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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 ENERLITES, INC. and TOP
13 GREENER, INC.,

14 Plaintiffs,

15 v.

16 CENTURY PRODUCTS, INC.,

17 a California Corporation; WEI HU, an
18 individual and DOES 1-10, inclusive,

19 Defendants.

Case No.: 8:18-cv-00839-JVS-KES

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS
COMPLAINT PURSUANT TO
FED. R. CIV. P. 12(b)(6)**

Oral Argument Requested

Date: August 13, 2018

Time: 1:30 p.m. PST

Judge: Hon. James V. Selna

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1 **MEMORANDUM OF POINT AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The present design patent and copyright infringement action concerns two
4 wall timers that are both for sale on Amazon.com. Plaintiffs Enerlites, Inc. and Top
5 Greener, Inc. (hereinafter “Enerlites” or “Plaintiffs”) bring claims of design patent
6 infringement, copyright infringement, and several auxiliary claims against
7 Defendants Century Products LLC and Wei Hu (hereinafter “Century Products” or
8 “Defendants”) after attempting to stop Defendants from selling a competing
9 product.
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13 However, Plaintiffs fail to state a plausible claim for design patent
14 infringement because 1) Plaintiffs’ infringement claim is fundamentally flawed as
15 the Complaint relied on an irrelevant view of the claimed design, 2) for an ordinary
16 observer familiar with the prior art designs, the accused product is significantly
17 dissimilar from the claimed design; and 3) Plaintiffs fail to prove ownership of the
18 patent-at-issue.
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22 Also, Plaintiffs fail to state a plausible claim for copyright infringement
23 because 1) Plaintiffs fail to prove ownership of a valid copyright, 2) the alleged
24 copyrighted phrase of “Neutral Wire Required” is functional and not copyright
25 eligible.
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1 It is clear that Plaintiffs fail to allege sufficient facts to raise the design
2 patent and copyright infringement claims against Defendants. Plaintiffs' other
3 piggy-backed claims, such as unfair competition claim under California Business
4 and Professional Code § 17200 *et seq* and common law unfair competition, fail to
5 state a claim for the same reasons. Because all of Plaintiffs' claims fail to state a
6 claim as a matter of law, Defendants move to dismiss all counts of the Complaint
7 with prejudice under FED. R. CIV. P. 12(b)(6).
8
9

10 11 **II. FACTUAL BACKGROUND**

12
13 Defendants and Plaintiffs are direct competitors for wall timers on
14 Amazon.com. Both Defendants and Plaintiffs rely heavily on the Amazon
15 marketplace to promote and sell their products, among which include the alleged
16 infringing timer named "Century 7 Day Programmable In-Wall Timer Switch"
17 (hereinafter "Century Timer" or "accused product") and Plaintiffs' product named
18 "Timer Switch Enerlites HET01-C". (Compl., ¶ 16).
19
20

21 Plaintiffs claim selling wall timers on Amazon since December 2009.
22 (Compl., ¶ 14). Upon information and belief, Defendants started to sell Century
23 Timer on or around August 2016 but quickly gained popularity among the
24 customers. Defendants attribute their success to winning market strategies. For
25 example, Defendants provide excellent customer services, invest heavily in
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1 Amazon advertisement to promote Century Timer, and also offer it at a
2 competitive price that is welcomed by the customers. These market strategies are
3 legitimate and encouraged because they create a diversified marketplace that
4 benefits customers.
5

6 Facing competition and loss of sales, Plaintiffs sent Defendants a “Cease and
7 Desist” letter in an effort to interfere with the accused product’s sale on August 17,
8 2017. (Compl., ¶ 21). This letter alleged patent infringement of Plaintiffs’ U.S.
9 design patent No. D575,646 (hereinafter “D646’ Patent”) having a priority date of
10 March 22, 2007. This was Defendants’ first time knowing of the D646’ Patent.
11

