

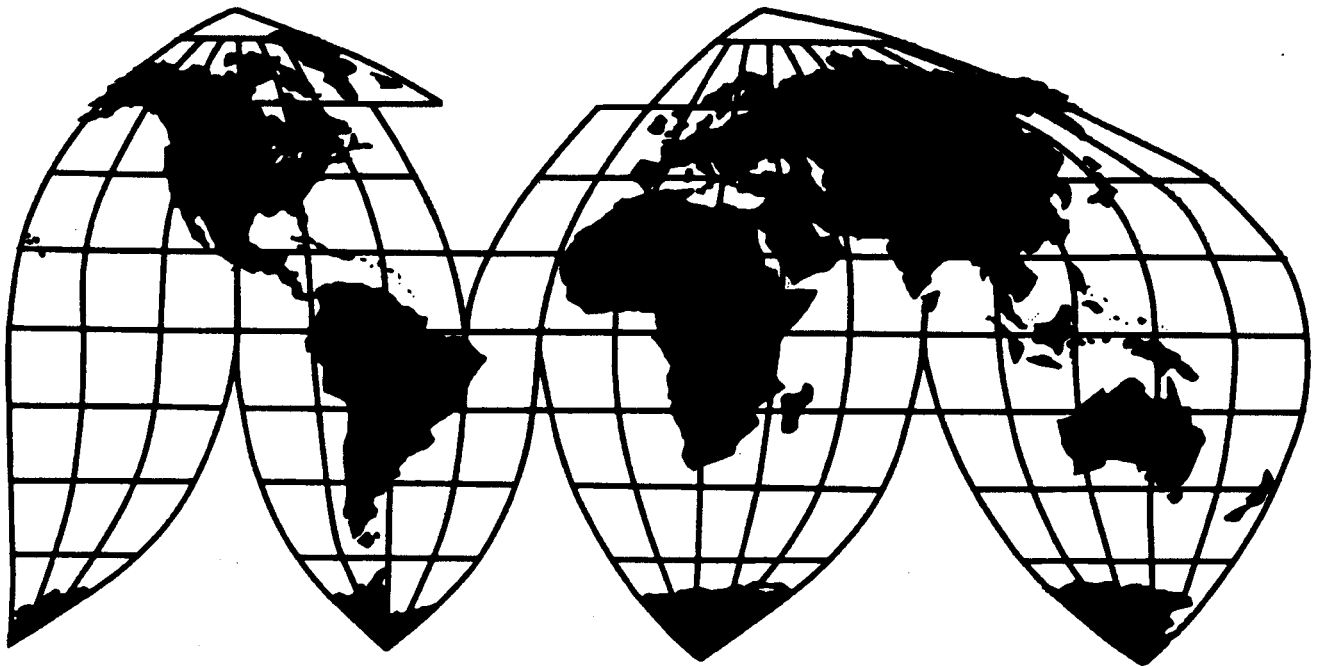
In the Matter of
Certain Compact Multipurpose Tools

Investigation No. 337-TA-416

Publication 3239

September 1999

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Secretary to the Commission
United States International Trade Commission
Washington, DC 20436**

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In the Matter of **Certain Compact Multipurpose Tools**



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Washington, D.C. 20436

In the Matter of:)

CERTAIN COMPACT)
MULTIPURPOSE TOOLS)
_____)

Investigation No. 337-TA-416

**NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER
AND TERMINATION OF INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that, having found violations of section 337 of the Tariff Act of 1930 as amended (19 U.S.C. § 1337), the U.S. International Trade Commission has issued a general exclusion order under section 337(d) (19 U.S.C. § 1337(d)) and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: P. N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3061. General information concerning the Commission also may be obtained by accessing its Internet server (<http://www.usitc.gov>). Hearing-impaired individuals can obtain information concerning this matter by contacting the Commission's TDD terminal at 202-205-1810.

SUPPLEMENTARY INFORMATION:

The Commission conducted the subject investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 as amended (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain compact multipurpose tools that allegedly infringe claims of four U.S. design patents. The complainant was the patent owner, Leatherman Tool Group, Inc. Six firms were named as respondents: Suncoast of America, Inc.; Quan Da Industries; Kumasama Products Co., Ltd.; Jiangsu Hongbao Group, Corp.; SCIKO Chinalight, Ltd.; and Charles Amash Imports, Inc., d/b/a Grip On Tools. Grip On and Suncoast were terminated from the investigation on the basis of consent orders. The Commission found Jiangsu, Kumasama, Quan Da, and SCIKO to be in default in light of their failure to answer the complaint and notice of investigation in the manner prescribed by the Commission's rules and their failure to respond to orders directing them to show cause why they should not be found in default. By granting the complainant's motions for

summary determination on various issues, the Commission determined that the latter four respondents violated section 337.¹

The remaining issues for the Commission to decide were (1) the appropriate remedy for the aforesaid violations, (2) whether the statutory public interest factors precluded such relief, and (3) the amount of the bond during the Presidential review period under section 337(j).² In making those determinations, the Commission was required to take into account the presiding administrative law judge's recommended determination (RD) on permanent relief and bonding under 19 C.F.R. § 210.42(a)(2), as well as any written submissions from parties, the public, or other Federal agencies.³ The Commission solicited but did not receive submissions from other agencies or members of the public.⁴ Complainant Leatherman and the Commission investigative attorney each filed a written submission on remedy, the public interest, bonding, and the RD.

After considering the RD and the parties' submissions, the Commission determined that a general exclusion order is the appropriate remedy for the violations found in the subject investigation, that the statutory public interest factors do not preclude such relief, and that the bond during the Presidential review period should be 100 percent of the imported articles' entered value.

The Commission accordingly has terminated the investigation and issued a general exclusion order prohibiting the entry of imported tools covered by one or more of the following design patents: U.S. Letters Patent Des. 385,168, entitled "Scissors," issued on October 21, 1997; U.S. Letters Patent Des. 385,169, entitled "Folding Scissors," issued on October 21, 1997; U.S. Letters Patent Des. 385,170, entitled "Folding Scissors," issued on October 21, 1997; and U.S. Letters Patent Des. 380,362, entitled "Scissors," issued on July 1, 1997.

Nonconfidential copies of the Commission's Order and its Opinion on Remedy, the Public Interest, and Bonding, all other documents cited in this notice, and all other nonconfidential documents filed in the investigation are or will be made available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Commission's Office of the Secretary,

¹ See 63 Fed. Reg. 52287 (Sept. 30, 1998); 63 Fed. Reg. 70215 (Dec. 18, 1998); and 64 Fed. Reg. 35679 (July 1, 1999).

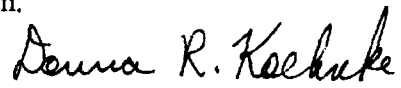
² See 19 C.F.R. § 210.50(a) and 19 U.S.C. § 1337(d), (f), (g), and (j)(3).

³ See 19 C.F.R. §§ 210.42(a)(2) and 210.50(a)(4). See also 19 U.S.C. § 1337(b)(2) and S. Rept. No. 1298, 93d Cong. 2d Sess. at 195 (1974).

⁴ *Id.* and 64 Fed. Reg. 35679 (July 1, 1999).

Dockets Branch, 500 E Street, SW., Room 112, Washington, D.C. 20436, telephone
202-205-1802.

By order of the Commission.

A handwritten signature in cursive script that reads "Donna R. Koehnke".

Donna R. Koehnke
Secretary

Issued: August 30, 1999

CERTIFICATE OF SERVICE

I, Donna R. Koehnke, hereby certify that the attached NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER AND TERMINATION OF INVESTIGATION, was served upon the following parties, via first class mail and air mail, where necessary on August 31, 1999.



Donna R. Koehnke, Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112
Washington, D.C. 20436

**ON BEHALF OF COMPLAINANT
LEATHERMAN TOOL GROUP, INC.:**

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**ON BEHALF OF SUNCOAST OF
AMERICA, INC.:**

Arthur W. Fisher, III, Esq.
Suite 316
5553 West Waters Avenue
Tampa, Florida 33634

PROPOSED RESPONDENTS:

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Grand Rapids, Michigan 49546-6909

SCIKO Chinalight
Room 03-04/14F, Changjiang Trade Bldg.
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Kumasama Products Company Ltd.
No. 260 Cheng Fu Road
Taiping City, Taichung Hsien
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Jiangsu Hongbao Group Corporation
Renmin Road
Daxin Town, Zhangjiagang City
Jiangsu, China 215636

CERTIFICATE OF SERVICE

Page Two

PROPOSED RESPONDENTS - CONT.

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ON BEHALF OF THE COMMISSION:

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**Ronnita Green
West Services, Inc.
901 Fifteenth Street, NW
Suite 1010
Washington, D.C. 20005**

Accordingly, the Commission hereby ORDERS that:

1. Compact multipurpose tools covered by the claims of U.S. Letters Patents Des. 385,168, Des. 385,169, Des. 385,170, or Des. 380,362 are excluded from entry for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption for the remaining terms of those patents, except under license of the patent owner as provided by law.

2. Notwithstanding paragraph 1 of this Order, the aforesaid compact multipurpose tools are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption, under bond in the amount of 100 percent of the entered value of such articles, from the day after this Order is received by the President, pursuant to section 337(j)(1) of the Tariff Act of 1930 as amended (19 U.S.C. § 1337(j)(1)), until such time as the President notifies the Commission that he approves or disapproves this action, but not later than 60 days after the President receives this Order.

3. In accordance with section 337(1) of the Tariff Act (19 U.S.C. § 1337(1)) the provisions of this Order shall not apply to compact multipurpose tools imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

4. The Commission may modify this Order in accordance with the procedure set forth in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

5. The Commission Secretary shall serve copies of this Order upon each party of record to this investigation, and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and

the U.S. Customs Service.

6. Notice of this Order shall be published in the *Federal Register* pursuant to section 337(j)(1)(A) of the Tariff Act (19 U.S.C. § 1337(j)(1)(A)) and section 210.49(b) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.49(b)).

By order of the Commission.

A handwritten signature in cursive script, reading "Donna R. Koehnke".

Donna R. Koehnke
Secretary

Issued: **August 30, 1999**

RECEIVED
OFFICE OF THE SECRETARY
US INTL TRADE COMM

99 SEP -7 PM 13

In the Matter of:
CERTAIN COMPACT
MULTIPURPOSE TOOLS

DOCKET

Investigation No. 337-PA-416

COMMISSION OPINION ON REMEDY, THE PUBLIC INTEREST, AND BONDING

PROCEDURAL HISTORY

This investigation was instituted to determine whether there is a violation of section 337 of the Tariff Act of 1930 as amended (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain compact multipurpose tools that allegedly infringe claims of four U.S. design patents. The complainant is the patent owner, Leatherman Tool Group, Inc. Six firms were named as respondents: Suncoast of America, Inc.; Quan Da Industries; Kumasama Products Co., Ltd.; Jiangsu Hongbao Group, Corp.; SCIKO Chinalight, Ltd.; and Charles Amash Imports, Inc., d/b/a Grip On Tools.¹

Grip On and Suncoast were terminated on the basis of consent orders.² The Commission found Jiangsu, Kumasama, Quan Da, and SCIKO to be in default owing to their failure to answer the complaint and notice of investigation in the manner prescribed by the Commission rules and their failure to respond to

¹ 63 Fed. Reg. 52287 (Sept. 30, 1998); and 63 Fed. Reg. 70157 (Dec. 18, 1998).

² See the Commission Notice issued on Apr. 21, 1999, and Order No. 13 (Mar. 25, 1999); the Commission Notice issued on Mar. 5, 1999, and Order No. 9 (Feb. 5, 1999).

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orders directing them to show cause why they should not be found in default.³

By granting the complainant's motions for summary determination on the domestic industry requirement, patent validity and infringement, and the defaulting respondents' importations and sales, the Commission has determined that the latter four respondents violated section 337 by importing into the United States, selling for importation, or selling within the United States after importation, tools that infringe claims of U.S. Letters Patents Des. 385,168, Des. 385,169, Des. 385,170, and Des. 380,362.⁴

The Commission must now decide (1) the appropriate remedy for the aforesaid violations, (2) whether the statutory public interest factors preclude such relief, and (3) the amount of the bond during the Presidential review period.⁵ In making those determinations, we are required to take into account the presiding administrative law judge's ("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.⁶

³ See 19 C.F.R. § 210.16(a)(1); the Commission Notice issued on May 11, 1999, and Order No. 14 (Apr. 8, 1999); the Commission Notice issued on Mar. 25, 1999, and Order No. 11 (Mar. 2, 1999).

⁴ See 64 Fed. Reg. 35679 (July 1, 1999); the Commission Notice issued on Mar. 5, 1999, and Order No. 7 (Feb. 2, 1999).

⁵ See 19 C.F.R. § 210.50(a) and 19 U.S.C. § 1337(d), (f), (g), and (j)(3).

⁶ See 19 C.F.R. §§ 210.42(a)(1)(ii) and 210.50(a)(4). During the course of each section 337 investigation, the Commission is required to consult with and to seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other agencies and departments as it considers appropriate. 19 U.S.C. § 1337(b)(2); and S. Rept. No. 1298, 93d Cong. 2d Sess. at 195 (1974).

The Commission solicited but did not receive submissions from other agencies or members of the public.⁷ Complainant Leatherman and the Commission investigative attorney ("the IA") each filed a written submission on remedy, the public interest, bonding, and the RD. Though given the opportunity,⁸ Leatherman and the IA chose not to respond to each other's submissions.

REMEDY

Section 337(d) of the Act 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.⁹

The ALJ recommended that we issue a general exclusion order in this investigation. Citing precedent beginning with Inv. No. 337-TA-90, *Certain Airless Paint Spray Pumps and Components Thereof*,¹⁰ the ALJ noted that the Commission has found a general exclusion order to be 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 the respondents might attempt to enter the U.S. market with infringing products.¹¹

In 1994, Congress amended section 337(d) of the Tariff Act of 1930

⁷ 64 Fed. Reg. at 35679 and 35680.

⁸ 64 Fed. Reg. at 35680.

⁹ See generally 19 U.S.C. § 1337(d).

¹⁰ USITC Pub. 1199 (1981)--Commission Opinion at 17-20.

¹¹ See generally Final Initial and Recommended Determinations (May 27, 1999) ("RD") at 25-27.

respondents to the investigation might attempt to enter the U.S. market with infringing articles.¹⁶

The ALJ went on to list the following factors, cited in *Paint 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.¹⁷

The ALJ went on to list the following factors, cited in *Paint Spray Pumps*, as relevant in demonstrating whether "certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation might attempt to enter the U.S. market with infringing articles":

- (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 facilities to produce the patented article.¹⁸

¹⁶ USITC Pub. 1199--Commission Opinion at [18].

¹⁷ RD at 26 at citing USITC Pub. 1199--Commission Opinion at [18-19].

¹⁸ RD at 26-27 at citing USITC Pub. 1199--Commission Opinion at [19].

respondents to the investigation might attempt to enter the U.S. market with infringing articles.¹⁶

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- (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.¹⁷

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- (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 facilities to produce the patented article.¹⁸

¹⁶ USITC Pub. 1199--Commission Opinion at [18].

¹⁷ RD at 26 at citing USITC Pub. 1199--Commission Opinion at [18-19].

¹⁸ RD at 26-27 at citing USITC Pub. 1199--Commission Opinion at [19].

