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LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LIFETIME BRANDS, INC.,

Plaintiff,

-against-

E-LIVING

Defendants.

Docket No. CV 17 2005

COMPLAINT

JURY TRIAL DEMANDED

SPATT, J.

TOMLINSON, M.J.

Plaintiff, LIFETIME BRANDS, INC. (hereinafter "Plaintiff" and/or "Lifetime"), by its attorneys, TUTUNJIAN & BITETTO, P.C., as and for its complaint against Defendant E-LIVING (hereinafter "Defendant") alleges as follows:

NATURE OF THE ACTION

1. This is an action for Patent Infringement under 35 U.S.C. §271 and §289.

2. As alleged in detail below, Defendant has engaged and continues to engage in a conscious, systematic, and willful pattern of patent infringement, to the damage of Plaintiff.

JURISDICTION AND VENUE

3. This court has jurisdiction over the patent infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4. Plaintiff's claims arising under New York State statutory and common law relate directly to Plaintiff's substantial claims under federal patent law and arise from the same nucleus of facts as Plaintiff's federal patent claims.

5. The court has jurisdiction as to Plaintiff's New York State statutory and common law claims under 28 U.S.C. §§ 1332 and 1338(b), as well as supplemental jurisdiction under 28 U.S.C. § 1367.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(b), as the claims arose in this District and due to the fact that Defendants are doing business in this district at least through online sales, thereby placing infringing products into the stream of commerce through established distribution channels with the expectation that such products will be purchased by residents of this District. Defendant has purposefully availed itself of this forum by, among other things, making, shipping, using, offering to sell and selling, and causing others to use, infringing products in the State of New York, including in this District, and, upon information and belief, deriving revenue from such activities.

THE PARTIES

7. Plaintiff is a New York corporation with a principal place of business at 1000 Stewart Ave., Garden City, NY 11530.

8. Defendant E-LIVING is, upon information and belief, a name used by a Chinese national selling products in the United States through a storefront on Amazon.com. E-LIVING is operated by Zhiyong Lei, No. 2 Fengcui Street, Huafu Ind. Park, Hushan, Liaobu Town, Dongguan City, Guangdong, CN 523401.

PLAINTIFF'S PATENT AND BUSINESS

9. Plaintiff owns U.S. Patent No. D533,752 (hereinafter "the '752 patent"). A copy of the '752 patent is attached as Exhibit A. The '752 patent is entitled "Lunch Purse with Zip," was

filed on October 27, 2005, and issued on December 19, 2006. Built NY, Inc., the original assignee of the '752 patent, assigned the '752 patent to Plaintiff. The assignment of the '752 patent was registered with the United States Patent and Trademark Office ("USPTO") on reel/frame 032390/0447 on March 3, 2014. A copy of the assignment of the '752 patent registered with the USPTO is attached as Exhibit B.

10. Plaintiff owns U.S. Patent No. D534,772 (hereinafter "the '772 patent"). A copy of the '772 patent is attached as Exhibit C. The '772 patent is entitled "Lunch Purse," was filed on October 27, 2005, and issued on January 9, 2007. Built NY, Inc., the original assignee of the '772 patent, assigned the '772 patent to Plaintiff. The assignment of the '772 patent was registered with the United States Patent and Trademark Office ("USPTO") on reel/frame 032390/0447 on March 3, 2014. A copy of the assignment of the '772 patent registered with the USPTO is attached as Exhibit B.

11. Plaintiff owns U.S. Patent No. D535,859 (hereinafter "the '859 patent"). A copy of the '859 patent is attached as Exhibit D. The '859 patent is entitled "Lunch Purse," was filed on October 27, 2005, and issued on January 30, 2007. Built NY, Inc., the original assignee of the '859 patent, assigned the '859 patent to Plaintiff. The assignment of the '859 patent was registered with the United States Patent and Trademark Office ("USPTO") on reel/frame 032390/0447 on March 3, 2014. A copy of the assignment of the '859 patent registered with the USPTO is attached as Exhibit B.

12. Plaintiff owns U.S. Patent No. D513,363 (hereinafter "the '363 patent"). A copy of the '363 patent is attached as Exhibit E. The '363 patent is entitled "One Bottle Tote Apparatus," was filed on January 8, 2005, and issued on January 3, 2006. Built NY, Inc. the original assignee of the '363 patent, assigned the '363 patent to Plaintiff. The assignment of the '363 patent was

registered with the United States Patent and Trademark Office ("USPTO") on reel/frame 032390/0447 on March 3, 2014. A copy of the assignment of the '363 patent registered with the USPTO is attached as Exhibit B.

13. Plaintiff owns U.S. Patent No. D529,278 (hereinafter "the '278 patent"). A copy of the '278 patent is attached as Exhibit F. The '278 patent is entitled "Two Bottle Tote Apparatus," was filed on January 8, 2005, and issued on October 3, 2006. Built NY, Inc., the original assignee of the '278 patent, assigned the '278 patent to Plaintiff. The assignment of the '278 patent was registered with the United States Patent and Trademark Office ("USPTO") on reel/frame 032390/0447 on March 5, 2014. A copy of the assignment of the '278 patent registered with the USPTO is attached as Exhibit B.

