocek CX 179, Exh. A at 9).

15. Respondent Kwang Il1 is located at Rm. #301 Korean Express Bldg., 36-7, Hannam-Dong, Yongsan-Ku, Seoul, R.O. Korea. (CX 1 at 12; Nocek CX 179, Exh. A at 6).

16. Respondent Lim Tai is located at 63-65 Mahaputaram Rd. (Wat Takheim), Bangkok, Thailand. (CX 1 at 12; Nocek CX 179, Exh. A at 10).

17. Respondent Lien Bin is located at No. 1, Lane 49, Kuo Ching Road, Pan Chiao City, Taipei, Taiwan. . (CX 1 at 12; Nocek CX 179, Exh. A at 5-6).

18. Respondent Meditech is a Colorado Corporation with its principal place of business at 4105 Holly (Unit 1), Denver, Colorado 80216. (CX 1 at 13; Nocek CX 179, Exh. A at j; RX 6 at 1).

19. Respondent Nina Plastic located at 1936 Premier Row, Orlando Central Park, Orlando, Florida 32809-6282. (CX 1 at 13; Nocek CX 179, Exh. A at 9).

20. Respondent Polycraft is a California Corporation with its principal place of business at 2727 Thompson Creek Road, Pomona, California 91767. (CX 1 at 13; Nocek CX 179, Exh. A at 9; RX 40 at 1).

21. Respondent Rol-Pak is located at Chin Thye Sdn Bhd, 5th Floor, Plaza Petaling, 65-67 Jalan Petaling, 50000 Kuala Lumpur, Malaysia. (CX 1 at 12; Nocek CX 179, Exh. A at 7).

22. Respondent Siam Import is located at 26/377 Eakachai Road, Bangbon, Bangkhuntien, Bangkok, 10150 Thailand. (CX 1 at 12; Nocek CX 179, Exh. A at 7-8).

23. Respondent Ta Sen is located at 315-2 Chang Chun Road, Taipei, Taiwan. (CX 1 at 13; Nocek CX 179, Exh. A at 5-6).

24. Respondent Teck Keung is located at 516, L.C.H. Bang Bldg., 4/Fl., 593-601 Nathan Road, Kowloon, Hong Kong. (CX 1 at 13; Nocek CX 179, Exh. A at 8).

25. Respondent Tracon is located at 1 Huntington Quadrangle, Suite 1C-01, Melville, New York 11747. (CX 1 at 13; CX 179, Exh. A at 10).

III. The '872 Patent

26. On March 23, 1976, the '872 patent titled "Making Plastic Film With Profiles and Opening Means For Bags" issued to Takashi Noguchi on an application filed December 26, 1973. (RX-3).

27. On May 16, 1977 an assignment of the '872 patent to Kakushiki Kaisha Seisan Nippon Sha (Seisan) was recorded in the U.S. Patent Office (CX-1 Exh. B).

28. Minigrip became the exclusive U.S. licensee of Seisan under their basic technology in January 1963. In 1971 Minigrip and Seisan entered into a supplemental agreement by which improvements the Seisan had made in the basic technology, including the improvement of the '872 patent, were also licensed to Minigrip. (CX-1 at 5, para. 7).

29. In February 1984, the '872 patent was assigned to Minigrip and the supplemental license was terminated. At the present time there is no longer any relationship between Minigrip and Seisan nor is there any relationship between Minigrip and the inventor of the '872 patent (CX-1 at 5, para. 7).

30. Complainant Minigrip Inc. is the owner, by assignment, of the entire right, title and interest on and to the '872 patent (CX-1, Exhibits A & B).

31. Claims 1 to 5 of the '872, in issue, read:

> 1. In the method of making plastic film with shaped profiles on the surface comprising the steps of:

extruding a continuous length of an interlocking profile from a die opening with the profile having a precise shape for interlockingly engaging with another profile;
and directing a flow of coolant onto the extruded profile of warm plastic and adjusting the direction of flow of coolant relative to the direction of movement of the profile for controlling the cooling rate and shape of the profile.

2. In the method of making a plastic film with shaped profiles on the surface in accordance with claim 1, wherein said direction is adjusted through an arc of 180 degrees.

3. In the method of making plastic film with shaped profiles on the surface in accordance with the steps of claim 1, wherein the flow of coolant is adjusted in an arc extending in the direction of travel of the profile length.

4. In the method of making plastic film with shaped profiles on the surface in accordance with the steps of claim 1, wherein the flow of coolant is adjusted in an arc extending transversely of the direction of movement of the profile length.

5. In the method of making plastic film with shaped profiles on the surface comprising the steps of:
extruding a continuous length of an interlocking profile from a die opening with t he profile having a precise shape for interlockingly engaging with another profile;
and directing a flow of coolant against the heated profile and adjusting the pressure of coolant flow for controlling the cooling rates and shape of the profile.

(RX-3, col. 4, 5)

32. The '872 patent is to an invention which relates to improvements in plastic extrusion equipment and methods for forming film with shaped profiles on the surface where such a film is eventally used in making reclosable bags or similar products (RX-3, col. 1 at 10-15).

33. The patentee teaches more particularly that:

the invention relates to improvements in forming the profiles such that the shape can be more completely controlled at relatively high extrusion speeds so that a precise shape can be maintained to accurately and strongly interlock with another mating profile. One type of film

having profiles on the surface is formed by supplying a continuous sheet of film and simultaneously extruding a profile which is laid on the film while hot so that it integrally attaches itself to the film to form a complete profile sheet. Mechanisms and processes for forming such sheets are shown in the cooling applications of Takashi Noguchi , U.S. Ser. No. 178,086, filed Sept. 7, 1971 and U.S. Ser. No. 178,087, filed Sept. 7, 1971. It will be understood that the features of the invention find advantage in forming profiles by other methods and other mechanisms, but the invention will be primarily described in connection with an environment such as that shown in the above referred to copending applications, the disclosures of which are embodied herein by reference. The features described herein may be employed, for example, in an extrusion arrangement wherein the profile is not formed separately and applied to a film while hot, but wherein the profile and film are extruded simultaneously out of a single die opening. It is also contemplated that the features of the invention may be employed in an arrangement wherein the film and profile are extruded separately, but substantially immediately joined to each other.

In the formation of profile sheets with the improvements of extrusion techniques and profile and film designs, it has become possible to form a very thin film of only a few mils of thickness and to make the profile very small and yet obtain interlocking profiles which will join to each other with a strength that approaches or surpasses the strength of the film. To obtain an efficient highly effective interlocking profile depends upon the accuracy thereof and this accuracy is hard to maintain at high extrusion speeds. It has been discovered that an important factor in maintaining the shape of the profile is in controlling the cooling thereof.

(RX-3, col. 1, lines 15-56)

34. In FIG. 1 of the '872 patent a flat thin strip of film is delivered traveling along a path and a freshly extruded profile is positioned on the film to be bonded thereto by the heated plastic of the profile adhering to and solidifying with the film. The film sheet is preferably heated such as by processing over a heated roll on that the profile will more readily adhere to the surface and form a firm bond. The plastic of the profile being freshly extruded is relatively hot and must be cooled so that it will solidify for subsequent interlocking or for rolling up the profile film on a roll in a

continuous operation. For this purpose a coolant jet mechanisim is provided for directing a flow of coolant, preferably air, against the heated profile to remove heat therefrom. The coolant jet may be referred to as a control coolant jet because it is said that it has been discovered that this jet can control the shape of the resultant profile on the film; that the profile after being adhered to the film, is in the somewhat plastic formative stage, and that the coolant jet can influence the shape of the profile by controlling the location where the coolant fluid is directed and the direction at which it engages the profile as well as the pressure or velocity at which it engages the profile. (RX-3, col. 2, lines 25-68).

35. FIG. 2 of the '872 patent shows a sheet wherein plastic film has a set of profiles bonded to the surface. A typical set of profiles will consist of a general arrowhead shape for one profile and a complementary groove shape with overlapping side jaws for the other profile (RX-3, col. 3 at 25-27, 38-42).

36. A use of the type of film claimed in the '872 patent is shown in the structure of FIG. 3 of the '872 patent wherein the film sheet is doubled to form a doubled closed bag with a top and a bag interior and a bottom. The top of the bag has interlocking profiles. For use the bag will be slit along the top and profiles can be pulled apart by the flanges located above the profiles for access to the interior of the bag. For reclosing the bag the profiles will be pressed together by applying a lateral pressure along the top of the bag on either side of the profiles. (RX-3, col. 3 at 27 to 37).

37. The following FIG. 4 is a somewhat schematic enlarged fragmentary sectional view showing a position of the cooling mechanism:

It is said that:

> FIG. 4 illustrates the relationship between the provide P on the film F and the cooling head 24. The cooling head is shown as having one or more jets illustrated by the air jets 33 and 34. Air supply lines 36 and 37 are connected to the jets. The jets are mounted on a movable adjustment piece 35 so that their angle can be altered in a direction transversely of the direction of travel of the profile. By shifting the jets in an arcuate path through 180° relative to the profile, more or less heat will be removed from one side of the profile than the other in the initial cooling which will change the shape of the resultant profile. During operation, the position of these jets can be changed to obtain the optimum shape in the profile. Thus this shape may be the female profile. This feature may be also used to correct resultant unequal size barbs of the male profile due to inaccuracies in the shape of the die 16. Additionally, if at different speeds of extrusion, the plastic tends to flow so that the head or jaw of the male of female profile is smaller on one side than on the other side, then compensation can be made by adjusting the motion of the air jets.

(RX-3, col. 1, lines 14-16, col. 3, lines 43-65)

38. In a variation of the invention in issue, a profile has a jet supplied with a flow of coolant through a line, controlled by a pressure control valve, directed against the profile. By varying said valve, the rate of flow of the coolant through the jet is altered which will have an effect on the resultant shape of the profile. It is said that the pressure control arrangement may be employed alone or simultaneously with the FIG. 4 arrangement (RX-3, col. 4, lines 17-28).

39. On April 25, 1986 there was filed a request for reexamination of the '872 patent. It was said that reexamination was requested of all of claims 1 to 8 of the '872 patent in view of the following U.S. patents:

Group A:	855,438	Ebel
	3,283,672	Mueller
	3,322,594	Lucas et al
	3,694,538	Okamoto
	3,932,090	Brumlik
	3,875,281	Behr
	Re 26,991	Luca

Group B:	3,421,960	Arbit
	3,462,332	Goto
	3,075,868	Long
	3,543,379	Naito

In comparing the prior art Luca Re 26,991 with independent claims 1 and 5 of the '872 patent the following comments were made:

Noguchi Patent 3,945,872	Luca Re.26,991
1. In the method of making plastic film with shaped profiles on the surface comprising the steps of:	Method for making film with shaped profiles is shown.
extruding a continuous length of an interlocking profile from a die opening with the profile having a precise shape for interlocking engaging with another profile;	continuous length of film 18 is extruded with profiles 19 or 20 each of a precise shape for interlockingly engaging with each other
and directing a flow of coolant onto the extruded profile of warm plastic and adjusting the direction of flow of coolant relative to the direction of movement of the profile for controlling the cooling rate and shape of the profile.	air is directed from the tubes 23 and 24, Fig. 3 out of the tube openings 32 and 33 but there is no teaching of directing coolant onto the profiles but instead air is blown against the side of the film opposite the profiles. No means is provided for adjusting the direction of movement of the profile.
5. In the method of making plastic film with shaped profiles on the surface comprising the steps of:	Method for making film with shaped profiles is shown
extruding a continuous length of an interlocking profile from a die opening with the profile having a precise shape for interlockingly engaging with another profile;	continuous length of film 18 is extruded with profiles 19 or 20 each of a precise shape for interlockingly engaging with each other
and directing a flow of coolant against the heated profile and adjusting the pressure of coolant flow for controlling the cooling rate and shape of the profile.	coolant is directed through the openings 32 and 33 but not against the profiles but against the film on the side opposite the profiles and there is no means or step taught for adjusting the pressure of the coolant flow.

(CX-1, Exh. I at 2)

40. It was argued in the April 25, 1986 request that Luca Re 26,991 shows extruding tubular film with profiles on the inner surface of the tube; that elongate tubes which are in a fixed position, provide excess cooling air at the location of the rib and groove profiles but on the surface opposite the rib and groove profiles; that the profiles are on the inner surface of the tube so that they can be interlocked by feeding the tube between pinch tools; and that there is no teaching of the critical method steps of the claims. (CX-1, Exh. 1 at 4)

41. It was further argued in the April 25, 1986 request that the extrusion of profiles at relatively high speed of a material which is essentially liquid is a critical art and those skilled in the art have had substantial difficulty in maintaining the dimensions of profiles such that they will satisfactorily interlock when the plastic has cooled; that the Noguchi patent '872 patent presents a unique and inventive method of cooling and solidifying the plastic of the profiles and yet simultaneously maintaining their dimensional criticality; that as set forth in the application and highlighted by the claims, a continuous length of interlocking profile is extruded from a die opening and coolant is directed onto the extruded profile of warm plastic in a unique manner by adjusting the direction of flow of coolant relative to the direction of movement of the profile as set forth in claim 1; that claim 2 provides that such direction can be adjusted through an arc of 180°, and claim 3 provides that the arc extend in the direction of travel of the profile length; that claim 4 provides that the flow of coolant be adjusted in an arc extending transversely of the direction of movement of the profile length; and that claim 5 provides that the pressure of the coolant flow be adjusted. The prior art it was said, at best, has considered a flow of coolant onto a continually moving extruded tube with profiles on the

surface and in some cases has directed the flow in a localized fashion but as exemplified by Luca Re.26,991, that is done by tubes which direct flow on the film on a side opposite the profiles; and that while the prior art discloses the use of auxiliary air in connection with cooling for the tubing, the invention in issue is concerned with the provision of air to fix and dimensionally stabilize the profiles. (CX-1, Exh.I at 11, 12).

42. In a Patent Office action dated June 13, 1980 the Examiner agreed that the consideration of the Luca patent raises a substantial new question of patentability "as to claims 6 and 8 of the Noguchi ['872] patent". (CX-1, Exh. I).

43. In the June 13, 1980 Patent Office action, the examiner stated in part:

> In regard to the limitation in claim 8 of Noguchi of "directing a first flow of coolant in a small jet against the heated profile length; and directing a second flow of coolant in a small jet shape against the heated profile length; said second flor [sic] of coolant being positioned after the first flow of coolant in the direction of profile length movement" attention is directed to Luca, column 3, lines 23-38 and line 74 through column 4, line 20. In that pipes 23 and 24 are elongated and have air jet openings positioned vertically thereof, then said pipes and jet openings read on the above noted limitations.

(CX-1, Exh. I)

44. Col. 4, lines 1-20 of the Luca Re. 26,991 reads:

> and 33 which are positioned to be directed immediately at the rib and groove elements. This provides an elongated stream of air continuously removing heat and cooling the plastic of the profile elements 19 and 20. The tubes may be mounted so as to be vertically adjustable as indicated schematically by the arrowed line 38 and 39 to adjust the location at which the air is applied relative to the location of the annular coolibg ring 22. The cooling rate may also be controlled by controlling the flow of the air to the cooling pipes 23 and 24 through the supply lines 34 and 35 which are provided with air flow control valves 36 and 37. The valves can also be individually regulated so that the different quantities of plastic which may be present in the rib element 20 relative to the groove

element 19 can be compensated for to obtain uniform and desired cooling. The control of cooling may also be obtained by controlling the temperature of the air although for convenience room temperature may be applied with the rate of air flow controlled.

