

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

RUNBERG, INC. d/b/a ZEPHYRS,
a New York corporation,

Plaintiff,

v.

MCDERMOTT, WILL & EMERY LLP;
and
BERNARD P. CODD, ESQ.,

Defendants.

INDEX NO. _____

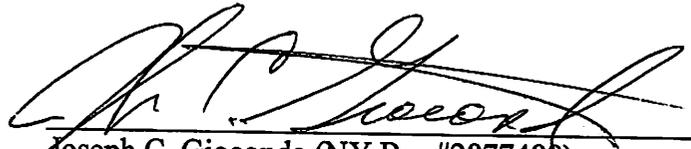
SUMMONS

To the Persons Named as Defendants above:

PLEASE TAKE NOTICE THAT YOU ARE SUMMONED to answer the Complaint of the Plaintiff herein and to serve a copy of your answer on the Plaintiff at the address indicated below within twenty (20) days after service of this Summons (not counting the day of service itself), or within thirty (30) days after service is complete if the Summons is not delivered personally to you within the State of New York.

YOU ARE HEREBY NOTIFIED THAT should you fail to answer, a judgment will be entered against you by default for the relief demanded in the complaint.

Dated: August 18, 2014
New York, NY



Joseph C. Gioconda (NY Bar #2877488)
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Attorneys for Plaintiff Runberg, Inc. d/b/a Zephyrs

DEFENDANTS:

MCDERMOTT, WILL & EMERY LLP
340 Madison Avenue
New York, NY 10173

BERNARD P. CODD, ESQ.
MCDERMOTT, WILL & EMERY LLP
340 Madison Avenue
New York, NY 10173

Venue: Plaintiffs designate New York County as the place of trial. The basis of this designation is the Plaintiff's residence in New York County under NY CPLR § 503.

4. As the Plaintiff's counsel, the Defendants and each of the partners at McDermott, Will & Emery LLP as an entity, owed the Plaintiff the strictest fiduciary duties of loyalty, care, candor, confidentiality and zealous advocacy.

5. Yet, even after repeatedly admitting that the Plaintiff's intellectual property rights have been compromised, the Defendants *still* refuse to accept responsibility.

6. The Defendants have still refused to reimburse the Plaintiff for all the damages directly and proximately caused by their own negligence and malpractice. Further, the Defendants have failed to reimburse the Plaintiff for even its legal fees and expenses incurred in the Reissue Application process, costs which are only necessary because of the Defendants' negligence and malpractice.

7. Therefore, this lawsuit is an action for professional legal malpractice, breach of fiduciary duty, breach of written contract and negligence arising out of the deficient legal services rendered by the Defendants during the drafting, prosecution and maintenance of U.S. Patent No. 8,216,021 B1 (hereinafter, the "'021 Patent"), which issued on July 10, 2012. A true and accurate copy of the '021 Patent is attached hereto as Exhibit 1.

PARTIES AND JURISDICTION

8. **PLAINTIFF RUNBERG, INC. D/B/A ZEPHYRS** ("Zephyrs") is a New York corporation having a principal place of business at 306 Jersey Avenue, Spring Lake NJ 07762. The Plaintiff is the owner of the '021 Patent and all related technology.

9. Upon information and belief, **DEFENDANT MCDERMOTT, WILL & EMERY LLP** is an Illinois limited liability partnership with a regular place of business in New York and this Judicial District at 340 Madison Avenue, New York, NY 10173-1922. Upon information and belief Defendant McDermott, Will & Emery LLP, through its member partners,

attorneys, associates and employees, regularly do business in New York, transact business in New York, litigate on behalf of their clients in this Court and other New York Courts, represent and counsel New York citizens, including the Plaintiff. Furthermore, Defendant McDermott, Will & Emery LLP is duly registered to do business in New York State as a foreign (Illinois) limited liability partnership.

10. Upon information and belief, **DEFENDANT BERNARD P. CODD, ESQ.** is an attorney admitted to practice law in the District of Columbia, Maryland and before the USPTO. Upon information and belief, at all times relevant hereto, Defendant Bernard P. Codd, Esq. was an attorney, employee, partner, member and/or agent of the Defendant McDermott, Will & Emery LLP, and in engaging in the conduct and omissions here so alleged, was acting within the scope of such capacity, employment and/or agency.

11. On March 28, 2008, Zephyrs formally engaged McDermott to advise, counsel and represent it and the Inventor in connection with the drafting, filing, prosecution and maintenance of an invention that the Inventor sought to have protected by a valid and enforceable United States utility patent. A true and accurate copy of that Engagement Letter is attached hereto as Exhibit 2.

12. This Court has personal jurisdiction over the Defendants as they are doing business in the State and County of New York, have regularly transacted business in New York, regularly done or solicited business in New York, and supplied legal, patent drafting and patent prosecution services to New York residents, including the Plaintiff, a New York corporation.

13. Venue is proper in this forum because the Plaintiff is a New York corporation and/or each of the parties regularly do business in the State and County of New York and the acts and omissions of the Defendants have directly caused injury here.

McDermott, Will & Emery LLP

14. On information and belief, in 2013, McDermott, Will & Emery LLP collected gross revenues of approximately \$881,000,000.

15. On information and belief, McDermott's profits per partner in 2013 were at an all-time high of approximately \$1.545 million.

16. On information and belief, McDermott's gross revenue per lawyer is approximately \$865,000 per year

17. On information and belief, McDermott's enormous profitability as a law firm is due in part to the millions of dollars in legal fees generated each year by lawyers in its Intellectual Property department.

18. To buttress its enormous profits, Defendants tout the critical value and importance of intellectual property to clients and prospective clients in their marketing literature, and encourage clients to aggressively protect their inventions by filing for patents in the United States.

19. Further, McDermott is consistently ranked as one of the "most active" firms for patent litigation.

20. McDermott cannot seriously contend that financial losses stemming from a failure to properly patent an invention could not seriously financially injure the Plaintiff.

21. In fact, McDermott consistently touts the revenue streams that can be generated from patent licensing programs in its marketing literature.

22. For example, McDermott's website states: "We are experienced in analyzing portfolios to present a variety of strategic alternatives for leveraging intangible assets into new market opportunities and revenue streams. These strategies include technology and merchandise

licensing, business format franchising, joint ventures, strategic alliances and partnering, co-branding and cooperative/federations.”

