

ESTTA Tracking number: **ESTTA1115384**

Filing date: **02/18/2021**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92076425
Party	Defendant M&T Bank
Correspondence Address	M&T BANK 2003 SOUTH EASTON ROAD SUITE 204 DOYLESTOWN, PA 18901 UNITED STATES Primary Email: trademarkdocketchica@us.dlapiper.com No phone number provided.
Submission	Motion to Suspend for Civil Action
Filer's Name	Michael Geller
Filer's email	michael.geller@dlapiper.com, ch.tm@dlapiper.com
Signature	/Michael Geller/
Date	02/18/2021
Attachments	Airofog v BandG - Motion for Suspension 240.pdf(5841726 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: Reg. No. 3,210,240
Mark: Sprayer Design
Filed: April 19, 2005
Registered: February 20, 2007

AIROFOG USA, LLC,)	
)	
Petitioner,)	
)	Cancellation No.: 92076425
v.)	
)	
M&T BANK,)	
)	
Respondent.)	

MOTION FOR SUSPENSION

Pursuant to 37 CFR § 2.117(a) and TBMP § 510.02(a), B&G Equipment Company (“B&G”), the owner of Registration No. 3,210,240 (the “Registration”), requests immediate suspension of the above-captioned proceeding (the “Cancellation”).

A. **The Registration is Owned by B&G Equipment Company.**

At the outset, B&G notes that the Petition to Cancel filed by Airofog USA, LLC (“Petitioner”) was filed against M&T Bank. B&G, *not* M&T Bank, is the owner of the Registration.

In 2013, B&G entered into a Loan Agreement (the “Loan Agreement”) with M&T Bank. As part of the Loan Agreement, the parties intended to record a Security Agreement with the U.S. Patent and Trademark Office (the “USPTO”). However, counsel for M&T Bank recorded a Trademark Assignment in error on January 8, 2014. This caused M&T Bank to be listed as the owner of the Registration in the USPTO “TSDR” database (the “TSDR Database”). Counsel for M&T Bank thereafter recorded a Corrective Assignment/Security Agreement to correct the error

on September 30, 2014. A copy of the Corrective Assignment/Security Agreement is attached hereto as **Exhibit A**. The Corrective Assignment/Security Agreement plainly identifies B&G as the owner of all rights, title, and interest in and to the Registration.

The TSDR Database did not automatically update the Registration's ownership information after the Corrective Assignment/Security Agreement was filed, and B&G, therefore, filed a Section 7 request to update the TSDR Database. A copy of the Section 7 request filed by B&G with regard to the Registration is attached as **Exhibit B**.

B. **Suspension is Proper.**

On February 15, 2019, B&G filed a complaint in federal court in the Middle District of Florida against Petitioner, captioned *B&G Equipment Company v. Airofog USA, LLC*, Case No. 8:19-cv-00430-CEH-AEP (the "Florida Litigation"). The Florida Litigation alleges claims for, *inter alia*, trademark infringement, false designation of origin, unfair competition, violations of the Florida Deceptive and Unfair Trade Practices Act, and unjust enrichment. B&G's trademark infringement and unfair competition claims in the Florida Litigation center around Petitioner's unauthorized use of the trademark/trade dress depicted in the Registration. Pursuant to TBMP § 510.02(a), B&G attaches a copy of the file-stamped complaint in the Florida Litigation as **Exhibit C**.

On March 19, 2019, Petitioner filed its Answer in the Florida Litigation, claiming that the Registration is invalid as "functional, generic, not inherently distinctive, ubiquitous, and [] not [having] acquired secondary meaning." Answer and Counterclaim, *B&G Equipment Company v. Airofog USA, LLC*, Case No. 8:19-cv-00430-CEH-AEP, p. 13-14 (Mar. 19, 2019). A copy of Petitioner's Answer and Counterclaim in the Litigation is attached as **Exhibit D**.

The Trademark Trial and Appeal Board (“TTAB”) may suspend a proceeding when the parties “are involved in a civil action that may have a bearing on the Board case.” TBMP § 510.02(a). The Board will suspend the proceeding absent “unusual circumstances” if the proceeding “may have a bearing on the issues before the board.” TBMP § 510.02(a). The Board policy is to favor suspension, even where the civil action involves matters outside the Board’s jurisdiction. TBMP § 510.02(a).

The Florida Litigation involves Petitioner and B&G, the owner of the Registration which Petitioner seeks to cancel. In Florida Litigation, B&G alleges that Petitioner infringed the mark covered by the Registration, and Petitioner asserted a defense that the Registration is invalid. Thus, the Florida Litigation and issues in it bear directly and substantially on this cancellation action against the Registration.

Therefore, B&G requests suspension of this cancellation action until a final determination of the Florida Litigation, as well as any and all appeals.

Dated: February 18, 2021

Respectfully submitted,

B&G EQUIPMENT COMPANY

By: /s/ Michael Geller

Michael A. Geller

DLA PIPER LLP (US)

michael.geller@dlapiper.com

444 West Lake Street, Suite 900

Chicago, Illinois 60606-0089

Telephone: 312.368.4000

Facsimile: 312.251.2187

Attorneys for B&G Equipment Co.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **MOTION FOR SUSPENSION** is being sent via courier, addressed to the correspondent of record:

SUSAN J LATHAM
FELDMAN & LATHAM, LLP D/B/A TRAILBLAZER
1200 BRICKELL AVENUE, PENTHOUSE 1900
MIAMI, FL 33131
UNITED STATES
slatham@trailblazerlaw.com; jfeldman@trailblazerlaw.com;
lnguyen@trailblazerlaw.com; icervantes@trailblazerlaw.com; tm@trailblazerlaw.com

/s/ Michael Geller

Signature

Michael Geller

Name

February 18, 2021

Date of Signature

EXHIBIT A

TRADEMARK ASSIGNMENT COVER SHEET

Electronic Version v1.1
Stylesheet Version v1.2

ETAS ID: TM318407

SUBMISSION TYPE:	CORRECTIVE ASSIGNMENT
NATURE OF CONVEYANCE:	Corrective Assignment to correct the Nature of the Conveyance from ASSIGNMENT OF THE ENTIRE INTEREST to a SECURITY INTEREST previously recorded on Reel 005189 Frame 0074. Assignor(s) hereby confirms the a continuing security interest in all of Assignor's right, title and interest in the Acquired Trademarks.

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
B&G Equipment Company (f/k/a B&G Acq. Corp.)		09/18/2014	CORPORATION: DELAWARE

RECEIVING PARTY DATA

Name:	M&T Bank
Street Address:	2003 Sourth Easton Road
Internal Address:	Suite 204
City:	Doylestown
State/Country:	PENNSYLVANIA
Postal Code:	18901
Entity Type:	Chartered Bank and Trust Company: NEW YORK

PROPERTY NUMBERS Total: 4

Property Type	Number	Word Mark
Registration Number:	0828504	EXTENDA-BAN
Registration Number:	1113449	B & G
Registration Number:	3210240	B&G
Registration Number:	3239891	

CORRESPONDENCE DATA

Fax Number: 2156653165
Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.

Phone: 215-665-3217
Email: joseph.aceto@obermayer.com
Correspondent Name: Joseph F. Aceto Ph.D., Esq.
Address Line 1: 1617 JFK Blvd.
Address Line 2: 19th Floor
Address Line 4: Philadelphia, PENNSYLVANIA 19103

ATTORNEY DOCKET NUMBER:	OBY 97 M&T CORRECTIVEACT
NAME OF SUBMITTER:	Joseph F. Aceto

TRADEMARK

SIGNATURE:	/Joseph F. Aceto/
DATE SIGNED:	09/30/2014
Total Attachments: 12 source=assignment-tm-5189-0074#page1.tif source=assignment-tm-5189-0074#page2.tif source=assignment-tm-5189-0074#page3.tif source=assignment-tm-5189-0074#page4.tif source=assignment-tm-5189-0074#page5.tif source=assignment-tm-5189-0074#page6.tif source=CORRECTIVE ASSIGNMENT_20140929090353#page1.tif source=CORRECTIVE ASSIGNMENT_20140929090353#page2.tif source=CORRECTIVE ASSIGNMENT_20140929090353#page3.tif source=CORRECTIVE ASSIGNMENT_20140929090353#page4.tif source=CORRECTIVE ASSIGNMENT_20140929090353#page5.tif source=CORRECTIVE ASSIGNMENT_20140929090353#page6.tif	

TRADEMARK ASSIGNMENT

Electronic Version v1.1
 Stylesheet Version v1.1

SUBMISSION TYPE:	NEW ASSIGNMENT		
NATURE OF CONVEYANCE:	ASSIGNS THE ENTIRE INTEREST AND THE GOODWILL		
CONVEYING PARTY DATA			
Name	Formerly	Execution Date	Entity Type
B&G Equipment Company, Inc.(f/k/a B&G Acq. Corp.)		12/20/2013	CORPORATION: DELAWARE
RECEIVING PARTY DATA			
Name:	M&T Bank		
Street Address:	2003 South Easton Road Suite 204		
City:	Doylestown		
State/Country:	PENNSYLVANIA		
Postal Code:	18901		
Entity Type:	chartered bank and trust company: NEW YORK		
PROPERTY NUMBERS Total: 4			
Property Type	Number	Word Mark	
Registration Number:	828504	EXTENDA-BAN	
Registration Number:	1113449	B & G	
Registration Number:	3210240	B&G	
Registration Number:	3239891		
CORRESPONDENCE DATA			
Fax Number:	2156653165		
<i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent via US Mail.</i>			
Phone:	215-665-3076		
Email:	susan.montella@obermayer.com		
Correspondent Name:	Dominic Liberi, Esq.		
Address Line 1:	1617 JFK Blvd., 19th Floor		
Address Line 4:	Philadelphia, PENNSYLVANIA 19103		
NAME OF SUBMITTER:	Susan M. Montella		

OP \$115.00 828504

900276644

TRADEMARK
 REEL: 005189 FRAME: 0074
 TRADEMARK
 REEL: 005371 FRAME: 0081

Signature:	/smm/
Date:	01/08/2014
Total Attachments: 4 source=trademrk assign#page1.tif source=trademrk assign#page2.tif source=trademrk assign#page3.tif source=trademrk assign#page4.tif	

CORRECTIVE ASSIGNMENT

THIS CORRECTIVE ASSIGNMENT and grant of security interest (this "Collateral Assignment" or "Assignment") is executed and delivered by **B&G Equipment Company, Inc.** (f/k/a B&G Acq. Corp.), a Delaware corporation with a mailing address of 135 Region South Drive, Jackson, Georgia 30233 ("Assignor"), in favor of **M&T Bank**, a New York chartered bank and trust company with a mailing address of 2003 South Easton Road, Suite 204, Doylestown, Pennsylvania 18901 ("Assignee"),

WHEREAS, this Assignment is being executed in connection with that certain Loan Agreement, dated as of December 20, 2013, entered into by and between Assignor and Assignee (as it may be supplemented, restated, superseded, amended or replaced from time to time, the "Loan Agreement") and a certain Security Agreement executed by and between Assignor and Assignee, as of even date therewith (the "Security Agreement"). Capitalized terms used in this Assignment and not defined herein shall have the respective meanings ascribed to such terms in the Loan Agreement; and

WHEREAS, pursuant to the Loan Agreement and the Security Agreement, the parties intended that Assignor would grant to Assignee a first priority lien and security interest in all of the assets of Assignor, including, but not limited to, each Trademark set forth on Schedule A attached hereto (the "Trademarks"), free and clear of all liens;

WHEREAS, on or about December 20, 2013, Assignor and Assignee executed a document entitled "Trademark Assignment" which the parties intended to assign a security interest in the Trademarks from Assignor to Assignee (the "Trademark Assignment");

WHEREAS, the terms of the Trademark Assignment actually purported to transfer to Assignee all right, title and interest in and to the Trademarks, a result that neither Assignor nor Assignee intended;

WHEREAS, the Trademark Assignment was recorded with the U.S. Patent and Trademark Office ("USPTO") at Reel 005189 and Frame 0074;

WHEREAS, Assignor and Assignee now wish to execute this Assignment, which the Assignor and Assignee intend to supersede, replace and render moot the Trademark Assignment, so as to confirm that no outright assignment or other conveyance of the Trademarks from Assignor to Assignee has ever occurred, and to grant a security interest in the Trademarks to Assignee, as the parties originally intended.

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, Assignor hereby agree as follows:

1. Grant of Security Interest. Further to the Loan Agreement and the Security Agreement, Assignor hereby grants to Assignee a first lien and priority security interest in and to the Trademarks together with the following additional rights, each of which shall be granted without restriction and free and clear of all liens and encumbrances (the "Security Interest"):

(a) all registrations of the Trademarks in any State of the United States and any foreign countries and localities;

(b) all trade names, trademarks and trademark registrations hereafter adopted or acquired and used, including, but not limited to, those which are based upon or derived from the Trademarks;

(c) all extensions, renewals and continuations of the Trademarks and the registrations referred to in clause (b) above;

(d) all rights to sue for past, present and future infringements of the Trademarks;

(e) all packaging, labeling, trade names, service marks, logos and trade dress including or containing the Trademarks, or a representation thereof, or any variation thereof;

(f) all licenses and other agreements under which Assignor is licensor, but only to the extent that the grant of a security interest therein would not be prohibited by or be a breach of terms thereof, and all fees, rents, royalties, proceeds or monies thereunder, relating to the Trademarks and the use thereof; and

(g) all goodwill of Assignor's business connected with, symbolized by or in any way related to the items set forth in clauses (a) through (g) above.

2. Further Assurances. Assignor hereby covenants and agrees that it will, at the request of Assignee, and without further consideration, execute and deliver, and will cause its Affiliates, agents, directors, officers and employees to execute and deliver, such other instruments and take such other action, as may reasonably be necessary to more effectively publish and confirm unto Assignee, and its successors and assigns, a first lien and priority security interest in the Trademarks and to carry out the purpose and intent of this Collateral Assignment, the Loan Agreement and the Security Agreement. Assignee represents, warrants and covenants that, to the extent any right, title or interest in the Trademarks were assigned to Assignee by the Trademark Assignment, Assignee hereby assigns back to Assignor all such right, title and interest in the Trademarks, and agrees to take all actions necessary to secure Assignor's full and undivided ownership of the Trademarks.

3. No Modification of Representations, Warranties, Rights, Remedies, or Obligations. Assignor, by its execution of this Assignment, hereby acknowledges and agrees that neither the representations and warranties nor the rights, remedies or obligations of any party under the Loan Agreement or the Security Agreement shall be deemed to be enlarged, modified or altered in any way by this instrument and Assignor further reaffirms the effectiveness of all of the referenced covenants, representations and warranties.

4. Loan Agreement Incorporated by Reference. The terms of the Loan Agreement (including, without limitation, Assignor's representations, warranties, covenants, agreements and indemnities relating to the Trademarks) are incorporated herein by this reference. Assignor acknowledges and agrees that the representations, warranties, covenants, agreements and indemnities contained in the Loan Agreement shall not be superseded hereby but shall remain in full force and effect

to the full extent provided therein. This Assignment is entered into pursuant to, and is subject to the terms and conditions of, the Loan Agreement. In the event of any conflict or inconsistency between the terms of the Loan Agreement and the terms hereof, the terms of the Loan Agreement shall govern and control.

5. Termination of Security Interest. Upon complete performance by Assignor of all obligations under the Loan Agreement and full and indefeasible payment of all Indebtedness under the Loan Documents, Assignor shall terminate this Assignment of record with the USPTO and release all liens in the Trademarks.

