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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LINH THI KHANH PHAN AND HUYEN THI THANH PHAN D/B/A DUSPRO, Plaintiffs, v. SIMPLY MOSSY ART INC., Defendant.	CASE NO. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs LINH THI KHANH PHAN AND HUYEN THI THANH PHAN D/B/A DUSPRO ("DUSPRO"), by and through their attorneys, bring this action against defendant SIMPLY MOSSY ART INC. ("MOSSIFY") seeking a declaratory judgment that United States Design Patent No. D989,355 is unpatentable and invalid and injunctive relief ordering MOSSIFY to retract its Amazon.com infringement report against DUSPRO.

THE PARTIES

1. Plaintiffs are residents of Vietnam. DUSPRO maintains its principal place of business at 84, Ba Trieu Street, Hai Ba Trung District, Hanoi, Vietnam. DUSPRO does business in the State of California.

2. Defendant MOSSIFY, on information and belief, is a federal corporation organized

under the laws of the Dominion of Canada and maintains its principal place of business at 351 Ferrier St #2, Markham, Ontario L3R 5Z2, Canada. Defendant claims to own the '355 Patent. On information and belief, Mossify does business in the State of California.

THE NATURE OF THE ACTION

3. This is a civil action arising under the patent laws of the United States, 35 U.S.C. § 101, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking a declaratory judgment that the claim in United States Design Patent number D989,355 (the "'355 Patent") is not patentable, and the '355 Patent is invalid.

4. Under the DUSPRO mark, sisters Linh Thi Khanh Phan and Huyen Thi Thanh Phan manufacture moss-covered garden stakes called "moss poles" and sell them on http://www.amazon.com/ ("Amazon").

5. DUSPRO's best-selling moss poles are pliable and can be bent into shapes such as circles, hearts, and spirals.

6. MOSSIFY also manufactures and sells moss poles, some of which are likewise pliable.

7. MOSSIFY filed a patent infringement warning against DUSPRO using Amazon's internal complaint system, which caused Amazon to deactivate eight of DUSPRO's best-selling listings, representing eight size variations of a common item, the DUSPRO Forest Moss Pole.

8. As a result, this action involves an actual case or controversy concerning the patentability and validity of the '355 Patent and Plaintiff's right to declaratory relief.

9. MOSSIFY also filed a single action, Case #1:23-cv-06434-PAC, in the Southern District of New York (the "SDNY Lawsuit") against DUSPRO and approximately 103 other defendants.

10. As of the filing of this Complaint, no service of process has been made in the SDNY Lawsuit, and the complaint filed in that action is defective for failure to comply with the joinder requirements of 35 U.S.C. § 299.

11. The SDNY Lawsuit should be dismissed for failure to comply with 35 U.S.C. § 299, which permits joinder of accused infringers only if "(1) any right to relief is asserted against the

parties jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences relating to the making, using, importing into the United States, offering for sale, or selling of the same accused product or process; and (2) questions of fact common to all defendants or counterclaim defendants will arise in the action."

12. The SDNY Lawsuit does not allege that all 104 defendants transacted together to make, use, import, offer to sell, or sell the *same accused product*. Rather, the SDNY Lawsuit only alleges that each defendant has infringed the '355 Patent.

13. 35 U.S.C. 299(b) instructs that "accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit."

14. Therefore, the SDNY Lawsuit is defective, the 104 defendants named in the SDNY Lawsuit may not be joined, and the SDNY Lawsuit should be dismissed for failure to comply with the joinder rules for patent infringement actions.

15. DUSPRO seeks a final judicial declaration that the claim in the '355 Patent is not patentable and is invalid.

16. Additionally, DUSPRO seeks injunctive relief instructing MOSSIFY to retract the patent infringement warning filed by it against DUSPRO on Amazon's internal complaint system.

17. Even if the Court grants Plaintiff declaratory relief, Plaintiff will be required to submit another appeal of Defendant's infringement report to Amazon and wait for Amazon to approve or reject the appeal.

