

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FIRST QUALITY BABY : **ELECTRONICALLY FILED**
 PRODUCTS, LLC., :
 FIRST QUALITY PRODUCTS, :
 INC., and
 FIRST QUALITY RETAIL
 SERVICES, LLC

Plaintiffs, :
: CIVIL ACTION NO. 1:09-cv-00354 (WWC)

VS.

KIMBERLY-CLARK
WORLDWIDE, INC

Defendant.

FIRST AMENDED COMPLAINT

Plaintiffs, First Quality Baby Products, LLC. (“FQB”), First Quality Retail Services, LLC (“FQRS”), and First Quality Products, Inc. (“FQP”), collectively “First Quality,” by and through their attorneys, hereby state their Complaint against Defendant, Kimberly-Clark Worldwide, Inc., (“KC”), and their demand for trial by jury, alleging as follows:

NATURE OF THE ACTION

1. This declaratory judgment action seeks a declaration of non-infringement, invalidity, and unenforceability of U.S. Patent No. 5,496,298, entitled “Elastomeric Ears for Disposable Absorbent Article” (“the ’298 Patent”), a declaration of non-infringement and invalidity of U.S. Patent No. 5,286,543, entitled “Method and Apparatus for Controlling the Cutting and Placement of Components on a Moving Substrate, and Article Made Therewith” (“the ’543 Patent”), a declaration of non-infringement and invalidity of U.S. Patent No. 5,601,542, entitled “Absorbent Composite” (“the ’542 Patent”), a declaration of non-infringement and invalidity of U.S. Patent No. 5,147,343, entitled “Absorbent Products Containing Hydrogels with Ability to Swell Against Pressure” (“the ’343 Patent”), and a declaration of non-infringement and invalidity of U.S. Patent No. 6,702,789, entitled “Folded Absorbent Article” (“the ’789 Patent”).

PARTIES

2. FQB is a limited liability company organized and existing under the law of Delaware with a place of business at Lewiston, Pennsylvania.

3. FQRS is a limited liability company organized and existing under the law of Delaware with a place of business at King of Prussia, Pennsylvania.

4. FQP is a corporation organized and existing under the law of New York with a place of business at McElhatten, Pennsylvania.

5. Upon information and belief, KC is a corporation organized and existing under the laws of the State of Delaware, with a place of business at 351 Phelps Drive, Irving, Texas 75038. Upon information and belief, KC maintains an active registration with the Secretary of the Commonwealth of Pennsylvania to do business in this state.

6. Upon information and belief, KC is the owner of the '298, '543, '542, '343, and '798 Patents.

JURISDICTION AND VENUE

7. This claim arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Patent Laws of the United States, Title 35 of the United States Code.

8. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338, 2201, and 2202.

9. The Court has personal jurisdiction over KC pursuant to Fed. R. Civ. P. 4(h)(1)(A), 4(e)(1), and 42 Pa.C.S.A. § 5301(a)(2)(i).

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c).

ACTUAL CONTROVERSY

11. FQB is a "private label" manufacturer of baby diapers.

12. There is a small number of private label manufacturers of baby diapers for the United States market. Private label manufacturers make and sell baby diapers to retailers that are typically branded with the retailer's own labeling. The use of private labeling enables retailers to bring high quality diaper products to their customers at more affordable prices than traditional manufacturers selling under their own label.

13. FQB has made substantial and meaningful preparations for the manufacture and sale of a new baby diaper product. FQB has spent tens of millions of dollars to build a new one million square foot production facility and to purchase new capital equipment for the purpose of making FQB's new baby diaper product.

14. FQB has sponsored in-home testing of its new baby diaper product.

15. FQB has offered for sale its new baby diaper product.

16. The first sale of FQB's new baby diaper product to consumers occurred in February 2009, with a trial volume of the new baby diaper product being sold by one retailer. An unrestricted launch of FQB's new baby diaper product occurred on March 12, 2009.