6. Continuing Obligations. Notwithstanding this Collateral Assignment, Assignor shall continue to protect and preserve the validity and effectiveness of the Trademarks at Assignor's sole cost and expense.

7. Choice of Law. This Assignment shall be governed by, and all disputes, claims or controversies relating to, arising out of, or in connection with this Assignment, including any question regarding its formation, existence, validity, enforceability, performance, interpretation, breach, or termination, shall be resolved in accordance with the laws of the Commonwealth of Pennsylvania without regard to its conflict of laws rules. In the event that a dispute, claim or controversy relating to, arising out of, or in connection with this Assignment is not the subject of a claim for specific performance pursuant to Section 9.2 of the Loan Agreement or is not otherwise arbitrable under the Loan Agreement, such dispute, claim or controversy shall be subject to the exclusive jurisdiction of the Pennsylvania courts of the United States District Court for the Eastern District of Pennsylvania and no others. The parties hereby consent to the jurisdiction of the above designated courts and to the service of process by registered mail, return receipt requested, or by any other manner provided by the laws of the Commonwealth of Pennsylvania.

8. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall for all purposes be deemed an original and all of which shall constitute one and the same instrument. Any signature page delivered by a facsimile machine shall be binding to the same extent as an original signature page with regard to any agreement subject to the terms hereof or any amendment thereto. A party that delivers a signature page in this manner agrees to later deliver an original counterpart to the other party.

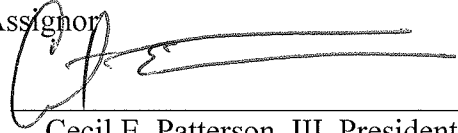
[SIGNATURE PAGE FOLLOWS]

Witness my hand and seal this 18th day of September 2014.

B&G EQUIPMENT COMPANY, INC.,

as Assignor

By:



Cecil E. Patterson, III, President

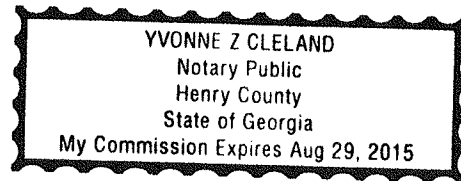
STATE OF Georgia :
COUNTY OF Henry : SS

On this 18th day of September 2014, before me, a Notary Public in and for the State and County aforesaid, personally appeared Cecil E. Patterson, III, who acknowledged himself to be President of B&G Equipment Company, Inc. (f/k/a B&G Acq. Corp.), a Delaware corporation (the "Company"), and that he as such President, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such President.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.


NOTARY PUBLIC

My Commission expires: August 29, 2015

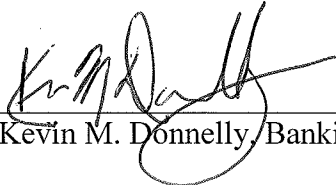


Signature Page to Corrective Assignment

ACCEPTANCE OF ASSIGNMENT

The undersigned officer of Assignee hereby accepts the foregoing Collateral Assignment and agrees to be bound by the provisions thereof applicable to Assignee.

M&T Bank

By: 
Kevin M. Donnelly, Banking Officer

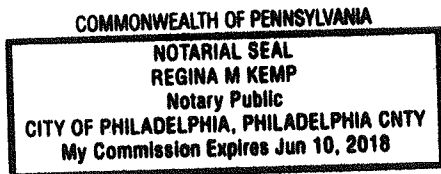
STATE OF Pennsylvania :
COUNTY OF Philadelphia : SS

On this 23rd day of September 2014, before me, a Notary Public in and for the State and County aforesaid, personally appeared Kevin M. Donnelly, who acknowledged himself to be a duly authorized officer of M&T Bank, (the "Bank"), and that being so authorized, has executed the foregoing instrument for the purposes therein contained by signing the name of the Bank.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.


NOTARY PUBLIC

My Commission expires:



Schedule A to Trademark Assignment

**TRADEMARKS REGISTERED WITH
THE UNITED STATES PATENT AND TRADEMARK OFFICE**


MARK	SERIAL NO.	FILING DATE	REGISTRATION NO.	REGISTRATION DATE
EXTENDA-BAN	72241418	03/21/1966	828504	05/09/1967
B & G	73113969	01/28/1977	1113449	02/20/1979
B&G	78611663	04/19/2005	3210240	02/20/2007
 (DESIGN MARK FOR HAND-OPERATED SPRAYERS FOR PESTICIDE)	78961769	08/28/2006	3239891	05/08/2007

EXHIBIT B

Section 7 Request Form

The table below presents the data as entered.

Input Field	Entered
REGISTRATION NUMBER	3210240
LAW OFFICE ASSIGNED	LAW OFFICE 108
SERIAL NUMBER	78611663
MARK SECTION	
MARK FILE NAME	https://tmng-al.uspto.gov/resting2/api/img/78611663/large
LITERAL ELEMENT	B&G
STANDARD CHARACTERS	NO
USPTO-GENERATED IMAGE	NO
OWNER SECTION (current)	
NAME	M&T BANK
MAILING ADDRESS	2003 SOUTH EASTON ROAD SUITE 204
CITY	DOYLESTOWN
STATE	Pennsylvania
ZIP/POSTAL CODE	18901
COUNTRY/REGION/JURISDICTION/U.S. TERRITORY	United States
EMAIL	XXXX
OWNER SECTION (proposed)	
NAME	B&G Equipment Company Inc.
MAILING ADDRESS	135 Region South Drive
CITY	Jackson
STATE	Georgia
ZIP/POSTAL CODE	30233
COUNTRY/REGION/JURISDICTION/U.S. TERRITORY	United States
EMAIL	XXXX
LEGAL ENTITY SECTION (current)	
TYPE	CHARTERED BANK AND TRUST COMPANY
STATE/COUNTRY/REGION/JURISDICTION/U.S. TERRITORY WHERE LEGALLY ORGANIZED	New York
LEGAL ENTITY SECTION (proposed)	
TYPE	corporation
STATE/COUNTRY/REGION/JURISDICTION/U.S. TERRITORY OF INCORPORATION	Delaware

EXPLANATION OF FILING

Pursuant to TMEP 1609.10(a) and Section 7(g) of the Lanham Act, Registrant respectfully requests an amendment to Registration No. 3210240 (the "'240 Registration") to correct a USPTO error. In 2013, the owner of the '240 Registration, B&G Equipment Company Inc. ("B&G"), entered into a Loan Agreement (the "Loan Agreement") with M&T Bank. As part of the Loan Agreement, the parties intended to record a Security Agreement with the US Trademark Office. However, counsel for M&T Bank recorded a Trademark Assignment in error on January 8, 2014. This apparently caused M&T Bank to be listed as the owner of the '240 Registration in TSDR. Counsel for M&T Bank thereafter recorded a Corrective Assignment/Security Agreement to correct the error on September 30, 2014. The TSDR records for all other involved Trademark Registrations were updated to reflect B&G as the owner, but the '240 Registration TSDR record was not updated. M&T Bank remains incorrectly listed as the owner of record even though B&G was, and still is, the owner of all right, title and interest in this '240 Registration.

ATTORNEY INFORMATION (current)

NAME	Michael A. Geller
ATTORNEY BAR MEMBERSHIP NUMBER	XXX
YEAR OF ADMISSION	XXXX
U.S. STATE/ COMMONWEALTH/ TERRITORY	XX
FIRM NAME	DLA Piper LLP (US)
STREET	P.O Box 64807
CITY	Chicago
STATE	Illinois
POSTAL CODE	60664-0807
COUNTRY/REGION/JURISDICTION/U.S. TERRITORY	United States
PHONE	312.368.4000
FAX	312.236.7516
EMAIL	ch.tm@us.dlapiper.com
DOCKET/REFERENCE NUMBER	BGE-05-1091

ATTORNEY INFORMATION (proposed)

NAME	Michael A. Geller
ATTORNEY BAR MEMBERSHIP NUMBER	XXX
YEAR OF ADMISSION	XXXX
U.S. STATE/ COMMONWEALTH/ TERRITORY	XX
FIRM NAME	DLA Piper LLP (US)
STREET	P.O Box 64807
CITY	Chicago
STATE	Illinois
POSTAL CODE	60664-0807
COUNTRY/REGION/JURISDICTION/U.S. TERRITORY	United States
PHONE	312.368.4000
FAX	312.236.7516
EMAIL	ch.tm@us.dlapiper.com
DOCKET/REFERENCE NUMBER	BGE-05-1091
OTHER APPOINTED ATTORNEY	Keith W. Medansky, Hilary H. Remijas, Nicole A. Chaudhari and Eugênia Schöntag

CORRESPONDENCE INFORMATION (current)	
NAME	Michael A. Geller
PRIMARY EMAIL ADDRESS FOR CORRESPONDENCE	ch.tm@us.dlapiper.com
SECONDARY EMAIL ADDRESS(ES) (COURTESY COPIES)	NOT PROVIDED
CORRESPONDENCE INFORMATION (proposed)	
NAME	Michael A. Geller
PRIMARY EMAIL ADDRESS FOR CORRESPONDENCE	ch.tm@us.dlapiper.com
SECONDARY EMAIL ADDRESS(ES) (COURTESY COPIES)	sheila.brown@us.dlapiper.com
DOCKET/REFERENCE NUMBER	BGE-05-1091
PAYMENT SECTION	
SECTION 7 FEE – Amendment filed is the correction of an immaterial error that was the fault of the USPTO	100
TOTAL FEES DUE	100
SIGNATURE SECTION	
DECLARATION SIGNATURE	/GoCats!65/
SIGNATORY'S NAME	Todd E Pawlowski
SIGNATORY'S POSITION	President
DATE SIGNED	01/22/2021
SIGNATURE METHOD	Sent to third party for signature
REQUEST SIGNATURE	/Michael Geller/
SIGNATORY'S NAME	Michael Geller
SIGNATORY'S POSITION	Associate attorney, DLA Piper LLP, Illinois bar member
DATE SIGNED	01/22/2021
ROLE OF AUTHORIZED SIGNATORY	Authorized Canadian Trademark Attorney/Agent
SIGNATURE METHOD	Sent to third party for signature
CONCURRENT § 8, 8 & 15, OR 8 & 9 FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Fri Jan 22 16:30:55 ET 2021
TEAS STAMP	USPTO/S7R-XXX.XXX.XXX.X-2 0210122163055455357-32102 40-7602fa09d5636a7da8cb4b 8aa624418d6fd2d898a94c306 942a8bb41d2ebbf9a28-DA-30 535851-202101211726331782 51

Section 7 Request Form

To the Commissioner for Trademarks:

The registrant requests the following amendment(s) to registration no. **3210240** B&G (Stylized and/or with Design, see <https://tmng-al.uspto.gov/resting2/api/img/78611663/large>) has been amended as follows:

EXPLANATION OF FILING

Pursuant to TMEP 1609.10(a) and Section 7(g) of the Lanham Act, Registrant respectfully requests an amendment to Registration No. 3210240 (the "'240 Registration") to correct a USPTO error. In 2013, the owner of the '240 Registration, B&G Equipment Company Inc. ("B&G"), entered into a Loan Agreement (the "Loan Agreement") with M&T Bank. As part of the Loan Agreement, the parties intended to record a Security Agreement with the US Trademark Office. However, counsel for M&T Bank recorded a Trademark Assignment in error on January 8, 2014. This apparently caused M&T Bank to be listed as the owner of the '240 Registration in TSDR. Counsel for M&T Bank thereafter recorded a Corrective Assignment/Security Agreement to correct the error on September 30, 2014. The TSDR records for all other involved Trademark Registrations were updated to reflect B&G as the owner, but the '240 Registration TSDR record was not updated. M&T Bank remains incorrectly listed as the owner of record even though B&G was, and still is, the owner of all right, title and interest in this '240 Registration.

OWNER AND/OR ENTITY INFORMATION

Registrant proposes to amend the following:

Current: M&T BANK a(n) CHARTERED BANK AND TRUST COMPANY, legally organized under the laws of New York, having an address of

2003 SOUTH EASTON ROAD SUITE 204
DOYLESTOWN, Pennsylvania 18901
United States
XXXX

Proposed: B&G Equipment Company Inc., a corporation of Delaware, having an address of

135 Region South Drive
Jackson, Georgia 30233
United States
XXXX

The owner's/holder's current attorney information: Michael A. Geller. Michael A. Geller of DLA Piper LLP (US), is a member of the XX bar, admitted to the bar in XXXX, bar membership no. XXX, is located at

P.O Box 64807
Chicago, Illinois 60664-0807
United States

The docket/reference number is BGE-05-1091.

The phone number is 312.368.4000.

The fax number is 312.236.7516.

The email address is ch.tm@us.dlapiper.com

The owner's/holder's proposed attorney information: Michael A. Geller. Other appointed attorneys are Keith W. Medansky, Hilary H. Remijas, Nicole A. Chaudhari and Eugênia Schöntag. Michael A. Geller of DLA Piper LLP (US), is a member of the XX bar, admitted to the bar in XXXX, bar membership no. XXX, and the attorney(s) is located at

P.O Box 64807
Chicago, Illinois 60664-0807
United States

The docket/reference number is BGE-05-1091.

The phone number is 312.368.4000.

The fax number is 312.236.7516.

The email address is ch.tm@us.dlapiper.com

Michael A. Geller submitted the following statement: The attorney of record is an active member in good standing of the bar of the highest court of a U.S. state, the District of Columbia, or any U.S. Commonwealth or territory.

Correspondence Information (current):

Michael A. Geller
PRIMARY EMAIL FOR CORRESPONDENCE: ch.tm@us.dlapiper.com
SECONDARY EMAIL ADDRESS(ES) (COURTESY COPIES): NOT PROVIDED

Correspondence Information (proposed):

Michael A. Geller
PRIMARY EMAIL FOR CORRESPONDENCE: ch.tm@us.dlapiper.com
SECONDARY EMAIL ADDRESS(ES) (COURTESY COPIES): sheila.brown@us.dlapiper.com

The docket/reference number is BGE-05-1091.

Requirement for Email and Electronic Filing: I understand that a valid email address must be maintained by the owner/holder and the owner's/holder's attorney, if appointed, and that all official trademark correspondence must be submitted via the Trademark Electronic Application System (TEAS).

FEE(S)

Fee(s) in the amount of \$100 is being submitted.

SIGNATURE(S)

Declaration Signature

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of this submission, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

Signature: /GoCats!65/ Date: 01/22/2021
Signatory's Name: Todd E Pawlowski
Signatory's Position: President
Signatory's Phone: 7708551048
Signature method: Sent to third party for signature

Request Signature

Signature: /Michael Geller/ Date: 01/22/2021
Signatory's Name: Michael Geller
Signatory's Position: Associate attorney, DLA Piper LLP, Illinois bar member

Signatory's Phone: 312.368.2152

Signature method: Sent to third party for signature

The signatory has confirmed that an authorized U.S. licensed attorney has been appointed to represent the owner/holder; that he/she has been granted reciprocal recognition under 37 C.F.R. §11.14(c)(1) by the USPTO's Office of Enrollment and Discipline; and, that he/she is an authorized signatory based on 37 C.F.R. §11.14(c)(2).

The applicant is NOT filing a Declaration of Use of Mark under Section 8; a Combined Declaration of Use of Mark under Sections 8 & 15; or a Combined Declaration of Use of Mark/Application for Renewal of Registration of Mark under Sections 8 & 9 in conjunction with this Section 7 Request.

