

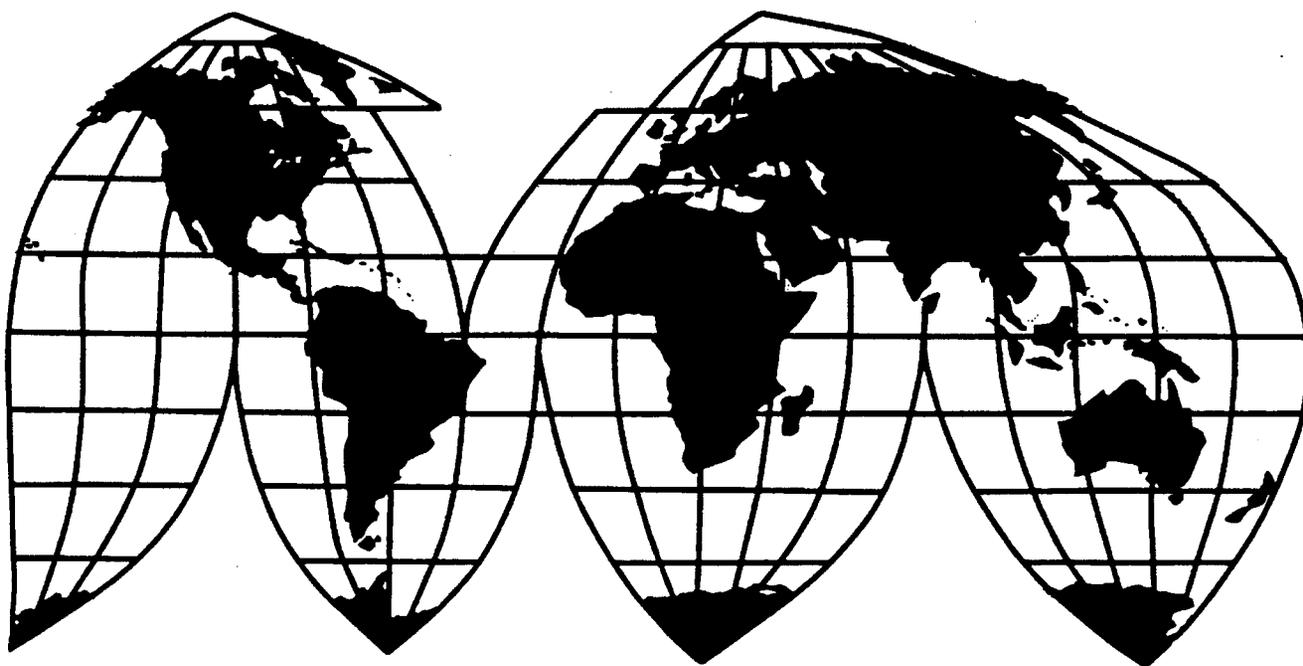
In the Matter of
**Certain Two-Handle Centerset Faucets and
Escutcheons, and Components Thereof**

Investigation No. 337-TA-422

Publication 3332

July 2000

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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DOCKET

In the Matter of

CERTAIN TWO-HANDLE CENTERSET
FAUCETS AND ESCUTCHEONS, AND
COMPONENTS THEREOF

Inv. No. 337-TA-422

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OFFICE OF THE GENERAL COUNSEL
U.S. INTERNATIONAL TRADE COMMISSION

**NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER;
TERMINATION OF THE INVESTIGATION**

000002

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission, having previously determined not to review the final initial determination (ID) issued by the presiding administrative law judge (ALJ) finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the above-captioned investigation, has issued a general exclusion order, and terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Michael Diehl, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3095. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on June 17, 2000, based on a complaint by Moen Incorporated of Ohio. 64 Fed. Reg. 32522. Moen's complaint alleged unfair acts in violation of section 337 in the importation and sale of certain two-handle centerset faucets and escutcheons, and components thereof. The complaint alleged that five respondents had infringed a U.S. design patent held by complainant Moen. The five respondents named in the investigation were Foremost International Trading, Inc. of East

Hanover, New Jersey (Foremost); Chung Cheng Faucet Co. Ltd. of Taiwan (Chung Cheng); Hometek International Group of Illinois (Hometek); Stuhlbarg International Sales Company Inc. d.b.a. Sisco, Inc. of Rancho Dominguez, California (Sisco); and Lota International Co. Ltd. of the People's Republic of China (Lota).

On October 6, 1999, the Commission determined not to review an ID terminating the investigation as to Hometek on the basis of a consent order. On December 29, 1999, the Commission issued a notice that an ID granting complainant's motion for partial summary determination that it had satisfied the economic prong of the domestic industry requirement had become the determination of the Commission. An evidentiary hearing before the ALJ was held December 13-15, 1999, with complainant, respondents Foremost and Chung Cheng, and the Commission investigative attorney (IA) participating. On February 1, 2000, the Commission determined not to review an ID terminating the investigation as to respondents Sisco and Lota on the basis of consent orders.

On March 17, 2000, the ALJ issued his final ID, finding a violation of section 337 by Foremost and Chung Cheng, the two remaining respondents. The ALJ also issued his recommendations on remedy and bonding. The ALJ recommended that the Commission issue a general exclusion order directing that faucets that infringe the '466 patent be excluded from entry into the United States. He also recommended a 264 percent bond during the period of Presidential review.

No party filed a petition for review of the ID.

After examining the record in the investigation, the Commission determined not to review the ID, and requested written submissions on remedy, the public interest, and bonding.

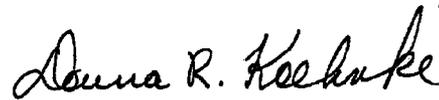
The Commission received written submissions from Moen and the IA that addressed the form of remedy, if any, that should be ordered, the effect of a remedy on the public interest, and the amount of the bond that should be imposed during the 60-day Presidential review period.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission determined that the appropriate form of relief is a general exclusion order prohibiting the unlicensed entry for consumption of two-handle centerset faucets and escutcheons that infringe U.S. Letters Patent Des. 347,466. The Commission also determined that the public interest factors enumerated in subsection (d) of section 337 do not preclude the issuance of the aforementioned general exclusion order, and that the bond during the Presidential review period shall be in the amount of 264 percent of the entered value of the articles in question.

Copies of the Commission's orders, the public version of the ID, and all other nonconfidential documents filed in connection with this investigation, are or will be 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, 500 E Street S.W., Washington, D.C. 20436, telephone 202-205-2000.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, and sections 210.45-210.51 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.45-210.51.

By order of the Commission.



Donna R. Koehnke
Secretary

Issued: June 19, 2000

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of

CERTAIN TWO-HANDLE CENTERSET
FAUCETS AND ESCUTCHEONS, AND
COMPONENTS THEREOF

Inv. No. 337-TA-422

GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation and sale of certain two-handle centerset faucets and escutcheons that infringe U.S. Letters Patent Des. 347,466.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing two-handle centerset faucets and escutcheons.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude the issuance of the general exclusion order and that the bond during the Presidential review period shall be in the amount of 264 percent of the entered value of the articles in question.

Accordingly, the Commission hereby ORDERS THAT:

1. Two-handle centerset faucets and escutcheons covered by the claim of U.S. Letters Patent Des. 347,466 are excluded from entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption for the remaining term of that patent, except under license of the patent owner or as provided by law.
2. Notwithstanding paragraph 1 of this Order, nothing in this Order shall apply to

Hometek International Group, Stuhlberg International Sales Company Inc. d.b.a. Sisco, Inc., or Lota International Co. Ltd. (including entities acting for them or on their behalf) pursuant to paragraph 8 of the Consent Orders issued by the Commission on October 6, 1999, and February 1, 2000.

3. Notwithstanding paragraph 1 of this Order, the aforesaid two-handle centerset faucets and escutcheons are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption under bond in the amount of 264 percent of the entered value of such articles, from the day after this Order is received by the President, pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended, until such time as the President notifies the Commission that he approves or disapproves this action, but no later than 60 days after the date of receipt of this Order by the President.
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to two-handle centerset faucets and escutcheons imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization and consent of the Government.
5. The Commission may modify this Order in accordance with the procedure described in section 210.76 of the Commission's rules of Practice and Procedure (19 C.F.R. § 210.76).
6. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation, upon Hometek International Group, Stuhlberg International Sales Company Inc. d.b.a. Sisco, Inc., and Lota International Co. Ltd., and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service.
7. Notice of this Order shall be published in the *Federal Register*.

By order of the Commission.



Donna R. Koehnke
Secretary

Issued: **June 19, 2000**

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of

CERTAIN TWO-HANDLE CENTERSET
FAUCETS AND ESCUTCHEONS, AND
COMPONENTS THEREOF

Inv. No. 337-TA-422

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

Background

By notice of investigation, published in the *Federal Register* on June 17, 1999, the Commission instituted a section 337 investigation to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain two-handle centerset faucets and escutcheons, and components thereof, by reason of infringement of U.S. Letters Patent Des. 347,466 ("the '466 design patent"), and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

The complaint was filed by complainant Moen Incorporated of North Olmstead, Ohio ("Moen"). The respondents named in the Commission's notice of investigation were Foremost International Trading, Inc. of East Hanover, New Jersey ("Foremost"), Chung Cheng Faucet Co. Ltd. of Taiwan ("Chung Cheng"), Hometek International Group of Illinois ("Hometek"), Stuhlbarg International Sales Company Inc. d.b.a. Sisco, Inc. of Rancho Dominguez, California ("Sisco"), and Lota International Co. Ltd. of the People's Republic of China ("Lota").¹

¹ Moen filed suit against Foremost in U.S. district court on December 17, 1997, alleging that a Foremost faucet infringed the '466 patent. Moen won a preliminary injunction on the issue of design patent infringement on September 1, 1998, nine months after Moen had filed suit. Moen Inc. v. Foremost Int'l Trading Inc., 19 F. Supp.2d 854 (N.D. Ill. 1998). On March 4, 1999, the district court entered summary judgment for Moen finding that the Foremost faucet, which is identical to the accused Foremost/Chung Cheng faucet in this investigation, infringed Moen's patented design, and issued a permanent injunction barring the importation, use, or sale in the United States of the Foremost faucet. Moen Inc. v. Foremost Int'l Trading Inc., 38 F. Supp.2d 680 (N.D. Ill. 1999). Foremost has appealed the

(continued...)

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On October 6, 1999, the Commission issued a notice that it had determined not to review an initial determination ("ID") terminating the investigation as to respondent Hometek on the basis of a consent order.

On December 29, 1999, the Commission issued a notice that an ID granting complainant's motion for partial summary determination that it had satisfied the economic prong of the domestic industry requirement of section 337(a)(3) by its economic activities in the United States with respect to its Monticello[®] 4-inch centerset lavatory faucets had become the determination of the Commission.

The prehearing conference and hearing were conducted on December 13 to 15, 1999, with complainant, respondents Foremost and Chung Cheng, and the Commission investigative attorney (IA) participating. Following the submission of post-hearing submissions, closing arguments were heard on January 27, 2000.

On February 1, 2000 the Commission issued a notice that it had determined not to review an ID terminating the investigation as to respondents Sisco and Lota on the basis of a consent order.

On March 17, 2000, the presiding administrative law judge ("ALJ") issued his final ID finding a violation of section 337 by the two remaining respondents, Foremost and Chung Cheng. His finding was based on his finding that Foremost and Chung Cheng infringed the claim of the '466 patent, the validity and enforceability of which were not at issue. The ALJ also issued his recommendations on remedy and bonding.

On April 19, 2000, the Commission determined not to review the ALJ's final ID, thereby finding a violation of section 337.

The Commission must now decide the appropriate remedy for the aforesaid violations, whether the statutory public interest factors preclude such remedy, and the amount of the bond during the Presidential review period.² In making those determinations, the Commission is required to take into account the ALJ's recommended determination ("RD") on permanent relief and bonding, as well as any written submissions from parties, interested members of the public, or other Federal agencies.³

¹ (...continued)

decision of the district court, but the appeal has been stayed pending the outcome of the Commission investigation.

² See 19 C.F.R. § 210.50(a) and 19 U.S.C. § 1337 (d), (g) and (j)(3).

³ See 19 C.F.R. §§ 210.50(a)(2) and 210.50(a)(4). See also 19 U.S.C. § 1337(b)(2) and S. Rep. No.

(continued...)

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Remedy

Section 337(d) provides that if the Commission determines, as a result of its investigation, that there is a violation of section 337, it may issue a limited or general exclusion order, subject to specified conditions.⁴

The ALJ recommended that we issue a general exclusion order in this investigation. The ALJ noted that a general exclusion order is appropriate when there is proof of (1) a widespread pattern of unauthorized use of the patented invention, and (2) certain business conditions from which one might reasonably infer that foreign manufacturers other than respondents to the investigation may attempt to enter the U.S. market with infringing products. RD at 60 (citing *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, USITC Pub.1199 at 17 (1981) (*Spray Pumps*)).

In 1994, standards for issuance of general exclusion orders were codified in section 337(d), which provides:

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that --

(A) a *general exclusion from entry* of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2) (effective January 1, 1995) (emphasis added); see also Commission rule 210.50(c) (incorporating the statutory standards into the Commission rules). The ALJ noted that the Commission stated in *Certain Neodymium-Iron-Boron Magnets*, Inv. No. 337-TA-372, Commission Opinion on Remedy, the Public Interest and Bonding at 5 USITC Pub. No. 2964 (1996) (*Magnets*), that the statutory standards "do not differ significantly" from the *Spray Pumps* standards. RD at 61.

³ (...continued)

1298, 93d Cong. 2d Sess. at 195 (1974).

⁴ See generally 19 U.S.C. § 1337(d).

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The ALJ noted the Commission's statement in *Spray Pumps* that a complainant --

should not be compelled to file a series of separate complaints against several individual foreign manufacturers as it becomes aware of their products in the U.S. market. Such a practice would not only waste the resources of the complainant, it would also burden the Commission with redundant investigations.

RD at 61 (citing *Spray Pumps*, USITC Pub. 1199 at 30). He stated that, under *Spray Pumps*, the above consideration must be balanced against the potential of a general exclusion order to disrupt legitimate trade. *Id.* With this balance in mind, the Commission concluded in *Spray Pumps* that it would --

require 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 one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.

RD at 61-62.

The ALJ listed the factors set forth in *Spray Pumps* as relevant in demonstrating whether there is a "widespread pattern of unauthorized use" --

- (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers;
- (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent at issue; and
- (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention;

and the factors that the Commission found relevant to showing "certain business conditions" --

- (1) an established market for the patented product in the U.S. market and conditions of the world market;
- (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;

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- (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;
- (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or
- (5) the cost to foreign manufacturers of retooling their facility to produce the patented article.

RD at 62.

The ALJ also cited several section 337 investigations in which, in determining the proper recommendation for remedy, the ALJ considered evidence regarding respondents terminated from the investigation on the basis of consent orders. RD at 62-63.

Applying the *Spray Pumps* factors to this investigation, the ALJ found a widespread pattern of unauthorized use of Moen's '466 design patent. He noted the evidence of record that there had been imports or sales by the three respondents (Hometek, Sisco, and Lota) as to which the investigation had been terminated on the basis of consent orders. RD at 63-64. He also noted evidence in the record that nonrespondents are selling or offering to sell within the United States products that purportedly infringe the '466 patent, and that imitations of the patented article are being sold in foreign countries. RD at 64. Although not noted by the ALJ in finding a widespread pattern of unauthorized use, the ALJ determined separately that respondents Foremost and Chung Cheng also infringed the '466 patent.

The ALJ also found all factors of the "certain business conditions" criterion of *Spray Pumps* to be satisfied. He found an established demand for the Moen faucet within the United States, with rapid growth in sales since its introduction in 1993. RD at 64-65. He also found that conditions in the world market make it profitable for foreign companies to enter the United States with infringing products, due to high U.S. prices for decorative faucets and because foreign manufacturers face lower costs than does Moen. RD at 65. The ALJ also found marketing and distribution networks in the United States available for the distribution of foreign-origin faucets. RD at 65-66. He further found that a foreign entrepreneur could at very little expense build a facility capable of producing copies of the patented design, or assemble copies of the Moen faucet from components produced by sub-manufacturers. RD at 66. The ALJ noted the existence of a town in [] -- where many small companies work together to produce faucets. RD at 66. He further found that many faucet manufacturers and zinc die casters in Asia could re-tool for the production of faucets in a short period of time (as little as [] days) and at relatively little expense. RD at 67. Having found that the *Spray Pumps* factors were satisfied, the ALJ recommended that a general exclusion

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order would be an appropriate remedy in this investigation.⁵ RD at 68.

Moen and the IA filed submissions on remedy, both supporting the ALJ's recommendation that the Commission issue a general exclusion order. Moen asserts that general exclusion orders are appropriate "whenever the Commission finds 'the existence of certain conditions that would undermine the effectiveness of the order,'" citing *Certain Agricultural Tractors Under 50 Power Take-off Horsepower*, Inv. No. 337-TA-380, Comm'n Op., 44 USPQ2d 1385, 1397 (Mar. 12, 1997). Moen agrees with the ALJ that both the "widespread unauthorized use" and "business conditions" prongs of the *Spray Pumps* test are satisfied.

As to widespread unauthorized use, Moen cites record evidence that, in addition to Foremost and Chung Cheng, former respondents Hometek, Sisco, and Lota imported, sold for importation, or sold after importation articles that infringe the '466 patent. Moen also points to evidence that nonrespondents are selling or offering to sell within the United States purportedly infringing products, and that 19 companies other than respondents manufacture or advertise faucets that copy Moen's patented design. Moen also argues that there is evidence of record demonstrating that it is very difficult to "shut down" foreign infringers, because entrepreneurs often sub-contract with smaller companies to manufacture faucets or faucet components, and because many such smaller companies exist throughout Asia.

As to the "business conditions" prong, Moen contends that the ALJ correctly determined that all the relevant *Spray Pumps* factors are satisfied. It maintains that there is evidence of an established market for the patented product in the United States. Moen argues that the record demonstrates that the market for the Moen faucet "is very strong and growing" and that the Moen faucet has been "overwhelmingly successful." Moen also notes that the ALJ concluded that record evidence indicates that "it is very profitable for foreign companies to enter the United States market with infringing products," because U.S. prices for decorative faucets are high, while production costs for foreign manufacturers are significantly lower than those faced by Moen and other domestic manufacturers.

Moen also agrees with the ALJ that the evidence of record demonstrates that there exist well-established distribution channels for 4-inch centerset lavatory faucets in the United States, and that smaller retailers in particular present an available channel for distribution of foreign-origin faucets. It also agrees with the ALJ's determination that foreign manufacturers could cheaply build a facility capable of producing the patented article, and that, in the alternative, an entrepreneur could contract with other companies to make faucet components and then assemble them. Moen points to [] as a town where such companies work

⁵ Complainant Moen has not requested issuance of cease and desist orders.

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together to make faucets. Moen also agrees with the ALJ that "many" foreign faucet companies could "easily copy" the '466 patent's design with minimal investment and in a short period of time. Moen contends that the most expensive faucet part to make is the ornamental escutcheon, but that even the escutcheon can be copied []].

Based on the above, Moen argues that both prongs of the *Spray Pumps* test for issuance of a general exclusion order are satisfied.

The IA also agrees with the ALJ that the circumstances in this investigation warrant the issuance of a general exclusion order. She notes that the Commission has broad discretion in selecting the form, scope, and extent of the remedy in the section 337 proceeding. According to the IA, the Commission issues general exclusion orders when the intellectual property right at issue is one that might readily be infringed by foreign manufacturers who are not parties to the investigation. She states that in *Spray Pumps* the Commission stated that a complainant "should not be compelled to file a series of separate complaints against several individual foreign manufacturers as it becomes aware of their products in the U.S. market." The IA also notes that in *Spray Pumps* the Commission acknowledged that general exclusion orders have the potential to disrupt trade, and thus will not be issued unless both prongs of the *Spray Pumps* test are satisfied.

Based on the same evidence summarized above in relation to the RD and in relation to Moen's arguments in support of the RD, the IA agrees that both prongs are satisfied in this investigation.

We agree with the ALJ that the issuance of a general exclusion order in this investigation is well supported by the facts. As *Spray Pumps* requires, there is a widespread pattern of unauthorized use of Moen's '466 design patent. There is record evidence of infringement by two respondents (Foremost and Chung Cheng) and three former respondents (Hometek, Sisco and Lota). There is also evidence of sales or offers to sell of purportedly infringing faucets by nonrespondents, and evidence that imitations of the Moen faucets are sold in foreign countries.

Regarding the "certain business conditions" criterion of *Spray Pumps*, there is evidence of an established market for the Moen faucet in the United States, an available distribution network for infringing foreign-origin faucets, an incentive to sell infringing faucets due to high prices for decorative faucets in the United States and lower costs for faucet producers located outside the United States, and a capability in Asia to produce large quantities of infringing faucets in a short period of time and with a relatively small investment. We therefore determine that a general exclusion order under section 337(d) is the appropriate remedy for the violations found in this investigation.

