

IN THE MATTER OF
THE STANLEY WORKS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3876. Complaint, June 2, 1999--Decision, June 2, 1999

This consent order, among other things, prohibits The Stanley Works, a Connecticut-based manufacturer and distributor of mechanics tools, from misrepresenting the extent to which any mechanics tool is made in the United States.

Participants

For the Commission: *Kent Howerton, Laura Koss, and Elaine Kolish.*

For the respondent: *John Harkrider, Axinn, Veltrop & Harkrider, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Stanley Works ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The Stanley Works is a Connecticut corporation with its principal office or place of business at 1000 Stanley Drive, New Britain, Connecticut.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including mechanics tools.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

HUSKY MECHANICS TOOLS

4. Respondent has disseminated or has caused to be disseminated advertisements, catalogs, packaging, labeling, in-store displays, and other promotional materials for certain of its Husky combination wrenches and sockets, including but not necessarily limited to the attached Exhibits A through J. These advertisements, catalogs, packaging, labeling, in-store displays, and other promotional materials contain the following statements or depictions:

A. Television Advertisement, Exhibit A:

Shows mechanics at work using Husky combination wrenches and standard sockets. Voice-over states: "We told these mechanics that Husky tools were American made and guaranteed forever."

B. Print Advertisement, Exhibit B:

A photograph of a man holding a combination wrench while working on his car. The words "Made in U.S.A." appear on the combination wrench.

C. Catalog, Exhibit C:

"The Husky name was first registered back in 1924 for use on quality US made Mechanics Tools Husky tools are made to exact standards in state of the art manufacturing plants in Dallas, Texas"; and

A logo consisting of an American flag with the phrases "Made in U.S.A." and "Guaranteed Forever" ("U.S. flag logo").

D. Catalog, Exhibit D:

"American Made to Meet or Exceed ANSI Specifications"; and
"Made in the USA."

E. Catalog, Exhibit E:

"Made in the USA"; and U.S. flag logo.

F. Catalog, Exhibit F:

U.S. flag logo.

G. Packaging and Labeling, Exhibit G:

"Made in U.S.A." in black and white; and U.S. flag logo.

H. Packaging and Labeling, Exhibit H:

"Made in U.S.A." in red, white, and blue; and
"Made in U.S.A." in black and white.

I. In-store Display, Exhibit I:

"All Husky Tools Made in USA"; and U.S. flag logo.

J. Product Registration Card, Exhibit J:

A depiction of a U.S. flag.

5. Respondent has distributed or has caused to be distributed certain of its Husky combination wrenches and sockets marked with the following statements: "U.S.A."; or "Made in U.S.A."

PROTO MECHANICS TOOLS

6. Respondent has disseminated or has caused to be disseminated advertisements, catalogs, packaging, labeling, and other promotional materials for certain of its Proto combination wrenches and teardrop ratchets, including but not necessarily limited to Exhibits K through L, that contain the following statements or depictions:

A. Catalog, Exhibit K:

Logo consisting of the words "Made in U.S.A.," appearing next to a silhouette of the continental United States that is covered by the U.S. flag.

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B. Stanley Catalog, Exhibit L:

"Proto was the first hand tool manufacturer to produce and market the combination wrench in the United States"; and

Photographs of combination wrenches marked "U.S.A."

C. Packaging and labeling:

"Made in the U.S.A."

7. Respondent has distributed or has caused to be distributed certain of its Proto combination wrenches and teardrop ratchets marked with the following statements: "U.S.A."; or "Mfg. U.S.A."

BLACKHAWK MECHANICS TOOLS

8. Respondent has disseminated or has caused to be disseminated promotional materials for certain of its Blackhawk combination wrenches, open end wrenches, box end wrenches, flare nut wrenches, sockets, ratchets, flex handles, wrench sets, and socket sets that contain the following statements or depictions:

"America's Best";

Photographs of certain tools marked "U.S.A.";

"Made in America"; or "American-Made."

9. Respondent has distributed or caused to be distributed certain of its Blackhawk combination wrenches, sockets, flex handles, box end wrenches, flare nut wrenches, and open end wrenches marked with the following statement: "U.S.A."

