UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

TTAB

SYBARITIC, INC. Opposer, v. **THOMAS P. MUCHISKY** Applicant.	**Opposition No.: 91/163,999** **Serial No.: 78/282,661**

OPPOSER'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS

Opposer Sybaritic, Inc. hereby requests that Applicant's motion to dismiss be denied and that Applicant Answer Opposer's Notice of Opposition. Sybaritic has standing to proceed with the Opposition proceeding. Further, Sybaritic has notice pled valid grounds for opposing Applicant's alleged trademark. Therefore, Applicant has not provided any reason that the Opposition proceeding should be dismissed and the Trademark Trial and Appeal Board should deny Applicant's motion.

Sybaritic Has Standing To Oppose the Present Trademark Application

Sybaritic has pled that it will be damaged by registration of the design shown in application serial no. 78/282,670. To have standing in an Opposition proceeding, the Opposer must have (1) a real interest in the proceeding, and (2) a reasonable basis for the belief of damage. *Ritchie v. Simpson*, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999).

When Sybaritic pled that it will be damaged shows that Sybaritic has a real interest in the proceeding. Sybaritic also has pled that it would be damaged because it may not be able to use a similarly configured functional applicator in commerce, as it is

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U.S. Patent & TMOfc/TM Mail Rcpt Dt. #72

entitled to do. Being prevented from using a hand held massage applicator in commerce, which is a product that Sybaritic has sold and sells in commerce is a reasonable belief of damage. Therefore, Sybaritic has met its burden to have standing to proceed with the present Opposition proceeding.

Further, to have standing to oppose, the opposer need only be something more than a gratuitous interloper or a vicarious avenger of someone else's rights. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 20:7, p. 20-19 (2004) (*citing Golden Gate Salami Co. v. Gulf States Paper Corp.*, 141 U.S.P.Q. 661 (C.C.P.A. 1964)(Opposer cannot be a "mere intermeddler"); *Lipton Industries, Inc. v. Ralston Purina Co.*, 213 U.S.P.Q. 185 (C.C.P.A. 1982) (purpose of standing is to weed out "intermeddlers" from those with "a personal interest in the outcome beyond that of the general public")).

Sybaritic has a real interest in this proceeding. In fact, Sybaritic is being sued for trademark infringement in the United States District Court for the Eastern District of Missouri, Eastern Division by General Physiotherapy, Inc. on trademarks owned by Applicant. A copy of the complaint with exhibits is attached hereto as Exhibit A. To be accused of trademark infringement on Registration Nos. 2,039,795, 2,066,217, 2,039,797, 2,041,648 and 2,038,211 (Exhibits 1-5 of the Complaint), leads Sybaritic to reasonably believe that it will be sued on the present application if it becomes a registration.

Therefore, Sybaritic clearly has standing. Further, it is interesting that the same attorney who filed the complaint in federal court apparently believes that Sybaritic is nothing more than a gratuitous interloper or a vicarious avenger of someone else's rights to allege that Sybaritic has no standing in the present proceeding.

Sybaritic Has Provided Valid Grounds for Opposing the Application

Sybaritic has pled valid grounds for Opposing the present application. Sybaritic has pled upon information and belief that the mark has functional aspects that cannot function as a trademark, that the mark at issue has not acquired secondary meaning and that the mark does not function as a trademark. *See* 15 U.S.C § 1052(e) and T.B.M.P. §309.03(c)("That defendant's product design is de jure functional, and if not de jure functional, that the product design has not acquired destinctiveness.") Sybaritic has pled valid grounds for opposing the application.

Further, Applicant's reasoning is flawed in that it is confusing a pleading with a showing of proof. Applicant is not under any obligation to plead with particularity the functional aspects of the mark in the application. The opposition process is designed for the taking of discovery and testimony to provide proofs of the functional aspects. However, one questions why a material of construction is included in the description of the mark if it is not functional.

Further to rely on the fact that the Trademark Office considered the mark to be registerable as a grounds for a motion to dismiss is unreasonable. Every application that has been or is being opposed has been found to be registerable by the Trademark Office. Otherwise, the mark would not have been published for opposition.

Regarding the pled issue that the mark in the application has not obtained secondary meaning, this is an issue that is pled and to be proved through the Opposition proceeding. Again, Applicant is confusing Notice pleading with a showing of proof through the taking of discovery and testimony. Applicant's arguments have no basis in a motion to dismiss.

