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7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
11

12 OLIVET INTERNATIONAL INC., a  
California Corporation,

13 Plaintiff,

14 vs.

15 COOLER CONCEPTS LLC, an  
Arizona Limited Liability Company,

16 Defendant.  
17

) Case No. CV-11-10632 GAF(OPx)  
)  
) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF  
) MOTION BROUGHT BY COOLER  
) CONCEPTS LLC TO DISMISS THE  
) COMPLAINT PURSUANT TO RULE  
) 12 FOR LACK OF JURISDICTION  
) AND FAILURE TO STATE A CLAIM,  
) OR IN THE ALTERNATIVE FOR A  
) MORE DEFINITE STATEMENT OF  
) THE CLAIM  
)

18 Hearing:

19 \_\_\_\_\_  
20 Date: May 7, 2012  
Time: 9:30 AM  
Court: Hon. Gary A. Feess  
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1 **I. INTRODUCTION**

2 Defendant Cooler Concepts LLC (hereinafter “Cooler Concepts”) moves to  
3 dismiss the complaint for lack of personal jurisdiction, lack of subject matter  
4 jurisdiction, and failure to state a claim for relief. In the alternative Cooler  
5 Concepts moves for a more definite statement of the claim from plaintiff before  
6 being required to respond.

7 Cooler Concepts is an Arizona limited liability company that is located in  
8 Arizona. Cooler Concepts does not have any offices, officers, agents, operations or  
9 property in the state of California. There are no grounds to exercise general  
10 personal jurisdiction over Cooler Concepts in California. It is also established law  
11 that a patent owner is not subject to specific personal jurisdiction in a forum for a  
12 declaratory judgment action merely on account of sending a letter regarding patent  
13 rights to an infringer in that forum, which is all that has been alleged in this case.  
14 Accordingly, there is no personal jurisdiction over Cooler Concepts for this action  
15 and the complaint must be dismissed. See Fed. R. Civ. P. 12(b)(2).

16 There is also no subject matter jurisdiction under the Declaratory Judgment  
17 Act. The law does not support a declaratory judgment action against an owner’s  
18 entire portfolio of patents simply because the owner of the portfolio has sent a letter  
19 indicating that a license from the patent owner may be required under its patents.  
20 The law for declaratory judgment jurisdiction requires the plaintiff to show a  
21 "definite and concrete" dispute for each patent, which requires a showing that rights  
22 were asserted under each particular patent against a particular product. There are  
23 no facts showing that Cooler Concepts has asserted its rights under a particular  
24 patent against a particular product of plaintiff’s. So there is no definite and concrete  
25 dispute for the five design patents that plaintiff has included in this action.  
26 Accordingly, there is no jurisdiction under the declaratory judgment act, and  
27 plaintiff’s complaint must be dismissed. Fed. R. Civ. P. 12(b)(1).

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1 Plaintiff has also failed to state a claim for declaratory relief. The plaintiff  
2 seeks a declaration from the court that plaintiff has not infringed each of five  
3 different U.S. design patents. To state a claim for declaratory relief the plaintiff had  
4 to plead sufficient facts showing that it is entitled to a conclusive decree regarding  
5 infringement for each of the patents. As a matter of law a decree regarding patent  
6 infringement can only be conclusive with respect to particular products, the facts of  
7 which are essential to any determination of infringement. Yet the plaintiff has  
8 failed in its complaint to identify for each patent-in-suit what product allegedly  
9 doesn't infringe the patent. Without pleading such essential facts it can't be  
10 reasonably concluded that a conclusive decree regarding the non-infringement of a  
11 patent could be entered by the Court. Accordingly, plaintiff has failed to state a  
12 claim for declaratory relief of non-infringement, and the complaint must be  
13 dismissed. Fed. R. Civ. P. 12(b)(6).

