

1 Andrew D. Skale (SBN 211096)
askale@mintz.com
2 Ben L. Wagner (SBN 243594)
bwagner@mintz.com
3 Justin S. Nahama (SBN 281087)
jnahama@mintz.com
4 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC
3580 Carmel Mountain Road, Suite 300
5 San Diego, CA 92130
Telephone: (858) 314-1500
6 Facsimile: (858) 314-1501

7 Attorneys for Plaintiff
ZIPBUDS, LLC
8

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11

12 ZIPBUDS, LLC.

13 Plaintiff,

14 v.

15 ZEIKOS, LLC d/b/a IHIP

16 Defendant.
17

Case No. **'12CV1020 IEG DHB**

PLAINTIFF ZIPBUDS' COMPLAINT FOR
DESIGN PATENT AND TRADEMARK
INFRINGEMENT; AND UNFAIR
COMPETITION

JURY DEMANDED

18 Plaintiff ZIPBUDS, LLC. for its Complaint against Defendant ZEIKOS, INC. d/b/a iHIP
19 alleges and states as follows:

20 **THE PARTIES**

21 1. Plaintiff ZIPBUDS, LLC, ("Zipbuds") is a limited liability company organized and
22 existing under the laws of the State of California with its principal place of business located at 6170
23 Cornerstone Court East, Suite 260, San Diego, CA 92121.

24 2. Defendant ZEIKOS INC. d/b/a iHIP ("iHip") is a corporation organized and existing,
25 on information and belief, under the laws of the State of New York, with its principal place of
26 business at, on information and belief, 1410 Broadway, 12th floor, New York, NY 10018.
27
28

1 **JURISDICTION AND VENUE**

2 3. This is a civil action for design patent infringement arising under the Patent Laws of
3 the United States, 35 U.S.C. sections 1 et seq. Subject matter jurisdiction is therefore proper under
4 28 U.S.C. sections 1331 and 1338(a). This is also an action for trademark and trade dress
5 infringement and unfair competition under the Lanham Act and thus jurisdiction is proper under 15
6 U.S.C. section 1121.

7 4. This Court has subject matter jurisdiction over the claims and causes of action
8 asserted in this complaint pursuant to 28 U.S.C. § 1332(a) because this dispute is between citizens
9 of complete diversity, including a New York company and a California company, and the amount in
10 controversy exceeds \$75,000, exclusive of interest and costs.

11 5. Venue is proper in this judicial district under 28 U.S.C. sections 1391(b) and (c) and
12 1400(b) because a substantial part of the events or omissions giving rise to the claims occurred in
13 the district; plaintiff resides in this district; and the defendants reside in this district by virtue of
14 being subject to personal jurisdiction in this judicial district by, among others, their repeatedly
15 availment and direction of their activity toward this district, and engaging in acts of infringement in
16 this judicial district.

17 **FACTUAL BACKGROUND**

18 6. Through heavy investment and hard work, Zipbuds designed a unique type of
19 headphone that is both useful and highly aesthetically pleasing. The design is so aesthetically
20 pleasing and ornamental that Zipbuds pursued and obtained a design patent to protect against others
21 who may wish to sell what an ordinary observer would view as the same product. A copy of
22 Zipbuds' U.S. Design Patent, US D652,407 S, is attached to this Complaint as Exhibit 1 ("407
23 Patent"). The '407 Patent protects design features which are in addition to the trade dress protection
24 afforded the particular trade dress Zipbuds selected and promoted to enhance its brand recognition.

25 7. In addition, Zipbuds sought to and did create distinct brand awareness by use of a
26 trademark, adopting the strong and inherently distinctive trademark "ZIPBUDS" for its highly
27 aesthetic ear phones featuring a zipper. To protect its trademark and provide notice to the public
28

1 that the trademark was for its exclusive use, Zipbuds sought and successfully obtained federal
2 registration of its ZIPBUDS trademark for use in connection with “audio headphones.”

3 8. Zipbuds has been marketing and selling its unique ZIPBUDS earphones since at least
4 as early as November 9, 2010, and has gained significant market recognition. In 2011 alone, over
5 \$1.5 million in sales of the ZIPBUDS earphones were made by Zipbuds, including through their
6 website and the far-reaching Amazon.com website. The colorful, high-quality ear buds have
7 become known for their quality and superior product design. By 2012, the ZIPBUDS earphones
8 won Travel & Leisure’s best personal gadget award. They have been featured extensively in the
9 media, including gizmag.com (<http://www.gizmag.com/zipbuds-keep-tangles-at-bay/17337/>), C-Net
10 (http://reviews.cnet.com/headphones/zipbuds-by-dga-tangle/4505-7877_7-34221397.html),
11 PRnewswire.com ([http://www.prnewswire.com/news-releases/zipbuds-introduces-2nd-generation-](http://www.prnewswire.com/news-releases/zipbuds-introduces-2nd-generation-of-tangle-resistant-earphones-featuring-higher-quality-sound-and-enhanced-functionality-130763828.html)
12 [of-tangle-resistant-earphones-featuring-higher-quality-sound-and-enhanced-functionality-](http://www.prnewswire.com/news-releases/zipbuds-introduces-2nd-generation-of-tangle-resistant-earphones-featuring-higher-quality-sound-and-enhanced-functionality-130763828.html)
13 [130763828.html](http://www.prnewswire.com/news-releases/zipbuds-introduces-2nd-generation-of-tangle-resistant-earphones-featuring-higher-quality-sound-and-enhanced-functionality-130763828.html)), among other sites. These products have been recognized for their innovation, and
14 also their successful refinement of a zipper earphone.

15 9. Unfortunately, in the midst of this momentous success, Zipbuds discovered that
16 Defendant started manufacturing and selling a competing earphone that infringes the trade dress and
17 design patent of Zipbuds.

18 10. Among those products, Defendant has begun sales of their product under the iHip
19 “ZipperEarphones” brand (including but not limited to Item # IPZIPBL and/or SKU 1170901894)
20 (collectively “Accused Products” or “Accused Product”). They have sold their Accused Products in
21 California, specifically San Diego. Not only is their product a copy of Zipbuds’ valuable patented
22 design, it is also marketed as the iHip’s “ZipperEarphone” with features that are virtually
23 indistinguishable from Zipbuds’ valuable product trade dress and design patent. The
24 ZipperEarphones name is, conveniently, straight from the ’407 Patent title: “Zippered Earphones.”