CHALLENGER MECHANICS TOOLS

10. Respondent has disseminated or has caused to be disseminated promotional materials for certain of its Challenger combination wrenches, sockets, combination wrench sets, box end wrench sets, open end wrench sets, and cold chisel sets that contain the following statements or depictions:

Photographs of a combination wrench marked "U.S.A.";

Photographs of sockets marked "Proto U.S.A.";

Photographs of cold chisels marked "U.S.A."; or

Photographs of combination wrench sets, box end wrench sets, an open end wrench set, and a cold chisel set in roll-up pouches that state "Made in U.S.A."

11. Respondent has distributed or caused to be distributed certain of its Challenger sockets, combination wrenches, open end wrenches,

box end wrenches, flare nut wrenches, and cold chisels marked with the following statement: "U.S.A."

MASTER MECHANIC MECHANICS TOOLS

12. Respondent has disseminated or has caused to be disseminated certain of its Master Mechanic combination wrenches, sockets, and socket sets with labeling or other promotional materials that contain the following statement: "Made in U.S.A."

13. Respondent has disseminated or has caused to be disseminated certain of its Master Mechanic combination wrench sets and socket sets with packaging, labeling, or other promotional materials that contain the following statement and depiction:

"Made in U.S.A." next to an American flag.

14. Respondent has distributed or caused to be distributed certain of its Master Mechanic combination wrenches, flex handles, and sockets marked with the following statement: "U.S.A."

STANLEY MECHANICS TOOLS

15. Respondent has distributed or caused to be distributed packaging, labeling, or other promotional materials for certain of its Stanley combination wrenches, box end wrenches, open end wrenches, ratchets, combination wrench sets, and socket sets that contain the following statements or depictions:

"Made in U.S.A."; "U.S.A.";

"Tools made in U.S.A. Case made in Taiwan.";

A logo consisting of an eagle head on an American flag and the words "Made in U.S.A.";

Photographs of combination wrench sets and an open end wrench set with "Made in U.S.A." on their packaging; or

A silhouette of the United States showing Stanley plant locations.

16. Respondent has distributed or caused to be distributed certain of its Stanley combination wrenches, open end wrenches, and box end wrenches marked with the following statement: "U.S.A."

CATERPILLAR MECHANICS TOOLS

17. Respondent has distributed or caused to be distributed certain combination wrenches and cold chisels that it manufactures for Caterpillar marked with the following statement: "U.S.A."

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JOHN DEERE MECHANICS TOOLS

18. Respondent has distributed or caused to be distributed certain combination wrenches and sockets that it manufactures for John Deere marked with the following statement: "U.S.A."

MARTIN MECHANICS TOOLS

19. Respondent has distributed or caused to be distributed certain ratchets, flex handles, and sockets that it manufactures for Martin marked with the following statement: "U.S.A."

WILDE MECHANICS TOOLS

20. Respondent has distributed or caused to be distributed certain sockets that it manufactures for Wilde marked with the following statement: "U.S.A."

21. Through the means described in paragraphs 4 through 20, respondent has represented, expressly or by implication, that certain of its mechanics tools are made in the United States, *i.e.*, that all, or virtually all, of the component parts of such mechanics tools are made in the United States, and that all, or virtually all, of the labor in manufacturing such mechanics tools is performed in the United States.

22. In truth and in fact, a significant portion of the components of certain of respondent's mechanics tools is, or has been, of foreign origin. Therefore, the representation set forth in paragraph 21 was, and is, false or misleading.

23. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

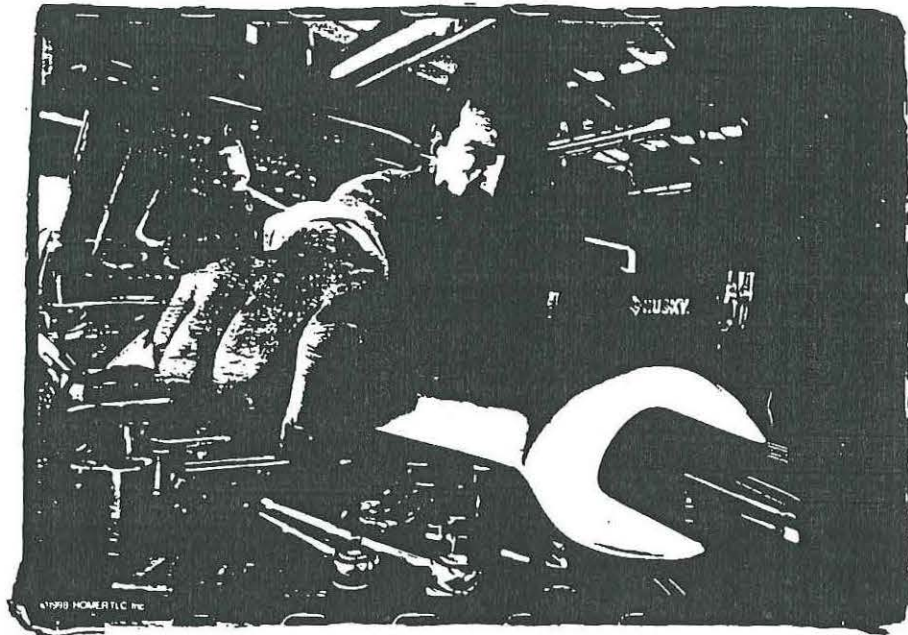
**Exhibit A consists of a video tape of a television advertisement.
It has been placed on the public record of this proceeding.**

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EXHIBIT B

[Hank's Helpful Hints]



1. Always use the best tool for the job.
2. The best isn't always the most expensive.
3. The best isn't always the most well known.
4. Buy Husky and forget the other rules.



EXHIBIT B

The toughest name in tools.
Guaranteed for life and only at The Home Depot.

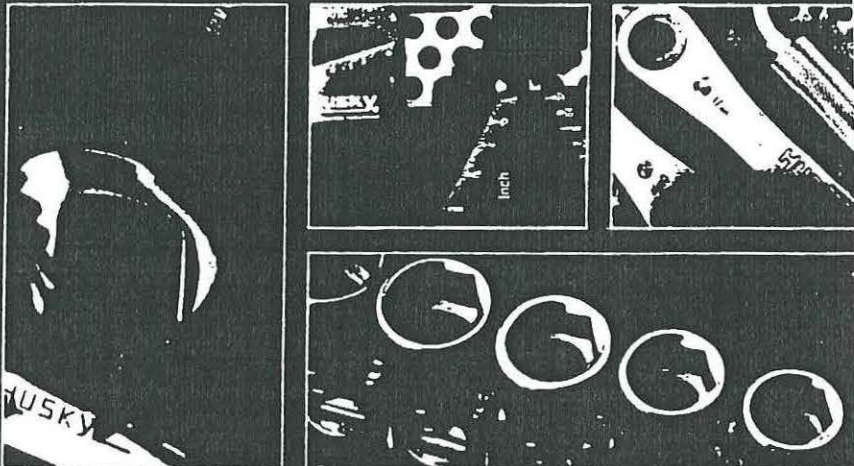
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EXHIBIT C



HUSKY *The Toughest Name In Tools*



The Husky name was first registered back in 1924 for use on quality US made Mechanics Tools. Now, over 70 years later, the name stands for a new line of professional-quality wrenches, sockets, ratchets and accessories...some of the most reliable, most durable, most versatile and functional tools on the market - at prices you can afford. Husky Tools are made to exact standards in state of the art manufacturing plants in Dallas, Texas. These factories are considered by many to be the most efficient tool making facilities anywhere in the world.

Throughout this catalog, you will see a wide selection of quality mechanics tools so tough, they are sure to please any professional. Made from select steel to resist brittleness they are heat-treated, oil quenched and tempered

All Husky Mechanics Tools are Guaranteed Forever by The Home Depot Worldwide.



