

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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|---|---|----------------------------------|
| |) | |
| |) | |
| TOP BRAND LLC, SKY CREATIONS, LLC, E STAR LLC, and FLYING STAR LLC |) | Civil Action No.: 1:20-cv-01238 |
| |) | |
| Plaintiffs, |) | JUDGE: Hon. Rebecca R. Pallmeyer |
| |) | |
| v. |) | |
| |) | |
| COZY COMFORT COMPANY LLC, BRIAN SPECIALE, and MICHAEL SPECIALE, |) | |
| |) | |
| Defendants | | |

**FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT
AND INVALIDITY OF UNITED STATES PATENT NO. D859,788 AND OTHER RELIEF**

Plaintiffs, Top Brand LLC ("Top Brand"), Sky Creations LLC ("Sky"), E Star LLC ("E-Star"), and Flying Star LLC ("Flying") (collectively "Plaintiffs"), by and through their attorneys, Aronberg Goldgehn Davis & Garmisa, for their complaint against Cozy Comfort Company LLC ("Cozy Comfort"), Brian Speciale, and Michael Speciale (collectively hereinafter "Defendants") allege as follows:

NATURE OF THE ACTION

1. This is a declaratory judgement action seeking a determination that Plaintiffs do not infringe any valid or enforceable claim of U.S. Design Patent No. D859,788 ("the '788 patent") under 35 U.S.C. § 271.

2. This is a declaratory judgement action seeking a determination that the '788

Design patent is invalid, and unenforceable, and that Defendants have engaged in false marking in violation of 35 U.S.C. § 292.

3. Plaintiffs also assert in this action Illinois state law claims for Unfair Competition and Intentional Interference with Contract.

4. This is an action seeking damages, attorneys fee and costs for violations of 35 U.S.C. § 292 and 815 ILCS 510.

5. A true and correct copy of the '788 patent is attached as Exhibit A.

6. A true and correct copy of the file history of the '788 patent is attached as Exhibit B.

THE PARTIES

7. Top Brand LLC is a California limited liability company with its principal place of business in Carson, California.

8. Top Brand is in the business of producing and selling clothing including hooded sweatshirts as well as wearable blankets through on-line retailers in Illinois and the Chicago area.

9. E Star LLC is a California limited liability company with its principal place of business in Carson, California.

10. E Star is in the business of producing and selling clothing including hooded sweatshirts and wearable blankets through on-line retailers in Illinois and the Chicago area.

11. Flying Star LLC is an Illinois limited liability company having its principal place of business in Elgin, Illinois.

12. Flying Star is in the business of producing and selling clothing including hooded sweatshirts and wearable blankets though on-line retailers in Illinois and the Chicago area.

13. Sky Creations, LLC is an Illinois limited liability company located in Chicago, IL.

14. Sky owns all rights, title and interests in U.S. Design Patent No. D728,900 (the '900 patent) for a Hoodie.

15. The '900 patent is cited as a reference in connection with the '788 patent and, along with other cited references, limits the scope of the claims of the '788 patent.

16. Top Brand and Flying Star are the sole licensees of Sky's intellectual property, including the '900 Patent.

17. Cozy Comfort is a limited liability company organized under the laws of Arizona.

18. Cozy Comfort has a principal place of business at 4634 E. Peak View Rd., Cave Creek, AZ 85331.

19. Michael Speciale and Brian Speciale are individuals and the only two members of Cozy Comfort.

20. On information and belief, Michael Speciale and Brian Speciale, individually and/or together manage, direct and control the actions of Cozy Comfort.

21. On information and belief, Michael Speciale is a co-founder of Cozy Comfort and is involved with Cozy Comfort's day-to-day operations.

22. Michael Speciale is a resident of Arizona, and maintains an address of 30604 N. 41st Way, Cave Creek, AZ 85331.

23. Brian Speciale is a resident of Arizona, and maintains an address of 4634 E. Peak View Rd., Cave Creek, AZ 85331.

24. In a communication to the United States Patent and Trademark Office ("USPTO") on September 21, 2017, attorney Thomas W. Galvani, acting on behalf of Defendants,

represented to the Patent Office that application that would mature into the '788 patent was assigned to Cozy Comfort by Michael Speciale and Brian Speciale, and that the assignment was recorded on September 14, 2017 on Real/Frame 043595/0508.

25. As of the date of the filing of this Amended Complaint, there is no assignment of the '788 patent recorded with the United States Patent and Trademark Office.

26. As of the date of the filing of this Amended Complaint, no assignment of U.S. Patent Application No. 29/617,421 has been recorded with the United States Patent and Trademark Office.

27. As of the date of this filing, searching for Reel/Frame 043595/0508 through the government patent assignment searching website <https://assignment.uspto.gov/patent/index.html#/patent/search> yields no results of any assignment being recorded with the USPTO.

28. In the absence of a valid assignment by each of Michael Speciale and Brian Speciale, as the individuals listed as the inventors on the '788 patent, each is presumed to be a co-owner of all right title and interest in and to the '788 patent.

29. In early November 2019 Cozy Comfort sent an email to Amazon.com alleging that Top Brand products infringed the '788 patent and requested that Amazon take down Top Brand listings to prevent sales of 15 different Top Brand products.

30. Throughout November of 2019 and continuing to this date, and at all material times, Cozy Comfort has filed multiple patent infringement complaints with Amazon.com in an attempt to bar Defendants from selling products through Amazon.com based on Cozy Comfort's assertions that various products of Defendants infringe Cozy Comfort's intellectual property including the '788 Patent.

31. Defendants maintain that their products do not infringe any valid and enforceable claim of the '788 Patent.

JURISDICTION AND VENUE

32. Plaintiffs bring this action under Title 35 of the United States Code, and under 28 U.S.C. §§ 2201 and 2202, to obtain a declaration of non-infringement and invalidity with respect to the '788 Patent.

33. This action arises under the patent laws of the United States, 35 U.S.C. §§ 100 et seq., which are within the original subject matter jurisdiction of this Court under 28 U.S.C. §§ 1331 and 1338(a).