12 Contrary to what Plaintiffs alleged as the willful disregard of the letter, *see* Compl.,
13 ¶ 22, Defendants immediately engaged an outside counsel to investigate the
14 matters laid out in the letter. For example, Defendants reached out to their sole
15 manufacturer, Ningbo Bainian Electric Appliance Ltd. (hereinafter “Bainian”), to
16 inquire about the research, design, and manufacture of Century Timer. Upon
17 information and belief, Bainian is one of the oldest timer manufacturers based in
18 Ningbo, China and has manufactured wall timers since the early 1990’s.
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22 On or about September 2017, Bainian informed Defendants that the accused
23 product was actually designed and manufactured by Bainian at least as early as
24 2005, two years earlier than the priority date of the D646’ Patent. To prove this,
25 Bainian provided to Defendants, a physical copy of its 2005 product catalog that
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1 includes a clear image of the Century Timer.¹ Defendants believed the printed
2 catalog/publication constitutes evidence of prior designs and thus non-infringement
3 of the patent-at-issue. On or about December 5, 2017, Defendants' then counsel
4 sent a digital copy of the 2005 catalog to Plaintiffs' counsel Pang Fei, along with a
5 suggestion that the two parties "walk away" without Defendants initiating an
6 invalidation procedure against the patent-at-issue. Plaintiffs did not respond to the
7 Email or catalog. Without hearing from Plaintiffs, Defendant thought the issue was
8 settled and continued selling the accused products on Amazon.
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12 Without knowing to Defendants, on August 30, 2017, Plaintiffs submitted a
13 copyright application (Case No. 1-5766208927, hereinafter the "927'
14 Application") based on a promotional photo. (Compl., Exhibit "2"). The category
15 of the copyright application is "literary work." (Compl., Exhibit "2"). At the time
16 of filing this Motion, Defendant's copyright application is pending at the United
17 States Copyright Office.
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20 On May 14th, 2018, Plaintiffs brought the present case against Defendants,
21 asserting design patent infringement, copyright infringement, and other related
22 claims.
23
24

25 ¹ Defendants understand that the 2005 catalog is not admissible evidence within the
26 scope of this Motion. However, Defendant submit that the communication about
27 the catalog is relevant for the purpose of countering Plaintiff's assertion that
28 Defendants have willfully ignored the infringement claim or have willfully
infringed the patent-at-issue.

1 **III. LEGAL STANDARD**

2
3 A 12(b)(6) motion to dismiss requires the court to determine the sufficiency
4 of the plaintiff's complaint and whether or not it contains a "short and plain
5 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
6 8(a)(2). To survive a motion to dismiss, a complaint must contain sufficient factual
7 matter to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662,
8 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
9 Pleading that offers only labels and conclusions or a formulaic recitation of the
10 elements of a cause of action is insufficient. *Iqbal*, 556 U.S. at 1949. A complaint's
11 allegations "may not simply recite the elements of a cause of action, but must
12 contain sufficient allegations of underlying facts to give fair notice and to enable
13 the opposing party to defend itself effectively." *Starr v. Baca*, 652 F. 3d 1216 (9th
14 Cir. 2011).

15
16 Under Rule 12(b)(6), a court must (1) construe the complaint in the light
17 most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as
18 true, as well as all reasonable inferences to be drawn from them. *See Sprewell v.*
19 *Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001).

20
21 Furthermore, while a motion under Rule 12(b)(6) generally is limited to the
22 pleadings, a court may rely on documents outside the pleadings if they are integral
23 to the plaintiff's claims and their authenticity is undisputed, or they are subject to
24

1 judicial notice. *Parrino v. FHP, Inc.*, 146 F. 3d 699, 705-06 (9th Cir. 1998); *Swartz*
2 *v. KPMG LLP*, 476 F. 3d 756, 763 (9th Cir. 2007).