25 11. The Accused Product also infringes the design of the ’407 Patent and the trade dress
26 of the ZIPBUDS earphones that utilize that valuable design. The ’407 Patent was issued after
27 review of relevant prior art, and found to be a novel design for earphones. As with the ’407 Patent,
28 the Accused Product does not begin its zipper feature immediately, but only does so partially up the

1 chord from the ear phone plug. Additionally, the base from which the zipper extends is shaped with
2 a conical shape, as is present in the '407 Patent and the ZIPBUDS earphones. The Accused
3 Products are sold in zipper tooth color options including teal blue, pink/red and white, virtually the
4 same colors as the ZIPBUDS earphones. The Accused Products all use the same looking black
5 chord that teaches an advantage over prior designs, the same shape of the chord, the same thin and
6 skinny rectangular black glossy zipper handle, the building of the zipper teeth directly over the cord,
7 the zipper-tooth shape, the spacing between the zipper teeth, the black earpiece with silver ring and
8 tilted cushion insert color matched to the zipper color, similarities with the '407 Patent and/or the
9 ZIPBUDS earphones' trade dress. These similarities to an ordinary observer would lead one to
10 conclude the design in the '407 Patent and the Accused Product are substantially the same such that
11 he or she would be deceived into purchasing one believing it to be the other. These same
12 similarities in trade dress are also likely to confuse the average consumer into believing there is an
13 association, relationship, sponsorship or other affiliation between the Accused Product and Plaintiff,
14 a confusion which is compounded by the use of "ZipperEarphones" by Defendant.

15 12. When Zipbuds learned of this infringement, it promptly contacted Defendant and
16 demanded it cease sales on February 21, 2012. The cease and desist letter identified the exact
17 product, stated the bases by which it was violating Zipbuds' rights, and demanded that the sales of
18 the Accused Product immediately cease.

19 13. Defendant did not stop sales, but instead responded on March 8, 2012, refusing to
20 discontinue its sales and instead continuing to sell the Accused Product. Defendant has provided no
21 founded justification for why it believes it could arguably be engaging in legitimate activity, and on
22 information and belief its sales are willful and intentionally impinging on Zipbuds' trade dress and
23 design patent rights.

24 **FIRST CLAIM FOR RELIEF**

25 **INFRINGEMENT OF U.S. PATENT NO. D652,407 S**

26 14. Zipbuds realleges all allegations in this Complaint as if stated herein.

27 15. On January 17, 2012, United States Patent Number D652,407 S ('407 Patent)
28 entitled "Zippered Earphones," was duly and legally issued to Zipbuds, who has the right to enforce

1 this patent. A true and correct copy of this Patent is attached hereto as Exhibit 1 and incorporated
2 herein by reference.

3 16. Defendant has infringed and continues to infringe the '407 Patent by making, using,
4 selling, offering for sale, importing, and/or actively inducing others to use products that infringe one
5 or more of the patented design(s) in the '407 Patent, and is thus liable for patent infringement
6 pursuant to 35 U.S.C. § 271. This includes the practice by Defendant via the Accused Product, sold
7 under the name ZipperEarphones, which infringes claim 1 of the '407 Patent.

8 17. Defendant's infringement of the '407 Patent has caused and continues to cause
9 damage to Zipbuds in an amount to be determined at trial.

10 18. Defendant's infringement of the '407 Patent has caused and will continue to cause
11 immediate and irreparable harm to Zipbuds for which there is no adequate remedy at law, unless
12 this Court enjoins and restrains such activities.

13 19. Zipbuds is informed and believes and, on that bases alleges, that Defendant knew of
14 the '407 Patent and that Defendant's infringement of the '407 Patent was willful and deliberate,
15 entitling Zipbuds to enhanced damages pursuant to 35 U.S.C. § 284, and costs incurred prosecuting
16 this action.

17 **SECOND CLAIM FOR RELIEF**

18 **TRADE DRESS INFRINGEMENT; UNFAIR COMPETITION**

19 **(15 U.S.C. § 1125 *et seq.* and Common Law)**

20 20. Plaintiff incorporates by reference all other paragraphs contained in this Complaint.

21 21. Plaintiff owns the trade dress rights to the trade dress of its ZIPBUDS products by
22 virtue of its long and continuous use which has come to associate the trade dress with itself in the
23 minds of the relevant consuming public.

24 22. Defendant has committed proscribed acts of unfair competition.

25 23. Defendant has sold and offered for sale counterfeit goods, as alleged above, falsely
26 designating their origin. This includes trade dress infringement of the ZIPBUDS, as alleged above.

27 24. On information and belief, Defendant's unfair competition was knowing and willful.

25. Defendant's uses are likely to cause confusion and mistake with the public and deceive them into believing that there is an affiliation, connection and association between Defendant and Zipbuds.

26. As a direct and proximate result of Defendant's wrongful acts, Zipbuds has suffered and continues to suffer substantial pecuniary losses and irreparable injury to its business reputation and goodwill. As such, Zipbuds' remedy at law is not adequate to compensate for injuries inflicted by Defendant. Accordingly, Zipbuds is entitled to temporary, preliminary and permanent injunctive relief.

27. By reason of such wrongful acts, Zipbuds is and was, and will be in the future, deprived of, among others, the profits and benefits of business relationships, agreements, and transactions with various existing clients and/or prospective clients and customers. Defendant has wrongfully obtained said profits and benefits. Zipbuds is entitled to compensatory damages and disgorgement of Defendant's said profits, in an amount to be proven at trial, along with other just damages.

THIRD CLAIM FOR RELIEF

UNFAIR COMPETITION

(California Common Law)

28. Plaintiff incorporates by reference all other paragraphs contained in this Complaint.

29. Plaintiff has the exclusive right to use the ZIPBUDS trade dress by virtue of its extensive and continuous use.

30. Defendant has committed unlawful acts of unfair competition, as alleged above.

31. As a direct and proximate result of Defendant's wrongful acts, Zipbuds has suffered and continues to suffer substantial pecuniary losses and irreparable injury to its business reputation and goodwill. As such, Zipbuds' remedy at law is not adequate to compensate for injuries inflicted by Defendant. Accordingly, Zipbuds is entitled to temporary, preliminary and permanent injunctive relief.