14. Plaintiff owns U.S. Patent No. 7,219,814 (hereinafter "the '814 patent"). A copy of the '814 patent is attached as Exhibit G. The '814 patent is entitled "Totes for Bottles," was filed on April 2, 2004, and issued on May 22, 2007. Built NY, Inc., the original assignee of the '814 patent, assigned the '814 patent to Plaintiff. The assignment of the '814 patent was registered with the United States Patent and Trademark Office ("USPTO") on reel/frame 032390/0447 on March 5, 2014. A copy of the assignment of the '814 patent registered with the USPTO is attached as Exhibit B.

15. Plaintiff owns Trademark Reg. No. 3,026,873 (hereinafter "the '873 trademark"). A copy of the '873 trademark is attached as Exhibit H. The '873 trademark has a date of first use in interstate commerce of April 28, 2003 and is registered in class 21 with the description, "THERMAL INSULATED BOTTLE TOTES FOR BEVERAGES." Built NY, Inc. the original owner of the '873 trademark, assigned the '873 trademark to Plaintiff. The assignment of the

'873 trademark was registered with the USPTO on reel/frame 5229/0120 on March 4, 2014. A copy of the assignment of the '873 trademark registered with the USPTO is attached as Exhibit I.

16. Plaintiff owns Trademark Reg. No. 3,023,095 (hereinafter "the '095 trademark"). A copy of the '095 trademark is attached as Exhibit J. The '095 trademark has a date of first use in interstate commerce of April 28, 2003 and is registered in class 21 with the description, "THERMAL INSULATED BOTTLE TOTES FOR BEVERAGES." Built NY, Inc. the original owner of the '095 trademark, assigned the '095 trademark to Plaintiff. The assignment of the '095 trademark was registered with the USPTO on reel/frame 5229/0120 on March 4, 2014. A copy of the assignment of the '095 trademark registered with the USPTO is attached as Exhibit I.

17. Plaintiff owns all right, title, and interest in and to the '752 patent, the '772 patent, the '859 patent, the '363 patent, the '814 patent, the '873 trademark, and the '095 trademark. Plaintiff manufactures and sells products in accordance with the '752 patent, the '772 patent, the '859 patent, the '363 patent, the '814 patent, the '873 trademark, and the '095 trademark.

18. One such product is BUILT NY GOURMET TO GO LUNCH TOTE, which Plaintiff and its predecessor in interest have manufactured and sold since at least February 6, 2006. Another such product is the BUILT GOURMET GETAWAY LUNCH TOTE. The '752 patent, the '772 patent, and the '859 patent cover the ornamental features of Plaintiff's products. In particular, the '752 patent protects the design of the BUILT NY GOURMET TO GO LUNCH TOTE and the BUILT GOURMET GETAWAY LUNCH TOTE.

19. Another such product is BUILT NY TWO BOTTLE TOTE, which Plaintiff and its predecessor in interest have manufactured and sold since at least December 11, 2003. The '278 patent and the '814 patent cover the ornamental and structural/functional features of Plaintiff's

products. In particular, the '278 patent and the '814 patent protect the design and structure/function of the BUILT NY TWO BOTTLE TOTE.

20. The '873 trademark and the '095 trademark furthermore protect the trade dress of the BUILT NY TWO BOTTLE TOTE.

21. Plaintiff actively develops new products and pursues intellectual property protection for those products to stay competitive in the face of counterfeits and knock-offs.

DEFENDANT'S INFRINGING ACTS

22. Defendant has been offering to sell and selling products that infringe the '752 patent, the '772 patent, the '859 patent, the '363 patent, the '814 patent, the '873 trademark, and the '095 trademark, including sales offered and made on Amazon.com, since at least April 5, 2016.

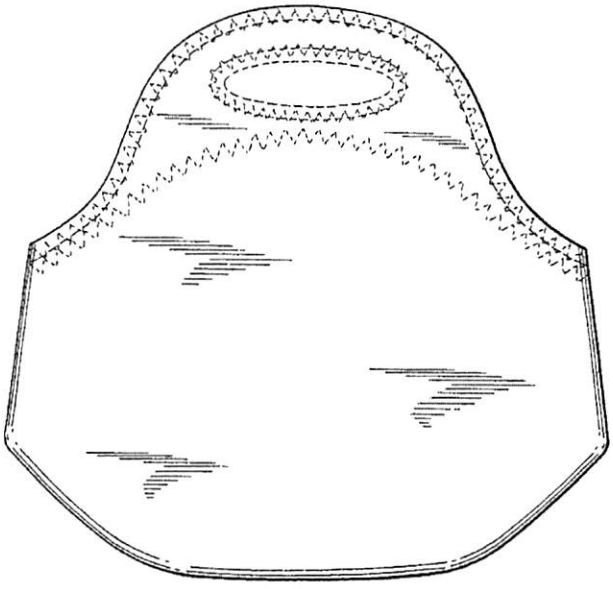
23. Rather than innovate and develop its own style and design, Defendant chose to copy Plaintiff's products. Indeed, the copying is so pervasive, that Defendant's products appear to be Plaintiff's products—with the same shape, surface, colors, style and design. When Defendant's products are used in public, there can be little doubt that those products would be viewed as Plaintiff's product based upon the design alone.

24. Defendant had many options in developing its consumer products. Defendant chose to infringe Plaintiff's design and utility patents, trade dress, and trademark rights throughout the design and promotion of its products, and it did so willfully to trade upon the goodwill that Plaintiff has developed in connection with its own products.