McDermott’s Professed Expertise in Drafting and Prosecuting Patents

23. McDermott’s accolades are legion. Printouts from McDermott’s website are attached hereto at Exhibit 3.

24. For example, McDermott has been rated a “top-tier” intellectual property firm by numerous publications. Id.

25. McDermott was ranked in Chambers USA 2014 as a Nationally Ranked Intellectual Property Department. Id.

26. Further, McDermott, Will & Emery LLP professes to have substantial expertise in handling patent prosecution for its clients on its website (id.):

Our intellectual property practice includes more than 125 registered patent lawyers and agents, representing one of the largest and most accomplished concentrations of prosecution experience worldwide.

The Firm continues to attract experienced and well-known practitioners who are leaders in the field, making our team of more than 200 lawyers and agents an invaluable asset to our clients. Members of the practice hold degrees in a wide variety of technical fields and are uniquely capable of handling intellectual property matters in virtually every technical or scientific discipline. For example, more than 150 of our members have technical and/or scientific degrees including, electrical engineering, computer engineering, chemical engineering, chemistry, biochemistry, aerospace and computer science.

Our patent prosecution lawyers are experienced in all aspects of prosecution practice.

We are committed to obtaining the broadest possible protection for each patent prosecution matter. In doing so, members of our practice are available to travel to clients’ plants and research facilities to meet with inventors in order to understand client innovations and the economic benefits expected from such innovations.

27. McDermott has received substantial attention from media and industry publications, which have noted the firm's vast patent prosecution expertise.

28. For example, *Intellectual Property Today (IP Today)* has ranked McDermott as one of the top 20 most active patent prosecution firms in its annual Top Patent Firms survey. Id.

29. On information and belief, McDermott prosecuted as many as 1,963 patents, including 1,908 utility patents, in 2012 alone, including the relevant '021 U.S. Patent. Id.

30. Zephyrs and Debra MacKinnon, understandably impressed with McDermott's substantial accolades and vast expertise in patent prosecution, engaged the law firm in connection with protecting its valuable intellectual property, including the Invention.

31. Ms. MacKinnon could have chosen from any of thousands of patent practitioners, law firms and patent agents offering these services, but relied upon McDermott for its professed expertise and sterling reputation for excellence in drafting and prosecuting U.S. utility patent applications.

32. Specifically, Defendant Bernard P. Codd, Esq., who handled the day-to-day relationship with the Inventor and who drafted the specific language included in the proposed '021 Patent's claims, was not an unsupervised paralegal.

33. Mr. Codd is a partner in McDermott's Washington, D.C. office, who focuses his entire practice on patent prosecution and infringement opinions. See attached Exhibit 3.

34. On information and belief, prior to joining McDermott, Mr. Codd was a primary patent examiner with the U.S. Patent and Trademark Office (USPTO). Id.

35. Previously, on information and belief, Mr. Codd served as both a research engineer and a project engineer in the research, development, and manufacture of a wide range of electrochemical cells. Id.

36. Upon information and belief, Mr. Codd is admitted to practice in the District of Columbia, Maryland and before the USPTO. Id.

37. Ms. MacKinnon is not a patent lawyer.

38. Ms. MacKinnon is not a patent agent.

39. Ms. MacKinnon is not an engineer.

40. In sum, Zephyrs and the Inventor had every reason to trust and rely upon McDermott's and Mr. Codd's excellent credentials and professed expertise in drafting and prosecuting the '021 Patent application, and paid a substantial premium for that supposed expertise.

41. For example, the 2008 Engagement Letter (Exhibit 2) reflects that partners at McDermott would charge the Plaintiff up to eight hundred sixty dollars (\$860.00) per hour, and associates would charge the Plaintiff as much as four hundred ninety-five dollars (\$495.00) per hour. McDermott further reserved its right to increase its billable rates annually.

42. The Plaintiff paid all of the Defendants' invoices with the reasonable expectation that it would receive the very best patent prosecution legal services that money could buy.

43. Instead, the Plaintiff received inferior legal services that fell below the degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, and far below reasonable expectations from a "top-tier" intellectual property law firm.

Zephyrs and the Inventor's Background

44. Zephyrs is a designer and supplier of high quality intimate apparel, including women's lingerie, hosiery and fashion accessories such as the kidney-shaped inserts at issue in this case.

45. Debra MacKinnon, the principal of Zephyrs and the inventor ("Inventor") of the technology at issue here, has many years of experience in the fashion and accessory industry.

46. Zephyrs is a small, woman-owned company.

47. In 2008, Ms. MacKinnon discovered that there existed a commercial need for a soft shaping insert that is anatomically designed to conform and push up the breasts, thereby increasing volume and cleavage, while providing a natural shape.

48. Ms. MacKinnon invented a novel kidney-shaped push up insert that would embody this unique invention (the "Invention"):

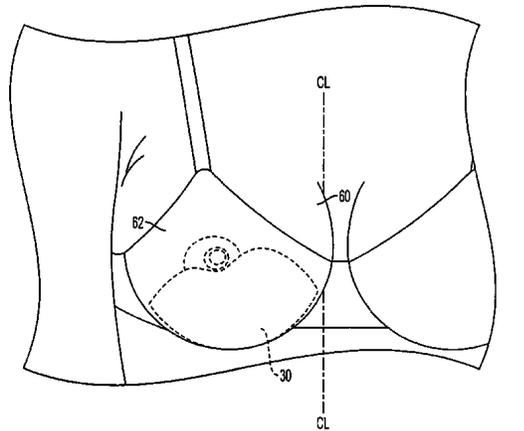


FIG. 1



FIG. 2



FIG. 3

49. The Defendants advised Zephyrs and the Inventor about how to best protect the Invention by filing for a United States utility patent.

50. When Ms. MacKinnon conversed at length with Mr. Codd in person on or about July 8, 2009, Mr. Codd insisted that the best available alternative to describe the Invention in the formal patent application would be through the use of defined “ratios.”

51. Mr. Codd explained that while visual diagrams would be included in the patent, it is the language contained in the patent’s claims that form the legal basis of a patent’s value.

52. Ms. MacKinnon is not a patent lawyer, patent agent or engineer, whereas Mr. Codd was employed by McDermott, Will & Emery LLP at all times relevant hereto.

53. Further, Mr. Codd was an accomplished patent lawyer, engineer and former primary patent Examiner at the USPTO.

54. Consequently, Ms. MacKinnon and the Plaintiff reasonably relied upon his professional legal advice and drafting skills in this regard.