Applying the *Paint Spray Pumps* criteria, the ALJ found that there is a widespread pattern of unauthorized use of the patented inventions, as established by evidence of the following:

- (1) respondents Jiangsu, Kumasama, Quan Da, and SCIKO have imported infringing tools, sold them for importation, or sold them in the United States after importation;
- (2) several non-respondent firms are also selling infringing tools for importation into the United States--or have the capability to do so;
- (3) complainant Leatherman has pursued retailers in Germany, Switzerland, and Canada that have been selling imitations of Leatherman's patented *micra* tool; and
- (4) products imitating the patented *micra* tool are being sold in several foreign countries.¹⁹

The ALJ also found that business conditions support the inference that foreign manufacturers other than the respondents might attempt to enter the U.S. market for compact multipurpose tools. In reaching that conclusion, the ALJ cited the following facts:

- (1) Leatherman's patented *micra* tool is sold in more than 100 mail order catalogs and in virtually all of the more than 10,000 retail outlets that sell Leatherman's products;
- (2) most of the mail order catalogs that offer Leatherman's patented *micra* tool also offer multipurpose tools by other manufacturers and would be available to any foreign manufacturer as a distribution network for an infringing product; and
- (3) there are numerous foreign manufacturers who could easily and cheaply retool their facilities to produce infringing products, as evidenced by the speed with which that has happened with copies of Leatherman tools other than the *micra* tool and the fact that copies of the *micra* tool could be produced more easily than the knock-offs of the other Leatherman tools, using the same

¹⁹ RD at 27.

manufacturing techniques and equipment.²⁰

Complainant Leatherman and the IA have argued to the Commission that a general exclusion order is the appropriate remedy, for the reasons stated by the ALJ.²¹

We agree. The facts in this investigation meet the statutory standard, i.e., that (a) a general exclusion order is necessary to prevent circumvention of an exclusion order limited to the products of named persons or (b) there is a pattern of violation of section 337 and it is difficult to identify the source of the infringing products.²² In addition, the criteria that the ALJ and the parties applied are consistent with Commission precedent, beginning with *Paint Spray Pumps*, and including most recently Inv. No. 337-TA-406, *Certain Lens-Fitted Film Packages*.²³

We therefore determine that a general exclusion order under section 337(d) is the appropriate remedy for the violations found in this investigation.

The ALJ recommended the issuance of a general exclusion order prohibiting the entry of infringing imported tools for consumption.²⁴ The

²⁰ Id. at 27-29.

²¹ See Complainant Leatherman Tool Group Inc.'s Written Submission to the Commission on the Issues of Remedy, the Public Interest and Bonding (July 13, 1999) ("Complainant's Submission") at 2-12; and Brief of the Office of Unfair Import Investigations on Remedy, the Public Interest, and Bonding (July 13, 1999) ("IA's Brief") at 4-6.

²² 19 U.S.C. § 1337(d)(2) and 19 C.F.R. § 210.50(c).

²³ See RD at 25-27 and, in *Lens-Fitted Film Packages*, the Commission Opinion [single-spaced public version] at 8-11.

²⁴ RD at 30.

Commission notice soliciting written submissions from the parties on remedy, the public interest, and bonding stated that any party seeking exclusion of infringing imported tools from entry into the United States for purposes other than entry for consumption should provide information establishing that activities involving other types of entry either are adversely affecting the party or are likely to do so.²⁵ Neither Leatherman nor the IA recommended that the Commission should issue a general exclusion order excluding entries for purposes other than consumption.²⁶

After considering the ALJ's recommendation and the arguments of the parties, the Commission has determined to issue a general exclusion order excluding entries for consumption. The Commission has always intended that its orders excluding entries for consumption cover all entries for consumption, including entries from a foreign trade zone for consumption and withdrawals from warehouse for consumption. The Commission understands that Customs has interpreted its orders consistent with this intent. However, in the interest of transparency, we make explicit that all entries for consumption are excluded.

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

²⁵ 64 Fed. Reg. at 35680.

²⁶ See Complainant's Submission--Proposed Order at 2; and IA's Brief at 6.

finds that such articles should not be excluded from entry."²⁷ The public interest must be paramount in the administration of section 337.²⁸ 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 the U.S. patent laws) then the Committee feels that such exclusion order should not be issued.²⁹

The ALJ found that the existence of numerous designs for multipurpose tools that do not infringe the complainant's patents and the presence of many domestic manufacturers assured continued competition in the U.S. marketplace and an adequate supply of tools to U.S. consumers, regardless of the issuance of any general exclusion order. The ALJ therefore determined that the issuance of such an order would not "raise any public interest concerns under [section 337(d)]."³⁰

For the same reasons given by the ALJ, Leatherman and the IA (who is the advocate of the public interest in section 337 investigations) both maintain that the statutory public interest factors do not preclude the issuance of a general exclusion order in this investigation.³¹

The Commission notes that the specific facts cited by the ALJ and the

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

²⁸ See S. Rept. No. 1298 at 193.

²⁹ Id. at 197.

³⁰ RD at 29.

³¹ See Complainant's Submission at 12; and IA's Brief at 9-10.

parties are relevant to competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. We also note, however, that the tools at issue in this investigation do not have uses or applications relating to aspects of the public health and welfare and, hence, the exclusion of infringing imports is not likely to have any significant impact upon that aspect of the public interest.³² For all the foregoing reasons, we determine that the public interest does not preclude the Commission from issuing a general exclusion order in this investigation.³³

BONDING

If the Commission decides to issue a general exclusion order, infringing imported tools covered by the order 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.³⁴ If the Commission issues a general exclusion order in this

³² The patented compact multipurpose tools are made of stainless steel and incorporate such items as scissors (which is the primary tool), a screwdriver, tweezers, and a knife blade. The tools are capable of folding into scissors handles to form a compact, pocket-size utensil. See Complaint at paragraph 36, pages 10-11. Compare the facts in this investigation with those in Inv. No. 337-TA-182/188, *Certain Fluidized Supporting Apparatus and Components Thereof*. In that case, the Commission determined that the public interest precluded temporary relief since the patented "burn beds" provided benefits unavailable from any other device or method of treatment, the domestic producer could not meet the demand for the beds for burn patients within a reasonable time, and no therapeutically comparable substitutes were available. See USITC Publication 1667 (Oct. 1984)--Commission Memorandum Opinion at 23-25 and 28.

³³ Complainant Leatherman did not request, and the ALJ and the IA did not recommend, the issuance of one or more cease and desist orders under section 337(f) of the Tariff Act (19 U.S.C. 1337(f)).

³⁴ See 19 U.S.C. § 1337(j)(2)-(4) and 19 C.F.R. § 210.50(a)(3).

investigation and the President approves the order or takes no action and allows it to become final, the bond may be forfeited to the complainant under terms and conditions prescribed by the Commission.³⁵ The Commission must set the amount of the bond at a level sufficient to "protect the complainant from any injury."³⁶

While the investigation was before the ALJ, Leatherman argued that the bond should be 225 percent of the entered value of infringing imports covered by the proposed general exclusion order. That amount reflected the differential between an average retail price of \$23.66 for Leatherman's patented *micra* tool and an average retail price of \$10.49 for the accused imported tools sold by former respondents Grip On and Suncoast.³⁷

The IA argued that the bond should be 122 percent of the entered value of the imported tools covered by the general exclusion order. He was of the view that that amount would equalize the difference between an average retail price of \$23.33 for Leatherman's patented *micra* tool and an average retail price of \$10.49 for the accused imported tools sold by Grip On and Suncoast. Since the IA had relied on the same facts as Leatherman, he concluded that Leatherman's calculations, which led it to propose a bond of 225 percent, were in error.³⁸

³⁵ See 19 U.S.C. § 1337(j)(3) and 19 C.F.R. § 210.50(d).

³⁶ See 19 U.S.C. § 1337(j)(3) and 19 C.F.R. § 210.50(a)(3).

³⁷ See Complainant Leatherman Tool Group Inc.'s Motion for Summary Determination Regarding Violation of Section 337, Remedy, and Bonding (Feb. 1, 1999) (Motion No. 416-6)--Memorandum of Points and Authorities in Support of [Motion No. 416-6] at 28-29.

³⁸ See Commission Investigative Staff's Response to Complainant's Motion for Summary Determination Regarding Violation of Section 337, Remedy, and
(continued...)

The ALJ decided that he could not calculate the amount of the bond on the basis of price differentials. Leatherman had provided data concerning the prices of its patented *micra* tool,³⁹ but Grip On and Suncoast had been terminated from the investigation, and the record contained no information about the sales prices of the infringing imports of defaulting respondents Jiangsu, Kumasama, Quan Da, and SCIKO. Citing the Commission Opinion in Inv. No. 337-TA-372, *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*,⁴⁰ the ALJ noted that when it is impossible to compute the bond on the basis of price differentials, it is appropriate to issue a bond of 100 percent of the entered value of the imported articles in question. The ALJ accordingly recommended a bond of 100 percent of the entered value of imported tools covered by the proposed general exclusion order in the present investigation.⁴¹

In its remedy submission to the Commission, Leatherman states that a bond of either 100 or 122 percent would be acceptable and that Leatherman will defer to the judgment of the Commission on that issue.⁴²

The IA, however, continues to advocate a bond of 122 percent. He notes that, unlike *Neodymium-Iron-Boron Magnets*, the pricing data available for

³⁸(...continued)
Bonding (Feb. 11, 1999) at 21-22.

³⁹ See Memorandum of Points and Authorities in Support of [Motion No. 416-6] at 28-29 and Exhibits 33, 34, and 35.

⁴⁰ USITC Pub. 2964 (May 1996)--Commission Opinion on Remedy, the Public Interest, and Bonding at 5 (Apr. 5, 1996).

⁴¹ RD at 29-31.

⁴² See Complainant's Submission at 13.

former respondents Grip On and Suncoast are not undependable or insufficient; hence, it is not impossible for the Commission to calculate the bond based on price differentials, as it was in *Neodymium-Iron-Boron Magnets*. The IA goes on to say that the close proximity of the retail prices of Grip On's and Suncoast's prices, having a differential of only \$1.00, indicates that the variation in the price of imported tools is not so wide as to render a bond based on the cited price differential unrepresentative of the actual competitive injury being experienced by Leatherman. Finally, the IA argues, it would be inappropriate for defaulting respondents Jiangsu, Kumasama, Quan Da, and SCIKO, who did not participate in the investigation and did not submit pricing information, to be afforded the benefit of a lower bond than one based on price differential information for Grip On and Suncoast who participated in the investigation until they were terminated on the basis of consent orders.⁴³

We recognize that the higher bond amount advocated by the IA would have a greater effect on the respondents and other importers who import infringing tools during the Presidential review period. As such, the higher bond would be an effective deterrent to infringing importations. The bond, however, is intended to indemnify the complainant. The statute and the implementing Commission rule both require that the bond be "an amount determined by the Commission to be sufficient to protect the complainant from any injury" [*italics added*].⁴⁴

We note also that section 337(j)(3) and the House and Senate reports

⁴³ See IA's Brief at 7-9.

⁴⁴ 19 U.S.C. § 1337(j)(3).

concerning that provision offer no guidance on complying with the statutory direction to set the bond in an amount sufficient to protect the complainant from any injury.⁴⁵ The preamble to the implementing Commission rule accordingly states that the Commission will construe the statutory direction on a case-by-case basis.⁴⁶ Hence, the extent to which the facts in the present investigation differ from or are comparable to those in *Neodymium-Iron-Boron Magnets* should not necessarily be outcome determinative regarding the amount of the bond in this investigation.

In our view, the critical consideration in this investigation is that Leatherman--the intended beneficiary of the bond--is no longer arguing that the bond amount must be higher than 100 percent to protect Leatherman from injury caused by importations or sales of infringing tools during the Presidential review period. Instead, Leatherman is deferring to the judgment of the Commission on the bond amount and states that it would be satisfied with a bond of 100 percent as suggested by the ALJ or 122 percent as suggested by the IA. Absent an affirmative request by Leatherman for the higher bond (with corroborating facts and legal arguments), we see no reason to reject the ALJ's recommendation.

Accordingly, imported tools covered by the general exclusion order in this investigation will be entitled to entry under a bond, prescribed by the Secretary of the Treasury, in the amount of 100 percent of the imported tools'

⁴⁵ See H.R. Rept. No. 826, 103d Cong., 2d Sess. at 142 (1994) and S. Rept. 412, 103d Cong., 2d Sess. at 121 (1994).

⁴⁶ See 59 Fed. Reg. 67622, 67625 (Dec. 30, 1994) regarding interim rule 210.50. The interim rule was adopted as a final rule without change or additional preamble commentary. See 61 Fed. Reg. 43429, 43432 (Aug. 23, 1996).

entered value, until the order becomes final or is disapproved by the President.⁴⁷

⁴⁷ See 19 U.S.C. § 1337(j)(2)-(4) and 19 C.F.R. § 210.50(a)(3).

United States International Trade Commission
Washington, D.C. 20436

DOCKET

In the Matter of:)
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CERTAIN COMPACT)
MULTIPURPOSE TOOLS)
)

Investigation No. 337-TA-416

99 JUN 28 19:43

OFFICE OF THE SECRETARY
US INT'L TRADE COMM

**NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DETERMINATION
GRANTING SUMMARY DETERMINATION; and REQUEST FOR SUBMISSIONS ON
REMEDY, THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has decided not to review the presiding administrative law judge's ("ALJ's") initial determination granting a motion for summary determination concerning violation of section 337 of the Tariff Act of 1930 as amended (19 U.S.C. § 1337) by the four respondents remaining in the investigation.

FOR FURTHER INFORMATION CONTACT: P. N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3061. General information concerning the Commission also may be obtained by accessing its Internet server (<http://www.usitc.gov>). Hearing-impaired individuals can obtain information concerning this matter by contacting the Commission's TDD terminal at 202-205-1810.

SUPPLEMENTARY INFORMATION:

On August 28, 1998, Leatherman Tool Group, Inc., filed a complaint with the Commission alleging violations 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 compact multipurpose tools that infringe claims of four U.S. design patents. The Commission instituted the investigation on September 30, 1998. Five firms were named as respondents: Suncoast of America, Inc.; Quan Da Industries; Kumasama Products Co., Ltd.; Jiangsu Hongbao Group, Corp.; and SCIKO Chinalight, Ltd. See 63 FR 52287 (Sept. 30, 1998). The Commission added Charles Amash Imports, Inc., d/b/a Grip On Tools, as a sixth respondent on December 14, 1998. See 63 FR 70215 (Dec. 18, 1998).

Grip On and Suncoast eventually were terminated on the basis of consent orders. Notice of Commission Decision Not to Review an Initial Determination Terminating a Respondent on the Basis of a Consent Order [and] Issuance of Consent Order (Apr. 21, 1999); Order No. 13 (Mar. 25, 1999); Notice of Commission Decision Not to Review an Initial Determination Terminating a Respondent on the Basis of a Consent Order [and] Issuance of Consent Order (Mar. 5, 1999); and Order No. 9 (Feb. 5, 1999).

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The Commission subsequently found the remaining respondents to be in default, in light of their failure to answer the complaint and notice of investigation in the manner prescribed by the Commission rules and their failure to respond to orders directing them to show cause why they should not be found in default. See Notice of Commission Decision Not to Review an Initial Determination Finding a Respondent in Default (May 11, 1999); Order No. 14 (Apr. 8, 1999); Notice of Commission Decision Not to Review an Initial Determination Finding Three Respondents in Default (Mar. 25, 1999); and Order No. 11 (Mar. 2, 1999).

On February 1, 1999, complainant Leatherman Tool Group, Inc., filed Motion No. 416-6 for summary determination that the four respondents remaining in the investigation have violated section 337.

On February 11, 1999, the Commission investigative attorney filed a response supporting the motion. No other party responded to the motion.

On May 27, 1999, the ALJ issued the ID granting the motion for summary determination concerning violation of section 337 by respondents. The ALJ found that there is no genuine issue of fact that: (1) each respondent has imported an accused tool into the United States, sold it for importation, and/or sold it in the United States after importation; (2) the four design patents at issue are valid and enforceable; and (3) the complainant has satisfied the technical prong of the domestic industry requirement (19 U.S.C. § 1337(a)(2)).¹

No party filed a petition for review of the ID pursuant to 19 CFR § 210.43(a), and the Commission found no basis for ordering a review on its own initiative pursuant to 19 CFR § 210.44. The ID thus became the determination of the Commission pursuant to 19 CFR § 210.42(h)(3).

As a final disposition of this investigation, the Commission may issue (1) an order that could result in exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair action in the importation and sale of such articles. The Commission is therefore interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see In the Matter of: Certain Devices for Connecting Computers Via Telephone Lines, Inv. No. 337-TA-360, USITC Publication No. 2843 (December 1994) (Commission Opinion).

¹ The Commission previously determined not to review an ID granting a summary determination on the economic prong of the statutory domestic industry requirement. See Notice of Commission Decision Not to Review an Initial Determination Granting Summary Determination on the Domestic Industry Requirement (Mar. 5, 1999); and Order No. 7 (Feb. 2, 1999).

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

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

WRITTEN SUBMISSIONS: The parties to the investigation, interested Government agencies, and other interested persons or entities are encouraged to file written submissions on remedy, the public interest, and bonding.