Mailing Address: Michael A. Geller
DLA Piper LLP (US)

P.O Box 64807
Chicago, Illinois 60664-0807
Mailing Address: Michael A. Geller
DLA Piper LLP (US)
P.O Box 64807
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PAYMENT: 3210240
PAYMENT DATE: 01/22/2021

Serial Number: 78611663
Internet Transmission Date: Fri Jan 22 16:30:55 ET 2021
TEAS Stamp: USPTO/S7R-XXX.XXX.XXX.X-2021012216305545
5357-3210240-7602fa09d5636a7da8cb4b8aa62
4418d6fd2d898a94c306942a8bb41d2ebbf9a28-
DA-30535851-20210121172633178251

ROUTING SHEET TO POST REGISTRATION (PRU)

Registration Number: 3210240



Serial Number: 78611663



RAM Sale Number: 3210240

RAM Accounting Date: 20210122

Total Fees: \$100

Note: Process in accordance with Post Registration Standard Operating Procedure (SOP)

<u>Transaction</u>	<u>Fee Code</u>	<u>Transaction Date</u>	<u>Fee per Class</u>	<u>Number of Classes</u>	<u>Total Fee</u>	
\$7 request		20210122	\$0	0	0	\$100

Physical Location: 900 - NO PHYSICAL FILE

Lost Case Flag: False

In TICRS (AM-FLG-IN-TICRS): True

Transaction Date: 20210122



EXHIBIT C

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

B&G EQUIPMENT COMPANY, INC.,

Plaintiff,

v.

AIROFOG USA, LLC, a Florida limited liability company,

Defendant.

Civil Action No.

**COMPLAINT FOR DAMAGES, INJUNCTIVE
RELIEF AND DEMAND FOR JURY TRIAL**

Plaintiff B&G Equipment Company, Inc. (“B&G” or “Plaintiff”) seeks legal and equitable remedies for violations of the Trademark Laws of the United States, 15 U.S.C. § 1051 et seq. (also referred to as the “Lanham Act”). This action also asserts related state claims under both the statutory law and common law of the State of Florida. Defendant AiroFog USA, LLC (“Defendant”) is promoting, selling and offering for sale goods which are confusingly similar imitations of Plaintiff’s trademark goods, and such actions by Defendant additionally violate the express terms of the parties’ Settlement Agreement. Plaintiff seeks preliminary and permanent injunctive relief, equitable relief, monetary damages, attorney’s fees, and other necessary relief. In support of the aforementioned claims, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over all causes of action set forth herein pursuant to 28 U.S.C. §§ 1331, 1332, 1338, and 1367, in that this is a civil action involving claims arising under the laws of the United States, and/or involving claims between parties with diversity of citizenship where the amount in controversy exceeds \$75,000, wherein all other

state law claims are so related to claims within the Court's original jurisdiction that they form part of the same case or controversy.

2. This Court also has jurisdiction over the state law claims under the doctrine of supplemental jurisdiction, because the federal and state claims are based on the same operative facts, and judicial economy, convenience and fairness to the parties will result if this Court assumes and exercises jurisdiction over such state law claims.

3. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391, because, Defendant resides in this District, and because some or all of Defendant's infringing activities set forth in this Complaint occurred within this District.

PARTIES

4. Plaintiff, B&G Equipment Company, Inc. (hereinafter referred to as "B&G") is a Delaware corporation, having a principal place of business at 135 Region South Drive, Jackson, Georgia, 30233.

5. B&G is a manufacturer and seller of various pest control products, such as sprayers and parts therefor, throughout the United States to both pest control specialists and the consuming public at large, and has been in the business of manufacturing and selling such products since 1949.

6. Upon information and belief, Defendant is a Florida limited liability company with offices located at 15331 Flight Path Drive, Brooksville, Florida 34604.

7. Upon information and belief, Defendant is a distributor of pest control products, including sprayers.

8. Upon information and belief, Defendant distributes pest control products both within Florida and throughout the United States.

FACTUAL BACKGROUND

B&G's Trade Dress

9. B&G has been manufacturing and selling pest control products for over sixty-seven (67) years.

10. One of B&G's longest-running and most popular products is the B&G 'Sprayer' (hereinafter the "Sprayer"). An image of the Sprayer is shown below:



11. After its introduction in 1962, the Sprayer quickly became the corporate image and brand for B&G, and continues to represent B&G's corporate image and brand to this day.

12. The Sprayer comes in a variety of volumetric sizes (e.g., ½ Gallon, 1 Gallon, 2 Gallon, etc.), but each size shares a common product configuration unique to B&G, including the following elements: (1) a cylindrical barrel; (2) circumferential rings extending around the barrel; (3) a slightly conical top member for the barrel; (4) a handle configuration incorporating a tubular gripping portion and a semicircular support member connecting the gripping portion to

a pump portion of the barrel; (5) a sprayer wand with an obtusely angled tip portion; and (6) a diagonal mounting pocket for the sprayer wand affixed to the barrel.

13. By 2007, B&G had obtained two (2) Trademark Registrations on the Sprayer: (1) U.S. Reg. No. 3,210,240 (for the Sprayer including the words “B&G” stamped thereon) and (2) U.S. Reg. No. 3,239,891 (for the Sprayer body alone) (collectively, the “Trademark Registrations”). Copies of the Trademark Registrations are attached hereto as Exhibit A.

14. The Trademark Registrations became incontestable on April 18, 2012 and January 2, 2013, respectively. Copies of the U.S. Trademark Office’s Acceptances of B&G’s Declarations of Incontestability are attached hereto as Exhibit B.

15. In addition to B&G’s federally registered rights as set forth in the Trademark Registrations, B&G has common law trademark and trade dress rights in the combination of unique and ornamental features that comprise the Sprayer, including: (1) a cylindrical barrel; (2) circumferential rings extending around the barrel; (3) a slightly conical top member for the barrel; (4) a handle configuration incorporating a tubular gripping portion and a semicircular support member connecting the gripping portion to a pump portion of the barrel; (5) a sprayer wand with an obtusely angled tip portion; and (6) a diagonal mounting pocket for the sprayer wand affixed to the barrel, which holds the sprayer wand generally upright when mounted on the barrel (collectively, the “Sprayer Trade Dress”).

16. The Sprayer Trade Dress is purely aesthetic, and non-functional.

17. B&G first sold a sprayer including all the elements of the Sprayer Trade Dress in 1962.

18. Since 1962, B&G has continuously and actively marketed sprayers including the Sprayer Trade Dress in interstate commerce.

19. The Sprayer Trade Dress has acquired secondary meaning through over fifty (50) years of substantially continuous and exclusive use by B&G in the marketplace.

20. Since B&G's first sale in 1962, B&G has enjoyed the goodwill associated with the Sprayer Trade Dress, and greatly values such goodwill.

21. Customers within the pest control industry associate the Sprayer Trade Dress exclusively with B&G.

Defendant's Copycat Products

22. Upon information and belief, Defendant began selling a sprayer (hereinafter the "AF Sprayer") with a design that blatantly copied the design of the B&G Sprayer at least as early as October 2014.

23. Upon information and belief, prior to 2014, a Chinese company also called AiroFog ("AiroFog China") had been trying to sell a sprayer similar in design to the AF Sprayer through various distribution channels in the United States.

24. Upon information and belief, after failing to gain traction in the United States through standard distribution channels in the pest control industry, AiroFog China decided to set up its own U.S. distributor, namely, Defendant.

25. Shown below are images of the B&G Sprayer (right) and the AF Sprayer (left) from 2016, arranged side-by-side.



26. As shown above, the design of the AF Sprayer was substantially identical to that of the B&G Sprayer in 2016.

27. At the time the AF Sprayer was first introduced (2014), the B&G Sprayer had been on sale for over fifty (50) years, and B&G had accumulated substantial goodwill in the design of the Sprayer.

28. The AF Sprayer includes all the features shown in the Trademark Registrations, with the exception of the word “B&G” on the barrel (which has been replaced with the word “AiroFog”).

29. The AF Sprayer includes all the elements of the Sprayer Trade Dress.

30. B&G and Defendant share the same channels of trade with respect to their products.

31. B&G and Defendant have attended the same trade shows in the past.

32. B&G and Defendant target the same end customers, namely, Pest Control Operators (PCOs).

33. Defendant is infringing, and will continue to infringe, B&G's intellectual property rights in the Trademark Registrations, and in the Sprayer Trade Dress, unless enjoined by this Court.

34. Upon information and belief, Defendant will continue to willfully infringe B&G's intellectual property rights in the Trademark Registrations and Sprayer Trade Dress, unless enjoined.

35. Many alternative ornamental designs exist in the marketplace for pest control products, such that Defendant did not need to copy the designs for B&G's Sprayer in order to compete.

36. Defendant's copying of the design for B&G's Sprayer permitted Defendant to make virtually no investment in product design and development with respect to the AF Sprayer, and also allowed Defendant to benefit from the substantial goodwill B&G has accumulated in the marketplace.

37. Upon information and belief, Defendant introduced the AF Sprayer with an intention to trade off B&G's long-standing goodwill, in order to cause confusion in the marketplace for pest control products, and to lead customers to believe that Defendant's products are sponsored by, or affiliated with, B&G.

The 2016 Litigation And Settlement

38. In 2016, B&G brought claims against Defendant in this judicial district for, *inter alia*, trademark infringement and unfair competition. *See B&G Equipment Co., Inc. v. AiroFog USA LLC*, Case No. 8:16-cv-03432-CEH-MAP (the "2016 Litigation").

39. The Court (Honorable Charlene Edwards Honeywell) dismissed the 2016 Litigation on December 5, 2017 pursuant to a settlement between the parties. *See* ECF No. 33, 2016 Litigation.

40. The parties settlement of the 2016 Litigation was set forth in a written Settlement Agreement dated November 15, 2017 (the “Settlement Agreement”), attached hereto as Exhibit C.

41. The Defendant expressly agreed to make material changes to specific ones of its products in the Settlement Agreement, including the AF Sprayer.

42. With respect to the AF Sprayer, the Defendant agreed to mark the AF Sprayer as “Made In China” with vinyl, destructible labels.

43. Section 3.3(a) of the Settlement Agreement specifically states:

All stickers comprise vinyl, destructible labels, or some equivalent type of label which is tamper resistant, or which is made in such a manner so as not to be easily removable from the respective Products without destruction of the label itself. B&G agrees that the following types of labels are appropriate for use in connection with this sub-section: (i) Brady Defender™ destructible labels made by Brady (<http://www.bradybrandprotection.com/>), (ii) CAMCODE® destructible labels made by Horizons Inc. (<https://www.camcode.com/>), or (iii) NADCO® destructible vinyl labels [Material 7613] made by Nadco Tapes & Labels, Inc. (<http://www.nadco-inc.com/index.html>).

44. The Defendant additionally expressly agreed to make the lengths of the wands for the AF Sprayer either 7 ½ or 17 ½ inches exactly.

45. Section 3.4(a) of the Settlement Agreement specifically states:

The lengths of the wands for the AF Sprayer shall be only 7 ½ inches or 17 ½ inches, and shall not be interchangeable with wands for the current B&G Sprayer; The hose, trigger valve, and filter for the AF Sprayer shall not be interchangeable with the current B&G Sprayer; No parts for the AF Sprayer shall be interchangeable with

the B&G Sprayer, except for the parts shown in Exhibit C attached hereto...

46. As shown above, the Defendant also expressly agreed to make the wands not interchangeable with the wands for the B&G Sprayer.

47. Defendant also expressly agreed to make the hose, trigger valve, and filter for the AF Sprayer not interchangeable with the B&G Sprayer.

48. Finally, Defendant expressly agreed in the Settlement Agreement to make no parts for the AF Sprayer that would be interchangeable with the B&G Sprayer, except for a few limited parts listed in the Settlement Agreement which are not at issue in this case.

Defendant's Recent Actions

49. Defendant has failed to adhere to the promises it made in the Settlement Agreement.

50. Plaintiff recently learned that Defendant has breached the Settlement Agreement in several material ways, including but not limited to:

- a. using "Made in China" labels that are easily removable without destruction of the label;
- b. using wands for the AF Sprayer that are not exactly 7 ½ inches nor exactly 17 ½ inches; and
- c. using parts for the AF Sprayer that are interchangeable with parts for the B&G Sprayer, including but not limited to the wands.

51. Below is an image of the “Made In China” label on an AF Sprayer; the label is already peeling off, and does not appear to be destructible in any manner:



52. Below is an image of the wand of the AF Sprayer (top) compared to the wand of the current B&G Sprayer (bottom); the wands have identical lengths of 8 ½ inches:



53. Below is an image of the wand of the AF Sprayer disassembled; the parts shown are attachable to the B&G Sprayer, and thus interchangeable with the B&G Sprayer:



54. In accordance with the notice provisions of Section 5.1 of the Settlement Agreement, Plaintiff notified Defendant in writing of the identified material breaches on December 14, 2018 and provided Defendant the thirty (30) days specified in the agreement to cure (the "Notice Letter"). A true and correct copy of the Notice Letter is attached hereto as Exhibit D.

55. Defendant did not cure the material breaches referenced above by January 14, 2019.

56. In fact, Plaintiff heard nothing from Defendant in response to the Notice Letter until midday on January 14, 2019, when Defendant's counsel contacted Plaintiff's counsel to request an extension of time to address the issues raised in the Notice Letter.

57. The months of November through February are the peak sales time for pest control products.

58. Despite this peak sales time, Plaintiff agreed to a limited extension of time of fourteen (14) days for Defendant to respond to the Notice Letter, in hopes that Defendant would cure the referenced material breaches, and that litigation would not be necessary.

59. Defendant failed to cure the material breaches of the Settlement Agreement by January 28, 2019, and thus this litigation became necessary.

60. Defendant continues to advertise and sell the AF Sprayer to this day, while touting the interchangeability of parts with the B&G Sprayer, and wand lengths greater than 7 ½ and 17 ½ inches. Attached hereto as Exhibit E are pages from the website of distributor (Pest Management Supply) selling Defendant's products. These pages advertise wand lengths of 8 inches and 18 inches for the AF Sprayer, and also advertise AF Sprayer parts that "fit[] [both] AiroFog and B&G tanksprayers."

61. To protect its trademarks and other valuable intellectual property from further infringement by Defendant, and to seek relief for the ongoing irreparable harm caused by Defendant, Plaintiff has filed the present action.

COUNT I

Trademark Infringement Under Section 32 of the Lanham Act

62. B&G restates and incorporates by reference Paragraphs 1 to 61 above, as if set forth fully in this Count.

63. B&G owns all right, title and interest in and to the Trademark Registrations.

64. Defendant is improperly and willfully infringing the Trademark Registrations in interstate commerce through the advertising, promotion, sale and distribution of the AF Sprayer.

65. The AF Sprayer is a counterfeit copy of B&G's genuine Sprayer.

66. Defendant's use in interstate commerce of the product designs that are virtually identical to the product configuration described in the Trademark Registrations is likely to cause confusion or deception of consumers as to the source, origin, or sponsorship of the products in violation of Section 32 of the Lanham Act (15 U.S.C. § 1114). Particularly, customers are likely to purchase Defendant's sprayer products believing them to be those of B&G, thereby resulting in a loss of goodwill and sales to B&G.

67. Defendant's conduct constitutes trademark infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

68. As a direct and proximate result of Defendant's conduct, B&G has been, and is likely to be, substantially injured in its business including harm to its goodwill and reputation and the loss of revenues and profits.

69. B&G has no adequate remedy at law, and unless enjoined by this Court, Defendant will continue to engage in such acts of trademark infringement, to the irreparable damage and injury of B&G.