55. On information and belief, Mr. Codd drafted the specific language to be contained in the ‘021 Patent’s claims and drafted and/or supervised and/or signed all other documents that were submitted to the USPTO regarding the ‘021 Patent during its prosecution.

56. The Defendants advised the Plaintiff that, in order for the ‘021 Patent to be able to claim priority to an earlier-filed provisional patent application, all relevant documents and drawings needed to be submitted to the USPTO by no later than July 31, 2009.

57. Fully aware of that fact, Mr. Codd did not send proposed claim language to the Inventor to be reviewed until July 30, 2009.

58. Further, Mr. Codd did not complete revising proposed draft claim language until after business hours on July 31, 2009, the very last day the patent application was due to be filed. See attached Exhibit 4.

59. On July 31, 2009, by submitting all required fees and submitting all appropriate disclosures, the Defendants formally applied for a United States utility patent on the Invention on the Inventor's behalf, and the USPTO assigned Application No. 12/461,116 to this application.

60. Furthermore, at all times during the prosecution of the '021 Patent, Mr. Codd directly communicated with the USPTO on behalf of the Inventor.

61. This application was duly examined by the USPTO, which ultimately issued U.S. Patent No. 8,216,021 B1 on July 10, 2012.

62. The Defendants continued to represent and counsel the Plaintiff and the Inventor during the prosecution of the '021 Patent, and well after the '021 Patent issued on July 9, 2012.

63. For example, as recently as May 11, 2014, the Defendants marked their written correspondence with the Plaintiff about the '021 Patent as a "Client-Attorney Privileged Communication."

64. At no time prior to the filing of this Complaint have the Defendants terminated their legal representation or fiduciary/contractual relationship with the Plaintiff in writing.

McDermott's Multiple Claim Drafting Errors in the '021 Patent

65. In April 2014, Ms. MacKinnon consulted with independent patent counsel who discovered that there were substantial errors contained within the '021 Patent as a direct result of the defective legal services rendered by the Defendants.

66. Independent Claim 1 and related dependent claims 2 and 3 from the issued '021 Patent are recited *verbatim*, below, with their respective drafting errors emphasized:

1. A kidney-shaped push up bra insert comprising:
a first lobe;
a second lobe on an opposing side of the bra insert from said first lobe;
a top side;
a bottom side on an opposing side of the bra insert from said top side, wherein a notch is formed in the top side between the first lobe and second lobe;
a first main surface having a depression formed adjacent the top side and extending towards the notch; and
a second main surface opposing said first main surface, wherein the second main surface is a substantially smooth arcuate-shaped surface,
wherein the first lobe is narrower in width between the top side and the bottom side than the second lobe, and the second lobe is thicker between the first main surface and the second main surface than the first lobe,
wherein a ratio of a maximum thickness between the first main surface and the second main surface to a maximum length between opposing ends of the first lobe and second lobe is less than about 9, and
wherein the bra insert is kidney-shaped as viewed from a direction perpendicular to the first main surface or second main surface.

2. The kidney-shaped push up bra insert according to claim 1, ***wherein the ratio of the maximum thickness between the first main surface and the second main surface to the maximum length between opposing ends of the first lobe and second lobe ranges from about 2 to about 8.***

3. The kidney-shaped push up bra insert according to claim 1, ***wherein the ratio of the maximum thickness between the first main surface and the second main surface to the maximum length between opposing ends of the first lobe and second lobe is about 4.5.***

* * * *

67. Independent Claim 11 and related dependent claims 12 and 13 from the issued

'021 Patent are recited *verbatim*, below, with their respective drafting errors emphasized:

11. A kidney-shaped push up bra insert comprising:
a first lobe;
a second lobe on an opposing side of the bra insert from said first lobe;
a top side;
a bottom side on an opposing side of the bra insert from said top side, wherein a notch is formed in the top side between the first lobe and second lobe; and
a first main surface having a depression formed adjacent the top side and extending towards the notch;
a second main surface opposing said first main surface, wherein the second main surface is a substantially smooth arcuate-shaped surface,

wherein the first lobe is narrower in width between the top side and the bottom side than the second lobe, and the second lobe is thicker between the first main surface and the second main surface than the first lobe,

wherein a ratio of a depth of the notch from a straight line connecting the first lobe and second lobe along the top side of the bra insert to a width of the bra insert from the top side to the bottom side at the notch is less than about 4, and

wherein the bra insert is kidney-shaped as viewed from a direction perpendicular to the first main surface or second main surface.

12. The kidney-shaped push up insert according to claim 11, ***wherein the ratio of the depth of the notch from the straight line connecting the first lobe and second lobe along the top side of the bra insert to the width of the bra insert from the top side to the bottom side at the notch ranges from about 1 to less than about 4.***

13. The kidney-shaped push up insert according to claim 11, ***wherein the ratio of the depth of the notch from the straight line connecting the first lobe and second lobe along the top side of the bra insert to the width of the bra insert from the top side to the bottom side at the notch is about 2.***

* * * *

68. Given the Defendants' billing rates, sterling reputations and professed expertise in patent drafting and patent prosecution, the proposed claims in the '021 Patent should have at least accurately described the Invention that was accurately depicted in the patent's diagrams.

69. Mr. Codd, who was responsible for the '021 Patent's drafting and prosecution and communicated with the USPTO on the Inventor's behalf, repeatedly advised the Inventor that utilizing these particular "ratios" in the claims was the advisable approach.

70. However:

- a. The language of Independent Claim 11 and related dependent claims 12 and 13 contain ratios and limitations that are fundamentally incorrectly drafted; and
- b. The language of Independent claim 1 and related dependent claims 2 and 3 were drafted in both the specification and the claim language so that the Patent states that the ratio of the thickness (T), *i.e.* from against the breast to against the bra, to the length (L), *i.e.*, from her sternum to near the armpit, is less than 9. Instead, this language appears ***backwards*** in the patent's claims. Presumably, Mr. Codd intended to say $L/T < 9$, but in words, he expressed $T/L < 9$. This same type of drafting error appears with respect to the notch/depth ratio, as well.

71. But for the Defendants' drafting errors, the Invention that was accurately depicted in the diagrams would have been deemed patentable by the USPTO.

72. However, several claims of the '021 Patent were severely damaged or nullified as a direct and proximate result of the Defendants' legal advice and drafting of the proposed claim language.