14 Lastly, the complaint is so vague or ambiguous that Cooler Concepts cannot  
15 reasonably prepare a response. See Fed. R. Civ. P. 12(e). In any action seeking a  
16 declaratory judgment of non-infringement a claim for patent infringement is  
17 considered a compulsory counterclaim. However, to assert a claim for patent  
18 infringement the law requires that a patent owner first compare the claims of the  
19 patent to the accused product. This necessarily requires that the patent owner know  
20 the facts concerning the accused product. Yet nowhere in the complaint does  
21 plaintiff sufficiently identify what the "accused product" is for each particular  
22 patent. This renders the complaint filed by plaintiff unintelligible for purposes of  
23 Cooler Concepts being able to prepare a compulsory counterclaim of patent  
24 infringement.

25 Accordingly, in the event that the Court does not dismiss the complaint for  
26 lack of jurisdiction and/or failure to state a claim, plaintiff should, for each of the  
27 five design patents, be required to provide a more definite statement that clearly  
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1 identifies what product(s) plaintiff is seeking a declaratory judgment on for the  
2 patent, and facts sufficient to allow Cooler Concepts to know the appearance of the  
3 product(s) to an ordinary observer (e.g. product photographs). Only with such  
4 details can Cooler Concepts reasonably be expected to prepare a complete response  
5 with any compulsory counterclaim of patent infringement. Fed. R. Civ. P. 12(e).

6  
7 **II. THERE IS NO PERSONAL JURISDICTION.**

8 Plaintiff bears the burden of establishing that jurisdiction is proper.  
9 *Boschetto v. Hansing*, 539 F. 3d 1011, 1015 (9<sup>th</sup> Cir. 2008). Plaintiff may not  
10 simply rest on the bare allegations of the complaint. *Schwarzenegger v. Fred*  
11 *Martin Motor Co.*, 374 F. 3d 797, 800 (9<sup>th</sup> Cir. 2004). The truth of allegations in a  
12 pleading may not be assumed if contradicted by affidavit.

13 In a declaratory judgment action no federal statute authorizes personal  
14 jurisdiction, so the law of the state in which the court sits applies. Fed. R. Civ. P.  
15 4(k)(1)(A). California's long-arm statute, Cal. Civ. Proc. Code § 410.10, is  
16 coextensive with federal due process requirements. So the jurisdictional analyses  
17 under state law and federal due process are the same. *Schwarzenegger*, 374 F.3d at  
18 800-01. For the court to exercise personal jurisdiction over a nonresident defendant  
19 consistent with due process, the defendant must have "certain minimum contacts"  
20 with the relevant forum "such that the maintenance of the suit does not offend  
21 `traditional notions of fair play and substantial justice.'" *International Shoe Co. v.*  
22 *Washington*, 326 U.S. 310, 316 (1945). Here there are not sufficient minimum  
23 contacts to support personal jurisdiction in this California court over Cooler  
24 Concepts which is an Arizona limited liability company.

25 **a. There Is No General Personal Jurisdiction**

26 For general jurisdiction to exist a defendant must engage in continuous and  
27 systematic general business contacts that approximate physical presence in the  
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1 forum state. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,  
2 416 (1984), See also *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082,  
3 1086 (9th Cir. 2000). The standard for establishing general jurisdiction is fairly  
4 high. *Id.* “Those who live or operate primarily outside a State have a due process  
5 right not to be subjected to judgment in its courts as a general matter.” *J. McIntyre*  
6 *Machinery Ltd. v. Nicastro*, 131 S.Ct. 2780, 2787 (2011). Activities that constitute  
7 doing business with California, are not the same as doing business in California.  
8 *Bancroft* 223 F.3d at 1086. Merely “engaging in commerce with residents of [a]  
9 forum state is not in and of itself the kind of activity that approximates physical  
10 presence within the state's borders”, and doesn’t support an assertion of general  
11 personal jurisdiction. *Id.*

