

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Dioptics Medical Products, Inc., a  
California corporation

SUMMONS IN A CIVIL CASE

V.

CASE NUMBER:

The Fashion Group, LLC, a New Jersey limited  
liability corporation

**C04 04426 EDL**

**E-FILING**

**ADR**

TO:

The Fashion Group, LLC

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY

David S. Bloch  
McDermott, Will & Emery  
3150 Porter Drive  
Palo Alto, CA 94304  
Telephone: 650.813.5118  
Facsimile: 650.813.5100

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

**RICHARD W. WIEKING**

**OCT 20 2004**

CLERK

DATE

**RITA BETANCOURT**

(BY) DEPUTY CLERK

AO 440 (Rev. 10/93) Summons in a Civil Action

**RETURN OF SERVICE**

Service of the Summons and Complaint was made by me<sup>1</sup> DATE

Name of SERVER (PRINT) TITLE

*Check one box below to indicate appropriate method of service*

Served Personally upon the Defendant. Place where served: \_\_\_\_\_

Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.  
Name of person with whom the summons and complaint were left

Returned unexecuted:

Other (specify):

**STATEMENT OF SERVICE FEES**

TRAVEL	SERVICES	TOTAL
0.00	0.00	0.00

**DECLARATION OF SERVER**

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on \_\_\_\_\_  
*Date* \_\_\_\_\_  
*Signature of Server*

\_\_\_\_\_  
*Address of Server*

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

COPY

CIVIL COVER SHEET

JS 44 (Rev. 3/99) The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings of other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS Dioptics Medical Products, Inc., a California corporation, (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES) (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) David S. Bloch (Bar No. 184530) McDermott Will & Emery LLP 3150 Porter Drive Palo Alto, CA 94304-1212 Telephone: 650.813-5118

DEFENDANTS The Fashion Group, LLC, a New Jersey limited liability corporation, COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN 'X' IN ONE BOX ONLY) 1 U.S. Government Plaintiff 2 U.S. Government Defendant 3 Federal Question (U.S. Government Not a Party) 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN 'X' IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) PTF DEF Citizen of This State 1 1 Citizen of Another State 2 2 Citizen or Subject of a Foreign Country 3 3 Incorporated or Principal Place of Business in This State 4 4 Incorporated and Principal Place of Business in Another State 5 5 Foreign Nation 6 6

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATES. Includes sub-sections like PERSONAL INJURY, PERSONAL PROPERTY, LABOR, and FEDERAL TAX SUITS.

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY) 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.) Patent and trademark infringement under titles 15 and 35, U.S. Code.

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 0.00 CHECK YES only if demanded in complaint: JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY None (See instructions): JUDGE DOCKET NUMBER

DATE 10/19/04 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**COPY ORIGINAL FILED**

**OCT 20 2004**

Richard W. Wisking  
Clerk, U.S. District Court  
Northern District of California  
San Jose

1 DAVID S. BLOCH (State Bar No. 184530)  
2 JENNIFER L. ISHIMOTO (State Bar No. 211845)  
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5 Attorneys for Plaintiff  
6 DIOPTICS MEDICAL PRODUCTS, INC.

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10  
11 DIOPTICS MEDICAL PRODUCTS, INC.,  
a California corporation,

12 Plaintiff,

13 v.

14 THE FASHION GROUP, LLC,  
15 a New Jersey limited liability corporation,

16 Defendant.

**C04 04426 EDL**  
**E-FILING**  
**ADR**

**COMPLAINT FOR PATENT  
INFRINGEMENT, TRADEMARK  
INFRINGEMENT, AND UNFAIR  
COMPETITION**

**DEMAND FOR JURY TRIAL**

17  
18 Plaintiff Dioptics Medical Products, Inc. ("Dioptics"), claims for relief against defendant  
19 The Fashion Group LLC as follows:

20 **PARTIES**

21 1. Dioptics is, and at all times material hereto was, a corporation organized and  
22 existing under the laws of the State of California with its principal place of business in San Luis  
23 Obispo, California.