34. Defendants sell Cozy Comfort products in Illinois through on-line retailers such as Amazon.com, and at Costco, Target, Walmart, Kohl's, Macy's, JC Penny, and Bed Bath & Beyond brick and mortar stores in the Chicagoland area. On information and belief, in the last two years alone Defendants have over 70 million in sales for their products, a substantial amount of which have been sold and delivered to consumers in this jurisdiction.

35. This Court has personal jurisdiction over each of the Defendants at least because Brian Speciale and Michael Speciale, as the sole and controlling members of Cozy Comfort, use Cozy Comfort to sell their products, assert the '788 patent, and to engage and maintain continuous and systematic contacts with the state of Illinois, including conducting substantial and regular business in Illinois at least through marketing and sales of products purportedly covered by the '788 patent including but not limited to "the Comfy" through at least www.thecomfy.com (the "Cozy Website").

36. Numerous other on-line retailers advertise and sell Cozy products into Illinois including Target.com, QVC.com, big5sportinggoods.com, and others.

37. The Cozy Website is an interactive website directed to the online promotion and sale of Cozy Comfort's goods.

38. Defendants utilize at least the Cozy Website to deliver Defendants' products into the stream of commerce with the intent that they will be purchased by consumers in Illinois as evidenced by the Cozy Website's use of a drop-down shipping menu thorough which Illinois may be selected as the shipping destination state.

39. Through the Cozy Website and others, Defendants knowingly enter into contracts for the sale of goods, including but not limited to *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids*, with customers that are residents of Illinois.

40. Plaintiffs compete for the exact same customers that are residents of Illinois.

41. Based on Defendants' actions there exists an actual substantial controversy between the parties with adverse legal interests of such immediacy and existence so as to warrant a declaratory judgment.

42. Sky and Flying Star, as Illinois companies are directly impacted and damaged in Illinois by Defendants wrongful conduct.

43. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (c) at least because a substantial part of the property and events giving rise to the claims herein occurred in this District and because Defendants have sufficient minimum contacts with this district for personal jurisdiction.

44. Further, this court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).

45. This Court has personal jurisdiction over Defendants because Defendants have transacted systematic and substantial business within the state of Illinois, committed tortious acts

directed to this District, damaged Plaintiffs in this District, and the Plaintiffs' claims arise from those activities.

46. Additionally, pursuant to 35 U.S.C. §292, any person is permitted to sue for false marking.

47. Accordingly, while each of Plaintiffs have been damaged by Defendants actions for at least the reasons set forth below, regardless of whether or not each is damaged, each may bring this action under 35 U.S.C. §292 in Illinois.

GENERAL ALLEGATIONS

48. Top Brand, E Star, and Flying Star are each clothing providers that sell a variety of different clothing, some of which are sold under license from Sky, through various retail outlets including Amazon.com.

49. One of Flying Star and Top Brand's clothing products is a large sweatshirt, referred to by Flying Star and Top Brands as the Tirrinia® Hoodie. (A true and correct photograph of said Hoodie is attached as Exhibit C).

50. The Tirrinia® Hoodie is available in a variety of colors, shapes, and sizes.

51. Top Brand, E Star and Flying Star also sell a variety of other products including:

- a. clothing for infants, children and adults;
- b. bed blankets and baby bedding;
- c. bags for carrying baby accessories;
- d. wearable blankets; and
- e. novelty children's wearable blankets.

52. Cozy Comfort purports to be the owner of the '788 patent titled ENLARGED OVER-GARMENT WITH AN ELEVATED MARSUPIAL POCKET.

53. Brian Speciale purports to be a co-inventor of the '788 patent

54. Michael Speciale purports to be a co-inventor of the '788 patent.

55. Brian Speciale and Michael Speciale are the moving, active, conscious force behind and direct the actions of Defendant Cozy Comfort.

56. Defendants, collectively by and through Cozy Comfort, have accused Top Brand E Star and Flying Star products of infringing the '788 patent. Those accusations have resulted in Plaintiffs' products being barred from sale on Amazon.com.

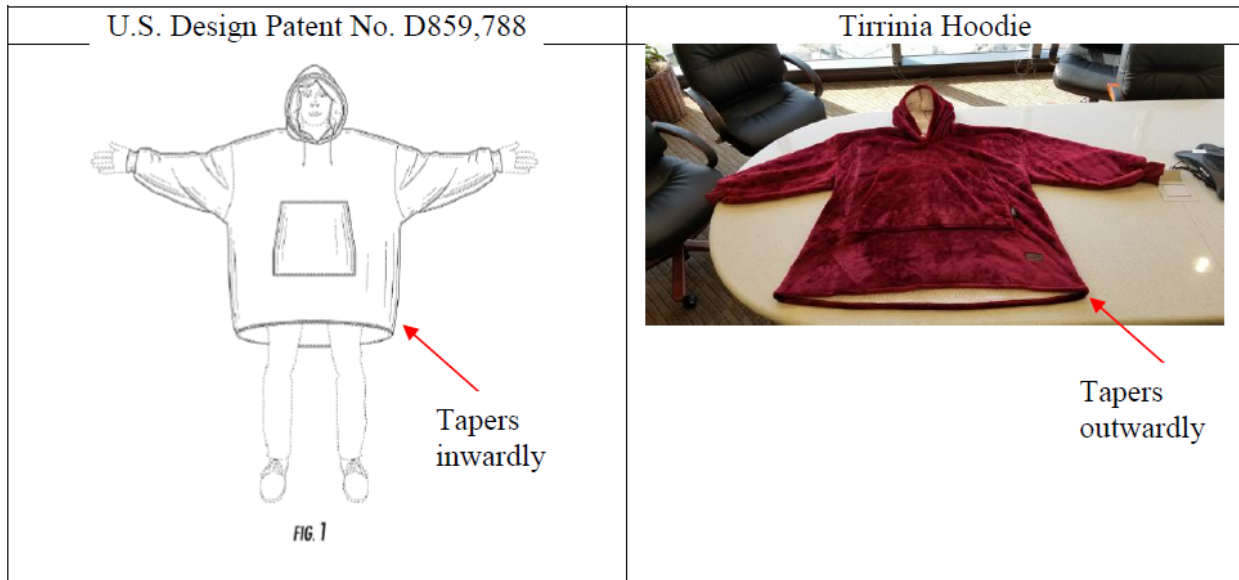
57. Defendants have used the '788 patent to prevent Top Brand, E Star and Flying Star from selling its products on Amazon.com.

