

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA**

TWENTY-SIX DESIGNS, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No:
)	
GUNTERSVILLE BREATHABLES,)	JURY TRIAL DEMANDED
INC.,)	
)	
Defendant.)	

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Twenty-Six Designs, LLC (“Plaintiff”), brings this Complaint for patent infringement against Defendant Guntersville Breathables, Inc. (“Defendant”), as follows:

NATURE OF THE ACTION

1. Plaintiff brings this action for patent infringement arising under the Patent Act, **35 U.S.C. § 1**, *et seq.*, to halt Defendant’s infringement of Plaintiff’s design patent. Plaintiff presently practices the design patent at issue in this suit.

THE PARTIES

2. Plaintiff Twenty-Six Designs, LLC is a New Jersey limited liability company with its principal place of business at 240 Route 17 South, Lodi, New Jersey 07644, engaged in the business of, among other things, designing, marketing, and selling bags to consumers.

3. Upon information and belief, Defendant is an Alabama limited liability company with its principal place of business at 131 Sundown Drive, Arab, Alabama 35016, engaged in the business of selling hunting and fishing equipment, apparel, rainwear, and footwear.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 35 U.S.C. § 1 *et seq.*, and 28 U.S.C. § 1331, 28 U.S.C. § 1338(a)-(b).

5. This Court has personal jurisdiction over Defendant because it is an Alabama limited liability company doing business in Alabama. Defendant's Alabama Secretary of State registration is attached as Exhibit A.

6. Venue is proper in this District pursuant to 28 U.S.C. §1391(b)-(c) and 28 U.S.C. §1400(b), because a substantial part of the events or omissions giving rise to the claim occurred in this District, and because Defendant is located and incorporated in this District, does business in this district, and places Accused Instrumentalities into the stream of commerce with the knowledge or understanding that such products are sold in Alabama, including in this District.

RELATED CASE

7. The parties have previously litigated a trademark matter in this District involving the same products that are at issue in this patent matter, *Guntersville Breathables Inc v. Twenty-Six Designs LLC*, Case No. 4:21-cv-01543-ACA (N.D.

Ala. 2021). That suit was dismissed in favor of a separately-filed action in the District Court for the District of New Jersey, which remains ongoing. *Guntersville Breathables Inc v. Twenty-Six Designs LLC* (Case No. 2:21-cv-2029) (D.N.J. 2021). Because venue for claims of patent infringement is proper only in a district where the defendant is incorporated or has a “regular and established place of business,” see *TC Heartland LLC v. Kraft Foods Group Brands LLC.*, 137 S.Ct. 1514 (2017), Plaintiff asserts this claim as a separate action in the Northern District of Alabama.

FACTS



The Original BOGG Bag

8. While Plaintiff manufactures and sells a variety of types of BOGG Bags, its most popular product style is the original BOGG Bag pictured above, a

firm, flexible, and easily-washable bag made from ethylene-vinyl acetate (“EVA”), and designed specifically for use at the beach, lake, or pool.

9. Over the past 9 years, Plaintiff has sold its BOGG Bags internationally and across the United States through over 2,500 stores. Plaintiff has widely promoted and sold its BOGG Bags through Plaintiff’s website at <https://boggbag.com/>.

10. Plaintiff’s BOGG Bag has become so popular and is so well-regarded that it has been featured in magazines including Better Homes and Gardens, Coastal Living, Country Living and more, and on Good Morning America.

Plaintiff’s Design Patent

11. On May 12, 2015, U.S. Patent No. D728,938 (the “’938 Patent”), entitled “Carrying Case,” was granted by the United States Patent and Trademark Office to Plaintiff’s founder and CEO, Kimberlee Vaccarella, who is the sole inventor and owner of the ‘938 Patent. The ‘938 Patent covers the ornamental design for the BOGG Bags. The priority date of the ‘938 Patent is October 18, 2007. A true and correct copy of the ‘938 Patent is attached as Exhibit B hereto.

12. The ‘938 Patent is in full force and effect as of the date of this Complaint and all times relevant to the allegations herein.

13. Plaintiff is the exclusive licensee of the ‘938 Patent, and the license grants all substantial rights in the patent, including the right to enforce the patent.

The Accused Instrumentalities

14. Upon information and belief, Defendant sells hunting and fishing equipment, apparel, rainwear, footwear, and infringing EVA totes (the “Accused Instrumentalities”) in two sizes.

