

J137-5183

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

E. MISHAN & SONS, INC.,

Plaintiff,

v.

MARK FELDSTEIN & ASSOCIATES, INC.,

Defendant.

Civil Action No. _____

JUDGE: _____

Jury Trial Demanded

COMPLAINT

Plaintiff E. Mishan & Sons, Inc. (“Emson” or “Plaintiff”), for its complaint against Defendant Mark Feldstein & Associates, Inc. (“MFA” or “Defendant”) alleges as follows.

NATURE OF THE ACTION

1. This is an action for (i) patent infringement arising under the patent laws of the United States, 35 U.S.C. § 1, *et seq.*; (ii) violation of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)); (iii) deceptive trade practices under Ohio Revised Code § 4165 and deceptive acts and practices under New York General Business Law § 349; and (iv) trade dress infringement and unfair competition under the common law of Ohio and New York.

THE PARTIES

2. Plaintiff Emson is a corporation organized and existing under the laws of the State of New York with its principal place of business at 230 Fifth Avenue, Suite 800, New York, New York 10001.

3. On information and belief, Defendant MFA is a corporation organized and existing under the laws of the State of Ohio, having a principal office address at 6703 Monroe Street, Sylvania, Ohio 43560.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the patent claims and the Lanham Act claims in this action under 28 U.S.C. §§ 1331 and 1338. This Court also has subject matter jurisdiction over the Lanham Act claims in this action pursuant to 15 U.S.C. § 1121. Subject matter jurisdiction over the state law claims in this action is proper pursuant to 28 U.S.C. §§ 1338 and 1367, because these claims are substantially related to the federal claims asserted herein and arise from the same case or controversy.

5. This Court has personal jurisdiction over Defendant MFA because MFA is incorporated in this judicial district and has a principal place of business in this judicial district and because the claims asserted herein arose in this judicial district and/or because MFA transacts business within this district and has committed infringing acts complained of hereinafter within this district.

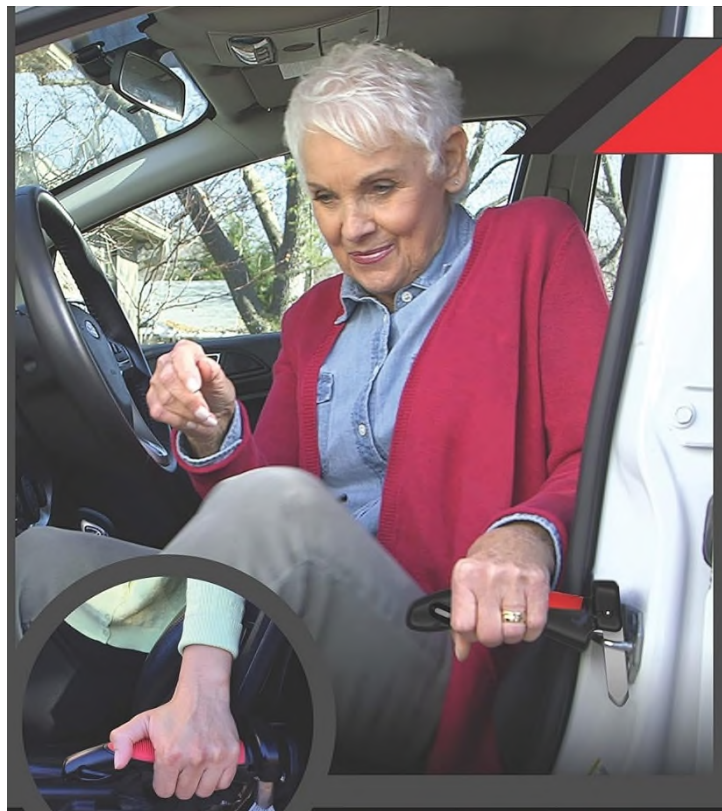
6. Venue is proper in this district under 28 U.S.C. § 1391. Venue of the patent claims is also proper in this district under 28 U.S.C. § 1400(b).

STATEMENT OF FACTS

A. Emson's Car Cane

7. For over seventy-five years, Emson has been in the business of designing, manufacturing, and selling consumer products. Emson markets and sells consumer products throughout the United States directly to consumers and to nationwide retailers for resale to consumers.

8. Since as early as 2015, Emson has been continuously marketing, offering to sell and selling in interstate commerce a portable hand held device for assisting users to enter and leave an automobile under its trademark “Car Cane” (the “Car Cane”). The Car Cane includes a post which is inserted into a striker pin or door latch of an automobile’s door frame. The user grasps the handle and pushes downward to support the user upon entering or leaving the vehicle. An image which depicts the operation of the Car Cane is shown below.



Car Cane

9. The trade dress of Car Cane comprises the colors black and red applied in combination to the surface of the device’s handle. In particular, the color black is applied to the surface of the handle body and the color red is applied to a generally ogive-shaped area along the top surface of the handle (the “Car Cane Trade Dress”).



Car Cane Trade Dress

10. Emson has adopted the Car Cane Trade Dress to distinguish the Car Cane from other automotive assistance devices in the marketplace.

11. The design features embodied by the Car Cane Trade Dress are not essential to the function of the product, do not make the product cheaper or easier to manufacture, and do not affect the quality of the product.