70. Upon information and belief, Defendant has engaged in the above-referenced acts of trademark infringement with full knowledge of B&G's exclusive rights in the Trademark Registrations, and Defendant continues in such acts of intentional infringement, thus making this case exceptional and entitling B&G to an award of treble its actual damages, plus attorneys' fees in bringing and maintaining this action.

COUNT II

Unfair Competition by False Designation of Origin Under Section 43(a) of the Lanham Act

71. B&G restates and incorporates by reference Paragraphs 1 to 61 above, as if set forth fully in this Count.

72. The designs reflected in the Trademark Registrations acts as indicators of source and/or origin, and have acquired distinctiveness via secondary meaning.

73. The Trademark Registrations are valid and subsisting, and incontestable.

74. The designs reflected in the Trademark Registrations are non-functional and distinctive in the minds of the relevant purchasers of B&G's goods and services as being associated exclusively with B&G.

75. The Sprayer Trade Dress collectively operates as an indicator of source and/or origin, and has acquired distinctiveness via secondary meaning.

76. The Sprayer Trade Dress is valid and subsisting, and has been in continuous and exclusive use throughout the United States, by B&G, since at least as early as 1962.

77. The Sprayer Trade Dress is non-functional and distinctive in the minds of the relevant purchasers of B&G's goods and services as being associated exclusively with B&G.

78. Defendant, through their use, display and copying of the designs of B&G's unique products (including the Sprayer), has without authorization, in connection with their goods and/or services in commerce, made or contributed to the making of false designations of origin, false or misleading descriptions of fact, and/or false or misleading representations of fact, which are likely to cause confusion, mistake, or to deceive as to the affiliation, connection or association of Defendant with B&G, and/or as to the origin, sponsorship or approval of Defendant's goods and/or services, in violation of Section 43(a)(1)(A) of the Lanham Act (15 U.S.C. § 1125(a)(1)(A)).

79. Consumers are likely to purchase pest control products such as AF Sprayer from Defendant believing that Defendant is affiliated, connected or associated with B&G, resulting in a loss of goodwill to B&G.

80. Defendant's acts as set forth herein constitute unfair competition, and/or induce or contribute to acts of unfair competition.

81. Defendant's unfair acts have been committed in bad faith and with the intent to cause confusion, mistake and/or to deceive.

82. As a direct and proximate result of Defendant's conduct, B&G has been, and is likely to be, substantially injured in its business including harm to its goodwill and reputation and the loss of revenues and profits.

83. B&G has no adequate remedy at law because the designs reflected in the Trademark Registrations and in the Sprayer Trade Dress are unique and represent to the public B&G's identity, reputation, and goodwill, such that damages alone cannot fully compensate B&G for Defendant's misconduct.

84. Unless enjoined by this Court, Defendant and those acting in concert with them will continue to infringe B&G's intellectual property rights, to B&G's irreparable injury. This threat of future injury to B&G's business identity, goodwill, and reputation requires injunctive relief to prevent Defendant's continued use of the designs reflected in the Trademark Registrations and in the Sprayer Trade Dress, and/or product configurations confusingly similar thereto, and to ameliorate and mitigate B&G's injuries.

85. Upon information and belief, Defendant has engaged in the above-referenced acts of unfair competition with knowledge of B&G's exclusive rights, and Defendant will continue in such acts unless enjoined by this Court.

COUNT III

Unfair Competition (Florida Common Law)

86. B&G restates and incorporates by reference Paragraphs 1 through 61 above, as if set forth fully in this Count.

87. B&G owns and enjoys common law trademark rights in the shape and design of its products (including those designs reflected in the Trademark Registrations, and in the Sprayer Trade Dress) in the State of Florida and throughout the United States.

88. The designs reflected in the Trademark Registrations, and in the Sprayer Trade Dress operate as indicators of source and/or origin, particularly when used in interstate commerce. Moreover, these designs have acquired distinctiveness via secondary meaning.

89. Defendant, through their use, display and copying of the designs reflected in the Trademark Registrations, and in the Sprayer Trade Dress, has without authorization, in connection with their goods and/or services in commerce, made or contributed to the making of false designations of origin, false or misleading descriptions of fact, and/or false or misleading representations of fact, which are likely to cause confusion, mistake, or to deceive as to the affiliation, connection or association of Defendant with B&G, and/or as to the origin, sponsorship or approval of Defendant's goods and services in violation of the common law of the State of Florida.

90. Consumers are likely to purchase pest control products from Defendant believing that Defendant is affiliated, connected or associated with B&G, resulting in a loss of goodwill to B&G.

91. Defendant's acts as set forth herein constitute unfair competition, and/or induce or contribute to acts of unfair competition.

92. Defendant's unfair acts have been committed in bad faith and with the intent to cause confusion, mistake and/or to deceive.

93. As a direct and proximate result of Defendant's conduct, B&G has been, and is likely to be, substantially injured in its business including harm to its goodwill and reputation and the loss of revenues and profits.

94. Upon information and belief, Defendant's acts of unfair competition are, and have been, oppressive, fraudulent and malicious, thus entitling B&G to punitive damages.

95. B&G has no adequate remedy at law because the designs reflected in the Trademark Registrations, and in the Sprayer Trade Dress, are unique and represent to the public B&G's identity, reputation, and goodwill, such that damages alone cannot fully compensate B&G for Defendant's misconduct.

96. Unless enjoined by this Court, Defendant and those acting in concert with them will continue to infringe B&G's intellectual property rights, to B&G's irreparable injury. This threat of future injury to B&G's business identity, goodwill, and reputation requires injunctive relief to prevent Defendant's continued use of the designs reflected in the Trademark Registrations, and the Sprayer Trade Dress, and/or product configurations confusingly similar thereto, and to ameliorate and mitigate B&G's injuries.

97. Upon information and belief, Defendant has engaged in the above-referenced acts of unfair competition with knowledge of B&G's exclusive intellectual property rights, and Defendant will continue in such acts unless enjoined by this Court.

COUNT IV

Violation Of Florida Deceptive And Unfair Trade Practices Act

98. B&G restates and incorporates by reference Paragraphs 1 through 61 above, as if set forth fully in this Count.

99. Defendant's use of the designs reflected in the Trademark Registrations, and the Sprayer Trade Dress, or colorable imitations thereof, constitute deceptive and unfair practices under Florida's Deceptive and Unfair Trade Practices Act (F.S.A. § 501.201 *et seq.*).

100. Specifically, Defendant's use of the designs reflected in the Trademark Registrations, and the Sprayer Trade Dress, and attempt to profit from the sale of the Infringing Products to third parties go against public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers.

101. As a direct result of Defendant's deceptive and unfair practices, B&G has been, and continues to be, damaged by Defendant's use of the designs reflected in the Trademark Registrations, and the Sprayer Trade Dress, and attempts to profit from the sale of the Infringing Products.

COUNT V

Unjust Enrichment

102. B&G restates and incorporates by reference Paragraphs 1 through 61 above, as if set forth fully in this Count.

103. B&G has invested substantial time, labor and money in the design and production of the B&G Sprayer.

104. Defendant has wrongfully misappropriated the unique features of the B&G Sprayer (as reflected in the Trademark Registrations, and the Sprayer Trade Dress), and has profited from and received certain other benefits as a result of such wrongful misappropriation.

105. Defendant has been unjustly enriched at B&G's expense.

106. It would be inequitable to allow Defendant to retain the profits and other benefits it acquired through its wrongful actions.

COUNT VI

Unfair Competition by False Advertising Under Section 43(a) of the Lanham Act

107. B&G restates and incorporates by reference the allegations of Paragraphs 1 through 61 as if fully set forth herein.

108. B&G alleges that Defendant, through its use and display of the AF Sprayer, use false and/or misleading descriptions and/or representations of fact in commercial advertising or promotion which misrepresent the nature, characteristics and/or qualities of the its goods and/or services in violation of Section 43(a)(1)(B) of the Lanham Act (15 U.S.C. § 1125(a)(1)(B)).

109. Defendant is manufacturing the AF Sprayer in China and importing the product into the United States without marking the country of origin on the goods or its packaging in a manner to make such information known to the end customer. Pursuant to the Tariff Act (19 U.S.C.A. § 1304), every article of foreign origin imported into the United States must be marked to indicate such country of origin.

110. While Defendant has apparently applied a “Made In China” labels to at least some versions of the AF Sprayer, such labels are cheap and easily removable.

111. Once such a label is removed, the end customer will not know the true source of the AF Sprayer.

112. The above-referenced conduct is deceptive and a misleading representation of fact that misrepresents the geographic origin of Defendant’s AF Sprayer in violation of 15 U.S.C. § 1125.

113. In addition to failing to designate the country of origin for the AF Sprayer, Defendant utilizes the term “USA” in its logo, with a red/white/blue color scheme. This conduct is intended to mislead the public into believing that the AF Sprayer has certain qualities

that it does not actually have, and is a misleading representation of fact in violation of 15 U.S.C. § 1125.

114. Defendant's activities in commercial advertising or promotion as described above misrepresent the nature, characteristics, qualities, or origin of Defendant's goods and services.

115. Defendant's false and misleading descriptions and/or statements actually deceive or have a tendency to deceive a substantial segment of customers.

116. Defendant's false and misleading statements and/or descriptions are material, and are likely to influence the purchasing decision of actual and prospective customers.

117. Upon information and belief, Defendant's actions with regard to the above-referenced false and misleading statements and/or descriptions have been committed willfully and in bad faith and with the intent to cause confusion, mislead and/or deceive.

118. As a direct and proximate result of Defendant's conduct, B&G has been and is likely to be substantially injured in its business including harm to its goodwill and its reputation and the loss of revenues and profits.

119. B&G has no adequate remedy at law because the product configuration of the B&G Sprayer is unique and represents to the public B&G's identity, reputation, and goodwill, such that damages alone cannot fully compensate B&G for Defendant's misconduct.

120. Unless enjoined by this Court, Defendant and those acting in concert with them will continue to infringe B&G's rights in the B&G Sprayer's product configuration, to B&G's irreparable injury. This threat of future injury to B&G's business identity, goodwill, and reputation requires injunctive relief to prevent Defendant's continued use of the product configuration of the B&G Sprayer and/or product configurations confusingly similar thereto, and to ameliorate and mitigate B&G's injuries.

121. Upon information and belief, Defendant has engaged in acts of false and/or misleading descriptions and/or representations of fact in commercial advertising with knowledge of B&G's exclusive rights in the product configuration of the B&G Sprayer, and Defendant continues in such acts.

COUNT VII

Breach Of Contract

122. B&G restates and incorporates by reference Paragraphs 1 through 61 above, as if set forth fully in this Count.

123. Defendant signed and entered into a valid written contract with B&G entitled "Settlement Agreement and Release," attached hereto as Exhibit C.

124. As expressly stated in Section 3.3(a) of the Settlement Agreement Defendant agreed:

The AF Sprayer, AF ADU, and AF Termite Tool (collectively the "Products") shall all be marked as "Made In China" from [November 15, 2017] forward for so long as such Products, or any component parts thereof, are actually made in China and such Products are sold in the United States of America...All stickers comprise vinyl, destructible labels, or some equivalent type of label which is tamper resistant, or which is made in such a manner so as not to be easily removable from the respective Products without destruction of the label itself. (emphasis added).

125. In Section 3.4 of the Agreement, Defendant expressly agreed:

(a) The lengths of the wands for the AF Sprayer shall be only 7 ½ inches or 17 ½ inches, and shall not be interchangeable with wands for the current B&G Sprayer; The hose, trigger valve, and filter for the AF Sprayer shall not be interchangeable with the current B&G Sprayer; No parts for the AF Sprayer shall be interchangeable with the B&G Sprayer, except for the parts shown in Exhibit C attached [to the Agreement]... (emphasis added).

126. The obligations set forth in the Settlement Agreement are reasonable and necessary to protect B&G's multiple legitimate business interests, trademarks, and intellectual property.

127. Defendant has breached multiple material obligations under the Settlement Agreement, as set forth above.

128. Defendant's conduct has caused irreparable injury to B&G, and B&G is facing the threat of further imminent irreparable harm as long as Defendant continues its wrongful conduct.

129. B&G has suffered harm and damages as a direct and proximate result of Defendant's breaches of its contractual obligations.

130. The threat of further imminent irreparable injury to B&G outweighs the threatened harm of the proposed injunctive relief against Defendant.

131. Any injunctive relief, if issued, will not disserve the public interest.

132. Unless Defendant is immediately enjoined from engaging in the wrongful conduct set forth herein, B&G will continue to suffer irreparable injury and harm for which it has no adequate remedy at law. Such injunctive relief was anticipated by the parties and is appropriate based on the express terms of the Settlement Agreement.

133. In particular, Section 6.9 of the Settlement Agreement provides:

Injunctive Relief Each of the Parties agree that it would be impossible or inadequate to measure and calculate damages from any breach of the covenants, representations or warranties set forth in this Agreement. Accordingly, each of the Parties agree that if he/she/it breaches any of such covenants, representations or warranties, the Party harmed by such breach will have available, in addition to any other right or remedy available to it at law or in equity, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this Agreement. Each of the Parties further agree that no bond or other security shall be required in obtaining such equitable relief.

134. B&G is entitled to recover attorneys' fees in connection with this action under Section 6.8 of the Agreement, which provides:

Attorneys' Fees If litigation arises concerning a breach of this Agreement, the Court shall award to the party prevailing in such litigation his/her/its reasonable costs and reasonable attorneys' fees in connection with such litigation.

135. Upon information and belief, Defendant has engaged in the above-reference acts and omissions with knowledge of relevant terms of the Settlement Agreement, and Defendant continues in such acts.

WHEREFORE, for the foregoing reasons, Plaintiff B&G Equipment Company, Inc. respectfully requests that this Court enter preliminary and permanent injunctive relief against Defendant AiroFog USA, LLC, as well as its employee and/or agents, awarding the following relief:

A. Entry of a judgment that:

1. Defendant has infringed Plaintiff's federal trademark rights in the Trademark Registrations;

2. Defendant's sale of the AF Sprayer, including the designs set forth in the Trademark Registrations, and in the Sprayer Trade Dress, constitutes unfair competition under Section 43(a) of the Lanham Act;

3. Defendant has engaged in common law unfair competition, through the sale of the AF Sprayer including the designs set forth in the Trademark Registrations, and in the Sprayer Trade Dress;

4. Defendant has engaged in deceptive and unfair trade practices in the State of Florida (under the Deceptive and Unfair Trade Practices Act), through the sale of the AF Sprayer including the designs set forth in the Trademark Registrations, and in the Sprayer Trade Dress;

5. Defendant has been unjustly enriched by the sale of the AF Sprayer; and

6. Defendant's false or misleading descriptions and/or representations of fact in the commercial advertising and promotion of their products and services constitutes unfair competition in violation of Section 43(a) of the Lanham Act.

B. Entry of judgment that Defendant's acts of trademark infringement and unfair competition detailed herein have been, and continue to be, willful and deliberate.

C. Entry of preliminarily and permanent injunctions enjoining Defendant, their agents, servants and employees, and those people in active concert or participation with it from:

1. using, infringing, contributing to, or inducing infringement of the B&G's registered and common law trademarks and service marks, including but not limited to the Trademark Registrations and the Sprayer Trade Dress;

2. using any false designation, description or representation regarding the source or sponsorship of its goods and/or services, or stating or implying that Defendant or its agents are connected with the goods and/or services of B&G, thereby damaging B&G's goodwill and reputation;

3. causing a likelihood of confusion or misunderstanding as to the source or sponsorship of Defendant's business and/or Defendant's goods or services, including but not limited to causing a likelihood of confusion or misunderstanding as to Defendant's affiliation, connection or association with B&G or any of B&G's goods and/or services; and,

4. otherwise infringing B&G's common law and registered trademarks and service marks, or otherwise unfairly competing with B&G.