3
4 Nonetheless, Courts have applied *Iqbal* and *Twombly* to dismiss design
5 patent, and copyright infringement claims that merely state the elements of the
6 claims without sufficient facts. *See, e.g., SCG Charaters LLC v. Telebrands Corp*,
7 *CV-15-00374 DDP (AGRx)*, (C.D. Cal. Aug. 3, 2015); *Anderson v. Kimberly-*
8 *Klark Corp.*, 570 Fed. Appx. 927 (Fed. Cir. 2014); *Colida v. Nokia, Inc.*, 347 Fed.
9 Appx. 568 (Fed. Cir. 2009).
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12 **IV. ARGUMENT**

13 14 **A. Count I for Design Patent Infringement**

15 16 **1. Standard for Pleading Design Patent Infringement**

17 A design patent protects only non-functional, ornamental features of an
18 article. *OddzOn Products, Inc. v. Just Toys, Inc.*, 122 F. 3d 1396, 1405 (Fed. Cir.
19 1997). The scope of a design patent is significantly narrow because it is defined by
20 its drawings. *In re Mann*, 861 F. 2d 1581, 1582 (Fed. Cir. 1988). Design patent
21 infringement is determined under the “ordinary observer test.” That is, whether an
22 ordinary observer familiar with the prior art designs, would be deceived into
23 believing that the accused product is substantially the same as the patented design.
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27 *Crocs, Inc. v. Intl. Trade Comm.*, 598 F. 3d 1294, 1303 (Fed. Cir. 2010).
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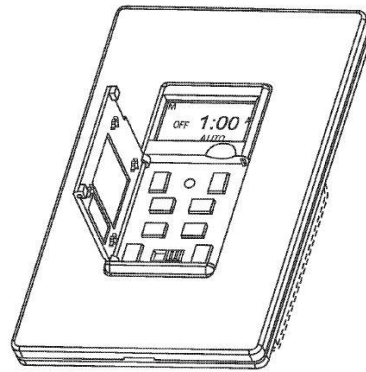
1 Specifically, in determining infringement of a design patent, the court
2 employs a “side-by-side” view comparison of the drawing of the patent design to
3 the appearance of the accused products, e.g., photographs. *Crocs, Inc.*, 598 F. 3d at
4 1304. Furthermore, “when the claimed and accused designs are not plainly
5 dissimilar, resolution of the question whether the ordinary observer would consider
6 the two designs to be substantially the same will benefit from a comparison of the
7 claimed and accused designs with the prior art.” *Egyptian Goddess, Inc. v. Swisa,*
8 *Inc.*, 543 F. 3d 665, 678 (Fed. Cir. 2008)(en banc). In other words, if the
9 appearance of the accused product and claimed design are not plainly dissimilar,
10 the prior art must be analyzed to determine whether the designs are so similar that
11 an ordinary observer familiar with the prior art would be deceived into believing
12 the accused product is the same as the patented design. *Egyptian Goddess*, 543 F.
13 3d at 678.

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19 Notably, employing the side-by-side analysis with the necessary
20 consideration of prior art as noted above, district courts have routinely dismissed
21 design patent infringement claims at the pleading stage. *See, e.g., Anderson v.*
22 *Kimberly-Clark Corp.*, 570 Fed. Appx. 927 (Fed. Cir. 2014); *Colida v. Nokia, Inc.*,
23 347 Fed. Appx. 568 (Fed. Cir. 2009); *SCG Characters LLC v. Telebrands Corp.*,
24 CV-15-00374 DDP (AGR_x), 2015 (C.D. Cal. Aug. 3, 2015).
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1 **2. Plaintiffs Fail to Adequately Allege Design Patent Infringement²**

