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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

H.I.S.C., INC. and DEPALMA  
ENTERPRISES, INC.,  
  
Plaintiff,  
  
v.  
  
FRANMAR INTERNATIONAL  
IMPORTERS, LTD. et al.,  
  
Defendants.

Case No.: 3:16-cv-00480-BEN-WVG

**ORDER ON MOTIONS IN LIMINE  
AND MOTIONS TO SEAL**  
**[Doc. Nos. 140, 141, 142, 143, 144, 145,  
146, 147, 148, 149, 150, 151, 152, 153,  
154, 155, 156, 157, 171]**

FRANMAR INTERNATIONAL  
IMPORTERS, LTD.,  
  
Counterclaimant,  
  
v.  
  
H.I.S.C., INC. and DEPALMA  
ENTERPRISES, INC.,  
  
Counterclaim Defendants.

Plaintiffs H.I.S.C., Inc. and DePalma Enterprises, Inc. sell a range of home and garden supplies, including a broom called “The Ultimate Garden Broom.” Defendant Franmar International Importers, Ltd. is an importer and distributor of a different but

1 similar broom called “The Original Garden Broom.” Defendant Maria Rajanayagam is  
2 President of Franmar.

3 Plaintiffs allege that, after they began selling the Ultimate Garden Broom,  
4 Defendants contacted Plaintiffs’ customers and accused the Ultimate Garden Broom of  
5 infringing certain intellectual property rights associated with Defendants’ Original Garden  
6 Broom. Plaintiffs allege that Defendants’ communications with its customers damaged  
7 their business and seek, among other things, a judgment that the trade dress asserted by  
8 Defendants is unenforceable and not infringed. Plaintiffs also assert claims for unfair  
9 business practices and tortious interference with prospective economic advantage.  
10 Defendants seek damages and assert trade dress and unfair competition counterclaims,  
11 alleging that Plaintiffs’ Ultimate Garden Broom infringes the trade dress of their Original  
12 Garden Broom. On Plaintiffs’ motion for partial summary judgment, the Court granted  
13 summary judgment in favor of Plaintiffs on Counts I, II, III, and IV of their Complaint and  
14 denied summary judgment as to Plaintiff’s Count V and Defendant-Counterclaimant  
15 Franmar International Importers, Ltd.’s Counterclaims I, II, III, and IV. [See Doc. 133.]

16 In preparation for trial on February 5, 2019, the parties filed 17 motions in limine.  
17 [Docs. 140-156.] The parties also filed motions to seal in conjunction with their motions  
18 in limine. [Docs. 157, 171.] The Court considers each motion in turn.

### 19 **I. LEGAL STANDARD**

20 Rulings on motions in limine fall entirely within this Court’s discretion. *United*  
21 *States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999) (citing *Luce v. United States*, 469  
22 U.S. 38, 41-42 (1984)). Evidence is excluded on a motion in limine only if the evidence is  
23 clearly inadmissible for any purpose. *Fresenius Med. Care Holdings, Inc., v. Baxter Int’l,*  
24 *Inc.*, No. C 03-1431 SBA (EDL), 2006 WL 1646113, at \*3 (N.D. Cal. June 12, 2006). If  
25 evidence is not clearly inadmissible, evidentiary rulings should be deferred until trial to  
26 allow questions of foundation, relevancy, and prejudice to be resolved in context. *See*  
27 *Bensimon*, 172 F.3d at 1127 (when ruling on a motion in limine, a trial court lacks access  
28 to all the facts from trial testimony). Denial of a motion in limine does not mean that the

1 evidence contemplated by the motion will be admitted at trial. *Id.* Instead, denial means  
2 that the court cannot, or should not, determine whether the evidence in question should be  
3 excluded before trial. *Id.*; *see also McSherry v. City of Long Beach*, 423 F.3d 1015, 1022  
4 (9th Cir. 2005) (rulings on motions in limine are subject to change when trial unfolds).

