

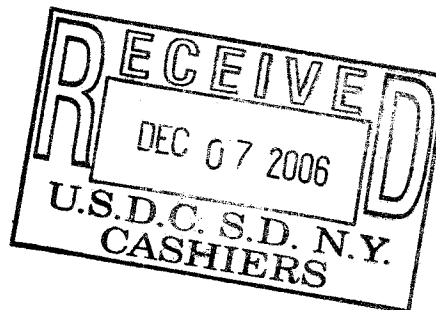
JUDGE SWAIN

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Built NY, Inc.



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BUILT NY, INC.,

Plaintiff,

v.

**SPENCER GIFTS, LLC, PROCERMEX,
INC., MOLSON COORS BREWING
COMPANY, V.S. INTERNATIONAL, LLC
AND JOHN DOES 1-10**

Defendants.

Civil Action No. _____

ECF Case

TRIAL BY JURY DEMANDED

COMPLAINT

Plaintiff **BUILT NY, INC.** ("Built NY" or "Plaintiff"), by and through its attorneys, for
its Complaint against defendants **MOLSON COORS BREWING COMPANY** ("Coors"),

SPENCER GIFTS, LLC ('Spencer'), **PROCERMEX, INC.** ("Procermex"), **V.S.**
INTERNATIONAL, LLC ("VS International") **AND JOHN DOES 1-10** (collectively, "the Defendants"), hereby alleges as follows:

NATURE OF ACTION

1. In this action, Built NY seeks injunctive relief, damages (including lost profits), costs, and attorneys' fees for Defendants' acts of infringement of Built NY's patents and trademarks.

JURISDICTION AND VENUE

2. This Court has original jurisdiction of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

3. Upon information and belief, Defendants contract to supply goods and transact business in New York within this judicial district, and the tortious acts of Defendants complained of in this Complaint, including, without limitation, the offer for sale, promotion, sale of Defendants' infringing goods, have been and continue to be committed, and have caused harm to Plaintiff within this judicial district. Accordingly, personal jurisdiction exists over Defendants pursuant to New York Civil Practice Law and Rules §§ 301 and 302.

4. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

THE PARTIES

5. Built NY is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in New York, New York.

6. Upon information and belief, Coors is a corporation duly organized and existing

under the laws of the State of Delaware, having corporate offices at 1225 17th Street, Denver, CO, 80202.

7. Upon information and belief, Spencer is a corporation duly organized and existing under the laws of the State of Delaware, having corporate offices at 6826 Black Horse Pike, Egg Harbor Township, NJ 08234-4132.

8. Upon information and belief, Procermex, Inc. is a corporation duly organized and existing under the laws of the State of Texas, having corporate offices at 8004 West Ave., San Antonio, TX 78213.

9. Upon information and belief, VS International is a corporation duly organized and existing under the laws of the State of Wisconsin, having corporate offices at 8362 Rextown Rd. Slatington, PA 18080.

FACTS

Built NY

10. Built NY is in the business of, *inter alia*, designing, marketing, and selling tote bags for carrying bottles of wine or other similarly sized containers (the "Built Products").

11. Built NY is a relatively small company with a limited number of products. Built NY's recognition, reputation and goodwill, as well as its relationship with its suppliers, distributors, and customers is inexorably tied to the Built Products.

12. The Built Products have been, and continue to be, a tremendous critical and commercial success.

13. Since their introduction, the Built Products have received substantial, unsolicited

media coverage.

14. As part of the unsolicited media coverage, the Built Products have received prestigious awards, including, *inter alia*: the Business Week Annual Design Award 2004 Gold Medal, co-sponsored by the Industrial Designers Society of America (IDEA Award); a Fortune 2003 Product of the Year award; an InStyle Top 40 Summer Must-Haves (#19); and acceptance into the juried section of the New York International Gift Fair (Accent on Design).

15. Additional positive media coverage has appeared in, *inter alia*: The Washington Post, New York Times, Chicago Tribune, Good Morning America, Food Network, WCBS am, Bon Appetit, CNN, Crain's, Wine Spectator, House and Garden, Conde Nast Traveler, Departures, American Way, the Miami Herald, Wines & Spirits, Fortune Small Business, Kitchenware News, Dwell, ID Magazine, Men's Health, Country Living, Newsweek, AARP, San Francisco Chronicle, CBS Morning Show, Fox Morning Show, Better Home and Gardens, Southern Living, and AARP Magazine. Also, Built NY has appeared in numerous articles in industry trade publications such as Home Furnishing News.

The '709 patent

16. On or about January 8, 2005, Built NY applied to the U.S. Patent and Trademark Office (the "PTO") for patent protection for its six bottle tote ("the Built Six Bottle Tote").

17. On or about October 10, 2006, the PTO issued to Built NY U.S. Design Patent No. D529,709, for the Built Six Bottle Tote ("the '709 patent"). A copy of the '709 patent is attached hereto as Exhibit A.

18. Built NY is the record owner of the '709 patent.

19. The '709 patent is presumptively valid pursuant to 35 U.S.C. § 282.

The Trademarks

20. Built NY developed, adopted, used, and continues to use distinctive configurations ("the Trademarks"), which include, but are not limited to, the silhouette of the flat Built Six Bottle Tote and the full Built Six Bottle Tote.

21. Pictures of the full and flat silhouettes of the Built Six Bottle Tote taken from the Built NY website are attached hereto as Exhibit B. See <http://www.builtny.com/sixpack.php>

22. Built NY uses the Trademarks in connection with the marketing, promotion, and sale of the Built Six Bottle Tote.

23. The Trademarks are non-functional.

24. The Trademarks are inherently distinctive.

25. Because of Built NY's exclusive and extensive use and promotion of the Trademarks, the sales of the Built Products, and the unsolicited media coverage, the Trademarks have acquired distinctiveness (or secondary meaning), and they indicate that Built NY is the single source of origin of the Built Products.

26. Built NY used the Trademarks in the State of New York and in interstate commerce prior to any of the acts of Defendants complained of herein, and the Trademarks are currently in such use.

27. Built NY's use of the Trademarks has been open, notorious, and continuous since the date of first use, a time prior to any of the acts of Defendants complained of herein.

