

1 David B. Draper (Bar No. 107790)
Email: ddraper@terralaw.com
2 Mark W. Good (Bar No. 218809)
Email: mgood@terralaw.com
3 James A. McDaniel (Bar No. 300041)
jmcdaniel@terralaw.com
4 TERRA LAW LLP
50 W. San Fernando St., #1415
5 San Jose, California 95113
Telephone: 408-299-1200
6 Facsimile: 408-998-4895

7 Attorneys for Plaintiff
ELLIOT KREMERMAN
8

9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN JOSE DIVISION**

12 ELLIOT KREMERMAN,

13 Plaintiff,

14 vs.

15 OPEN SOURCE STEEL, LLC.; JOSHUA
DELLAY aka JOSH DELLAY; JAMES
16 DELLAY; and Does 1-20, inclusive,

17 Defendants.
18
19

CASE NO.

**ORIGINAL COMPLAINT FOR
INFRINGEMENT OF U.S. PATENT
NOS. D775,310 AND D776,238,
FEDERAL FALSE DESIGNATION OF
ORIGIN AND UNFAIR
COMPETITION, STATE UNFAIR
COMPETITION, AND UNJUST
ENRICHMENT**

JURY TRIAL DEMANDED

1 Plaintiff ELLIOT KREMERMEN files his Complaint against Defendants OPEN
2 SOURCE STEEL, LLC.; JOSHUA DELLYAY aka JOSH DELLYAY; JAMES DELLYAY; and
3 Does 1-20, inclusive, alleging as follows:

4 **THE PARTIES**

5 1. Plaintiff ELLIOT KREMERMEN (“plaintiff” or “Kremerman”) is an individual
6 and resident in the State of California with his principal place of business in the State of
7 California.

8 2. Upon information and belief, OPEN SOURCE STEEL, LLC. (“OSS”) is a limited
9 liability company organized and existing under the laws of the State of Washington, with its
10 principal place of business at 23414 68th Ave S, Kent, Washington, 98032. OSS may be served
11 with process through its registered agent, JOSH DELLYAY, 517 Whitworth Ave. S., Renton,
12 Washington, 98057.

13 3. Upon information and belief, JOSHUA DELLYAY aka JOSH DELLYAY is an
14 individual and resident of the State of Washington. Plaintiff is informed and believes, and
15 thereon alleges, that Mr. Dellay is, and at all times relevant herein was a managing member of
16 OSS.

17 4. Upon information and belief, JAMES DELLYAY is an individual and resident of
18 the State of Washington. Plaintiff is informed and believes, and thereon alleges, that Mr. Dellay
19 is, and at all times relevant herein was a managing member of OSS.

20 5. The true names and capacities of defendants sued herein as Does 1 through 20 are
21 unknown to Plaintiff (who are ignorant of these names and capacities) but will be inserted herein
22 by amendment when they have been ascertained. (OSS, JOSHUA DELLYAY, JAMES DELLYAY
23 and Doe defendants referred to together as “defendants.”)

24 6. Plaintiff is informed and believes, and thereon alleges, that each defendant named
25 herein, including each of the Doe defendants, is and was the agent, servant, employee,
26 representative, and associate of each of the other defendants, and is and at all times herein
27 mentioned was acting within the course and scope of his, her, or its authority as agent, servant,
28

1 employee, representative, and associate, and with the knowledge, or authorization, consent,
2 permission or ratification of each of the other defendants.

3 7. Plaintiff is informed and believes, and thereon alleges, that there existed a unity of
4 interest and ownership between defendants JOSHUA DELLAY and JAMES DELLAY and
5 defendant OSS, such that any individuality and separateness between defendants JOSHUA
6 DELLAY and JAMES DELLAY and defendant OSS has ceased and defendant OSS is the alter
7 ego of defendants JOSHUA DELLAY and JAMES DELLAY in that they controlled and
8 dominated the limited liability company by, among other things, comingling personal funds with
9 LLC funds, using LLC funds and assets for personal use, underfunding the entity to meet its
10 obligations and to deter creditors, using the entity as a mere shell for the operation of JOSHUA
11 DELLAY and JAMES DELLAY's other businesses, using the entity to procure labor, goods, and
12 services for JOSHUA DELLAY and JAMES DELLAY individually, and by selling infringing
13 products with the intent to use the limited liability company as a shield against personal liability.

14 8. Adherence to the fiction of the separate existence of the defendant OSS as an
15 entity distinct from defendants JOSHUA DELLAY and JAMES DELLAY would permit an
16 abuse of the limited liability company privilege and would sanction fraud and promote injustice
17 in that, among other things, JOSHUA DELLAY and JAMES DELLAY will have shielded
18 themselves for obligations incurred for their individual benefit and which they personally and
19 intentionally infringed plaintiff's patents.

20
21 **JURISDICTION AND VENUE**

22 9. This is an action for infringement of United States patents. This Court has
23 exclusive jurisdiction of such action under Title 28 U.S.C. § 1338(a).