24 2. On information and belief, The Fashion Group was and is a limited liability  
25 corporation organized and existing under the laws of New Jersey with its principal place of  
26 business in Williamstown, New Jersey.

**JURISDICTION AND VENUE**

3. The court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the Patent Act, 35 U.S.C. §§ 1 *et seq.*, and the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*

4. Venue is proper in this federal district pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1400(b) in that, on information and belief, The Fashion Group has done business in California and in this judicial district, has committed acts of infringement in California and in this judicial district, and continues to commit acts of infringement in California and in this judicial district.

**INTRADISTRICT ASSIGNMENT**

5. This is an intellectual property action. It should be assigned on a district-wide basis in accordance with Local Rule 3-2(c).

**INFRINGEMENT OF U.S. PATENT NO. DES. 434,789**

6. On December 5, 2000, United States Patent No. Des. 434,789 (the “’789 patent”) was duly and legally issued for an invention entitled “Eyeglasses.” Dioptics holds all rights and interest in the ’789 patent. A true and correct copy of the ’789 patent is attached as Exhibit A.

7. On information and belief, The Fashion Group has infringed and continues to infringe the ’789 patent. The infringing acts include, but are not limited to, the manufacture, use, sale, importation and/or offer for sale of infringing eyeglasses and inducement of others to manufacture, use, sell, import and/or offer for sale of such eyeglasses, including but not limited to The Fashion Group’s Mad Marlin MMPP03 sunglass product. The Fashion Group therefore is liable for infringement of the ’789 patent pursuant to 35 U.S.C. § 271.

8. On information and belief, The Fashion Group has sold and/or made offers to sell products infringing the ’789 patent both nationwide and within this judicial district.

9. The Fashion Group’s infringement of Dioptics’ exclusive rights under the ’789 patent have and will continue to harm Dioptics, causing irreparable injury, for which there is no adequate remedy at law unless enjoined by this Court.

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PALO ALTO



1           14.     Dioptics has expended substantial resources to advertise and promote the sale of  
2 sunglasses and other eyewear products under the Dioptics Marks, including POLAR-EYES. By  
3 reason of this advertisement, sale, offering for sale, promotion and use of the Dioptics Marks, the  
4 Dioptics Marks have come to be recognized as signifying Dioptics and Dioptics's products and  
5 services. Dioptics has built up extensive goodwill in the Dioptics Marks. Indeed, since 1979,  
6 Dioptics has sold over 50 million products using one or more of the Dioptics Marks.

7           15.     Notwithstanding Dioptics's prior rights in and to the Dioptics Marks, The Fashion  
8 Group has advertised, sold, offered for sale, promoted, and used the mark "Polar Bear Polarized"  
9 in connection with sunglasses and other eyewear products. The Fashion Group also has  
10 advertised, sold, offered for sale, promoted, and used the image of a polar bear wearing  
11 sunglasses in connection with sunglasses and other eyewear products:



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14           16.     The Fashion Group's use of the words "Polar Bear" and its use of the graphic of a  
15 polar bear in connection with its products is confusingly similar to the previously used and not  
16 abandoned Dioptics Marks. The Fashion Group's use of the phrase "Polar Bear Polarized" and/or  
17 the image of a polar bear on or in connection with sunglasses or other eyewear were calculated  
18 and are likely to cause confusion among purchasers concerning the source, ownership, or  
19 sponsorship of the goods being sold by Dioptics and The Fashion Group. Such conduct will  
20 seriously damage Dioptics, its business, and its goodwill.

21                           **UNFAIR COMPETITION – BUS. & PROF. CODE § 17200**

22           17.     Dioptics incorporates paragraphs 12 through 16 by reference.