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Our order excludes only imports for consumption. In *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, Comm. Opinion at 8-9, USITC Pub. 2843 (Dec. 1994), we determined that section 337 authorizes the Commission to exclude all types of entry, not just entries for consumption. We also determined, however, that, because we exercise our authority to exclude in "measured fashion," we would not exclude entries other than for consumption in most cases, and that a complainant seeking exclusion of other types of entry "should present evidence that activities by respondents involving other types of entry either are adversely affecting it or are likely to do so." *Id.* at 10. In this case, Moen has not argued in favor of excluding entries other than for consumption, and its proposed exclusion order applies only to "entry for consumption."

The consent orders issued with respect to respondents Hometek, Sisco, and Lota provide that if a general exclusion order is issued, they will remain subject to the consent order and will be excluded from the general exclusion order. Therefore, accused products that are imported, sold for importation, or sold after importation by these former respondents are specifically excluded from our general exclusion order.

The Public Interest

The Commission may issue an exclusion order "unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry."⁶ The public interest must be paramount in the administration of section 337.⁷ As the legislative history explains:

Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare; on competitive conditions in the United States economy; on production of like or directly competitive articles in the United States; or on the United States consumer, than would be gained by protecting the patent holder (within the context of U.S. patent laws) then the [Senate Finance] Committee feels that such exclusion order should not be issued.⁸

⁶ 19 U.S.C. § 1337(d)(1). See also 19 C.F.R. § 210.50(a)(2).

⁷ See S. Rep. No. 1298 at 193.

⁸ *Id.* at 197.

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We find that an adequate supply of the distinctively designed 4-inch centerset faucets protected by the patent is not necessary to ensure public health or welfare in the United States. Moreover, Moen states that it has been able to produce enough faucets to meet U.S. demand for faucets of the protected design since 1993. Also, Moen and its competitors produce many lavatory faucets that compete directly with the patented faucets without infringing the design patent, indicating continued competition and that an adequate supply of faucets in the U.S. market will be maintained. We therefore do not believe that any public interest concerns are presented in this investigation that should prevent the issuance of a general exclusion order. On the contrary, the public interest favors the protection of U.S. intellectual property rights by excluding infringing imports.

Bonding

Because we have issued a general exclusion order, infringing imported faucets and escutcheons will be entitled to entry under a bond prescribed by the Secretary of the Treasury, in an amount determined by the Commission, until the order becomes final or is disapproved by the President.⁹ If the President approves the order or takes no action and allows the order to become final, the bond may be forfeited to the complainant under terms and conditions prescribed by the Commission.¹⁰ The Commission must set the amount of the bond at a level sufficient to "protect the complainant from any injury."¹¹

Regarding the amount of the bond, the ALJ accepted Moen's proposal that it be calculated based on the average prices of the Moen faucets and the infringing Foremost/Chung Cheng faucets. In that comparison, the ALJ found the average price of the Moen faucets to be \$[] (with prices ranging from \$[] to \$[]) and the average price of the Foremost/Chung Cheng faucets to be \$[] (with prices ranging from \$[] to \$[]). RD at 71.

The ALJ rejected the respondents' argument that such a price comparison amounts to "comparing apples and oranges," noting that for both the Moen and infringing faucets, average sales prices were used. RD at 70. The ALJ also rejected the IA's argument¹² that it is not possible to calculate a precise price differential based on price ranges, noting that the Commission did so in *Certain Coin-Operated Audiovisual Games and Components Thereof*, 337-TA-105, Comm'n Action and Order, 1982 WL 212657 at 41 (July 1982) (setting a bond

⁹ 19 U.S.C. § 1337(j)(2)-(4) and 19 C.F.R. § 210.50(a)(3).

¹⁰ 19 U.S.C. § 1337(j)(3) and 19 C.F.R. § 210.50(d).

¹¹ 19 U.S.C. § 1337(j)(3) and 19 C.F.R. § 210.50(a)(3).

¹² The ALJ was responding to the argument of the IA, made prior to the issuance of the RD, that a precise price differential cannot be based on price ranges. In commenting subsequently on the RD, the IA acknowledged that basing the price differential on average prices is permitted.

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of 300 percent from the wholesale price of complainants' products and dividing the difference by the average wholesale price of respondents' products). RD at 70. The ALJ also noted that the Commission has set a bond as high as 600 percent. *Certain Cube Puzzles*, 337-TA-112, Comm'n Action and Order, 1982 WL 212660 at 36 (Dec. 30, 1982). RD at 70.

Based on the average selling prices of the Moen faucets and the Foremost/Chung Cheng faucets, the ALJ set the bond at 264 percent.¹³ RD at 71.

We agree with the ALJ that the evidence supports establishing a bond at a rate of 264 percent. As the ALJ noted, we must endeavor to set the bond at a level sufficient to prevent any harm to the complainant. Determining the proper amount for the bond is difficult where prices for the complainant's and respondents' products are not fixed, but instead fluctuate within a range. In fact, a bond set based on average prices would necessarily be too small to eliminate any injury in some sales, and larger than necessary in others. Nevertheless, where it is based on reliable record evidence, a bond based on average prices appears to be the best available means to set a bond sufficient to prevent any harm to the complainant.

We have set bonds based on average prices in past investigations. *See, e.g., Certain Methods for Extruding Plastic Tubing*, 337-TA-110, Commission Opinion at 23, USITC Pub. 1287 (September 1982) (bond set at 400 percent to ensure it would completely offset any competitive advantage, where weighted average could not be calculated, but record evidence indicated that infringing product was offered at "one-half to one-fourth" the price of the comparable domestic product), and *Certain Coin-Operated Audiovisual Games and Components Thereof*, 337-TA-105, Commission Opinion at 31 USITC Pub. 1267 (July 1982) (bond set using the average wholesale prices of the respondents' and complainant's products).

The use of average prices is appropriate here too, because the record evidence of price used by the ALJ appears reliable. For the average price of the Moen faucet the ALJ used the weighted average sales price of all of Moen's Monticello 4-inch centerset faucets. RD at 71 (citing CX-7). A weighted average is a reliable price because it reflects not only the range of prices for sales, but also the volume of sales at each price point. For the average price of the Foremost/Chung Cheng faucets, the ALJ cited a response to an interrogatory by Foremost, where the company stated that "the average sale price by Foremost of the FC-1032 faucet was \$[] to \$[] per faucet depending on its finish." RD at 71 (citing SX-23, page 7). This information appears reliable because it is supplied by Foremost, and it is accepted by Moen and the IA as well. The ALJ appears to have derived the \$[] figure for the average price of

¹³ The amount of the bond was derived by dividing the remainder of the average price of the Moen faucet minus the average price of the infringing Foremost/Chung Cheng faucets by the average price of the Foremost/Chung Cheng faucets, and then multiplying the result by 100: $((\$[] - \$[]) \div \$[]) \times 100 = 264.4$ percent.

PUBLIC VERSION

the Foremost/Chung Cheng faucets from the simple average of the \$[] and \$[] figures. Although a weighted average would have been preferable, it is not clear that the record provides the information necessary to derive a weighted average, and no party has objected to the use of a simple average. Additionally, because the range in prices (\$[] to \$[]) is relatively narrow, the potential inaccuracy introduced by using a simple average is presumably small.

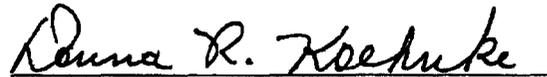
Based on the above, we determine to adopt the recommendation of the ALJ to set the bond at 264 percent.

**CERTAIN TWO-HANDLE CENTERSSET FAUCETS AND
ESCUTCHEONS AND COMPONENTS THEREOF**

337-TA-422

CERTIFICATE OF SERVICE

I Donna R. Koehnke, hereby certify that the attached NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER; TERMINATION OF THE INVESTIGATION, was served upon the following parties, via first class mail and air mail, where necessary on June 19, 2000.



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**CERTAIN TWO-HANDLE CENTERSET FAUCETS AND
ESCUTCHEONS AND COMPONENTS THEREOF**

337-TA-422

**CERTIFICATE OF SERVICE
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PUBLIC VERSION

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

| | | |
|------------------------------|---|-------------------------------------|
| In the Matter of |) | |
| |) | |
| CERTAIN TWO-HANDLE |) | Investigation No. 337-TA-422 |
| CENTERSET FAUCETS AND |) | |
| ESCUTCHEONS, AND |) | |
| COMPONENTS THEREOF |) | |

Final Initial and Recommended Determinations

Pursuant to the Notice of Investigation (64 Fed. Reg. No. 116 at 32522-32523 (June 17, 1999)), this is the administrative law judge's final initial determination, under Commission rule 210.42. The administrative law judge, after a review of the record developed, finds that a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), has occurred.

This is also the administrative law judge's recommended determination on remedy and bonding, pursuant to Commission rule 210.42(a)(1)(ii). The administrative law judge recommends that the Commission issue a general exclusion order and further recommends a bond of 264% of entered value during Presidential review.

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ABBREVIATIONS

| | |
|---------|---|
| CPost | Complainant's Initial Posthearing Submission |
| CPostR | Complainant's Reply Brief |
| CFF | Complainant's Proposed Finding of Fact |
| CX | Complainant's Exhibit |
| CPX | Complainant's Physical Exhibit |
| MRFCFF | Complainant's Proposed Rebuttal Finding to Respondents' Proposed Finding |
| MOFCFF | Complainant's Objection to Respondents' Proposed Finding |
| MOSFF | Complainant's Objection to Staff's Proposed Finding |
| MRSFF | Complainant's Proposed Rebuttal to Staff's Proposed Finding |
| RPBr | Respondents' Prehearing Brief |
| RPost | Respondents' Foremost and Chung Cheng Initial Posthearing Submission |
| RPostR | Respondents' Reply Brief |
| FCFF | Respondents' Proposed Finding of Fact |
| RFCX | Respondents' Exhibit |
| RFCPX | Respondents' Physical Exhibit |
| ROCF | Respondents' Objection to Complainant's Proposed Finding |
| RRCFF | Respondents' Rebuttal to Complainant's Proposed Finding |
| ROSFF | Respondents' Objection to Staff's Proposed Finding |
| RPostRO | Respondents' Submission Containing Objections And Proposed Rebuttal Findings To Complainant's Proposed Findings |
| RRSFF | Respondents' Rebuttal Finding to Staff's Proposed Finding |

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|----------------|--|
| SPost | Staff's Initial Posthearing Submission |
| SFF | Staff's Proposed Finding of Fact |
| SPostRO | Staff's Submission Containing Objections And Proposed Rebuttal Findings |
| SPostR | Staff's Reply Brief |
| SOCFF | Staff's Objection to Complainant's Proposed Finding |
| SRCFF | Staff's Proposed Rebuttal to Complainant's Proposed Finding |
| SORFF | Staff's Objection to Respondents' Proposed Finding |
| SRRFF | Staff's Proposed Rebuttal to Respondents' Proposed Finding of Fact |
| SX | Staff's Exhibit |
| Tr. | Transcript |

OPINION

I. Procedural History

By notice of investigation, which issued on June 14, 1999, the Commission instituted an investigation, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain two-handle centerset faucets and escutcheons, and components thereof by reason of infringement of U.S. Patent Des. 347,466, ('466 patent) and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

The complaint filed by complainant Moen Incorporated of Ohio (Moen), as supplemented, alleged violation of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain two-handle centerset faucets and escutcheons and components thereof by reason of infringement of the design '466 patent. The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337.

The respondents, upon which the complaint was served and which were identified in the notice of investigation, were Foremost International Trading, Inc. of New Jersey (Foremost), Hometek International Group of Illinois (Hometek), Sisco, Inc. of California (Sisco), Chung Cheng Faucet Co. Ltd. of Taiwan (Chung Cheng), and Lota International Co. Ltd. of People's Republic of China (Lota).¹

¹ Moen filed suit against Foremost in U.S. District Court on December 17, 1997 alleging that a Foremost faucet infringed the '466 patent. Moen won a preliminary injunction on the issue of design patent infringement on September 1, 1998, nine months after Moen had filed suit. See Moen Inc. v. Foremost Int'l Trading Inc., 19 F. Supp.2d 854 (N.D. Ill. 1998). (Moen I). On March 4, 1999, the Court entered summary judgment for Moen finding that the Foremost faucet

Order No. 3 set a target date of June 19, 2000 and represented that the final initial determination on violation would be due no later than March 17, 2000.

On September 7, 1999 an initial determination (Order No. 6) issued which terminated the investigation, as to respondent Hometek, on the basis of a consent order stipulation and incorporated proposed consent order. The Commission determined not to review Order No. 6 on October 6, 1999.

On November 16, 1999 an initial determination (Order No. 11) issued which granted complainant's Motion No. 422-10 for partial summary determination that it had satisfied the economic prong of the domestic industry requirement of 19 U.S.C. § 1337(a)(3) by its economic activities in the United States with respect to its Monticello ® 4" centerset lavatory faucets. The Commission determined not to review Order No. 11 on December 29, 1999.

Order No. 14, which issued on November 30, 1999 denied, without prejudice, complainant's Motion No. 422-12 for summary determination of infringement of the '466 patent by Foremost's series FC-1032 faucets, based on issue preclusion as a consequence of Moen I and Moen II. Motion No. 422-12 was predicated on complainant's argument that Chung Cheng was in privity with Foremost during the pendency of Moen I and Moen II.

On December 14, 1999, an initial determination (Order No. 20) issued which granted Joint Motion No. 422-18 of complainant, Sisco and Lota to terminate the investigation with respect to respondents Sisco and Lota. The Commission determined not to review Order No. 20

which is identical to the Foremost/Chung Cheng accused faucet in this investigation infringed Moen's patented design and issued a permanent injunction barring the importation, use or sale in the United States of the Foremost faucet. See Moen Inc. v. Foremost Int'l Trading Inc., 38 F. Supp.2d 680 (N.D. Ill. 1999) (Moen II). Foremost has appealed the decision of the district court, but the appeal has been stayed pending the outcome of this investigation.

on February 1, 2000.

The prehearing conference and hearing were conducted on December 13 to 15, 1999 with complainant, Foremost and Chung Cheng (respondents) and the staff participating. Following the filing of post-hearing submissions, closing arguments were heard on January 27, 2000.

The matter is now ready for a decision.

The "Final Initial and Recommended Determinations" are based on the record compiled at the hearing and closing arguments as well as the exhibits admitted into evidence. The administrative law judge has also taken into account his observation of the witnesses who appeared before him during the hearing. Proposed findings submitted by the parties not herein adopted, in the form submitted or in substance, are rejected as either not supported by the evidence or as involving immaterial matter and/or as irrelevant. The findings of fact included herein have references to support evidence 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 said findings.

II. Parties And Jurisdiction

With respect to parties and former parties, see FF 1-6.

Foremost and Chung Cheng responded to the complaint and notice of investigation and participated at the hearing, thereby agreeing to the in personam jurisdiction of the Commission. Chung Cheng admits the sale for importation, and Foremost admits the importation and sale in the United States after importation of the Foremost/Chung Cheng accused facet. The Commission therefore has in rem jurisdiction over the subject matter of this investigation. (See respondents' unobjected to CFF 87, RPostRO at 26).

III. Issues On Violation Including Ordinary Observer

Each of the parties agree that infringement is the only contested issue before the administrative law judge. (Tr. at 651).² Patent infringement must be established by a preponderance of the evidence. Braun Inc. v. Dynamics Corp. Of America, 975 F.2d 815, 24 U.S.P.Q.2d 1121, 1124 (Fed. Cir. 1992) (Braun) (“Infringement of a design patent is the unauthorized manufacture, use, or sale of the article embodying the patented design or any colorable imitation thereof.”) Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co., 162 F.3d 1113, 1116-17 (Fed. Cir. 1998) (citing 35 U.S.C. § 289).³ In conducting a design patent infringement analysis, “the patented design is viewed in its entirety, as it is claimed...[T]he ultimate question requires determining whether ‘the whole design [is] substantially the same.’” L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d at 117, 25 U.S.P.Q.2d 1913, 1918 (Fed. 1993) rehearing in banc denied (1993) (citations omitted) (Gear). Also “minor differences between a patented design and an accused article’s design cannot, and shall not, prevent a finding

² No party at the hearing challenged the validity and enforceability of the ‘466 patent.

³ 35 U.S.C. § 289 reads:

§ 289. Additional remedy for infringement of design patent

Whoever during the term of a patent for a design, without license of the owner, (1) applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture for the purpose of sale, colorable imitation has been applied shall be liable to the owner to the extent of his total profit, but not less than \$250, recoverable in any United States district court having jurisdiction of the parties.

Nothing in this section shall prevent, lessen, or impeach any other remedy which an owner of an infringed patent has under the provisions of this title, but he shall not twice recover the profit made from the infringement.

of infringement.” Litton Sys., Inc. v. Whirlpool Corp., 728 F.2d 1423, 1444, 221 U.S.P.Q. 97, 110, (Fed. Cir. 1984).

After the design patent claim is properly construed to determine its meaning and scope, a two-part test is applied to determine if an accused product infringes a design patent. Elmer v. ICC Fabricating Inc., 67 F.3d 1571, 36 U.S.P.Q.2d 1417, 1421 (Fed. Cir. 1995) (Elmer). In the first instance, the nonfunctional, or ornamental, aspects of the patented and accused designs are compared to determine whether there is an overall visual similarity (the substantial similarity or Gorham test (Gorham Co. v. White, 81 U.S. (14 Wall) 511 (1871))). Id. Thereafter, the administrative law judge considers if the accused design “appropriate[s] the novelty in the patented design which distinguishes it from the prior art”(the point of novelty test). Avia Group Int’l Inc. v. L.A. Gear California Inc., 853 F.2d 1557, 7 U.S.P.Q.2d 1548, 1554 (Fed. Cir. 1988) (quoting Shelcore, Inc. v. Durham Indus., Inc., 745 F.2d 621, 628 n.16 (Fed. Cir. 1984)). Although essential for finding design patent infringement, the point of novelty test need not, and should not, be considered unless and until the substantial similarity test is satisfied. Lee v. Dayton-Hudson Corp., 838 F.2d 1186, 1189 n.4, 5 U.S.P.Q.2d 1625, 1627 n. 4 1627 (Fed. Cir. 1988), (“[U]nless the Gorham standard for finding infringement is met by the accused devices, there is no need for detailed analysis in terms of the prior art”).

In Gorham, Gorham Manufacturing Company owned a patent on an ornamental design for the handles of silverware and alleged that White’s 1867 and 1868 designs for tablespoons and forks infringed. Gorham, 81 U.S. (14 Wall.) at 521. The lower court found that White’s designs did not infringe. Id. at 524. The Supreme Court, in reversing the lower court and finding infringement, began by framing the factual issue:

The sole question, therefore, is one of the fact. Has there been an infringement? Are the designs used by the defendant substantially the same as that owned by the complainants? To answer these questions correctly, it is indispensable to understand what constitutes identity of design, and what amounts to infringement? [Gorham 81 U.S. at 531.] [Emphasis added].

The Court then equated “identity of design” with “sameness of appearance” and noted that slight variances will not destroy substantial identity, Id. at 524, if they are so insubstantial as to have no effect on the eye of the ordinary observer:

We are now prepared to inquire what is the true test of identity of design. Plainly, it must be sameness of appearance, and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variances in configuration, if insufficient to change the effect upon the eye, will not destroy the substantial identity. [Id. at 526-27].

The Court thereafter arrived at an “ordinary observer” standard for determining whether the designs are “substantially the same.”

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other. [Id. at 528].

At closing arguments the administrative law judge questioned each of the parties as to its position as to who is an “ordinary observer,” pursuant to the substantiality similarity or Gorham test. Complainant argued that its expert Cooper Woodring was not only an expert who is skilled in the art but was also a person who had been working at J. C. Penny for decades in consumer product design, and had been working with consumers and understanding their perceptions, although complainant admitted that the standard is lower in the ordinary observer’s perceptions; that while Woodring can testify as to “substantially the same,” and because of his heightened skills

he can point out more differences than “most of us,” he can also, from his experience, testify what consumers see (Tr. at 793-795); and that respondents cannot object to Woodring’s testimony as to the perception of an ordinary observer because respondents at the hearing had not objected to Woodring’s testimony. (Tr. at 803).

Respondents cited the following portion of Arner v. Sharper Image Corp. 39 U.S.P.Q.2d 1282, 1290, n. 10 (D.C.D. Cal. 1995) (Tr. at 798-799):

Plaintiff also presents the declaration of Cooper Woodring [who appears to be complainant’s expert Woodring⁴], a retained expert on industrial design. In his declaration, he states as follows: “Based upon my review of the designs at issue in this litigation, I have concluded that a consumer who was familiar with the Arner design, when confronted with any one of the Sharper Image or Remington designs, would believe that the Sharper Image or Remington design was substantially the same as Ms. Arner’s design.” Woodring Decl. ¶ 9. Defendants object to this paragraph in the declaration, and the Court sustains the objection. Under Federal Rule of Evidence 702, an expert witness may testify in the form of an opinion if “such testimony would assist the trier of fact to understand the evidence or determine a factual issue.” Little Oil Co., Inc. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988). Mr. Woodring’s testimony above reaches the ultimate issue the jury would decide: the degree to which the devices are substantially similar. While Federal Rule of Evidence 704 permits expert testimony on ultimate issues, Rule 702 limits it to circumstances in which it is “helpful” to the jury. Little Oil, 852 F.2d at 446 (citing United States v. Gwaltney, 790 F.2d 1378, 1381 (9th Cir. 1986)). The Court finds that an industrial design expert’s testimony regarding what an “ordinary purchaser” would perceive is not helpful under Rule 702. [Emphasis added].