18. On information and belief, Plaintiff alleges that Amazon will reactivate the items immediately if Defendant retracts its complaint. Therefore, injunctive relief ordering MOSSIFY to retract its report is appropriate.

JURISDICTION AND VENUE

19. DUSPRO brings this complaint against Mossify pursuant to the Patent Laws of the United States, Title 35 of the United States Code, with a specific remedy sought based upon the laws authorizing actions for declaratory judgment in United States courts, 28 U.S.C. §§ 2201 and 2202.

20. This Court has subject matter jurisdiction over the action, which arises under the

Patent Laws of the United States, pursuant to 28 U.S.C. §§ 1331 and 1338.

21. Defendant is subject to personal jurisdiction in this District because it purposely directs its activities toward and conducts business with consumers throughout the United States, including within the State of California and this Judicial District, and operates through one or more online stores, including http://www.mossify.ca/, http://www.etsy.com/shop/mossify/, and http://www.amazon.com/, that are accessible in California.

22. Defendant is also subject to personal jurisdiction in this District because it caused Amazon to deactivate Plaintiff's best-selling moss pole, rendering it unsellable on Amazon to consumers in the United States, including within the State of California and this Judicial District, causing injury to Plaintiff in California, and Plaintiff's claims arise out of those activities.

23. California's long-arm statute, C.C.P. § 410.10, permits this Court to exercise personal jurisdiction over Defendant because it conducts business through internet websites and platforms intentionally targeting and selling to California consumers, and exercise of personal jurisdiction is therefore not inconsistent with the Constitution of California or of the United States.

24. Additionally or alternatively, Defendant is subject to personal jurisdiction in this District pursuant to Fed. R. Civ. P. 4(k)(2) because Plaintiff's claims arise under federal law and, on information and belief, (A) Defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

25. Venue in this District is proper under 28 U.S.C. § 1391 because Defendant, upon information and belief, is a foreign corporation not resident in the United States, and there is no district in which an action may otherwise be brought.

EXISTENCE OF AN ACTUAL CONTROVERSY

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

27. Defendant reported Plaintiff to Amazon on or about August 15, 2023, alleging that Amazon Standard Item Numbers B09K3XPVGH, B0B2NY1RMM, B0BR6KN36B, B09DP34NFW, B0B1LG3GQ9, B0B2NWZ3LK, B09NDRCYFC, and B0B2NV54NF (the "Accused Products") infringe the '355 Patent. The Accused Products represent eight size variations of Plaintiff's best-

selling bendable moss pole.

28. Defendant's report caused Amazon to deactivate the Accused Products. When Plaintiff attempted to negotiate with Defendant directly to retract the report, Defendant demanded one hundred percent of the profits of Plaintiff's moss pole sales between May 26, 2021, and the present.

29. Plaintiff has unsuccessfully appealed Amazon's decision to deactivate the Accused Products.

30. A person is not entitled to a patent if the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention (35 U.S.C. 102).

31. Furthermore, a United States Design Patent only protects how an article looks, i.e., its "new, original, and ornamental design" (35 U.S.C. 171). The ornamental appearance of an article includes its shape/configuration, surface ornamentation, or both.

32. Mossify's Design Patent No. D989,355, entitled "Bendable Moss Pole Assembly" and attached hereto as Exhibit 1, was filed on May 26, 2021, and issued on June 13, 2023.

33. The '355 Patent contains a single claim for "[t]he ornamental design for a bendable moss pole assembly, as shown and described" therein.

34. The Patent Examiner did not issue any office actions during prosecution, and the application was allowed on March 17, 2023.

35. The "ornamental design" claimed in the '355 Patent is not patentable.

36. An actual and justiciable controversy exists between DUSPRO and MOSSIFY as to whether the claim in the '355 Patent is patentable.

37. Absent a declaration of non-patentability and invalidity, MOSSIFY will continue to wrongfully assert the '355 Patent against DUSPRO and thereby cause DUSPRO irreparable injury and damage.

