

In the Matter of

**CERTAIN HEAVY-DUTY
STAPLE GUN TACKERS**

Investigation No. 337-TA-137



USITC PUBLICATION 1506

MARCH 1984

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

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Washington, D.C. 20436**

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

In the Matter of)
)
)
CERTAIN HEAVY-DUTY)
STAPLE GUN TACKERS)
_____)

Investigation No. 337-TA-137

COMMISSION ACTION AND ORDER

Background

On February 24, 1983, the Commission instituted investigation No. 337-TA-137, Certain Heavy-Duty Staple Gun Tackers, to determine whether there is a violation of section 337(a) in the unauthorized importation into and sale in the United States of certain heavy-duty staple gun tackers. 48 Fed Reg. 7,826-27 (1983). The investigation was based on a complaint filed by Arrow Fastener Co., Inc. (Arrow), of Saddle Brook, New Jersey, on January 7, 1983.

Twenty-three respondents were named in the original notice of investigation. Four of the respondents were foreign manufacturers of the subject merchandise: Test-Rite Int'l. (Taiwan) Ltd.; Test-Rite Automotive Ltd.; Taiwan Royal United International; Chen Dah Machinery Ltd. The other 19 respondents were alleged to be involved in importation and/or sales in the United States of heavy duty staple gun tackers: Test-Rite Products Corp., of New Jersey; Alltrade, Inc., of California; Wal-Mart Stores Inc., of Arkansas;

Western Auto Supply, of Missouri; Central Hardware Co., of Missouri; The Handyman of California, d/b/a The Handyman Hardware; Handyman Supply Inc., d/b/a The Handyman Hardware, of Ohio; Meijer Thrifty Acres, of Michigan; Dart Drug Corp., of Maryland; Menards, Inc., d/b/a Menards Cashway Lumber, of Iowa; Aco Inc., of Michigan; Venture Stores Inc., of Missouri; L.G. Distributors, Inc., d/b/a L.G. Cook Distributors of Michigan; Fred Meyer Inc., of Oregon; Ranch Wholesale Supply, Inc., d/b/a Longmont Big R, of Colorado; Stop & Shop Companies, Inc., of Massachusetts; Waverly Screw & Hardware, Inc., d/b/a Lustre Line Products, of Pennsylvania; Pep Boys—Manny, Moe & Jack, of Pennsylvania and California; and Tractor Supply Co., a subsidiary of TSC Industries, Inc., of Tennessee.

Five of the original respondents were alleged to be infringing Arrow's trademark in the pictorial of the Model T-50 staple gun, in addition to infringement of Arrow's trademark in the configuration of the Model T-50 staple gun and passing off. The other eighteen were alleged only to be infringing Arrow's trademark in the configuration of the Model T-50 staple gun and to be passing off.

On June 13, 1983, the complaint was amended to add three more firms as respondents to the investigation. 48 Fed. Reg. 28,562 (June 22, 1983). The three respondents were Moss Manufacturing, Inc., of Florida; Quinn Products of Illinois; and Tab Merchandise Corp., of Missouri. These firms were alleged to infringe Arrow's trademark in the configuration of the Model T-50 staple gun tacker. On June 30, 1983, the complaint was amended to add two additional respondents alleged to be manufacturing and exporting the subject staple gun

tackers. The two respondents added by the second amendment to the complaint were Quality Master and Upmaster, which are related to Test-Rite Int'l. (Taiwan) Ltd. 48 Fed. Reg. 31,308 (July 7, 1983).

On June 21, 1983, respondent Handyman Supply, Inc. was terminated on the basis that discovery had shown that Handyman was not engaged in the importation or sale of the subject merchandise. By the time of the hearing before the presiding officer, all but eleven of the respondents had settled with Arrow, and by the time the presiding officer's initial determination was issued, only ten respondents remained. The eleven respondents remaining at the time of the evidentiary hearing were: Central Hardware Co., L.G. Distributors, Inc., Fred Mayer, Inc., Meijer, Inc., Moss Manufacturing, Inc., Ranch Wholesale Supply, Inc., Stop & Shop Companies, Inc., Tab Merchandise Corp., Taiwan Royal United International, Western Auto Supply, Inc., and Quinn Products, Inc. Quinn Products settled with Arrow, and was terminated as a respondent prior to the issuance of the presiding officer's initial determination.

The evidentiary hearing on violation was held from September 9, 1983, through September 13, 1983. Counsel for the complainant and the Commission investigative attorney appeared and presented evidence. None of the ten remaining respondents participated in the hearing.

The presiding officer issued his initial determination on violation on November 28, 1983. He found that there was a violation of section 337 in the importation into and sale in the United States of the subject heavy-duty staple gun tackers, which infringe complainant Arrow's common law trademark in the configuration of its Model T-50 staple gun. On December 27, 1983, the

Commission determined not to review the initial determination. 49 Fed. Reg. 668 (Jan. 5, 1984). The parties were requested to file written submissions on remedy, public interest, and bonding by January 26, 1984. Complainant, the Commission investigative attorney, and former respondent Test-Rite Int'l (Taiwan) Ltd. (Test-Rite), filed written submissions concerning remedy, public interest, and bonding. No submissions were received from any of the other respondents.

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 and those portions of the record relating to those issues, the Commission on February 13, 1984, determined to issue a general exclusion order prohibiting entry into the United States, except under license, of heavy-duty staple gun tackers that infringe complainant Arrow's common law trademark in the configuration of its Model T-50 staple gun. The Commission also determined that the public interest factors enumerated in section 337(d) (19 U.S.C. §1337(d)) do not preclude issuance of a general exclusion order, and that the bond during the Presidential review period should be in the amount of 116 percent of the entered value of the imported heavy-duty staple gun tackers.

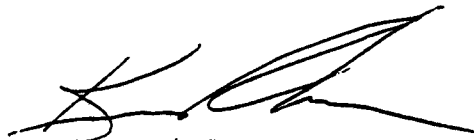
Order

Accordingly, it is hereby ORDERED THAT—

1. Heavy-duty staple gun tackers which infringe complainant Arrow Fastener Company's common law trademark in the configuration of its Model T-50 staple gun tacker are excluded from entry into the United States, except under license of the owner of the trademark;

2. The articles ordered to be excluded from entry into the United States shall be entitled to entry under bond in the amount of 116 percent of the entered value of the subject articles from the day after this order is received by the President pursuant to subsection (g) of section 337 of the Tariff Act of 1930, until such time as the President notifies the Commission that he approves or disapproves this action, but, in any event, not later than 60 days after the date of receipt of this action;
3. The Secretary shall serve copies of this Commission Action and Order, and the Opinion of the Commission, upon each party of record to this investigation, and publish notice thereof in the Federal Register;
4. 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: February 24, 1984

In the Matter of
CERTAIN HEAVY-DUTY
STAPLE GUN TACKERS

Investigation No. 337-TA-137

COMMISSION OPINION

The Commission has determined not to review the administrative law judge's initial determination that there is a violation of section 337 in this investigation. ^{1/} The only issues remaining to be resolved in this investigation are remedy, the public interest, and bonding.

Remedy

1. General exclusion order

We determine that the appropriate remedy in this investigation is a general exclusion order. The facts of this investigation satisfy the criteria established in Certain Airless Paint Spray Pumps and Components Thereof, ^{2/} for the issuance of a general exclusion order. ^{3/} In Spray Pumps, the Commission noted that it has an obligation to balance complainant's interest in complete protection against the inherent potential of a general exclusion

^{1/} See Federal Register notice of January 5, 1984, (49 Fed. Reg. 668).

^{2/} Inv. No. 337-TA-90, USITC Pub. No. 1199, (1981); 216 U.S.P.Q. 465 (1981).

^{3/} It should be noted that the Commission did not issue a general exclusion order in Spray Pumps, as the facts of that investigation did not meet the criteria set forth.

order to disrupt legitimate trade. ^{4/} Therefore, the Commission requires that a complainant seeking a general exclusion order prove "both a widespread pattern of unauthorized use of its patented invention and certain business conditions from which we might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles." ^{5/}

In Spray Pumps, the Commission stated that in order to establish a widespread pattern of unauthorized use, there must be:

- (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or
- (2) pending foreign infringement suits based upon foreign patents which correspond to a domestic patent in issue; and
- (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention. ^{6/}

In this investigation, the record demonstrates that there is unauthorized importation into the United States of the infringing staple gun tackers by numerous foreign manufacturers. ^{7/} Moreover, it was established that there is ample capacity on the part of the foreign firms involved to deliver large

^{4/} Spray Pumps, supra, at 18.

^{5/} Id. While Spray Pumps dealt with patent infringement, it is reasonable to apply the same standards governing remedy in cases where some other unfair act is established, such as common law trademark infringement in this investigation.

^{6/} Spray Pumps, supra, at 18-19 (footnotes omitted).

^{7/} Initial Determination (hereinafter ID) at 62-63; Findings of Fact (hereinafter FF) 103-112; Complainant's Exhibits (hereinafter CX) 112-13, 116, 122, 124-26, 137-38, 154, 156-58, 187-88, 208, 211-12, 222, 224, 226-27, 229, 281, 283-85, 315, 327.

numbers of infringing staple gun tackers. ^{8/} In addition, there exist at least three different sets of dies in Taiwan -- all owned by persons other than respondents in this investigation -- which can be used to make copies of complainant's staple gun tacker. ^{9/}

In order to establish the "business conditions" referred to in Spray Pumps as a prerequisite for the issuance of a general exclusion order, the Commission has considered:

- (1) an established demand for the product in question in the U.S. market and conditions of the world market;
- (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;
- (3) the cost to foreign entrepreneurs of building a facility capable of producing the product in question;
- (4) the number of foreign manufacturers whose facilities could be retooled to produce the product; or
- (5) the cost to foreign manufacturers of retooling their facility to produce the product. ^{10/}

The record in this case establishes a strong U.S. demand for the Arrow Model T-50 staple gun tacker. Over 6 million of these staple gun tackers had been sold in the United States as of the end of 1982. ^{11/} In addition, an undetermined number of infringing staple gun tackers have been sold by

^{8/} ID at 81; FF 103, 111-12, 144, 150-53; CX 102-03, 109, 112, 113, 116, 122, 136-38, 183-88, 283-85, 315, 320, 327.

^{9/} FF 151; Transcript (hereinafter Tr.) at 183-86.

^{10/} Spray Pumps, supra, at 18-19.

^{11/} FF 138-39; CX 36, 110a; Staff Exhibit (hereinafter SX) 7; Tr. 123-125.

respondents and other companies, indicating a strong demand for the product. The existence of distributors and operators in the United States who have already been solicited by foreign manufacturers or sold imported staple gun tackers establishes the availability of marketing and distribution networks in the United States for potential foreign manufacturers. ^{12/} The record also establishes the low cost of production for foreign manufacturers of staple gun tackers, the ease with which foreign manufacturing facilities can prepare to produce staple gun tackers, and the low cost of such preparation. ^{13/} It appears that by simply making additional dies, a foreign manufacturer would have the basic component of a tooling system for staple gun tackers. Because the staple gun tackers are small and involve relatively few parts, they lend themselves to large scale production.

While the issuance of a general exclusion order carries with it the inherent potential to disrupt legitimate trade, we believe that this consideration is outweighed in this investigation by the factors outlined above. Arrow's trademark is in the configuration of its Model T-50 staple gun tacker. Thus, determination of whether an imported staple gun tacker infringes on Arrow's proprietary right can be made by a simple visual inspection. ^{14/}

^{12/} ID at 75; FF 102, 135-37; CX 84, 88, 110, 113, 122, 132, 154, 156-58, 187-88, 222, 226, 266, 281, 283, 324; Tr. 13, 123, 180; Complainant's Physical Exhibit (hereinafter CPX) 35.

^{13/} ID at 82; CX 45, 156, 158, 160; Tr. 182-86.

^{14/} Former respondent Test-Rite requested that it be specifically exempted from any exclusion order. We do not believe it is necessary to do so. Test-Rite was terminated from this investigation on the basis of a settlement agreement with complainant Arrow. As part of the settlement, Arrow approved a new design of a staple gun for Test-Rite to manufacture and sell which does not infringe Arrow's common law trademark. Therefore, importation of the Test-Rite staple gun should not be affected by the issuance of an exclusion order.

2. Cease and desist orders

Complainant Arrow has also requested the issuance of cease and desist orders to the nine domestic respondents remaining in the investigation. Arrow argues that an exclusion order will not give complete relief in this instance, as it will not prevent the continued sale of infringing staple gun tackers by respondents who have already imported large quantities prior to or during the pendency of this proceeding.

No evidence was presented in support of complainant's assertion that respondents have many thousands of infringing staple gun tackers in inventory. The facts of record do demonstrate that several hundred thousand infringing staple gun tackers were imported prior to June 1983, but there is no evidence to indicate that respondents have continued to import infringing staple gun tackers during the pendency of this investigation, or that they have stockpiled inventories for later sale. We therefore conclude that cease and desist orders are unwarranted and that a general exclusion order is the most appropriate form of relief in this case.

The Public Interest

The Commission may issue an exclusion order only after "considering the effect of such [an order] 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(d). We conclude that an exclusion order will not have an adverse effect on these public interest factors.

Staple gun tackers are not an essential item for the preservation of the public health and welfare. The record establishes that numerous domestic competitors of complainant exist whose products do not infringe Arrow's common law trademark. Moreover, Arrow has stated that it has sufficient production capacity to meet the entire domestic demand for its trademarked product, and it has adequate means to distribute its product throughout the United States.

Bonding

Section 337(g)(3) provides for entry of infringing articles upon the payment of a bond during the 60-day Presidential review period. 19 U.S.C. §1337(g)(3). The bond is to be set at a level sufficient to "offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation." ^{15/} A bond of 116 percent of the entered value of respondents' staple gun tackers should offset the competitive advantage enjoyed by respondents. The figure is derived from the \$5.00 average price of respondents' staple gun tackers and the \$10.80 wholesale price of Arrow's staple gun tackers. These prices are believed to be representative of the sales transactions involving heavy-duty staple gun tackers.

^{15/} S.Rep. No. 1298, 93d Cong., 2d Sess. 198 (1974).

This is an initial determination issued by a Commission administrative law judge (presiding officer) that was not reviewed by the Commission. The initial determination has, therefore, become the Commission determination in this investigation on the issue of violation of section 337. See section 210.53(h) of the Commission's Rules of Practice and Procedure, 47 Fed. Reg. 25134, June 10, 1982 and 48 Fed. Reg. 20225, May 5, 1983; to be codified at 19 C.F.R. § 210.53(h).

After testimony and comments have been received and analyzed, a final EIS Will be prepared.

William D. Beltenburg,
Director, Minerals Management Service,
December 29, 1983.

Approved:
[FR Doc. 84-151 Filed 1-4-84; 8:45 am]
BILLING CODE 4310-MR-M

INTERNATIONAL TRADE COMMISSION

(Investigation No. 731-TA-163
(Preliminary))

Import Investigations; Certain Cell-Site Radio Apparatus and Subassemblies Thereof From Japan

AGENCY: United States International Trade Commission.

ACTION: Institution of a preliminary antidumping investigation and scheduling of a conference to be held in connection with the investigation.

EFFECTIVE DATE: December 29, 1983.

SUMMARY: The United States International Trade Commission hereby gives notice of the institution of investigation No. 731-TA-163 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Japan of certain cell-site radio apparatus and subassemblies thereof, provided for in items 685.24 or 685.29 of the Tariff Schedules of the United States (1983), which are alleged to be sold in the United States at less than fair value.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Schechter (telephone 202-523-0300), U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

SUPPLEMENTARY INFORMATION:

Background

This investigation is being instituted in response to a petition filed in proper form on December 29, 1983, by counsel for E.F. Johnson Co., Waseca, Minn. The Commission must make its determination in this investigation within 45 days after the date of the filing of the petition, or by February 13, 1984 (19 CFR 207.17).

Participation

Persons wishing to participate in this investigation as parties must file an

entry of appearance with the Secretary to the Commission, as provided for in section 201.11 of the Commission's Rules of Practice and Procedure (19 CFR 201.11), not later than seven (7) days after the publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who shall determine whether to accept the late entry for good cause shown by the person desiring to file the notice.

Service of documents

The Secretary will compile a service list from the entries of appearance filed in this investigation. Any party submitting a document in connection with the investigation shall, in addition to complying with § 201.8 of the Commission's rules (19 CFR 201.8), serve a copy of each such document on all other parties to the investigation. Such service shall conform with the requirements set forth in § 201.16(b) of the rules (19 CFR 201.16(b)), as amended by 47 FR 33682, Aug. 4, 1982.

In addition to the foregoing, each document filed with the Commission in the course of this investigation must include a certificate of service setting forth the manner and date of such service. This certificate will be deemed proof of service of the document. Documents not accompanied by a certificate of service will not be accepted by the Secretary.

Written submissions

Any person may submit to the Commission on or before January 25, 1984, a written statement of information pertinent to the subject matter of this investigation (19 CFR 207.15). A signed original and fourteen (14) copies of such statements must be submitted (19 CFR 201.8).

Any business information which a submitter desires the Commission to treat as confidential shall be submitted separately, and each sheet must be clearly marked at the top "Confidential Business Data." Confidential submissions must conform with the requirements of § 201.6 of the Commission's rules (19 CFR 201.6). All written submissions, except for confidential business data, will be available for public inspection.

Conference.—The Director of Operations of the Commission has scheduled a conference in connection with this investigation for 9:30 a.m. on January 20, 1984, at the U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. Parties wishing to participate in the conference should contact Mr. Bill Schechter (202-523-0300) not later than

January 16, 1984, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference.

Public inspection.—A copy of the petition and all written submissions, except for confidential business data, will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and B (19 CFR part 207; as amended by 47 FR 33682, Aug. 4, 1982), and part 201, subparts A through E (19 CFR part 201, as amended by 47 FR 33682, Aug. 4, 1982). Further information concerning the conduct of the conference will be provided by Mr. Bill Schechter.

This notice is published pursuant to § 207.12 of the Commission's rules (19 CFR 207.12).

Issued: December 30, 1983.

Kenneth R. Mason,
Secretary.

[FR Doc. 84-249 Filed 1-4-84; 8:45 am]
BILLING CODE 7520-02-M

(Investigation No. 337-TA-137)

Heavy-Duty Staple Gun Tackers; Commission Decision Not To Review Initial Determination; Deadline for Filing Written Submissions on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the Commission has determined not to review the presiding officer's initial determination that there is a violation of section 337 in the above-captioned investigation. The parties to the investigation and interested Government agencies are requested to file written submissions on the issues of remedy, the public interest, and bonding.

Authority: The authority for the Commission's disposition of this matter is contained in section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and in §§ 210.53-210.56 of the Commission's Rules of Practice and Procedure (47 FR 25134 (June 10, 1982) as amended by 48 FR 20225 (May 5, 1983) and 48

FR 21115 (May 11, 1983); to be codified at 19 CFR 210.53-210.56).

SUPPLEMENTARY INFORMATION: On November 28, 1983, the presiding officer issued an initial determination that there is a violation of section 337 in the unauthorized importation and sale of certain heavy-duty staple gun tackers. No petitions for review of the initial determination were filed by any party and no written comments were filed by any Government agency. The initial determination has now become the Commission determination on violation of section 337 in this investigation.

Written Submissions

Inasmuch as the Commission has found that a violation of section 337 has occurred, it may issue (1) an order which could result in the exclusion of the subject articles from entry into the United States and/or (2) cease and desist orders which could result in one or more respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions which address the form of relief, if any, which should be ordered.

If the Commission contemplates some form of relief, it must consider the effect of that relief upon the public interest. The factors which the Commission will consider include the effect that an exclusion order and/or a cease and desist order would have upon (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the U.S. production of articles which are like or directly competitive with those which are the subject of the investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions concerning the effect, if any, that granting relief would have on the public interest.

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

The parties to the investigation and interested Government agencies are requested to file written submissions on the issues of remedy, the public interest, and bonding. The complainant and the Commission investigative attorney are also requested to submit a proposed

exclusion order and/or a proposed cease and desist order for the Commission's consideration. Persons other than the parties and Government agencies may file written submissions addressing the issues of remedy, the public interest, and bonding. Written submissions on remedy, the public interest, and bonding must be filed not later than the close of business on the day which is twenty-one (21) days from the date this notice appears in the Federal Register.

Commission Hearing

The Commission does not plan to hold a public hearing in connection with final disposition of this investigation.

Additional Information

Persons submitting written submissions must file the original document and 14 true copies thereof with the Office of the Secretary on or before the deadline stated above. Any person desiring to submit a document (or a portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment by the presiding officer. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Documents containing confidential information approved by the Commission for confidential treatment will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Secretary's Office.

Notice of this investigation was published in the Federal Register of February 24, 1983 (48 FR 7826).

Copies of the public version of presiding officer's initial determination of November 28, 1983, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

FOR FURTHER INFORMATION CONTACT: Jane Albrecht, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-523-1627.

By order of the Commission.
Issued: December 29, 1983.

Kenneth R. Mason,
Secretary.

[FR Doc. 84-250 Filed 1-4-84; 8:45 am]
BILLING CODE 7020-02-M

[332-162]

Cancellation of Hearing on Foreign Industrial Targeting

AGENCY: United States International Trade Commission.

ACTION: Cancellation of Hearing.

EFFECTIVE DATE: December 30, 1983.

SUPPLEMENTARY INFORMATION:

Background

The Commission instituted the present investigation on its own motion under section 332(b) of the Tariff Act of 1930 (10 U.S.C. 1332(b)) on April 19, 1983, at the request of the Subcommittee on Trade of the House Committee on Ways and Means. The original notice of investigation, published in the Federal Register of May 11, 1983, (48 FR 21210), announced that the investigation would be divided into three phases: the first to consider Japanese industrial targeting, the second to consider the European Community's industrial targeting, and the third to consider industrial targeting of other major U.S. trading partners. The first phase of the study has been completed and a report was published, (USITC Publication 1437), in October 1983. The second phase of the study, initiated on October 18, 1983, and a notice was published in the Federal Register of October 26, 1983, (48 FR 49559).

Public Hearing

A public hearing was scheduled to be held in the Commission Hearing Room in Washington, D.C., beginning at 10 a.m. on January 4, 1984. Because there were no witnesses requesting an opportunity to testify, the Commission, on its own motion, has canceled the hearing.

Written Submissions

In lieu of or in addition to appearance at the public hearing, interested persons were invited to submit written statements concerning the investigation, no later than December 16, 1983. Because of the cancellation of the hearing, written submissions concerning the investigation will be received until January 15, 1983.

By order of the Commission.

Issued: December 30, 1983.

Kenneth R. Mason,
Secretary.

[FR Doc. 84-251 Filed 1-4-84; 8:45 am]
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68

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In the Matter of)	
)	
CERTAIN HEAVY-DUTY STAPLE)	Investigation No. 337-TA-137
GUN TACKERS)	

INITIAL DETERMINATION

Pursuant to the Notice of Investigation in this matter (48 Fed. Reg. 7826-27, Feb. 24, 1983), this is the Presiding Officer's initial determination under Rule 210.53 of the Rules of Practice and Procedure of this Commission, 19 C.F.R. 210.53. The Presiding Officer hereby determines after a review of the briefs of the parties and of the record developed at the hearing, that there is a violation of Section 337 of the Tariff Act of 1930, as amended, ^{1/} in the unauthorized importation into the United States, and in the sale of certain heavy-duty staple gun tackers by reason of infringement of complainant's common law trademark under section 43(a) of the Lanham Act, in the heavy-duty staple gun tacker, and passing off, with the effect and tendency to destroy or to injure substantially an industry, efficiently and economically operated, in the United States.

* * * * *

NOTE: The following abbreviations are used throughout this Initial Determination:

- Tr. means Official reporter's transcript.
- Numbered exhibits are identified by the proffering party:
- Complainant (CX); Commission Investigative Attorney (SX);
- CPX refers to Physical Exhibits of complainant.
- (C) means confidential information subject to the protective order herein.

1/ 19 U.S.C. §1337, hereinafter Section 337.

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Appendix: Hearing Exhibits Lists

PROCEDURAL HISTORY

On January 7, 1983, Arrow Fastener Co., Inc., 271 Mayhill St., Saddle Brook, New Jersey 07662 filed a complaint with the U.S. International Trade Commission pursuant to 19 U.S.C. §1337 (Section 337). The complaint alleged unfair methods of competition and unfair acts in the importation of certain heavy-duty staple gun tackers into the United States or in their sale, by reason of alleged (1) infringement of Arrow's common law trademark under §43(a) of the Lanham Act, in the heavy-duty staple gun tacker, (2) passing off, and (3) infringement of Arrow's common law trademark under §43(a) of the Lanham Act, in the pictorial of the heavy duty staple gun tacker. The complaint further alleged that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Complainant requested the Commission to institute an investigation, and, after a full investigation, to issue both a permanent exclusion order and a permanent cease and desist order.

On February 17, 1983, the Commission issued a notice instituting an investigation pursuant to subsection (b) of Section 337. The notice of institution of such investigation was published in the Federal Register on February 24, 1983 (48 Fed. Reg. 7826-27). The Commission ordered that an investigation be instituted to determine whether there is a violation of subsection (a) of Section 337 in the unlawful importation of certain heavy-duty staple gun tackers into the United States, or in their sale, by reason of alleged: (1) infringement of Arrow's common law trademark under section 43(a) of the Lanham Act of the heavy-duty staple gun tacker; (2) passing off; and (3) infringement of Arrow's common law trademark under

section 43(a) of the Lanham Act, in the pictorial of the heavy-duty staple gun tacker, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The following twenty-three parties were named respondents in the Notice of Investigation. The first five respondents listed below were alleged to be committing all three of the unfair methods of competition and unfair acts listed above, and the remaining respondents were alleged to be committing the first two of the unfair acts and unfair methods of competition listed above:

Taiwan Royal United Int'l.
21-2 Ching-Cheng St.
Taipei, Taiwan

Test-Right Products Corp.
1144 Clifton Ave.
Clifton, NJ 07013

Test-Rite Int'l (Taiwan) Ltd.
293 Chung Hsiao East Rd., 2nd Floor
Sec. 4, Taipei, Taiwan

Test-Rite Automotive Ltd.
Room 1504, Star House
3 Salisbury Rd., T.S.T.
Kowloon, Hong Kong

Waverly Screw & Hardware, Inc.
d/b/a/ Lustre Line Products
Richmond & Norris Streets
Philadelphia, PA 19125

ACO, Inc.
23333 Commerce Dr.
Farmington Hills, MI 48024

Alltrade, Inc.
1728 Greenwood Ave.
Montebello, Calif. 90640

Central Hardware Co.
111 Boulder Industrial
Bridgeton, MO 63044

Chen Dah Machinery Ltd.
239 Hoping St.
Taichung, Taiwan

Dart Drug Corp.
3301 Pennsylvania Dr.
Landover, MD 20785

Handyman Supply, Inc.
d/b/a The Handyman Hardware
4417 Mahonig Ave., N.W.
Warren, OH 44483

The Handyman of California
d/b/a The Handyman Hardware
6666 Convoy Court
San Diego, CA 92111

L.G. Distributors, Inc.
d/b/a L.G. Cook Distributors
515 Ann St., N.W.
Grand Rapids, MI 49504

Meijer Thrifty Acres
2727 Walker, N.W.
Grand Rapids, MI 49504

Menards, Inc.
d/b/a Menards Cashway Lumber
4601 First Ave., S.E.
Cedar Rapids, IA 52404

Fred Meyer, Inc.
3800 S. 22nd
Portland, OR

Pep Boys-Manny, Moe & Jack
32nd & Allegheny
Philadelphia, PA 19132

Ranch Wholesale Supply, Inc.
d/b/a Longmont Big R
1515 Main Street
Longmont, CO 80501

Stop & Shop Companies, Inc.
393 D Street
Boston, MA 02110

Tractor Supply Co.
915 Murfreesboro Rd.
Nashville, TN 37217

Venture Stores, Inc.
615 N.W. Plaza, Lower Level
St. Ann, MO 63074

Wal-Mart Stores, Inc.
702 S.W. Eighth Street
Bentonville, AR 72712

Western Auto Supply, Inc.
2107 Grand Ave.
Kansas City, MO 64108

On March 10, 1983, respondent Stop & Shop Companies, Inc. filed a response to the complaint and notice of investigation. On March 15, 1983, respondents Test-Rite Products Corp., Test-Rite International (Taiwan) Ltd., Test-Rite Automotive Ltd., Alltrade, Inc., Menards, Inc., Meijer Thrifty Acres, Dart Drug Corp., Aco, Inc., Western Auto Supply, Inc., L. G. Cook Distributors, Inc., Wal-Mart Stores, Inc., Waverly Screw & Hardware Inc., Pep Boys - Manny, Moe & Jack, TSC Industries, Inc. (Tractor Supply Co.), Venture Stores, Inc., The Handyman of California, Inc., and Central Hardware Co. filed a response to the complaint and notice of investigation.

