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Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

HOME4U Inc. and HOME IT, Inc.)	
)	
Plaintiffs,)	CIVIL ACTION NO.:
)	2:20-cv-6272
v.)	
)	
STARLUX GAMES, LLC.)	JURY TRIAL DEMANDED
Defendant.)	

COMPLAINT

Plaintiffs HOME4U INC. (“Home4U”) and HOME IT Inc. (“Home It”) (collectively, “Plaintiffs” or “Play22”), by and through its attorneys, hereby alleges for its Complaint against Starlux Games, LLC (“Starlux” or “Defendant”) on personal knowledge as to its own activities and on information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. This is an action for a declaratory judgment of non-infringement and

invalidity of United States Patent No. 10,441,875 (the “’875 Patent”) arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the patent laws of the United States, 35 U.S.C. § 1 et seq., as well as an action for tortious interference with prospective economic advantage.

PARTIES

2. Plaintiffs are New York corporations with a place of business at 55 Bergenline Avenue, Westwood, New Jersey 07675. Plaintiffs are affiliates under the same control, and cooperate to collectively manufacture, import and sell various games and entertainment products.

3. Upon information and belief, Defendant Starlux is a California corporation with a place of business at 4861 Buchanan Street, Los Angeles, California 90042. Defendant may be served with process through its agent, Judd King, at the same address. Upon information and belief, Defendant sells various games and activities through e-commerce sites.

JURISDICTION AND VENUE

4. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the provisions of the Patent Laws of the United States of America, Title 35 of the United States Code, §§ 100, *et seq.*, due to Defendant’s assertion of infringement of the ’875 Patent against Plaintiff.

5. Subject matter jurisdiction over the claims is conferred upon this Court by 28 U.S.C. § 2201 and 2202 (declaratory judgment), 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1332 (diversity jurisdiction); 28 U.S.C. § 1338(a) (patent jurisdiction), and 28 U.S.C. § 1367 (supplemental jurisdiction).

6. Plaintiffs are citizens of the States of New York and New Jersey. Upon information and belief, Defendant is a citizen of the State of California. The amount in controversy exceeds \$75,000, exclusive of interest and costs.

7. This Court also has personal jurisdiction over Defendant because, upon information and belief, Defendant has committed acts giving rise to this action within this District. Plaintiffs market, sell, and/or offer for sale the Accused Product (defined *infra*) nationally, including to New Jersey. Moreover, Plaintiffs place of business, through which it imports, processes and ships the Accused Product, resides within this State and in this District. Plaintiffs have also entered into a contract with Amazon.com in this District and, as discussed *infra*, Defendant tortiously interfered with that contractual relationship. Therefore, Defendant has established minimum contacts with this forum. Defendant also regularly conducts business in this forum, engages in other persistent courses of conduct and derives substantial revenue from products and/or services provided in this District, demonstrating that Defendant has purposefully established substantial, continuous and systematic contacts with New Jersey.

8. The exercise of personal jurisdiction comports with Defendant's right to due process, because it has purposefully availed itself of the privilege of conducting activities nationally, including within the District of New Jersey, such that it should reasonably anticipate being haled into court here. Moreover, Defendant has caused damages to Plaintiffs in this District, as a result of Defendant's interference with Plaintiffs ability to sell and ship the Accused Product from this District.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) and § 1400(b) at least because Plaintiffs place of business is within this District, and both

Plaintiffs and Defendant transact business within this District. Moreover, Defendant has directed its enforcement activities at the District and a substantial part of the events giving rise to the claim occurred in this District.

THE PATENT-IN-SUIT

10. The '875 Patent, entitled "Low Light Game System and Method", names Judd Paul King II as the inventor and lists an issue date of October 15, 2019. Attached as Exhibit A is a true and correct copy of the '875 Patent.

11. The '875 Patent is directed to "a method of establishing game play for a capture the flag game in low-light conditions with at least two players."

12. On information and belief, Defendant is the assignee of all right, title and interest in the '875 Patent.

DEFENDANT'S CAPTURE THE FLAG REDUX GAME

13. Defendant sells a game called Capture the Flag REDUX, which it claims is an embodiment of the claims of the '875 Patent.

14. It is undisputed that the concept of the "capture the flag" game is well-known. According to Defendant's Kickstarter fund-raising webpage, "The original version of 'Capture the Flag' is an outdoor game that pits two teams against one another. The objective is to steal the enemy's flag without getting caught. It has been played for some ninety years all over the world." A true and correct copy of a printout of the Kickstarter webpage is attached as Exhibit B. *See* Exhibit B at page 3.