Zephyrs' Attempts to Mitigate the Damages from McDermott's Errors

73. Upon discovering the serious errors in the '021 Patent in early 2014 after consulting with independent patent counsel, the Inventor brought them to the attention of the Defendants, who were still acting as attorneys for the Plaintiff in the prosecution and maintenance of the '021 Patent.

74. In multiple telephone conversations with the Inventor, Mr. Codd has admitted there were significant and serious errors contained within the '021 Patent.

75. Further, the Defendants have acknowledged that the serious drafting errors appearing in both types of claims may and should be corrected/amended by filing for a reissue application in the USPTO.

76. The Plaintiff retained the independent law firm of Oblon Spivak McClelland Maier and Neustadt, LLP ("Oblon Spivak") to file a reissue application on the Inventor's behalf.

77. Mr. Codd has admitted that the '021 Patent contains multiple errors in telephone conversations with Oblon Spivak's attorneys.

78. The Plaintiff has been forced to mitigate the damages caused by the Defendants' malpractice at its own substantial expense.

79. At no time did the Defendants offer to reimburse the Plaintiff for its expenses incurred or for mitigating the damages caused by their own malpractice and negligence.

80. Further, at no time did the Defendants offer to reimburse the Plaintiff for the damages caused by their own malpractice and negligence.

81. The Defendants' conduct as complained of herein fell far below the high standard of care that McDermott professes to exercise, and below the standard of care of a reasonable lawyer acting in similar circumstances.

82. Oblon Spivak has filed a reissue application on the Plaintiff's behalf, which is now pending before the USPTO (the "Reissue Application"). Attached as Exhibit 5 is a true and accurate copy of the Reissue Application filed on July 9, 2014.

83. This Reissue Application attempts to "correct" at least some of the errors caused by the Defendants.

84. However, Claims 11, 12 and 13 in the '021 Patent were so fundamentally flawed, that they must be cancelled by the USPTO. Id.

85. Further, it is important to note that the reissue process to "correct" the '021 Patent can only correct Claims 1, 2 and 3, and only on a prospective basis.

86. Furthermore, under applicable federal law, because the original '021 Patent is defective, the Reissue Process does not permit Zephyrs to sue under or assert the original, damaged patent from the date that infringement began until a reissue application is granted, a not insubstantial *interim* period that could last up to three years from when the '021 Patent issued (the "Blackout Period").

87. Zephyrs has already suffered economic damages during this Blackout Period.

88. The economic damage to Zephyrs from the Defendants' conduct is not speculative.

89. Several large retailers such as Amazon.com, Victoria's Secret and their respective suppliers have already decided to capitalize on this opportunity, and willfully infringe upon the Invention that should have been claimed accurately in the '021 Patent.

90. Finally, companies which desire to sell products that infringe upon the reissued patent during this Blackout Period may possess a statutory and equitable defense of “intervening rights” to the Reissued Patent, as a direct and proximate result of McDermott’s negligence.

91. In other words, if a third party begins manufacturing or selling products that incorporate the Invention now (as many already have), they are permitted to keep selling such products *even if they would infringe upon a Reissued Patent that is later granted and issued.*

92. Thus, as a direct and proximate result of the Defendants’ malpractice and negligence as complained of herein, the Plaintiff has suffered serious economic injury, and continues to suffer such injuries.

93. Already during this Blackout Period, at least five different third parties have taken advantage of this golden opportunity created solely by the Defendants’ malpractice: (1) Victoria’s Secret; (2) Victoria’s Secret’s unknown supplier/manufacturer; (3) Amazon.com, Inc.; (4) Envy Body Shop; and (4) Amazon/Envy’s unknown supplier/manufacturer.

Zephyrs’ History With Victoria’s Secret

94. On information and belief, third party Victoria’s Secret owns and/or manages approximately 1,000 retail stores in all fifty states, through which they do substantial business.

95. Through the Victoria’s Secret print catalog and online distribution through VictoriasSecret.com, Victoria’s Secret reaches more than 390 million customers each year.

96. Zephyrs has a long history with Victoria’s Secret.

97. For over a decade, as a successful and reliable vendor, Zephyrs designed and supplied high quality products to Victoria’s Secret, including hosiery products and the kidney-shaped inserts at issue here, which were sold under the Victoria’s Secret brand “STYLE SECRETS” (Exhibit 6):



FIG. 4

98. The contractual arrangement was a successful one for the parties, and was characterized as an “important effort” in 2001 by then-President and CEO of Limited Logistics Services, Inc., speaking as the authorized representative of Defendant Victoria’s Secret Stores, Inc.

99. Victoria's Secret successfully sold at least \$120 million worth of Zephyrs-designed products to consumers throughout all fifty states, through the Victoria's Secret chain of retail stores, the Victoria's Secret print catalogue, and the popular Victoria's Secret website.

100. While the '021 Patent was still pending, from September 30, 2011 to July 12, 2012, Zephyrs supplied packages of the distinctive kidney-shaped inserts to Victoria's Secret.

101. Victoria's Secret sold these kidney-shaped inserts through their network of stores and on their website to consumers at \$58.00 per package. See Id.

102. In August 2012, Victoria's Secret purported to "terminate" the Master Sourcing Agreement with Zephyrs based on disagreements. Simultaneously, Zephyrs filed a federal lawsuit against Victoria's Secret. That case was captioned *Runberg, Inc. d/b/a Zephyrs v. Victoria's Secret Stores, Inc., et al.*, United States District Court for the Southern District of Ohio, Eastern Division, Case No. 2:12-CV-722 (the "Prior Lawsuit").

103. The Complaint in the Prior Lawsuit accused Victoria's Secret of intentionally breaching the parties' Amended Master Sourcing Agreement, by:

- a. Committing false advertising by misleading consumers about the nature and quality of the hosiery products that they were offering for sale as those designed and previously supplied by Zephyrs, by falsely depicting Zephyrs' products on the packaging, when they were accused of selling cheaper, lower quality "knockoffs";
- b. materially breaching the written Amended Master Sourcing agreement with Zephyrs by, *inter alia*, directly contacting Zephyrs' suppliers, and by unlawfully using Zephyrs' proprietary information when doing so, in order to reduce or eliminate the volume of sales conducted through Zephyrs; and
- c. delaying processing usual orders, until and unless Zephyrs acceded to a variety of unreasonable demands. One particular demand included the parties entering into a new agreement under which Zephyrs would be required to cede ownership of its own proprietary information, patents and other intellectual property.

