

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

The Topps Company, Inc.,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 1:16-CV-05954
)	
Koko's Confectionery & Novelty, a Division)	DEMAND FOR JURY TRIAL
of A & A Global Industries, Inc.)	
)	
Defendant.)	
_____)	

**SECOND AMENDED COMPLAINT FOR PATENT AND TRADE DRESS
INFRINGEMENT**

Plaintiff The Topps Company, Inc. ("Topps" or "Plaintiff") brings this action for patent and trade dress infringement against Defendant A & A Global Industries, Inc., including its division, Koko's Confectionery & Novelty ("Koko's" or "Defendant") and alleges as follows:

THE PARTIES

1. Plaintiff Topps is a Delaware corporation with its principal place of business at 1 Whitehall Street, New York, New York, 10004.
2. Upon information and belief, Defendant is a Maryland corporation with its principal place of business at 17 Stenersen Lane, Cockeysville, Maryland, 21030.

JURISDICTION AND VENUE

3. This is an action for patent infringement and trade dress infringement under the patent laws of the United States of America, 35 U.S.C. §§ 1 *et seq.*, including 35 U.S.C. § 271,

and under the Trademark Act, 15 U.S.C. § 1125(a), respectively. The Court has subject matter jurisdiction over the matters pleaded herein under 28 U.S.C. §§ 1331, 1338(a), and 1367(a).

4. The Court has personal jurisdiction over Defendant because, on information and belief, Defendant regularly and systematically transacts business in this judicial district, directly or through intermediaries, and/or committed acts of infringement in this judicial district, including offering to sell, selling and/or distributing infringing products in this district.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1400 and 1391(b) and (c) because, on information and belief, among other reasons, Defendant is subject to personal jurisdiction in this district and has committed acts of infringement in this district, including offering to sell, selling and/or distributing infringing products in this district.

BACKGROUND FACTS COMMON TO ALL CLAIMS

6. Topps hereby incorporates the allegations of Paragraphs 1 through 5 as if fully set forth herein.

7. For nearly eighty years, Topps has been a leader in the highly competitive business of designing, manufacturing, distributing and selling high-quality candy, chewing gum, and collectibles.

8. Topps employs hundreds of individuals across the United States and around the world.

9. Topps is nationally and internationally recognized for its creative, innovative, and unique confectionery and entertainment products.

10. Topps has been a leader in candy and confectionery items, and is the company behind the world-renowned bubblegum product BAZOOKA Bubblegum.

11. Topps has been a leader, for decades, in the sports trading card business, having popularized and standardized the unique style of card design, and the unique arrangement of pictures and information on trading cards.

12. Topps candy products include RING POP, PUSH POP, BABY BOTTLE POP, and JUICY DROP lollipops, taffy and gummies, all of which are well and favorably known throughout the United States and elsewhere around the world.

13. The JUICY DROP lollipop, which is an embodiment of the product claimed in the '316 Patent (defined below), was first introduced in May 2003, and in the last five years in the United States alone has had unit sales in excess of 118 million units with dollar sales of nearly \$200 million dollars during the same time period.

14. JUICY DROP lollipops have been sold in unique packaging that is both distinctive and non-functional. The key elements of the packaging are: (i) the JUICY DROP logo that appears on the package; (ii) the unique type font in which the mark JUICY DROP appears set against a black background that fancifully surrounds the contours of the mark and separates it from the package graphics and color; (iii) the appearance of the word "POP" in a smaller font size, set off from and below the JUICY DROP mark; (iv) the background graphics on the packaging, namely the use of swirls, water splash imagery, and other symbols; (v) a translucent compressible button and the aesthetic spiral-like appearance of the button; (vi) the use of creative and inventive flavor names, such as, for example, "Blue Razz Watermelon Blast"; and finally (vii) the colors of the lollipop and the packaging, namely, red, green, blue, and pink (hereinafter, the "JUICY DROP Trade Dress"). The JUICY DROP Trade Dress is shown below. The JUICY DROP Trade Dress has been used since 2009 and is consistent across the line of five flavors, the only difference being the package background color that changes to reflect the flavor.