The Defendants

28. On its web site, Spencer's describes itself as a "unique retail brand that has been focused on delivering humor and enjoyment to peoples' lives for over 50 years . . . with over 600 mall locations throughout the United States and Canada . . ." *See*

<http://www.spencersonline.com/index.cfm/fuseaction/content.page/nodeID/bf45ae7c-7a94-4b07-8b3b-6bdbd7bfl86/>, attached hereto as Exhibit C.

29. Upon information and belief, as compared to Built NY, Spencer's is a large company, which sells hundreds of different products, under numerous brands, including the "Corona Six Pack Insulated Holder w/ Opener," (hereinafter, "the Corona Six Bottle Tote"). *See* <http://www.spencersonline.com/index.cfm/fuseaction/products.detail/productID/f591d118-8ff5-4cb3-9cc0-fe458ca5a0a9/>, attached as Exhibit D hereto.

30. Upon information and belief, Spencer also sells the "Coors Light Six Pack Insulated Holder w/ Opener," (hereinafter, "the Coors Six Bottle Tote"). *See* <http://www.spencersonline.com/index.cfm/fuseaction/products.detail/productID/4803aa58-cb27-4d4f-8b9f-2d57c7a1e735/>, attached as Exhibit E hereto.

31. On or about September 16, 2006, Built NY first became aware that, without the authorization or consent of Built NY, the Defendants, are in fact making, using, advertising and/or selling products, including, but not limited to, the aforementioned Corona Six Bottle Tote and Coors Six Bottle Tote, which infringe the '709 patent and the Trademarks of Built NY ("the Infringing Products").

32. The Infringing Products, as described in more detail below, are being offered for sale and sold under the Corona and Coors Light brand online at www.SpencerGifts.com and in

Spencer's stores throughout the United States.

33. Upon information and belief, Procermex has obtained the exclusive rights to grant licenses for the use of the "Corona" trademark in the United States.

34. Upon information and belief, Procermex granted VS International the authority to place the logos of Coors and Corona on the Infringing Products.

35. Upon information and belief, VS International is purchasing the Infringing Products from a manufacturer in China, importing them to the United States, affixing them with the Coors and Corona logo and brand name, and then selling them to Spencer for redistribution to United States consumers.

36. Without the authorization or consent of Built NY, and after Built NY built up extensive and valuable business and goodwill in connection with the Trademarks, Defendants commenced use, and are currently offering for sale and are selling the Corona Six Bottle Tote and the Coors Six Bottle Tote, both of which are confusingly similar to the Built Six Bottle Tote, and therefore infringe the Trademarks.

37. Built NY and Defendants are engaged in the business of selling the same type of goods, to the same class of customers, through the same channels of trade.

38. Defendants' actions, including the offer for sale, promotion, and sale of the Infringing Products, have injured and interfered with Built NY's relationships with its suppliers, distributors, and customers.

COUNT I

INFRINGEMENT OF THE '709 PATENT

39. Built NY reasserts and incorporates by reference the allegations of the prior paragraphs above as though fully set forth herein.

40. This claim is against the Defendants and arises under the Patent Laws of the United States.

41. This is a claim by Built NY for infringement of the '709 patent.

42. The Defendants are not licensed or otherwise authorized by Built NY to make, use, offer for sale, sell, import or export any article embodying the design claimed in the '709 patent.

43. The '709 patent is valid and subsisting.

44. Defendants are manufacturing, using, and/or selling the Infringing Products.

45. On information and belief, Built NY alleges that the Defendants, jointly and/or severally, actively induce others to infringe the '709 patent by intentionally persuading or inducing third parties to make, use, offer for sale, or sell the Infringing Products.

46. The overall appearance of the Corona Six Bottle Tote is substantially similar to the design that is claimed in the '709 patent.

47. The overall appearance of the Coors Six Bottle Tote is substantially similar to the design that is claimed in the '709 patent.

48. The Corona Six Bottle Tote appropriates the novel ornamental features of the

design claimed in the '709 patent.

49. The Coors Six Bottle Tote appropriates the novel ornamental features of the design claimed in the '709 patent.

50. As a direct and proximate result of the Defendants' infringement of the '709 patent, as alleged herein, Built NY has suffered and will continue to suffer damages in an amount not yet determined.

51. On information and belief, Built NY alleges that the Defendants will continue to infringe the '709 patent and damage Built NY unless and until this Court permanently enjoins them from selling the Infringing Products, including the Corona Six Bottle Tote and the Coors Six Bottle Tote. Infringement by Defendants of the '709 patent, unless enjoined, will cause Built NY irreparable damage in that Built NY will have no adequate remedy at law to compel the Defendants to cease such infringement. The acts of Defendants caused irreparable harm and damage to Built NY and caused Built NY to suffer monetary damage in an amount thus far not determined.

52. Based upon Defendants' acts of infringement, Built NY is entitled to injunctive relief, monetary damages, costs, and its attorneys' fees.

COUNT II

TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN, FALSE DESCRIPTION, AND UNFAIR COMPETITION

53. Built NY reasserts and incorporates by reference the allegations of the prior paragraphs above as though fully set forth herein.

54. The aforementioned acts of Defendants have caused and will continue to cause a

likelihood of confusion in the minds of the trade and the public, and will damage Built NY's reputation for exclusivity in connection with the Trademark, as well as for quality and reliable merchandise.

55. Defendants' acts constitute trademark infringement and the use of a false designation of origin, a false representation, and unfair competition, by inducing the erroneous belief that Defendants and/or the Infringing Products are in some manner affiliated with, originate from, or are sponsored by Built NY, and by misrepresenting the nature and origin of the Infringing Products, all in violation of Lanham Act § 43(a).

56. Defendants' acts are willful, unfair, untrue, and deceptive, in that they tend to mislead, deceive and confuse, and will have the result of misleading, deceiving and confusing the public to believe that Defendants and/or the Infringing Products are affiliated with, sponsored or controlled by Built NY. As a consequence, Defendants have traded upon, and gained public acceptance and other benefits from Built NY's favorable reputation, which has accordingly been placed at risk by Defendants' illegal acts and conduct.

57. Defendants' unlawful actions have interfered with Built NY's sales, have unfairly diverted sales to Defendants, and have caused Built NY monetary damage.

58. Defendants have caused irreparable harm and damage to Built NY and will continue to cause irreparable harm to Built NY, and have caused Built NY to suffer monetary damage in an amount thus far not determined.