(RX-5, col. 4, lines 1-20)

45. In complainant's "Petition for Rexamination--Supplemental Remarks", received by the Patent Office on June 26, 1986, it was argued that:

> Petitioner (Patentee) has now again reviewed Patentee's statements to the Patent Office in the Petition for Reexamination. It has been noted that Patentee pointed out that in the prior art Luca Re.26,991, air is blown against the side of the film opposite the profiles.
>
> This, however, is not a distinction upon which Patentee is relying for nonobviousness of the invention and patentability of the claims. A reading of the original Petition may erroneously indicate such, and these Supplemental Remarks are being submitted to clarify Patentee's position.
>
> It is completely clear that the disclosure and scope of the claims of the Noguchi patent 3,945,872 contemplate and include an arrangement wherein th coolant may be directed against the profile either from the side of the film on which the profile projects, or against the profile from the opposite side of the film. At times one or the other arrangement may be desirable or necessary. This has been discussed with the Examiner on the telephone on June 17, 1986, and the Examiner agrees that the claims are clearly entitled to this scope of interpretation. While the drawings of the application show one mode in compliance with 35 USC 112, that is, directing the jet of air against the profile from the side of the film where the profile projects, the method of the invention can be practiced by the jet of coolant being directed against the heated profile from the opposite side of the film.
>
> Noguchi employs the method of directing a small jet of coolant at an adjustable direction onto the profile from either side of the film, to control the cooling rate and profile shape. This is not taught by Luca or the other prior art.
>
> Therefore, the explanation of the distinctions of Noguchi patent 3,945,872 and its teachings over Luca Re.26,991 are not based on the fact that Luca blows the air against the film opposite the profiles but on the fact that Luca fails to teach the concept of controlling the profile shape and cooling rate by adjusting the direction

of coolant relative to the direction of movement of the profile such as required by claim 1. Also, Luca fails to teach directing a flow of coolant against the heated profile in a small jet shape such as required by claim 7 and by claim 8 or to adjust the pressure of the coolant as required by claim 5.

Patentee submits the remarks contained herein to make it clear to the Examiner that reliance for patentable distinction of the claims is not based on the fact that Luca directs a flow of air on the surface opposite the direction of projection of the rib and groove profiles, and Patentee wishes to make clear that there was no intention to mislead the Examiner as to this argument. The distinctions over Luca are believed substantial and clear in that Luca teaches directing a substantial flow of an amount of air in the area of the profiles to increase the speed of production by removing the excess heat of the thicker plastic profiles (as compared to the remainder of the tube). This is practiced by the air being emitted over the elongate pipes 23 and 24 of Fig. 1 and the disclosure that by the time the tube 18 is beyond the end of the cooling pipes 23 and 23, all of the plastic (including the profiles) has sufficiently cooled to collapse the tube and direct it through nip or pinch rolls (col. 3, ls. 50-57). Patentee's method is directed at precise control of cooling as well as precise control of the shape and retention of the shape of the profiles in a manner not heretofore possible following the teachings of Luca or the other references of record.

By the adjustment of coolant flow direction and/or pressure and/or temperature, control of heat removal and profile shape is possible. Such control enables accurate profile shape management with change in profile size and film thickness. The use of small jet shape also aids in this profile shape control and management.

(CX-1, Exh. I at 1-3)

46. In a "Response to Examiner Upon Granting of Request for Reexamination received by Group 130 on August 13, 1986 the argument was made that:

In the present Noguchi patent, the concept of the method involves directing a flow of coolant onto the extruded profile of warm plastic, while the plastic is still in the formative stage...The coolant is employed while the plastic is in the formative stage to fix the dimensions and shape of the profile soon after the profile leaves the extruder. Because the profiles are relatively small, and because the male and female profile must be capable of interlocking,

the shape must be held and not permitted to drift or change, and this is a very sensitive operation particularly at the relatively high speeds employed in commercial production. This immediate cooling fixes the size and shape but normally does not remove enough of the heat to solidify the plastic to extent that the profiles can be interlocked or the film wound.

By contrast, the concept of the Luca patent is directing a general flow of air against the film in the area of the rib and groove elements in order to remove sufficient excess heat and harden the plastic of the rib and groove elements so that they can stand the forces of interlocking or winding. Since the rib and groove profiles containsubstantially more plastic than the film, their resistance to cooling is greater than that of the film.

In practice the methods and mechanisms of each of the separate and distinct concepts can be and often are used together, each performing in its own individual way and achieving its own independent objective. This is referred to in the very specification of Noguchi which recognizes the different prior art concept of Luca in referring to the Luca concept as additional cooling means. In paragraph 3 of the specification, it is stated "An additional cooling means 23 further along the path of travel of the strip may be employed for completing the cooling operation." This is referring to the Luca concept.

The concept of Noguchi is next referred to in the same paragraph which states: "The primary or the control coolant jet 24 removes the majority of the heat and controls the shape of the profile, and the secondary coolant means 23 completes the operation but usually has no effect on the size and shape of the profile."

It is believed that the Examiner will be convinced as to the difference between these concepts with a review of the teachings of Luca and a review of the teachings of Noguchi.

(CX-1, Exh. I at 2-3)

47. In an Office action dated October 9, 1986 the Examiner rejected claims 6 and 8 under 35 U.S.C. 103 as being unpatentable over Luca Re.26,991. Claims 1 to 5 in issue and 7 were said to be allowed (CX-1, Exh. I).

48. A "Rexamination Certificate issued May 5, 1987 which stated in part:

THE ['872] PATENT IS HEREBY AMENDED AS INDICATED BELOW

Matter enclosed in heavy brackets [] appeared in the patent, but has been deleted and is no longer a part of the patent; matter printed in italics [underlined] indicates additions made to the patent.

AS A RESULT OF REEXAMINATION, IT HAS BEEN DETERMINED THAT:

The patentability of claims 1-5 and 7 is confirmed.

Claims 6 and 8 are determined to be patentable as amended.

6. In the method of making plastic film with shaped provides on the surface, the steps of:
extruding a continuous length of an interlocking profile from a die opening with the profile having a precise shape for interlockingly engaging with another profile;
directing a flow of coolant onto the extruded profile of warm plastic <u>in a predetermined variable direction while the plastic is in the formative stage</u>;
and varying the temperature of the coolant flow for controlling the cooling rate and shape of the profile.

8. In the method of making plastic with shaped profiles on the surface, the steps of:
extruding a continuous length of an interlocking profile from a die opening with he profile having a precise shape for interlockingly engaging with another profile
directing a first flow of coolant in a small jet shape against the heated profile length <u>in a predetermined variable direction while the plastic is in the informative state</u>;
and directing a second flow of coolant in a small jet shape against the heated profile length;
said second [flor] <u>flow</u> of coolant being positioned after the first <u>flow</u> of coolant in the direction of the profile [lenth] length movement.

(RX-4)

IV. <u>Complainant and the Process In Issue</u>

49. Steven Ausnit is Chairman and C.E.O. of Minigrip. He graduated in 1944 from Harvard University as an engineer with a Bachelor of Science Degree.

complainant

became aware that reclosable plastic bags, identical with complainant's product were being imported from the Far East and sold at predatory prices; that as a result of these importations, complainant's growth started to slow down and when it appeared that complainant was on the verge of suffering irreparable injury and damages Minigrip Inc. applied for and obtained an Exclusion Order from the Commission which issued in January 1977 and was based on a single patent relating to specific details of the male female zipper

profiles of the Minigrip bag; and that in 1982 complainant applied and obtained a second Exclusion Order from the Commission which was based on the patents covering the exclusive basic process technology complainant obtained from Seisan. (Ausnit CX-180 at 3 to 5)

52.

53. Ausnit testified that

(Ausnit CX-180 at 7).

54. Ausnit described the Minigrip Plastic tubing and reclosable bags involved in this investigation as follows:

(Ausnit CX-180 at 8)

55. As to the difference between the original bags made by Flexigrip and the Minigrip bags, Ausnit testified that the difference is as follows:

(Ausnit CX-180 at 9)

56. Ausnit testified that

(Ausnit CX-180 at 9).

57. Reclosable bags and tubes are made from polyethylene (Ausnit CX-180 at 9).

58. Ausnit testified, as to how the Minigrip bags and tubing are manufactured by complainant, as follows:

(Ausnit CX-180 at 10 to 14)

59.

(Ausnit CX-180 at 14, 15

Tr. at 794 to 791, 818).

60. Ausnit testified:

> A. Figure 3 [of the '872 patent] denotes tubing with profiles on the inside.
>
> Q. Is that shown in the patent?
>
> A. It is not shown in figure 1, no.

Q. Is that shown anywhere else in the patent?

A. It is described in the patent.

Q. Could you tell me where it is described?

A. On column 1, line 35 it says, "The features described herein may be employed, for example, in an extrusion arrangement wherein the profile is not formed separately and applied to a film white hot, but wherein the profile and film are extruded simultaneously out of a single dye opening."

Q. Does that say it would be a tube or could it be something else?

A. It could be something else. It could be either a tube or it could be a sheet.

Q. Is there anywhere else in the patent that you find the word "tubing" or "tube"?

A. No.

(Ausnit Tr. at 665)

61. According to Ausnit, profiles can be controlled by controlling the pressure and two other parameters (Ausnit Tr. at 673, 674).

62. According to Ausnit, the air rings in Luca Re.26,991 (RX-5) and RE.29,208 (RX-41) perform a similar function (Ausnit Tr. at 679).

63. Ausnit testified that one cannot control the flow of air in a pipe where there are two or three one inch holes, as compared to a pipe having one small 1/8 inch jet of air being delivered; that as long as one has a number of holes that are spaced at certain distance from each other with the flow of air going to five holes, one cannot get any control of the air (Ausnit Tr. at 683).

64. Luca Re 26,991, according to Ausnit, mentions that a single jet of air can be used but Ausnit testified that a single jet could not work in practice for the purpose of Luca's invention, viz. to deliver air to the

profiles after the tube has been formed and after the profile is no longer in a plastic or formative stage. (Ausnit Tr. at 685, 686).

65. Ausnit testified that if the air can be adjusted onto the profile so that the air can control the shape then the air will work. (Ausnit Tr. at 687).

66. Ausnit testified that the Luca invention was essentially to remove the heat from the profiles and cool them at a certain rate while the '872 invention is a different concept, viz. shaping the profile while the profile is in the formative stage. (Ausnit Tr. at 688).

67. While Luca refers to "air jet openings", Ausnit testified that if one cannot adequately control the air of the jet itself, one cannot control the shape of the profile. (Ausnit Tr. at 689).

68. According to Ausnit, adjusting air in a whole pipe with holes in it is not the same as adjusting air in the individual jets. (Ausnit Tr. at 690).

69. According to Ausnit adjusting individual air jets depend very much on the location of those air jets (Ausnit Tr. at 690).

70. Ausnit testified:

> A. ...The function of the Luca patent is to cool the profiles at the same rate as the thinner tube next to it.
>
> The '872 patent talks about shaping the profiles by a jet of air when the profiles are in a formative stage. That's my interpretation. That is my understanding of the patents, and I'm not going to change.

(Ausnit Tr. at 691, 692)

71. As to controlling the shape of a profile Ausnit testified:

> A. I've tried to explain my position. If a profile is in formative stage you have to deliver to it a controlled jet of air, and you have to have reasonably good control on that air jet.

If you have a lot, a series of holes -- let me put it differently. If you have a series of holes that are spaced at a certain distance from each other and which do not have control that you can deliver air, adjust the air of those specific holes, you are not going to be able to control the shape of the profile.

You may cool it, but you will not control the shape.

Q. You say the openings on the side of a pipe are not the same as an air jet; is that correct?

A. The openings on the side of a pipe which do not have individual controls are not the same as an air jet.

(Ausnit Tr. at 694, 695)

72. Ausnit testified that blowing air at the profiles and blowing air on the surface of the film opposite the profiles would provide the same results. (Ausnit Tr. at 713, 714).

73. Ausnit makes a distinction between controlling the air to the air pipe and controlling the air to the air jets. (Ausnit Tr. at 715).

74.

(Ausnit Tr. at 728, 729; RX-41).

75. Good tubing can be made by the process of Luca Re 26,991 (RX-5) which expired in 1984
although a little faster than with the air rings only of Naito Re 29,208 (Ausnit Tr. at 729; RX-5).

76.

because the Re 29,208 process is too slow (Ausnit Tr. at 729).

77. The Naito process would be even if the process is that of Re 26,991 (Ausnit Tr. at 729, 730).

78. Re. 26,991 concerns a plastic extruder which comprises an extruding die that has a slot for extruding a thermoplastic and which is formed with an enlarged profile portion in a slot shape for forming pressure interlocking complementary rib and groove elements and having first cooling means cooling the film and second cooling means which cool specifically the rib and groove elements. (RX-5, col. 1).

79. Re. 29,208 concerns a method and apparatus for manufacturing a tube to be used for forming plastic reclosable bags including means for extruding a continuous annular tube of plastic with circumferentially spaced axially extending interlocking rib and groove profiles on the surface from a die shaped to form the tube and profiles, means for delivering tube separating air through the die into the tube interior, means for delivering a flow of outside cooling air around the outer surface of the tube to cool the tube at a rate to maintain the profiles on the surface of the tube and drawing means positioned for receiving the tube and drawing it from the die and flattening it. (RX-41, col. 1).

80. In the '872 patent it is important that the air jet be directional (Ausnit Tr. at 789).

81. Ausnit testified:

> Q. In referring to the Luca patent that we were talking about earlier, the pipes of that, at what direction does the air from those pipes impinge upon the profile?
>
> * * *
>
> THE WITNESS....Generally, they would impinge on the profile from behind in a fairly broad area.
>
> BY MS. TAYLOR: (Resuming)
>
> Q. And at what angle is the opening in relation to the profile?
>
> A. The angle need not be exactly behind the base of the profile. It could be on the side.

(Ausnit Tr. at 789)

82. Ausnit also testified:

Q. I'm trying to ask if there's a variation between the position of the openings in the Luca pipes that the air comes out. Does it come out in one direction only or are there other directions that the air can be forced out of the pipe?

A. The Luca pipe, the air comes out in a fairly broad fan shape arrangement.

Q. So with an air jet, do you get more accurate aiming of the coolant?

A. Yes, very definitely.

(Ausnit Tr. at 790)

83. Ausnit testified as to

(Ausnit Tr. at 819)

84. Luca, according to Ausnit, does teach controlling the flow of coolant to the air pipe but Ausnit makes a distinction between controlling the air to the air pipe and controlling the air to the air jet. (Ausnit Tr. at 715).

85. When asked to explain complainant's presently used extruder, Ausnit testified:

A.

92.

93.

94.

(Ausnit Tr. at 731, 738).

95.

(Ausnit Tr. at 731).

96.

(Ausnit Tr. at 732).

97.

(Ausnit Tr. at 732, 733).

98.

(Ausnit Tr. at 734).

99.

(Ausnit Tr. at 724).

100. Ausnit testified:

Q. Now I refer you quickly to the Luca patent, column 4. That's RX-5.

* * *

A. "The cooling rate may also be controlled by controlling the flow of air to the cooling pipes. 23 and 24, through the supply lines, 34 and 35, which are provided with air flow control valves, 36 and 37." [col. 4, line 9]

Q. Does that say anything about jets in claim 5 that you can see?

A. It talks about directing a flow of coolant against a heated profile and adjusting the pressure of coolant flow for controlling the cooling rate and shape of the profile.

