Special Note: Filed Under 19 CFR 174.21(b) Relating to Exclusion; Decision Shall be Made Within 30 Days

DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

Approved OMB No. 1651-0017
Exp. 11/30/2012

PROTEST

Pursuant to Sections 514 & 514(a), Tariff Act of 1930 as amended, 19 CFR Part 174 et. seq.

NOTE: If your protest is denied, in whole or in part, and you wish to CONTEST the denial, you may do so by bringing a civil action in the U.S. Court of International Trade within 180 days after the date of mailing of Notice of Denial. You may obtain further information concerning the institution of an action by writing the Clerk of U.S. Court of International Trade, One Federal Plaza, New York NY 10007 (212-264-2800).

1. PROTEST NO. *(Supplied by CBP)*: 4601-12-100252

2. DATE RECEIVED *(CBP Use Only)*: Date 2/11/2012

SECTION I - IMPORTER AND ENTRY IDENTIFICATION

3. PORT: Newark

4. IMPORTER NO.: 27-407606500

6. NAME AND ADDRESS OF IMPORTER OR OTHER PROTESTING PARTY:
AEP Trading Inc
977 57th Street, Ground
Brooklyn, New York 11219

7. Is Accelerated Disposition being requested (19 CFR 174.22)?
[X] Yes [ ] No But Under 19 CFR 174.21(b)

5. ENTRY DETAILS

PORT CODE	FILER CODE	ENTRY NO.	CHECK DIGIT	DATE OF ENTRY	DATE OF LIQUIDATION
4601	NV3	0046687	1	10/21/11	
4601	NV3	0047013	9	11/03/11	

SECTION II - DETAILED REASONS FOR PROTEST

8. With respect to each category of merchandise, set forth, separately, (1) each decision protested, (2) the claim of the protesting party, and (3) the factual material and legal arguments which are believed to support the protest. All such material and arguments should be specific. General statements of conclusions are not sufficient.

The imported merchandise consists of plastic trays without lids, shapes of 1)round, 2) rectangular and 3)partitioned rectangular, which were excluded respectively on December 5, 2011 and January 6, 2012, under an ITC General Exclusion Order 337-TA-514. See Attached.

(Attach Additional Sheets if necessary.)

SECTION III - REQUEST FOR DISPOSITION IN ACCORDANCE WITH ACTION ON PREVIOUSLY FILED PROTEST

Protesting party may request disposition in accordance with the action taken on a previously filed protest that is the subject of a pending application for further review and is alleged to involve the same merchandise and the same issues. (See 19 CFR 174.13(a)(7).) To request such disposition, enter in Blocks 8 and 9 the protest number and date of receipt of such previously filed protest. ▶

9. PROTEST NO. OF PREVIOUSLY FILED PROTEST:

10. DATE OF RECEIPT:

SECTION IV - SIGNATURE AND MAILING INSTRUCTIONS

11. NAME AND ADDRESS OF PERSON TO WHOM ANY NOTICE OF APPROVAL OR DENIAL SHOULD BE SENT
Hanbin Wang, Esq.
277 Broadway, Suite 510
New York, New York 10007
Tel.: (212)577-2220
E-Mail: hb_wang@yahoo.com

12. NAME, ADDRESS, AND CBP IDENTIFICATION NUMBER TO WHICH REFUND SHOULD BE SENT
AEP Trading Inc 27-407606500
977 57th Street, Ground
Brooklyn, New York 11219

13. IF FILING AS ATTORNEY OR AGENT, TYPE OR PRINT YOUR NAME, ADDRESS AND IMPORTER NUMBER, IF ANY
Hanbin Wang, Esq.
277 Broadway, Suite 510
New York, New York 10007

14. SIGNATURE: X

DATE: 01/31/2012

(Optional) SECTION V - APPLICATION FOR FURTHER REVIEW *(Fill in Item 1 above if this is a separate Application for Further Review.)*

15. MARK BOX CORRESPONDING TO YOUR ANSWER TO EACH OF THE FOLLOWING QUESTIONS

YES	NO		
[ ]	[X]	(A)	Have you made prior request of a port director for a further review of the same claim with respect to the same substantially similar merchandise?
[ ]	[X]	(B)	Have you received a final adverse decision from the U.S. Court of International Trade on the same claim with respect to the same category of merchandise or do you have action involving such a claim pending before the U.S. Court of International Trade?
[ ]	[X]	(C)	Have you previously received an adverse administrative decision from the Commissioner of CBP or his designee or have you presently pending an application for an administrative decision on the same claim with respect to the same category of merchandise?

16. JUSTIFICATION FOR FURTHER REVIEW UNDER THE CRITERIA IN 19 CFR 174.24 AND 174.25 (Include Applicable Rulings)

The protest involves questions of law and fact which have not been ruled upon by the Commissioner of CBP and involves interpretation of ITC General Exclusion Order 337-TA-514. ->

(Attach Additional Sheets If Necessary.)

SECTION VI - DECISION *(CBP USE ONLY)*

17. APPLICATION FOR FURTHER REVIEW EXPLANATION: [X] Approved* [ ] Denied for the reason checked: [ ] Untimely filed [ ] Does not meet criteria [ ] Other, namely

AFR Granted

*When further review only is approved the decision on the protest is suspended, pending issuance of a protest review decision.

18. PROTEST EXPLANATION: [X] Approved [ ] Rejected as non-protestable [ ] Denied in full for the reason checked: [ ] Denied in part for the reason checked: [ ] Untimely filed [ ] See attached protest review decision [ ] Other, namely

19. TITLE OF CBP OFFICER	20. SIGNATURE AND DATE
Import Specialist 46	APR 20 2012

Previous Editions are Obsolete

CBP Form 19 (05/10)

U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and Border Protection

HQ H209396

APR 3 2012

OT:RR:BSTC:IPR H209396 WJW

CATEGORY: 19 U.S.C. § 1337; Unfair Competition

Adele J. Fasano
Port Director
U.S. Customs and Border Protection
1100 Raymond Bldv.
Newark, NJ 07102

RE: Protest 4601-12-100252; U.S. International Trade Commission; General Exclusion Order; Investigation No. 337-TA-514; *Certain Plastic Food Containers*

Dear Ms. Fasano:

This is in response to the application for further review of the above-referenced protests filed by AEP Trading Inc. ("Protestant") challenging the exclusion from entry for consumption of certain plastic food containers determined by the port to fall within the scope of the above-referenced general exclusion order issued by the U.S. International Trade Commission ("ITC").