Respondents also argued that Woodring was making his assessment of what the ordinary observer would perceive based on Woodring’s review of the prior art and not based on Woodring’s perceptions or his observations or discussions with ordinary observers or Woodring’s prior

⁴ Complainant’s expert Woodring testified that he works as an expert witness and that he has given testimony at trial or in a deposition in five cases in the past four years and his recollection is that all five of those cases involve or involved design patent issues. (CX-64 at 1, 5).

knowledge of what consumers believe. (Tr. at 802).

The staff argued that an ordinary observer is the hypothetical person with attributes or characteristics of a purchaser of faucets and that the best evidence is the administrative law judge's own visual comparison, although it was argued that Woodring's testimony can assist the administrative law judge in making the administrative law judge's own comparison. (Tr. at 806, 808).

In Braun, 975 F.2d at 821, the Federal Circuit made it clear that a trier of fact may rely exclusively or primarily on a visual comparison of the patented design, as well as the device that embodies the design, and the accused device's design; and that in a jury case a panel of jurors was a panel of ordinary observers capable of making a factual determination as to whether it would be deceived by an accused device's design similarity to a patented design. Accordingly the administrative law judge finds that an ordinary observer is a hypothetical potential purchaser of faucets, which could include this administrative law judge but which would exclude persons having expert knowledge of faucets.

A. Scope of the Claim In Issue

Turning to claim construction, a claim is construed as one skilled in the art would have interpreted the claim at the time of invention. Vivid Tech. v. American Sciences & Engineering 202 F.3d 795, 804, 58 U.S.P.Q.2d 1289 (Fed. Cir. 1999). Moreover in a design patent case, any claim "is limited to what is shown in the application drawings" In re Mann, 861 F.2d 1581, 1582, 8 U.S.P.Q.2d 2030, 2031 (Fed. Cir. 1988). In addition, one looks to the ornamental aspects of the design as a whole and not merely isolated portions of the patented design. Braun 975 F.2d at 815, 24 U.S.P.Q.2d at 1125.

The '466 patent in issue is titled "Faucet Body" and it issued on May 31, 1994 to Paul P. Kolada, Michael J. Painter and Terry Birchler on application Ser. No. 854,968 which was filed on March 20, 1992. (FF 20). It claims "[t]he ornamental design for a faucet body, as shown and described." (CX-5). Under the heading "DESCRIPTION" it states

FIG. 1 is a perspective view taken from the top front and left side of a faucet body showing our new design;⁵
FIG. 2 is a front elevational view thereof;
FIG. 3 is a top plan view thereof;
FIG. 4 is a left side elevational view thereof, the right side being a mirror image of the left side;
FIG. 5 is a rear elevational view thereof, and;
FIG. 6 is a bottom plan view thereof.
The broken line representation of faucet handles in FIGS. 1 and 2 are for purposes of illustration only and form no part of the claimed design.

Those figures are represented in the patent as follows:

⁵ FIG. 1, as the parties agree (Tr. at 29-30), is identical to a drawing that appears on the title page of the '466 patent.

All parties agree that any faucet body design necessarily incorporates some functional aspects and that while for example, the holes in the top of the claimed faucet body, with centers spaced four inches apart, are required to accommodate the valves and pipes that permit the user to control water flow, the elements of the design depicted in the '466 patent are primarily ornamental. (See CFF 118, RPostRO at 34, SPostRO at 41). The administrative law judge agrees and finds, as to the scope of the claimed design in issue, that it is primarily ornamental as shown by FIGS. 1-6 of the patent which portray a 4" centerset faucet having a curved spout (as best seen in FIGS. 1 & 4), which spout terminates in a clean cut angle toward the base (as best seen in FIGS. 2, 4 & 6), and which is smoothly blended to a rounded base (as best seen in FIGS. 3, 5 & 6).

In closing arguments the administrative law judge asked each of the parties to put in words the scope of the claim in issue independent of the point of novelty test. (Tr. at 654-655, 658). Complainant's position was that "you really can't. That's why in a design patent the description of what the patent covers is simply a faucet body as shown in the drawings." (Tr. at 657). Later complainant stated that the scope of the '466 patent is

"a faucet body design and that's what it is. You can be more specific about each aspect of the faucet body design. But it comes back to the overall appearance of it." (Tr. at 659).

Complainant concluded that "the design shown in the patent drawing is the scope of the claim." (Tr. at 660).

Respondents agreed with complainant that "the literal scope of the patent . . . is exactly what is shown in the patent drawings." (Tr. at 660). However they would also characterize the scope of the claim as follows:

“a faucet base having a curved spout, smoothly blended into an elliptical base which is fully rounded. By fully rounded, I mean it has no sharp angles on it, on the base. The base is elliptical shaped meaning there are no straight lines on the base and it is curved from front to back with no sharp edges, sharp breaks, no flat surface anywhere on the base or on the spout for that matter.” (Tr. at 661)

Complainant objected to respondents’ word characterization on the ground that respondents are “trying to define scope that’s different than this faucet by focusing on the shape of the base, elliptical or some other shape” and it’s complainant’s position that “you look at the overall appearance” and that the base is a part as any other part but it’s wrong to focus on small parts and “[t]hat’s why it’s very difficult to put into words the scope.” (Tr. at 661-662).

Respondents later argued that the staff:

“appears to have . . . overestimated the scope of the ‘466 design. Page 10 of the Staff’s brief [SPost] suggests that the Staff has presumed that the ‘466 design protects ‘a graceful, flowing appearance [of a two-handled, centerset faucet], the visual focus of which is . . . [a] raised, highly arched spout that smoothly transcends out of the forward and upper surfaces of the base and terminates with a pronounced, angled cut-off.’ . . . [and that] [i]t does not have that broad a scope.” [RPostR at 2]

The staff, in response, argued (Tr. at 662-663) that it did use a description of the design in words but argued that it was not an attempt to define the scope of the design but was more of an introduction.⁶ The staff agreed with complainant and respondents “that it’s best not to put the scope of the patent into words because the scope is what is shown in the drawings;” that the Court, in Pelouze Scale & Mfg. Co. v. American Cutlery Co. et al. 102 F. 916 (7th Cir. 1900) (Pelouze) emphasized that “it’s the impression through the eye upon the mind that one is

⁶ The staff (SPost at 10) used the language under the subheading “B. ‘Substantial Similarity’ Test,” and “2. The Accused Product” and the quoted language was in reference to the staff’s visual comparison of the accused and patented designs. (SPost at 10).

interested in” and “as soon as you start trying to put something into words, you’re unfortunately, picking out one feature over another to mention that’s what you’re not supposed to do.”⁷

Respondents however had earlier argued (RPBR at 1, 5-6) that while “certain named-brand Moen, Delta and Price Pfister faucets” have bases and spouts that have a “traditional” look with smooth “graceful” styling, Moen does not assert that the Price Pfister and Delta faucets infringe the ‘466 patent (RPBr at 1); that the fact that the Delta and Price Pfister faucets are and have been on the market for some time has taught purchasers to recognize those faucets as different versions of a particular style characterized by such a “traditional” look and “graceful” lines; that Moen’s “admission” that the Delta and Price Pfister faucets do not infringe the ‘466 patent is a tacit concession that the ‘466 patent cannot (and should not) prevent competitors from presenting their own product offerings having such a style; that as a result while the casual observer may view the Delta, Moen, and Price Pfister faucets as “substantially the same” in the sense that each has this general “traditional” or “graceful” style, the ordinary purchaser would recognize them as distinct offerings in that style; and that accordingly the differences found in the

⁷ In Pelouze, the Court stated:

Design, in the view of the patent law, is that characteristic of a physical substance which, by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually, nor in their method of arrangement, but in the tout ensemble – in that indefinable whole that awakens some sensation in the observer’s mind. Impressions thus imparted may be complex or simple; in one a mingled impression of gracefulness and strength, in another the impression of strength alone. But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character. [102 F. at 918, 919] [Emphasis added].

contended that the Delta and Price Pfister faucets infringe the '466 patent, it is "likely" it would also have initiated such action against Delta and Price Pfister. (RPost at 2).⁹

Respondents have admitted that the Price Pfister faucet was not in existence as of May 31, 1994 which is the issuance date of the '466 patent and hence is not prior art.¹⁰ (Tr. at 684, 685).¹¹ At closing arguments, for the proposition that the administrative law judge could use the Price-Pfister and Delta faucets in determining whether or not there is infringement of the '466 patent and in "valuing the scope of a design patent," respondents' counsel cited the following cases (Tr. at 685, 688):¹² Queen's University at Kingston, and Giram Company, Inc. v. Kinedyne Corporation 910 F. Supp. 527 (D. Kansas 1995) (Kinedyne), Southeastern Metals Co., Inc. v.

⁹ While respondents appear to argue that the Price Pfister and Delta faucets are non-infringing, respondents have not established that said faucets are non-infringing. Moreover respondents have not established that the Price Pfister and Delta faucets are closer to the claimed design in issue. In addition there is no requirement that Moen promptly identify and sue all parties that Moen believes infringe the patent in issue. See Polymer Technologies, Inc. v. Bridwell, 103 F.3d 970, 975, 41 U.S.P.Q.2d 1185, 1189 (Fed. Cir. 1996) ("A patentee does not have to sue all infringers at once").{

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¹⁰ The term "prior art" in section 103, though not expressly defined in the statute, means that which was known before as described in section 102. This definition follows the legislative history of the 1952 Patent Act. In patent law, nonobviousness "means that an invention must not have been obvious to one with ordinary skill in the art to which the subject matter of the invention pertains at the time of the invention and in the light of the teachings of the prior art. Nonobviousness is distinct from novelty in the sense that an invention may be obvious even though it is not identically disclosed anywhere in the prior art." Chisum Vol. 2 § 501 (1999). (Emphasis added).

¹¹ There is nothing in the record to establish that a Delta faucet is prior art.

¹² Respondents admitted that it is not their position that the Delta and Price Pfister faucets are prior art; that "[w]e're not trying to prove" that they are prior art; and that "I don't think the record evidence" would support a finding that they are prior art. (Tr. at 685).

American Seating Company 298 F. Supp. 1128 (N.D. Ala. 1968) (Southeastern), Erickson Tool Company v. Balas Collet Company 277 F. Supp. at 226 (N.D. Ohio) (Erickson) and Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corporation 275 F. at 362 (E.D. N.Y. 1921) (Findlay).

Complainant's position is that there is nothing in the cases cited by respondents that supported the argument that one could rely on the Price Pfister or Delta faucets in any aspect of determining infringement. (Tr. at 770). The staff, limiting its comments to Kinedyne and Findlay, argued that while in those cases there was a mention of a non-prior art device, the Court in Findlay did not rely on the non-prior art device anywhere and "[i]t's the same thing" in Kinedyne. (Tr. at 771-772).

In Findlay, complainant sued for infringement of a design patent. The Court did state that "[w]hen we come to the question of noninfringement, the designs of the prior art, and also other designs now upon the market which are admittedly not infringements, are offered in order to show the narrow range of resemblances by which liability for infringement is sought to be presented" 275 F. at 362-363. (Emphasis added).

In issue in Kinedyne, was alleged infringement of a '210 patent, which was a utility patent. The Court, in finding no infringement (910 F. Supp. at 534), stated:

The Kinedyne [accused] system is much more similar to the commercial products developed by plaintiffs after the '210 patent was issued and the Ortho Safe system (which plaintiffs admit does not infringe the '210 patent [in issue]), than to the invention claimed in the '210 patent. The simple answer to plaintiffs' claims is that a patent was never obtained on any of the subsequent product improvements that they now claim are embodied in the '210 patent. Giram [patentee] did not apply for a new patent on the modified systems developed after the '210 patent issues or

attempt to broaden the claims of the '210 patent pursuant to 35 U.S.C. § 251 ... Plaintiffs' present infringement claims under the doctrine of equivalents attempts to significantly expand the scope of the '210 patent beyond any reasonable construction of the patent language. Even under a liberal interpretation of the patent claims, Kinedyne's accused device does not infringe the '210 patent because the differences between the device claimed in the '210 patent and the accused Kinedyne device are substantial. [Emphasis added].

In issue in Southeastern, inter alia, was alleged infringement of a '723 patent which was a utility patent involving a plastic seat panel. The Court, in finding that the claims of the '723 patent were valid but not infringed, pointed out that it was stipulated during the trial that "a chair equipped with a seat made exactly as PX-11 is made," does not infringe any of the claims of the '723 patent; and found that the only difference between PX-11 and the seats of the accused chairs is the addition of extra ribbing on the underneath side of the plastic seats, at the rear thereof. It then concluded.

Taking into account that ribbing for strength is old, that the claims of the '723 patent specifically define the precise way in which the frame chair and seat are combined and attached, and further considering that PX-11, except for the extra ribbing, corresponds precisely to the accused seat, yet is admitted not to be an infringement, the Court finds that the addition of the ribs does not result in a combination which is the mechanical equivalent, and therefore an infringement, of the claimed structure. The plaintiff simply has adopted a different method of attaching its seat to its frame. [Emphasis added].

298 F. Supp at 1132.

In Erickson the complaint charged that defendant had infringed a '845 patent, a utility patent, by making and selling collet chucks embodying the invention of claims 1, 3, 4, 6 and 7 of said patent. The Court, in holding that the '845 patent was invalid and not infringed, found, inter

alia:

30. ... Defendant has also contemporaneously made and sold a second form of collet chuck which is substantially and essentially identical in all respects with the accused chuck except that it does not employ the Torrington roller thrust bearing of the accused chuck. This second chuck has been excused by plaintiff from its charge of infringement of the patent in suit and has been admitted by plaintiff to not embrace any alleged invention of any claim of the patent in suit. Plaintiff's admissions to defendant's requests Nos. 1 and 17.

* * *

37. Defendant's accused collet chuck does not differ in function or mode of operation or coaction between the constituent parts from defendant's excused collet chuck. Lutz, Tr. 296 and 297.

38. Defendant's accused collet chuck does not differ in results from defendant's excused collet chuck, except as the grip on a tool or work piece is shown on deft's Ex. UU Lutz, Tr. 297 [Emphasis added].

277 F. Supp at 231, 232.

As seen from the foregoing, only Findlay related to a design patent and in that case the Court did not place any weight on the admission of complainant that designs on the market are not infringing. To the contrary the Court found infringement of the design patent in issue. Findley, 275 F. at 363. The other three cases relied on by respondents relate to infringement of utility patents. To determine whether a utility patent is infringed, courts do not look to the substantial similarity and the point of novelty tests. Moreover in each of the utility patent cases relied on by respondents, it was beyond doubt that the patentee had admitted that the utility patent in issue was not infringed by certain other products. Thus in Kinedyne the Court found that plaintiffs do "admit" to commercial products developed by plaintiffs, after the patent in issue

had issued which do not “infringe” the ‘210 patent that was in issue; in Southeastern the Court found that PX-11 was admitted not to be an infringement; and in Erickson the Court found that a collet chuck had been excused by plaintiff from infringement, see supra.

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The administrative law judge has found that the ordinary observer in the substantial similarity test, one of the two tests for determining infringement of a design patent, is a hypothetical potential purchaser of faucets, which included this administrative law judge but which would exclude persons having expert knowledge of faucets. See supra.

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B. Infringement

As found supra the elements of the design shown in the '466 patent in issue are primarily ornamental. A two part test, viz., the substantial similarity test and the point of novelty test, is applied to determine whether this primarily ornamental design is infringed. See supra.

(a) The Substantial Similarity Test

Although design patent analysis requires comparison of the claimed design with the accused articles, when the patent design does not differ from the embodiment in the Moen commercial faucet the finding of actual similarity between the Moen's faucet, which embodies the patented design and the accused faucet, is applicable to an infringement analysis. Gear, 988 F.2d at 1125 (finding comparison of the accused article to the embodiment of the claimed design appropriate where no party contests that the embodiment does not differ from the claimed design). The accused faucet is represented by RFCPX-1. Each of the complainant and the staff argued that CPX-11 is the Moen faucet which embodies the patented design in issue. (Tr. at 902, 904). Respondents admitted that they did not challenge the assertion that CPX-11 practices the patent in issue but argued that "I don't think we ever agreed - - we were leaving the burden of proof on Moen that it was practicing [the patent in issue]" (Tr. at 903, 904). Thus, no party contested that the embodiment does not differ from the claimed design. Moreover, in the domestic industry section, infra, of this Final Initial and Recommended Determinations the administrative law judge has found that Moen has satisfied its burden, through CPX-11, as to meeting the technical prong of the domestic industry requirement.

The administrative law judge finds that the ornamental design of respondents' accused Connoisseur series faucet, when taken as a whole, is substantially similar to the overall design

(CPX-11) protected by the '466 patent. Thus a visual comparison of the accused faucet (RFCPX-1) and a patented faucet (CPX-11) shows that the designs therein are substantially similar each portraying a 4" centerset faucet having a curved spout seen in FIGS. 1 and 4, of the '466 patent, which spout terminates in a clean cut angle toward the base seen in FIGS. 2, 4 & 6 and which is smoothly blended to a rounded base as seen in FIGS. 3, 5 & 6.

Respondents argued that the issuance of their U.S. Patents D390,637 and D390,638 is evidence that an ordinary observer would not find the patented and the accused designs to be substantially similar. (RPBr at 7). However proof of patentability of an accused design over an asserted design does not preclude a finding of infringement. Gargoyles Inc. v. Aearo Corp., 49 U.S.P.Q.2d 1556, 1566 (D. Mass. 1998). Thus, as the Court in Step Co. v. Consumer Direct Inc., 33 U.S.P.Q.2d 1338, 1344 (N.D. Ga. 1994) held, a determination of non-obviousness for the purpose of patenting a design is made from the point of view of the ordinary designer and not from the point of view of the ordinary observer. Consequently, in determining that the accused design was non-obvious, the U.S. Patent and Trademark Office applies a higher standard of inspection than that of the ordinary observer. Hence its determination is not probative of the question of whether an ordinary observer would confuse the accused and patented designs and whether the accused product thus infringes. Id. at 1344. In Black & Decker (U.S.) Inc. v. Cedarberg Indus. Inc. 48 U.S.P.Q.2d 1204, 1207 (N.D. Ga. 1994) the district court denied a motion of defendants for summary judgment of, inter alia, non-infringement of a design patent on the ground that the grant of a separate patent on the accused device does not avoid infringement, either literal or by equivalency. Thus the district court concluded:

... [v]iewing the accused device as a whole, the ribbed tubing and

end cap are similar, although not identical, to the design of the '935 patent [in issue]. In light of the similar ribbed tubing and end caps of the '935 patent and defendants' device, a reasonable jury could return a verdict in plaintiffs' [patentees'] favor.

48 U.S.P.Q.2d at 1207.

(b) The Point Of Novelty Test

Part of what makes the design of the '466 patent novel, considering the art that was cited on the face of the '466 patent as well as other prior art references including Japanese Design Patent 552,155, is the context of issuing the design in a four-inch centerset faucet. (FF 88, 92). The points of novelty in the design of the '466 patent include a raised and smoothly arched soft-D shaped cross section spout, said spout terminating in a clean cut, angle toward the base with said spout being smallest in cross-section near its mid-point and being blended with a racetrack shaped base. (FF 91, 92, 93, 97-99). The administrative law judge has already found that the designs of the accused faucet (RFCPX-1) and a patented faucet (CPX-11) are substantially similar. He further finds that the accused faucet appropriates said points of novelty in the claimed design.

(c) Surveys

Complainant and respondents each presented a consumer survey in an attempt to demonstrate how ordinary observers view the accused faucets in relation to the patented design. In Gorham, the Supreme Court found design patent infringement and in doing so relied in part on empirical and testimonial evidence that ordinary observers would be likely to mistake one product for another. 81 U.S. at 530. The Court, however, in Braun stated:

[i]n Gorham, the Supreme Court did not state, or suggest, that a panel of jurors was anything other than a panel of ordinary observers capable of making a factual determination as to whether they would be deceived by an accused device's design similarity to

a patented design. Simply, put, a jury, comprised of a sampling of ordinary observers, does not necessarily require empirical evidence as to whether ordinary observers would be deceived by an accused device's design. The desirability of or necessity for presentation of such evidence might vary depending on the circumstances of the particular case;...

Braun, 975 F.2d at 821, (Emphasis added). Thus, the administrative law judge finds that, while survey evidence may be relevant, it is necessary to make the determination of their usefulness on a case by case basis. In determining what weight the administrative law judge will give to the surveys, the administrative law judge must first find that the surveys are reliable and credible.