15. The Accused Instrumentalities are nearly identical to the design claimed in the ‘938 Patent. Both feature:

- a. A border running the circumference of the top hem;
- b. A textured border running the circumference of the base;
- c. A body with a rectangular shape and rounded corners; and
- d. Holes in the exact same positions with alternating long and short rows of holes where the long rows contain one more hole than the short rows and the holes are off-set by half the distance between the holes from one row to the next, with all 17 visible holes on the Accused Instrumentalities in the exact location as holes on the BOGG Bags, except that the Accused Instrumentalities contain Defendant’s logo where the BOGG Bags have five more holes.

16. A comparison of the larger of the two Accused Instrumentalities and the claimed design of the ‘938 Patent illustrates the exacting similarities between the two:

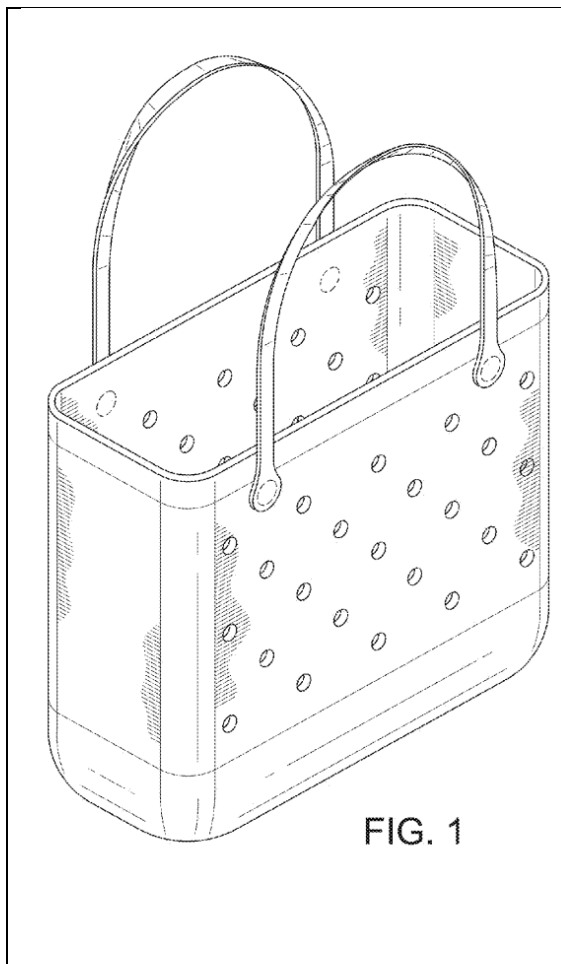
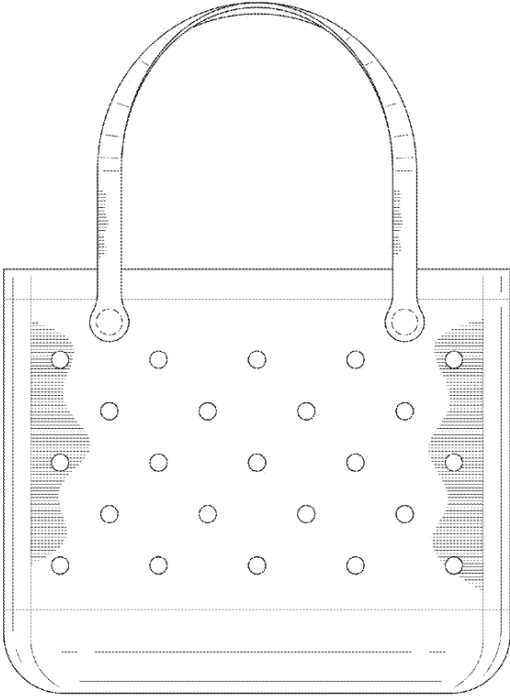



Fig. 1 of the '938 Patent showing a perspective view of the claimed carrying case

A perspective view of the Accused Instrumentality showing identical hole size, placement, and orientation (excepting the frog footprint logo), top and bottom borders, similar bag proportions, and identical handle design.