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EXHIBIT C

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EXHIBIT D

Husky Tools And Chests

254-PIECE MECHANICS TOOL SET

- Standard and metric
- 1/4", 3/8" and 1/2" drive
- 90038 (881-680)

\$197

52-PIECE MECHANICS TOOL SET 90001 (881-011) **\$34.40**

\$297²

63-PIECE SOCKET SET with SOFT SIDE CASE

- Standard and metric
- Includes standard ratchet, 1/4" and 3/8" drive sockets, hex keys, screwdriver bits and soft side case
- 95063 (413-397)

11 DRAWER COMBO HOMEOWNER TOOL CHEST/CABINET

- Drawer liner not included in combo price

\$196

ITEMS SOLD SEPARATELY:

6 DRAWER CHEST 91708 (820-298) **\$9.00**

5-DRAWER CABINET

- Red baked enamel finish
- 8250 cu. in. capacity
- Embossed top and bottom for increased strength

91-8481Y (887-830) **\$107.00**

CHEST DRAWER LINER 92-4714Y (887-908) **7.44**

7 DRAWER COMBO HOMEOWNER TOOL CHEST/CABINET

- Drawer divider not included in combo price

\$146

ITEMS SOLD SEPARATELY:

4 DRAWER CHEST 91704 (814-664) **\$5**

3-DRAWER CABINET

- Red baked enamel finish
- 8250 cu. in. capacity
- Embossed top and bottom for increased strength

91-8481Y (887-813) **\$71**

CABINET DRAWER DIVIDE 92-8281Y (887-942) **\$1**

HUSKY TOOLS EXCLUSIVELY AT THE HOME DEPOT

Where Low Prices are Just the Beginning

\$37¹⁰

2-DRAWER PORTABLE TOOL CHEST

- 21" Wx8 1/2" Dx11 1/2" H
- 23 lbs.
- 92-6521Y (887-644)

\$44⁹⁷

32" PROFESSIONAL TOOL BOX

- 32" Wx8 1/2" Dx9 1/2" H
- 24 lbs.

EXHIBIT D

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EXHIBIT E

HUSKY
MECHANICS TOOLS

Protected by a nickel-chrome electroplated finish so they won't chip, peel or corrode!

2 stage heat treat, through-hardened for strength, then tempered for wear resistance

Torque strength meets or exceeds ANSI specs

Forged from superior quality molybdenum steel and heat treated for lifetime of service

Nickel-chrome plated for rust resistance

- Guaranteed forever by The Home Depot
- Made in the USA
- Wide range of Sockets, Ratchets & Accessories in 1/2", 3/4" & 1" drive
- We're so proud of Husky tools that we'll honor competitor replacement warranties. We'll replace your damaged Craftsman or Snap-On mechanics tools with comparable Husky tools.

MADE IN USA
GUARANTEED FOREVER

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EXHIBIT E

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EXHIBIT F

Available Exclusively At The Home Depot

Full Polish Combination Wrenches

- Professional quality performance
- Forged from tough molybdenum alloy steel
- "High polish" chrome plated finish for a lustrous appearance and resistance to rust and corrosion
- Easy to clean surface
- Longer length for easy grip and higher torque use
- "Husky Drive" design on the box end for better gripping strength
- Size stamped on both the wrench body and open end for easy identification
- Full range of standard and metric sizes
- Available sets include:
Two 15-piece sets with a vinyl pouch and two 10-piece sets in a convenient carrying rack

SKU#	MODEL#	DESCRIPTION	CONTENTS
962-813	45005	15 Pc. Full Polish Combo Wrench Set	8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22MM
968-303	45505	15 Pc. Full Polish Combo Metric Wrench Set	8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22MM
198-694	47110	10 Pc. Full Polish Combo Wrench Set-Inch	10, 11, 12, 13, 14, 15, 16, 17, 18, 19MM
198-695	47610	10 Pc. Full Polish Combo Wrench Set-Metric	10, 11, 12, 13, 14, 15, 16, 17, 18, 19MM