In evaluating the use of surveys in trademark cases the Commission has generally looked to the eight factors set forth in the Judicial Conference of the United States Handbook of Recommended Procedures for the Trial of Protracted Cases (West Ed. 1970) (Handbook) in evaluating the credibility and reliability of consumer survey evidence. These factors are:

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;
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; and
8. The interviewers, trained in this field, have no knowledge of the litigation or the purpose for which the survey is to be used.

See Certain Air Impact Wrenches, 337-TA-311, Unreviewed Initial Determination at 58-59, 88

(May 6, 1991) (Wrenches) (giving no weight to survey where 3 of the 8 factors were not met); see also Certain Compound Action Metal Cutting Snips And Components Thereof, Inv. No. 337-TA-197, Unreviewed Initial Determination at 80 (April 18, 1985) (Metal Cutting Snips) (giving weight to survey where all 8 factors met), and Certain Single Handle Faucets, Inv. No. 337-TA-167 at 41, 44 (1984) (Single Handle Faucets) (giving “some” weight to survey where all 8 factors were met). Thus, under Wrenches, Metal Cutting Snips, and Single Handle Faucets, it is only when a survey does comply with all 8 factors that the administrative law judge may give the survey “some” level of weight.

(i) Complainant’s Survey

Complainant, who has the burden in establishing infringement by a preponderance of evidence, Braun, supra, argued that its survey supports a finding of infringement; that the survey was carefully designed; that the results of the survey are “remarkably consistent;” that between { } of survey respondents found the design of each faucet to be either substantially or exactly the same as the design shown in the ‘466 patent; and that the survey complies with all eight guidelines listed in the Handbook. (CPost at 34-35).

Respondents, with the exception of guideline 3, took no position on the eight guidelines with respect to complainant’s survey.

The staff argued that the survey evidence presented by complainant is “flawed;” and that, therefore, the survey should be given little weight when determining infringement. (SPost at 12).

Moen, through its survey research expert, Heisler, presented a survey conducted on Moen’s behalf by Opinion Research Corporation. (Opinion Research).¹⁴ The Opinion Research

¹⁴ Heisler was qualified as an expert in survey research. (FF 16).

survey was a mall intercept study in which approximately 200 pre-screened adults were questioned after being shown four sets of paired stimuli. (CX-65 at 4-6). Each respondent was shown the drawings of the '466 patent and photographs of the Moen, Foremost/Chung Cheng, Sisco/Lota and Hometek faucet bodies each photographed from the same perspective as the faucet drawings in the '466 patent. (CX-65 at 4-5; CX-38; CX-39). See FF 197, 198, 199 and 210.

Guideline 1 (Proper Universe)

The first guideline of the Handbook requires the examination of the proper universe. Complainant argued that Heisler properly defined the universe of potential respondents to his survey as "ordinary observers;" that in order to ensure the proper universe was selected, the survey asked four screening questions; that the screening questions resulted in respondents who were adult homeowners who made the faucet purchase decisions in their household, but who were not experts in the faucet industry; and that, therefore, the survey satisfied the first guideline. (CPost at 35).

The staff argued that complainant's survey "generally" satisfies guideline 1. It is argued that the Moen survey excluded non-homeowners, homeowners who do not have any decision making authority with respect to the purchase of a faucet, individuals who are in the plumbing business, and individuals under the age of 21 although the survey did not exclude those who are skilled in the art of industrial design and the possible inclusion of those skilled in the art of industrial design was improper. The staff argued, however, that the possible inclusion of those skilled in the art of industrial design should not have any "significant effects" on the results of the survey because those skilled in the art are not so numerous that the failure to exclude them would

be likely to skew the results. It is also argued by the staff that while the exclusion of non-homeowners or individuals who are in the plumbing business was improper, the exclusion of non-homeowners or individuals who are in the plumbing business would not have any significant effect on the results of the survey because there is no evidence that ordinary observers who are homeowners would view faucet designs any differently than ordinary observers who are not homeowners. (SPost at 16).

Complainant, respondents and the staff agreed that the proper universe for the study is the “ordinary observer,” (CPost at 28, RPost at 9, SPost at 20), and the administrative law judge finds that the proper universe for the study is the “ordinary observer.” For purposes of complainant’s survey, Heisler defined the universe of ordinary observers as ordinary purchasers of faucets, i.e., adults who are potential faucet purchasers, but who are not experts as to faucets. (FF 103). The administrative law judge finds that this definition of ordinary observer is consistent with the administrative law judge’s determination of who the ordinary observer is. See “Issues On Violation Including Ordinary Observer” supra.

In order to obtain the defined universe of ordinary observers the survey asked potential survey respondents four screening questions. (FF 104-108). The administrative law judge finds that the result of the four screening questions was to obtain a pool of potential survey respondents that were in fact adults who are potential faucet purchasers, but who are not experts as to faucets. However, the administrative law judge finds that the screening questions asked by the survey resulted in a pool of survey respondents that did not exclude those who are skilled in the art of industrial design and that did exclude the non-homeowners or individuals who are in the plumbing business. Hence, the administrative law judge finds that complainant’s survey may have included

those who are skilled in the art of industrial design.

The administrative law judge further finds that any inclusion of those who are skilled in the art of industrial design was improper because an individual skilled in the art of industrial design would view design drawings and products differently than an individual not skilled in industrial design, and therefore, an individual skilled in the art of industrial design is not an ordinary observer. However, the administrative law judge takes judicial notice of the fact that the percentage of those skilled in the art of industrial design out of the whole population of the United States is extremely low. Thus, the administrative law judge finds that the number of persons skilled in the art of industrial design is not so numerous that complainant's survey results would be skewed in complainant's favor.

With respect to the exclusion of non-homeowners, CX-20 is a "Faucet In-Store Research" study prepared for complainant which reflects that { } of faucet purchasers are not homeowners. (CX-20 at 18). Thus, the administrative law judge finds that the exclusion of non-homeowners resulted in the exclusion of potential ordinary observers. However, there is no evidence in the record that indicates that non-homeowners would view faucets differently than homeowners. Moreover, the exclusion of non-homeowners would not introduce into the survey any individuals who are not ordinary observers. Based on the foregoing, the administrative law judge finds that the exclusion of non-homeowners is an insignificant error.

With respect to the exclusion of individuals who are in the plumbing business, the administrative law judge rejects the staff's argument that said exclusion was improper. While the staff argued that "Moen's survey research expert conceded that individuals in the plumbing business sometimes purchase faucets," citing Heisler, Tr. at 439, the administrative law judge

finds that individuals in the plumbing business might have much more familiarity with faucets in general than would someone who is not in the plumbing business. Thus, the administrative law judge finds that individuals in the plumbing business might not be ordinary observers and there exclusion was proper.

Based on the foregoing, the administrative law judge finds that complainant has sustained its burden in demonstrating that it's survey complied with guideline 1 of the Handbook.

Guideline 2 (Representative Sample)

Guideline 2 of the Handbook requires that, with respect to the proper universe, a representative sample be drawn from that universe.

Complainant argued that Heisler ensured that his survey had drawn a representative sample from the proper universe of ordinary observers; and that therefore guideline 2 was satisfied. (CPost at 35).

The staff argued that a representative sample was properly selected by Heisler. (SPost at 16).

In order to obtain a representative sample complainant's survey included 208 respondents, drawn from six different shopping malls in each of two geographic markets, the metropolitan area of Chicago and northern New Jersey. (FF 109). Moreover, the respondents were selected at random from shoppers those malls. (CX-43). Accordingly, the administrative law judge finds that complainant has sustained its burden in establishing that its survey complied with guideline 2 of the Handbook.

Guideline 3 (Mode of Questioning)

Guideline 3 of the Handbook requires a correct mode of questioning interviewees.

Complainant argued that its survey asked only one question with respect to each of the four faucet bodies in issue; that the question provided survey respondents with a multiple point verbal scale; that the question included the response choice “substantially the same,” which corresponds to the correct legal standard; that the question, by asking the survey respondents to consider “how the faucets looked, not how they worked,” focused the survey respondents on the ornamental, not functional features of the faucet body designs; and that therefore, the survey uses the correct mode of questioning and satisfies guideline 3. (CPost at 36).

The staff argued that complainant satisfied guideline 3 because there is no evidence in the record “of any error in the mode of questioning...” (SPost at 14). However, the staff, in its analysis of guideline 6, did challenge the question asked in complainant’s survey stating “[t]he Staff submits that the Opinion Research survey asked the wrong question.” (SPost at 17). It is further argued that the multiple point verbal scale created by complainant’s survey question was not properly balanced; that the scale was loaded towards the complainant; and that, therefore, the survey may overstate the actual percentage of ordinary observers who would view the design of the Moen and accused faucets to be substantially the same as the ‘466 design. (SPost at 17-18).

Respondents argued that the survey intended the category of “substantially the same” to be a conceptual midpoint between “exactly the same” and “different;” that the term “substantially the same” is leading and, therefore is a factor against the survey’s reliability; and that the survey question never asked the survey respondents if there was similarity between the designs “apart from the fact that the Foremost faucet and the ‘466 design are both essentially 4” centerset faucets.” (RPost at 44-46).

Complainant’s survey showed the survey respondents four set of paired stimuli, viz., the

drawings of the '466 design and photographs of each of the accused faucet bodies. (FF 110).

Subsequently the survey respondents were asked the following question:

Here are photos of a faucet. Please look at both the photos and the drawings as if you were considering the purchase of a faucet. Take as much time as you would like. Now please answer the following question. Thinking about how they look, not how they work, the design of the faucet in the drawings and the design in the photos are: Exactly the same, Substantially the same, Different.”

(FF 111). Thus, the survey respondents could make one of three choices in their response.

Donald Hughes, respondents' survey expert,¹⁵ testified that the part of complainant's survey question which consisted of a number of options for the survey respondents is known to market researchers as a verbal scale. (Hughes, Tr. at 618-21). Hughes further testified that, in most instances, a properly designed and balanced verbal scale has equal gradations between the points.

Id. In addition, Hughes testified that the verbal scale used in complainant's survey was not balanced but, rather, loaded towards the complainant. (Hughes, Tr. at 600, 618-619).

Complainant's expert Heisler agreed that verbal scale created by his survey did not have equal gradations between the points. Heisler testified that on a 5 point scale with "5" being "exactly the same" and "1" being "different" it was his intent that consumers would view "substantially the same" as somewhere between "3" and "4." (Heisler, Tr. at 429-30, 462-63, 468, 472-73). Based on the testimony of Hughes and Heisler, the administrative law judge finds that the verbal scale used in complainant's survey was not balanced and the response choices did not have equal gradations. As a result, the administrative law judge finds that two of the three response choices were choices that were favorable to complainant.

¹⁵ Hughes was qualified as an expert in consumer research. (FF 17).

In closing argument complainant argued that:

Your Honor, we believe the questions posed were proper under the case law because the case law asks whether to the eyes of an ordinary observer the designs were substantially the same. So we went off to ask ordinary observers whether they believed them to be substantially the same or not.

* * *

The problem is that the word substantially the same is not a mid-point as, Ms. Goalwin pointed out, between exactly the same and different. But there's no real correct word to put in there. We could say substantially different but that really doesn't get anyone anywhere. Exactly different would be the fourth point.

(Tr. at 716-717). (Emphasis added). Thus it appears that complainant's argument is that even though "substantially the same" was not a mid-point in the verbal scale, there was no other way to create a scale with equal gradations. However, the fact that there was no way for complainant's to create a verbal scale with equal gradations does not give complainant license to disregard the accepted standard that a scale must be properly balanced.

Complainant argued that there is no suggestion in the question of the survey that the response choices are to be considered as equally divided and that Heisler testified that this mode of questioning was proper, citing Heisler's testimony at Tr. at 472. (Tr. at 721). However, Heisler's testimony at Tr. at 472 does not address whether or not the verbal scale used in complainant's survey was proper. In fact, Heisler's testimony does not refute any of Hughes' testimony regarding the fact that a proper verbal scale is one that is balanced and has equal gradations between the points.

Based on the foregoing, the administrative law judge finds that the improper verbal scale used in complainant's survey was loaded towards a favorable result for the complainant. The

administrative law judge also finds that the improper scale could skew the results obtained by the survey in favor of complainant. Therefore, the administrative law judge finds that guideline 3 of the Handbook was not satisfied by complainant's survey.

Guidelines 4 & 5 (Recognized Experts and Accurate Data Reporting)

Guidelines 4 and 5 of the Handbook require (4) recognized experts conducting the survey, and (5) accurate reporting of data gathered. Complainant argued that its survey "undisputably" satisfies guideline 4; and that it also satisfies guideline 5 because the accuracy of the data gathered was validated. (CPost at 37).

The staff also argued that guideline 4 was satisfied because Heisler is a recognized expert; and that 5 was satisfied because the interviewers were trained with specific instructions to ensure the accuracy of the data. (SPost at 14).

With respect to guideline 4, Heisler was qualified as an expert in the field of survey research. (FF 16). Moreover, Heisler has worked in the market research industry for over thirty years and has designed and executed surveys examining consumer confusion with respect to marketing and advertising. (CX-65 at Q5). Based on the foregoing, the administrative law judge finds that complainant has sustained its burden in establishing that its survey satisfies guideline 4 of the Handbook.

With respect to guideline 5, the administrative law judge finds that Heisler validated the data the survey gathered by recontacting each respondent and asking whether the respondent recalled being interviewed, and by dropping any respondent that did not recall being interviewed. (FF 112). Moreover, the administrative law judge finds that interviewers were trained with specific instructions to ensure the accuracy of the data. (CX-45). Based on the foregoing, the

administrative law judge finds that the survey data were accurately reported and complainant has met its burden in establishing that its survey complies with guideline 5 of the Handbook.

Guideline 6 (Sample Design, Questionnaire, and Interviewing)

Guideline 6 of the Handbook requires sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys.

Complainant argued that its survey was consistent with the generally accepted standards of objective procedure and statistics for survey research. (CPost at 37).

The staff argued that complainant's survey did not satisfy guideline 6 because the survey question created an improper verbal scale. (SPost at 17).

As the administrative law judge found with respect to guideline 3, the survey question contained an improper verbal scale which was loaded towards Moen and thus resulted in a significant error in the survey results sufficient to question the reliability of the survey. Hence, complainant has not sustained its burden in establishing that its survey complied with guideline 6.

Guidelines 7 & 8 (Independent of Attorneys, and Knowledge of Survey's Purpose)

Guidelines 7 and 8 require that (7) the sample design and interviews are conducted independently of the attorneys; and (8) the interviewers, trained in the field, have no knowledge of the litigation or the purpose for which the survey is to be used. Complainant argued that its survey complies with guideline 7 because the survey was conducted independently from counsel for Moen; that Heisler made the important decisions in the creation of the survey; and that the survey meets guideline 8 because at no time during the survey were the field supervisors or interviewers made aware of the fact that the Heisler survey was being conducted in support of this

investigation. (CPost at 38).

The staff argued that guideline 7 was satisfied because the field supervisors and interviewers in the mall locations were directed by Opinion Research not by Moen's attorneys; and that guideline 8 was satisfied because the interviewers were not told that the research was being conducted in support of litigation. (SPost at 14).

With respect to guideline 7, the administrative law judge finds that Heisler made the important decisions in the design, execution, and analysis of the Heisler survey, and Heisler's conclusions are derived from his independent mode of analysis of the survey results. (FF 114). Moreover, the administrative law judge finds that the field supervisors and interviewers in the mall locations were directed by Opinion Research not by Moen's attorney's. (CX-44, 45). Based on the foregoing, the administrative law judge finds that complainant has met its burden in establishing that its survey satisfies guideline 7 of the Handbook.

With respect to guideline 8, the administrative law judge finds that at no time were the field supervisors or interviewers made aware of the fact that the Heisler survey was being conducted in support of this investigation; that Moen was the ultimate client; that the drawings and photographs corresponded to the '466 patent and the faucet bodies at issue; and that there was any desired outcome. (FF 115). Although the supervisor's and interviewers' instructions were titled "Kirkland & Ellis Study," no indication of the client or purpose of the survey was given to the supervisors, interviewers or survey respondents. Id. Based on the foregoing the administrative law judge finds that complainant has met its burden in establishing that its survey satisfies guideline 8 of the Handbook.

The administrative law judge has determined that complainant's survey does not satisfy

guidelines 3 and 6 of the Handbook. Moreover he finds that the failure to satisfy said guidelines has resulted in an error in the survey sufficient to question the reliability and credibility of the survey. Accordingly pursuant to Commission precedent in Wrenches, Metal Cutting Snips, and Single Handle Faucets, the administrative law judge gives no weight to complainant's survey in his infringement analysis.¹⁶

(ii) Respondents' Survey

Respondents argued that their survey is trustworthy and provides an otherwise unavailable insight into the perceptions of the ordinary observer; and that their survey meets the guidelines set forth in the 1995 Manual Of Complex Litigation (Third) (Manual). (RPost at 9). Respondents, in arguing that their survey meets the guidelines set forth in the Manual, states that the Manual sets forth "seven" guidelines as follows:

- a) the population (or "universe") was properly chosen and defined;
- b) the sample chosen was representative of that population;
- c) the questions asked were clear and not leading;
- d) the survey was conducted by qualified persons following proper interview procedures;
- e) the data gathered were accurately reported;
- f) the process was conducted to assure objectivity (e.g. was the survey conducted in anticipation of litigation and by

¹⁶ Respondents argued that Heisler's survey actually confirms that the vast majority of people do recognize the difference between the accused faucet and the '466 design. (RPost at 43). However, in view of the administrative law judge's finding that complainant's survey is not entitled to any weight, the administrative law judge rejects respondents' argument that Heisler's survey actually confirms that the vast majority of people do recognize the difference between the accused faucet and the '466 design.

persons connected with the parties or counsel or aware of its purpose in the litigation); and

- g) the data were analyzed in accordance with accepted statistical principles.

(RPost at 12). However, while the respondents rely on the seven guidelines set forth in the in the Manual, the respondents do not attempt to analyze their survey pursuant to the guidelines set forth in the Handbook, as required by Commission precedent. Moreover, the respondents do not cite any Commission precedent that use of the Manual instead of the Hanbook is appropriate. Based on the foregoing, the administrative law judge finds that respondents reliance on the Manual is improper and does not address the necessary requirements to determine the reliability and credibility of their survey under Commission precedent in Wrenches, Metal Cutting Snips, and Single Handle Faucets. Thus, the administrative law judge will rely on the 8 guide lines of the Handbook in the following analysis of respondents' survey.¹⁷

Complainant argued that respondents' survey is not reliable or probative; and that respondents' survey fails to meet guidelines 1, 2, 3, 6 and 7 of the Handbook. (CPost at 34).

The staff argued that the survey evidence presented by respondents is "flawed;" and that, therefore, the survey should be given little weight when determining infringement. (SPost at 12).

Hughes, through Heakin Research, conducted a mall intercept survey where 50 individuals were presented with the drawings from the '466 patent and then, arranged side-by-side, the faucet bodies from the Moen faucet, the accused Foremost faucet, the Delta 2530

¹⁷ Many of the guidelines in the Manual are similar to those set forth in the Handbook. To the extent that any of respondents' arguments concerning the Manual are responsive to an analysis of the guidelines set forth in the Handbook, the administrative law judge will consider said arguments.

faucet, and the Price Pfister 8B5-8CMB faucet. (FF 116).

Guideline 1 (Proper Universe)

The first guideline of the Handbook requires the examination of the proper universe. Respondents argued that the universe chosen to be examined in their survey was properly defined and chosen; and that it was useful and legitimate. (RPost at 13, RPostR at 11).

Complainants argued that the survey failed to properly define the universe of potential respondents; that the survey asked no screening questions other than age to define the population; that this resulted in a pool of potential respondents which would include individuals who are not ordinary observers; and that therefore guideline 1 is not satisfied. (CPost at 31-32).

The staff argued that respondents' survey "essentially" satisfies guideline 1; that the proper population to be studied is ordinary observers, who are the ordinary purchasers of faucets, excluding those skilled in the art; that even though respondents' survey did not screen out individuals in the plumbing business, non-homeowners, and persons skilled in the art, the effect of those errors would "likely be negligible" on the study. (SPost at 20).

As stated supra, complainant, respondents and the staff agreed that the proper universe for the study is the "ordinary observer," (CPost at 28, RPost at 9, SPost at 20), and the administrative law judge has found that the proper universe for the study is the "ordinary observer." The Hughes survey defined the universe of potential survey respondents as "ordinary Americans" at least 21 years old. (FF 127). The Hughes survey asked no screening questions other than age to obtain the universe of "ordinary Americans" at least 21 years old. (Hughes, Tr. at 580). The administrative law judge has defined the ordinary observer as a hypothetical potential purchaser of faucets which could include this administrative law judge but which would

include persons having expert knowledge of faucets. See “Issues On Violation Including Ordinary Observer” supra.

The administrative law judge finds that Hughes’ definition of the universe as “ordinary Americans” over the age of 21 is different from the definition of the ordinary observer. The administrative law judge finds that the universe chosen by Hughes could include individuals who are skilled in the art of industrial design. As stated supra, the administrative law judge has found that the inclusion of those who are skilled in the art of industrial design was improper because an individual skilled in the art of industrial design would view design drawings and products differently than an individual not skilled in industrial design, and therefore, an individual skilled in the art of industrial design is not an ordinary observer. However, as stated supra, the administrative law judge has found that individuals skilled in the art of industrial design are not so numerous, and therefore, respondents’ survey would not be skewed in respondents’ favor.