Q. Could you do that with an opening on the side of a pipe?

A. No, I don't think you could control the shape of the profile with just an ordinary opening.

Q. Could you control the cooling rate?

A. With what?

Q. With a flow of air from a pipe having an opening on the side of it.

A. What kind of pipe are you talking about?

Q. A short vertical pipe having holes on the side of the pipe, blowing onto a profile.

A. I do not think so, not if it's a short vertical pipe with just holes in it.

Q. You could not control the cooling rate?

A. I don't see how you could control it well enough to be able to shape the profile.

Q. Could you not control the amount of air to that?

A. Yes.

Q. Wouldn't that control the cooling rate?

A. The cooling rate, not the shaping of the profile.

Q. But that would control the cooling rate, would it not?

A. Control the cooling rate of what?

Q. Of the profile.

(Ausnit Tr. at 735 to 738)

101. According to Ausnit, if one cannot control exactly the shape of the profile will not be controlled. (Ausnit Tr. at 739).

102.

(Ausnit Tr. at 739)

103. Ausnit testified:

(Ausnit Tr. at 739, 740)

104. (Ausnit Tr. at 748).

105.

(Ausnit Tr. at 749).

106.

107.

108. Ausnit testified on the Minigrip process:

(Ausnit Tr. at 804)

109. Charles A. Garris was qualified as respondents' expert in fluid mechanics and heat and mass transfer. (Tr. at 883; RX-2).

110. Garris has never seen an extrusion line of extruding tubing (Garris Tr. at 913).

111. Garris learned from one of the patents that the approximate temperature polyethylene extrudate would exit from an extruder would be about 400 degrees Fahrenheit. (Garris Tr. at 913, 914).

112. When Garris was asked at what temperature the extrudate would no longer be in a formative stage, Garris testified:

> Again, sir, I haven't really studied the properties of the extrudate to a high degree. But I would have to guess.
>
> But I do know that it has a fairly sharp -- most materials of that type have a reasonably sharp phase-change characteristics. So if the liquification point were at about 400 degrees Fahrenheit, I think a reasonable guess would be that if you cooled it about 100 degrees, it would be on the verge of being hardened. But that's just --
>
> Q. That's a guess?
> A. That's a guess.
> Q. Dr. Garris, if you don't know at what temperature the polyethylene would go from a liquid stage to a solid stage, or at least a sufficiently solid stage, so that it's no longer in the formative stage, how can you know at what point the air or anything will no longer have an effect on shaping the polyethylene extrudate?
>
> * * *
>
> The Witness: I believe the answer to that, sir, is that you don't really have to know, for what I going to testify on, you don't really knave to know the precise temperature, because I have not been asked to perform calculations to determine it.
>
> If I were going to do a calculation to detemine, a precise calculation, then I would have to know the temperatures. But the area that I am being asked to testify on largely is whether or not the angular orientation of a jet on the opposite side of the film could actually have an influence on the shape of the profile of the form.
>
> Now, I don't have to know the precise temperatures to formulate an opinion on that.
>
> By Mr. Levy (Resuming):
> Professor Garris, would you assume with me that if plastic is in its formative stage, the shape of a plastic can be changed by applying some force to the plastic.
>
> A. Yes, sir.

Q. Now would you take that beyond an assumption. Would you agree to that based on your knowledge?

A. That if the plastic is in a formative state, that by applying a force to that plastic you can change the shape? That's correct.

Q. Professor Garris, at the bottom of page 2 of your testimony, you state that the tube shown in the Luca patent is about 12 inches. How did you arrive at that number?

A. Well, it was a ballpark calculation, based on what I've been told what typical plastic bags are.

In other words, in the Luca patent, the diameter of the bag is actually, well, we know what a diameter of the typical bag is, so I just took what I consider to be a fairly large bag and I calculated, if you take that bag and you blow it up into a circular cross section, then, knowing the circumference of the bag, you can calculate what the diameter should be. That's what I came up with the 12 inches.

Q. Was that number suggested to you by Mr. Aubel?

A. Well, we discussed what an appropriate sized bag might be.

Q. And he threw out the number 12?

A. I believe that he suggested that we do the calculation for a large bag.

In other words, this was just, these numbers I think were just some idea to get a rough estimate as to the relative dimensions of the components in the patent.

I don't think they are particular critical.

In other words, we could have done the same thing for a little sandwich bag, in which case the diameter would have been consiserably smaller.

(Garris Tr. at 914-918).

113. Garris testified:

Q. What does heat and mass transfer have to do with profiles?

A. It has a lot to do with profiles, because the thing that fixes the shape of the profile happens to do with the heat transfer rates from the tube to and from the profile.

In other words, it is the heat transfer mechanism that actually cools the profile and fixes it. It's actually the heat transfer mechanism that enables, that produces relative changes in cooling rates which can, in fact, produce distortions.

It is, in fact, fluid mechanics that enables, and when you talk about the formative state of the thermoplastic, you are actually talking about a fluid state, and that happens to be fluid mechanics.

Q. Dr. Garris, isn't it the openings in the die plate that determine the shape of the profiles in the first instance?

A. Well, it's the openings in the die plate that determines the shape of the profile in the first instance. But, since it's in its formative state, if it's not cooled immediately, it's possible for the profiles to distort.

Q. Dr. Garris, how would you compensate for a change in resin consistency in an extrusion process?

Any idea?

A. Well, as far as the profiles go, I can say that it would be irrelevant, except for possibly adjusting the cooling rates.

In other words, as Mr. Aubel [respondents Meditech's counsel] said yesterday, it has to do with the time, with the time that you introduce the cooling.

In other words, if you change the resin consistency, what you could do is you could change the phase characteristics of the material. So it might take more heat in order to cool it down to a certain temperature, or in order to cool it down to point in which you would freeze the profile.

So, you might -- to answer your question, you might compensate for a change in resin consistency simply by, as Mr. Ausnit said, by increasing the amount of air, by raising or lowering the position of the air jets.

* * *

Q. Would your answer be the same as to how to compensate for a change in ambient temperature conditions?

A. Yes, sir.

Q. And would your answer be the same to compensate for a variation in the extruder output?

A. Yes.

Q. And would it be the same to compensate for a variation in the extruder draw off rate?

A. Yes.

Q. And would it be the same to compensate for a change in the diameter of the desired tube?

A. Yes.

Q. And would it be the same to compensate for a variation in the air pressure that is blowing up the tube?

A. Yes.

Q. And would it be the same to compensate for speed of the extrusion line?

A. Yes.

Q. Would it be the same to compensate for an interruption of energy?

A. For an interruption of energy?

Q. A blip in the power supply.

A. In other words, when you say "a blip in the power supply," do you mean suddenly the machine shuts down?

Q. Well, maybe not shuts down, but slows down because of some disruption in the power supply that's momentarily off for a short duration.

A. Well, if you had a sudden blip in the power supply, probably you would get a section of defective bags.

I don't think anyone would attempt to compensate for that. You'd just throw out that section of bags.

(Garris Tr. at 920 to 922, 924 to 925)

V. Patent Infringement

114. Robert S. Nocek is vice president of marketing and sales of complainant Minigrip, has held that position for 3 years and has been with Minigrip for 5 years. (Nocek CX-179; Exh. A at 1).

115. Nocek testified that during the period of August 25, 1986-September 9, 1986, he travelled throughout the Far East and surveyed the situation concerning the manufacture of reclosable plastic bags in Hong Kong, Taiwan, South Korea, Thailand, Malaysia and Singapore; that in this regard, he toured actual manufacturing facilities, took pictures of the equipment being used, obtained samples of the product manufactured, was provided with quoted prices for export to the United States and met with equipment manufacturers and suppliers and was advised of their customers; that as to the foreign reclosable plastic bag manufacturers where he was permitted to inspect the manufacturing lines, he saw plastic film in the form of tubing being extruded wherein a flow of coolant was directed on the extruded profiles while they were still in the warm plastic formative stage and using the flow of coolant by adjusting its pressure and/or direction to control the cooling rate and shape of the profiles; that in addition, said foreign manufacturers had the special extruders for providing a color line on their product; that without exception, each of said manufacturers used a flow of coolant directed at the profiles to cool and shape the profiles, had the equipment for applying a color line to their product and, expressed an interest to export reclosable plastic bags to the United States; that the present foreign production capacity far exceeds the domestic demand for reclosable plastic bags and the entire Asian reclosable plastic bag industry is geared to export; that many of the foreign factories that produce reclosable plastic bags manufacture such bags as their sole product, and thus those factories need an expanding customer base; that the foreign manufacturers are presently expanding their capacity to produce more reclosable plastic bags in anticipation of the U.S. market opening to them in 1987; that the foreign manufacturers are capable of further expanding their capacity to substantially take over the U.S. market in

air on the profile. Complainant provided no testimony from Mr. Hong and while the copy of the photographs has typed in the margin "profile" and "air jet" with arrows, the "air jet" is not able to be detected from the xerox copy of the photographs. The actual photographs, without legends, but which are legible form a portion of RX-91A and an air jet directly adjacent to what appears to be cooling rings can be detected from that photograph. Also attached to the Nocek affidavit is an Exhibit 4 which is said to be a sample of the product of Chang Won showing the use of the color line on the bag. Exhibit 4 is a xerox copy of the photograph. The color line is evident from the photograph (Nocek CX-179, Exh. A at 4, 5).

121. Nocek dictated a trip report on his visit to Chang Won which states in part:

(SX-11)

Hogn Ter

122. Nocek testified that on August 27, 1986, he met with Mr. Chi-Jen [illegible] the General Manger of Hogn Ter; that he was allowed to tour the plant but was not allowed to take photographs; that the plant included at least fifteen extruders with ten operating at the time; that the extrusion lines included air jets directing air onto the profiles; that Nocek made a sketch (Exh. 5 to testimony) immediately after his visit which shows the air jet arrangement [illegible] Hogn Ter; and that a photograph (Exh. 6 to testimony) of a sample of Hogn Ter's product clearly shows Minigrip's color line trademark. Nocek testified that Hogn Ter eagerness to export to the U.S. is shown by a price list, CIF New York. (Exh. 7 to his testimony). Exhibit 5 to Nocek's testimony states that "air jet positioned below 2 air rings about 12" abo[illegible] [illegible]ooling pipe located vertically above air rings" and "jets were fully adjustable and visible on all extruders seen." Exhibit 6 to Nocek's testimony [illegible] of the color line on the bag. Exhibit 7 to Nocek's affidavit has a heading "Hogn Ter Product Co. Ltd." and a subheading "Minigrip Blueline Zipper bags" (Nocek CX-179, Exh. A at 6).

123. (Nocek Tr. at 373, 434-435, 554; SX-1, Ans. to Inv. No. 22).

air on the profile. Complainant provided no testimony from Mr. Hong and while the copy of the photographs has typed in the margin "profile" and "air jet" with arrows, the "air jet" is not able to be detected from the xerox copy of the photographs. The actual photographs, without legends, but which are legible form a portion of RX-91A and an air jet directly adjacent to what appears to be cooling rings can be detected from that photograph. Also attached to the Nocek affidavit is an Exhibit 4 which is said to be a sample of the product of Chang Won showing the use of the color line on the bag. Exhibit 4 is a xerox copy of the photograph. The color line is evident from the photograph (Nocek CX-179, Exh. A at 4, 5).

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122. Nocek testified that on August 27, 1986, he met with Mr. Chi-Jen Yeh, the General Manger of Hogn Ter; that he was allowed to tour the plant but was not allowed to take photographs; that the plant included at least fifteen extruders with ten operating at the time; that the extrusion lines included air jets directing air onto the profiles; that Nocek made a sketch (Exh. 5 to testimony) immediately after his visit which shows the air jet arrangement used by Hogn Ter; and that a photograph (Exh. 6 to testimony) of a sample of Hogn Ter's product clearly shows Minigrip's color line trademark. Nocek testified that Hogn Ter eagerness to export to the U.S. is shown by a price list, CIF New York. (Exh. 7 to his testimony). Exhibit 5 to Nocek's testimony states that "air jet positioned below 2 air rings about 12" abo die. Cooling pipe located vertically above air rings" and "jets were fully adjustable and visible on all extruders seen." Exhibit 6 to Nocek's testimony shows use of the color line on the bag. Exhibit 7 to Nocek's affidavit has a heading "Hogn Ter Product Co. Ltd." and a subheading "Minigrip Blueline Zipper bags". (Nocek CX-179, Exh. A at 6).

123.

(Nocek Tr. at 373, 434-435, 554; SX-1, Ans. to Inv. No. 22).

Ideal Plastic, Lien Bin, Ta Sen

124. Nocek testified that on August 28, 1986, he attended a meeting which took place in the World Trade Center, Taipei, Taiwan, along with representatives of these companies; that each of these companies is a manufacturer of reclosable plastic bags and is a member of the "Plastic Bag Union" which was described to Nocek as being an association set up for the sole purpose of exporting reclosable plastic bags; that it was indicated at this meeting that these companies, as well as other Taiwanese manufacturers, wanted to sell reclosable plastic bags to the U.S. as soon as possible; that in view of the present exclusion order, the representatives refused to provide further information regarding their business; that however, while in Taiwan and Hong Kong, Nocek met with representatives of Facit Industries, Lung Meng, Siusco and Harbona Ltd., who are manufacturers of extrusion equipment for reclosable plastic bags; that each of those manufacturers provides adjustable air jets for cooling and shaping the profiles as part of their equipment and offer the special extruder needed to supply the color line trademark; and that Nocek is not aware of any manufacturers of equipment for producing reclosable plastic bags who does not provide such adjustable air jets as part of its equipment.

125. Nocek further testified that the August 28, 1986 meeting took place in a building devoted to export; that the walls of the room in which the attendees met were covered with dozens of samples of reclosable plastic bags of various sizes and shapes; that most, if not all of the bags bore the color line trademark, predominantly red; that at the meeting he received name cards from Ideal Plastic, Lein Bin and Ta Sen (Exh. 31 to testimony); that from the discussion that ensued at the August 28 meeting it was made clear to Nocek that the manufacturers present cooperated with each other and that they were

prepared to cooperate to export reclosable bags to the United States; that each of the manufacturers present expressed an intent to export to the United States; that Nocek assumes that the manufacturers present at the meeting obtained their equipment from one or more of the manufacturers listed since, as far as Nocek knows, these are the only manufacturers of such equipment; and that although Keron was not represented at the meeting, Nocek believes the above also applies to Keron since Keron did advise Nocek that Keron belongs to the Plastic Bag Union.

Keron Industrial Co., Ltd.

126. Nocek testified that although he was scheduled to meet with Keron, at the last minute Keron cancelled the meeting

Kwang II

127. Nocek testified that on September 1, 1986, he met with Mr. Lee, the president of Kwang II and Mr. Yoo, its Sales Chief, at their factory and observed its operation; that at each extruder Nocek saw an air jet used to blow air onto the profile to control its shape; that a photograph (Exh. 8 to testimony) Nocek took of one of the extruders shows the use of such an air jet; that Nocek was advised by Mr. Yoo that the plant, at full capacity, would produce 16,000,000 reclosable bags per month; that a photographs (Exh. 9 to testimony) of a sample of the bag manufactured by Kwang II shows the use of Minigrip's color line trademark; and that Yoo indicated an interest in exporting to the United States. The copy of the photograph (Exh. 8) has typed in the margin "air jet" and "profile" with arrows. However the air jet is not able to be detected from the photograph copy. The actual photograph, without

legends, but which is legible, forms a portion of RX-91A and an air jet can be detected from that photgraph between what appears to be a cooling ring and the extruder. Exh. 9 does show the color line trademark. (Nocek CX-179, Exh. A at 6).

Lim Tai

128. Nocek testified that on September 4, 1986, he met Mr. Ti Kasen and toured the factory of Lim Tai located outside Bangkok, Thailand; that each of the extruders for reclosable bags there included adjustable air jets blowing air onto the profiles; and that this company expressed a keen interest and intent to export reclosable bags to the United States. Attached to the testimony of Nocek is an Exh. 10 which is said to show a sample of the reclosable bag manufactured by Lim Tai. Exh. 10 is not legible. (Nocek CX-179, Exh. A at 7).