58. Cozy Comfort actions have resulted in Amazon.com removing listings of Top Brand, E Star and Flying Star products from sale on the Amazon.com website.

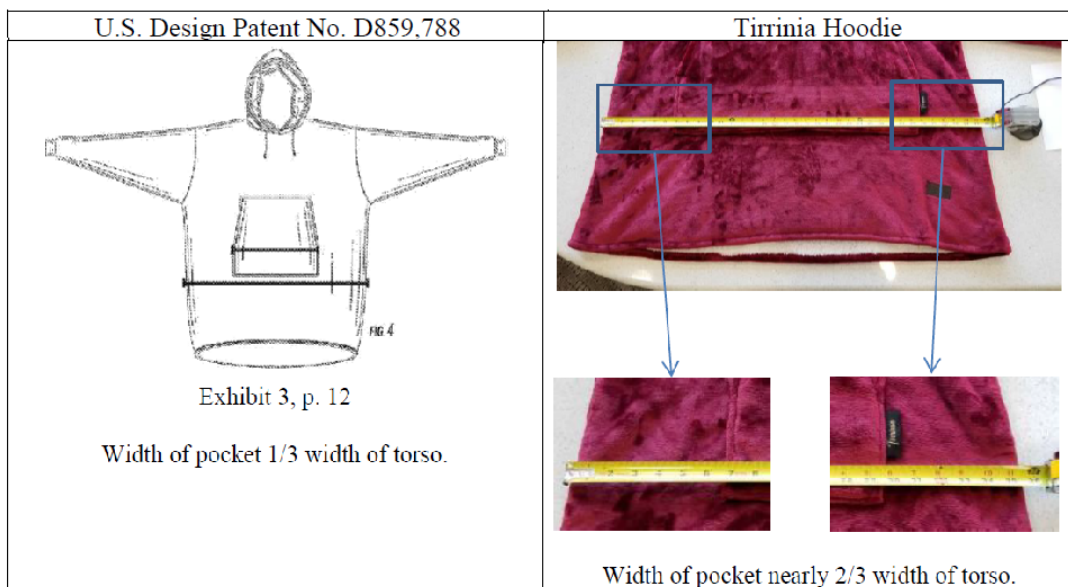
59. On November 13, 2019, attorneys for Top Brand sent a letter to Cozy Comfort counsel, attached hereto as Exhibit D, in which Top Brand described in detail the non-infringement of Top Brand products. Despite that notice, Cozy Comfort has refused to provide any basis for the claim of infringement, has continued to assert patent infringement claims, including those claims of infringement of the '788 patent, against Top Brand, E Star and Flying Star, and has continued its campaign to prevent sales of a wide range of Top Brand, E Star and Flying Star products through Amazon.

60. Indeed, the letter compared the overall appearance of the accused product and the '788 patent noting numerous significant differences in the design of the accused product.



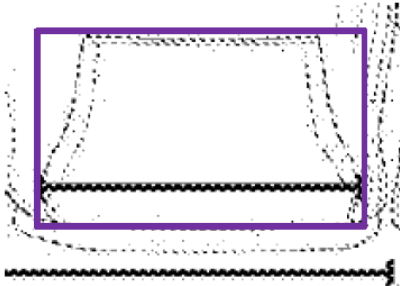
61. The letter established that the accused product (the Tirrina® Hoodie) has an outward taper at the hemline whereas the '788 patent has a hemline that tapers inward as shown:



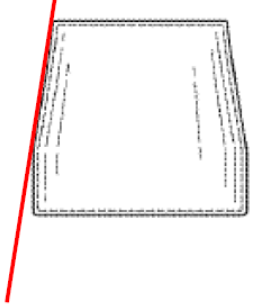

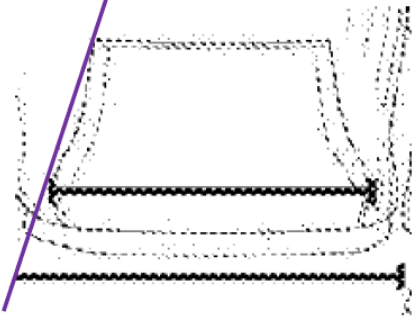
62. The letter established that the accused product has an enlarged front pocket that covers approximately 2/3 of the width of the front of the garment whereas the '788 patent has a narrow pocket that only covers approximately 1/3 of the width of the front of the garment as shown:



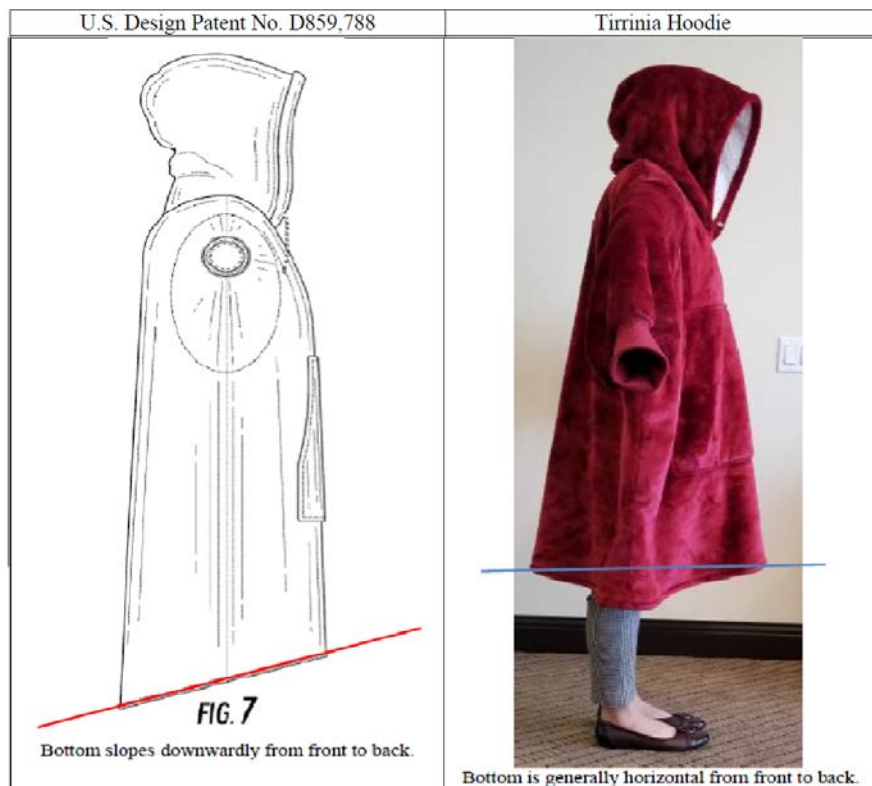
63. The letter established that the accused product has a wide, rectangular pocket having curved sides as in the prior art '900 patent of Sky whereas the '788 patent has a substantially square pocket with straight sides and no curves at all as shown:

| U.S. Design Patent No. D859,788 | Tirrinia Hoodie |
|--|--|
|  <p data-bbox="228 695 781 722">Close-up of pocket in Figure 1, generally square.</p> |  <p data-bbox="967 709 1268 737">Demonstrably rectangular.</p>  <p data-bbox="1057 1087 1154 1115">FIG. 3</p> <p data-bbox="857 1129 1377 1157">Prior art closer to square than accused hoodie.</p> |

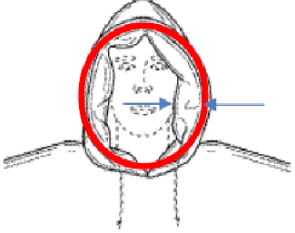
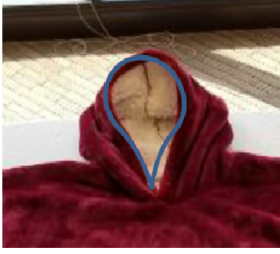
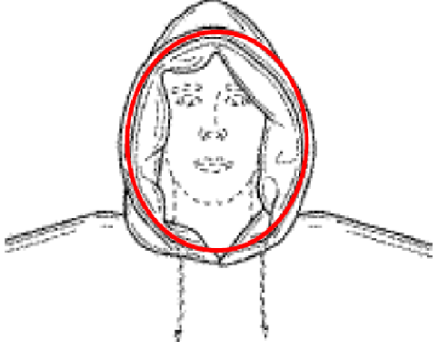

64. The letter established that the accused product has curved pocket sides that exhibit a shallow angle as in the '900 patent whereas the '788 patent has straight sides with a very steep angle as shown:

| U.S. Design Patent No. D859,788 | Tirrinia Hoodie |
|--|--|
|  <p data-bbox="316 577 690 609">Steep angle of entry into pocket.</p> |   <p data-bbox="1047 808 1153 840">FIG. 3</p> <p data-bbox="852 882 1380 976">Angle of entry of prior art is closer to claimed angle of entry than angle of entry for accused hoodie.</p> |

65. The letter established that the accused product has a horizontal hemline whereas the '788 patent has a substantially angled hemline that is significantly longer in the back than in the front as shown:



66. The letter established that the accused product has an elongated, tear-drop hood opening with smooth sides whereas the '788 patent has a substantially circular hood opening with fat, puffy sides as shown:

| U.S. Design Patent No. D859,788 | Tirrinia Hoodie |
|--|---|
|  <p data-bbox="441 537 688 562">Hood is circular and puffy.</p> |  <p data-bbox="906 537 1201 562">Hood is teardrop shape and thin.</p> |
|  |  |

67. Accordingly, upon analyzing the '788 patent and comparing it to Top Brand products, it is clear that Top Brand products do not infringe the '788 patent.

68. Top Brand products exhibit a number of distinguishing characteristics and design elements that establish that they are distinct from what is claimed by the '788 patent.

69. For example, the hood shape of Top Brand products and the '788 patent is different and would be perceived as distinct in the eyes of an ordinary observer.

70. For example, the hemline shape of Top Brand products and the '788 patent is different and would be perceived as distinct in the eyes of an ordinary observer.

71. For example, the pocket shape of Top Brand products and the '788 patent is different and would be perceived as distinct in the eyes of an ordinary observer.

72. For example, one or more of the forgoing features, whether viewed individually or collectively give the Top Brand product an overall appearance that it district and different

from the appearance of anything claimed in the '788 patent.

73. Defendants' conduct has and continues to cause harm to Plaintiffs through Defendants' use of the '788 patent to interfere with Plaintiffs' sales of its products.

74. Defendants' conduct and accusations of infringement raise an actual case or controversy between the parties.

75. As a direct and proximate result of Defendants' wrongful conduct, Plaintiffs have been damaged, not only by the prevention of the sale of fleece hooded garments, but also by the prevention of sale of unrelated products such as blankets, bedding, and bags.

76. Indeed, Cozy Comfort has repeatedly made erroneous patent infringement accusations against Defendants.

77. For example, Cozy Comfort asserted patent infringement against the Catalonia Wearable Fleece Blanket with Sleeves and Foot Pockets sold by E Star and Flying Star.

78. An image of the Catalonia Wearable Fleece Blanket with Sleeves and Foot Pockets is as follows:



79. Cozy Comfort asserted infringement even though the forgoing product has no hood and no marsupial pocket.

80. As a result of Cozy Comfort's actions, Top Brand, E Star, and Flying Star have all received Notice emails from Amazon identifying that a complaint has been made against them.

81. The Amazon notices are sent from the email address notice-dispute@amazon.com.

82. The emails all include the same stock language that merely relays that Amazon has "received a report from a rights owner that claims" that the listed items on the email infringe the alleged owner's patent rights.