12       There are no allegations or facts to support an assertion of general personal  
13 jurisdiction over Cooler Concepts. Cooler Concepts is a limited liability company  
14 organized under the laws of Arizona. See Declaration of Greg Sanchez ¶ 1. Cooler  
15 Concepts does not have any offices, officers, agents, operations or property in the  
16 State of California. See Declaration of Greg Sanchez ¶ 1. Plaintiff’s bald “on  
17 information and belief” allegation in the complaint that Cooler Concepts advertises  
18 and sells products through the Internet to California residents certainly does not  
19 satisfy the high standard for establishing general personal jurisdiction over an out of  
20 state defendant. *Bancroft* 223 F.3d at 1086. Accordingly, there simply is no basis  
21 for an allegation of general jurisdiction in California over Cooler Concepts.

22       **b. There Is No Specific Personal Jurisdiction**

23       “[O]rdinary cease-and-desist notices sent by a patentee to an alleged  
24 infringing party in a different state are not sufficient to subject the patentee to  
25 specific jurisdiction in that state.” See *Radio Systems Corp. v. Accession Inc.* 638  
26 F.3d 785, 789 (Fed. Cir. 2011) citing *Red Wing Shoe Co. v. Hockerson-Halberstadt,*  
27 *Inc.*, 148 F.3d 1355 (Fed.Cir.1998). “As a matter of patent law policy . . .

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1 "[p]rinciples of fair play and substantial justice afford a patentee sufficient latitude  
2 to inform others of its patent rights without subjecting itself to jurisdiction in a  
3 foreign forum." *Id.*

4 In a declaratory action for non-infringement of a patent "[f]or the exercise of  
5 personal jurisdiction to comport with fair play and substantial justice, there must be  
6 'other activities' directed at the forum *and related to the cause of action* besides the  
7 letters threatening an infringement suit." *Avocent Huntsville Corporation v. Aten*  
8 *International Co., Ltd.*, 552 F.3d 1324, 1333 (Fed. Cir. 2008). The "other  
9 activities" must in a clearly identifiable way relate to *enforcement* of the patent in  
10 the forum state. *Id.* at 1334.

11 A defendant patentee's mere acts of making, using,  
12 offering to sell, selling, or importing products—whether  
13 covered by the relevant patent(s) or not—do not, in the  
14 jurisdictional sense, relate in any material way to the  
15 patent right that is at the center of any declaratory  
16 judgment claim for non-infringement, invalidity, and/or  
17 unenforceability. Thus, we hold that such sales do not  
18 constitute such "other activities" as will support a claim of  
19 specific personal jurisdiction over a defendant patentee.

20 *Avocent*, 552 F.3d at 1336 (Fed. Cir. 2008). See also *Radio Systems Corp. v.*  
21 *Accession Inc.* 638 F.3d 785, 790 (Fed. Cir. 2011)("[A]ttempts to sell a product or  
22 license a patent do not give rise to personal jurisdiction in declaratory judgment  
23 actions for non-infringement or invalidity").

24 In this case the plaintiff has simply alleged that Cooler Concepts sent it  
25 letters regarding Cooler Concepts patent rights and potential infringement on  
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1 September 29, 2011<sup>1</sup>. See complaint ¶17. As a matter of law this correspondence  
2 alone does not give rise to specific personal jurisdiction in California over Cooler  
3 Concepts. *Avocent Huntsville Corporation v. Aten International Co., Ltd.*, 552 F.3d  
4 1324, 1333 (Fed. Cir. 2008). There are no other facts alleged which could  
5 constitute "other activities" by Cooler Concepts that relate to the enforcement of the  
6 design patents in California. Accordingly, there is no specific personal jurisdiction  
7 over Cooler Concepts, and the plaintiff's complaint must be dismissed.

### 8

### 9 **III. THERE IS NO DECLARATORY JUDGMENT JURISDICTION**

10 The declaratory judgment act provides that, "In a case of actual controversy  
11 within its jurisdiction . . . any court of the United States . . . may declare the rights  
12 and other legal relations of any interested party seeking such declaration, whether or  
13 not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "a case of  
14 actual controversy" in the act refers to the types of "cases" and "controversies" that  
15 are justiciable under Article III of the U.S. Constitution. *Aetna Life Ins. v. Haworth*,  
16 300 U.S. 227, 239-40 (1937).