2 **a) The D646’ Patent and Plaintiffs’ Flawed Infringement Claim**

3 Here, Plaintiffs D646’ Patent comprises only one perspective view of a
4 digital in-wall timer, as shown below (*See*, Compl., Exhibit “1”; also Dunn
5 Declaration, ¶3, Exhibit B):
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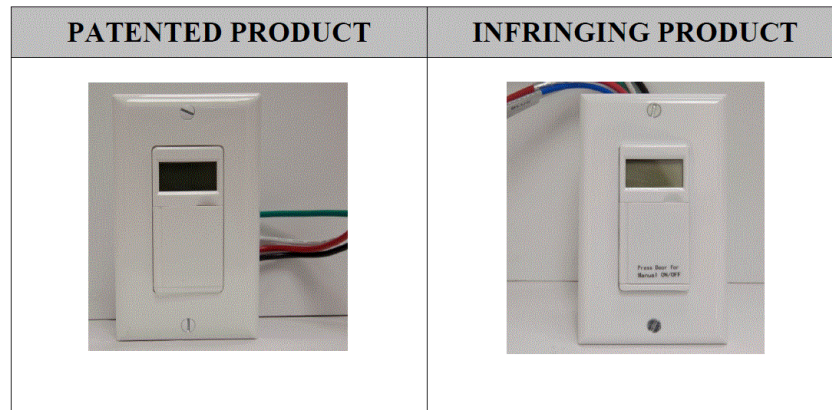
15 Sole Figure of the D 646’ Patent

16 It is important to note that all other views of the product are not claimed and
17 thus form no part of the patented design. As noted in the Notice of Allowance of
18 the D646’ Patent mailed on May 30, 2008, the Examiner reiterated in the section of
19 “Unclaimed Elements”: “[i]t is understood that the appearance of any part of the
20 article not shown in the drawing or described in the specification form no part of
21 the claimed design. Therefore, the determination of patentability is based on the
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26 _____
27 ² No statement in this Motion and related documents constitutes Defendants’
28 admission for validity of the patent-at-issue. Defendants reserve their full rights to
later challenge its validity.

1 design of the article as shown and described.” (Dunn Declaration, Exhibit C,
2 D646’ Patent’s Notice of Allowance). Thus, Plaintiffs’ patented design is narrowly
3 limited to the non-functional, ornamental features of the sole figure.
4

5 Here, Plaintiffs erroneously compare a front view of the “patented product”
6 and “infringing product,” which is irrelevant to the scope of the D646’ Patent.
7 (Compl., ¶ 25). Contrary to what alleged by Plaintiffs, the D646’ Patent does not
8 claim a perspective view as shown in ¶ 25 of the Complaint, as shown below:
9



18 In addition, beyond the above irrelevant photos, Plaintiffs fail to provide any
19 explanation, as to how the accused design of Century Timer incorporates any
20 patented features of the claimed design. Specifically, Plaintiffs fail to point out
21 which part of the claimed design is non-functional, ornamental; or, what are the
22 points of novelty in the claimed design and how these points of novelty have been
23 incorporated into the accused product.
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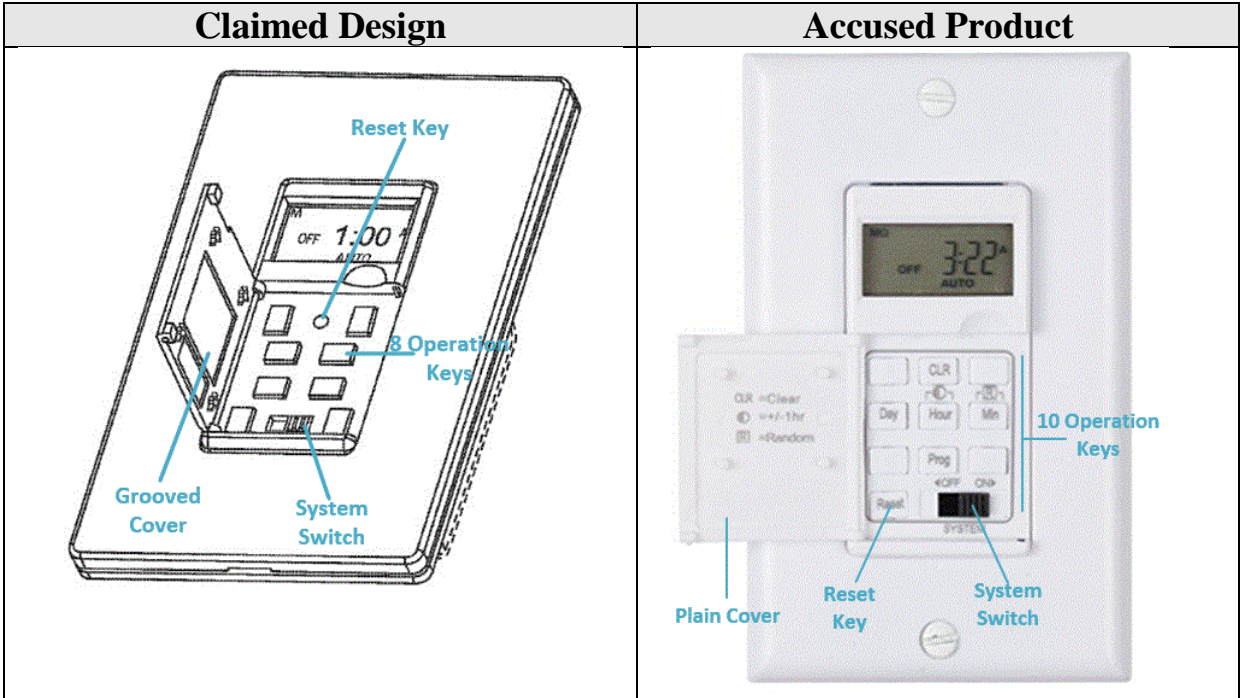
25 Accordingly, Plaintiffs have failed to allege sufficient facts to raise the
26 design patent infringement claim against Defendants.
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1 **b) The D646' Patent and the Accused Product**