83. The emails instruct the accused company to "work directly with the rights owner to resolve this dispute."

84. The emails further state that "[f]ailure to do so may result in removal of your

offers or your Amazon.com selling privileges.”

85. At no point does the Amazon Notice indicate that Amazon performed any substantive assessment of the claim.

86. At no point does the Amazon notice provide any infringement analysis.

87. At no point does the Amazon notice indicate that Amazon as formed a substantive opinion respecting whether the accused products do in fact infringe any purported intellectual property asset.

88. At no point does the Amazon notice indicate that Amazon as formed a substantive opinion respecting whether the accusation has any merit.

89. On information and belief, Amazon does not publish or otherwise make available to the rights owner or the seller any notification that it has made any determination respecting infringement.

90. On information and belief, when Amazon is provided with a complaint by a rights owner, the rights owner is not required to provide Amazon with a copy of the file history of the patent.

91. On information and belief, when Cozy Comfort contacted Amazon regarding its allegations of infringement by Defendants, Cozy Comfort did not provide Amazon with a copy of the file history of any of the intellectual property it was asserting was infringed.

92. On information and belief, to the extent that Amazon performed any infringement analysis, Amazon performed that analysis without the benefit of the file history of any asserted patent for the purpose of properly construing the claims.

93. On information and belief, Amazon does not gather prior art in response to an allegation of infringement by a rights owner.

94. On information and belief, Amazon did not gather prior art in response to any allegation of infringement by a Cozy Comfort.

95. On information and belief, Amazon did not perform an invalidity analysis of Cozy Comfort's intellectual property prior to sending any of the defendants a notice of any dispute filed by Cozy Comfort.

96. On information and belief, Amazon did not perform any analysis as to whether Cozy Comfort engaged in inequitable conduct in prosecuting the '788 patent prior to Amazon's sending any of Defendants a notice of the dispute filed by Cozy Comfort.

97. Defendant's actions have effectively functioned as an extrajudicial injunction based on a mere claim of infringement, not a judicial finding of infringement or even a judicial finding of a likelihood of infringement of a valid patent. There are at least six pending lawsuits against parties whose actions are similar to Defendants concerning the misuse of the Amazon process to unlawfully suppress competition.

98. As a result of Cozy Comfort's actions, the Amazon sales of accused products by Top Brand, E Star and Flying Star to Illinois customers were stopped and Plaintiffs have been damaged.

99. As a result of Cozy Comfort's actions, Illinois consumers have been deprived of competition in the market place between the products of Top Brand, E Star and Flying Star and Defendants' products.

100. As a result of Cozy Comfort's actions, Cozy Comfort has granted itself a de facto injunction against Top Brand, E Star and Flying Star without ever substantiating its claims under the level of legal scrutiny required for the issuance of a legal injunction.

101. As a result of Cozy Comfort's actions, Sky Creations has been damaged due to

Cozy Comfort's interference with Sky's licensees, Top Brand and Flying Star and preventing Top Brand and Flying Star from selling its licensed products on Amazon.

102. Cozy Comfort has never substantiated any of its claims of infringement.

103. Counsel for Plaintiffs has written to Cozy Comfort requesting a claim chart identifying how any of Plaintiffs' products meet all of the limitation of any patent claim Cozy has asserted to be infringed.

104. Cozy Comfort has never provided a claim chart of any kind to any to Plaintiffs.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment of Non-Infringement)

105. Defendants reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

106. As a result of the acts set forth in the paragraphs herein, a substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment.

107. A judicial declaration is necessary and appropriate so that Plaintiffs may definitively establish their rights with respect to the sale of their products in view of the '788 patent.

108. Such a determination is further necessary to bar Defendants from continuing to misuse its patent though assertions of infringement by Plaintiffs to third-party retailers (such as Amazon.com) and inducing such third-party retailers to remove Plaintiffs' products.

109. On information and belief, Defendants knew or should have known that Plaintiffs' products do not infringe the '788 patent.

110. Specifically, Defendants intentionally approached third-parties just prior to the critical holiday retail selling season, and specifically just prior to 2019 Black Friday, and filed complaints to remove the products of Top Brand, E Star and Flying Star even though those

products did not infringe.

111. The complaints filed by Cozy Comfort with Amazon continue despite Defendants being advised and informed that Plaintiffs' products do not infringe the '788 patent.

112. Defendant's conduct was egregious and exemplified Defendants' unilaterally and improperly expanding the scope of its patent to misuse the '788 patent against Plaintiffs.

113. Defendants' conduct make this case an exceptional case, entitling Plaintiffs to an award of their fees and costs.

114. Plaintiffs are entitled to a declaratory judgment that each has not infringed and does not infringe, directly, indirectly, or contributorily any valid and enforceable claim of the '788 patent.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment of Invalidity)

115. Plaintiffs reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

116. The '788 patent includes a single claim to the ornamental design for an enlarged over-garment with an elevated marsupial pocket, as shown and described in the '788 patent.

117. The design of the '788 patent is nothing more than a design for an ordinary sweatshirt but made larger.

118. On information and belief, garments exhibiting the same features as those disclosed and claimed by the '788 patent were on sale, sold, or described in one or more printed publications prior to the priority date of the '788 patent rendering the '788 patent invalid under one or more of 35 U.S.C 102, 103.

119. Additionally, or in the alternative, the drawings of the '788 patent are indefinite.

120. Only solid lines may be used to identify the subject matter of the design.

121. Dashed (or broken) lines cannot form the subject matter of the design.

122. Many of the drawings in the '788 Patent include lines that at some points appear to be solid lines, but at other points appear to be dashed (or broken) lines.

123. Due to the indefinite nature of the drawings, it is not possible to discern the proper scope of the ornamental design that is supposedly covered by the claim of the '788 patent.

124. The '788 patent is invalid under 35 U.S.C. § 112 at least for failing to distinctly set forth the subject matter of the invention.