17. FQB's new baby diaper product has elastic ears with non-parallel sides for fastening the sides of the diaper.

18. Among the other private label manufacturers are Arquest Inc. (“Arquest”) and Valor Brands LLC (“Valor Brands”).

19. In the summer of 2007, Arquest launched a new diaper product having elastic ears with non-parallel sides. Within weeks Arquest received a letter from KC alleging that Arquest’s new diaper having elastic ears with non-parallel sides infringed the ’298 Patent. On December 13, 2007, KC brought suit against Arquest alleging infringement of the ’298 patent in the United States District Court for the Northern District of Texas. KC’s lawsuit against Arquest has now settled.

20. In May 2008, Valor Brands introduced for sale in the United States, under the name “Natural Choice,” a new diaper having elastic ears with non-parallel sides. On May 21, 2008, KC brought suit against Valor Brands in the United States District Court for the Northern District of Texas alleging that Valor Brands’ product infringed the ’298 Patent. KC’s lawsuit against Valor Brands has now settled.

21. On information and belief every U.S. manufacturer of private label diapers which has introduced a diaper having elastic ears with non-parallel sides has been sued by KC for infringement of the ’298 Patent.

22. Based on KC’s history of bringing suit against manufacturers of diapers having elastic ears with non-parallel sides alleging infringement of the ’298 Patent; the fact that FQB’s new baby diaper product has elastic ears with non-

parallel sides; the meaningful preparations taken by FQB to launch its new baby diaper product; and the offers for sale, sale and use by consumers of FQB's new baby diaper product, an actual case or controversy existed between KC and FQB as to whether the manufacture, use, or sale of FQB's new baby diaper product infringed any valid and enforceable claim of the '298 Patent when FQB filed its original declaratory judgment action Complaint on February 25, 2009. The case or controversy continues to exist today.

23. On March 12, 2009, KC filed a Complaint against FQB, FQRS, and FQP (i.e., First Quality) in the Northern District of Texas alleging that First Quality infringed each of the '298, '543, '542, '343, and '798 Patents. *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC*, Civil Action No. 3:09-cv-00488-D. The "Texas Complaint" is attached hereto as Exhibit 1.

24. The Texas Complaint alleges that FQB, FQRS, and FQP infringe the '298 Patent by sale of products "including but not limited to" FQB's new baby diaper product. (Texas Complaint at ¶ 8).

25. The Texas Complaint alleges that FQB, FQRS, and FQP infringe the '543 Patent by sale of products "including but not limited to" FQB's new baby diaper product. (Texas Complaint at ¶ 16).

26. The Texas Complaint alleges that FQB, FQRS, and FQP infringe the '542 Patent by sale of products "including but not limited to, Walgreens Certainty

Ultra Thin Underwear, Extra Absorbent; Walgreens Certainty Pads, Ultimate Absorbent; Wal-Mart Assurance Underwear for Women, Extra Absorbent; Wal-Mart Assurance Underwear, Super Plus Absorbent; Wal-Mart Assurance Underwear, Overnight Absorbent; and Wal-Mart Assurance Male Guards, Extra Absorbent.” (Texas Complaint at ¶ 22).

27. The Texas Complaint alleges that FQB, FQRS, and FQP infringe the ’343 Patent by sale of products “including but not limited to, Walgreens Certainty Guards for Men, Extra Absorbent; and on information and belief, Target Diaper, Walgreens Certainty Pads, Ultimate Absorbent, Wal-Mart Assurance Belted Undergarments, Extra Absorbent; and Wal-Mart Assurance Underwear for Women, extra Absorbent.” (Texas Complaint at ¶ 27).

28. The Texas Complaint alleges that FQB, FQRS, and FQP infringe the ’798 Patent by sale of products “including but not limited to, Wal-Mart Assurance Premium Underwear for Women; Walgreens Certainty Extra Absorbency; CVS Protective Underwear, Extra Absorbency; CVS Protective Underwear, Extra Absorbency[sic]; and CVS Protective Underwear - Day & Night, Super Plus Absorbency.” (Texas Complaint at ¶ 32).

29. Accordingly, an actual case or controversy exists between KC and First Quality as to whether the manufacture, use, or sale of any of the above

identified products infringe any valid and enforceable claim of the '298, '543, '542, '343, and/or '798 Patents.

COUNT I

(Declaratory Judgment of Unenforceability)

30. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-29 as if fully set forth herein.