Rol-Pak

129. Nocek testified that on September 8, 1986 he met with Messrs. Kuen (Managing Director), Wak (Assistant Marketing Manager) and Kuok (Production Manager) of Rol Pak and toured their plant in Kaula Lumpur, Malaysia; that each of the extruders for reclosable bags included air jets blowing air onto the profiles to control their shape; and that Nocek was advised that Rol-Pak presently make approximately 20-25,000,000 bags per month for export. Exh. 11 to Nocek's testimony is said to be a copy of a photograph Nocek took of one of the extruders and said to clearly show the use of air jets. Exh. 11 is a xerox copy. While there is typed in the margin "air jets" and "profile" with arrows, air jets are not able to be detected from the photograph. The actual photograph, without legends, but which is legible, forms a portion of RX-91A and an air jet can be detected from that photograph. The air jets are between what appears to be a cooling ring and

the extruder. Exh. 12 to Nocek's testimony is a copy of a photograph. The photograph does show a color line trademark. Exh. 13 is directed to Nocek and states that it was a pleasure meeting Nocek on his recent Far East trip. It quotes the prices of polyethylene finished blueline zipperbags CIF New York. (Nocek CX-179, Exh. A at 7).

130. Nocek's trip report on his visit to Rol-Pak read:

(SX-12)

Siam Import

131. Nocek testified that on September 4, 1986, he met with Mr. Chan Ma, who is Director of Production of Siam Import and toured the factory in Bangkok, Thailand; that the factory was very modern and included new extruders for manufacturing tubing for reclosable plastic bags, each of which used adjustable air jets to control the profile cooling and shape; and that Nocek directly observed a color line being applied to products and there was expressed a desire and intent to export to the U.S. Exhs. 14, 15 and 16 to Nocek's testimony (CX-179, Exh. A) are said to be copies of photographs Nocek took and which "clearly" show the use of an air jet directing air into the profile and that in Exh. 16 there is shown a color line extruder and a color line in the tubing. Exhs. 14, 15 and 16 are xerox copies of photographs. Exh. 16 is barely legible as to any details. While Exh. 15 has typed in the margin "air jet" and "profile" with arrows, the air jet is not discernible from the xerox copy. Likewise while Exh. 16 has typed in the margin "color line", "air jet" and "color line extruded" with arrows, said items are not discernible. The actual photograph, without legends, but which are legible, forms a portion of RX-91A and air jet can be detected from the photographs above the extruder. Exh. 17 is said to be a sample of a reclosable bag manufactured by Siam Import. Exh. 17 appears to be a xerox copy of a photograph. Exh. 17 is barely legible. (Nocek CX-179, Exh. A at 7, 8).

Gideons Plastic

132. Nocek testified that he is advised by a nonrespondent selling agent that Gideons Plastic is represented exclusively by a selling agent, Focus Taiwan Corporation; that Focus has offered for export to the United States Gideons Plastic's reclosable bags; and that there is a price list of Focus for reclosable bags CIF New York along with correspondence relating to solicitation in the U.S. (Exh. 18 to Nocek testimony) (Nocek CX - 179, Axer, A at 8).

Tech Keung

133. Nocek testified that Teck Keung in the spring of 1986 exported over 700,000 reclosable bags to the United States. (Nocek CX-179, Exh. A at 3 to 8, Exh. B).

134. Nocek testified as to domestic importers, as follows (Exhibits referred to are exhibits to CX-179, Exh. A):

> Euroweld Inc. - Exhibits 19 and 20 are price lists for reclosable bags offered by Euroweld Distributing ("Euroweld"). Along with a sample of the reclosable bag. Based upon the side welds, the sizes and the clarity of these bags, as well as the prices, it is my firm belief they could only be bags manufactured abroad. Accompanied herewith as Exhibit 21 is an invoice showing the actual sale in the U.S. of what is therein designated No. 6017 reclosable bags.
>
> Insertion Advertising Corp. - From September, 1984 through September 1985, Insertion Advertising Corp. imported approximately 18,000,000 reclosable bags, which were refused entry by U.S. Customs. Attached hereto as Exhibit 22 is a group of documents which relate to the purchase and importations by Insertion of reclosable bags into the U.S.
>
> Ka Shing Corp. - Attached hereto as Exhibit 23 is a copy of a correspondence we received which indicates that Ka Shing Corp. was importing reclosable bags from Taiwan (TPE) via the port of New York along with a sample of the reclosable bag.

Meditech International, Inc. - As shown by the attached Exhibit 24, Meditech was offering for sale in the United States reclosable bags made by "several large overseas manufacturers". Meditech has asserted in an advisory opinion request in Investigation No. 337-TA-110

Nina Plastic Bag Co. - Attached hereto as Exhibit 25 is promotional literature, including a price list, of Nina Plastic Bags, Inc., for its "Easy Seal" reclosable bags. The sizes of the bags set forth on the price list indicate that these bags are not made in the united States. In November, 1985, Nina imported 5,700,000 reclosable bags from Hong Kong via Tampa, Florida.

Polycraft Corporation - Attached hereto as Exhibit 26 is a price list of Polycraft for reclosable bags for sale in the United States.

Tracon Industries Corp. - In June, 1986, Tracon Industries imported over 16 million reclosable bags. Since Minigrip obtained its exclusion order in Investigation No. 337-TA-110, there have been at least 21 instances of importation of reclosable plastic bags which were intercepted by Customs. Exhibit 27 sets forth Minigrip's information pertaining to the imports.

(Nocek CX-179, Exh. A at 8 to 10)

134a. From 1984 through 1986 Tracon imported approximately $18,916 worth of reclosable plastic bags into the U.S. (CX-179, Ex. A at 10; SPX-5).

135.

(CX - 169).

136. Nocek has circled a price list of Euroweld as to bags identified by size which Nocek testified are bags being offered by Euroweld which are not made domestically and can only be imports (Nocek CX-179, Exh. B, para. 4 and

its Exh. 33). Nocek has done the same with a price list of Nina Plastic Bag Co. (Nocek CX-179, Exh. B, para. 5, Exh. 34).

136a. Nocek visited Harbona, Ltd. in August 1986. Harbona Ltd. is located in Hong Kong. It has five operating extruders. All five had multiple air jets consisting of eight flexible pipes, each pair (one for the female and one for the male) being controlled by a separate valve. Each flexible air jet was fully adjustable in both the vertical and horizontal directions. The air flow was adjustable as well. Harbona Ltd. also has a color line (Nocek RX-91A, Ex. 23).

137. Nocek testified that he is unaware of any manufacturer of equipment for extruding profile tubing for reclosable plastic bags that does not provide adjustable air jets to control the profile cooling and shape and that accordingly he believes all reclosable plastic bags manufactured or imported by the named respondents were made by a process in which the cooling rate and shape of the profile were controlled by a flow of coolant. (Nocek Cx-179, Exh. A at 11, 12).

138. Nocek testified that he has measured samples of respondents' bags and have generally found them to be undergauged; that upon information and belief, such foreign bags are not made from FDA approved materials, and that he believes the resins used include reclaimed material obtained from third parties so that the actual content of the material is unknown (Nocek CX-179, Exh. B, para. 6).

139. Minigrip presently fills orders for stock bags from inventory as quickly as the paperwork involved allows, usually 3-5 days. Minigrip has no back orders for stock bags, thus confirming its ability to meet demand (Nocek CX-179, Exh. B, para. 7).

140. Nocek provided the following compilation of the number of production lines for the listed countries:

RECLOSABLE PLASTIC BAG PRODUCTION LINES

Country	Number of Lines
Hong Kong	15
Taiwan	45
Malaysia	7
Thailand	18
South Korea	18

Nocek testified that the number of lines are based on his observations on information given to him during his 1986 trip to the Far East with the exception of Taiwan; that in Taiwan, with the exception of Hogn Ter, he was not permitted into plants nor was he given information as to current capacity; and that accordingly, for Taiwan the number of lines is based on information obtained in connection with 337-TA-110. (Nocek CX-179, Exh. B, at 4, Exh. 32).

141. Wilson Ip, resident of Hong Kong, has been Managing Director of respondent Chung Kong since June 1979. He received a Bachelor degree in Science from the University of Toronto, Toronto Canada in 1978 (Ip RX-47 at 1).

142. Ip testified that the extruders at Chung Kong are generally similar; that the plastic film for making reclosable bags is extruded as tubing with rib and groove profiles on the interior surface of the tubing; that Chung Kong does not have extruders for extruding flat sheets. (Ip RX-47 at 1).

143. According to Ip in the Chung Kong process

(Ip RX-47 at 2).

144. According to Ip in the Chung Kong process

(Ip. RX-41 at 2).

145. Ip testified that the old version of Chung Kong's polybag machines as above in a photograph (RX-29) taken by Mr. in August 1986 had two air pipes mounted to blow air at the profiles and that said air pipes were disconnected because they were found to be unnecessary. (Ip RX-47 at 2, 3).

146. Ip testified that if Chung Kong

(Ip RX-47 at 3, 4).

147. Daryl Chang is president of Keron. Keron has a manufacturing plant in Taipei Taiwan. It extrudes tubing for making reclosable plastic bags

and makes bags from the tubing. Keron has a number of extruders for extruding plastic film in the form of tubing (Chang RX-53 at 1).

148. Chang testified that to show Keron's method of cooling, he made a video tape on June 27, 1987 (RPX-2) which shows the extrusion of tubing from Keron's extruders and the method used to cool the tubing and the rib and groove profiles on the tubing; that the video tape is self-explanatory and shows the principal cooling apparatus; and that the

(Chang RX-53 at 1)

149. Chang testified that he took a photograph in May, 1987 when Mr. visited Keron's plant (RX-30, RX-33 is a marked copy of RX-30); that as shown in the photograph RX-33,

(Chang RX-53 at 1, 2).

150. Chang testified that

(Chang RX-53 at 2).

151.

152. The Keron process has a red line machine. If one wants to put a red pigment on a bag, then the machine is used. Most often a red color is used -- hence the name red color machine. (Chang Tr. at 1191).

153.

154.

155.

156.

157. If the air ring in the Keron process is not adequate for cooling the plastic tubing, more air rings are used. (Chang Tr. at 1183, 1184).

158.

159.

161.

162. As to air jets Chang testified:

Q. Do you have any air jets at all in your equipment to cool the profiles?

A. (Translated) No.

JUDGE LUCKERN: Would you ask him? He is over there. What is his understanding of any air jet? Could you ask him that question.

THE WITNESS: (Translated) To my knowledge, air jet is a pointed thing which spits out air.

(Chang Tr. at 1198)

163. In the Keron process an electric guide controls the size of the bag. (Chang Tr. at 1199).

164.

(Chang Tr. at 1208, 1209)

165. RPX-2 shows the entire process at Keron. All extruders at Keron are similar. (Chang Tr. at 1217, 1218).

166. Nossi Taheri has been president of respondent Meditech since 1983.

Meditech has its principal place of business at 4105 Holly Unit 1, Denver Colorado 80216.

(Taheri RX-6 at 1).

167. Taheri testified that he first visited in December, 1985; that he met

168. Photographs RX-29 and 32 show the air pipes (16) at a distance located above and away from the cooling ring which surround the hot plastic film coming from the extruder.

169. Luca Re. 26,991 teaches that in order to remove excess heat and solidify the plastic of the rib and grove elements, auxiliary cooling means are provided to blow separate jets of air at the tube at the locations of the rib and grove elements (RX-5, Col. 3, lines 17 to 22).

170. Taheri testified that

171. Taheri testified that

172. Taheri testified that he also saw equipment for applying a color line to the plastic tubing; that it seemed quite simple; that it consisted of an enclosure about one cubic foot square; that to put a color

line on the tubing, a small nozzle from the enclosure was positioned adjacent and touching the outer surface of the tube; that a hot plastic bead was extruded from the nozzle; that it reminded him of squeezing toothpaste from a tube; that the hot plastic bead adhered to the side of the tube and formed a thickened line; that he was told that any color plastic, or plastic with no color, could be extruded from the enclosure to form any color of line which is ordered; that the color line is used to show or indicate the openable end or mouth of the bag, and also it forms a slight rigid line area to make the opening of the bag easier;

173. Taheri testified that in May 1987,

174. Taheri testified that

175. A June 25, 1987 letter from respondents Meditech counsel to the staff stated:

> As requested, we are providing samples of recloseable plastic bags which respondents, Meditech International, Inc., and Polycraft Corporation,
>
> Meditech is shipping samples from other possible suppliers, which will be provided on June 26, 1987.
>
> We understand that the Commission Investigative Staff will take responsibility for safeguarding these samples.

(SPX-18)

176. SPX-1 and SPX-2 have each been identified as a reclosable plastic bag sample of Meditech. SPX - 1 has a Bates identification of 000324 and SPX-2 has a Bates identification of 000326.

VI. The '120 Trademark

177. The '120 trademark at issue is the subject of complainant's incontestable Reg. No. 946,120 on the Principal Register of the U.S. Patent and Trademark Office for plastic bags. (RX-46).

178. The color line trademark consists of a horizontal stripe adjacent the bag top lined for the color red although Minigrip makes no claim to any specific color (RX-46).

179. Minigrip registered the color line trademark on the Prinicipal Register of the United States Patent and Trademark Office on October 31, 1972 (RX-46).

180. The color line mark was first used by Flexigrip on zipper to be attached to film for reclosable bags in 1959 (CX-1, para. 7).

181. The color line mark has been used continuously since 1959 by Minigrip and Flexigrip (CX-1, para. 7).

182. U.S. Letters Patent 3,380,481 ('481 patent) issued to O.K. Kraus on April 30, 1968 on an application filed March 2, 1962. The patent is titled "Closed Tube With Fastener Members." It is assigned on its face to Minigrip. (RX-42).

183. Claims 1 and 2 of the Kraus '481 patent read:

> 1. A structure of use in making a recloseable container comprising, an elongated closed flexible integral tube, a first interlocking element integral with the tube on this inner surface thereof, and a second interlocking element integral with the tube on the outer surface thereof, said elements being shaped for cooperative pressure interengagement and forcible separation.
>
> 2. The structure as defined in claim 1 and includng means defining a separational line extending longitudinally along the tube for separating the tube material between said interlocking elements.

(RX-42, Col. 7, lines 2-13).

184. Col. 6, lines 54 to 75 of the Kraus '481 patent reads:

> In the arrangement of FIG. 21, an elongated continuous flexible plastic tube 152 has fastener profiles 153 and 154 extending therealong for forming closure elements. To separate the tube and form flanges at the top of the bag which is to be constructed, a knife blade 156 is run along between the fastener elements 153 and 154 along a line of severance 157. The tube is provided with an integral colored line 155 located between the male and female profiles 153 and 154. The colored line will be

extruded simultaneously with the tube. With the line of severance 157 formed in the middle of the line, the opening flanges will each be marked with a colored outer edge. If desired, the colored line 155 and the line of severance 157 can be related so that a cut is along the edge of the colored line 155, and then only one of the flanges will be colored for ease of separation. It will be understood that any of the structures of FIG. 2 through 20 may be provided with a colored line or colored lines between the male and female interlock of profiles and the tubes cut axially along the center of the colored line or lines, or along the edge or edges thereof.

185. While complainant's Kraus patent states:

"It will be understood that any of the structures of FIGURES 2 through 20 any be provided with a colored line or colored lines between the male and female interlocking profiles and the tubes cut actually along the center the colored line or lines or along the edge or edges thereof."