104. Victoria's Secret denied each of these allegations, and filed a Counterclaim against the Plaintiff alleging that Zephyrs had breached the same supply agreement. In its

Counterclaim, Victoria's Secret alleged, *inter alia*, that the Plaintiff had failed to comply with its brand standards and cited various audits of Zephyrs' facilities.

Victoria Secret's Willful Copying of the Invention

105. When the invention was conceived and reduced to practice by the Inventor, Victoria's Secret did not provide creative or other input into the designs for the kidney-shaped inserts Invention.

106. Further, Victoria's Secret did not modify the Invention at that time.

107. The Amended Master Services Agreement between the parties contemplated that "[i]f [Zephyrs] provides the designs for any Goods to be manufactured or sold by [the Victoria's Secret Defendants], then [Zephyrs] shall retain rights to the designs...."

108. Therefore, Zephyrs and Ms. MacKinnon own the entire right and title to the Invention and all related technology.

109. During the course of communications in the Prior Lawsuit, Zephyrs became concerned that Victoria's Secret might later choose to infringe upon the Plaintiff's valid and enforceable U.S. patent rights in the Invention.

110. Specifically, Zephyrs had become concerned that Victoria's Secret might later ask a new supplier to slavishly copy and effectively "knock off" the unique patented shaping inserts that she had previously supplied to Victoria's Secret.

111. Consequently, even though Victoria's Secret was already aware of the existence of the '021 Patent from other written communications, Zephyrs' outside counsel formally placed Victoria's Secret on notice of the concern about this prospect of patent infringement on September 12, 2012, by writing a formal letter to Victoria Secret's outside counsel, stating:

To the extent that Victoria's Secret apparently intends to sell third parties' gel-shaping inserts, we would like to bring the attached U.S. Patent No. 8,216,021 owned by our client to your attention, to ensure that your clients do not infringe it directly or indirectly.

112. A hard copy of the '021 Patent was provided to Victoria's Secret's outside counsel at that time.

113. Victoria's Secret never responded to this portion of the Plaintiff's letter.

114. Victoria's Secret never sought or received any license, express or implied, to practice the '021 Patent from the Plaintiff.

115. Subsequently, the parties in the Prior Lawsuit decided to dismiss their claims and counterclaims with prejudice.

116. At the time that the claims and counterclaims in the Prior Lawsuit were dismissed with prejudice, the parties made it clear to the Court and to one another that the mutual releases that were exchanged and the dismissal related solely to the breach of contract claims actually asserted in the Complaint and Counterclaim.

117. On the formal record before the District Court, the parties expressly reserved their rights with regard to any unasserted, potential future patent disputes that might arise between them:

6 MR. GIOCONDA: Joseph Gioconda, of the Gioconda Law
7 Group, admitted pro hac vice for the plaintiff Runberg. And
8 with me is the principal of Runberg, Inc., d/b/a Zephyrs,
9 Ms. Debra MacKinnon.

10 THE COURT: Okay.

11 Mr. Shumate.

12 MR. SHUMATE: Keith Shumate, from Squire, Sanders &
13 Dempsey, here on behalf of the defendants. Also with me is my
14 colleague, Heather Stutz. And we also have our client
15 representative, Mr. Joseph Quigley. And we have one of our
16 summer clerks, Andrew King.

* * *

16 Mr. Gioconda, do you want to add anything?

17 MR. GIOCONDA: Just two quick points, Your Honor.

* * *

21 and, second, that this is a mutual release of claims that are
22 those asserted in this action or could have been asserted in
23 this action with respect to the subject matter thereto and
24 expressly does not include any possible claims relating to
25 patent infringement, for example, which are not at issue in

1 this case.

5

9 THE COURT: Okay. And as I understand it -- well,
10 anything else, or is everybody in agreement with those terms?

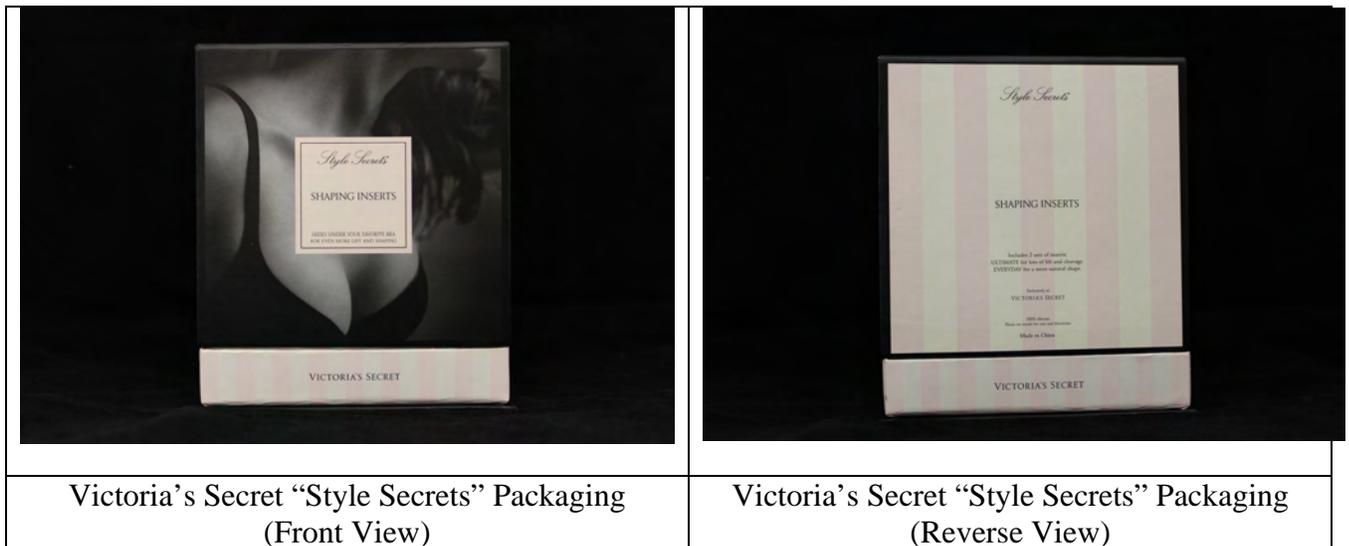
11 MR. GIOCONDA: The plaintiff is in agreement with
12 those terms, Your Honor.

13 MS. STUTZ: Defendants are in agreement as well.

118. Since that time, Victoria’s Secret has slavishly copied the Invention, without paying any royalty or receiving any express or implied license from the Plaintiff.