FACTS:

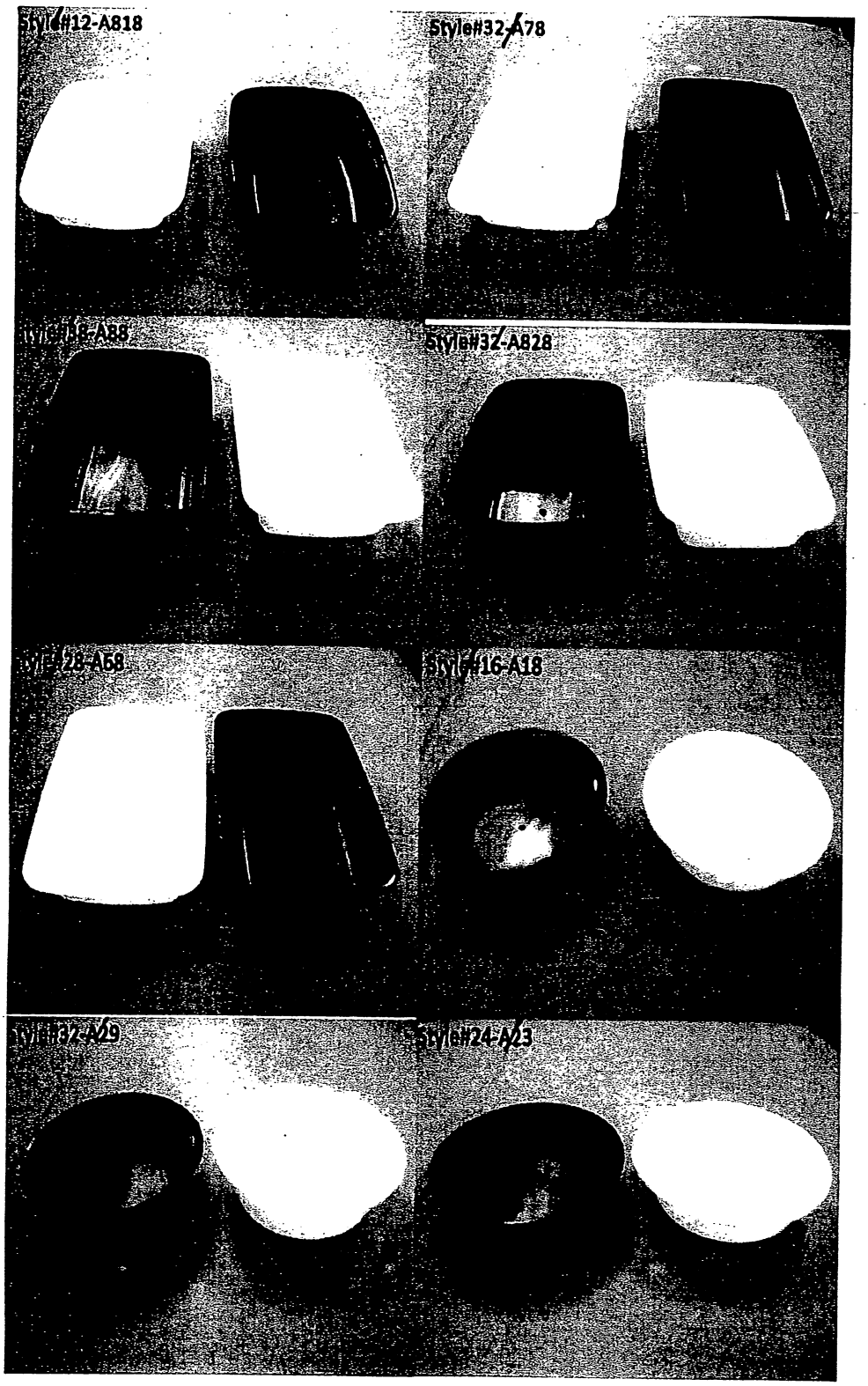
U.S. Customs and Border Protection ("CBP") issued a notice to Protestant on December 05, 2011, and January 06, 2012, which indicated that certain plastic food containers were excluded from entry for consumption because the plastic food containers were covered by the general exclusion order issued by the ITC that resulted from Inv. No. 337-TA-514 ("514 GEO"). See Protest at 1. Pursuant to 19 U.S.C. § 1514(c), as implemented by 19 C.F.R. § 174, Protestant timely filed a valid protest on February 01, 2012, challenging the exclusion from entry and determination that the plastic food containers at issue fell within the scope of the 514 GEO. Specifically, Protestant denied that their plastic food containers infringe any of the patents at issue during the investigation, and found to be infringed by, the ITC.

ITC Inv. No. 337-TA-514 was instituted based on a complaint filed by Newspring Industrial Corp. ("Complainant"), which named two parties as

respondents to the investigation. See Administrative Law Judge's ("ALJ") Initial Determination ("ID") at 3-4 (February 10, 2005). The ITC instituted the investigation to determine whether there was a violation of subsection (a)(1)(B) of section 337, as amended, in the importation into the United States, the sale for importation into the United States, or the sale within the United States after importation of certain plastic food containers by reason of infringement of one or more of claims 1-5 of utility U.S. Patent No. 6,056,138 ("the '138 patent"), claims 1-2 and 4-9 of utility U.S. Patent No. 6,196,404 ("the '404 patent"), and the claim of design U.S. Patent No. D 415,420 ("the '420 patent"). Id. Protestant was not named as a respondent in the investigation.

The ALJ found a violation of section 337 of the Tariff Act of 1930, as amended, and granted Complainant's motion for a summary determination with respect to most, but not all, issues presented, which was affirmed by the Commission after limited review to examine certain formatting and typographical errors. See Commission Opinion at 1-3 (May 23, 2005). Accordingly, the ITC provided relief in the form of a general exclusion order that bars the entry for consumption into the United States of plastic food containers covered by one or more of claim 1 of the '138 patent, claim 1 of the '404 patent, or the claimed design of the '420 patent. See 514 General Exclusion Order (May 23, 2005).

As stated above, Protestant was not named as a respondent to the investigation, nor were the excluded plastic food containers at issue in this protest analyzed during the investigation at the ITC. Protestant's excluded plastic food containers include a round and a rectangular embodiment, in different sizes and colors (black or white). Protestant has indicated that the excluded plastic food containers contain the same rim features and consist only of a tray or base portion. The containers do not contain a lid or covering portion capable of enclosing the tray or base portion. The embodiments of the excluded plastic food containers are depicted in the images below.



AEP Containers

ISSUE:

The issue presented is whether the excluded plastic food containers infringe any of the relevant patents at issue and therefore fall within the scope of the 514 GEO.