D. Entry of judgment requiring Defendant to offer up for destruction all articles, displays, advertisements, labels, signs, prints, packages, packaging, wrappers, receptacles, brochures, catalogs, plates, molds, uniforms, and logo items in its possession or control which display a product which is identical to, or confusingly similar with, B&G's protected product configuration trade dress as set forth in the Trademark Registrations, as provided by Section 36 of the Lanham Act (15 U.S.C. §1118).

E. Entry of judgment requiring Defendant to file with the Court and to serve upon B&G's counsel within thirty (30) days after entry of any injunction or order issued herein, a written report, under oath, setting forth in detail the manner in which it has complied with such injunction or order pursuant to Section 34 of the Lanham Act (15 U.S.C. §1116(a)).

F. Entry of judgment:

1. awarding B&G such actual damages as it has sustained by reason of Defendant's acts of trademark infringement in violation of Section 32 of the Lanham Act (15 U.S.C. §1114) (including, but not limited to, a disgorgement of Defendant's profits, B&G's lost profits, and the costs of this action);

2. awarding B&G treble its actual damages for such trademark infringement;

3. awarding B&G its attorney's fees in bringing and maintaining this action, which should be deemed exceptional, for such trademark infringement; and

4. requiring Defendant to account to B&G for any and all profits derived by it from sales of the Infringing Products, and to compensate B&G for all damages sustained by reason of such trademark infringement and the other acts complained of herein; all pursuant to Section 35 of the Lanham Act (15 U.S.C. §1117).

G. Entry of judgment:

1. awarding B&G such actual damages as it has sustained by reason of Defendant's acts of unfair competition in violation of Section 43(a)(1)(A) of the Lanham Act (15 U.S.C. §1125(a)(1)(A)) (including, but not limited to, a disgorgement of Defendant's profits, B&G's lost profits, and the costs of this action);

2. awarding B&G treble its actual damages or such acts of unfair competition;

3. awarding B&G its attorney's fees in bringing and maintaining this action, which should be deemed exceptional, for such acts of unfair competition; and

4. requiring Defendant to account to B&G for any and all profits derived by it from sales of the Infringing Products, and to compensate B&G for all damages sustained by reason of such acts of unfair competition and the other acts complained of herein; all pursuant to Section 35 of the Lanham Act (15 U.S.C. §1117).

H. Entry of judgment ordering Defendant to compensate B&G for the advertising or other expenses necessary to dispel any confusion caused by Defendant's trademark infringement, unfair competition and other unlawful acts (including but not limited to the costs of an appropriate corrective advertising campaign), pursuant to Section 35 of the Lanham Act (15 U.S.C. §1117).

I. Entry of judgment awarding B&G such damages as it has sustained by reason of Defendant's acts of common law unfair competition, including but not limited to compensatory damages, attorneys' fees, costs and/or punitive damages.

J. Entry of judgment awarding B&G such damages as it has sustained by reason of Defendant's deceptive and unfair trade practices, including but not limited to compensatory damages, attorneys' fees, costs and/or punitive damages.

K. Entry of judgment awarding B&G the amount of Defendant's unjust enrichment.

L. Entry of judgment enjoining Defendant from further material breaches of the Agreement and awarding B&G damages it sustained due to the Defendant's material breaches of the Agreement, including but not limited to compensatory damages, attorneys' fees, and costs.

M. Affording B&G such further and other relief as this Court may deem just and proper.

Dated: February 1, 2019

Respectfully submitted,

s/ Amanda E. Reagan

Fredrick H.L. McClure

Florida Bar No. 147354

Amanda E. Reagan

Florida Bar No. 92520

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Pro Hac Vice to be submitted

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ATTORNEYS FOR PLAINTIFF

B&G EQUIPMENT CO., INC.

VERIFICATION

I, PETER MANGION, declare and aver as follows:

1. I am the Chief Executive Officer for Hansard 3449 Ltd. d/b/a Pelsis (“Pelsis”). Pelsis is the owner of the Plaintiff in this action, B&G Equipment Company, Inc. I have read the foregoing Complaint (the “Complaint”), and know the contents thereof. Except as stated upon information and belief, I have knowledge of the matters stated in the Complaint, and believe them to be true.

2. Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: February 1, 2019


By: 
Peter Mangion

EXHIBIT A

Int. Cl.: 8

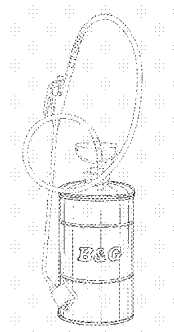
Prior U.S. Cls.: 23, 28 and 44

Reg. No. 3,210,240

United States Patent and Trademark Office

Registered Feb. 20, 2007

**TRADEMARK
PRINCIPAL REGISTER**



B&G EQUIPMENT COMPANY (DELAWARE CORPORATION)
135 REGION SOUTH DRIVE
JACKSON, GA 30233

FOR: HAND-OPERATED SPRAYERS FOR PESTICIDE, IN CLASS 8 (U.S. CLS. 23, 28 AND 44).

FIRST USE 0-0-1962; IN COMMERCE 0-0-1962.

OWNER OF U.S. REG. NO. 1,113,449.

THE MARK CONSISTS OF A CONFIGURATION OF A HAND OPERATED SPRAYER WHEREIN THE FEATURES OF THE MARK ARE- THE CYLINDRICAL BARREL OF THE SPRAYER; THE CIRCUMFERENTIAL RINGS EXTENDING AROUND THE BARREL OF THE SPRAYER; THE SLIGHTLY CON-

ICAL TOP MEMBER OF THE SPRAYER BARREL; AND THE STYLIZED TRADEMARK "B&G" ON THE BARREL. THESE FEATURES ARE ORNAMENTAL AND MAKE UP A UNIQUE PRODUCT CONFIGURATION. THE DOTTED LINES IN THE DRAWING PROVIDE PERSPECTIVE FOR THE LOCATION OF THE ABOVE-DESCRIBED UNIQUE FEATURES IN THE DESIGN CONFIGURATION, AND ARE NOT CLAIMED AS FEATURES OF THE MARK.

SEC. 2(F).

SER. NO. 78-611,663, FILED 4-19-2005.

JAY BESCH, EXAMINING ATTORNEY

Int. Cl.: 8

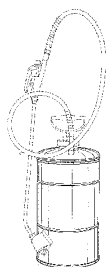
Prior U.S. Cls.: 23, 28 and 44

Reg. No. 3,239,891

United States Patent and Trademark Office

Registered May 8, 2007

**TRADEMARK
PRINCIPAL REGISTER**



B & G EQUIPMENT COMPANY (DELAWARE CORPORATION)
135 REGION SOUTH DRIVE
JACKSON, GA 30233

FOR: HAND-OPERATED SPRAYERS FOR PESTICIDE, IN CLASS 8 (U.S. CLS. 23, 28 AND 44).

FIRST USE 0-0-1962; IN COMMERCE 0-0-1962.

OWNER OF U.S. REG. NO. 1,113,449.

THE DOTTED LINES IN THE DRAWING PROVIDE PERSPECTIVE FOR THE LOCATION OF THE ABOVE-DESCRIBED UNIQUE FEATURES IN THE DESIGN CONFIGURATION, AND ARE NOT CLAIMED AS FEATURES OF THE MARK.

THE MARK CONSISTS OF A CONFIGURATION OF A HAND OPERATED SPRAYER WHEREIN THE FEATURES OF THE MARK ARE- THE CYLINDRICAL BARREL OF THE SPRAYER; THE CIRCUMFERENTIAL RINGS EXTENDING AROUND THE BARREL OF THE SPRAYER; AND THE SLIGHTLY CONICAL TOP MEMBER OF THE SPRAYER BARREL. THESE FEATURES ARE ORNAMENTAL AND MAKE UP A UNIQUE PRODUCT CONFIGURATION.

SEC. 2(F).

SER. NO. 78-961,769, FILED 8-28-2006.

JAY BESCH, EXAMINING ATTORNEY

EXHIBIT B

Side - 1



**NOTICE OF ACCEPTANCE AND
ACKNOWLEDGEMENT OF §§8 & 15
DECLARATION
MAILING DATE: Apr 18, 2012**

The combined declaration of use and incontestability filed in connection with the registration identified below meets the requirements of Sections 8 and 15 of the Trademark Act, 15 U.S.C. §1058 and 1065. The combined declaration is accepted and acknowledged. The registration remains in force.

For further information about this notice, visit our website at: <http://www.uspto.gov>. To review information regarding the referenced registration, go to <http://tarr.uspto.gov>.

REG NUMBER: 3210240
MARK: B&G AND DESIGN
OWNER: B&G Equipment Company

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

FIRST-CLASS MAIL
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DARIUS C. GAMBINO
DLA Piper LLP (US)
1650 Market Street
One Liberty Place, Suite 4900
PHILADELPHIA, PA 19103

From: TMOfficialNotices@USPTO.GOV
Sent: Wednesday, January 2, 2013 11:01 PM
To: pto.phil@dlapiper.com
Subject: Trademark RN 3239891: Official Notice of Acceptance and Acknowledgement under Sections 8 and 15 of the Trademark Act

Serial Number: 78961769
Registration Number: 3239891
Registration Date: May 8, 2007
Mark: Miscellaneous Design
Owner: B & G Equipment Company

Jan 2, 2013

NOTICE OF ACCEPTANCE UNDER SECTION 8

The declaration of use or excusable nonuse filed for the above-identified registration meets the requirements of Section 8 of the Trademark Act, 15 U.S.C. §1058. **The Section 8 declaration is accepted.**

NOTICE OF ACKNOWLEDGEMENT UNDER SECTION 15

The declaration of incontestability filed for the above-identified registration meets the requirements of Section 15 of the Trademark Act, 15 U.S.C. §1065. **The Section 15 declaration is acknowledged.**

The registration will remain in force for the class(es) listed below for the remainder of the ten-year period, calculated from the registration date, unless canceled by an order of the Commissioner for Trademarks or a Federal Court.

Class(es):
008

TRADEMARK SPECIALIST
POST-REGISTRATION DIVISION
571-272-9500

REQUIREMENTS FOR MAINTAINING REGISTRATION

WARNING: Your registration will be canceled if you do not file the documents below during the specified time periods.

Requirements in the First Ten Years

What and When to File: You must file a declaration of use (or excusable nonuse) **and** an application for renewal between the 9th and 10th years after the registration date. See 15 U.S.C. §§1058, 1059.

Requirements in Successive Ten-Year Periods

What and When to File: You must file a declaration of use (or excusable nonuse) **and** an application for renewal between every 9th and 10th-year period, calculated from the registration date. See 15 U.S.C. §§1058, 1059.

Grace Period Filings

The above documents will be considered as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

*****The USPTO WILL NOT SEND ANY FURTHER NOTICE OR REMINDER OF THESE REQUIREMENTS. THE REGISTRANT SHOULD CONTACT THE USPTO ONE YEAR BEFORE THE EXPIRATION OF THE TIME PERIODS SHOWN ABOVE TO DETERMINE APPROPRIATE REQUIREMENTS AND FEES.*****

To view this notice and other documents for this application on-line, go to <http://tdr.uspto.gov/search.action?sn=78961769>. NOTE: This notice will only be available on-line the next business day after receipt of this e-mail.

EXHIBIT C

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (“**Agreement**”), effective on the last date when this Agreement has been executed below (the “**Effective Date**”), is entered into by and between B&G EQUIPMENT COMPANY, INC., a company organized and existing under the laws of the State of Delaware, with a principal place of business at 135 Region South Drive, Jackson, Georgia 30233 (“**B&G**”), and AIROFOG USA, LLC, a company organized and existing under the laws of the State of Florida, with a principal place of business at 15331 Flight Path Dr, Brooksville, FL 34604 (“**Airofog**”) (each a “**Party**,” and collectively the “**Parties**”).

WHEREAS, B&G filed a Complaint for, *inter alia*, trade dress infringement in the United States District Court for the Middle District of Florida against Airofog on December 16, 2016, captioned *B&G Equipment Co., Inc. v. Airofog USA, LLC*, Case No. 8:16-cv-03432-CEH-MAP (the “**Litigation**”);

WHEREAS, the Litigation involves claims by B&G that certain products sold by Airofog infringe certain intellectual property rights held by B&G, such Airofog products comprising the AF Sprayer, the AF ADU and the AF Termite Tool, which are specifically identified and defined in an Amended Complaint filed by B&G in the Litigation on or about June 5, 2017 (the “**Amended Complaint**”);

WHEREAS, B&G alleged in the Amended Complaint that specific designs of the AF Sprayer, the AF ADU and the AF Termite Tool (shown in Exhibit A attached hereto) caused a likelihood of confusion with respect to certain products manufactured and sold by B&G, and Airofog disputes such claims;

WHEREAS, Airofog filed a Motion to Dismiss the Amended Complaint in the Litigation on June 19, 2017, which Motion remains pending;

WHEREAS, B&G and Airofog desire to compromise and settle all of B&G’s claims in the Litigation, as well as all other claims that could have been brought by Airofog in the Litigation, upon the terms, covenants and conditions as defined hereinbelow;

NOW, THEREFORE, for and in consideration of the premises and covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto do hereby agree as follows:

I. DEFINITIONS

“**Affiliate**” of any specified entity means any other entity directly or indirectly “controlling,” “controlled by,” or “under common control with” (within the meaning of the Securities Act) on and after the Effective Date, such specified entity. For purposes of this definition, “control” means direct or indirect (*e.g.*, through any number of successive tiers) ownership of: (a) more than fifty percent (50%) of the outstanding shares having the right to vote for the election of directors or other managing authority of the subject entity; or (b) in the case of an entity which does not have outstanding shares (*e.g.*, a partnership, joint venture or unincorporated association), more than fifty percent (50%) of the ownership interests having the right to make decisions for the subject entity.

“**Claims**” shall mean any and all actual or possible claims, counterclaims, third-party claims, contribution claims, indemnity claims, demands, actions, liabilities, damages, losses, causes of action, obligations, losses and all actual or possible other claims of every kind and nature in law or equity, whether arising under state, federal, international or other law.

“**Effective Date**” shall have the meaning ascribed to it in the preamble.

II. MUTUAL RELEASES AND COVENANTS NOT TO SUE

2.1 Except with respect to the obligations created by or arising out of this Agreement, B&G, and each of B&G’s attorneys, representatives, agents, heirs, successors and assigns (collectively the “**B&G Releasors**”) hereby releases, acquits and forever and absolutely discharges Airofog, and each of Airofog’s employees, attorneys, representatives, agents, officers, directors, parents, subsidiaries, Affiliates and insurance carriers, past and present (collectively, the “**Airofog Releasees**”) of and from any and all Claims, that the B&G Releasors now have against the Airofog Releasees, including but not limited to any Claims, facts or allegations which were or could have been asserted in the Litigation, or which arise out of the facts, circumstances and allegations in the Litigation, and that existed prior to the Effective Date (collectively, the “**B&G Release**”).