FIRST CLAIM

DECLARATORY JUDGMENT OF NONPATENTABILITY OF THE '355 PATENT

38. DUSPRO hereby restates and realleges the allegations set forth in paragraphs 1 through 37 above and incorporates them by reference.

39. The '355 Patent shows and claims "[t]he ornamental design for a bendable moss pole assembly, as shown and described," and includes the following Figures:

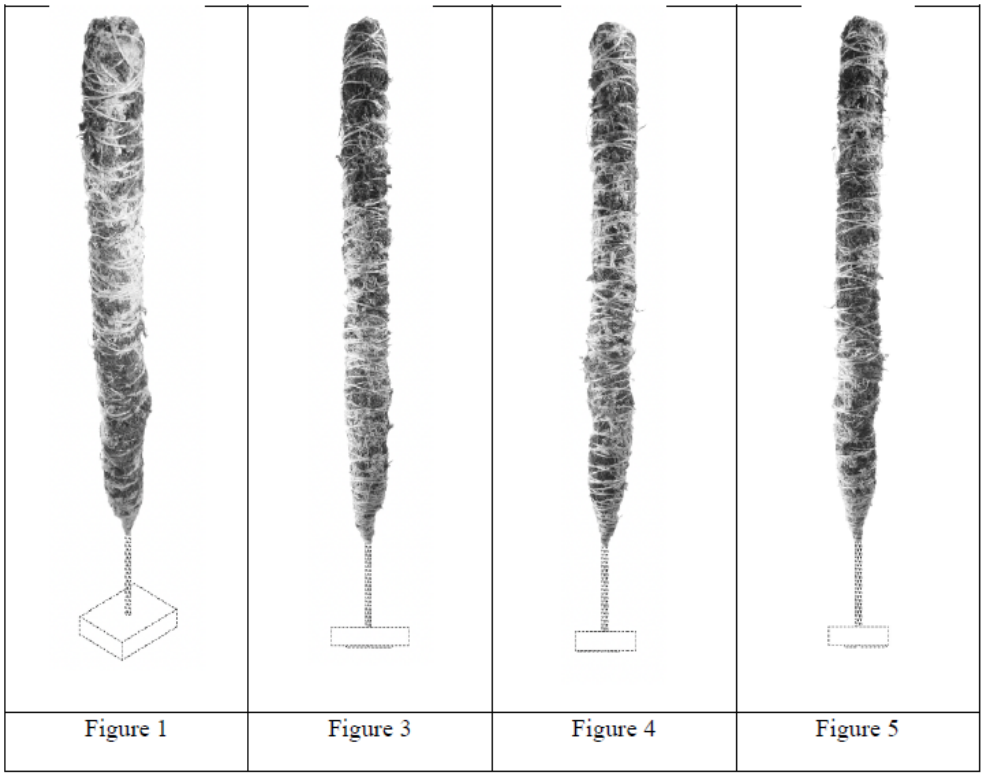
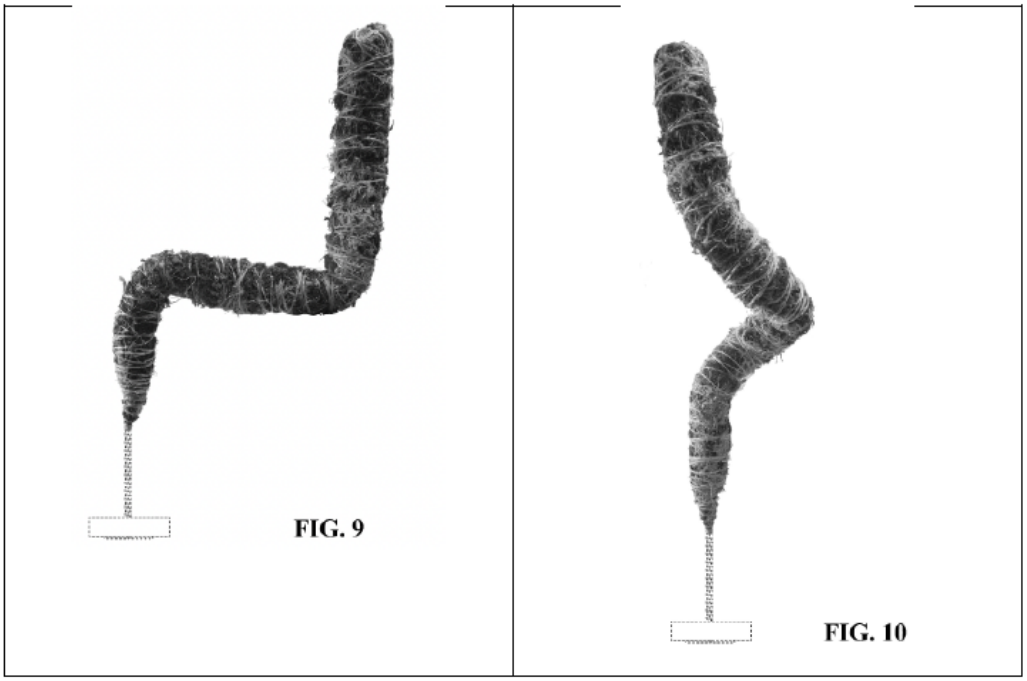