12. The Car Cane Trade Dress is not functional.

13. The design of the Car Cane Trade Dress is not a competitive necessity.

14. Emson sells the Car Cane throughout the United States directly to consumers and to nationwide retailers for resale to consumers.

15. Emson has sold millions of Car Canes.

16. Emson sells the Car Cane in retail packaging which prominently displays the Car Cane Trade Dress.

17. Emson has spent millions of dollars advertising the Car Cane and the Car Cane Trade Dress via an infomercial broadcast on national and local television channels throughout the U.S. The Car Cane Trade Dress has been prominently displayed in the Car Cane infomercial.

18. Emson's printed advertisements and promotional materials for the Car Cane also prominently display the Car Cane Trade Dress.

19. As a result of Emson's extensive sales, advertising and promotion of the Car Cane and Car Cane Trade Dress, the Car Cane Trade Dress has become widely and favorably known by general consumers in the United States as designating high quality and dependable products originating exclusively from Emson.

20. The Car Cane Trade Dress is a distinctive design owned exclusively by Emson and has acquired secondary meaning as an indicium of source for Emson's product.

21. As a result, the Car Cane Trade Dress has become a widely known and valuable trademark, possessing a strong secondary meaning among consumers. Consequently, the Car Cane Trade Dress has come to symbolize the enormous goodwill of Emson's business. No other manufacturer lawfully uses the Car Cane Trade Dress or any other substantially similar trade dress for similar types of goods.

B. Emson's Patents

22. Emson owns the following United States patents for the Car Cane: U.S. Patent Nos. 9,403,466; 9,533,611; D743,324; and D766,809 (collectively, the "Emson's Patents").

23. United States Patent No. 9,403,466 ("the '466 Patent"), entitled "Vehicle Entry/Egress Assistance Device," duly and legally issued on August 2, 2016. A true and correct copy of the '466 Patent is attached hereto as Exhibit A.

24. Plaintiff Emson is the owner of all right, title, and interest in and to the '466 Patent. Emson has owned the '466 Patent at all times during Defendant's infringement of the '466 Patent.

25. The '466 Patent is directed to an assistance device for entering and leaving a vehicle. Claim 1 of the '466 Patent is as follows:

1. An assistance device for entering and leaving a vehicle comprising:

a handle member for supporting at least part of the weight of a user grasping the handle member;

a striker pin insertion post connected to the handle member for extending into an opening of a striker pin in a door frame of the vehicle; and

an enlarged area between the handle member and striker pin insertion post, extending transversely outwardly of the insertion post, on respective opposite sides of the handle member and the insertion post, wherein the handle member is straight and has an axis, the device including at least one LED for casting light parallel to the axis.

26. United States Patent No. 9,533,611 ("the '611 Patent"), entitled "Vehicle Entry/Egress Assistance Device," duly and legally issued on January 3, 2017. A true and correct copy of the '611 Patent is attached hereto as Exhibit B.

27. Plaintiff Emson is the owner of all right, title, and interest in and to the '611 Patent. Emson has owned the '611 Patent at all times during Defendant's infringement of the '611 Patent.

28. The '611 Patent is directed to an assistance device for entering and leaving a vehicle. Claim 12 of the '611 Patent is as follows:

12. An assistance device for entering and leaving a vehicle comprising:

a handle member for supporting at least part of the weight of a user grasping the handle member;

a striker pin insertion post connected to an end of the handle member for extending into an opening of a striker pin in a door frame of the vehicle, the door frame having a plane and the insertion post also for supporting at least part of the weight of the user grasping the handle member;

an outrigger extending transversely outwardly of the insertion post, on respective opposite sides of the handle member and insertion post, of a sufficient size to impede entry of the insertion post into the opening of the striker pin when the end of the handle member is outside the plane of the door frame.

29. United States Design Patent No. D743,324 (“the D’324 Patent”) entitled “Car Handle” duly and legally issued on November 17, 2015. A true and correct copy of the D’324 Patent is attached as Exhibit C.

30. Plaintiff Emson is the owner of all right, title, and interest in and to the D’324 Patent. Emson has owned the D’324 Patent at all times during Defendant’s infringement of the D’324 Patent.

31. The D’324 Patent claims the ornamental design for a car handle as shown and described in the seven figures of Exhibit C. Figures 1 and 4 of the D’324 Patent are reproduced below:

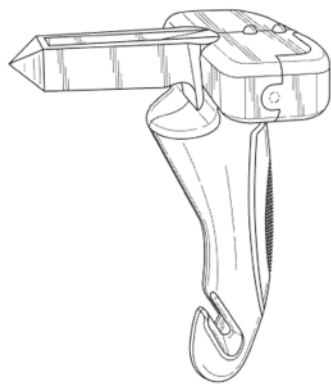


FIG. 1

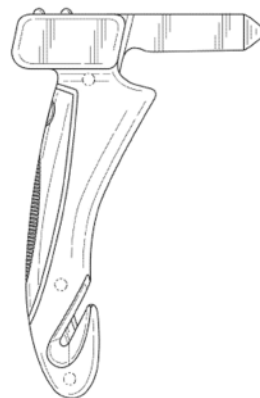


FIG. 4

32. United States Design Patent No. D766,809 (“the D’809 Patent”) entitled “Vehicle Assist Device” duly and legally issued September 20, 2016. A true and correct copy of the D’809 Patent is attached as Exhibit D.