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EXHIBIT G

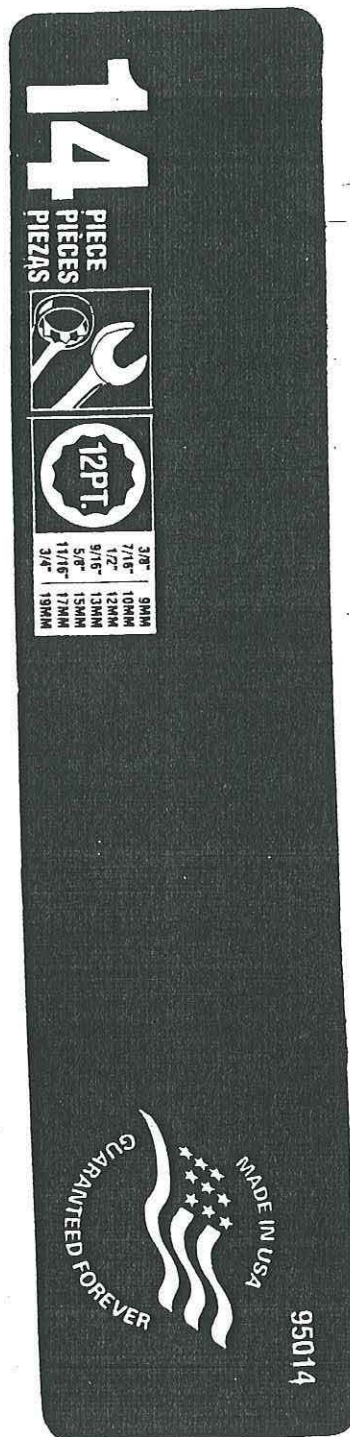


EXHIBIT G
(front)

Complaint

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EXHIBIT G



14

PIECE
ENSEMBLE DE CLÉS COMBINES - 14 PIÈCES

PIEZAS
JUEGO DE LLAVES. COMBINACIÓN, 14 PIEZAS

CONTIENTE:

14 CLÉS MIXTES:
3/8", 7/16", 1/2", 9/16", 5/8", 11/16", 3/4", 1", 1 1/8", 1 1/4", 1 1/2", 1 3/4", 1 7/8", 2"

CONTIENE:

14 CLAVES DE COMBINACIÓN:
3/8", 7/16", 1/2", 9/16", 5/8", 11/16", 3/4", 1", 1 1/8", 1 1/4", 1 1/2", 1 3/4", 1 7/8", 2"

GUARANTEED FINISHED BY THE HOME DEPOT WORLDWIDE

Husky Professional Tools warrants this product against defects in material and workmanship and if defective will replace it free of charge. Simply return it to any HOME DEPOT or to Husky Professional Tools, 1304 Chesapeake Circle, Carrollton, Texas 75006. This warranty does not cover normal wear and tear, misuse, or damage caused by unauthorized repair or alteration. The warranty is void if the product is not used in accordance with the instructions. This warranty is not transferable.

Garantía por todos los productos por HOME DEPOT en todo el mundo.

Los productos Husky profesionalmente terminados están garantizados contra defectos de material o de mano de obra. Si el producto es defectuoso, lo reemplazaremos sin costo. Simplemente devuélvalo a cualquier tienda HOME DEPOT o a Husky Professional Tools, 1304 Chesapeake Circle, Carrollton, Texas 75006. Esta garantía no cubre el desgaste normal, el uso indebido o el daño causado por la reparación o modificación no autorizada. Esta garantía no es transferible.

Garantizado para siempre por los Home Depot de todo el mundo.

Husky Professional Tools garantiza sus productos contra defectos de material o de mano de obra. Si el producto es defectuoso, lo reemplazaremos sin costo alguno. Simplemente devuélvalo a cualquier tienda HOME DEPOT o a Husky Professional Tools, 1304 Chesapeake Circle, Carrollton, Texas 75006. Esta garantía no cubre el desgaste normal, el uso indebido o el daño causado por la reparación o modificación no autorizada. Esta garantía no es transferible.

4300908

95014

1304 CHESAPEAKE CIRCLE
CARROLLTON, TEXAS 75006
1-800-4-A-HUSKY
© 1999 Husky Professional Tools
MADE IN U.S.A.

1304 CHESAPEAKE CIRCLE
CARROLLTON, TEXAS 75006
1-800-4-A-HUSKY
© 1999 Husky Professional Tools
MADE IN U.S.A.



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EXHIBIT G
(back)

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EXHIBIT H

6 PC. COMBINATION WRENCH SET

FULL LIFETIME WARRANTY

3/8" 7/16" 1/2" 9/16" 5/8" 3/4"

**Forged
Alloy
Steel**

MADE IN USA

EXHIBIT H (front)

Complaint

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EXHIBIT H

Husky
PROFESSIONAL**6 PC. COMBINATION
WRENCH SET**

3/8"	7/16"	1/2"
9/16"	5/8"	3/4"

- Forged alloy steel for long life
- Chrome plated to resist rust

FULL LIFETIME WARRANTY

Husky Professional Tools warrants this product against defects in material and workmanship and if defective will replace it free of charge. Simply return it to any HOME DEPOT or to Husky Professional Tools, 1304 Champion Circle, Carrollton, Texas 75006.