17 A dispute under the declaratory judgment act must be definite and concrete,  
18 touching the legal relations of parties having adverse legal interests, real and  
19 substantial, and admit of specific relief through a decree of a conclusive character,  
20 as distinguished from an opinion advising what the law would be upon a  
21 hypothetical state of facts. See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118,  
22 127 (2007). To establish the existence of a "definite and concrete" dispute, more is  
23 required than "a communication from a patent owner to another party, merely  
24 identifying its patent and the other party's product line." *Hewlett-Packard Co. v.*  
25 *Acceleron LLC*, 587 F.3d 1358, 1362 (Fed. Cir. 2009).

26 \_\_\_\_\_  
27 <sup>1</sup> The alleged letter sent to Walmart, located in Arkansas, was also simply a  
28 letter communicating Cooler Concept patent rights and possible infringement.

1 In patent cases, declaratory judgment jurisdiction exists where a patentee  
2 asserts rights under a patent based on certain identified ongoing or planned activity  
3 of another party, and where that party contends that it has the right to engage in the  
4 accused activity without license. See e.g. *SanDisk Corp. v. STMicroelectronics,*  
5 *Inc.*, 480 F.3d 1372, 1377 (Fed. Cir. 2007). Plaintiff bears the burden of proving  
6 the existence of an actual controversy by a preponderance of the evidence with  
7 regard to their declaratory judgment complaint. *Shell Oil Co. v. Amoco Corp.*, 970  
8 F.2d 885, 887 (Fed.Cir. 1992). The burden is also on plaintiff to establish that  
9 declaratory jurisdiction existed at the time the claim for declaratory relief was filed  
10 and that it has continued since." *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495  
11 F.3d 1340, 1344 (Fed. Cir. 2007). Plaintiff has not met this burden.

12 The initial March 16, 2011 correspondence from Cooler Concepts to plaintiff  
13 was simply a business letter offering to license a portfolio of issued design patents  
14 and pending published utility patent applications. On its face the correspondence  
15 was being sent based upon a belief that plaintiff was "in the business of providing  
16 various items relating to coolers and ice chests . . . [and] may be interested in  
17 obtaining a license under one or more of our client's patents or pending patent  
18 applications." See Exhibit F to the complaint. On April 26 2011 plaintiff  
19 responded with a letter stating that "at this time we have no plans to sell products  
20 incorporating these ideas and do not feel that a license will be necessary." See  
21 Exhibit G to complaint.

22 Subsequently on September 29, 2011 Cooler Concepts sent correspondence  
23 to plaintiff regarding sales by Walmart of covers for water coolers / ice chests made  
24 and sold by plaintiff stating that such sales without a license from Cooler Concepts  
25 were a *possible* actionable patent infringement. The correspondence expressly  
26 stated that it was not in the best interests of the parties to pursue litigation, and  
27 invited discussions about plaintiff's need for a license. See Exhibit H to complaint.

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1 The correspondence did not identify or assert rights under any particular patent, as  
2 no patent is even identified in the correspondence. Nearly three months later at the  
3 end of December 2011, without any prior communication to Cooler Concepts,  
4 plaintiff filed this action seeking a declaratory judgment of non-infringement  
5 against *all* of the design patents initially presented to plaintiff for licensing  
6 consideration in March 2011. None of the patents in this action had been identified  
7 as being asserted in the September 2011 correspondence.