 <p>FIG. 2</p>	
<p>Fig. 2 of the '938 Patent showing a front view of the claimed carrying case</p>	<p>A front view of the Accused Instrumentality showing identical hole size, placement, and orientation (excepting the frog footprint logo), top and bottom borders, similar bag proportions, and identical handle design.</p>

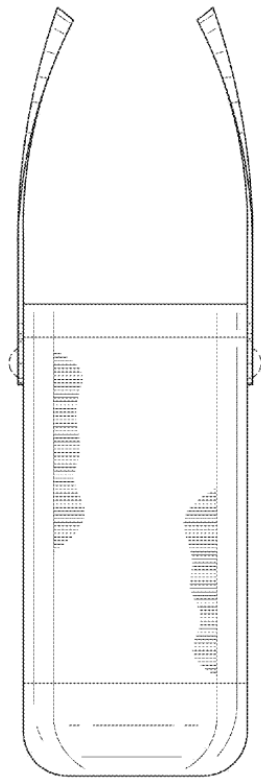


FIG. 4



Fig. 4 of the '938 Patent showing a lateral view of the claimed carrying case

A lateral view of the Accused Instrumentality showing top and bottom border elements and identical handle design

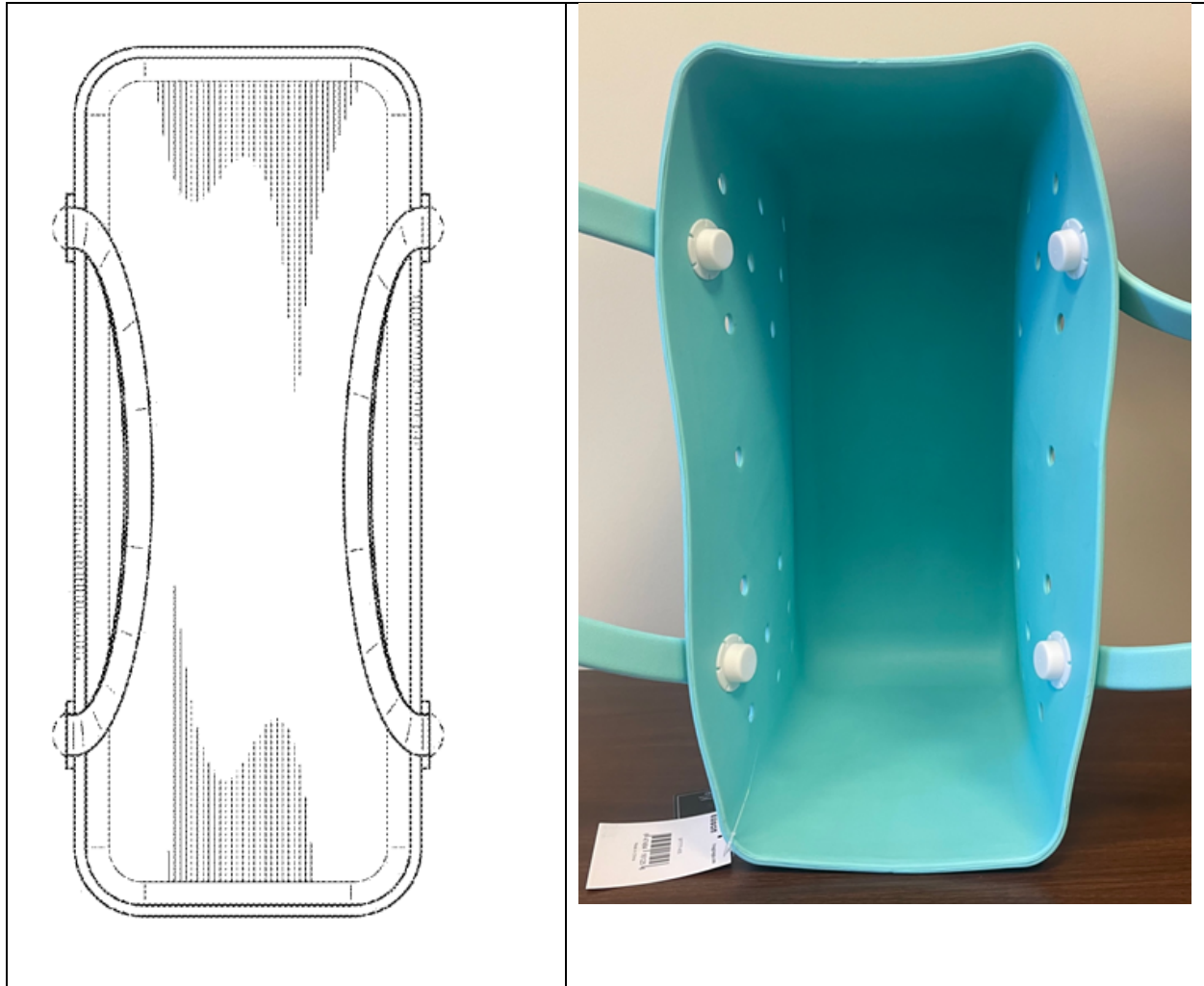




Fig. 6 of the '938 Patent showing a top view of the claimed carrying case

A top view of the Accused Instrumentality showing rounded corners and similar proportions

