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9 LINH THI KHANH PHAN AND
10 HUYEN THI THANH PHAN d/b/a DUSPRO

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

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

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

24 **THE PARTIES**

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

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

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

4 **THE NATURE OF THE ACTION**

5 3. This is a civil action arising under the patent laws of the United States, 35 U.S.C.
6 § 101, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking a declaratory
7 judgment that the claim in United States Design Patent number D989,355 (the “‘355 Patent”) is not
8 patentable, and the ‘355 Patent is invalid.

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

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

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

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

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

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

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

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

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

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

8 13. 35 U.S.C. 299(b) instructs that “accused infringers may not be joined in one action as
9 defendants or counterclaim defendants, or have their actions consolidated for trial, based solely on
10 allegations that they each have infringed the patent or patents in suit.”

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

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

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

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

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

24 **JURISDICTION AND VENUE**

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

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

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

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

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

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

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

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

22 **EXISTENCE OF AN ACTUAL CONTROVERSY**

23 26. There is an actual controversy within the jurisdiction of this Court under 28 U.S.C.
24 §§ 2201 and 2202.

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

1 selling bendable moss pole.

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

5 29. Plaintiff has unsuccessfully appealed Amazon’s decision to deactivate the Accused
6 Products.

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

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

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

15 33. The ‘355 Patent contains a single claim for “[t]he ornamental design for a bendable
16 moss pole assembly, as shown and described” therein.

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

19 35. The “ornamental design” claimed in the ‘355 Patent is not patentable.

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

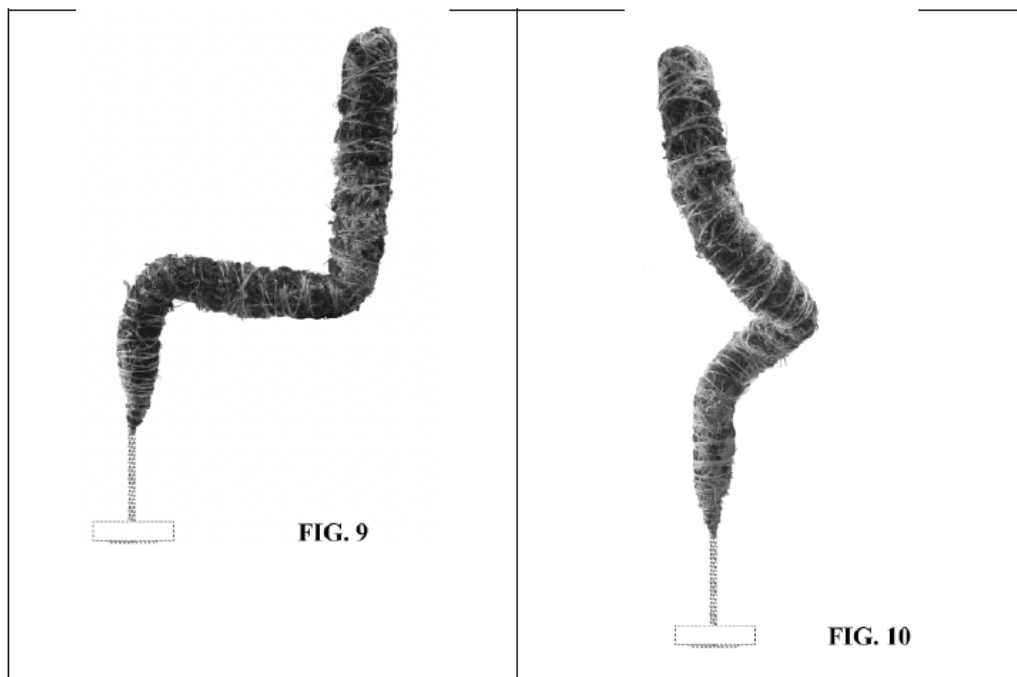
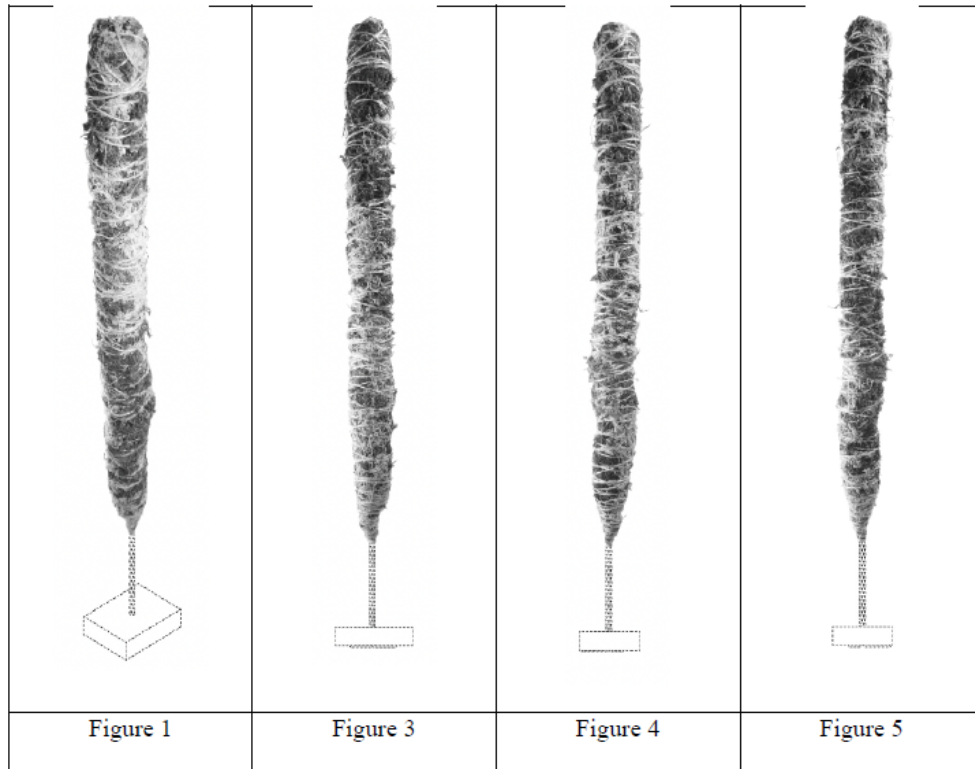
22 37. Absent a declaration of non-patentability and invalidity, MOSSIFY will continue to
23 wrongfully assert the ‘355 Patent against DUSPRO and thereby cause DUSPRO irreparable injury
24 and damage.