8 The five separate U.S. design patents at issue here each claim a different  
9 ornamental design for an article of manufacture. See 35 U.S.C. §171 (“Whoever  
10 invents any new, original, and ornamental design for an article of manufacture may  
11 obtain a patent therefore”). There must be declaratory judgment jurisdiction for  
12 each of the patents. See e.g. *Alza Corp. v. ANDRX Pharmaceuticals LLC.*, 607 F.  
13 Supp. 2d 614, 620-22 (D. Del. 2009) *affirmed* 603 F.3d 935, 943 fn. 2 (Fed. Cir.  
14 2010)(dismissing declaratory judgment counterclaim for one of the patents-in-suit  
15 on the basis of lack of declaratory judgment jurisdiction). This requires that  
16 plaintiff establish for each design patent that at the time this action was filed Cooler  
17 Concepts was asserting rights under that design patent based on certain identified  
18 ongoing or planned activity of plaintiff, and that plaintiff contends it had the right to  
19 engage in the accused activity without license. See e.g. *SanDisk Corp. v.*  
20 *STMicroelectronics, Inc.*, 480 F.3d 1372, 1377 (Fed. Cir. 2007). See also *Benitec*  
21 *Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1344 (Fed. Cir. 2007). There  
22 are no facts pleaded to support this.

23 The law does not support a declaratory judgment action against an owner’s  
24 entire portfolio of patents simply because the owner of the portfolio has sent a letter  
25 indicating that a license from the patent owner may be required under its patents.  
26 The law for declaratory judgment jurisdiction requires a plaintiff to show a "definite  
27 and concrete" dispute for each patent, which requires a showing that rights were  
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1 asserted under a particular patent against a particular product. The plaintiff here has  
2 not pleaded any facts showing that Cooler Concepts has asserted its rights under a  
3 particular patent against a particular product of plaintiff's. There is no definite and  
4 concrete dispute shown for each of the five design patents that plaintiff has included  
5 in this action. Accordingly, there is no jurisdiction under the declaratory judgment  
6 act, and plaintiff's complaint must be dismissed. Fed. R. Civ. P. 12(b)(1).

#### 7 8 **IV. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR RELIEF**

9 "A pleading that states a claim for relief must contain . . . a short and plain  
10 statement of the claim showing that the pleader is entitled to relief". Fed. R. Civ. P.  
11 8(a)(2). Rule 8, like every other rule of civil procedure, "should be construed and  
12 administered to secure the just, speedy, and inexpensive determination of every  
13 action and proceeding." Fed. R. Civ. P. §1. Plaintiff in this case has failed to state  
14 a claim for the relief requested.

15 On a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must  
16 accept all factual allegations pleaded in the complaint as true, and construe those  
17 facts and draw all reasonable inferences therefrom "in the light most favorable to  
18 the nonmoving party." *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th  
19 Cir.1996). However, threadbare naked conclusory assertions regarding the required  
20 elements of a claim are not sufficient under the law. See *Bell Atlantic Corp. v.*  
21 *Twombly* 550 U.S. 544, 555 (2007)(" While a complaint attacked by a Rule  
22 12(b)(6) motion to dismiss does not need detailed factual allegations, [ ] a plaintiffs  
23 obligation to provide the "grounds" of his "entitle[ment] to relief" requires more  
24 than labels and conclusions, and a formulaic recitation of the elements of a cause of  
25 action will not do. . . ."). The Supreme Court in concluding that mere labels and  
26 conclusions are insufficient reasoned that courts must be free to require enough  
27 specificity in a pleading to prevent a plaintiff with a groundless claim from using  
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1 the prospective burden and expense of litigation as a threat to force defendants to  
2 settle. *Id.* When allegations fail to raise a claim of entitlement to relief “this basic  
3 deficiency should . . . be exposed at the point of minimum expenditure of time and  
4 money by the parties and the court.” *Id.* at 558.