33. Plaintiff Emson is the owner of all right, title, and interest in and to the D’809 Patent. Emson has owned the D’809 Patent at all times during Defendant’s infringement of the D’809 Patent.

34. The D’809 Patent claims the ornamental design for a car handle as shown and described in the six figures of Exhibit D. Figures 1 and 6 of the D’809 Patent are reproduced below.

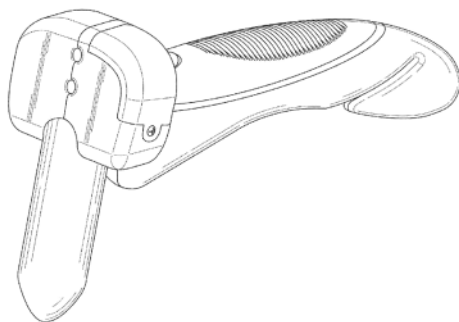


FIG. 1

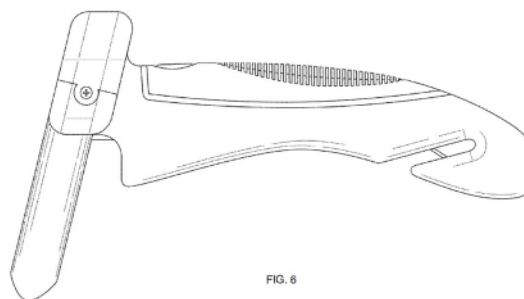


FIG. 6

C. Defendant MFA’s Infringement


35. On information and belief, MFA imports, offers for sale, and sells throughout the United States and in this judicial district car door support handles under the trademark “Sophist-a-Care” (the “MFA Car Handle”).



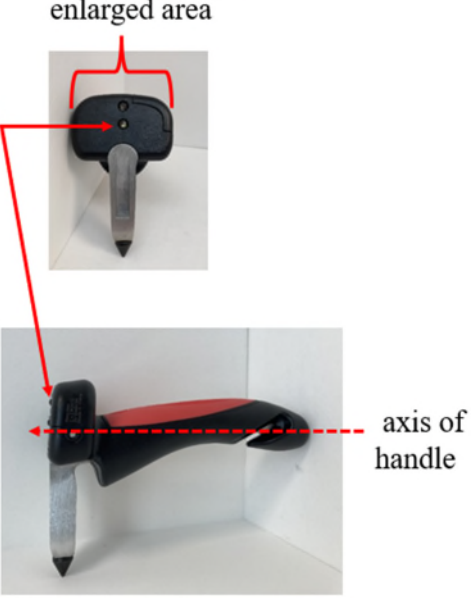
36. A photograph of the MFA Handle is shown below:







37. Defendant markets, advertises, sells and distributes the MFA Car Handle in interstate commerce in competition with Emson’s Car Cane.

38. The table below compares the elements of exemplary claim 1 of the ’466 Patent with the MFA Car Handle:

Claim 1 of ’466 Patent	Defendant’s MFA Car Handle
1. An assistance device for entering and leaving a vehicle comprising:	