LAW AND ANALYSIS:

The ITC has authority to conduct investigations into imported articles that allegedly infringe United States patents and impose remedies if the accused products are found to be infringing. See 19 U.S.C. § 1337(a)(1)(B), (b)(1), (d), (f). Specifically, 19 U.S.C. § 1337(d) provides the Commission authority to direct the exclusion from entry of articles found to be infringing. Moreover, when the Commission determines that there has been a violation of section 337, as amended, it may issue two types of exclusion orders: a limited exclusion order and/or a general exclusion order. See Fuji Photo Film Co., Ltd. v. U.S. Int'l Trade Comm'n, 474 F.3d 1281, 1286 (Fed. Cir. 2007); see also Certain Ink Cartridges and Components Thereof, Inv. No. 337-TA-565, Commission Opinion (October 19, 2007).

Both types of orders direct CBP to bar infringing products from entering the country. See Yingbin-Nature (Guangdong) Wood Indus. Co. v. U.S. Int'l Trade Comm'n, 535 F.3d 1322, 1330 (Fed. Cir. 2008). A limited exclusion order is "limited" in that it only applies to the specific parties before the Commission in the investigation. Id. In contrast, a general exclusion order bars the importation of infringing products by everyone, regardless of whether they were respondents in the Commission's investigation. Id. A general exclusion order is only appropriate if two exceptional circumstances apply. See Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n, 545 F.3d 1340, 1356. A general exclusion order may only be issued if (1) "necessary to prevent circumvention of a limited exclusion order," or (2) "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); see Kyocera, 545 F.3d at 1356 ("If a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO by satisfying the heightened burdens of §§ 1337(d)(2)(A) and (B).").

As stated above, the 514 GEO issued by the ITC provides, in relevant part, that:

> Plastic food containers covered by one or more of claim 1 of the '420 patent, claim 1 of the '138 patent, or claim 1 of the '404 patent, or [sic] are excluded from entry for consumption, entry for consumption

> from a foreign-trade zone, and withdrawal from warehouse for consumption for the remaining term of the patents, except under license of the patent owner or as provided by law.

The above language is typical of general exclusion orders, speaking in terms of patent claims rather than parties and/or infringing products. See Yingbin-Nature, 535 F.3d at 1331. The 514 GEO directs CBP to exclude plastic food containers, regardless of their manufacturer or importer, that infringe the patents referenced above. Accordingly, since the ITC issued a general exclusion order based on the additional findings required by 19 U.S.C. § 1337(d)(2), the fact that Protestant was not named as a respondent before the ITC is immaterial to the question of whether the accused plastic food containers fall within the scope of the 514 GEO. The only pertinent question is whether the plastic food containers infringe any of the relevant patents. See Sealed Air Corp. v. U.S. Int'l Trade Comm'n, 645 F.2d 976, 985 (C.C.P.A. 1981) ("An exclusion order operates against goods, not parties."); see also Vastfame Camera, Ltd. v. U.S. Int'l Trade Comm'n, 386 F.3d 1108, 1114 (Fed. Cir. 2004) ("A general exclusion order broadly prohibits entry of articles that infringe the relevant claims of a listed patent without regard to whether the persons importing such articles were parties to, or were related to parties to, the investigation that led to issuance of the general exclusion order.").

Significantly, the Court of Appeals for the Federal Circuit ("CAFC") has recognized that issuance of a general exclusion order by the ITC binds named parties and non-named parties alike and shifts to would-be importers (such as Protestant), "as a condition of entry, the burden of establishing noninfringement." Hyundai Electronics Industries Co. v. U.S. Int'l Trade Comm'n, 899 F.2d 1204, 1210 (Fed. Cir. 1990). Accordingly, the burden is on Protestant to establish that the excluded plastic food containers at issue do not infringe any of the relevant patents and therefore are admissible.

UTILITY PATENT INFRINGEMENT

Patent infringement determinations for utility patents entail two steps. The first step is to interpret the meaning and scope of the patent claims asserted to be infringed. The second step is to compare the properly construed claims to the accused device. See Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996). The first step is a question of law; the second step is a question of fact. See Freedman Seating Co. v. American Seating Company, 420 F.3d 1350, 1357 (Fed. Cir. 2005).

In patent law, there are two types of infringement: direct and indirect infringement. Direct infringement includes two varieties: literal infringement and infringement under the doctrine of equivalents.

Literal infringement is when every limitation recited in a claim is found in the accused device. See Strattec Security Corp. v. General Automotive Specialty Co., 126 F.3d 1411, 1418 (Fed. Cir. 1997); see also Digital Biometrics, Inc. v. Identix, Inc., 149 F.3d 1335, 1349 (Fed. Circ. 1998) ("An accused device cannot infringe, as a matter of law, if even a single limitation is not satisfied.").

Under the doctrine of equivalents, "a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 21 (1997) (citing Graver Tank & Manufacturing Co. v. Linde Air Products Co., 339 U.S. 605, 609 (1950)). The CAFC applies two articulations of the test for equivalence. See Voda v. Cordis Corp., 536 F.3d 1311, 1326 (Fed. Cir. 2008) (explaining that different phrasing may be "more suitable to different cases, depending on their particular facts..."). Under the insubstantial differences test, "[a]n element in the accused device is equivalent to a claim limitation if the only differences between the two are insubstantial." Id. at 1326 (citing Honeywell International Inc. v. Hamilton Sundstrand Corp., 370 F.3d 1131, 1139 (Fed. Cir. 2004)).

Alternatively, under the function-way-result test, an element in the accused device is equivalent to a claim limitation if it "performs substantially the same function in substantially the same way to obtain substantially the same result." Id. (citing Schoell v. Regal Marine Industries, Inc., 247 F.3d 1202, 1209-10 (Fed. Cir. 2001). However, the doctrine of prosecution history estoppel acts as a constraint to limit the application of the doctrine of equivalents. See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 733-41 ("Prosecution history estoppel requires that the claims of a patent be interpreted in light of the proceedings in the PTO during the application process....The doctrine of equivalents allows the patentee to claim those insubstantial alterations that were not captured in drafting the original patent claim but which could be created through trivial changes. When, however, the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory comprised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent. On the contrary, by the amendment [the patentee] recognized and emphasized the difference between the two phrases[,]...and the difference which [the patentee] thus disclaimed must be regarded as material....Prosecution history estoppel

ensures that the doctrine of equivalents remains tied to its underlying purpose.") (internal citations omitted).

As for the scope of protection provided by the utility patents at issue in the 514 GEO, it is a "bedrock principle" of patent law that "the claims of a patent define the invention to which the patentee is entitled the right to exclude." Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc., 381 F.3d 1111, 1115 (Fed. Cir. 2004); Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996) ("[W]e look to the words of the claims themselves...to define the scope of the patented invention.").