2 Plaintiffs' fundamentally deficient patent infringement claim, even if being
3 allowed to amend and accepted as true, does not state a claim for design patent
4 infringement that is plausible on its face, as required by *Twombly* and *Ashcroft*.
5 This is because, an ordinary observer who is familiar with the prior art, would not
6 be deceived into believing the that accused product is the same as the claimed
7 design.
8

9 A side-by-side comparison, as shown below, demonstrates that the claimed
10 design and the accused product are substantially dissimilar (Dunn Declaration, ¶ 5,
11 Exhibit D, a front view photo of the accused product). This apparent dissimilarity
12 is further highlighted in consideration of cited prior art in the prosecution of the
13 D646', as further explained later in pages 12-15.
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Number of Operation Keys	
8	10
The Layout of the Operation Keys	
Two operation keys in each row	Three operation keys evenly located in each of the first three rows, one operation key in the fourth row
The Shape of the Operation Keys	
Vertical and horizontal rectangular	Horizontal rectangular
Reset Key	
A circular button located in the middle of the first row	A rectangular operation key in the left of the last row
System Switch	
Located in the middle of the last row	Located on the right side of the last row
Product Cover	
Grooved Cover with two window-like lines	Plain Cover
Keyboard Boarder	
No borderline	Surrounded by a closed borderline

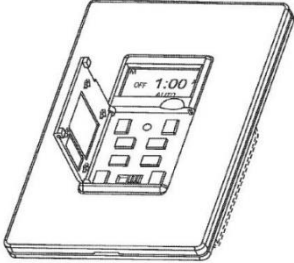
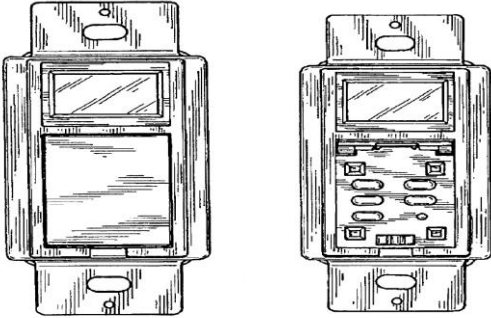
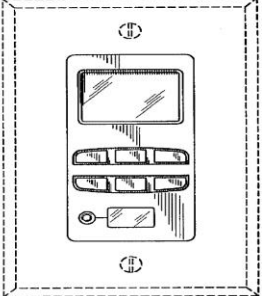
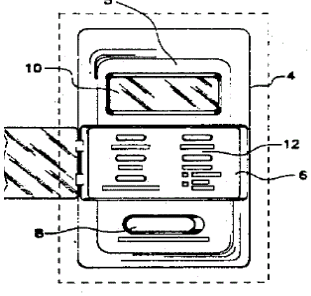
1 As shown above, the accused product looks significantly dissimilar to the
2 claimed design. By way of example, the claimed design has the following
3 distinctive features defined by solid lines: 1) eight operation keys that are evenly
4 distributed in four rows, wherein four of them are horizontal rectangular, and the
5 rest are vertical rectangular; 2) a circular reset key prominently located between
6 two operation keys in the first row; and 3) a grooved keyboard cover with two
7 window-like designs.
8