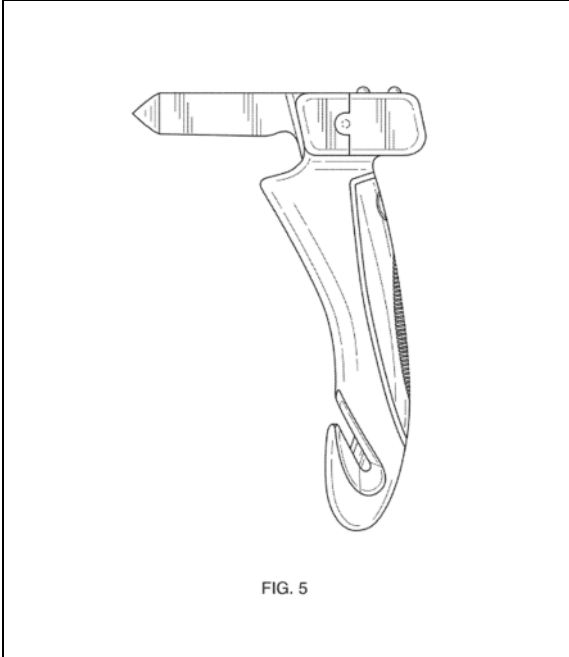
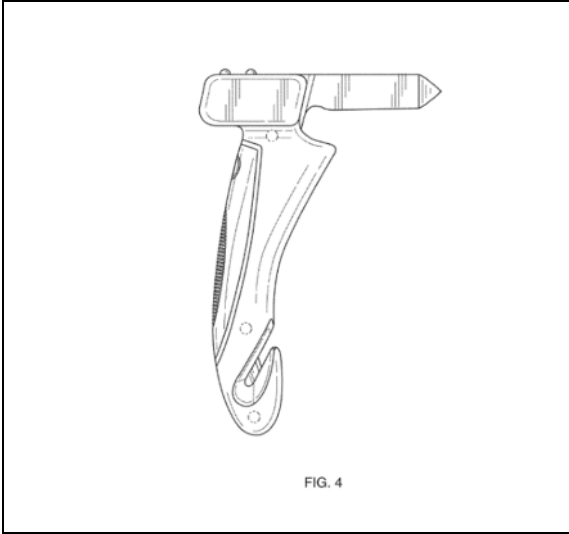
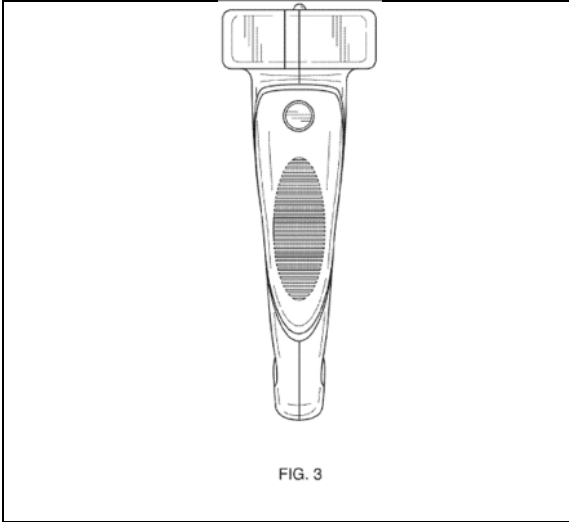
<p>a handle member for supporting at least part of the weight of a user grasping the handle member;</p>	 <p>handle member</p>
<p>a striker pin insertion post connected to the handle member for extending into an opening of a striker pin in a door frame of the vehicle; and</p>	 <p>striker pin insertion post</p>
<p>an enlarged area between the handle member and striker pin insertion post, extending transversely outwardly of the insertion post, on respective opposite sides of the handle member and the insertion post, wherein the handle member is straight and has an axis, the device including at least one LED for casting light parallel to the axis.</p>	 <p>enlarged area</p> <p>LED</p> <p>axis of handle</p>

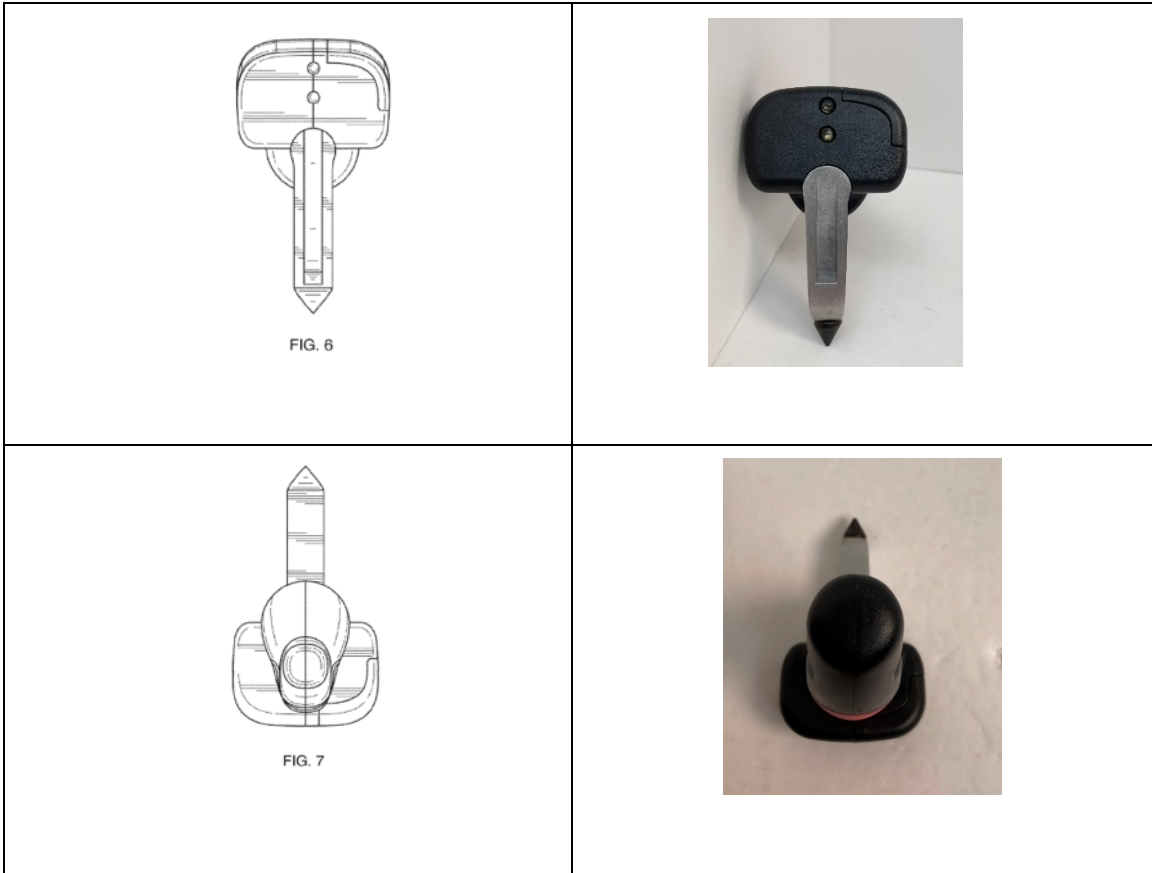
39. The table below compares the elements of exemplary claim 12 of the '611 Patent with the MFA Car Handle:

Claim 12 of '611 Patent	Defendant's MFA Car Handle
12. An assistance device for entering and leaving a vehicle comprising:	
a handle member for supporting at least part of the weight of a user grasping the handle member;	
a striker pin insertion post connected to an end of the handle member for extending into an opening of a striker pin in a door frame of the vehicle, the door frame having a plane and the insertion post also for supporting at least part of the weight of the user grasping the handle member;	
an outrigger extending transversely outwardly of the insertion post, on respective opposite sides of the handle member and insertion post, of a sufficient size to impede entry of the insertion post into the opening of the striker pin when the end of the handle member is outside the plane of the door frame.	

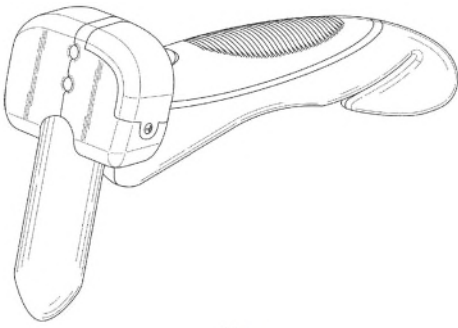

40. The table below compares the figures of the D'324 Patent with the MFA Car Handle:

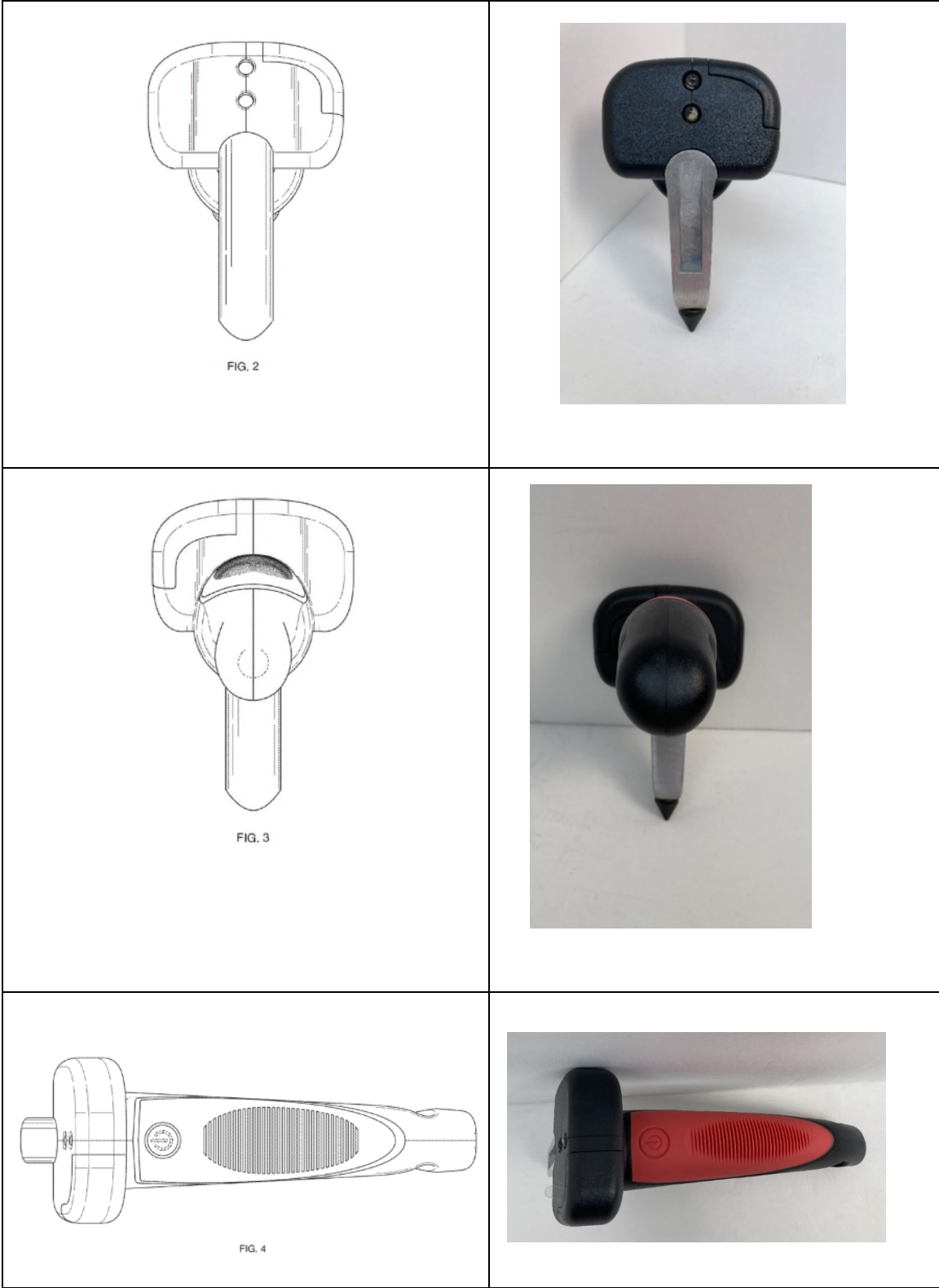
D'324 Patent	Defendant's MFA Car Handle
 <p data-bbox="560 766 609 787">FIG. 1</p>	
 <p data-bbox="560 1333 609 1354">FIG. 2</p>	