A preliminary conference was held before Administrative Law Judge Donald K. Duwall on April 6, 1983, pursuant to Order Nos. 3 and 4, issued March 14 and March 22, 1983, respectively.

On April 28, 1983, complainant filed a motion to amend the complaint to add as respondents the following three parties:

Moss Manufacturing, Inc.
c/o Mr. Roger J. Schindler, Esq.
Suite 101
1492 South Miami Avenue
Miami, Florida 33130

Quinn Products, Inc.
d/b/a J & C Products, Inc.
c/o Mr. John P. Kelley
1535 Schaumburg Road
Schaumburg, Illinois

Tab Merchandise Corp.
c/o Mr. Jay M. Reichman
11-11 N. Broadway
St. Louis, Missouri

The first two parties were alleged to be committing the unfair act of passing off, and all three of the above-named parties were alleged to be infringing Arrow's common law trademark under section 43(a) of the Lanham Act, in the heavy-duty staple gun tacker. By Order No. 7, issued May 10, 1983, the Administrative Law Judge filed an initial determination pursuant to Rule 210.53(c) granting the motion to amend the complaint, and amending the notice of investigation to add the above-named three respondents. On June 13, 1983, the Commission issued a Notice of Joinder of Respondents, joining these parties as respondents to this investigation.

On May 9, 1983, complainant and respondent Handyman Supply, Inc. jointly filed a motion to terminate this investigation as to respondent Handyman Supply, Inc. By Order No. 8, issued May 19, 1983, the Administrative Law Judge filed an initial determination pursuant to Rule 210.53(c) granting this motion. On June 21, 1983, the Commission issued a Notice of Commission Decision Not To Review Initial Determination.

On May 13, 1983, Arrow filed a second motion to amend the complaint to add as respondents the following two parties:

Upmaster
2nd Floor, No. 293, Sec. 4
Chung Hsiao E. Road
Taipei, Taiwan

Quality Master Co., Ltd.
2nd Floor, No. 293, Sec. 4
Chung Hsiao E. Road
Taipei, Taiwan

By Order No. 10, issued May 31, 1983, the Administrative Law Judge filed an initial determination pursuant to Rule 210.53(c) granting the motion to amend the complaint and amending the notice of investigation. On June 30, 1983, the Commission issued a Notice of Commission Decision Not To Review Initial Determination Effecting Joinder of Two Respondents.

On August 19, 1983, Arrow and respondents Test-Rite Products Corp., Test-Rite International (Taiwan) Ltd., Test-Right Automotive Ltd., Menard, Inc., Dart Drug Corp., ACO, Inc. Walmart Stores, Inc., Waverly Screw and Hardware, Inc., Pep Boys - Manny, Moe & Jack of California, TSC Industries, Venture Stores, Inc., The Handyman of California, Inc., Quality Master Co.,

Ltd., and Upmaster moved jointly to terminate this investigation pursuant to Rule 210.51 on the basis of a settlement agreement concluded among these parties. On September 9, 1983, an amendment to this settlement agreement was filed. By Order No. 25, issued October 11, 1983, the Administrative Law Judge filed an initial determination pursuant to Rule 210.53(c) granting this motion to terminate. On November 10, 1983, the Commission issued a Notice of Commission Decision Not To Review Initial Determination Terminating 14 Respondents on the Basis of a Settlement Agreement.

On September 8, 1983, complainant moved for an order finding respondents Taiwan Royal United International (Taiwan Royal) and Moss Manufacturing, Inc. (Moss) in default for failure to file responses to the complaint and for an order imposing sanctions against respondents Taiwan Royal and Ranch Wholesale Supply, Inc. (Ranch Wholesale) for failure to comply with Order No. 18, issued July 19, 1983, compelling certain discovery. For the reasons stated infra at 12-14, this motion is granted to the extent of finding Moss in technical default, thereby waiving its right to appear and contest the allegations of the complaint and notice of investigation, and to the extent of imposing certain sanctions as enumerated infra at 14, against Ranch Wholesale. This motion is denied as to the finding of default and imposition of sanctions against Taiwan Royal for the reasons stated infra at 10-11.

On September 20, 1983, complainant and respondent Alltrade, Inc. moved jointly to terminate this investigation as to Alltrade pursuant to Rule 210.51 on the basis of a settlement agreement. By Order No. 26, issued October 20,

1983, the Administrative Law Judge filed an initial determination pursuant to Rule 210.53(c) granting this motion. On November 10, 1983, the Commission issued a Notice of Commission Decision Not to Review Initial Determination Terminating Respondent on the Basis of a Settlement Agreement.

On September 20, 1983, complainant filed a motion to terminate this investigation as to respondent Chen Dah Machinery Ltd. By Order No. 27, issued October 17, 1983, the Administrative Law Judge filed an initial determination granting this motion. On November 10, 1983, the Commission issued a Notice of Commission Decision Not To Review Initial Determination Terminating Chen Dah Machinery Ltd. as a Respondent to the Investigation.

On October 26, 1983, Arrow and respondent Quinn Products, Inc. moved jointly to terminate this investigation as to respondent Quinn pursuant to Rule 210.51 on the basis of a settlement agreement. By Order No. 28, issued November 16, 1983, the Administrative Law Judge filed an initial determination pursuant to Rule 210.53(c) granting this motion. This initial determination is pending before the Commission.

The following eleven respondents remain in this investigation:
Central Hardware Co. (Central Hardware); L.G. Distributors, Inc. (L.G. Cook); Fred Meyer, Inc. (Fred Meyer); Meijer, Inc. (Meijer); Moss Manufacturing, Inc. (Moss); Quinn Products, Inc. (Quinn); Ranch Wholesale Supply, Inc. (Ranch Wholesale); Stop & Shop Companies, Inc. (Stop & Shop); Tab Merchandise Corp. (Tab); Taiwan Royal United International (Taiwan Royal); and, Western Auto Supply, Inc. (Western Auto).

A prehearing conference was held on September 6, 1983. The hearing commenced immediately thereafter before Administrative Law Judge Donald K. Duvall to determine whether there is a violation of Section 337 as alleged in the complaint, as amended. Appearances were made by counsel for complainant and the Commission investigative staff. No respondents made an appearance at this hearing. The hearing continued through September 9, 1983, whereupon it recessed until September 13, 1983. The hearing concluded and the record in this investigation closed on September 13, 1983.

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

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

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

JURISDICTION

The United States International Trade Commission has jurisdiction over the subject matter of this investigation pursuant to 19 U.S.C. §1337. (Notice of Investigation, 48 Fed. Reg. 7826-27, February 24, 1983). Furthermore, the Commission has personal jurisdiction over respondents Fred Meyer, Inc., Ranch Wholesale Supply, Inc. d/b/a Longmont Big K, Stop & Shop Cos., Inc., Western Auto Supply, Inc., Quinn Products, Inc., Central Hardware Co., L. G. Distributors, Inc., Meijer, Inc., Tab Merchandise Corp. and Moss Manufacturing, Inc. All of the foregoing respondents were properly served with the complaint and notice of investigation, and/or submitted a timely response to the complaint, and/or entered an appearance through counsel, and all have imported into and/or sold the accused heavy-duty staple gun tackers in the United States. (Findings of Fact 1, 2, 3, 103-112).

The Commission's records indicate, however, that sufficient service upon respondent Taiwan Royal United International has not been effected. (Finding of Fact 4). A copy of the complaint and notice of investigation was sent to Taiwan Royal on February 18, 1983 by registered mail, but no return receipt was received by the Commission. (ALJX 1, p. 2). Taiwan Royal has been served with numerous documents in the course of this investigation, but the record is devoid of any indication that Taiwan Royal ever received or responded to any of these documents. Therefore, there is no evidence to establish that Taiwan Royal ever received actual notice of this investigation. In addition, there is insufficient evidence on this record to establish that Taiwan Royal either manufactures or exports to the

United States heavy-duty staple gun tackers of the type involved in this investigation. Consequently, the Commission lacks personal and subject matter jurisdiction over Taiwan Royal. For the foregoing reasons, the presiding officer hereby determines that respondent Taiwan Royal should be dismissed from this investigation for lack of jurisdiction.^{1/}

^{1/} On September 8, 1983, complainant filed a motion for a finding of default and imposition of sanctions against respondent Taiwan Royal. (Motion Docket No. 137-21). In view of the Commission's lack of jurisdiction over Taiwan Royal, Motion 137-21 is hereby denied in this respect.

DEFAULT AND SANCTIONS

On September 8, 1983, complainant, Arrow Fastener Co., Inc., moved for an order holding that respondents Taiwan Royal and Moss are in default due to their failure to file responses to the complaint. This motion further seeks a determination that the facts are as alleged in the Complaint and Notice of Investigation and the filing of an initial determination containing such findings. (Motion Docket No. 137-21). The complainant further moved in the same motion, under Rule 210.36(b)(5), for an order imposing sanctions against respondents Taiwan Royal and Ranch Wholesale for failure to comply with Order No. 18, issued July 19, 1983, compelling certain discovery.

Complainant's Motion for Default and Sanctions was opposed in a written response by respondent Moss essentially on the grounds that, although it filed no answer to the complaint in order to avoid the expense of active defense in the investigation, it had cooperated fully in response to complainant's discovery requests, including a deposition and production of documents. The Commission investigative attorney, in her Partial Opposition to the Motion for Default and Motion for Sanctions, took the position that, under the Commission's Rules and practice, it would be inappropriate to find in default to the full extent of Rule 210.21(d) a respondent who, like Moss, has cooperated in discovery and provided information

assisting the complainant to prove a prima facie case against that respondent. In its reply to the Moss opposition (Motion Docket No. 137-23), for which leave to file is hereby granted, complainant acknowledged Moss' cooperation in discovery, but maintained that since it was entitled to a response to its complaint, Moss' unexcused failure to make such response warrants a holding of default and that any filing of a response at this late date should have no legal effect.

All arguments considered, I agree with complainant that respondent Moss is in technical default within the meaning of Rule 210.21(d). However, under the circumstances, and for the reasons stated by respondent Moss and the Commission investigative attorney, I decline to impose the full strictures provided under said Rule upon respondent Moss. The purpose of the Rule providing for default is to allow the Commission to act where a respondent refuses to participate in a proceeding. Here, counsel for respondent Moss noted an appearance for the purpose of participating in discovery. Furthermore, under Commission practice, the effect of a default is not necessarily to allow a complainant to rely solely upon the allegations in his complaint and require the presiding officer to make a finding of violation based upon those allegations. Rather, "[t]he effect of a finding of default is to authorize the presiding officer to create certain procedural disabilities for the defaulting party and to entertain, without opposition, proposed findings and conclusions, based upon substantial, reliable and probative evidence, which would support a ... determination." Certain Electric Slow Cookers, Inv. No. 337-TA-42 (1979), Opinion in Support of Orders Terminating Certain Respondents, at 7.

Consistent with Rule 210.21(d), respondent Moss' failure to respond to the complaint is deemed to constitute a waiver of its right to appear to contest the allegations of the Complaint and of the Notice of Investigation. I draw no further inferences from respondent's non-response. Accordingly, as to respondent Moss, complainant's motion for default is granted to the extent indicated.

With respect to respondent Taiwan Royal, the subject of complainant's motion both for default and sanctions, based on my determination that the Commission does not have personal jurisdiction over Taiwan Royal, complainant's motion is denied in this respect.

Respondent Ranch Wholesale is the subject of complainant's motion for sanctions under Rule 210.36(b)(5) for failure to comply with my discovery Order No. 18. Since the pertinent submissions and record support complainant's allegations relating to this motion, I hereby grant it, imposing the following sanctions: (1) it is inferred that Ranch Wholesale's responses to complainant's First Set of Interrogatories and First Requests for Production of Documents, if given, would have been adverse to said respondent; and (2) for the purposes of this investigation, the matter or matters concerning Order No. 18 are taken as established adversely to said respondent.

Motion 137-21 is hereby granted to the extent indicated herein as to respondents Moss and Ranch Wholesale, and denied as to respondent Taiwan Royal.

OPINION

Introduction

This is an investigation instituted by the U.S. International Trade Commission (ITC) on the basis of a complaint filed by the complainant, Arrow Fastener Co., Inc. (Arrow), Saddle Brook, New Jersey, to determine whether certain named respondents, located in the United States, Taiwan and Hong Kong, are in violation of Section 337 in the importation of certain heavy-duty staple gun tackers into the United States, or in their sale, by reason of alleged: infringement of Arrow's common law trademark under section 43(a) of the Lanham Act (a) in its Model T-50 heavy-duty staple gun tacker and (b) in the pictorial of that heavy-duty staple gun tacker; and passing off. This determination also requires consideration of Arrow's allegation that the effect or tendency of the aforesated unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

In its Notice of Investigation, the Commission limited the issue relating to the alleged infringement of Arrow's common law trademark in the pictorial of its T-50 staple gun to five respondents, namely, Test-Rite Products Corp., Test-Rite Int'l (Taiwan) Ltd., Test-Rite Automotive Ltd., Taiwan Royal United Int'l, and Waverly Screw and Hardware, Inc. (Notice of Investigation, at 2). As previously noted in the Procedural History, each of the Test-Rite respondents and respondent Waverly Screw and Hardware, Inc. were terminated as respondents in this investigation on November 10, 1983, based on a settlement agreement between the parties. (Commission Decision Not to Review Initial Determination Terminating 14 Respondents, November 10, 1983). Also, as previously noted supra, at 10-11,

respondent Taiwan Royal is the subject of the Presiding Officer's initial determination that this respondent be dismissed from this investigation for lack of jurisdiction.^{2/}

Since all five respondents charged with infringement of the alleged Arrow pictorial trademark are either terminated from this investigation or without the jurisdiction of the Commission, I find it inappropriate and unnecessary to consider further this particular issue, even though it was an issue at the hearing which was briefed by the active parties. In short, Commission adjudication of the Arrow pictorial trademark infringement issue in this investigation has been precluded or mooted by procedural developments of a definitive nature. For these reasons, this allegation of Arrow's complaint is hereby dismissed, without prejudice as to the respondent Taiwan Royal United Int'l.

Common Law Trademark

Trademark infringement is an unfair act or method of competition under Section 337. Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-105 (1982) (Games II); In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). A trademark, as defined in the Lanham Act^{3/} and at common law, is any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured and sold by others.^{4/} In addition to being the objective symbol of the goods by

^{2/} Even if Taiwan Royal were not dismissed from this investigation, I find no evidence of record to sustain the allegation that this respondent used a pictorial in its packaging or advertising to promote sales of its staple gun in this country which infringes Arrow's pictorial featuring the T-50.

^{3/} 15 U.S.C. §1127 (1976).

^{4/} 3 Callmann, Unfair Competition, Trademarks & Monopolies, §17.01 (4th ed.); In re Morton-Norwich Products, Inc., 213 U.S.P.Q. 9, 11 (C.C.P.A. 1982).

which a business builds its reputation, trademarks perform four functions deserving of legal protection: (1) to identify one seller's goods and distinguish them from goods sold by others; (2) to signify that all goods having the trademark came from a single, albeit anonymous, source; (3) to signify that all goods bearing the trademark are of an equal level of quality; and (4) as a prime instrument in advertising and selling the goods.^{5/}

A trademark is deemed established and protectible upon proof that it is distinctive, either inherently or by reason of acquired secondary meaning, that the trademark is not functional, and has not acquired generic meaning. Certain Cube Puzzles, Inv. No. 337-TA-112 (1982) (Cube Puzzles); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108 (1982) (Vacuum Bottles); Certain Novelty Glasses, Inv. No. 337-TA-55 (1979) (Novelty Glasses). To prove infringement of a trademark it is necessary to show likelihood of confusion among purchasers as to the source or sponsorship of the competing domestic and imported products. Cube Puzzles, supra, 1 McCarthy, supra, §2.3.

The product the configuration of which Arrow seeks trademark protection is the Model T-50 heavy-duty staple gun tacker, used for tacking insulation, upholstery, carpeting, roofing, fencing, wiring, and similar uses. This staple gun has the capacity to drive a 1/4 to 9/16 inch heavy wire staple flush into a wood or comparable surface, and is sold primarily to home owner consumers,^{6/}

^{5/} 1 McCarthy, Trademarks and Unfair Competition §3.1 (1973).

^{6/} The T-50 is alleged to be primarily a man's tool because of the considerable amount of pressure required to fire it. (Abrams, Tr. 90-91). The recent advent of the electric staple gun, manufactured domestically and abroad, is competitive with the T-50, but has opened a new market rather than decreasing sales of the hand-operated T-50. (Abrams, Tr. 137-39).

mainly do-it-yourselfers, but also to contractors and tradesmen, through retail stores, such as hardware and discount stores, mass merchandisers, home supply centers and building and lumber yards in a nationwide market. (Findings of Fact 17, 19). The product was designed as a heavy-duty staple gun in the early 1950's by Arrow's founder, Morris Abrams, who secured a patent on the internal mechanism of the product at that time. (Findings of Fact 21, 22). Shortly thereafter, the product was distributed and sold under the mark "T-50" and since that time approximately million T-50 staple guns have been sold under the same mark. (Finding of Fact 23). Apart from its particular design configuration, the T-50 has the Arrow word mark embossed on both sides of its chrome finish base. Easily readable upon inspection, the embossment on one side reads:

Model T-50 Made in U.S.A. by
 ARROW FASTENER CO., INC.
 Saddle Brook, N.J.

The other side reads:

Use only genuine
ARROW T-50 STAPLES
Pat. No. 2671215, 2754515, others pending

The T-50 is customarily sold in a cutaway cardboard box whose back cover bears a pictorial in color, featuring a large photograph of the T-50 being operated by a human hand, and ejecting in mid-air staples with a fairly sizeable arrow, bearing the ARROW name pointing to the photograph. Other descriptive wording appears on the top and sides of the cover. Removal of the top cover, as is done for display purposes, reveals the boxed T-50 under see-through cellophane, under a top heading showing a smaller reproduction of the same pictorial with the same sized ARROW inscribed arrow pointing to the T-50 described as "Heavy Duty Staple Gun Tacker." Contrasting brown

and yellow colors of the packaging accentuate the pictorial. Samples of the T-50 are also displayed outside their packaging on display boards or racks using headers provided by Arrow. Some T-50's are sold as part of a closed kit in a plastic storage case, but in all cases the packaging bears the pictorial described above. (CPX 1, 40; SX 6 at 9-10).

There are a number of other domestic companies producing and selling heavy-duty staple guns competitive with the T-50, including Swingline, Bostitch, Duo-Fast, Hansen, Parker and Craftsman. (Finding of Fact 24). Importation into the United States of foreign made heavy-duty staple gun tackers identical or very similar in appearance to the T-50 began in late 1982, with over 150,000 estimated sales between October 1982 and June 1983. (Finding of Fact 144). The accused imports are manufactured in Taiwan and distributed in the United States under different names, including Test-Rite, Moss, Alltrade, Central Hardware, and Buffalo. (Finding of Fact 20). There are also competing imports of heavy-duty staple guns on the market that do not resemble the T-50, including Rapid, Esco and staple guns from Japan, England, and France. (Finding of Fact 25). Many of the accused guns are distributed with no names or identifying marks and all of the look-alike imports are sold at an average price less than that of the T-50. (Findings of Fact 20, 93, 145).

Generic Meaning

A term or design has generic meaning if it substantially defines or connotes the universe of that term or design. That is, the term or design must identify the product itself rather than indicate that it comes from one source. Thus, the term "generic" and "trademark" are mutually exclusive. 1 McCarthy, supra, §12.1, 2.

In this investigation, not one of the parties has alleged that the Arrow T-50 staple gun has generic meaning, no evidence has been introduced to show genericness, and Arrow has not even explicitly argued non-genericness in its briefs. In a recent trademark case, however, the Commission ruled that proof of a common law trademark must include a showing that the mark has not acquired generic meaning. Cube Puzzles, supra, at 7. Accordingly, based on my review of the evidentiary record, I find that Arrow has made at least a prima facie showing that the T-50 configuration is non-generic.

The presence in the market of a substantial number of competing staple gun configurations over a substantial period of time is persuasive evidence that the public does not associate the T-50 configuration with staple guns generally. (See CPX 8-24). The results of Dr. Helfgott's surveys, although not inclusive of the entire staple gun universe, also tend to show consumer awareness of the distinctiveness of specific brands and configurations of staple guns, including the association of the T-50 configuration with a particular source. (CX 215). I find no evidence of record to rebut this showing of non-genericness.

Functionality

In determining functionality, the Commission has adopted the Morton-Norwich test of whether competition will be hindered by preventing others from copying the design or configuration. In re Morton-Norwich Products, 213 U.S.P.Q. 9; Vacuum Bottles, supra at 19-25; Cube Puzzles, supra at 16-19. The court's rationale was that the public should have the right to copy those "[n]ecessary elements of mechanical construction, essential to the practical operation of a device, and which cannot be changed without either lessening the efficiency or materially increasing expense." Morton-Norwich, 213 U.S.P.Q. at 14. Thus, a product feature may have a utilitarian purpose but be considered

nonfunctional if there are commercially feasible, alternatively designed features that perform the same function. Furthermore, "a discussion of 'functionality' is always in reference to the design of the thing under consideration (in the sense of appearance) and not the thing itself." Id. at 13. (Emphasis in original).

In applying the functionality test, the court identified four determinative factors: (1) whether the utilitarian advantages of the design are touted in advertising; (2) whether the particular design results from a comparatively simple or cheap method of manufacture; (3) whether there exists a utility patent which discloses the utilitarian advantage of the design sought to be registered; and (4) whether other commercial alternatives are available.

Discussing these factors seriatim, although Arrow packaging and advertising promote the general superiority of the T-50 staple gun, no advertisement specifically claims that the overall design is superior to other designs. (Finding of Fact 26). Certain parts of the trademark are touted, e.g., the "chrome finish" and "visual refill window," but these piece-meal elements are not significant evidence of functionality since they do not encompass or relate to the design as a whole. (Finding of Fact 27).

The design of the T-50 is based on designer's choice and is not the result of a simple or cheap method of manufacture. In fact, the T-50 can be made less expensively by changing the overall configuration of the gun, including the handle, front cover, and the finger hold. (Finding of Fact 28).

With respect to utility patents, U.S. Letters Patent No. 2,671,215, issued March 9, 1954 on certain features of the T-50, and included two elements now claimed by Arrow to be part of its trademark. These elements were described as having a utilitarian purpose. First, the patent claims that the front cover of the T-50 serves the function of supporting the undersides of the wings of the bottom stops. Second, the patent claims that the inclined top edge below the handle of the T-50 is required to make contact with the shock absorber attached to the handle. (Finding of Fact 29). As previously noted, the fact that some individual features of a product serve a utilitarian purpose does not render the entire design functional. Furthermore, there are other ways the front cover and inclined top edge could be shaped. (See, e.g., CPX 7-13).

With respect to alternative commercial designs to the T-50, there are many competitors who successfully manufacture and sell heavy-duty staple guns. Swingline and Bostitch, Arrow's largest competitors, distribute heavy-duty staple guns which have appearances very different from the Arrow's T-50. (Abrams, Tr. 140-41; CPX 12, 13, 27). Pictures and samples of other heavy-duty staple guns were produced at trial, all of which have different appearances, and are competitive with the T-50. (Finding of Fact 32). Most of these competitive guns are of the same general dimensions as the Arrow T-50, however, they do not use the same designs or combination of design features.

In sum, I conclude that the configuration of the Arrow T-50 is non-functional in that it is not dictated by the purpose or function of the product and there is no competitive necessity to copy.

Distinctiveness

Arrow seeks protection of its claimed trademark in the overall appearance of its T-50 heavy-duty staple gun. It asserts that the configuration of the T-50 is sufficiently arbitrary or fanciful as to render the product inherently distinctive, thus obviating the need for any proof of secondary meaning to show distinctiveness. See 1 McCarthy, supra at §7.7, citing Application of Esso Standard Oil Co., 305 F.2d 495 (C.C.P.A. 1962); Re Interstate Bakeries Corp., 153 U.S.P.Q. 488 (T.T.A.B. 1967). An arbitrary mark is a word, symbol or design in common usage that is applied arbitrarily to the goods in question in a way that is not descriptive or suggestive. 1 McCarthy, supra, at §11.2. A fanciful mark is a mark which is devised for the express purpose of functioning as a trademark. Id., at §§11.2, 11.3.

To apply these criteria to the staple gun in question requires closer examination of the configuration of the T-50. The major elements of the overall appearance of the T-50 include: (1) the handle, particularly its upswept curvature in the direction of its length, the curvature of its cross-section, and the inclined shape of its front end; (2) the front cover, particularly the shape of the front boss and the arcuate wrap-around side edges enclosing the side holes; (3) the main housing, particularly the inclined top below the handle, the size and shape of the hand grip slot, and the ARROW embossments on the sides of

the base; and, (4) the highly polished chrome finish of the product in this configuration. (Finding of Fact 33). A review of all the staple guns exhibited indicates that every staple gun has some type or form of handle, front cover, and main housing. (CPX 1, 3, 7-27). However, the particular shape and design of the T-50 elements enumerated above appear to be nondescriptive and nonsuggestive of the product and function involved, as well as being the result of the designer's choice from a great number of possible design alternatives. (Finding of Fact 34). Indeed, prior to 1982 there were no other heavy-duty staple guns on the American market with the same combination of design elements. (Abrams, Tr. 154). Similarly, the configuration elements of the T-50 appear to serve no primarily functional purpose. (Findings of Fact 35, 36).

In designing the T-50, Allan Abrams' father sought an appearance that would be "memorable, different than anything else on the market." (Abrams, Tr. 152). The resulting "image," which to Mr. Abrams looked like a "distinctive" and "sturdy, solid machine," is an image which Arrow has spent considerable sums to advertise. (Abrams, Tr. 153). Notwithstanding Mr. Abrams' unrebutted testimony as to the genesis and purpose of the T-50, the Commission investigative attorney argues that the resulting design connotes a run-of-the-mill staple gun bearing, at best, a descriptive mark.^{7/} I disagree, since I find the configuration of the T-50 different and unique, albeit less than arbitrary or fanciful in the legal sense.

^{7/} A mark is descriptive "if it is descriptive of: the intended purpose, function or use of the goods; of the size of the goods, of the class of users of the goods, of a desirable characteristic of the goods, or of the end effect on the user." 1 McCarthy, supra, §11.5 (footnotes omitted).