Furthermore, the CAFC has made clear that claim terms are given their ordinary and customary meaning, which refers specifically to the ordinary and customary meaning that the claim term would have to a person of ordinary skill in the art at the time of the invention. See Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc). The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation. See Innova, 381 F.3d at 1116. That starting point is based on the well-settled understanding that inventors are typically persons skilled in the field of the invention and that patents are addressed to and intended to be read by others of skill in the pertinent art. See Verve, LLC v. Crane Cams, Inc., 311 F.3d 1116, 1119 (Fed. Cir. 2002).

CLAIM 1 OF U.S. PATENT NO. 6,056,138

The subject matter of the '138 patent involves a triple seal for use in plastic food containers where the seals are designed to provide enhanced protection against spillage and spoilage. See ALJ Initial Determination ("ALJ ID") at 11. The '138 patent has 5 claims. Only claim 1, an independent claim, was included in the 514 GEO. Claim 1 contains the following limitations and reads as follows:

1. A container having three seals, comprising:

A	a base having
B	a substantially planar bottom,
C	a base perimeter wall extending substantially vertically upward from said bottom,
D	a base rim extending substantially horizontally outward from said base perimeter wall, and
E	a base sealing edge attached to said base rim; and
F	a lid having

G	a substantially planar top,
H	a lid perimeter wall extending substantially vertically downward from said top,
I	a lid rim extending substantially horizontally outward from said lid perimeter wall,
J	a lid sealing edge attached to said lid rim, and
K	a locking lip protruding from said sealing edge;
L	wherein said base sealing edge and said lid scaling edge are molded to be correspondingly mateable to each other and
M	upon mating said base sealing edge and said lid sealing edge form a middle seal and an exterior seal and
N	said base rim and said lid rim form an interior seal,
O	wherein said interior seal has a surface area greater than said middle seal and said exterior seal,
P	said base sealing edge further comprising an inner base edge extending generally vertically upward from said base rim;
Q	a middle base sealing edge extending substantially horizontally outward from said inner base edge; and
R	an exterior base sealing edge extending substantially vertically downward from said middle base sealing edge; and
S	said lid sealing edge further comprising an inner lid edge extending generally vertically upward from said lid rim;
T	a middle lid sealing edge extending substantially horizontally outward from said inner lid edge; and
U	an exterior lid sealing edge extending substantially vertically downward from said middle lid sealing edge,
V	said locking lip protruding from said downward exterior lid sealing edge; wherein
W	upon mating of said base and said lid,
X	said base rim and said lid rim form said interior seal and said middle base sealing edge and
Y	said middle lid sealing edge form said middle seal and said exterior base sealing edge
Z	and said exterior lid sealing edge form said exterior seal.

The first step in making a utility patent infringement determination, that of interpreting the claims, has been done by the ALJ for the claim limitations underlined above. Therefore, the second step in the infringement analysis, involving a question of fact, requires CBP to examine the ALJ's claim constructions and read them onto the excluded plastic food containers to determine whether the containers are infringing.

The ALJ construed the underlined claim terms above as follows:

- mateable: "capable of being joined or fitted together"
- mating: "the act of being joined or fitted together"
- middle seal: "the structure formed by the mating of the middle base sealing edge and middle lid sealing edge"
- exterior seal: "the structure formed by the mating of the exterior base sealing edge and said exterior lid sealing edge"
- interior seal: "the structure formed by the mating of the base rim and the lid rim"
- surface area: "a shared surface of the respective seals (i.e., the area of mating of one edge with another edge)"

Accordingly, claim 1 of the '138 patent, as construed by the ALJ, requires three seals: an exterior seal (formed by the mating of the base sealing edge with the lid sealing edge), an middle seal (also formed by the mating of the base sealing edge with the lid sealing edge), and an interior seal (formed by the mating of the base rim with the lid rim). An embodiment of this patented invention is depicted in Figure 5 of the '138 patent, as shown below. The various seals have been labeled for illustrative purposes. As is apparent from Figure 5, the three seals are formed when the base sealing edge or base rim come into contact with the lid sealing edge or lid rim.

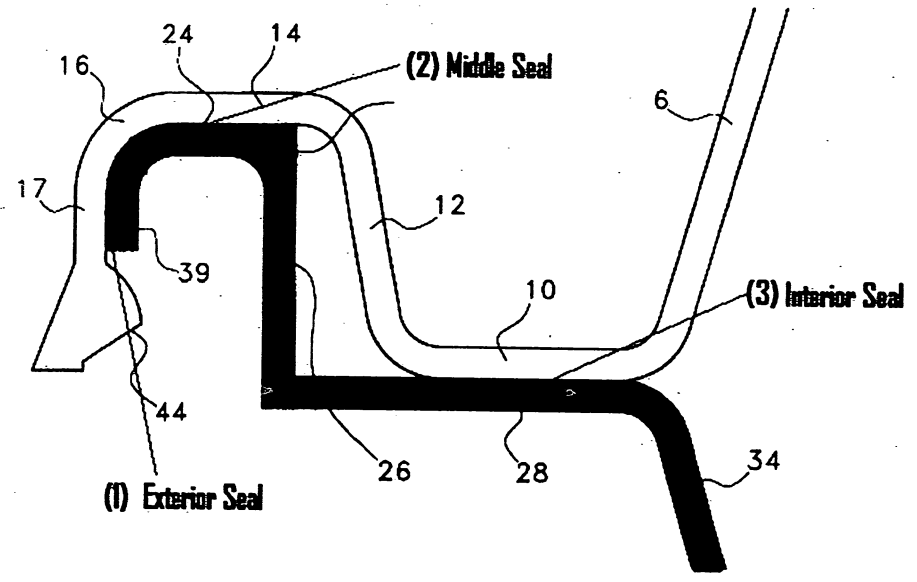


Fig. 5

CLAIM 1 OF U.S. PATENT NO. 6,196,404

The subject matter of the '404 patent involves a triple seal with protrusions for use in plastic food containers to provide enhanced protection against spillage and spoilage. See ALJ ID at 16. The '404 patent has 9 claims. Only claim 1, an independent claim, was included in the 514 GEO. Claim 1 contains the following limitations and reads as follows:

1. A container having three seals, comprising:

A	a base having
B	a substantially planar bottom,
C	a base perimeter wall extending substantially vertically upward from said bottom,
D	a base rim extending substantially horizontally outward from said base perimeter wall, and
E	a base sealing edge attached to said base rim; and
F	a lid having
G	to a substantially planar top,
H	a lid perimeter wall extending substantially vertically downward from said top,
I	a lid rim extending substantially horizontally outward from said lid perimeter wall,
J	a lid sealing edge attached to said lid rim,
K	a protrusion attached to said lid sealing edge, and
L	a locking lip protruding from said sealing edge;
M	wherein said base sealing edge and said lid sealing edge are molded to be correspondingly mateable to each other and
N	upon mating said base sealing edge and said lid sealing edge form a middle seal and an exterior seal and
O	said base rim and said lid rim form an interior seal and further wherein
P	said protrusion pushes said base sealing edge against said lid sealing edge.