9
10 By contrast, the accused product shows the following corresponding
11 features: 1) ten operation keys unevenly distributed in four rows, wherein each of
12 them is a horizontal rectangular; 2) a reset key located at the left corner of the
13 keyboard; and 3) a groove-free keyboard cover. Furthermore, unlike the claimed
14 design, the keyboard of the accused product is enclosed by a borderline. In
15 summary, these representative features distinctively separate the two designs. An
16 ordinary observer would not be deceived into believing the that the accused
17 product is the same of the claimed design.
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22 **c) The D646' Patent and the Cited Prior Art**

23 The apparent dissimilarity between the claimed design and the accused
24 product is further highlighted with consideration of the cited prior art. The
25 examiner of the D646's Patent cited multiple prior art references, which are
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1 relevant to this Motion and some of them are shown as below (Dunn Declaration,
2 ¶¶ 6-8, Exhibits E, F, and G):

<p>3 4 Claimed Design 5 6 7 8</p>	
<p>9 10 US Design Patent 11 No. 500686 12 13 14 15</p>	 <p>16 17 FIG. 1 FIG. 7</p>
<p>18 US Design Patent 19 No. 435523 20 21 22</p>	
<p>23 US Patent No. 24 5160853 25 26 27 28</p>	

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As shown above, US Design Patent No. 500686 (hereinafter “Patent D686”) illustrates a wall timer with almost-identical general appearance to the claimed design, including the shape and location of the keyboard cover, the size, and location of the LCD in relation to the product. (Note here Patent D686’ only shows the main product design without the wall cover included in the claimed design.). Similarly, US Design patent No 435523 shows a wall timer with an LCD and keyboard design that is similar to the claimed design. Furthermore, U.S. Patent No. 5160853 discloses a wall timer with a general appearance and component layout almost identical to the claimed design.

For a wall timer design, many of the common design features, such as the product’s general appearance, the location of the LCD screen, and the look of the keyboard cover, predate the claimed design. These features cannot be claimed as points of novelty by the claimed design. Accordingly, instead of accrediting to the claimed design, any similar features between the accused product and the claimed design are rooted in common features of the prior art.

In summary, comparing the D646’ Patent with its cited prior art demonstrates that many design features are pre-existed, well-known elements in prior art. Thus, an ordinary observer familiar with the prior art design would not be

1 deceived into believing that the appearance of the accused product is the same as
2 the claimed design.