15. Defendant continues to explain what it considers its improvements to the beloved game, "Now imagine playing this game at night -- but rather capturing a flag, players steal glowing Orbs of Light. Imagine flashing red 'War Lights' forming borders

between territories, and envision players wearing luminous wristbands to identify team loyalties. That's what Capture the Flag REDUX is: a kit comprised of specialty game pieces that create a futuristic nighttime adventure.” *See id.* That is, Defendant added lights to the well-known game Capture the Flag.

16. Defendant included a FAQ (“frequently asked questions”) section to its Kickstarter page. The very first FAQ that Plaintiff chooses to address is “Why not just but (sic) some glow sticks and play with those?” In response, Defendant admits, “using glow sticks would in some ways have similar effects.” *See id.* at 13.

17. This statement is an admission by the Defendant that a glow stick would have a similar effect on the play of its game as does an LED. Both light sources could act as visual signals interchangeably in game play.

EXISTENCE OF AN ACTUAL CONTROVERSY

18. There is an actual controversy within the jurisdiction of this Court under 28 U.S.C. §§ 2201 and 2202.

19. Plaintiffs first listed for sale their “Play22 American Capture The Flag Glow in The Dark Game,” (formally titled “Glow-in-the-Dark LED Game Capture the Flag”) (the “Accused Product”) on the Amazon.com website on or about December 1, 2019. A true and correct copy of a listing for the Accused Product on Amazon.ca is attached hereto as Exhibit C. Upon information and belief, Exhibit C is substantially identical to the content listed on the Amazon.com listing as it existed on December 1, 2019.

20. On December 16, 2019, Defendant sent a letter to Plaintiffs (addressed to Plaintiffs’ brand, Play22), and received by Plaintiffs in this District, alleging patent

infringement of the '875 Patent, based on Plaintiffs' sale of the Accused Product. A true and correct copy of the letter is attached hereto as Exhibit D. Defendant's December 16, 2019 letter was sufficient to establish an actual controversy within the jurisdiction of this Court between the parties.

21. Prior to its December 16, 2019 to Plaintiffs, letter (Ex. D), on or before December 4, 2019, Defendant first filed a complaint with Amazon.com alleging that Plaintiffs' Accused Product, which is sold on Amazon.com, infringes the '875 Patent, in an attempt to coerce Amazon.com to remove the listing for sale of the Accused Product. A true and correct copy of a record of the complaint is attached hereto as Exhibit E.

22. Defendant's December 4, 2019 complaint to Amazon was sufficient to establish an actual controversy within the jurisdiction of this Court between the parties.

23. Plaintiffs' Accused Product was not otherwise available to Defendant or the general public prior to its listing on Amazon websites. Plaintiffs' Amazon listing did not contain sufficient information to describe all the pieces that came with Plaintiffs' Accused Product. Plaintiffs' Amazon listing also did not include the instructions that come with Plaintiffs' Accused Product. Plaintiffs' Amazon listing did not contain sufficient information to describe all the pieces that come with Plaintiffs' Accused Product.

24. Upon information and belief, Defendant purchased Plaintiffs' Accused Product from Plaintiff from Amazon on December 4, 2019. Delivery of the Accused Product was not made to Defendant until after December 4, 2019. See a true and correct copy of a printout of Plaintiffs' Amazon records of a transaction to Defendant attached hereto as Exhibit P.

25. Defendant's December 4, 2019 complaint to Amazon concerning infringement by Plaintiffs' Accused Product was lodged prior to Defendant having Plaintiffs' Accused Product in its possession.

26. Defendant's December 4, 2019 complaint to Amazon concerning infringement by Plaintiffs' Accused Product was lodged prior to Defendant having ever seen the contents of Plaintiffs' Accused Product.

27. Defendant's December 4, 2019 complaint to Amazon concerning infringement by Plaintiffs' Accused Product was lodged prior to Defendant having the instructions to Plaintiffs' Accused Product in its possession.

28. Defendant's December 4, 2019 complaint to Amazon concerning infringement by Plaintiffs' Accused Product was lodged prior to Defendant having ever seen or read the instructions to Plaintiffs' Accused Product.

29. Defendant could not have conducted a proper infringement analysis of Plaintiffs' Accused Product prior to its December 4, 2019 complaint to Amazon.