Again, as stated above, the first step in making a utility patent infringement determination, that of interpreting the claims, has been done by the ALJ for certain claim limitations. Therefore, the second step requires CBP to examine the relevant claim constructions and read them onto the excluded plastic food containers.

The ALJ construed the underlined claim terms above as follows:

- protrusion: "a projection from a surrounding surface"
- mateable: *same as the '138 patent term construction
- mating: *same as the '138 patent term construction
- middle seal: *same as the '138 patent term construction
- exterior seal: *same as the '138 patent term construction
- interior seal: *same as the '138 patent term construction

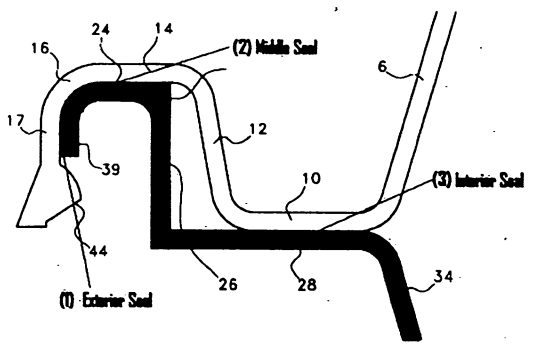
Protestant argues that the excluded plastic food containers do not meet certain limitations of either the '198 or '404 patents above. While claim 1 of the '404 patent and claim 1 of the '138 patent are not identical (the former, for example, requires a "protrusion" that pushes the base sealing edge against said lid sealing edge), they both contain limitations requiring an exterior, middle and interior seal that is formed by the mating of the container's base rim with the lid rim.

Specifically, Protestant states that their excluded plastic food container lacks an exterior, middle and/or interior seal formed by the mating of a base and lid rim. See Protest Continuation Sheet 2-7. The reason asserted for why this claim limitation is not met by the excluded plastic food containers is that the excluded containers consist of a base portion only, and that no lid portion exists with which to mate and form a seal. Therefore the excluded plastic food containers are not capable of forming any of the required seals. Additionally, Protestant states that the rim of the tray portion is designed in such a way that even if a lid portion were provided the resulting seals would not meet the limitations of claim 1, in either the '198 or the '404 patent. See Protest Continuation Sheet 6-9. It is undeniable that the exterior, middle and interior seal claimed by the '138 and '404 patents cannot be formed by the mating of a base and lid portion if no lid portion exists.

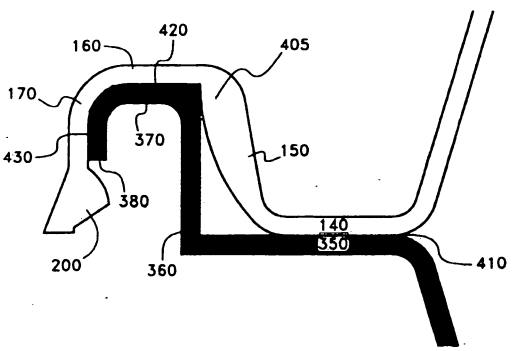
Previous findings from **HQ H106415 (July 15, 2010), HQ H118860 (October 25, 2010), HQ H126815 (October 25, 2010), HQ H126816 (October 25, 2010), and HQ 203055 (March 16, 2012)** have determined that plastic food containers where the base rim and the lid rim do not come into contact, and therefore cannot form the required interior sea, cannot be found to infringe claim 1 of the '138 or '404 patent either literally or under the doctrine of equivalents. Because the plastic food containers do not satisfy the claimed limitation of an "interior seal." Based on visual inspection of the

remaining container embodiments, it is apparent that none of the excluded plastic food containers exhibit the interior seal described by claim 1 of the '138 or '404 patent. Accordingly, this determination adopts the previous findings of **HQ H106415 (July 15, 2010), HQ H118860 (October 25, 2010), HQ H126815 (October 25, 2010), HQ H126816 (October 25, 2010), and HQ 203055 (March 16, 2012)** that plastic food containers which do not satisfy this claim limitation cannot be found to literally infringe claim 1 of the '138 or '404 patents. Furthermore, since the interior seal is entirely lacking, and there is no other portion of the container that performs this function, the excluded plastic food containers cannot infringe under the doctrine of equivalents.

We now turn to Protestants allegation that even if a lid portion were to be mated to the excluded base portion, no infringing seal would be formed. Protestant alleges certain aspects of the claim language related to the form of the base rim are not applicable to their product and could not infringe the requisite exterior, middle and interior seals. Below are side-by-side images of the base/lid "seal" area described by the patents and the rim area of the excluded plastic containers. The relevant area of each base portion is marked in red.