Conclusion

For the foregoing reasons, Sybaritic has standing and has pled valid grounds for opposing the present application. Therefore, Sybaritic respectfully requests that Applicant's motion to dismiss be denied.

All correspondence should be addressed to **Brian Kidwell, Esq.**, Sybaritic, Inc., 9220 James Avenue, Bloomington, Minnesota 55431.

Respectfully submitted,

Westman, Champlin & Kelly, P.A.

Dated: March 14, 2005

By: _____

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ATTORNEYS FOR OPPOSER SYBARITIC, INC.

FILED
AUG - 1 2003
U. S. DISTRICT COURT
EASTERN DISTRICT OF MO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GENERAL PHYSIOTHERAPY, INC.,

Plaintiff,

v.

SYBARITIC, INC.,
SYMEDEX LLC, SYMEDEX, INC.,
AMERICAN MEDICAL TECHNOLOGIES LLC,
STEVEN J. DAFFER, and
PHYREA PRODUCTION LLC
Defendants.

4:03CV01058HEA

Civil Action No.

Jury Trial Demanded

COMPLAINT

General Physiotherapy, Inc., Plaintiff in the above entitled action, for its complaint against Sybaritic, Inc.; Symedex LLC; Symedex, Inc.; American Medical Technologies, LLC; Steven J. Daffer; and Phyrea Production, LLC; Defendants in such action, state:

(1) This action arises under the Acts of Congress relating to trademarks, namely, the Lanham Act, 15 U.S.C. §1051 et seq., and the common law of the State of Missouri, being a civil action for trademark infringement, authorized by Title 15, United States Code, §1114 et seq., and unfair competition. This Court has jurisdiction under 15 U.S.C. §1121 and Title 28, United States Code, §1338(a) and 1338(b), as well as the Court's supplemental jurisdiction under §1367. Venue is proper in this Court under 28 U.S.C. §1391. The amount in controversy, exclusive of interest and costs, exceeds Fifty Thousand Dollars ($50,000.00).

(2) General Physiotherapy, Inc. ("General"), is a corporation organized and existing under the laws of the State of Missouri, having its principal place of business at 13222 Lakefront Drive, Earth City (St. Louis), Missouri 63045-1505.

EXHIBIT
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(3) General is informed and believes and therefore alleges that Defendant, Sybaritic, Inc. ("Sybaritic") is a corporation organized and existing under the laws of the State of South Dakota, having a regular and established place of business at 9220 James Avenue South, Bloomington, Minnesota 55431. Sybaritic is doing business in this state and district by offering for sale, advertising for sale, selling and shipping its products to customers located in this jurisdiction.

(4) General is informed and believes and therefore alleges that Defendant Symedex LLC ("Symedex") is a limited liability corporation organized and existing under the laws of the State of Minnesota, having a regular and established place of business at 9220 James Avenue South, Bloomington, Minnesota 55431. Symedex is doing business in this state and district by offering for sale, advertising for sale, selling and shipping its products to customers located in this jurisdiction.

(5) General is informed and believes and therefore alleges that Defendant Symedex, Inc. is a corporation organized and existing under the laws of the State of Minnesota, having a regular and established place of business at 9220 James Avenue South, Bloomington, Minnesota 55431. Symedex, Inc. is doing business in this state and district by offering for sale, advertising for sale, selling and shipping its products to customers located in this jurisdiction.

(6) General is informed and believes and therefore alleges that Defendant American Medical Technologies, LLC ("AMT") is a limited liability corporation organized and existing under the laws of the State of Minnesota, having a regular and established place of business at 9220 James Avenue South, Bloomington, Minnesota 55431. AMT is doing business in this

state and district by offering for sale, advertising for sale, selling and shipping its products to customers located in this jurisdiction, through Sybaritic and/or Symedex and/or Symedex, Inc.

(7) General is informed and believes and therefore alleges that Defendant Phyrea Production, LLC ("Phyrea") is a corporation organized and existing under the laws of the country of France, having a regular and established place of business at 2 Route Robert Algayon, Parc d'Activite Robert Algayon, Ayguemorte Les Graves 33640 (Gironde), France. Phyrea is doing business in this state and district by offering for sale, selling, and shipping its products to Sybaritic and/or AMT LLC and/or Symedex LLC and/or Symedex, Inc. and/or other U.S. customers which subsequently advertise for sale, sell and ship its products into this jurisdiction.