32. By reason of such wrongful acts, Zipbuds is and was, and will be in the future, deprived of, among others, the profits and benefits of business relationships, agreements, and

1 transactions with various existing clients and/or prospective clients and customers. Defendant has
2 wrongfully obtained said profits and benefits. Zipbuds is entitled to compensatory damages and
3 disgorgement of Defendant's said profits, in an amount to be proven at trial, along with other just
4 damages.

5 33. Such acts, as alleged above, were done with malice, oppression and/or fraud, thus
6 entitling Zipbuds to exemplary and punitive damages.

7 **FOURTH CLAIM FOR RELIEF**
8 **STATUTORY UNFAIR COMPETITION**
9 **(Cal. Bus. & Prof. Code § 17200 *et seq.*)**

10 34. Plaintiff incorporates by reference all other paragraphs contained in this Complaint.

11 35. Defendant has committed proscribed acts of unfair competition, as alleged above.

12 36. As a direct and proximate result of Defendant's wrongful acts, Zipbuds has suffered
13 and continues to suffer substantial pecuniary losses and irreparable injury to its business reputation
14 and goodwill. As such, Zipbuds remedy at law is not adequate to compensate for injuries inflicted
15 by Defendant. Accordingly, Zipbuds is entitled to temporary, preliminary and permanent injunctive
16 relief.

17 37. By reason of such wrongful acts, Zipbuds is and was, and will be in the future,
18 deprived of, among others, the profits and benefits of business relationships, agreements, and
19 transactions with various existing clients and/or prospective clients and customers. As a result,
20 Zipbuds is entitled to restitutionary relief in an amount to be determined upon proof at the time of
21 trial.

22 **PRAYER**

23 **WHEREFORE**, Plaintiff demands the following relief:

- 24 1. A judgment in favor of Plaintiff Zipbuds and against Defendant on all counts;
25 2. A preliminary and permanent injunction from design patent and trade dress
26 infringement, and unfair business practices by Defendant;
27 3. Damages in an amount to be determined at trial, including Defendant's unjust
28 enrichment, such damages enhanced and/or trebled for willful infringement;

4. Statutory damages;
5. Exemplary and punitive damages;
5. Pre-judgment interest at the legally allowable rate on all amounts owed;
6. Costs, expenses and fees under, among others, 15 U.S.C. § 1117(a)-(b);
7. Restitution;
8. Attorney's fees under, among others, 15 U.S.C. § 1117(a) as an exceptional case and § 1117(b) for willful use of a counterfeit mark; and
9. Such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY

Zipbuds demands trial by jury on all issues triable as a matter of right at law.

Dated: April 25, 2012

MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO

By: s/Andrew D. Skale

Andrew D. Skale, Esq.

Attorneys for Plaintiff,
ZIPBUDS, LLC.

6304282v.1

EXHIBIT 1



US00D652407S

(12) **United States Design Patent**
Groset et al.

(10) **Patent No.:** **US D652,407 S**
(45) **Date of Patent:** **** Jan. 17, 2012**

(54) **ZIPPERED EARPHONES**

(75) Inventors: **Erik Groset**, Carlsbad, CA (US); **Justin Liu**, San Diego, CA (US); **Michael Klasco**, Richmond, CA (US); **Robin DeFay**, Poway, CA (US)

(73) Assignee: **Zipbuds, LLC**, San Diego, CA (US)

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

(21) Appl. No.: **29/397,922**

(22) Filed: **Jul. 22, 2011**

Related U.S. Application Data

(63) Continuation of application No. 12/941,943, filed on Nov. 8, 2010.

(51) **LOC (9) Cl.** **14-01**

(52) **U.S. Cl.** **D14/205**

(58) **Field of Classification Search** D14/205,
D14/206, 223, 167, 168, 192; 379/430; 381/380,
381/381, 374, 383, 370, 385; 181/135, 137;
D2/607; 24/381, 383; 455/90.3, 569.1

See application file for complete search history.

(56) **References Cited**

U.S. PATENT DOCUMENTS

2,896,217	A *	7/1959	Cedarstaff	.....	2/150
D231,613	S *	5/1974	Sarber	.....	D14/206
4,160,306	A *	7/1979	Pizzoccaro	.....	24/381
D270,634	S *	9/1983	Ungar	.....	D14/205
D469,753	S *	2/2003	Andre et al.	.....	D14/205
D546,321	S *	7/2007	Kim	.....	D14/223
D569,841	S *	5/2008	Chung et al.	.....	D14/205
D578,507	S *	10/2008	Ando	.....	D14/205
7,450,014	B2 *	11/2008	Farhadian	.....	340/573.1
D589,491	S *	3/2009	Andre et al.	.....	D14/205

(Continued)

FOREIGN PATENT DOCUMENTS

EP 1509062 A1 2/2005

(Continued)

Primary Examiner — Paula Greene

(74) *Attorney, Agent, or Firm* — Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.

(57)

CLAIM

The ornamental design for zippered earphones, as shown and described.

DESCRIPTION

FIG. 1 is a front view of the zippered earphones showing our new design;

FIG. 2 is a top view of the zippered earphones;

FIG. 3 is a bottom view of the zippered earphones;

FIG. 4 is an exploded front view thereof;

FIG. 5 is an exploded rear view thereof;

FIG. 6 is an exploded side view thereof, the opposite side is a mirror image;

FIG. 7 is an enlarged front view of the earphone shown separately for purposes of illustration thereof, the other earphone is a mirror image;

FIG. 8 is an enlarged side view of the earphone thereof, the other earphone is a mirror image;

FIG. 9 is an enlarged side view of the earphone thereof, the other earphone is a mirror image;

FIG. 10 is an enlarged top view of the earphone thereof, the other earphone is a mirror image;

FIG. 11 is an enlarged bottom view of the earphone thereof, the other earphone is a mirror image;

FIG. 12 is an enlarged front view of the zipper in a closed position shown separately for purposes of illustration;