30. Defendant lacked a good faith basis to accuse Plaintiffs' Accused Product of patent infringement prior to its December 4, 2019 complaint to Amazon.

31. Defendant lacked a good faith basis to accuse Plaintiffs' Accused Product of patent infringement prior to its December 16, 2019 letter to Plaintiffs.

32. Plaintiffs continue to deny that they infringe the '875 Patent or that the '875 Patent is valid.

33. Based on the foregoing, a justiciable controversy exists between Plaintiffs and Defendant as to whether Plaintiffs' Accused Product infringes the '875 Patent and

whether the claims of the '875 Patent are valid.

34. Absent a declaration of non-infringement and/or invalidity, Defendant will continue to wrongfully allege that Plaintiffs' Accused Product infringes the '875 Patent, and thereby cause irreparable injury and damage to Plaintiffs.

35. Absent a declaration of non-infringement and/or invalidity, Defendant's unfounded allegation that Plaintiffs' Accused Product infringes the '875 Patent will cause Amazon.com to prevent Plaintiffs from selling the Accused Product, and/or cause Amazon.com to remove Plaintiff's selling privileges on Amazon.com.

DEFENDANT'S "BAD FAITH" ACTIVITIES

Baseless Infringement Claim

36. Defendant has asserted patent claims against Plaintiffs that cannot be infringed by the Plaintiffs. All of the independent claims of the '875 Patent are method claims directed to "establishing game play," that may be performed, if at all, only by users of the game and are not performed by Plaintiffs as sellers of the Accused Product. Moreover, to the extent any of the steps of the independent claims of the '875 Patent are performed by Plaintiffs, only some, and not all, steps are capable of being performed by Plaintiffs, and therefore, infringement is divided.

37. As a specific example, each claim requires either "placing the flags," "placing each flag," or "placing their flag." It is not physically possible for Plaintiffs, as merely online retailers to "place" a flag anywhere at all to establish game play.

38. Because there are claim elements that must be performed by a user of the game, and not by Plaintiffs themselves, two parties would have to act separately to perform each and every element of the asserted claims. Plaintiffs alone cannot infringe any of the

claims of the '875 Patent.

39. There are only limited circumstances where actions by two entities can combine to result in direct infringement, none of which are applicable to this infringement accusation. These circumstances are limited to: “where the entity directs or controls others’ performance,” “where the actors form a joint enterprise,” or where the accused infringer “conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance.” *Travel Sentry, Inc., v. Tropp*, 877 F.3d 1370, 1378 (Fed. Cir. 2017) (reaffirming that direct infringement requires a single actor unless the acts of one are attributable to the other).

40. Yet, Defendant failed in its cease and desists letter to accuse Plaintiffs of joint infringement, let alone cite any evidence that would support attributing to Plaintiffs the actions of users of the Accused Product.

41. Moreover, Defendant would be unable to make a plausible argument of Plaintiffs’ “direction or control” over users of the Accused Product, a “joint enterprise” between Plaintiffs and users of the Accused Product, nor would it be able to make a plausible argument of any “conditions” for use of the Accused Product, much less conditions on a user performing specific infringing steps. There simply is no basis to attribute the actions of players of a game to the online retailer of that game.

42. Therefore, Defendant must fail to meet its burden to demonstrate that user’s activities in participating in game play can be attributable to Plaintiffs and thus it is impossible to prove direct infringement. Defendant’s assertion of direct infringement is baseless.

43. Meanwhile, to the extent Defendant would attempt to rectify the deficiency in its assertion in the cease and desist letters, by arguing that a user guide to the Accused Product could somehow establish conditions on a user's participation in or enjoying of playing with the Accused Product, the evidence refutes it.

44. Once again, for example, each claim requires a "placing" of a flag. Regardless of whether a user guide provided by Plaintiffs describes a method of play describing in any way flag placement, any argument that this would create a "condition" is belied by the very teachings of the '875 Patent. The specification of the '875 Patent describes numerous embodiments of game play, including specifically different locations and ways that a flag may be placed solely at the discretion and pleasure of the game players.