59. Built NY has no adequate remedy at law for the injury alleged in this count, and said injury is, in part, intangible in nature and not capable of being fully measured or valued entirely in terms of monetary damages.

PRAYER FOR RELIEF

WHEREFORE, Built NY demands judgment against Defendants as follows:

A. That Defendants' conduct infringes the '709 patent and the Trademarks, that the Defendants falsely designate the origin of the Infringing Products, falsely describe such products, and unfairly compete with Built NY, in violation of 35 U.S.C. § 271 *et seq.* and Lanham Act § 43(a).

B. That Defendants' conduct constitutes willful trademark infringement.

C. That Defendants and their agents, officers, directors, servants, employees, their successors and assigns, and all others in active concert or participation with Defendants be preliminarily and permanently enjoined from directly or indirectly:

(i) Using the designs disclosed in the '709 patent, the Trademarks, and/or any other designs, artwork, trademarks which are similar to or are colorable imitations of the Patent, the Registrations or the Trademarks, alone or as a part of, or together with any other designs, artwork, word or words, trademark, service mark or other business or commercial designation or any logo, symbol or design in connection with the sale, offering for sale, advertising, distributing or promoting of bottle totes, or any products related thereto;

(ii) Representing by words or conduct that the Infringing Products or any products related thereto, which are offered for sale, sold, promoted or advertised by Defendants, are authorized, sponsored, endorsed by, or otherwise connected with Built NY;

(iii) Committing any act which, in and of itself, or from the manner or under the circumstances in which it is done, amounts to patent infringement, false designation of origin,

false description or false representation of the Infringing Products, whereby wholesalers, retailers and/or consumers of such products are deceived into believing that the Infringing Products, or related products, emanate from Built NY or from a company that is sponsored, authorized, or endorsed by Built NY;

(iv) Taking any action which is likely to put others in a position to sell or palm-off the goods of Defendants as the goods of Built NY or to unfairly compete with Built NY; and

(v) Otherwise unfairly competing with Built NY or committing infringement of Built NY's rights.

D. That the Court issue an Order directing Defendants:

(i) To immediately deliver to Built NY, under oath and for destruction, all bottle totes, labels, packaging, wrappers, receptacles, containers, advertisements, promotional materials, printing devices, molds, business forms, catalogs, price sheets and/or all of the things in the possession, custody, or control of Defendants, which are or can be used to create and/or display any design, artwork, name, mark or dress which infringes the Patent or is similar to and/or a colorable imitation of the Trademark, alone or together with any other design, artwork, suffix, prefix, word or words, trademark, service mark, trade name, or other business or commercial designation or any logo, symbol or design in connection with the manufacture, distribution, sale, offer for sale, advertisement or promotion of bottle totes and/or any products related thereto;

(ii) To file with the Court and serve on Built NY, within thirty (30) days after the service on Defendants of such injunctions, a report in writing and under oath, setting forth in detail the manner and form in which Defendants have complied with the injunction.

E. That Built NY be awarded such damages that constitute at least its lost profits, lost royalties, and lost conveyed sales as a result of the wrongful acts of the Defendants.

F. That this case is exceptional and that Defendants are required to pay Built NY's costs and reasonable attorneys fees under 35 U.S.C. § 285.

G. That the Court award punitive damages to Built NY in an amount to be determined.

H. That the Court require a full and complete accounting of all monies received by Defendants as a result of the manufacture, sale, advertising, and distribution of the Infringing Products, together with an order transferring to Built NY any amount found to be due to it.

I. For interest on all amounts found to be due to Built NY from Defendants, at the prevailing rate, from the date said amounts or any part thereof became or becomes due.

J. That the Court require Defendants to notify their commercial associates, suppliers and customers, including manufacturers, wholesalers and retailers of said Order.

K. That the Court order such other, further, and different relief as the nature of this action may require and that the Court may deem just and proper.

L. That the Court retain jurisdiction of this action for the purpose of enabling Built NY to apply to the Court, at any time, for such further orders and directions as may be necessary or appropriate for the interpretation or execution of any order entered in this action, for the modification of any such order, for the enforcement or compliance therewith, and for the punishment of any violations thereof.


TRIAL BY JURY DEMANDED

Plaintiff demands a jury trial of all issues so triable.

Dated: New York, New York December 7, 2006.

Respectfully submitted,

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EXHIBIT A



US00D529709S

(12) **United States Design Patent** (10) **Patent No.:** **US D529,709 S**
Swartz et al. (45) **Date of Patent:** **** Oct. 10, 2006**

(54) **SIX PACK TOTE APPARATUS**

(75) Inventors: **John Roscoe Swartz**, Ridgewood, NJ (US); **Aaron Lown**, Tuxedo, NY (US)

(73) Assignee: **Built, NY, Inc.**, New York, NY (US)

(**) Term: **14 Years**

(21) Appl. No.: **29/220,937**

(22) Filed: **Jan. 8, 2005**

(51) **LOC (8) CL.** **09-01**

(52) **U.S. CL.** **D3/202**

(58) **Field of Classification Search** **D3/201,**

D3/219, 220, 226, 229, 232, 202, 246, 303,

D3/316; D9/702-705, 710, 711, 751, 753,

D9/754, 444, 445; 206/139, 428, 433; 220/509,

220/515; 383/10, 38, 127

See application file for complete search history.

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(Continued)

Primary Examiner—Louis S. Zarfas

Assistant Examiner—John Windmuller

(74) *Attorney, Agent, or Firm*—Lackenbach Siegel, LLP

(57)

CLAIM

The ornamental design for a six pack tote apparatus, as shown and described.

DESCRIPTION

FIG. 1 is a front perspective view of a six pack tote apparatus showing our new design;

FIG. 2 is a front elevational view thereof.

FIG. 3 is a top plan view thereof.

FIG. 4 is a right side elevational view thereof.

FIG. 5 is a bottom plan view thereof.

FIG. 6 is a perspective view thereof with bottles inserted.

FIG. 7 is a front elevational view thereof.