## 5 **II. PLAINTIFFS' MOTIONS IN LIMINE NOS. 1-10 [Docs. 140-149]**

### 6 **A. Motion No. 1 – Non-Expert Evidence and Witnesses Disclosed after the Close** 7 **of Fact Discovery [Doc. 140]**

8 On August 2, 2018, two months after the close of fact discovery, Plaintiffs took  
9 Maria Rajanayagam's expert witness deposition. At the deposition's conclusion,  
10 Defendants produced 20 pages of documents as being related to secondary meaning, an  
11 issue on which Ms. Rajanayagam was designated to provide expert testimony. Plaintiffs  
12 seek to exclude each of those documents as disclosed after the close of fact discovery.  
13 However, of those documents, Defendants seek to offer only the testimony of Customer  
14 Jennifer Grist and her late-disclosed 6/4/2018 email chain [F003673-F003678] with Ms.  
15 Rajanayagam in which Ms. Grist professes to be confused about who sold the broom she  
16 purchased at the Philadelphia Flower Show.

17 In the email, Ms. Rajanayagam responds that it was a copy of her broom sold by  
18 Plaintiffs because Ms. Rajanayagam's brooms were not sold at that particular flower show.  
19 Plaintiffs, however, suspect that Ms. Grist purchased the broom at a different flower show  
20 occurring close in time to the Philadelphia Flower Show and at which one of *Defendants'*  
21 retailers was present. Plaintiffs contend they never had a fair opportunity to test their  
22 suspicion through a third party subpoena to Ms. Grist, which might have revealed  
23 exculpatory sales receipts and/or deposition testimony. Plaintiffs seek to exclude both the  
24 emails and Ms. Grist's testimony. Defendants oppose, contending they could not have  
25 produced the documents prior to the close of fact discovery because the documents did not  
26 exist at the time. Plaintiffs do not appear to have filed any formal discovery motions to  
27 address the late-disclosed evidence, e.g. a motion to compel Ms. Grist's deposition or to  
28 reopen discovery.

1 Under Rule 37(c)(1), the party whose evidence may be excluded has the burden of  
2 proving its failure to disclose was substantially justified or is harmless. *R & R Sails, Inc.*  
3 *v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012). Nondisclosure is  
4 harmless if it does not prejudice the other party. *Id.* In assessing harmlessness, the Court  
5 may consider a number of factors, including “(1) the surprise to the party against whom  
6 the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the  
7 extent to which allowing the evidence would disrupt the trial; (4) the importance of the  
8 evidence; and (5) the nondisclosing party’s explanation for its failure to disclose the  
9 evidence.” *Unionamerica Ins. Co., Ltd. v. Fort Miller Grp., Inc.*, 2009 WL 275104, at \*1  
10 (N.D. Cal. Feb. 4, 2009).

11 Here, the failure to disclose is harmless. First, Defendants offered justification for  
12 not disclosing the discovery prior to the cut-off. Second, Plaintiffs will not be surprised by  
13 the evidence because they have had time to develop a defense and can cross-examine Ms.  
14 Grist about her attendance at the flower show. Further, Plaintiffs do not appear to have  
15 taken any steps in discovery to attempt to address the alleged prejudice of the evidence.  
16 Moreover, because the emails evince a customer’s confusion about the seller of the broom,  
17 the evidence is important to the actual confusion element of secondary meaning. Finally,  
18 the evidence is unlikely to disrupt trial because, as provided by Defendants, the testimony  
19 will take approximately five minutes.

20 Accordingly, the motion is **DENIED**. The evidence is relevant because it tends to  
21 show customer Jennifer Grist was confused about the broom. Further, it appears  
22 Defendants did nothing to depose Ms. Grist. For example, Defendants did not move to  
23 compel or move for sanctions, and only now do Defendants ask to preclude the Ms. Grist  
24 evidence.

25 **B. Motion No. 2 – Any Evidence or Testimony that the Asserted Trade Dress**  
26 **Constitutes Packaging and/or is Inherently Distinctive [Doc. 141]**

27 Plaintiffs seek to exclude this evidence because the Court ruled on summary  
28 judgment that the trade dress is product design, not packaging. Defendants do not oppose.

1 The motion is **GRANTED**. Because the Court ruled on summary judgment that the trade  
2 dress is product design, evidence that the trade dress is packaging or is inherently  
3 distinctive is not relevant.