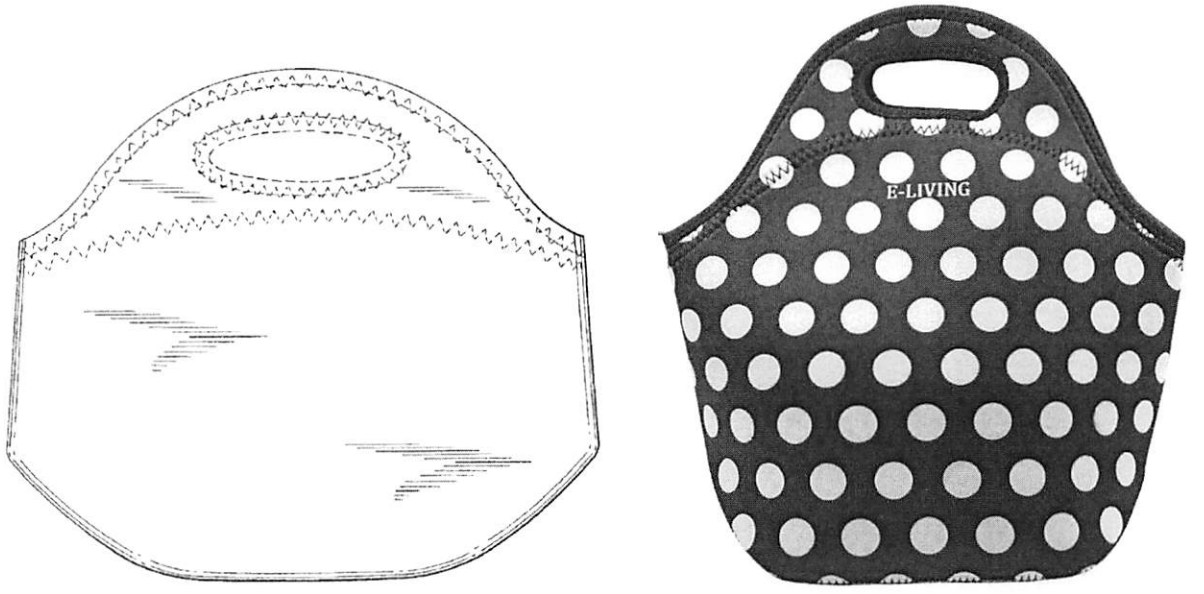
25. In particular, Defendant sells an item identified as, "E - Living Neoprene Lunch Tote Bag - 7 Designs (USA / London / Paris / White Dots / Vintage Roses) (White Dots)" (hereinafter "E-LIVING tote"), with multiple graphical designs printed on the bag and similar bags. The E-

LIVING tote is listed for sale at https://www.amazon.com/dp/B01DUCE35C. A copy of the Amazon webpage where Defendant offers for sale its infringing E-LIVING tote is attached as Exhibit K.

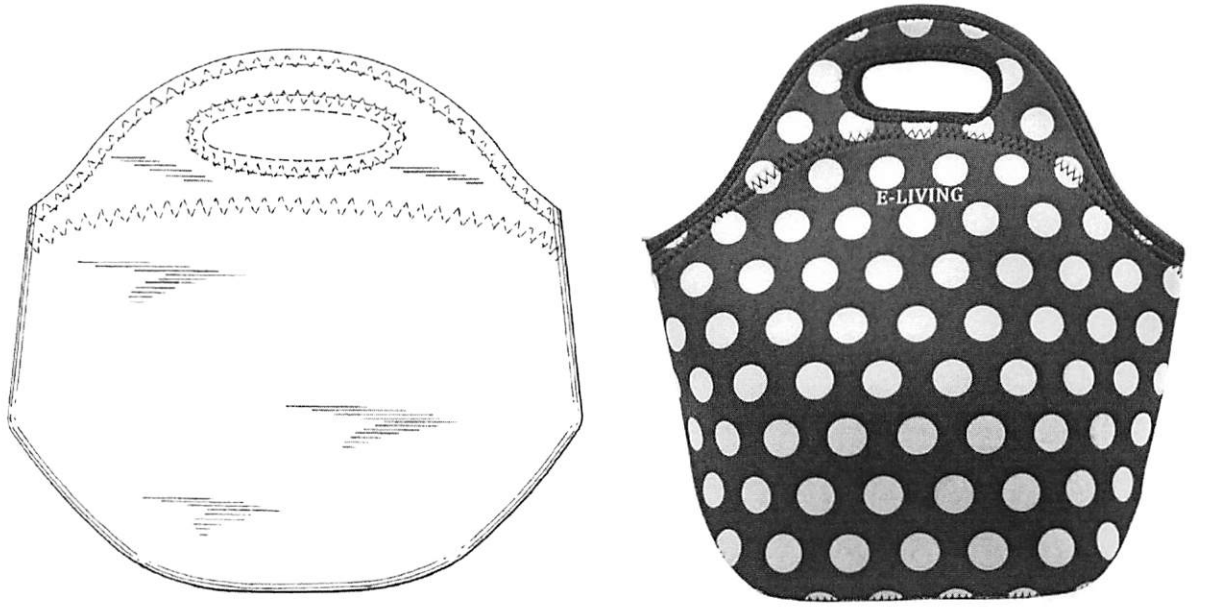
26. An ordinary observer would think that the E-LIVING tote is substantially the same as at least one of the design of the '752 patent, the '772 patent, and the '859 patent. Indeed, as the side-by-side comparison shown below reveals, Defendant has misappropriated and infringed Plaintiff's patented lunch purse design in the accused E-LIVING tote depicted below. A view of the '752 patent is shown on the left, with corresponding views of the infringing E-LIVING tote on the right.