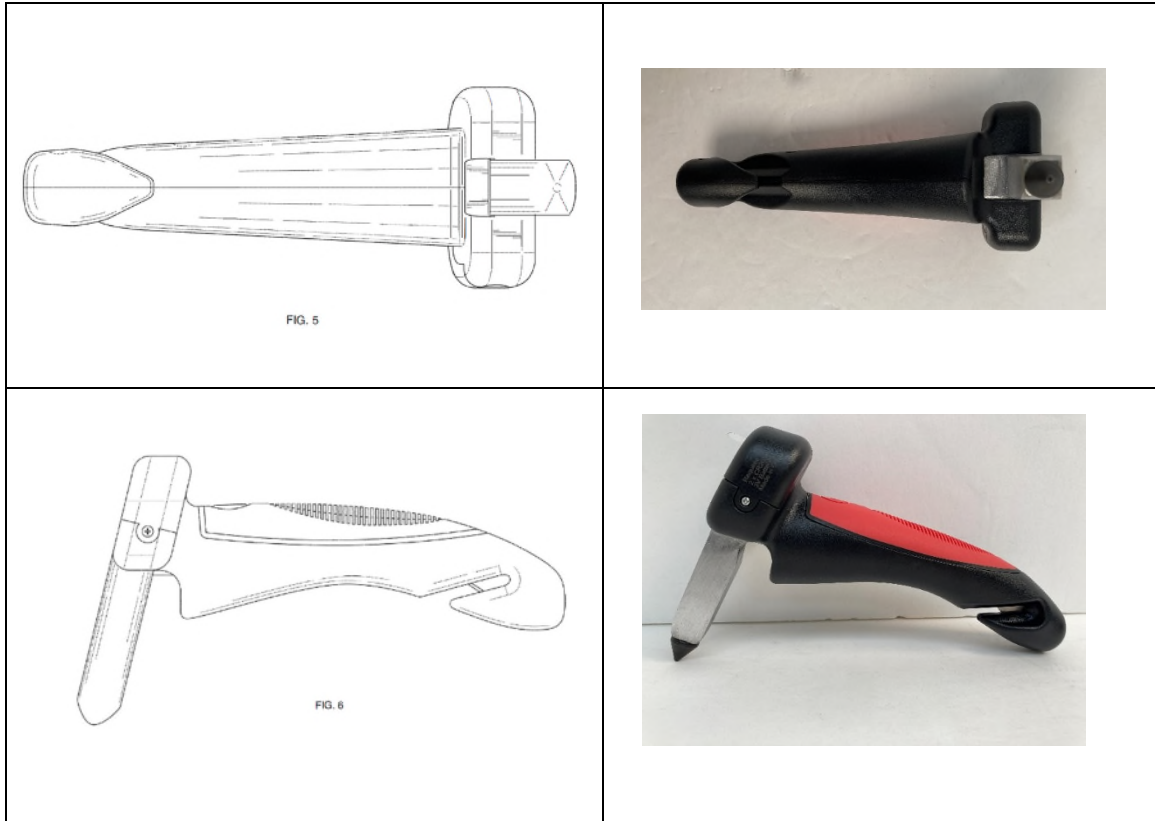




41. The table below compares the figures of the D'809 Patent with the MFA Car Handle:

D'809 Patent	Defendant's MFA Car Handle
 <p style="text-align: center;">FIG. 1</p>	





42. Accordingly, through its importation offer for sale and sale of the MFA Car Handle, MFA has infringed Emson's Patents; engaged in trade dress infringement, false designation of origin and unfair competition in violation of the Lanham Act; and engaged in trade dress infringement, unfair competition, and deceptive trade practices in violation of Ohio and New York state law.

COUNT I
Patent Infringement of '466 Patent
(15 U.S.C. § 271)

43. Plaintiff realleges and incorporates by reference each of paragraphs 1 through 42 above, as if fully set forth herein.

44. Defendant has infringed and continues to infringe at least claims 1-4, 6-8, and 10-12 of the '466 Patent, in violation of 35 U.S.C. § 271, by importing, offering for sale and selling the MFA Car Handle.

45. Defendant's acts of infringement were without permission or license from Emson.

46. Emson is entitled to damages for Defendant's infringement of the '466 Patent pursuant to 35 U.S.C. § 284.

47. Defendant's infringement of the '466 Patent has caused and, unless enjoined and restrained by this Court, will continue to cause, irreparable injury to Emson that is not fully compensable in monetary damages and for which Emson has no adequate remedy at law. Emson is therefore entitled to preliminary and permanent injunctions enjoining Defendant from further infringement of the '466 Patent.

COUNT II
Patent Infringement of '611 Patent
(15 U.S.C. § 271)

48. Plaintiff realleges and incorporates by reference each of paragraphs 1 through 47 above, as if fully set forth herein.