119. The specific identity of Victoria’s Secret’s supplier is not yet known, but this unknown supplier represents yet another party who has trampled on the Invention during the Blackout Period.

120. In fact, the kidney-shaped inserts are being sold by the Victoria’s Secret Defendants in the same packaging under their brand STYLE SECRETS, and for the same price to customers, in their stores and on its website:



121. The products currently being sold by Victoria’s Secret are a slavish copy of the Invention, and would have infringed upon the Plaintiff’s ‘021 Patent, had the claims been accurately drafted by the Defendants.

122. Below are comparisons between the accurate figures included in the ‘021 Patent, and Victoria’s Secret’s Kidney-Shaped Push Up Inserts:

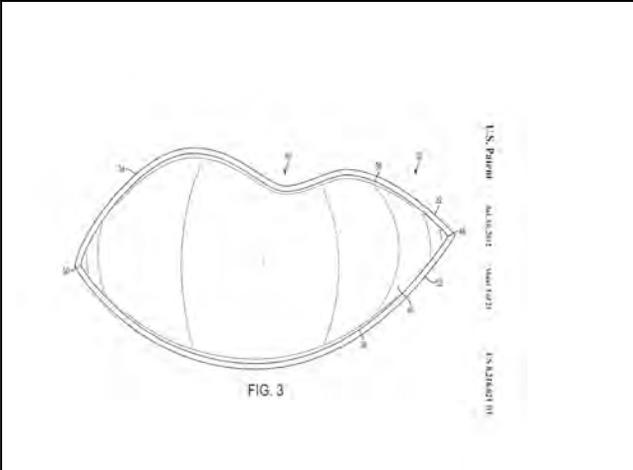


Figure 3 from U.S. Patent No. 8,216,021 B1 (Main Surface)



Victoria's Secret's Kidney-Shaped Push Up Insert (Main Surface)

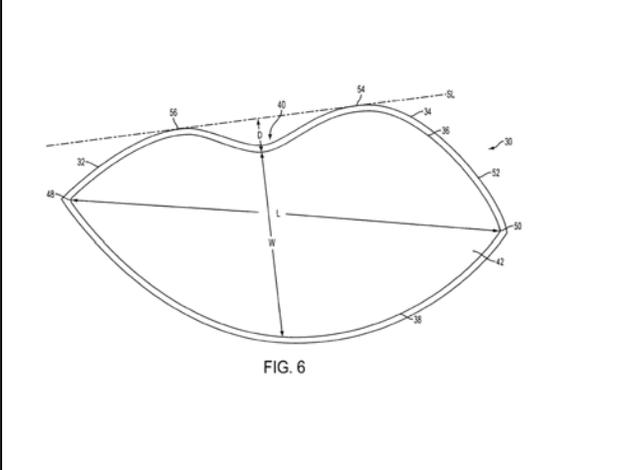


Figure 6 from U.S. Patent No. 8,216,021 B1 (Isometric Reverse View)



Victoria's Secret's Kidney-Shaped Push Up Insert (Reverse View)

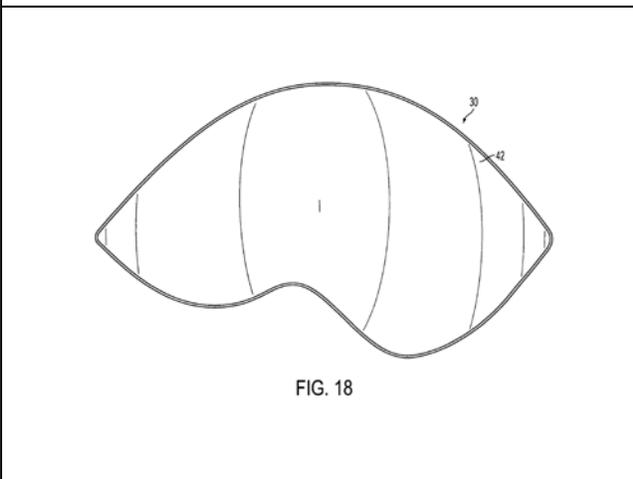


Figure 18 from U.S. Patent No. 8,216,021 B1



Victoria's Secret's Kidney-Shaped Push Up Insert

Damages to Zephyrs from Victoria's Secret's Conduct

123. Zephyrs has experienced serious harm from its inability to collect royalties under the '021 Patent as a direct and proximate consequence of the Defendants' acts and omissions.

124. The past, present and future damages to Zephyrs from Victoria's Secret's ongoing, royalty-free sales can be ascertained with reasonable certainty.

125. While the '021 Patent was pending, for the three quarters from September 30, 2011 to July 12, 2012, Zephyrs sold Victoria's Secret large quantities of kidney-shaped inserts.

126. Thus, while the '021 Patent was pending, Victoria's Secret ordered a specific number of units per quarter from Zephyrs.

127. Zephyrs sold the kidney-shaped inserts at a certain wholesale price per package to Victoria's Secret's stores, and a slightly different wholesale price per package to Victoria's Secret's Catalog.

128. Victoria's Secret sold, and continues to sell, the shaping inserts to consumers for \$58.00 at retail. See Exhibit 6.

129. Furthermore, Victoria's Secret's unknown new supplier is manufacturing, distributing and selling slavish copies of the Invention.

130. No royalties under the '021 Patent have been paid to the Plaintiff for these sales.

131. Presumably, on information and belief, these third parties' manufacture, distribution and sale of these royalty-free products can and will continue indefinitely.