27. A similar front view of the '772 patent is shown on the left, with a corresponding view of the infringing E-LIVING tote on the right:



28. A similar front view of the '859 patent is shown on the left, with a corresponding view of the infringing E-LIVING tote on the right:



29. The E-LIVING tote infringes the design of one or more of the '752 patent, the '772 patent, and the '859 patent.

30. The E-LIVING tote Amazon.com page attached as Exhibit K identifies the "Date first available at Amazon.com" as April 5, 2016.

31. Upon information and belief, Defendant has been offering for sale and selling its infringing E-LIVING tote from April 5, 2016 to the present day.

32. Defendant had constructive notice of Plaintiff's '752 patent through the marking of products sold with the patented design.

33. Defendant's ongoing sales of the E-LIVING tote therefore constitute willful infringement.

34. Defendant further sells an item identified as, "E-Living Neoprene 3-in-1 One Bottle Wine Tote for Champagne / Wine / Beer Bottles - 3 Designs with Van Gogh / Monet Oil Painting Masterpieces (3, Starry Night)" (hereinafter "E-LIVING wine bottle bag"), with multiple graphical designs printed on the bag and similar bags. The E-LIVING wine bottle bag is listed for sale at https://www.amazon.com/E-Living-Neoprene-Bottle-Champagne-Bottles/dp/B01DUI2QL4. A copy of the Amazon webpage where Defendant offers for sale its infringing E-LIVING wine bottle bag is attached as Exhibit L.

35. An ordinary observer would think that the E-LIVING wine bottle bag is substantially the same as the design of the '363 patent. Indeed, as the side-by-side comparison shown below reveals, Defendant has misappropriated and infringed Plaintiff's patented one bottle tote in the accused E-LIVING wine bottle bag depicted below. A view of the '363 patent is shown on the left, with corresponding views of the infringing E-LIVING wine bottle bag on the right.

36. The E-LIVING wine bottle bag infringes the design of the '363 patent.

37. The E-LIVING wine bottle bag Amazon.com page attached as Exhibit L identifies the "Date first available at Amazon.com" as April 5, 2016.

38. Upon information and belief, Defendant has been offering for sale and selling its infringing E-LIVING wine bottle bag from April 5, 2016 to the present day.

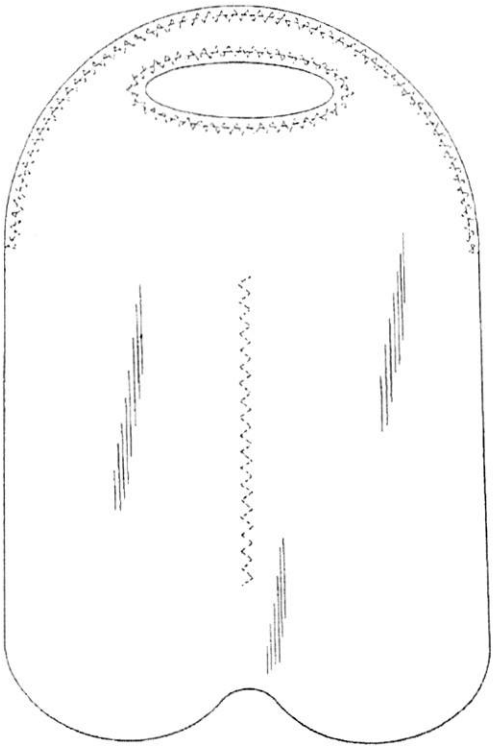
39. Defendant had constructive notice of Plaintiff's '363 patent through the marking of products sold with the patented design.

40. Defendant's ongoing sales of the E-LIVING wine bottle bag therefore constitute willful infringement.

41. The Defendant further sells an item identified as "E-Living Neoprene 3-in-1 Two Bottle Wine Tote for Champagne / Wine / Beer Bottles - 4 Designs (I Love USA / White Dots / Sweet Wedding / Vintage Roses) (1, Vintage Flowers)" (hereinafter "E-LIVING double tote") which is listed for sale at https://www.amazon.com/E-Living-Neoprene-Bottle-Champagne-

Bottles/dp/B01L257G1W. A copy of the Amazon.com webpage where Defendant offers for sale its infringing E-LIVING double tote is attached as Exhibit M.

42. An ordinary observer would think that the E-LIVING double tote is substantially the same as the design of the '278 patent. Indeed, as the side-by-side comparison shown below reveals, Defendant has misappropriated and infringed Plaintiff's patented two-bottle tote design in the accused E-LIVING double tote depicted below. A front view of the '278 patent is shown on the left, with a corresponding view of the infringing E-LIVING double tote on the right.



