



JRL 11/22/02 11:27

3:02-CV-02306 LANARD TOYS LIMITED V. FUN-TIME INT'L INC

1

CMP.

FILED

02 NOV 21 PM 3:40

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
[Signature]
DEPUTY

1 Richard P. Sybert, Bar No. 80731
2 Aaron M. McKown, Bar No. 208781
3 GORDON & REES LLP
4 101 West Broadway, Suite 1600
5 San Diego, California 92101
6 telephone (619) 696-6700
7 facsimile (619) 696-7124

8 Attorneys for Plaintiff
9 LANARD TOYS LIMITED

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA

12 '02 CV 02306 L (RBB)

13 LANARD TOYS LIMITED,
14 a Hong Kong corporation,

15 Plaintiff,

16 vs.

17 FUN-TIME INT'L INC.,
18 a corporation,

19 Defendant.

Civil Action No.

COMPLAINT FOR
DECLARATORY RELIEF RE:
(1) NO PATENT INFRINGEMENT;
(2) INVALIDITY OF PATENT;
(3) UNFAIR COMPETITION
UNDER STATE LAW.

[JURY TRIAL DEMANDED]

(35 U.S.C. §§ 1, 101, 102, 103, 112, 119;
28 U.S.C. §§ 1331, 1332, 1338, 1367,
2201, 2202; California Business and
Professions Code §§ 17200 *et seq.*)

20 Comes now the Plaintiff LANARD TOYS LIMITED (hereinafter referred to as
21 "Lanard") and for its Complaint herein alleges as follows:

22 1. Plaintiff Lanard is a corporation duly organized and at all times relevant hereto in
23 good standing under the laws of Hong Kong, with its principal place of business at 6/F, Energy
24 Plaza, 92 Granville Road, Tsimshatsui East, Kowloon, Hong Kong, and having a design
25 subsidiary, Lanard Toys, Inc., a Missouri corporation, with its place of business at 2011 Auto
26 Center Drive, Suite 200, Oxnard, California 93030.
27

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101 West Broadway
Suite 1600
San Diego, CA 92101

[Handwritten mark]

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1 2. Defendant FUN-TIME INT'L INC. (hereinafter referred to as "Fun-Time") is, on
2 information and belief, a corporation with its principal place of business at 413 N. 4th Street,
3 Philadelphia, Pennsylvania 19123, and doing business in the Southern District of California.
4 Fun-Time has sufficient contacts with the State of California to support the existence of personal
5 jurisdiction in California over Fun-Time. Specifically without limitation, on information and
6 belief, Fun-Time has sold and distributed toys or other products allegedly falling within the U.S.
7 Design Patents alleged below in the Southern District of California.
8

9 3. This Complaint arises under the patent laws of the United States of America, 35 U.S.C.
10 § 101 *et seq.*, and under the laws of the State of California.
11

12 4. This Court has jurisdiction pursuant to 35 U.S.C. § 1 *et seq.* and 28 U.S.C. §§ 1331,
13 1332, 1338(a), 1338(b), 2201 and 2202, and supplemental jurisdiction pursuant to 28 U.S.C.
14 § 1367. The Court has pendent jurisdiction of the California state law claim under 28 U.S.C.
15 § 1338(b).
16

17 5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.
18

19 6. Lanard since 1978 has engaged in the business of designing, manufacturing,
20 marketing, and selling children's toys and products on a worldwide basis, including the United
21 States. One of these toys is Lanard's MOLLY THE MILKSHAKE MAKER™ toy, Lanard Item
22 or SKU No. 71012. A true copy of a photograph of this Lanard toy is attached to this Complaint
23 as Exhibit A. The MOLLY THE MILKSHAKE MAKER™ toy includes as a minor or
24 incidental item a looped drinking straw or straws.
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1 7. The Defendant, Fun-Time, has claimed ownership of United States Design Patent No.
2 D412,423 ("the '423 Design Patent), issued August 3, 1999 to Erik Lipson for "Swirly Straw."
3 A true copy of the '423 Design Patent, on information and belief, is attached hereto as Exhibit A.
4 Fun-Time has also claimed ownership of, and is listed as the assignee on, United States Design
5 Patent No. D389,365 ("the '365 Design Patent") issued January 20, 1998 to Erik Lipson for
6 "Wavy Straw." A true copy of the '365 Design Patent, on information and belief, is attached to
7 this Complaint as Exhibit C.
8

9
10 8. Fun-Time has sent Lanard an electronic letter dated November 20, 2002, alleging that
11 Lanard's MOLLY THE MILKSHAKE MAKER™ toy "directly and literally infringes both of
12 the aforementioned patents." A true copy of said letter is attached to this Complaint as Exhibit D.
13