The document constituting the ID also contains the ALJ's recommended determination ("RD") under 19 CFR § 210.42(a)(2) concerning remedy and bonding. The ALJ has recommended that the Commission issue a general exclusion order and set the bond at 100 percent of the entered value of the accused imports during the Presidential review period. The parties' written submissions on remedy, the public interest, and bonding may assert their arguments concerning the RD in accordance with 19 CFR § 210.46(a). The Commission also requests that the complainant and the Commission investigative attorney submit proposed remedial orders for the Commission's consideration.

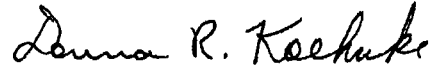
All written submissions and proposed remedial orders must be filed with the Office of the Secretary no later than 5:15 p.m. on Tuesday, July 13, 1999. Reply submissions must be filed no later than 5:15 p.m. on Tuesday, July 20, 1999. No further submissions on remedy, the public interest, and bonding will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions and proposed remedial orders must file the original document and 14 true copies with the Office of the Secretary on or before the deadlines stated above. Any person desiring to submit a document or portion thereof in confidence must request confidential treatment unless the information contained in the document or portion thereof has already been granted such treatment during the investigation. All requests for confidential treatment should be directed to the Secretary of the Commission and must include a full statement of the reasons that the Commission should grant such treatment. See 19 CFR § 201.6. All nonconfidential written submissions will be available for public inspection at the Office of Secretary.

Nonconfidential copies of the ID granting the motion for summary determination, the RD on remedy and public interest, all other nonconfidential documents filed in the investigation are or will be available for public inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the

Commission's Office of the Secretary, Dockets Branch, 500 E Street, S.W., Room 112, Washington, D.C. 20436, telephone 202-205-1802.

By order of the Commission.



Donna R. Koehnke
Secretary

Issued: June 28, 1999

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)

CERTAIN COMPACT)
MULTIPURPOSE TOOLS)
_____)

) Investigation No. 337-TA-416
)
)
)
)

Final Initial and Recommended Determinations

Pursuant to the Notice of Investigation (63 Fed. Reg. 14474, 14475), this is the administrative law judge's final initial determination, under Commission rules 210.42 (c) and 210.42(h)(3). 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 against entry for consumption in the United States of compact multipurpose tools that infringe the four design patents in issue. He further recommends a bond of 100% of entered value of the accused products of SCIKO, Quan Da, Kumasama and Jiangsu during Presidential review.

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OFFICE OF THE
US INTERNATIONAL
TRADE COMMISSION
WASHINGTON, D.C.

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I. PROCEDURAL HISTORY

By notice of investigation, which was published on September 30, 1998 (63 Fed. Reg. 52288-89), the Commission instituted this investigation. Order No. 4 set a target date of August 30, 1999.

Respondents identified in the notice of investigation were Suncoast of America Inc. of Florida (Suncoast), SCIKO Chinalight of China (SCIKO), Kumasama Products Co., Ltd. of Taiwan (Kumasama), Quan Da Industry and Commerce Development Co. of China (Quan Da) and Jiangsu Hongbao Group Corp. of China (Jiangsu). Order No. 5, which issued on November 19, 1998, was an initial determination granting Motion No. 416-2 of complainant Leatherman Tool Group Inc. (Leatherman) to amend the complaint and notice of investigation to add Charles Amash Imports, Inc., dba Grip On Tools (Grip On). The Commission on December 15 determined not to review Order No. 5.

On February 5, 1999, in an initial determination (Order No. 9), the administrative law judge granted complainant's Motion No. 416-5 to terminate the investigation with respect to respondent Suncoast by entry of a consent order pursuant to a stipulation and on March 25 a similar initial determination (Order No. 13) was granted with respect to respondent Grip On. On March 5 and April 21 respectively the Commission determined not to review Order Nos. 9 and 13. Thus the only respondents remaining in the investigation are Quan Da, Kumasama, Jiangsu and SCIKO. Those respondents have been found in default pursuant to Commission rule 210.16.¹

¹ On March 2, in an initial determination (Order No. 11), the administrative law judge found respondents Quan Da, Kumasama and Jiangsu in default pursuant to Commission rule 210.16 and on April 8 a similar initial determination (Order No. 14) was granted with respect to respondent SCIKO. On March 25, and May 11 respectively the Commission determined

On February 1, 1999 complainant Leatherman, pursuant to Commission rule 210.50(a), moved for summary determination in its favor that four U.S. design patents, viz., No. 380,362 (the '362 patent), No. 385,168 (the '168 patent), No. 385,169 (the '169 patent) and No. 385,170 (the '170 patent) (all the patents in issue) are valid and infringed by respondents and that there has been a violation of 19 U.S.C. § 1337 and the investigation should be terminated in toto. It further moved for the entry of a general exclusion order and a bond of 225% during the Presidential review period. (Motion Docket No. 416-6).²

II. MOTION NO. 416-6

The staff, in a response to Motion No. 416-6 filed on February 11, 1999, argued that complainant's Motion No. 416-6 for summary determination should be granted by finding a violation of section 337 by reason of infringement of the patents in issue by the respondents still in the investigation. It further argued that the recommended remedy should be a general exclusion order against entry for consumption in the United States of compact multipurpose tools that infringe the patents in issue, and that a bond of 122.4 percent of the entered value of infringing products should be set during the Presidential review period.³

No responses to Motion No. 416-6 from any private party were received.

Under Commission rule 210.18(b), a party is entitled to summary determination in its

not to review Order Nos. 11 and 14.

² Motion No. 416-6 is supported by an accompanying memorandum and declarations of Julianne Ross Davis, Ben Rivera, James Foley and David Cornwell, and attached exhibits.

³ Complainant's counsel in a letter dated February 23, 1999 acknowledged that the calculations in its Motion No. 416-6 regarding a proposed bond of 225% were in error and further agreed to a proposed bond of 122.4% based on calculations of the staff.

favor on all or any part of the issues to be determined in the investigation "if pleadings and any depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." See Serrano v. Telular Corp., 111 F.3d 1578, 1581 (Fed. Cir. 1997) and Lockwood v. American Airlines, Inc., 107 F.3d 1565, 1569 (Fed. Cir. 1997). Summary judgment may follow when it is shown that the infringement issue can be reasonably decided only in favor of the movant, when all reasonable factual inferences are drawn in favor of the non-movant." Voice Technologies Group, Inc. v. VMC Systems, Inc., 49 U.S.P.Q.2d 133, 1999 (Fed. Cir. 1999). In considering summary determination, the trier of fact should

"assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial"

EMI Group North America, Inc. v. Intel Corporation, 48 U.S.P.Q.2d 1181 (Fed. Cir. 1988).

Summary determination is an appropriate vehicle for determining design patent infringement.

See, e.g., Certain Cellular Radiotelephones and Subassemblies and Component Parts Thereof, Inv. No. 337-TA-297, (Unreviewed) Initial Determination (Order No. 28) (October 24, 1989).

A. Importation and Sale

Complainant argued that the record establishes conclusively that all the respondents either imported, sold for importation or sold after importation compact multipurpose tools that infringe the four design patents in issue. (Memorandum at 8).

The staff argued that complainant has presented evidence that the accused products were

imported into the United States and sold or offered for sale in the United States after importation. (Memorandum at 6).

Section 337 requires an "importation" or "sale for importation" before the Commission may exercise jurisdiction over any accused goods. Enercon GmbH v. U.S. Int'l. Trade Comm., 151 F.3d 1376, 1380 (Fed. Cir. 1998). Thus, importation or sale for importation must be proven with respect to the respondents remaining in this investigation, viz; SCIKO, Kumasama, Jiangsu and Quan Da.

Complainant's counsel, Julianne Ross Davis, in her declaration accompanying Motion No. 416-6, stated that respondents SCIKO, Kumasama and Jiangsu all had booths at a 1998 National Hardware Show held in Chicago between August 16-19, 1998 (Davis decl. ¶ 3); that each one of those booths was displaying a product that adopted the design disclosed in the patents in issue (Davis decl. ¶ 4, Physical Exhs. 2 and 3)⁴; that complainant obtained from the United States District Court in Chicago orders which issued on August 17, 1998 allowing seizure of the infringing products from SCIKO and Kumasama (Davis decl. ¶ 7, Exhs. 12 and 13); that the orders were executed on August 18, 1998 (Davis decl. ¶ 7); that the individuals operating the SCIKO and Kumasama booths confirmed that the tools being offered by SCIKO and Kumasama were being manufactured in China (Davis decl. ¶ 7); that after the orders were executed, complainant discovered that another vendor, Jiangsu, was displaying a product that adopted a design disclosed in the patents in issue (Davis decl. ¶¶ 8, 10); and that representatives of Jiangsu confirmed that the displayed tools were manufactured in China

⁴ Physical Exhibit Nos. are to physical exhibits attached to the complaint. Non-physical Exhibit Nos. are to exhibits attached to Motion No. 416-6 unless specified otherwise.

(Davis decl. ¶ 11).

Complainant also attended a National Hardware show in 1997. In connection with the 1997 National Hardware show Davis stated that complainant found the vendor Sunshine Dalian Free Trade Zone (Sunshine) was selling infringing product at a booth in the Chinese Pavilion (Davis decl. ¶ 13); that a representative of the complainant purchased an infringing product from an individual operating the Sunshine booth (Davis decl. ¶ 14, Exh. 14, Physical Exh. 6); that complainant obtained an order to seize all remaining infringing products and sales information (Davis decl. ¶ 15, Exh. 15); and that Sunshine representatives wrote to Davis and identified respondent Quan Da as the manufacturer of the tool displayed and sold at the Sunshine booth (Davis decl. ¶ 16, Exh. 17). The letter from Sunshine to Davis reads in part:

On August 11-12, 1997 Sunshine present at the 97's National Hardware Show in Chicago. At the show we occupy only one booth #39649 not the booth #39650 mentioned in your fax. We display products only within our own business such as anchor & fitting for wire rope and chain. The is not one MICRA or MICRA's copy that we have displayed. We left before August 13 for business so we don't know what happened then. But we know the booth #39650 mentioned in your fax is occupied by a company which does not have any relation with Sunshine displayed the name MICRA products. For they came one day later than Sunshine so their booth is under Sunshine's mark. We supply the information about them in the following:

QUAN DA INDUSTRY AND COMMERCE DEVELOPMENT

COMPANY ZIIUIIAI S.E.Z.

Tel. 86 756 2233186 Fax: 86 756 2255099

We get this information only today, through the courtesy of the following (we don't know the exact English name): [Exh. 17]

While Quan Da submitted an unverified letter to the administrative law judge stating that

it had never sold an infringing product in the United States⁵ complainant submitted a sales brochure (Exh. 16) which complainant represented that it obtained upon the execution of the order to seize infringing product and sales information from the Sunshine booth, and which brochure identifies Quan Da as the vendor of the accused product.

Based on the foregoing, the administrative law judge finds that respondents SCIKO, Kumasama, Jiangsu and Quan Da sell for importation, import and/or sell after importation the accused products as required by section 337; and that there is no genuine issue of fact regarding importation and sale of the accused product.

B. Patent Validity and Enforceability

Complainant argued that there is no genuine issue of fact with respect to validity and enforceability of the patents in issue. Thus complainant argued that the four design patents in issue cover a new ornamental and non-obvious design for a compact multipurpose tool; that Leatherman's micra[®] product is the commercial embodiment of those patents and incorporates the overall appearance of the patented designs; that all of the patents in issue were assigned by the inventor, Benjamin Rivera, to complainant; that each of the applications for said patents were filed on the same day, and assigned to the same Primary Examiner from group art unit "2902;" that three of the four applications issued on the same day (the '168, '169 and '170 patents); that the other application issued "three months earlier" as the '362 patent;⁶ and that

⁵ See Notice to the Parties, dated October 27, 1998, from the administrative law judge.

⁶ The '168 patent (Exh. 1) is based on U.S. Serial No. 47,298 which was filed on November 29, 1995 and issued on October 21, 1997. The '169 patent (Exh. 2) is based on U.S. Serial No. 47, 300 which was filed on November 29, 1995 and issued on October 21,

the primary reason for the delay between the issuance of the '362 patent and the '168, '169 and '170 patents stemmed from the processing of a statutory disclaimer that the U.S. Patent and Trademark Office (PTO) required complainant file to avoid an obviousness type double patenting rejection in the later issued applications in view of the '362 patent. (Memorandum at 6).

Complainant also argued that its expert, David K. S. Cornwell, Esq.,⁷ has done an independent analysis of the file histories of the patents in issue and has determined that the patents are valid and enforceable (Memorandum at 7-8).

The staff argued that by statute patents are valid and enforceable and that the party challenging a patent's validity has the burden of overcoming this presumption of validity by clear and convincing evidence. It was also argued that no party has challenged the enforceability or validity of any of the design patents in issue⁸ and accordingly the presumption of patent validity and enforceability should be deemed conclusive.

Pursuant to 35 U.S.C. § 282 "a patent shall be presumed valid...[t]he burden of establishing invalidity of a patent claim or any claim thereof shall rest on the party asserting

1997. The '170 patent (Exh. 3) is based on U.S. Serial No. 47, 307 which was filed on November 29, 1995 and issued on October 21, 1997. The '362 patent (Exh. 4) is based on U.S. Serial No. 47, 220 which was filed on November 29, 1995 and issued on July 1, 1997.

⁷ Complainant has identified Cornwell as an expert in design patents. See Memorandum at 7.

⁸ The staff noted that although respondent Suncoast asserted invalidity as an affirmative defense in its response to the complaint, Suncoast has been terminated; and that the staff has studied the file wrappers and the most pertinent prior art and has determined not to challenge the validity or enforceability of the patents in issue.

such invalidity." See Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1064 (Fed. Cir. 1998) (en banc) (Nobelpharama). The party challenging a patent's validity has the burden of overcoming this presumption of validity by clear and convincing evidence. See Nobelpharma, supra; Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Repositionable Notes, Inv. No. 337-TA-366, Commission Opinion at 7-16 (December 15, 1995) (Microsphere Adhesives), aff'd sub nom, Minnesota Mining and Manufacturing v. U.S. Int'l Trade Comm., 91 F.3d 171 (Fed. Cir. 1996); Certain Plastic Encapsulated Integrated Circuits, Components Thereof, and Products Containing Same, Inv. No. 337-TA-315, Commission opinion at 16 (March 24, 1992), (Encapsulated Circuits), aff'd sub nom. Texas Instruments Inc. v. U.S. Int'l Trade Comm., 988 F.2d 1165 (Fed. Cir. 1993).

Based on the foregoing and in view of the fact that each of respondents Quan Da, Kumasama, Jiangsu and SCIKO has not filed a response to Motion No. 416-6 and has never challenged the validity or enforceability of the patents in issue, the administrative law judge finds that there is no genuine issue of fact concerning the validity or enforceability of the patents in issue and that summary determination is warranted in finding that said patents are valid and enforceable. See Lannon Mfg. Co., Inc. v. U.S. Intern. Trade Com'n 799 F.2d 1572, 1580 (Fed. Cir. 1986).

C. Infringement of the Design Patents In Issue

Whether a design patent is infringed is determined by two tests, viz., the "ordinary observer" test and the "point of novelty" test. Both tests must be met. See Avia Group International v. L.A. Gear California, Inc., 7 USPQ2d, 1548 (Fed. Cir. 1988) (Avia) where

the Federal Circuit stated "[a]bsent the presence of the novel features in the accused products, a patented design has not been appropriated." Avia at 1554. See also Unidynamics Corp. v. Automatic Products International, Ltd., 48 USPQ2d 1099, 1107 (Fed. Cir. 1998).

In the ordinary observer test one first construes the claim to the design, when appropriate, and then compares the claimed design to the design of the accused device.

OddzOn Prods., Inc. v. Just Toys, Inc., 122 F.3d 1396, 1404 (Fed. Cir. 1997) (OddzOn).

The comparison step of the ordinary observer test requires the fact finder to determine whether the patented design as a whole is substantially similar in appearance to the accused design.

This test was first announced by the Supreme Court in Gorham Mfg. Co. v. White, 81 U.S.

(14 Wall) 511 (1872) (Gorham), as follows:

If, 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 another, the first one patented is infringed by the other.

Id. at 528. See e.g. Avia; Litton Systems Inc. v. Whirlpool Corp., 728 F.2d 1423, 1444

(Fed. Cir. 1984) (Litton). To determine whether two designs are substantially the same, the

accused device must be compared with the patented design. Unette Corp. v. Unit Pack Co.,

785 F.2d 1026, 1028 (Fed. Cir. 1986). In making this comparison, the patented design must

be viewed in its entirety. L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1125

(Fed. Cir. 1993), cert. denied, 510 U.S. 908 (1993). "[M]inor differences between a patented

design and an accused article's design cannot, and shall not, prevent a finding of

infringement." Litton, 728 F.2d at 1444. "The patented and accused design do not have to be

identical in order for design patent infringement to be found." OddzOn, 122 F.3d at 1405.