25 **FIRST CLAIM**

26 **DECLARATORY JUDGMENT OF NONPATENTABILITY OF THE ‘355 PATENT**

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

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



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

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

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

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

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

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

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



12 **Figure 1. Instagram image posted January 27, 2020, by user @garden.in.my.room; retrieved**
13 **9/25/23**



27 **Figure 2. Instagram image posted March 2, 2020, by user @garden.in.my.room; retrieved**
28 **9/25/23**



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

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

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



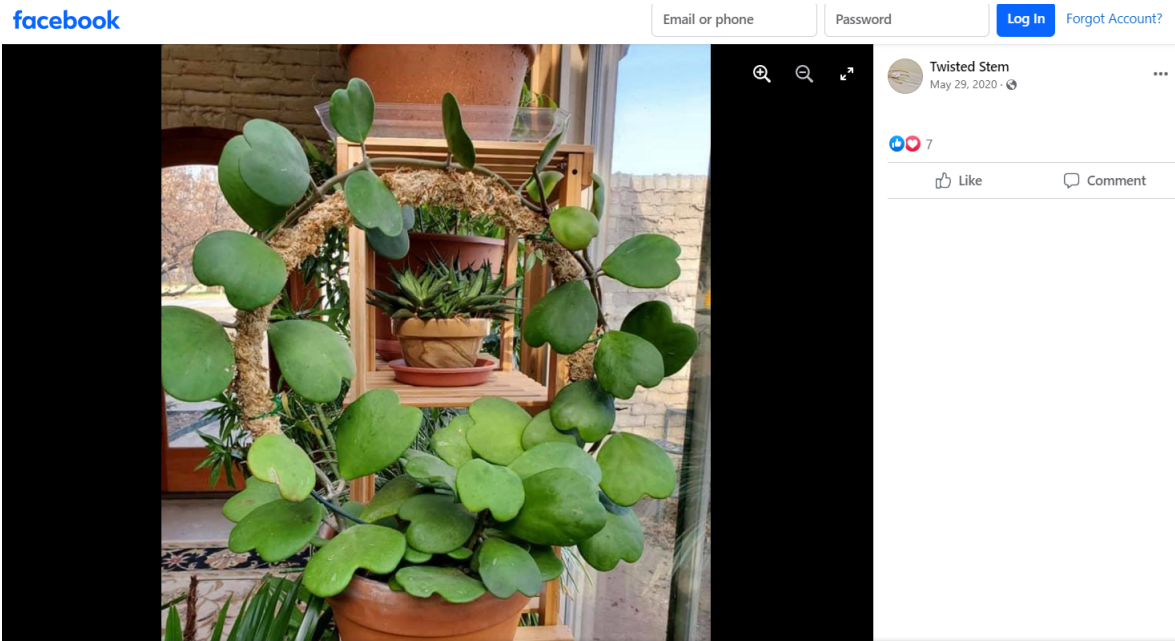
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15 **Figure 4. Instagram image posted April 28, 2020, by user @garden.in.my.room; retrieved**
16 **9/26/23**

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18 49. Figure 5 shows a collection of moss poles demonstrated to the public by Instagram
19 user @cyrilcybernated on October 4, 2019. The moss poles pictures are identical to the '355 Patent in
20 ornamental appearance and visual impression. The moss poles are bendable, generally columnar
21 portions of moss bound in string or twine in such a way that it has an irregular outer contour. The
22 columnar moss portions retain an organic look in their bent forms.
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16 **Figure 5. Instagram image posted September 20, 2019, by user @cyrilcybernated; retrieved**
17 **9/26/23**

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



12 **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

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

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

6 **SECOND CLAIM**

7 **INJUNCTIVE RELIEF FOR RETRACTION OF AMAZON REPORT**

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

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

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

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

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

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

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

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

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

1 retract its report is appropriate.

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

4 **PRAYER FOR RELIEF**

5 WHEREFORE, DUSPRO prays for judgment as follows:

- 6 1. Declaring that the '355 Patent is invalid for lack of patentability;
7 2. Declaring that MOSSIFY shall retract its Amazon report against DUSPRO;
8 3. Preliminary and permanent injunctive relief;
9 4. Declaring this case exceptional under 35 U.S.C. § 285 and awarding DUSPRO its
10 attorneys' fees and costs in connection with this case; and
11 5. Awarding DUSPRO such other and further relief as the Court deems just and proper.

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13 Dated: September 27, 2023

CARR & FERRELL LLP

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15 By: 
16 ROBERT J. YORIO


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

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