Figure 1 | Figure 3 | Figure 4 | Figure 5



40. The ‘355 Patent was granted in error because the claim contained in the ‘355 Patent is not patentable.

41. The ‘355 Patent is invalid because its design is dictated by function.

42. For a design to be protectable by a design patent, the design must not be governed solely by function. A design patent is invalid if the design is “dictated by the utilitarian purpose of the article.” *High Point Design LLC v. Buyer’s Direct, Inc.*, 730 F.3d 1301, 1315 (Fed. Cir. 2013) (internal quotation marks omitted).

43. Additionally or alternatively, the ‘355 Patent is also invalid because its design is obvious.

44. Plaintiff has identified multiple references, including countless homemade examples, the design characteristics of which are identical to the design claimed in the ‘355 Patent and which create visual impressions that are identical to the ‘355 Patent as a whole.

45. The Accused Products are identical in ornamental appearance to bendable moss poles that have been demonstrated to the public for many years before the filing date of the ‘355 Patent, including Figures 1 through 6, below.

46. The ‘355 Patent and Figures 1 and 2, below, all share identical ornamental appearance characterizable as featuring a generally columnar portion of moss bound in string or twine in such a way that it has an irregular outer contour. The columnar moss portions retain an organic look in their bent forms.

Figure 1. Instagram image posted January 27, 2020, by user @garden.in.my.room; retrieved 9/25/23

Figure 2. Instagram image posted March 2, 2020, by user @garden.in.my.room; retrieved 9/25/23

Figure 3. YouTube video "Easy DIY Moss Pole Tutorial" posted October 24, 2020, by user @FelineJungle; retrieved 9/25/23

47. In Figure 3, YouTube user @FelineJungle demonstrates an "Easy DIY Moss Pole Tutorial" dated October 24, 2020, that teaches how to make a generally columnar moss pole bound in string or twine with design characteristics identical to the design claimed in the '355 Patent and which creates an identical visual impression.

48. Figure 4 shows two moss poles demonstrated to the public by Instagram user @garden.in.my.room on April 28, 2020, with ornamental appearance and visual impression identical to the '355 Patent. The moss poles are bendable, generally columnar portions of moss bound in string or twine in such a way that it has an irregular outer contour. The columnar moss portions retain an organic look in their bent forms.

Figure 4. Instagram image posted April 28, 2020, by user @garden.in.my.room; retrieved 9/26/23

49. Figure 5 shows a collection of moss poles demonstrated to the public by Instagram user @cyrilcybernated on October 4, 2019. The moss poles pictures are identical to the '355 Patent in ornamental appearance and visual impression. The moss poles are bendable, generally columnar portions of moss bound in string or twine in such a way that it has an irregular outer contour. The columnar moss portions retain an organic look in their bent forms.