45. For example, the specification provides: "Examples of the kit of parts can include a number of flags **120** configured to be selectively disposable upon or attachable to a terrain **130**." ('875 Patent 3:42-44); "In an example, the flags **120** may be placed upon the terrain **130** including by placing the flag on a chair in an open gymnasium or in a tree in an outdoor playing environment." (*Id.* 3:64-67); "The flags **120** may be placed in any suitable position, including on the ground surface, for example on grass, dirt or pavement." (*Id.* 3:67-4:2); "Each team places a flag **120** on their own territory." (*Id.* 6:52); "The Wizard can have the power to shout 'freeze' and cause all players **110** to stop moving. He or she may then reposition players **110** or the flags **120** for up to sixty seconds, then shout 'unfreeze' (resume movement)." (*Id.* 7:37-40); "One variation can include identifying one player **110** on each team to carry the flag **120** for the player's team during game play. In this way, the player **110** holding the flag **120** effectively becomes the flag **120** with the

addition of movement by the player **110**. Also, the player **110** holding the flag **120** cannot hide the flag **120** or pass the flag **120** to another player **110**.” (*Id.* 7:42-48); “Still another game play variation can include two teams using an alternate playing field arrangement including a single perimeter of territory markers **140** around a single flag **120**.” (*Id.* 8:48-51); “The other players can face away from the playing field while the Werewolf hides one flag **120** and starts the game in a self-selected position within the playing field.” (*Id.* 8:63-66).

46. Based on the teaching of the ’875 Patent, a user is capable of “placing the flag” in innumerable ways and locations without Plaintiffs imposing a condition on its participation in the game or a condition on its receipt of enjoyment from the game upon by how it places a flag.

47. Accordingly, any allegation that Plaintiffs directly infringe any claim of the ’875 patent would be objectively baseless.

48. At the time of making the infringement allegation to Amazon, Defendant knew that Plaintiffs did infringe the ’875 patent.

49. At the time of making the infringement allegation to Amazon, Defendant believed that the ’875 patent was invalid at least under 35 U.S.C. §§ 101, 102, 103, and 112.

50. Defendant’s counsel and agent, Mr. Alex W. Haymond of Thorpe North & Western, LLP, is a seasoned patent attorney and was well aware of multiple cases holding that patents directed to the abstract idea of rules for playing a game are invalid as patent ineligible under 35 U.S.C. § 101. *See generally In re Marco Guldenaar Holding BV*, 911 F.3d 1157 (Fed. Cir. 2018); *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016).

51. Mr. Haymond, Defendant's counsel and agent, believed the '875 patent to be invalid under 35 U.S.C. § 101.

52. At the time of making the infringement allegation to Amazon, Defendant knew that its assertion of the '875 patent was objectively baseless.

53. At the time of making the infringement allegation to Amazon, Defendant knew that any patent infringement lawsuit that would be filed asserting the '875 patent would have no likelihood of success and any claims would be frivolous.

54. An objectively baseless infringement claim is evidence of bad faith.

55. Moreover, Defendant knew or should have known, when it made its allegations of infringement that such claims were without merit, and thus are evidence of Defendant's bad faith.

56. Evidence of Defendant's bad faith is found in every step of its prefiling activity. Prior to sending its cease and desist letter to Plaintiffs, Defendant filed two continuation patent applications claiming priority to the '875 Patent (the "Continuation Applications"). Several of the newly filed claims included the limitation "instructions instructing to." Upon information and belief, this new limitation was added by Defendant to attempt to rectify the divided infringement flaw discussed *supra*. The filing of these new claims prior to first accusing Plaintiffs of infringement is evidence that Defendant knew its '875 Patent claims were not infringed by Plaintiffs and is further evidence of Defendant's bad faith in making claims of infringement that were *prima facie* not infringed. See for example, attached at Exhibit O, a true and correct copy of U.S. Patent Publication No. 2020/0023268, a patent application claiming priority to the '875 Patent.

57. The Continuation Applications were filed by Defendant because it knew

that neither Plaintiffs, nor any other Amazon seller, infringes the '875 Patent.

58. Additional evidence of Defendant's bad faith is demonstrated in its pre-filing correspondence with Plaintiffs. Defendant's initial cease and desist letter failed to provide the factual allegations concerning the specific way in which the Accused Product infringed the '875 Patent or was covered by the claims in the '875 Patent. *See* Exhibit D. More egregiously, this December 16, 2019, letter, filled with bald accusations, was sent from patent counsel directly to our lay client. The December 16th letter includes the conclusory statement that "Your Play22 Game infringes the '875 patent because the method of game play, as set out in your instructions, includes all of the elements of one or more claims of the '875 patent."