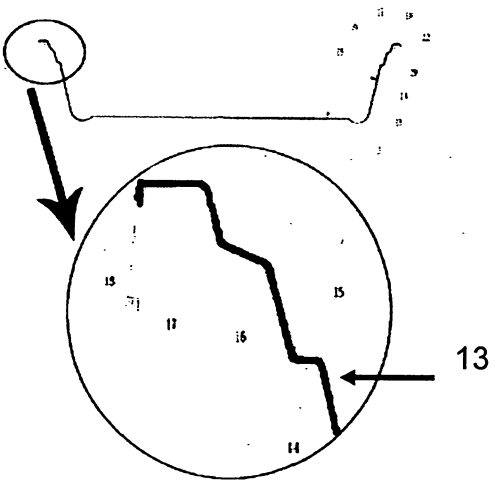


'138 Patent



'404 Patent

AEP Figure

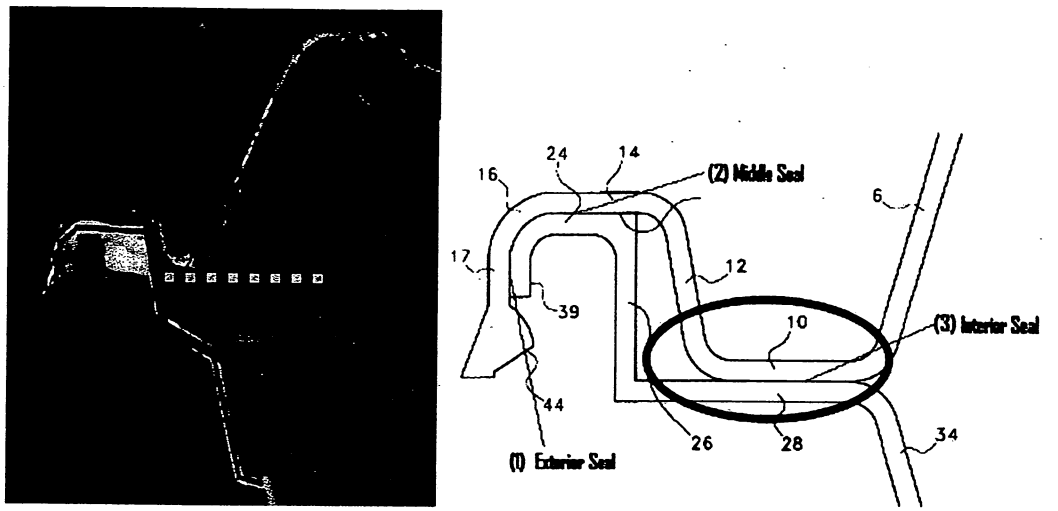


Claimed Feature	'138 and '404	(AEP) article equivalent
Base perimeter wall	34	13
Base rim	28 or 350	16
Extending base sealing edge	26 (within 24)	17
Base sealing edge	24	15 & 17
Base sealing rim	39 or 430	26
Inner base edge (extending vertically upward from)	360 (within 24)	edge between 16 & 17, extending through 17

Referencing the claim charts for claim 1 of the '138 and '404 above, part D of both claims require a "base rim" extending substantially horizontally outward from said "base perimeter wall". Parts E, define a "base sealing edge" attached to said "base rim," and Part P of the '404 further defines a "base sealing edge further comprising an "inner base edge" extending generally vertically upward from said "base rim". These claim limitations infer that the angle between the "Extending base sealing edge" and the "Base rim" approaches a 90 degree angle[1]. It is evident from the ('198 and '404 Patent) images above depicting the "seal" area that the corresponding base rim portion of Protestant's product is not substantially horizontal and that a corresponding lid portion would not be able to form the requisite interior seal. This analysis is further buttressed by the similarities between the rim shape of the subject plastic container and the subject plastic container of **HQ 203055**.

[1] "substantially horizontal" X axis and "generally vertically upward" Y axis.

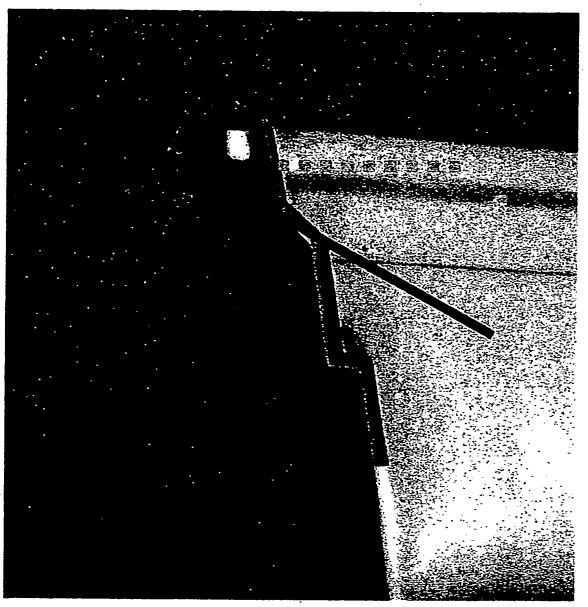
In **HQ 203055**, the product contained a base rim and a lid rim but an interior seal could not be formed due to the depth at which the base rim is positioned in relation to the inner base edge, and the lack of a substantially horizontal base rim. See image below from page 11 of **HQ 203055**.

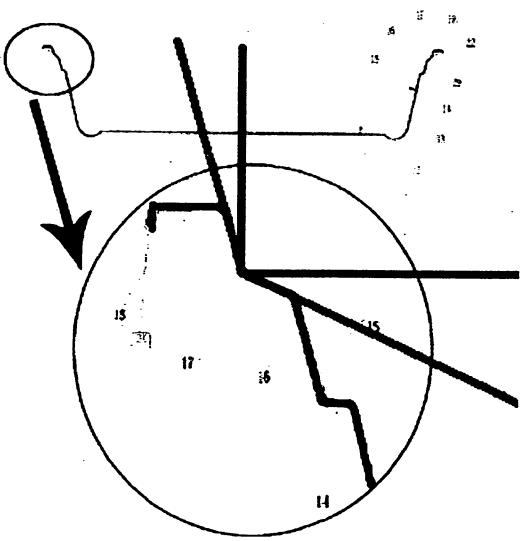


HQ 203055

In the images below, the area of the base rim that would come into contact under claim's 1 of the '138 and '404 with the lid rim are identified by overlaid lines. From the images it is evident that the mating of the base rim and a lid rim would form an exterior seal and a middle seal, just as in the plastic container of **HQ 203055**. However, just as in **HQ 203055**, an interior seal would likely not be formed because of the depth at which the base rim is positioned in relation to the inner base edge, and the angle between an equivalent "Extending base sealing edge" and "Base rim" In the plastic container. Through visual measurement and comparison of the products it has been determined that the supplementary angle to Protestant's "Extending base sealing edge" and "Base rim" is even smaller than that found in the subject of **HQ 203055**, increasing the likelihood that a corresponding lid rim would be in incapable of forming the require interior seal.

AEP Figure





Lastly, since claim 1 is the only claim of the '138 or '404 patents at issue in the 514 GEO, We find that the subject plastic food containers are not covered by the claims of those patents.

DESIGN PATENT INFRINGEMENT

The starting point for any proper examination of design patent law, as made clear by the CAFC, is the Supreme Court's decision in Gorham Co. v. White, 81 U.S. 511 (1871); see also Egyptian Goddess, Inc. v. Swisa, 543 F.3d 665, 670 (Fed. Cir. 2008) (en banc). The Gorham Court, in reviewing the infringement allegation before it, stated that the test of identity of design "must be sameness of appearance, and mere difference of lines in the drawing or sketch...or slight variances in configuration...will not destroy the substantial identity." Gorham, 81 U.S. at 526-27. In this case, the Supreme Court established the test for infringement that would be used in future design patent cases: "[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 patented is infringed by the other." Id. at 528.

