APPENDIX 3
PTX 157

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Intellectual Property Law

8 March 2012

Mr. Eric Broadway
Apex Tool Group, LLC
14600 York Road, Suite A
Sparks, MD 21152

RE: Brown Patents on "Bionic Wrench"
Reference No.: 4499-964

Dear Mr. Broadway:

Per your request, I have taken an initial look at the Brown patents on the "Bionic Wrench" in order to understand their scope. Further, I have taken an initial look at the possibility of Apex Tool Group making/selling a gripping wrench based on the circa 1957 design of Buchanan. I am happy to report that it appears that the proposed product would not infringe the Brown patents, and I therefore believe there is little risk in proceeding to the next phase of product development on this proposed product.

Buchanan: U.S. Patent No. 2,787,925 to Buchanan, and dating from 1957, is prior art to all the Brown patents. Buchanan discloses a multifunction tool that grips by moving "plungers" 24 in and out based on the position of the handles. The drawings from Buchanan are reproduced below for reference:

FIG. 1

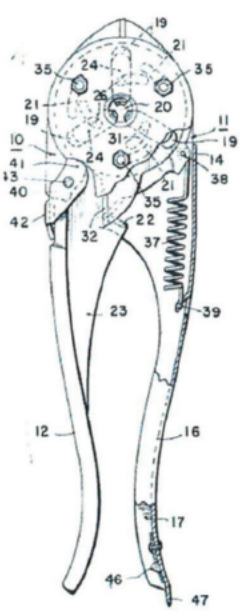
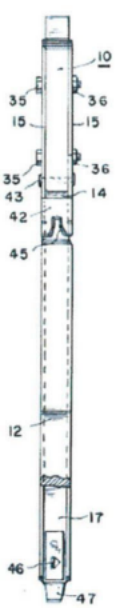
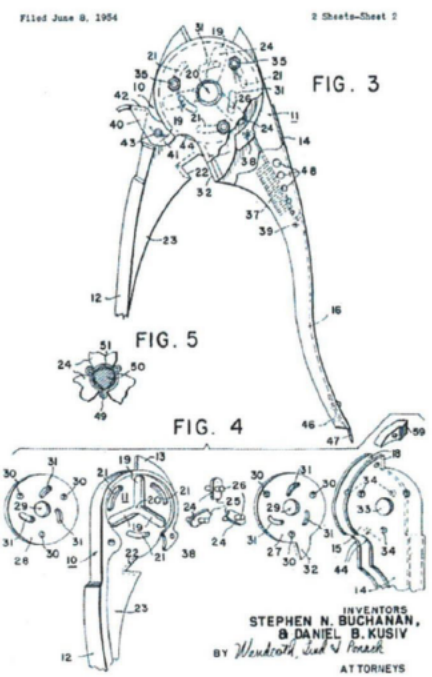


FIG. 2





Eric Broadaway
Exhibit_40
11/11/15

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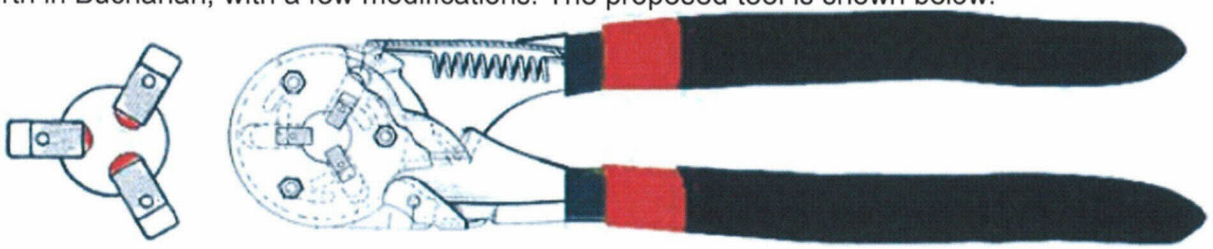
LoggerHead Tools, LLC v. Apex Tool Group, LLC and Sears Holding Corporation
Case No. 1:12-cv-9033
PTX157

The Buchanan plungers 24 rest in the guide slots 19 and are caused to move in/out by the interaction of pins 26 and curved slots 31, as handles 10,14 are rotated relative to each other. The handles are rotationally held together by bolts 35 that extend through slots 21. Note that slots 21 are at a constant radius about the center of central holes 20,29,33, while slots 31 have a varying radius. Further, note that the plungers 24 appear to have a relatively flat body with pin 26 extending therethrough, and that the body of plungers 24 ride in the guide slots 19.