23           18.     The Fashion Group, by engaging in the conduct described herein, in the past has  
24 engaged in, and is currently committing and engaging in, unfair and unlawful business acts and  
25 practices, as defined in California Business and Professions Code Section 17200 *et seq.*

26           19.     The Fashion Group's conduct has harmed and confused Dioptics and the general  
27 public. The harm to Dioptics outweighs the utility of The Fashion Group's acts and practices.  
28

1 20. As a direct and proximate result of The Fashion Group's unfair competition,  
2 Dioptics has suffered injury to its business.

3 **UNFAIR COMPETITION – LANHAM ACT**

4 21. Dioptics incorporates paragraphs 12 through 20 by reference.

5 22. The Fashion Group, by engaging in the conduct described herein, in the past has  
6 engaged in, and is currently committing and engaging in, unfair and unlawful business acts and  
7 practices, as defined in Section 43 of the Lanham Act, Title 15, U.S. Code.

8 23. The Fashion Group's conduct has harmed and confused Dioptics and the general  
9 public. The harm to Dioptics outweighs the utility of The Fashion Group's acts and practices.

10 24. As a direct and proximate result of The Fashion Group's unfair competition,  
11 Dioptics has suffered injury to its business.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Dioptics Medical Products, Inc. requests entry of judgment in its favor  
14 and against The Fashion Group as follows:

15 (a) Declaring that The Fashion Group has infringed U.S. Patent No. Des. 434,789 and  
16 the Dioptics Marks;

17 (b) Preliminarily and permanently enjoining The Fashion Group, its officers, agents,  
18 employees, and those acting in privity with them, from further infringement, contributory  
19 infringement, and/or inducing the infringement of U.S. Patent No. Des. 434,789 and the Dioptics  
20 Marks, and from engaging in further acts of unfair competition;

21 (c) Granting an injunction pursuant to 15 U.S.C. § 1116, enjoining and restraining The  
22 Fashion Group and its officer, agents, employees, and those acting in privity with them, from  
23 directly or indirectly using the name Polar Bear Polarized, the image of a polar bear, or any other  
24 mark, word or name similar to the Dioptics Marks which is likely to cause confusion, mistake or  
25 to deceive;

26 (d) Ordering all labels, signs, prints, packages, wrappers, receptacles, and  
27 advertisements in the possession of The Fashion Group bearing the mark Polar Bear Polarized or  
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PALO ALTO



1 the image of a polar bear, and all plates, molds, matrices and other means of making the same, to  
2 be delivered up and destroyed;

3 (e) Ordering an accounting for any and all profits derived by The Fashion Group from  
4 the sales of its goods, and for all damages sustained by Dioptics, by reason of said acts of  
5 infringement complained of herein;

6 (f) Awarding of attorneys' fees pursuant to 15 U.S.C. § 1117, 35 U.S.C. § 285, and as  
7 otherwise permitted by law;

8 (g) Awarding Dioptics treble the amount of actual damages suffered by Dioptics; and

9 (h) Granting such other and further relief as the Court may deem just and proper.

10 Dated: October 19, 2004

Respectfully Submitted,

McDermott Will & Emery LLP

11  
12  
13 By: \_\_\_\_\_

David S. Bloch  
Jennifer L. Ishimoto

14  
15 Attorneys for Plaintiff  
16 DIOPTICS MEDICAL PRODUCTS, INC.  
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MCDERMOTT, WILL & EMERY LLP  
ATTORNEYS AT LAW  
PALO ALTO

**DEMAND FOR JURY TRIAL**

Plaintiff DIOPTICS MEDICAL PRODUCTS, INC. hereby demands a trial by jury on all issues properly triable to a jury in this action.

Dated: October 19, 2004

Respectfully submitted,

McDermott Will & Emery LLP

By: 

David S. Bloch  
Jennifer L. Ishimoto

Attorneys for Plaintiff  
DIOPTICS MEDICAL PRODUCTS, INC.

**CERTIFICATION OF INTERESTED ENTITIES OR PARTIES**

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: October 19, 2004

Respectfully submitted,

McDermott Will & Emery LLP

By: 

David S. Bloch  
Jennifer L. Ishimoto

Attorneys for Plaintiff  
DIOPTICS MEDICAL PRODUCTS, INC.