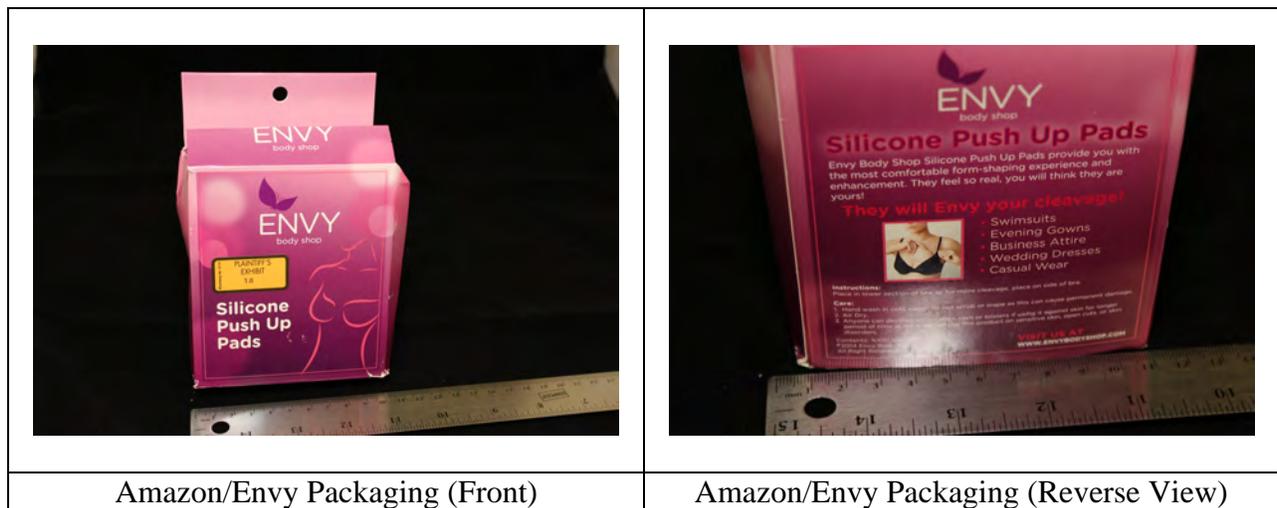
132. Therefore, the Plaintiff estimates that its lost revenue from the damaged '021 Patent likely **exceeds four million nine hundred thousand dollars (\$4,900,000)** in the form of lost royalty revenue from Victoria's Secret.

133. This demand is based upon projected royalty-free sales by Victoria's Secret during the Blackout Period and thereafter, for the entire twenty (20) year term of the original '021 Patent.

134. This demand does not include the royalty-free sales being made by Victoria's Secret's unknown supplier.

Damages to Zephyrs from Amazon/Envy's Conduct

135. Further, upon information and belief, third party Amazon.com, Inc. has also been marketing, distributing and selling a product distributed by third party Envy Body Shop ("Envy"), and manufactured by an unknown manufacturer (see Exhibit 7):



136. These products currently being sold and distributed by Amazon/Envy are also slavish copies of the Invention, and would have infringed upon the Plaintiff's '021 Patent, had the claims been accurately drafted and described by the Defendants.

137. Below are comparisons between the accurate figures included in the '021 Patent, and Amazon/Envy's Kidney-Shaped Push Up Insert:

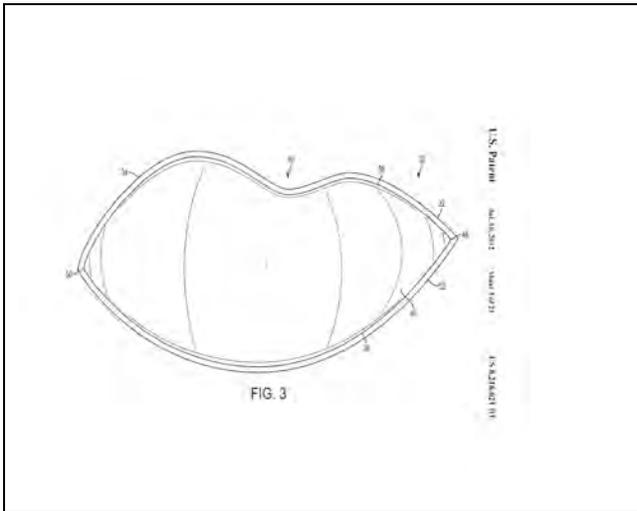


Figure 3 from U.S. Patent No. 8,216,021 B1
(Main Surface)



Amazon/Envy's Kidney-Shaped Push Up
Insert (Main Surface)

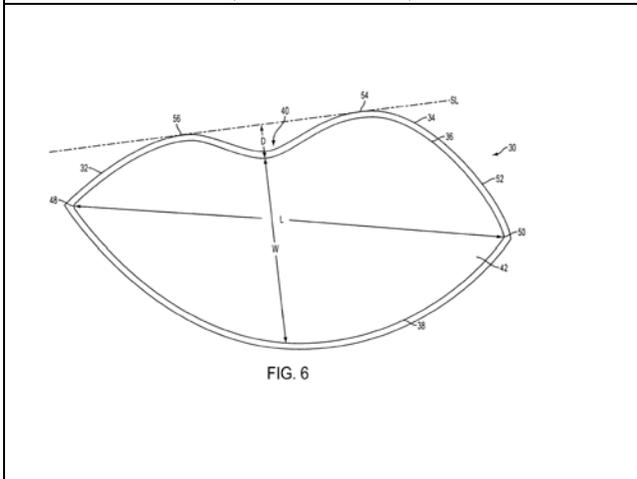
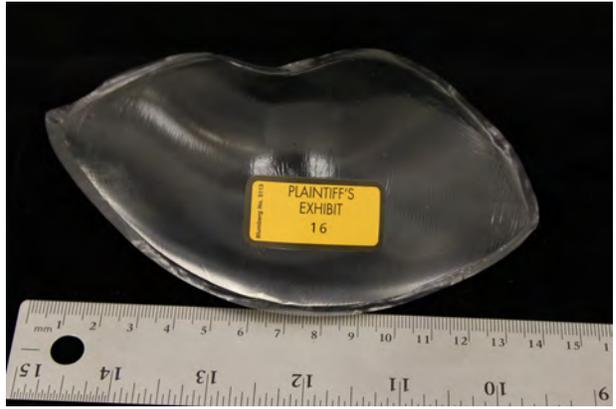


Figure 6 from U.S. Patent No. 8,216,021 B1
(Isometric Reverse View)



Amazon/Envy's Kidney-Shaped Push Up
Insert (Reverse View)

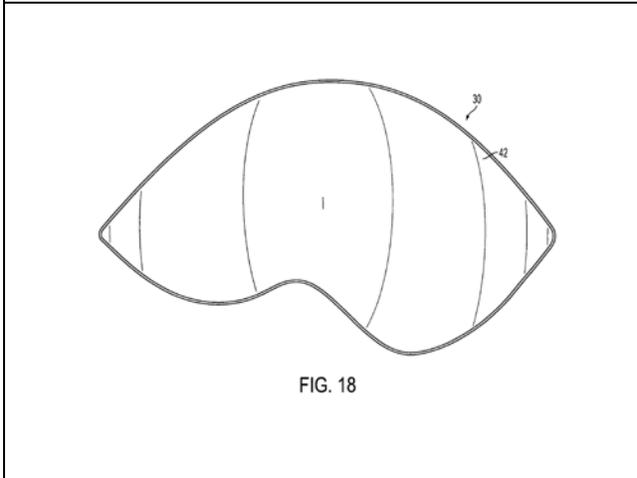


Figure 18 from U.S. Patent No. 8,216,021 B1



Amazon/Envy's Kidney-Shaped Push Up
Insert

Damages to Zephyrs from Amazon/Envy/Unknown Manufacturer's Conduct

138. Amazon and/or Envy (and its unknown manufacturer/supplier) are currently manufacturing, distributing and selling slavish copies of the Invention for \$17.79 each. Id.