Since that time, the test provided by the Supreme Court has generally been referred to as the "ordinary observer" test and has been recognized by

lower courts, including the CAFC, as the proper standard for making determinations as to design patent infringement. See Egyptian Goddess, 543 F.3d at 670. Significantly, the CAFC has stated that "[i]n some instances, the claimed design and the accused design will be sufficiently distinct that it will be clear without more that the patentee has not met its burden of proving the two designs would appear 'substantially the same' to the ordinary observer, as required by Gorham. In other instances, when the claimed and accused designs are not plainly dissimilar, resolution of the question whether the ordinary observer would consider the two designs to be substantially the same will benefit from a comparison of the claimed and accused designs with the prior art....Where there are many examples of similar prior art designs,...differences between the claimed and accused designs that might not be noticeable in the abstract can become significant to the hypothetical ordinary observer who is conversant with the prior art." Id.

U.S. PATENT NO. D 415,420

The '420 design patent is entitled "Double Sealed Rim Stackable Container" and includes six drawings of a round, two-piece food container from various angles. See ALJ ID at 8. The '420 patent further indicates that what is claimed here consists of "[t]he ornamental design for a double sealed rim stackable container, as shown and described." The six drawings from the '420 patent are included below, with their corresponding figure designations.

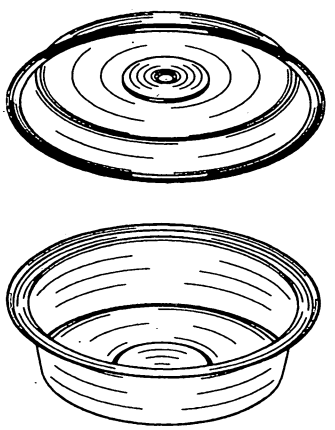


Fig. 1

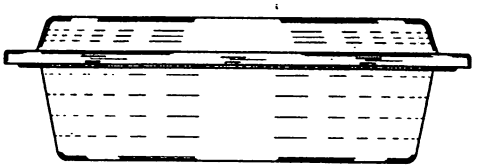


Fig. 2

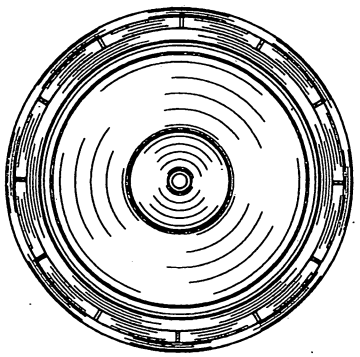


Fig. 3

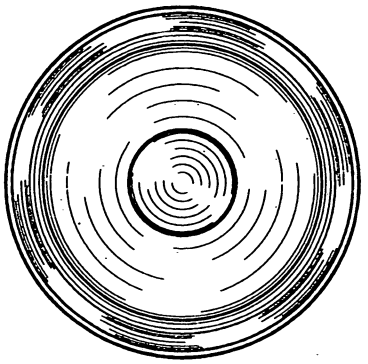


Fig. 4

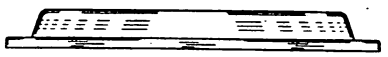


Fig. 5

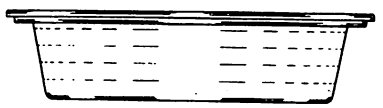


Fig. 6

The first step is to consider the claim construction for the '420 patent. The ITC did not provide a claim construction in words for the design of the '420 patent. However, as the CAFC has noted, there is no prescribed form that a design patent claim construction must take. See Egyptian Goddess, 543 F.3d at 679. In fact, the CAFC has recently re-emphasized, while reviewing a case in the exclusion order context, that "[d]epictions of the claimed design in words can easily distract from the proper infringement analysis of the ornamental patterns and drawings" and further admonished the "misplaced reliance on a detailed verbal description of the claimed design [which] risks undue emphasis on particular features of the design rather than examination of the design as a whole." Crocs Inc. v. Int'l Trade Comm'n, 598 F.3d 1294, 1302 (Fed. Cir. 2010) (emphasis added).

As indicated by the CAFC, design patents are claimed as shown in their drawings and therefore a court or administrative body tasked with making an infringement determination is not required to provide a detailed verbal

description of the claimed design. See Egyptian Goddess, 543 F.3d at 679 (citing Contessa Food Products v. Conagra, Inc., 282 F.3d 1370, 1377 (Fed. Cir. 2002) for the proposition that the trial court did not err in construing the asserted design claim as "a tray of a certain design as shown in Figures 1-3"); see also Crocs Inc. v. Int'l Trade Comm'n, 598 F.3d at 1302-03. In fact, the Supreme Court has recognized that a design is better represented by an illustration "than it could be by any description and a description would probably not be intelligible without the illustration." Dobson v. Dornan, 118 U.S. 10, 14 (1886). Taking the above into consideration, as well as the construction provided in **HQ H004452 (September 25, 2009)**, the design claim is construed as a two-piece, round container of a certain design as shown in Figures 1-6. Accordingly, the analysis below will examine the Protestants containers to determine whether the product infringes upon the design of the '420 patent under this claim construction.

As an initial matter, upon visual inspection it is the determination here that the round patented '420 design is plainly dissimilar to the rectangular excluded plastic food containers and that the latter has not appropriated the claimed design as a whole, such that no ordinary observer would find the excluded containers to be substantially the same as the patented design. Accordingly, no reference to prior art containers is necessary here since this is a case, as discussed in Egyptian Goddess, where the claimed design and the accused design are sufficiently distinct making it clear, without more, that the two designs would not appear substantially the same to the ordinary observer, as required by Gorham. For these reasons, we find the rectangular containers imported by Protestant do not infringe the '420 patent.

Turning now to Protestant's excluded round plastic containers, upon visual inspection and as shown in the comparative images below, it is the determination here that the patented design and Protestant's round excluded plastic food containers are not plainly dissimilar, particularly when taking into consideration the CAFC's repeated pronouncement that the proper inquiry for design patent determinations is "whether the accused design has appropriated the claimed design as a whole." Egyptian Goddess, 543 F.3d at 677; see also Crocs Inc. v. Int'l Trade Comm'n, 598 F.3d at 1303 ("[T]he deception that arises is a result of the similarities in the overall design, not of similarities in ornamental features in isolation.") (citing Amini Innovation Corp. v. Anthony California, Inc., 439 F.3d 1365 (Fed. Cir. 2006)) (emphasis added).