MCDERMOTT, WILL & EMERY LLP  
ATTORNEYS AT LAW  
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# **EXHIBIT A**



US00D434789S

**United States Patent** [19]

[11] **Patent Number:** Des. 434,789

**Lane**

[45] **Date of Patent:** \*\* Dec. 5, 2000

[54] **EYEGLASSES**  
 [75] **Inventor:** Henry Welling Lane, San Luis Obispo, Calif.  
 [73] **Assignee:** Dioptrics Medical Products, Inc., San Luis Obispo, Calif.  
 [\*\*] **Term:** 14 Years

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[21] **Appl. No.:** 29/117,087  
 [22] **Filed:** Jan. 14, 2000  
 [51] **LOC (7) Cl.** ..... 16-06  
 [52] **U.S. Cl.** ..... D16/326; D16/321; D16/337  
 [58] **Field of Search** ..... D16/101, 300-330, D16/335-337, 339-340, 900; D29/109, 110; 351/41, 44, 51, 52, 57-61, 111, 121, 123, 153, 156-158; 2/428, 430, 436, 444, 448, 449

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*Primary Examiner*—Raphael Barkai  
*Attorney, Agent, or Firm*—Haverstock & Owens LLP

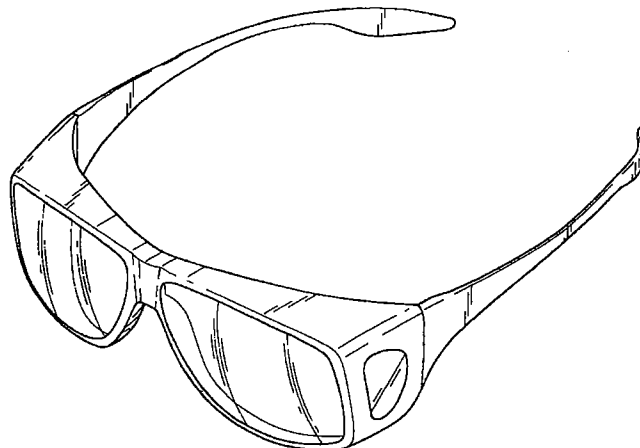
[57] **CLAIM**

I claim the ornamental design for eyeglasses, as shown and described.

**DESCRIPTION**

FIG. 1 is a top perspective view of eyeglasses showing of my new design;  
 FIG. 2 is a bottom perspective view thereof;  
 FIG. 3 is a front elevational view thereof;  
 FIG. 4 is a rear elevational view thereof;  
 FIG. 5 is a right side elevational view thereof, the left side being a mirror image of the right side;  
 FIG. 6 is a top view thereof; and,  
 FIG. 7 is a bottom view thereof.