3
4 **d) Plaintiffs Fail to Prove Patent Ownership**

5 To sufficiently allege infringement of a design patent, a plaintiff must first
6 allege ownership of the patent. *Hall v. Bed Bath & Beyond, Inc.*, 705 F. 3d 1357,
7 1362 (Fed. Cir. 2013). Here, Plaintiffs fail to prove ownership of the D646' Patent
8 by any assignment or license record. As shown in Exhibit H, the D646' Patent is
9 not assigned to any one of the plaintiffs Enerlites, Inc. or Top Greener, Inc. (Dunn
10 Declaration, ¶ 9, Exhibit H). Without providing any factual evidence, Plaintiffs
11 merely assert that one inventor Ni Lidong is a part owner of Enerlites and Top
12 Greener, and Ni “later issued exclusive licensing rights to Enerlites.” (Compl. ¶
13 15). Defendants’ unsupported assertion is insufficient to establish legitimate
14 ownership or license right of the D’646 Patent, which is a prerequisite to bringing
15 the present case.
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20 In summary, Plaintiffs fail to state a plausible claim for design patent
21 infringement because 1) Plaintiffs’ infringement claim is fundamentally flawed as
22 the Complaint relied on an irrelevant view of the claimed design, 2) the accused
23 product is significantly dissimilar from the claimed design with consideration of
24 the prior art, and 3) Plaintiffs fail to prove ownership of the patent-at-issue.
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1 Accordingly, Plaintiffs' claim for design patent infringement should be dismissed
2 under FED. R. CIV. P. 12(b)(6).

3
4 **B. Count II for Copyright Infringement**

5 **1. Standard for Pleading Copyright Infringement**

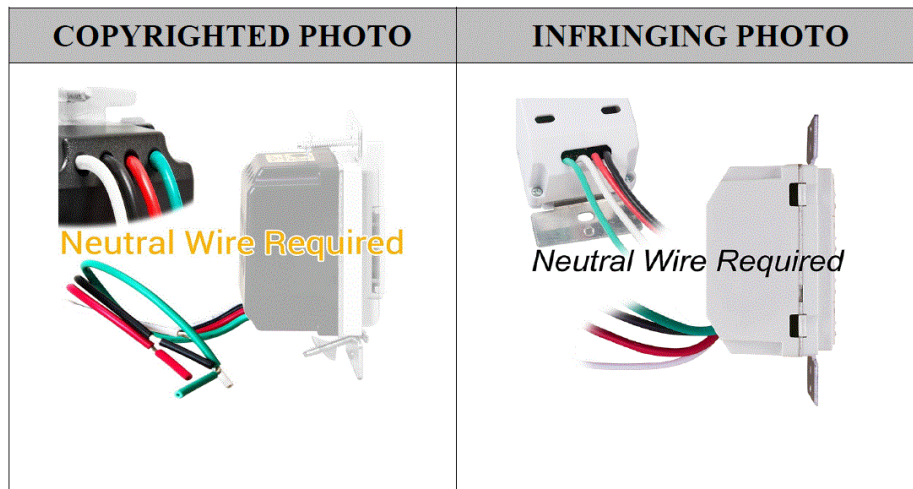
6 To properly plead copyright infringement, a plaintiff must allege sufficient
7 facts to show (1) ownership of a valid copyright, and (2) copying of constituent
8 elements of the work that are original. *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*,
9 676 F.3d 841, 846 (9th Cir. 2012). Furthermore, elements of a copyrighted work
10 that are purely functional, utilitarian or mechanical are not eligible for copyright
11 protection and therefore cannot be considered when determining originality.
12 *Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1221-22
13 (9th Cir. 1997).

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17 **2. Plaintiffs Fail to Adequately Allege Copyright Infringement**

18 Here, Plaintiffs first fail to prove ownership of a valid copyright. The alleged
19 copyright photo, at the time of this Motion, is still pending at the Copyright Office.
20 (Compl., Exhibit 2). Secondly, even if the pre-registered application is sufficient,
21 Plaintiffs fail to assert which portion of the photo is considered "original" so it is
22 entitled to the copyright protection. Instead, Plaintiffs merely recite "Defendants
23 have publicly displayed, in advertising materials, product packaging and other
24 aspects, identical or substantially similar copies of one or more of Top Greener's
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1 copyrighted photos and images.” (Compl., ¶ 28). Such a general allegation without
2 explaining which aspect of the work is original is not sufficient.

3
4 Furthermore, Plaintiffs’ asserted copyrighted photo is intended to be
5 registered as “literary work,” *See* Compl. Exhibit 2, meaning Plaintiffs’ alleged
6 copyright protection extends narrowly to the literary portion of the photo. As
7
8 shown below, the only identifiable literary portion is the phrase of “Neutral Wire
9 Required.” (Compl. ¶ 28).