4 **C. Motion No. 3 – Evidence and Testimony Related to the Traditional Kade Broom**  
5 **[Doc. 142]**

6 Plaintiffs contend the Kade Broom evidence cannot be introduced to show inherent  
7 distinctiveness because the Court ruled on summary judgment that the alleged trade dress  
8 constitutes product design and thus, cannot be inherently distinctive. The parties agree on  
9 this point (*see supra* Motion No. 2). Plaintiffs further argue the evidence should be  
10 excluded for any other purpose as irrelevant. Defendants respond that showing the  
11 traditional Kade Broom to the jury will highlight its functional and non-functional  
12 elements, and a visual comparison of the two brooms will go to two factors relevant to the  
13 secondary meaning inquiry: (6) copying and (7) confusion. The evidence is also relevant  
14 in explaining how Ms. Rajanayagam developed the distinguishing features of her broom.  
15 The evidence is relevant, and its probative value likely outweighs any risk of confusion of  
16 the issues, unfair prejudice, or misleading the jury. The motion is **DENIED**.

17 **D. Motion No. 4 – Expert Witness Testimony from Maria Rajanayagam Not**  
18 **Disclosed in Defendants’ Expert Witness Disclosures (The QVC Evidence)**  
19 **[Doc. 143]**

20 Plaintiffs seek to exclude Ms. Rajanayagam’s expert testimony regarding customer  
21 confusion caused by Defendants’ alleged exclusion from QVC and certain trade shows,  
22 much of which will likely involve customers’ out-of-court statements. Plaintiffs argue the  
23 evidence should be excluded because Defendants failed to disclose these topics in their  
24 expert witness disclosures and instead, disclosed them for the first time in Defendants’  
25 pretrial disclosures. Plaintiffs argue they did not have the opportunity to depose Ms.  
26 Rajanayagam regarding the alleged bases for those opinions.

1           Because Plaintiffs had the opportunity to depose Ms. Rajanayagam multiple times,  
2 and she testified regarding customer confusion supporting secondary meaning during her  
3 deposition, Plaintiffs had an opportunity to address these alleged issues, and the evidence  
4 need not be excluded on that ground. The motion is **DENIED**.

5           **E. Motion No. 5 –Evidence re: Copying in Support of Secondary Meaning [Doc.**  
6           **144]**

7           Plaintiffs argue that evidence of their intentional copying of Defendants’ product is  
8 not relevant to secondary meaning in a product design case, relying almost exclusively on  
9 *Continental Laboratory Products, Inc. v. Medax Intern. Inc.*, 114 F. Supp. 2d 992 (S.D.  
10 Cal. 2000). There, Judge Whelan extensively analyzed the evidentiary relationship  
11 between intentional copying and secondary meaning in a trade dress case based entirely on  
12 product design and concluded that, in a case where the plaintiff offers *only* evidence of  
13 actual copying without any other evidence showing secondary meaning, secondary  
14 meaning cannot be inferred.

15           In other words, Judge Whelan’s holding appears limited to cases where the only  
16 secondary meaning evidence offered is that of actual copying. In contrast, the Ninth Circuit  
17 jury instructions identify eight total factors, including actual copying, that the jury should  
18 consider to determine whether a product has acquired secondary meaning. Unlike in  
19 *Continental Laboratory*, Defendants here appear likely to proffer secondary meaning  
20 evidence based on *additional* factors over and above actual copying, and thus, *Continental*  
21 *Laboratory* does not apply. Because evidence of actual copying accompanied by other  
22 secondary meaning evidence is relevant, the motion is **DENIED**.

23           **F. Motion No. 6 – Evidence re: Extraterritorial Sales, Advertising, and Marketing**  
24           **[Doc. 145]**

25           Plaintiffs argue all evidence of sales, advertising, and marketing activities occurring  
26 outside of the U.S. is not relevant because the U.S. is the relevant market. However, the  
27 evidence appears relevant to Defendants’ counterclaims and the parties’ business  
28 relationship, leading to the alleged infringement. Specifically, Plaintiffs entered a three

1 year working relationship with Defendants where their agreement was performed partially  
2 in Sri Lanka (source of manufacturing), partially in Canada (Defendants held an exclusive  
3 distributorship agreement with Ravi Industries, Ltd., to sell the broom in North America),  
4 and partially in the U.S. (through sales at QVC, USA, and domestic trade shows). Further,  
5 because the motion seeks to exclude *all* such evidence, it is also overbroad and vague.  
6 Because the motion is overbroad and vague, and this evidence appears relevant, the motion  
7 is **DENIED**.