**1 Claim, 4 Drawing Sheets**



## Des. 434,789

Page 2

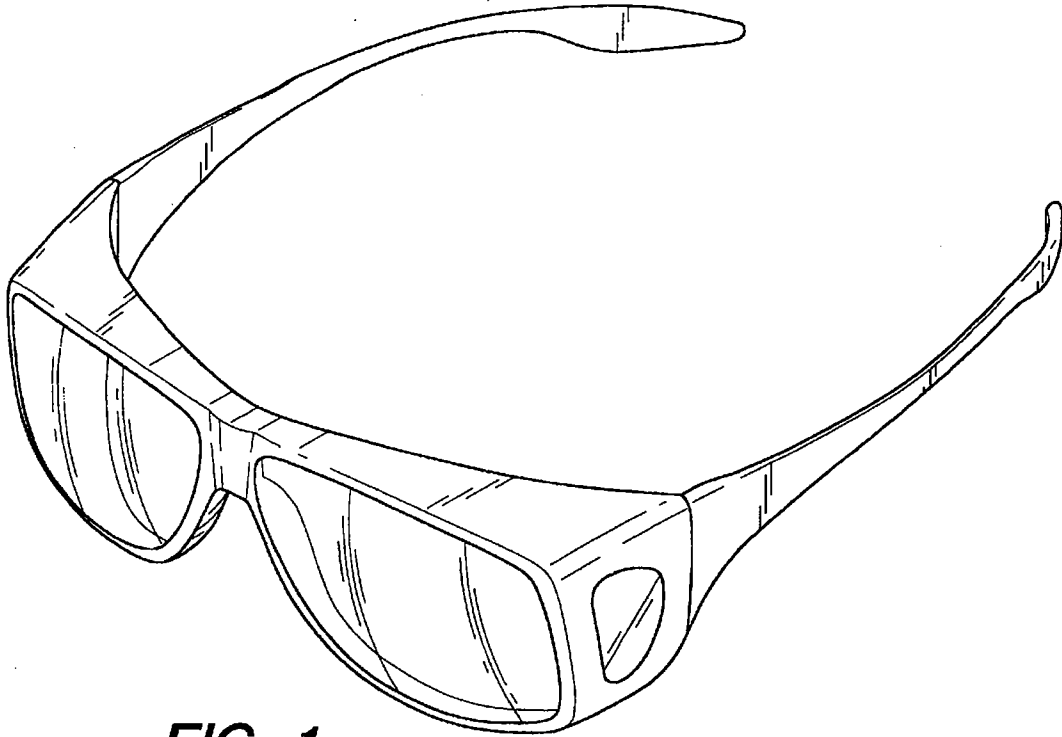
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**U.S. Patent**