139. Because of the Defendants' conduct as complained of herein, the Plaintiff has been prevented from formally asserting any patent rights to the Invention against Amazon/Envy and its unknown manufacturer.

140. No royalties under the '021 Patent have been paid to the Plaintiff for these sales.

141. Presumably, on information and belief, these third parties' manufacture, distribution and sale of these royalty-free products can and will continue indefinitely.

142. Therefore, the Plaintiff estimates that its lost revenue from the damaged '021 Patent likely **exceeds one million dollars (\$1,000,000)** in the form of lost royalty revenue from Amazon/Envy and its unknown manufacturer/supplier.

143. Further, as even more new parties begin infringing upon the Invention during the Blackout Period and thereafter, Zephyrs' lost revenue and damages will only continue to increase.

144. Finally, the Plaintiff will likely be forced to incur over **thirty thousand dollars (\$30,000)** in additional legal fees and expenses to file a Reissue Application to mitigate the harm caused by the Defendants' conduct.

FIRST CAUSE OF ACTION

**PROFESSIONAL LEGAL MALPRACTICE
IN VIOLATION OF NEW YORK LAW**

145. The Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 to 144 of this Complaint as though fully set forth herein.

146. As complained of herein, the Defendants failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community.

147. The Defendants' conduct as complained of herein fell below the required standard of care of patent attorneys rendering legal services to New York citizens.

148. As a direct and proximate result of the Defendants' legal malpractice as complained of herein, the Plaintiff has suffered and will continue to suffer damages in excess of **five million nine hundred thirty thousand dollars (\$5,930,000)**.

149. The Plaintiff is entitled to recover from the Defendants all the damages suffered by it, as a result of their acts and omissions as complained of herein.

SECOND CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY UNDER NEW YORK LAW

150. The Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 to 149 of this Complaint as though fully set forth herein.

151. As the Plaintiff's attorneys, the Defendants and each of their members and partners as an entity, owed and owe a fiduciary duty to the Plaintiff, to act at all times in the Plaintiff's best interests, and had a duty, among other things, to perform the legal services for which they were retained with reasonable care and skill, to act in the Plaintiff's highest and best interests at all times, and not to expose the Plaintiff to any unnecessary risk or peril. This confidential and fiduciary duty was never repudiated by the Defendants at any time herein mentioned.

152. By their conduct and omissions complained of herein, the Defendants breached their fiduciary duties and obligations to the Plaintiff. Among other things, the Defendants

breached their duty by failing to properly counsel and advise the Plaintiff with regard to the '021 Patent's drafting, prosecution and maintenance, as complained of herein.

153. As a direct and proximate result of the Defendants' breaches of fiduciary duty as complained of herein, the Plaintiff has suffered and will continue to suffer damages in excess of **five million nine hundred thirty thousand dollars (\$5,930,000)**.

154. The Plaintiff is entitled to recover from the Defendants all the damages suffered by it, as a result of their acts and omissions as complained of herein.

THIRD CAUSE OF ACTION

BREACH OF WRITTEN CONTRACT UNDER NEW YORK LAW

155. The Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 to 154 of this Complaint as though fully set forth herein.

156. The Defendants materially breached the written terms of contract in the Engagement Letter, attached hereto as Exhibit 2.

157. As a direct and proximate result of the Defendants' breaches of written contract as complained of herein, the Plaintiff has suffered and will continue to suffer damages in excess of **five million nine hundred thirty thousand dollars (\$5,930,000)**.

158. The Plaintiff is entitled to recover from the Defendants all the damages suffered by it, as a result of their acts and omissions as complained of herein.

FOURTH CAUSE OF ACTION

NEGLIGENCE UNDER NEW YORK LAW

159. The Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 to 158 of this Complaint as though fully set forth herein.

160. The Defendants failed to exercise reasonable care and skill in advising and representing Plaintiff, as complained of herein.

161. The Defendants' conduct as complained of herein fell below the required standard of care of attorneys rendering legal services to New York citizens.

162. As a direct and proximate result of the Defendants' negligence as complained of herein, the Plaintiff has suffered and will continue to suffer damages in excess of **five million nine hundred thirty thousand dollars (\$5,930,000)**.

163. The Plaintiff is entitled to recover from the Defendants all the damages suffered by it, as a result of their acts and omissions as complained of herein.

PRAYER FOR RELIEF

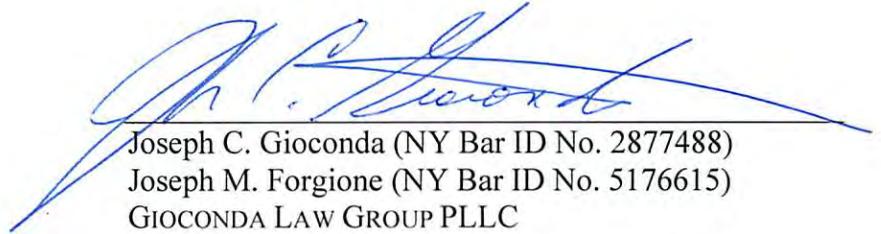
WHEREFORE, the Plaintiff prays for the following relief:

- a. That the Defendants be ordered to account for and pay to Plaintiff all damages caused to it by reason of their acts and omissions as complained of herein;
- b. That the Plaintiff be awarded its attorneys' fees, expenses, and costs incurred in this action;
- c. That Plaintiff be granted pre-judgment and post-judgment interest on the damages caused to it by reason of the Defendants' acts and omissions as complained of herein;
- d. That the Defendants be ordered to pay all costs associated with this action; and
- e. That the Plaintiff be granted such other and additional relief as the Court deems just and proper.

A TRIAL BY JURY IS DEMANDED

New York, NY
August 18, 2014

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "J. C. Gioconda", is written over a horizontal line.

Joseph C. Gioconda (NY Bar ID No. 2877488)

Joseph M. Forgione (NY Bar ID No. 5176615)

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