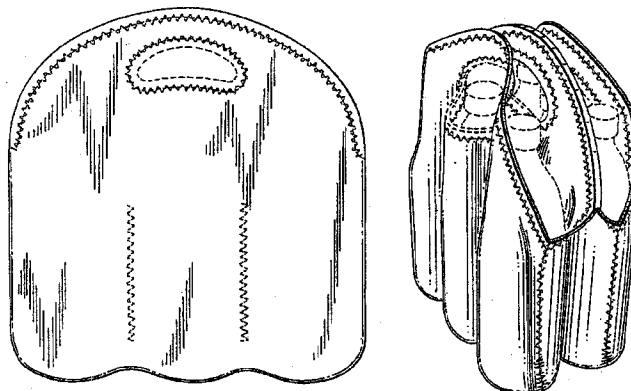
FIG. 8 is a top plan view thereof.

FIG. 9 is a right side elevational view thereof, the left side elevational view being identical; and,

FIG. 10 is a bottom plan view thereof.

The broken line showing of stitching, bottles, edge piping, and handle opening is for illustrative purposes only and forms no part of the claimed design.

1 Claim, 8 Drawing Sheets



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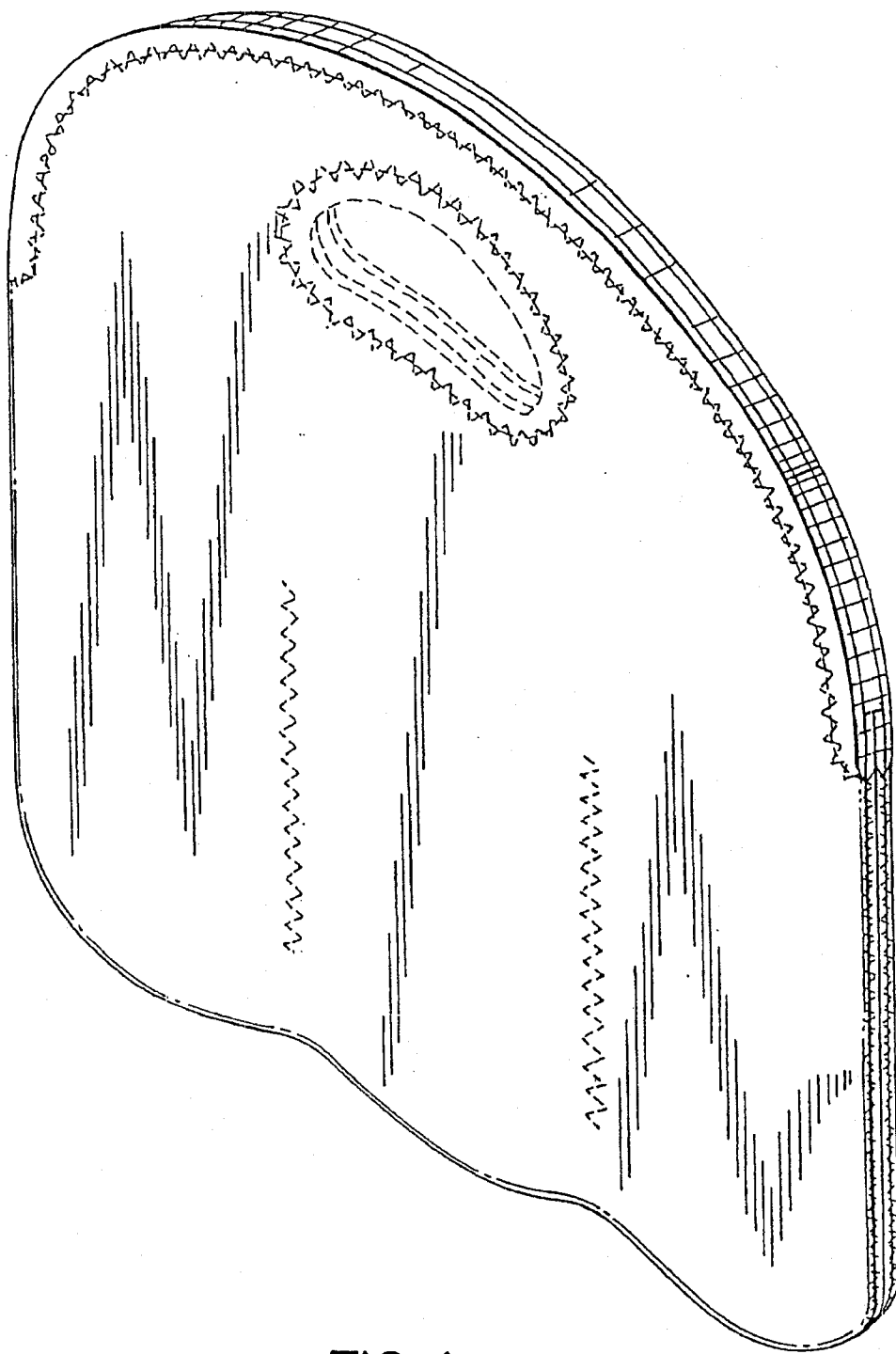