59. The December 16, 2019, letter, without indicating which claim it refers to, continues to recite certain method steps. Defendant presents three of the four method steps as allegedly "used by" or "meant to be used by" the Accused Product, and then hollowly states that "the game is meant to be played by" for the fourth step. This presentation of an infringement allegation falls well short of a sufficient analysis in a cease and desist letter by not even describing how the Accused Product could allegedly perform the claimed steps. Particularly, Defendant provided no discussion of how Plaintiffs, who are online retailers, can complete the method steps described, which were part of game set-up and game play that must be completed by a game player.

60. As a result, the December 16th letter is devoid of any disclosure of a theory of infringement. In fact, the December 16 letter fails to even identify which claims it alleges are infringed. This lack of specific factual allegations are exactly the type of deficiencies in cease and desist letters found by jurisdictions around the country to be

evidence of a bad faith assertion of patent infringement.

61. The December 16, 2019, letter then demands that Plaintiffs “immediately stop making, using, selling, advertising, promoting, or importing...[and] immediately remove the Play22 Game listing from Amazon.” Plaintiffs were given a mere eleven (11) days, until December 27, 2019, during the Christmas holiday season, to confirm that Defendant’s demands would be met. Unreasonably short time frames to respond to a cease and desist letter are also commonly found to be evidence of a bad faith assertion. “Immediately” certainly qualifies as unreasonably short. The threatened consequence for failure to acquiesce immediately was that Defendant would “pursue a complaint with Amazon to put an end to your infringement.” Yet, as set forth *supra*, Defendant had already lodged a complaint with Amazon against the Accused Product prior to ever contacting Plaintiffs. This is yet another incident of bad faith found in Defendant’s allegations.

62. Defendant was aware, at the time of making the allegations of infringement to Amazon and Plaintiffs, that Plaintiffs do not perform each of the method steps of independent claims 1, 8, and 17, and therefore, do not infringe any claim of the ‘875 Patent. Moreover, Defendant, instead of performing their diligence and undertaking the requisite pre-suit investigation, did not point to the allegedly infringed claims with particularity, in the hopes of strong-arming Plaintiffs into capitulation.

63. Defendant, as an experienced Amazon seller, was aware that Plaintiffs, also Amazon sellers, do not have a contractual relationship with their Amazon buyers.

64. Defendant, as an experienced Amazon seller, was aware that Plaintiffs, also Amazon sellers, do not “direct[] or control[] [their Amazon buyers’] performance.”

65. Defendant, as an experienced Amazon seller, was aware that Plaintiffs, also Amazon sellers, do not “form a joint enterprise” with their Amazon buyers.

66. Defendant, as an experienced Amazon seller, was aware that Plaintiffs, also Amazon sellers, do not “condition[] participation in an activity or receipt of a benefit upon performance of a step or steps [by their Amazon buyers] of a patented method and establishes the manner or timing of that performance.”

67. Defendant was aware that including instructions to a game does not constitute one “direct[ing] or control[ling] others’ performance,” “the actors form[ing] a joint enterprise,” or “condition[ing] participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance.”

68. As Defendant is aware, the Amazon seller ecosystem penalizes sellers for even mere allegations of patent infringement, irrespective of their truth, validity or likelihood of success. Indeed, in the complaint Plaintiffs received from Amazon (Exhibit E, discussed *supra*), Amazon states:

We received a report from a rights owner that claims the items at the end of this email infringe their utility patent rights. We consider allegations of intellectual property infringement a serious matter...We encourage you to resolve this dispute promptly.
Failure to do so may result in removal of your offers or your Amazon.com selling privileges. (emphasis added)

69. As a result of Defendant’s complaint to Amazon, Plaintiffs, for fear of losing their livelihood and ability to maintain their storefront on Amazon, were forced to comply with Defendant’s demands to suspend their listing, or risk banishment from the Amazon ecosystem.

70. Faced with no other option to clear their name with Amazon and enforce their ability to sell the Accused Product without fear of retribution, Plaintiffs had no recourse but to initiate this declaratory judgment action.

71. At the time Defendant made the infringement allegations, Defendant was aware that it would lose any infringement lawsuit it filed against Plaintiffs.

72. Upon information and belief, a complaint to Amazon does not require the factual basis for an allegation of patent infringement.

73. Upon information and belief, Amazon employees who determine whether listing should be taken down or selling privileges suspended or not attorneys. Nor do they have specialized training in intellectual property. Upon information and belief, such Amazon employees are often not based in the United States and are thus unfamiliar with U.S. intellectual property laws. Thus, such employees are unable to properly evaluate an infringement claim and simply take the patentee's word that their patent is infringed.