Based on the foregoing, the administrative law judge finds that respondents’ survey improperly defined the universe of potential survey respondents, but that said improper definition did not result in skewed survey results in favor of respondents. Accordingly, the administrative law judge finds that respondents have met their burden in establishing that their survey satisfies guideline 1 of the Handbook.

Guideline 2 (Representative Sample)

Guideline 2 of the Handbook requires that, with respect to the proper universe, a representative sample be drawn from that universe. Respondents argued that the sample chosen by its survey was representative the universe it defined; and that the sample provided a good cross-section of the American population. (RPost at 13-14).

Complainant argued that respondents sample size was small; that a larger sample size would have provided more accurate results; that the sample was not representative of the universe designed; and that the survey failed to satisfy guideline 2. (CPost at 32).

The staff argued that the sample selected by Hughes was representative of the universe; and that respondents survey “essentially” satisfies guideline 2. (SPost at 20).

Hughes conducted a mall intercept survey where 50 individuals were presented with the drawings from the ‘466 patent and then, arranged side-by-side, the faucet bodies from the Moen faucet, the accused Foremost faucet, the Delta 2530 faucet, and the Price Pfister 8B5-8CMB faucet. (FF 116). Hughes testified that the sample size of 50 was a sufficient sample. (Hughes, Tr. at 564). Moreover, while Heisler testified that a sample size of 50 was too small (Heisler, Tr. at 421), he also agreed that “statisticians generally agree that a sample size of 30 is usually adequate to enable a normal distribution.” (Heisler, Tr. at 456-457). In addition, the administrative law judge rejects complainant’s argument that the fact that the sample was taken from only one mall in one geographic location renders the sampling insufficient. (CPost at 32). Complainant’s expert testified that there is no reason to believe the Golf Mill mall location skewed the survey results, and he also testified that there is no reason to believe that there would be geographic differences in how people perceive the Foremost and Moen faucets. (Heisler, Tr. at 438-439).

Based on the foregoing, the administrative law judge finds that respondents have sustained their burden in establishing that their survey has satisfied guideline 2 of the Handbook. Guideline 3 (Mode of Questioning)

Guideline 3 of the Handbook requires a correct mode of questioning interviewees.

Complainants argued that respondents' survey asked the wrong question of the survey respondents; that the question applied the wrong legal standard; that the first question asked by the survey is "fatally flawed" because it failed to direct the respondents to focus on the ornamental not functional aspects of the faucet design; and that the second question asked by the survey is also flawed because the survey respondents had difficulty answering it. (CPost at 32-33).

Respondents argued that the questions asked by their survey were clear and not misleading; and that even if the second question asked by the survey was somehow unclear, the fact that it was asked after the original question was answered means that its use could not affect the legitimacy of the responses to the first question. (RPost at 15, 17). However, it appears that respondents did not address, in their post hearing submissions, complainant's arguments that the survey asked the wrong question, used the wrong legal standard, and that the question did not direct the survey respondents to the ornamental not functional aspects of the design.

The staff argued that there is no evidence in the record that the correct mode of questioning was not used. (SPost at 21). However, it appears that the staff also did not address, in their post hearing submissions, complainant's arguments that the survey used the wrong legal standard and that the question did not direct the survey respondents to the ornamental not functional aspects of the design.

Each respondent in the Hughes survey was shown the '466 patent drawings and instructed:

Q2 "Please look at this drawing of a faucet. Review it as carefully as if you were thinking of buying a faucet. Take as much time as you like."

Each respondent was then shown all four faucet bodies and asked:

Q3 “Here are four faucets. Please look them over and tell me which, if any, have the same design as the faucet shown in the drawing?”

For each faucet identified the respondent was next asked:

Q4 “Are you sure enough of that, that you would buy this faucet in the belief that it has the design shown in the drawing?”

(FF 124-126).

The administrative law judge finds that the question “[h]ere are four faucets. Please look them over and tell me which, if any, have the same design as the faucet shown in the drawing,” asks the survey respondents whether they think any faucet has the same design as that shown in the ‘466 design drawings. However, the standard for design patent infringement as articulated in Gorham, supra, is “substantially the same” not “the same.” Moreover, respondents’ expert, when questioned as to whether he makes a distinction between “the same” and “substantially the same”, testified that “I make the distinction. The same is different to me- - the same is a higher order than substantially the same.” (Hughes, Tr. at 603-604). (Emphasis added). The administrative law judge finds that respondents’ survey question used the wrong legal standard and thus, the administrative law judge finds that whether or not the survey respondents believe that any of the faucets have the same design as the ‘466 patent is of no probative value on the issue of whether an ordinary observer would think the faucets are “substantially the same.”

In addition, when determining design patent infringement, it is the ornamental features of the design, not the functional features, that must be examined. See Oddzon, 122 F.3d at 1406. The administrative law judge finds that respondents’ survey failed to direct the respondents to focus on the ornamental and not functional features of the faucet design. The administrative law

judge also finds that said failure could result in the survey respondents making a decision as to similarity or non-similarity based on the functional aspects of the faucets and the '466 design. Accordingly, the administrative law judge finds that the failure to direct the respondents to focus on the ornamental not functional aspects of the faucet design could skew the survey results.

With respect to the second question asked by respondents' survey, viz., "Are you sure enough of that, that you would buy this faucet in the belief that it has the design shown in the drawing," Hughes testified that he had commented to LaBarge, counsel for respondents, concerning the second question as follows:

I hope the wording suggested for the questionnaire is not sacred. I'm struggling with the second question in particular as I think the respondents will have difficulty with it. Could we possibly think of some simple four - or five point verbal scale expressing how closely they thought the actual sample resembled the drawing."

(Hughes, Tr. at 585, CX-83). Thus, the administrative law judge finds that the second question is of no probative value because it is possible that the survey respondents did not understand it or had difficulty answering it.

Based on the foregoing, the administrative law judge finds that respondents' survey does not satisfy guideline 3.

Guideline 4 (Recognized Experts)

Guideline 4 of the Handbook requires recognized experts conducting the survey. Respondents argued that respondents' survey was conducted by an established market research company with a good reputation. (RPost at 19).

Neither complainant nor the staff contest that respondents' survey satisfied guideline 4.

Hughes was qualified as an expert in the field of consumer research. (Hughes, Tr. at

559-60). Moreover, the research firm used in the Hughes study, Heakin Research, has a good reputation in the industry and Heakin Research has been in business 30-35 years in Chicago. (FF 117).

Based on the foregoing, the administrative law judge finds that respondents' survey satisfies guideline 4.

Guideline 5 (Accurate Data Reporting)

Guideline 5 of the Handbook requires accurate reporting of data gathered. Respondents argued that Hughes tabulated the data himself, and that the data were accurately reported. (RPost at 20).

Complainant did not contest that respondents' survey satisfies guideline 5.

The staff argued that "the Hughes survey does not fully satisfy guideline 5;" that responses to one of the questions were not recorded on two of the 50 response forms; and that, nevertheless, this failure does not constitute a fatal flaw. (SPost at 21).

With respect to whether or not the data in respondents' survey was accurately reported, two of the questionnaires completed during the interviews conducted by Heakin Research (#13 and #39) are incomplete in that no response to one of the questions (question 4) was recorded. (FF 119). The administrative law judge rejects respondents' argument that the fact that one question was not completed on two forms does not necessarily reflect an inaccuracy of the reporting because the respondents may simply have been unable or unwilling to answer that question (RPostR at 16). Moreover there is no evidence that the survey respondents did have an answer to that question and it was not recorded. (LaBarge, Tr. at 746). The administrative law judge finds that while there is no evidence that those survey respondents did have an answer to

that question but it was not recorded, there is also no evidence that those respondents did not have an answer to that question and therefore the failure to complete the questionnaire is an accurate reflection of the survey respondents' responses. The administrative law judge finds that there is no way to establish, from the evidence in the record, whether or not the two incomplete questionnaires were incomplete due to inaccuracy or inability of the respondents to answer, however, the administrative law judge finds that had the respondent been unwilling or unable to respond to that question a notation could have been made, or that respondent could have been disqualified from the survey. Thus, the administrative law judge finds that there is potential for inaccurate reporting with respect to the two incomplete questionnaires.

The administrative law judge rejects the staff's argument that the inaccurate reporting is not a fatal flaw. The administrative law judge finds that, in a survey of 50 people, the failure to record two responses, which responses could have favored complainant, might have had a significant effect on the results of the survey. Based on the foregoing, the administrative law judge finds that respondents' survey does not satisfy guideline 5.

Guideline 6 (Sample Design, Questionnaire, and Interviewing)

Guideline 6 of the Handbook requires sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys. Respondents argued that the question in the survey questionnaire was clear; that no words were put in the survey respondents' mouths; that no demand situation was created by the survey questions; that even if the survey respondents thought they should only pick one faucet in response to the survey question, "the fact remains that more picked the non-infringing Price Pfister faucet than picked the Foremost;" that if the survey respondents thought they

should only pick one faucet in response to the survey question then the survey would reflect false positives, i.e., picking the Foremost faucet when they would not have picked any faucet; that such false positives overestimate the number of people who truly thought that the Foremost faucet had the '466 design; and that even if the survey resulted in a situation where the survey respondents would have picked more than one faucet that had similarity to the '466 design, and assuming that the extra choice would have been the Foremost faucet, the survey results would still not have "created a majority who could be said to have thought that the Foremost faucet had the '466 design." (RPost at 17-19).

Complainant argued that the survey deviates from accepted standards of objective procedure because the survey created a demand situation that introduced bias into the survey results; that Hughes deviated from standard survey procedure by misusing a statistical method, called the "T-test," to project the survey's results onto the population at large; and that, therefore, respondents' survey does not satisfy guideline 6.

The staff argued that respondents' survey created a demand situation; that the demand situation introduced bias into respondents' survey; and that therefore, respondents' survey does not satisfy guideline 6.

The respondents' survey asked the following question "Here are four faucets. Please look them over and tell me which, if any, have the same design as the faucet shown in the drawing?" (FF 124). With respect to this question Heisler testified that:

A demand situation is, in any type of research where there is something either in the way the questions are worded or some aspect of the context in which the interview was going on that would suggest to a respondent that they are expected to answer one way or another

(Heisler, Tr. at 421). Heisler further testified that:

Mr. Hughes showed respondents four faucets vis-a vis one drawing of the patent. In my mind that seems suggestive to the respondents that there was probably only one, if any, but one of the faucets that was similar to the design patent.

(Heisler, Tr. at 422). Not only did Heisler testify that the respondents' survey question could have created a demand situation, he also testified that the survey results itself indicate that there was a demand situation, stating that:

With that going in as a suspicion, I noted that 37 of the 50 respondents said that only one of the four faucets was similar. It just struck me as an unusually high number of respondents picking one. I would have expected the number to have been less.

(Heisler, Tr. at 422). Based on the wording of the respondents' survey question, the survey results, and the testimony of Heisler, the administrative law judge finds that respondents' survey question created a demand situation which suggested to the survey respondents that they should pick one and only one faucet in their response.

The administrative law judge also rejects respondents' argument that even if a demand situation were created it would result in false positives that would favor Moen, but that the record does not support a finding that the demand situation would skew the results in favor of respondents. While it is true that if a respondent did not think that any of the faucets were similar the respondent would have chosen one faucet anyway, and therefore the demand situation favored complainant, the administrative law judge finds that it is also true that a respondent who would have chosen more than one faucet only chose one, and therefore, the demand situation favored respondents.

The administrative law judge rejects respondents' argument that there is no support for

the argument that respondents' survey underestimated the number of people who thought that the Foremost faucet had the design of the '466 patent. Respondents argued that a total of thirteen survey respondents picked the Moen faucet and no others; and that assuming each and every such survey respondent really believed that the Foremost faucet also had the same design, but didn't pick it simply because they felt that they were only supposed to pick one faucet, adding all those respondents to the total number of respondents who actually did pick the Foremost faucet still would not have created a majority who could be said to have thought that the Foremost faucet had the '466 design. (RPost at 18-19). The administrative law judge finds that of the 37 survey respondents that chose only one faucet 30 did not choose the Foremost faucet. (RFCX-11). If, because of the demand situation, those 30 survey respondents had chosen more than one faucet they could have chosen the Foremost faucet. Thus, the administrative law judge finds that the respondents' survey results could have been skewed in favor of respondents by as many as thirty people. In a survey of only 50 people, the administrative law judge finds that even if only 10 of the thirty had chosen the Foremost faucet, in addition to another faucet, there would have been a significant effect on the survey results. Thus, the administrative law judge finds that there is the potential for a significant impact on the survey results had a demand situation not been created.

With respect to respondents' analysis of the results of the survey, the administrative law judge finds that the results of the survey may have been so skewed by the demand situation that whether or not the use of the "T-test" by respondents was proper is moot.

Based on the foregoing, the administrative law judge finds that respondents' survey does not satisfy guideline 6.

Guideline 7 (Independent of Attorneys)

Guideline 7 requires sample design and interviews conducted independently of the attorneys. Respondents argued that “both the staff and Moen relied on the handbook of recommended procedures for protracted cases which, as I understand it, was published in 1960. We had cited the 1995 edition of that rather than the 1960” (LaBarge, Tr. at 750); that the current version differs from the old version in that the recommendation that attorneys not be involved in sample design is not found in the current 1995 edition, (LaBarge, Tr. 751, RPostR 19); that the involvement of the Foremost attorney did not significantly impair the objectivity of the Foremost survey; and that the Foremost survey was conducted so as to assure objectivity. (RPost at 20, RPostR at 19-20).

Complainant argued that the survey was designed almost exclusively by LaBarge, counsel for respondents; and that, therefore, respondents’ survey does not satisfy guideline 7.

The staff argued that respondents’ survey does not satisfy guideline 7 because respondents’ counsel selected the population to be studied and drafted the questions to be posed to the survey respondents. However, the staff also argued that respondents’ failure to comply with guideline 7 is not a fatal flaw. (SPost at 21).

Regarding respondents’ argument that “both the staff and Moen relied on the handbook of recommended procedures for protracted cases which, as I understand it, was published in 1960. We had cited the 1995 edition of that rather than the 1960” (LaBarge, Tr. at 750); and that the current version differs from the old version in that the recommendation that attorneys not be involved in sample design is not found in the current 1995 edition, as stated supra respondents argued that their survey meets the guidelines set forth in the 1995 Manual Of

Complex Litigation (Third) not the Handbook. Thus, respondents' argument that the "new edition" of the Handbook no longer recommends that attorneys not be involved in the survey is inaccurate. Respondents are referring to the guideline set forth in the Manual. The Handbook and Commission precedent still require that surveys be conducted independent of counsel.

With respect to the involvement of counsel in respondents' survey, Hughes admitted that Foremost's lawyer LaBarge instructed him to use a sample size of fifty, instructed him that no screening questions were required and suggested the specific language for the questions to be posed to each respondent. (FF 120). Hughes also testified that he suggested the use of a simple four or five point verbal scale expressing how closely the respondents thought the actual sample resembled the drawing in response to LaBarge's instruction regarding the language to be used in the questionnaire, but that suggestion was rejected. (FF 121). Moreover, the language used in the questionnaire is virtually identical to that first proposed by Foremost's counsel, LaBarge. (FF 122). Furthermore, LaBarge admitted he was involved in the design of the survey, when he testified that "I think it is a good idea that I was involved in designing the questions. I think it led to a much better question." (LaBarge, Tr. at 751-2). Thus, the administrative law judge finds that counsel for respondents was involved in the design of respondents' survey.

The administrative law judge rejects respondents' argument that "the suggestion that attorneys may be involved in the development of the protocol is wise because it reduces the risk that a researcher with no legal training will misconstrue the legal standard." (RPostR at 19). Respondents give no support for the assertion that the suggestion that attorneys may be involved in the development of the protocol is wise because it reduces the risk that a researcher with no legal training will misconstrue the legal standard. Moreover, respondents' counsel admitted that

said assertion was merely legal argument, and not accepted scientific practice. (LaBarge, Tr. at 750).

The administrative law judge also rejects respondents' and the staff's argument that counsel's involvement did not effect the objectivity of the survey and that counsel's involvement was not a "fatal flaw." Respondents' counsel is an advocate on behalf of the respondents, and the administrative law judge finds that there is no evidence in the record that suggests that respondents' counsel is educated in the field of consumer research, or that respondents' counsel is in any way qualified to design and run an objective survey for use in litigation.

Based on the foregoing, the administrative law judge finds that respondents' survey fails to satisfy guideline 7.

Guideline 8 (Knowledge of Survey's Purpose)

Guideline 8 requires that interviewers, trained in the field, have no knowledge of the litigation or the purpose for which the survey is to be used. Respondents argued that the survey interviewers and their supervisors did not know who the parties or their counsel were. (RPost at 21).

The staff argued that at the time the survey respondents were interviewed, Hughes and the interviewers were each unaware of the purpose for which the survey would be used or what result would be considered favorable. (SPost at 20).

Complainant did not take a position as to whether respondents' survey complied with guideline 8.

With respect to whether there were interviewers, trained in the field, who had no knowledge of the litigation or the purpose for which the survey is to be used, when the survey

was conducted, neither the interviewers at Heakin Research nor Hughes knew on whose behalf the research was being conducted or what would be considered a favorable result. (FF 118). Moreover, Hughes testified that he and the interviewers were unaware of the purpose for which the survey would be used. (Hughes, Tr. at 605-606).

Based on the foregoing the administrative law judge finds that respondents' survey did involve interviewers, trained in the field, who had no knowledge of the litigation or the purpose for which the survey is to be used. Accordingly, the administrative law judge finds that respondents' survey complies with guideline 8 of the Handbook.

The administrative law judge has determined that respondents' survey does not satisfy guidelines 3, 5, 6, and 7 of the Handbook. Moreover he finds that its failure to satisfy said guidelines has resulted in an error in the survey sufficient to question the reliability and credibility of the survey. Accordingly, pursuant to Commission precedent in Wrenches, Metal Cutting Snips, and Single Handle Faucets, the administrative law judge gives no weight to respondents' survey in his infringement analysis.

(d) Evidence Of Actual Confusion

Complainant cited instances of alleged actual customer confusion, viz., returns of accused faucets to Moen, { } instances of alleged customer confusion between accused faucets and the Moen faucets, an accused faucet mistakenly labeled as a Moen faucet, and alleged confusion by { } (CPost at 39-40, CPostR at 19). It is argued that those instances of actual confusion are probative evidence on the issue of whether or not an ordinary observer would find the accused faucets to be substantially the same as the claimed design of the '466 patent. (CPost at 39).

Respondents argued that there is no direct evidence that purchasers have ever been deceived by the respondents' faucet; that the placement of the Moen sign on a display including a Foremost faucet did not reflect or result in purchaser confusion; that the return by retailers of { } Foremost faucets is no more significant than the return of other non-infringing faucets; and that the { } instances of alleged customer confusion between an accused faucet and the Moen faucets did not involve the Foremost faucets, but rather involved the admittedly infringing Sisco/Lota faucets. (RPost 38-40).

The staff argued that evidence of confusion is of "little probative value" when the confusion is not linked to common features of the designs that are protected by the design patent; and that, therefore, it cannot be concluded from the "alleged confusion evidence" that the Moen and accused faucet bodies are substantially similar. (SPost at 12).

The Commission has held that evidence of confusion "is relevant to the issue of infringement, because it indicates that ordinary observers may have found the designs to be substantially the same." Certain Luggage Products, Inv. No. 337-TA-39, 200 U.S.P.Q. 810, 814 (USITC, 1978). See also OddzOn Products Inc. v. Just Toys Inc., 122 F.3d 1396, 43 U.S.P.Q.2d 1641, 1648 (Fed. Cir. 1997) (OddzOn) (exclusion of evidence of actual confusion on relevance grounds held to be an abuse of discretion). However, the Court in OddzOn also held that in order for confusion evidence to be of probative value, the confusion must be due to the ornamental aspects of the design that are protected by the patent. Id. To prove that an accused design is substantially similar to a design that includes both functional and ornamental features, one must prove that an ordinary person would be deceived by reason of the common ornamental features. Elmer, 36 U.S.P.Q.2d at 1421. Thus, evidence of confusion is of "little probative

rejects complainant's assertion that because Moen has not received returns from other 4" centerset lavatory faucet manufacturers, such as Delta and Price Pfister or Kohler, the confusion is specific to the accused faucets designs and not due to the fact that both are 4" centerset lavatory faucets. Moreover Brian Spike (FF 82) testified that most of the time a customer returns a faucet to Moen the faucet includes the handles. (Spike, Tr. at 491). As seen from the '466 patent design figures, the handles are not part of the design, and thus are not considered in the comparison of the overall appearance of the accused faucets to the claimed design.¹⁸ The administrative law judge finds no evidence in the record to show that the{ } returns of respondents' faucets were caused by elements of the accused device other than the handles.