Figure 5. Instagram image posted September 20, 2019, by user @cyrilcybernated; retrieved 9/26/23

50. Figure 6 shows a photograph shared to Facebook on May 29, 2020, by user "plant trellises" demonstrating to the public a moss pole bent in a circular configuration. For comparison, Figure 7 shows a DUSPRO moss pole bent in a circular configuration. Even bent in a circular configuration, the identical ornamental appearance and visual impression of each moss pole is apparent and the columnar moss portions retain an organic look even in their bent forms.

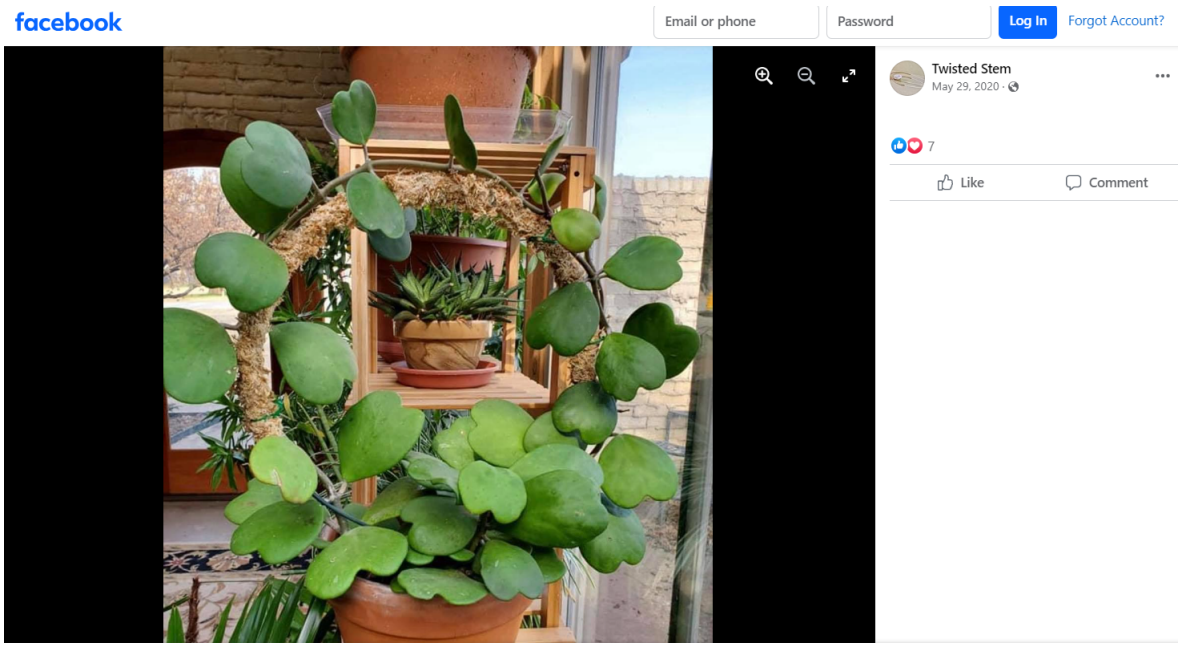


Figure 6. Facebook image posted May 29, 2020, by user "plant.trellises"; retrieved 9/26/23