The Federal Circuit in Braun Inc. v. Dynamics Corp., 975 F.2d 815 (Fed. Cir. 1992),

stated that:

Nothing in Gorham suggests that, in finding design patent infringement, a trier of fact may not as a matter of law 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. ...Simply put, a jury, composed of a sample of ordinary observers, does not necessarily require empirical evidence as to whether ordinary observers would be deceived by an accused device's design. ...

Id. at 821. Furthermore, judges routinely undertake the ordinary observer test for design patent infringement without resort to expert testimony or other additional evidence. See Certain Tape Dispensers, Inv. No. 337-TA-354, Order No. 5 (unreviewed Initial Determination) at 5 (December 23, 1993) (Tape Dispensers) and Certain Cellular Radiotelephones and Subassemblies and Component Parts Thereof, Inv. No. 337-TA-297, Order 21, (unreviewed Initial Determination granting Complainant's Motion for Temporary relief) at 137-138 (August 9, 1989).

Moreover, the Federal Circuit in Avia, with respect to the evidence presented to the trial court, stated:

Here, besides its patents and the accused shoes, Avia presented evidence in the form of an expert's declaration analyzing infringement and deposition testimony of LAG's president, in which he confused LAG's Thrasher and Avia's Model 750. In addition, the court performed its own comparison of LAG's shoes to the patented designs. LAG merely challenges the weight accorded the expert's declaration and the ultimate finding of infringement. Neither argument raises a genuine issue of material fact which requires a trial.

Avia, 7 USPQ2d at 1555, (Emphasis added). Thus, the administrative law judge, in addition to making his own comparison between the patented designs and the accused products, may

utilize expert testimony in the infringement analysis under the ordinary observer test.

In the point of novelty test, "the accused device must appropriate the novelty in the patented device which distinguishes it from the prior art." Avia, 7 USPQ2d at 1554, citing Shelcore, Inc. v. Durham Indus., Inc., 223 USPQ 584, 590 n.17 (Fed. Cir 1984). See also, Litton, 728 F.2d at 1444; Lund Indus., v. GO Indus., Inc., 19 USPQ2d 1383 (Fed. Cir. 1991); Oakley, Inc. v. International Tropic-Cal, Inc., 17 USPQ2d 1401 (Fed. Cir. 1991); and FMC Corp. v. Hennessy Indus., Inc., 5 USPQ2d 1272 (Fed. Cir. 1987).

1. Respondents SCIKO and Quan Da

a. The Ordinary Observer Test

Complainant, relying on the declaration of its expert Cornwell, argued that it is Cornwell's opinion that the accused devices are substantially similar in appearance to each of the patents in issue;⁹ that Cornwell stated:

[a] simple visual comparison of the '168, '169, '170 and '362 patents [the patents in issue] with the accused devices readily reveals that the accused compact multipurpose tools have substantially the same overall appearance as Leatherman's patented designs...[Substantial] similarity is apparent from the slavish copying by respondents of the shape of nearly every feature of Leatherman's patent designs...

citing Cornwell decl. at ¶ 23; that Cornwell also opines that tools sold by the respondents incorporate the novel combination features that make up the patented designs, citing Cornwell

⁹ The "accused devices" referred to in the Cornwell declaration are the accused devices of respondent Suncoast (Physical Exhibit 1), which was supplied by respondent Grip-On, respondent SCIKO (Physical Exhibits 2 and 3) and respondent Quan Da (Physical Exhibit 6). The Cornwell declaration did not refer to any accused device of respondents Kumasama or Jiangsu. See Cornwell decl. at ¶9. Each of respondents Suncoast and Grip-On have been terminated from the investigation. See Order Nos. 9 and 13.

decl. at ¶ 25; that Cornwell sets forth the novel features of the patented designs that were not present in the prior art, and enumerates how the accused products incorporate these features, citing Cornwell decl. at ¶¶ 27-30; and that Cornwell concludes that "[i]t is unquestionable that the accused tools have misappropriated a novel combination of elements of the '168, '169, '170 and '362 patents," citing Cornwell decl. at ¶ 30.

The staff argued that, while complainant submitted the declaration of Cornwell, on the issue of design infringement, the expert opinion of a patent attorney on the question of design patent infringement is not usually entitled to significant weight. However it is argued that the Cornwell declaration is instructive on complainant's legal and factual arguments on infringement; and that infringement is an issue that can be decided based upon comparisons of the designs at issue and a review of the prosecution histories, including the most pertinent prior art. The staff also argued that "it is readily apparent" from a visual inspection of the accused products¹⁰ that they are identical in design to one another except for (i) a variation in size between Physical Exh. 3 and the others, (ii) a variation in metallic finish between Physical Exhs. 1¹¹ and 6 on the one hand and Physical Exhs. 2 and 3 on the other, and (iii) the presence of etched markings on Physical Exh. 1 compared to the absence of markings on the others; and that none of those variations are relevant to the claimed designs of the patents at issue.

¹⁰ The staff, in its memorandum at 10 and 11, when making a visual comparison of the "accused products" with the designs at issue, stated "Compare Cornwell Declaration at p. 8 with Physical Exhibits 1-3 and 6." Thus, the staff, like complainant, has not conducted a visual comparison of the accused products of Kumasama and Jiangsu, for which there are no physical exhibits, with the designs in issue.

¹¹ Physical Exhibit 1 is a exhibit from Suncoast which has been terminated from the investigation.

(Memorandum at 9-10).

The staff further argued that when the accused products are compared visually to the top view of the open tool designs depicted in Figure 1 of each of the patents in issue, "it is clear" that all are indistinguishable from those views of the patented designs; that when all four accused products¹² are compared visually to the side view of the open tool designs depicted in Figure 4 of each of the patents in issue, all of the accused products are identical to the design depicted in Figure 4 of the '168 patent because the bend in one of the side walls (3) near the central pivot pins (5), also known as a "jog," is larger on one handle than it is on the other handle in each instance; that even though with regard to the designs viewed from the side as depicted in Figure 4 of each of the other three patents, the jog arrangements are not exactly the same in each of those patents and none duplicates precisely the jog arrangement in the accused products, viz, the '362 patented design has no jogs at all, whereas the '169 patent has a jog on only one handle, and the '170 patent has equally sized jogs on both handles, the differences between the side view of the accused products on the one hand and the side views of the '362, '169 and '170 patents on the other are sufficiently minor when viewing the entirety of the design that the ordinary observer would still be deceived into thinking that the accused products are in fact the patented designs in each instance; and that the prosecution histories support the conclusion that those differences are minor variations. (Memorandum at 10-12).

The administrative law judge has undertaken a visual analysis of the patented designs,

¹² The staff is here referring to the accused products of respondent Suncoast (Physical Exhibit 1) which has been terminated from the investigation, respondent SCIKO (Physical Exhibits 2 and 3) and respondent Quan Da (Physical Exhibit 6).

the devices that embody the patented designs and the designs of the accused devices of SCIKO and Quan Da to determine whether or not, in the eye of an ordinary observer, there is substantial similarity such that the ordinary observer would be induced to purchase one supposing it to be the other. In making this analysis the administrative law judge has relied primarily on his own visual comparisons. However he has also given weight to the expert testimony of Cornwell, viz., the Cornwell declaration, because it sets forth diagrams of said accused devices and identifies what Cornwell believes are potential points of similarity.

The administrative law judge finds that the accused products of SCIKO and Quan Da are identical in design to one another except for (i) a variation in size between Physical Exh. 3 and the others, and (ii) a variation in the metallic finish between Physical Exh. 6 on the one hand and Physical Exhs. 2 and 3 on the other. However, the administrative law judge finds that none of those variations are relevant to the claimed designs of the patents in issue.

The administrative law judge does find further that a simple visual comparison of the '168, '169, '170 and '362 patents with the accused devices of SCIKO and Quan Da shows that the accused compact multipurpose tools have substantially the same overall appearance as Leatherman's patented designs. Looking at such a visual comparison, see Cornwell decl. ¶ 23, substantial similarity is found between the shapes of many of the features of the accused products of respondents Quan Da and SCIKO and the shape of many features of Leatherman's patent designs, including: a pair of elongate channel shaped handles (1) defined by a web (2) and two upstanding side walls (3) which are pivotally connected to a pair of elongate scissor blades (4); pivot pins (5) located at the inner and outer ends of each handle; a stop shoulder (6) located at the tang of each scissor blade and a corresponding catch (7) located at the inner end

of each handle; pivotal connection (8) located at the pivot point of the pair of elongate scissor blades (4); and rounded outer ends (9) on each handle.

Thus, the administrative law judge finds that when the accused products of SCIKO and Quan Da are compared visually to the top view of the open tool designs depicted in Figure 1 of each of the four design patents in issue, all are indistinguishable from those views of the patented designs, see Physical Exhs. 2-4 and 6, Figure 1 of the '362, '168, '169 and '170 patents, and the Cornwell decl. at p. 9; that when the accused products of SCIKO and Quan Da are compared visually to the side view of the open tool designs depicted in Figure 4 of each of the four design patents in issue, said accused products are identical to the design depicted in Figure 4 of the '168 patent because the bend in one of the side walls (3) near the central pivot pins (5), also known as a "jog," is larger on one handle than it is on the other handle in each instance, see Physical Exhs. 2-3 and 6, Figure 4 of the '168 patent and the Cornwell decl. at p. 8; and that, with regard to the designs viewed from the side as depicted in Figure 4 of each of the '362, '169 and '170 patents, while the jog arrangements are not exactly the same in each of those patents and none duplicates precisely the jog arrangement in the accused products of SCIKO and Quan Da and the '362 patented design has no jogs at all, whereas the '169 patent has a jog on only one handle, and the '170 patent has equally sized jogs on both handles, see Figure 4 of the '362, '169 and '170 patents and the Cornwell decl. at p. 8, the differences between the side view of the accused products of SCIKO and Quan Da on the one hand and the side views of the '362, '169 and '170 patents on the other hand are found to be sufficiently minor, see OddzOn 122 F.3d at 1405 ("The patented and accused design do not have to be identical in order for design patent infringement to be found... It is the

appearance of a design as a whole which is controlling in determining infringement.") Thus, the administrative law judge finds that when viewing the entirety of the designs, even in light of the minor differences between the side views, the ordinary observer would still be deceived into thinking that the accused products of SCIKO and Quan Da are in fact the patented designs in each instance.

Based on the foregoing, the administrative law judge finds that the accused tools of SCIKO and Quan Da are infringing under the Gorham ordinary observer test with respect to all four of the asserted design patents.

b. The Point of Novelty Test

Complainant argued that its expert Cornwell determined that he is unaware of any prior art reference that adopts the same basic design as the designs in the patents in issue; and that Cornwell stated that each of the designs shown in the patents in issue are sufficiently different from those that came before and there can be no credible argument that the designs are not patentable. (Memorandum at 7-8). It is also argued that the tools sold by "respondents" incorporate the novel combination of features that make up the patented design (Memorandum at 15).

The staff argued that while the Cornwell declaration does not compare the elements of the four design patents in issue to specific prior art references for the purpose of demonstrating that the elements are "truly points of novelty," it is "readily observable" that the "accused" products are carbon copies of every feature of the '168 patent, and that therefore, said products necessarily appropriate whatever points of novelty are present in the '168 patent design. It is argued that, in as much as the "accused" products differ "somewhat" from the

claimed designs of the '362, '169 and '170 patents, certain elements of those patents do not constitute points of novelty after comparison with the specific prior art. However, the staff argued that there are at least certain other elements of the '362, '169 and '170 design patents that constitute points of novelty, and because those features are appropriated by the "accused products," complainant has satisfied the "point of novelty" prong for proving infringement for each of the four design patents in issue. (Memorandum at 14).

The administrative law judge finds, with respect to the "point of novelty test," that the accused products of Quan Da and SCIKO are exact copies of every feature in the design of the '168 patent. See Physical Exhs. 2-3 and 6, the '168 patent and Cornwell decl. at ¶ 23. Thus, said accused products necessarily appropriate whatever points of novelty are present in the '168 patented design. See Tape Dispensers at 5. The administrative law judge finds that there are differences between the accused products of Quan Da and SCIKO and the claimed designs of the '362, '169 and '170 patents and that therefore it is necessary to examine the closest prior art to determine what features in those design patents constitute points of novelty and whether those features are appropriated by the accused products.

Complainant's expert Cornwell, in his declaration identifies a "combination of elements in the drawings [of the four patents in issue] which is not found in prior compact multipurpose tool designs" of the references that were considered by the PTO during prosecution of the patents in issue. See Cornwell Decl. at ¶ 27. Those elements include, without limitation: (i) a pair of elongate channel shaped handles (ii) defined by a web and (iii) two upstanding side walls pivotally connected to (iv) a pair of elongate scissor blades; (v) pivot pins located at the inner and outer ends of each handle; (vi) a stop shoulder located at the tang of each scissor

blade and (vii) a corresponding catch located at the inner end of each handle; (viii) a pivotal connection located at the pivot point of the pair of elongate scissor blades; and (ix) rounded outer ends on each handle. See Cornwell decl. at ¶¶ 28-30.

The administrative law judge finds that certain elements set forth by Cornwell in his declaration at ¶¶ 28-30 constitute points of novelty. Thus the closest prior art to the designs of the four design patents at issue is an 1882 British patent for a "folding pocket scissors" issued to Alfred Julius Boulton. (Boulton patent, See Attachment B to Staff's memorandum). The Boulton patent was considered by the PTO early in the prosecution of the patent applications and prior to issuance of the four design patents in issue. See Complaint, Exh. 20 at p. 14. There are features of the patented designs identified in the Cornwell declaration that are dissimilar to the Boulton design and thus constitute "points of novelty" over that prior art reference. Those features are: (ii) a web which is identified in the Cornwell declaration as item 2 of the patented designs but which is substituted in Boulton by items *c c*, referred to as "springs"; (v) pivot pins located at the inner and outer ends of each handle, which are identified in the Cornwell declaration as items 5 of the patented designs but which are substituted in Boulton by items *s s* and *p p*¹, referred to as "pins", that do not have large knurled pin heads; (vi) a stop shoulder located at the tang of each scissor blade, which is identified in the Cornwell declaration as item 6 of the patented design but which is substituted in Boulton by item *e*, referred to as a "pin"; (vii) a corresponding catch located at the inner end of each handle, which is identified in the Cornwell declaration as item 7 of the patented designs but which is substituted in Boulton by items *c c*¹, referred to as "springs"; and (ix) rounded outer ends on each handle, which are identified in the Cornwell declaration as items 9 of the patented designs but which are

substituted in Boulton by unmarked squared outer ends. In addition, the administrative law judge finds the shape of the inner end of the handle in the patented designs, which is rounded on one side and squared on the other to be a novel feature because the counterpart in the Boulton patent is squared on both sides and generally different in appearance.

Thus, as seen supra, there are features in each of the patented designs that constitute points of novelty. The administrative law judge finds that the accused products of SCIKO and Quan Da appropriate all of the novel features of the patented designs that distinguish those designs from the prior art and therefore satisfy the "point of novelty" test. See Physical Exhs. 2-3 and 6, the '362, '169 and '170 patents and the Cornwell decl. at ¶¶ 28-30.

2. Respondents Kumasama and Jiangsu

There are no Physical Exhibits in the record corresponding to the accused devices of respondents Kumasama and Jiangsu because no Physical Exhibits for those respondents were submitted by complainants. Thus the administrative law judge has been unable to make any visual comparison involving actual accused products of respondents Kumasama and Jiangsu as he did with the accused products of SCIKO and Quan Da, supra. As indicated in section II C 1, supra, when the complainant and the staff referred to the "accused devices," they were referring to the device of Suncoast (Physical Exhibit 1), which was supplied by Grip-On¹³, and to the devices of SCIKO (Physical Exhibits 2 and 3) and Quan Da (Physical Exhibit 6). The staff, in its memorandum at 7, did acknowledge that there were no physical exhibits from Kumasama and Jiangsu.

¹³ As indicated supra, the investigation has been terminated with respect to respondents Suncoast and Grip-On.

Leatherman's counsel, in her declaration supporting Motion No. 416-6, did state:

3. Respondents SCIKO, Kumasama and Jiangsu all had booths at the 1998 National Hardware Show held in Chicago, Illinois between August 16-19, 1998.