Ausnit testified that in complainant's present reclosable bag the color line between the profiles or adjacent to the profiles is not used for any purpose other than as a mark of distinction (Aunsit Tr. at 717,718).

186. As to the Kraus patent (RX-42, col. 6, line 67), Ausnit testified:

Q. There is a statement here: "If desired, the color line" -- and I believe that number is 155 -- "and the line of severance, 157, can be related so that the cut is along the edge of the color line, 155, and then only one of the flanges will be colored, for ease of separation."

Do you interpret that statement as the Kraus patent requiring that the color line and the line of severance be related so that the cut is along the edge of the colored line?

A. No. It's one of the possibilities of the patent.

187. Ausnit testified that to identify complainant's products, Minigrip, in its extrusion processes extrudes a color line on its sliderless zipper products (including both the zippers and plastic tubing) adjacent the zipper locks; that the color line is a registered trademark and is used today to identify the sliderless zippers, zipper tubing, and reclosable bags made

therefrom as quality products of Minigrip; and that Minigrip heavily promotes the color line as its trademark, and the color line is recognized as such. (Ausnit CX-180 at 7).

188. Ausnit testified that Minigrip uses the color line to identify all of the sliderless zipper products it manufactures, whether zipper itself, zipper (profile) tubing, or reclosable zipper bags, as quality products manufactured by Minigrip in Orangeburg; and that this has become more and more significant as other reclosable zipper products have appeared on the market place. (Ausnit CX-180 at 10).

189. Complainant normally uses its color line trademark as shown in RPX-5. It has been so used under a year (Ausnit Tr. at 650).

190. Complainant discourages providing another color line, other than red, but will do so (Ausnit Tr. at 818).

191. Nocek provided the following compilation of those using the color line trademark in issue on reclosable plastic bags products and the basis for same:

SCHEDULE OF RESPONDENTS
USING COLOR LINE TRADEMARK

Respondent	Source of Information
C.A.G.	Advised by "chief manager" bags available with color line.
Chang Won	Sample with color line seen.
Euroweld	Sample with color line seen.
Gideons Plastic	Sample with color line seen.*
Hogn Ter	Sample with color line seen.*
Ideal Plastic	Sample with color line seen.*
Ka Shing	Sample with color line seen.

Keron	Sample with color line seen.*
Kwang Il	Sample with color line seen.
Lien Bien	Sample with color line seen.*
Nina Plastic	Sample with color line seen.
Rol-Pak	Sample with color line seen.
Siam Import	Sample with color line seen.
Ta Sen	Sample with color line seen.*

Nocek testified that the above samples marked with * were obtained in connection with 337-TA-110 investigation and bore color line trademark (Nocek CX-179, Exh. B at 2, Exh. 30)

192. The physical exhibits in evidence of reclosable plastic bags with color lines include some bags in which the separational line or bag opening edge coincides with an edge of the color line. Additionally, several bags, including those bags of respondent with color lines, have the color line spaced from the separational line or bag opening. (SPX-3; SPX-9, CPX-1, Exhibits D and E thereto; Ausnit Tr. at 644).

193. The sole testimony of record concerning whether the color line is useful in the manufacturing process is the following testimony of Meditech's Taheri:

> I understand that the color line also serves as a guide in the manufacturing process to show the line on the tube where it can be cut.

(Taheri RX-6 at 8).

194. Respondent's Taheri provided the following testimony relating to the alleged functionality of the color line:

> It would be nice to use the color line, particularly since it serves the function of allowing the consumer to differtiate the top of the bag from the bottom. I would like to print the instructions "LIFT COLOR LINE TO OPEN" on the bag.

(Taheri RX - 6 at 8).

195. A visual examination of reclosable plastic bags show that they contain longitudinal plastic profiles which are the closure elements of the bag and which run horizontially near the top of the bag. These profile elements are thicker than the rest of the bag material and are apparent to the eye and not transparent as is the remainder of the plastic material bag. The longitudinal profiles can serve the function of allowing a user to identify the top of a bag without a color line, and to discriminate between the top and bottom of the bag. (SPX - 1, 3, 7, and 8).

196. Several exhibits of record depict reclosable plastic bags containing printed instructions thereon which refer to the color line on the bags. These printed instructions refer to a functional use of the color line, such as "LIFT COLOR LINE TO OPEN" or "LIFT RED LINE TO OPEN". These instructions indicate no degree of functionality of the color line. (RX-95; RX-91A, Exhibits 7, 8, 9, 11, 12, 13, 14, 17, 18, 19, 20, 21 thereto; Bruno RX-40).

197. Complainant has never printed functional instructions such as in the previous finding relating to the color line on its products -- bags, tubing, and zippers (Nocek, Tr. at 598, 601, 602, Nocek Dep. RX - 91 at 113-119).

198. Complainant Minigrip has instructed both verbally and in writing its customers not to use such instructions referring to the color line, and all known such uses of opening instructions referring to the color line have ceased. (Nocek, Tr. at 601-602; RX-91, Nocek Dep. at 129 - 130).

199. Minigrip's witnesses Ausnit and Nocek testified that the color line is a trademark and has no functional purpose. (Ausnit Tr at 718; Nocek Dep RX-91 at 113).

200. Minigrip uses printed opening instrucitons on its products which do not refer to the color line. The most common wording it uses is only the words "open" and "close" and arrows pointing to the zipper or profile fastner. (Nocek Dep. RX-91 at 122-124).

201. Complainant's Ausnit testified that Minigrip heavily promotes the color line as its trademark and the color line is recognized as Minigrip's trademark. Minigrip has placed advertisements expressly promoting the color line as its trademark. Its price lists contain the prominent legend "LOOK FOR THE COLOR LINE. A TRADEMARK OF MINIGRIP INC. [In bold letters], IT IDENTIFIES THE ZIPPER, ZIPPER FILM AND/OR ZIPPER BAG AS A QUALITY PRODUCT OF MINIGRIP INC." (CX-180 at 7; CX-1, Ex. F thereto; SX-20). Minigrip's stationery, price lists, and advertising prominently and expressly promote the color line as a trademark (CX-1, Ex. F thereto -- Ads "Look for the color line, the trademark of Minigrip, Inc., it identifies the tubing as a quality product of Minigrip, Inc.," and "THE COLOR LINE is the IDENTIFIABLE registered trademark on quality products from Minigrip, Inc."; RX-38 stationery "LOOK FOR THE COLORLINE, THE TRADEMARK OF MINIGIP, INC., IT IDENITIFIES THE ZIPPER, ZIPPER FILM AND/OR ZIPPER BAG AS A QUALITY PRODUCT OF MINIGRIP INC.").

202. Dow, a licensee of complainant, has estimated sales of $100 million reclosable plastic bags in the consumer market under the trademark Ziploc. The bags sold by Dow do not contain a color line. (CX-1 at 9, 16; Nocek Dep. RX-91 at 153; Ausnit Dep. RX-92 at 67-68; Nocek Tr. at 500).

203. Minigrip currently uses the color line mark near the top of its reclosable plastic bags and its predecessor in interest has continuosly used the mark since 1959. (Ausnit CX-180 at 10; Ausmit Tr. at 638-640; 642-645; CX-1, Exh. C thereto).

204. Meditech's Taheri has indicated that he would like in the future to use bags with a color line with printed instructions "LIFT COLOR LINE TO OPEN" on the bag. There is no evidence of past Meditech imports with such printed instructions and past Meditech imports of record with a color line have not contained such instructions. (Taheri RX-6 at 8; SPX-3; SPX-9).

205. Additional extrusion equipment is needed to co-extrude the color line onto the reclosable bag tubing. (CX-179, Nocek at 2).

206. machinery includes an extruder head for extruding a thickened line of plastic formed near the mouth of the bags, and that thickened line may be colored or uncolored.

207. reclosable plastic bags with a red line identical or similar to Minigrip's color line trademark. at 981-984, 995; SX-17; CX-157).

208. Samples were obtained from nonrespondent Keron bearing the color line trademark. (Nocek Dep. RX-91 at 139-40; RX-179, Exh. B, Exh. 30).

209.

210.

211. Any manufacturer of reclosable plastic bags can produce reclosable plastic bags with a color line. (Taheri Tr. 981).

212. Respondent C.A.G. charges a higher price for bags with color lines, as opposed to bags without a color line. (Nocek CX-179, Exh. A, Exh. 1 thereto).

213. Ausnit testified that complainant's color line trademark which states "adjacent to bag top" can be anywhere within a reasonable distance of the bag top. Ausnit also testified:

A. Well, as far as we are concerned the color line, which is our trademark and denotes the product is from Minigrip, should be adjacent or near the bag top. I would say within an inch or an inch and a quarter, an inch and a half, as long as it's close to the bag top, the color line denotes the bag was manufactured by Minigrip.

Q. Is near the bag top the only criteria for placement of the color line?

A. As far as the color line is concerned, I would think so, yes.

Q. Color line is not specific to a color, as stated here. What color is used the majority of the time by Minigrip?

A. The majority of the time, the color is red. But we also use a reasonable amount of time the color blue or black, green quite often.

(Ausnit Tr. at 787 to 788)

214. Complainant uses the color red, blue, black, green, mauve, orange, brown, gold, silver in its color line. Also Minigrip's Ausnit testified that the color line on its reclosable plastic bags and tubing is used to identify zipper tubing and reclosable plastic bags as quality products of Minigrip. He testified that the color line is heavily promoted as a trademark and recognized as such. (Ausnit Tr. at 788; Ausnit CX-180 at 7).

VII. Economic Issues

A. Importation and Sale

215.

216. Mr. Ng of C.A.G. confirmed to Nocek of Minigrip that C.A.G. had exported bags made by Siam Import to the U.S. which had not been stopped by U.S. Customs. C.A.G. is also an agent for a "one extruder operation in Malaysia just outside of Singapore" (RX-68). The evidence does not show what that "one extruder operation" makes. (Nocek CX-179 at 3; RX-68; RX-67).

217. Gideons Plastic's exclusive selling agent agent, non-respondent Focus Taiwan Corporation

solicited sales of such bags CIF New York. (Nocek CX-179 at 8 & Ex. 17 thereto; SPX-6; SX-24).

218. imported into the U.S. $145,000 worth of allegedly infringing reclosable plastic bags in 1984 through 1986. (Nocek CX-179 at 9 & Ex. 27 thereto; SPX-5; SX-21).

219. Respondent foreign manufacturer Hogn Ter has imported to the U.S. allegedly infringing reclosable plastic bags. (Noeck RX-91A, Ex. 23 thereto at 4).

220. Respondent foreign manufacturer Teck Keung in 1986 exported to the U.S. 700,000 allegedly infringing reclosable plastic bags which were subjected to a redelivery notice by U.S. Customs. (Nocek CX-179 at 8).

221. in 1986 imported at least $39,096 worth of allegedly infringing reclosable plastic bags into the U.S. (SPX-5; Nocek CX-179 at 9; SX-21).

222. Euroweld has imported reclosable plastic bags and also has agreed to purchase imported reclosable plastic bags. (SX-24; CX-169; CX-174).

223. Respondent domestic importer Insertion imported reclosable plastic bags in 1984 and 1985. (SX-21; SPX-5; Nocek CX-179 at 9, & Exhibit 27 thereto).

B. Domestic Industry

224. Minigrip produces both reclosable plastic bags and profiled tubing at its plant in Orangeburg, New York. (Ausnit CX-180 at 3-8).

225. Complainant's Orangeburg plant has 21 extrusion lines for the production of profiled tubing, three printing presses, and 20 bag making machines to cut and seal across the tubing to produce reclosable plastic bags. (Ausnit CX-180 at 8, 14-15).

226. Reclosable plastic bags are produced by Minigrip from extruded plastic film tubing with continuous shaped profiles with the use of air jets to blow cooling air at the base of the profiles, while they are still in a formative stage, to control the shape and cooling rate of the profiles. (Ausnit CX-180 at 8, 10-15 & Exhibits 1-3 thereto; Ausnit Dep. RX-92 at 9-23; Tr. 719-728).

227. The air velocity and air pressure through complainant's air jets are adjustable and are adjusted according to the speed of the extrusion and the gauge of the plastic going through the die. The air jet has a dial gauge

228.

229. Minigrip annual sales of reclosable plastic bags and profile tubing are as follows:

230. The Dow Minigrip license refers to (RX-181).

231. Dow's annual sales of reclosable bags made from profiled tubing are approximately $100 million. Dow's reclosable plastic bags are sold under the trademark Ziploc in four sizes: sandwich, quart, gallon and jumbo storage sizes (CX-1 paragraph 20).

232. Complainant's expert Keegan testified that entry into the consumer market occupied by Dow would be far more difficult for import sales than would entry into the industrial market occupied by Minigrip (Keegan Tr. at 133).

233.

(Ausnit Dep. RX-92 at 28-29).

234. Minigrip has licensed to Dow concerning the production of reclosable plastic bags (RX-86).

235. In a study prepared by the Market Research Department of Packaging Digest Dow was found to be a leading supplier of zipper polybags, i.e., reclosable plastic bags (RX-71 at 11).

236. Although imports undersell Minigrip bags by a wide margin (see FF 249, 250, 252, 257-267 below), Meditech has found quotations concerning imported boxed reclosable bags for consumer use to be uncompetitive in price with the similar Dow product (RX-16; CX-112; CX-114).

CX-178 at 3-4; Ausnit, CX-180 at 18-19; SX-1 Ans. to Int No. 32; Keegan, Tr. at 119).

242. have been installed on a number of extruders at Minigrip's Orangeburg facility to insure on the extruder lines. The plant is air-conditioned to improve extruder speeds and create a working environment that maximizes employee alertness and efficiency especially under summer conditions. The Minigrip plant has its own machine shop which is using the latest technology to There is an active research and development program There are 13 resin silos which permit the purchase of resin in efficient bulk quantities.

aid in the production of the products at issue. Minigrip has an active research and development progeram to introduce new

(Keegan, CX-178 at 3-4; Ausnit, CX-180 at 18-19; SX-1; Ans to Int. No. 32; Keegan, Tr. at 119).

243.

(Keegan, Tr. at 127).

244. Minigrip's sales per employee in tubing and bag production has increased from in 1982 to in 1987 (first quarter annualized). The productivity of Minigrip's tubing and bag employees has increased since 1982, by measure of sales per employee, a basic measure of operating efficiency. (Keegan, CX-178 at 5).

245. To provide enough manufacturing space and machinery to meet anticipated demand, Mingrip has increased its plant capacity on four different occasions. Minigrip is now in the process of building a square foot plant in Sequin, Texas, which will start production in the first quarter of

(Ausnit, CX-180 at 15-17).

251. Keegan further testified that

CX-178 at 10; Tr. 164; 172; 188; 195-197; 222-227; 229; CX-1, Exhibit K thereto.

252.

(CX-178; TR. 159; 162-163; 185-187; 235).

253.

Tr at 169-170; 199.

254.

(Tr. 169-170).

255. Respondent Hogn Ter of Taiwan has fifteen extruder lines for reclosable bag production which utilize air jets directed onto the profiles, of which only ten lines were operating at the time of the visit of Minigrip's Nocek to the plant.

Minigrip has seen samples of Hogn Ter bags with a color line which were obtained in connection with Inv. No. 337-TA-110. (CX-179 Ex. A at 5, & Ex. B, Ex. 30 thereto; RX-75 at 2).

256. Respondent C.A.G. has offered reclosable plastic bags for sale and include importation to Minigrip's customer KCL. (CX-179 at 4 & Ex. 4 thereto).

257.

(RX-75; SX-20).

258.

(CX-179, Exs A,1 thereto; SX-20).

259.