However, the ultimate test posed by the Commission and the courts in evaluating the inherent distinctiveness of a product configuration is whether the design is so unique in its field that the reaction of the average purchaser may be presumed. Cube Puzzles, supra, at 10; Vacuum Bottes, supra at 7; In re Days-Ease Home Products Corp., 197 U.S.P.Q. 566 (T.T.A.B. 1977); In re International Playtex Corp., 153 U.S.P.Q. 377 (T.T.A.B. 1967), cited with approval, In re Morton-Norwich Products, Inc., 213 U.S.P.Q. at 9. In applying this average purchaser test, the Court of Customs and Patent Appeals (now the Court of Appeals for the Federal Circuit) looks to whether a design:

[W]as a "common" basic shape or design, whether it was unique or unusual in a particular field, whether it was a mere refinement of a commonly adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods, or whether it was capable of creating a commercial impression distinct from the accompanying words.

Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 196 U.S.P.Q. 289, 291 (C.C.P.A. 1977). In other words the question of "inherently distinctive" depends on the uniqueness of the product's configuration in relation to its competitors in the field, which would condition the reaction of purchasers to the shape or appearance, and what the reaction of the average purchaser to this shape reasonably can be expected to be. See In re Days-Ease Home Products Corp., 197 U.S.P.Q. at 568.

Comparing the Arrow T-50 to the non-accused products of its competitors, particularly Swingline (CPX 23), U.S.M. Corporation (CPX 14), Duo-Fast (CPX 10), Hansen (CPX 7, 25), Craftsman (CPX 8), and Tashikawa (CPX 11), I conclude

that the configuration and appearance of the T-50, viewed as a whole, does not have the degree of uniqueness to raise the conclusive presumption that the likely reaction of the average purchaser to this configuration would be a commercial impression distinct from other competing staple guns in the market. All of the staple guns of record, including those particularly referenced, have some type of narrow, extended handle to depress the firing mechanism, all have front covers, many with variously shaped sides wrapped around the column housing the staples, and most have a similarly shaped main housing, featuring an oval-shaped hand grip slot. (Cf. CPX 7-27).

Although the staple gun handles of the various competing manufacturers are shaped somewhat differently, these differences are essentially refinements of a basic shape or design. Some have a partial upswept curve, most have a cross-sectional curve, and the U.S.M. gun also has an inclined front end. (Cf. CPX 7, 10, 11, 14, 25). The housing of at least two of the competing staple guns has an inclined top under the handle. (CPX 13, 23). Although the front cover design of the T-50 has a slightly different appearance and design from its competitors, most of the latter, like the T-50, have a predominantly upright, sturdy appearance, with wrap-around sides encompassing one or more rivet bolts. (Cf. CPX 8, 10, 11, 14, 23). In addition, the sides of the Duo-Fast have a curved, if not arcuate shape. (CPX 10).

The main housing is found in a number of competing staple guns in substantially the same location, size and shape as the T-50.

(Cf. CPX 10, 11, 12, 13, 23). Several of the competing staple guns also have a trade name or manufacturer embossed in the metal sides of the main housing, below or above the hand grip slot. (Cf. CPX 7, 10, 11, 13, 23). The U.S.M. gun has a source identification sticker on one side of its main housing. (CPX 14). These embossed marks are clearly distinguishable only upon close inspection, and would not likely be readily apparent or distinguishable to the less than careful shopper viewing one or more samples on display. Even the shiny, all-chrome appearance of the T-50 is duplicated in Swingline's Professional Tacker 1000 and U.S.M.'s HTS 56 staple gun. (CPX 23, 14). At least three other guns employ substantial amounts of chrome in their design. (Cf. CPX 8, 10, 11).

However, the distinctiveness of a product configuration, like a composite mark, must be determined by looking at the product or mark as a whole. See 1 McCarthy, supra, §11.10. The commercial impression of a trademark is derived from its appearance as a whole, not from each element separated and considered in detail; therefore, the configuration must be examined in its entirety. Estate of P.D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 538, 551-52 (1919). Although the overall appearance of the T-50, viewed as a whole, and including the refinements previously discussed, is distinctive, I do not find it so uniquely distinctive as to sustain a presumption that an average purchaser clearly would identify the T-50, alone among its competitors, with a single source or manufacturer. In short, in terms of the increment or degree of distinctive-

ness required to show inherent distinctiveness, the commercial impression created by the T-50, compared to competing staple guns in the market place, is more comparable to the commercial impressions found by the Commission in Vacuum Bottles, and Cube Puzzles, in which no inherent distinctiveness was found, than, for example, to the eye-catching, clearly unique ice cream cone package of In re International Playtex Corp., or the drain pipe bottle of In re Days-Ease Home Products Corp.

Applied to the staple gun industry, the average purchaser test contemplates a relatively unsophisticated, one time or infrequent buyer, who may or may not be aware of the T-50 by reason of Arrow's pictorial advertising of its products and its thirty year presence in the domestic market, with essentially the same configuration. This purchaser may also be presumed to be purchasing with a degree of care commensurate with the relatively low price of the product. (Findings of Fact 37-39). Even if this purchaser were conditioned to the overall shape and appearance of the T-50 through such prior awareness, I cannot conclude on this evidentiary record that his reaction clearly would be that the distinctiveness of the T-50 is obvious. Accordingly, I find that the configuration and appearance of the T-50 is not inherently distinctive as a matter of law.

Secondary Meaning

Having found the T-50 product to be distinctive, but not inherently distinctive, it remains to determine whether, individually and standing alone, it has acquired the secondary meaning necessary to qualify as a trademark. See In re David Crystal, Inc., 132 U.S.P.Q. 1 (C.C.P.A. 1961);

1 McCarthy, supra, §15.2. A preponderance of the evidence of record persuades me that the T-50 product has so qualified.

Secondary meaning may be proven by evidence of an association between the mark and the seller in the minds of a substantial number of the buyer group. Vacuum Bottles, supra at 8; Cube Puzzles, supra at 10, citing 1 McCarthy, supra, §15.11. Secondary meaning depends upon a showing that "in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 214 U.S.P.Q. 1, 4 n.11 (S. Ct. 1982). In determining whether a trademark has acquired secondary meaning, two types of evidence may be considered: direct evidence, including actual testimony, affidavits, or surveys of buyers as to their state of mind; and circumstantial evidence, including length of use of the mark, sales, advertising, amounts spent publicizing the mark, and similar evidence showing wide exposure to the mark. 1 McCarthy, supra, §15.16.

Direct Evidence

In this investigation, Arrow presented as direct evidence of secondary meaning the results of surveys conducted by Dr. Myron J. Helfgott, an experienced consultant in the fields of marketing, advertising, and research with a Ph.D. in Social Psychology and extensive training in surveys and public opinion polls. (Helfgott, CX 172). Dr. Helfgott has conducted thousands of trademark surveys in many different industries, although never in the staple gun industry, for court cases, including the Commission's Cube Puzzles investigation. (Helfgott, CX 172, at 3, 5).

Dr. Helfgott conducted three surveys in July 1983 for this investigation, each one in a different region of the United States. The surveys, which complied with a methodology prescribed by Dr. Helfgott, consisted essentially of interviewing, by means of a questionnaire, a total of 665 consumers selected at random at a home supply center at each location (Findings of Fact 42-52). Dr. Helfgott then evaluated the responses to the questionnaire for the purpose of determining (1) the degree to which these consumers could identify the manufacturer of the T-50 staple gun among samples of four heavy-duty staple guns presented, and (2) the degree to which staple guns of similar design might be confused with the Arrow T-50. (Finding of Fact 40). These surveys were intercept or quota surveys (as distinguished from probability surveys),^{8/} which are a type frequently used and accepted by accepted by courts in proving secondary meaning because of their relatively low cost and general reliability for marketing and legal research purposes. (Finding of Fact 62). Cube Puzzles, supra at 11; 1 McCarthy, supra, §32.45.

The criteria or guidelines prescribed by the Judicial Conference of the United States, for a proper survey to be admissible evidence, required:

1. examination of the proper universe;
2. a representative sample drawn from that universe;
3. a correct mode of questioning interviewees;
4. recognized experts conducting the survey;

^{8/} A probability survey consists of a comprehensive sampling procedure, e.g., every 20th unit of all units in the population, which can be reliably projected into the relevant universe. By contrast, in a quota survey, certain judgments or estimates are made about the population or relevant universe. This relevant universe is divided into certain categories and quotas within those categories--e.g., age, income, race quotas--are sampled as a basis for drawing certain inferences. (Helfgott, Tr. 355-57; Sorenson, CX 330, at 5-6).

5. accurate reporting of data gathered;
6. sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys;
7. sample design and interviews conducted independently of the attorneys;
8. the interviewers, trained in this field, have no knowledge of the litigation or the purposes for which the survey is to be used.

Handbook of Recommended Procedures for the Trial of Protracted Cases 73-74 (West ed. 1960); 25 FRD 351, 429 (1960); see also Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189 (E.D.N.Y. 1983).

The Commission investigative attorney contends that the surveys conducted by Dr. Helfgott violated the second, sixth and seventh criteria noted above, and thus were biased and unreliable by reason of flaws in the site selection process and the interviewing process. Determination of the validity of this contention requires closer examination of the procedures followed in conducting the surveys.

Based on his acquired knowledge of the staple gun product and related trade surveys indicating the widespread distribution of Arrow products, (Findings of Fact 69-72), Dr. Helfgott reasonably concluded that the relevant universe^{9/} of the T-50 is adult, male consumers who own, use or are likely to buy a heavy-duty staple gun, and that people involved in do-it-yourself home repair, improvement and construction were more likely to own or use such a staple gun. (Findings of Fact 41, 42, 51).

^{9/} The universe is that segment of the population whose characteristics are relevant to the mental associations at issue, i.e., the perception of the T-50 staple gun and the likelihood of confusion among the purchasing public for that product. See 2 McCarthy, supra §32.47.

To assure a representative sample, Dr. Helfgott determined that 600 interviewees divided between three different geographical areas, east, mid-west, and west, would meet his requirements for statistical stability, efficiency and spectrum of sales ranges, and provide a cross-section of the population or the relevant universe throughout the country. (Findings of Fact 43, 44, 48-52). Consultation with the Arrow management in this context led to selection of San Diego, California, Rockford, Illinois and Tom's River, New Jersey as the survey site areas. The specific retail stores where the survey interviews were to be held--Dixieline, in San Diego, Bob's Hardware in Rockford, and Trilco in Tom's River--were selected by Arrow regional managers in accordance with Dr. Helfgott's requirements. Dr. Helfgott requested that the store be a place where large numbers of people in the relevant market congregate, resulting in heavy floor traffic, with a typical sales pattern of offering staple guns made by Arrow and at least one other competitor. (Findings of Fact 45-51). This led to the selection of the three suburban retail home center stores in middle class communities where do-it-yourselfers and tradespeople tend to shop, as well as the kind of sites targeted by sellers of the accused imported staple guns. (Helfgott, Tr. 353).

Dr. Helfgott inspected each site before the survey to assure himself that they met his criteria and that no promotions or displays of Arrow products were visible at the interviewing location. The surveys were conducted on a Saturday from about 10:00 a.m. to 5:00 p.m. The customers interviewed were selected at random as they entered the stores, presumably in a "buying mood." The interviewers who actually conducted the interviews were briefed by Dr. Helfgott and did not know for whom they were working or the purposes of the interviews. (Findings of Fact 55-56). Each interview consisted primarily of an oral questionnaire

including eight questions as follows:

1. Do you now own a heavy-duty staple gun?
If yes, state brand.
2. Do you ever use a heavy-duty staple gun?
If yes, state brand.
3. Are you likely to buy a heavy-duty staple gun in the future?
4. Do you use any hand tools, or have you purchased any hand tools for home repair?
5. Without guessing, can you identify the brand name under which the four staple guns shown are sold? (Swingline, Bostitch, Duo-Fast, Arrow T-50, all without packaging and with any identifying marks on gun taped over)
6. Have you ever heard of a heavy-duty staple gun made by Arrow?
7. One of the above four staple guns is sold under the brand name of Arrow Heavy-Duty Staple Gun...Which one?
8. Which of two additional staple guns shown is the Arrow Heavy-Duty staple gun? (Arrow T-50 and accused imported staple gun without packaging, and with identifying marks on gun taped over).

In the classification data section, each interviewee was asked his name, phone number and age range.

The first four questions were aimed at screening out and defining the relevant universe, i.e., people who own or use, or are likely to buy a heavy-duty staple gun. (Findings of Fact 57-58). Question 5 sought to discern the degree of secondary meaning involved in the design of the Arrow T-50. Questions 6 and 7 were aided response questions to determine if the interviewee could associate the appearance of the gun(s) with a particular source once exposed to that source's name. Interviewees answering yes to question 6 were then asked question 8 in order to determine whether there is a likelihood of confusion between the two guns, and whether the packaging had any effect in distinguishing the two products.

The results of the survey, tabulated by Dr. Helfgott, indicate that in answer to question 5, 18% of the sample correctly identified the Swingline staple gun, 29% the Bostitch, 20% the Duo-Fast, and 79% the Arrow T-50. (Finding of Fact 67). Dr. Helfgott concluded from these results that the appearance of the T-50, relative to the other staple guns, serves as a source identifier. From the results of question 8, Dr. Helfgott concluded that the consumer cannot tell the difference between the Arrow T-50 and the accused gun, thus establishing a clear likelihood of confusion between the guns as to their source. The results also indicated to Dr. Helfgott that the presence of packaging, which was used at Rockford, but not at San Diego, had no effect on the results, which were the same whether there was packaging or not. Finally, Dr. Helfgott concluded that the T-50 has a distinctive physical configuration within the field of heavy-duty staple guns. (Helfgott, CX 172, at 12-14).

The Commission investigative attorney argues that the selection of sites by Arrow salesmen biased the surveys because the stores chosen did not represent typical retail outlets for staple guns, in that their customers had greater exposure to the Arrow staple gun products than did average consumers of all types of heavy-duty staple guns. Obviously, the potential for bias lies both in the self-interest of the salesmen and in their lack of expertise in designing surveys. It does appear that all three stores chosen were good Arrow customers and that Arrow was the dominant brand of staple guns sold in each store. (CX 323,

329). Although the San Diego and Rockford stores clearly carried one or more other brands of hand-held staple guns, the record suggests, but does not clearly show, that the Tom's River store carried only a Swingline electric staple gun in addition to Arrow products.^{10/} (Helfgott, Tr. 426-27; SX 29 at 11).

Similarly, Arrow's extensive advertising, which is done primarily through specific stores, focuses on the suburbs. (Finding of Fact 65). The Commission investigative attorney further alleges systematic error ^{11/} or bias in the surveys by reason of site selection of only suburban home center stores which typically provide more sophisticated and more brand-aware customers than are found in the relevant universe of staple gun customers as a whole. If there are significant differences in the perception of staple guns among those frequenting different types of stores, then the omission of retail outlets other than suburban home centers, such as discount/department stores and mass merchandisers like Sears Roebuck and K-Mart or urban retail stores, may skew the results of the surveys unless they are properly controlled or taken into account.

Thus, the question is whether the interviewees who walked into the survey's three suburban home centers were representative of the relevant universe of owners, users, or potential purchasers of staple guns of the Arrow T-50 type. Both Dr. Helfgott and Dr. Sorenson, the only market

^{10/} Although electric staple guns look and operate differently than T-50 hand-operated staple guns and may be somewhat more expensive, they are competitive with the T-50. (Abrams, Tr. 253-54).

^{11/} Systematic error can lead to serious bias because an improper sampling frame has been selected, e.g., taking a survey in front of Arrow headquarters or in stores that sell only Arrow staple guns. No amount of samples taken on this basis will reduce the error. Random error, which is a matter of sample dispersion and spread, is reducible by increasing the number of samples considered. (Helfgott, Tr. 398-99).

research experts to testify, were of the opinion that the relevant universe selected and the site selection technique were correct and utilized in accordance with accepted professional standards.^{12/} (Finding of Fact 53).

In support of her contention with respect to site selection bias, the Commission investigative attorney cites the testimony of Arrow salesmen Oaks and Salo that the customers in mass merchandiser or urban stores are a different type of customer than customers who shop at suburban home center stores, and therefore, are likely to have different perceptions of staple guns. These types of customers allegedly should be included in any representative sampling of the relevant universe. (Oaks, Tr. 337-38; Salo, Tr. 483-84). However, a close reading of the salesmen's testimony, taken in conjunction with the testimony of Mr. Abrams and Dr. Helfgott, does not persuade me that the differences in the types of stores or in their location in a city rather than suburbia are such as to produce substantially different consumer perceptions of the appearance of the staple guns in issue. The customer differences contemplated by the salesmen related more to primary buying objectives or intent than to perceptions of different brands of the same product. Thus, both salesmen expressed the view that the nature of the specific product for which a person shops, such as for a staple machine, largely governs the type of store he goes to. For example, "you don't go to Sears to buy a staple gun, but if you happen to see one there while making your

^{12/} The limited knowledge of Drs. Helfgott and Sorenson concerning the staple gun industry, gleaned essentially from discussions with Arrow's counsel and exhibits in evidence in this proceeding, does not warrant discrediting their opinions on this subject. Both men have impressive credentials as experienced marketing and survey experts and they were credible witnesses, basing their opinions on marketing information and data which stands essentially undisputed of record. (Helfgott, CX 172 at 1-5; Sorenson, CX 330 at 1-3; Sorenson, Tr. 541).

primary purchase, such as tires, you might buy it." (Oaks, Tr. 338; Salo, Tr. 483-84).

With respect to the alleged urban/suburban differences, Dr. Helfgott agreed that there is a difference in the nature of the stores and the customers between surban and suburban locations, largely because there are more customers for staple guns in the do-it-yourselfer home owning suburbs than in the apartment dwelling inner city zone. In addition, real estate values in the suburbs afford more space in these stores for larger inventories, and thereby allow more selection for customers. (Helfgott, Tr. 409-10). In this sense, "the people are different in terms of this product." But Dr. Helfgott expressed no opinion as to whether there was a difference between the mass merchandisers' customer's perception of the guns and the perception of customers at the home center stores, other than his view that, ordinarily, he "would not have thought so." (Helfgott, Tr. 411).

Actually, Dr. Helfgott attached importance to the buying habits of the people to be interviewed, e.g., do-it-yourselfers, in determining store selections, believing that selecting stores with a certain density of people in the market for staple guns would make for more efficiency in interviewing. (Finding of Fact 63). Also, Mr. Abrams, certainly very knowledgeable as to the staple gun market, was clearly of the opinion that there is no difference between urban and suburban purchasers of staple guns in terms of awareness of the secondary meaning of Arrow staple guns. (Abrams, Tr. 233-34).

Even if it were convincingly shown that customer perceptions of staple guns were more casual and, therefore, less discerning and sophisticated at mass merchandiser stores than at home center stores, it is possible that including one or more mass merchandisers in the sampling sites could produce

more bias than it would prevent. For example, if Sears Roebuck were the mass merchandiser selected, that particular site would exclude all staple guns except the private label "Craftsman," which is the only heavy-duty staple gun Sears sells. If K-Mart were the mass merchandiser selected, this would skew the survey results since this store is one of Arrow's largest accounts for staple guns, which it sells exclusively. (Abrams, Tr. 219). Furthermore, broadening the sampling to include stores other than home center stores would be inconsistent with the theory and practice of quota/intercept surveys which, by definition, depend on relatively small samples based on value judgments about the market. This would also defeat the purpose of the quota survey, which is to sample inexpensively and efficiently at a few selected sites where customers concentrate or cluster to purchase from a wide range of products. (Findings of Fact 61, 62).

Given the realities of the staple gun market, in which 85% or more of the stores nation-wide carry Arrow staple guns, a store site that did not sell Arrow staple guns would be atypical and misleading. In short, the selection of home center stores as the survey sites is the result of the criteria established for the sites. There is no evidence that the use of such suburban home centers per se created any actual bias. Indeed, the home center stores are representative of a substantial share of the market, based on a reasonable breakdown of Arrow's T-50 sales, whereas the other major sale centers, independent urban hardware stores and lumber yards, would probably lack "traffic" necessary to conduct this quota survey. (Abrams, Tr. 215-19).^{13/} In any event, the stores chosen were all average volume stores for Arrow products. (Abrams, Tr. 199).

^{13/} Since the survey store sites in Rockford and San Diego have everything for building a home, including lumber, they could qualify as a lumberyard as well as home center, with combined T-50 sales of about 75%. (Oaks, Tr. 462; Abrams, Tr. 215-19).

The Commission investigative attorney also questions the validity of the survey on the ground that the interviewees included a disproportionate number of arrow staple gun owners (79%) compared to interviewee/owners of other brands of staple guns (Bostitch, 29%; Duo-Fast, 20%, Swingline, 18%). (Finding of Fact 67). But these interviewee/owners are clearly part of the relevant universe or market. The frequency of representation of the Arrow owner in the sample is not out of line with what would be expected in this relevant universe, given the high volume of Arrow's sales and its percentage share of the domestic market. (Findings of Fact 45, 66). In the case of the San Diego store site, the possibility of excessive Arrow owner representation was certainly controlled since the store began to sell Arrow only months before the survey was taken. (Salo, Tr. 462).

The Commission investigative attorney's further contention that the survey was biased by reason of the involvement of Arrow employees in the site selection methodology is also not well founded. Although Arrow's regional managers did in fact determine which specific stores in the three regions were to be utilized as sites of the surveys, they made their selections in accordance with the criteria prescribed and verified by Dr. Helfgott, subject only to the availability and cooperation of the stores contacted through the store managers. (Findings of Fact 43, 46-50). In Dr. Helfgott's unrebutted opinion, every store within the three areas selected which met his criteria (high traffic, selling Arrow plus at least one other staple gun), had an equal chance of being selected for inclusion in the surveys. (Helfgott, Tr. 416). Before the interviews began, Dr. Helfgott verified that each of the stores met his criteria without bias, and, in fact, were exactly the kinds of stores he wanted to select. (Helfgott, Tr. 416-17).

Utilizing client employees to assist in selecting the store in accordance with certain given requirements is completely normal for this field of market research and is consistent with Dr. Helfgott's normal practice. (Finding of Fact 54). Neither the Arrow salesmen who assisted Dr. Helfgott, nor the managers of the stores contacted by the salesmen were told why the survey was being conducted, who the interviewees were or what questions they would be asked. (Finding of Fact 47). In fact, within the set parameters, the specific stores were selected at random for Dr. Helfgott's final approval. (Oaks, Tr. 294-301, 316-35; Salo, Tr. 454-79, 491-505). Apart from the criteria specified, no attempt was made to limit the site locations to suburban areas. The resulting selection of suburban home center stores simply reflects a market reality: it is in this type of store that staple guns are primarily sold to home owners and do-it-yourselfers. This conclusion is reinforced by the evidence that this is the same type of store in which respondents seek to market the accused imported staple guns. (Oaks, Tr. 318; Salo, Tr. 476).

Finally, it seems clear that although he was retained by Arrow's counsel, and subsequently derived through counsel factual and background information concerning this litigation and the staple gun industry, Dr. Helfgott designed and conducted the surveys independently of the attorneys involved in the case. (Findings of Fact 45-46).

The Commission investigative attorney also criticizes the aided questions asked in the surveys (questions 6-8) as being inappropriate and biasing. The mention of the Arrow staple gun allegedly could lead to a substantial amount of correct selection by guessing on the part of interviewees, absent any follow-up questions to verify the reliability of the

responses as probative evidence of secondary meaning of the Arrow T-50 configuration. The rationale of this criticism is that, since the prime element of secondary meaning is a mental association in buyers' minds between the alleged mark and a single source of the product (1 McCarthy, supra, §15.2A), the suggestion that one of four staple guns presented derives from a single source, i.e., Arrow, would tend to obtain by chance a 25% response for each of the staple guns. This assumes that the interviewees did not know the answer, wanted to give an answer and were not willing to say "I don't know." (Helfgott, Tr. 380-81). For example, an interviewee who had in fact heard of an Arrow staple gun and, accordingly, answered "yes" to question 6, might be motivated by prideful consistency to attempt to identify the Arrow gun presented in question 7, even though he did not really recognize it, and even though question 5 was prefaced by the direction "without guessing."

However, it is standard practice in survey techniques to use aided recall questions in order to secure more information on the extent of knowledge in the marketplace. (Helfgott, Tr. 380). In Dr. Helfgott's opinion, the use of such an aided recall question is not a biasing factor in surveys generally. Specifically, the responses to question 7 in the surveys were overwhelmingly in the direction of the correct answer, i.e., there was not much guessing.^{14/} (Helfgott, Tr. 381). This means that when given the Arrow name, most of the interviewees could identify the Arrow staple gun from the field of four guns, based on the visual appear-

^{14/} The responses to question 8, involving a choice between two similar staple guns, were of a pattern that indicated to Dr. Helfgott that guessing was a substantial operational factor. (Helfgott, Tr. 381). Still responses to question 8 clearly indicated to Dr. Helfgott that the consumer cannot tell the difference between the accused imported staple gun and the Arrow T-50, thus establishing a clear likelihood of confusion between the guns as to their source.

ance of the gun alone. This result reinforced Dr. Helfgott's conclusion based on the responses to earlier unaided questions that the visual appearance of the Arrow staple gun has trademark significance or secondary meaning in terms of brand awareness. (Helfgott, Tr. 381).

Finally, the Commission investigative attorney questions the sufficiency of the survey results to prove secondary meaning throughout the United States, as required by the Commission in common law trademark cases. Sneakers with Fabric Uppers and Rubber Soles, Inv. No. 337-TA-118, at 9 (1983) (Sneakers). The argument here is that the survey results showing the percentage of those interviewed who could correctly identify the Arrow T-50 (14% in San Diego, 30% in Rockford, and 40% in Tom's River) is too low to demonstrate recognition sufficiently probative of nationwide secondary meaning. (Finding of Fact 59). This assertion is based on a comparison with court decisions holding that brand awareness percentages of 25% or less were insufficient. Compare Zippo Mfg. Co. v. Rogers Imports, Inc. 137 U.S.P.Q. 413 (S.D.N.Y. 1963) (25%); Roselux Chemical Co, Inc. v. Parsons Ammonia Co., Inc., 132 U.S.P.Q. 627 (C.C.P.A. 1962) (10%); with North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc., 203 U.S.P.Q. 1012 (Cal. App. 1979) (37% brand awareness sufficient); and Monsieur Henri Wines, Ltd. v. Duran, 204 U.S.P.Q. 601 (T.T.A.B. 1979) (37% brand awareness sufficient). However, a recognition rate of 25% was held to be a credible percentage in Seven-Up Co. v. Green Mill Beverage Co., 128 U.S.P.Q. 284, 286 (N.D. Ill. 1961). In Zippo, the court's ruling was based on the 25% alone, but in circumstances where an almost equal number of interviewees (24.1%) incorrectly identified the product. In addition, the survey was taken three years after the date on which secondary meaning was to be proven, i.e., at which earlier date the level of recognition probably would have been even less. In Roselux, the

10% recognition rate was among the actual users who knew the product best, and did not represent 10% of the entire relevant market being sampled. The survey facts in both Zippo and Roselux, therefore, are distinguishable from the survey results here and cannot properly be compared.

Even if a recognition percentage in excess of 25% were required, the recognition levels achieved by the surveys in Rockford and Tom's River would be sufficient. Although the San Diego survey recognition level of 18% is below 25%, it is also well above 10%. Based on the entire relevant sample, and in the context of the circumstances, including the short time the San Diego store had been selling Arrow staple guns, the tabulation cannot reasonably be totally discounted or allowed to discredit the reliability of the survey. Thus, in Dr. Helfgott's view, even though the limitations of a quota survey preclude any projection of a national average based on these recognition level percentages from three different regional locations, these percentage figures do represent a range of responses which are probably fairly typical of the United States as a whole. (Finding of Fact 61).