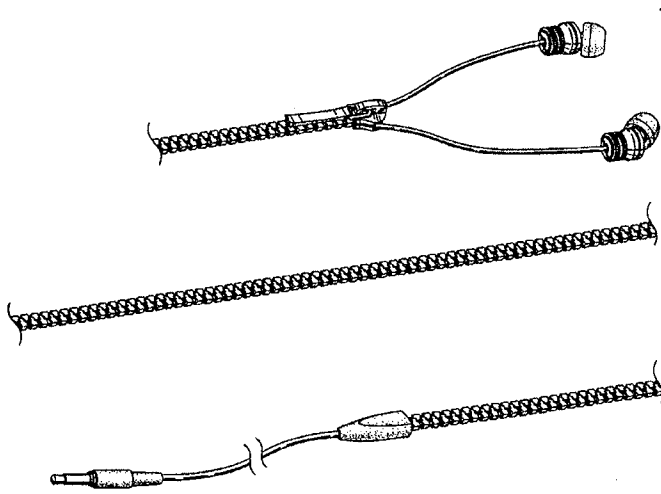
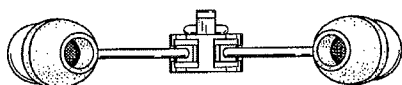
FIG. 13 an enlarged side view thereof;

FIG. 14 is an enlarged perspective view of the zipper and pull in an open position thereof.

FIG. 15 is an enlarged perspective view thereof; and,

FIG. 16 is a perspective view of the zippered earphones.

1 Claim, 9 Drawing Sheets



US D652,407 S

Page 2

U.S. PATENT DOCUMENTS

D591,264 S *	4/2009	Hong et al.	D14/205
D596,690 S *	7/2009	Bennett	D21/791
D598,010 S *	8/2009	Matsuda et al.	D14/223
D599,778 S *	9/2009	Ando	D14/205
D605,628 S *	12/2009	Ando	D14/205
D607,875 S *	1/2010	Pedersen, II	D14/206
D614,168 S *	4/2010	Rogers et al.	D14/206
D637,756 S *	5/2011	Okano et al.	D26/135

D637,999 S *	5/2011	Brunner et al.	D14/205
D643,414 S *	8/2011	Lee et al.	D14/223
2005/0069147 A1	3/2005	Pedersen	
2011/0162883 A1	7/2011	Groset et al.	