(8) General is informed and believes and therefore alleges that Steven Daffer ("Daffer") is an individual residing at 6604 Sally Lane, Edina, Minnesota 55439, with his primary offices at 9220 James Avenue South, Bloomington, Minnesota 55431, and is the owner of and/or principal investor in, and/or controls directly or indirectly Sybaritic, Symedex, Symedex, Inc., AMT and Phyrea.

(9) General is engaged in the manufacture and sale of various massage equipment, which it sells to distributors and retailers throughout the world. The sale of massage equipment is essentially the sole product line of General, and General has expended substantial amounts of money, over the past 25 years, in advertising, exhibiting, promoting and establishing those products in the marketplace.

(10) Sybaritic was, until August 29, 2002, a distributor of General, selling massage machines and applicator attachments therefor manufactured by or for General. On and after

August 29, 2002, the distributorship relationship by and between General and Sybaritic was terminated. Defendant Sybaritic retained no rights to use any of the trademarks owned by General, except for the right to sell off remaining inventory of massage equipment originally obtained from General, which right expired on March 1, 2003. The other named Defendants were never granted rights to use any of General's intellectual property.

(11) Thomas P. Muchisky ("Muchisky") is an individual residing in the State of Missouri and having a place of business at 13250 Lakefront Drive, Earth City (St. Louis), Missouri 63045-1505. Muchisky is the owner, and General is the exclusive North American licensee with the right to bring actions for infringement in General's own name, of the following trademark registrations: United States Trademark Registration Numbers 2,066,217; 2,039,795; 2,041,648; 2,039,797; 2,038,211; and 1,496,651, attached hereto as Exhibits 1-6, respectively.

(12) General is informed and believes and therefore alleges that Daffer established AMT as an organization legally separate from Sybaritic, Symedex, and Symedex, Inc. in an attempt to avoid violation of a non-competition agreement between General and Sybaritic. General is further informed and believes and therefore alleges that, promptly after being formed, AMT established and financed Phyrea, whose function is to manufacture massage machines. Daffer is the President and sole shareholder of AMT, and is the sole shareholder of Phyrea Production. Phyrea sells said massage machines to Sybaritic and/or Symedex and/or Symedex, Inc. and/or AMT and/or to customers thereof, in direct competition with General.

(13) Sybaritic, despite being terminated as a distributor for General since at least August 29, 2002, and each of the other Defendants have used and continue to use the trademarks of General, and in particular the marks represented by Exhibits 1-6, without the

consent of General, in order to attempt to "pass off" Phyrea-made massage machines and accessories as General-made massage machines and accessories.

COUNT I

FEDERAL TRADEMARK INFRINGEMENT

(14) Plaintiff re-alleges and incorporate by reference the allegations set forth in Paragraphs 1-13, inclusive, of this Complaint as if set forth, verbatim, herein.

(15) This Count, arising under Section 32 of the Lanham Act (15 U.S.C. § 1114) is for infringement of a trademark registered in the United States Patent and Trademark Office.

(16) Registration Number 2,039,795 for a two-ball applicator is incontestable.

(17) Registration Number 2,066,217 for a four-ball applicator is incontestable.

(18) Registration Number 2,039,797 for a right-angle adaptor is incontestable.

(19) Registration Number 2,041,648 for a contour applicator is incontestable.

(20) Registration Number 2,038, 211 for a hot/cold applicator is incontestable.

(21) Registration Number 1,496,651 for "Directional Stroking" is incontestable.

(22) Continuously since about 1978, General has used the above-recited marks to identify its massage products, to distinguish them from those made and sold by others, by among other things, prominently displaying the product designs on containers for the goods, and the displays associated therewith. In addition, General has prominently displayed the marks on advertisements, Internet sites, direct mailing advertisements, trade shows and exhibitions through the United States and in periodicals distributed throughout the United States.

(23) Defendants have infringed the marks in interstate commerce by various acts, including the advertisement and sale of massage units and accessories for massage units utilizing the trademarks. The use of the marks is without permission or authority of General and/or Muchisky, and said use by Defendants is likely to cause confusion, to cause mistake, and/or to deceive.

(24) Plaintiff therefore alleges that the acts of trademark infringement and unfair competition have been committed with the intent to cause confusion, mistake and to deceive.

(25) Since on or about the date of registration of the respective trademark registrations, General has given notice that the marks are registered in the United States Patent and Trademark Office by displaying with the mark as used the letter "R" enclosed within a circle ("®"). Defendants adopted the word mark and product configurations as trademarks for their products with the full knowledge of the prior use by General of the word mark and product configurations.