On balance, I find that the surveys conducted by Dr. Helfgott, as described in this record, were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys, and that their reliability has not been rebutted by a preponderance of the evidence. However, a survey, especially a quota survey, is but one element of proof in trademark cases and should be accorded only such weight as it may warrant in conjunction with other evidence adduced in the course of the investigation. 1 McCarthy, supra, §15.

Other direct evidence of secondary meaning includes the testimony of several persons concerning instances of confusion between the T-50 and certain accused imported staple guns, as well as some physical exhibits to the same effect. In one instance, a buyer for Wolohan Lumber, a customer of Arrow, stated to an Arrow employee that he believed the accused Test-Rite staple gun was actually an Arrow T-50 sold under private label. (Masanec, Tr. 29-30). In another instance, a sales person at a Venture store, when asked for an Arrow T-50, handed the customer an accused Taiwanese staple gun. (Oaks, Tr. 313-14). Finally, a number of accused staple guns were returned to Arrow by customers for repairs or warranty claims, presumably in the belief that Arrow was the manufacturer. Some of the accused gun returns were from respondents L.G. Cook and Western Auto, the latter's return being in an Arrow package. (Finding of Fact 94).

Although the foregoing instances primarily show confusion in the buying public's mind between the Arrow T-50 and the accused staple guns, they also tend to show purchasers' inclination to associate staple guns of the T-50 configuration with a single source, namely Arrow. See 1 McCarthy, supra, §15.3.

Circumstantial Evidence

In addition to direct evidence, circumstantial evidence, such as "[l]ength of use of the mark, sales, advertising, amounts spent publicizing the mark and any similar evidence showing wide exposure of the buyer class to the mark in question," may be probative of secondary meaning. Vacuum Bottles, supra, at 9.

The record in this investigation clearly shows that the Arrow T-50, with essentially the same design, has been on sale and used in the United States, on a nation wide basis for over 30 years. (Finding of Fact 68).

- (C) Arrow has sold about million T-50 staple guns since the early 1950's and, because of their durability, many are likely still to be in use. (Finding of Fact 69). Arrow has extensively advertised the T-50, the flagship of its
- (C) line of staple guns, and about 80% of almost million dollars spent for
- (C) advertising since 1982 has been for the T-50. Since 1975, between and million dollars have been spent for T-50 advertising. (Findings of Fact 73-74).

This advertising is principally directed toward home owners, do-it-yourselfers and contractors through such publications as Better Homes & Gardens, House Beautiful, Family Handyman, Popular Mechanics, Home Improvement Time, trade magazines, and newspapers. (Findings of Fact 75-76). As previously discussed, most if not all of this advertising features a photographic reproduction of the T-50 in pictorial form, almost always in conjunction with the Arrow logo. (CX 2-30). It is undisputed that this pictorial has been used by Arrow since 1958 on the packaging of its T-50 staple guns, T-50 staples, and other staple guns in Arrow's line, as well as on most of Arrow's advertising, warranty slips, and other literature. (Finding of Fact 77). The object of this advertising practice, planned and consistently followed by the Arrow management over the past 30 years, is to create an equivalence in the mind of the public between the appearance of the T-50 and the name "Arrow" so that when the consumer sees one, he thinks of the other. (Finding of Fact 78). The advertising emphasizes the appearance and configuration of the T-50 in the somewhat unique mode of being operated in mid-air by a human hand in close proximity to the Arrow logo. This visual image predominates over the Arrow logo and descriptive language in the ads

as well as on the see-through packaging in which most T-50's are sold. (Abrams, Tr. 161-63). Unlike the configuration of the product in Vacuum Bottles, whose sleek, shell shaped, stainless steel exterior also bore an eye-catching color coded "Unovac" logo, both on the product and in the advertising of the product, here the Arrow embossment on the T-50 itself is much less prominent, unobtrusive and colorless, both on the product and in the advertising. (CPX 1). Although the T-50 is usually advertised and packaged in a manner that displays the T-50 in close proximity to the Arrow logo, the latter is clearly separate and apart from the gun, which appears to stand alone, accentuating its distinctive appearance. This independent existence of the T-50 design and appearance is confirmed by the results of the survey conducted by Dr. Helfgott. (CX 219).

Arrow's extensive, vigorous, and constant advertising has contributed to the T-50's extraordinary commercial success and consistent sales growth. (Findings of Fact 70-71). Indeed, the T-50 has become the number one staple gun tacker in the United States today, being sold in 85% of all stores in this country that sell this type of product. (Finding of Fact 72).

However, the Commission investigative attorney contends that since Arrow always uses its name or logo on all its advertising, including advertisements utilizing the pictorial, and packaging it is impossible to determine from the circumstantial evidence of record alone whether the consumers' association of the T-50 with a single source derives from the pictorial separate and apart from the word mark. (Finding of Fact 80). In other words, the critical question is whether the pictorial creates a commercial impression distinct from the accompanying Arrow name and logo.

It seems clear from the record that Arrow intended that the pictorial, showing the hand held T-50 in a unique action mode, should be the dominant image projected in its advertising and packaging, separate from but in association with the proximately located Arrow logo, which itself is a registered trademark. (Findings of Fact 79, 81). In Mr. Abrams view, "the average consumer may remember a picture better than he may remember a name." (Abrams, Tr. 279-80). Yet, the pictorial is used 90% of the time with the Arrow logo, with the Arrow line "always pointing to the gun itself." (Sigler, Tr. 45).^{15/}

Certainly the threshold question is made more difficult by the fact that the distinctive pictorial has been extensively advertised in the media and on packages in association with the separate, but strong Arrow trademark for over 25 years. (Findings of Fact 77, 80, 82). For this extensive advertising to contribute to secondary meaning, Arrow must show that, in the minds of the public, the primary significance of the pictorial alone is to identify the source of the product rather than the product itself. Cube Puzzles, supra, at 10.

Considering all the evidence of record in terms of the criteria set forth in Vacuum Bottles, and in the total factual context of this case, I conclude that Arrow has shown secondary meaning, in part, through its advertising. In the first place, although the pictorial may not be as strong a mark as the Arrow name and logo, the pictorial was unique and distinctive in the staple gun industry, prior to the infringing imports in 1982, and has been consistently and constantly publicized for over 25 years. The

^{15/} Complainant's assertion in its Brief at 35 that the pictorial "often appears independently of the "ARROW" name and logo is not suggested by substantial evidence of record.

pictorial itself, featuring a photograph of a hand held T-50 projecting in mid-air a plurality of staples, is visually outstanding in relation to everything else on the package and in the advertising, including the "Arrow" word mark and logo. (E.g., CPX 1, 5-6, 12). The principal commercial package containing the T-50 is predominantly brown and yellow in color, with some black and white, with the pictorial showing the chrome-finished gun. (CPX 1).^{16/} The package is wrapped in see-through cellophane, with the top cover, containing an enlargement of the pictorial, on the under side, and a smaller pictorial on the top see-through side, as well as on two of the narrow sides of the package, one of which stands alone without any Arrow mark or logo shown.

- (C) As previously noted, over million packaged T-50 staple guns have been
(C) sold since the late 1950's, with million dollars spent on advertising
(C) since 1975 alone, including million dollars since 1982. (Findings of Fact 69, 73, 74).

The massive nation-wide sales and extensive advertising of the T-50 in the form above described over such an extended period of time, combined with the distinctive character of the pictorial used to effect these sales, invests the pictorial with the capability of creating a commercial impression of its own. See Seabrook Foods, Inc. v. Bar-Well Foods, Ltd., 196 U.S.P.Q. at 293 (Dissent). Indeed, the pictorial reinforces in the public's mind the configuration and appearance of the T-50 itself, since the pictorial features a photograph of the T-50 in a unique mode (hand-held, projecting staples in mid-air). This pictorial is not a mere background design, but

^{16/} The uniform color coding of the pictorial and the packaging on which it appears and is displayed should not be discounted as an element of consumer recognition of a product and its source. Cf. In re Flex-O-Glass, Inc., 194 U.S.P.Q. 203, 205-206 (T.T.A.B. 1977).

rather has been prominently used and extensively promoted, with the result that it has come to serve in and of itself as a strong indication of origin. Although there is no survey evidence relating to the pictorial to corroborate this conclusion (Helfgott, Tr. 447), such survey evidence is unnecessary^{17/} in the face of the overwhelming circumstantial evidence adduced in this case. This evidence indicates that the nature of the pictorial, in effect mirrors the T-50 itself, and is reinforced by the credible testimony of Mr. Abrams and Mr. Sigler, both experienced in gauging consumer reaction to staple guns, that the pictorial alone, without any Arrow reference, would impress the average consumer as depicting the Arrow T-50 which it, in fact, portrays. (Abrams, Tr. 280-81; Sigler, Tr. 44-45). Under these circumstances, I have little doubt that the average consumer, exposed as he has been for over 25 years to Arrow's pictorial in association with the "Arrow" word mark and logo, would be likely to believe that the staple gun depicted in the pictorial, without any reference to the Arrow mark, originates from or is in some way associated with Arrow. See Monsieur Henri Wines, Ltd. v. Duran, 204 U.S.P.Q. at 606 ; In re Johnson & Johnson, 196 U.S.P.Q. 559 (T.T.A.B. 1975) (Trademark registration granted to cross-hatch design as not mere background for word mark, but has acquired distinctiveness as indication of origin when design used as mark on fabrics for 33 years, with \$15 million in sales and over \$150,000 in advertising expenses).

^{17/} The Commission has held that, generally a consumer survey is not required to establish a common law trademark. Vacuum Bottles, supra. Although the Commission investigative attorney cites Vacuum Bottles as requiring a survey when a configuration has been used with a word mark (Staff's Brief, p. 40), the Commission clearly limited this pronouncement to "the specific facts of this case." Vacuum Bottles, supra, at 14. Here the facts are clearly distinguishable from Vacuum Bottles. The associated word mark is separate and apart from and not on or an integral part of the pictorial, and the pictorial features a photograph of the product itself independent of the word mark.

From the early 1950's until late 1982, Arrow was the only source of heavy-duty staple gun tackers having the unique appearance of the T-50. (CPX 7-27). In 1982, Test-Rite International, located in Taiwan, introduced into the United States its heavy duty staple gun which was admitted to be an almost identical copy of the T-50. (Finding of Fact 83). The accused Test-Rite staple gun is distinguishable from the T-50 only by its trade name inconspicuously embossed in the metal base of its main housing. Other accused staple guns, now imported into the United States, also look exactly like the T-50, but bear no identifying marks or the embossed instruction "use Arrow T-50 staples" or the like. (CPX 46, 55). These accused imports are sold in the same markets and to the same types of customers as those in and to which Arrow sells its T-50. (Finding of Fact 84).

The fact that respondents, beginning with Test-Rite, obviously copied Arrow's T-50 is probative of secondary meaning. See Vacuum Bottles, supra, at 17; Ideal Toy Corp. v. Plawner Toy Mfg. Corp., 216 U.S.P.Q. 102 (3d Cir. 1982). This conclusion is reinforced by the fact that some of the respondents in this case use Arrow's artwork and drawings in advertising their imported, look-alike staple guns, presumably to confuse consumers and thus facilitate market penetration by their similar if not identical product. (CX 60-63, 106, 220, 314, 322). The copying of Arrow's pictorial by competitors is additional persuasive evidence of secondary meaning of the T-50 configuration. See Ideal Toy Corp. v. Plawner Toy Mfg. Corp., 216 U.S.P.Q. 102.

The Commission investigative attorney would preclude that inference here because, as stated by the Commission, intentional close copying "is not sufficient standing alone to establish secondary meaning in a weak mark." Sneakers, supra, at 10. But, as I have previously found, the configuration mark of the T-50 is not weak. Indeed, it is distinctive, and copying is certainly not the only evidence of secondary meaning in this investigation. Furthermore, in the circumstances of this case, including the pre-eminent market sales position and goodwill the T-50 enjoyed at the time the copying began (Sutter, Tr. 14), and in the absence of any evidence that the respondents copied the T-50 merely because it was more convenient than creating an original design, it is reasonable to infer that the copying here was done substantially, if not primarily, because consumers identified the T-50 with a single source.^{18/} The reasonableness of this inference concerning respondents' intention or motivation is strengthened by the fact that respondents' copies of the T-50 quickly captured a share of the staple gun market that was more substantial than Arrow's non-infringing competitors could accomplish in 30 years of competition. See Injury, infra.

Considering all the direct and circumstantial evidence adduced of record, I conclude that complainant has proved secondary meaning in the appearance of the T-50 staple gun by a preponderance of the evidence.

^{18/} It is undisputed that Test-Rite used the T-50 as a prototype in designing its staple guns. (Speizer, CX 282, at 39-40).

Infringement

Likelihood of Confusion

Likelihood of confusion is the basic test of both common law trademark infringement and federal statutory trademark infringement. 2 McCarthy, supra, §23.1, citing inter alia McLean v. Fleming, 96 U.S. 245 (1877); Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2d Cir. 1962). Having shown that the configuration of the Arrow T-50 has secondary meaning to consumers, Arrow contends that the ordinary consumer is likely to be confused as to the source or origin of respondents' accused staple guns. See Novelty Glasses, supra, at 11. The test for likelihood of confusion has been stated in the Restatement of Torts, §729 to include consideration of: (a) the degree of similarity between the designation and the trademark; (b) the intent of the actor in adopting the designation; (c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other; and (d) the degree of care likely to be exercised by purchasers.

Proper evaluation of the likelihood of buyer confusion requires consideration of the ordinary circumstances under which prospective purchasers make their product choices. 2 McCarthy, supra, §23.17; see also Beech-Nut, Inc. v. Warner-Lambert Co., 178 U.S.P.Q. 385 (2d Cir. 1973). Thus, in order to determine the degree of similarity between the Arrow T-50 staple gun and respondents' staple guns, the guns must be examined both in and outside of their respective packaging, just as they appear or are displayed to retail consumers. (Abrams, Tr. 162-63). Outside of their packages, the configurations of the Arrow T-50 and respondents' staple guns appear virtually identical. (Finding of Fact 85). The only difference, and this

is apparent only upon close inspection, is that whereas the T-50 has the Arrow label of origin embossed in the metal base of the main housing, the respondents' guns bear either no mark of origin or source or a name mark, such as "Test-Rite", or a mark of origin, such as "Made in Taiwan," each inconspicuously embossed on the lower side of the gun. (Findings of Fact 86, 87, 95-100). The packaging of respondents' guns, however, is quite different from that of Arrow's. Arrow packages most of its staple guns, including the T-50, in cardboard boxes, principally colored brown and yellow with a cellophane, see-through top cover exposing the gun. (CPX 1). As previously noted, the package carries the Arrow pictorial, word name and logo on the top and bottom and two sides, with some descriptive language. Most of the respondents use plastic see-through blister packages with a cardboard label on top of the package. (E.g., CPX 37, 39a, 42). The respondents' packages are multi-colored and many bear trade-names or trademarks, together with descriptive language and directions (CPX 30, 32, 53). Some bear the words "uses all Arrow T-50 staple sizes" or the like. (Findings of Fact 95-97, 99, 100).

Notwithstanding the different source embossments on some respondents' guns, visual comparison of Arrow's T-50 and respondents' accused staple guns confirms their close similarity and look-alikeness, resulting in essentially the same commercial impression and, therefore, likely confusion. See In re Triple R Mfg. Corp., 168 U.S.P.Q. 447 (T.T.A.B. 1970). This conclusion is corroborated by the results of Question 8 of the survey conducted by Dr. Helgott, which clearly indicated that the consumer cannot tell the difference between the Arrow T-50 and respondents' look-a-like

staple gun made in Taiwan. (Finding of Fact 88). This close similarity becomes more evident when the T-50 and respondents' staple guns are displayed together, as they often are, in the store display area. (Findings of Fact 89-90).

Despite the apparent differences in packaging of the various staple guns, the fact that most of them provide a window over the displayed gun results in the gun itself providing the main focus of attention to consumers in the marketplace. Thus, the different identifying marks on the packages tend to be overlooked or disregarded by consumers whose principal focus is on the product itself. Indeed, a different label on essentially identical products does not preclude a finding of likelihood of confusion. T & T Mfg. Co. v. A. T. Cross Co., 197 U.S.P.Q. 763, 771 (D.R.I. 1978) aff'd, 587 F.2d 533 (1st Cir. 1978). This is further borne out by the responses to question 8 of Dr. Helfgott's surveys in San Diego and Rockford, which indicated consumer confusion between the T-50 and respondents' staple guns even when they were displayed in their respective packages. (Finding of Fact 88). Additionally, the fair use of Arrow's name in the reference to staples to be used with respondents' staple guns promotes further confusion to consumers about the source or sponsorship of respondents' staple guns.

With respect to respondents' intent in adopting the Arrow T-50 configuration for their staple guns, the president of Test-Rite Products, Melvin Speizer, testified at his deposition that Test-Rite International used the Arrow T-50 as a prototype for designing its staple gun. (Finding of Fact 91). The fact that the resulting design of the Test-Rite staple guns is essentially identical in appear-

ance to the T-50 indicates that the Test-Rite gun was intentionally and closely copied from the T-50.^{19/} (Findings of Fact 83, 88). Intentional copying provides additional support for a finding of likelihood of confusion because intent to copy supports the inference that the mark's copiers intended to cause confusion. Sneakers, supra at 20; 2 McCarthy, supra, §23.33. Furthermore, the number of respondents shown on this record to be importing and marketing the T-50 lookalikes in this country that are manufactured by a variety of companies in Taiwan indicates that such close and deliberate copying is widespread. (Findings of Fact 143, 144, 152).

In regard to their relationship in the marketplace, the staple guns of Arrow and the respondents are directly competitive. They are used for the same purposes by the same consumers, and are usually displayed side by side in the same areas of retail stores. (Findings of Fact 84, 89, 90). Although the accused staple guns are usually priced well under the \$21.60 suggested retail price of the T-50, staple gun tackers as a category are relatively inexpensive products. (Finding of Fact 93). Indeed, the accused staple guns have often been purchased for resale by Arrow's own customers, including Central Hardware, Western Auto, Wal-Mart, L.G. Cook, Meijer Thrifty Acres, Bradlees(Stop & Shop), Linsley Lumber, and Fred Meyer. (Finding of Fact 92). Reports of salesmen

^{19/} Although Test-Rite International, Test-Rite Products, Upmaster and Quality Master were terminated as respondents subsequent to the hearing in this investigation on the basis of a settlement agreement, there is evidence on this record relating to their activities, and several respondents remaining in this investigation, as well as many non-respondents, have imported the accused Test-Rite staple guns.

produced by Arrow also indicate that other customers of Arrow have sold the accused guns. (CX 83a, 84, 86, 87, 90, 90(a),90(b); Abrams, Tr. 169). In sum, the fact that Arrow and respondents sell their respective staple guns through the same channels of commerce to the same potential consumers strengthens the likelihood that consumers will be confused as to the source of respondents' guns.

In view of the relatively low retail prices of the staple guns at issue, it is likely that consumers exercise a relatively low degree of care or attention when making purchases of this type of product. It is reasonable to presume that the level of purchasers' care decreases with the price of the product being purchased. R J R Foods, Inc. v. White Rock Corp., 201 U.S.P.Q. 578 (S.D.N.Y. 1978), aff'd, 203 U.S.P.Q. 401 (2d Cir. 1979). Such lessened degree of care or attentiveness on the part of purchasers of staple guns tends to increase the likelihood of confusion between the T-50 and the accused guns of respondents.

Although evidence of actual confusion is not necessary to relief, where such evidence does exist it is persuasive, if not irrefutable, on the issue of likelihood of confusion. See Time Mechanisms, Inc. v. Qonaar Corp., 194 U.S.P.Q. 500 (D.N.J. 1976); Union Carbide Corp. v. Ever-Ready, Inc., 188 U.S.P.Q. 623, 638-39 (7th Cir. 1976); World Carpets, Inc. v. Dick Littrell's New World Carpets, 168 U.S.P.Q. 609 (5th Cir. 1971). There is considerable evidence here that customers were actually confused as to the source of respondents' staple guns. For example, Beaver Lumber, L.G. Cook, and Western Auto, all customers of Arrow, returned accused staple guns to Arrow to be repaired. (Finding of Fact 94). The credible and unrebutted testimony of Arrow salesman Oaks and Mazanec, previously noted, also provides specific

instances of confusion between the T-50 and respondents' look-alike staple guns on the part of employees at Venture Stores and Wolohan Lumber. (Oaks, Tr. 313-314; Mazanec, Tr. 29-30).

In conclusion, all factors considered, there is a preponderance of evidence of record to support a finding of likelihood of confusion in the minds of prospective purchasers between the Arrow T-50 and respondents' accused staple guns. Accordingly, respondents' accused staple guns must be deemed to be infringements of Arrow's trademark in the configuration and appearance of its T-50 staple gun.

Passing Off

Although certain elements of common law trademark infringement are relevant to a finding of passing off, an essential element of passing off is an intentional act of deception that leads a customer to believe that he is buying the goods of another. To succeed on this claim, there must be affirmative proof that respondents subjectively and knowingly intended to confuse buyers. Certain Braiding Machines, Inv. No. 337-TA-130 at 79-80 (1983), Cube Puzzles, supra, at 25-26; Vacuum Bottles, supra, RD at 64; Stoves, supra, at 3; 2 McCarthy, supra §25.1. Thus, there must be evidence of respondents' intention to deceive consumers, beyond mere copying of the configuration of the Arrow T-50. Vacuum Bottles, supra, CD at 28.

In the present investigation, it is clear that the appearance of Arrow's T-50 staple gun has been copied. Complainant alleges that certain respondents have also used Arrow's artwork and instructions, or its pictorial, to aid them in passing off their imported staple gun tackers as the Arrow T-50. The packaging of certain respondents' guns also states "Uses All 6 Sizes of Arrow T-50 Staples."

Respondents Stop & Shop, Western Auto, L.G. Cook, Meijer, and Fred Meyer have all purchased Test-Rite staple guns. (Findings of Fact 104, 106, 107, 109, 110). The appearance of these staple guns is identical to the Arrow T-50, and these tackers are displayed in entirely see-through plastic packaging. (See, e.g., CPX 37). Some of Test-Rite's staple guns have "Test-Rite, Made in Taiwan," embossed on the base. Other Test-Rite staple guns bear no markings,

other than a removable sticker indicating "Made in Taiwan." The packaging does not use the Arrow pictorial or copy Arrow's instructions. The label indicates that the staple gun uses Arrow T-50 staples. This marking on the label is more prominent than the smaller indication that the staple gun is distributed by Test-Rite Products Corp. (Findings of Fact 87, 95). In advertising the accused imported staple guns, respondents Meijer and Fred Meyer have used a line drawing of the Arrow T-50, or the Arrow pictorial. In these advertisements, although Arrow's drawings and artwork are used, no reference is made to Arrow or the T-50. (Findings of Fact 101, 102).

These respondents' use of Arrow's name mark on their package to indicate useability of Arrow's T-50 staples is a truthful and descriptive fair use of Arrow's mark. Car-Freshener Corp. v. Auto-Aid Manufacturing Corp., 201 U.S.P.Q. 233, 239 (N.D.N.Y. 1979). The most prominent features on the package are the words "Heavy-Duty Stapler, Tacker, Nailer." The fact that Test-Rite's name is relatively inconspicuous compared to Arrow's on the packaging may suggest that the manufacturer intended to represent that its staple gun is associated with complainant. (Finding of Fact 95). Having deliberately copied the appearance of the T-50, and placed the infringing product in a package which bears the Arrow name more prominently than that of the actual manufacturer, the parties responsible for manufacturing and packaging these staple guns, i.e., the Test-Rite companies, Quality Master and Upmaster, may be presumed to have

deliberately copied the Arrow T-50 so as to enable their distributors to pass off the infringing staple guns as the Arrow T-50.^{20/} Cube Puzzles, supra, at 25-26. However, as to the remaining respondents who have sold Test-Rite staple guns in the package provided by Test-Rite, there is no independent evidence that they have intentionally attempted to pass off these staple guns as Arrow T-50. Accordingly, I determine that complainant has not met the burden of proving passing off as to respondents Stop & Shop, Western Auto, L.G. Cook, Meijer, and Fred Meyer.

Respondent Ranch Wholesale also purchased Test-Rite staple guns, but through the importer Alltrade. The packaging of the staple gun marketed by Alltrade does make reference to use of Arrow T-50 staples, but also bears the mark of Alltrade. The packaging of this staple gun is in all other respects identical to the packaging used by Test-Rite. (Findings of Fact 96, 108).

Respondent Central Hardware has obtained staple guns both from Test-Rite and from Western Universal Mercantile Ltd. The staple guns obtained from Test-Rite reference use of Arrow T-50 staples, but are equally prominently marked with the name Central Hardware. (Finding of Fact 97). By contrast, the packaging of the staple guns obtained from Western Universal does not utilize any trade name on the front of the package. On the back of the

^{20/} These staple guns were designed, manufactured, and/or packaged by Test-Rite International (Taiwan) Ltd., Test-Rite Products Corp., and Quality Master. (SX 9, at 5; Speizer, CX 282, at 48). Test-Rite has admitted that these staple guns were intended to be an exact copy of the T-50. (Speizer, CX 282, at 51, 175-78). Upmaster, Quality Master and Test-Rite International are . (Speizer, CX 282, at 12-17). Thus, intentional copying of the T-50 by staple guns exported by Upmaster, Quality Master and Test-Rite reasonably has been shown. However, each of these respondents has been terminated from this investigation by reason of a settlement agreement. (Procedural History, supra).

(C)

package there is reference to both Arrow T-50 staples and Western Universal. These markings are in close proximity and are equally prominent. (Finding of Fact 98).

The packaging in which the staple guns are sold by Moss are prominently marked "World Famous Moss Heavy Duty Staple Gun." The front of the package indicates, in smaller lettering, that the staple gun uses all Arrow T-50 staple sizes. On the back of the package, some Arrow's operating instructions and artwork similar to Arrow's are displayed. (Finding of Fact 99).

In circumstances in which an element of proof of unfair competition is the intent of the respondent, "display of the house name is strong evidence of lack of intent to deceive." T & T Manufacturing Co. v. A.T. Cross Co., 197 U.S.P.Q. at 771. (Citations omitted). The staple guns sold by respondents Ranch Wholesale, Central Hardware and Moss all bear house names in a prominent location on the package. This fact, taken together with the fact that the reference to Arrow T-50 staples is a fair use of Arrow's mark leads me to the conclusion that complainant has not established that these respondents have engaged in passing off.^{21/}

The staple guns distributed by respondent Quinn are identical in appearance to the Arrow T-50 and are packaged in a blister pack of approximately the same size as the Arrow T-50. The only markings on the

^{21/} Complainant also alleges that the use of Arrow's operating instructions and accompanying artwork by certain respondents constitutes passing off. There is no allegation that Arrow has any trademark rights in the operating instructions or artwork displayed with the T-50 staple gun. Accordingly, I determine that mere copying of these elements without other positive evidence of intent does not contribute to a finding of passing off.

staple gun are "Made in Taiwan" and a white sticker stating "Heavy Duty" placed in an identical location to the placement on the Arrow T-50. (Finding of Fact 100). The package contains no identification of the manufacturer or distributor. Thus, the only reference to a trademark is the statement "Uses 6 No. AROW [sic] T-50 staples [sic] sizes." This marking is placed in the same location and in virtually the same manner on the Quinn package as it appears on the Arrow T-50 package. (Cf. CPX 39b and CPX 40). On the back of the package, the operating instructions and artwork are essentially identical to that used by Arrow. The president of Quinn stated at his deposition that the staple gun distributed by Quinn is identical to the Arrow T-50, and that this similarity is a selling factor to its retailers. (Finding of Fact 100). This combination of factors, together with my determination that the staple gun imported and sold by Quinn infringes Arrow's common law trademark in the configuration of the T-50, leads me to the conclusion that Quinn has intentionally passed off its staple guns as the Arrow T-50 in an attempt to confuse its customers.