FOREIGN PATENT DOCUMENTS

JP	2004056636 A	2/2004
WO	2009030578 A1	3/2009

* cited by examiner

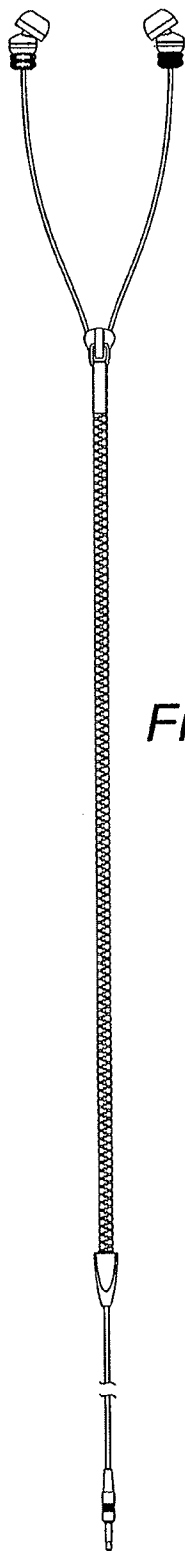


Fig. 1

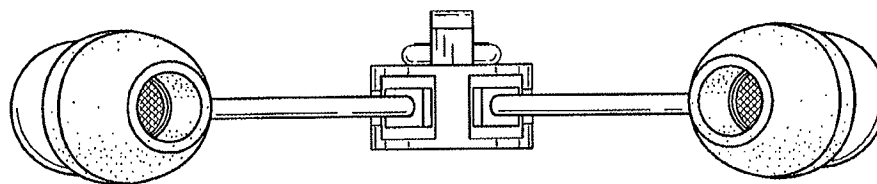


Fig. 2

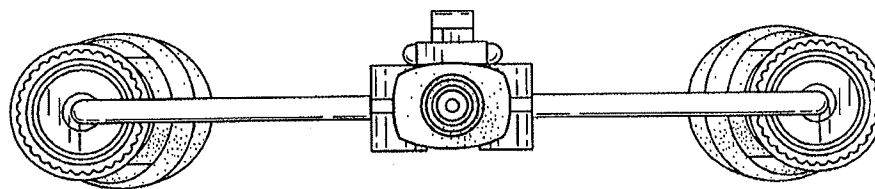
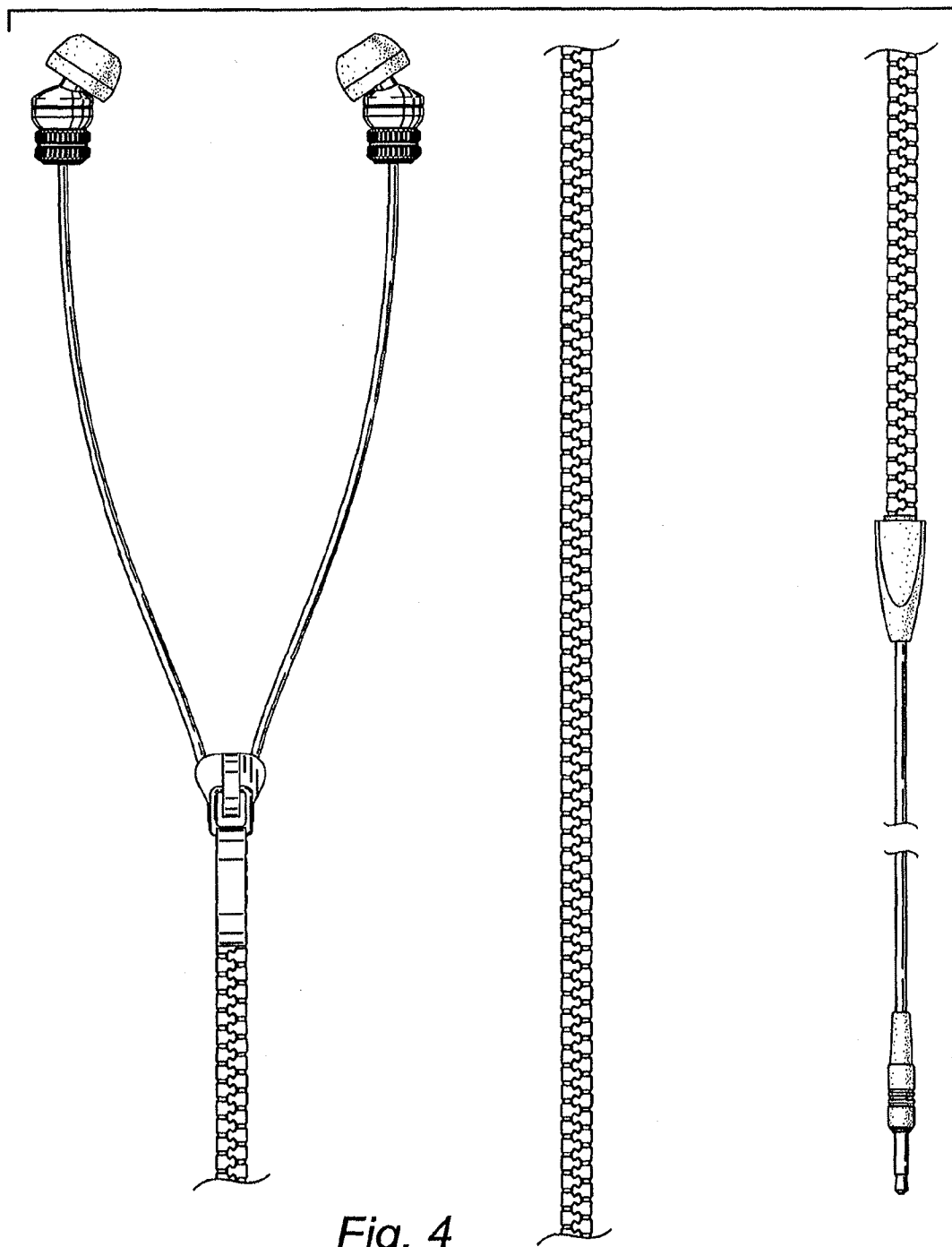
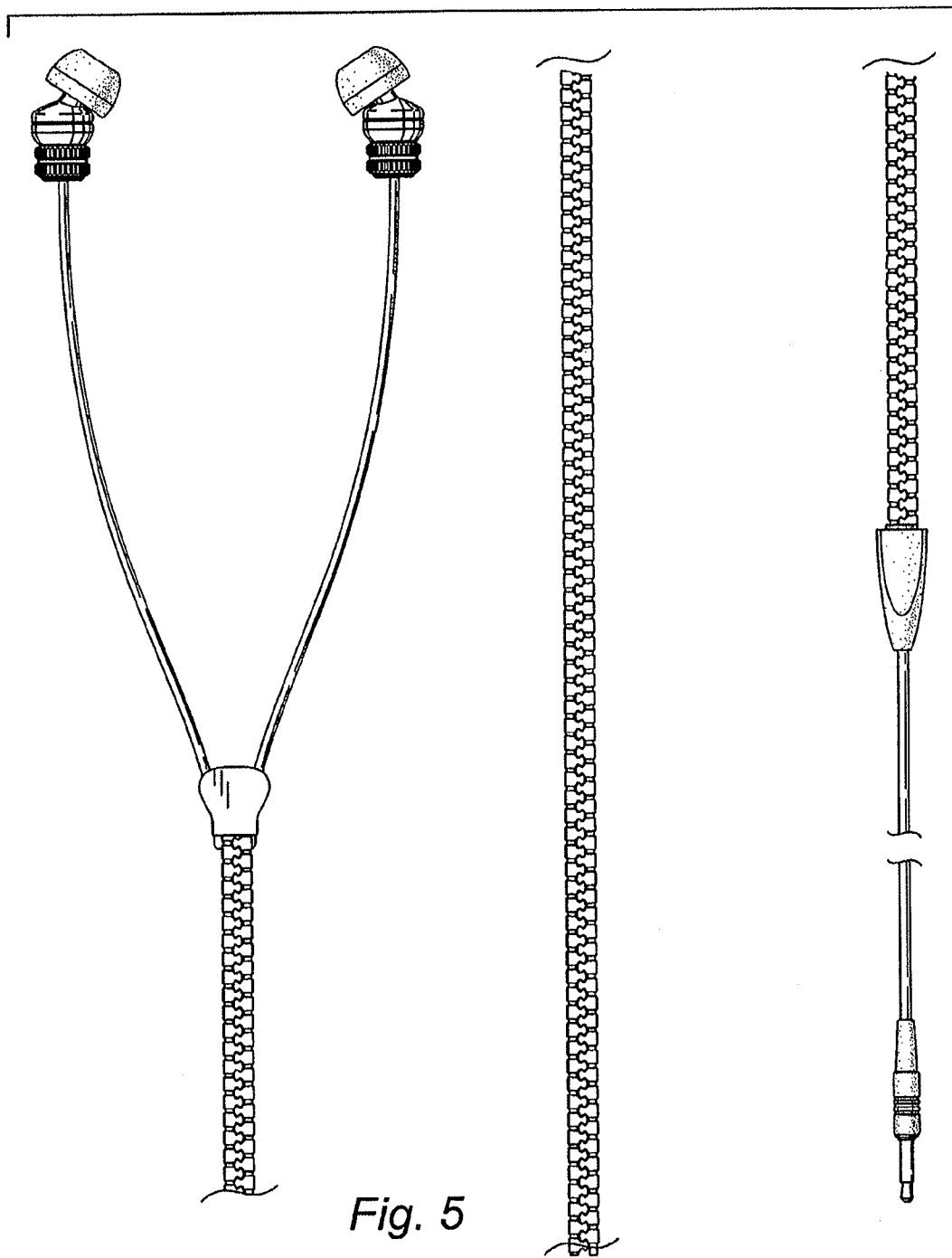