43. The E-LIVING double tote infringes the design of the '278 patent.

44. In addition, the E-LIVING double tote infringes claims 1–3 of the '814 patent.

45. Claim 3 of the '814 patent is reproduced here:

> 3. A tote for carrying and transporting a bottle or bottles, the tote comprising:
>
> a front panel defining a perimetral edge;

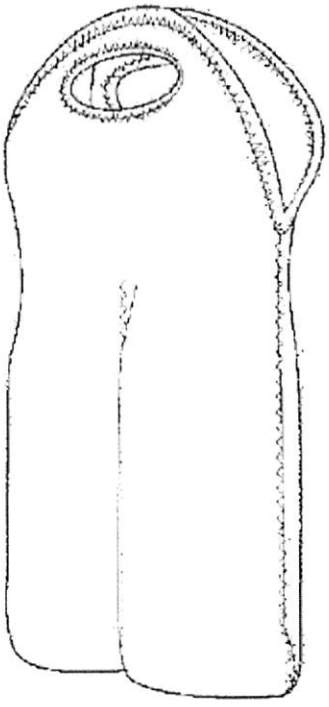
> a rear panel defining a perimetral edge, the front panel being secured to the rear panel along at least a portion of the perimetral edge so as to define a pocket there between and an opening into the pocket, wherein the front and rear panels are fabricated from a neoprene laminated between two layers of stretch nylon, and each said front and rear panel including a handle opening, wherein the front and rear panels are secured to one another along a contact line extending in a direction orthogonal to the opening, wherein the contact line divides the pocket into a first and a second pocket, wherein the terminal edge opposite the opening is scalloped such that each of the first and second pockets is in operative association with a lobe of the scalloped terminal edge.

46. The E-LIVING double tote includes a front and rear nylon-laminated neoprene panel, with the two being secured to one another along the perimetral edge. Both panels include a handle opening, as can be seen in the pictures above and together the panels define a pocket. The panels are secured to one another along a contact line that extends in a direction orthogonal to the opening (e.g., the central stitching) and that contact line divides the pocket into two pockets. The terminal edge (i.e., the bottom of the E-LIVING double tote) has a scalloped shape, with the first and second pockets being in operative association with a respective lobe of the scalloped terminal edge.

47. The E-LIVING double tote literally infringes at least claim 3 of the '814 patent.

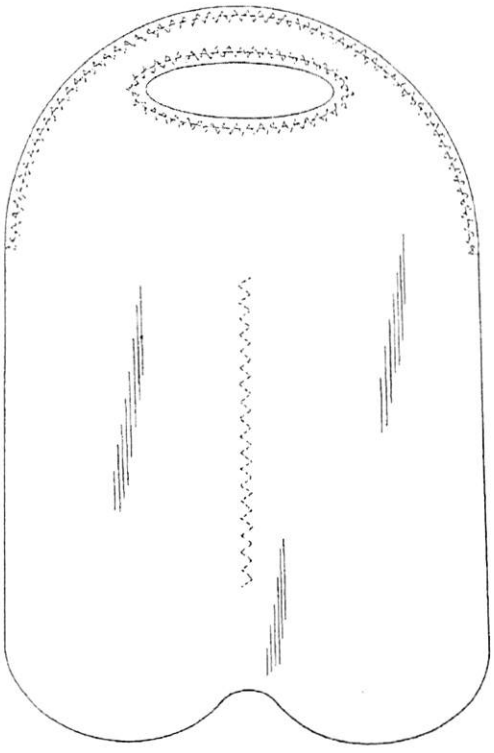
48. Defendant's adoption of a trade dress for the E-LIVING double tote that slavishly copies, misappropriates and infringes Plaintiff's trade dress protected by the '873 trademark is likely to cause confusion or mistake, or to deceive consumers, purchasers and others into thinking that Defendant's products are Plaintiff's products, or that they are sponsored by or affiliated with Plaintiff, when they are not. The copying is particularly problematic because the E-LIVING double tote and Defendant's other infringing products are the type of products that will be used in public where others, who were not present when the products were purchased, will associate

them with Plaintiff. Indeed, as the side-by-side comparison shown below reveals, Defendant's E-LIVING double tote is virtually identical to the trade dress of the '873 trademark. The illustrated trade dress of the '873 trademark is shown on the left, with a corresponding view of the infringing E-LIVING double tote on the right.



49. Defendant's adoption of a trade dress for the E-LIVING double tote that slavishly copies, misappropriates, and infringes Plaintiff's trade dress protected by the '095 trademark is likely to cause confusion or mistake, or to deceive consumers, purchasers, and others into thinking that Defendant's products are Plaintiff's products, or that they are sponsored by or affiliated with Plaintiff, when they are not. The copying is particularly problematic because the E-LIVING double tote and Defendant's other infringing products are the type of products that will be used in public where others, who were not present when the products were purchased, will associate them with Plaintiff. Indeed, as the side-by-side comparison shown below reveals, the Defendant's E-LIVING double tote is virtually identical to the trade dress of the '095 trademark.

The illustrated trade dress of the '095 trademark is shown on the left, with a corresponding view of the infringing E-LIVING double tote on the right.



50. The E-LIVING double tote Amazon page attached as Exhibit M identifies the "Date first available at Amazon.com" as August 26, 2016, though it should be noted that other graphical designs for the same product have been sold by the Defendant as early as April 5, 2016.