In the amendment to the complaint and notice of investigation which joined Tab as a respondent, there was no allegation that Tab had engaged in passing off. (Order No. 7, May 10, 1983). Therefore, no determination as to passing off will be made as to respondent Tab.

Thus, I determine that complainant has not established that respondents Stop & Shop, Western Auto, L.G. Cook, Meijer, Fred Meyer, Ranch Wholesale, Central Hardware, and Moss have engaged in the unfair act of passing off. However, complainant has met its burden of proving passing off as to respondent Quinn.

Importation and Sale

Section 337(a) requires complainant to show "unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale" Complainant has offered evidence establishing importation and/or sale of the accused heavy-duty staple gun tackers by all respondents except Taiwan Royal.^{22/}

Respondent Moss began importation of staple gun tackers, which it sells in (C) packaging marked "World Famous Moss," . These staple guns are (C) imported by Moss through , located at the same (C) address as Moss. Moss purchases these staple guns from (C) , an export trading company in Taiwan, and sells them to customers in the (C) United States, such as (Goggans, CX 111, pp. 4-6, (C) 23-25, 73-76). During 1983, Moss has purchased from and (C) imported into the United States staple guns at a cost of (Finding of Fact 103). The marking on the staple gun imported by Moss indicates only "Made in Taiwan." (CPX 28, 34, 35).

Respondent Quinn Products has imported the accused staple guns from (C) Yung Shuo, a Taiwanese trading company. The packaging of these staple guns is marked by Quinn as J & C Products Co. As of July 1983, Quinn had (C) imported staple guns and had sold all of them except . (Finding of Fact 111; Curcio, CX 136, pp. 6-7, 17, 27). The marking on the staple gun imported by Quinn indicates only "Made in Taiwan." (CPX 39a, 39b).

^{22/} The presiding officer has determined that Taiwan Royal should be terminated from this investigation for lack of Commission jurisdiction over it and insufficient proof of importation. See Jurisdiction, supra.

Respondent Tab Merchandise imports staple gun tackers from Buffalo Tool, a trading company in Taiwan. The packaging of this staple gun is marked as Buffalo Brand. The marking on the staple gun itself indicates only "Made in Taiwan." As of July 1983, Tab had sold Buffalo staple gun tackers, and had approximately in inventory. (Finding of Fact 112; CPX 52).

On February 20, 1982, respondent Central Hardware ordered staple guns from Test-Rite International in Taiwan. These staple guns were later imported by Central Hardware, and as of January 31, 1983, units had been sold, and remained in inventory. (SX 4, p. 3). The packaging of the staple gun purchased from Test-Rite International is marked with the name Central Hardware. The staple gun itself is marked only with a removable sticker stating "Made in Taiwan." (CPX 42). In March 1983, Central Hardware purchased staple guns from Western Universal (Taiwan) Ltd. in Taiwan. (Finding of Fact 105). These staple guns are marked "Made in Taiwan" and their packaging is marked Western Universal Mercantile Ltd. (CPX 43).

During 1982 and 1983, respondents Western Auto, Fred Meyer, L.G. Cook and Stop & Shop directly imported staple gun tackers from Test-Rite International. Western Auto has imported approximately staple gun tackers, which are marked "Test-Rite, Made in Taiwan." (Finding of Fact 104, CPX 54). In July 1982, Fred Meyer imported staple gun tackers from Test-Rite International, of which it had less than remaining in inventory as of June 1983. (Finding of Fact 106; SX 11). Respondent L.G. Cook imported approximately staple guns from Test-Rite International between August 1982 and

February 1983. (Finding of Fact 107). Since September 1982 it has
(C) sold staple gun tackers for , and as of its last inventory,
(C) had staple gun tackers remaining in stock. (SX 19). Stop & Shop has
(C) imported approximately staple guns from Test-Rite International
(Finding of Fact 110). The packaging of this staple gun is marked "Dis-
tributed by Test-Rite Products Corp.," and the staple gun itself is marked
with a removable sticker which states "Made in Taiwan." (CPX 37). As of May
(C) 1983, Stop & Shop had sold approximately staple guns, and estimated its
(C) end-of-year inventory for 1982 to be units. (SX 12).

Respondent Meijer has purchased Test-Rite staple guns from respondent
(C) L.G. Cook. In October 1982, Meijer purchased staple guns from L. G.
Cook. (Finding of Fact 109). The package is marked "Distributed by Test-Rite
Products Corp." and the staple gun itself is marked with both "Test-Rite" and
"Made in Taiwan." As of February, 1983, Meijer had remaining in
inventory. (SX 21).

(C) Respondent Ranch Wholesale has purchased approximately staple guns
(C) from Alltrade, Inc., at a cost of . (Finding of Fact 108).

Domestic Industry

Definition

In cases in which trademark infringement constitutes the alleged unfair method of competition or unfair act, the Commission has defined the relevant domestic industry for purposes of §337 to be that portion of complainant's operations devoted to the exploitation of the trademark rights at issue. Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-87 (1981) (Games I); Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 (1981) (Stoves). In appropriate cases, the Commission has refined this definition to be the segment of the industry which is the target of the unfair acts and practices. Stoves, supra. This exploitation includes manufacture, distribution and sale of the subject articles. The exact definition of the domestic industry for purposes of §337 is based upon consideration of the realities of the marketplace in a particular case. Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52 (1979).

Arrow's manufacturing facilities are located in Saddle Brook, New Jersey. These facilities are devoted to the design, manufacture, assembly, inspection, packaging and repair of all Arrow products. In addition to manufacturing all of its staplers and staples, Arrow also builds the majority of its tools, dies, jigs, fixtures and other equipment. (Findings of Fact 113, 121, 125).

Complainant manufactures an entire line of tackers which are all of similar appearance, which include the T-50, T-55, JT-21, T-18, T-25, T-37,

and T-75. The T-18, T-25, T-37, and T-75 are all wire tackers which are specifically designed for tacking electrical wire. The end market for these tackers is primarily the specialty trades, and there is no evidence that any imported tackers copy these specialty staple guns. (Findings of Fact 118, 119). The president of Arrow identified the T-50 as the flagship of the line, and it is the T-50 that is the most advertised by complainant and the most copied by the imported tackers. (Finding of Fact 117). Thus, the market for the T-50 is the home owner, do-it-yourselfer, and the T-50 and its market are the target of the imported product. (Findings of Fact 17, 19, 20). However, Mr. Abrams also testified that there have been imports recently of copies of Arrow's T-55, JT-21, and HT-50 tackers. (Abrams, Tr. 180-81).

The Commission has, on occasion, defined the domestic industry to be less than all of the domestic operations devoted to the exploitation of the proprietary rights sought to be protected. Thus, in Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof, Inv. No. 337-TA-82 (1981) (Headboxes) the Commission found the domestic industry to consist of only one of two products manufactured by complainant in accordance with the suit patents. Although a patent-based case, the analysis of the Commission is applicable here:

[O]ur focus under section 337 in patent cases is on injury caused by infringing imports to the domestic industry producing articles, covered by the patent, which compete with the subject imports. Thus, we cannot look just at the domestic facilities devoted to the production of all headboxes made in accordance with the ... patents. To do so would not focus on the actual point at which the infringing imports have an adverse impact.

Rather, we must identify specifically that portion of complainant's facilities which produces articles under the patents in suit and which is adversely affected by the infringing imported articles Upon that segment only should we assess the economic impact which the unauthorized importation and sales have on the legal monopoly of the patent holder.

Id. at 29.

In view of the fact that only complainant's T-50, T-55 and JT-21 compete in the same home owner, do-it-yourselfer market, have the same configuration for which complainant claims a trademark, and are the items in Arrow's line which are being copied by imported products, I find that the domestic industry consists of complainant's facilities devoted to the design, manufacture, distribution, packaging, and sale of the Arrow T-50, T-55 and JT-21 staple gun tackers.^{23/}

- (C) Of Arrow's total of employees, approximately are engaged full time in the manufacture of T-50 staple gun tackers. In addition, a number of employees are involved in the manufacture of the T-50 line of staples, which fit the T-50 as well as other Arrow staple guns. (Finding of Fact 114). Arrow also maintains a nationwide sales distribution network
- (C) consisting of sales representatives who sell only Arrow products, including the T-50. (Finding of Fact 115). Mr. Abrams estimated that

^{23/} During the course of the hearing, Mr. Abrams testified that the Arrow hammer tacker, HT-50 is also being copied by Taiwanese imports. (Abrams, Tr. 180). Although this tacker bears some of the same features as the T-50, the staff alleges that it does not have the same degree of similarity or function as the T-50. (Posthearing Brief of the Commission investigative attorney, p. 49 n.1). In addition, complainant does not allege that the HT-50 comprises a portion of the domestic industry, or that it is injured by infringing imports. Thus, I do not consider the Arrow HT-50 to be included in the domestic industry for purposes of this investigation.

Arrow has invested about million in capital equipment which is used approximately 80% of the time for the manufacture of the T-50. (Finding of Fact 123).

The record does not indicate what portion of Arrow's operations are devoted to the manufacture of the T-55 and the JT-21. Nevertheless, it appears from the record that the T-50 is Arrow's largest selling item, and that the vast majority of imported staple gun tackers have been copies of the T-50.

Efficient and Economic Operation

Section 337 requires complainant to establish that the domestic industry is efficiently and economically operated. The factors relevant to an evaluation of economic and efficient operation include: (1) use of modern equipment and procedures; (2) substantial investment in research and development; (3) profitability of the relevant product line; (4) effective quality control programs; and (5) incentive compensation and fringe benefit programs for employees. Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110 (1982) (Plastic Tubing); Games II, supra; Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60 (1979).

The Arrow Fastener Co. was started in the 1920's by its founder, Morris Abrams, in the basement of his house. As the business grew, Mr. Abrams moved to a small factory in New York, continued to acquire staple forming machines, and began to hire employees. The T-50 staple gun was introduced in the 1950's. The current Arrow facility in Saddle Brook, New

Jersey was built sixteen years ago and consists of 250,000 square feet. The company owns thirty acres of property, on which there is an adjacent building consisting of 200,000 square feet. This building is currently leased, but is available for the continued growth of the company. The company has never borrowed money or mortgaged its property. (Findings of Fact 113, 120).

(C) The entire manufacturing process of the T-50 is carried out at Arrow's facilities in New Jersey. In addition to manufacturing staple guns and staples, Arrow builds most of its tools, dies and other equipment. The main equipment used to manufacture staple guns includes lathes, milling machines, grinders, punch presses, plating machines, heat treating furnace, spinning machine, and shrink wrapping machine. The capital investment in these machines is approximately million, plus in tools. The machinery and tools are used for all of Arrow's fastening products, but manufacture of the T-50 accounts for about 70-80% of the use. Three years ago, Arrow purchased a new plating machine at a cost in excess (C) of . In order to accommodate this machine, it was necessary to add an extension to the building. More than 50% of the plating equipment is devoted to manufacture of the T-50. (Findings of Fact 121, 123, 125, 126).

(C) Arrow has continued to modernize its manufacturing equipment, particularly its dies. By developing improved dies, Arrow has been able to improve the quality of its products, while achieving a larger output and reduction in labor costs. With its modern dies, Arrow is able to manufacture parts per day. There are more than one of each die on

hand to allow continuous operation in the event of repairs or breakdowns. At this rate of manufacture, Arrow can produce a year's supply of the components for the T-50 in about months. (Finding of Fact 126).

The assembly of the T-50 is semi-automatic. Many procedures are done by hand to ensure uniformly high quality. Arrow performs all of its own heat treating, mainly for quality control purposes. Certain parts are individually racked by hand for heat treating to ensure uniform exposure, and therefore, uniform hardness of the treated part. This meticulous racking procedure reduces wear and tear on the product. (Finding of Fact 124).

(C) Arrow carries out rigid quality control inspections at every stage of the manufacturing process. In the stamping and punch press department, inspectors examine the parts being stamped by the dies to ensure that they are within established tolerances. These tolerances are held to of an inch. On the assembly line, there are about fifty employees who only inspect parts. For every moving and wearing part, e.g., trigger, plunger, staple channel, there is 100% inspection of every staple gun to ensure proper assembly and function. Every product manufactured by Arrow is loaded with staples, fired and operated to ensure that the mechanism operates properly. In addition, every staple gun is hand polished and inspected for nicks and scratches before packaging. (Findings of Fact 130, 131).

(C) The repair department is the smallest part of Arrow's operations. There are employees responsible for repairing all Arrow products sold nationwide. Arrow also maintains a shipping department, and keeps all of its products in inventory. There is about a month inventory of raw steel on hand at all times to ensure that all orders can be shipped promptly.

Arrow has a policy of having all of its products in inventory and immediately available for shipment upon order. (Findings of Fact 132, 133).

(C) Arrow has approximately employees, of whom about are the office staff. The employees are unionized and receive vacation and health benefits, paid holidays, paid sick leave, and union pension. The pay scale is competitive. As a result of these factors, the turnover rate is low, and Arrow's employees become experienced in Arrow's operations. (Finding of Fact 134).

The wholesale price of the Arrow T-50 has increased from \$6.25 in the 1950's to \$10.80 in 1983. Mr. Abrams attributes this small increase in price to continuous modernization in machinery and procedures, including, automization and improved assembly techniques. (Finding of Fact 129).

Arrow manufactures approximately million T-50 staple gun tackers per year on one shift with and assembly lines. This capacity could be expanded with ease. (Finding of Fact 127). The T-50 has been a profitable item in Arrow's line of products. The trend of sales of the T-50 over the (C) years since its introduction has shown an increase of approximately per year. In 1980-81 there was a slight decrease in sales due to the recession in the construction industry. The T-50 has customarily been Arrow's largest selling staple gun, although historically all of its staple (C) guns have been profitable. Arrow makes approximately profit, or (C) per staple gun on its T-50, on annual sales of about million. (Finding of Fact 128).

On the basis of the foregoing, I determine that the domestic industry, as defined above, is efficiently and economically operated.

Injury

In order to prevail under Section 337, complainant must establish not only that respondents have engaged in unfair methods of competition and committed unfair acts, but also that respondents' unfair methods of competition and unfair acts have the effect or tendency to destroy or substantially injure the domestic industry. Proof of injury must be made independently of proof of an unfair act. Certain Spring Assemblies and Components Thereof, and Methods of Their Manufacture, Inv. No. 337-TA-88, at 43-44 (1981) (Spring Assemblies). Thus, complainant has the burden both of proving injury to the domestic industry, and of establishing a causal connection between the injury and the products imported by respondents. Id.

Several factors are relevant to a determination of injury to the domestic industry, including: (1) lost customers; (2) declining sales; (3) volume of imports and ratio of sales of the imported product to the domestic product; (4) underselling; (5) decreased production and profitability; and (6) price depression of the domestic product. Certain Drill Point Screws for Drywall Construction, Inv. No. 337-TA-116, at 18 (1982); Spring Assemblies, supra, at 42-49; Certain Flexible Foam Sandals, Inv. No. 337-TA-47, RD at 4 (1979); Certain Roller Units, Inv. No. 337-TA-44, at 10 (1979); Reclosable Plastic Bags, Inv. No. 337-TA-22, at 14 (1977); Convertible Game Tables, T.C. Pub. 705, at 16-17 (1974); and Lightweight Luggage, T.C. Pub. 463, at 7 (1972).

In this investigation, it is necessary to consider whether it is proper to aggregate the impact of imports by parties who have been terminated from the investigation on the basis of a settlement agreement. Immediately prior to the hearing in this investigation, Test-Rite International (Taiwan) Ltd. and Test-Rite Products Corp., together with its Taiwanese manufacturers of the accused staple gun, Upmaster and Quality Master, and many of its United States customers, entered into a settlement agreement with Arrow, thereby terminating these respondents from the investigation. See Procedural History, supra. In addition, several of the respondents who remain in this investigation have imported or purchased only Test-Rite staple guns. (Findings of Fact 104, 106-110). Finally, the record discloses several companies in the United States who were not joined as respondents in this investigation who have imported staple guns from Test-Rite. (Finding of Fact 143). The evidence demonstrates that the majority of imports of the accused staple gun tackers originated from Test-Rite.

The Commission has concluded that, depending on the facts of a given case, evidence of imports by settling respondents will be relevant to a determination of injury:

We do not intend to discourage the amicable settlement of section 337 actions. We conclude that injury from imports by parties terminated from an investigation will as a general rule be relevant to the "effect" of imported devices, when there is some indication that an "unfair act" has occurred. In addition, import competition is an economic factor relevant to our consideration of tendency to injure. For example, the presence of significant import competition may be an indication that a domestic industry is vulnerable to injury. A slight increase in unfair import competition could have a disproportionate future impact, and this circumstance could sustain a finding of tendency to injure.

Food Slicers and Components Thereof, Inv. No. 337-TA-76, at 19 (1981)

(Food Slicers). Similarly, the Court of Appeals for the Federal Circuit has held that determination of the existence of a domestic industry for purposes of Section 337 should be made at the time of the filing of the complaint, rather than at the time the Commission renders its decision. Bally/Midway Mfg. Co. v. U.S. International Trade Commission, 219 U.S.P.Q. 97 (C.A.F.C. 1983). The definition of the domestic industry in this investigation is focused on the portion of complainant's operations producing the articles protected by the trademark and which is adversely affected by the infringing imports. A determination of injury, on this theory, should be made at the same point in time as the domestic industry is defined. Thus, an assessment of injury must include imports by respondents who were importing the accused staple guns into the United States at the commencement of this investigation, or were subsequently discovered and joined, irrespective of their subsequent termination.

Substantial Injury

(a) Lost Customers

Many of the respondents in this investigation are customers of Arrow for the T-50. In about September or October 1982, several Arrow salesman became aware of the fact that a T-50 look-alike manufactured in Taiwan had entered the market. These salesmen were advised by their customers that the Taiwanese staple gun was considerably lower priced than the T-50 and because it looked exactly like the T-50, customers would not know the difference. (Findings of Fact 135, 136). Thus, there is ample evidence on this record that many of Arrow's customers have purchased a smaller volume

of T-50's during the past year, and have begun to purchase the Taiwanese staple guns. (Finding of Fact 137). For example, respondent Western Auto purchased approximately fewer Arrow T-50 staple guns between October 1982 and May 1983 than it had during the same period one year earlier. The record also shows that Western Auto purchased about staple guns from Test-Rite between October 1982 and April 1983. (Findings of Fact 104, 137). A similar pattern has occurred with several of Arrow's customers. (Finding of Fact 137).

(b) Declining Sales

The president of Arrow testified that the T-50 has historically been Arrow's leading item in volume of sales, and that the company has historically averaged about annual growth. (Abrams, Tr. 122-28). Until recently, sales of the T-50 have been the largest and have grown the most. (SX 7). However, over the past year, sales of the T-50 have declined, and the dollar value of those sales increased only slightly, compared to Arrow's other staple gun products for which volume of sales increased at about the historic rate. (Findings of Fact 138, 139). In an effort to meet the price competition from the Taiwanese tackers, Arrow has begun to promote sales of its T-55, which is competitive with the T-50, but cheaper to produce. (Abrams, Tr. 125-27). This promotion was successful, in that sales of the T-55 increased dramatically. (Id.; CX 110).

(c) Volume of Imports

Complainant estimates that Arrow claims about 85% of the market for heavy duty staple gun tackers. This estimate is based on Mr. Abrams' experience in the field and on knowledge that Arrow products are distributed in about 90% of the retail outlets which market this type of product, and that many of these outlets carry only Arrow products, or Arrow and one other competitive line, such as Swingline, Duo-Fast or Bostich. (Findings of Fact 140, 141). Annual sales of the Arrow T-50 have customarily been close to million units per year. (Findings of Fact 138, 142). However, for purposes of defining injury to the domestic industry, I conclude that Arrow had 100% of the market for heavy-duty staple gun tackers which have the appearance of the T-50.

The record indicates that more than staple gun tackers which look like the T-50 have been imported into the United States from Taiwan since about August 1982. (Finding of Fact 144). Arrow states that between October 1982 through June 1983 it sold about T-50 staple guns in the United States. (CX 110). Thus, this volume of imports represents approximately of the domestic market for heavy-duty staple guns.

(d) Underselling

The wholesale price of the Arrow T-50 is \$10.80, and the suggested retail price is \$21.60. (Finding of Fact 145). Mr. Abrams estimated that the cost to manufacture the T-50 is approximately . (Abrams, Tr. 209).

by contrast, Test-Rite sells its staple gun at wholesale prices ranging from about to . (Finding of Fact 143). Moss has imported staple guns from in Taiwan at prices ranging from about . (Findings of Fact 147, 148). At the retail level, these staple guns have been sold at full retail prices in the range of about \$14-17, and on sale at about \$9-12. (SX 4, 12, 19).

(e) Decreased Production and Profitability

(C) Arrow has the capacity to manufacture approximately million T-50 staple guns per year. Mr. Abrams testified that this current level of production requires months to manufacture the parts and uses one shift of about and assembly lines. Thus, there is immediate potential to increase the level of production to meet any increases in demand. (Finding of Fact 127).

However, sales of the T-50 over the past three years have not grown at their historic rate. During 1980-1981, the decrease in sales was caused by the general economic recession. Since that time, sales of the T-50 have not increased at the same levels as other Arrow products. (Findings of Fact 138, 139, 142). In an attempt to compete with the Taiwanese staple guns, Arrow has promoted its T-55 by selling it at near cost, for about \$7.99. (Finding of Fact 149).

(f) Price Depression

Since about October 1982, when Arrow first became aware of the importation of the accused Taiwanese staple guns, many of Arrow's salesmen have been advised by customers that they would continue to buy Arrow staple guns only if the price were lowered to meet the price of the Taiwanese tackers. (Finding of Fact 146). The wholesale price of the imported staple guns is lower than Arrow's cost to produce the T-50.

On the basis of the foregoing factors, I determine that the operations of complainant devoted to the manufacture, distribution and sale of the T-50 have been substantially injured by importation of the accused Taiwanese staple gun tackers. There is insufficient evidence on this record with respect to Arrow's sales of the T-55 or the JT-21 or with respect to importation of staple guns which have the appearance of the T-55 or the JT-21 to make any finding of injury. Thus, I determine that complainant has not established the existence of any injury to that portion of the domestic industry devoted to the manufacture, distribution and sale of the T-55 or the JT-21.

Tendency to Substantially Injure

The assessment of a tendency to injure the domestic industry may be conducted in light of the following:

[A] showing of tendency to injure, while not requiring proof of past or present injury, requires a clear showing of relevant conditions or circumstances from which probable or likely injury in the future can reasonably be inferred.

Certain Combination Locks, Inv. No. 337-TA-45, RD at 24 (1979). Commission precedent indicates that foreign cost advantage and production capacity demonstrate a potential injury, Reclosable Plastic Bags, supra, and further, that a tendency to injure may exist in a strong and growing industry where the imports have a demonstrated ability to undersell complainant's products. Panty Hose, Tariff Commission Pub. No. 471 (1972). As stated in the legislative history of Section 337, "[w]here unfair methods and acts have resulted in conceivable loss of sales, a tendency to substantially injure such industry has been established." Trade Reform Act of 1973, Report of the House Comm. on Ways and Means, H. Rep. No. 93-571, 93d Cong., 1st Sess., at 78 (1973), citing In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). A tendency to substantially injure may also be found where respondents have substantial capacity to manufacture and export, together with the intention to export and undersell the domestic product, resulting in the inability of complainant to compete effectively. Plastic Tubing, supra.

Although the largest volume of imports of the accused staple guns originated from Test-Rite, who entered into a settlement agreement with Arrow, there is ample

evidence on this record that there are other sources in Taiwan for infringing staple guns. Beginning in early 1983, there is evidence of imports from Taiwanese trading companies, such as Buffalo Tool, Western Universal, Andrews International, X-Pole and Yung Shuo. (Findings of Fact 103, 111, 112, 144). It is not clear on this record who is manufacturing these staple guns, but it appears that there is more than one manufacturer, and there are several trading companies which export hand tools, including the accused staple gun tackers. (Findings of Fact 150, 151; Abrams, Tr. 182-87; CPX 35, 42, 50, 53).

In May 1983, Arrow received a letter from Edmund Lee & Co. Ltd. in Taiwan, offering to make Arrow the exclusive distributor of a staple gun tacker substantially similar to the T-50. Mr. Lee offered to sell these staple guns at a unit price of \$4.40 and indicated that his capacity for production would be about 40,000-50,000 pieces per month. (Finding of Fact 152).

One of Arrow's customers, K-Mart, recently advised a salesman for Arrow that it had received an offer to purchase a Taiwanese manufactured copy of the T-50 at about \$3.90 per unit. (Finding of Fact 153). The buyer for K-Mart did not disclose the identity of the manufacturer or importer.

It appears from this record that respondents other than Test-Rite and its customers have imported in excess of infringing staple guns

between January and June 1983. (Finding of Fact 144). In view of the proliferation of export companies trading this product, it is apparent that there is more than one manufacturer in Taiwan, and that the capacity and intent to export are significant. The cost of entering the business is relatively low, and the quality of the staple guns manufactured in Taiwan is low. (Abrams, Tr. 182-86; CX 45, 156, 158, 160). As a consequence of the low quality of these imported tackers, several customers have mistaken them for Arrow T-50's and have returned them to Arrow for repairs. (Finding of Fact 94). The low quality of the imported staple guns also has the tendency to injure Arrow's long established reputation and good will in the domestic market. (Finding of Fact 154).

Accordingly, I determine that complainant has met its burden of establishing a tendency to substantially injure the domestic industry.

FINDINGS OF FACT

The Administrative Law Judge adopts the following Findings of Fact to the extent they are consistent with this opinion.

Jurisdiction

1. Service of the complaint and notice of investigation was perfected on respondents Fred Meyer, Inc., Ranch Wholesale Supply, Inc., Stop & Shop Cos. Inc., Western Auto Supply Inc., and Quinn Products, Inc. (ALJX 1).
2. Responses to the complaint and notice of investigation were filed by respondents Central Hardware Co., L. G. Distributors, Inc., Meijer, Inc., Stop & Shop Cos., Inc., Western Auto Supply, Inc., and Tab Merchandise Corp. (Responses to complaint by Central Hardware Co., L.G. Distributors, Inc., Meijer, Inc., and Western Auto Supply Inc., filed March 15, 1983; response to complaint by Stop & Shop Cos., Inc., filed March 10, 1983; response to complaint by Tab Merchandise Corp., filed July 11, 1983).
3. Respondent Moss Manufacturing, Inc. entered an appearance through counsel on June 29, 1983. (Notice of Appearance of June 29, 1983 by Robert S. Swecker, Burns, Doane, Swecker & Mathis).
4. The Commission's record in this investigation indicates that no return receipt has been received with respect to service by mail of the complaint and notice of investigation upon foreign respondent Taiwan Royal United International. (ALJX 1, at 2).

Parties

5. Complainant Arrow Fastener Co., Inc. (Arrow) is a New Jersey corporation having its principal place of business at 271 Mayhill Street, Saddle Brook, New Jersey 07662. Arrow is engaged in the manufacture, distribution, and sale of stapling and fastening products, including the Arrow T-50 heavy-duty staple gun tacker in issue. (Abrams, Tr. 85-89).
6. Respondent Central Hardware Co. is a Missouri corporation having its principal place of business in Bridgeton, Missouri. Central Hardware Co. is a subsidiary of Interco, Inc. (SX 5).
7. Respondent L. G. Cook Distributor, Inc. is a Michigan corporation having its principal place of business at 1575 Muskegon, N.W., Grand Rapids, Michigan 49501. (SX 19).
8. Respondent Fred Meyer, Inc. is an Oregon corporation having its principal place of business at 3800 S.E. 22nd, Portland, Oregon 97202. (SX 11).
9. Respondent Meijer, Inc. is a Michigan corporation having its principal place of business at 2727 Walker, N.W., Grand Rapids, Michigan 49504. (SX 21).
10. Respondent Ranch Wholesale Supply, Inc., d/b/a Longmont Big R is alleged to be a Colorado corporation having its principal place of business at 1515 Main Street, Longmont, Colorado 80501. (Complaint, ¶7(q)).