74. Upon information and belief, the complaints by Defendant against Plaintiffs make it more likely that Plaintiffs' Amazon seller account will be suspended and or individual listing taken down.

75. The result of these complaints to Amazon was to damage Plaintiffs reputation with Amazon, and interference with Plaintiffs sales to existing and future customers.

COUNT ONE:
TORTIOUS INTERFERENCE WITH PROSPECTIVE
ECONOMIC ADVANTAGE BY DEFENDANT

76. Plaintiffs re-allege and incorporate the allegations of all of the paragraphs

in this complaint as if fully set forth herein.

77. Due at least to offering its products for sale on the Amazon.com retail platform, including the Accused Product, Plaintiffs are party to a valid contract granting it rights to sell the Accused Product on the Amazon.com platform. Plaintiffs continue to develop their economic relationship with Amazon.com, and intend to continue selling on the Amazon.com platform, and offering additional products for sale. Plaintiffs further have reasonable expectations of entering into future contracts with Amazon.com.

78. Defendant, as a seller itself on the Amazon.com platform, possesses full knowledge of Plaintiffs' reasonable expectation of entering into future contracts with Amazon.com to continue selling products on its platform.

79. Defendant's communications with Amazon.com, including its baseless infringement allegations against Plaintiffs, were solely out of malice, and used dishonest, unfair and improper means. Even a cursory review of the '875 Patent would lead one to the conclusion that Plaintiffs do not infringe and that the patent is invalid.

80. Amazon suspends and takes down listings after patent infringement allegations at least because Amazon may be liable for contributory infringement if Amazon takes no action in response to such allegations.

81. Defendant's communications with Amazon.com were threats of litigation.

82. Defendant has contacted Amazon.com to remove Plaintiffs' product listing, intentionally attempting to cause Amazon.com to disrupt and/or terminate the relationship between Amazon.com and Defendant, and ultimately resulting in the listing for the Accused Product being removed from Amazon prior to the filing of this complaint.

83. Due to Defendant's acts, Plaintiffs' account with Amazon.com was at risk of suspension or termination. Further, Plaintiffs' relationship with Amazon.com has been permanently tarnished due to Defendant's infringement allegations.

84. Moreover, once Plaintiffs have shown that the Accused Product does not in fact infringe the '875 Patent, and/or that the '875 Patent is invalid, Plaintiffs will be able to resume selling on Amazon. However, Plaintiff's listing for the Accused Product will be disadvantaged and tarnished, due to Amazon's ranking algorithms, which, upon information and belief, demotes listings based on factors such as lack of purchases and/or positive reviews.

85. Moreover, Plaintiffs have new and existing customers, who shop for Plaintiffs' goods on Amazon, who can no longer purchase the Accused Product on their preferred platform. These customers may choose to now otherwise make purchases from other vendors, such as Defendant, to the detriment of Plaintiffs.

86. Plaintiffs have suffered and will continue to suffer damages due to Defendant's tortious interference with its prospective economic advantage.

87. Plaintiffs have suffered and will continue to suffer irreparable harm due to Defendant's tortious interference with its prospective economic advantage.

COUNT TWO:
DECLARATION OF INVALIDITY OF U.S. PATENT NO. 10,441,875

88. Plaintiffs re-allege and incorporate the allegations in each of the preceding paragraphs as if fully set forth herein.

89. The '875 Patent is invalid at least under 35 U.S.C. §§ 101, 102, 103, and 112.

Invalidity - 35 U.S.C. § 103

90. Plaintiffs are entitled to a declaratory judgment that all claims of the ‘875 Patent are invalid under 35 U.S.C. § 103 as obvious in view of one or more of the following references, alone or in combination: (i) the lets-get-together.com webpage blog post entitled Glow In The Dark Capture The Flag, posted October 6, 2014, found at <https://lets-get-together.com/2014/10/06/glow-in-the-dark-capture-the-flag/>, true and correct copies of printouts from the webpage are attached hereto as Exhibit F, (ii) TheGameGal.com webpage blog post entitled Capture the Flag, posted October 28, 2010, found at <https://www.thegamegal.com/2010/10/28/capture-the-flag/>, true and correct copies of screen-captures from the webpage are attached hereto as Exhibit G, (iii) a video entitled Glow in the Dark Capture the Flag, posted May 8, 2014, found at <https://www.youtube.com/watch?v=9iw3cjyzjWw>, a true and correct copy of a screenshot of which is attached hereto as Exhibit H, (iv) CA2634930, entitled “Board game and method for playing a game with multiple game options and customizable components,” a true and correct copy of attached hereto as Exhibit I; (v) US20070191116, entitled “Game” and a true and correct copy attached hereto as Exhibit J; (vi) US20090197710 entitled “Marking system for sport areas” and a true and correct copy attached hereto as Exhibit K; (vii) a video entitled How to Play Capture the Flag, posted December 18, 2009, found at <https://www.youtube.com/watch?v=L10lAy9YX8g>, a true and correct copy of a screenshot of which is attached hereto as Exhibit L.