8 **G. Motion No. 7 – Evidence on Whisks and Colorized Brooms [Doc. 146]**

9 Plaintiffs move to exclude evidence of whisk and colorized brooms as not relevant.  
10 Defendants respond the marketing and sales of whisk and colorized brooms form a small  
11 part of this trade dress and unfair competition case because the brooms are a smaller size  
12 of the original broom, and this evidence is part of the “development story” of the broom.  
13 Defendants concede, however, that they have not located any cases holding that trade dress  
14 can be expanded to include derivative or spin-off products. The whisks and colorized  
15 brooms are not part of Defendants’ alleged trade dress, and thus, this evidence does not  
16 appear relevant and would likely confuse the jury. Because this evidence’s minimal  
17 probative value is outweighed by risk of jury confusion, the motion is **GRANTED**.

18 **H. Motion No. 8 – Testimony re: Similar Product Names or Packaging Labels**  
19 **[Doc. 147]**

20 Plaintiffs limit their motion to argument or testimony that alleges the parties’ product  
21 names (“Ultimate Garden Broom” versus “Original Garden Broom”) and/or virtually  
22 identical wrap-around packaging labels are similar because Defendants have not asserted  
23 trade dress infringement related to Plaintiffs’ product name and/or the wrap-around label.  
24 Defendants respond that the labels are relevant to show their broom acquired secondary  
25 meaning based on actual copying of the label. Defendants argue the similar names and  
26 labels are relevant to demonstrate their unfair competition claim – false designation for  
27 “passing off” where one’s own creation is sold under the name or mark of another. Thus,  
28 the evidence should be admitted for that purpose, only. Accordingly, because Defendants’

1 product name or wrap-around label are not relevant to their trade dress claim, the evidence  
2 is not admissible for the trade dress claim, and the motion is **GRANTED** as limited.

3 **I. Motion No. 9 – Evidence Not Disclosed in Pretrial Disclosures or the Pretrial**  
4 **Order [Doc. 148]**

5 Plaintiffs seek a blanket exclusion of all such evidence and testimony to avoid unfair  
6 surprise at trial, acknowledging that the evidence may come in for impeachment.  
7 Defendants correctly respond the motion is vague and overbroad. Thus, because the  
8 motion is overbroad and vague and requests a blanket exclusion, the motion is **DENIED**.

9 **J. Motion No. 10 – Hearsay Evidence or Reference to Potential Hearsay Evidence**  
10 **in Opening Statement [Doc. 149]**

11 Plaintiffs seek to exclude all hearsay at trial, citing to numerous exhibits identified  
12 by Defendants, which Plaintiffs contend will likely constitute inadmissible hearsay  
13 “depending on how Defendants use them at trial.” Because whether evidence is hearsay  
14 often depends on the context in which it is offered, the Court will delay ruling on such  
15 hearsay objections until trial, and the motion is **DENIED**.

16 **III. DEFENDANTS’ MOTIONS IN LIMINE NOS. 1-7 [Docs. 150-156]**

17 **A. Motion No. 1 – Plaintiffs’ Exhibit Nos. 4-12, 24, and 28 [Doc. 150]**

18 Defendants move to exclude exhibits containing certain pleadings and letters from  
19 one public and several private attorneys as not authenticated, not relevant, comprising  
20 attorney argument, lack of foundation, and hearsay. Defendants also argue that the  
21 Complaint and Answer are not admissible because they are unsworn. Many of these  
22 determinations cannot be made until trial and will depend upon, among other  
23 considerations, the foundation laid for the exhibits and the purpose for which they are being  
24 offered. Because whether many of these exhibits are admissible cannot be determined until  
25 trial, the motion is **DENIED**.