4. Each one of those booths was displaying a product that adopted the design disclosed in the patents in issue and practiced by the micra®.

7. Orders allowing seizure of the infringing products were entered by the United States District Court in Chicago on August 17, 1998 at approximately 4:30 p.m. The following day, August 18, 1998, I accompanied the United States Marshals to the Hardware Show to execute the orders. During the seizure process, I interviewed individuals manning the booths and confirmed that the tools being offered by SCIKO and Kumasama were being manufactured in China.

8. After the seizure orders were executed a Leatherman representative and I surveyed the vendors participating in the Hardware Show and discovered yet another vendor that was displaying products that infringed the patents in issue. The vendor was respondent Jiangsu. Jiangsu was displaying two tools, one was slightly larger than the other.

9. Jiangsu has [sic] apparently set up its booth after Leatherman made its initial survey. The Hardware Show was set to conclude the following day, so there was no time to obtain an order from the court allowing seizure of the products being sold by Jiangsu.

10. I carefully inspected Jiangsu's products and determined that each one adopted the patented design.

See Davis decl. at ¶¶ 3-4, and 7-10 [Emphasis added]. Davis, in a supplemental declaration submitted with a supplement to the complaint, also stated:

13. I also personally interviewed representatives of Jiangsu Hongbao Group. I inspected two separate versions of a micra® knock-off tool being offered for sale at the Jiangsu booth. I compared the tools being offered by Jiangsu with the micra® tool. The products being offered by Jiangsu were nearly identical in appearance. The handles were shaped identically, they both had scissors as the main tool, and they both folded together in the same manner as the micra® tool. In my opinion, the

appearance of the tools offered by Jiangsu differed only in extremely insignificant minor details from the appearance of the micra®. Leatherman did not seek an order of seizure against Jiangsu because it was not discovered that Jiangsu was offering a knock-off until after the court had entered the seizure orders against SCIKO and Kamasuma [sic], and after those had been executed.

14. In sum, the appearance of both of the tools was virtually identical to that of the micra® tool. One of the tools was exactly the same size when I compared it to the micra®. The other tool was slightly larger. However, the larger tool had the same shaped handles, the same shaped scissors and appeared to be identical except for work markings in every other respect to the micra® tool. I asked the representatives at the Jiangsu booth where the tools were manufactured. The representatives told me that the tools were manufactured in China.

15. I personally interviewed the representative of Kumasama Products Company, Ltd. with respect to where the infringing products displayed at that booth were being manufactured. I was told that those tools were manufactured in China. That product is depicted in Exhibit 3 [an advertising brochure] to the Complaint. The Kumasama promotional materials indicated that there was a United States representative in Aurora, Oregon for Kumasama Products. I asked if the micra® knock-off was being manufactured in Aurora, Oregon. I was told that all the products that were displayed in any of the promotional materials or at the booth were manufactured in China and that they were not being produced in Aurora, Oregon. On September 10, 1998 an investigator, Charles Dean, visited W.W. Grigg Company in Aurora, Oregon to determine whether the micra® knock-off was being manufactured in the United States. Mr. Dean interviewed Mr. Grigg and was told that the tools were manufactured in China. [Emphasis added]

In light of the Davis declarations and the fact that respondents Kumasama and Jiangsu have been found in default pursuant to Commission rule 210.16, the administrative law judge finds that the accused devices of Kumasama and Jiangsu infringe each of the '362, '168, '169 and '170 patents in issue.

3. Conclusion

Based on the foregoing, the administrative law judge finds that there are no genuine issues of fact with respect to infringement of the four design patents in issue by each of

respondents SCIKO, Quan Da, Kumasama and Jiangsu and that summary determination is warranted in finding that the accused products of SCIKO, Quan Da Kumasama and Jiangsu infringe each of the '362, '168, '169 and '170 patents in issue.

D. Domestic Industry

Section 337(a)(3) sets forth the following criteria for determining whether a domestic industry exists in investigations based on allegations of patent infringement:

an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent...concerned-

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

(C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337 (a)(3). Thus a complainant must establish an economic prong of the domestic industry test, and in a patent based investigation must demonstrate a technical prong, *i.e.*, that it is exploiting or practicing the patents in issue. See *Microsphere Adhesives*, supra, Commission opinion at 8 and *Encapsulated Circuits*, supra, Commission opinion at 16.

On January 19, 1999, complainant moved for summary determination that Leatherman has satisfied the economic prong of the domestic industry requirement of Section 337(a)(3)(A)-(C) with respect to the '362, '168, '169 and '170 patents. (Motion Docket No. 416-3). Order No. 7, which issued on February 2, 1999, was an Initial Determination which granted Motion No. 416-3 for summary determination with respect to the economic prong of the domestic industry requirement. On March 5, the Commission determined not to review Order No. 7. In view of Order No. 7, the administrative law judge need only determine whether the

complainant has satisfied the technical prong of the domestic industry requirement.

Each of the design patents in issue claims a pair of elongate channel shaped handles defined by a web and two upstanding side walls, pivotally connected to a pair of elongate scissor blades; pivot pins located at the inner and outer ends of each handle; a stop shoulder located at the tang of each scissor blade and a corresponding catch located at the inner end of each handle; pivotal connection located at the pivot point of the pair of elongate scissor blades; and rounded outer ends on each handle. See the '168, '169, '170 and '362 patents and the Cornwell decl. at ¶ 31. A terminal disclaimer was filed for the '168, '169 and '170 patents because of the close similarity of the claimed designs to the '362 patent. As shown by Diagrams 1 and 2 reproduced infra, complainant's micra[®] tool embodies the designs of the patents in issue because the micra[®] has a pair of elongate channel shaped handles (1) defined by a web (2) and two upstanding side walls (3), pivotally connected to a pair of elongate scissor blades (4); pivot pins (5) located at the inner and outer ends of each handle; a stop shoulder (6) located at the tang of each scissor blade and a corresponding catch (7) located at the inner end of each handle; pivotal connection (8) located at the pivot point of the pair of elongate scissor blades (4); and rounded outer ends (9) on each handle.

Diagram 1

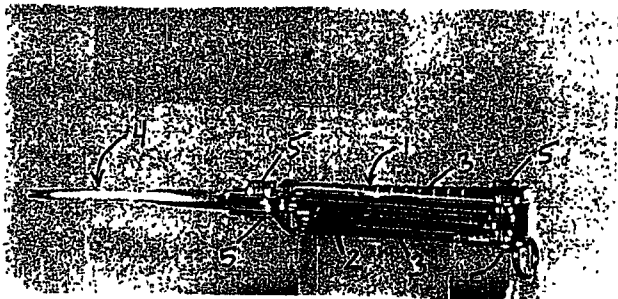
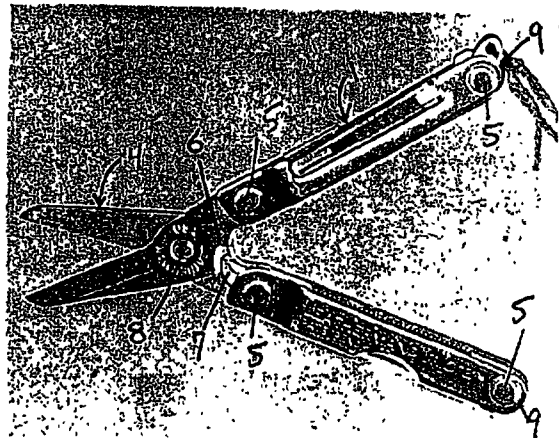


Diagram 2



Based on the foregoing, the administrative law judge finds that complainant's micra[®] tool practices the claimed designs of the four design patents in issue and that summary determination is warranted in finding that complainant satisfies the technical prong of the domestic industry requirement.

E. Remedy and Bonding

Under Commission rules 210.36(a) and 210.42(a)(1)(ii), the administrative law judge is to consider issues of remedy and bonding and issue a recommended determination thereon. Complainant has requested in its Motion No. 416-6 for summary determination that a general exclusion order be issued. Complainant, in support, argued that there is a widespread pattern of unauthorized use of the patented invention's; that the complainant has pursued foreign enforcement activities in Germany and is in the process of sending cease and desist letters to entities in Switzerland and Canada; and that there is widespread use in foreign countries of the patented design, such that complainant has confirmed the sale of accused products in eight foreign countries. Complainant also argued that a bond of 122.4 percent of the entered value of the infringing products,¹⁴ during presidential review, is sufficient to equalize the price differential with respect to the average micra[®] price.

The staff argued that complainant has submitted sufficient evidence to show that there is a widespread pattern of unauthorized use of the patented invention; that business conditions exist from which one might reasonably infer that foreign manufacturers other than the

¹⁴ See fn. 3, *supra*.

respondents to the investigation may attempt to enter the U.S. market for compact multipurpose tools with products that infringe the patents in issue; and that a bond of 122.4 percent is appropriate.

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). These 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 (Apr. 5, 1996). (Magnets) See also Certain Agricultural Tractors, Inv. No.

337-TA-380, 33 U.S.P.Q.2d 1385, Comm'n Op. at 34-41 (1997) (general exclusion order granted).

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 in Spray Pumps 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.

The administrative law judge finds that there is a widespread pattern of unauthorized use of the patented invention. Each of respondents SCIKO, Kumasama, Quan Da and Jiangsu have imported, sold for importation, or sold after importation articles that infringe the patents in issue. Moreover, there is evidence that several non-respondents are also selling infringing products for importation into the United States, or have the capability to do so. See Davis decl. at ¶ 17, Motion Exhs. 19, 31, 36, 37 and 38. In addition complainant has pursued retailers in Germany, Switzerland and Canada that have been selling imitations of its micra[®] tool. See Davis decl. at ¶ 18, Motion Exh. No. 20. Also, there is evidence that products that imitate the patented invention are being sold in several foreign countries. See Motion Exhs. 21 and 23-28.

The administrative law judge also finds that business conditions exist in which one might reasonably infer that foreign manufacturers other than the respondents in the

investigation may attempt to enter the U.S. market for compact multipurpose tools. Thus, the administrative law judge finds that there is an established market in the United States for the patented invention, see confidential Exh. to complainant's Motion No. 416-3 filed January 19, 1999 for summary determination regarding the domestic industry, attached to the Bjorklund declaration; that complainant's products are sold in over 10,000 retail outlets in the United States, and virtually all of these establishments sell the patented invention and that the patented invention is sold in over 100 mail order catalogs, see Foley decl. at ¶¶ 7-8; and that most of those catalogs carry multipurpose tools made by other manufacturers and would be available to any foreign manufacturer as a distribution network for an infringing product, see Foley decl. at ¶ 8. The administrative law judge also finds that there are numerous foreign manufacturers whose facilities could easily and cheaply be retooled to produce infringing products; that complainant began manufacturing and selling the Pocket Survival Tool (PST) in 1985 and that within two years foreign knock-offs of the PST entered the U.S. market and that despite enforcement efforts more than a million imitation PSTs made by foreign manufacturers enter the U.S. market every year, see complaint at ¶¶ 38-40; that the PST and the micra[®] are made using the same manufacturing techniques and the equipment needed to produce the two products is the same, see Rivera decl. at ¶¶ 3-4 and 8; that, however, it is easier to manufacture an imitation micra[®] because there is no casting needed, see Rivera decl. at ¶¶ 4, 7; that a factory that produces PST knock-offs could easily be converted to produce micra[®] knock-offs, see Rivera decl. at ¶ 8; that the micra[®] requires fewer primary manufacturing processes and those that it does require would already be in place in a facility manufacturing imitation PSTs, see Rivera decl. at ¶8; and that there are 27 foreign manufacturers that

presently produce a multipurpose tool that imitates a PST, see Exh. 29 to the complaint.

Thus, the administrative law judge finds that complainant has satisfied the requirements for issuance of a general exclusion order.

The administrative law judge further finds that entry of permanent relief in the form of an exclusion order does not raise any public interest concerns under 19 U.S.C. § 1337(d).

There are a number of domestic manufacturers that are producing tools that directly compete with the micra[®], without infringing the design patents, see Davis decl. at ¶ 21 and Exh. 39.

Moreover the multipurpose tool industry is thriving and highly competitive with numerous designs that do not infringe the patents in issue, see Exh. 39. The presence of many U.S. manufacturers of multipurpose tools assures not only continued competition in the marketplace but also an adequate available supply of multipurpose tools to U.S. consumers, irrespective of the issuance of any general exclusion order.

With respect to the bond during the presidential review period, both complainant and the staff argued that a bond of 122.4% is appropriate based on a comparison of complainant's wholesale price of the micra[®] and the sales prices of the Grip-On tool and the "Angler's Choice" tool sold by Suncoast. However, as stated supra, both Grip-On and Suncoast have been terminated from this investigation. Moreover, the administrative law judge can find no evidence in the record pertaining to the sales prices of the accused products of SCIKO, Quan Da, Kumasama and Jiangsu. Absent any sales price information for the accused products of SCIKO, Kumasama, Quan Da and Jiangsu, the administrative law judge cannot calculate the level of bond based on price differentials. In Magnets the Commission held that "[where] it is impossible...to calculate what level of bond based on price differentials will protect a

complainant from any injury, it is appropriate to issue a bond of 100 percent of entered value...of the goods in question." Magnets, Comm'n Op. at 15. Hence in this investigation a bond of 100 percent of entered value of the goods in question is appropriate.

Based on the foregoing the administrative law judge recommends permanent relief through the entry of a general exclusion order against entry for consumption in the United States of compact multipurpose tools that infringe the four design patents in issue. The administrative law judge also recommends a bond amount of 100 percent of the entered value of the accused products of SCIKO, Quan Da, Kumasama and Jiangsu in order to equalize the price differential with respect to the average micra® price.

III. CONCLUSIONS OF LAW

1. Respondents SCIKO, Kumasama, Jiangsu and Quan Da sell for importation, import and/or sell after importation the accused products.
2. Each of respondents SCIKO, Quan Da, Kumasama and Jiangsu has infringed each of the design patents in issue.
3. It has not been established that each of the design patents in issue is not valid and not enforceable.
4. Complainant has established a domestic industry relating to its micra® tool.
5. There is a violation of section 337 by each of remaining respondents SCIKO, Kumasama, Quan Da and Jiangsu.
6. Motion No. 416-6 is granted in that this investigation is terminated in toto.
7. Based on the record, the administrative law judge recommends entry of a general exclusion order against entry for consumption in the United States of compact multipurpose tools that

infringe the four design patents in issue and also recommends a bond amount of 100 percent of the entered value of the accused products of SCIKO, Quan Da, Kumasama and Jiangsu during Presidential review.

IV. ORDER

Based on the foregoing 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 compact multipurpose tools. It is also the administrative law judge's recommendation that a general exclusion order should issue and that a bond of 100% of entered value of the accused products of SCIKO, Quan Da, Kumasama and Jiangsu during Presidential review should be imposed.

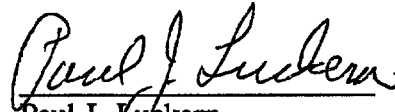
The administrative law judge hereby CERTIFIES to the Commission his final initial and recommended determinations. The pleadings of the parties filed with the Secretary, including Motion No. 416-6, are not certified since they are already in the Commission's possession in accordance with Commission rules.