14 9. Based upon the threats and allegations by Fun-Time, and upon said correspondence,
15 there is an actual controversy within the meaning of 28 U.S.C. § 2201 for purposes of this
16 declaratory judgment action. Lanard has an objectively reasonable apprehension that it will face
17 an infringement suit by Fun-Time regarding the '423 Design Patent and the '365 Design Patent if
18 Lanard continues to sell Lanard's MOLLY THE MILKSHAKE MAKER™.
19

20 10. Lanard will be harmed if it is forced to proceed with its business without a clear
21 declaration of its non-infringement. Potential damages will continue to accrue, and Lanard will
22 thereby be subjected to uncertainty and insecurity. As Lanard is anxious to resolve this dispute,
23 it is filing this current action.
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1 **FIRST CLAIM**
2 **(Declaratory Judgment re Non-Infringement of the '423 and '365 Design Patents)**

3 11. Lanard hereby incorporates the allegations of Paragraphs 1 through 10 above as if set
4 forth and re-alleged in full herein.

5
6 12. Lanard's MOLLY THE MILKSHAKE MAKER™ toy does not infringe the '423
7 Design Patent or the '365 Design Patent as hereinabove alleged, under Section 271 of the Patent
8 Act, 35 U.S.C. § 271, or Section 289 of the Patent Act, 35 U.S.C. § 289.

9
10 13. Lanard's sale and offer for sale of its MOLLY THE MILKSHAKE MAKER™ toy
11 does not constitute unfair competition under California state law.

12
13 14. Lanard is entitled to a judgment declaring that its MOLLY THE MILKSHAKE
14 MAKER™ toy does not infringe the '423 Design Patent, the '365 Design Patent, or otherwise
15 infringe Fun-Time's rights.

16 **SECOND CLAIM**
17 **(Declaratory Judgment re Invalidity of the Claim of the '423 and '365 Design Patents)**

18 15. Lanard hereby incorporates the allegations of Paragraphs 1 through 14 above as if set
19 forth and re-alleged in full herein.

20
21 16. The Claim of the '423 Design Patent is invalid for failure to satisfy the statutory
22 criteria for patentability under the patent laws of the United States, including without limitation
23 35 U.S.C. §§ 101, 102, 103, and 171.
24

1 17. The Claim of the '365 Design Patent is invalid for failure to satisfy the statutory
2 criteria for patentability under the patent laws of the United States, including without limitation
3 35 U.S.C. §§ 101, 102, 103, and 171.

4 **THIRD CLAIM**
5 **(Unfair Competition and Unfair Trade Practices)**

6 18. Lanard hereby incorporates the allegations of Paragraphs 1 through 17 above as if set
7 forth and re-alleged in full herein.

8
9 19. Fun-Time's conduct in effectively alleging and implying that Lanard infringes the
10 '423 and '365 Design Patents, as set forth in Fun-Time's letter of November 20, 2002 (Exhibit
11 D), constitutes unfair competition and unfair trade practices in violation of California Business
12 and Professions Code Section 17200 *et seq.*

13
14 20. There is a strong public interest in protecting Lanard from Fun-Time's unfair
15 competition and unfair trade practices.

16
17 21. Lanard is entitled to recover any and all damages permitted under California
18 Business and Professions Code Section 17200 *et seq.*, including attorney's fees, punitive
19 damages, and costs from Fun-Time for Fun-Time's willful, knowing misconduct as well as
20 injunctive relief against Fun-Time's continued unfair competition and unfair trade practices.
21

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff Lanard prays that this Court enter judgment as follows:

- 24
25 1. Declaring that Lanard's MOLLY THE MILKSHAKE MAKER™ toy does not
26 infringe the '423 Design Patent under 35 U.S.C. § 271, 35 U.S.C. § 289, or otherwise.
27
28 2. Declaring that the Claim of the '423 Design Patent is invalid.

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1 3. Declaring that Lanard's MOLLY THE MILKSHAKE MAKER™ toy does not
2 infringe the '365 Design Patent under 35 U.S.C. § 27, 35 U.S.C. § 289, or otherwise..

3 4. Declaring that the Claim of the '365 Design Patent is invalid.

4 5. Declaring that the sale and offer for sale of Lanard's MOLLY THE MILKSHAKE
5 MAKER™ toy does not constitute unfair competition under California law.

6 6. Declaring that Fun-Time's conduct constitutes unfair competition and unfair trade
7 practices in violation of California Business and Professions Code Section 17200 *et seq.*

8 7. Granting preliminary and permanent injunctions to stop Fun-Time's threats and unfair
9 competition and trade practices.

10 8. Awarding Lanard its actual damages to be proven at trial.