1        **B. Motion No. 2 – Plaintiffs’ Exhibit Nos. 43 and 44 [Doc. 151]**

2            Defendants seek to exclude Dr. Chorn’s expert report and rebuttal expert report as  
3 inadmissible hearsay because they include approximately 400 respondents’ out-of-court  
4 statements going to secondary meaning. Plaintiffs respond that they do not intend to  
5 introduce the reports for the truth of the matters asserted, except for purposes of refreshing  
6 Dr. Chorn’s recollection. However, Plaintiffs do intend to introduce the appendices to Dr.  
7 Chorn’s report, which include a list of documents she reviewed in preparing her report,  
8 screenshots of her survey questionnaire, statistics related to participants’ responses to the  
9 subject survey, the raw data obtained, and a data glossary. Because an expert witness can  
10 testify as to the contents of her report to the extent she relies on it in forming her ultimate  
11 opinion, portions of the report are admissible. *See, e.g., Paddack v. Dave Christensen,*  
12 *Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) (“Rule 703 . . . permits . . . hearsay, or other  
13 inadmissible evidence, upon which an expert properly relies, to be admitted to explain the  
14 basis of the expert’s opinion.”). Thus, because portions of Dr. Chorn’s reports may be  
15 admissible under Fed. R. Evid. 703, the motion is **DENIED**.

16        **C. Motion No. 3 – Plaintiffs’ Exhibit No. 14 [Doc. 152]**

17            Defendants move to exclude Exhibit 14, which is a January 13, 2015 letter in which  
18 a non-party (Home Hardware Stores Limited) requests Defendant Ms. Rajanayagam’s  
19 “written assurances that HHSL is cleared entirely from any allegations of wrong doing,  
20 that Franmar undertakes not to complain or initiate and that HHSL remains entirely free to  
21 source ekel brooms from any company it chooses.” Defendants contend the letter is  
22 inadmissible under FRE 408 as a “settlement agreement,” is not relevant, and is likely to  
23 confuse the jury. Plaintiffs respond that the letter is not a settlement agreement and is  
24 instead a business discussion with a non-party because it refers to an “assurance” required  
25 by Home Hardware as part of its “decision to begin purchasing ekel brooms again from  
26 Ravi through Franmar.” These business discussion communications are admissible  
27 because the discussions “had not crystallized to the point of threatened litigation, a clear  
28

1 cut-off point.” *Big O Tires Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365,  
2 1368 (10th Cir. 1977) (sustaining district court’s admission of evidence because  
3 communications were “simply business communications”).

4 The letter appears relevant to Plaintiffs’ state law claims to show “Defendants were  
5 and are engaged in a business practice of knowingly making false representations to  
6 Plaintiffs and Plaintiffs’ retailers, business partners, trade shows, customers and/or  
7 potential customers that Plaintiffs are selling ‘knock off’ brooms that infringe on  
8 Defendants’ alleged intellectual property rights.” Plaintiffs also allege “Defendants’  
9 falsely asserted [IP] rights that were invalid and unenforceable on their face and did so  
10 knowingly, recklessly, and/or negligently in order to usurp Plaintiffs’ business for itself.”  
11 Because the letter reflects business communications and is relevant to Plaintiffs’ state law  
12 claims, the motion is **DENIED**.

13 **D. Motion No. 4 – Reference to Granted Summary Judgment Issues of Patent,**  
14 **Copyright, and Trademark [Doc. 153]**

15 On summary judgment, Plaintiffs partially prevailed on four unopposed counts:  
16 “Defendants concede they do not assert rights to the ‘664 patent, any copyright, or  
17 trademark in the name the ‘Original Garden Broom’ and thus, do not oppose Plaintiffs’  
18 motion for summary judgment on Counts 1-4.” Defendants now move to exclude *all*  
19 references to patent, trademark, and copyright infringement as irrelevant because the  
20 lawsuit is proceeding only on the trade dress, unfair competition, and interference with  
21 prospective economic advantage claims. Plaintiffs respond that such evidence is relevant  
22 because Plaintiffs’ state law claims of unfair competition and interference rest on  
23 Defendants’ allegations of trade dress infringement, as well as patent, trademark, and  
24 copyright infringement. Because Plaintiffs’ patent, copyright, and trademark claims are  
25 relevant to the state law claims, the evidence is relevant, and the motion is **DENIED**.

1        **E. Motion No. 5 – Plaintiffs’ Reserve Exhibits Nos. 93-98, 158, 168, 172, 173 [Doc.**  
2        **154]**

3        Defendants contend the pleadings, emails from several private attorneys, and  
4        purported actions of the United States Patent Trademark Office on a registered trademark  
5        are not admissible as unauthenticated, not relevant, comprising attorney argument, lacking  
6        foundation, and hearsay. Again, these determinations cannot be made until trial and will  
7        depend upon, among other factors, the foundation laid for the exhibits and the purpose for  
8        which they are being offered. Because whether many of these exhibits are admissible  
9        cannot be determined until trial, the motion is **DENIED**.