Further it is ORDERED that:

1. In accordance with Commission rule 210.39, any 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. The final initial determination portion of the "Initial and Recommended Determination," issued pursuant to Commission rule 210.42(c) and 210.42(h)(3), shall become the determination of the Commission within thirty (30) days after the service thereof, unless

the Commission, within thirty (30) 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 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: May 27, 1999



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United States Patent and Trademark Office**

April 29, 1998

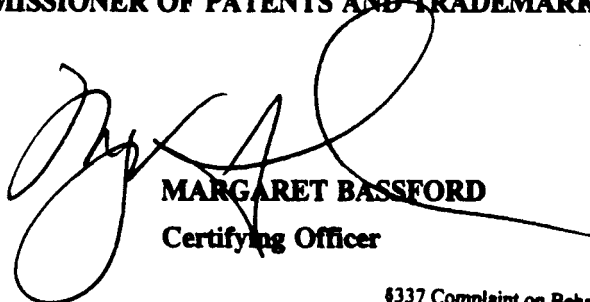
**THIS IS TO CERTIFY THAT ANNEXED IS A TRUE COPY FROM THE RECORDS
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U.S. PATENT: *D 385,168*

ISSUE DATE: *October 21, 1997*



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MARGARET BASSFORD
Certifying Officer

§337 Complaint on Behalf of
The Leatherman Tool Group
Exhibit 11, Page 1 of 5

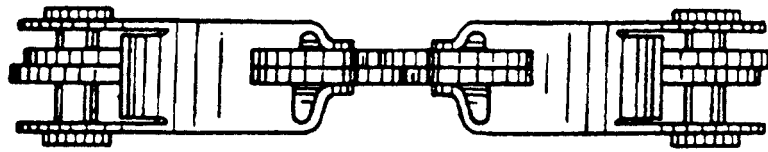


FIG. 3

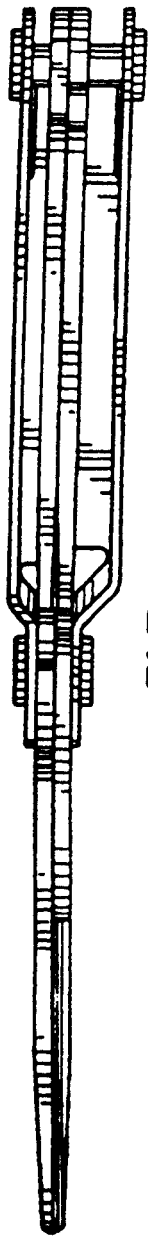


FIG. 4

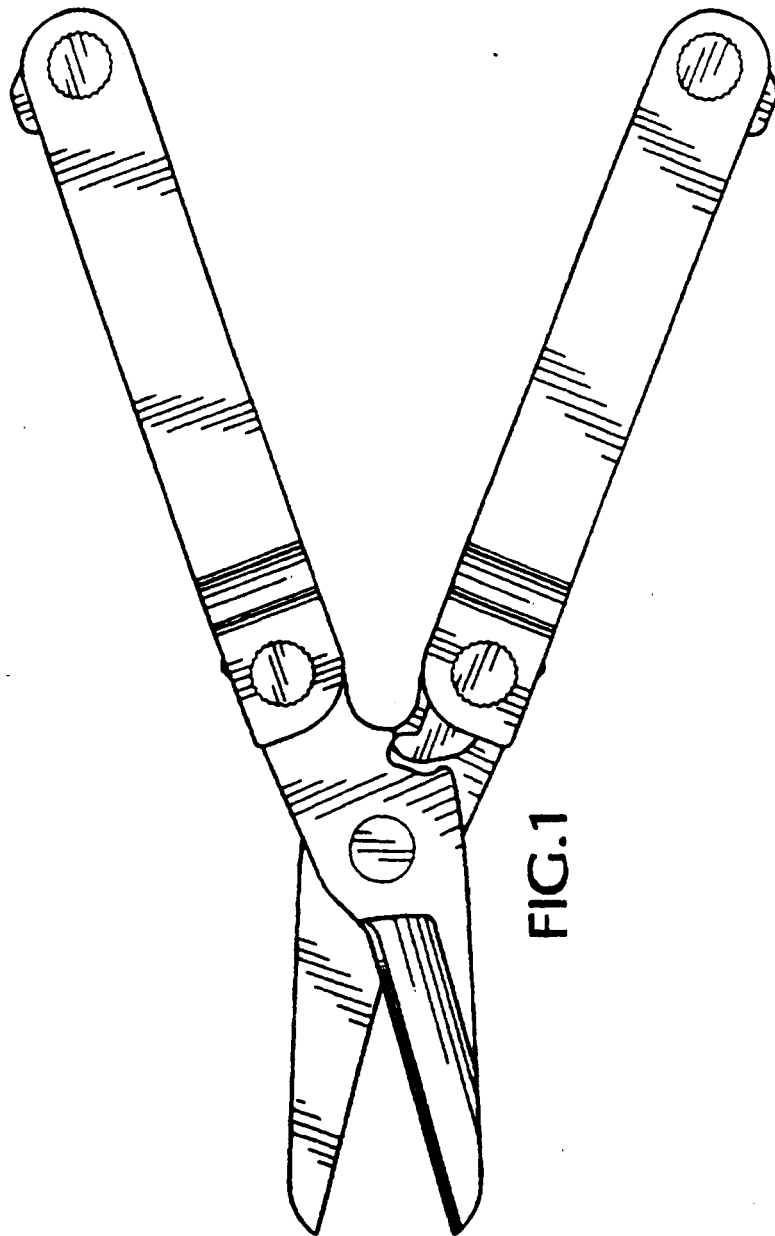


FIG. 1

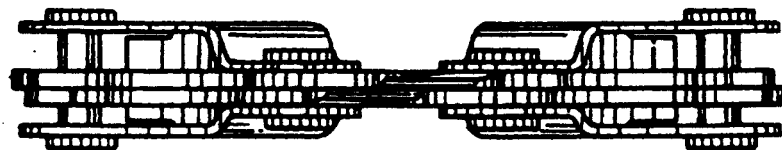


FIG. 2



FIG. 5

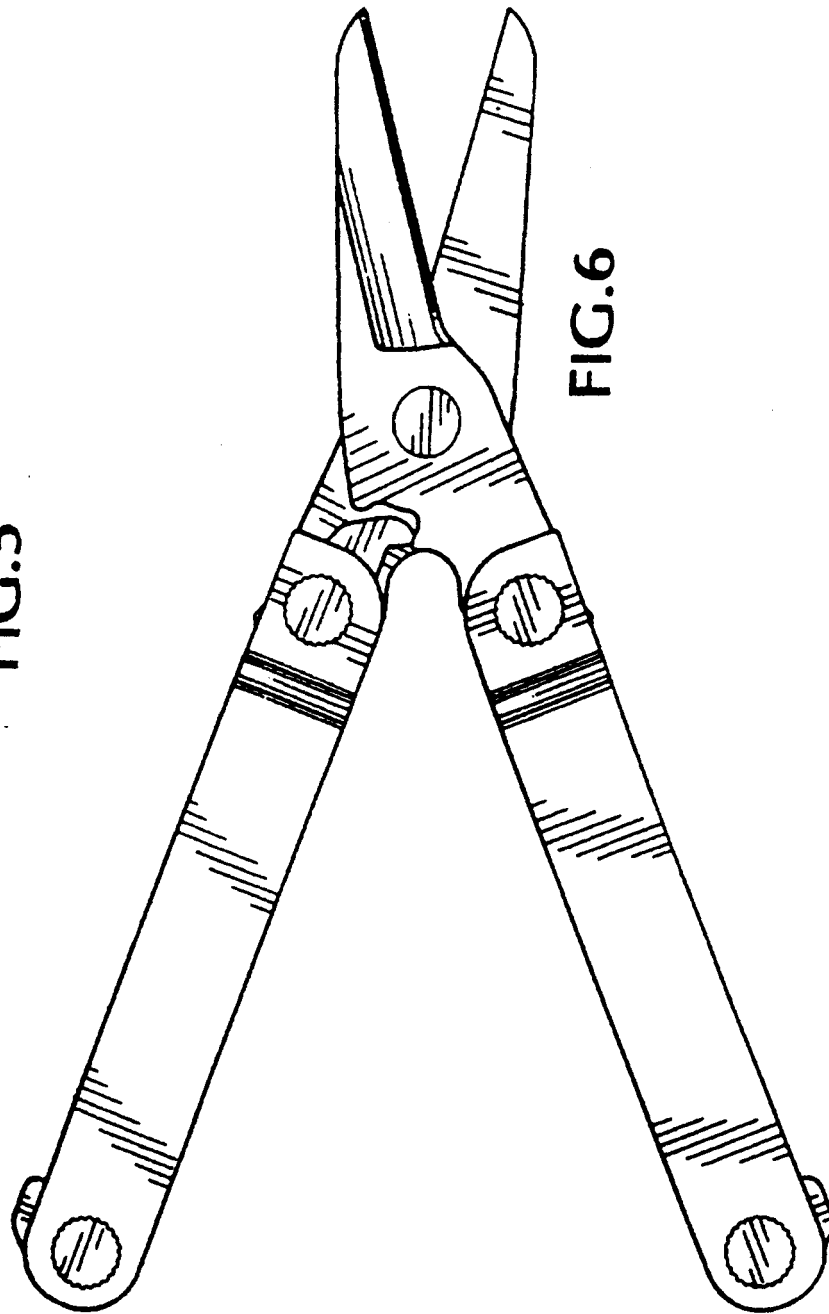


FIG. 6

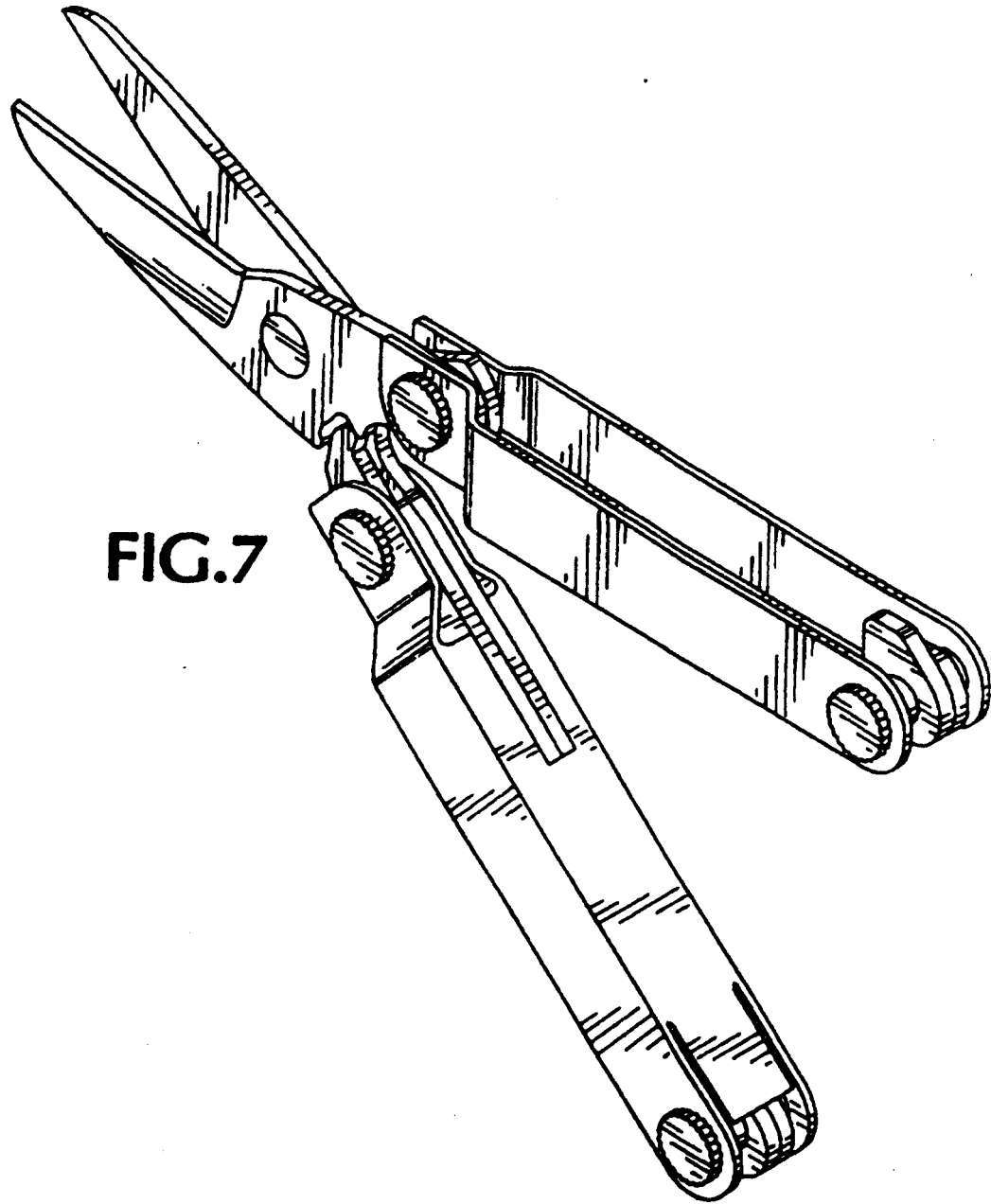


FIG. 7



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United States Patent and Trademark Office**

April 29, 1998

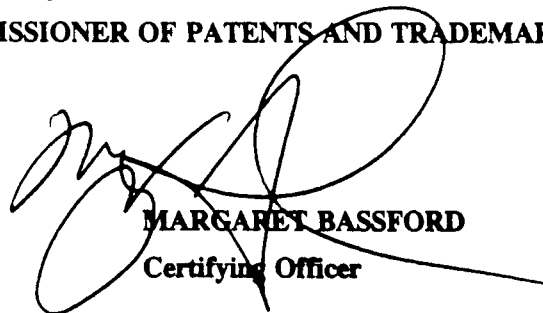
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OF THIS OFFICE OF:**

U.S. PATENT: *D 385,169*

ISSUE DATE: *October 21, 1997*



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COMMISSIONER OF PATENTS AND TRADEMARKS**


**MARGARET BASSFORD
Certifying Officer**

§337 Complaint on Behalf of
The Leatherman Tool Group
Exhibit 12, Page 1 of 5

United States Patent [19]

[11] Patent Number: **Des. 385,169**

Rivera

[45] Date of Patent: *****Oct. 21, 1997**

- [54] **FOLDING SCISSORS**
- [75] Inventor: **Benjamin C. Rivera**, West Linn, Oreg.
- [73] Assignee: **Leatherman Tool Group, Inc.**,
Portland, Oreg.
- [*] Notice: The portion of the term of this patent
subsequent to Jul. 1, 2011, has been dis-
claimed.
- [**] Term: **14 Years**

5,062,173	11/1991	Collins et al.	7/128
5,142,721	9/1992	Sessions et al.	7/128
5,212,844	5/1993	Sessions et al.	7/128
5,267,366	12/1993	Fruzer	7/128

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409943	5/1910	France
29556	4/1884	Germany
145784	7/1902	Germany
232229	5/1974	Germany
521555	3/1955	Italy

OTHER PUBLICATIONS

Slip 'n' Snip Collapsible Scissors, at least as early as Oct. 1994.
Leatherman Tool Group, Inc., "The Original Leatherman PST II" - Jul. 1995.
Folding Scissors, at least as early as Oct. 1994.

Primary Examiner—Philip S. Hyder
Attorney, Agent, or Firm—Chernoff, Vilhauer, McClung & Stenzel

- [21] Appl. No.: **47,300**
- [22] Filed: **Nov. 29, 1995**
- [51] LOC (6) CL _____ **08-05**
- [52] U.S. Cl. _____ **D8/52; D3/18**
- [58] Field of Search _____ **D8/57, 105, 51,**
D8/52, 98, 5; D3/18; 7/128, 129; 30/254,
255, 260, 266, 268

[56] **References Cited**

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310,439	1/1885	Kamak	
464,405	12/1891	Widmann	
515,828	3/1894	Hayden	
696,995	4/1902	Moser	
1,524,694	2/1925	Maio	30/255
1,828,121	10/1931	Adams et al.	
2,575,652	11/1951	Bovee	81/43
2,952,912	9/1960	Crawford	30/255
3,766,648	10/1973	Chandelak, Jr.	30/255
3,781,992	1/1974	Barr	30/255
4,238,862	12/1980	Leatherman	7/128
4,744,272	5/1988	Leatherman	7/129

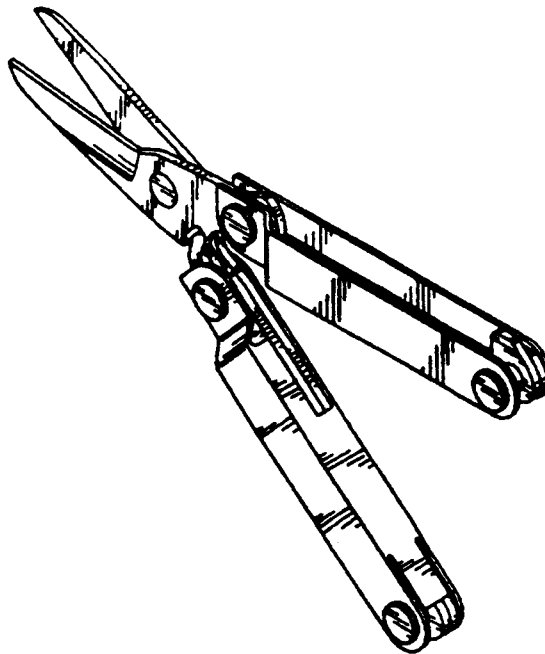
[57] **CLAIM**

The ornamental design for a folding scissors, as shown and described.