(26) The use by Defendants of the registered trademarks of Plaintiff is an infringement thereof, and unless restrained by this Court, the Defendants will continue to infringe Plaintiff's registered marks to Plaintiff's irreparable injury.

COUNT II

UNFAIR COMPETITION

(27) Plaintiff hereby re-alleges, as if fully set forth herein, the allegations set forth in paragraphs 1-26, inclusive.

(28) This action arises under the Lanham Act Section 43(a), 15 U.S.C. § 1125(a).

(29) Said acts of Defendants constitute unfair competition and an infringement of Plaintiff's common law rights in the product configurations for the two-ball applicator, the four-ball applicator, the right-angle adapter, the contour applicator and the hot/cold applicator, incontestable Registration Nos. 2,039,795; 2,066,217; 2,039,797; 2,041,648 and 2,038,211, Exhibits 1-5 respectively; and the word mark "Directional Stroking" of Registration 1,496,651 shown in Exhibit 6.

(30) Continually since or about 1978, General has used the respective product configurations of a two-ball applicator, a four-ball applicator, a right-angle adaptor, a contour applicator, a hot cold applicator, and the word mark "Directional Stoking" to identify its goods and to distinguish them from those made and sold by others by, among other things, prominently displaying the word mark and the product configuration in conjunction with the goods, the containers and displays associated therewith. In addition, General has prominently displayed word mark and the product configurations on direct mail advertisements, in trade exhibitions, on Internet sites and in periodicals distributed throughout the United States and the world. Said goods and said advertising have been distributed in the trade area where Defendants are doing business. As a result of said sales and advertising by General under the product configuration trademarks, the word mark and product configurations have become incontestable and have a secondary and distinctive trademark meaning to purchasers in Defendants' trade area. Said word mark and product configurations have come to indicate to said purchasers the meaning of massage products originating only with General. As a result of said association by purchasers of the word mark and product configurations with General, Defendants' use of the word mark and the product configuration marks is likely to cause confusion of said purchasers.

(31) Defendants have infringed Plaintiff's marks as alleged herein with the intent to deceive the public into believing that the goods sold by Defendants are made by, approved by, sponsored by, or affiliated with General. Defendants' acts, as alleged herein, were committed with the intent to pass off and palm off Defendants' goods as the goods of General, and with the intent to deceive and defraud the public.

COUNT III

FALSE DESIGNATION OF ORIGIN AND FALSE DESCRIPTION

(32) Plaintiff hereby re-alleges, as if fully set forth, the allegations set forth in paragraphs 1-31, inclusive.

(33) Defendants have caused massage goods to enter into interstate commerce that utilize the word mark and product configurations closely associated with General. The use of the word mark and those product configurations is a false designation of origin that is likely to cause confusion, to cause mistake, to deceive as to the affiliation, connection, or association of Defendants with General and as to the origin, sponsorship, or approval of such massage apparatus and product configurations by General. These acts are in violation of 15 U.S.C. § 1125(a), in that Defendants have used in connection with goods and services, a false designation of origin, a false and misleading description and representation of fact which is likely to cause confusion, and to cause mistake, and to deceive as to the affiliation, connection or association of Defendants with General, as to the origin, sponsorship and approval of Defendants' goods, services and commercial activities by General.

COUNT IV

DILUTION

(34) Plaintiff hereby re-allege, as if fully set forth, the allegations set forth in paragraphs 1-33, inclusive.

(35) Defendants' use of Plaintiff's word mark and product configurations has caused and is causing dilution of the incontestable trademarks represented by the word mark and those product configurations.

ALLEGATION OF DAMAGE

(36) By reason of Defendants' acts alleged herein, General has and will suffer damage to its business, reputation, and goodwill and the loss of sales and profits General would have made but for Defendants' acts.

(37) Defendants threaten to do the acts complained of herein and, unless restrained and enjoined, will continue to do so, all to Plaintiff's irreparable damage. It would be difficult to ascertain the amount of compensation that could afford Plaintiff adequate relief for such continuing acts, and a multiplicity of judicial proceedings would be required. Plaintiff's remedy at law is not adequate to compensate it for damages threatened.