(RX-75 at 3; SX-20 at 5; CX-179, Exhibits A, 7 thereto)

260. During the visit of Minigrip's Nocek to Hogn Ter's plant in October, 1986 only 10 of 15 extruder lines for making reclosable plastic bags were operating, indicating their excess capacity. (Tr. 546; CX-179, Ex. A thereto 5.)

261.

(RX-75 at 1; SX-20)

261.

262.

263.

to its production for export. Harbona admitted to Minigrip's Nocek that it had exported bags to the U.S. (CX-91A, Ex. 23 thereto).

264. Minigrip's Nocek visited respondent C.A.G. in Singapore in September, 1986. C.A.G. is an agent for Siam Import. C.A.G.'s Ng admitted previously exporting bags to the U.S. which were not stopped by customs. (CX-179, Ex. B at 3-4; RX-68).

265. Minigrip's annual sales of reclosable bags and tubing amounted to with annual sales of bags. For a five month period then, such as the relevant December 1, 1987 to April 29, 1988 period during which any temporary exclusion order determination in this case would be operative, Minigrip's comparable sales would be with units of bags comparably over units. (RX-83).

266.

(There is no FF 267, 268, 269).

270.

(RX-65).

271. Respondent Chang Won of South Korea has one extrusion line and one bag making machine for making reclosable plastic bags with a color line. It has a small export business and is operating at 50% capacity. The plant manager of Chang Wong indicated to Minigrip's Nocek that Chang Wong is interested in export of bags to the U.S. (SX-11; CX-179, Ex. A thereto at 4.

272. Respondents Ideal, Lien Bien, and Ta Sen of Taiwan are members of the Taiwan "Plastic Bag Union" which is an association set up for the purpose of exporting reclosable plastic bags, as represented at a meeting with Minigrip's Nocek. These companies have stated a desire to export reclosable plastic bags to the U.S. as soon as possible. No information was available concerning their use of air jets apart from Nocek's representation that no supplier of equipment that he was aware of offered equipment without such air jets; however, Nocek did not testify that he was aware of all such (Far East) equipment suppliers; nor did he testify that these respondents actually obtained their equipment from the equipment suppliers he knew. CX-179 at 5-6.

273.

(CX-179, Exhibit B, Ex. 30 thereto; CX-6).

274.

(CX-179, Ex. B, Ex. 30 thereto).

275. Samples of Ta Sen's reclosable plastic bags obtained in connection with Inv. No. 337-TA-110 showed use of a color line. (CX-179, Ex. B, Ex. 30 thereto).

276.

(CX-179 at 6 & Ex. 9 thereto; RX-62).

277. Respondent Lim Tai's factory near Bagnkok contained reclosable bag extruders with adjustable air jets blowing air jets onto the profiles. This company indicated to Minigrip's Nocek an intent to export reclosable bags to the U.S. (CX-179 at 7).

278. Respondent Rol-Pak of Malaysia advised Minigrip's Nocek that Rol-Pak presently makes approximately 20-25 million bags per month for export (occupying 2 and 1/2 to 3 20 foot sized containers) using air jets blowing on the extruded profiles to control their shape. It also has color line extruders, five profiled tubing extruders, and 12 bag making converter machines.

Rol-Pak now exports reclosable bags to the U.K., France, Denmark and West Germany where patents have recently expired. Rol-Pak is represented by an export trading company. (CX-179 at 7 & Exhibit 13 thereto; SX-12).

279. Minigrip's Nocek visited the Bangkok factory of Siam Import observing adjustable air jets directed at extruded profiles and color line extrusion on its new extrusion lines. (CX-179 at 7).

280.

(CX-179 Ex. A. at 8, & Ex. 18 thereto, & Ex. B--30; SX-24; RX-93).

(There is no FF 281 to 289)

290. There is no information of record concerning Nina Plastic's use of adjustable air jets. However, Minigrip has seen samples of Nina Plastic's bags containing a color line. From 1983-1986 Nina Plastic has reclosable plastic bags and in 1985 it CX-179, Ex. A at 9; SX-21).

291. Respondent Ka Shing uses a color line on its reclosable plastic bags. (CX-179, Ex. B., Ex. 30).

292. U.S. Customs records show that Ka Shing made 24 entries of imported reclosable plastic bags worth $39,000 in 1986. SX-21; SPX-5).

293. There is no information of record concerning use by respondents Insertion and Teck Keung of adjustable air jets or color lines.

294. Respondent Euroweld has reclosable plastic bags with a color line. At least three shipments of imported bags have been imported by Euroweld. (SPX-5; CX-179 Ex. A at 8-9 & Ex 20, & Ex. B, Ex. 30; SPX-3).

295. Minigrip's Nocek testified concerning several Far East reclosable bag manufacturing equipment suppliers. A) Siusco Enterprise Ltd. of Hong Kong-- The Director of Siusco, Mr. Siu indicated that they had sold extrusion and bag making equipment to mainland China (3-4 units), East Africa (1 unit), and several Hong Kong manufacturers. Mr. Siu indicated that profile shape is

controlled on its machines through the use of air jets directed at the profiles. B) Lung Meung Machinery Co. of Taiwan-- Officials from Lung Meung advised Minigrip's Nocek that it has sold reclosable bag making equipment to Hong Kong, mainland China and India and a video tape was shown of its equipment in operation showing color line extrusion and the use of adjustable air jets to control profile shape. Lung Meung advertized its machinery in a Taiwan newspaper as "Zipper (Minigrip) bag making machine" and sells an extruder and bag making machine for and a flexographic printing press for Lung Meng indicated that it had made one or two reclosable bag making machines per month in 1985. (CX-179, Ex. A at 10-11; RX-61; RX-63).

296. Respondent Meditech has imported at least sample reclosable plastic bags bearing a red color line. (SPX-9).

296(a). Meditech's Taheri estimates that

297.

Ausnit Tr. at 906.

298. Consumer reclosable plastic bags sold in grocery stores for consumer use are boxed in quantities of Ausnit Tr. at 907.

299.

Ausnit Tr. at 902.

300.

(RX-75).

301.

Ausnit Tr. 768-771; Nocek Dep. RX-90 at 45, RX-91 at 142-143.

302.

(Ausnit Tr. at 769-773, 798-799; CX-180 at 16; Nocek Dep. 9X-91 at 170-171).

303. Now underway is the building of a new Minigrip plant for the manufacture of reclosable plastic bags and tubing in Sequin, Texas.

The Texas Minigrip plant construction will be complete in October and operation will begin in the first quarter of . Initially the Texas plant will increase Minigrip's present capacity by , while the capacity of the whole plant will add to present capacity. Initial employment at the Texzas plant would add production workers.

(Tr. 767).

304.

(Ausnit Dep. RX-92 at 71-74); Ausnit Tr. at 780).

305. All the Far East manufacturers which Nocek visited on his 1986 trip, including C.A.G., Hogn Ter, and Harbona, stated that they were not operating at full capacity. (Nocke Dep. RX-90 at 68).

306. Minigrip's price sensitive sales of stock reclosable bags in 1986 amounted to units and for a five month period such sales would be comparable to and units. (RX-83).

307.

Ausnit Tr. at 906.

308. Reclosable bags sold in grocery stores for consumer use are boxed in quantities of . (Ausnit Tr. at 907).

309. Ausnit testified that it is highly unlikely that its industrial distributors sell in the consumer market because those distributors do not deal with that type of customer. (Ausnit Tr. at 902).

310.

311. At a distributor's level respondent Euroweld's prices to the trade (in lots of 5000) for reclosable bags are as follows, as compared to Minigrip's comparable prices:

Size	Euroweld
1 1/2 x 2	7.99
2 x 2	8.99
2 x 3	9.99

CX-179, Ex. A,19 thereto; SX-20).

312. Minigrip's annual sales of domestically produced reclosable plastic bags and tubing were as follows:

(RX-83).

313. Dow's annual sales of reclosable plastic bags are approximately $100 million sold through supermarket and similar establishments to retail customers. Bags are sold in four sizes: gallon, quart, sandwich, and jumbo storage bag. (CX-1 at 16).

314. The vast majority of complainant's bag, tubing, and zippers contain color lines with the color red. Other colors used include blue, black, green, mauve, orange, brown, gold, and silver; these other colors are used if requested by a customer to match their printing, etc. (Ausnit Tr. at 788).

315. Minigrip's CEO Ausnit testified that extruding machinery for reclosable plastic bags generally costs Minigrip (Ausnit Tr. 755).

316.

(RX-91A, Ex 22 Thereto).

317. For a five month period Minigrip's annual sales would be comparable to

318. Chung Kong has equipment to manufacture bags with a red color line, but has not yet exported bags to the U.S. with a colr line. (CX-65; CX-117; Taheri Tr. at 1019).

319.

320.

Tr. 1131-1133; 1144-45; SX-9; Keegan Tr. at 189-190; CX-22; CX-117).

320(a).

321. Meditech's Taheri testified that has equipment for applying a color line to plastic tubing. Taheri further testified that this process is "quite simple", that the equipment for applying the color line of "any color platic, or plastic with no color," can be extruded onto the tubing. Taheri indicated that such an applied plastic line at the top of the bag "forms a slight rigid line area to make the opening of the bag easier." additionally has equipment for applying a color line to plastic bags. (Taheri RX-6 at 9-11).

321A. The reclosable plastic bags of CAG and Siam Import, Hogn Ter and Harbona, are sold in particular sizes, number of sizes, quantities (sold in units of one thousand) as comparably used by Minigrip for sale in the industrial reclosable bag market to distributors and business customers as packaging for their products. Apart from certain sample imports from Chung Kong of its "Pleasure Loc" boxes, imports in this investigation have not been offered or distributed in boxes, packages, or small quantities for consumer use. (Nocek CX-179, Ex. A; RX-75; RX-50; CX-10; CX-109; CX-112; CX-114; CX-138; Keegan Tr. at 129-132).

322. There have been numerous imports of reclosable plastic bags which have been subjected to U.S. Customs Exclusion Action or Entered dispite the Exclusion order set by Inv. No. 337-TA-110. (Nocek CX-179, Ex. B, Ex. 27 thereto; SPX-5; SX-21; SX-24).

323.

324. Siam Imports of Bangkok Thailand has a new large and modern factory which, it reported to Minigrip's Nocek, exports 40% of its production and plans to increase this amount to 50% of its production. Siam Imports produces 750 million total reclosable plastic bags a year with 300 million in exports. It has 80 employees and has continued its ability to increase production for export. (RX-67).

VIII. Other Issues

325.

326.

(RX-20).

CONCLUSIONS OF LAW

1. The Commission under 19 U.S.C. 1337 has jurisdiction over the subject matter of this investigation.

2. There is a reason to believe that certain respondents will export into and sell in the United States from December 1, 1987 to April 29, 1988 (interim period) certain reclosable plastic bags and tubing.

3. There is a reason to believe that processes of certain respondents involved in exporting certain reclosable plastic bags and tubing in the interim period to the United States will infringe the '872 patent.

4. There is a reason to believe that respondents Meditech in importing certain reclosable plastic bags and tubing in the interim period to the United States will not infringe the '872 patent.

5. There is a reason to believe that certain respondents involved in exporting certain reclosable plastic bags and tubing to the United States will infringe the '120 trademark in the interim period.

6. There is a reason to believe that respondents Meditech in importing certain reclosable plastic bags and tubing to the United States will infringe the '120 trademark in the interim period.

7. There is no reason to believe that the '872 patent is unenforceable.

8. There is no reason to believe that the '872 patent is invalid.

9. There is no reason to believe that the '120 trademark is de jure functional.

10. There is no reason to believe that the '120 trademark has been abandoned.

11. There is a reason to believe that there are two domestic industries involving reclosable plastic bags and tubing in the United States. These

industries consist of (1) complainant's facilities directed to the manufacture (under the '872 patent), sale and distribution of reclosable plastic bags and profile tubing which would include profile tubing and bags made by complainant for Dow, and (2) complainant's facilities directed to the manufacture, sale and distribution of reclosable plastic bags and profile tubing which bear the '120 trademark.

12. There is a reason to believe that the importation of certain reclosable plastic bags and tubing in the interim period by certain respondents will cause immediate, and substantial harm to complainant.

13. It is probable that complainant will succeed on the merits in this investigation.

14. There is insufficient evidence to establish that respondents will suffer significant harm if a temporary exclusion order issues for the interim period.

15. The issuance of a temporary exclusion order for the interim period would not adversely affect the public interest.

16. Consideration of each of the four factors set forth in Commission Rule 210.24(e) leads the administrative law judge to conclude that temporary relief should be granted.

INITIAL DETERMINATION AND ORDER

Based on the foregoing findings of fact, conclusions of law, the opinion, and the record as a whole, and having considered all of the pleadings and arguments presented orally and in briefs, as well as proposed findings of fact, it is the administrative law judge's determination that there is a reason to believe in the interim period that there will be a violation of section 337 in the alleged unauthorized importation into, and sale in, the United States of certain reclosable plastic bags and tubing by reason of alleged infringement of claim 1 of the '872 patent and infringement of the '120 trademark with the effect or tendency to destroy or substantially injure an industry efficiently and economically operated in the United States.

The administrative law judge hereby CERTIFIES to the Commission the initial determination, together with the record in this investigation consisting of the following:

1. The transcript of the oral arguments; and

2. The Exhibits admitted into evidence as well as those offered but not so admitted.

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

Further it is ORDERED that:

1. In accordance with Rule 210.44(b), all material heretofore marked in camera because of business, financial, and marketing data found by the administrative law judge to be cognizable as confidential business information under Rule 201,6(a), is to be given in camera treatment from the date this investigation is terminated.

2. Counsel for the parties shall have in the hands of the administrative law judge those portions of the initial determination which contain confidential business information to be deleted from the public version of the initial determination no later than Wednesday September 9, 1987. If no comments are received from a party it will mean that the party has no objection in removing the confidential status, in its entirety, from this initial determination.

3. This initial determination shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within forty-five (45) days after the date of filing of the initial determination shall have ordered review of the initial determination or certain issues therein pursuant to 19 C.F.R. 210.54(b) or 210.55 or by order shall have changed the effective date of the initial determination.