DESCRIPTION

FIG. 1 is a left side elevational view of a folding scissors showing my new design;
FIG. 2 is a front end elevational view thereof;
FIG. 3 is a rear end elevational view thereof;
FIG. 4 is a top plan view thereof;
FIG. 5 is a bottom plan view thereof;
FIG. 6 is a right side elevational view thereof; and
FIG. 7 is a perspective view thereof.

1 Claim, 3 Drawing Sheets



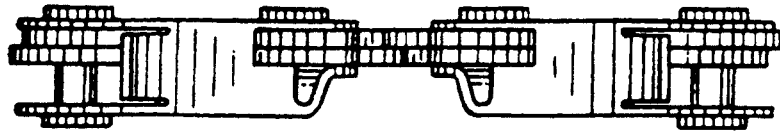


FIG. 3

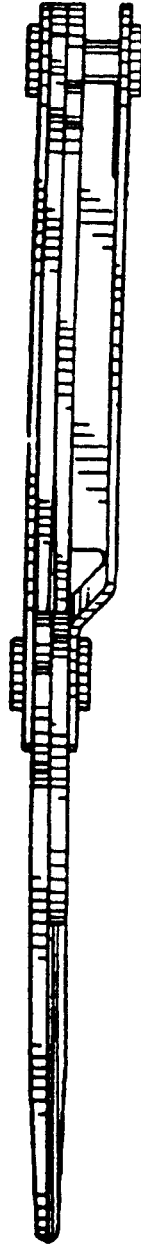


FIG. 4

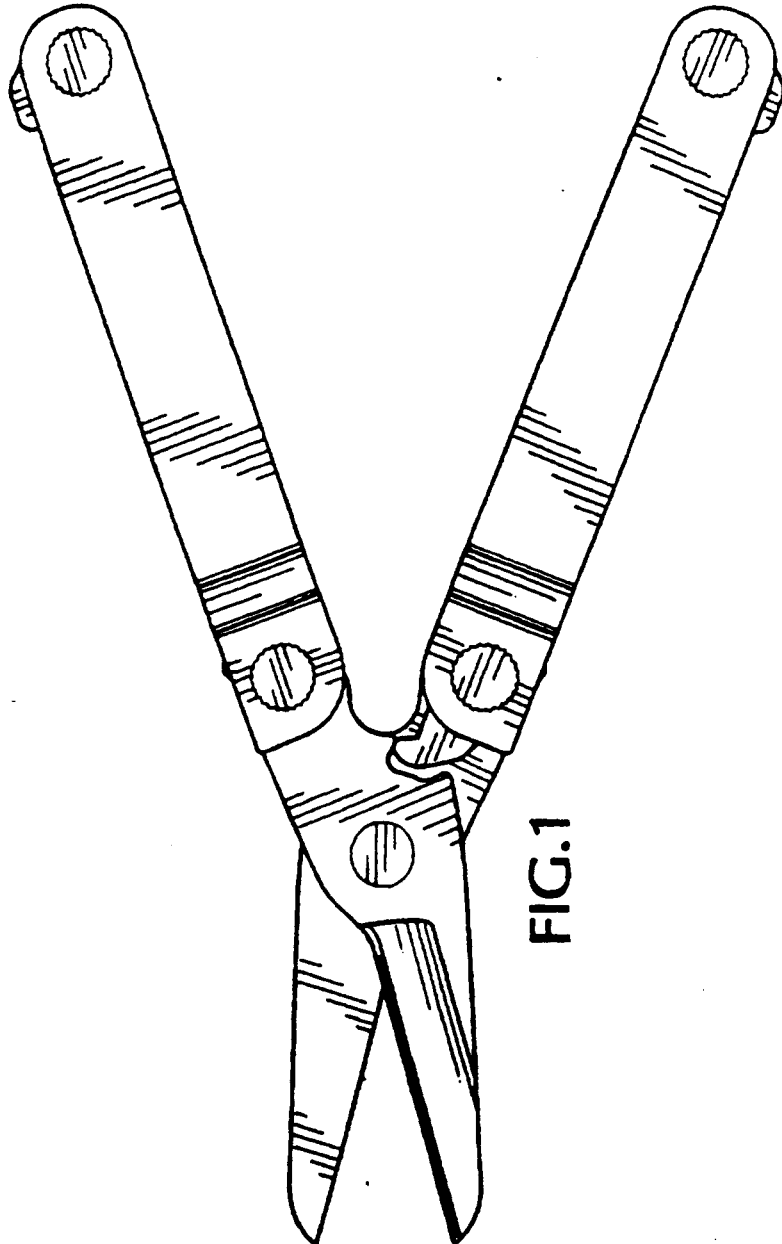


FIG. 1



FIG. 2

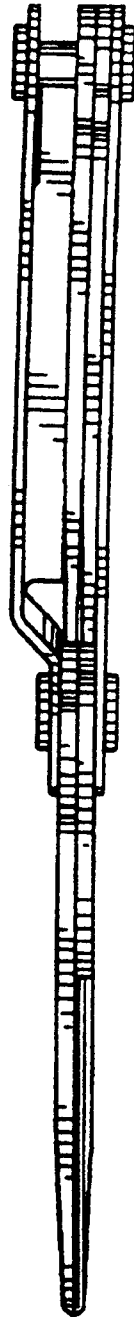


FIG. 5

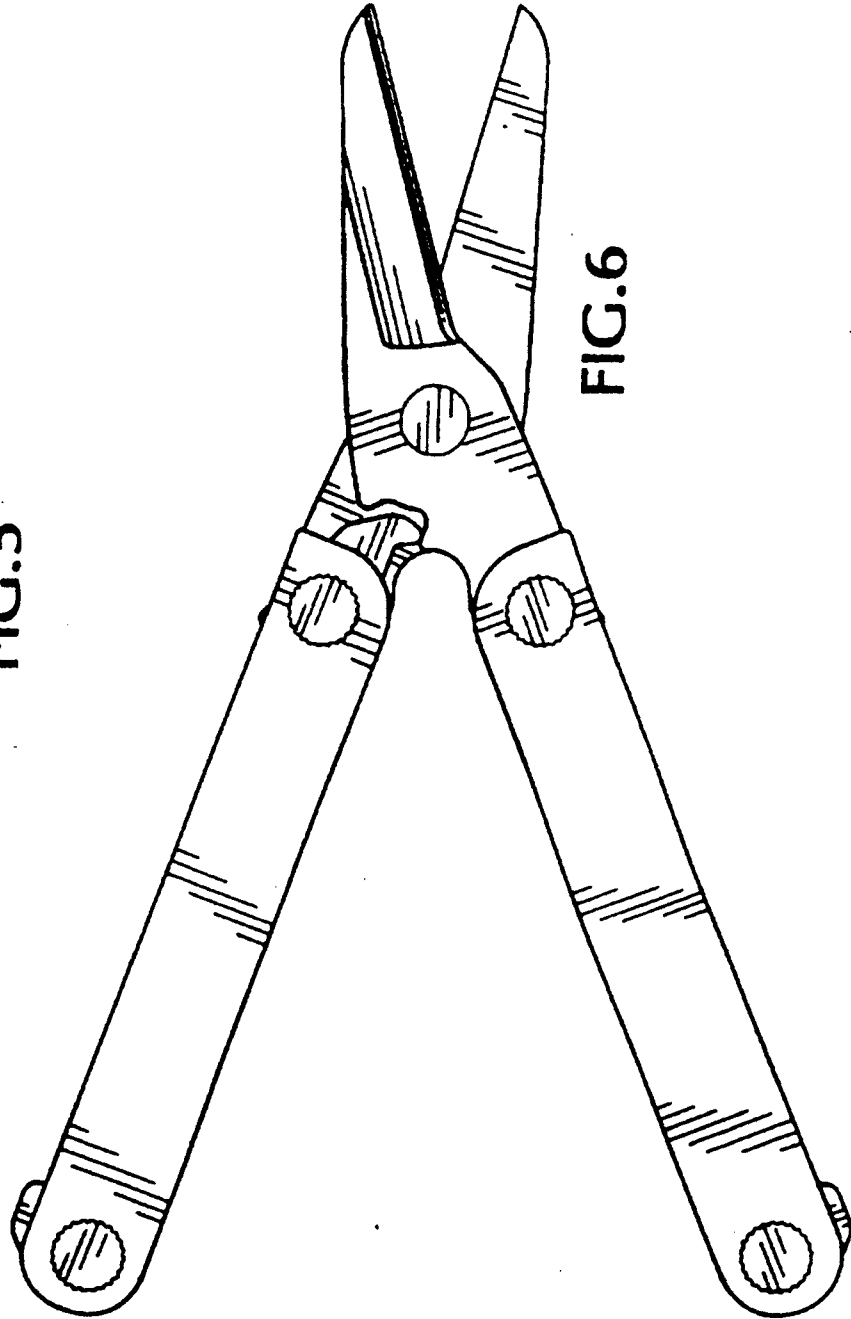


FIG. 6

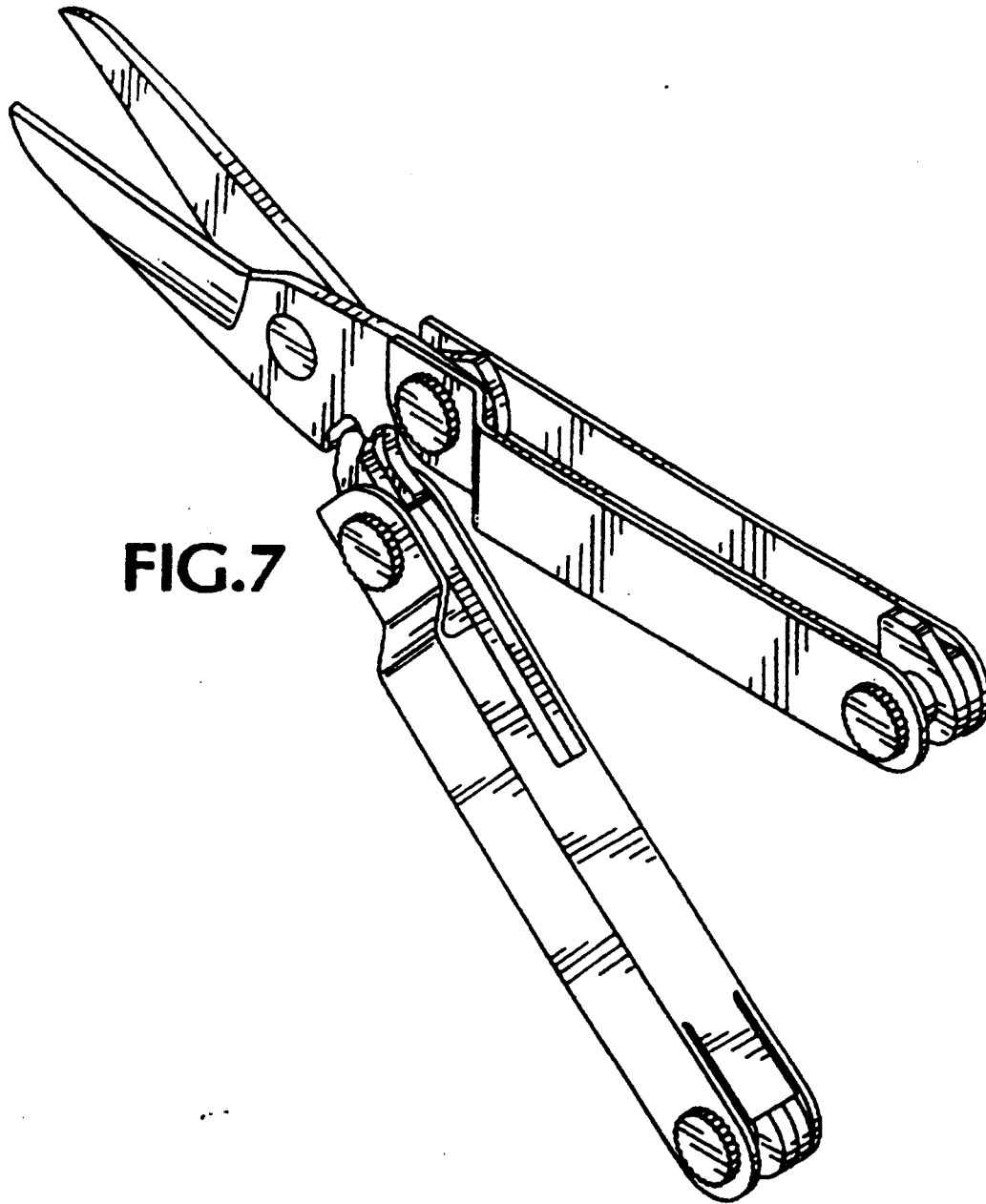


FIG.7



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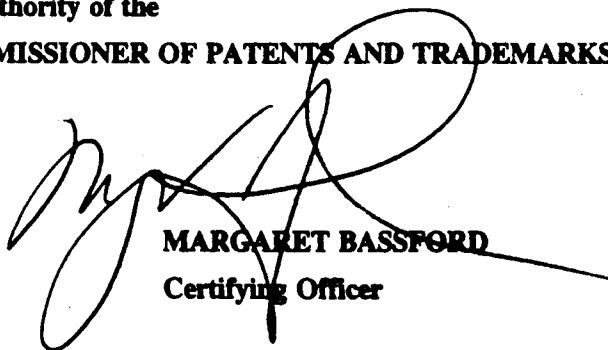
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U.S. PATENT: *D 385,170*

ISSUE DATE: *October 21, 1997*



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MARGARET BASSFORD
Certifying Officer

**§337 Complaint on Behalf of
The Leatherman Tool Group
Exhibit 13, Page 1 of 4**

[54] FOLDING SCISSORS

[75] Inventor: Benjamin C. Rivera, West Linn, Oreg.

[73] Assignee: Leatherman Tool Group, Inc., Portland, Oreg.

[*] Notice: The portion of the term of this patent subsequent to Jul. 1, 2011, has been disclaimed.

[**] Term: 14 Years

[21] Appl. No.: 47,307

[22] Filed: Nov. 29, 1995

[51] LOC (6) Cl. 08-05

[52] U.S. Cl. D8/52; D3/18

[58] Field of Search D3/18; D8/57; D8/105, 51, 52, 98, 5; 7/128, 129; 30/255, 254, 260, 266, 268

[56] References Cited

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D. 303,872	10/1989	Tanemura	D3/18
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464,405	12/1891	Widmann	
515,828	3/1894	Hayden	
696,995	4/1902	Moser	
1,524,694	2/1925	Mais	30/255
1,828,121	10/1931	Adam et al.	
2,575,652	11/1951	Bovee	81/43
2,932,912	9/1960	Crawford	30/255
3,766,648	10/1973	Chandelak, Jr.	30/255
3,781,992	1/1974	Barr	30/255
4,238,862	12/1980	Leatherman	7/128
4,744,272	5/1988	Leatherman	7/129

5,062,173	11/1991	Collins et al.	7/128
5,142,721	9/1992	Sessions et al.	7/128
5,212,844	5/1993	Sessions et al.	7/128
5,267,366	12/1993	Frazier	7/128

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409943	5/1910	France
2322229	5/1974	German Dem. Rep.
29556	4/1884	Germany
145784	7/1902	Germany
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Slip 'n' Snip Collapsible Scissors, at least as early as Oct. 1994.

Leatherman Tool Group, Inc., "The Original Leatherman PST II" - Jul. 1995.

Folding Scissors, at least as early as Oct. 1994.

Primary Examiner—Philip S. Hyder

Attorney, Agent, or Firm—Chernoff, Vilhauer, McClung & Stenzel

[57] CLAIM

The ornamental design for a folding scissors, as shown and described.