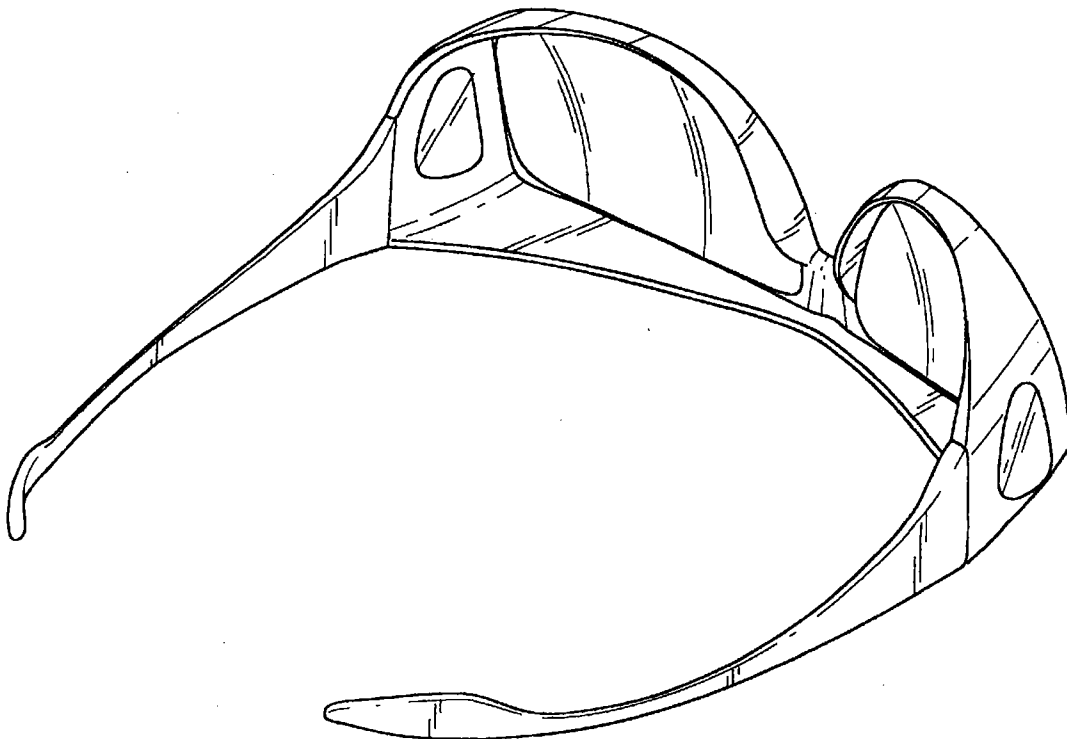
**Dec. 5, 2000**

**Sheet 1 of 4**

**Des. 434,789**



**FIG. 1**



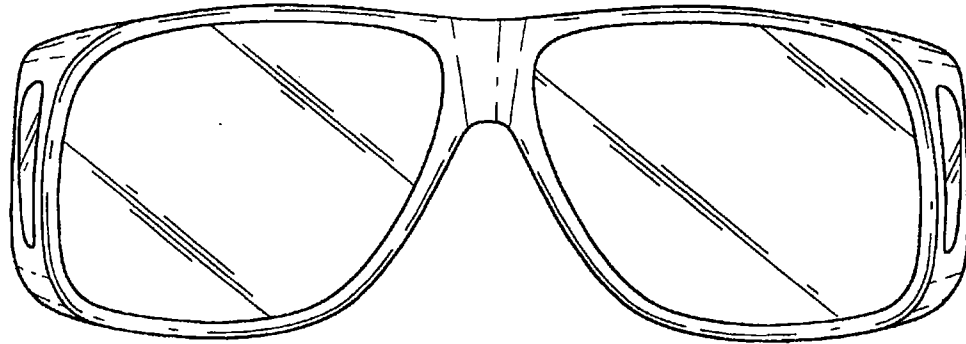
**FIG. 2**

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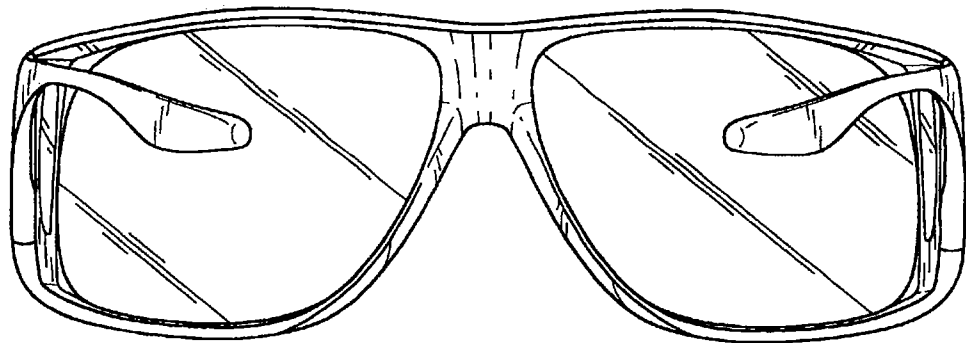
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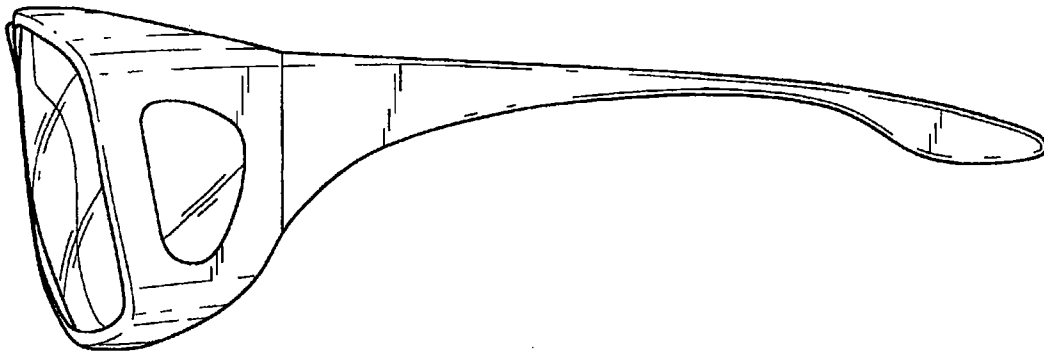
**Des. 434,789**