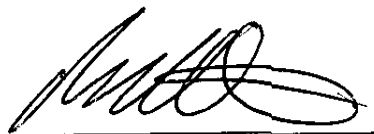
11 9. Declaring this to be an exceptional case and awarding Lanard its reasonable attorney's
12 fees under 35 U.S.C. § 285.

13 10. Awarding Lanard its reasonable attorney's fees under California Business and
14 Professions Code Section 17200 *et seq.*

15 11. Granting Lanard such other further equitable and legal relief as the Court may deem
16 proper.

17 Dated: November 21, 2002

18 Respectfully submitted,
19 GORDON & REES LLP

20 by 
21 Richard P. Sybert
22 Attorneys for Plaintiff
23 LANARD TOYS LIMITED

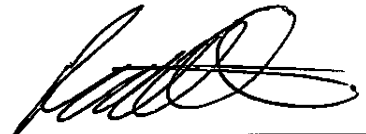
Gordon & Rees LLP
101 West Broadway
Suite 1600
San Diego, CA 92101

REQUEST FOR JURY TRIAL

Pursuant to F.R.Civ.P. 38(b) and Southern District Civil Local Rule 38.1, Plaintiff Lanard Toys Limited hereby demands its right to a jury trial on all issues triable to a jury.

Dated: November 21, 2002

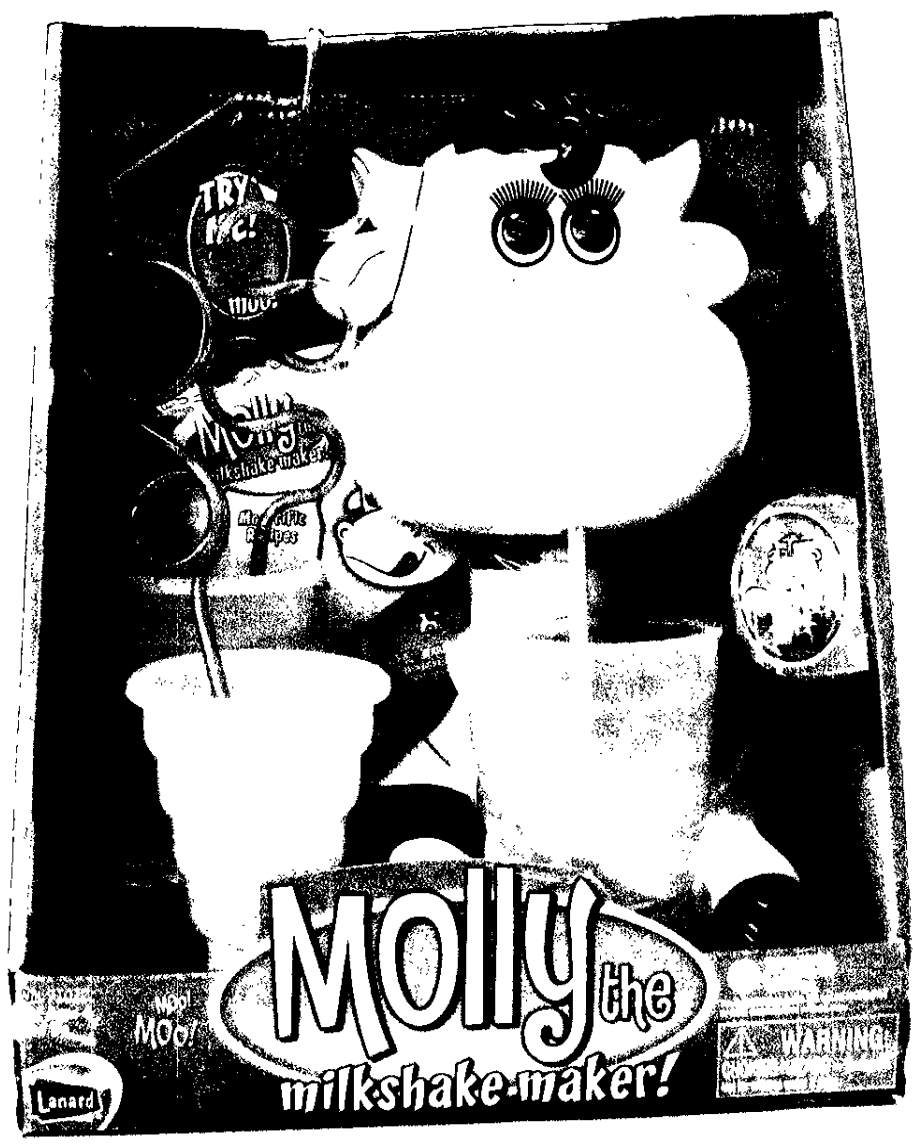
Respectfully submitted,
GORDON & REES LLP

by 

Richard P. Sybert
Attorneys for Plaintiff
LANARD TOYS LIMITED

Gordon & Rees LLP
101 West Broadway
Suite 1600
San Diego, CA 92101

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US00D412423S

United States Patent [19]