COUNT I:
INFRINGEMENT OF U.S. PATENT NO. D533,752

51. Paragraphs 1 through 50 are incorporated by reference herein.

52. Lifetime is the owner of all right, title, and interest in the '752 patent, entitled, "LUNCH PURSE WITH ZIP."

53. Defendant has infringed and continues to infringe the '752 patent by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United

States, products that are covered by and embody the '752 patent, including the E-LIVING tote identified in this Complaint.

COUNT II:
INFRINGEMENT OF U.S. PATENT NO. D534,772

54. Paragraphs 1 through 53 are incorporated by reference herein.

55. Lifetime is the owner of all right, title, and interest in the '772 patent, entitled, "LUNCH PURSE."

56. Defendant has infringed and continues to infringe the '772 patent by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United States, products that are covered by and embody the '772 patent, including the E-LIVING tote identified in this Complaint.

COUNT III:
INFRINGEMENT OF U.S. PATENT NO. D535,859

57. Paragraphs 1 through 56 are incorporated by reference herein.

58. Lifetime is the owner of all right, title, and interest in the '859 patent, entitled, "LUNCH PURSE."

59. Defendant has infringed and continues to infringe the '859 patent by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United States, products that are covered by and embody the '859 patent, including the E-LIVING tote identified in this Complaint.

COUNT IV:
INFRINGEMENT OF U.S. PATENT NO. D513,363

60. Paragraphs 1 through 59 are incorporated by reference herein.

61. Lifetime is the owner of all right, title, and interest in the '363 patent, entitled, "ONE BOTTLE TOTE APPARATUS."

62. Defendant has infringed and continues to infringe the '363 patent by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United States, products that are covered by and embody the '363 patent, including the E-LIVING wine bottle bag identified in this Complaint.

COUNT V:
INFRINGEMENT OF U.S. PATENT NO. D513,363

63. Paragraphs 1 through 62 are incorporated by reference herein.

64. Lifetime is the owner of all right, title, and interest in the '278 patent, entitled, "TWO BOTTLE TOTE APPARATUS."

65. Defendant has infringed and continues to infringe the '278 patent by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United States, products that are covered by and embody the '278 patent, including the E-LIVING double tote identified in this Complaint.

COUNT VI:
INFRINGEMENT OF U.S. PATENT NO. 7,219,814

66. Paragraphs 1 through 65 are incorporated by reference herein.

67. Lifetime is the owner of all right, title, and interest in the '814 patent, entitled, "TOTES FOR BOTTLES."

68. Defendant has infringed and continues to infringe the '814 patent by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United States, products that are covered by and embody the '814 patent, including the E-LIVING double tote identified in this Complaint.

COUNT VII:
INFRINGEMENT OF U.S. TRADEMARK REG. NO. 3,026,873

69. Paragraphs 1 through 68 are incorporated by reference herein.

70. Plaintiff has been using the trade dress protected by the '873 trademark since at least April 28, 2003.

71. Subsequent to Plaintiff's first use of its distinctive trade dress in the United States, and subsequent to Plaintiff's acquisition of secondary meaning in its trade dress, Defendant adopted and began to use a trade dress that is substantially identical, and thus confusingly similar, to Plaintiff's trade dress.

72. Defendant is not, and has never been, authorized or licensed by Plaintiff, nor has Defendant ever received permission from Plaintiff to use the trade dress protected by the '873 trademark.

73. The infringement by Defendant has been willful and deliberate, and was and is designed specifically to trade upon the goodwill associated with Plaintiff's trade dress. Defendant is benefiting unfairly from Plaintiff's reputation and success, thereby giving Defendant's infringing products sales and commercial value they would not have otherwise.

74. Upon information and belief, Plaintiff's and Defendant's products are similar and operate through similar channels of trade to similar classes of consumers.

75. Defendant's actions are likely to cause confusion, to cause mistake, and to deceive consumers and others as to the source, nature, and quality of the goods offered by Defendant.

76. To the extent that consumers, already familiar with Plaintiff's trade dress, encounter Defendant's products with the same trade dress, such consumers are likely to believe incorrectly that Plaintiff is the source of Defendant's goods, or that Defendant's goods are sponsored or endorsed by, or otherwise affiliated with, Plaintiff.

77. To the extent that customers or prospective customers become familiar with Defendant's use of the infringing trade dress first and then later encounter Plaintiff's use of its trade dress, such consumers are likely to suffer reverse confusion, believing incorrectly that Defendant is the source of Plaintiff's services and goods, that Plaintiff's services are sponsored or endorsed by or otherwise affiliated with Defendant or, even worse, that Plaintiff is a junior user and infringer.

78. Plaintiff has no control over the nature and quality of goods provided by Defendant. Any failure, neglect, or default by Defendant in providing such goods will reflect adversely on Plaintiff as the believed origin thereof, hampering efforts by Plaintiff to continue to protect its reputation.

79. The goodwill of Plaintiff's business under its trade dress is of enormous value, and Plaintiff will suffer irreparable harm should infringement be allowed to continue to the detriment of its trade reputation and goodwill.

80. Defendant has infringed and continues to infringe the '873 trademark by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the United States, products that are covered by and embody the '873 trademark, including the E-LIVING double tote identified in this Complaint.

81. Plaintiff has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position, confusion of potential customers and goodwill flowing from Defendant's infringing activities. Plaintiff is suffering irreparable harm and damage as a result of the acts of Defendants and is entitled to an injunction, pursuant to 15 U.S.C. §1116 against Plaintiff's continuing infringement of Defendant's '873 trademark. The full scope of damages are nearly impossible to determine without discovery, as Defendant is selling products using the Plaintiff's trade dress to unknown third parties.