31. Upon information and belief, the claims of the '298 Patent are unenforceable because one or more of the named inventors of the '298 patent and/or the attorney prosecuting the application for the '298 Patent breached their duty of candor by failing to disclose to the United States Patent and Trademark Office ("USPTO") material prior art as required by 37 C.F.R. § 1.56.

32. The application for the '298 Patent was filed on December 23, 1993. The '298 Patent issued on March 5, 1996 and is entitled "Elastomeric Ears for Disposable Absorbent Article."

33. The claims of the '298 Patent recite "ears" having a particular configuration, and this recited configuration was highlighted by Mr. Thomas J. Mielke, the KC employee and attorney who prosecuted the '298 Patent, to distinguish the claims of the '298 Patent over cited prior art references.

34. Fig. 1 of the '298 Patent is shown below with "ears" 38.

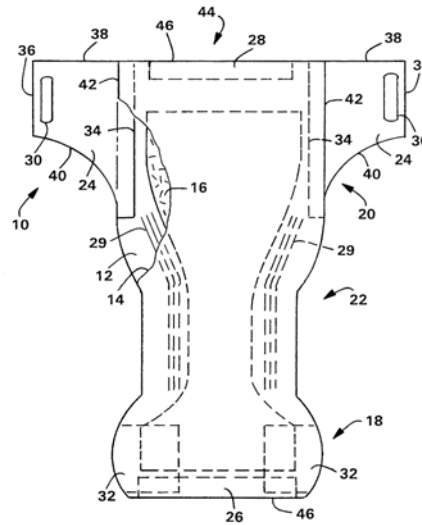


FIG. 1

35. During prosecution of the '298 Patent, the inventors and their attorney cited as prior art forty different U.S. and European patents and publications to the USPTO. These patents and publications are listed on the face of the '298 Patent.

36. Neither the inventors nor Mr. Mielke ever cited U.S. Patent No. 5,019,073, entitled "Disposable Diaper with Improved Mechanical Fastening System" ("the '073 Patent") to the USPTO. Fig. 11 of the '073 Patent is shown below.

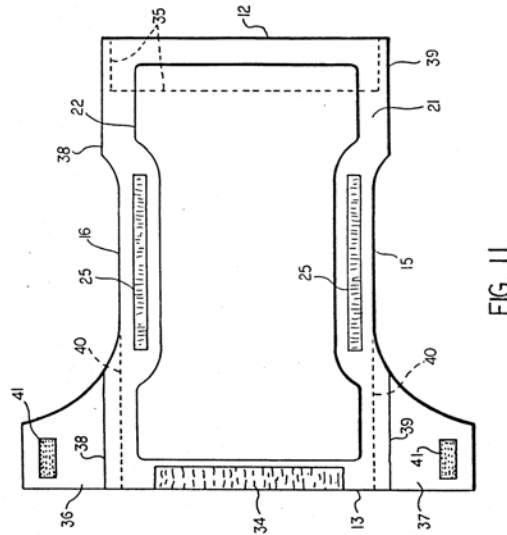


FIG. 11

37. The '073 Patent is prior art to the '298 Patent, having issued on May 28, 1991, 19 months prior to the filing of the application for the '298 Patent.

38. Both the '073 Patent and the '298 Patent are assigned to KC, and during their prosecution were assigned to KC's predecessor in interest, Kimberly-Clark Corporation.

39. During the prosecution of the '298 Patent Mr. Mielke had knowledge of the '073 Patent. Mr. Mielke personally signed an Information Disclosure Statement filed during the prosecution of U.S. Patent No. 5,318,555 ("the '555 Patent") citing the '073 Patent to the USPTO. Mr. Mielke is also listed as the "attorney or agent" on the face of U.S. Patent No. 5,462,541 ("the '541 Patent") and U.S. Patent No. 5,489,282 ("the '282 Patent"), in both of which the '073 Patent was cited in an Information Disclosure Statement. All three of these U.S. Patents were pending during the prosecution of the application for the '298 Patent.

40. Notwithstanding Mr. Mielke's knowledge of the '073 Patent, Mr. Mielke never cited the '073 Patent to the USPTO during the prosecution of the application for the '298 Patent.