[11] **Patent Number: Des. 412,423**

Lipson

[45] **Date of Patent: ** Aug. 3, 1999**

[54] **SWIRLY STRAW**

2,063,803 12/1936 Gildersleeve 239/33

[76] **Inventor: Erik Lipson, 1530 Locust St., #15F, Philadelphia, Pa. 19102**

*Primary Examiner—Mitchell I Siegel
Attorney, Agent, or Firm—Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.*

[**] **Term: 14 Years**

[57] **CLAIM**

[21] **Appl. No.: 29/078,275**

The ornamental design for a swirly straw, as shown.

[22] **Filed: Oct. 23, 1997**

DESCRIPTION

[51] **LOC (6) Cl. 07-06**

FIG. 1 is a front elevation view of a swirly straw showing my new design;

[52] **U.S. Cl. D7/300.2**

FIG. 2 is a left side elevation view thereof;

[58] **Field of Search D7/300.2; D21/61; 215/229, 388; 239/33**

FIG. 3 is a rear elevation view thereof;

FIG. 4 is a right side elevation view thereof;

FIG. 5 is a top plan view thereof; and,

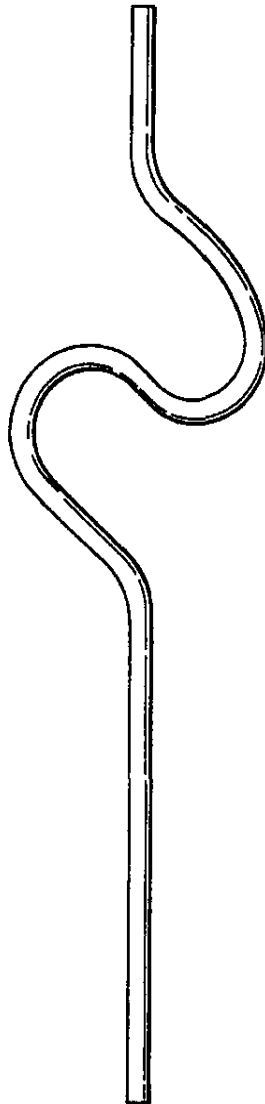
FIG. 6 is a bottom plan view thereof.