FIG.1

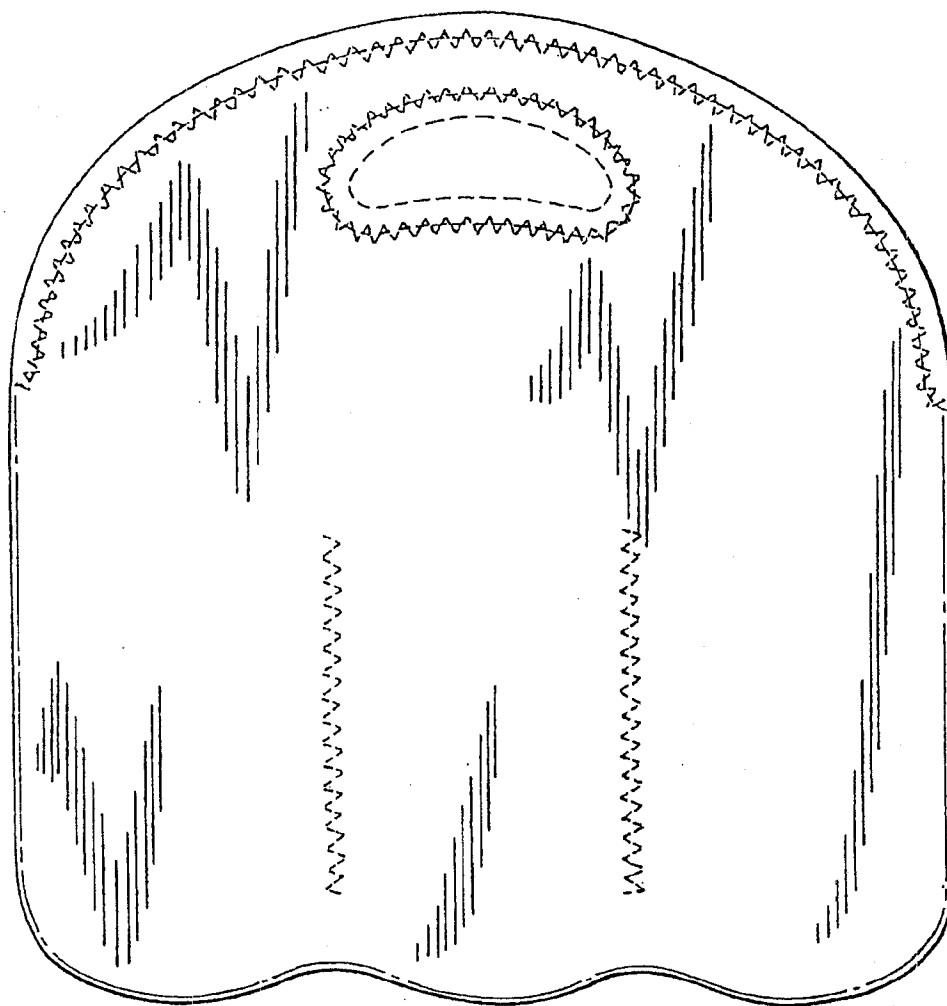
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FIG.2



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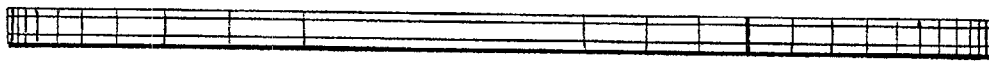


FIG. 3



FIG. 4

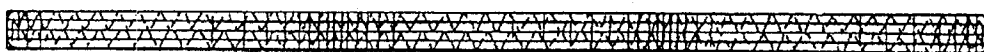


FIG. 5

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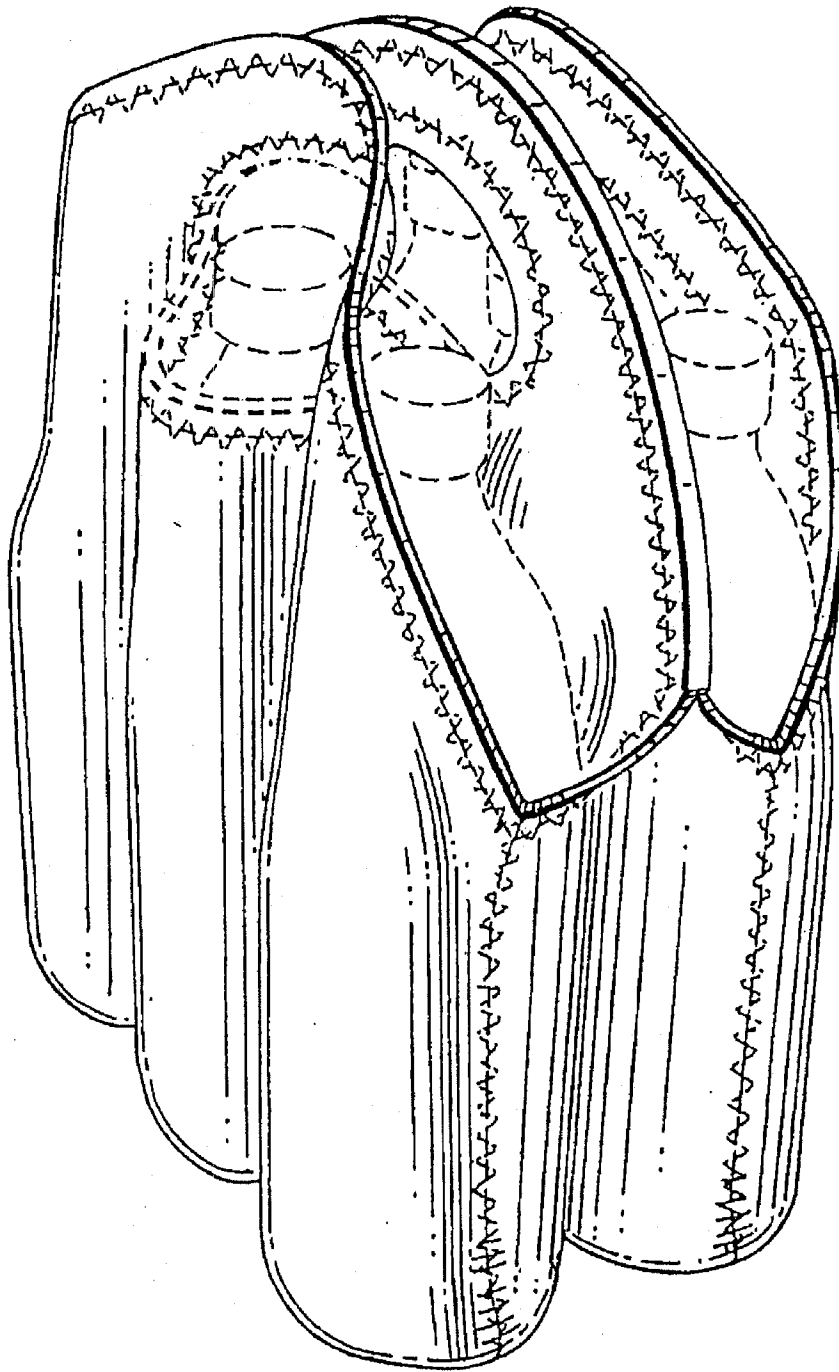