COUNT VIII:
INFRINGEMENT OF U.S. TRADEMARK REG. NO. 3,023,095

82. Paragraphs 1 through 81 are incorporated by reference herein.

83. Plaintiff has been using the trade dress protected by the '095 trademark since at least April 28, 2003.

84. Subsequent to Plaintiff's first use of its distinctive trade dress in the United States, and subsequent to Plaintiff's acquisition of secondary meaning in its trade dress, Defendant adopted and began to use a trade dress that is substantially identical, and thus confusingly similar, to Plaintiff's trade dress.

85. Defendant is not, and has never been, authorized or licensed by Plaintiff, nor has Defendant ever received permission from Plaintiff to use the trade dress protected by the '095 trademark.

86. The infringement by Defendant has been willful and deliberate, and was and is designed specifically to trade upon the goodwill associated with Plaintiff's trade dress. Defendant is benefiting unfairly from Plaintiff's reputation and success, thereby giving Defendant's infringing products sales and commercial value they would not have otherwise.

87. Upon information and belief, Plaintiff's and Defendant's products are similar and operate through similar channels of trade to similar classes of consumers.

88. Defendant's actions are likely to cause confusion, to cause mistake, and to deceive consumers and others as to the source, nature, and quality of the goods offered by Defendant.

89. To the extent that consumers, already familiar with Plaintiff's trade dress, encounter Defendant's products with the same trade dress, such consumers are likely to believe incorrectly that Plaintiff is the source of Defendant's goods, or that Defendant's goods are sponsored or endorsed by, or otherwise affiliated with, Plaintiff.

90. To the extent that customers or prospective customers become familiar with Defendant's use of the infringing trade dress first and then later encounter Plaintiff's use of its trade dress, such consumers are likely to suffer reverse confusion, believing incorrectly that Defendant is the source of Plaintiff's services and goods, that Plaintiff's services are sponsored or endorsed by or otherwise affiliated with Defendant or, even worse, that Plaintiff is a junior user and infringer.

91. Plaintiff has no control over the nature and quality of goods provided by Defendant. Any failure, neglect, or default by Defendant in providing such goods will reflect adversely on Plaintiff as the believed origin thereof, hampering efforts by Plaintiff to continue to protect its reputation.

92. The goodwill of Plaintiff's business under its trade dress is of enormous value, and Plaintiff will suffer irreparable harm should infringement be allowed to continue to the detriment of its trade reputation and goodwill.

93. Defendant has infringed and continues to infringe the '095 trademark by, among other things, making, using, offering to sell, and selling in the United States, and/or importing into the

United States, products that are covered by and embody the '095 trademark, including the E-LIVING double tote identified in this Complaint.

94. Plaintiff has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position, confusion of potential customers and goodwill flowing from Defendant's infringing activities. Plaintiff is suffering irreparable harm and damage as a result of the acts of Defendants and is entitled to an injunction, pursuant to 15 U.S.C. §1116 against Plaintiff's continuing infringement of Defendant's '095 trademark. The full scope of damages are nearly impossible to determine without discovery, as Defendant is selling products using the Plaintiff's trade dress to unknown third parties.

COUNT IX:
NEW YORK COMMON LAW UNFAIR COMPETITION

95. Paragraphs 1 through 94 are incorporated by reference herein.

96. Plaintiff and its predecessors in interest have sold products under the protection of the '752 patent, the '772 patent, the '859 patent, the '363 patent, the '278 patent, the '814 patent, the '873 trademark, and the '095 trademark for nearly ten years.

97. Plaintiff complied with the marking statute, 35 U.S.C. § 287, with respect to at least the BUILT NY GOURMET TO GO LUNCH TOTE, marking that product as being protected by the '752 patent.

98. Defendant therefore had notice of its patent infringement.

99. What is more, Defendant had clear knowledge of Plaintiff's existing products, as Defendant produced products that are substantially identical.

100. As such, Defendant's offer for sale of, and actual sale of, infringing products has been conducted in bad faith.

101. "[T]he essence of unfair competition under New York common law is the bad faith misappropriation of the labors and expenditures of another." *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 34 (2d Cir. 1995) (internal citations and quotations omitted).

102. Furthermore, Defendant's use of its infringing trade dress is likely to cause confusion as to the source of Defendant's products and is likely to cause others to be confused or mistaken into believing that there is a relationship between Defendant and Plaintiff or that Defendant's products are affiliated with or sponsored by Plaintiff.

103. The above-described acts are likely to mislead or deceive the general public and therefore constitute fraudulent business practices and unfair competition under the common law of the State of New York.

104. As a result of Defendants' unfair competition, Plaintiff has been damaged in an amount to be ascertained at trial and, unless Defendants' conduct is preliminarily and permanently enjoined, Plaintiff will continue to suffer irreparable harm.

COUNT X:
FEDERAL UNFAIR COMPETITION UNDER THE LANHAM ACT

105. Paragraphs 1 through 104 are incorporated by reference herein.

106. Plaintiff is the owner of all right and title to the distinctive trade dress (as protected by at least the '873 and '095 trademarks). Plaintiff's trade dress has acquired secondary meaning, is inherently distinctive, and is not functional.