41. The '282 Patent is entitled "Newborn's Growth Adjustable Absorbent Diaper Having Variable Overlapping and Non-overlapping Ears."

42. The patent claims of the '282 Patent recite "ear members" and the specification refers "ear members," elements 14 and 16. Fig. 1 of the '282 Patent is shown below.

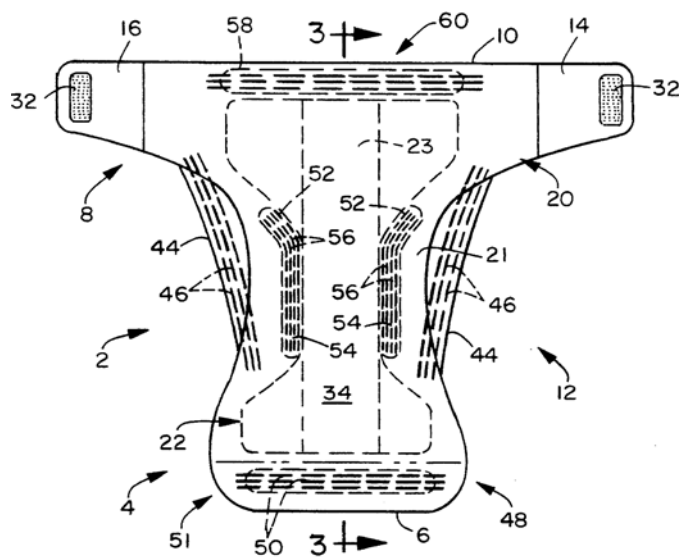
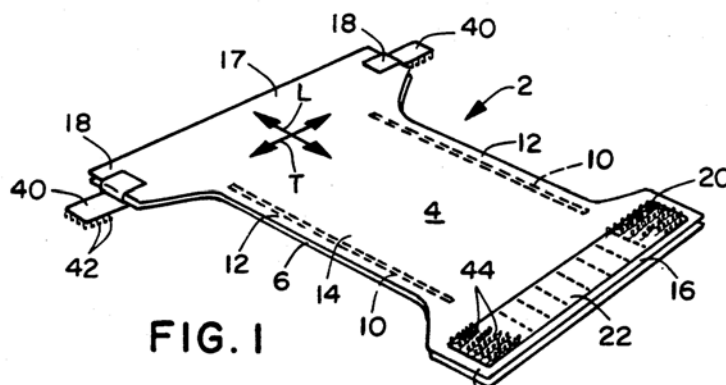


FIG. 1

43. The '555 Patent is entitled "Absorbent Article Having an Improved Fastening System."

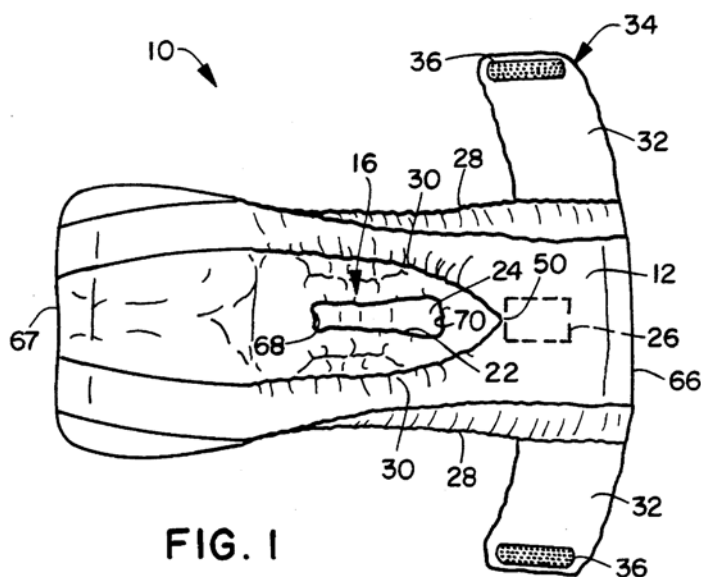
44. The patent claims of the '555 Patent recite “ear portions,” and the specification of the '555 Patent refers to “ear portions” 18 and “ear sections” 20.