FIG. 6

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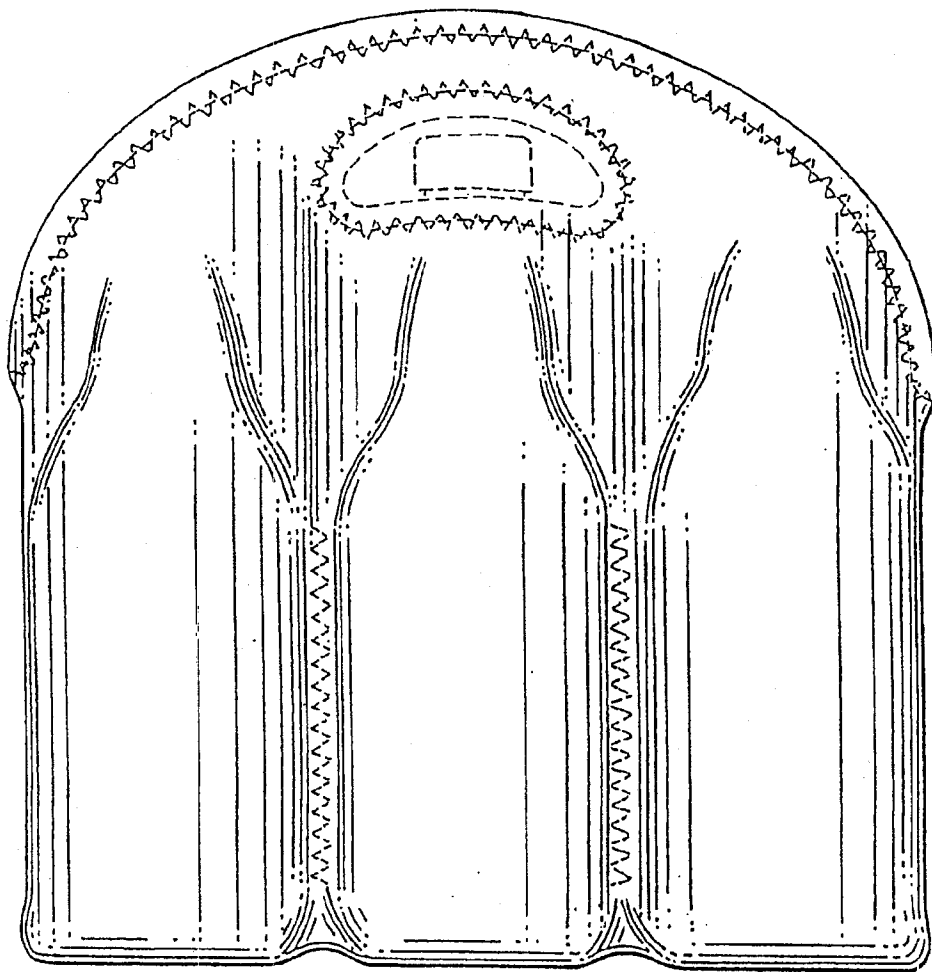


FIG. 7

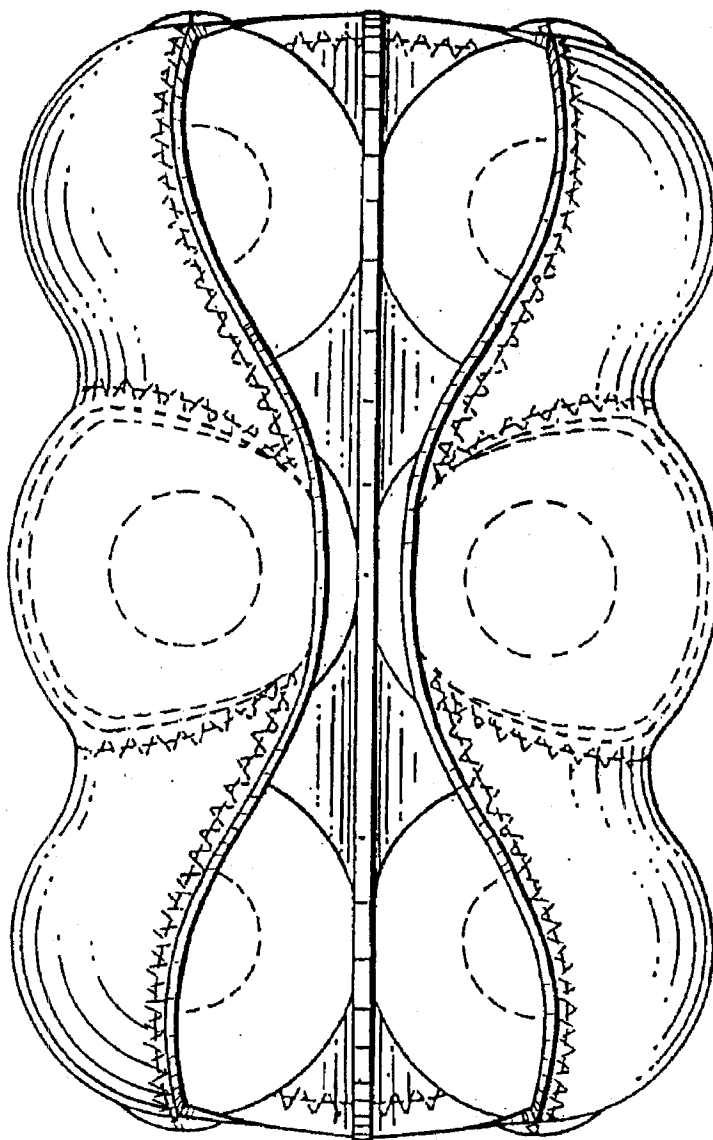
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FIG. 8