This warranty excludes incidental/consequential damages which exclusion is not allowed in some states and may not apply to you. This warranty gives you specific legal rights and possibly others which vary from state to state.



**WORK SAFELY WITH TOOLS BY
WEARING SAFETY GOGGLES**

**WRENCHES SHOULD NEVER BE USED AS
A HAMMER OR STRUCK WITH A HAMMER**

**WHENEVER POSSIBLE PUSH, DON'T PULL
ON A WRENCH HANDLE**

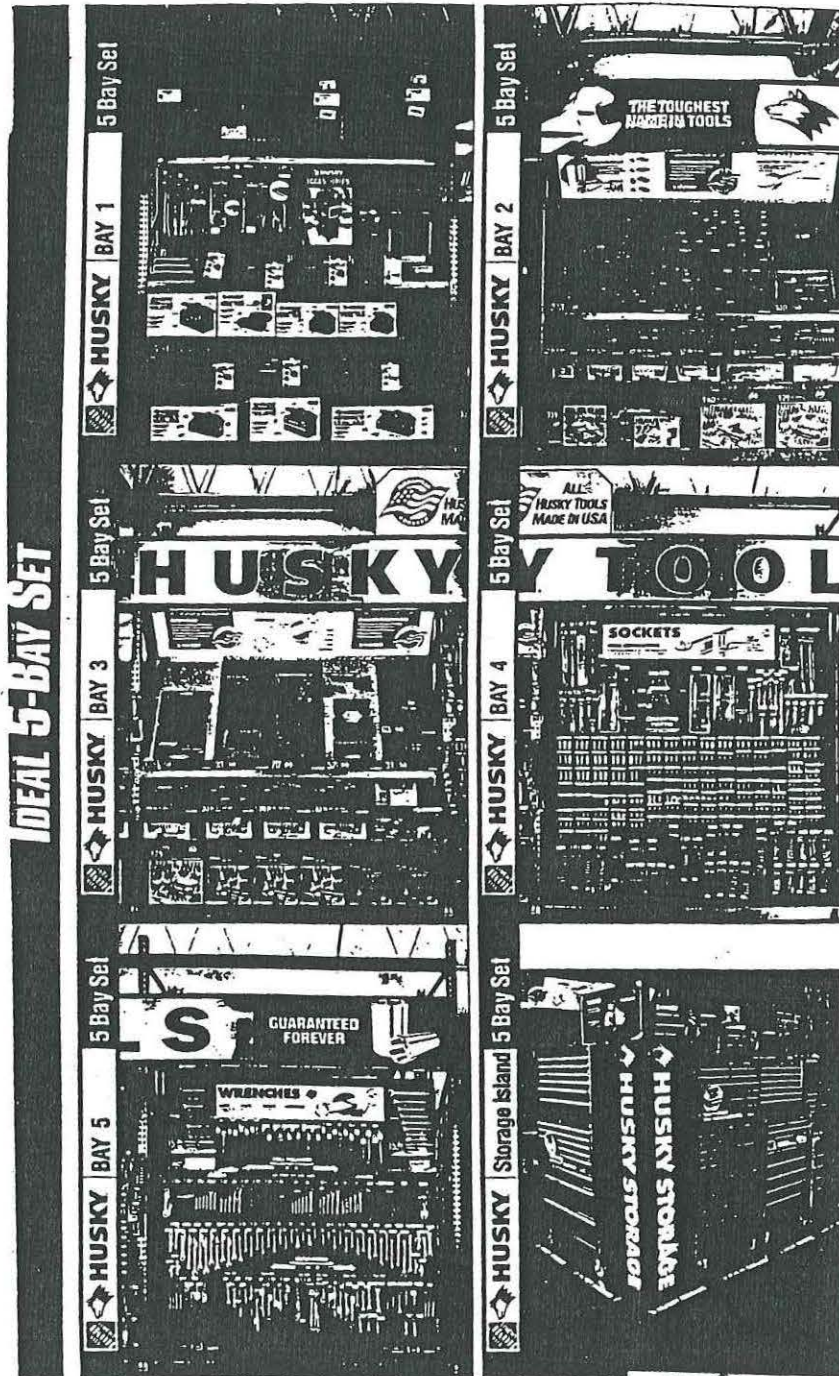
EXHIBIT H

(back)