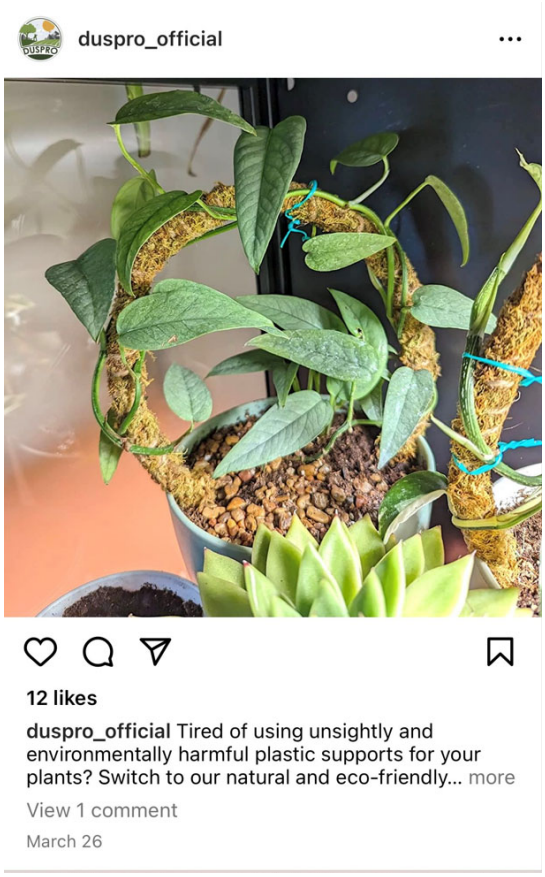


Figure 7. Instagram image posted March 26, 2023, DUSPRO; retrieved 9/26/23

51. These and other examples of prior art were not considered during the prosecution of the '355 Patent.

52. The application history reveals that the Patent Examiner who granted the '355 Patent was not made aware of and, hence, never considered crucial prior art when deciding to allow the application. Thus, there is no presumption that the '355 Patent is valid over this prior art.

SECOND CLAIM

INJUNCTIVE RELIEF FOR RETRACTION OF AMAZON REPORT

53. DUSPRO hereby restates and realleges the allegations set forth in paragraphs 1 through 52 above and incorporates them by reference.

54. MOSSIFY wrongly asserted the '355 Patent against DUSPRO, causing Amazon to deactivate DUSPRO items B09K3XPVGH, B0B2NY1RMM, B0BR6KN36B, B09DP34NFW, B0B1LG3GQ9, B0B2NWZ3LK, B09NDRCYFC, and B0B2NV54NF. Deactivation means the Accused Products cannot be sold on Amazon.

55. Before deactivation, these eight products generated revenues nearing $150,000 each month.

56. Therefore, DUSPRO has suffered significant economic losses due to MOSSIFY's assertion of infringement—losses that grow with each passing day.

57. DUSPRO's financial viability and the livelihoods of numerous hardworking craftspeople depend on the immediate reactivation of the Accused Products.

58. DUSPRO will suffer irreparable harm, and may even have to cease operations, if injunctive relief is not granted and the Accused Products are not restored to the Amazon marketplace.

59. On information and belief, Plaintiff alleges that Amazon will not reactivate the Accused Products until a court of competent jurisdiction resolves the matter.

60. Even if the Court grants Plaintiff declaratory relief, Plaintiff is required to submit another appeal of Defendant's infringement report to Amazon and wait for Amazon to approve or reject the appeal.

61. On information and belief, Plaintiff alleges that Amazon will reactivate the items immediately if Defendant retracts its complaint. Therefore, injunctive relief ordering MOSSIFY to

retract its report is appropriate.

62. Plaintiff therefore asks the Court to order MOSSIFY to retract its Amazon report against DUSPRO so that DUSPRO may resume sales of the Accused Products.

PRAYER FOR RELIEF

WHEREFORE, DUSPRO prays for judgment as follows:

1. Declaring that the '355 Patent is invalid for lack of patentability;

2. Declaring that MOSSIFY shall retract its Amazon report against DUSPRO;

3. Preliminary and permanent injunctive relief;

4. Declaring this case exceptional under 35 U.S.C. § 285 and awarding DUSPRO its attorneys' fees and costs in connection with this case; and

5. Awarding DUSPRO such other and further relief as the Court deems just and proper.

Dated: September 27, 2023

CARR & FERRELL LLP

By: Robert J. Yorio
ROBERT J. YORIO

Attorney for Plaintiffs
LINH THI KHANH PHAN AND
HUYEN THI THANH PHAN d/b/a DUSPRO

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands a trial by jury on all issues triable to a jury.

Dated: September 27, 2023

CARR & FERRELL LLP

By: _____
ROBERT J. YORIO

Attorney for Plaintiffs
LINH THI KHANH PHAN AND
HUYEN THI THANH PHAN d/b/a DUSPRO