Fig. 2 of the '555 Patent is shown below.



45. Ms. Christine Rasmussen, allegedly an inventor of the '298 Patent, is also named as an inventor of the '541 patent which is entitled "Pocket-like Diaper or Absorbent Article."

46. Element 32 of Fig. 1 of the '541 Patent, which is shown below, is described in the specification of the '541 Patent as “ears.”



47. On information and belief, Ms. Rasmussen knew or had reason to know of the '073 Patent during prosecution of the application for the '298 Patent before the USPTO.

48. The '073 Patent was material to the claims of the '298 Patent because of its disclosure of "ears" having the same configuration claimed in the '298 Patent. None of the other cited prior art had ears with this same configuration. Therefore the '073 Patent was not cumulative to other information before the patent examiner during prosecution of the application of the '298 Patent.

49. On information and belief, Mr. Mielke and Ms. Rasmussen did not disclose the '073 Patent to the USPTO during prosecution of the application for the '298 Patent with the intent to deceive the USPTO.

50. Failure to disclose the '073 Patent, a known piece of material prior art, is a breach of the duty of candor and 37 C.F.R. § 1.56 constituting inequitable conduct that renders the '298 Patent unenforceable.

COUNT II

(Declaratory Judgment of Invalidity Under 35 U.S.C. § 101, et. seq.)

51. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-50 as if fully set forth herein.

52. Upon information and belief, one or more claims of the '298 Patent are invalid for failing to comply with one or more requirements of the Patent Laws of the United States, Title 35, United States Code.

COUNT III

(Declaratory Judgment of Non-infringement)

53. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-52 as if fully set forth herein.

54. First Quality's products, including but not limited to its new baby diaper product, do not fall within the scope of any valid claim of the '298 Patent, either literally or under the doctrine of equivalents.

COUNT IV

(Declaratory Judgment of Invalidity Under 35 U.S.C. § 101, et. seq.)

55. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-54 as if fully set forth herein.

56. Upon information and belief, one or more claims of the '543 Patent are invalid for failing to comply with one or more requirements of the Patent Laws of the United States, Title 35, United States Code.

COUNT V

(Declaratory Judgment of Non-infringement)

57. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-56 as if fully set forth herein.

58. First Quality's products, including but not limited to its new baby diaper product, do not fall within the scope of any valid claim of the '543 Patent, either literally or under the doctrine of equivalents.

COUNT VI

(Declaratory Judgment of Invalidity Under 35 U.S.C. § 101, et. seq.)

59. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-58 as if fully set forth herein.

60. Upon information and belief, one or more claims of the '542 Patent are invalid for failing to comply with one or more requirements of the Patent Laws of the United States, Title 35, United States Code.

COUNT VII

(Declaratory Judgment of Non-infringement)

61. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-60 as if fully set forth herein.

62. First Quality's products, including but not limited to its new baby diaper product; Walgreens Certainty Ultra Thin Underwear, Extra Absorbent;

Walgreens Certainty Pads, Ultimate Absorbent; Wal-Mart Assurance Underwear for Women, Extra Absorbent; Wal-Mart Assurance Underwear, Super Plus Absorbent; Wal-Mart Assurance Underwear, Overnight Absorbent; and Wal-Mart Assurance Male Guards, Extra Absorbent, do not fall within the scope of any valid claim of the '542 Patent, either literally or under the doctrine of equivalents.

COUNT VIII

(Declaratory Judgment of Invalidity Under 35 U.S.C. § 101, et. seq.)

63. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-62 as if fully set forth herein.

64. Upon information and belief, one or more claims of the '343 Patent are invalid for failing to comply with one or more requirements of the Patent Laws of the United States, Title 35, United States Code.

COUNT IX

(Declaratory Judgment of Non-infringement)

65. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-64 as if fully set forth herein.

66. First Quality's products, including but not limited to its new baby diaper product; Walgreens Certainty Guards for Men, Extra Absorbent; Target Diaper; Walgreens Certainty Pads, Ultimate Absorbent, Wal-Mart Assurance Belted Undergarments, Extra Absorbent; and Wal-Mart Assurance Underwear for

Women, Extra Absorbent, do not fall within the scope of any valid claim of the '343 Patent, either literally or under the doctrine of equivalents.