24 10. Upon information and belief, defendants are subject to personal jurisdiction by
25 this Court. Defendants have committed such purposeful acts and/or transactions in the State of
26 California that it reasonably knew and/or expected that it could be haled into a California court
27 as a future consequence of such activity. Defendants make, use, and/or sell infringing products
28 within the Northern District of California and has a continuing presence and the requisite

1 minimum contacts with the Northern District of California, such that this venue is a fair and
2 reasonable one. Upon information and belief, defendants have transacted and, at the time of the
3 filing of this Complaint, are continuing to transact business within the Northern District of
4 California. For all of these reasons, personal jurisdiction exists and venue is proper in this Court
5 under 28 U.S.C. §§ 1391(b)(1), (2) and (c)(2) and 28 U.S.C. § 1400(b).

6
7 **PATENTS-IN-SUIT**

8 11. Plaintiff has protected his innovative designs through design patents issued by the
9 United States Patent and Trademark Office. Plaintiff's design patents cover the many
10 ornamental features of Plaintiff's glassware, such as the overall bent head design, bent and
11 straight extended distillation path directly above the load flask port, discharge condenser with
12 distinctive fluid ports, and sized adapter regions between the extended distillation path and other
13 elements of the devices.

14 12. On December 27, 2016, United States Patent No. D775,310 S ("the '310 Patent")
15 was duly and legally issued for a "BENT DISTILLATION HEAD." A true and correct copy of
16 the '310 Patent is attached hereto as **Exhibit A** and made a part hereof.

17 13. On January 10, 2017, United States Patent No. D776,238 ("the '238 Patent") was
18 duly and legally issued for "STRAIGHT PATH DISTILLATION HEAD." A true and correct
19 copy of the '238 Patent is attached hereto as **Exhibit B** and made a part hereof.

20 14. The '310 Patent and the '238 Patent are sometimes referred to herein collectively
21 as "the Patents-in-Suit."

22 15. As it pertains to this lawsuit, the Patents-in-Suit, very generally speaking, relate to
23 ornamental designs for a bent distillation head as shown in Exhibit A, and a straight path
24 distillation head as shown in Exhibit B.

25 **Infringement of Kremerman's Trade Dress**

26 16. Plaintiff created and first started selling the bent distillation head covered by the
27 '310 Patent on July 6, 2015. Plaintiff created and first started selling the straight path distillation
28

1 head covered by the '238 Patent in December of 2015. Plaintiff sold his distillation heads on the
2 Internet as well as through other direct marketing channels.

3 17. Each of defendants' distillation heads embodies a combination of several
4 elements of the Kremerman product configuration trade dress identified above, namely a product
5 configuration with:

- 6 • the overall bent head design (bent distillation head only)
- 7 • bent and straight extended distillation path directly above the load flask port
- 8 • discharge condenser with distinctive fluid ports, and
- 9 • sized adapter regions between the extended distillation path

10 18. OSS also used pictures of plaintiff's products as advertisement for its own
11 infringing products, which on information and belief were copied from plaintiff's website. As
12 shown in Exhibits C and D, the designs of the two infringing products sold by defendants were
13 slavishly copied.

14
15 **FIRST CLAIM FOR RELIEF**

16 **(Patent Infringement)**

17 19. Kremerman repeats and realleges every allegation set forth above.

18 20. Kremerman is the owner of the Patents-in-Suit with the exclusive right to enforce
19 the Patents-in-Suit against infringers, and collect damages for all relevant times, including the
20 right to prosecute this action.

21 21. Defendants have had knowledge of, or were willfully blind to, the existence of the
22 Patents-in-Suit since the filing of this Complaint, if not earlier.

23 22. Defendants have had actual knowledge of the Patents-in-Suit since April 22, 2016
24 when counsel for plaintiff first sent a letter to defendants James Dellay and OSS putting them on
25 notice of their pending infringement based on plaintiff's then pending patent applications. On
26 information and belief, defendants have also acknowledged that they have copied or "reverse
27 engineered" plaintiff's designs, previous to the issuance of the Patents-in-Suit.

1 and enjoys secondary meaning among consumers, identifying Kremerman as the source of these
2 products.

3 30. Kremerman's promotion of the distinctive Kremerman product trade dress has
4 resulted in Kremerman's acquisition of valuable, legally protected rights in the Kremerman
5 product trade dress as well as considerable customer goodwill.

6 31. Defendants' line of products have misappropriated the Kremerman trade dress by
7 mimicking a combination of several elements of that trade dress.

8 32. Defendants' manufacture and distribution of the infringing products incorporating
9 plaintiff's designs that mimic a combination of several elements of the Kremerman product trade
10 dress is likely to cause confusion, or to cause mistake, or to deceive the consumer as to the
11 affiliation, connection or association of OSS with Kremerman, or as to the origin, sponsorship, or
12 approval by Kremerman of OSS's goods, services or commercial activities.

13 33. Defendants' manufacture and distribution of the its infringing distillation heads
14 incorporating plaintiff's designs which mimic a combination of several elements of the
15 Kremerman product trade dress enables defendants to benefit unfairly from Kremerman's
16 reputation and success, thereby giving defendants' infringing products sales and commercial
17 value they would not otherwise have.