11. Respondent Stop & Shop Cos., Inc. is a Massachusetts corporation, alleged to have its principal place of business at 393 D Street, Boston, Massachusetts 02110. (SX 12; Complaint, ¶ 7(r)).
12. Respondent Taiwan Royal United International is alleged to be a foreign company having its principal place of business at 21-1 Ching Cheng Street, Taipei, Taiwan. (Complaint, ¶ 7(d)).
13. Respondent Western Auto Supply, Inc. is a Delaware corporation, having its principal place of business at 2107 Grand Avenue, Kansas City, Missouri 65108. (SX 15).
14. Respondent Moss Manufacturing, Inc. is alleged to be a Florida corporation having a principal place of business at 7600 N.W. 69th Avenue, Miami, Florida 33152 and a registered agent for service of process, Roger J. Schindler, Esq., 1492 S. Miami Avenue, Suite 101, Miami, Florida 33130. (Motion Docket No. 137-3).
15. Respondent Quinn Products, Inc. is alleged to be an Illinois corporation d/b/a J & C Products, Inc. and having a principal place of business at 1695 Elmhurst Road, Elk Grove Village, Illinois and a registered agent for service of process, John P. Kelley, 1535 Schaumburg Road, Schaumburg, Illinois. (Motion Docket No. 137-3).
16. Respondent Tab Merchandise Corp. is alleged to be a Missouri corporation having a place of business and registered agent for service of process, Jay M. Reichman, 11-11 North Broadway, St. Louis, Missouri. (Motion Docket No. 137-3).

Product in Issue

17. The subject of this investigation is a heavy-duty staple gun tacker used for general purposes, including tacking insulation, upholstery, roofing, fencing and wiring. A heavy-duty staple gun has the power to drive a 9/16 inch heavy wire staple flush into wood. This product is primarily sold to home owners, do-it-yourselfers and small contractors, and is distributed to consumers through retail outlets, such as hardware stores, discount stores, home center operations, building materials centers, lumber yards and roofing suppliers. (Abrams, Tr. 87-90).
18. Arrow manufactures a line of staple gun tackers, including the T-50, T-55, HT-50, T-25, T-18, T-75 and T-37. The T-25, T-18, T-75 and T-37 are specialty tackers, used primarily for tacking wires, and are primarily sold to specialty trades. (Abrams, Tr. 88-89; CPX 1-4, 57-60).
19. The Arrow T-50 is a general purpose tacker purchased predominantly by home-owners and do-it-yourselfers. The T-50 staple gun tacker has been sold by Arrow since 1955 to wholesalers, distributors and retailers and is the largest selling and most popular staple gun tacker of Arrow's line of products. (Abrams, Tr. 87-90, 133, 162; CPX 1).
20. The imported staple guns of similar appearance to the Arrow T-50 are manufactured in Taiwan and imported into and sold in the United States under various names, including Test-Rite, Moss, Alltrade, Central Hardware and Buffalo. Many of the imported staple guns are distributed without brand names. (Abrams, Tr. 265-69; CPX 28, 30, 32, 37, 38, 39, 41, 42, 43, 52, 53).

Common Law Trademark

21. The Arrow T-50 heavy-duty staple gun was designed by the founder of the Arrow Fastener Co., Morris Abrams. The appearance of the T-50 has remained unchanged since the late 1950's. (Abrams, Tr. 81, 151, 157).
22. There are no expired or unexpired design patents for the Arrow T-50. Morris Abrams did secure a utility patent for the internal mechanism of the T-50. (Abrams, Tr. 157).
- (C) 23. Since the 1950's, the T-50 has been advertised and sold under the same mark. Arrow has sold approximately million T-50 heavy-duty staple gun tackers during that time. (Abrams, Tr. 93; Sigler, CX 176, at 1-2).
24. Several domestic companies manufacture heavy-duty staple guns competitive with the T-50, including Swingline, Bostich, Duo-Fast, Hansen, Parker, and Craftsman. (Abrams, Tr. 136; CPX 7, 8, 10, 13, 23).
25. Several foreign manufactured heavy-duty staple guns that are competitive with the T-50, but do not have the same appearance, are sold in the United States, including Rapid, Esco, Rexal from England, Roca Graf, from France and Max Industry and Tachikawa from Japan. (Abrams, Tr. 136-37, 141; CPX 11, 15, 19).

Functionality

26. The packaging and advertising of the Arrow T-50 generally promote the superiority of the T-50, but do not specifically claim that

the design or utility of the T-50 is superior to other designs.

(Abrams, Tr. 149; CPX 2-4; CX 6-22).

27. In advertising the T-50, certain features are promoted, such as the "lasting chrome finish," "all steel construction," "patented jam-proof mechanism", and "visual refill window." (SX 6, at 2, 3; CX 2-30).
28. The shape of the handle, front cover, and finger hole of the Arrow T-50 can be made less expensively and without changing the operation of the gun. (Abrams, Tr. 150-51, 154-55).
29. U.S. Letters Patent No. 2,671,215, ('215 patent) issued March 9, 1954 is a utility patent covering the mechanism of the T-50. The '215 patent claims that the front cover of the T-50 supports the undersides of the wings of the bottom stops. In addition, the patent claims that the inclined top edge below the handle of the T-50 is required to make contact with the shock absorber attached to the handle. (SX 6, at 2-3).
30. Although the handle of the T-50 serves to operate the gun, its specific shape represents the designer's choice, as does the shape of the front cover and the main body. (Abrams, Tr. 154-55).
31. The purpose or operation of the internal mechanism of the gun would not be affected by use of a different shell or skin. (Abrams, Tr. 149).
32. There are several competitive heavy-duty staple guns which are shaped differently than the T-50. (Abrams, Tr. 140-43, 148; CPX 7-11, 14-16, 18-21, 23-27; CX 47-49).

Distinctiveness

33. The major elements of the T-50 which contribute to its overall appearance and design include: (1) the upswept curvature of the handle in the direction of its length, the curvature of the handle in cross-section, and the inclined shape of the front end; (2) the overall shape of the front cover, including the shape of the front boss and the arcuate, wrap-around side edges enclosing the side holes; (3) the shape of the main housing, including the inclined top edge below the handle, the size and shape of the hand grip slot, and ARROW embossments on the sides of the base; and (4) the highly polished chrome finish of the product. (Abrams, Tr. 153-54; SX 6, at 1-2).
34. There are many alternative designs possible for various features of the staple gun. The handle of a staple gun could be longer or straighter, the front cover could be straight, rather than arched, and any of the curved features could have been made straight. (Abrams, Tr. 154-57; Sigler, CX 176, at 2).
35. The shape of the T-50 handle does not affect the operation of the staple gun, the cross-section and inclined front end have no effect on the operation of the gun, and the shape of the hand grip does not accomodate any of the internal mechanism, nor does it affect the operation of the gun. (Abrams, Tr. 154-57; SX 6, at 6).
36. It is more expensive to manufacture a staple gun having curves, angles and arcs. It would be less expensive to make each one of these features straight. (Abrams, Tr. 156).

37. A heavy duty staple gun tacker is generally purchased by the end user on a single unit basis. The average customer of a staple gun tacker will purchase one unit for his own use, which can be expected to have an indefinite lifetime. (Abrams, Tr. 134-35).
38. The T-50 staple gun is designed to last forever. Very few of the parts wear out, and the staple gun is designed to be easily repaired. (Abrams, Tr. 135-36).
39. The wholesale price of the Arrow T-50 is \$10.80. Although the suggested retail price of the T-50 is \$21.60, it generally sells for about \$17-18.00. (Abrams, Tr. 146-47).

Secondary Meaning

40. Dr. Myron Helfgott, a marketing, advertising and research consultant was hired to investigate the degree to which consumers could identify the source of Arrow's T-50 staple gun and the degree to which staple gun tackers of similar design might be confused with Arrow's product as to its source. (CX 172, at 6; CX 219).
41. Dr. Helfgott had never done work in the staple gun industry before this investigation. He has subsequently acquired knowledge of the product and become familiar with related trade surveys. (Helfgott, Tr. 354-55, 391; CX 69; Sigler, CX 176, at 11-13).
42. Dr. Helfgott included in his survey the universe of males who own, use or are likely to buy heavy duty staple guns. (Helfgott, Tr. 349; CX 219 at 2).
43. Dr. Helfgott independently established that the survey sites should be high traffic sites which would have enough people entering the stores to obtain a representative number of respondents. He requested

- that sites be found in diverse geographical areas and that Arrow obtain permission at the sites to conduct the survey. (Helfgott, Tr. 352-54).
44. It was determined that for statistical analysis, some 200 interviewees among diverse geographical areas would be needed to conduct the survey. As such, the relevant universe would be sampled from populations of the east, midwest and west. (Helfgott, Tr. 397-403; Helfgott, CX 172, pp. 7-8).
45. Dr. Helfgott determined that as a criteria the sites should have a typical sales pattern and since Arrow is sold in nine out of ten of these types of stores, the sites should carry Arrow and at least one competitive product. A field of competitive products was present at each site at the time of the survey. (CX 323, 329).
46. Dr. Helfgott's criteria for survey sites were conveyed to Mr. Abrams who asked Arrow salesmen in the various geographic areas to obtain permission from stores fitting these criteria to conduct a survey. (Abrams, Tr. 195).
47. The salesmen did not know what the survey was intended to prove, did not know what the questions were to be, or what was to be shown to respondents. (Abrams, Tr. 195; Oaks, Tr. 292-94; Salo, Tr. 454-55).
48. Arrow's salesmen only directed Dr. Helfgott to specific stores. (Helfgott, Tr. 371; Oaks, Tr. 299-300; Salo, Tr. 461).
49. In New Jersey, four sites were provided to Dr. Helfgott and he selected one at random. (Abrams, Tr. 95).

50. In the Chicago area, Dr. Helfgott was given one name, the fourth store contacted by the Arrow salesman. (Abrams, Tr. 198; Oaks, Tr. 299).
51. The three sites chosen were large, suburban home centers, because these places are where large number of people in the relevant market would be expected to congregate. (Helfgott, Tr. 352-54).
52. Dr. Helfgott interviewed a total of 633 respondents: San Diego (225), Rockford (208), and Tom's River (200). After excluding those who did not own or use a staple gun, the total sample included 526 respondents.
53. Both Dr. Helfgott and Dr. Sorensen testified that the relevant universe and site selection technique used is an acceptable procedure for intercept surveys. Such the sites are selected on the basis of judgments as to the relevant market rather than on sheer probability. The prime consideration was the random selection of the interviewees rather than the sites themselves. (Helfgott, CX 172, at 6; Helfgott, Tr. 352-54, 358, 371-72, 418-19, 428-29; Sorenson, CX 330, at 8; Sorenson, Tr. 538-41, 556-59).
54. In site selection, the client frequently selects the store or assists in obtaining permission from a site. Market research firms give the description of what is wanted and the client selects stores consistent with that request. (Helfgott, Tr. 418-19; Sorenson, CX 330, at 8, Sorenson, Tr. 548, 553).
55. Dr. Helfgott designed the survey and tabulated the results. Depth Research Laboratories assisted Dr. Helfgott in executing the survey. (Helfgott, Tr. 359; CX 219, at 4).

56. Dr. Helfgott personally briefed the interviewers with respect to their samples, interviews and instructions. The interviewers did not know for whom they were working, or the purposes of the interview. (Helfgott, CX 172, at 8-9).
57. Survey respondents were asked screening questions near the entrance to each store. Those interviewees who did not use or who were unlikely to use or buy hand tools were eliminated. (Helfgott, CX 172, at 10; CPX 62).
58. Interviewees were shown four staple gun tackers from Arrow, Swingline, Bostitch and Duo-Fast respectively. All were presented to respondents with the brand identification and any other name identification masked. (Helfgott, CX 172, at 11).
59. The unaided responses to Question 5 indicate that 14% of the respondents in San Diego properly identified the T-50; 30% in Rockford and 40% in Tom's River. When the aided Question 7 was asked, using the Arrow name, these figures rose to 32%, 52% and 58% respectively. (Helfgott, CX 172, at 11; CX 219, 328).
60. Interviewees were then told the name ARROW, asked if they had heard of the ARROW heavy-duty staple gun, told that one of the four guns displayed was an ARROW gun, then asked if they could identify the ARROW gun. (CX 219, at 4).
61. While the surveys conducted are not probability samples and cannot provide a precise national average of recognition for the T-50, Dr. Helfgott believed that they provide a range of responses which would

be fairly typical of America as a whole for similar markets. (Helfgott, Tr. 406-08).

62. A probability study is very expensive, and therefore the majority of work done in market research is on a quota sample basis. The extra precision obtained in a probability study is very often not necessary. (Helfgott, Tr. 355-57).
63. Arrow chose stores with a certain density of people in the area for efficiency in interviewing, but according to the specifications and directions of Dr. Helfgott. (Helfgott, Tr. 397-98).
64. Dr. Helfgott was not aware, when he designed the survey, of the type of outlets in which Arrow staple guns are sold. (Helfgott, Tr. 396-97).
65. Although Arrow's advertising is done through specific stores and focuses on the suburbs, Dr. Helfgott did not know where Arrow advertising was directed when he designed the survey. (Helfgott, Tr. 394; Abrams, Tr. 252).
66. The number of Arrow owners questioned in the survey is consistent with what one would expect in light of Arrow's extensive sales, with the results slightly higher in New Jersey and lower in San Diego. (Helfgott, Tr. 363-64).
67. Arrow owners identify the ARROW gun at a far greater rate than owners of other guns. Thus, only 18% of Swingline owners properly identified their gun; 29% for Bostitch, 20% for Duo-Fast; and 79% for Arrow. (Helfgott, Tr. 386-87).

68. The Arrow T-50 has been sold in the United States with its current design configuration since the 1950's. (Abrams, Tr. 85, 113-14).
- (C) 69. Since the early 1950's, Arrow has sold approximately million T-50 staple guns, many of which are likely still to be in use. (Abrams, Tr. 93; Helfgott, Tr. 435).
70. Arrow's sales of the T-50 for the past several years have averaged about units per year. (CX 36).
- (C) 71. Sales of the Arrow T-50 have grown consistently at a rate of per year, for the past thirty years, only leveling off in the recent recession. (Abrams, Tr. 121-23).
72. The Arrow T-50 is sold in more than 85% of the stores in this country that sell this type of product. (Abrams, Tr. 121-23, 142, 258; Sigler, CX 176, at 11; CX 69-80; CX 326).
- (C) 73. Since 1975, Arrow has spent approximately million in advertising for the Arrow T-50. (CX 35).
- (C) 74. Of the almost spent in Arrow advertising during 1982, almost 80% was for the T-50. (Abrams, Tr. 158, 237).
75. Arrow's advertising is directed to the home owner, do-it-yourselfer, and contractors, appearing principally in such publications as Better Homes & Gardens, House Beautiful, Family Handyman, Popular Mechanics, Home Improvement Time, and trade magazines and newspapers. (CX 5; Sigler, CX 176, at 5).

76. Arrow also advertises its T-50 product to the consumer market through co-op advertising. The customer receives an advertising credit and Arrow bears a portion of the advertising expense. (Sigler, CX 176, p. 5).
77. Arrow has used its pictorial on the packaging of its T-50 staple guns, as well as in its advertising, warranty slips and other product literature continuously since 1958. (Abrams, Tr. 279; Sigler, CX 176, at 1; SX 6, at 16).
78. Arrow advertising emphasizes the visual elements of the T-50 rather than verbal descriptions thereof. The product is sold in see-thru packaging. The object of the plan was to create an equivalence in the mind of the public between the appearance of the gun and the name Arrow so that when the consumer sees one, he thinks of the other. (Abrams, Tr. 161-163; Sigler, Tr. 44-46; CX 176, at 3).
79. The Arrow word mark is registered on the principal register with the U.S. Patent and Trademark Office. (CX 311).
80. The Arrow word mark and logo is consistently used in Arrow's advertisements and on the packaging of the T-50. This logo also appears in advertising and packages which display Arrow's pictorial. (Abrams, Tr. 279; CX 176, at 3).
81. In developing the pictorial of the hand held Arrow T-50, in an action mode with a stream of staples shooting from it, Arrow intended this pictorial to be the dominant image appearing in its advertising and on its packaging. (Abrams, Tr. 279-80, 282; Sigler, Tr. 44-45).

82. The Arrow word mark has a high degree of consumer awareness.
(Sigler, Tr. 43-45; CX 78-80; Sigler, CX 176, at 3).
83. In 1982 Test-Rite International and Test-Rite Products introduced a heavy-duty staple gun into the United States market having a similar appearance to the Arrow T-50. This imported staple gun was admitted to be virtually an exact copy of the Arrow T-50. (CX 247, 248; Speizer, CX 282, at 39, 40, 51, 175-78; CPX 41, 46).
84. The imported staple guns are sold in the same markets and channels of trade, and to the same types of customers as those in and to which Arrow sells its T-50 staple gun. (Abrams, Tr. 168; CX 110, 324; Oaks, Tr. 308-12).

Likelihood of Confusion

85. The appearance of Arrow's and respondents' staple guns is virtually identical. There are differences in packaging, but the gun is prominently visible in both Arrow's and respondents' packages.
(CPX 1, 28, 30, 32, 38, 39a, 39b, 40, 42, 43, 53).
86. The base of the Arrow T-50 is embossed with the following inscription:
"Model T-50, Made in U.S.A. by Arrow Fastener Co., Inc., Saddle Brook, N.J. (CPX 1).
87. On one model of the Test-Rite staple gun which has the appearance of the T-50, the base is embossed with the following markings: "Test-Rite, Model 008436, Made in Taiwan." The other side of the base is inscribed with the instructions "Use Only Test-Rite or Arrow T-50 Staples."
(CPX 36, 38, 41, 46).

88. About two hundred subjects in San Diego, California and two hundred in Rockford, Illinois were shown: (a) Arrow's T-50, both in and out of its packaging with all indicia of origin covered, and (b) an accused staple gun tacker sold by respondent Test-Rite Products, also in or out of packaging with all indicia of origin covered. Of those interviewed, about twenty percent (20%) correctly identified the Arrow T-50, 20% mistakenly identified the Test-Rite product as an Arrow T-50 staple gun, and fifty-six percent (56%) could not distinguish between the two products. (Helfgott, CX 172, at 11, 14).
89. Some retail stores display the Arrow T-50 next to the accused imported guns. (Abrams, Tr. 171-172, CX 82, 135, 233).
90. In the stores, the Arrow heavy-duty staple gun tackers and each of the accused guns are displayed in see-thru packaging and sometimes advertised without their packaging. (CX 288, at 3; CPX 1-41).
91. Test-Rite International of Taiwan used the Arrow T-50 as a prototype for designing its staple gun. (Speizer, CX 282, at 39-40).
- 92.. The following Arrow customers have sold both Arrow T-50 staple guns and allegedly infringing guns: Central Hardware, Western Auto, Walmart, L.G. Cook, Meijer's Thrifty Acres, Bradlees (Stop & Shop), Linsley Lumber, and Fred Meyer. (Abrams, Tr. 168).
93. The Arrow T-50 suggested retail price is \$21.60. Respondents' guns sell at various retail prices below \$15.00. (SX 5, 10, 11, 24, 27).

94. Many customers of Arrow have returned broken imported staple guns to Arrow for repair, believing them to be Arrow T-50 staple guns. These customers include Beaver Lumber, L.G. Cook and Western Auto. Western Auto returned a Test-Rite staple gun to Arrow in an Arrow T-50 box. (Abrams, Tr. 189-91; CX 102, 230-31; CPX 36, 45-47, 54).

Passing Off

95. Respondent Stop & Shop has imported and sold Test-Rite heavy-duty staple guns having an appearance identical to the Arrow T-50. The staple gun itself bears no marks, except for a removable sticker stating "Made in Taiwan." This staple gun is packaged in a see-through, all plastic blister pack. The label of the package states in large letters "Heavy Duty Stapler, Tacker, Nailer." Alongside this marking, in slightly smaller letters, the label states, "Uses All 6 Arrow T-50 Staple Sizes." In smaller lettering on the lower portion of the label, there is a marking "Distributed by Test-Rite Products Corp., Clifton, N.J. ... Made in Taiwan." (CX 124-126; CPX 37).

96. Alltrade has imported and sold staple guns manufactured in Taiwan and exported by Test-Rite. The staple gun distributed by Alltrade bears no markings other than a removable sticker which indicates "Made in Taiwan." This staple gun is packaged in a see-through, plastic blister pack. The cardboard label on the package states in large red and black lettering, "Heavy Duty Stapler, Tacker, Nailer." To the left of this marking is a large, red letter "A" in a green background with the name Alltrade in bold, black letters underneath. The label also bears the marking, in slightly

smaller letters, "Uses All 6 Arrow T-50 staple sizes." In small letters along the lower portion of the label is the indication "Distributed by Alltrade, Inc., Montebello, CA ... Made in Taiwan." (CPX 30).

97. Central Hardware has imported staple guns having the appearance of the T-50 from Test-Rite. This staple gun has no markings other than a removable sticker indicating "Made in Taiwan." The staple gun is packaged in a see-through, plastic blister pack. The cardboard label on the package states in large letters: "Heavy Duty Stapler, Tacker, Nailer." Above this marking in white letters on an orange background is the name Central Hardware. The label also states "Uses All 6 Arrow T-50 staple sizes." In small lettering on the label is the marking, "Distributed by Central Hardware Co., Bridgeton, Mo. ... Made in Taiwan." (CX 187; CPX 42).
98. Central Hardware has imported and sold heavy-duty staple gun tackers having the appearance of the Arrow T-50 from Western Universal Mercantile Ltd. The staple gun is embossed with the marking "Made in Taiwan," and has a black and white sticker affixed to it which states "Heavy Duty." The staple gun is packaged in a see-through, all plastic blister pack. The front of the cardboard label on the package states "Heavy Duty Staple Gun." The back of the label pictures instructions similar to those used by Arrow. Beneath the pictured instructions is the legend "Can Use Replacements Arrow T-50 Staples," followed by a listing of the sizes. Immediately below this legend is the marking "Western Universal Mercantile Ltd., N.Y.C., N.Y. ... Made in Taiwan." (CX 188; CPX 43).

marking "Western Universal Mercantile Ltd., N.Y.C., N.Y. ...
Made in Taiwan." (CX188; CPX 43).

(C) 99. Respondent Moss has imported and sold staple guns having the appearance of the Arrow T-50 from _____ in Taiwan. The staple gun is embossed with the marking "Made in Taiwan." The staple gun is packaged in a see-through, plastic blister pack with a black, cardboard backing. On the upper left hand corner of this backing, in large yellow letters are the words, "World Famous Moss Heavy Duty Staple Gun." Visible through the hand grip is the marking "Uses All Arrow T-50 Staples," with a list of sizes. On the bottom of the package there is a stylized, large letter "M" in yellow, alongside the marking "Moss Mfg. Inc.," with address and telephone number, and the indication "Made in Taiwan." (CX 112, 113, 116, 122; CPX 34).

100. Quinn has imported and sold staple gun tackers having the appearance of the Arrow T-50, which it obtained from Yung Shuo in Taiwan. The base of the staple gun is embossed with the marking "Made in Taiwan," and a white and black sticker stating "Heavy Duty" is placed on the main frame of the staple gun. The staple gun is packed in a see-through plastic blister pack with a cardboard backing. Along the top of the package is the marking "Heavy-Duty Staple Gun Tacker" in large white letters against a blue background. Visible through the handle grip is the indication "Uses 6 No. Arow [sic] T-50 Staples [sic] Sizes," with a list of the sizes. In small letters on the bottom right corner of the package is the legend "Made in Taiwan." The name of the manufacturer or distributor does not appear anywhere

on the package. The president of Quinn stated at his deposition that retailers recognize that the Quinn staple gun looks exactly like the T-50, and this is a selling factor. (Curcio, CX 136, at 32-33; CX 137, 138; CPX 39b).

101. In advertising the Test-Rite staple gun, Fred Meyer has used a line drawing of the T-50 obtained from Arrow. (CX 288, Req. Nos. 5-6).

102. In advertising the Test-Rite staple gun, Meijer has used a line drawing of the T-50 as well as the Arrow pictorial. The advertisement makes no reference to Arrow or to Test-Rite. (CX 81, 293, 294).

Importation and Sale

103. During _____, respondent Moss Manufacturing purchased from _____ in Taiwan, and imported into the United States, at least _____ staple gun tackers at a cost of _____. (CX 112, 113, 116, 122).

(C) 104. Between October 1982 and May 1983, respondent Western Auto Supply, Inc. purchased from Test-Rite International (Taiwan) Ltd. in Taiwan, and imported into the United States, at least _____ staple gun tackers at a cost of _____. (CX 154, 156, 157, 158).

(C) 105. Between February 1982 and March 1983, respondent Central Hardware Co. purchased from Test-Rite International (Taiwan) Ltd. in Taiwan and from Western Universal (Taiwan) Ltd. in Taiwan and imported into the United States at least _____ staple gun tackers at a cost of _____. (CX 187, 188, 310).

106. In July 1982, respondent Fred Meyer, Inc. purchased from Test-Rite International (Taiwan) Ltd. in Taiwan, and imported into the United States, staple gun tackers at a cost of . (CX 208).
- (C) 107. Between August 1982 and February 1983 respondent L.G. Cook Distributors purchased from Test-Rite International (Taiwan) Ltd. in Taiwan, and imported into the United States at least staple gun tackers at a cost of . (CX 222, 226, 227, 281).
- (C) 108. Between August 1982 and February 1983, respondent Ranch Wholesale Supply, Inc., d/b/a Longmont Big R purchased staple gun tackers from Alltrade, Inc. at a cost of . (CX 211, 212).
- (C) 109. In October 1982, respondent Meijer, Inc. purchased from respondent L.G. Cook Distributors staple gun tackers at a cost of . (CX 224, 229).
- (C) 110. Between May and September 1982, respondent Stop & Shop Cos., Inc. purchased from Test-Rite International (Taiwan) Ltd. in Taiwan and imported into the United States approximately staple gun tackers. (CX 124, 125, 126).
- (C) 111. Between November 1982 and March 1983, respondent Quinn Products, Inc. purchased from Yung Shuo in Taiwan and imported into the United States staple gun tackers at a cost of . (CX 137, 138).
- (C) 112. Since February 1983, respondent Tab Merchandise purchased from Buffalo Tool in Taiwan and imported into the United States staple gun tackers which were sold for . As of July 1983, Tab had approximately Buffalo staple gun tackers in inventory. (Krakover, CX 315, at 9-19; CX 283-85, 327).