WHEREFORE, Plaintiff prays as follows:

(a) that this Court grant an injunction pursuant to the powers granted it under 15 U.S.C. § 116, enjoining and restraining Defendants and their agents, owners, managers, officers, directors, servants and employees from directly or indirectly using the word mark and product configurations represented by the incontestable trademark registrations 1,496,651; 2,039,797;

2,039,795; 2,041,648; 2,066,217; and 2,038,211; or any other marks and/or product configuration, similar to General's marks which are likely to cause confusion, mistake, or to deceive;

(b) that this Court, pursuant to the powers granted it under 15 U.S.C. § 1118, order that all labels, signs, printouts, packages, samples, inventories, products, catalogs, price lists, wrappers, receptacles, product configurations and advertisements in the possession of Defendants which are the same as or confusingly similar to General's marks and product configurations, including all plates, molds, matrices and other means of making the same, be delivered up to General for destruction;

(c) that this Court grant an injunction enjoining and restraining Defendants and their agents, owners, managers, officers, directors, servants and employees from directly or indirectly using the word mark and/or product configurations marks for the advertising, promotion, distribution, sale or use of massage machines and/or applicators and/or accessories to be used with massage machines, or any marks or configurations similar to General's marks, which are likely to cause confusion, and from continuing any and all acts of unfair competition as alleged herein;

(d) that Defendants be required to account to General for any and all profits derived by Defendants from the sale of goods, and for all damages sustained by General by reason of said acts of infringement and unfair competition complained of herein;

(e) that this Court award General treble the amount of actual damages suffered by General;

(f) that this Court award punitive and exemplary damages against Defendants and in favor of General in the sum of One Million Dollars ($1,000,000) by reason of Defendants' fraud and palming off;

(g) that the costs of this action be awarded to General in that this is an exceptional case and that General be awarded its reasonable attorneys' fees;

(h) that this Court award such other and further relief as shall be deemed just.

By: _____

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Ned W. Randle, #8788
Douglas E. Warren, #98,097
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Fax: (314) 991-2178

Attorneys for General

Int. Cl.: 10

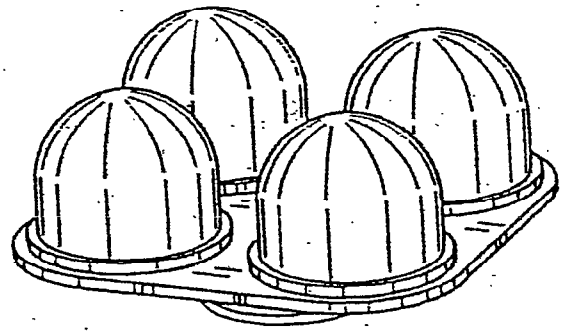
Prior U.S. Cls.: 26, 39 and 44

United States Patent and Trademark Office

Reg. No. 2,066,217

Registered June 3, 1997

TRADEMARK
PRINCIPAL REGISTER



MUCHISKY, THOMAS P. (UNITED STATES CITIZEN)
13250 LAKEFRONT DRIVE
EARTH CITY, MO 630451505

FOR: APPLICATOR FOR HAND-HELD MASSAGER, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 1-0-1969; IN COMMERCE 1-0-1969.

THE LINING SHOWN IN THE MARK IS USED TO INDICATE THE 3-DIMENSIONAL CHARACTER OF THE MARK AND IS NOT A FEATURE OF THE MARK.

THE MARK CONSISTS OF A FLAT RECTANGULAR BASE PLATE, HAVING FOUR SIDES OF EQUAL LENGTHS JOINED AT FOUR ROUNDED CORNERS. THE BASE PLATE INCLUDING A SMOOTH FIRST SURFACE AND A SMOOTH SECOND SURFACE, WITH A CIRCULAR COLLAR CONCENTRIC TO THE BASE CENTRALLY POSITIONED ON THE SECOND SURFACE, THE FIRST SURFACE INCLUDING FOUR DISCRETE RAISED RINGS, THE RINGS BEING POSITIONED EQUIDISTANT APART ABOUT THE FIRST SURFACE OF THE BASE PLATE WITH ONE EACH OF THE RINGS BEING POSITIONED ADJACENT A ROUNDED CORNER OF THE BASE PLATE, EACH RING CONTAINING A CONCENTRIC RAISED DOME STRUCTURE, EACH DOME STRUCTURE INCLUDING A VERTICAL BODY TUBULAR TOPPED BY INTEGRAL ROUNDED DOME.

SEC. 2(F).

SER. NO. 74-690,330, FILED 6-19-1995.