107. Defendant's actions constitute unfair competition under 15 U.S.C. § 1125(a) by passing off its use of Plaintiff's trade dress (as protected by at least the '873 and '095 trademarks) for that of Defendant in a manner that is false, misleading, and that misrepresents the nature, characteristics, and quality of Defendant's products.

108. As a direct and proximate result of Defendant's above-described actions, Plaintiff has suffered and will continue to suffer damages in an amount unknown and to be ascertained at trial.

109. Defendant's actions constitute unfair competition and false designation or origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Upon information and belief, Defendant's infringement has been and continues to be intentional and willful.

COUNT XI:
COMMON LAW TRADEMARK INFRINGEMENT

110. Paragraphs 1 through 109 are incorporated by reference herein.

111. The Defendant's above-described conduct is a violation and infringement of Plaintiff's prior rights in the trade dress protected by the '873 and '095 trademarks at common law.

112. Defendant's products have infringed Plaintiff's trademarks by using identical or similar styles and designs in Defendant's products.

113. Defendant's use of its infringing products is likely to cause confusion, or to cause mistake, or to deceive the consumer as to the affiliation, connection or association of Defendant with Plaintiff, or as to the original, sponsorship, or approval by Plaintiff of Defendant's goods.

114. Plaintiff has been damaged by Defendant's acts, Defendant has profited thereby, and unless said acts are preliminarily and permanently enjoined, Plaintiff and its reputation will suffer immediate, substantial, and irreparable injury that cannot be adequately calculated and compensated in money damages, due to the fact that Defendant is selling its products to unknown third parties.

COUNT XII

NEW YORK INJURY TO REPUTATION AND DILUTION OF TRADE NAME AND MARK

115. Paragraphs 1 through 114 are incorporated by reference herein.

116. This count arises under § 360-l of the New York General Business Law.

117. Defendant's use of the Plaintiff's trade dress in connection with their business has injured and will continue to cause injury to Plaintiff's business reputation and to dilute the distinctive quality of the trade dress protected by the '873 and '095 trademarks, all to Plaintiff's irreparable injury, unless enjoined by this Court.

COUNT XIII:
DECEPTIVE TRADE PRACTICES

118. Paragraphs 1 through 117 are incorporated by reference herein.

119. Defendants' actions are false and misleading and constitute deceptive trade practices in violation of New York General Business Law § 133.

120. By reason of the foregoing, Plaintiff has been irreparably harmed and damaged in amount to be determined and is entitled to the remedies provided for in New York General Business Law § 133.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

1. For a judgment declaring that Defendant has infringed U.S. Patent No. D533,752, U.S. Patent No. D534,772, U.S. Patent No. D535,859, U.S. Patent No. D513,363, U.S. Patent No. D529,278; U.S. Patent No. 7,219,814, U.S. Trademark Reg. No. 3,026,873, and U.S. Trademark Reg. No. 3,023,095;
2. For a preliminary and permanent order enjoining Defendant and its officers, directors, agents, employees, affiliates and all other acting in privity or in concert with them, and their parents, subsidiaries, divisions, successors and assigns from further acts of infringement of the '752 patent, the '772 patent, the '859 patent, the '363 patent, the '278 patent, the '814 patent, the '873 trademark, and the '095 trademark;
3. For a judgment awarding Plaintiff damages adequate to compensate for Defendant's infringement of the '752 patent, the '772 patent, the '859 patent, the '363 patent, the '278 patent, and the '814 patent, together with interest and costs, and in no event less than a reasonable royalty, under 35 U.S.C. § 284, including all pre-judgment and post-judgment interest at the maximum rate permitted by law;
4. For a judgment awarding Plaintiff all of Defendant's profits deriving from the sale of products that infringe the '752 patent, the '772 patent, and the '859 patent, the '363 patent, and the '278 patent, under 35 U.S.C. § 289;
5. For a judgment awarding Plaintiff all of Defendant's profits deriving from the sale of products that infringe the '873 trademark and the '095 trademark, under 35 U.S.C. §1117(a).

6. For a judgment declaring that Defendant's infringement of Plaintiff's patent rights has been willful and deliberate;
7. For a judgment awarding Plaintiff treble damages and pre-judgment interest under 35 U.S.C. § 284 as a result of Defendant's willful and deliberate infringement of Plaintiff's patent rights;
8. For a judgment awarding Plaintiff treble damages and pre-judgment interest under 15 U.S.C. § 1117(b) as a result of Defendant's sale of counterfeit products using Plaintiff's trade dress;
9. For a judgment declaring that this case is exceptional and awarding Plaintiff its expenses, costs, and attorney fees in accordance with 35 U.S.C. § 284 and § 285, 15 U.S.C. § 1117(a), and Rule 54(d) of the Federal Rules of Civil Procedure;
10. An award of damages to Plaintiff in an amount determined at trial for Defendant's unfair competition;
11. That Plaintiff have such other and further relief as the Court may deem just and proper, including all remedies provided for in 15 U.S.C. §1117, New York General Business Law §§ 133 and 360, and under any other New York law.

This the 30th day of March, 2017.

Edward P. Ryan (ER6661)
Tutunjian & Bitetto, P.C.
Attorneys for Plaintiffs
401 Broadhollow Rd., Suite 402
Melville, NY 11747
(631) 844-0080
edr@tb-iplaw.com