5 In this case plaintiff has sought a declaratory judgment that it has not  
6 infringed five separate U.S. design patents, each of which claims a different  
7 ornamental design for an article of manufacture. See 35 U.S.C. §171 (“Whoever  
8 invents any new, original, and ornamental design for an article of manufacture may  
9 obtain a patent therefore”). There must be declaratory judgment jurisdiction for  
10 each of the patents. See e.g. *Alza Corp. v. ANDRX Pharmaceuticals LLC.*, 607 F.  
11 Supp. 2d 614, 620-22 (D. Del. 2009) *affirmed* 603 F.3d 935, 943 fn. 2 (Fed. Cir.  
12 2010)(dismissing declaratory judgment counterclaim for one of the patents-in-suit  
13 on the basis of lack of declaratory judgment jurisdiction). A dispute under the  
14 declaratory judgment act must be definite and concrete, touching the legal relations  
15 of parties having adverse legal interests, real and substantial, and admit of specific  
16 relief through a decree of a conclusive character, as distinguished from an opinion  
17 advising what the law would be upon a hypothetical state of facts. See  
18 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

19 Accordingly to state a claim for declaratory relief the plaintiff must plead  
20 facts showing that it is entitled to “relief through a decree of conclusive character”.  
21 *Id.* See also Fed. R. Civ. P. 8(a)(2). For a decree to be of conclusive character the  
22 doctrine of claim preclusion (or res judicata) must apply. See e.g. *Mpoyo v. Litton*  
23 *Electro-Optical Systems Inc.* 430 F.3d 985 (9<sup>th</sup> Cir. 2005). For claim preclusion to  
24 apply to a decree concerning patent infringement (or non-infringement) the decree  
25 must apply to a particular product:

26 [C]laim preclusion does not apply unless the accused  
27 device in the action before the court is "essentially the  
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1 same" as the accused device in a prior action between the  
2 parties that was resolved by a judgment on the merits. . . .  
3 Accused devices are "essentially the same" where the  
4 differences between them are merely "colorable" or  
5 "unrelated to the limitations in the claim of the patent."

6 *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1324 (Fed. Cir. 2008). See also  
7 *Foster v. Hallco Mfg. Co., Inc.*, 947 F.2d 469, 479-80 (Fed. Cir. 1991)("An  
8 essential fact of a patent infringement claim is the structure of the device or devices  
9 in issue").

10 Accordingly, for each patent-in-suit plaintiff was required to plead facts  
11 identifying a particular product(s) alleged to not infringe the patent. Without the  
12 identification of a particular product there is nothing to show that a conclusive  
13 decree regarding infringement of a patent with claim preclusion effect could be  
14 entered by the Court, and a claim for declaratory judgment of non-infringement of  
15 the patent has not been stated.

16 In this case plaintiff has not pleaded facts identifying any particular product  
17 with respect to any of the patents-in-suit. Nowhere in the complaint is a product of  
18 plaintiff's identified by name, model number, or anything else. There are also no  
19 facts plead in the complaint showing what the design(s) is of any accused product(s)  
20 that plaintiff alleges doesn't infringe the design patents. Accordingly, plaintiff has  
21 not pleaded sufficient facts to show that it is entitled to a conclusive declaratory  
22 judgment for any of the five design patents. Thus, plaintiff has failed to state a  
23 claim for a declaratory judgment of non-infringement of the patents, and the  
24 complaint should be dismissed. Fed. R. Civ. P. §§ 8(a)(2) & 12(b)(6).

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1 **V. A MORE DEFINITE STATEMENT WOULD BE REQUIRED**

2 A patent owner defendant to an action seeking a declaratory judgment of  
3 non-infringement of a patent must bring a claim of infringement for that patent as a  
4 counterclaim. See Fed. R. Civ. P. 13(a)(1)(a):

5 [T]his court reiterates that a claim for a declaration of  
6 noninfringement makes a counterclaim for patent  
7 infringement compulsory. . . . [A] party that does not  
8 assert its compulsory counterclaim in the first proceeding  
9 has waived its right to bring the counterclaim and is  
10 forever barred from asserting that claim in future  
11 litigation.