**FIG. 3**



**FIG. 4**



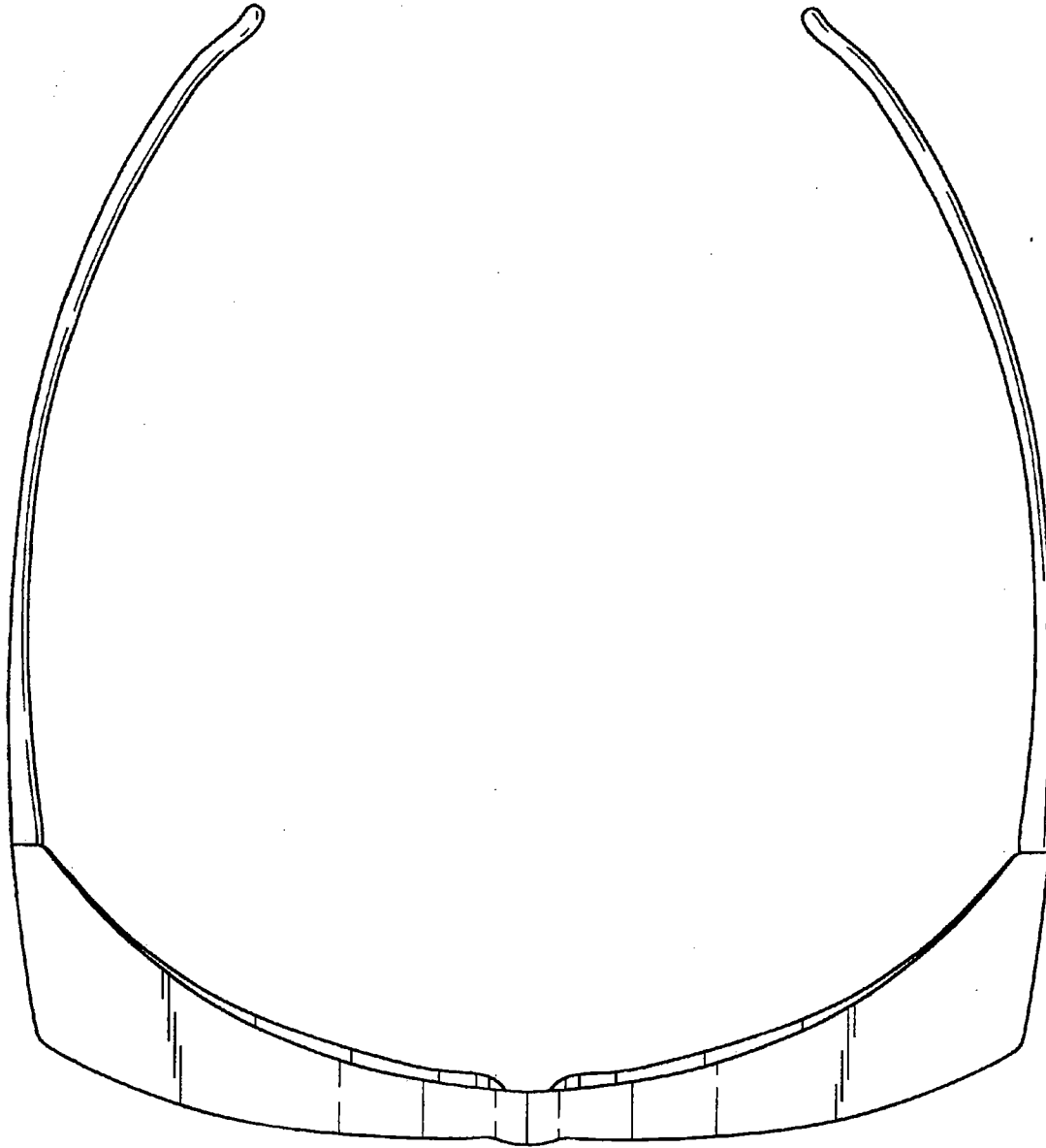
**FIG. 5**

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**FIG. 