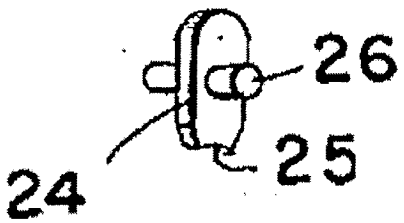
Proposed Product: The proposed product is a gripping tool based on the design set forth in Buchanan, with a few modifications. The proposed tool is shown below:



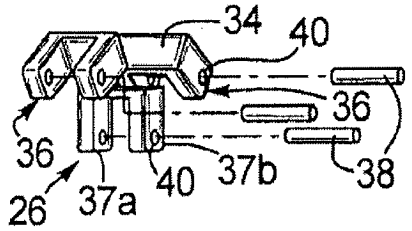
My understanding is that proposed product would be exactly like the Buchanan tool, except 1) the grip portion of the handles would have a colored plastic coating (red/black above); 2) the slots (31) that cause the grip elements to move might have a more radial change so as to allow for more plunger movement to accommodate larger fasteners; and 3) the tips of the grip elements may be convex (in red above) rather than concave as shown in Buchanan. Further, while not particularly relevant to the analysis, the other features of Buchanan (e.g., cutting feature, stripping feature, etc.) may not be included.

Brown Patents/Publications: This analysis looked at three issued U.S. patents to Brown (U.S. Patent Nos. 6,889,579; 7,748,298; 7,992,470) and one pending application of Brown (U.S. Patent Publication No. 20100089206). The '579 patent is the "parent" case of the family, and all the other cases are "continuation-in-part" cases of at least the '579 patent.

The Brown patents are generally directed to a gripping tool. Relevant to the following analysis, the Brown patents refer to the actual gripping parts as "gripping elements", and these function much like the "plungers" in Buchanan. However, the structure of the Brown gripping elements is slightly different from that in Buchanan, as shown below (see next page):



Buchanan's Plunger



Applicant's Gripping Element

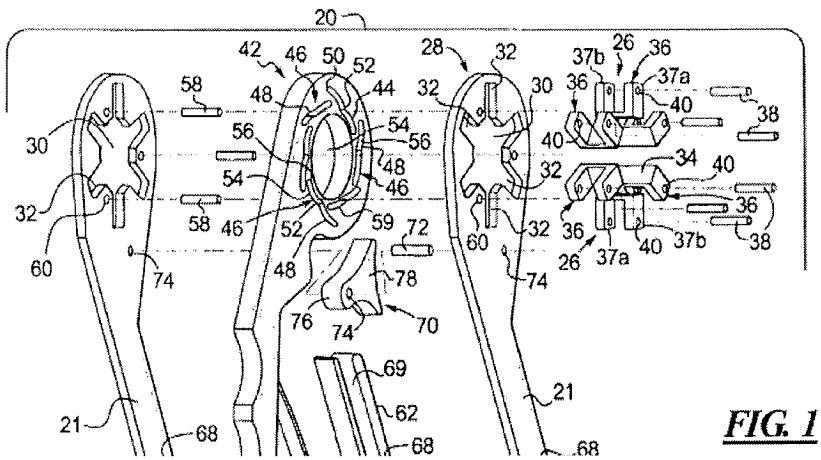


FIG. 1

The Brown gripping elements (note: three are shown on the right above) each include a body portion 34, two arms 36, and a "force transfer element" (pin) 38. Further, Brown contemplates that only the arms 36 will engage/slide in the guides (slots) 32. That is, Brown contemplates that the body portion 34 will not be engaged by guides 32. In comparison, the Buchanan plunger 24 appears to have a relatively flat body with a pin 26 extending therethrough, and the body of Buchanan plungers 24 appear to ride directly in one of the slots 19.

Further, Brown contemplates that "aligning elements" (pins) 58 keep the handle assemblies aligned with each other while allowing relative rotation. The aligning elements 58 ride in the same slots 46 as the "force transfer elements" (pins) 38 of the gripping elements. Thus, the Brown slots 46 have first and second sections 48, 54 with the different pins 38,58 riding in their respective sections. The first and second sections of the Brown slots 46 are at different angles (called "divergent" in Brown). In comparison, the bolts 35 in Buchanan ride in slots 21, while Buchanan pins 26 ride in slots 31.

Of course, the various claims in the Brown patents cover various combinations of aspects, including numerous ones not discussed above, and not everything disclosed in the Brown patents is required to be present by every claim.

An analysis of the claims of the Brown patents/publications finds the following::

- The '579 patent has 10 independent claims. Independent claims 1, 3, 5, 12, 14, 15, 16 all require that the gripping element include "at least one arm portion configured to engage one of said at least one guide" [the guide is slot 32, see Fig. 1]. Independent claims 20, 25, 26 all require both that the slots for the pins "define divergent paths" and that the "aligning elements" (pins 58) contact the second section of those slots.