Domestic Industry

113. Arrow owns 30 acres of property in Saddle Brook, New Jersey and a building with 250,000 square feet in area for manufacture of Arrow's staple guns. Arrow also owns an adjacent building of 200,000 square feet which is presently under lease, but was built by Arrow to provide additional growth space. Thirty to forty percent of these facilities are devoted to manufacture of the T-50. Eighty to ninety percent of the plant is used for manufacture of products that use the T-50 staples. (Abrams, Tr. 84, 96, 105, 118).
- (C) 114. Approximately of the employees employed by Arrow are involved specifically in the manufacture of the T-50 staple gun. Most of these are unskilled assembly line workers. Approximately of the remaining employees are involved in the manufacture of staples for the T-50 staple gun. (Abrams, Tr. 105-06).
- (C) 115. Arrow has sales representative nationwide who sell only Arrow products, including the T-50 staple gun. (Abrams, Tr. 112-13).
116. The main market for the T-50 gun is the do-it-yourself home owner trade. The T-50 is sold through hardware stores, discount stores, home center operations, lumber yards, roofing suppliers, etc. It is sold mainly through wholesalers and directly to large retail outlets. (Abrams, Tr. 90).
117. Complainant's T-50 staple gun tacker has been called the "flagship" of its line and complainant has tried to establish a "family" of staple gun tackers around the image of the T-50. (Abrams, Tr. 153; CX 176, at 2-3; SX 3, at 24).

118. Several of the products Arrow manufactures share the same appearance of the T-50, including complainant's models T-18, T-25, T-37, T-75, T-55C, JT-21C and variations upon these model designations which represent these staple guns when sold in kits. (Abrams, Tr. 153; SX 27).
119. The wire tackers that Arrow manufactures, model numbers T-18, T-25, T-37 and T-75, are a specialized professional or commercial line directed primarily to artisans. These guns are sold primarily to telephone companies, cable companies and alarm companies. These guns are marketed by Arrow differently and sold in significantly smaller quantities than complainant's general purpose guns directed to the general consumer market, such as the T-50, T-55C, and the JT-21C. (Abrams, Tr. 88-89, 242; SX 3, at 18).
120. Complainant Arrow is a family-owned company that started as a small home, one-room shop operation in 1929. The New Jersey facility was bought without borrowed money and has no mortgages. (Abrams, Tr. 81-84).
121. Arrow assembles all its T-50 staple gun tackers and manufactures almost all component parts for the product at its Saddle Brook, New Jersey plant. Arrow also performs all design, engineering research and development work at the plant. (Abrams, Tr. 93-106; CPX 6).
122. Arrow uses automated equipment and assembly-line procedures. (Abrams, Tr. 93-106; CPX 6).

- (C) 123. Arrow has invested approximately million in capital equipment, 80 percent of which is used for manufacture of the T-50. The value of its land and improvements is over million. (Abrams, Tr. 108).
124. Arrow makes use of modern equipment and techniques for its die-making, production, assembly, heat treating and quality control operations. In the production of its T-50 gun, Arrow heat treats each part individually for quality control. Individual heat treatment was commenced only after commercial methods were found inadequate. The individual heat treating is much more expensive than placing all in one basket for the furnace. (Abrams, Tr. 96-110).
- (C) 125. Arrow builds virtually all its own tools, dies, jigs, fixtures and much of its own equipment. That equipment includes lathes, milling machines, and grinders. Arrow employs approximately die makers working full time and another or machinists. (Abrams, Tr. 96-97).
- (C) 126. Arrow has recently introduced new dies costing over a piece to improve its efficiency. A new plating machine costing over and requiring a extension on the plant was also added. With its new dies, Arrow is able to manufacture parts per day. (Abrams, Tr. 96-111).
- (C) 127. Arrow has been manufacturing approximately a T-50 staple guns a year on assembly lines on one shift. Its capacity for the T-50 is virtually unlimited in that it has enough presses to go to additional shifts and could easily add more assembly tables and turn out more than the present pieces per day. (Abrams, Tr. 120-21).

128. Arrow's gross annual overall sales for all of its products are
(C) approximately million. Sales per year for the T-50 are
approximately million. Net profit on the T-50 is
percent of million. (Abrams, Tr. 129-30; CX 36, 110, 312).

129. The price of the Arrow T-50 when it was introduced in the 1950's
was \$6.25. Currently the price is \$10.80, an increase of only
slightly over 70 percent. Arrow's president, Allan Abrams,
attributes Arrow's ability to hold prices down to its capacity
to expand production through modernization and automation.
(Abrams, Tr. 131-32).

130. Arrow employs several inspectors who have been on the job for
(C) many years and are thoroughly experienced. These people inspect
the products to be stamped in the dies of the punch press depart-
ment to make sure they are within the proper tolerances. All of
Arrow's tolerances are held to within of an inch.
(Abrams, Tr. 97).

131. Arrow maintains 100 percent inspection on almost every wearing
(C) part for every critical part in the machine. There are approxi-
mately people involved on the assembly lines that do nothing
but inspect parts. Every channel is 100 percent checked with
staples and with the pusher. All the triggers and plungers are
gauged. At the end of every assembly line there is 100 percent
inspection on the finished product. (Abrams, Tr. 101, 103).

132. Arrow keeps approximately a month supply of raw steel on
(C) hand at all times to maintain its reputation for shipping on
time and not running out of goods. (Abrams, Tr. 97).

133. All of Arrow's products are kept in inventory. Everything is immediately available upon receipt of an order and the entire order is shipped within five to ten days. (Abrams, Tr. 104-105).

134. Arrow's employees are unionized. Arrow provides an employee benefit program consisting of paid vacations, health insurance, paid holidays and sick leave and a union pension plan. (Abrams, Tr. 111-12).

Injury

135. Complainant Arrow became aware in October 1982 that Taiwanese look-alikes of its T-50 staple gun were being offered for sale on the market and that importations of Taiwanese copies of its T-55C and JT-21 had started to occur. (Abrams, Tr. 123, 180; CPX 35).

136. Arrow salesmen have reported back to Arrow that accounts they have for the T-50 are highly attracted to the low price of the Taiwanese imports, even though they do not hold up as well as the T-50. These salesmen find that, unless Arrow can sell its guns at the same low prices, these accounts have switched and will continue to switch to the Taiwanese copies. (Sutter, Tr. 13; CX 84, 88).

137. Certain customers of the Arrow T-50 staple gun purchased the T-50 and Taiwanese staple guns as follows:

(C) <u>Customers</u>	<u>Oct. '81 - June '82</u>	<u>Oct '82 - June '83</u>	
	<u>Arrow T-50</u>	<u>Arrow T-50</u>	<u>Taiwanese Tacker</u>
Western Auto Supply			
Central Hardware			
L.G. Cook			
Dart Drug			
ACO			
Lebovitz Hardware			
Tab Merchandise			
84 Lumber			

(CX 110, 113, 122, 130, 132, 154, 156-158, 187, 188, 222, 226, 227, 238, 266, 281, 283, 324).

138. The history of sales of the Arrow T-50 is as follows:

(C)	<u>Year</u>	<u>Units</u>	<u>Dollar Sales</u>
	1957		
	1967		
	1977		
	1978		
	1979		
	1980		
	1981		
	1982 (11 mos.)		

(SX 7; CX 36).

139. Sales of the following Arrow products for the following periods are as follows:

(C)	<u>Oct '81 - June '82</u>	<u>Oct. '82 - June '83</u>
	T-50	
	T-55	
	JT-21	
	HT-50	

The sales figure for the T-50 staple gun in the Oct. '82 - June '83 period shows only a percent increase over the same period in the preceding year. Arrow's president feels that this figure would have been down percent if Arrow had not picked up two very large accounts during 1982.

Historically, Arrow products have enjoyed a percent growth each year.

(Abrams, Tr. 123-25; CX 110a).

140. Arrow holds about 85% of the market in heavy-duty staple gun tackers.

(Abrams, Tr. 141-14A).

141. The importation of the accused staple gun tackers by respondents has

(C) reduced Arrow's market share in the United States by over staple gun tackers from October 1982 through June 1983. This represents about of the market. Arrow's longtime competitors, Swingline, Duo-Fast and Bostitch each have less than 5-10% of the domestic market. (Abrams, Tr. 277; Finding of Fact 144).

142. Arrow sold approximately T-50's in 1978 and only in 1981. Taiwanese copies of the T-50 did not start coming into the United States until late 1982. Arrow's president, Allan Abrams, attributes the decline in 1981 to the fact that this figure is being compared both to an unusual boom period Arrow experienced in 1978-79 and to a recessionary period in 1981. (Abrams, Tr 240-41).

143. From 1982 until approximately May 1983, imports of the Test-Rite heavy-duty staple gun were as follows:

<u>Customer</u>	<u>Quantity</u>	<u>Cost</u>
Stop & Shop Cos.		
Fred Meyer		
L. G. Cook		
Western Auto		
Central Hardware		
Venture Stores		
Waverly Screw & Hardware		
Pep Boys		
Alltrade		
Handyman of California		
Dart Drug		
ACO		
Wal Mart		
TSC Industries		
Menards		
Lebowitz Hardware		
Lampert Lumber		
Chaffin, Inc.		
OTASCO		
Thurman Ind.		
Rose's Stores		
Peavy Lumber		
Glosser Bros.		
Giray Enterprises		
Gramex Corp.		
American Fuel		
AB Wholesale		
Damax Int'l		
Jewel Cos.		

TOTAL

The unit price of these staple guns ranged from about to about .
 (CX 92, 94-95, 97, 102-103, 124-27, 130-32, 153-54, 156-58, 169, 171, 187-88, 208-09 218, 222, 226-27, 232, 238, 264-65, 266-81; SX 5, 10-13, 16, 19, 20, 24).

144. Total imports from Taiwan from about June 1982 through about June 1983 of heavy-duty staple guns which have the same appearance as the Arrow T-50 are as follows:

(C)

<u>Exporter</u>	<u>Importer</u>	<u>Quantity</u>
Test-Rite International	See Finding of Fact 143	
Buffalo Tool	Moss Mfg.	
Western Universal	Tab Merchandise	
Yung Shuo	Central Hardware	
Andrews International	Quinn Products	
X-Pole	Alltrade	
	Alltrade	

(CX 102-03, 112-13, 116, 122, 136-38, 187-88).

145. The wholesale price for the T-50 is \$10.80, and \$15.90 for the staple gun in kit form. The suggested retail price is \$21.60. The Taiwanese imports are offered at retail prices as low as \$8.88 (Home Depot), and \$9.99 (Bradlees and ACO). (Abrams, Tr. 130, 207-209; CX 119, 128, 133; SX 27).

146. Most of the companies to whom Arrow has experienced a drop in its T-50 sales have asked Arrow for a price reduction of its T-50, to make it comparable in price to the imported tackers. (Abrams, Tr. 207-09; CX 83-84, 87-88, 129, 149, 152).

147. Since February 1983, copies of the T-50 have been imported by Moss

(C)

Manufacturing Inc. from . . . in Taiwan. . . .
 is a trading company involved in exportation, importation and possibly
 manufacture of the staple guns in issue and is a competitor of Test-Rite.
 . . . sells the guns in the United States that
 Moss Mfg. imports from . . . (CX 111-16, 122).

-) 148. In one of its advertisements, _____ offers the Moss staple gun at a price of _____ F.O.B. Orient, Model No. 55. Moss' unit price of these staple guns from Taiwan ranges from _____, FOB Taiwan. (CX 113, 118, 122).
149. Arrow has run specials on its T-55 staple gun, offering it virtually at cost for a price of \$7.99. Furthermore, to keep some of its accounts from buying the Taiwanese guns, Arrow has given them additional advertising money to promote the T-50 staple gun. Complainant Arrow gives no discounts to customers on the wholesale price of this T-50 staple gun. However, a _____ percent advertising allowance, or _____ cents per staple gun, is given. (Abrams, Tr. 125-27, 210, 245).
- (C) 150. The supplier of staple gun tackers to Moss also indicates a capacity to deliver container loads of 14,000 staple gun tackers at a time. (CX 320).
151. From the physical exhibits presented in evidence, it appears that there are in existence at least three different sets of dies in Taiwan, none owned by respondents, which can be used for making copies of the T-50. (Abrams, Tr. 183-86).
152. Edmund Lee & Co. Ltd., listed as an "importer, exporter, manufacturer" in a letter to Arrow offered to sell Arrow staple gun tackers similar to Arrow's T-50 at a FOB price of \$4.40 per piece. Lee states that their production capacity is in the range of 40,000 - 50,000 pieces per month. (Abrams, Tr. 187-88; CX 109; CPX 33).

153. One of Arrow's salesmen has reported that one of Arrow's largest, if not its largest, retail customers, K-Mart, has been offered a price of under \$4.00, F.O.B. Taiwan, on a Taiwanese look-alike staple gun. (Sutter, Tr. 7-12).

154. Sales of infringing imported staple gun tackers also injure the reputation and name of Arrow to the extent that other simulated staple gun tackers are inferior in quality and create dissatisfaction in the minds of the public, which dissatisfaction is then associated with complainant Arrow. (Abrams, Tr. 210-11).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this investigation. 19 U.S.C. §1337(b); In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955).
2. The Commission has personal jurisdiction over respondents Fred Meyer, Inc., Ranch Wholesale Supply, Inc., Stop & Shop Cos., Inc., Western Auto Supply, Inc., Quinn Products, Inc., Central Hardware Co., L.G. Cook Distributors, Inc., Meijer, Inc., Tab Merchandise Corp., and Moss Manufacturing, Inc. (See p. 10, supra).
3. The Commission lacks in personam and subject matter jurisdiction over respondent Taiwan Royal United International. (See pp. 10-11, supra).
4. Complainant Arrow Fastener Co., Inc. has established a common law trademark in the overall appearance of its T-50 heavy-duty staple gun tacker. (See pp. 16-51, supra).
5. The heavy-duty staple gun tackers having the appearance of the T-50 imported and/or sold by respondents Fred Meyer, Ranch Wholesale, Stop & Shop, Western Auto, Quinn, Central Hardware, L.G. Cook, Meijer, Tab and Moss infringe complainant's common law trademark rights. (Id.).
6. Common law trademark infringement is an unfair act or method of competition under 19 U.S.C. §1337(a). In re Von Clemm, supra; Games I, supra.

7. Adjudication of the alleged infringement of complainant's alleged common law trademark in its pictorial as set forth in the Notice of Investigation, has been mooted by the termination or dismissal from this investigation of respondents Test-Rite Products Corp., Test-Rite Int'l (Taiwan) Ltd., Test-Rite Automotive Ltd., Waverly Screw and Hardware, Inc., and Taiwan Royal United Int'l. (Procedural History, supra at pp. 6-7, 10-11; Opinion, Introduction, supra at pp. 15-16).
8. Respondents Fred Meyer, Ranch Wholesale, Stop & Shop, Western Auto, Central Hardware, L.G. Cook, Meijer, and Moss have not passed off their imported heavy-duty staple gun tackers as Arrow T-50 heavy-duty staple gun tackers. (See pp. 58-62, supra).
9. Respondent Quinn has passed off its imported heavy-duty staple gun tacker as an Arrow T-50 heavy-duty staple gun tacker. (See pp. 58-62, supra).
10. Passing off is an unfair act or method of competition under 19 U.S.C. §1337(a). Certain Airtight Cast-Iron Stoves, supra.
11. There is a relevant domestic industry in complainant's operations devoted to the design, manufacture, distribution, packaging, and sale of the Arrow T-50, T-55 and JT-21 staple gun tackers. (See pp. 66-69, supra).
12. The relevant domestic industry is efficiently and economically operated. (See pp. 69-72, supra).

13. The domestic industry in the T-50 is substantially injured and there exists a tendency to substantially injure this domestic industry.
(See pp. 73-82, supra).
14. No determination is made of the alleged violation of §337 by respondent Taiwan Royal United International by reason of that respondent's dismissal from this investigation for lack of jurisdiction. (See Jurisdiction, supra, at 10-11).
15. The following respondents are in violation of §337: Fred Meyer, Inc.; Ranch Wholesale Supply, Inc.; Stop & Shop Cos.; Inc., Western Auto Supply, Inc.; Central Hardware, Co.; L.G. Cook Distributors, Inc.; Meijer, Inc.; Quinn Products, Inc.; Tab Merchandise Corp.; and Moss Manufacturing, Inc.

INITIAL DETERMINATION AND ORDER

Based on the foregoing findings of fact, conclusions of law, the opinion, and the record as a whole, and having considered all of the pleadings and arguments presented orally and in briefs, as well as proposed findings of fact and conclusions of law, it is the Presiding Officer's DETERMINATION that there is a violation of Section 337 in the unauthorized importation into and sale in the United States of the accused heavy-duty staple gun tackers.

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

1. The transcript of the hearing, with appropriate corrections as may hereafter be ordered by the Presiding Officer; and further,
2. The Exhibits accepted into evidence in the course of the hearing, and the exhibit proffered by the Administrative Law Judge, as listed in the Appendix attached hereto.

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

Further it is ORDERED that:


1. In accordance with Rule 210.44(b), all material heretofore marked in camera by reason of business, financial, and marketing data found by the Presiding Officer to be cognizable as confidential business information under Rule 210.6(a) is to be given five-year in camera treatment from the date this investigation is terminated;

2. The Secretary shall serve a public version of this Initial Determination upon all parties of record and the confidential version upon all counsel of record who are signatories to the protective order issued by the Presiding Officer in this investigation;

3. Motion 137-21 is granted in part and denied in part to the extent described in this initial determination; Motion 137-23 is granted;

4. Respondent Taiwan Royal is dismissed from this investigation by reason of lack of Commission jurisdiction over this party; and further,

5. This Initial Determination shall become the determination of the Commission thirty (30) days after the service thereof, unless the Commission, within thirty (30) days after the date of filing of 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.


Judge Donald K. Duvall
Presiding Officer

Issued: November 28, 1983

APPENDIX

DOCUMENTARY EXHIBITS

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>SPONSORING WITNESS</u>
CX 1	Complainant's Exhibit Lists	
CX1a	Complainant's Revised Exhibit Lists 8/31/83	
CX1b	Complainant's Revised Exhibit Lists 9/21/83	
CX 2	<u>Home Center News</u> 2/14/83	E. Sigler
CX 3	<u>Hardware Merchandiser</u> 11/82	E. Sigler
CX 4	<u>Master Plumber & Heating Contractor</u> 10/71	E. Sigler
CX 5	List of Magazines in Which Arrow Ads Have Appeared	E. Sigler
CX 6	<u>Homeowners</u> 3/82	E. Sigler
CX 7	<u>The Family Handyman</u> 9/82	E. Sigler
CX 8	Sheet of Ad Sliks for 1951-1954	E. Sigler
CX 9	Copies of Ads for 1954-1956	E. Sigler
CX10	Copies of Ads for 1950-1952	E. Sigler
CX11	Arrow Envelope	E. Sigler
CX12	Arrow Catalog	E. Sigler
CX13	Arrow Coop Ad Program	E. Sigler
CX14	Collection of Press Clippings	E. Sigler
CX15	Sample TV Ad Storyboard	E. Sigler
CX16	Arrow Ad - <u>Look</u> 10/5/71	E. Sigler
CX17	Arrow Ad - <u>Popular Mechanics</u> 5/65	E. Sigler
CX18	Arrow Ad - <u>The Saturday Evening Post</u> 4/25/64	E. Sigler
CX19	Arrow Ad - <u>Look</u> 5//5/70	E. Sigler
CX20	Arrow Ad - <u>Look</u> 11/3/64	E. Sigler
CX21	Arrow Ad - <u>Hardware Age</u> 1/83 p. 114 and back cover	E. Sigler
CX22	Arrow Ad - <u>Northern Hardware Trade</u> 3/78	E. Sigler
CX23	Arrow Ad - <u>Science & Mechanics</u> 10/71	E. Sigler
CX24	Arrow Ad - <u>Better Homes & Gardens Remodeling Ideas</u> Winter/82	E. Sigler
CX25	Arrow Ad - <u>Better Homes & Gardens Do It Yourself</u> 1982	E. Sigler
CX26	Arrow Ad - <u>Mechanix Illustrated Plans & Projects</u> Sept. 1982	E. Sigler
CX27	Arrow Ad - <u>Mechanix Illustrated Home Improvements You Can Do</u> Oct. 1979	E. Sigler

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>SPONSORING WITNESS</u>
CX28	Arrow Ad - <u>Look</u> 5/4/65	E. Sigler
CX29	Arrow Ad - <u>Look</u> 10/5/71	E. Sigler
CX30	Arrow Ad - <u>The Saturday Evening Post</u> 4/25/64	E. Sigler
CX31	Arrow Ad. - Arrow Door Window Decal	E. Sigler
CX32	Arrow Warranty	A. Abrams
CX33	Arrow Warranty	A. Abrams
CX34	Arrow Warranty	A. Abrams
CX35C	Summary of Advertising Expenses	A. Abrams
CX36C	Sales Summaries	A. Abrams
CX37C	Profit Summaries	A. Abrams
CX38	"T-50" Part List and Drawing	A. Abrams
CX39	Arrow Price Lists 1/16/61	A. Abrams
CX40	Arrow Price Lists 1/15/66	A. Abrams
CX41	Arrow Price Lists 8/1/72	A. Abrams
CX42	Arrow Price Lists 11/15/78	A. Abrams
CX43	Arrow Price Lists 7/1/82	A. Abrams
CX44	Collection of Drawings of Other Gun Designs with Same Mechanisms	A. Abrams & E. Sigler
CX45	Arrow Test Reports	A. Abrams
CX46	Duo Fast Ad	A. Abrams
CX47	Bostitch Ad	A. Abrams
CX48	Duo Fast Ad	A. Abrams
CX49	Swingline Ad	A. Abrams
CX50	Swingline Ad	A. Abrams
CX51	Swingline Ad	A. Abrams
CX52	Apex Mfg. Ad	A. Abrams
CX53	Swingline Ad	A. Abrams
CX54	Novus Tacker Ad	A. Abrams
CX55	Bostitch Ad	A. Abrams
CX56	Swingline	A. Abrams
CX57	Sofragraf	A. Abrams
CX58	Esco	A. Abrams
CX59	Esco	A. Abrams
CX60	Asian Sources Hardware 11/82	E. Sigler
CX61	Asian Sources Hardware 2/83	A. Abrams
CX62	Asian Sources Hardware 9/82	A. Abrams
CX63	Asian Sources Hardware 3/83	A. Abrams
CX64	Asian Sources Hardware 12/82	A. Abrams
CX65	Spenard Builders Supply Ad May 1983	A. Abrams

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX66	84 Lumber Ad 6/10/83		A. Abrams
CX67	84 Lumber Ad 5/83		A. Abrams
CX68	Return Letter from Bob's Hardware		A. Abrams
CX69	1981 <u>Building Supply News</u> Brand Awareness Survey		E. Sigler
CX70	April 1982 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX71	March 1979 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX72	April 1977 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX73	August 1978 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX74	June 1979 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX75	August 1982 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX76	Jan. 1983 <u>Discount Store News</u> "Product Movement Audit"		E. Sigler
CX77	<u>Hardware Age</u> Questionnaire		E. Sigler
CX78	<u>Hardware Age</u> Recognition Study 1982		E. Sigler
CX79	<u>Hardware Age</u> Recognition Study 1981		E. Sigler
CX80	<u>Hardware Age</u> Recognition Study 1979		E. Sigler
CX81	Meijer Ad	CDX264	H. Koetze
CX82	Collection of Photos		A. Abrams
CX83	Salesmen's Report		H. Sutter
CX83A	Salesmen's Report		A. Abrams
CX84	A.A. Memos .		A. Abrams
CX85	Salesmen's Report		J. Bridges
CX86	Salesmen's Report		A. Abrams
CX87	Salesmen's Report		A. Abrams
CX88	Salesmen's Report		J. Bridges
CX89	Salesmen's Report		E. Mazanec
CX90	Salesmen's Reports		A. Abrams
CX90A	Salesmen's Reports		A. Abrams
CX90B	Salesmen's Reports		A. Abrams
CX91	Pep Boys Advertisement		Admitted
CX92C	Invoice to Pep Boys		Admitted
CX93C	Custom's Invoice		Razzano & Schill
CX94C	Purchase Order		Admitted
CX95C	Purchase Order		Admitted
CX96C	Purchase Order		Razzano & Schill
CX97C	Invoice and Related Customs Documents		Razzano & Schill
CX98C	Purchase Order		Razzano & Schill
CX99C	Invoice and Related Customs Documents		Razzano & Schill

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX100	Alltrade Price List	CDX301	G. Hillinger
CX101	Beaver Lumber Repair Request	(See CPX36)	A. Abrams
CX102C	Shipping Advice and Other Documents	CDX247	M. Speizer
CX103C	Shipping Advice and Other Documents	CDX248	M. Speizer
CX104	Home Depot Advertisement		E. Sigler
CX105	Home Depot Advertisement		E. Sigler
CX106	Lustre Line Ad		A. Abrams
CX107C	Lustre Line Price List		Razzano & Schill
CX108C	Lustre Line Inventory Sheet		Razzano & Schill
CX109	Offer to Sell Guns		A. Abrams
CX110C	Summaries of Lost Sales		A. Abrams
CX111	Transcript of Deposition of Zane Goggans, Pages 3-6, 10-31, 33-50, 64-69, 72-77, 81-84, 86-89, 95-96		
(C) CX112		CDX21	Z. Goggans
(C) CX113		CDX22	Z. Goggans
CX114	Moss Sales Summary	CDX23	Z. Goggans
CX115	Taiwanese Ad	CDX24	Z. Goggans
CX116	Moss Order Summary and Order	CDX25	Z. Goggans
CX117	Notice of Deposition	CDX26	Z. Goggans
CX118	Moss Flyer	CDX27	Z. Goggans
CX119	Home Depot Ad	CDX28	Z. Goggans
CX120	Witness Statement of Harris Sutter		H. Sutter
(C) CX121		CDX30	Z. Goggans
(C) CX122		CDX31	Z. Goggans
CX123	Transcript of Deposition of R.L. Peckham, Pages 3, 4, 7-8, 10-14, 16-20, 25, 29, 37-38		
CX124	Purchase Order	CDX53	R. Peckham
CX125	Invoice	CDX54	R. Peckham
CX126	Purchase Order	CDX55	R. Peckham
CX127	Inventory List	CDX55A	R. Peckham
CX128	Bradlee Ad	CDX56	R. Peckham
CX129	Transcript of Deposition of Robert G. Haege, Pages 3-9, 12-16, 23, 26-32, 36-38, 45		
CX130C	Pro Forma Invoice	CDX42	R. Haege
CX131C	Invoice and Other Purchase Documents	CDX43	R. Haege
CX132C	Shipping Advice	CDX44	R. Haege
CX133	ACO Ad	CDX45	R. Haege

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX134	ACO Ad	CDX46	R. Haege
CX135	Collection of Photographs of ACO Displays		A. Abrams
CX136	Transcript of Deposition of Joseph Curcio, Pages 3, 5-8, 11-21, 26-28, 32-34, 38-40, 43-44, 46		
CX137	Purchase Order	CDX33	J. Curcio
CX138	Purchase Order	CDX34	J. Curcio
CX139	Quinn Inventory Record	CDX36	J. Curcio
CX140	Letter and Ad	CDX37 & 38	J. Curcio
CX141	Arrow Ad Sliks	CDX39	E. Sigler
CX142	Arrow Warranty	CDX40	J. Curcio
CX143	Sales Invoice	CDX41	J. Curcio
CX144C	Transcript of Deposition of Robert Neil Walling, Pages 2, 5, 8-9, 11-25, 27, 29-37, 41-44, 46-47, 49, 52-56, 62, 65-67, 70-74, 77-79, 81, 83		
CX145	No Exhibit		
CX146C	Inventory Record	CDX103	R. Walling
CX147	Western Auto Ad	CDX104	R. Walling
CX148	Western Auto Ad	CDX105	R. Walling
CX149	Witness Statement of Richard Mazanec		R. Mazanec
CX150	Western Auto Ad	CDX107	R. Walling
CX151	Western Auto Ad	CDX107A	R. Walling
CX152	Witness Statement of John Bridges		J. Bridges
CX153	Wal-Mart's Response to Complainant's Requests for Admissions.		
CX154C	Western Auto Purchase Order	CDX110	R. Walling
CX155C	Western Auto Purchase Order	CDX110A	R. Walling
CX156C	Western Auto Purchase Order	CDX111	R. Walling
CX157C	Western Auto Purchase Order	CDX112	R. Walling
CX158C	Western Auto Purchase Order	CDX113	R. Walling
CX159C	Inventory Record	CDX114	R. Walling
CX160C	Test-Rite Letter	CDX115	R. Walling
CX161C	Western Auto Documents	CDX116	R. Walling
CX162	Western Auto Test Report	CDX117	R. Walling
CX163	Western Auto Ad	CDX118	R. Walling
CX164	Western Auto Ad	CDX119	R. Walling
CX165	Medi Mart 8/10/83 Ad		A. Abrams
CX166	Handyman's Response to Complainant's Requests for Admissions		
CX167	Western Auto Ad	CDX122	R. Walling
CX168	Menard's Response to Complainant's Requests for Admissions		