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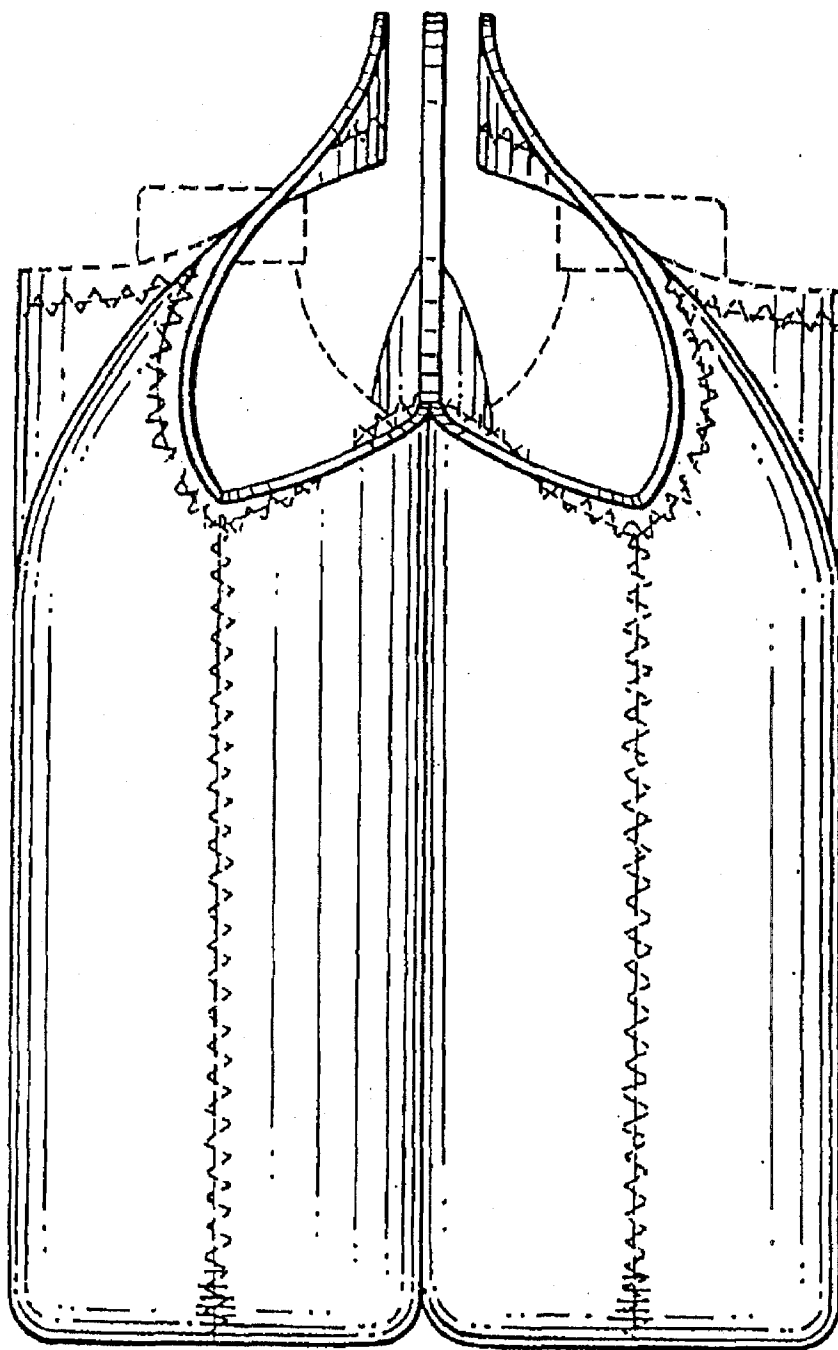


FIG. 9

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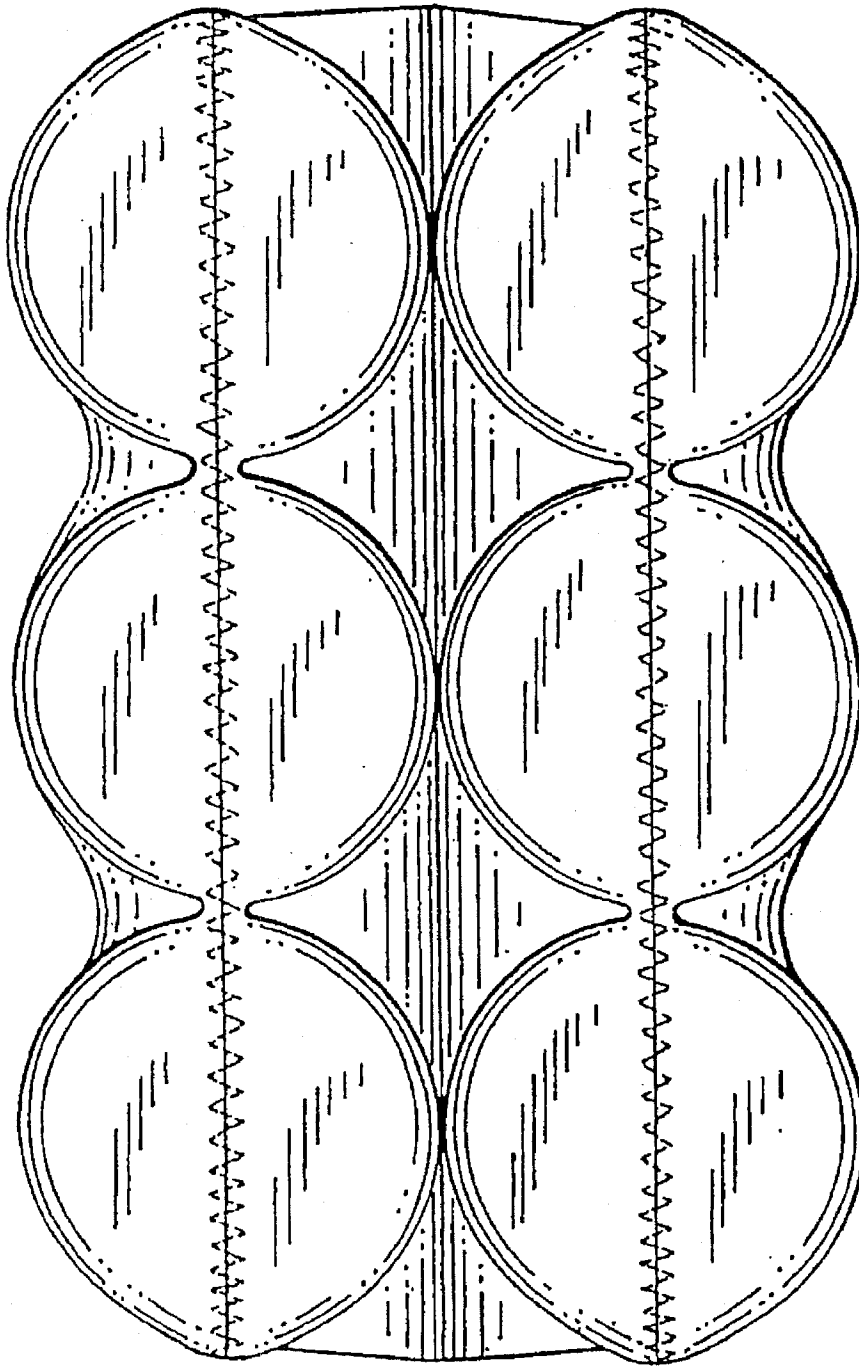
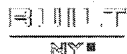