[56] **References Cited**

U.S. PATENT DOCUMENTS

D. 389,365 1/1998 Lipson D7/300.2

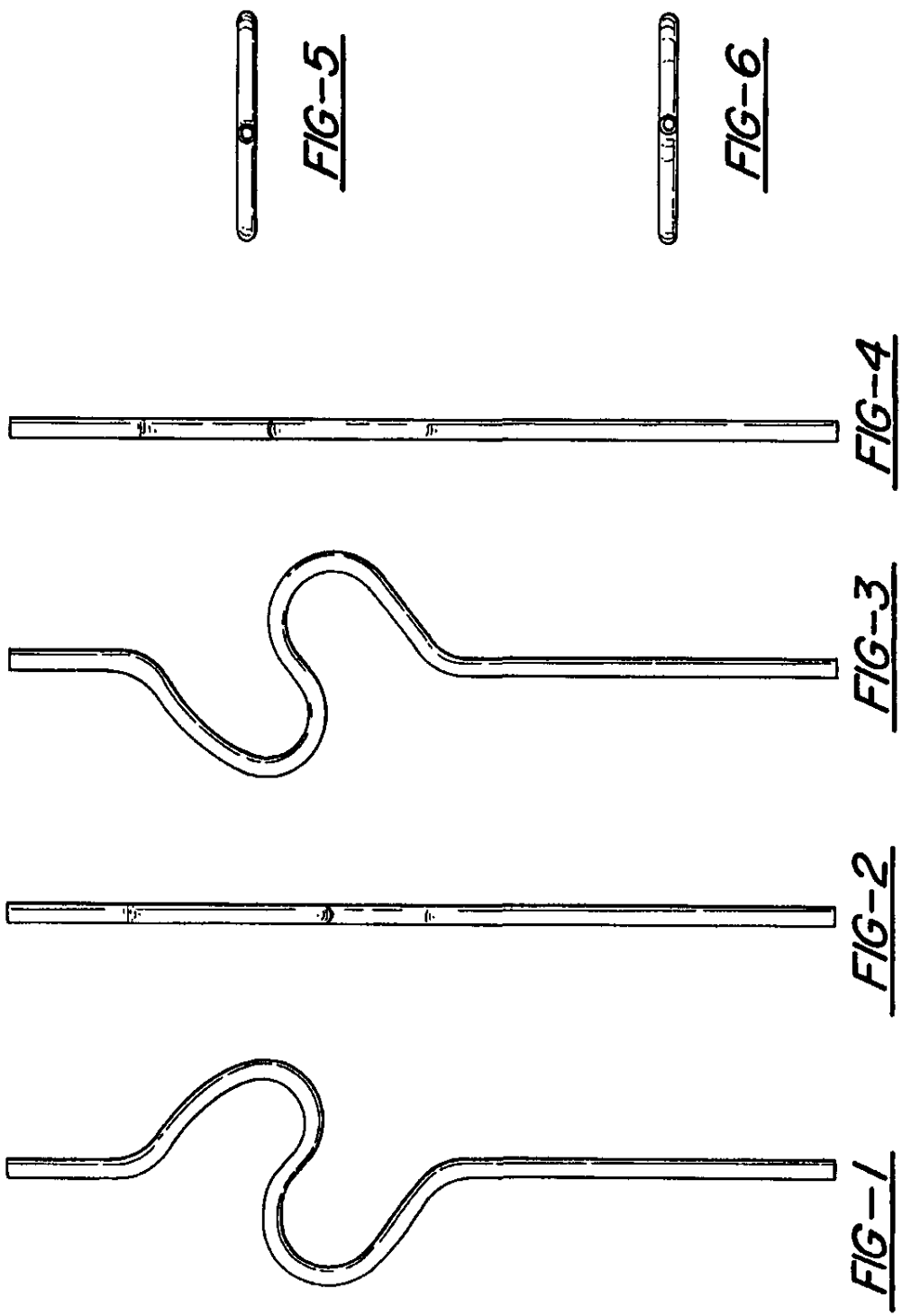
1 Claim, 1 Drawing Sheet



U.S. Patent

Aug. 3, 1999

Des. 412,423





US00D389365S

United States Patent [19]

[11] **Patent Number:** Des. 389,365

Lipson

[45] **Date of Patent:** **Jan. 20, 1998

[54] WAVY STRAW

[57] CLAIM

[75] Inventor: Erik Lipson, Philadelphia, Pa.

The ornamental design for a wavy straw, as shown.

[73] Assignee: Fun-Time International, Inc., Philadelphia, Pa.

DESCRIPTION

[**] Term: 14 Years

FIG. 1 is a front elevation view of a wavy straw showing my new design;

[21] Appl. No.: 60,184

FIG. 2 is a left side elevation view thereof;

[22] Filed: Sep. 24, 1996

FIG. 3 is a rear elevation view thereof;

[51] LOC (6) CL 07-06

FIG. 4 is a right side elevation view thereof;

[52] U.S. Cl. D7/300.2; D21/61

FIG. 5 is a top plan view thereof;

[58] Field of Search D7/300.2; D8/499; D21/61; 215/229, 388; 239/33; 446/15

FIG. 6 is a bottom plan view thereof;

[56] References Cited

FIG. 7 is a front elevation view of an alternate embodiment of FIG. 1;

U.S. PATENT DOCUMENTS

2,063,803	12/1936	Gildersleeve	D7/300.2 X
2,557,411	6/1951	Butsch	239/33
3,517,884	6/1970	Horvath	239/33
5,184,774	2/1993	Lipson	239/33

FIG. 8 is a left side elevation view of FIG. 7;

FIG. 9 is a rear elevation view of FIG. 7;

FIG. 10 is a right side elevation view of FIG. 7;

FIG. 11 is a top plan view of FIG. 7;

FIG. 12 is a bottom plan view of FIG. 7;

FIG. 13 is a front elevation of an alternate embodiment of FIG. 1;

FIG. 14 is a left side elevation view of FIG. 13;

FIG. 15 is a rear elevation view of FIG. 13;

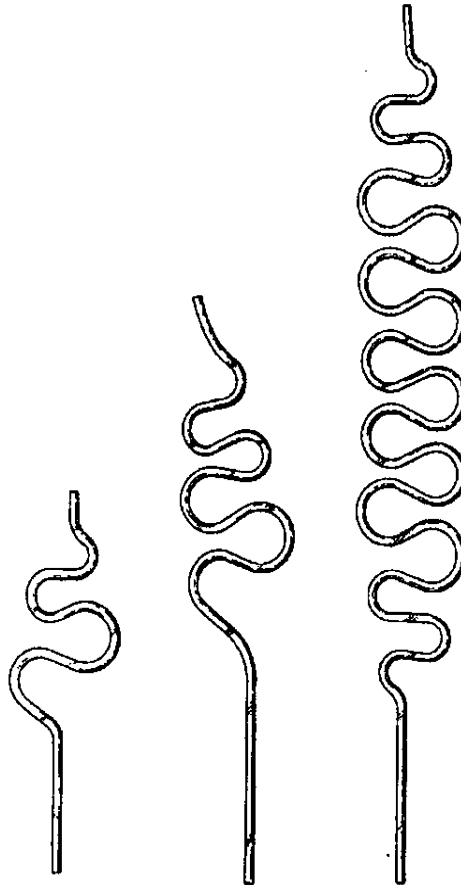
FIG. 16 is a right side elevation view of FIG. 13;