125. Additionally, or in the alternative, the '788 patent is invalid under 35 U.S.C. § 171 because the design of the alleged invention is primarily functional rather than ornamental.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment of Unenforceability)

126. Plaintiffs reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

127. The application that would mature into the '788 patent was filed on September 13, 2017.

128. The Patent Office did not issue a notice of allowance in the application that would mature into the '788 patent until June 5, 2019.

129. During the prosecution of the application that would mature into the '788 patent, the Defendants filed a single Information Disclosure Statement.

130. On September 13, 2018, Defendants filed a utility patent application (U.S. Patent Application No. 16/130,502, "the '502 application") that included identical figures to those figures contained in the '788 patent.

131. During the prosecution of the '502 application, Defendants filed an Information

Disclosure Statement that was limited to disclosing the same references as were disclosed in the Information Disclosure Statement that they filed in the '788 patent.

132. During the prosecution of the '502 application, and at a time when the application that would mature into the '788 patent was still pending, the Patent Examiner identified a number of prior art references other than those references listed by the Defendants on their Information Disclosure Statements.

133. Rather than disclosing the existence of the new prior art references in the application that would mature into the '788 patent through the filing of another Information Disclosure Statement, Defendants chose to hide those references from the Examiner of the application that would mature into the '788 patent.

134. The Defendants knew or should have known that the references identified in the prosecution of the '502 application were relevant and material to the patentability of the claim of the '788 patent.

135. At least by choosing not to disclose the prior art to the Examiner of the application that would mature into the '788 patent, Defendants breached their duty of candor to the Patent Office and engaged in inequitable conduct that renders the '788 patent unenforceable.

136. Plaintiffs are entitled to a declaratory judgment that the '788 patent is unenforceable due to inequitable conduct.

FOURTH CLAIM FOR RELIEF

(False Marking)

137. Plaintiff's reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

138. It is a violation of 35 U.S.C § 292 to affix or use in advertising in connection with an article any words that imply that the article is covered by a patent when it is not.

139. At all times relevant, Defendants owned and operate the Cozy Website www.thecomfy.com.
140. On information and belief, the promotion the Cozy Website by Defendants is one of the day-to-day operations of Cozy Comfort.
141. On information and belief, at least Michael Speciale is involved in the day-to-day operations of Cozy Comfort, and involved with the promotion of the Cozy Website.
142. On information and belief, as co-founders, both Michael Speciale and Brian Speciale have knowledge of the contents of the Cozy Website and approved the content of the Cozy Website.
143. On information and belief, Defendants intend that consumers, including consumers in Illinois, rely on the statements made on the Cozy Website in determining whether to purchase one of Defendants' products over a competitor's product, such as the products of Plaintiffs.
144. Products offered on the Cozy Website include *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids*.
145. The Cozy Website further states: "*The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* U.S. Patent Nos. D859788...."
146. On information and belief, through the Cozy Website, Defendants intend that customers are to believe that each of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* is covered by the '788 patent.
147. The '788 patent includes only a single claim.
148. One or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* do not exhibit the ornamental design that is within the scope of the single claim of the '788

patent.

149. For example, the shape of the hood exhibited by one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* do not exhibit the ornamental design that is within the scope of the claim of the '788 patent.

150. For example, the shape of the arms exhibited by one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* do not exhibit the ornamental design that is within the scope of the claim of the '788 patent.

151. For example, the shape and placement of the pocket exhibited by one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* do not exhibit the ornamental design that is within the scope of the claim of the '788 patent.

152. For example, the overall combined appearance of features of one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* do not exhibit the ornamental design that is within the scope of the claim of the '788 patent.

153. At least due to the one or more of the substantial design differences identified above, whether considered separately or in combination, one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* would be viewed as not being covered by the claim of the '788 patent in the eyes of the ordinary observer.

154. Plaintiffs have suffered a competitive injury and been damaged by Defendants' assertions that one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* are covered by the '788 patent.

155. Brian Speciale and Michael Speciale are each listed as an inventor on the '788 patent.

156. In filing the application that would mature into the '788 patent, both Brian and

Michael Speciale signed an oath that they reviewed and understand the contents of the application, including the claims.

157. Brian and Michael Speciale were further assisted by patent counsel in preparing and prosecuting the application that would mature into the '788 patent and therefore, on information and belief, each was fully aware of the limits of the scope of the '788 patent.

158. On information and belief, the only reason that Defendants' initially applied to patent their product was so that Defendants could say its products were patent pending.

159. On information and belief, Defendants' intent was therefore for the purpose of marketing and attracting attention.

160. On information and belief, Defendants' intended that its representations regarding its products being covered by patent applications was to entice potential customers and investors into giving money to Defendants.

161. On information and belief, since the issuance of the '788 patent, Defendants' have represented that their products are covered by the '788 patent with the intent that consumers believe that the products are covered by the '788 patent and therefore will be swayed into purchasing Defendants' product over another product, such as one of Plaintiffs' products.

162. On information and belief, Defendants knew that one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* is not within the scope of any claim of the '788 patent at least due to such products having differing ornamental appearances than the claim of the '788 patent as set forth above.

163. Because one or more of *The Comfy*, *The Comfy Lite*, *The Comfy Hoodie*, and *The Comfy Kids* are not covered by the '788 patent, Plaintiffs intent that the public rely on its false representations that its products are covered by the '788 patent is undertaken with the further

intent to deceive the public into believing that Plaintiff's products are covered by the '788 patent when they are not.

164. On information and belief, Plaintiffs further routinely make disparaging remarks about competitors, such as Plaintiffs, referring to them as "Comfy knockoffs" with the intent that consumers be swayed to place greater importance of the false representation that Defendants' products are covered by the '788 patent and to only purchase its falsely marked products.

165. Defendants' aggressive marketing tactics promoting its products as being patented—when they are not—has driven customers to purchase Defendants products rather than Plaintiffs products.

166. Defendants' false assertions of selling a product covered by the claim of the '788 patent have consequently damaged Plaintiffs by driving customers to purchase Defendants' product over Plaintiffs' products and artificially making Plaintiffs' products seem less attractive in the marketplace.