FIG. 10

EXHIBIT B



PRODUCTS

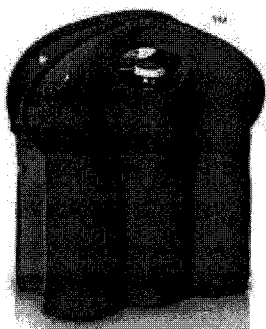
ONLINE STORE

BUZZ

ABOUT US

STORE LOCATOR

WHOLESALE



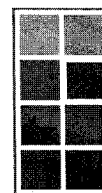
Patented and Patents Pending



six pack tote

six pack tote

- Convenient and comfortable carrying of bottles and cans.
- Insulates and protects bottles from breaking.
- Made from neoprene, the wetsuit material.
- Holds six, 12 oz bottles or cans of water, soda, beer...



cranberry red

AVAILABLE COLORS

\$19.99*
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\$4.95 shipping & handling per order

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EXHIBIT C



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ALTERNATIVE PRESS

RECALL SAFETY NOTICE

Spencer's is a unique retail brand that has been focused on delivering humor and enjoyment to peoples' lives for over 50 years. We are dedicated to providing our core 18-25 year old guests with innovative, humorous and fun merchandise that supports their lifestyle. With over 600 mall locations throughout the United States and Canada, we are THE destination for entertainment, excitement & fun. Our guests find it impossible to resist the infectious laughter that comes from experiencing a Spencer's store.

Our History

Originally founded as a mail-order catalog in 1947, Spencer's sold a vast assortment of innovative, novel merchandise that added excitement and laughter to its customers' lifestyles. Soon after its launch Spencer's became a leader in the mail-order industry and decided to expand its business by entering the mall arena. In 1964 Spencer's opened its first retail store in the Cherry Hill Mall in Cherry Hill, New Jersey where we continue to have a retail presence.

Shortly after launching its retail division, Spencer's was acquired by MCA, Inc. As an MCA company, Spencer's, Inc. became a member of one of the world's largest entertainment families and experienced tremendous growth by becoming the destination within the mall environment for everything unique and fun.

In 1995, MCA was acquired by Seagram Company Ltd. and operated under the name Universal Studios. While a Universal Studios company, Spencer's continued to experience growth by cultivating its merchandise, expanding its store base into Canada and acquiring a Halloween seasonal retailer, Spirit Halloween, in an effort to expand its Halloween business beyond the mall. Since joining the Spencer's family, Spirit has experienced consistent growth and today is a leader within the Halloween industry.

In 2001, shortly after entering Canada and acquiring [Spirit Halloween](#), Vivendi, a diversified international entertainment company acquired Universal Studios and re-branded the entire organization as Vivendi Universal Entertainment LLLP.

Less than two years later, in 2003, GB Palladin, a joint venture between Gordon Brothers Group, LLC and Palladin Capital Group, Inc. acquired Spencer Gifts LLC.

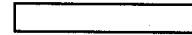
The Spencer's brand is a mainstay in popular culture and continues to evolve. In the Fall of 2004, four new prototype stores were constructed and opened in Deptford, NJ, Lehigh Valley, PA, Concord NH, and Des Moines, IA. Mixing influences from urban industrialism with a nightclub atmosphere, these new stores are paving the way for Spencer's to become the most outrageous retail brand on the planet.

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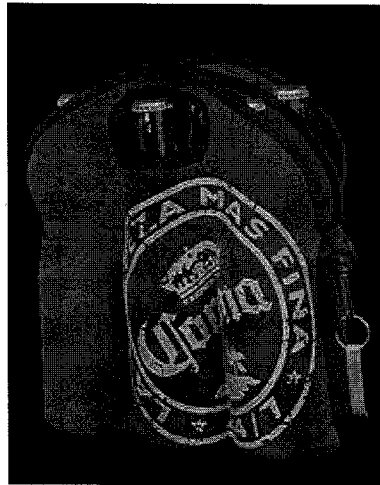
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Corona 6 Pack Insulated Holder w/ Opener

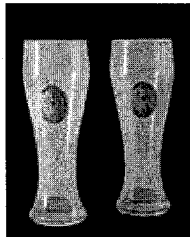


This classic Corona six pack holder will dazzle your friends when you bring it along with you to the beach, pool, or anywhere. It keeps your beers cold and your hands warm. What better item to pick up today!

\$16.99

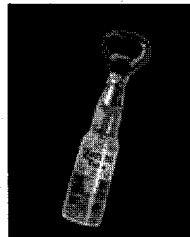


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Corona Twin Pilsner Set

\$19.99



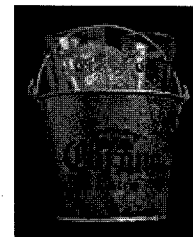
Corona Bottle Opener With Lime

\$7.99



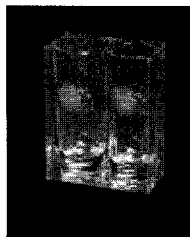
Corona Coaster Set

\$19.99



Corona Tin Gift Set

~~\$24.99~~
 SALE \$19.99



Corona 2pk Shooter Glass

\$9.99



Corona Frosty Mug With Floating Limes

\$4.99

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Coors Light Insulated 6 Pack Holder

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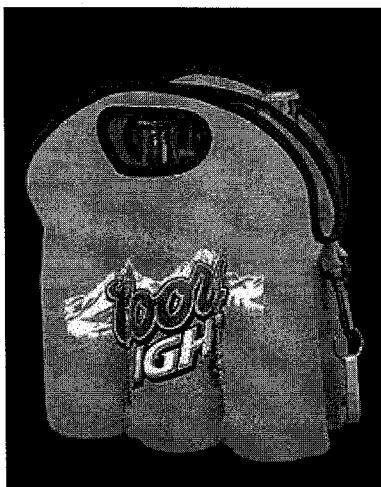
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This awesome Coors Light six pack holder will amaze your friends when you bring it along with you to the mountain, wilderness, or Alaska. It keeps your beers cold and your hands warm. For serious drinkers only!
\$16.99



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