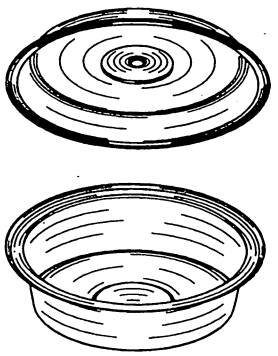
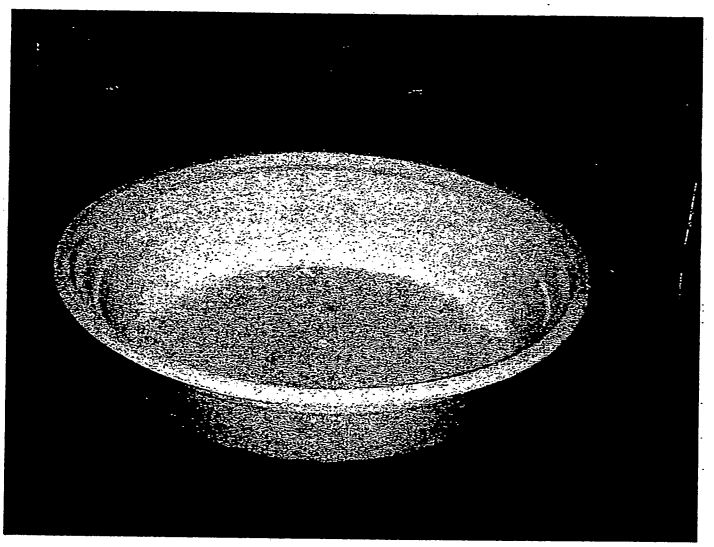


Fig. 1



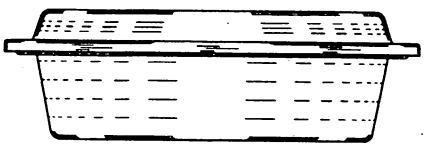


Fig. 2

N/A

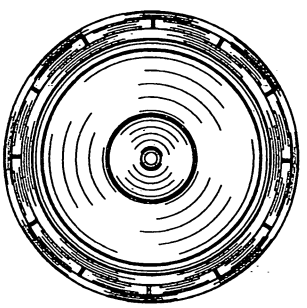


Fig. 3

N/A

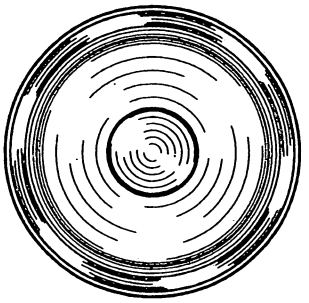


Fig. 4

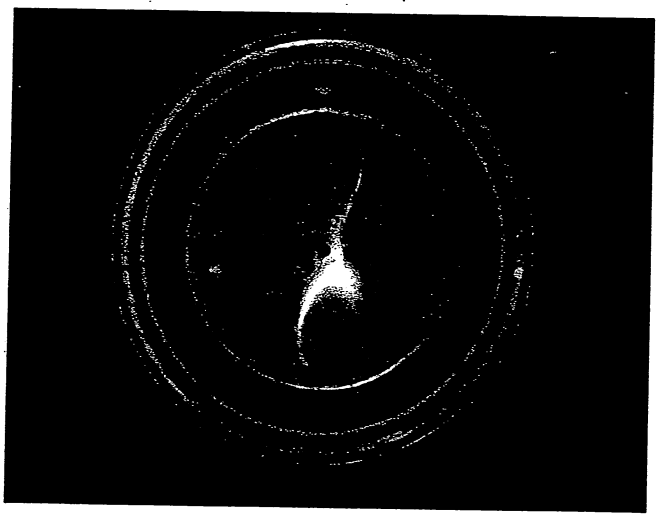
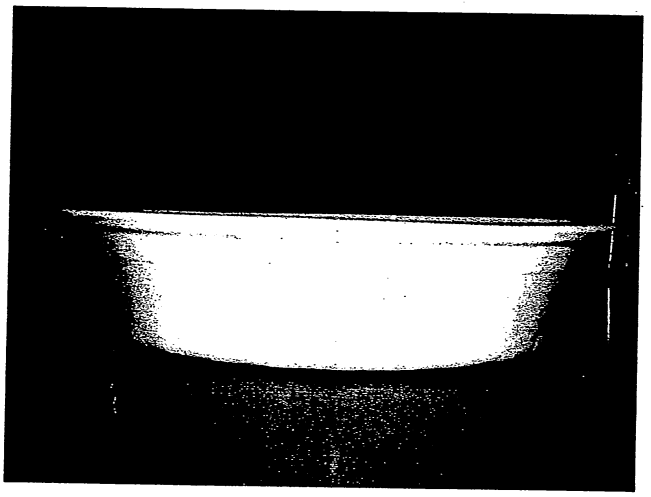


Fig. 5



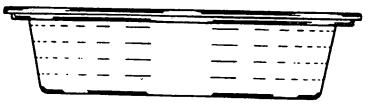


Fig. 6

As shown above, the patented design consist of a two-piece round container with a separable base portion and lid portion. Protestant's container consist of a base portion, which is analogous to the base portion of the container design depicted in Figures 1, 2, 4 and 6 of the '420 patent. Although, the patented design and accused article do not need to be identical for the accused to be infringing. See OddzOn Prods. v. Just Toys, 122 F.3d 1396, 1405 (Fed. Cir. 1997). Instead, the accused article need only appropriate the claimed design as a whole such that an ordinary observer, with knowledge of the prior art, would consider the patented and accused designs to be substantially the same and thereby be deceived into purchasing the one while thinking it is the other. See Egyptian Goddess, 543 F.3d at 678. The determination here is that this test cannot be met, Protestant cannot be found to have appropriated the claimed design as a whole, such that no ordinary observer would find the excluded containers to be substantially the same as the patented design thereby establishing infringement. The absence

of a covering, lid or upper portion to Protestant's plastic container is fatal to the determination that the excluded plastic container is infringing of the design claimed by the '420 design patent "as a whole" Id. at 677.

HOLDING:

The plastic food containers at issue in this protest do not infringe either of the utility patents or the design patent referred to above. Therefore, none of Protestant's plastic food containers fall within the scope of the 514 GEO. Accordingly, you are instructed to grant the protest in full.

In accordance with the Protest/Petition Processing Handbook (CIS HB, December 2007), you are to mail this decision, together with the Customs Form 19, to the Protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of the decision. Sixty days from the date of the decision, Regulations and Rulings of the Office of International Trade will make the decision available to CBP personnel and to the public on the CBP Home Page on the World Wide Web at www.cbp.gov, by means of the Freedom of Information Act, and other methods of public distribution.

Sincerely,

Charles R. Steuart
Chief, Intellectual Property Rights Branch