DESCRIPTION

FIG. 1 is a side elevational view of a folding scissors showing my new design, the other side being identical to that shown;

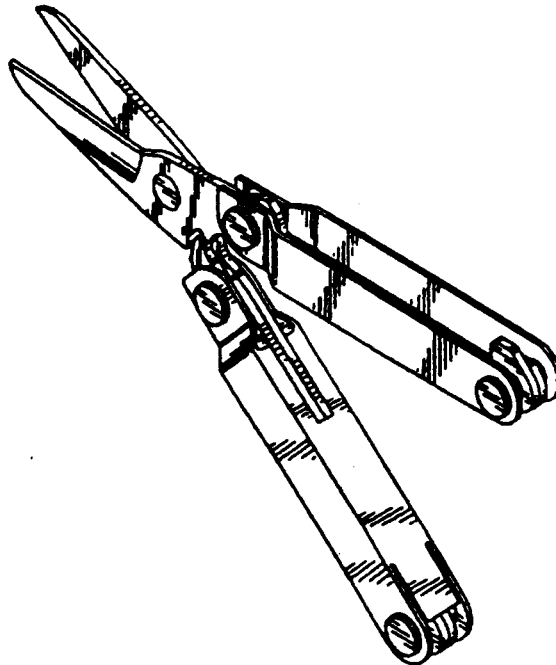
FIG. 2 is a front end elevational view thereof;

FIG. 3 is a rear end elevational view thereof;

FIG. 4 is a top plan view thereof, the bottom plan view thereof being identical thereto; and,

FIG. 5 is a perspective view thereof.

1 Claim, 2 Drawing Sheets



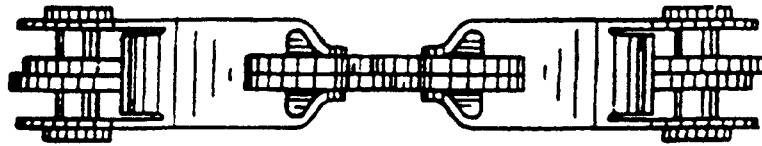


FIG. 3



FIG. 4

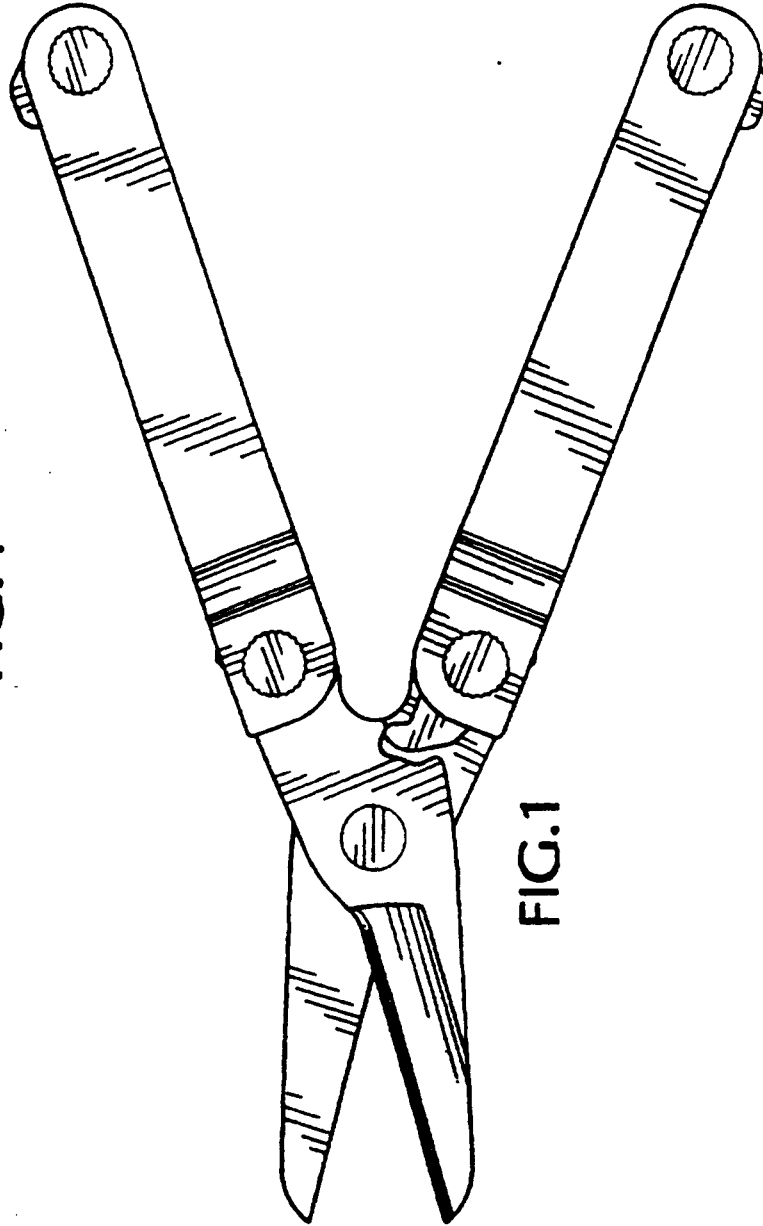


FIG. 1

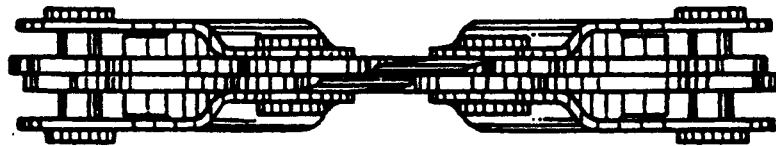


FIG. 2

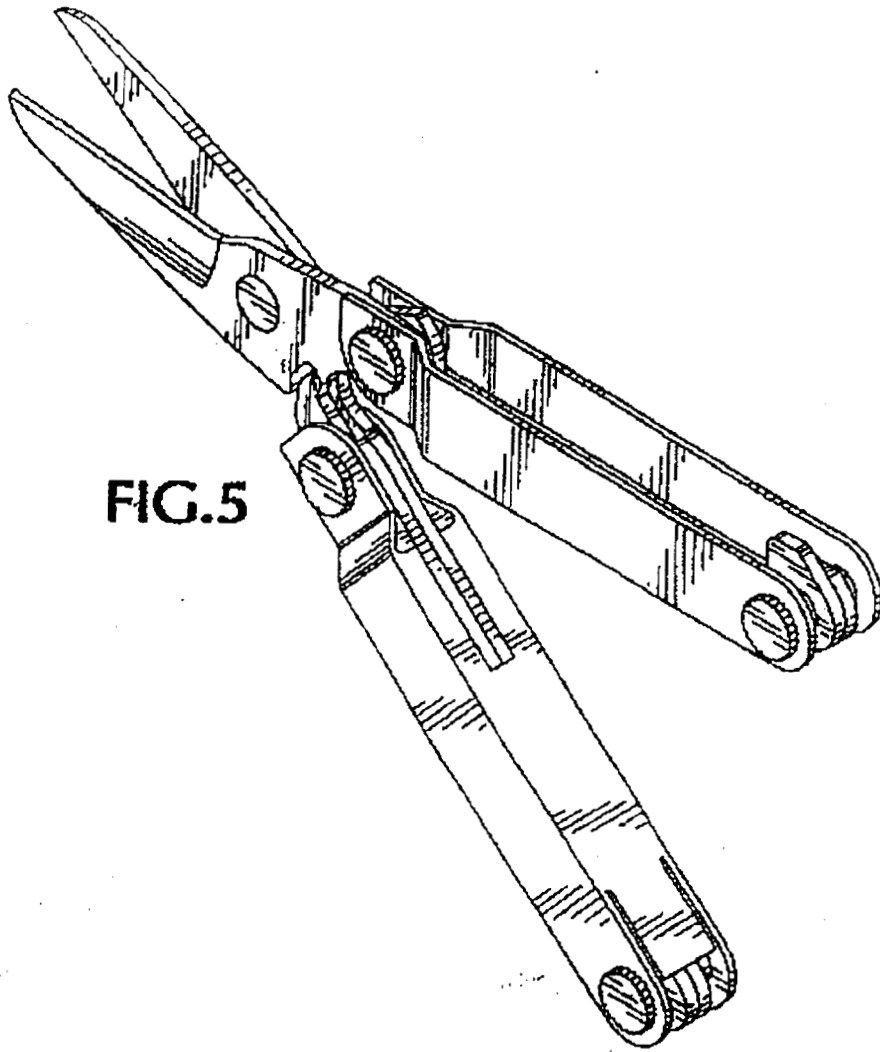


FIG.5



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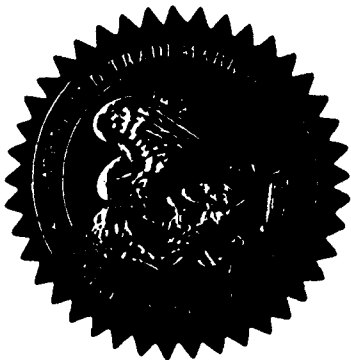
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April 29, 1998

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U.S. PATENT: D 380,362

ISSUE DATE: July 01, 1997



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H. L. Jackson
H. L. JACKSON
Certifying Officer

**§337 Complaint on Behalf of
The Leatherman Tool Group
Exhibit 14, Page 1 of 3**

- [54] SCISSORS
- [75] Inventor: Benjamin C. Rivera, West Linn, Oreg.
- [73] Assignee: Leatherman Tool Group, Inc.,
Portland, Oreg.
- [**] Term: 14 Years
- [21] Appl. No.: 47,220
- [22] Filed: Nov. 29, 1995
- [51] LOC (6) CL _____ 08-05
- [52] U.S. Cl. _____ D8/52; D3/18
- [58] Field of Search _____ D3/18; D8/57.
D8/105, 51, 52, 98, 5; 30/254, 255, 260,
266, 268; 7/128, 129

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5,142,721	9/1992	Sessions et al.	7/128
5,212,844	5/1993	Sessions et al.	7/128
5,267,366	12/1993	Frazer	7/128

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145784	7/1902	Germany	
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521555	3/1955	Italy	
5375	11/1882	United Kingdom	30/255

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Folding Scissors.

Primary Examiner—Philip S. Hyder
Attorney, Agent, or Firm—Chernoff, Vilhauer, McClung &
Stenzel

[56] References Cited

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464,405	12/1891	Widmann	
515,828	3/1894	Hayden	
696,995	4/1902	Moser	
1,524,694	2/1925	Maio	30/255
1,828,121	10/1931	Adam et al.	
2,575,652	11/1951	Bovee	81/43
2,952,912	9/1960	Crawford	30/255
3,766,648	10/1973	Chundelak, Jr.	30/255
3,781,992	1/1974	Barr	30/255
4,238,862	12/1980	Leatherman	7/128
4,744,272	5/1988	Leatherman	7/129

[57] CLAIM

The ornamental design for a scissors, as shown and described.

DESCRIPTION

FIG. 1 is a side elevational view of a scissors showing my new design, the other side being identical to that shown; FIG. 2 is a front end elevational view thereof; FIG. 3 is a rear end elevational view thereof; and, FIG. 4 is a top plan view thereof, the bottom plan view thereof being identical thereto.

1 Claim, 1 Drawing Sheet

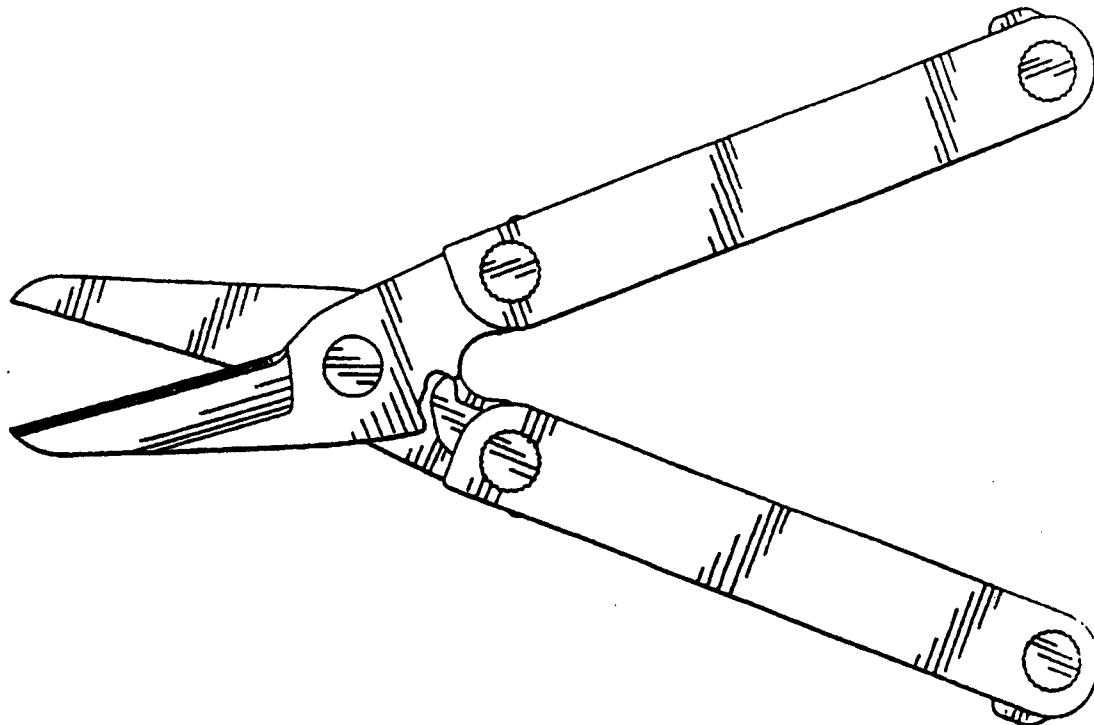




FIG. 3



FIG. 4

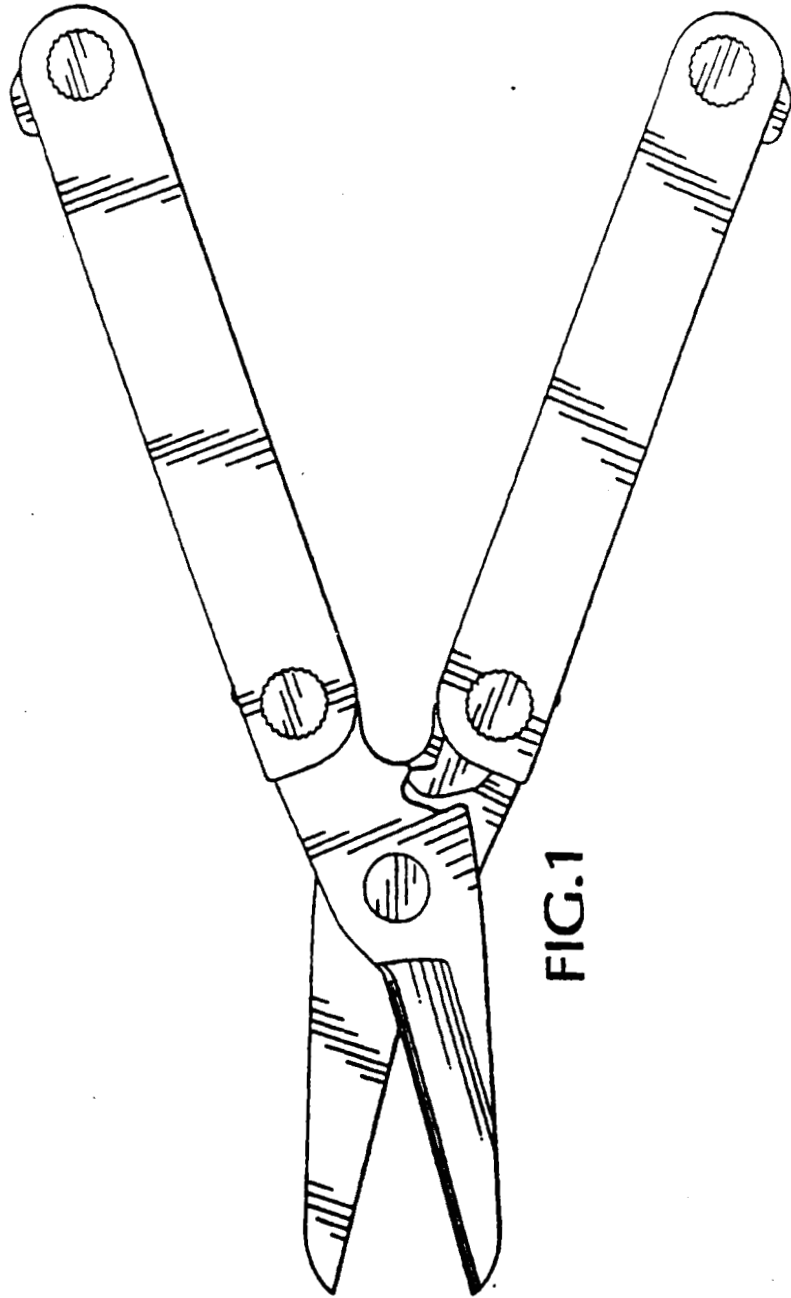


FIG. 1



FIG. 2