Regarding the{ } instances of actual confusion by consumers cited by complainant, complainant argued that Spike observed consumer confusion between the Sisco/Lota faucets and the Moen faucet. (CPost at 40). The administrative law judge finds that evidence of consumer confusion regarding the Sisco/Lota accused faucets is irrelevant to the issue of whether or not an ordinary observer would find the Foremost/Chung Cheng faucet to be substantially similar to the claimed design.

With respect to the instance cited by complainant where an accused faucet was mistakenly labeled as a Moen faucet, complainant argued that Spike observed a Foremost/Chung Cheng faucet mistakenly labeled as a Moen faucet at a { } (CPost at 40).

Complainant further argued that such a mistake indicates retailer confusion; and that when Spike

¹⁸ The Manual of Patent Examining Procedure (MPEP) § 1503.02 states that "[s]tructure that is not part of the claimed design but is considered necessary to show the environment in which the design is associated may be represented in the drawing by broken lines." The handles in the drawings of the '466 patent are represented by broken lines and accordingly are not considered in the overall appearance of the claimed design.

pointed out the error to the {

}sales force should not be faulted because the Foremost/Chung Cheng accused faucet and the Moen faucet “look so much alike.” (CPost at 40). The administrative law judge finds that there is no evidence in the record concerning the circumstances in which the faucet was mistakenly labeled. Thus, it is unknown what level of care the { } employee was taking when he/she mistakenly labeled the Foremost/Chung Cheng faucet. Moreover, the administrative law judge finds that there is no evidence in the record which shows that the mistakenly labeled faucet confused anyone other than the salesperson, viz., a purchaser. In addition, the administrative law judge finds that there is no evidence in the record that indicates that the salesperson’s confusion was due to the ornamental and not functional aspects of the accused device.

Regarding the confusion by {

} confusion resulted only

from the ornamental features of the faucets and not features that are not part of the claimed

design, viz., the handles.

Accordingly, the administrative law judge is giving no weight to any of complainant's asserted instances of actual confusion.

(e) Preclusion

In Order No. 14¹⁹ the administrative law judge, based on the record at that time, found that Moen did not demonstrate that Foremost and Chung Cheng were in privity during the pendency of the Illinois action and that Chung Cheng did not have the opportunity to fully litigate the issues.

Complainant, in footnote 5 of its posthearing brief, maintained its argument that principles of issue preclusion prevent Foremost and Chung Cheng from re-litigating the determination of the district court in Illinois that the accused faucets made by Chung Cheng and sold by Foremost infringe Moen's '466 patent. With respect to privity, Foremost and Chung Cheng deny any privity between them, and the administrative law judge finds that complainant, at the evidentiary hearing, failed to establish the existence of privity between Foremost and Chung Cheng through any contractual or corporate relationship or through control of the litigation of the Illinois action. (See Chen, Tr. 531-38). However, in its footnote 5, complainant specifically argued that it was setting aside the issue that Foremost and Chung Cheng were in privity during the pendency of the district court proceeding. Having abandoned any privity argument, complainant argued that Moen 2 should be binding against both Foremost and Chung Cheng because it was an "in rem" determination that the accused faucets infringe. In support, complainant cites MGA, Inc. v. Centri-Spray Corp., 699 F. Supp. 610, 614 (E.D. Mich. 1987)

¹⁹ See Procedural History, supra.

(MGA). MGA however does not address issue preclusion in the context of a prior finding of infringement where a party did not have the opportunity to fully litigate the issues.

Complainant also cites Chisum, Patents § 19.02[2] and Blonder-Tongue Labs. v. University Found., 402 U.S. 313 (1971) (Blonder-Tongue) to support its argument that issue preclusion applies because the accused faucets are branded “in rem.” Both § 19.02[2] of Chisum and Blonder-Tongue address the issue of preclusion with respect to a prior finding of patent invalidity. The Supreme Court in Blonder-Tongue held that a judgement of patent invalidity in a suit against one infringer accrues to the benefit of any other accused infringer unless the patent owner shows that it did not have a fair opportunity, procedurally, substantively and evidentially to pursue his patent claim the first time. Id. The Supreme Court in Blonder-Tongue did not address issue preclusion in the context of a prior finding of infringement especially where a party did not have the opportunity to litigate the issue. To the contrary when the Court addressed validity it recognized that all affected parties have the opportunity to litigate the issue. See supra.

C. Domestic Industry

To establish a domestic industry under 19 U.S.C. § 1337, a complainant must show that a technical prong for that industry exists, viz., the complainant must establish that a domestic industry exists relating to articles protected by any patent in issue. See 19 U.S.C. § 1337(a)(2).²⁰ In determining that the technical prong has been met, the Commission has inquired as to whether or not a complainant’s article is covered by at least one claim of a asserted utility patent. Certain

²⁰ Order No. 11 determined that complainant had satisfied the economic prong of the domestic industry requirement of 19 U.S.C. Section 1337(a)(3). See Procedural History, supra

Lens Fitted Film Packages, Inv. No. 337-TA-406, Final Initial Determination at 203 (Feb. 24, 1999), reviewed-in-part on other grounds (April 19, 1999). With respect to design patents, because there is only one claim, the administrative law judge finds that the scope of the design claim must cover complainant's article in order to establish the technical prong of the domestic industry.

In The Matter Of Certain Toothbrushes And Packaging Thereof, Inv. No. 337-TA-391, Order 8, Initial Determination (July 7, 1997), Commission Unreviewed (August 5, 1997) (Toothbrushes) the administrative law judge, in a design patent case, found the technical prong satisfied where the complainant's embodiment of the claimed design was substantially the same as the claimed design. However, the administrative law judge in Toothbrushes did not address the points of novelty. In Certain Compact Multi-Purpose Tools, Inv. No. 337-TA-416, Final Initial and Recommended Determination at 22-24 (May 27, 1999), Commission Unreviewed (June 28, 1999), the administrative law judge, in a design patent case, found the technical prong of the domestic industry requirement satisfied where complainant's embodiment adopted the points of novelty of the claimed design. In that case the administrative law judge did not address substantial similarity. Thus, under Commission precedent, the technical prong of the domestic industry is satisfied where the complainant establishes that the embodiment of the claimed design either is substantially similar to the claimed design or adopts the points of novelty of the claimed design.²¹

²¹ The Commission, in treating utility patents, has acknowledged that the test for domestic industry and the test for infringement are not the same. In Certain Microsphere Adhesives, process For Making Same and Products Containing Same Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, USITC Pub. 2949 (1996) the Commission stated that although there must be a domestic industry with respect to each asserted patent, there is no claim

Respondents do not contend that complainant does not satisfy the technical prong of the domestic industry requirement or that complainant does not practice the '466 patent. (FF 35). Moreover, respondents do not contest that complainant's expert Woodring, based on a comparison of the Moen faucet to the '466 patent, determined that despite some "minor differences", the two designs are not only substantially the same, but "virtually identical" and "indistinguishable...in the eyes of the ordinary observer." (FF 36). Also respondents did not contest that Woodring analysis determined that the Moen faucet appropriates each of the four numbered points of novelty identified by Woodring. (FF 37).

Significantly, however, the administrative law judge has undertaken a comparison of the Moen faucet and the claimed design of the '466 patent. Based on his comparison, the administrative law judge finds that the Moen faucet (CPX-11) is substantially similar to the claimed design of the '466 patent. Moreover, the administrative law judge also finds, based on his own comparison, that the Moen faucet appropriates teach of the four numbered points of novelty identified by Woodring, viz, (1) a raised and smoothly arched soft "D" shaped cross-section spout; (2) said spout terminating in a clean cut, angled toward the base; (3) said spout being smallest in cross-section near its mid-point; and (4) said spout being blended with a racetrack shaped base.

Based on the administrative law judge's own comparison and based on the fact that respondents do not contest that complainant satisfies the technical prong of the domestic industry requirement or that complainant practices the '466 patent, the administrative law judge finds that

correspondence requirement as between the claims asserted against respondents and those practiced by the domestic industry.

complainant has met its burden in establishing the technical prong of the domestic industry requirement.

D. Recommendation On Remedy

Complainant requested the issuance of a general exclusion order. (CPost at 50).

Complainant also requested a bond of 264% during the presidential review period. (CPost at 66).

(a) General Exclusion Order

Complainant argued that the evidence overwhelmingly supports issuance of a general exclusion order; that complainant meets the prerequisites for a general exclusion order; and that the public interest factors support issuance of a general exclusion order.

Respondents take no position as to whether a general exclusion order or limited exclusion order would be an appropriate remedy. (RPost at 53).

The staff argued that complainant has established the necessary elements for issuance of a general exclusion order. (SPost at 36).

With respect to the issuance of a general exclusion order, in Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, USITC Pub. 1199 at 17, 216 U.S.P.Q. 465, 472-73 (1981) (Spray Pumps) a general exclusion order was deemed appropriate when there is proof of (1) a widespread pattern of unauthorized use of the patented invention, and (2) certain business conditions from which one might reasonably infer that foreign manufacturers other than respondents to the investigation may attempt to enter the U.S. market. Id.

In 1994, statutory standards on the issuance of general exclusion orders were adopted

in the amendments to Section 337, adding a new subsection to Section 337(d) that states:

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that --

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2) (effective January 1, 1995); see also Commission rule 210.50(c) (incorporating the statutory standards into the Commission rules). Those standards "do not differ significantly" from the Spray Pumps standards. Certain Neodymium-Iron-Boron Magnets, Inv. No. 337-TA-372, Commission Opinion on Remedy, the Public Interest and Bonding at 5 USITC Pub. No. 2964(1996) (Magnets). See also Certain Agricultural Tractors, Inv. No. 337-TA-380, 44 U.S.P.Q.2d 1385, 1397-1404 (1997) (General exclusion order granted) (Tractors).

In Spray Pumps, the Commission pointed out that a complainant

should not be compelled to file a series of separate complaints against several individual foreign manufacturers as it becomes aware of their products in the U.S. market. Such a practice would not only waste the resources of the complainant, it would also burden the Commission with redundant investigations. (Comm'n Op. at 30).

That consideration must be balanced against the potential of a general exclusion order to disrupt legitimate trade. (Id.) With this balance in mind, the Commission concluded that it would

"require 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 one might reasonably infer that foreign

manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” [Id.]

The Commission in Spray Pumps then set out the following factors as relevant in demonstrating whether there is a “widespread pattern of unauthorized use”:

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

(Id.) The Commission also identified the factors relevant to showing “certain business conditions” as including:

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

(Id. at 31-32).

Moreover, when determining the proper recommendation for a remedy, it is appropriate for the administrative law judge to consider evidence regarding respondents who have been

terminated from the investigation on the basis of Consent Orders. Thus, the Commission has considered evidence of respondents who have been terminated from the investigation on the basis of Consent Orders. In Magnets the administrative law judge considered evidence regarding respondent Tridus, which had entered into a Consent Order earlier in the proceeding. The administrative law judge stated that the Consent Order made it clear that it did not “preclud[e] further remedial action,” and concluded that it would be appropriate to “consider evidence relating to Tridus samples as relevant to the remedy issue.” Magnets, Comm’n Op. at 21, fn. 18. In Woodworking Machines, Inv. No. 337-TA-174, USITC Pub. 1979 at 49 (1987), the Commission considered evidence regarding terminated respondents that had entered into Consent Orders in finding a pattern of widespread unauthorized use of the complainant’s patents and trademarks. Also, in Certain Compact Multipurpose Tools, Inv. No. 337-TA-416, Unreviewed Final Initial and Recommended Determinations at 24-30 (1999) (Tools), the administrative law judge found a widespread pattern of unauthorized use based, inter alia, on evidence regarding sales by a respondent which had entered into a Consent Order in the proceeding. See also Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same, Inv. No. 337-TA-413 Final Initial and recommended Determination at 151-152 (September 8, 1999), Commission Unreviewed (October 26, 1999) (the administrative law judge found a widespread pattern of unauthorized use based, inter alia, on evidence regarding sales by a respondent which had entered into a Consent Order in the proceeding).

The administrative law judge finds that there is a widespread pattern of unauthorized use. Thus, there is evidence that former respondents Sisco and Lota and have imported, sold for importation, or sold after importation articles that infringe the ‘466 patent. See Notice of

Commission Determination Not To Review An Initial Determination Terminating The Investigation As To Two Respondents On The Basis Of Consent Order. Issuance Of Consent Order, Inv. No. 337-TA-422 (February 1, 2000) (Consent Order ¶¶ I, J and Q, admission by Sisco and Lota that they manufacture for importation and/or import for sale certain two handle centerset faucets and components thereof which infringe the claim of the '466 patent).

In addition, complainant has submitted evidence that former respondent Hometek has imported, sold for importation, or sold after importation articles that infringe the '466 patent. See SX-18, 19, CPX-14, and Woodring Tr. at 330-31 and 335-38, see also Notice of Commission Determination Not To Review An Initial Determination Terminating The Investigation As To One Respondent On The Basis Of Consent Order. Issuance Of Consent Order, Inv. No. 337-TA-422 (October 6, 1999) (Consent Order ¶ K, Hometek understands and acknowledges that with regard to information it has provided in discovery, Hometek waives its right to object to, rebut, or otherwise address the introduction of such evidence into the record).

Additionally, there is evidence in the record that non-respondents are selling or offering to sell products within the United States that purportedly infringe the '466 patent. (CX-59 at 13-14; CX-8; CX-9; CX-71; CPX-6; CPX-7; CPX-25). There is also evidence that imitations of the patented article are being sold in foreign countries. (CX-59 at 13-15; CX-10; CX-11; CX-12; CX-13; CX-14; FF 70).

With regard to the "certain business conditions" which constitute the second prong of the Spray Pumps test, the administrative law judge finds that all of the factors of the "business conditions" are satisfied. As to the first factor, viz., an established market for the patented product, the administrative law judge finds that there is evidence of such an established domestic

faucet market which is strong and growing. (FF 50, 67, 68, 128). The evidence shows that there is an established demand for the Moen faucet within the United States, and that conditions in the world market make it profitable for foreign companies to enter the United States with infringing products. Moen more than{ } its expected sales volumes for the MOEN Faucet in 1994, its second year of production, and more than{ }its projections in 1995. (FF 129). Since 1995, overall sales volumes have continued to grow at a rapid pace. Id.

The evidence further indicates that in addition to the strong demand for the Moen faucet, it is very profitable for foreign companies to enter the market with infringing products. On one hand, the market for decorative faucets in the United States is high-priced. On the other hand, foreign faucet manufacturers face “significantly less” costs than Moen. (FF 130). Most importantly, the cost of labor in China and Taiwan is dramatically less than it is in the United States. (FF 131, 133, 139). While Moen argued that it pays its workers approximately{ } a month, there is evidence that the typical worker at Lota only makes { } a month { } (FF 132). Moreover, costs are less for foreign manufacturers of infringing products because they do not have to make significant investment in creative design. (FF 134). Also, foreign copies can be made with a cheaper alloy and typically have a lesser quality finish. (FF 136).

Regarding the second factor of the “certain business conditions” test, viz., the availability of marketing and distribution networks, the administrative law judge finds that the evidence shows that there exist well-established distribution channels for 4" centerset lavatory faucets within the United States. As Lingafelter testified, Moen has found copies of its Moen faucet at large retailers such as{ } (FF 138). Moreover, Lingafelter testified that smaller retailers are a particularly easy and available channel for the distribution of foreign-origin

faucets. Id. These smaller companies, such as{ } and regional hardware stores like{ } “cannot compete with the{ } on pricing for branded merchandise,” so they often look to sell foreign made off-brand products. Id.

As to the third factor of the “certain business conditions” test, viz., the cost to foreign manufacturers of building a facility capable of producing the patented articles, the administrative law judge finds that the evidence shows that a foreign entrepreneur could, at very little expense, build a facility capable of producing copies of the patented design, or for even less money, out source the faucets’ components to sub-manufacturers and then merely assemble a copy of the Moen faucet. Kenneth Slusher (FF 81) testified that for approximately{ } an entrepreneur could build an assembly facility in China or Taiwan that would “support a fairly large retail business.” (FF 144). Also, the evidence indicates that the Chinese government has created large tax incentives to encourage entrepreneurs to build large factories in towns seeking to expand, and that these factories are relatively inexpensive to build because of the low cost of labor. (FF 139). The evidence also shows, however, that building a large facility is not necessary. Entrepreneurs could easily contract with other companies to produce the different faucet components quickly and cheaply. (FF 140). In Taiwan, for example, there is a town called Chung Hua where many of these smaller companies work together to make faucets. (FF 159). Because these smaller companies each participate in only a small part of the manufacturing business and because there are so many small companies in Asia, entrepreneurs can respond quickly to changes in demand for faucets abroad, and as Slusher testified faucet manufacturers in China and Taiwan have the manufacturing capability to meet almost any level of demand in the United States. (See CX-63 at Q13).

With respect to the third and fourth factors of the “certain business conditions” test, viz., the number of foreign manufacturers whose facilities could be retooled and the cost of retooling, the administrative law judge finds that the evidence shows that there are many foreign faucet companies, and that with a minimal investment and in a short period of time, these foreign companies could easily copy the ‘466 Patent’s faucet design. Thus, there are{

} (FF 157-158). The cost to these foreign manufacturers of re-tooling their facilities to make copies of the Moen faucet is small. (FF 139, 140, 144-154). Also, there are companies in Asia that could retool their facilities in as little as 20 days. (FF 153, 154). The most expensive faucet part to make is the ornamental escutcheon. However, a duplicate of the escutcheon can be cheaply made by creating a mold, which involves “simply pressing the faucet into a substance that is similar to children’s playdough.” (FF 151). The die cast tool used to create the escutcheon only costs about { } (FF 147). Slusher testified that the total cost of producing one ornamental faucet is no more than{ } (FF 149). The other faucet components, such as the cartridges, screws, and internal piping, are standardized, inexpensive and can be purchased at numerous outlets around the world. (See Slusher, Tr. at 223). Once a company has both a copy of the ornamental escutcheon and the other faucet components, assembling the faucet does not require any technical equipment or expertise, and in Slusher’s words, “the assembly is relatively easy;” in fact, { } (See Slusher, Tr. at 223).

In view of the fact that the administrative law judge has found both a widespread pattern

of unauthorized use with respect to the '466 patent in issue, and he has found that certain business conditions exist in which one might reasonably infer that foreign manufacturers other than the respondents to this investigation may attempt to enter the U.S. market with infringing articles, the administrative law judge is recommending a general exclusion order as an appropriate remedy.²²

(b) Bonding

Complainant has requested a bond of 264% during the presidential review period. In support of the 264% bond complainant argued that a comparison of the average net selling price of the Moen faucet to the average net sale price of the Foremost/Chung Cheng faucet results in a 264% bond; and that such a bond is necessary to protect complainant from any further injury. (CPost at 67).

Respondents argued that a bond is unnecessary in this investigation because Foremost has been precluded from selling any faucets in the United States by the preliminary injunction entered in the Illinois action, and that in as much as Foremost is Chung Cheng's exclusive distributor, Chung Cheng is also precluded from importing or selling accused faucets in the United States. (RPost at 54). It is also argued that the price comparison of accused products and the Moen faucet made by Moen was based on a comparison of "weighted average net selling price" of the Moen faucet and the "unit value" of the Foremost/Chung Cheng faucet; that such an analysis is

²² The staff argued (CPost at 36) that the issuance of a general exclusion order does not raise public interest concerns under 19 U.S.C. § 1337(d); that there are many domestic manufacturers that produce lavatory faucets that compete directly with the Moen faucet, citing Carbonari, Tr. at 142; RFCX-4; Mayer, RFCX-16 at 80-81, 130; and that the presence of many U.S. faucet manufacturers assures continued competition in the marketplace and an adequate supply of lavatory faucets to U.S. consumers, irrespective of the issuance of a general exclusion order.

like comparing apples to oranges; that such a comparison artificially inflates the bond; and that the amount of bond should be based on a fair comparison of the prices of the accused faucets and the Moen faucets. (RPost at 54-55).

The staff argued that there is no direct evidence of what would be necessary to protect complainant from injury; that while there is a range of prices for the accused faucets and the Moen faucets, “given the range of prices at which both the Moen and the Connoisseier series faucets are sold it is not possible to calculate a precise price differential” based on said ranges; and that, in such a circumstance, a bond of 100% is appropriate. (SPost at 36-37).

Section 1337(j) provides for the entry of infringing articles upon the payment of a bond during the sixty (60)-day Presidential review period. The bond is to be set to a level sufficient to “protect complainant from any injury” during the Presidential review period. 19 U.S.C. § 1337(j).²³

The administrative law judge rejects respondents’ argument that a bond is not necessary. While respondents argued that Foremost is precluded from selling accused faucets and that therefore Chung Cheng is also precluded, it is a fact that the existing injunction does not apply to Chung Cheng. Also the record does not establish that any exclusive distributorship arrangement can, and will, be enforced. If not enforced, Chung Cheng would thus be in a position to sell for importation, import into, or sell in the United States the accused faucets. Moreover, as stated in Section D (a), supra, there are a number of foreign manufacturers that could conceivably sell for

²³ Although “[t]he bond should not be set so high as to prevent importation during the Presidential review period,” the Commission may set the bond at a “substantial level” because the review period is “relatively short and the consequences of any bond are . . . likely to be short-lived”. See Toothbrushes, Comm’ Op. On Remedy, The Public Interest, and Bonding, 1997 WL 696291 at 6 (Oct. 15, 1997).

importation, import into, or sell in the United States the accused faucets. Thus, the administrative law judge finds that a bond is appropriate.