91. Defendant admitted on its Kickstarter page that glow sticks and LEDs “would in some ways have similar effects” in the playing of the Capture the Flag REDUX game. *See* Exhibit B at 15.

92. Likewise, that statement is also an admission by the Defendant that glow sticks would have the exact same effect as a “visual signal” for playing capture the flag in the dark as the LEDs in the method claims of the ’875 Patent have.

93. Capture the flag, played in the dark, using glow sticks as visual signals was described in printed publications, or in public use, on sale, or otherwise available to the public before the effective filing date of the ’875 Patent. *See* Exhibits F-H.

94. Any differences between the claimed invention of the ’875 Patent and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the ’875 Patent to a person having ordinary skill in the art to which the claimed invention pertains. *See* Exhibits F-K.

Invalidity – 35 U.S.C. § 112

95. Plaintiffs are entitled to a declaratory judgment that the ’875 Patent is invalid under 35 U.S.C. § 112(b) as indefinite because each of independent claims 1 and 17, as well as dependent claims 2-7 and 18-20, recite a system (i.e., a game kit of multiple parts) as well as rules for playing the game.

96. Claims covering two categories of invention, such as a system and a method of using that system, are “not sufficiently precise to provide . . . an accurate determination of the ‘metes and bounds’ of protection involved.” *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005). *See also In re Katz Interactive Call Processing Patent Litigation*, 639 F.3d 1303, 1318 (Fed. Cir. 2011) (Claim held indefinite because it was unclear “whether infringement . . . occurs when one creates a system that allows the user [to use the system], or whether infringement occurs when the user actually uses the [system].”)

97. Independent claim 1 of the '875 Patent, for example, recites multiple system elements, which represent physical elements of the Capture the Flag game: (1) “a number of flags configured to be selectively disposable upon or attachable to a terrain, each of the flags carrying one or more light emitting diodes (LEDs) operable to provide a visual signal;” (2) “a number of territory markers, each of the territory markers carrying one or more LEDs to provide a visual signal, the territory markers configured to be selectively disposable upon or attachable to the terrain in order to define upon the terrain a game play territory area for each of at least two teams”; and (3) “a number of jail markers, each of the jail markers carrying one or more LEDs to provide a visual signal, the jail markers configured to be selectively disposable upon or attachable to the terrain in order to define upon the terrain a game play jail area for each of the at least two teams.”

98. Independent claim 1 of the '875 Patent also recites multiple method steps, representing the rules of Capture the Flag: (1) “dividing the at least two players into the at least two teams, each team to include one or more players”; (2) “assigning one of the flags to each team, each flag having a different LED color”; (3) “distributing the territory markers to define a game play territory area for each team”; and (4) “distributing the jail markers to define a game play jail area for each team within each team's territory area; and placing the flags within a corresponding team's territory area.”

99. It is thus unclear whether independent claim 1 of the '875 Patent would be infringed by the mere creation or a provision of the flags, territory markers, or jail markers to users or whether there would be infringement by users who use the system in a particular way by playing the game.

100. For at least the above reasons, independent claim 1 of the '875 Patent is

invalid under 35 U.S.C. § 112(b) as indefinite. Independent claim 17 and dependent claims 2-7 and 18-20 are invalid for similar reasons to independent claim 1.

Invalidity – 35 U.S.C. § 101

101. Plaintiffs are entitled to a declaratory judgment that the '875 Patent is invalid under 35 U.S.C. § 101 because the claims are directed to the abstract idea of rules for playing a game. *See generally In re Marco Guldenaar Holding BV*, 911 F.3d 1157 (Fed. Cir. 2018); *In re Smith*, 815 F.3d 816 (Fed. Cir. 2016).

102. Each of the elements of the claims of the '875 Patent were well-understood, routine, and conventional and are thus not inventive components or concepts that transform the abstract idea into significantly more.

103. The claims of the '875 Patent are so broad as to preempt the abstract idea of rules for playing numerous outdoor games with conventional lights, effectively granting a monopoly to Defendant for such abstract ideas.