49. Defendant has infringed and continues to infringe at least claim 1-6, 8, 10, 12-18, 21-27 of the '611 Patent, in violation of 35 U.S.C. § 271, by importing, offering for sale and selling the MFA Car Handle.

50. Defendant's acts of infringement were without permission or license from Emson.

51. Emson is entitled to damages for Defendant's infringement of the '611 Patent pursuant to 35 U.S.C. § 284.

52. Defendant's infringement of the '611 Patent has caused and, unless enjoined and restrained by this Court, will continue to cause, irreparable injury to Emson that is not fully

compensable in monetary damages and for which Emson has no adequate remedy at law. Emson is therefore entitled to preliminary and permanent injunctions pursuant to 35 U.S.C. § 283 enjoining Defendant from further infringement of the '611 Patent.

COUNT III
Patent Infringement of D'324 Patent
(15 U.S.C. § 271)

53. Plaintiff realleges and incorporates by reference each of paragraphs 1 through 52 above, as if fully set forth herein.

54. Defendant has infringed and continues to infringe the D'324 Patent, in violation of 35 U.S.C. § 271, by importing, offering for sale and selling the MFA Car Handle.

55. Defendant's acts of infringement were without permission or license from Emson.

56. On information and belief, Defendant's acts of infringement have been, and continue to be, willful and deliberate.

57. Emson is entitled to damages for Defendant's infringement of the D'324 Patent pursuant to 35 U.S.C. § 284.

58. Emson is entitled to an award of the total profits realized by Defendant from its infringement of the D'324 Patent pursuant to 35 U.S.C. § 289.

59. Defendant's infringement of the D'324 Patent has caused and, unless enjoined and restrained by this Court, will continue to cause, irreparable injury to Emson that is not fully compensable in monetary damages and for which Emson has no adequate remedy at law. Emson is therefore entitled to preliminary and permanent injunctions pursuant to 35 U.S.C. § 283 enjoining Defendant from further infringement of the D'324 Patent.

COUNT IV
Patent Infringement of D'809 Patent
(15 U.S.C. § 271)

60. Plaintiff realleges and incorporates by reference each of paragraphs 1 through 59 above, as if fully set forth herein.

61. Defendant has infringed and continues to infringe the D'809 Patent, in violation of 35 U.S.C. § 271, by importing, offering for sale and selling the MFA Car Handle.

62. Defendant's acts of infringement were without permission or license from Emson

63. On information and belief, Defendant's acts of infringement have been, and continue to be, willful and deliberate.

64. Emson is entitled to damages for Defendant's infringement of the D'809 Patent pursuant to 35 U.S.C. § 284.

65. Emson is entitled to an award of the total profits realized by Defendant from its infringement of the D'809 Patent pursuant to 35 U.S.C. § 289.

66. Defendant's infringement of the D'809 Patent has caused and, unless enjoined and restrained by this Court, will continue to cause, irreparable injury to Emson that is not fully compensable in monetary damages and for which Emson has no adequate remedy at law. Emson is therefore entitled to preliminary and permanent injunctions pursuant to 35 U.S.C. § 283 enjoining Defendant from further infringement of the D'809 Patent.

COUNT V
False Designation of Origin, Passing Off, and Unfair Competition
(15 U.S.C. § 1125(a))

67. Emson realleges and incorporates by reference each of paragraphs 1 through 66 above, as if fully set forth herein.

68. Defendant's use, offer for sale, and sale of a confusingly similar imitation of the Car Cane Trade Dress in commerce in direct competition with Emson's products is likely to cause confusion, cause mistake, or to deceive as to the affiliation, connection, or association of Defendant with Emson and/or as to the origin, sponsorship, or approval of Defendant's products and commercial activities with Emson.

69. The complained of acts constitute willful, deliberate, and intentional false designations of origin and false or misleading descriptions of fact, as to products made available by Defendant and unfair competition in violation of §43(a) of the Lanham Act (15 U.S.C. §1125(a)).

70. Defendant's activities have caused and, unless enjoined by this Court, will continue to cause irreparable injury and other damages to Emson's goodwill and reputation as symbolized by the Car Cane Trade Dress. Emson has no adequate remedy at law.

COUNT VI
Unfair and Deceptive Trade Practices

71. Emson realleges and incorporates by reference each of paragraphs 1 through 70 above, as if fully set forth herein.

72. Defendant has been, and currently is, passing off the MFA Car Handle as those of Emson, causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval of the MFA Car Handle, causing a likelihood of confusion as to Defendant's affiliation, connection, or association with Emson, and otherwise damaging Emson and the consuming public. Defendant's conduct constitutes unfair and deceptive acts or practices in the course of a business, trade, or commerce in violation of the unfair and deceptive trade practices statutes of New York, namely, N.Y. GEN. BUS. Law § 349; and Ohio, namely, OHIO REV. CODE ANN. § 4165.01.

73. Defendant's unauthorized use, offer for sale, and sale of confusingly similar imitations of the Car Cane Trade Dress has caused and is likely to cause substantial injury to the public and to Emson. Emson is entitled to injunctive relief to recover damages, and, if appropriate, punitive damages, costs, and reasonable attorneys' fees.