- The '298 patent has 2 independent claims. Both independent claims require a "living hinge" on one of the handles between the grip section and the head. The living hinge is labeled as 200 in Figs. 47-51.
- The '470 patent has 1 independent claim. The lone independent claim requires that the gripping element include at least one arm portion.
- The '9206 publication has only 1 presently pending independent claim. This lone independent claim requires 1) that the gripping element include at least one arm portion and 2) that one of the handles have a handle portion and a "gripping" portion that are moveably connected. On the latter aspect, see handle 108 and gripping portion 110 in Figs. 2-5.

Relevant to the present analysis, Brown argued multiple times during prosecution of the various patents that Buchanan's plungers do not have an arm portion. Brown argued that Buchanan instead has only a "body" and "force transfer element", and therefore did not show a structure that has a "gripping element" with a body and a force transfer element and an arm portion. Brown further argued that the body of Buchanan's plunger rode in the relevant slot, but that there was no arm that did. After making this argument, the '470 patent was allowed. Without going into the legal details, this means that Brown is very likely prevented from now asserting that a flat body structure like in Buchanan's "plungers" falls within the scope of Brown's claims that require an arm portion on the gripping element.

Based on the above, a product that meets all four of the following requirements should fall outside the scope of any of the issued claims:

1) use of a flat type gripping element like Buchanan's plungers (even with a convex tip);
2) use of continuous curving slots that don't "diverge" for the pins of the gripping elements;
3) having the bolts connecting the two pivoting parts extend through different slots than the pins for the gripping elements; and
4) absence of a living hinge.

As I understand, the proposed product meets all of these requirements, and therefore is likely to avoid the Brown patents.[1]

With regard to the pending claims in the '9206 publication case, these claims may change during prosecution, so it is impossible to say that the proposed design will not infringe whatever claims, if any, that may emerge. However, two points suggest that there should not be a problem. First, the existing claims require the not-present arm portion on the gripping elements, and have other limitations not present in the proposed design. Second, the proposed design, in the relevant aspects, is identical to the Buchanan device. As such, if the claims that emerge were to cover the proposed device, they would likely be invalid as being either anticipated or obvious over Buchanan. This is not to say that it is impossible that claims could be crafted to avoid Buchanan and still cover the proposed product, but such would be very difficult to achieve, and therefore unlikely to happen.

Cautions & Limitations

This letter is intended solely for Apex Tool Group, LLC ("Client"), and the contents of this opinion are not to be shared or relied upon, in whole or in part, by any third party without the prior written consent of the undersigned. No opinions are intended to be implied or inferred

[1] However, I also recommend that the gripping elements in the proposed products 1) not be replaceable; 2) not be able to score/cut; 3) not move in a curvilinear fashion.

beyond those expressly stated in the letter. This letter addresses the facts and law as understood as of this date; neither the undersigned nor Coats and Bennett, PLLC has any obligation to advise Client of changes in law or fact that occur after this date -- even though such change(s) may affect the legal analysis contained in this letter. Further, this letter is strictly limited to an analysis under United States law, and no consideration has been given to any laws of any other jurisdictions.

This letter is based on a patent identified by Client, and a search looking only for other cases that are officially related to that case. No additional search has been performed for other potential problems, such search being outside the scope of the present project. However, if you would like to explore additional searching, please contact us.

Also, because there is at least one pending case discussed above, we remind you that there is a possibility that the scope of the claims may change, favorably or unfavorably, during prosecution, and that additional cases may be filed that claim priority thereto. As such, the patentee may be able to craft claims directed toward the proposed product after the proposed product becomes publicly available.

While we have endeavored to apply a reasonable legal analysis to the possible infringement issues addressed herein, this letter is not a guarantee that no litigation will result involving the proposed product and the patents and/or publications identified above. This is particularly true where the patentee is motivated to seek redress in the courts because the proposed product might negatively impact the patentee's income. And, you should be advised that patent litigation is an expensive endeavor costing possibly millions of dollars, and may take years to resolve. Further, the outcome of patent litigation is difficult to predict, and there is no guarantee that a judge or jury will reach the same conclusion as expressed above.

Finally, I must remind you that the above analysis is *preliminary* only and based on minimal information about the as-yet-to-be-determined design details of the proposed product. Thus, I would recommend a more thorough analysis of the proposed product in view of the Brown patents identified above be undertaken once the design for the proposed product is finalized.

I believe that this addresses your concerns about the Brown patents, but please contact me if you have any questions or would like any clarification.

Sincerely,

John R. Owen

Enclosures