Paul J. Luckern
Administrative Law Judge

Issued: August 31, 1987

July 20, 1987

Inv. No. 337-TA-266
FINAL EXHIBIT
LIST OF RESPONDENTS MEDITECH

Exhibit No.	Description	Sponoring Witness
RX - 1	Witness Statement of Professor Charles A. Garris	Charles A. Garris
RX - 2	Resume of Charles A. Garris	Charles A. Garris
RX - 3	U. S. Patent No. 3,945,872 (Patent in Suit) with wrapper as attached to the Complaint	Charles A. Garris
RX - 4	Reexamination Certificate of Patent No. 3,945,872	Charles A. Garris
RX - 5	U.S. Patent No. 26,991 (Luca)	Charles A. Garris
RX - 6-C	Witness Statement of Nossi Taheri	Nossi Taheri
RX - 7-C	Handwritten memo dated August 2, 1985 to	Nossi Taheri
RX - 8-C	Handwritten note dated February 7, 1986 to	Nossi Taheri
RX - 9-C	Letter dated January 15, 1986 to Ed Bruno from Bob Leeper	Nossi Taheri
RX - 10-C	Letter to Nossi Taheri	Nossi Taheri
RX - 11-C	Hand drawing with handwritten notes dated September 18, 1985	Nossi Taheri

RX - 12-C	Letter dated April 23, 1986 to Leo Aubel from Nossi Taheri	Nossi Taheri
RX - 13-C	Letter dated May 5, 1986 to Leo Aubel from Nossi Taheri	Nossi Taheri
RX - 14-C	Letter dated May 8, 1986 to Leo Aubel from Nossi Taheri	Nossi Taheri
RX - 15-C	Handwritten notes dated July 30, 1986 regarding	Nossi Taheri
RX - 16-C	Letter dated September 6, 1985 to Wilson Ip from Nossi Taheri	Nossi Taheri
RX - 17-C	Letter dated November 17, 1986 to Leo Aubel from Nossi Taheri	Nossi Taheri
RX - 18-C	Handwritten letter dated February 6, 1987 to Leo Aubel from Nossi Taheri	Nossi Taheri
RX - 19-C	Note dated June 6, 1987	Nossi Taheri
RX - 20-C	Notice of	Nossi Taheri

RX - 21-C	Meditech balance sheet and income statement dated December 31, 1986	Nossi Taheri
RX - 22-C	Offer to Purchase dated June 27, 1987	Nossi Taheri
RX - 23-C	Offer to Purchase dated June 26. 1987	Nossi Taheri
RX - 24-C	Offer to Purchase dated June 27, 1987	Nossi Taheri
RX - 25-C	Agreement dated August 12, 1985 between	Nossi Taheri
RX - 26-C	Telex dated February 27, 1987 to	Nossi Taheri
RX - 27-C	Agreement dated May 11, 1987 between	Nossi Taheri
RX - 28-C	Agreement dated May 6, 1987 between	Nossi Taheri
RX - 29-C		Nossi Taheri
RX - 30-C		Nossi Taheri
RX - 31-C		Nossi Taheri
RX - 32-C		Nossi Taheri
RX - 33-C		Nossi Taheri

RX - 34-C		Nossi Taheri
RX - 35-C		Nossi Taheri
RX - 36	Letter dated June 22, 1986 to Governor Richard Lamm (Colorado) from Sergio Abara	Nossi Taheri
RX - 37	Letter dated February 26, 1986 to Nossi Taheri from the Honorable Patricia Schroeder	Nossi Taheri
RX - 38	Letter dated June 2, 1986 to distributors from Robert Nocek	Nossi Taheri
RX - 39-C	Handwritten notes by Gale Bender re: converstions with Jerry Schneiderman and Bob Curtis	Nossi Taheri
RX - 40-C	Witness Statement of E. C. Bruno	Edward C. Bruno
RX - 41	U.S. Patent No. 29,208	Edward C. Bruno
RX - 42	U.S. Patent No. 3,380,481 (Kraus); and retyped marked copy of Column 6, lines 54-75 and Claims 1 and 2	Edward C. Bruno
RX - 43	Photostatic copy of bag with colorline	Edward C. Bruno (Withdrawn, TR at 321)
RX - 44	Photostatic copy of bag with colorline and label	Edward C. Bruno (Withdrawn, TR at 321)
RX - 45	Sample of bag with yellow and blue color lines	Edward C. Bruno (withdrawn at 327)
RX - 46	Trademark Registration 946,120 (colorline)	Edward C. Bruno

RX - 47-C	Witness Statement of Wilson Ip	Wilson Ip
RX - 48-C	Telex to Chung Kong Industrial Co., Ltd.	Wilson Ip
RX - 49-C	Fax memo dated March 31, 1987 to from Wilson Ip	Wilson Ip
RX - 50-C	Letter dated September 6, 1985 to Wilson Ip from	Wilson Ip
RX - 51-C	Telex dated January 30 to Wilson Ip	Wilson Ip
RX - 52-C	Letter dated March 11, 1987 to Wilson Ip from	Wilson Ip
RX - 53-C	Witness Statement of Darryl Chang	Darryl Chang
RX - 54-C	Witness Statement of S.Y. Lee	S. Y. Lee
RX - 55	Minigrip Affidavit of Robert S. Nocek in support of the Complaint of Minigrip, Inc.	Robert S. Nocek
RX - 56-C	Three page Memorandum dated	Robert S. Nocek
RX - 57-C	Two page memorandum dated	Robert S. Nocek
RX - 58-C	Trip report dated	Robert S. Nocek

RX - 59-C	Two page memorandum dated	Robert S. Nocek
RX - 60	Two memorandum dated 1986 re:	Robert S. Nocek
RX - 61-C	Three page memorandum dated	Robert S. Nocek
RX - 62-C	Two page memorandum dated	Robert S. Nocek
RX - 63-C	One page Memorandum dated	Robert S. Nocek
RX - 64-C	One page memorandum dated	Robert S. Nocek

RX - 65-C	Five page memorandum dated	Robert S. Nocek
RX - 66-C	Two page memorandum dated	Robert S. Nocek
RX - 67-C	One page handwritten form re:	Robert S. Nocek
RX - 68-C	Two page memorandum dated	Robert S. Nocek
RX - 69-C	Two page Memorandum dated	Robert S. Nocek
RX - 70-C	One page handwritten notes	Robert S. Nocek
RX - 71-C		Robert S. Nocek

RX - 72-C	Minigrip's current plant description attached as Exhibit L to Complaint	Robert S. Nocek
RX - 73-C	Letter dated May 22, 1987	Robert S. Nocek
RX - 74-C	Minigrip Texas Plant Budget Building and Sitework	Robert S. Nocek
RX - 75-C		Robert S. Nocek
RX - 76-C	Minigrip Sales Figures attached as Exhibit R to Complaint	Robert S. Nocek
RX - 77-C	Minigrip Capital Investment Chart attached as Exhibit Q to Complaint	Robert S. Nocek
RX - 78-C	Minigrip Profit Figures attached as Exhibit P to the Complaint	Robert S. Nocek
RX - 79-C	Minigrip Production and Sales Figures attached as Exhibit O to the Complaint	Robert S. Nocek
RX - 80-C	Minigrip Price List attached as Exhibit N to the Complaint	Robert S. Nocek
RX - 81-C	List of Minigrip Employees attached as Exhibit M to the Complaint	Robert S. Nocek
RX - 82-C	Minigrip Plant Capacity Analysis	Robert S. Nocek
RX - 83-C	Minigrip Capacity Numbers of Bags attached as Exhibit K to the Complaint	Robert S. Nocek

RX - 84-C	Minigrip Corporate Charts	Robert S. Nocek
RX - 85-C		Robert S. Nocek
RX - 86-C	Letter dated December 7, 1983 to	Robert S. Nocek
RX - 87	Photocopies of plastic bags and advertisements	Robert S. Nocek
RX - 88	Drawings - undated (5 pages)	Robert S. Nocek
RX - 89	Supplement to Nocek Affidavit	Robert S. Nocek
RX - 90	Deposition of Robert S. Nocek (Volume 1)	Robert S. Nocek
RX - 91-C	Deposition of Robert S. Nocek (Volume 2)	Robert S. Nocek
RX - 91-A-C	Exhibits to Deposition of Robert S. Nocek (Vols. 1&2)	Robert S. Nocek
RX - 92-C	Deposition of Steven Ausnit	Steven Ausnit
RX - 93-C	Minigrip Customer Sales List & Computer Listing (Bates 000244-000249) (TR. 887 at 907)	Steven Ausnit
RX - 94-C	Complainant's Response To Respondents' Request for Admissions	Robert S. Nocek Steven Ausnit
RX - 95	Associated Bag Company Document Entitled "Polyethylene Bags and Products" (Remarked - Was RX-93C)	Edward C. Bruno
RX - 96	Complainant's First Set of Interrogatories and Requests to Produce	Nossi Taheri

Documentary Exhibits

CX-94. Production No. 000030. Telex from

CX-95. Production No. 000080. Distributor price list for reclosable poly bags dated August 1, 1985.

CX-96. Production No. 000027. Telex from

CX-97. Production No. 000036. Page 1 of a handwritten letter

CX-98. Production No. 000037. Page 2 of a handwritten letter

CX-99. Production No. 000038. Page 3 of a handwritten letter

CX-100. Production No. 000039. Page 4 (last page) of a handwritten letter

CX-101. Production No. 000040. List of bag sizes, possible inventory numbers and possible test results.

CX-102. Production No. 000041. Inventory and price list for various size bags.

CX-103. Production No. 000251. Page 1 of an Agreement

CX-104. Production No. 000252. Page 2 of an Agreement

PHYSICALS EXHIBITS

Exhibit No.	Description	Sponsoring Witness
RPX - 1C		Wilson Ip (Not Accepted)
RPX - 2C		Darryl Chang
RPX - 2A-C		Darryl Chang
RPX - 3C		S.Y. Lee (Not Accepted)
RPX - 4	Recloseable Plastic Bag With Multi-Colored Color Line Of Union Carbide (Glad Bag).	Steven Ausnit
RPX - 5	Recloseable Plastic Bag With Color Line, Provided By Complainant (Bates No. 000625).	Steven Ausnit

* Unless indicated, all exhibits have been entered into evidence, unless a notation indicates they are withdrawn. (See attached list of temporary relief hearing transcript notations concerning handling of exhibits, provided for the convenience of the parties.).

b:\Exhibit

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Before Paul J. Luckern
Administrative Law Judge

In the Matter of	)	
	)	
CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING	)	Investigation No. 337-TA-266
	)	
	)	

REVISED EXHIBIT LIST OF THE COMMISSION INVESTIGATIVE STAFF ON ISSUES CONCERNING TEMPORARY RELIEF

Documentary Exhibits

Exhibit No.	Description
SX-0	Revised Exhibit List
SX-1(C)*	Complainant Minigrip Inc.'s Response to the First Set of Interrogatories and Request for the Production of Documents of the Commission Investigative Staff of the United States International Trade Commission
SX-2	Response of Meditech International Inc. and Polycraft Corporation to the Complaint and Notice of Investigation
SX-3	Response of Euroweld Distributing to the Complaint and Notice of Investigation
SX-4(C)	Response of Respondents, Meditech International Co. and Polycraft Corporation, to the First Set of Interrogatories of the Commission Investigative Staff of the United States International Trade Commission
SX-5(C)	Response of Respondent, Euroweld Distributing Inc., to the First Set of Interrogatories of the Commission Investigative Staff of the United States International Trade Commission

*(C) Denotes Confidential

SX-6(C)	Minigrip's Answer to Question 31 of the First Set of Interrogatories and Request for the Production of Documents of the Commission Investigative Staff of the United States International Trade Commission
SX-7(C)	Invoice from Chung Kong Industrial Co., Ltd.
SX-8(C)	
SX-9(C)	Letter dated January 15, 1986 to
SX-10(C)	Purchase Order Dated January 15, 1986
SX-11(C)	September 1, 1986 Report
SX-12(C)	September 8, 1986 description
SX-13(C)	September 27 telex from Chung Kong
SX-14(C)	Letter dated August 21, 1985 to Chung Kong Industrial Co.
SX-15(C)	Telex from Meditech
SX-16(C)	January 30 Telex from Meditech
SX-17(C)	Purchase Order
SX-18(C)	Letter dated June 25, 1987 to Dr. Cheri Taylor from Larry Klayman, Re. samples of reclosable plastic bags

SX-19(C)	Complainant Minigrip Inc.'s Response to the Second Set of Interrogatories of the Commission Investigative Staff of the United States International Trade Commission
SX-20(C)	Minigrip Price Lists
SX-21(C)	Letter dated June 9, 1987 to Peter Baish of the United States Customs from Dr. Cheri Taylor, Re. computer search; Memo dated July 2, 1987 to Dr. Cheri Taylor from Peter Baish, Re. results of computer search; and a two page document listing importers of reclosable plastic bags from 1984 to present.
SX-22(C)	Hold Harmless Agreement
SX-23(C)	Five invoices plastic bags Company for the
SX-24(C)	Memo dated July 7, 1987 to United States International Trade Commission from Peter Baish, Re. search results; and a one page document listing importations of reclosable plastic bags done by RD Plastics and Euroweld Corporation
SX-25(C)	Response and Objections of Respondents Meditech International Company and Polycraft Corporation To Complainant's First Set of Interrogatories
SX-26(C)	First Set of Interrogatories of the Commission Investigative Staff of the United States International Trade Commission Propounded To All Respondents

Physical Exhibits

SPX-1	Reclosable Plastic Bag Sample of Meditech
SPX-2	Reclosable Plastic Bag Sample of Meditech
SPX-3	Reclosable Plastic Bag Sample of Euroweld
SPX-4(C)	Deposition of Steven Ausnit
SPX-5(C)	Computer print-out from United States Customs
SPX-6(C)	Supplemental computer print-out from United States Customs
SPX-7	Reclosable Plastic Bag Samples of R.E. Leeper Enterprises, Inc.
SPX-8	Reclosable Plastic Bag Samples of RD Plastics
SPX-9	Reclosable Plastic Bag Samples, with colorline trademark, of Meditech

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.
Before Judge Paul Luckern
Administrative Law Judge

----------X

In the Matter of

CERTAIN RECLOSABLE PLASTIC BAGS AND TUBING

Investigation No. 377-TA-266

----------X

COMPLAINANT MINIGRIP'S EXHIBITS ADMITTED INTO EVIDENCE

KANE, DALSIMER, SULLIVAN, KURUCZ,
LEVY, EISELE and RICHARD
420 Lexington Avenue, Ste. 2710
New York, New York 10170-0071
(212) 687-6000

OF COUNSEL:

GERALD LEVY, ESQ.
RONALD R. SANTUCCI, ESQ.
JAMES G. MARKEY, ESQ.

Documentary Exhibits

CX-1.	Complaint and Non-Confidential Exhibits A-I, S thereto.
CX-2.	Response of Meditech International Inc. and Polycraft Corporation to First Requests For Admission.
CX-3.	Response of Euroweld Distributing to the Complaint and Notice of Investigation.
CX-4.	Response of Certain Taiwanese Manufacturers to the Complaint and Notice of Investigation.
CX-5.	Certified Copy of Re-examination Certificate for U.S. Patent No. 3,945,872.
CX-6.	Statement of Capacity of Respondent Ideal Produced in Response to Investigative Staff's Motion to Supplement Responses by Counsel for Respondents Meditech and Polycraft.
CX-7.	Statement of Capacity of Respondent Keron Produced in Response to Investigative Staff's Motion to Supplement Responses by Counsel for Respondents Meditech and Polycraft.
CX-8.	Statement of Capacity of Respondent Lien Bin Produced in Response to Investigative Staff's.
	The following documents were produced by Counsel for Respondents Meditech, Polycraft and Euroweld. Respondents production number for the respective document is listed for the designated exhibit number:
CX-9.	Production No. 000056. Letter from

Documentary Exhibits

CX-10.	Production No. 000055. Telex from Mr. Taheri dated December 29th.
CX-11.	Production No. 000074. Chung Kong dated February 1, 1985.
CX-12.	Production No. 000075. Chung Kong dated February 1, 1985.
CX-13.	Production No. 000053. Telex from Mr. Taheri
CX-14.	Production No. 000254. The first page of a letter from Mr. Taheri to
CX-15.	Production No. 000255. The second page of a letter from Mr. Taheri
CX-16.	Production No. 000052. Telex from Mr. Taheri
CX-17.	Production No. 000051. Telex from
CX-18.	Production No. 000050. Letter
CX-19.	Production No. 000048. Telex from Mr. Taheri
CX-20.	Production No. 000148. Letter from Mr. Taheri dated March 1, 1985.
CX-21.	Production No. 000147. Letter from Mr. Taheri

Documentary Exhibits

CX-22. Production No. 000047. Handwritten purchase order dated March 5, 1985.

CX-23. Production No. 000049. Handwritten list of probable sizes for the first order.

CX-24. Production No. 000046. Telex from Mr. Taheri

CX-25. Production No. 000045. Telex

CX-26. Production No. 000216. Telex from

CX-27. Production No. 000044. Telex from

CX-28. Production No. 000215. Telex from

CX-29. Production No. 000214. Handwritten prices for both f.o.b. Hong Kong and c.i.f. Long Beach dated March 18, 1985.