15. The JUICY DROP lollipop is regularly advertised via mediums such as television commercials on networks such as Nickelodeon , Cartoon Network, Disney XD, Nicktoons, Boomerang, Teen Nick, ABC Family, Disney Family, Nick@Nite, and Adult Swim, social media (e.g., Facebook at facebook.com/Juicy Drop Candy/ and Instagram), online videos, the website candymania.com, and in-store promotions and promoted throughout the United States. Since January of 2011, Topps spent nearly \$6.5 million on such advertising and promotion. The vast majority of the advertising and promotions prominently feature the JUICY DROP Trade Dress. Screen shots from the JUICY DROP Facebook page are annexed hereto as Exhibit A. Screen shots from the candymania.com website are annexed hereto as Exhibit B. Screen shots from the current JUICY DROP Señor Sour and Showdown! television commercials are annexed hereto as Exhibit C. Examples of a banner ad is annexed hereto as Exhibit D.

16. Within the last five years alone, JUICY DROP television commercials such as the ones captured in the screenshots annexed hereto as Exhibit C, which prominently display the JUICY DROP Trade Dress, have garnered in excess of 3 billion viewer impressions from being aired on Nickelodeon , Cartoon Network, Disney XD, Nicktoons, Boomerang, Teen Nick, ABC Family, Disney Family, Nick@Nite, and Adult Swim, causing consumers to immediately recognize and associate the JUICY DROP Trade Dress exclusively with Topps.

17. The page devoted to the JUICY DROP lollipop on Topps' candy brand-dedicated website, <www.candymania.com>, features numerous images of the lollipop and has averaged hundreds of thousands page views annually since at least as early as 2013, which repeated impressions cause consumers to recognize and associate the JUICY DROP Trade Dress exclusively with Topps.

18. The JUICY DROP banner ad shown in Exhibit D annexed hereto that prominently displays the JUICY DROP Trade Dress appears on the JUICY DROP page of the Topps' candymania website as well as the websites Nick.com, AddictingGames.com CartoonNetwork.com and WWE.com, and in 2014 and 2016 alone, had approximately 44 million impressions, which repeated impressions cause consumers to recognize and associate the JUICY DROP Trade Dress exclusively with Topps.

19. The JUICY DROP lollipop has gained recognition beyond traditional advertisements reach. There are currently over 58,000 consumer made videos on YouTube.com of individuals taking the "JUICY DROP CHALLENGE." A copy of a sample of the Internet search results for the "JUICY DROP CHALLENGE" is annexed hereto as Exhibit E. These videos show consumers on camera eating the product, often featuring the JUICY DROP Trade Dress on screen, and reacting to its sweet and sour taste. Screenshots from a few such videos are annexed hereto as Exhibit F.

20. The JUICY DROP Trade Dress is not functional because it is not essential to the use or purpose of the product, does not affect the cost or quality of the article, and does not put competitors at a significant, non-reputation-related disadvantage given that the JUICY DROP Trade Dress in no way restricts competitor's ability to manufacture and sell a combination

lollipop and liquid candy dispenser, except to the extent that its packaging mimics the arbitrary combination of the design, color and graphics comprising the JUICY DROP Trade Dress.

21. As a result of the sales in excess of 118 million units of the JUICY DROP lollipop since 2011, equaling sales of nearly \$200 million, as well as the prominent display of the JUICY DROP Trade Dress in television commercials and online advertising, and in store promotions, the JUICY DROP Trade Dress has become well and favorably known such that it has acquired secondary meaning so consumers encountering the JUICY DROP Trade Dress in the marketplace recognize and associate it exclusively with Topps.

22. The consuming public and the commercial trade have come to recognize and exclusively associate the JUICY DROP Trade Dress with Topps as a result of the extensive and continuous promotion and sales of the JUICY DROP lollipop since use of said Trade Dress commenced in 2009.

23. United States Patent No. 6,660,316 (“’316 Patent”) is titled “Packaged Candy Product.” It issued on December 9, 2003, and names Daniel G. Hart and Gary D. Weiss as the inventors. It names Topps as the assignee. The ’316 Patent issued from United States Patent Application No. 10/027,521, filed on December 20, 2001.

24. Topps is the sole owner by assignment of all right, title, and interest in the ’316 Patent. A true and correct copy of the ’316 Patent is attached as Exhibit G.

25. In non-technical terms, the ’316 Patent pertains to a candy product consisting of a housing with two chambers. A candy holder retains a piece of hard candy and is placed in one chamber. A compressible bottle is included in the other chamber. The bottle is used to release flavored liquid onto the candy.