Fig. 3





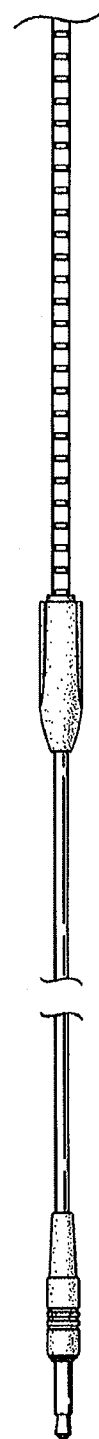
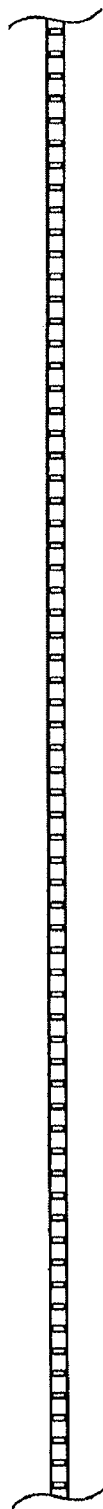
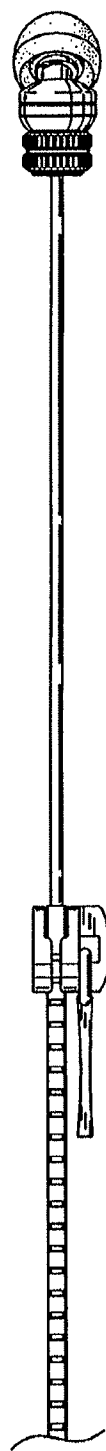