CX-30. Production No. 000212. Handwritten copy of telex sent from Mr. Taheri

CX-31. Production No. 000205. List of reclosable P.E. bag sizes and quantities signed by Mr. Taheri and dated March 19, 1985.

CX-32. Production No. 000211. Telex from

CX-33. Production No. 000210. Telex from

Documentary Exhibits

CX-34.	Production No. 000209.	Invoice from
CX-35.	Production No. 000208.	Letter from
CX-36.	Production No. 000202.	Telex from Mr.
CX-37.	Production No. 000201.	Letter from Mr. Taheri
CX-38.	Production No. 000183.	Invoice from
CX-39.	Production No. 000153.	Invoice from
CX-40.	Production No. 000207.	Confirmation
CX-41.	Production No. 000206.	Confirmation
CX-42.	Production No. 000129.	Invoice from
CX-43.	Production No. 000199.	Telex from
CX-44.	Production No. 000198.	Telex from

Documentary Exhibits

CX-45. Production No. 000197. Telex from

CX-46. Production No. 000195. Confirmation of

CX-47. Production No. 000196. Telex from

CX-48. Production No. 000194. Telex from Mr.

CX-49. Production No. 000181. U.S. Customs Service Entry Summary re plastic bags imported by Meditech dated June 4, 1985.

CX-50. Production No. 000169. Certificate

CX-51. Production No. 000175. Certificate of Origin and Declaration by the Exporter re a shipment from Chung Kong to Meditech dated April 25, 1985.

CX-52. Production No. 000168. A List

CX-53. Production No. 000167. Invoice from

CX-54. Production No. 000166. Packing List

Documentary Exhibits

CX-55. Production No. 000165. Invoice from

CX-56. Production No. 000121. Invoice from

CX-57. Production No. 000191. Telex from

CX-58. Production No. 000190. Telex from

CX-59. Production No. 000069. Letter from

CX-60. Production No. 000179. cargo receipt for shipment

CX-61. Production No. 000178. bill of lading for shipment

CX-62. Production No. 000171. bill of lading for shipment

CX-63. Production No. 000164. Letter of Credit

CX-64. Production No. 000163. Letter of Credit

Documentary Exhibits

CX-65. Production No. 000043. Telex

CX-66. Production No. 000042. Telex from

CX-67. Production No. 000150. Letter from Mr. Taheri to Charles M. Schayer & Co. dated May 21, 1985.

CX-68. Production No. 000159. packing list re shipment

CX-69. Production No. 000160. Certificate

CX-70. Production No. 000155. Certificate

CX-71. Production no. 000154. packing list re shipment

CX-72. Production No. 000158. Invoice from

CX-73. Production No. 000189. Telex from

CX-74. Production No. 000157. cargo receipt re shipment

CX-75. Production No. 000156. cargo receipt re shipment

Documentary Exhibits

CX-76. Product No. 000141. U.S. Customs Service Notice of Redelivery of reclosable P.E. bags imported by Meditech dated June 4, 1985.

CX-77. Production NO. 000120. U.S. Customs service Notice of Redelivery of reclosable P.E. bags imported by Meditech dated June 4, 1985.

CX-78. Production No. 000119. U.S. Customs Service Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit re shipment

CX-79. Production No. 000162. combined transport bill of lading re shipment

CX-80. Production No. 000143. Handwritten document re cost of P.E. bags to Meditech and sale of same dated June 6, 1985.

CX-81. Production No. 000176. Shipping order DSL to transport P.E. bags for

CX-82. Production No. 000140. Packing list or bill of lading for shipment

CX-83. Production No. 000151. notification of debiting

Documentary Exhibits

CX-84.	Production No. 000145. Telex from Mr. Taheri
CX-85.	Production No. 000138. Immediate Delivery Application by Meditech
CX-86.	Production No. 000123. U.S. Customs Service Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit re P.E. bags imported by Meditech dated July 21, 1986.
CX-87.	Production No. 000136. U.S. Customs Service Notice of Redelivery re reclosable P.E. bags imported by Meditech dated June 4, 1985.
CX-88	Production No. 000144. Telex from
CX-89.	Production No. 000149. Invoice from
CX-90.	Production No. 000081. Invoice from
CX-91.	Production No. 000033. Telex from Mr.
CX-92.	Production No. 000032. Telex from
CX-93.	Production No. 000029. Telex from

Documentary Exhibits

CX-94. Production No. 000030. Telex from

CX-95. Production No. 000080. Distributor price list for reclosable poly bags dated August 1, 1985.

CX-96. Production No. 000027. Telex from

CX-97. Production No. 000036. Page 1 of a handwritten letter

CX-98. Production No. 000037. Page 2 of a handwritten letter

CX-99. Production No. 000038. Page 3 of a handwritten letter

CX-100. Production No. 000039. Page 4 (last page) of a handwritten letter

CX-101. Production No. 000040. List of bag sizes, possible inventory numbers and possible test results.

CX-102. Production No. 000041. Inventory and price list for various size bags.

CX-103. Production No. 000251. Page 1 of an Agreement

CX-104. Production No. 000252. Page 2 of an Agreement

Documentary Exhibits

CX-105. Production No. 000006. Sales letter written by Mr. Leeper dated August 14, 1985.

CX-106. Production No. 000021. Letter from

CX-107. Production No. 000023. Telex from

CX-108. Production No. 000022. Telex from

CX-109. Production No. 000020. Telex from

CX-110. Production No. 000019. Telex from

CX-111. Production No. 000018. Telex from

CX-112. Production No. 000017. Telex from

CX-113. Production No. 000128. Lien Notice from Distribution Services Ltd. to Meditech International Co. dated September 6, 1985.

CX-114. Production No. 000253. Letter from

CX-115. Production No. 000016. Telex from

CX-116. Production no. 000015. Letter from

Documentary Exhibits

CX-117. Production No. 000014. Telex from

CX-118. Production No. 000134. Letter from Rene LaRue, Import Specialist, to Mr. Taheri of Meditech International Corp. dated September 16, 1986.

CX-119. Production No. 000013. Telex from

CX-120. Production No. 000228. Page 2 of letter

CX-121. Production No. 000226. Page 1 of letter

CX-122. Production No. 000001. Purchase Order of

CX-123. Production No. 000065. P.E. Roll Material Cost Sheet from Meditech International Co. dated January 20, 1986.

CX-124. Production No. 000067. Blue Star Stock Bags Cost Sheet from Meditech International Co. dated January 22, 1986.

CX-125. Production No. 000066. Quoted Costs of

CX-126. Production No. 000012. Telex from Mr.

CX-127. Production No. 000011. Page 1 of telex

Documentary Exhibits

CX-128. Production No. 000010. Page 2 of telex

CX-129. Production No. 000009. Telex from

CX-130. Production No. 000008. Telex from Mr.

CX-131. Production No. 000007. Letter from

CX-132. Production No. 000057. Page 1 of handwritten price list and quotations

CX-133. Production No. 000058. Page 2 of handwritten price list and quotations

CX-134. Production No. 000079. Price List of

CX-135. Production No. 000064. Price List of

CX-136. Production No. 000092. Descriptions of Inner Box and Outer Carton markings

CX-137. Production No. 000106. Telex from

CX-138. Production No. 000105. Telex from

CX-139. Production No. 000104. Telex from

Documentary Exhibits

CX-140. Production No. 000103. Telex from

CX-141. Production No. 000101. Telex from

CX-142. Production No. 000098. Application and Agreement for Commercial Letter of Credit for the benefit of M.I.C. International dated January 28, 1986.

CX-143. Production No. 000100. Merchandise description attachment from Mr. Taheri dated January 28, 1986.

CX-144. Production No. 000095. Telex from

CX-145. Production No. 000094. Telex from M.I.C.

CX-146. Production No. 000091. Drawings re Inner Box and Outer Carton

CX-147. Production No. 000085. Statement No. 68809 of First Interstate Bank to M.I.C. International Inc. dated January 31, 1986.

CX-148. Production No. 000087. Page 1125 of Confirmation

CX-149. Production No. 000086. Page 1121 of Confirmation

CX-150. Production No. 000084. Telex from M.I.C.

Documentary Exhibits

CX-151. Production No. 000132. Inventory Transfer

CX-152. Production No. 000131. Bill of Lading

CX-153. Production No. 000219. Page 17 of telex

CX-154. Production No. 000220. Page 18 of telex

CX-155. Production No. 000126. City Distribution Services Customs Warehouse #14 Statement Receipt dated July 21, 1986.

CX-156. Production No. 000059. Request for Quotation from C.T. Armstrong-Bey to Meditech dated September 15, 1986.

CX-157. Production No. 000002. Purchase Order

CX-158. Production No. 000114. Letter from Mr. Taheri

CX-159. Production No. 000222. U.S. Customs Service Notice of Penalty & Demand for Payment to Meditech re case #87270420417 dated November 13, 1986.

CX-160. Production No. 000130. U.S. Customs Service Notice of Penalty & Demand for Payment to Meditech re case #87270420415 dated November 13, 1986.

CX-161. Production No. 000062. Price List of Seal Top Bags of Elkay Plastics Co. effective January 5, 1987.

CX-162. Production No. 000112. Invoice from

Documentary Exhibits

CX-163. Production No. 000111. United Airlines Waybill to M.I.C. Inc.

CX-164. Production No. 000110. Commercial Invoice

CX-165. Production No. 000109. U.S. Customs Service Entry Sumamry dated February 21, 1987.

CX-166. Production No. 000108. United Airlines Waybill

CX-167. Production No. 000218. Letter from

CX-168. Production No. 000217. Fax Memo from

CX-169. Production No. 000004. Purchase Order

CX-170. Production No. 000247. Page 1 of Agreement

CX-171. Production No. 000248. Page 2 (last page) of Agreement

CX-172. Production No. 000249. Page 1 of Agreement

CX-173. Production No. 000250. Page 2 (last page) of Agreement

CX-174. Production No. 000003. Purchase Order

Documentary Exhibits

CX-175.	Production No. 000068. Formula used by Meditech for Calculating Yield for Zip-Lock Material.
CX-176.	Production No. 000088. Drawings of Meditech's Blue Star Open-Reclosable Poly Bags.
CX-177.	Response of Respondents Meditech International, Inc., Polycraft Corporation, and Euroweld Distributing, Inc. to Complainant's Second Set of Interrogatories and Request for Production of Documents.
CX-178-C.	Witness Statement of Dr. Warren J. Keegan.
CX-179.	Witness Statement of Robert S. Nocek.
CX-180-C.	Witness Statement of Steven Ausnit.
CX-181-C.	Confidential Exhibits J-R, T Accompanying the Complaint.
CX-182.	Second Supplemental Response of Respondents, Meditech International, Inc. and Polycraft Corporation, to Commission Investigative Staff's Motion to Require Certain Respondents to Supplement Responses to the Complaint or, in the Alternative, Motion to Strike.

Respectfully submitted,

KANE, DALSIMER, SULLIVAN, KURUCZ,
LEVY, EISELE and RICHARD

James G. Markey

420 Lexington Avenue, Ste. 2710
New York, NY 10170-0071
Attorneys for Complainant
Minigrip Inc.

Of Counsel
Gerald Levy, Esq.
Ronald R. Santucci, Esq.
James G. Markey, Esq.

CERTIFICATE OF SERVICE

I, James G. Markey, hereby certify that copies of the attached COMPLAINANT MINIGRIP INC.'S EXHIBITS ADMITTED INTO EVIDENCE were served upon the following via First Class Mail and Express Mail, where necessary, on August 7, 1987.

James G. Markey

James G. Markey

Hon. Judge Paul J. Luckern
Administrative Law Judge
U.S. INTERNATIONAL TRADE COMMISSION
Room 6335
Interstate Commerce Commission Bldg.
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20436 [EXPRESS MAIL]
(Two Copies)

Cheri M. Taylor, Esq.
Jeffrey Gertler, Esq.
Commission Investigative Attorney
U.S. INTERNATIONAL TRADE COMMISSION
Room 125
701 E Street, N.W.
Washington, D.C. 20436 [FIRST CLASS MAIL]

Mr. Kenneth R. Mason
Secretary
U.S. INTERNATIONAL TRADE COMMISSION
701 E Street, N.W.
Washington, D.C. 20436 [FIRST CLASS MAIL]
(Original and Six Copies)

CERTIFICATE OF SERVICE

I, James G. Markey, hereby certify that copies of the attached COMPLAINANT MINIGRIP INC.'S EXHIBITS ADMITTED INTO EVIDENCE were served upon the following via First Class Mail and Express Mail, where necessary, on August 7, 1987.

James G. Markey

Hon. Judge Paul J. Luckern
Administrative Law Judge
U.S. INTERNATIONAL TRADE COMMISSION
Room 6335
Interstate Commerce Commission Bldg.
12th Street & Constitution Avenue, N.W.
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(Two Copies)

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Jeffrey Gertler, Esq.
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Mr. Kenneth R. Mason
Secretary
U.S. INTERNATIONAL TRADE COMMISSION
701 E Street, N.W.
Washington, D.C. 20436 [FIRST CLASS MAIL]
(Original and Six Copies)

(certificate of service con't page 2)

FOR RESPONDENTS: Meditech International Co., Polycraft Corporation and Euroweld Distributing, Inc.

Larry Klayman, Esq.
John Gurley, Esq.
Michael Diedring, Esq.
KLAYMAN & GURLEY, P.C.
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-and- [VIA LARRY KLAYMAN, ESQ.]

Leo Aubel, Esq.
Amy Rockwell, Esq.
WALLENSTEIN, WAGNER, HATTIS, STRAMPEL & AUBEL, LTD.
100 South Wacker Drive
Chicago, Illinois 60606

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Initial Determination (Public Version) was served upon Cheri M. Taylor, Esq. and Jeffrey L. Gertley, Esq., and upon the following parties via first class mail, and air mail where necessary, on September 21, 1987.

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

FOR COMPLAINANT MINIGRIP, INC.:

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Gerald Levy, Esq.
Ronald R. Santucci, Esq.
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FOR RESPONDENTS: Meditech International Co., Polycraft Corporation, Euroweld Distributing, Inc.

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Chicago, Illinois 60606

(certificate of service con't page 2)

RESPONDENTS:

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Jalan Remaja, Singapore 2366

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Seoul, R.O. Korea

Chung Kong Industrial Co., Ltd.
Wah Shun Ind. Bldg.
Blk. B, 2/F
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Yau Tong Bay
Kowloon, Hong Kong

Gideons Plastic Industrial Co., Ltd.
No. 22, Lane 59
Ti Eng North St.
Tou Liu, Taiwan

Hogn Ter Product Co., Ltd.
No. 12 Lane 122 Street Chiang Nan
Village New HWU
Taipei, Taiwan

Ideal Plastic Industrial Co., Ltd.
81, Lane 59, Ha Mi St.
Taipei, Taiwan

Insertion Advertising Corp.
132 West 24th Street
New York, New York 10011

Ka Shing Corp.
150 S. 4th Avenue
Mount Vernon, New York 10550

Kwang Il
Rm. #301 Korean Express Bldg.
36-7, Hannam-Dong, Yongsan-ku
Seoul, R.O. Korea

(certificate of service con't page 3)

RESPONDENTS:

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Taipei, Taiwan

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Orlando, Florida 32809-6282

Rol-Pak Sdn Bhd
Chin Thye Sdn Bhd
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65-67 Jalan Petaling
50000 Kuala Lumpur, Malaysia

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Bangbon, Bankhuntien
Bankkook, 10150 Thailand

Ta Sen Plastic Industrial Co., Ltd.
315-2 Chang Chun Road
Taipei, Taiwan

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