10       **F. Motion No. 6 – Plaintiffs’ Certain Deposition Testimony of Unavailable**  
11       **Witnesses [Doc. 155]**

12       In essence, Defendants object to three categories of deposition designations. First,  
13       Defendants seek to exclude portions of Plaintiffs’ deposition testimony designations  
14       because they contain Plaintiffs’ counsel’s objections. However, these objections are not  
15       evidence; they are objections to Defendants’ proffered evidence, and thus, inclusion of the  
16       objections is necessary to preserve them for trial.

17       As to Sam Ahilan’s testimony, Defendants object certain designations are  
18       “incomplete.” As to several designations, Plaintiffs concede the designations are  
19       incomplete because they end with questions or mid-sentence, which Plaintiffs contend are  
20       “typos.” Thus, Plaintiffs request permission to amend these designations in the proposed  
21       pretrial order. Plaintiffs do not object to Defendants providing responsive designations as  
22       to the corrected designations.

23       Finally, Defendants also move to exclude the designation of third party QVC, Inc.’s  
24       employee Jenne Frackelton at 69:19-24, arguing it is speculation without foundation.  
25       However, Defendants posed the designated testimony question, and neither party objected.  
26       Thus, Defendants cannot now object to the answer to a question they, themselves, posed to  
27       the witness.  
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1 Because the objected to designations are appropriately designated and not  
2 inadmissible on a motion in limine, the motion is **DENIED**. Further, as to the specific Sam  
3 Ahilan designations, Plaintiffs may amend as specified in their brief with Defendants  
4 having an opportunity to counter-designate.

5 **G. Motion No. 7 – Evidence of Damages [Doc. 156]**

6 Defendants move to exclude Plaintiffs from presenting “new” evidence on damages  
7 at trial, based on their alleged failure to present meaningful testimony on damages at the  
8 Rule 30(b)(6) deposition and the parties’ stipulation that Plaintiffs “will not produce any  
9 fact evidence of its revenues and expenses that has not already been produced by any party  
10 in discovery.” Plaintiffs did not provide any documents showing loss of revenues under  
11 their state law claims, and they declined to designate any expert on damages. Plaintiffs  
12 should be bound by their stipulation. Because Plaintiffs specifically stipulated in discovery  
13 to not provide “any fact evidence of its revenues and expenses not already produced,” the  
14 motion is **GRANTED**.

15 **IV. MOTIONS TO SEAL [Docs. 157, 171]**

16 The parties filed separate motions to seal various documents related to their motions  
17 in limine. Defendants move to seal Exhibits 93-96 in support of their Motion in Limine  
18 No. 5. [Doc. 157.] As support, Defendants contend the exhibits were supplied by Plaintiffs  
19 and marked as “confidential.” The Court has inspected these exhibits, which contain  
20 business communications emails between various legal counsel and businesses, searches  
21 on the public Trademark Electronic Search System website, and a mockup of a broom.  
22 None of these exhibits appear to contain information requiring sealing.

23 Likewise, Plaintiffs move to seal their opposition to Defendants’ Motion in Limine  
24 No. 3 to exclude Exhibit 14, which contains the business communications alleged to be a  
25 settlement, as well as two accompanying exhibits. [Doc. 171.] As support, Plaintiffs  
26 contend the exhibits contain portions of Ms. Rajanayagam’s deposition and an exhibit  
27 referenced in that deposition, both of which Defendants asserted contain confidential  
28 business information and marked as “confidential.” Again, a party’s designation of records

1 as “confidential” and their inclusion of business communications do not justify precluding  
2 the public from viewing those documents.

3 Although the Court recognizes there are times when documents should be protected  
4 from public disclosure, the explanations provided are insufficient to justify filing each of  
5 these documents under seal. Accordingly, the parties’ motions to seal, Docs. 157 and 171,  
6 are **DENIED WITHOUT PREJUDICE**. However, the Court grants the parties leave to  
7 file renewed motions to file under seal, so long as those motions provide greater  
8 justification specific to *each* document for which sealing is sought. For any documents the  
9 parties seek to file under seal, they should either (1) file redacted versions with an  
10 explanation of why the redacted portions should be redacted from public view, or (2) they  
11 should provide a detailed explanation of why the entire document should be filed under  
12 seal. As to either option, the parties should offer authority in support.