DEFENDANT’S UNLAWFUL CONDUCT

Patent Infringement

26. Topps is informed and believes, and thereon alleges, that Defendant has infringed, is currently infringing, and will continue to infringe the '316 Patent in violation of 35 U.S.C. § 271 by, among other things, making, using, selling, offering to sell, and/or importing within this district or elsewhere in the United States, without license or authority, products falling within the scope of one or more claims of the '316 Patent including at least Claim 1.

27. Based on the information presently available to it, Topps alleges that Defendant’s “SQUEEZY SQUIRT POP” device infringes at least Claim 1 of the '316 Patent. The infringing product identified in this Paragraph, all of Defendant’s products that are substantially similar to these products, and products containing the same are referred to collectively as the “Infringing '316 Products.” Topps makes this preliminary identification of infringing products and infringed claims without the benefit of discovery or claim construction in this action, and expressly reserves the right to augment, supplement, and revise its identifications based on additional information obtained through discovery or otherwise.

28. The Infringing '316 Products possess all of the limitations of at least representative Claim 1 of the '316 Patent, which states as follows:

A packaged candy product, comprising:

a housing including a front face and a back face, said housing defining an upper chamber and a lower chamber;

a candy holder for supporting a piece of candy and including a handle at its lower end, said candy holder being receivable within said lower chamber to close the chamber and being selectively removable therefrom;

a piece of hard candy supported by said candy holder;

a compressible bottle within the upper chamber of said housing, said bottle containing a flavored liquid said bottle and said housing being configured to allow

said liquid to be expelled from the bottle, at least two sides of said bottle being directly accessible through said housing such that a user can apply pressure directly to said bottle to dispense the flavored liquid on the hard candy when said hard candy supported on said candy holder has been removed from said housing.

29. Specifically, but without limitation, the Infringing '316 Products are packaged candy products that have a housing that includes a front face and a back face. The housing of the Infringing '316 Products defines an upper and a lower chamber. *See* Figure A below.

30. 29. Specifically, but without limitation, the Infringing '316 Products are packaged candy products that have a candy holder for supporting a piece of candy with a handle at its lower end. The candy holder can be removed from and is receivable within and removed from the lower chamber in the housing to close the lower chamber, and supports a piece of hard candy. *See* Figure A below.

31. Specifically, but without limitation, the Infringing '316 Products are packaged candy products that have a compressible bottle within the upper chamber of the housing. The bottle contains flavored liquid that can be expelled from the bottle by applying pressure to two sides of the bottle that are directly accessible through the housing, such that a user can dispense the liquid on the hard candy by applying pressure directly to the bottle, when the hard candy has been removed from the housing. *See* Figure A below.