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20 However, the commonly-used phrase of “Neutral Wire Required” explains
21 the necessary wiring requirement to allow a wall timer function properly. It is
22 purely functional. Under *Entm’t Research Grp*, such a functional element cannot
23
24 be considered when determining originality, thus rendering it not eligible for
25 copyright protection.
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1 Accordingly, it is proper for the Court to take judicial notice that the phrase
2 “Neutral Wire Required” is commonly-used, functional by nature and thus not
3 subject to copyright protection.
4

5 In summary, Plaintiffs fail to state a plausible claim for copyright
6 infringement because 1) Plaintiffs fail to prove ownership of a valid copyright, 2)
7 the alleged copyrighted phrase of “Neutral Wire Required” is functional and not
8 copyright eligible. Accordingly, Plaintiffs’ claim for copyright infringement should
9 be dismissed under FED. R. CIV. P. 12(b)(6).
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12 **C. Counts III-VIII for Unfair Business Practices, Common Law Unfair**

13 **Competition, Unjust Enrichment, Constructive Trust, Accounting and**
14
15 **Injunctive Relief**

16 First, Plaintiffs base Count III-IV for unfair business practices in violation of
17 California Business and Professional Code § 17200 *et seq*, common law unfair
18 competition, unjust enrichment, constructive trust, accounting and injunctive relief
19 on the substantially same claims for design patent infringement and copyright
20 infringement. *See* Compl. at ¶¶ 33-54. Because Plaintiffs fail to sufficiently state
21 plausible claims for the underlying design patent or copyright claims, as set forth
22 above, their related claims for Count III-VIII should be dismissed too.
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26 Secondly, Plaintiffs’ claims in violation of state laws, e.g., unfair business
27 practices claims in violation of California and common law unfair competition,
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1 should be preempted by federal patent and copyright law when the state claims
2 incorporate by reference and merely restates federal patent and copyright claims.
3
4 *Litchfield v. Speilberg*, 736 F. 2d 1352, 1358 (9th Cir. 1984).

5 Thirdly, regarding Plaintiffs' Count V for unjust enrichment, it has been well
6 settled that California does not recognize a cause of action for unjust enrichment.
7
8 See, e.g., *McVicar v. Goodman Glob, Inc.*, 1 F. Supp. 3d 1044, 1059 (C.D. Cal.
9 2014). Here, Plaintiff's unjust enrichment allegations are "inextricably
10 intertwined" with Plaintiffs' design patent and copyright claims and "do not give
11 rise to a separate theory of quasi-contract." *Purcell v. Spokeo, Inc.*, No. 2:11-cv-
12 06003-ODW(AGRx) 2014 U.S. Dist. LEXIS 118280, at *15 (C.D. Cal, Aug. 25,
13 2014). Accordingly, Plaintiffs' unjust enrichment claim should be dismissed.
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16 In summary, Plaintiffs' Count III-IV should be dismissed because 1)
17 Plaintiffs fail to sufficiently state plausible claims for the underlying design patent
18 or copyright claims; 2) Plaintiffs' claims in violation of state laws should be
19 preempted by federal patent and copyright law; and 3) unjust enrichment is not
20 recognized in California.
21

22 **V. CONCLUSION**

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24 For the foregoing reasons, this Court should grant Defendant's Motion to
25 Dismiss Complaint Pursuant to FED. R. CIV. P. 12(b)(6).
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1 Dated: June 12, 2018

PLATINUM INTELLECTUAL PROPERTY LLP

2 By: /s/Michelle C. Dunn
3 Michelle C. Dunn

4 Attorney for Defendants
5 CENTURY PRODUCTS, INC., and WEI HU
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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on June 12, 2018, a true and correct
3 copy of the foregoing was transmitted electronically to the Electronic Filing
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14 By: /s/Michelle C. Dunn
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