18 34. Defendants' actions constitute unfair competition and false designation of origin
19 in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

20 35. Defendants knew of Kremerman's product trade dress when they it designed their
21 infringing products, and have refused to change their product design in response to Kremerman's
22 objections. Accordingly, defendants' infringement has been and continues to be intentional,
23 willful and without regard to Kremerman's product trade dress.

24 36. Plaintiff has been and will continue to be irreparably harmed and damaged by
25 defendants' conduct, and plaintiff lacks an adequate remedy at law to compensate for this harm
26 and damage.

27 37. Plaintiff is informed and believes, and on that basis alleges, that defendants have
28 gained profits by virtue of their infringement of the Kremerman product trade dress.

1 dress, with an intent to cause confusion or mistake or to deceive customers into believing that
2 there is an affiliation between defendants and Kremerman or between defendants' products and
3 Kremerman's products.

4 47. The unlawful and fraudulent business practices of defendants described above
5 present a continuing threat to, and is meant to deceive members of, the public in that defendants
6 continue to promote their products by wrongfully trading on the goodwill of the Kremerman
7 product trade dress.

8 48. As a direct and proximate result of these acts, defendants have received, and will
9 continue to profit from, the strength of the Kremerman product trade dress.

10 49. As a direct and proximate result of defendants' wrongful conduct, Kremerman has
11 been injured in fact and has lost money and profits, and such harm will continue unless
12 defendants' acts are enjoined by the Court. Kremerman has no adequate remedy at law for
13 defendants' continuing violation of Kremerman's rights.

14 50. Defendants should be required to restore to Kremerman any and all profits earned
15 as a result of their unlawful and fraudulent actions, or provide Kremerman with any other
16 restitutionary relief as the Court deems appropriate.

17 **FOURTH CLAIM FOR RELIEF**

18 **(Unjust Enrichment)**

19 51. Kremerman repeats and realleges every allegation set forth above.

20 52. As a result of the conduct alleged herein, defendants have been unjustly enriched
21 to Kremerman's detriment. Kremerman seeks a worldwide accounting and disgorgement of all
22 ill-gotten gains and profits resulting from defendants' inequitable activities.

23
24 **PRAYER FOR RELIEF**

25 Kremerman requests that the Court find in his favor and against defendants, and that the
26 Court grant Kremerman the following relief:

27 a. Judgment that defendants have infringed one or more claims of each of the
28 Patents-in-Suit;

- 1 b. Judgment that defendants account for and pay to Kremerman all damages to and
2 costs incurred by Kremerman because of defendants' infringing activities and
3 other conduct complained of herein;
- 4 c. That defendants, their officers, agents, servants and employees, and those persons
5 in active concert and participation with any of them, be permanently enjoined
6 from infringement of the Patents-in-Suit. In the alternative, if the Court finds that
7 an injunction is not warranted, Kremerman requests an award of post judgment
8 royalty to compensate for future infringement;
- 9 d. That Kremerman be granted pre-judgment and post-judgment interest on the
10 damages caused to it by reason of defendants' infringing activities and other
11 conduct complained of herein;
- 12 e. That this Court declare this an exceptional case and award Kremerman its
13 reasonable attorney's fees and costs in accordance with 35 U.S.C. § 285;
- 14 f. Actual damages suffered by plaintiff as a result of defendants' unlawful conduct,
15 in an amount to be proven at trial, as well as prejudgment interest as authorized by
16 law;
- 17 g. Reasonable funds for future corrective advertising;
- 18 h. An accounting of defendants' profits pursuant to 15 U.S.C. § 1117;
- 19 i. A judgment trebling any damages award pursuant to 15 U.S.C. § 1117; Punitive
20 damages pursuant to California Civil Code § 3294; Restitutionary relief against
21 defendants and in favor of plaintiff, including disgorgement of wrongfully
22 obtained profits and any other appropriate relief;
- 23 j. Costs of suit and reasonable attorneys' fees;
- 24 k. Any other remedy to which plaintiff may be entitled, including all remedies
25 provided for in 15 U.S.C. § 1117, Cal. Bus. & Prof. Code §§ 17200, et seq.,
26 17500, et seq., and under any other California law.
- 27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. That Kremerman be granted such other and further relief as the Court may deem just and proper under the circumstances.

DATED: January 20, 2017

/s/ Mark W. Good

MARK W. GOOD
(Bar No. 218809)
TERRA LAW LLP
50 W. San Fernando St., #1415
San Jose, CA 95113
Telephone: 408-299-1200
Facsimile: 408-998-4895
Email: mgood@terralaw.com

Attorney for Plaintiff
ELLIOT KREMERMAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JURY DEMAND

Plaintiff hereby requests a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure.

DATED: January 20, 2017

/s/ Mark W. Good

MARK W. GOOD
(Bar No. 218809)
TERRA LAW LLP
50 W. San Fernando St., #1415
San Jose, CA 95113
Telephone: 408-299-1200
Facsimile: 408-998-4895
Email: mgood@terralaw.com

Attorney for Plaintiff
ELLIOT KREMERMAN

4831-1481-7600, v. 2