BALDEV SARAI, EXAMINING ATTORNEY

EXHIBIT 1

Int. Cl.: 10

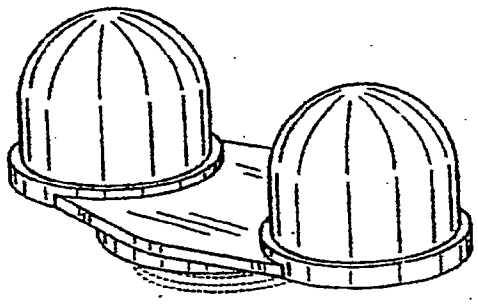
Prior U.S. Cls.: 26, 39 and 44

Reg. No. 2,039,795

United States Patent and Trademark Office

Registered Feb. 25, 1997

TRADEMARK
PRINCIPAL REGISTER



MUCHISKY, THOMAS P. (UNITED STATES CITIZEN)
13250 LAKEFRONT DRIVE
EARTH CITY, MO 630451505

FOR: APPLICATOR FOR HAND-HELD MASSAGER, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 1-0-1969; IN COMMERCE 1-0-1969.

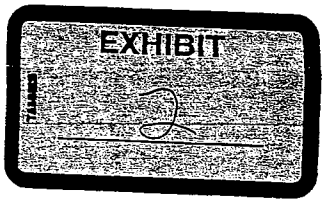
THE LINING SHOWN IN THE MARK IS USED TO INDICATE THE 3-DIMENSIONAL CHARACTER OF THE MARK AND IS NOT A FEATURE OF THE MARK.

THE MARK CONSISTS OF A FLAT ELONGATED PARALLELOGRAM BASE PLATE HAVING A FIRST SMOOTH SURFACE AND A SECOND SMOOTH SURFACE AND A FIRST END AND A SECOND END, THE FIRST END INCLUDING A RAISED RING ON THE FIRST SMOOTH SURFACE AND THE SECOND END INCLUDING A RAISED RING ON THE FIRST SMOOTH SURFACE, THE RINGS PROJECTING OUT OF THE PLANE OF THE BASE PLATE, THE FIRST RING HAVING A CONCENTRIC DOME STRUCTURE THEREIN WHICH INCLUDES A VERTICALLY EXTENDING CYLINDRICAL BODY AND AN INTEGRAL DOME TOP, THE SECOND RING HAVING A CONCENTRIC DOME STRUCTURE THEREIN WHICH INCLUDES A VERTICALLY EXTENDING CYLINDRICAL BODY AND AN INTEGRAL DOME TOP. THE BASE PLATE INCLUDES A CIRCULAR COLLAR CENTRALLY POSITIONED ON THE SECOND SMOOTH SURFACE, THE CIRCULAR COLLAR INCLUDING AN AXIALLY ALIGNED DEPENDING CONCENTRIC EXTERNALLY THREADED COLLAR. THE BROKEN LINE IS INTENDED TO SHOW THE POSITION OF THE MARK AND IS NOT CLAIMED AS A FEATURE OF THE MARK.

SEC. 2(F).

SER. NO. 74-690,331, FILED 6-19-1995.

BALDEV SARAI, EXAMINING ATTORNEY



Int. Cl.: 10

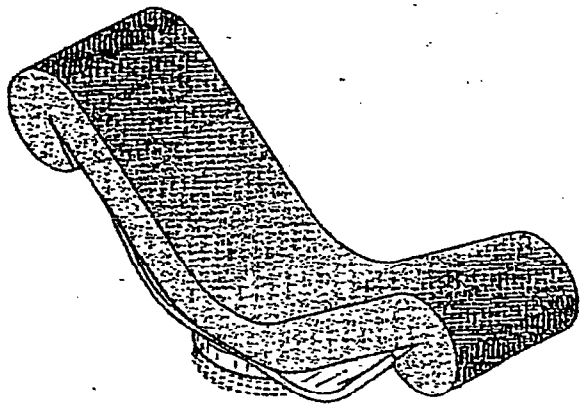
Prior U.S. Cls.: 26, 39 and 44

Reg. No. 2,041,648

United States Patent and Trademark Office

Registered Mar. 4, 1997

TRADEMARK
PRINCIPAL REGISTER



MUCHISKY, THOMAS P. (UNITED STATES CITIZEN)
13250 LAKEFRONT DRIVE
EARTH CITY, MO 630451505

FOR: APPLICATOR FOR HAND-HELD MASSAGER, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 1-0-1969; IN COMMERCE 1-0-1969.

THE LINING SHOWN IN THE MARK IS USED TO INDICATE THE 3-DIMENSIONAL CHARACTER OF THE MARK AND IS NOT A FEATURE OF THE MARK.