12 *Polymer Industrial Products Co. v. Bridgestone/Firestone Inc.*, 347 F.3d 935, 938  
13 (Fed. Cir. 2003)

14 Before filing a claim alleging patent infringement an attorney is required to  
15 interpret the asserted patent claims and compare the accused device with those  
16 claims. See e.g. *Q-Pharma, Inc. v. Andrew Jergens Company*, 360 F. 3d 1295,  
17 1301 (Fed. Cir. 2004). This necessarily requires that the patent owner know what  
18 the accused device is, and have sufficient factual information about the accused  
19 device to compare it to the patent claims.

20 Accordingly, in order for a defendant patent owner in a declaratory action to  
21 reasonably prepare a compulsory counterclaim of patent infringement in response to  
22 a claim for a declaration of non-infringement of a patent, the plaintiff must plead  
23 sufficient facts to allow the patent owner to know what the “accused device” is that  
24 is alleged to be non-infringing and that is the subject matter of plaintiff’s claim.  
25 See Rule 13(a). This is consistent with the requirement that a declaratory judgment  
26 claim must be definite and concrete, touching the legal relations of parties having  
27 adverse legal interests, real and substantial, and admit of specific relief through a  
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1 decree of a conclusive character, as distinguished from an opinion advising what the  
2 law would be upon a hypothetical state of facts. See *MedImmune, Inc. v.*  
3 *Genentech, Inc.*, 549 U.S. 118, 127 (2007). At a minimum this requires a  
4 declaratory action plaintiff seeking a judgment of non-infringement for a patent to  
5 specifically and definitely identify the “accused product(s)” that is the subject of its  
6 declaratory claim.

7       The plaintiff’s complaint in this case fails to do this. It is so vague or  
8 ambiguous with respect to what the accused products are for each of the five design  
9 patents that Cooler Concepts can’t reasonably prepare a response with a compulsory  
10 counterclaim for each of the five patents-in-suit. See Fed. R. Civ. P. 12(e).  
11 Nowhere in the complaint is an “accused product” of plaintiff’s identified by name,  
12 model number, or anything else. There is also no information in the complaint  
13 showing what the design(s) is of any accused product(s) to allow a comparison to  
14 the designs claimed by the five design patents. This renders the complaint filed by  
15 plaintiff unintelligible for purposes of Cooler Concepts being able to prepare a  
16 response with a compulsory counterclaim of patent infringement.

17       Accordingly, in the event that the Court does not dismiss the complaint for  
18 lack of jurisdiction and/or failure to state a claim, it should at least require plaintiff  
19 to provide a more definite statement of its declaratory claim for each design patent.  
20 Specifically, the plaintiff should be required for each design patent to identify the  
21 name and any model number for the particular product(s) that plaintiff is alleging  
22 doesn’t infringe the design patent, and also facts sufficient to show the appearance  
23 of the product(s) to an ordinary observer. Facts concerning the appearance of the  
24 product may be shown through photographs of the product(s).

25       Such facts are reasonably required because assessment of design patent  
26 infringement necessarily requires a visual comparison of the appearance of a  
27 particular product to an ordinary observer and the ornamental design claimed in the  
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1 design patent. See e.g. *Egyptian Goddess Inc. v. Swisa Inc.*, 543 F.3d 665 (Fed. Cir.  
2 2008)(Explaining the ordinary observer test of infringement). For any actual  
3 product underlying the alleged case and controversy such facts would clearly be in  
4 the possession of the plaintiff and should be provided in a more definite statement  
5 of the claim by plaintiff for each patent before any response is required. Fed. R.  
6 Civ. P. 12(e).

7  
8 **VI. CONCLUSION**

9 For the reasons set forth above the complaint should be dismissed for lack of  
10 personal jurisdiction, lack of subject matter jurisdiction, or failure to state a claim.  
11 In the alternative plaintiff should be required to provide a more definite statement of  
12 its declaratory claim for each patent before a response is required from defendant.

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14 Date: April 5, 2012

15 /s/ - David M. Kleiman \_\_\_\_\_.

16 David M. Kleiman  
17 Counsel for COOLER CONCEPTS LLC

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