COUNT X

(Declaratory Judgment of Invalidity Under 35 U.S.C. § 101, et. seq.)

67. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-66 as if fully set forth herein.

68. Upon information and belief, one or more claims of the '798 Patent are invalid for failing to comply with one or more requirements of the Patent Laws of the United States, Title 35, United States Code.

COUNT XI

(Declaratory Judgment of Non-infringement)

69. First Quality reasserts and realleges each and every allegation contained in paragraphs 1-68 as if fully set forth herein.

70. First Quality's products, including but not limited to its new baby diaper product; Wal-Mart Assurance Premium Underwear for Women; Walgreens Certainty Extra Absorbency; CVS Protective Underwear, Extra Absorbency; and CVS Protective Underwear - Day & Night, Super Plus Absorbency, do not fall within the scope of any valid claim of the '798 Patent, either literally or under the doctrine of equivalents.

PRAYER FOR RELIEF

WHEREFORE, First Quality respectfully requests:

- A. a Declaratory Judgment that the '298 Patent is unenforceable due to inequitable conduct;
- B. a Declaratory Judgment that the '298 Patent is invalid;
- C. a Declaratory Judgment that that making, using, selling or offering for sale of First Quality's products, including but not limited its new baby diaper product does not infringe any valid claim of the '298 Patent;
- D. a Declaratory Judgment that the '543 Patent is invalid;
- E. a Declaratory Judgment that that making, using, selling or offering for sale of First Quality's products, including but not limited its new baby diaper product does not infringe any valid claim of the '543 Patent;
- F. a Declaratory Judgment that the '542 Patent is invalid;
- G. a Declaratory Judgment that making, using, selling or offering for sale of First Quality's products, including but not limited to its new baby diaper product; Wal-Mart Assurance Premium Underwear for Women; Walgreens Certainty Ultra Thin Underwear, Extra Absorbent; Walgreens Certainty Pads, Ultimate Absorbent; Wal-Mart Assurance Underwear for Women, Extra Absorbent; Wal-Mart Assurance Underwear, Super Plus Absorbent; Wal-Mart Assurance Underwear,

Overnight Absorbent; and Wal-Mart Assurance Male Guards, Extra Absorbent, do not infringe any valid claim of the '542 Patent;

H. a Declaratory Judgment that the '343 Patent is invalid;

I. a Declaratory Judgment that that making, using, selling or offering for sale of First Quality's products, including but not limited to its new baby diaper product; Walgreens Certainty Guards for Men, Extra Absorbent; Target Diaper; Walgreens Certainty Pads, Ultimate Absorbent, Wal-Mart Assurance Belted Undergarments, Extra Absorbent; and Wal-Mart Assurance Underwear for Women, Extra Absorbent, do not infringe any valid claim of the '343 Patent;

J. a Declaratory Judgment that the '798 Patent is invalid;

K. a Declaratory Judgment that that making, using, selling or offering for sale of First Quality's products, including but not limited to its new baby diaper product; Walgreens Certainty, Extra Absorbency; CVS Protective Underwear, Extra Absorbency; and CVS Protective Underwear - Day Night, Super Plus Absorbency, do not infringe any valid claim of the '798 Patent;

L. such further relief as the Court may deem proper.

Date: March 13, 2009

/s/ Ira E. Silfin

Kenneth P. George (*admitted pro hac vice*)

Ira E. Silfin (*admitted pro hac vice*)

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First Quality Retail Services, LLC

First Quality Products, Inc.

CERTIFICATE OF SERVICE

I here by certify that on this 13th Day of March, 2009, a copy
Plaintiffs', FIRST QUALITY BABY PRODUCTS, LLC., FIRST QUALITY
PRODUCTS, INC., FIRST QUALITY RETAIL SERVICES, LLC., FIRST
AMENDED COMPLAINT was sent to all parties by operation of the Court's
filing system. Parties may access these filings through the Court's system.

/s/ Ira E. Silfin

Ira E. Silfin