MADE IN U.S.A.
© 1992 Husky Professional Tools
1304 Champion Circle, Carrollton, Texas 75006



EXHIBIT I



Complaint

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EXHIBIT J

Please complete and return this information card.
Upon receipt, you will be entered in our

QUARTERLY PRIZE DRAWING!

Full completion of this card is required for entry into the drawing.

Winner will be awarded one -

10 drawer Husky Tool Chest
10 drawer Husky Roller Cabinet
and 175 piece Husky Tool set
(Valued at over \$600)

Winners will be selected from entries received during the 4 calendar quarters ending
March 31, June 30, September 30 and December 31.

All entries for each drawing must be received no later than the last day of the quarter.

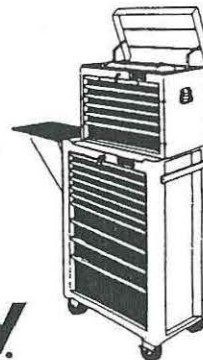
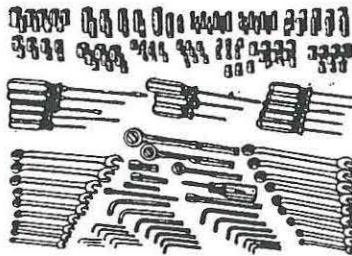
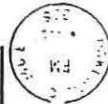
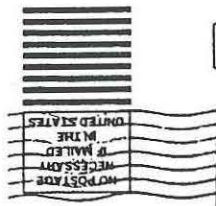
Summary of Rules

No purchase is necessary to win. Facsimile entries containing the name, address, city, state and ZIP code of the entrant and the phrase "Husky Professional Tools" will be accepted and should be mailed to Husky Professional Tools, 1304 Champion Circle, Carrollton, Texas 75006. Only one entry per person. Prizes are limited to one per family or per household for each quarterly drawing. Any applicable taxes are the responsibility of the winner. Offer open to residents of the U.S., 18 years of age and older, except employees of the judging organization, Husky Professional Tools and The Home Depot. Only eligible entries will be entered. The odds of winning will be determined by the numbers of eligible entries received. This drawing is void where prohibited by law. For a list of prize winners, (include the drawing termination date) send a self addressed stamped envelope to: Husky Professional Tools, 1304 Champion Circle, Carrollton, Texas 75006. Ask: Husky Prize winners.

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DALLAS TX 75234-9850
12827 VALLEY BRANCH LN
HUSKY PROFESSIONAL TOOLS

BUSINESS REPLY MAIL
FIRST CLASS MAIL PERMIT NO. 390 DALLAS TEXAS
POSTAGE WILL BE PAID BY ADDRESSEE



Husky
PROFESSIONAL

PRODUCT REGISTRATION CARD

EX-J

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Stanley Works is a Connecticut corporation with its principal office or place of business at 1000 Stanley Drive, New Britain, Connecticut.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, The Stanley Works, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, marking, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any mechanics tool in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such mechanics tool is made in the United States. For purposes of this order, mechanics tools means professional grade hand tools (other than carpentry tools) used by consumers or professionals in the assembly, repair, or maintenance of machinery or vehicles, or for other purposes. Such tools include, but are not limited to, wrenches, ratchets, sockets, and chisels.

Provided, however, that a representation that any mechanics tool is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of the mechanics tool are made in the United States and all, or virtually all, of the labor in manufacturing the mechanics tool is performed in the United States.

Provided, further, that this order shall not apply to the marking of mechanics tools or components of mechanics tools forged, machined, or cast before the date that the complaint and order became final.

II.

It is further ordered, That respondent The Stanley Works and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All labeling, packaging, advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent The Stanley Works, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent The Stanley Works, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent The Stanley Works, and its successors and assigns, shall, within sixty (60) days after the date of

service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

This order will terminate on June 2, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.