167. Plaintiffs are entitled to damages pursuant to 35 U.S.C. 292(b) to compensate for its injury.

FIFTH CLAIM FOR RELIEF
(Unfair Competition under 815 ILCS 510)

168. Plaintiffs reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

169. It is a violation of 815 ILCS 510/2 when, among other things, a person engages in a deceptive trade practice through, in the course of business, disparaging the goods, services, or business of another by making a false or misleading representation of fact.

170. Defendants made false or misleading statements of fact to at least the online retailer Amazon.

171. For example, Defendants represented to Amazon that Plaintiffs' products infringed the '788 patent when those products did not.

172. Defendants made such representations willfully and with knowledge that they were false or misleading.

173. Plaintiffs provided Defendants with a detailed explanation of why their products did not infringe the '788 patent, yet Defendants willfully ignored such bases of noninfringement in making further bad faith claims of infringement to third parties such as Amazon.

174. Plaintiffs have been damaged by Defendants' representations at least insofar as Plaintiffs have been prevented from selling their products on Amazon.com.

175. Additionally, Defendants have falsely advertised and marketed its products as being covered by the '788 patent when they are not.

176. Defendants' false statements have been made at least on the Cozy Website, which is accessible to customers in Illinois.

177. Defendants' Cozy Website includes a dropdown menu that allows for shipping of its falsely advertised and marketed products to Illinois.

178. On information and belief, Defendants have actually sold and shipped such products to customers in Illinois.

179. Plaintiffs have been damaged by Defendants' false representations at least insofar as Defendants' false representations reduce the market value of Plaintiffs' goods, disparage Plaintiffs' goods, drive customers in Illinois view Defendants' products as more desirable, and drive customers in Illinois to purchase Defendants' products over Plaintiffs' products.

180. Plaintiffs have further suffered damage to their seller's ranking on Amazon due to Defendant's conduct which has caused reputational damage to Plaintiffs.

181. Plaintiffs incorporate each of the paragraphs below as if fully set forth herein.

182. On information and belief, each time a company submits a complaint to Amazon, like Defendant did, Amazon maintains a record of that complaint.

183. On information and belief, Amazon does not rank the complaints or reconsider the merits of the complaints in the event that they are determined, such as by a court, to be unfounded.

184. On information and belief, if a company receives too many complaints, Amazon will permanently revoke the seller's ability to sell on Amazon.

185. If a seller's ability to sell on Amazon is revoked, it loses all of its reviews and Amazon site rankings.

186. Thus, even if the seller relaunches a product that had been complained of, but for example, a court had determined that the complaint was unfounded, the seller will have to rebuild its ranking which is extremely difficult when starting anew.

187. Due to Defendants' improper complaints, Plaintiffs' Amazon seller's profiles have been permanently damaged, and those seller's profiles are at further risk for being revoked.

188. Plaintiffs are entitled to injunctive relief, damages, costs, and attorney's fees.

SIXTH CLAIM FOR RELIEF
(Tortious Interference with Contract)

189. Plaintiffs reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

190. Prior to November of 2019, Top Brand had a contract with Amazon whereby Top Brand was permitted to sell its products on Amazon.com in exchange for a fee per sale.

191. The contract was valid and enforceable.

192. Defendants were aware of the contract because Defendant also sold on

Amazon.com and therefore knew what was required of sellers like Top Brand that sold products on Amazon.com.

193. Defendants willfully and intentionally induced Amazon to breach its contract with Top Brand and prevent Top Brand from selling its products on Amazon.com by making false claims of patent infringement against Top Brand.

194. Defendants actively persuaded and encouraged Amazon to prohibit Top Brand from selling its products on Amazon.com by filing a complaint with Amazon.com alleging that Top Brands was infringing the '788 patent.

195. Plaintiffs provided Defendants with a detailed explanation of why their products did not infringe the '788 patent, yet Defendants willfully ignored such bases of noninfringement in making further bad faith claims of infringement to third parties such as Amazon.

196. Amazon did breach its contract and prevent Top Brand from selling its products on Amazon.com due to Defendants' wrongful conduct.

197. Top Brand sells its products under license from Sky.

198. Prior to November of 2019, E Star had a contract with Amazon whereby E Star was permitted to sell its products on Amazon.com in exchange for a fee per sale.

199. The contract was valid and enforceable.

200. Defendants were aware of the contract because Defendant also sold on Amazon.com and therefore knew what was required of sellers like E Star that sold product on Amazon.com.

201. Defendants willfully and intentionally induced Amazon to breach its contract with E Star and prevent E Star from selling its products on Amazon.com by making false claims of patent infringement against E Star.

202. Defendants actively persuaded and encouraged Amazon to prohibit E Star from selling its products on Amazon.com by filing a complaint with Amazon.com alleging that E Star was infringing the US Utility Patent No 10,420,431 in the same manner as it's assertions for infringement of the '788 Design patent. When asked by Plaintiffs' counsel to provide a substantiating claim chart as a basis for the infringement claim, Defendants simply ignored Plaintiffs' counsel's repeated requests for that infringement analysis.

203. Amazon did breach its contract and prevent E Star from selling its products on Amazon.com due to Defendants' wrongful conduct.

204. Prior to November of 2019, Flying Star had a contract with Amazon whereby Flying Star was permitted to sell its products on Amazon.com in exchange for a fee per sale.

205. The contract was valid and enforceable.

206. Defendants were aware of the contract because Defendant also sold on Amazon.com and therefore knew what was required of sellers like Flying Star that sold products on Amazon.com.

207. Defendants willfully and intentionally induced Amazon to breach its contract with Flying Star and prevent Flying Star from selling its products on Amazon.com by making false claims of patent infringement against Flying Star.

208. Defendants actively persuaded and encouraged Amazon to prohibit Flying Star from selling its products on Amazon.com by filing a complaint with Amazon.com alleging that Flying Star was infringing the US Utility Patent No 10,420,431 in the same manner as it's assertions for infringement of the '788 Design patent. When asked by Plaintiffs' counsel to provide a substantiating claim chart as a basis for the infringement claim, Defendants simply ignored Plaintiffs' counsel's repeated requests for that infringement analysis.