2.2 Except with respect to the obligations created by or arising out of this Agreement, Airofog, and each of Airofog’s employees, attorneys, representatives, agents, officers, directors, parents, subsidiaries, Affiliates and insurance carriers, past and present (collectively, the “**Airofog Releasors**”) hereby releases, acquits and forever and absolutely discharges B&G, and each of B&G’s attorneys, representatives, agents, heirs, successors and assigns (collectively the “**B&G Releasees**”) of and from any and all Claims, that the Airofog Releasors now have against the B&G Releasees, including but not limited to any Claims, facts or allegations which were or could have been asserted in the Litigation, or which arise out of the facts, circumstances and allegations in the Litigation, and that existed prior to the Effective Date (the “**Airofog Release**”).

2.3 B&G covenants that it will never make any claim or commence or prosecute against Airofog any suit, cause of action or alleged cause of action, claim or demand which was brought, or could have been brought, in the Litigation, or which is otherwise the subject of the B&G Release (the “**B&G Covenant Not To Sue**”).

2.4 Airofog covenants that it will never make any claim or commence or prosecute against B&G any suit, cause of action or alleged cause of action, claim or demand which was brought, or could have been brought, in the Litigation, or which is otherwise the subject of the Airofog Release (the “**Airofog Covenant Not To Sue**”).

2.5 The Parties acknowledge and agree that this Agreement, fully and finally releases and forever resolves B&G’s Claims against Airofog in the Litigation, and any counterclaims or other claims that Airofog could have asserted in the Litigation. Neither the execution nor delivery of this Agreement or any related documents required herein, nor any actions taken or refrained from being taken pursuant to this Agreement, shall be deemed to constitute or be construed as any acknowledgment of wrongdoing or liability of any kind or in any respect on the part of any Party to this Agreement.

III. SETTLEMENT AND COEXISTENCE

3.1 This Agreement is entered into without any admission of liability by either Party. Nothing in the Agreement shall constitute an admission by either Party regarding the merits of the Claims, defenses, or counterclaims of the other Party.

3.2 Within ten (10) days of the Effective Date of this Agreement, B&G, for good and valuable consideration, the receipt of which is hereby acknowledged, shall dismiss with prejudice, and cause to be dismissed with prejudice, the Litigation.

3.3 In consideration of the B&G Release, and other good and valuable consideration, the receipt of which is hereby acknowledged, Airofog represents, warrants and covenants that:

(a) The AF Sprayer, AF ADU, and AF Termite Tool (collectively the “**Products**”) shall all be marked “Made In China” from the Effective Date forward for so long as such Products, or any component parts thereof, are actually made in China and such Products are sold in the United States of America. This marking requirement shall not apply to Products sold to customers outside the United States of America. The marking of the AF Sprayer shall be a sticker of ½” width and 1 ½” length with the wording taking up eighty percent (80%) or more of the sticker area, and the sticker shall be placed at a position on the lower portion of the tank which is clearly visible to consumers and which is not obstructed by any portions of the AF Sprayer. For the AF ADU and the AF Termite Tool, the sticker shall 3/8” width and 1 1/8” length with the wording taking up eighty percent (80%) or more of the sticker area and may be placed in any location that is easily visible to the purchaser. All stickers comprise vinyl, destructible labels, or some equivalent type of label which is tamper resistant, or which is made in such a manner so as not to be easily removable from the respective Products without destruction of the label itself. B&G agrees that the following types of labels are appropriate for use in connection with this sub-section: (i) Brady Defender™ destructible labels made by Brady (<http://www.bradybrandprotection.com/>), (ii) CAMCODE® destructible labels made by Horizons Inc. (<https://www.camcode.com/>), or (iii) NADCO® destructible vinyl labels [Material 7613] made by Nadco Tapes & Labels, Inc. (<http://www.nadco-inc.com/index.html>). A “Made in China” label for the AF Sprayer shown on its location, which is compliant with this paragraph, is attached as Exhibit B.

(b) Airofog will sell off no more than twenty-five (25) AF Sprayers of the current design after the Effective Date of this Agreement. All other AF Sprayers sold by Airofog going forward shall be of the New Designs defined and agreed upon below, and Airofog shall not sell any AF Sprayers with the old design after thirty (30) days from the Effective Date of this Agreement. Additionally, Airofog represents and warrants that, as of the Effective Date, it has no more than twenty-five (25) units of each of the AF ADU and AF Termite Tool in inventory, and that it shall not sell any AF ADU or AF Termite Tool products of the old design after thirty (30) days from the Effective Date of this Agreement.

3.4 In further consideration of the B&G Release, and other good and valuable consideration, the receipt of which is hereby acknowledged, Airofog represents, warrants and covenants to make and maintain the following changes to the AF Sprayer, AF ADU and AF Termite Tool (collectively, the “**New Designs**”):

(a) The lengths of the wands for the AF Sprayer shall be only 7 ½ inches or 17 ½ inches, and shall not be interchangeable with wands for the current B&G Sprayer; The hose, trigger valve, and filter for the AF Sprayer shall not be interchangeable with the current B&G Sprayer; No parts for the AF Sprayer shall be interchangeable with the B&G Sprayer, except for the parts shown in Exhibit C attached hereto; The color of the hose for the AF Sprayer shall be blue; The base of the AF Sprayer shall be blue and the pocket in the base for holding the tip of the sprayer wand shall be more circular and deeper than the pocket in the B&G Sprayer, as shown in Exhibit D attached hereto; The pump handle of the AF Sprayer shall have the square configuration (but not the color) shown in Exhibit E attached hereto; The flat portion of the pump handle of the AF Sprayer shall include a colored sleeve; The pump cap of the AF Sprayer shall be approximately 2½ times the size of the pump cap on the B&G Sprayer (collectively, the “**AF Sprayer New Design**”).

(b) The color of the hose and the clamp cap for the AF ADU shall be blue, as shown in Exhibit F attached hereto; The clamp for the AF ADU shall have a twist locking mechanism, as opposed to the push locking ring of the B&G ADU (collectively, the “**AF ADU New Design**”).

(c) The color of the handle for the AF Termite Tool and the color of the foot ram for the AF Termite Tool shall be blue or black; the handle of the AF Termite Tool and the foot ram of the AF Termite Tool shall have the configurations shown in Exhibit G attached hereto and shall not interchangeable with the handle or the foot ram of the B&G TT400; The rods of the AF Termite Tool shall be quick connect, and not interchangeable with the rods currently used with the B&G TT400. The valve parts of the AF Termite Tool shall not be interchangeable with the valve parts of the B&G TT400 (collectively, the “**AF Termite Tool New Design**”).

3.5 B&G covenants not to sue or assert any claims against Airofog relating to any of the New Designs, provided the Products remain in the form specified by the New Designs.

IV. COVENANTS, REPRESENTATIONS AND WARRANTIES

4.1 B&G represents and warrants that: (i) it has the right, power and authority to enter into this Agreement, to grant the rights granted herein, to perform its obligations hereunder, and to do so will not violate or conflict with any material term or provision of any agreement, instrument, statute, rule, regulation, order or decree to which it is a party or by which it is bound; and (ii) B&G is the owner of all rights, Claims, demands, and causes of action which are being released, discharged, or waived in this Agreement and has not sold, assigned or otherwise transferred any such rights, Claims, demands or causes of action.

4.2 Airofog represents and warrants that (i) it has the right, power and authority to enter into this Agreement, to grant the rights granted herein, to perform its obligations hereunder, and to do so will not violate or conflict with any material term or provision of any agreement, instrument, statute, rule, regulation, order or decree to which it is a party or by which it is bound; and (ii) Airofog is the owner of all rights, Claims, demands, and causes of action which are being released, discharged, or waived in this Agreement and has not sold, assigned or otherwise transferred any such rights, Claims, demands or causes of action.

V. DEFAULT

5.1 **Default** In the event either Party materially breaches any of its obligations under the Agreement, the non-breaching Party shall give notice in writing of such material breach to the breaching Party, and, in the event such breaching Party fails to cure said breach within thirty (30) days from the date of said notice, such breaching Party shall be deemed in default of this Agreement.

VI. OTHER PROVISIONS

6.1 **Governing Law**. This Agreement will be governed by and construed in accordance with the laws of the State of Georgia, without regard to its conflict of laws principles.

6.2 **Entire Agreement**. This Agreement contains the entire agreement between the Parties concerning the subject matter hereof and supersedes and cancels all previous agreements, negotiations, and commitments, whether oral or in writing, with respect to the subject matter of this Agreement. No material term of this Agreement may be released, discharged, abandoned, changed, or modified in any manner, oral or otherwise, except by a written instrument duly signed by an authorized officer of each of the Parties. The Parties acknowledge they are sophisticated Parties that have consulted with their counsel prior to entering into this agreement and understand all terms set forth herein, including the releases. The Parties have had the opportunity to include additional representations and/or warranties, but have waived the right to request that such be included in this Agreement. The Parties expressly waive now, and in the future, any claim based upon an oral representation or alleged misrepresentation contained in this document or which may have served as a basis for such party to enter into this agreement.

6.3 **Severability**. The illegality, invalidity, or unenforceability of any provisions of this Agreement shall not operate to invalidate the whole Agreement and shall in no way affect the validity or enforceability of any other provisions of this Agreement and they will remain in full force and effect. If any provision of this Agreement is found by a court of competent jurisdiction to be invalid or unenforceable the affected provision shall be modified to the minimum extent necessary to be valid and enforceable and shall be enforced as modified.

6.4 **Counterparts**. The Parties agree that this Agreement may be executed in counterparts or duplicate originals, both of which shall be regarded as one and the same instrument, and which shall be the official and governing version in the interpretation of this Agreement. This Agreement may be executed by facsimile signatures, portable digital file (PDF) or electronic mail of executed signature pages and such signatures shall be deemed to bind each party as if they were original signatures.

6.5 **Amendment**. This Agreement may only be amended by a writing dated after the Effective Date hereof and signed by or on behalf of each of the Parties.

6.6 **Confidential Nature**. This Agreement, all the terms thereof, and all discussions leading up to the execution of this Agreement, shall be considered confidential. The Parties hereby agree to use all available commercially reasonable efforts to keep the terms of this Agreement confidential (such as they would apply to their own confidential information), and agree that they will not intentionally disclose or publicize any of the terms, except where required in a court

proceeding, or where required by law. If any such disclosure of this Agreement is required by law or in a court proceeding, the Party so disclosing it shall provide at least ten (10) days advance written notice to the other Party of such disclosure. Neither Party shall in any way use the terms of this Agreement to defame the other Party or any of its products, nor to interfere with the production or sale of the other Party's products. Notwithstanding anything to the contrary in this Agreement, the Parties may agree on the form of a notice regarding the settlement of the Litigation which may be provided to others, and which informs others that the Parties have resolved the disputes between them on mutually agreeable terms, and that the Litigation has been dismissed.


6.7 Assignability. Except as otherwise provided, this Agreement shall be binding upon and inure to the benefit of the Party's heirs, successors and assigns.

6.8 Attorneys' Fees If litigation arises concerning a breach of this Agreement, the Court shall award to the party prevailing in such litigation his/her/its reasonable costs and reasonable attorneys' fees in connection with such litigation.

6.9 Injunctive Relief Each of the Parties agree that it would be impossible or inadequate to measure and calculate damages from any breach of the covenants, representations or warranties set forth in this Agreement. Accordingly, each of the Parties agree that if he/she/it breaches any of such covenants, representations or warranties, the Party harmed by such breach will have available, in addition to any other right or remedy available to it at law or in equity, the right to obtain an injunction from a court of competent jurisdiction restraining such breach or threatened breach and to specific performance of any such provision of this Agreement. Each of the Parties further agree that no bond or other security shall be required in obtaining such equitable relief.

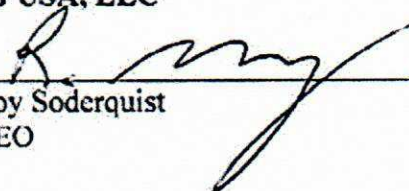
IN WITNESS WHEREOF, the Parties hereto have allowed this agreement to be duly executed in their individual or representative corporate capacity by their duly authorized officers.

B&G EQUIPMENT COMPANY, INC.

By:  11/15/17

Cecil Patterson
CEO

AIRFOG USA, LLC

By:  Nov 10/2017

Roy Soderquist
CEO

EXHIBIT A

AF Sprayer



AF ADU



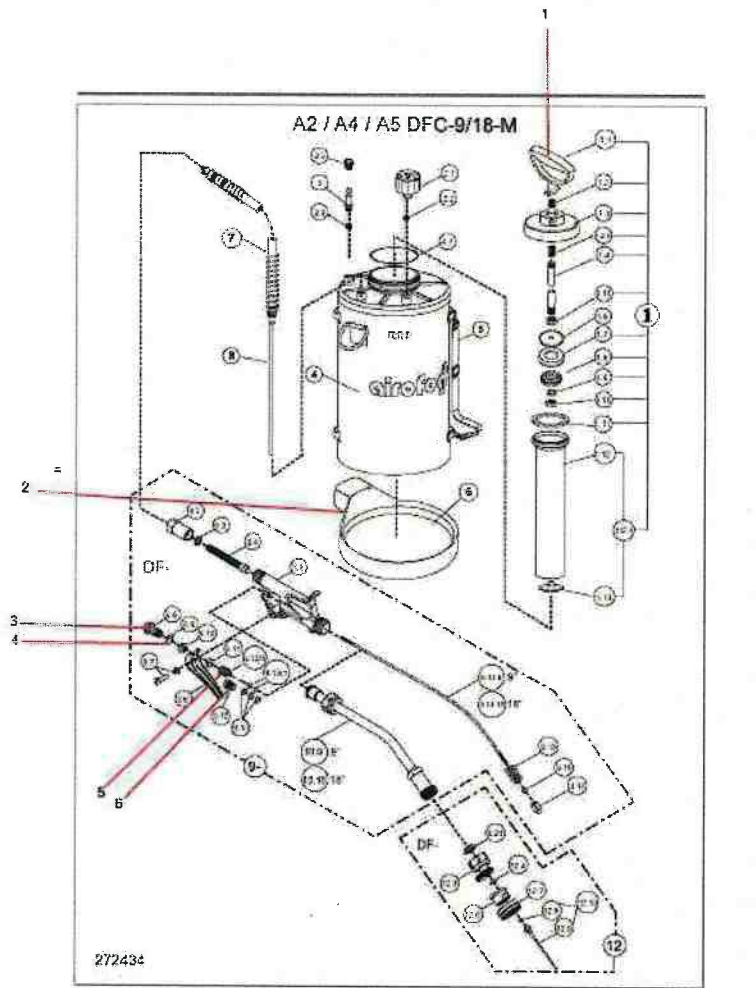
AF Termite Tool



EXHIBIT B



EXHIBIT C



- 5 B&G code listed (PN149) sample
- 1) pump handle with different configuration is interchangeable (standard threads) (P-275)
 - 2) Blue tank bottom is interchangeable (TB-1)
 - 3-4) trigger lock and clip are interchangeable as agreed to by B&G
 - 5) packing nut is made of different material but interchangeable, Made of stainless steel (PN-150) cost \$1.20
 - B) Lock nut (LN-149) maybe interchangeable
- In good faith we change the hose BG part number D-50 so they are not interchangeable to the trigger valve

EXHIBIT D



EXHIBIT E



EXHIBIT F



EXHIBIT G



EXHIBIT D



DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, Pennsylvania 19103
main 215.656.3300
www.dlapiper.com

DARIUS C. GAMBINO
darius.gambino@dlapiper.com
direct 215.656.3309 fax 215.656.2498 or 2499

December 14, 2018

Our Ref.: File 1022

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Roy Soderquist
Chief Executive Officer
AiroFog USA, LLC
15331 Flight Path Drive
Brooksville, FL 34604

***Re: Breach of Settlement Agreement and Release
B&G Equipment Co., Inc. v. Airofog USA, LLC (M.D. Fla. 2016)***

Mr. Soderquist:

As you may be aware, this firm represents B&G Equipment Company (hereafter “B&G”). Some information has recently come to B&G’s attention that is a cause of concern.