The administrative law judge also rejects respondents' argument that complainant's price comparison is similar to comparing apples and oranges. Complainant, in its post hearing briefs compared the average sales price of the Moen faucet to the average sales price of the Foremost/Chung Cheng faucet. Respondents did not address this comparison in their posthearing briefs, and the administrative law judge finds that such a comparison is a fair comparison, and is an accurate method for determining a price differential.

In addition, the administrative law judge rejects the staff's argument that "it is not possible to calculate a precise price differential" based on price ranges. The Commission has used average sales prices to calculate the price differential between accused and patented products. See, Certain Coin Operated Audiovisual Games and Components Thereof, 337-TA-105, Comm'n Action and Order, 1982 WL 212657 at 41 (July 1982) (setting a bond of 300% and calculating this bond by "subtracting the average wholesale price of respondents' products from the wholesale price of complainants products and dividing the difference by the average wholesale price of respondents' products)." Moreover, the Commission has set a bond as high as 600%. See Certain Cube Puzzles, 337-TA-112 Comm'n Action and Order, 1982 WL 212660 at 36 (Dec. 30, 1982) (determining a bond of 600% to be reasonable "because it is basically the difference between the wholesale imported price and the domestic price, and offsets the competitive advantage of the unfair acts here.").²⁴

²⁴ In Certain Methods for Extruding Plastic Tubing, 337-TA-110 (Comm'n Action and Order 1982 WL 212648 at 29 (Sept. 1982) the Commission imposed a bond of 400% even though the accused products ranged "at anywhere from one-half to one-fourth" the price of

The administrative law judge finds that sales price of the Foremost/Chung Cheng accused faucet ranges from { } (SX-23). Thus, the administrative law judge finds that the average sales price of the Foremost/Chung Cheng accused faucet is { } The 1999 net sale price of the Moen faucet ranges from { } (CX-7; CX-59 at Q&A 22, and Tr. at 151-152). Thus, the administrative law judge finds that the average net sale price of the Moen faucet is { } A comparison of the average sales prices of the accused faucets and the Moen faucets results in a bond of 264.38%.

Based on the foregoing the administrative law judge recommends a bond of 264% during the presidential review period to protect complainant from any further injury.

domestic products, and “it was not possible to calculate a weighted average price.”

IV. Additional Findings

A. Parties and Former Parties

1. Complainant Moen is a corporation organized and existing under the laws of Delaware, with its corporate headquarters at 25300 Al Moen Drive, North Olmsted, Ohio 44070-8022. (SX-1 at ¶ 2.1; SX-5 at ¶ 2.1; SX-7 at ¶ 2.1; CX-72, Stipulation 4). Moen manufactures and sells faucets and other plumbing-related products in the United States and abroad. Since Moen was purchased by American Brands in 1990, Moen's market share has{ }and Moen is now the number one faucet brand in North America. (CX-59 at Q2 - Q3; Carbonari, Tr. at 142).

2. Respondent Foremost is a corporation organized and existing under the laws of New Jersey, with a principal place of business at 906 Murray Road, East Hanover, NJ 07936. (SX-5 at ¶ 3.1; CX-72, Stipulation 7). Foremost imports faucets for sale in the United States from three Asian faucet companies: Chung Cheng, Hong Lai Faucet Company and Zen Hsin Faucet Company. (CX-102 at 14 - 15). Foremost does not design or develop faucets, but chooses from what is offered by its Asian suppliers. (CX-102 at 21 - 22).

3. Respondent Chung Cheng is a business entity organized under the laws of Taiwan, with a principal place of business at 69 Lane 22 Chang Tin Road, Ting Fan Li, Lu Kang, Changhua Hsien, Taiwan. (SX-7 at ¶ 3.5, Required 210.13(b) Information ¶ 1; CX-72, Stipulation 8). Chung Cheng manufactures and sells faucets for importation into the United States to Foremost and various other importers. (CX-102 at 15).

4. Former respondent Sisco is a corporation organized under the laws of California with a principal place of business in Rancho Dominguez, California. (Sisco/Lota Consent Order

Stipulation ¶ 1). Sisco imports faucets for sale in the United States and was founded in 1986 by its owner Mort Stuhlbarg. It currently has{ }employees. (CX-100 at 17, 18).

5. Former respondent Lota is a business entity organized under the laws of China having a principal place of business in Xiamen, China. (Sisco/Lota Consent Order Stipulation ¶ 2). Lota opened in 1990 and now has{ }workers in its Xiamen, China faucet manufacturing facility. (CX-103 at 9, 14). {

} (CX-103 at 15).

6. Former respondent Hometek is a corporation organized under the laws of Illinois, with a principal place of business in Naperville, Illinois. (Hometek Consent Order Stipulation ¶ 1). Hometek imports and sells faucets in the United States. (SX-18-C (Hometek's Resp. To Moen's Interrogs.) at 1).

B. Products At Issue

7. The Moen Monticello 4" centerset faucet is sold in the United States under the following model numbers: M4550CP, M4555CP, M4550, M4555, R4550, 4550, 4555, 84200, 84201, 84202, 84204, 84205, 84206, 84846, 84883, 84884, 84887, 84888, M4550P, M4555P, R4550P, 4550P, 4555P, 84210, 84212, 84214, 84215, 84885, 84886, 84210E, 84214E, 84886E, R4550PM, 4550W, 84200W, 84200WE, 4550CP, 4555CP, 84200E, 84204E, 84206E, 84846E, 84883E, 84884E and 84888E. (SX-17 at 2).

8. The Moen faucet comes in a variety of finishes, and with either lever or cross handles, but the ornamental design of the faucet body remains the same. (CX-59 at 8; CPX-11).

9. The different model numbers under which the Moen faucet is sold reflect different finishes, different accessories, and different types of customers, i.e. wholesale customers, retail customers{ } (CX-59 at 9).

10. Foremost has imported and sold within the United States after importation its faucet models FC-1032-CPB, FC-1032-PB, and FC-1032-CP. These models have the same ornamental design and differ in finish only. CX-110 is a Foremost catalog that displays the Foremost/Chung Cheng accused faucets on pages. (CX-72).

11. Faucet models FC-1032-CPB, FC-1032-PB, and FC-1032-CP ("the Connoisseur series faucet") were manufactured by Chung Cheng in Taiwan. (CX-72; SX-44 at 6, 8, 9).

12. Chung Cheng manufactured the Foremost/Chung Cheng accused faucet in Taiwan and has sold for importation into the United States faucet models FC-1032-CPB, FC-1032-PB, and FC-1032-CP. (CX-72; SX-7).

13. Faucet models FC-1032-CPB, FC-1032-PB, and FC-1032-CP have the same ornamental design and differ in their finishes only. (CX-72; CPX-12).

14. Moen first become aware of the Foremost/Chung Cheng accused Faucet in late 1997, and thereafter filed suit for design patent infringement in U.S. District Court for the Northern District of Illinois. (CX-59 at Q26).

C. Experts

15. Cooper C. Woodring, FIDSA, was qualified as an expert in industrial design. (Woodring, Tr. at 245).

16. James T. Heisler, Ph.D. was qualified as an expert in survey research. (Heisler, Tr. at 408-09).

17. Donald Hughes was qualified as an expert in consumer research. (Hughes, Tr. at 559-60).

D. The Patent In Issue

18. In 1991, Moen hired an outside design firm, Priority Designs, headed by Paul Kolada, to produce a faucet with a design focused on the customer's demands. (CX-59 at 5-6; CX-61 at 3-4).

19. CX-5 is a certified copy of '466 patent, which claims "[t]he ornamental design for a faucet body, as shown and described" in the six figures of the patent. (CX-59 at Q18; CX-5 at 2).

20. The '466 patent entitled "Faucet Body" was issued on May 31, 1994, and lists three inventors, Paul P. Kolada, Michael J. Painter and Terry Birchler. It is based on Ser. No. 854,968 filed on March 20, 1992. (CX-5; CX-59 at Q18; CX-5 at 2).

21. The design claimed by Messrs. Kolada, Painter, and Birchler in the '466 patent is an original, novel and non-obvious design for a two-handled four-inch centerset lavatory faucet body. (Woodring, Tr. at 293).

22. Moen is the owner of the '466 patent by assignment from the inventors. (SX-5 at ¶ 2.2; SX-7 at ¶ 2.2). CX-6 is a certified copy of the assignment to Moen of the invention that became the '466 Patent, signed by the inventors in March, 1992. (CX-59 at Q19).

23. Respondents Foremost and Chung Cheng did not contest the validity or enforceability of the '466 patent. (Tr. at 21; Foremost/Chung Cheng's Surreply To Complainant's Reply to Respondents' Resp. to Complainant's Motion In Limine; SX-29, Foremost's Resp. to Moen's Req. for Admis. Nos. 21 & 22; SX-27, Foremost's Resp. to Moen's

Interrogs. Nos. 46, 47, 50 & 51; SX-22, Chung Cheng's Resp. to Moen's Interrogs. Nos. 53, 54 & 57).

24. The certified prosecution history for the '466 patent includes the following documents generated by the Patent and Trademark Office: Notice of Allowability, Notice of Allowance and Issue Fee Due, Issue Notification, Notice of References Cited, Notice of Draftsman's Patent Drawing Review, and Record of Telephone Conversation of December 8, 1993, and notice of recordation of assignment document. (CX-29).

25. The following references are cited on the face of the '466 patent: U.S. Patent D169,405; U.S. Patent D193,923; U.S. Patent D200,042; U.S. Patent D203,324; U.S. Patent D229,495; U.S. Patent D237,615; U.S. Patent D280,008; U.S. Patent D284, 499; U.S. Patent D293,362; U.S. Patent D295,661; Domestic Engineering, Oct. 1990, p.38, "Decorator Faucets" item; Renovator's Supply Catalog, p. 5, item #97551. Each of these references shows a two-handle four-inch centerset lavatory faucet. (CX-5 at 2; CX-64 at 7; Woodring, Tr. at 281-82).

26. Japanese design patent 552,155 (the '155 patent) was not cited as prior art on the face of the '466 patent but was considered as prior art by Woodring. Woodring testified that the '155 patent was identified by "others" as the closest prior art to the '466 patent. (Woodring, Tr. at 332-33; CX-5 at 2).

27. A "faucet body" is only part of a fully-assembled faucet. Although handles, a pop-up, and an aerator generally are included in a completed "faucet," as well as pipes and valves, those components are not part of the design claimed in the '466 Patent. Handles are shown in dotted lines in Figures 1 & 2 "for purposes of illustration only." (CX-5; Woodring, Tr. at 254 - 256).

28. The term “faucet body” refers to a spout and escutcheon that are integral, and does not refer to separate parts that are joined together. (Woodring, Tr. at 271, 367).

“Escutcheon” is another word for a base or a cover. (Woodring, Tr. at 360).

29. The faucet body depicted and claimed in the ‘466 patent is a faucet body for a two-handled four-inch centerset lavatory faucet. (CX-64 at Q23 -Q24; Woodring, Tr. at 246 - 247).

30. Each and every one of the references cited on the face of the ‘466 patent by the patent examiner, collected as exhibit CX-30, is to a two-handled four-inch centerset lavatory faucet or to the faucet body for a two-handled four-inch centerset lavatory faucet. (CX-64 at Q24 - Q27; Woodring, Tr. at 281 - 282). In selecting “Renovator’s Supply Catalog, p. 5, item #97551,” the examiner cited only the two-handled four-inch centerset faucet and not the eight-inch widespread model pictured directly below Item #97551 on the same catalog page. (Woodring, Tr. at 279 - 281; CX-30).

31. A “throat plate” is a metal stamping, or sometimes an injection mold plastic part, which is a secondary piece that can be included as an undercovering in a faucet body. (Woodring, Tr. at 302).

32. In the ‘466 patent design, the particular configuration of the throat plate is ornamental because a throat plate can be designed in any number of ways. Thus the selection of the particular throat plate shown in the ‘466 patent is an ornamental consideration and not dictated by function. (Woodring, Tr. at 306-307).

33. The figures of the ‘466 patent are sufficiently clear and complete to allow one skilled in the art to ascertain what is claimed, and to enable such a person to practice the patented

invention. (Woodring, Tr. at 253 - 254).

34. The '466 patent teaches to one skilled in the art the shape, proportion and configuration of a faucet body, as shown in the patent drawings. Other visual attributes, however, such as color, degree of gloss, material, and texture, are not taught by the patent. (Woodring, Tr. at 259-260, 265).

E. Technical Prong Of Domestic Industry

35. Foremost and Chung Cheng do not contend that Moen does not satisfy the technical prong of the domestic industry requirement under 19 U.S.C. § 1337(a), or that Moen does not practice the '466 Patent with the MOEN Faucet. (SX-27, Foremost's Resp. to Moen's Interrogs. Nos. 52, 54 & 59; SX-22, Chung Cheng's Resp. to Moen's Interrogs. Nos. 59, 61 & 66).

36. Woodring compared the faucet body of the MOEN Faucet, (CPX-11), to the '466 patent and found that, despite some "minor differences," (Woodring, Tr. at 387, 389), the two designs are not only substantially the same, but "virtually identical" and "indistinguishable . . . in the eyes of the ordinary observer." (Woodring, Tr. at 313 - 314, 322, 323-323, 326-328; CX-58 at 1).

37. The MOEN Faucet appropriates each of the four numbered points of novelty identified by Mr. Woodring, viz, (1) a raised and smoothly arched soft "D" shaped cross-section spout; (2) said spout terminating in a clean cut, angled toward the base; (3) said spout being smallest in cross-section near its mid-point; and (4) said spout being blended with a racetrack shaped base. (Woodring, Tr. at 314). The second page of CX-81, for example, illustrates that the MOEN Faucet appropriates the soft "D" shaped cross-section spout of the '466 patent, including

that the flatter side of the "D" on the bottom of the spout is formed by a throat plate. (Woodring, Tr. at 314 - 315; CX-81 at 2).

F. Infringement

38. Bruce Carbonari is Chairman and Chief Executive Officer of Moen. Moen was sold to American Brands, now known as Fortune Brands in 1990, at which time he assumed the role of President and Chief Operating Officer of Moen. (CX-59 at 1, 2).

39. Carbonari started for Moen's then-parent, Stanadyne, in 1980 as a controller. In 1987 he became Chief Financial Officer of Stanadyne, which was taken private in a leveraged buy-out. Soon after that he became Chief Financial Officer and Executive Vice President of Operations, a post he held for about three years. Of Stanadyne's five business, four were divested and only Moen remained. (CX-59 at 1).

40. Carbonari testified as to{

}

{

}

{

}

MR. ADDUCI: Do you have a recollection, Mr. Carbonari, of which unit was being referred to when this question was being asked?

* * *

Q. I am referring to the Price-Fister unit on page 62?

A. Do I have a recollection?

Q. Yes.

A. Yes.

Q. What model number would that be?

A. I don't know but if you show it to me --

Q. If I am reading this deposition transcript, will I know what product is being referred to. The Price-Fister is at 62 --

A. This is part of the faucet.

MR. LABARGE: RFCX 3.

JUDGE LUCKERN: Is this a Price-Fister?

MR. LABARGE: It has been represented that this is the base of a Price-Fister faucet.

JUDGE LUCKERN: Would you agree with that?

THE WITNESS: Yes.

JUDGE LUCKERN: Would this be the one that -- I am looking at what you said at page 62. So you don't believe that products competes with the Monticello?

THE WITNESS: At the time I took the deposition I didn't reference this product very much and as we prepared, I saw this and said it does but at the time of the deposition I really was not familiar with this product from Price-Fister but today I am because it has been shown --

JUDGE LUCKERN: What is your testimony today?

{

}

41. Moen was historically a single handle faucet company. Al Moen invented the single handle faucet in 1937. The single handle faucet was popularized in the 1950s and 1960s, along with Moen's invention of the replaceable cartridge, which took the place of a faucet's washers. Stanadyne created a high-quality faucet and marketed this faucet directly to plumbers

and builders. It was in 1960s that Moen developed its mainstay faucets, the Chateau and Legend. Those faucets were perennial best sellers for Moen, but in the early 1990s it became apparent to Moen that{

}

42. Traditionally at Moen, {

}

43. In 1991, as part of Moen's{

44. New product development had{

}

45. One of Moen's earliest decisions{

}

}

46. Carbonari{

}

47. Moen approached{

}

48. {

}

49. {

}

50. Moen more than{

}

51. {

}

52. [There is no Finding 52]

53. {

}

54. {

55. David Lingafelter is Vice President of Faucet Marketing at Moen and has been with Moen since 1990. {

}

56. With respect to the development of the Monticello faucet{

}

57. {

58. {

59. A firm of outside designers in Columbus called Priority Designs, headed by Paul Kolada was hired by Moen. Kolada had prior experience designing faucets, {

} Kolada worked on the project with two junior designers, Michael Painter
and Terry Birchler. {

60. With respect to the design parameters given to the outside designers, Moen

{

61. {

}

} (Lingafelter, CX-61 at 5).

62. Moen had five lines of bathroom faucets in 1991: Boutique, Chateau, Concentrix, Legend and Traditional. Many of those faucets had been designed a long time ago. (Lingafelter, CX-61 at 5).

63. CPX-8 is a Moen Traditional 4" centerset lavatory faucet, model 5932. (Lingafelter, CX-61 at 5).

64. The Traditional was the last significant new lavatory faucet family. The Traditional was a higher-priced faucet and did not incorporate the spout into the escutcheon. This particular model supplemented some earlier 4" centerset faucets in the Traditional family that had represented Moen's failure to integrate all the parts – handles, spout, liftrod, escutcheon- into the whole of the faucet. This model was an improvement on where Moen had been before. (Lingafelter, CX-61 at 6).

65. {

}

66. {

}

67. Moen's sales{

}

68. {

}

69. Moen launched the Monticello at the Kitchen and Bath Show in May, 1993. Moen had initially set its sites on January 1993, but Moen wanted sufficient inventory to be able to ship immediately after the show, and that took a little more time to build up. Moen sells it to nearly all its customers, both wholesale and retail, from big customers like{ } to small supply

houses and regional retailers. (Lingafelter, CX-61 at 9).

70. {

}

71. [There is no Finding 71]

72. Lingafelter,{

}

73. Peter V. Jung testified, referring to{

74. He testified, as to the '466 patent (CX-77 at 90):

{

}

}

75. Linda Mayer is senior vice president of marketing and product development at Moen. (CX-60 at 1).

76. Mayer, at Moen, is responsible for Moen's product plan: its creation, development and execution. She is also responsible for Moen's marketing-related activities in support of both current and new products, such as market research, advertising, promotions, product line management and channel management. (Mayer, CX-60 at 1).

77. Mayer, since beginning work in consumer marketing in 1983, has developed extensive expertise in looking at product from the consumer's viewpoint, understanding how consumers think, their purchase behavior and what they value in a product. It is an analytical skill set developed by years in marketing and having observed consumers, from focus groups to in-aisle observations. Mayer brings this expertise into her day-to-day responsibilities at Moen. (Mayer, CX-60 at 1-2).

78. Moen{

}

79. Moen's marketing efforts since the early 1990s were targeted {

}

80. Mayer, as{

}

81. Kenneth Slusher is Vice President of Sourcing and Productivity Engineering at Moen. (CX-63 at Q1). As Vice President of Sourcing and Productivity Engineering, Mr. Slusher oversees Moen's component sourcing business in the United States and abroad. (CX-63 at Q3). Mr. Slusher travels overseas approximately five times a year for business, has visited companies in China and Taiwan that either make faucets or faucet components, and is in frequent contact with Moen's employees and affiliates throughout Asia. (CX-63 at Q4). Before assuming his current position, Slusher worked as a plating manager, a manufacturing manager, and then as a plant manager at Moen's facility in Sanford, North Carolina. (CX-63 at Q2). Slusher has worked in the finishing and plating business all of his professional life. (CX-63 at Q3).

82. Brian Spike is Moen's Midwest Regional Sales Manager and is responsible for ensuring that Moen's retail displays are properly maintained and for training Moen's service representatives and retail sales personnel regarding Moen's products. (CX-67 at Q3 & Q5).

83. David Coll is a senior quality engineer at Moen's New Bern, North Carolina customer returns facility; he supervises seven customer returns associates. His group receives, reviews and verifies customer returns to Moen. (CX-68 at Q4 and Q6; Coll, Tr. at 497).

84. **[There is no Finding 84]**

85. Paul Kolada is the lead inventor listed on the patent in issue. (CX-5). Kolada testified as the corporate representative of Priority Designs, the firm employing the three inventors of the patent in issue. (SX-11 and RFCX-18).

86. While Kolada{

} (Kolada,

RFCX-18 at 108, 110 - 112, 126 - 127).