	
<p>Fig. 7 of the '938 Patent showing a bottom view of the claimed carrying case</p>	<p>A bottom view of the Accused Instrumentality showing rounded corners and similar proportions</p>

Defendant’s Willful Infringement

17. In or before June 2021, an agent of Defendant called Plaintiff inquiring about licensing Plaintiff’s “BOGG” trademark. Defendant’s agent, Robert Sheppard, then emailed Plaintiff on June 21, 2021, referring to the earlier call and

again inquiring about entering into a licensing deal with Plaintiff. Plaintiff declined to enter into a licensing agreement with Defendant.

18. As indicated by these initial inquiries, Defendant was aware of Plaintiff's intellectual property, and valued it sufficiently to propose a business arrangement.

19. Upon information and belief, Defendant determined that if it could not license Plaintiff's intellectual property legally, it would proceed undeterred and make knock-off BOGG Bags without a license.

20. Upon information and belief, Defendant's scheme to create knock-off BOGG Bags hit a snag when Defendant was unable to produce bags in time to create sales materials, including a pricing sheet that it wanted to send to third party retailers.

21. Defendant thus created sales materials purporting to show actual products it had made, but which instead featured images of Plaintiff's BOGG Bags that have been awkwardly edited to cover the "BOGG" label in the bottom right corner with "FROGG TOGGS" and the frog footprint logo and place Defendant's frog footprint logo in the middle of the bag. In the below images, it is apparent that Defendant took images of Plaintiff's BOGG Bags and edited them, which is especially apparent from the rectangle surrounding the large central frog logo that Defendant was unable to fully blend in.



Plaintiff's Image of its BOGG Bag

Defendant's Pricing Sheet Containing A Copy of Plaintiff's Image Edited to Add Defendant's Logo

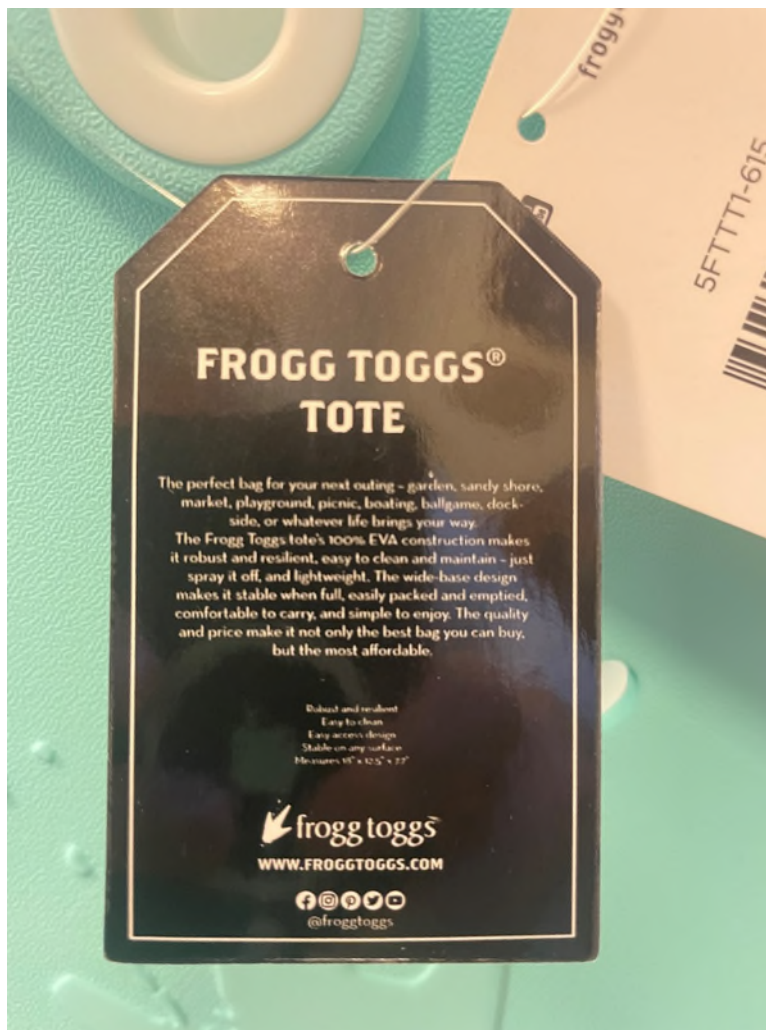


Note the faint rectangle around the logo where the orange shade of the FroggToggs frog footprint logo laid over the BOGG Bag image does not quite match the orange shade of the BOGG Bag.