209. Amazon did breach its contract and prevent Flying Star from selling its products on Amazon.com due to Defendants' wrongful conduct.

210. Flying Star sells its products under license from Sky.

211. Plaintiffs have suffered damages as a result of Defendants' wrongful conduct at least insofar as they have been prevented from selling products through Amazon.com, have lost sales, and their seller's reputations have been damaged because of Defendants' tortious actions.

SEVENTH CLAIM FOR RELIEF
(Tortious Interference with Prospective Economic Advantage)

212. Plaintiffs reallege and incorporate each of the foregoing paragraphs as if fully set forth in this paragraph.

213. Prior to November of 2019, Top Brand had a business relationship with Amazon whereby Top Brand was permitted to sell its products on Amazon.com in exchange for a fee per sale.

214. Top Brands reasonably expected that it would continue to sell its products through Amazon.com.

215. Defendants were aware of the relationship because Defendant contacted Amazon about Top Brand's products being sold on Amazon.com and therefore knew that Top Brand expected to continue to sell its products on Amazon.com.

216. Defendants willfully, intentionally and unjustifiably induced Amazon to terminate the business relationship and Top Brand's expectancy and prevented Top Brand from selling its products on Amazon.com by making false claims of patent infringement against Top Brand.

217. Defendants actively persuaded and encouraged Amazon to prohibit Top Brand from selling its products on Amazon.com by filing a complaint with Amazon.com alleging that Top Brands was infringing the '788 patent.

218. Plaintiffs provided Defendants with a detailed explanation of why their products did not infringe the '788 patent, yet Defendants willfully ignored such bases of noninfringement in making further bad faith claims of infringement to third parties such as Amazon.

219. Amazon did terminate its business relationship with Top Brand, preventing Top Brand from selling its products on Amazon.com due to Defendants' wrongful conduct.

220. Top Brand sells its products under license from Sky.

221. Prior to November of 2019, E Star had a business relationship with Amazon whereby E Star was permitted to sell its products on Amazon.com in exchange for a fee per sale.

222. E Star reasonably expected that it would continue to sell its products through Amazon.com.

223. Defendants were aware of the relationship because Defendant contacted Amazon about E Star's products being sold on Amazon.com and therefore knew that E Star expected to continue to sell its products on Amazon.com.

224. Defendants willfully, intentionally and unjustifiably induced Amazon to terminate the business relationship and E Star's expectancy and prevented E Star from selling its products on Amazon.com by making false claims of patent infringement against E Star.

225. Defendants actively persuaded and encouraged Amazon to prohibit E Star from selling its products on Amazon.com by filing a complaint with Amazon.com alleging that E Star was infringing the US Utility Patent No 10,420,431 in the same manner as it's assertions for infringement of the '788 Design patent. When asked by Plaintiffs' counsel to provide a substantiating claim chart as a basis for the infringement claim, Defendants simply ignored Plaintiffs' counsel's repeated requests for that infringement analysis.

226. Prior to November of 2019, Flying Star had a business relationship with Amazon

whereby Flying Star was permitted to sell its products on Amazon.com in exchange for a fee per sale.

227. Flying Star reasonably expected that it would continue to sell its products through Amazon.com.

228. Defendants were aware of the relationship because Defendant contacted Amazon about Flying Star's products being sold on Amazon.com and therefore knew that Flying Star expected to continue to sell its products on Amazon.com.

229. Defendants willfully, intentionally and unjustifiably induced Amazon to terminate the business relationship and Flying Star's expectancy and prevented Flying Star from selling its products on Amazon.com by making false claims of patent infringement against Flying Star.

230. Defendants actively persuaded and encouraged Amazon to prohibit Flying Star from selling its products on Amazon.com by filing a complaint with Amazon.com alleging that Flying Star was infringing the US Utility Patent No 10,420,431 in the same manner as it's assertions for infringement of the '788 Design patent. When asked by Plaintiffs' counsel to provide a substantiating claim chart as a basis for the infringement claim, Defendants simply ignored Plaintiffs' counsel's repeated requests for that infringement analysis.

231. Flying Star sells its products under license from Sky

232. Plaintiffs have suffered damages as a result of Defendants' wrongful conduct at least insofar as they have been prevented from selling products through Amazon.com, have lost sales, and their seller's reputations have been damaged because of Defendants' tortious actions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for this Court to enter an Order granting the

following relief on the claims in suit and against Cozy Comfort, Brian Speciale, and Michael Speciale, jointly and severally:

1. A declaration that Plaintiffs' products do not infringe, either directly, indirectly, or contributorily any valid and enforceable claim of the '788 patent;
2. A declaration that the claim of the '788 patent is invalid;
3. A declaration that the '788 patent is void and unenforceable;
4. An order declaring that Plaintiffs are the prevailing party and that this is an exceptional case, awarding Plaintiffs their costs, expenses, and reasonable attorney's fees under 35 U.S.C. § 285;
5. An order awarding Plaintiffs damages for the injury they suffered due to Defendants' mislabeling;
6. An order that Defendants, jointly, severally and all those acting in concert or participation with them be permanently enjoined from contacting third-parties to remove Plaintiffs' products as infringing the '788 patent;
7. An order awarding Plaintiffs damages adequate to compensate Plaintiffs for Defendants' tortious acts;
8. An order awarding Plaintiffs punitive damages due to Defendants' willful and wanton misconduct;
9. An order awarding Plaintiffs such other and additional and equitable relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demands a trial by jury on all issues so triable.

Respectfully submitted,

Date: June 18, 2020

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2020 I caused the FIRST AMENDED COMPLAINT FOR DECLARATORY JUSDGMENT OF NON-INFRINGEMENT AND INVALIDITY OF UNITED STATES PATENT NO. D859,788 AND OTHER RELIEF to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record at their e-mail addresses on file with the Court.

Respectfully submitted,

Date: June 18, 2020

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