### 13 **V. CONCLUSION**

14 In summary, the Court rules as follows:

- 15 1. The Court **DENIES** Plaintiffs’ Motion in Limine # 1 – Non-Expert Evidence and  
16 Witnesses Disclosed after the Close of Fact Discovery [Doc. 140].
- 17 2. The Court **GRANTS** Plaintiffs’ Motion in Limine #2 – Any Evidence or  
18 Testimony that the Asserted Trade Dress Constitutes Packaging and/or is  
19 Inherently Distinctive [Doc. 141].
- 20 3. The Court **DENIES** Plaintiffs’ Motion in Limine #3 – Evidence and Testimony  
21 Related to the Traditional Kade Broom [Doc. 142].
- 22 4. The Court **DENIES** Plaintiffs’ Motion in Limine #4 – Expert Witness Testimony  
23 from Maria Rajanayagam Not Disclosed in Defendants’ Expert Witness  
24 Disclosures (The QVC Evidence) [Doc. 143].
- 25 5. The Court **DENIES** Plaintiffs’ Motion in Limine #5 – Evidence re: Copying in  
26 Support of Secondary Meaning [Doc. 144].
- 27 6. The Court **DENIES** Plaintiffs’ Motion in Limine # 6 – Evidence re:  
28 Extraterritorial Sales, Advertising, and Marketing [Doc. 145].


- 1 7. The Court **GRANTS** Plaintiffs' Motion in Limine # 7 – Evidence on Whisks and  
2 Colorized Brooms [Doc. 146].
- 3 8. The Court **GRANTS** as limited Plaintiffs' Motion in Limine # 8 – Testimony re:  
4 Similar Product Names or Packaging Labels [Doc. 147].
- 5 9. The Court **DENIES** Plaintiffs' Motion in Limine #9 – Evidence Not Disclosed  
6 in Pretrial Disclosures or the Pretrial Order [Doc. 148].
- 7 10. The Court **DENIES** Plaintiffs' Motion in Limine #10 – Hearsay Evidence or  
8 Reference to Potential Hearsay Evidence in Opening Statement [Doc. 149].
- 9 11. The Court **DENIES** Defendants' Motion in Limine #1 – Plaintiffs' Exhibit Nos.  
10 4-12, 24, and 28 [Doc. 150].
- 11 12. The Court **DENIES** Defendants' Motion in Limine #2 – Plaintiffs' Exhibit Nos.  
12 43 and 44 [Doc. 151].
- 13 13. The Court **DENIES** Defendants' Motion in Limine #3 – Plaintiffs' Exhibit No.  
14 14 [Doc. 152].
- 15 14. The Court **DENIES** Defendants' Motion in Limine #4 – Reference to Granted  
16 Summary Judgment Issues of Patent, Copyright, and Trademark [Doc.153].
- 17 15. The Court **DENIES** Defendants' Motion in Limine #5 – Plaintiffs' Reserve  
18 Exhibits Nos. 93-98, 158, 168, 172, 173 [Doc. 154].
- 19 16. The Court **DENIES** Defendants' Motion in Limine #6 – Plaintiffs' Certain  
20 Deposition Testimony of Unavailable Witnesses [Doc. 155].
- 21 17. The Court **GRANTS** Defendants' Motion in Limine #7 – Evidence of Damages  
22 [Doc. 156].
- 23 18. The Court **DENIES** the parties' motions to seal [Docs. 157, 171.]

24 In addition, the parties are ordered to submit a joint set of proposed jury instructions  
25 to the Court on or before **January 15, 2019**. To the extent jury instructions are disputed,  
26 the parties may submit separate jury instructions only as to the disputed instructions. To  
27 aid the Court, the parties should also submit a joint index, which reflects the numbers and  
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1 titles of their proposed jury instructions and identifies the particular instructions with which  
2 they do not agree.

3 **IT IS SO ORDERED.**

4  
5 DATED: December 19, 2018

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8 Hon. Roger T. Benitez  
9 United States District Court  
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