22. Previously, Defendant went so far as to copy the dimensions of the BOGG Bags – 19” x 15” x 9.5” – on the hangtags of the Accused Instrumentalities, even though the actual Accused Instrumentalities are smaller. Defendant’s hangtags were since corrected after Defendant was notified of this fact during companion trademark infringement litigation, currently ongoing in the United States District Court for the District of New Jersey (Case No. 2:21-cv-2029). Plaintiff took the following photographs of the original, incorrect hangtag with the BOGG bag dimensions, Defendant’s since-corrected hangtag, and the corrected dimensions on Defendant’s website:



Original Hangtag for Large Bag with BOGG bag dimensions



Updated Hangtag with Updated Dimensions (18\" x 12.5\" x 7.7\")



Screenshot from www.froggtoggs.com showing corrected measurements

23. Upon information and belief, Defendant intentionally copied Plaintiff's BOGG Bag to create the Accused Instrumentalities, as evidenced by the Accused Instrumentalities being clearly produced to look identical to the mockup in Defendant's sales material, which was itself created by editing a photo of a BOGG Bag. The physical Accused Instrumentality only differs from the mockup in that Defendant proved unable to include white rivets on the handles like those on the BOGG Bags.

24. The Accused Instrumentalities are extremely similar to the BOGG Bags, with the following features in common:

- a. A textured border running the circumference of the top hem;
- b. A textured border running the circumference of the base;
- c. A semi-rigid synthetic base with round corners
- d. A body with a rectangular shape and rounded corners;

- e. The same semi-rigid synthetic EVA material, which;
- f. A word mark ending in “OGG” at the bottom right of the bag, in the exact same location;
- g. Identical looped handles made of the same synthetic material, riveted to the main body of the bag in the same locations;
- h. Holes in the exact same positions, with all 17 visible holes on the Accused Instrumentalities in the exact location as holes on the BOGG Bags, except that the Accused Instrumentalities contain Defendant’s logo where the BOGG Bags have five more holes; and
- i. Identical fine “diamond grid” texture at top and bottom borders on the side of the bag as shown below:



BOGG Bag texture at bottom border BOGG Bag texture at top border



FrogTogg texture at bottom border **FrogTogg texture at top border**

25. These physical similarities demonstrate intent to duplicate the patented design of the BOGG Bag.

26. Defendant additionally has used language to advertise the Accused Instrumentalities on froggtoggs.com that is nearly identical to the language drafted by Plaintiff and used to advertise the Bogg Bags on boggbag.com. Compare the following language from <https://boggbag.com/products/original-bogg-bag> as of February 24, 2022:

Take the Bogg Bag along for **all your adventures** and know that our **durable, washable**, tip-proof, sturdy design will **give you peace of mind** knowing you have everything you need in a bag, just don't forget the sunscreen! Bogg® Bags are designed with you in mind. We love the beach but we don't love bringing sand home, so we designed this bag to be washable. **Simply rinse off at the end of the day and it's as good as new again, ready for the next adventure!**

Compare to the following language from February 24, 2022, which contains similar language throughout and an identical final sentence:

The ALL NEW Frogg Toggs Tote is perfect for **all of life's adventures** - big and small. The Frogg Toggs Tote is convenient, lightweight, **durable, and washable, giving you the peace of mind** that there is no better bag to be had. These stylish bags are designed with your Outdoor Lifestyle in mind. **Simply rinse off at the end of the day and it's as good as new again, ready for the next adventure!**

27. After Plaintiff made this same comparison of the website language in a declaration in support of Plaintiff's motion to dismiss the trademark declaratory judgment litigation brought by Defendant in the Northern District of Alabama, *Guntersville Breathables Inc v. Twenty-Six Designs LLC*, Case No. 4:21-cv-01543-ACA, Defendant changed its website to use language that was not copied from Plaintiff.

28. These marketing similarities further demonstrate Defendant's intent to duplicate the patented design of the BOGG Bag.