Fig. 6

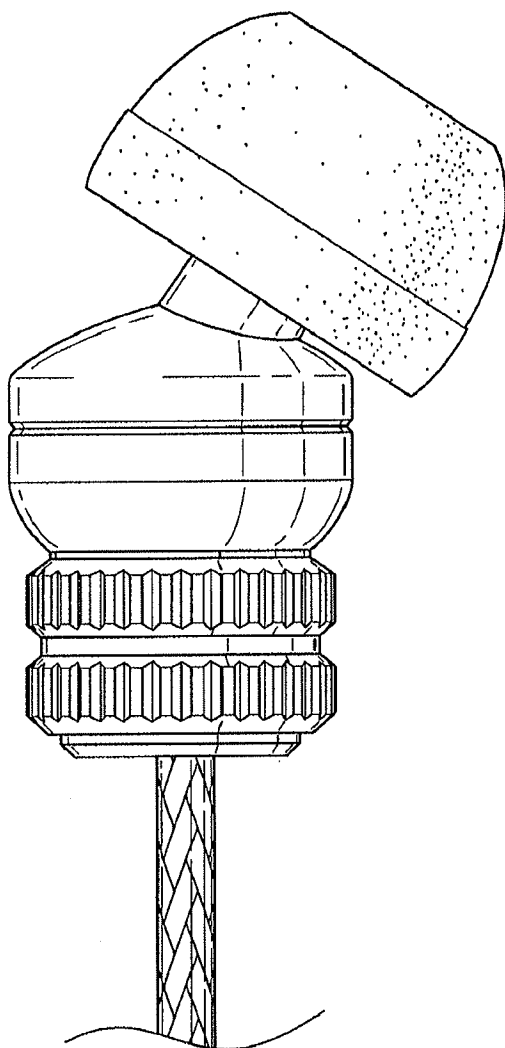


Fig. 7

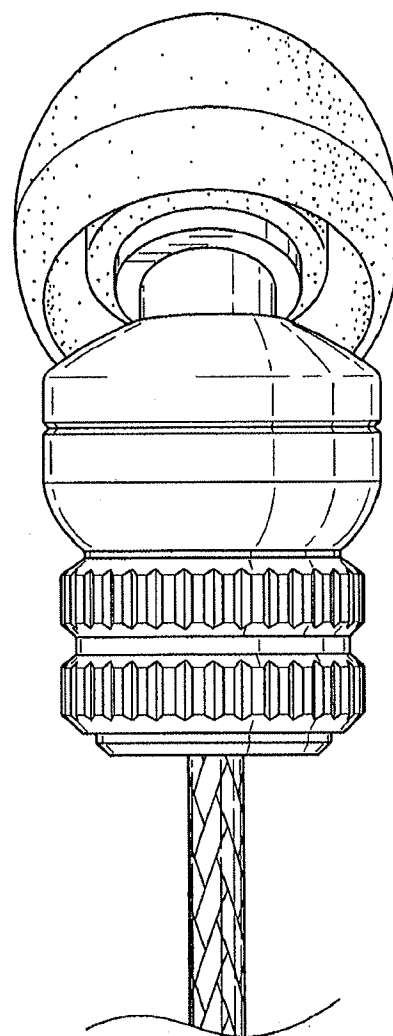


Fig. 8

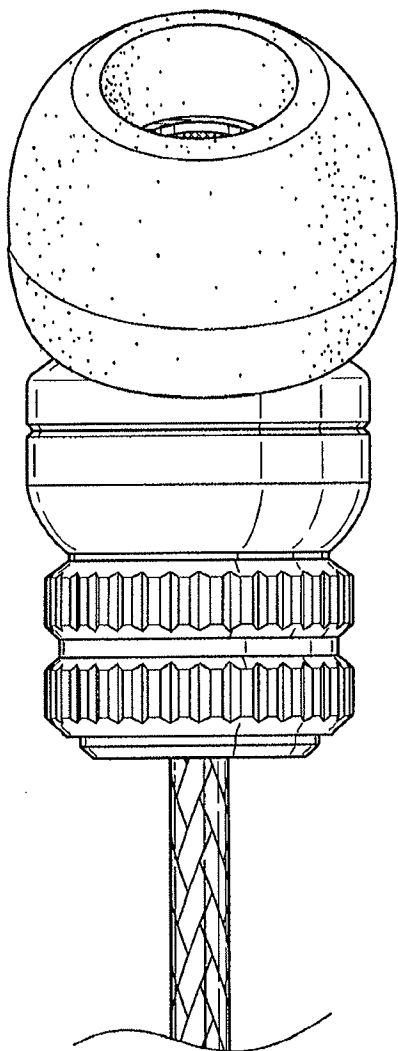


Fig. 9

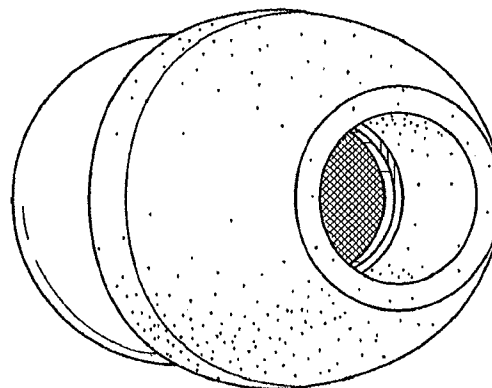


Fig. 10

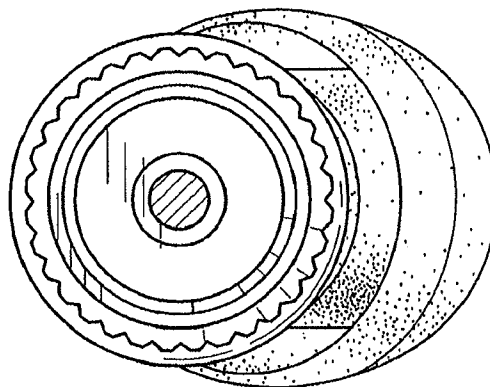


Fig. 11

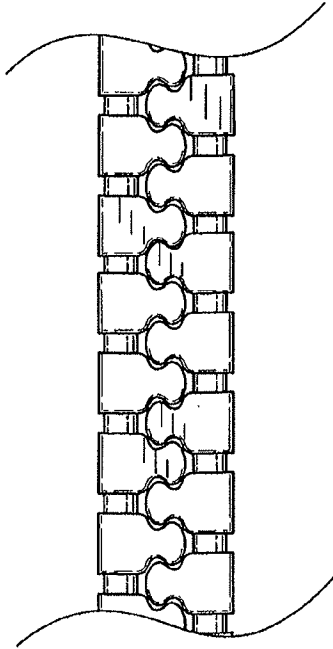


Fig. 12

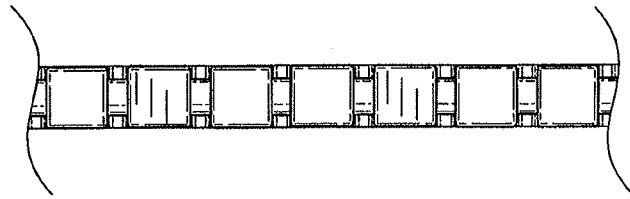


Fig. 13

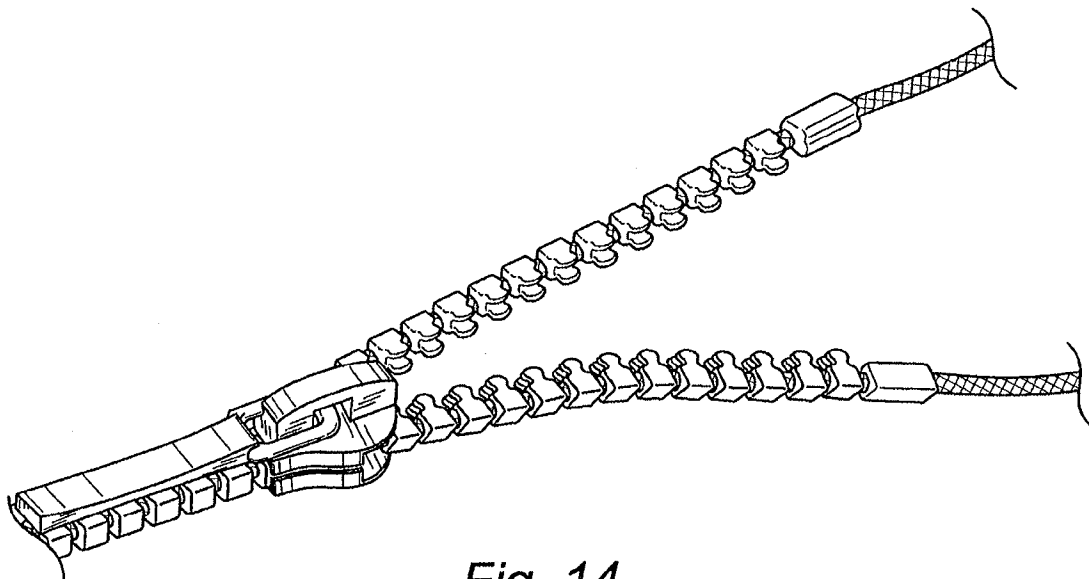
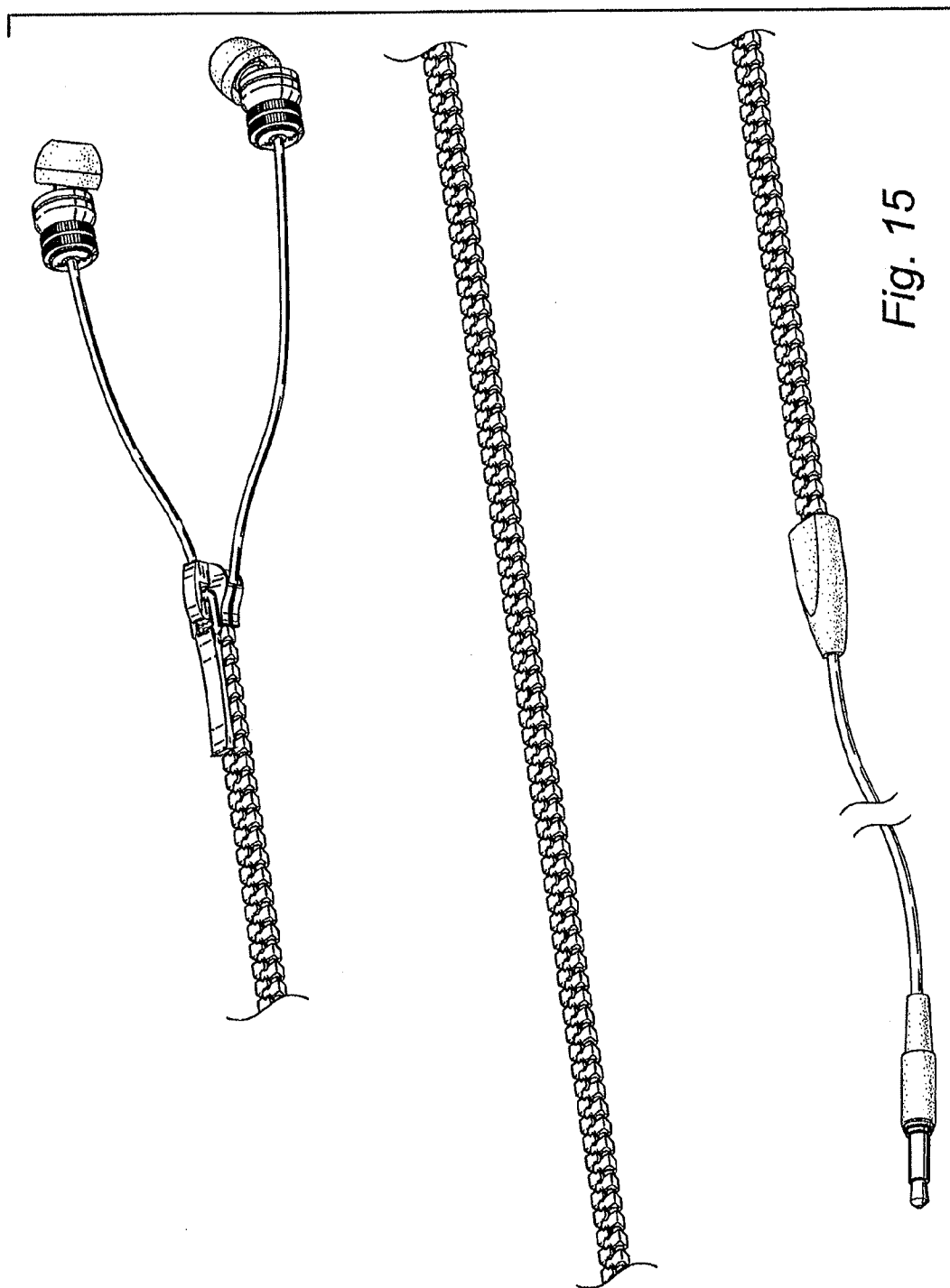