In particular, I reference the Settlement Agreement and Release that was executed on or about November 15, 2017 settling the litigation entitled *B&G Equipment Co., Inc. v. Airofog USA, LLC*, Case No. 8:16-cv-03432-CEH-MAP (the “Settlement Agreement”). In the Settlement Agreement, AiroFog USA, LLC (“AiroFog”) represented, warranted and covenanted that it would take at least the following actions in exchange for B&G dismissing the Litigation:

(1) Mark the products referred to in the Settlement Agreement as the “AF Sprayer,” the “AF ADU,” and the “AF Termite Tool” (collectively the “Products”) as “Made In China” with a “vinyl, destructible labels, or some equivalent type of label which is tamper resistant, or which is made in such a manner so as not to be easily removable from the respective Products without destruction of the label itself.”;

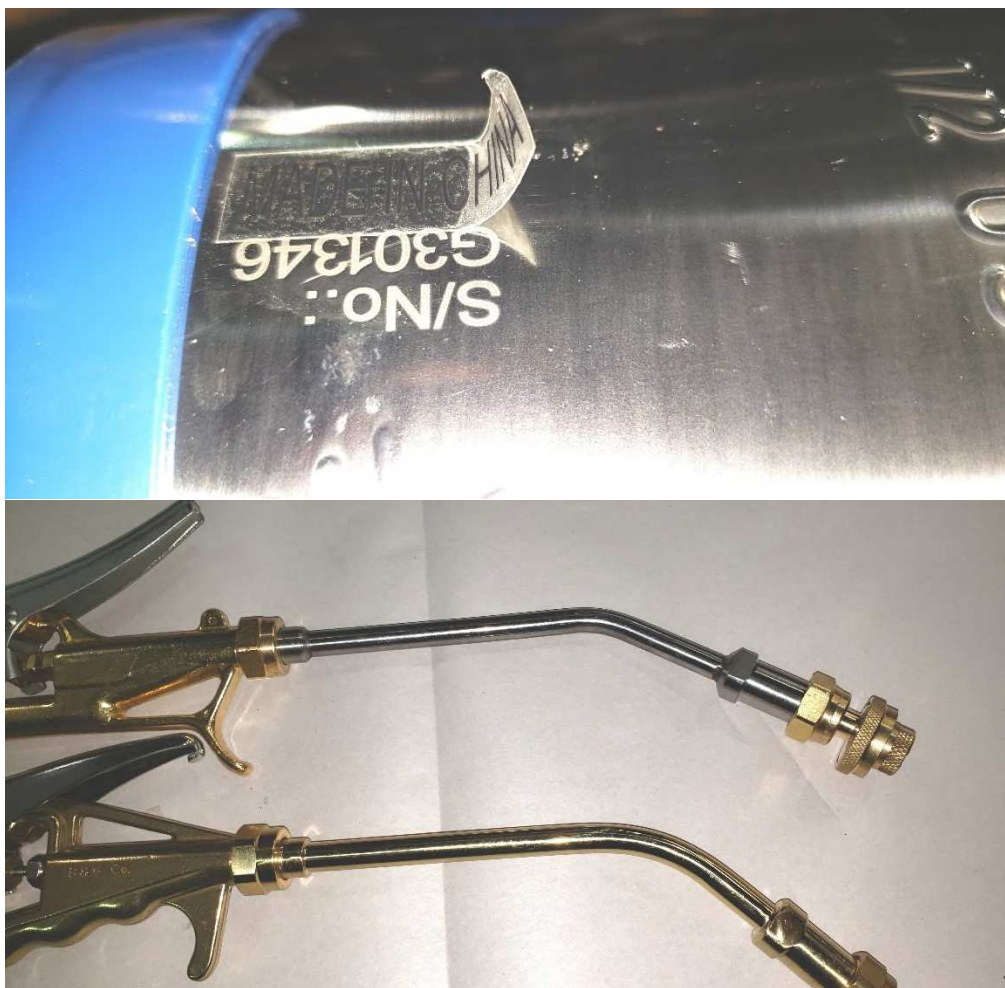
(2) Make the lengths of the wands for the AF Sprayer “only 7 ½ inches or 17 ½ inches”;

(3) Make the wands not “interchangeable with wands for the current [2017] B&G Sprayer”;

(4) Make the hose, trigger valve, and filter for the AF Sprayer not interchangeable with the current [2017] B&G Sprayer”; and,

(5) Make “[n]o parts” for the AF Sprayer that would be interchangeable with the [2017] B&G Sprayer, except for the parts shown in an Exhibit to the Settlement Agreement.

However, AiroFog has failed to follow through on these promises. Below are some images from an AiroFog Sprayer that B&G recently obtained. As you can see, the “Made In China” label is easily removable without destruction of the label, and in fact is already peeling off, in violation of Point # 1 above. Additionally, the wand of the AiroFog Sprayer is virtually identical in length to the length of the wand of the B&G Sprayer. When measured, the wand of the AiroFog Sprayer is approximately eight and one half (8 1/2) inches, in clear violation of Point #2 above. Furthermore, the wand and other parts of the AiroFog Sprayer are interchangeable with the B&G Sprayer, in violation of Points #3-5 above.



Roy Soderquist
December 14, 2018
Page 3



Please let this letter serve as notice under Section 5.1 of the Settlement Agreement of AiroFog's material breach and default. Pursuant to Section 5.1, AiroFog has thirty (30) days from the date of this letter to cure these deficiencies. If AiroFog has not cured the deficiencies by that time, B&G will have no choice but to file suit against AiroFog. Under Sections 6.8 and 6.9 of the Settlement Agreement, B&G is entitled to immediate injunctive relief, and its attorneys' fees expended in connection with such litigation.

I am copying your counsel from the Litigation (Richard E. Fee) on this letter. To the extent he will be representing AiroFog in this matter, I ask that he contact me as soon as possible to discuss a resolution of these matters. In any case, if this matter has not been fully resolved to B&G's satisfaction by **January 14, 2019** (30 days from the date of this letter), B&G will pursue its available remedies under the Settlement Agreement.

This letter is being sent without prejudice, and B&G hereby expressly reserves all rights, legal, equitable or otherwise, including the right to initiate formal legal action without further notice.

Very truly yours,

Darius C. Gambino

DCG

cc: Richard E. Fee, Esq. (rfee@feejeffries.com)
Paul Devlin
Ted Kostecki

EXHIBIT E

8" EXTENSION, CURVED, AIROFOG & REPLACES VE-154

SKU: **AF500-010-080**

\$23.80

Replacement 8" curved extension. Fits both AiroFog and B & G tanksprayers. This is a stainless steel extension. This replaces VE-154 part for B & G tank sprayers.



SIZE:	EACH
MANUFACTURER:	AIROFOG [view products]
NOT FOR SALE TO:	NON U.S. LOCATIONS

Replacement 8" curved extension. Fits both AiroFog and B & G tank sprayers. This is a stainless steel extension. This replaces VE-154 part for B & G tank sprayers.



OPERATES MONDAY - FRIDAY
8:00 a.m. - 4:30 p.m. CST

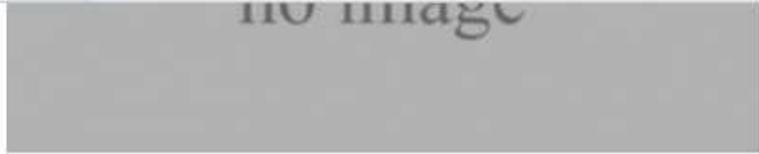
LOCATIONS

CHICAGO OFFICE (MAIN)
2027-29 S. WABASH AVENUE
CHICAGO, IL 60616

KANSAS CITY OFFICE
1534 N. BURLINGTON ST.
N. KANSAS CITY, MO 64116

PHONE: 312.791.1211
FAX: 312.791.0875

PHONE: 816.221.1080
FAX: 816.221.2033



VALVE CABLE - 9", AIROFOG & REPLACES VC-152

SKU: **AF501-009-141**

\$22.38

Replacement 9" valve cable. Fits both AiroFog and B & G tanksprayers. This replaces VC-152 part for B & G tank sprayers



SIZE:	EACH
MANUFACTURER:	AIROFOG [view products]
NOT FOR SALE TO:	NON U.S. LOCATIONS

Replacement 9" valve cable. Fits both AiroFog and B & G tank sprayers. This replaces VC-152 part for B & G tank sprayers



OPERATES MONDAY - FRIDAY
8:00 a.m. - 4:30 p.m. CST

LOCATIONS

CHICAGO OFFICE [\(MAIN\)](#)
2027-29 S. WABASH AVENUE

KANSAS CITY OFFICE
1534 N. BURLINGTON ST.

AIROFOG 1 GALLON SPRAYER W/ 18" WAND, C/C TIP

SKU: **AF501-504-210-G**

\$243.93



Airofog USA uses nothing but the highest quality material in their products. AISI 304 Stainless steel is a higher quality steel than AISI 303 used by competitors. With a much less failure rate, less pitting, withstand 3X pressure stress. Proper hose fittings to eliminate Teflon tape and a hose adapter. True Brass and stainless steel wand and all metal parts. High grade stainless steel bottle corrosion-resistant with a professional look and a rugged design. A heavy duty pressure gauge with scratch proof glass dial allows accurate monitoring and control of the spray operation. Pressure release valve ensures safety. High efficient pump design makes pumping to 60 psi easily. Handle comfort design in ergonomics.

Quantity:

SIZE:	EACH
MANUFACTURER:	AIROFOG [view products]
NOT FOR SALE TO:	NON U.S. LOCATIONS

All parts in contact with liquid are chemical resistant materials such as Viton™, Teflon™, high grade stainless steel brass, and other engineered materials. A cable-operated DRIP-FREE nozzle shut off actuated by the trigger valve provides a maximum operator safety environmental safety. The trigger valve can also be simply locked on or off for added safety.

SEARCH HERE

- AEROSOLS
- CONCENTRATES
- INSECTS
- RODENTS
- TERMITES
- EQUIPMENT
- OTHER PRODUCTS

Home | Equipment | AIROFOG 1 GALLON SPRAYER W/ 9" WAND, C/C TIP

AIROFOG 1 GALLON SPRAYER W/ 9" WAND, C/C TIP

SKU: **AF501-504-080**

\$241.30



Airofog USA uses nothing but the highest quality material in their products. AISI 304 Stainless steel is a higher quality steel than AISI 303 used by competitors. With a much less failure rate, less spitting, withstand 3X pressure stress. Proper hose fittings to eliminate Teflon tape and a hose adapter. True Brass and stainless steel wand and all metal parts. High grade stainless steel bottle corrosion-resistant with a professional look and a rugged design. A heavy duty pressure gauge with scratch proof glass dial allows accurate monitoring and control of the spray operation. Pressure release valve ensures safety. High efficient pump design makes pumping to 60 psi easily. Handle comfort design in ergonomics.

Quantity:

SIZE:	EACH
MANUFACTURER:	AIROFOG [view products]
NOT FOR SALE TO:	NON U.S. LOCATIONS

All parts in contact with liquid are chemical resistant materials such as Viton™, Teflon™, high grade stainless steel brass, and other engineered materials. A cable-operated DRIP-FREE nozzle shut off actuated by the trigger valve provides a maximum operator safety environmental safety. The trigger valve can also be simply locked on or off for added safety.

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

B&G EQUIPMENT COMPANY, INC.

(b) County of Residence of First Listed Plaintiff Butts County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Frederick H.L. McClure and Amanda E. Reagan, DLA PIPER LLP (US), 3111 W. Dr. Martin Luther King, Jr. Blvd., Suite 300, Tampa, FL 33607

DEFENDANTS

AIROFOG USA, LLC

County of Residence of First Listed Defendant Hernando County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship and incorporation status: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, PERSONAL INJURY, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. §1114; 15 U.S.C. §1116(a); 15 U.S.C. §1117; 15 U.S.C. §1118; 15 U.S.C. §1125

Brief description of cause: Trademark Infringement and Breach of Contract

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 02/14/2019 SIGNATURE OF ATTORNEY OF RECORD /s/ Amanda E. Reagan

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

MIDDLE DISTRICT OF FLORIDA

B&G EQUIPMENT COMPANY, INC.

Plaintiff(s)

v.

AIROFOG USA

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) AIROFOG USA
By Serving Its Registered Agent: Roy E. Soderquist
22546 Skyview Circle
Brooksville, FL 34602

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Fredrick H.L. McClure
Amanda E. Reagan
DLA PIPER LLP (US)
3111 W. Dr. Martin Luther King, Jr. Blvd., Suite 300
Tampa, FL 33607-6233

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

B&G EQUIPMENT COMPANY, INC.,

Plaintiff,

Case No.: 8:19-cv-00403-CEH-AEP

v.

AIROFOG USA, LLC,

Defendant.

_____ /

**DEFENDANT AIROFOG USA, LLC'S ANSWER AND AFFIRMATIVE
DEFENSES TO COMPLAINT AND COUNTERCLAIM**

Defendant, Airofog USA, LLC (“Airofog USA”), answers, asserts affirmative defenses to the Complaint of Plaintiff, B&G Equipment Company, Inc. (“Plaintiff”), asserts its Counterclaims, and demands trial by jury as follows:

JURISDICTION AND VENUE

1. Admitted for jurisdictional purposes only.
2. Without knowledge.
3. Admitted that venue is proper in this district because Airofog USA’s principal place of business is located within the district; the remaining allegations in paragraph 3 are denied.

PARTIES

4. Without knowledge.
5. Without knowledge.

6. Admitted that Airofog USA is a Florida limited liability company; the remaining allegations in paragraph 6 are denied.

7. Admitted.

8. Admitted.

FACTUAL BACKGROUND

B&G's Trade Dress

9. Without knowledge.

10. Admitted that an image of the alleged Sprayer is shown below paragraph 10; without knowledge as to the remaining allegations in paragraph 10.

11. Without knowledge.

12. Denied that the product configuration for the B&G Sprayer is “unique to B&G”; without knowledge as to the remaining allegations in paragraph 12.

13. Admitted that Exhibit A contains copies of the alleged Trademark Registrations; the Trademark Registrations speak for themselves.

14. Admitted that Exhibit B contains a copy of the U.S. Patent and Trademark Office's Notice of Acceptance and Acknowledgement; denied that the Trademark Registrations are incontestable.

15. Denied.

16. Denied.

17. Without knowledge.

18. Without knowledge.

19. Denied.

20. Without knowledge.

21. Denied.

Defendant's Copycat Products

22. Denied.

23. Without knowledge.

24. Denied that another company set up Airofog USA; without knowledge as to the remaining allegations in paragraph 24.

25. Admitted that images of the alleged B&G Sprayer and the AF Sprayer are shown below paragraph 25; without knowledge as to the date of the Sprayers.

26. Denied that the images above paragraph 26 show that the design of the AF Sprayer was substantially identical to that of the B&G Sprayer; without knowledge as to the date.

27. Denied that the AF Sprayer was first introduced in 2014; without knowledge as to the remaining allegations in paragraph 27.