Defendant Further Indicates Its Interest in Plaintiff's Intellectual Property

29. In an incident further evidencing the value Defendant places on Plaintiff's intellectual property while also raising serious ethical concerns, on or about November 9, 2021, Defendant's counsel improperly went around Plaintiff's counsel to contact Plaintiff directly, inquiring by telephone as to whether Plaintiff was open to being purchased by Defendant. Defendant's counsel repeated this inquiry by email on November 10, 2021. These communications occurred despite Defendant and its counsel being well aware that Plaintiff was represented by counsel

during ongoing litigation between the parties, as evidenced by Defendant's earlier October 26, 2021 letter to Plaintiff's counsel. Plaintiff rejected this inquiry.

30. In the November 10, 2021 email from Defendant's counsel to Plaintiff's president, Defendant's counsel included a written message from Defendant's president, which stated in part:

Our interest in the Boggs brand would be to present the brand and product as the cornerstone of our rapidly expanding beach and casual market lines. As the premier brand in the category they serve, the Boggs name and products would provide both immediate increase in sales and legitimacy to our brand in that category. We would keep the Boggs brand and product line intact, use it as the flagship product and name in our continued segment expansion, and to increase the visibility and efficacy of the brand via our expansive sales channels and marketing reach.

We would strive to maintain or increase the level of quality currently associated with the Boggs brand, expand the product line where applicable using other high-quality products that fit the brands core business model and consumer base; all while respecting the brand and the current consumer base.

31. On November 10, 2021, Plaintiff's counsel sent a second letter to Defendant's counsel, directly stating that Plaintiff was prepared file a lawsuit against Defendant if Defendant did not confirm by November 17, 2021 that it would cease its infringing behavior and ethical breaches.

32. Instead, Defendant filed a Complaint on November 18, 2021 in the United States District Court for the Northern District of Alabama requesting

declaratory judgment of non-infringement of Plaintiff's trademarks. That matter was transferred to and is presently ongoing in the District of New Jersey.

CLAIM : PATENT INFRINGEMENT

Violation of the Patent Act, 35 U.S.C. § 1, et seq.

33. Plaintiff incorporates the foregoing paragraphs 1-32 above as if set forth fully herein.

34. The '938 Patent is in full force and effect as of the date of this Complaint and all times relevant to the allegations herein.

35. Plaintiff is the exclusive licensee of the '938 Patent, and the license grants all substantial rights in the patent, including the right to enforce the patent.

36. Defendant has infringed and continues to infringe the '938 Patent. Defendant is infringing, directly or indirectly, by making, using, selling and/or offering to sell, or inducing others to make, use, sell and/or offer for sale, in the United States or by importing into or inducing others to import into the United States, including in Alabama and in this District, Accused Instrumentalities that are covered by the '938 Patent and will continue to do so unless enjoined by this Court.

37. Upon information and belief, Defendant's infringement of the '938 Patent has been willful and/or malicious and with actual or constructive notice of the

'938 Patent. The circumstances of this infringement warrant finding this matter of infringement to be exceptional.

38. Plaintiff has sustained damages as a result of the infringing acts of Defendant including but not limited to lost profits.

39. Plaintiff has suffered and will continue to suffer irreparable harm unless infringement of the '938 Patent is enjoined.

DEMAND FOR RELIEF

WHEREFORE, Plaintiff Twenty-Six Designs, LLC respectfully requests that this Court enter judgment in favor of Plaintiff and against Defendant as follows:

A. Pursuant to **35 U.S.C. § 283**, that Defendant, its officers, agents, servants, employees, representatives, parents, subsidiaries, affiliates, divisions, successors and assigns and all those persons or entities in active concert or participation with any of them who receive actual notice of the injunctive order, be preliminarily and permanently enjoined from selling or placing into commerce the Accused Instrumentalities and any other product that infringes the '938 Patent;

B. Pursuant to **35 U.S.C. §§ 284** and **289**, that Defendant be directed to account to Plaintiff for all gains, profits and advantages derived from its patent infringement and to pay Plaintiff all damages sustained as a result of Defendant's unlawful conduct, together with pre- and post-judgment interest;

D. Pursuant to 35 U.S.C. § 284, that Plaintiff recover from Defendant the greater of three times the amount of Defendant's profits, a reasonable royalty, and/or any damages sustained by Plaintiff, together with interest on such amount and the costs of this action;

E. Pursuant to and 35 U.S.C. § 285, that Plaintiff recover from Defendant attorneys' fees and costs in this action; and

F. That Plaintiff have such other and further relief as this Court may deem just, equitable and proper.

Respectfully submitted this the 1st day of November, 2022.

s/ Marcus R. Chatterton

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