THE MARK CONSISTS OF SUBSTANTIALLY OF A CONTOURED BASE PLATE HAVING A SUBSTANTIALLY HORIZONTAL CENTER SECTION WITH A FIRST AND SECOND END WITH A FIRST INTEGRAL INCLINED PLANE AT THE FIRST END OF THE CENTER SECTION AND A SECOND INTEGRAL INCLINED PLANE AT THE SECOND END OF THE CENTER SECTION, THE INCLINED PLANES BEING AT EQUAL OBTUSE ANGLES TO THE CENTER SECTION WITH UPPER SURFACES OF THE CENTER SECTION AND INCLINED PLANES BEING IN ALIGNMENT, THE CENTER SECTION INCLUDING A CIRCULAR COLLAR CENTRALLY POSITIONED ON THE LOWER SURFACE, THE CIRCULAR COLLAR HAVING A CONCENTRIC, DEPENDING, EXTERNALLY THREADED COLLAR, THE CONTOURED BASE INCLUDING AN ELONGATED SECOND LAYER AFFIXED TO THE UPPER SURFACE OF AND CONFORMING TO THE SHAPE OF THE CENTER SECTION AND TWO INTEGRAL INCLINED PLANES, THE SECOND LAYER HAVING A GREATER LENGTH AND WIDTH THAN THE CONTOURED BASE AND EXTENDING LATERALLY OUTSIDE THE PLANE OF THE CONTOURED BASE WITH ENDS OF THE SECOND LAYER BEING FOLDED OVER THE OUTER ENDS OF THE INCLINED PLANES AND ABUTTING AND AFFIXED TO THE UNDERSIDE OF THE TIPS OF THE INCLINED PLANES. THE BROKEN LINES ARE INTENDED TO SHOW THE POSITION OF THE MARK AND ARE NOT CLAIMED AS A FEATURE OF THE MARK.

SEC. 2(F).

SER. NO. 74-690,329, FILED 6-19-1995.

BALDEV SARAI, EXAMINING ATTORNEY

EXHIBIT 3

Int. Cl.: 10

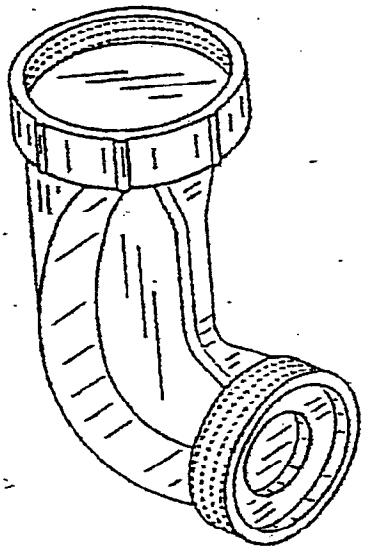
Prior U.S. Cls.: 26, 39 and 44

Reg. No. 2,039,797

United States Patent and Trademark Office

Registered Feb. 25, 1997

TRADEMARK
PRINCIPAL REGISTER



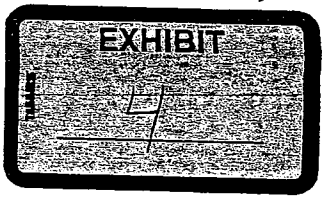
MUCHISKY, THOMAS P. (UNITED STATES CORPORATION)
13250 LAKEFRONT DRIVE
EARTH CITY, MO 630451505

FOR: APPLICATOR FOR HAND-HELD MASSAGER, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 1-0-1975; IN COMMERCE 1-0-1975.

THE LINING SHOWN IN THE MARK IS USED TO INDICATE THE 3-DIMENSIONAL CHARACTER OF THE MARK AND IS NOT A FEATURE OF THE MARK.

THE MARK CONSISTS OF A TUBULAR ELONGATED BODY HAVING A SUBSTANTIALLY COLLAPSED OVAL CROSS-SECTION AT THE MIDDLE WHERE THE BODY IS BENT AT A RIGHT ANGLE AND HAVING A FIRST END AND A SECOND END. THE FIRST END INCLUDING A FIRST CIRCULAR COLLAR HAVING A GREATER EXTERNAL DIAMETER THAN THE BODY. THE COLLAR INCLUDING EXTERNAL RAISED RIBS EQUIDISTANT AROUND THE EXTERNAL SURFACE OF THE COLLAR, THE COLLAR ALSO INCLUDING INTERNAL THREAD, THE SECOND END OF THE BODY INCLUDING A CIRCULAR COLLAR HAVING A GREATER EXTERNAL DIAMETER THAN THE BODY BUT LESSER DIAMETER THAN THE FIRST CIRCULAR COLLAR, THE SECOND CIRCULAR COLLAR INCLUDING AN INNER RING APPROXIMATELY AT THE MIDPOINT OF THE SECOND CIRCULAR COLLAR, THE INNER RING INCLUDING A CENTRAL CIRCULAR OPENING HAVING A DIAMETER SUBSTANTIALLY LESS THAN THE EXTER-