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX169	Tractor Supply's Response to Complainant's Requests for Admissions		
CX170	Alltrade's Response to Complainant's Requests for Admissions		
CX171	Pep Boy's Response to Complainant's Requests for Admissions		
CX172	Witness Statement of M. Helfgott		
CX173	Western Auto Ad	CDX128	R. Walling
CX174	Western Auto Ad	CDX129	R. Walling
CX175	Western Auto Ad	CDX130	R. Walling
CX176	Witness Statement of E. Sigler		
CX177	No Exhibit		
CX178	No Exhibit		
CX179	No Exhibit		
CX180	No Exhibit		
CX181	No Exhibit		
CX182	Arrow Ad Slicks	CDX137	R. Walling & A. Abrams
CX183C	Western Auto Documents re Arrow	CDX138	R. Walling
CX184	No Exhibit		
CX185	Transcript of Deposition of Steven East, Pages 5, 7-8, 12, 18-21, 23-24, 30-32, 34-39, 41-43, 46-48, 50, 51-53, 55, 57, 58-59, 61-63, 66-67, 69-81, 91-94, 96-103, 106-107, 110-111, 113-114		
CX186	No Exhibit		
CX187	Import Invoice Record	CDX142	S. East
CX188	Import Invoice Record	CDX143	S. East
CX189	Inventory Record	CDX144	S. East
CX190	No Exhibit		
CX191	Inventory Record	CDX146	S. East
CX192	Inventory Record	CDX147	S. East
CX193	Inventory Record	CDX149	S. East
CX194	Inventory Record	CDX150	S. East
CX195	Inventory Record	CDX151	S. East
CX196	Inventory Record	CDX152	S. East
CX197	Central Hardware Ad	CDX153	S. East
CX198	Central Hardware Ad	CDX154	S. East
CX199C	Central Hardware Ad Circulation	CDX155	S. East
CX200C	Central Hardware Ad Circulation	CDX156	S. East
CX201	Arrow Warranty	CDX157	S. East
CX202	No Exhibit		
CX203	No Exhibit		
CX204C	Invoice and Related Documents	CDX236	M. Speizer
CX205C	Invoice and Shipping Advice	CDX237	M. Speizer
CX206C	Invoice and Related Documents	CDX238	M. Speizer

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DÉPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX207C	Invoice and Related Documents	CDX239	M. Speizer
CX208C	Shipping Advice, Invoice and Related Documents	CDX240	M. Speizer
CX209C	Purchase Order		Razzano & Schill
CX210C	Buyer's Quote		Razzano & Schill
CX211C	Invoice		Razzano & Schill
CX212C	Shipping Document		Razzano & Schill
CX213	Handyman Ad	CDX241	M. Speizer, Razzano & Schill
CX214C	Letter of Credit and Related Documents		Razzano & Schill
CX215C	Letter of Credit and Related Documents		Razzano & Schill
CX216C	Letter of Credit and Related Documents		Razzano & Schill
CX217C	Purchase Order and Attached Letter of Credit		Razzano & Schill
CX218C	Shipping Advice and Related Documents	CDX242	M. Speizer
CX218aC	Shipping Advice and Related Documents re Handyman of California	CDX243	M. Speizer
CX219	Report of Dr. M. Helfgott and Blank Questionnaire		M. Helfgott
CX220	Advertisement		E. Sigler, A. Abrams
CX221	L.G. Cook Ad		A. Abrams
CX222C	Invoice to TSC		Razzano & Schill
CX223C	Accounts Payable		Razzano & Schill
CX224C	Invoice	CDX261	R. Cook
CX225C	Purchase Order		Razzano & Schill
CX226C	Customs Documents		Razzano & Schill
CX227C	Customs Documents		Razzano & Schill
CX228	L.G. Cook Customer Ad	CDX260	R. Cook
CX229	Collection of L.G. Cook Invoices	CDX262	R. Cook
CX230	L.G. Cook Letter re returning	CDX257	R. Cook, A. Abrams
CX231	L.G. Cook Claim re returning guns	CDX254	R. Cook, A. Abrams
CX232C	Shipping Advice	CDX245	M. Speizer
CX233	Collection of Photos		J. Bridges
CX234C	Purchase Order	CDX2	T. Tenovan
CX235C	Receiving Report	CDX3	T. Tenovan
CX236C	Test-Rite Letter	CDX5	T. Tenovan
CX237C	Pro Forma Invoice	CDX6	T. Tenovan
CX238C	Pro Forma Invoice	CDX7	T. Tenovan
CX239C	New Buyer Item Form	CDX9	T. Tenovan
CX240C	Purchase Order	CDX10	T. Tenovan
CX241C	Receiving Report	CDX11	T. Tenovan
CX242	Dart Drug Ad	CDX12	T. Tenovan

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX243	Dart Drug Ad	CDX13	T. Tenovan
CX244	Transcript of Deposition of T. Tenovan, Pages 1, 8-12, 19-35, 37-40, 42-48, 50-51, 54-56, 58-61, 63-65, 68-70, 77-78, 91-92, 96, 103-104, 111-116		
CX245	Dart Drug Ad	CDX14	T. Tenovan
CX246	Dart Drug Ad	CDX15	T. Tenovan
CX247C	Copy of Arrow Drawing	CDX201	M. Speizer
CX248C	Test-Rite Taiwan Parts Drawing	CDX202	M. Speizer
CX249	No Exhibit		
CX250C	Test-Rite Blueprints	CDX204	M. Speizer
CX251C	Test-Rite Quality Control Reports	CDX205	M. Speizer
CX252C	Test-Rite Production Record	CDX206	M. Speizer
CX253	Test-Rite Ad	CDX207	A. Abrams
			M. Speizer
CX254	Taiwan Yellow Pages	CDX208	M. Speizer
CX255	Letter of 10/29/82	CDX209	M. Speizer
CX256C	U.S. Testing Co. Report	CDX210	M. Speizer
CX257	Letter of 12/22/82	CDX211	M. Speizer
CX258C	U.S. Testing Co. Report	CDX212	M. Speizer
CX259C	Letter of 2/23/83	CDX213	M. Speizer
CX260*	U.S. Testing Co. Report	CDX214	M. Speizer
CX261	U.S. Testing Co. Report #84492		A. Abrams
CX262C	Shipping Advice to Stop & Shop	CDX215	M. Speizer
CX263C	Shipping Advice to Dart Drug	CDX217	M. Speizer
CX264C	Shipping Advice to Pep Boys	CDX218	M. Speizer
CX265C	Shipping Advice to Pep Boys	CDX219	M. Speizer
CX266C	Shipping Advice to Lebovitz	CDX220	M. Speizer
CX267C	Sales Documents to Lampert Lumber	CDX221	M. Speizer
CX268C	Sales Documents to Chaffin Central Distributing	CDX222	M. Speizer
CX269C	Sales Documents to O'Fasco	CDX223	M. Speizer
CX270C	Shipping Advice to Nueman Industries	CDX224	M. Speizer
CX271C	Shipping Advice to Rose's Stores	CDX225	M. Speizer
CX272C	Shipping Advice to Peavy Co.	CDX226	M. Speizer
CX273C	Shipping Advice to Glosser Brothers	CDX227	M. Speizer
CX274C	Shipping Advice to Giray Enterprises	CDX228	M. Speizer
CX275C	Shipping Advice to Gramex Corp.	CDX229	M. Speizer
CX276C	Shipping Advice to American Fuel	CDX230	M. Speizer

* Confidentiality waived by Test-Rite

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX277C	Shipping Advice to A.B. Wholesale	CDX231	M. Speizer
CX278C	Shipping Advice to Damax Int.	CDX232	M. Speizer
CX279C	Shipping Advice to Jewel Companies	CDX233	M. Speizer
CX280C	Shipping Advice to Test-Rite/Wal-Mart	CDX234	M. Speizer
CX281C	Shipping Advice to L.G. Cook	CDX235	M. Speizer
CX282	Transcript of Deposition of Mel Speizer, Pages 3-15, 17-22, 24-28, 31-34, 38-40, 48-49, 51-68, 75-77, 78-82, 86-87, 89-113, 117-130, 134-135, 137-150, 152-156, 161-162, 175-179		
CX283C	Tab Shipping Document	CDX251	T. Krakover
CX284C	Tab Inventory	CDX252	T. Krakover
CX285C	Tab Inventory	CDX253	T. Krakover
CX286	Asian Sources Hardwares June 1983, p. 46 and Inside Back Cover		A. Abrams
CX287	Return Memo. from Western Auto		A. Abrams
CX288	Fred Meyer's Response to Complainant's Requests for Admissions		
CX289	Arrow 1983 Price List		A. Abrams
CX290	ABC List of Top 100 Home Centers		A. Abrams
CX291	Ever-Shiny Ad		A. Abrams
CX292	Transcript of Deposition of H. Koetze, Pages 3, 5-7, 9-17, 20, 24-27, 29-36 and 39		
CX293	Meijer Ad	CDX265	
CX294	Meijer Ad	CDX266	
CX295	Meijer Ad	CDX267	
CX296C	Transcript of Deposition of George Hillinger, Pages _____		
CX297C	Test-Rite Pro Forma Invoice to Alltrade	CDX302	G. Hillinger
CX298	Alltrade Flyer	CDX303	G. Hillinger
CX299	Alltrade Ad	CDX304	G. Hillinger
CX300	Letter of Spet. 29, 1982 from Sunshine, Slot & Sunshine to Alltrade, Inc.	CDX305	G. Hillinger
CX301	Letter of 10/4/82 from Alltrade to R. Sunshine	CDX306	G. Hillinger
CX302C	X' Pole Invoice to Alltrade	CDX307	G. Hillinger

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CX303C	Andrew's International Invoice	CDX308	G. Hillinger
CX304	Letter of 11/4/82 from Curtis, Morris & Safford to G. Hillinger	CDX309	G. Hillinger
CX305C	Alltrade Records re Returns of Staple Guns in Jan., Feb. and July, 1983		Razzano & Schill
CX306C	Specimen Alltrade Invoices		Razzano & Schill
CX307C	Alltrade Purchase Order to X'Pole		Razzano & Schill
CX308C	Alltrade Purchase Order to Test-Rite		Razzano & Schill
CX309	Transcript of Deposition of Carl Sigman, Pages 1, 7, 16-18, 22-24, 26-27, 40-43, 47-48, 55,56, 65-68, 71-73		
CX310	Collection of Western Universal Sales Documents	CDX403	C. Sigman
CX311	U.S. TM Reg. No. 1,150,227		A. Abrams
CX312C	Sales Summary for T/25; T/18; T/75; T/37		A. Abrams
CX313	Salesmen's Report 8/9/83		A. Abrams
CX314	Wolohan Lumber Ad		A. Abrams
CX315	Transcript of Deposition of T. Krakover, Pages 4-17, 22-23, and 31		
CX316	Transcript of Deposition of Richard Cook, Pages 3-8, 12-17, 19, 21-27, 29-34		
CX317	Response to Requests for Admissions by Test-Rite Int'l (Taiwan)		
CX318C	Sales Comparison for T-18, etc.		A. Abrams
CX319	Aye Ka Industrial Corp. Ad		A. Abrams
CX320	Moss Correspondence re Initial Purchases and Returns		Hovanec & Razzano
CX321	Complainant's List of Deposition Pages and Lines Relied On		
CX322	Noblit Bros. Ad		A. Abrams
CX323	Photographs of Bob's Hardware Display		A. Abrams
CX324	Additional Lost Sales Summaries		A. Abrams
CX325	Asian Sources July 1983		A. Abrams
CX326	1983 Brand Awareness/Purchase Study		A. Abrams
CX327	Tab Merchandise Corp. Request for Admissions		
CX328	Correct Unaided Identification Summary		
CX329	Photographs of Dixieline Store		
CX330	Witness Statement of Robert C. Sorensen		

PHYSICAL EXHIBITS-

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CPX 1	"ARROW T-50" Tacker	CDX51	A. Abrams
CPX 2	"ARROW T-50" MP		A. Abrams
CPX 3	"ARROW T-55"		A. Abrams
CPX 4	"ARROW HT-50"		A. Abrams
CPX 5	Box of Arrow Staples		A. Abrams
CPX 6	Videotape		A. Abrams
CPX 7	Hansco Tacker		A. Abrams
CPX 8	Sears Tacker		A. Abrams
CPX 9	Markwell Tacker		A. Abrams
CPX10	Duo Fast Tacker		A. Abrams
CPX11	Tachikawa Tacker		A. Abrams
CPX12	Swingline Tacker		A. Abrams
CPX13	Bostitch Tacker		A. Abrams
CPX14	USM Tacker		A. Abrams
CPX15	Roca Graf Tacker		A. Abrams
CPX16	Salco Tacker		A. Abrams
CPX17	Duo Fast Tacker		A. Abrams
CPX18	Paslode Tacker		A. Abrams
CPX19	Max Industry Tacker		A. Abrams
CPX20	Craftsman Tacker		A. Abrams
CPX21	PSI Tacker		A. Abrams
CPX22	Unbranded Tacker		A. Abrams
CPX23	Swingline 1000		A. Abrams
CPX24	Star Tacker		A. Abrams
CPX25	Hansco Tacker		A. Abrams
CPX26	Duo Fast Tacker		A. Abrams
CPX27	Swingline Tacker		A. Abrams
CPX28	Moss Gun No. 55		A. Abrams
CPX29	Defective Test-Rite Gun	(See CX68)	A. Abrams
CPX30	Alltrade Gun	CDX203	G. Hillinger
CPX31	Alltrade Staples	CDX246	M. Speizer, G. Hillinger
CPX32	Lustre Line Gun		A. Abrams
CPX33	E. Lee Sample Gun	(See CX109)	A. Abrams
CPX34	Moss Gun	CDX20	Z. Goggans
CPX35	Moss No. 70 Gun	CDX29	Z. Goggans
CPX36	Test-Rite Gun Returned for Repair	(See CX101)	A. Abrams
CPX37	Bradlee Gun	CDX52	R. Peckham
CPX38	ACO Gun	CDX41	G. Haege

<u>EXHIBIT NO.</u>	<u>TITLE</u>	<u>DEPOSITION EXHIBIT NO.</u>	<u>SPONSORING WITNESS</u>
CPX39a&b CPX40	Quinn Guns "ARROW T-50"	CDX32 & 35 CDX102	J. Curcio N. Walling & A. Abrams
CPX41	Test-Rite Gun	CDX109	N. Walling
CPX42	Central Hardware Gun	CDX141	S. East
CPX43	Central Hardware Gun	CDX148	S. East
CPX44a-44h	Guns Used in Surveys		M. Helfgott
CPX45	Test-Rite Staple Gun Returned to Arrow	CDX259 (See CX230)	A. Abrams & R. Cook
CPX46	Test-Rite Staple Gun Returned to Arrow	CDX258 (See CX230)	A. Abrams & R. Cook
CPX47a & 47b	Two Test-Rite Staple Guns Returned to Arrow	CDX255 & 256 (See CX231)	A. Abrams & R. Cook
CPX48	Arrow Gun	CDX1	T. Tenovan
CPX49	Dart Drug Test-Rite Gun	CDX4	T. Tenovan
CPX50	Dart Drug Test-Rite Gun	CDX8	T. Tenovan
CPX51	No Exhibit		
CPX52	Tab Gun	CDX250	T. Krakover
CPX53	Nichols Gun		A. Abrams
CPX54a	Returned Western Auto Guns	(See CX287)	A. Abrams
CPX54b	Returned Western Auto Gun	(See CX287)	A. Abrams
CPX55	Alltrade Gun Returned to Alltrade	CDX300	G. Hillinger
CPX56a-f	Collection of Alltrade Staples		C. Schill & P. Razzano
CPX57	"ARROW T-25" Gun		A. Abrams
CPX58	"ARROW T-18" Gun		A. Abrams
CPX59	"ARROW T-75" Gun		A. Abrams
CPX60	"ARROW T-37" Gun		A. Abrams
CPX61	Gun purchased from D.C. Heckinger's		
CPX62	Actual Completed Questionnaires		

INVESTIGATION NO. 337-TA-137

RETURN TO SECRETARY'S OFFICE
RECORD OF CERTIFIED OR REGISTERED MAIL

SUBJECT CERTAIN HEAVY-DUTY STAPLE

STAPLE TACKERS

DATE COMPLAINT SERVED 2-18-83

RESPONSE DUE: STATE SIDE FOREIGN x 2-14-83

NO I of Complaint

REGISTERED OR REGISTERED NO.	NAME AND ADDRESS	DATE COMPLAINT RECEIVED BY PARTY	DATE RESPONSE RECEIVED BY COMMISSION	DATE PACKAGE RETURNED	ALJ EXHIBITS
76 107	Arrow Fastener Co., Inc. 271 Mayhill Street Saddle Brook, NJ 07662				
76 108	Pasquale A. Razzano, Esq. CURTIS, MORRIS & SAFFORD, P.C. 530 Fifth Avenue New York, NY 10036				
76 109	Test-Rite Products Corp. 1144 Clifton Avenue Clifton, NJ 07013	2-24-83			
76 110	Waverly Screw & Hardware, Inc. d/b/a Lustre Line Products Richmond & Norris Streets Philadelphia, PA 19125				
76 111	Alltrade, Inc. 1728 Greenwood Ave. Montebello, CA 90640	2-25-83	3-5-83		
76 112	Central Hardware Co. 111 Boulder Industrial Bridgeton, MO 63044				
76 113	The Handyman of California d/b/a The Handyman Hardware 6666 Convoy Court San Diego, CA 92111				

REGISTRATION NO. 337-TA-137

RETURN TO SECRETARY'S OFFICE

RECORD OF CERTIFIED OR REGISTERED MAIL

SUBJECT CERTAIN HEAVY-DUTY STRAPLE

1 TRACKERS

DATE COMPLAINT SERVED 2-18-83

RESPONSE DUE:

STATE SIDE

FOREIGN X

21-286-83

CERTIFIED OR REGISTERED NO.

NAME AND ADDRESS

DATE COMPLAINT RECEIVED BY PARTY

DATE RESPONSE RECEIVED BY COMMISSION

DATE PACKAGE RETURNED

Test-Rite Int'l (Taiwan) Ltd.
293 Chung Hsiao East Rd., 2nd Floor
Sec. 4, Taipei, Taiwan

~~2-28-83~~

2/28/83

Test-Rite Automotive Ltd.
Room 1504, Star House
3 Salisbury Rd., T.S.T.
Kowloon, Hong Kong

2-28-83

21-286-030

Taiwan Royal United Int'l.
21-2 Ching-Cheng St.
Taipei, Taiwan

21-286-031

Chen Dah Machinery Ltd.
239 Hoping St.
Taichung, Taiwan

21-286-032

2/28/83

DOCUMENTARY EXHIBITS

<u>Exhibit No.</u>	<u>Title</u>	<u>Sponsoring Witness</u>
SX 1	Deposition of Myron J. Helfgott	Myron J. Helfgott
SX 2	Public deposition of Allan Abrams	Allan Abrams
SX 3-C	Confidential deposition of Allan Abrams	Allan Abrams
SX 4-C	Central Hardware's Answers to Investigative Attorney's (IA's) Interrogatories	Glenn H. Hertenstein
SX 5-C	Response of Pep Boys to IA's Interrogatories	Donald Grant
SX 6-C	Complainant's Answers and Objections to IA's Interrogatories	Allan Abrams and Pasquale Razzano
SX 7-C	Complainant's Confidential Answers to IA's Interrogatories	Abrams and Razzano
SX 8	Response of Menard, Inc. to First Set of IA's Interrogatories	Walter R. Johnson
SX 9	Response of Test-Rite Products Corp., Test-Rite Int'l (Taiwan) Ltd. and Test-Rite Automotive Ltd. to IA's Interrogatories	Mel Speizer
SX 10	Response of Wal-Mart Stores, Inc. to IA's Interrogatories	Donald Soderquist
SX 11	Response of Fred Meyer, Inc. to IA's Interrogatories	Jeffrey Alden
SX 12	Response of Stop & Shop to IA's Interrogatories	Ronald Dolan
SX 13	Response of Waverly Screw & Hardware to IA's Interrogatories	Theodore Haldis
SX 14-C	Response of Quality Master and Upmaster to IA's Interrogatories	Charles Schill
SX 15	Response of Western Auto to IA's Interrogatories	James J. Poplinger
SX 16-C	Answers of Dart Drug to IA's Interrogatories	Ronald M. Hirschel

SX 17-C	Documents produced by Moss Mfg., Inc.	George Hovanec
SX 18-C	Handyman of California's Answers to IA's Interrogatories	Jerald M. Alton
SX 19	Answers of C.G. Cook Distributors, Inc. to IA's Interrogatories	Richard G. Cook
SX 20	Response of ACO Inc. to IA's Interrogatories	Mary Tutor
SX 21	Answers of Meijer Inc. to IA's Interrogatories	Harold Hans
SX 22, SX 23C	Stop & Shop's Answers to Interrogatories and Document Requests	Ronald Dolan
SX 24	Venture Stores, Inc.'s Answers to IA's Interrogatories	Margaret M. Hoxworth
SX 25	1982 Company Recognition Study - Hardware Age	Abrams
SX 26	1981 Company Recognition Study - Hardware Age	Abrams
SX 27	July 15, 1983 Price List of Arrow Fastener Co., Inc.	Abrams
SX 28	Affidavit of Jeffrey S. Neeley	Jeffrey S. Neeley
SX 29	<i>Continued Deposition of Allan Abrams</i>	

continuation page 2

CERTIFIED REGISTERED NO.	NAME AND ADDRESS	DATE COMPLAINT RECEIVED BY PARTY	DATE RESPONSE RECEIVED BY COMM.	DATE PACKAGE RETURNED
76 132	Handyman Supply, Inc. d/b/a The Handyman Hardware 4417 Mahonig Ave, NW Warren, OH 44483	2-24-83		
76 114	Meijer Thrifty Acres 2727 Walker NW. Grand Rapids, MI 49504	2-23-83	3-10-83 3-31-83 <i>Replaced by Council</i>	
76 115	Dart Drug Corp. 3301 Pennsylvania Dr. Landover, MD 20785	2-24-83		
76 116	Menards, Inc. d/b/a Menards Cashway Lumber 4601 First Ave, SE. Cedar Rapids, IA 52403	2-24-83	4-4-83	
76 117	Acco, Inc. 2333 Commerce Dr. Farmington, Hills MI 48024	3-7-83		
76 118	Venture Stores, Inc. 615 NW. Plaza, Lower Level St. Ann, MO 63074			
76 119	L.G. Distributors, Inc. d/b/a L.G. Cook Distributors 525 Ann St. NW. Grand Rapids, MI 49504		<i>Hydramatic pay alley - appearance filed 3-9-83</i>	
76 120	Fred Meyer, Inc. 3800 S. 22nd Portland, OR	2-24-83		
76 121	Wal-Mart Stores, Inc. 702 SW. Eighth St. Bentonville, AR 72712	2-24-83		
76 122	Ranch Wholesale Supply, Inc. d/b/a Longmont Big R 1515 Main St. CO. 80501	2-28-83		
76 123	Stop & Shop Companies, Inc. 393 D Street Boston, MA 02110	2-25-83	3-10-83 3-10-83	

continuation page 3

CERTIFIED
REGISTERED NO.

	NAME AND ADDRESS	DATE COMPLAINT RECEIVED BY PARTY	DATE RESPONSE RECEIVED BY COMM.	DATE PACKAGE RETURNED
76 124	Western Auto Supply, Inc. 2107 Grand Ave Kansas City, MO 64108	2-25-83		
76 125	Pep Boys-Manny Joe & Jack 32nd & Allegheny Philadelphia, PA 19132	no date ✓	4-1-83	
76 126	Tractor Supply Co. 915 Murfreesboro Rd Nashville, TN 37217			
76 127	Charles F. Schill, Esq. V. James Adduci, Esq. ADDUCI, DINAN & MASTRIANI 1140 Connecticut Ave, NW Suite 250 Washington, D.C. 20036	2-24-83		
76 128	Mr. Carol W. Thomas Secretary Federal Trade Commission Pennsylvania Ave at Sixth Street, N.W. Washington, D.C. 20580			
76 129	Richard Abbey, Esq. Chief Counsel U.S. Customs Service 1301 Constitution Avenue NW Washington, D.C. 20229			
76 130	Darrel J. Grinstead, Esq. Assistant General Counsel Dept of Health & Human Services Room 5362, North Building 330 Independence Ave NW Washington, D.C. 20201	2-23-83		
76 131	Mr. Charles S. Stark Chief, Foreign Commerce Section Antitrust Division U.S. Dept. of Justice Room 7115, Main Justice Pennsylvania Ave and Tenth Street., NW Washington, D. C. 20530	2-23-83		

INVESTIGATION NO. 337-TA-137

RETURN TO SECRETARY'S OFFICE
RECORD OF CERTIF. OR REGISTERED MAIL

SUBJECT CERTAIN HEAVY-DUTY STAPLE

GUN TACKERS (NOTICE OF JOINDER OF RESPONDENTS)

Complaint w/ Ruler

DATE COMPLAINT SERVED 6-15-83

RESPONSE DUE:
STATE SIDE XX
FOREIGN

CERTIFIED OR
REGISTERED NO.

NAME AND ADDRESS

DATE COMPLAINT
RECEIVED BY
PARTY

DATE RESPONSE
RECEIVED BY
COMMISSION

DATE PACKAGE
RETURNED

96 579

Moss Manufacturing, Inc.
c/o Mr. Roger J. Schindler, Esq.
Suite 101
1492 South Miami Avenue
Miami, Florida 33130

96 580

Quinn Products, Inc.
d/b/a J & C Products, Inc.
c/o Mr. John P. Kelley
1535 Schaumberg Road
Schaumberg, Illinois

7-11-83

96 581

Tab Merchandise Corp.
c/o Mr. Jay M. Reichman
11-11 N. Broadway
St. Louis, Missouri 63102

● **SENDER:** Complete items 1, 2, 3, and 4. Add your address in the "RETURN TO" space on reverse.

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one).
 Show to whom and date delivered
 Show to whom, date, and address of delivery ..
 RESTRICTED DELIVERY

2. **RESTRICTED DELIVERY**

Quinn Products, Inc.
 d/b/a J & C Products, Inc.
 c/o Mr. John P. Kelley
 1535 Schaumburg Road
 Schaumburg, Illinois

4. TYPE OF SERVICE: ARTICLE NUMBER
 REGISTERED INSURED
 CERTIFIED COO
 EXPRESS MAIL
 (Always obtain signature of addressee or agent)

I have received the article described above.
 SIGNATURE Addressee Authorized agent
P. Brown

5. DATE OF DELIVERY

6. ADDRESSEE'S ADDRESS (only if requested)

7. UNABLE TO DELIVER BECAUSE:

POSTMARK
 JUL 11 1983
 USPS

RE-SHIPPER'S INITIALS
[Signature]

PS Form 3811, July 1982

RETURN RECEIPT

U.S. POST OFFICE