Fig. 14



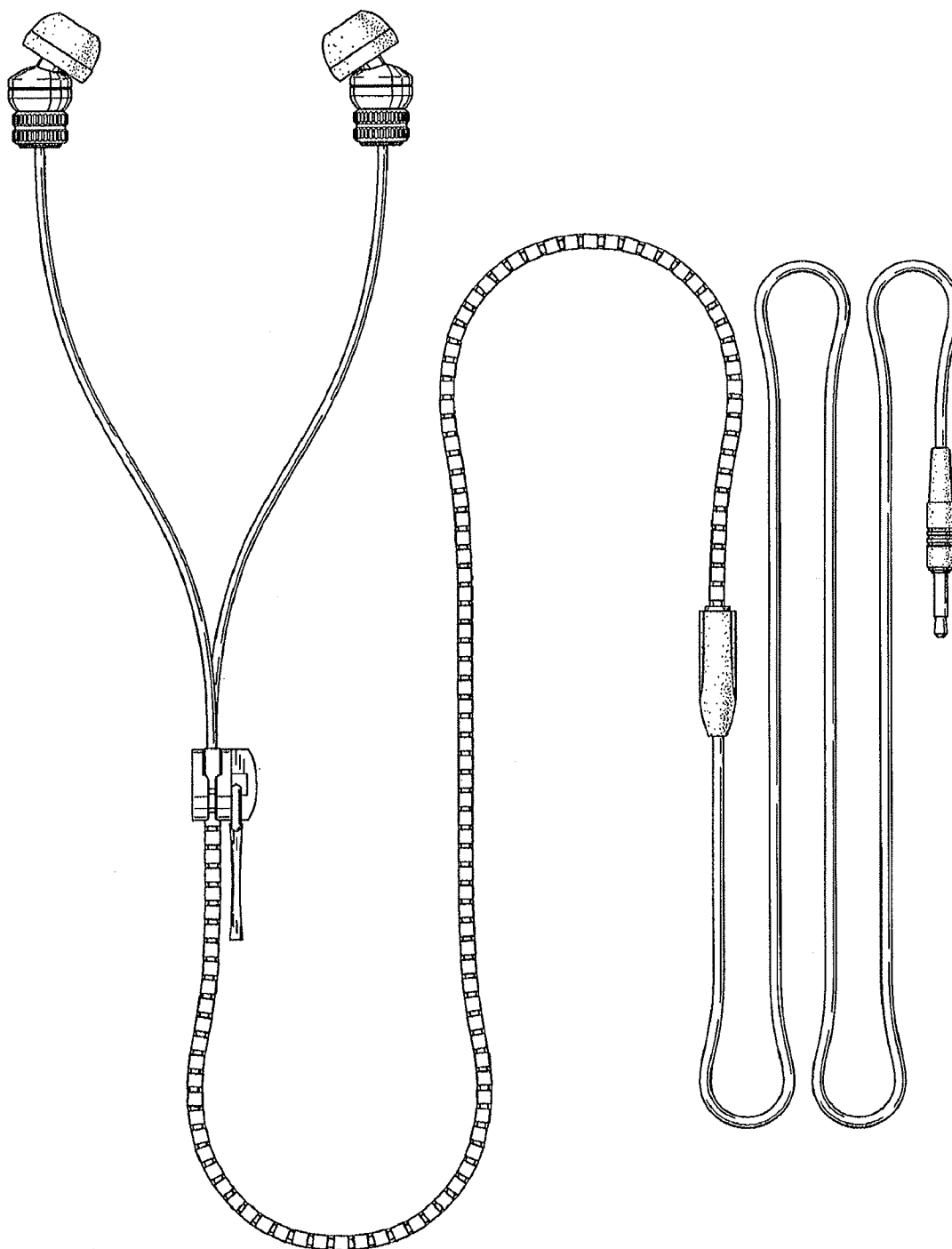


Fig. 16