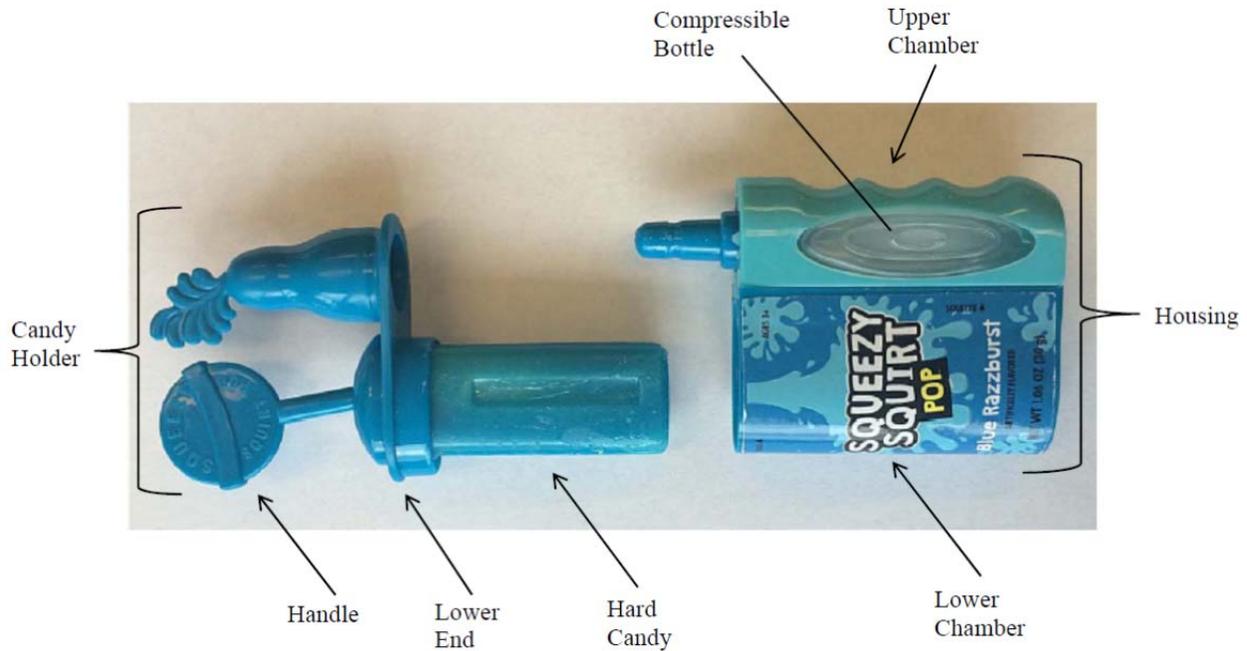


Figure A.

32. On information and belief, Defendant directly infringes and/or is inducing infringement of the '316 Patent by making, using, offering to sell, selling, and/or importing the Infringing '316 Products in this judicial district and elsewhere in the United States, and inducing others to make, use, offer to sell, sell, and/or import Infringing '316 Products or products containing Infringing '316 Products.

33. Defendant has been aware of the '316 Patent since no later than July 27, 2016. In particular, Defendant was specifically notified by letter dated July 26, 2016, that its "SQUEEZY SQUIRT POP" infringes the '316 Patent. Plaintiff further demanded that Defendant immediately cease and desist the manufacture, distribution, advertising and sale of the product, but Defendant has refused to do so, notwithstanding an objectively high likelihood that the product infringes the '316 Patent, as demonstrated above. Defendant's refusal to cease and desist its infringing activities despite knowledge of such infringement constitutes at least objective recklessness with regard to its highly likely infringement.

34. Defendant also has been aware that Defendant's customers, distributors and other purchasers of the Infringing '316 Products are infringing the '316 Patent as set forth in this Complaint.

Trade Dress Infringement

35. Upon information and belief, Defendant is a direct competitor of Topps in the candy business, both manufacturing and selling candy directly to distributors and retailers and even sells Topps' candy products, including the JUICY DROP lollipop. Defendant has copied the salient features of the JUICY DROP Trade Dress in an attempt trade off the reputation and good will associated with the JUICY DROP lollipop.

36. Defendant is offering for sale and/or selling a lollipop having a trade dress that violates Topps' JUICY DROP Trade Dress rights, in violation of Section 43(a) of the Trademark Act of 1946, *as amended* (the "Lanham Act"), 15 U.S.C. § 1125(a), and that is intended to cause and is likely to cause confusion among consumers and the trade.

37. Defendant's infringing product, SQUEEZY SQUIRT POP, directly and willfully infringes Topps' JUICY DROP Trade Dress, and Defendant intended, and continues to intend to trade off the stellar reputation and goodwill associated with the JUICY DROP lollipop.

38. Defendant's infringing lollipop product was plainly designed to evoke Topps' JUICY DROP lollipop in the minds of consumers. Specifically, and by way of example only, Defendant's SQUEEZY SQUIRT POP Trade Dress, consists of: (i) the SQUEEZY SQUIRT POP logo prominently appearing centered on the lollipop portion of the package just as the JUICY DROP mark appears on the JUICY DROP Trade Dress; (ii) the type font in which the mark SQUEEZY SQUIRT POP appears is highly similar to that of JUICY DROP Trade Dress; (iii) the SQUEEZY SQUIRT POP logo is set against a black background, causing a shadow effect that is extremely similar to that of the JUICY DROP logo; (iv) the word "POP" appears in

a smaller font size, set off from and below the SQUEEZY SQUIRT mark in a manner that mirrors that of JUICY DROP logo; (v) the background splatter graphics are substantially similar to those used as a part of the JUICY DROP Trade Dress; (vi) the translucent plastic button to dispense the liquid candy and swirl design appearing thereon are virtually identical to the translucent plastic button and swirl design of the JUICY DROP Trade Dress; (vii) the use of fanciful flavor names, such as “Blue Razzburst” are similar to those used for the JUICY DROP Trade Dress such as “Blue Razz Watermelon”; and finally (viii) the colors of the SQUEEZY SQUIRT POP lollipops and packaging track the colors of the JUICY DROP Trade Dress. Defendant’s infringing product and infringing trade dress is shown below.