Int. Cl.: 10

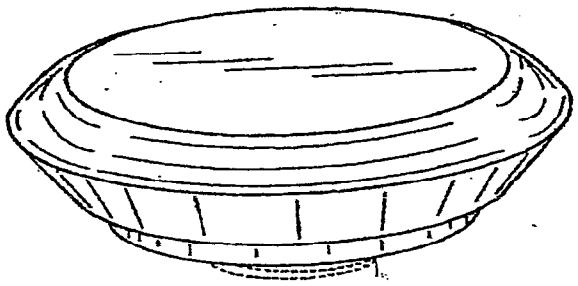
Prior U.S. Cls.: 26, 39 and 44

Reg. No. 2,038,211

United States Patent and Trademark Office

Registered Feb. 18, 1997

TRADEMARK
PRINCIPAL REGISTER



MUCHISKY, THOMAS P. (UNITED STATES CITIZEN)
13250 LAKEFRONT DRIVE
EARTH CITY, MO 630451505

FOR: APPLICATOR FOR HAND-HELD MASSAGER, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 1-0-1969; IN COMMERCE 1-0-1969.

THE LINING SHOWN IN THE MARK IS USED TO INDICATE THE 3-DIMENSIONAL CHARACTER OF THE MARK AND IS NOT A FEATURE OF THE MARK.

THE MARK CONSISTS OF A SQUAT, FRUSTO-CONICAL WALL, THE WALL INCLUDES A TOP WHICH HAS AN INWARDLY AND UPWARDLY ANGLED, MILDLY CURVED CIRCUMFERENTIAL SIDE WALL AND A FLAT, CIRCULAR HORIZONTAL WALL ACROSS THE TOP OF THE SIDE WALL. THE BOTTOM SIDE OF THE WALL INCLUDES A SHORT CONCENTRIC, CIRCULAR COLLAR AND A SECOND CIRCULAR COLLAR CONCENTRIC TO THE FIRST COLLAR. THE BROKEN LINES ARE INTENDED TO SHOW THE POSITION OF THREADS AND ARE NOT PART OF THE MARK.

SEC. 2(F).

SER. NO. 74-690,328, FILED 6-19-1995.

BALDEV SARAI, EXAMINING ATTORNEY

EXHIBIT 5

Int. Cl.: 10

Prior U.S. Cl.: 44

United States Patent and Trademark Office

Reg. No. 1,496,651
Registered July 19, 1988

TRADEMARK
PRINCIPAL REGISTER

DIRECTIONAL-STROKING

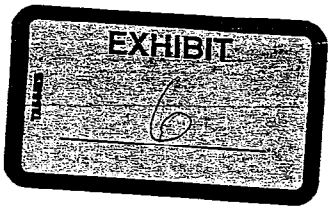
GENERAL PHYSIOTHERAPY, INC. (MISSOURI CORPORATION)
1520 WASHINGTON AVENUE
ST. LOUIS, MO 63103

FOR: MASSAGE AND PERCUSSION MACHINES FOR THERAPEUTIC USE, IN CLASS 10 (U.S. CL. 44).

FIRST USE 1-1-1979; IN COMMERCE 1-1-1979.
SEC. 2(F).

SER. NO. 485,768, FILED 6-18-1984.

MICHELE L. MCSHANE, EXAMINING ATTORNEY



CERTIFICATE OF SERVICE

I certify that:

I am over the age of 18 and am not a party to this action. My business address is Westman, Champlin & Kelly, P.A., Suite 1600 - International Centre, 900 Second Avenue South, Minneapolis, MN 55402-3319.

On **March 14, 2005**, a copy of the following document:

OPPOSER'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS

was delivered via first class, U.S. Mail to:

Lionel L. Lucchesi, Esq.
POLSTER, LIEDER, WOODRUFF & LUCCHESI, L.C.
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Peter J. Ims