COUNT THREE:
DECLARATION OF NON-INFRINGEMENT OF U.S. PATENT NO. 10.441.875

104. Plaintiffs re-allege and incorporate the allegations of each of the preceding paragraphs as if fully set forth herein.

105. Plaintiffs' Accused Product does not infringe, has not induced others to infringe, and does not contribute to the infringement, directly or indirectly, of any valid claim of the '875 Patent, and Plaintiffs are entitled to a declaratory judgment reflecting the same.

106. Regarding independent claim 1, Plaintiffs do not perform at least the following steps of the claim and thus does not infringe the claim: (1) "dividing the at least

two players into the at least two teams, each team to include one or more players”; (2) “assigning one of the flags to each team, each flag having a different LED color”; (3) “distributing the territory markers to define a game play territory area for each team”; and (4) “distributing the jail markers to define a game play jail area for each team within each team's territory area”; and (5) “placing the flags within a corresponding team's territory area.”

107. Regarding independent claim 8, Plaintiffs do not perform at least some of the steps in the body of the claim. Plaintiffs thus do not infringe independent claim 8.

108. Regarding independent claim 17, Plaintiffs do not perform at least the following steps: (1) “assigning the first and the second flags to the first and second teams, respectively”; (2) “distributing the first and second team identifiers to the players of the first and second teams, respectively”; (3) “distributing the plurality of territory markers to define a game play territory area on the terrain for each team”; (4) “distributing the first and second plurality of jail markers to define a game play jail area within the first and second team's territory area, respectively, on the terrain”; and (5) “each team placing their flag in their respective territory area.” Plaintiff thus does not infringe independent claim 17.

109. The above steps may be performed, if at all, only by users of the game and are clearly not performed by Plaintiffs and are not attributable to Plaintiffs.

110. For at least the same reasons as the respective independent claims, Plaintiffs do not infringe dependent claims 2-7, 9-16, and 18-20.

111. Further, Plaintiffs and/or the Accused Product do(es) not perform each and every limitation of independent claims 1, 8 and 17. Therefore, Plaintiffs do not infringe

independent claims 1 and 17. For at least the same reasons as the respective independent claims, Plaintiffs do not infringe dependent claims 2-7, 9-16, and 18-20.

112. For at least the above reasons, Plaintiffs are entitled to a judgment declaring that it does not infringe, and has not infringed, any of the claims of the '875 Patent either literally or under the doctrine of equivalents.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant as follows:

A. Adjudging that Defendant has committed acts of tortious interference with economic advantage and awarding damages to Plaintiffs at an amount to be determined at trial;

B. Adjudging that Plaintiffs have not infringed and is not infringing, either directly or indirectly, any valid and enforceable claim of the '875 Patent, in violation of 35 U.S.C. § 271;

C. Adjudging that the '875 Patent is invalid;

D. Awarding a permanent injunction enjoining Defendant and its affiliates, officers, agents, employees, attorneys, and all other persons acting in concert with Defendant from interfering with Plaintiffs' business on Amazon.com, including, *inter alia*, enjoining Defendant from filing complaints of infringement relating to the Accused Product;

E. Awarding damages to be paid by Defendant adequate to compensate Plaintiffs for their loss of business reputation and goodwill;

F. Issuing a judgment declaring that Defendant and each of its officers,

directors, agents, counsel, servants, employees, and all persons in active concert or participation with any of them, be restrained and enjoined from alleging, representing, or otherwise stating that Plaintiffs infringe any claims of the '875 Patent or from instituting or initiating any action or proceeding alleging infringement of any claims of the '875 Patent against Plaintiffs or any customers, manufacturers, users, importers, or sellers of Plaintiffs' products;

G. Declaring Plaintiffs as the prevailing parties and this case as exceptional, and awarding Plaintiffs their reasonable attorneys' fees, pursuant to 35 U.S.C. § 285;

H. Ordering that Defendant pay all fees, expenses, and costs associated with this action; and

I. Granting Plaintiffs such further relief as this Court deems just and proper under the circumstances.

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DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all claims and issues so triable.

Dated: May 22, 2020

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CERTIFICATION PURSUANT TO LOCAL CIVIL RULES 11.2 and 40.1

I hereby certify that, to the best of my knowledge, the matter in controversy is not the subject of any other action pending in any court or of any pending arbitration or administrative proceeding.

Dated: May 22, 2020

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