6**

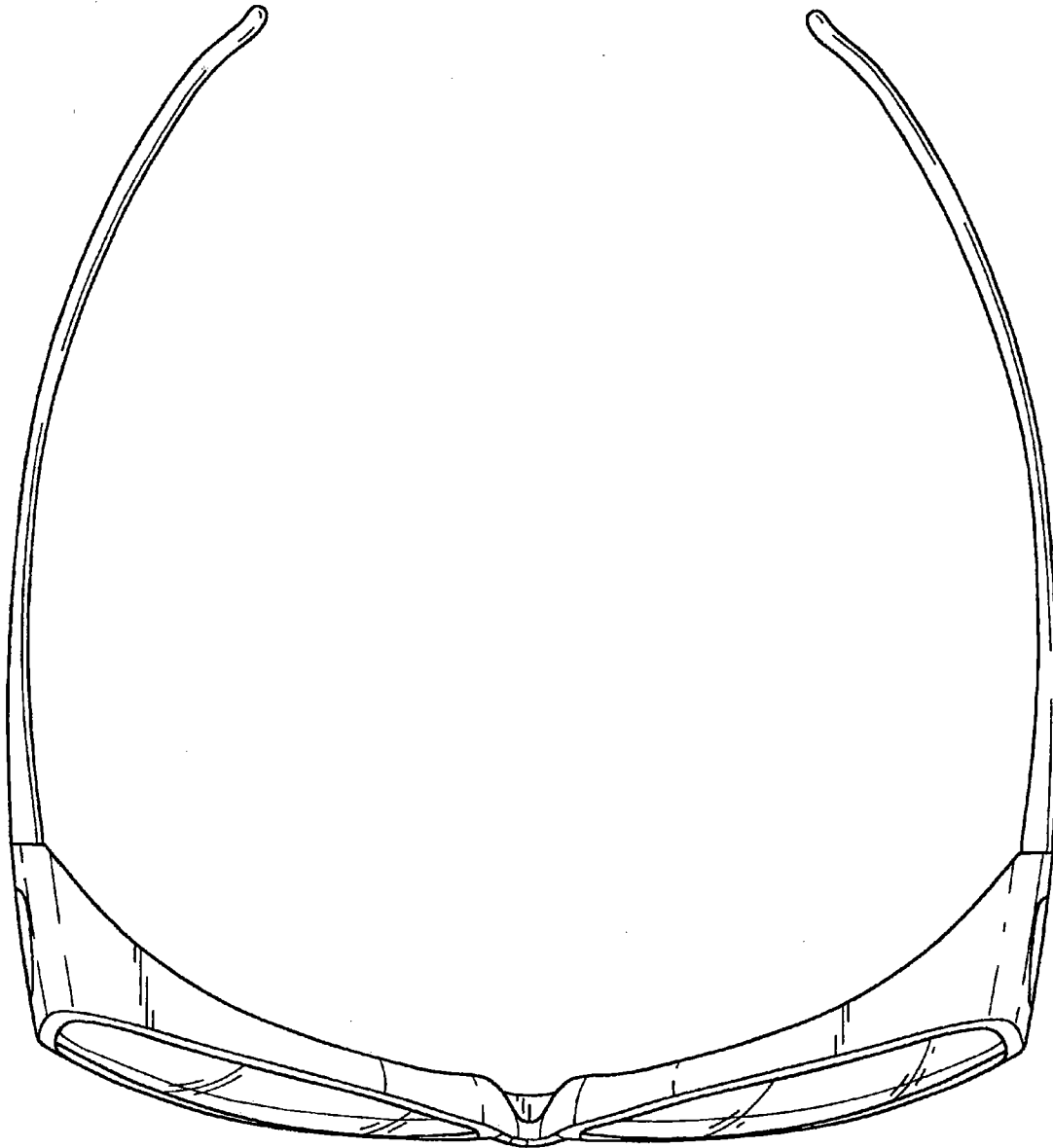


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**FIG. 7**