FIG. 17 is a top plan view of FIG. 13; and,

FIG. 18 is a bottom plan view of FIG. 13.

1 Claim, 3 Drawing Sheets

Primary Examiner—Terry A. Wallace
 Attorney, Agent, or Firm—Gifford, Krass, Groh, Sprinkle,
 Patmore, Anderson & Citkowski, P.C.

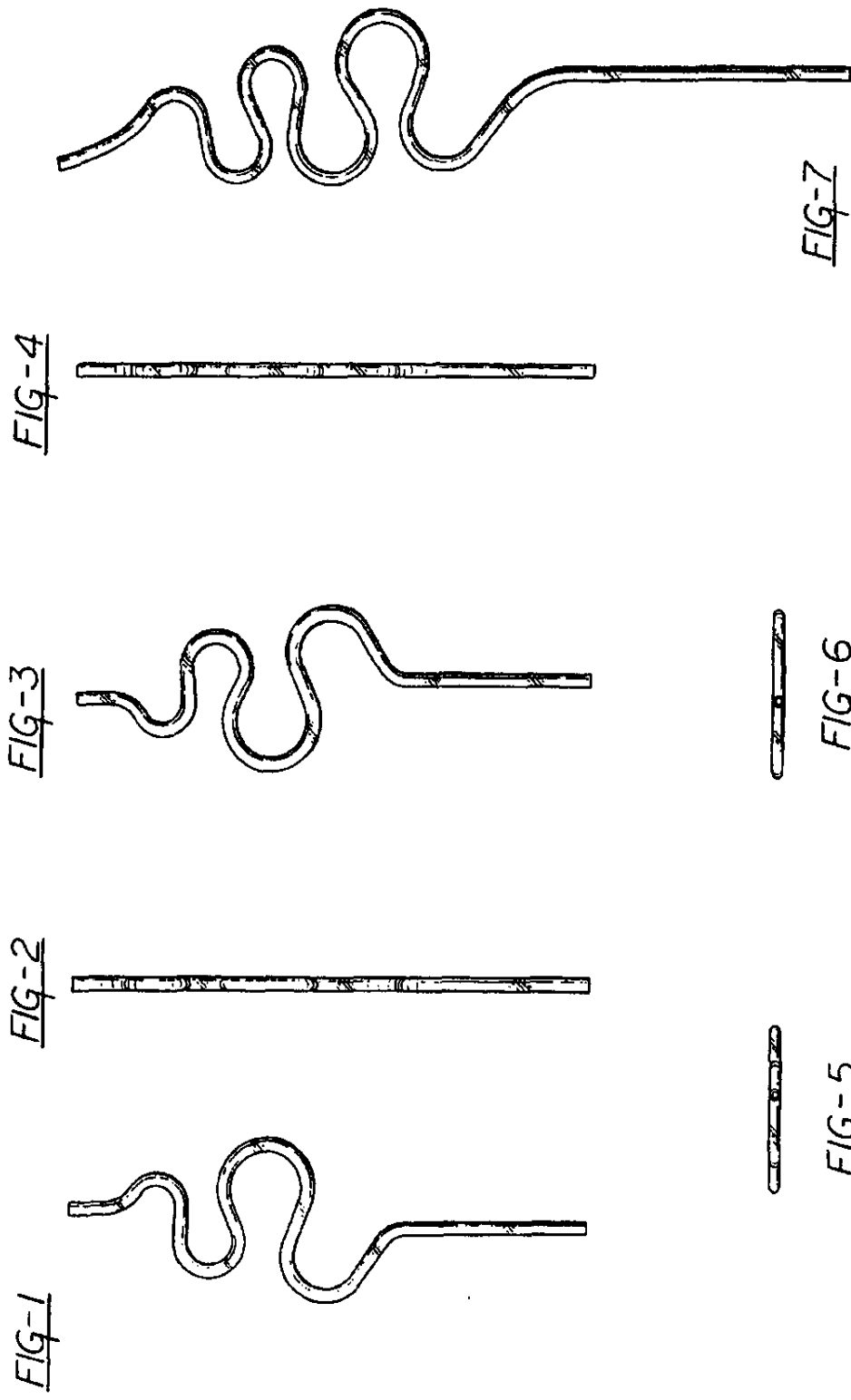


U.S. Patent

Jan. 20, 1998

Sheet 1 of 3

Des. 389,365



U.S. Patent

Jan. 20, 1998

Sheet 2 of 3

Des. 389,365



FIG-11



FIG-12

FIG-10

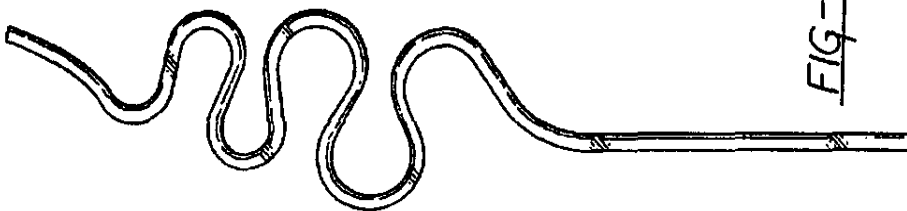


FIG-9



FIG-8

U.S. Patent

Jan. 20, 1998

Sheet 3 of 3

Des. 389,365

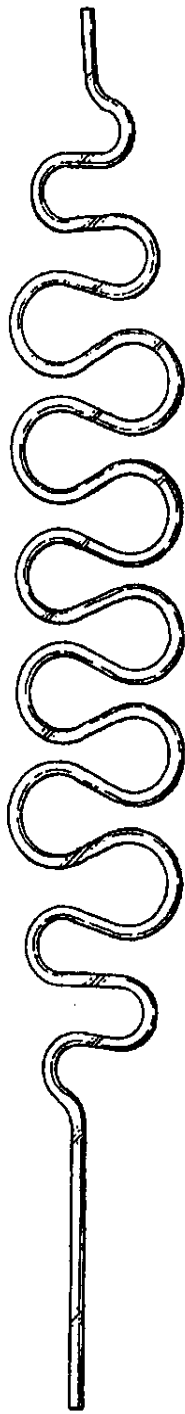


FIG-13



FIG-14

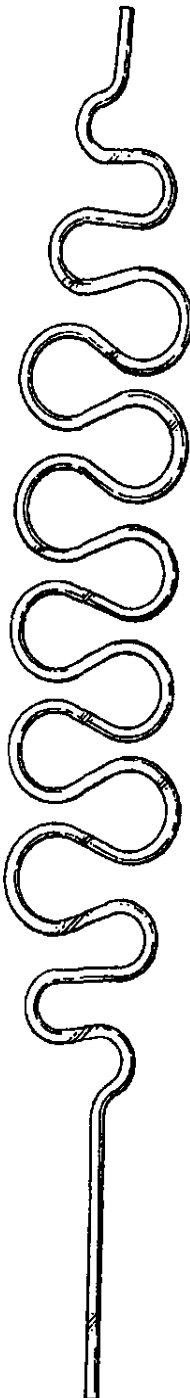


FIG-15



FIG-16



FIG-17



FIG-18

From: Jaysen Thorne [JThorne@krazystraws.com]
Sent: Thursday, November 21, 2002 5:32 AM
To: kennethchoy@lanard.com.hk
Cc: Richard Spector
Subject: Product Infringement

Importance: High

Date: November 20, 2002

To: Kenneth Choy
Lanard Toys Ltd.
6th Floor, Energy Plaza, Granville Road
T.S.T. Kowloon, Hong Kong

From: Richard Spector
Fun-Time Int'l Inc.
413 N. 4th Street
Philadelphia, PA 19123
Tel: (215) 925-1450
Fax: (215) 925-1884

RE: "Swirly/Wavy Straw"
U.S. Patent No. Des. 412,423 and U.S. Patent No. Des.389,365
Fun-Time International Inc. - Patent Owner

Dear Sir:

It has come to my attention that you are offering for sale a certain plastic drinking straw product shaped in the form of swirl. Please be informed that Fun-Time Int'l Inc. (413 N. 4th Street, Philadelphia, Pennsylvania 19123 U.S.A.) is the exclusive owner of the right, title and interest in U.S. Patent No's. D412,423 and D389,365, both pertaining to ornamental designs for a swirly/wavy drinking straw.