87. The unique features of the '466 design include: the combination of a 4-inch centerset faucet with a well-designed, sculpted throat-plate, the curvature of the spout in both side and cross-sectional view, the sharply sliced tip geometry at the aerator landing, the S curve on the upper surface of the spout, and the narrowing of the spout as it extends out from the base and then flaring of the spout near its tip. (Kolada, SX-11 at 108-109, 112, 126-30; SX-12).

88. Part of what makes the design of the '466 patent unique is the context of using the design in a four-inch centerset faucet, and that designs from eight- inch faucets would not translate to four-inch faucets. (Kolada, SX-11 at 109).

89. In his deposition, {

} (SX-11 at 127 - 129).

90. The first page of CX-81 illustrates how one can determine from the '466 patent figures—in this exhibit, for example, using Figures 1, 2 & 3—that the spout cross-section is a soft “D” shape. (Woodring, Tr. at 297 - 298).

91. Woodring defined the points of novelty as following:

“The ornamental design for a faucet body comprised of

(1) a raised and smoothly arched soft “D” shaped cross-section spout;

- (2) such spout terminating in a clean cut, angled toward the base;
- (3) such spout being smallest in cross-section near its mid-point; and
- (4) such spout being blended with a racetrack shaped base.”

Through his use of the phrase “such spout,” which incorporates by reference the spout description in subpart (1), Woodring, in fact, defined five separate points of novelty: (a) a faucet body with a spout as described in subpart (1); (b) a faucet body with a spout as described in both subparts (1) and (2); (c) a faucet body with a spout as described in subparts (1) and (3); (d) a faucet body with a spout as described in subpart (1) being blended with a racetrack shaped base as described in (4); and (e) a faucet body with all the design features described in subparts (1), (2), (3), and (4). (Woodring, Tr. at 295-97, 299, 361-62, 364-65, 384-86).

92. In identifying the points of novelty, Woodring considered art that was cited on the face of the ‘466 patent as the most relevant prior art as well as prior art references, including the Japanese Design Patent 552,155 (‘155 patent), which were forwarded to him by Moen’s attorneys. Woodring instructed Moen’s attorneys to send him any additional prior art as soon as they became aware or appraised of it. (Woodring, Tr. at 378-80).

93. The word “blended” used in Woodring’s definition of the points of novelty of the ‘466 design refers to more than “combined.” It means “visually blended so that it is inseparable or hard to discern where the spout ends and the base begins so that they are blended or married into an inseparable whole.” (Woodring, Tr. at 384).

94. Both elliptical shapes, such as the outline of the ‘466 patent base or of the design patent 203,324 (‘324 patent) prior art base, for example, and “hot dog” shapes, such as the

outline of the Sisco/Lota Accused Faucet, for example, are subsets of “racetrack” shapes as those terms are used by designers. The bases of the MOEN Faucet and of each of the accused faucets have outlines that would fall into the category of “racetrack shaped.” (Woodring, Tr. at 392 - 393, 331; CX-5; CX-30; CPX-11; CPX-12; CPX-13; CPX-14).

95. The elliptical footprint, or outline, of the base, as can be seen in Figure 6 of the ‘466 patent, is not a legitimate point of novelty of the claimed design. (CX-5). The ‘324 patent, a cited prior art reference, (CX-30, ‘324 patent at Fig. 5), teaches a two-handled four-inch centerset lavatory faucet body with a footprint almost exactly the same as that of the ‘466 patent design. (Woodring, Tr. at 301).

96. It is likely that there were other faucets in existence prior to his design for the ‘466 patent that had an “S” curve for the top surface of the spout, including products made by the Kohler Company. (RFCX-18-C (Kolada dep.) at 156 - 157).

97. Kolada, one of the inventors of the ‘466 patent, testified that the strongest feature of the ‘466 design, in terms of its uniqueness, is the three-dimensional spout geometry. (SX-11C at 110-11).

98. That there are discernible differences between the Foremost faucet body, CPX12, and the ‘466 design but these differences are inconsequential enough, at least in the eyes of the ordinary observer and the two designs are substantially the same. (Woodring, Tr. at 330-31).

99. Woodring identified the following minor differences between the Foremost faucet body and the ‘466 design that he, as a designer, could observe: (1) the Foremost faucet body lacks the small flat area on the rear of the body where the opening for the pop-up is located that is shown in the ‘466 patent drawings, (2) the rear edge of the Foremost faucet body is somewhat

more crisp than in the '466 design, and (3) the sidewall of the base of the Foremost faucet body, when viewed from the front or rear, does not have the same "S" curve shape as is found in the '466 patent drawings. (Woodring, Tr. at 389-90).

G. Moen's Survey Evidence

100. Heisler designed, conducted and analyzed a survey on behalf of Moen (the "Heisler Survey"). (Heisler, Tr. at 423).

101. **[There is no Finding 101]**

102. Heisler reviewed several design patent infringement cases, including Gorham Manufacturing Co. v. White, 81 U.S. 511 (1871) and Moen Inc. v. Foremost International Trading, Inc., 38 F. Supp.2d 680 (N.D. Ill. 1999), before designing his survey, so as to gain an understanding of the definition of an ordinary observer and the legal test for design patent infringement. (CX-65 at Q9; Heisler, Tr. at 418 - 419, 427 & 429 - 430).

103. Heisler defined the universe of ordinary observers as ordinary purchasers of faucets, i.e., adults who are potential faucet purchasers, but who are not experts as to faucets. (Heisler, Tr. at 426 - 427).

104. The Heisler Survey asked potential respondents four screening questions, Questions S1-S4, to ensure that the respondents were a subset of the defined universe of adults who are potential faucet purchasers, but who are not experts as to faucets. (CX-65 at Q23; Heisler, Tr. at 423 & 426 - 427).

105. Question S1 states: "First, do you currently own a home?" (Heisler, Tr. at 426; CX-42 (Faucet Study) at MS 1). This question was designed to screen for respondents who own homes, because they are primarily the population that is most likely to purchase a faucet.

(Heisler, Tr. at 426 - 427; CX-65 at Q23; CX-60 at Q11).

106. Question S2 reads: "If you were going to buy a new faucet for your home, would you decide which design to buy (1) yourself, (2) with someone else or (3) would you let someone else make the decision." (Heisler, Tr. at 427; CX-42 (Faucet Study) at MS 1).

107. Question S3 asks if potential respondents are at least 21 years old and is designed to limit the survey respondents to adults only. (Heisler, Tr. at 427; CX-42 (Faucet Study) at MS 1; see also CX-65 at Q23; CX-60 at Q11).

108. Question S4 states: "Do you or anyone in your household work for a company that makes or sells plumbing products?" (Heisler, Tr. at 427; CX-42 (Faucet Study) at MS 1)

109. In order to obtain a representative sample from the defined universe, the Heisler Survey included 208 respondents, drawn from six different shopping malls in each of two geographic markets, the metropolitan area of Chicago and Northern New Jersey. (Heisler, Tr. at 431 - 432 & 432; see also CX-65 at Q12 & Q30).

110. The Heisler Survey respondents were shown four sets of paired stimuli—the drawings of the '466 patent and photographs of each of the faucet bodies at issue in this investigation, i.e., the Foremost/Chung Cheng, Sisco/Lota and Hometek Accused Faucet bodies and the MOEN Faucet body. (CX-65 at Q12). The photographs of the faucet bodies consisted of six different views of the faucets, corresponding to the six different drawings of the '466 Patent. (Heisler, Tr. at 428:20-22; CX-65 at Q15). The respondents were shown each of the four pairs separately and then asked the same question. (CX-65 at Q12).

111. The Heisler Survey asked the following: "Here are photos of a faucet. Please look at both the photos and the drawings as if you were considering the purchase of a faucet. Take as

much time as you would like. Now please answer the following question. Thinking about how they look, not how they work, the design of the faucet in the drawings and the design in the photos are: Exactly the same, Substantially the same, Different.” (Heisler, Tr. at 428 - 429; CX-65-C (Heisler witness statement) at Q25 & Q26; CX-42-C (Faucet Study) at MS 2-5).

112. The Heisler Survey results were validated. (CX-65 at Q40 - Q42). Validation was completed by recontacting each respondent and asking him or her whether he or she had been interviewed about faucets and then re-asking the screening questions. (CX-65 at Q41). Of 210 individuals contacted, 20 did not recall being interviewed. (CX-65 at Q41). Accordingly, their answers were dropped from the survey and an additional 18 interviews were conducted and then validated, resulting in a sample size of 208. (CX-65 at Q41).

113. The results of the Heisler Survey are: (1) as to the MOEN Faucet body, { } of the respondents stated that the designs in the drawings and the photographs were “Exactly the Same” or “Substantially the Same;” (2) as to the Foremost/Chung Cheng Accused Faucet body, { } of the respondents stated that the designs in the drawings and the photographs were “Exactly the Same” or “Substantially the Same;” (3) for the Sisco/Lota Accused Faucet body, { } of the respondents stated that the designs in the drawings and the photographs were “Exactly the Same” or “Substantially the Same;” and (4) as to the Hometek Accused Faucet body, { } stated that the designs were “Exactly the Same” or “Substantially the Same.” (CX-65 at Q45; Heisler, Tr. at 434).

114. Heisler made the important decisions in the design, execution, and analysis of the Heisler Survey. (Heisler, Tr. at 426 - 435; CX-65 at Q21). Heisler’s conclusions are derived from his independent mode of analysis of the survey results. (Heisler, Tr. at 430 & 434 - 435).

Thus, the Heisler Survey was conducted independently of Moen's attorneys.

115. At no time were the field supervisors or interviewers made aware of the fact that the Heisler Survey was being conducted in support of this investigation; that Moen was the ultimate client; that the drawings and photographs corresponded to the '466 Patent and the faucet bodies at issue; or that there was any desired outcome. (CX-65 at Q34). Although the supervisor and interviewers' instructions were titled "Kirkland & Ellis Study," no indication of the client or purpose of the survey was given to the supervisors, interviewers or survey respondents. (CX-65 at Q34).

H. Respondents' Survey Evidence

116. Hughes, through Heakin Research, conducted a mall intercept survey where 50 individuals were presented with the drawings from the '466 patent and then, arranged side-by-side, the faucet bodies from the Moen faucet, the accused Foremost faucet, the Delta 2530 faucet, and the Price Pfister 8B5-8CMB faucet. (RFCX-40; RFCX-11; RFCPX-1; RFCPX-2; RFCPX-3; RFCPX-4; Hughes, Tr. at 566-67; SX-23C at 13).

117. The research firm used in the Hughes study, Heakin Research, has a good reputation in the industry. Heakin Research has been in business 30-35 years in Chicago. (Heisler, Tr. at 439; Hughes, Tr. at 605).

118. When the survey was conducted, neither the interviewers at Heakin Research nor Hughes knew on whose behalf the research was being conducted or what would be considered a favorable result. (Hughes, Tr. at 605-06).

119. Two of the questionnaires completed during the interviews conducted by Heakin Research (#13 and #39) are incomplete in that no response to one of the questions (question 4)

was recorded. (RFCX-11).

120. Hughes admitted that Foremost's lawyer LaBarge instructed him to use a sample size of fifty, instructed him that no screening questions were required and suggested the specific language for the questions to be posed to each respondent. (Hughes, Tr. at 579-80; CX-82).

121. Hughes, Foremost's consumer research expert, testified that he suggested the use of a simple four or five point verbal scale expressing how closely the respondents thought the actual sample resembled the drawing in response to LaBarge's instruction regarding the language to be used in the questionnaire, but that suggestion was rejected. (Hughes, Tr. at 584-86; CX-83).

122. The language used in the questionnaire is virtually identical to that first proposed by Foremost's counsel LaBarge. (CX-82; RFCX-11; Hughes, Tr. at 580).

123. Heakin Research ensured that potential respondents were at least 21 years old before inviting them to participate in the Hughes survey. Additionally, Heakin Research made sure that at least 20 but no more than 30 of the respondents were male. Industrial designers were not screened out from participating in the survey. (RFCX-11).

124. Each respondent in the Hughes survey was shown the '466 patent drawings and instructed:

Q2 "Please look at this drawing of a faucet. Review it as carefully as if you were thinking of buying a faucet. Take as much time as you like."

125. Each respondent was then shown all four faucet bodies and asked:

Q3 "Here are four faucets. Please look them over and tell me which, if any, have the same design as the faucet shown in the drawing?"

126. For each faucet identified the respondent was next asked:

Q4 "Are you sure enough of that, that you would buy this faucet in the belief that it has the design shown in the drawing?"

Finally, each respondent was thanked for his or her help. (RFCX-11).

127. The Hughes survey defined the universe of potential survey respondents as "ordinary Americans" at least 21 years old. (Hughes, Tr. at 580 & 587).

I. Remedy

128. Slusher testified that the domestic market for MOEN Faucets is very strong and growing. (CX-63 at Q8).

129. The MOEN Faucet has enjoyed tremendous commercial success in the United States. Moen{

}

130. The faucet market in the United States has a lot of relatively high-priced products, while the production costs faced by foreign manufacturers are significantly less than those faced by Moen and other domestic manufacturers. As a result, there is a large potential profit for foreign entrepreneurs who are able to supply faucets to the United States. (CX-63 at Q14; Slusher, Tr. at 224).

131. Slusher testified that the cost of labor in Asia is much less than it is in the United States and that labor in Asia is widely available. In Taiwan wages are{ } less than they are in the United States. In China wages are{ } less than they are in the United States. (CX-63 at Q14).

132. {

} This chart shows that a typical factory worker at Lota
is paid { }

133. Most copies of the MOEN Faucet that Moen knows about are manufactured in either Taiwan or China. Companies in Indonesia, Korea, Malaysia and Thailand, however, have the capability to produce faucets. (CX-63 at Q6; Slusher, Tr. at 219). It is Slusher's opinion that because the cost of labor in these countries is so low, it is likely that these countries will begin manufacturing faucets for export to the United States. (Slusher, Tr. at 218 - 219).

134. Foreign manufacturers who make copies of the MOEN Faucet do not have to invest in creative design. (CX-63 at Q14).

135. Stuhlberg testified that,{

}

136. Slusher testified that in his opinion, although foreign-origin copies are identical in appearance to the MOEN Faucet, they can be made with a cheaper alloy and typically have a lesser quality finish. (CX-63 at Q14).

137. Slusher testified that he believed foreign manufacturers often misrepresent, with little or no repercussions, that their faucets are certified by groups like the National Sanitation Foundation (NSF) and the Canadian Standards Association (CSA). (CX-63 at Q14).

138. Lingafelter testified that although the Chung Cheng/Foremost and Lota/Sisco Accused Faucets have been found in large retailers such as{ } he

believed smaller retailers, such as{ } and regional hardware stores, such as { } are logical places to find imported faucets that copy the '466 Patent's design, because these channels cannot compete with larger retailers on price for branded merchandise, and instead sell small off-brands. This is an easy channel for smaller foreign manufacturers and importers to enter into the U.S. faucet market. (CX-61 at Q35).

139. Slusher testified that a foreign manufacturer could easily and relatively cheaply build a totally integrated facility capable of producing copies of the MOEN Faucet. In China, for example, the cost of labor is very low, and the Chinese government has created large tax incentives to encourage entrepreneurs to build large factories in towns seeking to expand. (CX-63 at Q11).

140. Slusher testified that an entrepreneur{

}

141. Asian faucet manufacturers such as Chung Cheng outsource die-cast components, such as escutcheons [n.b: deposition transcript incorrectly states "sketchings"] to die casting companies and then manufacture the complete faucet at their facilities. (CX-102 (J. Chen dep.) at 21).

142. Similarly, the faucet housing used in the Sisco/Lota Accused Faucet is produced by an unrelated supplier in Taiwan known as the{ } {

}

143. {

}

144. Slusher testified that for only{ } an entrepreneur could build a major facility for assembling the different faucet components and produce enough faucets to support a fairly large retail business. (CX-63 Q11; Slusher, Tr. at 224-225).

145. Slusher testified that if an entrepreneur wanted to produce fewer faucets and support only smaller retailers it would not even be necessary to build a major assembly facility. An entrepreneur could even contract with smaller companies to assemble the faucet. {

}

146. Slusher testified that it is very easy and inexpensive for a company that already has the proper tools and facilities to copy the design of the MOEN Faucet's escutcheon. (CX-63 (Slusher witness statement) at Q9). With a minimal investment, a foreign faucet manufacturer could quickly retool its facilities and start producing a copy of the MOEN Faucet. (CX-63 at Q10).

147. According to Slusher, the zinc die cast tool is the only significant expense for foreign faucet manufacturers wanting to retool their facilities and to produce copies of the MOEN

Faucet. The zinc die cast tool costs about{ } to make in China or Taiwan, and could be made in approximately { } (CX-63 at Q11; Slusher, Tr. at 220- 221).

148. Lota estimated in June, 1998, that {

}

149. Slusher testified that the ornamental escutcheon is the most expensive part of the faucet to make, and the total cost of producing one ornamental escutcheon is no more than{ } per unit. (CX-63 at Q9; Slusher, Tr. at 219- 220 & 223).

150. {

}

151. {

}

152. {

}

153. {

}

154. Slusher provided an example of a company in China called{
} that has about{ }employees and owns machinery that would allow it to copy the
MOEN Facuet in about{ } According to Mr. Slusher, there are a lot of
companies similar to{ } in China. (CX-63 at Q13).

155. Stuhlberg testified that, if given a handmade sample, an Asian manufacturer could
start producing faucets based on that sample within{ } (CX-101 (Stuhlberg dep.)
at 65).

156. Slusher testified{

}

157. Stuhlbarg testified{

} (CX-101 (Stuhlbarg dep.) at 72).

158. Stuhlbarg testified{

} (CX-

101 (Stuhlbarg dep.) at 73).

159. Slusher testified that he has visited a town in Taiwan named Chung Hua where companies involved in the faucet manufacturing process line the streets and are found everywhere. In many cases, these companies are small family-run businesses. The "factory" is the main floor of the family's home, which is often no larger than a small two-car garage. (CX-63 at Q13).

160. Stuhlbarg testified that{

} (CX-101 (Stuhlbarg dep.) at 20- 21).

161. Slusher testified that the production capacity of faucet manufacturers in China and Taiwan is very large. For example,{

} Slusher testified that

there are many companies similar to Chang Jiang in Asia. (CX-63 at Q13).

162. In November, 1999,{

} (CX-103 (G. Chen dep.) at 26, 27).

163. Lota had{

} (CX-103 (G. Chen dep.) at 40 - 41).

164. According to Slusher, faucet manufacturers in China and Taiwan have the capability of meeting almost any level of demand within the United States. (CX-63 at Q13).

V. Conclusions of Law

1. The Commission has in rem jurisdiction and subject matter jurisdiction.
2. There has been an importation by respondents of certain two-handle centerset faucets and escutheons and components thereof which are the subject of the unfair trade allegations.
3. Complainant's activities satisfy the domestic industry requirements (both the economic and technical prongs) of section 337.
4. The claim of the '466 patent is valid and enforceable.
5. Complainant has established by a preponderance of the evidence that the accused faucets of respondents infringe the claim of the '466 patent.
6. There is a violation of section 337 by respondents.
7. The record supports the issuance of a general exclusion order and a bond of 264% of entered value during Presidential review.

ORDER

Based on the foregoing opinion, additional findings of fact, conclusions of law, and the record as a whole, and having considered all of the pleadings, evidence and arguments presented orally and in briefs, as well as certain proposed findings of fact, it is the administrative law judge's final initial determination that there is a violation of section 337 in the importation into the United States, sale for importation, and the sale within the United States after importation of certain two-handle centerset faucets and escutcheons and components thereof. It is also the administrative law judge's recommendation that a general exclusion order should issue and that a bond of 264% of entered value during Presidential review should be imposed.

The administrative law judge hereby CERTIFIES to the Commission his final initial and recommended determinations together with the record consisting of the exhibits admitted into evidence. The pleadings of the parties filed with the Secretary and the transcript of the hearing, including closing arguments, are not certified, since they are already in the Commission's possession in accordance with Commission rules of Practice and Procedure.

Further it is ORDERED that:

1. In accordance with Commission rule 210.39, all material heretofore marked in camera because of business, financial, and marketing data found by the administrative law judge to be cognizable as confidential business information under Commission rule 201.6(a) is to be given in camera treatment continuing after the date this investigation is terminated.

2. Counsel for the parties shall have in the hands of the administrative law judge those portions of the final initial and recommended determinations which contain bracketed confidential business information to be deleted from any public version of said determinations, and

all attachments thereto, no later than April 7, 2000. Any such bracketed version shall not be served by telecopy on the administrative law judge. If no version is received from a party it will mean that the party has no objection to removing the confidential status, in its entirety, from the initial and recommended determinations.

3. The final initial determination portion of the "Initial and Recommended Determination," issued pursuant to Commission rule 210.42(h)(2), shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within forty-five (45) days after the date of such service of the initial determination portion shall have ordered review of that portion or certain issues therein or by order has changed the effective date of the initial determination portion. Any findings and recommendation, made by the administrative law judge in said recommended determination portion, issued pursuant to Commission rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission rule 210.50(a).


Paul J. Luckern
Administrative Law Judge

Issued: March 17, 2000