39. The overall commercial impression created by the SQUEEZY SQUIRT POP package (the “Objectionable Trade Dress”) is substantially similar to the JUICY DROP Trade Dress and, therefore, likely to cause confusion therewith.

40. It is inevitable that that the target consumers for these products will mistakenly purchase the SQUEEZY SQUIRT POP lollipop believing it to be the JUICY DROP lollipop, or that it is authorized by Topps or in some way related to Topps and the JUICY DROP lollipop.

41. Defendant's offering for sale and/or sale of the infringing product using the Objectionable Trade Dress, clearly derived from Topps' JUICY DROP Trade Dress, is intended to, and is likely to, cause confusion, mistake or deception of the trade and public and to cause them to believe that Defendant's product is the same as, authorized or approved by, or otherwise affiliated or connected with Topps and/or Topps' JUICY DROP lollipop.

42. Defendant is well aware of the JUICY DROP trademark and JUICY DROP Trade Dress, and of the goodwill represented and symbolized thereby. Notwithstanding said awareness, and in fact by reason of the same, Defendant has knowingly manufactured, distributed, offered for sale and/or sold in this judicial district and elsewhere in the United States, the SQUEEZY SQUIRT POP lollipop that uses a trade dress that is extremely similar to the Topps JUICY DROP Trade Dress, and/or directly and actively participated in such activities, without authorization and in a manner designed to confuse consumers.

43. Defendant's activities have caused and will continue to cause irreparable harm to Topps and to the substantial goodwill embodied in the JUICY DROP Trade Dress, and said acts will continue unless preliminary and thereafter permanently restrained by this Court.

FIRST CAUSE OF ACTION

[Patent Infringement Under 35 U.S.C. § 271]

44. Plaintiff realleges and incorporates by reference Paragraphs 1 through 34 as though fully set forth herein.

45. Defendant has infringed, is currently infringing, and will continue to infringe the '316 Patent.

46. Defendant is knowingly and intentionally directly infringing the '316 Patent, in violation of 35 U.S.C. § 271(a), by making, using, selling, offering to sell, and/or importing

Infringing '316 Products within this judicial district and elsewhere in the United States, without license or authority, *e.g.*, through its website (www.kokos.com), at trade shows and conferences, and through its sales representatives, distributors, and other channels.

47. Defendant is knowingly and intentionally inducing infringement of the '316 Patent, in violation of 35 U.S.C. § 271(b), by actively encouraging others to make, use, offer for sale, sell, and/or import within this judicial district and elsewhere in the United States, without license or authority, Infringing '316 Products or products containing Infringing '316 Products that directly infringe the '316 Patent. For example, Defendant markets, promotes and advertises its infringing flavored liquid dispenser devices and offers descriptions, and other materials that actively encourage others to directly infringe the '316 Patent by making, using, selling, offering to sell and/or importing products that contain Defendant's infringing candy product through its website (www.kokos.com), at trade shows and conferences, and through its sales representatives, distributors, and other channels that encourage and facilitate infringing use of Defendant's candy product by others. Since at least the date of this Complaint, Defendant has had knowledge that the Infringing '316 Products infringe the '316 Patent and it has intended that Defendant's customers, distributors, and other purchasers infringe the '316 Patent by making, using, selling, offering to sell and/or importing Infringing '316 Products or products containing the Infringing '316 Products.

48. Defendant's acts of infringement have caused damage to Topps in an amount yet to be determined and subject to proof at trial.

49. On information an belief, Defendant has acted with at least objective recklessness as to its highly likely infringement of the '316 Patent, and thus its infringement has been willful.

50. Topps has no adequate remedy at law.

SECOND CAUSE OF ACTION

[False Designations of Origin Under 15 U.S.C. § 1125(a)]

51. Plaintiff realleges and incorporates by reference Paragraphs 1 through 22 as though fully set forth herein.

52. Defendant's infringement of the JUICY DROP Trade Dress constitutes trade dress infringement under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

53. Defendant's unauthorized use of the JUICY DROP Trade Dress has caused and is likely to cause confusion as to the source of Defendant's SQUEEZY SQUIRT POP lollipop, all to the detriment of Topps.