COUNT VII
Common Law Unfair Competition and Trade Dress Infringement

74. Plaintiff realleges and incorporates by reference each of paragraphs 1 through 73 above, as if fully set forth herein.

75. Defendant's acts constitute common law trade dress infringement and unfair competition, and have created and will continue to create, unless restrained by this court, a likelihood of confusion to the irreparable injury of Emson. Emson has no adequate remedy at law for this injury.

76. On information and belief, Defendant acted with full knowledge of Emson's use of, and statutory and common law rights to, Car Cane Trade Dress, and without regard to the likelihood of confusion of consumers created by Defendant's activities.

77. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Emson's Car Cane Trade Dress to the great and irreparable injury of Emson.

78. As a result of Defendant's acts, Emson has been damaged in an amount not yet determined or ascertainable. At a minimum, however, Emson is entitled to injunctive relief, an accounting of Defendant's profits, damages and costs. Further, in light of the deliberately fraudulent and malicious use of confusingly similar imitations of Emson's Car Can Trade Dress, and the need to deter Defendant from engaging in similar conduct in the future, Emson additionally is entitled to punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff E. Mishan & Sons, Inc., prays for the following relief:

A. For infringement of Emson's Patents:

1. An order adjudging that Defendant has infringed the '466, '611, D'324 and D'809 Patents in violation of 35 U.S.C. § 271;
2. An order preliminarily and permanently enjoining Defendant, its officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of them, from infringing the '466, '611, D'324 and D'809 Patents;
3. A judgment directing that any products in the possession, custody or control of Defendant which infringe the '466, '611, D'324 and D'809 Patents, including but not limited to the MFA Car Handle, be delivered up and destroyed within 30 days of entry of judgment; and
4. An award of damages in an amount to be proven at trial, including disgorgement of profits or gains of any kind made by Defendant from its infringing acts of design patents, lost profits and/or reasonable royalty, in amounts to be fixed by the Court in accordance with proof, including general, and/or treble damages, as appropriate pursuant to 35 U.S.C. §§ 284 and 289.

B. For infringement of the Car Cane Trade Dress and for related unfair competition

and deceptive acts and practices under federal and state law:

1. An order adjudging Defendant to have willfully infringed the Car Cane Trade Dress and committed unfair competition;
2. An order preliminarily and permanently enjoining Defendant, its officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of them, from:
 - (a) importing, selling, offering for sale, distributing and/or distributing the products accused of infringing the Car Cane Trade Dress, and any products which are colorable imitations of the Car Cane Trade Dress, and from directly or indirectly infringing the Car Cane Trade Dress;
 - (b) using any other false designation of origin or false description or representation or any other thing calculated or likely to cause confusion or mistake in the mind of the trade or public or to deceive the trade or public into believing that Defendant's products or activities are in any way sponsored, licensed, or authorized by or affiliated with or in connection with Plaintiff;

(c) passing off, inducing or enabling others to sell or pass off any products as products of Plaintiff which products are not made or sold by Plaintiff, or belonging to Plaintiff, or under the control, supervision or approval of Plaintiff, or for sale under the Car Cane Trade Dress, or any other mark or trade dress which so resembles the Car Cane Trade Dress so as to be likely to cause confusion, deception or mistake; and

(d) transporting, moving, returning, or otherwise disposing of, in any manner, any products confusingly similar to Plaintiff's products, or that otherwise bear, contain, display or utilize any of the Car Cane Trade Dress, any derivation or colorable imitation thereof;

3. Based on Defendant's knowing and intentional use and sale of confusingly similar imitations of Car Cane Trade Dress, the damages awarded be trebled and the award of Defendant's profits be enhanced as provided for by 35 U.S.C. § 1117;
 4. Defendant be required to pay Emson the costs and reasonable attorneys' fees incurred by Emson in this action pursuant to 35 U.S.C. § 1117(a) and the state statutes cited in this Complaint;
 5. That an accounting be ordered to determine Defendant's profits resulting from its unfair competition and that Plaintiff be awarded monetary relief in an amount to be fixed by the Court as it finds just as an equitable remedy and as a remedy under 15 U.S.C. § 1117, including all profits received by Defendant from sales and revenues of any kind made as a result of its infringing actions; all damages sustained by Plaintiff as a result of Defendant's unfair competition;
 6. An order that all infringing articles, packages, printed materials, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed, pursuant to 15 U.S.C. § 1118;
- C. An order finding that Defendant's conduct alleged herein was willful and intentional;
- D. Damages according to maximum allowable for each and every cause of action alleged herein, exclusive of costs, attorneys' fees, and disbursements;
- E. An order directing Defendant to file with the Court, and serve upon Emson's counsel, within thirty (30) days after entry of the order of injunction, a report setting forth the manner and form in which it has complied with the injunction;

- F. An order finding that this is an exceptional case, and awarding Plaintiff's reasonable attorneys' fees;
- G. An order awarding Emson its costs of court;
- H. That Plaintiff be granted prejudgment and post judgment interest; and
- I. For such other and further relief as this Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiff E. Mishan & Sons, Inc. hereby requests a trial by jury.

Respectfully submitted,

Dated: January 16, 2024

s/Kevin M. Norchi
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