From a recently purchased package of "Molly The Milkshake Maker" (Item #NS02-9) at a local KayBee Toys Store, it is clear that the product directly and literally infringes both of the aforementioned patents. The infringement of a patent is a serious matter and can subject you to serious monetary and other legal penalties. You may be found libel for patent infringement under the U.S. Patent Act, and may be required to compensate Fun-Time for the infringement in money damages. These damages may be increased up to three times if the infringement is found to be willful. In addition, you may be required to pay Fun-Time's attorneys fees, and to pay Fun-Time the profits you have realized from selling the infringing products. In addition, Fun-Time can seek injunctive relief through the federal courts. Furthermore, Fun-Time also has the option to require KayBee Toy Stores to remove the infringing product from their shelves (KayBee Toys will have the option in turn, to seek monetary compensation from Lanard Toys Ltd.).

Fun-Time considers these patents a valuable piece of property, and the products sold under these patents are an important part of our product line. While we would like to resolve this matter promptly and amicably, please be assured that we will not hesitate to bring suit against you should you go forward and persist in the infringement. We have successfully defended many drinking straw patents over the years against several major international corporations.

Lanard Toys Ltd.

Accordingly, Lanard Toys Ltd. and all of its agents and affiliates must immediately cease and desist from the sale and/or distribution in the U.S. of all novelty drinking straws falling within the scope of the aforementioned patents. Moreover, U.S. Customs will be notified of the infringing product to ensure that no future shipments will be allowed into the country.

In addition, we require the following information in order to accurately calculate our damage claim:

1. the total number of units produced to date by or for Lanard Toys Ltd. or any related entity that were sold to the U.S.;
2. the location of existing inventories of the product; and
3. the number of units in each inventory and/or the number of units otherwise available for sale in the U.S.;
4. the name of all U.S. customers the item has been sold to, including quantities; and
5. the total number of units pre-sold in the U.S. (if not yet manufactured).

Please give this matter your immediate attention and promptly advise me, in writing, as to your future intentions with respect to the aforementioned product so that we can make an appropriate disposition of this matter.

Very truly yours,

A rectangular box with a thin black border, containing a small square icon with a crosshair in the top-left corner. The rest of the box is empty, indicating that the signature has been redacted.

Richard Spector

RS/jt

Cc: Jim Hesterberg, Lanard Toys Ltd.
S. Shepard, VP Fun-Time
J. Riley, Esq.

AO 120 (3/85)

TO: Commissioner of Patents and Trademarks Washington, D.C. 20231	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT
---	--

In compliance with the Act of July 19, 1952 (66 Stat. 814; 35 U.S.C. 290) you are hereby advised that a court action has been filed on the following patent(s) in the U.S. District Court:

DOCKET NO.	DATE FILED	U.S. DISTRICT COURT
02cv2306 L(RBB)	11/21/02	United States District Court, Southern District of California
PLAINTIFF LANARD TOYS LTS		DEFENDANT FUN-TIME INT'L INC
PATENT NO.	DATE OF PATENT	PATENTEE
1 412,423	8/3/99	ERIK LIPSON
2 389,365	1/20/98	Erik Lipson
3		
4		
5		

In the above-entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY			
	<input type="checkbox"/> Amendment	<input type="checkbox"/> Answer	<input type="checkbox"/> Cross Bill	<input type="checkbox"/> Other Pleading
PATENT NO.	DATE OF PATENT	PATENTEE		
1				
2				
3				
4				
5				

In the above-entitled case, the following decision has been rendered or judgment issued:

DECISION/JUDGMENT		
CLERK	(BY) DEPUTY CLERK	DATE

Copy 1 - Upon initiation of action, mail this copy to Commissioner Copy 3 - Upon termination of action, mail this copy to Commissioner
 Copy 2 - Upon filing document adding patent(s), mail this copy to Commissioner Copy 4 - Case file copy

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or 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 SECOND PAGE OF THIS FORM.)

FILED

02 NOV 21 PM 3:39

CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

I. (a) PLAINTIFFS

LANARD TOYS LIMITED, a Hong Kong corporation

DEFENDANTS

FUN-TIME INT'L INC., a corporation

'02 CV 02306 L (RBB)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Hong Kong (EXCEPT IN U.S. PLAINTIFF CASES)

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.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Gordon & Rees, LLP 101 West Broadway, Suite 1600 San Diego, CA 92101

ATTORNEYS (IF KNOWN)

(619) 696-6700

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)

Table with columns for PT and DEF for Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business in This State, Incorporated and Principal Place of Business in Another State, Foreign Nation.

IV. 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.)

35 U.S.C. § 101 et seq.; 28 U.S.C. §2201. Declaratory relief action for non-infringement and invalidity of United States Design Patents; pendent claim for state unfair competition 28:1331 et

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

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

VI. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- 1 Original Proceeding, 2 Removal 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

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 and injunctive relief, damages and fees DEMAND \$ declaratory JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE Docket Number

DATE November 21, 2002 SIGNATURE OF ATTORNEY OF RECORD

#088845 \$150.00