54. Upon information and belief, Defendant's acts are willful, deliberate, and intended to confuse the public and to injure Topps.

55. Topps has no adequate remedy at law to compensate it fully for the damages that have been caused and which will continue to be caused by Defendant's infringing conduct, unless it is preliminarily, and thereafter permanently enjoined by this Court.

THIRD CAUSE OF ACTION

[Common Law Unfair Competition – Trade Dress Infringement]

56. Topps realleges and incorporates by reference Paragraphs 1 through 55 as though fully set forth herein.

57. Defendants have used in commerce the Trade Dress for the JUICY DROP lollipop, or colorable imitations thereof, without the authorization or consent of Topps, in connection with the sale and offer for sale of goods and services similar to those sold by Topps.

58. Defendant's use of the Objectionable Trade Dress for its SQUEEZY SQUIRTY POP lollipop is calculated to, likely to, and does in fact confuse and deceive consumers about the origin of Defendant's goods and services.

59. The foregoing conduct of the Defendants constitutes the infringement of Topps' common law rights in the JUICY DROP Trade Dress for JUICY DROP lollipop and unfair competition in violation of the common law of the State of New York.

60. Defendant's conduct as aforesaid has caused great and irreparable injury to Topps, and unless such conduct is preliminarily and thereafter permanently enjoined, it will continue and Topps will continue to suffer great and irreparable injury.

61. Topps has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Topps prays for relief as follows:

- A. Judgment that Defendant has directly infringed the '316 Patent, both literally and under the doctrine of equivalents;
- B. Judgment that Defendant has induced infringement of the '316 Patent;
- C. Judgment that Defendant has directly infringed on Topps' Trade Dress;
- D. Judgment that such infringement as detailed above was willful;
- E. An injunction against Defendant requiring Defendant to discontinue the manufacture, use distribution, advertising, sale, offer for sale, and importation of all products infringing the '316 Patent.
- F. An order granting temporary, preliminary, and permanent injunctive relief restraining and enjoining Defendant, its agents, servants, employees, officers, associates,

attorneys, and all persons acting by, through, or in concert with any of them from using Topps' JUICY DROP Trade Dress, including but not limited to:

- a. manufacturing, importing, advertising, marketing, promoting, supplying, distributing, offering for sale, or selling the SQUEEZY SQUIRT POP lollipop or any other products bearing Topps' JUICY DROP Trade Dress and/or any trade dress confusingly similar thereto;
 - b. engaging in any other activity constituting unfair competition with Topps, or acts and practices that deceive consumers, the public, and/or trade, including without limitation, the use of designations and design elements used or owned by or associated with Topps; and
 - c. committing any other act, which falsely represents or which has the effect of falsely representing that the goods of Defendant are licensed by, authorized by, offered by, produced by, sponsored by, or in any other way associated with Topps;
- G. An order requiring Defendant to recall from any distributors and retailers and to deliver to Topps for destruction or other disposition all remaining inventory of all SQUEEZY SQUIRT POP lollipops utilizing the Objectionable Trade Dress, including all advertisements, promotional and marketing materials therefore, as well as means of making same;
- H. An order requiring Defendant to file with this Court and serve on Topps within thirty (30) days after entry of the injunction a report in writing, under oath, setting forth in detail the manner and form in which Defendant has complied with the injunction;
- I. An order of accounting by Defendant of all gains, profits and advantages derived from its wrongful acts pursuant to 15 U.S.C. § 1117(a);

J. An award of compensatory damages in an amount according to proof, and in any event, no less than a reasonable royalty;

K. An award in the amount equivalent to disgorgement of Defendant's profits resulting from said infringements in Paragraph C;

L. An award of treble damages for willful infringement;

M. An award of punitive damages to Topps in connection with its claims under New York law;

N. An award of reasonable attorneys' fees, costs, and expenses pursuant to 35 U.S.C. §285 because this is an exceptional case;

O. An award of reasonable attorneys' fees, costs, and expenses pursuant to 15 U.S.C. § 1125(a);

P. Prejudgment interest on all damages awarded to Topps;

Q. Post-judgment interest on all sums awarded to Topps from the date of the judgment;

R. Costs of suit incurred herein; and

S. Any and all other relief that the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Topps hereby demands a trial by jury on all issues.

Dated: September 28, 2016

Respectfully submitted,

/s/ Steven J. Rizzi

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