28. Admitted that the AF Sprayer does not include the word "B&G" on the barrel of the Sprayer; the word "Airofog" is not discernible on the barrel of the AF Sprayer in the image above paragraph 26, therefore denied; the remaining allegations in paragraph 28 are denied.

29. Denied.

30. Without knowledge as to B&G's channels of trade.

31. Admitted that Plaintiff and Airofog USA have attended some of the same trade shows before the Complaint was filed.

32. Admitted that Airofog USA targets customers such as Pest Control Operators; without knowledge as to Plaintiff's end customer or who Plaintiff targets.

33. Denied.

34. Denied.

35. Denied that Airofog USA copied the designs of the B&G Sprayer; the phrase "[m]any alternative ornamental designs exist in the marketplace for pest control products" is vague, ambiguous, and overly broad, thereby preventing Airofog from framing a response to the allegation.

36. Denied.

37. Denied.

The 2016 Litigation And Settlement

38. Admitted that Plaintiff filed a lawsuit against Airofog USA on December 16, 2016, Case No. 8:16-cv-03432 and asserted claims for trademark infringement and unfair competition; without knowledge as to the remaining allegations in paragraph 38.

39. Admitted.

40. Admitted that the Settlement Agreement is attached as Exhibit C; the Settlement Agreement speaks for itself.

41. The Settlement Agreement speaks for itself; to the extent paragraph 41 is referring to any agreement of Airofog USA not memorialized in the Settlement Agreement, denied.

42. Admitted that Airofog USA agreed to mark the AF Sprayer "Made in China" for as long as the Sprayer or any component parts thereof are actually made in China and

sold in the U.S. and that the marking would be a sticker that “comprise[d] vinyl, destructible labels, or some equivalent type of label which is tamper resistant, or which is made in such a manner so as not to be easily removable from the [Sprayer] without destruction of the label itself.”

43. Section 3.3(a) of the Settlement Agreement speaks for itself.

44. Agreed that Airofog USA agreed in the Settlement Agreement that the length of the wand for the AF Sprayer would be only 7 ½ inches or 17 ½ inches; to the extent paragraph 44 is referring to any agreement of Airofog USA not memorialized in the Settlement Agreement, denied.

45. Section 3.4 (a) of the Settlement Agreement speaks for itself.

46. Section 3.4(a) of the Settlement Agreement speaks for itself; to the extent paragraph 46 is referring to any agreement of Airofog USA not memorialized in Section 3.4(a), denied.

47. Section 3.4(a) of the Settlement Agreement speaks for itself; to the extent paragraph 47 is referring to any agreement of Airofog USA not memorialized in Section 3.4 (a), denied.

48. The Settlement Agreement speaks for itself.

Defendant's Recent Actions

49. Denied.

50. a.-c. Denied.

51. Admitted that below paragraph 51 is an image of the “Made in China” label on the AF Sprayer and the label appears to have been partially peeled off the product; denied that the image shows the label is not destructible in any manner.

52. Admitted that below paragraph 52 is an image of two wands and that the bottom sprayer appears to be the B&G Sprayer; it is not clear from the image whether or not the top sprayer is the Airofog Sprayer, therefore Airofog USA is unable to admit or deny this allegation; denied that the wands are identical lengths; without knowledge as to the length of the wands in the image.

53. Admitted that below paragraph 53 is an image of the wand of a sprayer disassembled; it is not clear from the image whether the image shows the AF Sprayer or some other company’s sprayer, or the AF Sprayer or some other company’s sprayer disassembled, therefore Airofog USA is unable to admit or deny whether the parts shown are attachable to the B&G Sprayer and whether the parts shown are interchangeable with the B&G Sprayer.

54. Admitted that a copy of the alleged Notice Letter is attached to the Complaint as Exhibit D; Exhibit D speaks for itself.

55. Denied that Airofog USA committed any breaches and therefore denied that it had any obligation to cure by January 14, 2019.

56. Admitted that Airofog USA’s counsel requested on January 14, 2019, an extension through and including February 4, 2019, in which to address the issues in the Notice Letter, that Plaintiff’s counsel would agree to an extension only through January 28th,

and that Airofog USA's counsel responded in writing to the Notice Letter on January 28th as Plaintiff agreed.

57. Without knowledge.

58. Admitted that Plaintiff agreed to a limited extension of time of fourteen (14) days for Airofog USA to respond to the Notice Letter; without knowledge of the remaining allegations in paragraph 58.

59. Denied that Airofog USA committed any material breaches of the Settlement Agreement and therefore denied that Airofog USA had an obligation to cure any breaches by January 28, 2019; the remaining allegations in paragraph 59 are denied.

60. Admitted that Airofog USA advertises and sells the AF Sprayer and that Exhibit E to the Complaint contains pages from the website of Pest Management Supply, some of which advertise Airofog USA's products for sale; expressly denied that Airofog USA touts the interchangeability of parts with the B&G Sprayer, and that the wand lengths are greater than 7 ½ inches or 17 ½ inches; Exhibit E speaks for itself.

61. Admitted that Plaintiff filed the present action; the remaining allegations in paragraph 61 are denied.

COUNT I

Trademark Infringement Under Section 32 of the Lanham Act

62. Airofog USA repeats and realleges its responses to the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

63. Without knowledge.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

COUNT II

Unfair Competition by False Designation of Origin Under Section 43(a) of the Lanham Act

71. Airofog USA repeats and realleges its responses to the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

72. Denied that the designs reflected in the Trademark Registrations are distinctive; the remaining allegations in paragraph 72 state legal conclusions that Airofog USA is not required to admit or deny.

73. Denied.

74. Denied.

75. Denied that the alleged Sprayer Trade Dress is distinctive; the remaining allegations in paragraph 75 state legal conclusions that Airofog USA is not required to admit or deny.

76. Denied that the alleged Sprayer Trade Dress is valid and subsisting; without knowledge as to the remaining allegations in paragraph 76.

77. Denied.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

COUNT III

Unfair Competition (Florida Common Law)

86. Airofog USA repeats and realleges its responses to the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

87. The allegations set forth in paragraph 87 are so vague, ambiguous, and overly broad that Airofog USA is unable to admit or deny the allegations.

88. Denied that the designs reflected in the Trademark Registrations and in the alleged Sprayer Trade Dress are distinctive; the remaining allegations in paragraph 88 state legal conclusions that Airofog USA is not required to admit or deny.

89. Denied.

90. Denied.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

96. Denied.

97. Denied.

COUNT IV

Violation Of Florida Deceptive And Unfair Trade Practices Act

98. Airofog USA repeats and realleges its responses to the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

99. Denied.

100. Denied.

101. Denied.

COUNT V

Unjust Enrichment

102. Airofog USA repeats and realleges its responses to the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

103. Without knowledge

104. Denied.

105. Denied.

106. Denied.

COUNT VI

Unfair Competition by False Advertising Under Section 43(a) of the Lanham Act

107. Airofog USA repeats and realleges its responses to the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

108. Admitted that Plaintiff alleges but the allegations in the remainder of paragraph 108 are denied.

109. The first sentence in paragraph 109 is denied. The second sentence states a legal conclusion that Airofog USA is not required to admit or deny.

110. Admitted that Airofog USA has applied a “Made in China” label to all AF Sprayers; the remaining allegations in paragraph 110 are denied.

111. The allegations in paragraph 111 are so vague, ambiguous, and overly broad that Airofog USA is unable to admit or deny them.

112. Denied that Airofog USA misrepresents the geographic origin of the AF Sprayer or that it violates 15 U.S.C. § 1125; the remaining allegations in paragraph 112 are so vague, ambiguous, and overly broad that Airofog USA is unable to admit or deny them.

113. Admitted that “USA” is part of Airofog USA’s corporate name and Airofog USA uses blue and red lettering in its corporate name; the remaining allegations in paragraph 113 are denied.

114. Denied.

115. Denied.

116. Denied.

117. Denied.

118. Denied.

119. Denied.

120. Denied.

121. Denied.

COUNT VII

Breach Of Contract

122. Airofog USA repeats and realleges the allegations in paragraphs 1 through 61 above, as if set forth fully herein.

123. Admitted.

124. Section 3.3(a) of the Settlement Agreement speaks for itself.

125. Section 3.4 of the Settlement Agreement speaks for itself.

126. Without knowledge.

127. Denied.

128. Denied.

129. Denied.

130. Denied.

131. Denied.

132. Denied.

133. Section 6.9 of the Settlement Agreement speaks for itself.

134. Denied that Plaintiff is entitled to recover attorneys' fees in connection with this action; Section 6.8 of the Settlement Agreement speaks for itself.

135. Denied.

RESPONSE TO WHEREFORE CLAUSE

Airofog USA objects to B&G's Wherefore clause as procedurally improper. Rather than set forth a prayer for relief following each count of the Complaint, B&G instead lumped all of its requests for relief in a single Wherefore clause at the end of its Complaint that is four (4) pages long, which is not in accord with Federal procedure. It is impossible to discern what relief B&G seeks under which count. Airofog USA denies that B&G is entitled to any of the relief it seeks in its Wherefore clause.

DEMAND FOR ATTORNEYS' FEES

Pursuant to Section 6.9 of the Settlement Agreement, Airofog USA hereby demands an award of its reasonable costs and attorneys' fees incurred in connection with defending against the litigation.

Airofog USA additionally demands an award of its reasonable attorneys' fees and costs incurred in defending against B&G's trademark infringement and unfair competition claims because this is an "exceptional" case under 15 U.S.C. §1117(a).

Airofog USA additionally demands an award of its reasonable attorneys' fees and costs incurred in defending against B&G's claim for violation of Florida's Deceptive and Unfair Trade Practices Act under Section 501.2105 (1), Florida Statutes.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Airofog USA is not liable for trademark infringement in Count I of the Complaint because the asserted Trademark Registrations are invalid. The trade dress described in the Trademark Registrations is not protectable under 15 U.S.C. Section 1125 or the common

law because the claimed elements are functional, generic, not inherently distinctive, ubiquitous, and have not acquired secondary meaning in the minds of the consuming public.

Second Affirmative Defense

B&G is prohibited from enforcing its alleged trademarks and trade dress based upon the principle of trademark misuse. B&G filed two frivolous trademark infringement lawsuits against Airofog, Case No. 8:16-cv-03432 in the Middle District of Florida and the instant action, for the sole purpose of eliminating lawful competition with Airofog, which is a competitor of B&G's.

Third Affirmative Defense

Any customer confusion alleged in Counts I, II, and III of the Complaint was caused by B&G's previous demand that Airofog USA change the length of its wand from 9 inches and 19 inches and agreement memorialized in the Settlement Agreement that the wand could be 7 ½ or 17 ½ inches in length.

Fourth Affirmative Defense

Airofog USA is not liable for the claims alleged in Counts I through VI of the Complaint because all of those claims are based upon alleged breaches of the Settlement Agreement and Airofog USA did not breach the Settlement Agreement.

Fifth Affirmative Defense

To the extent that Counts I, II, III, IV, and V of the Complaint are based upon Airofog USA's use of elements for the AF Sprayer configuration other than those B&G expressly identified as breaches of the Settlement Agreement, B&G has failed to state a claim upon which relief can be granted. In the Settlement Agreement,

B&G and each of B&G’s attorneys, representatives, agents, heirs, successors and assigns (collectively the “**B&G Releasors**) ... **release[d], acquit[ed] and forever and absolutely discharge[d] Airofog**, and each of Airofog’s employees, attorneys, representatives, agents, officers, directors, parents, subsidiaries, Affiliates and insurance carriers, past and present (collectively, the “**Airofog Releasees**”) **of and from any and all Claims- that the B&G Releasors now have against the Airofog Releasees, including but not limited to any Claims, facts or allegations which were or could have been asserted in the Litigation, or which arise out of the facts, circumstance and allegations in the Litigation, and that existed prior to the Effective Date** (collectively, the “**B&G Release**”).

§ 2.1 (emphasis in original in part and added in part).

The elements of the AF Sprayer that B&G complains of, other than those that allegedly breached the Settlement Agreement, were used in the AF Sprayer’s configuration before B&G’s prior litigation was filed and the Settlement Agreement was executed. Thus, B&G could have asserted its claims in Counts I through V in the 2016 litigation (the “2016 Litigation”), or its claims in Counts I through V arise out of the facts, circumstance and allegations in the [2016] Litigation.” B&Gs claims in Counts I through V were therefore released.

The Court dismissed the 2016 Litigation with prejudice, which B&G agreed to in Section 3.2 of the Settlement Agreement. *See* Case No. 8:16-cv-03432, Dkt. No. 33. Like the instant action, the 2016 Litigation asserted claims against Airofog USA for trademark infringement under Section 32 of the Lanham Act, unfair competition by false designation of origin under Section 43 (a) of the Lanham Act, unfair competition (Florida common law), violation of Florida Deceptive and Unfair Trade Practices Act, and unjust enrichment. Because the Court dismissed the claims with prejudice, B&G cannot re-assert them now.

Sixth Affirmative Defense

To the extent that Counts I through VI of the Complaint are based upon Airofog USA's alleged use of a "Made in China" sticker that does not comply with the Settlement Agreement and alleged sale of an AF Sprayer wand that is not 7 ½ inches or 17 ½ inches in length, Airofog USA is not liable because B&G acquiesced or consented to Airofog USA's alleged activities. B&G expressly agreed in Section 3.3 (a) of the Settlement Agreement that the "Made in China" sticker could be a "label which is tamper resistant, or which is made in such a manner so as not to be easily removable from the respective Products without destruction of the label itself." The "Made in China" label for the AF Sprayer is "tamper resistant" and "not ... easily removable." Moreover, B&G expressly agreed that the "Made in China" label for the AF Sprayer was "compliant" with Section 3.3 (a) of the Settlement Agreement. In the Settlement Agreement, B&G agreed that the label pictured in Exhibit B thereto was compliant. Airofog USA has continuously used the same type and brand of label for its "Made in China" stickers as pictured in Exhibit B.

With regards to the AF Sprayer's wand length, B&G agreed in the Settlement Agreement that the wand length could be 7 ½ or 17 ½ inches. Airofog USA sells one version that is 7 ½ inches in length and one version that is 17 ½ inches. B&G's error in measurement is attributable to its measurement of the tip assembly and complete assembly of the wand, and not just the wand itself.

Seventh Affirmative Defense

To the extent that Counts I through VI are based upon statements, representations, and/or advertising by third parties, and not Airofog USA, with regards to the AF Sprayer,

those claims fail to state a claim for relief against Airofog USA. Airofog USA is not responsible for the actions of third parties.

Eighth Affirmative Defense

B&G's claims for unfair competition in Counts II, III, and VI are based upon the same acts or activities B&G alleges constitutes trademark infringement in Count I and are therefore redundant of its trademark infringement claim. Airofog is not liable to B&G for unfair competition as alleged in Counts II, III, and VI for the same reasons that it is not liable for trademark infringement as set forth in Airofog's responses to the allegations in Count I and its Affirmative Defenses

Ninth Affirmative Defense

B&G has failed to state a claim upon which relief can be granted in Counts II and VI of the Complaint because the alleged wrongs are not alleged to implicate interstate commerce.

Tenth Affirmative Defense

Airofog USA is not liable for violation of the Florida Deceptive and Unfair Trade Practices Act in Count IV and for unjust enrichment in Count V because those claims are based upon the enforceability and infringement of B&G's alleged registered and common law trade dress rights, and those alleged rights are not enforceable and were not infringed by Airofog USA.

Eleventh Affirmative Defense

B&G has failed to state a claim for relief for unjust enrichment in Count V. A claim for unjust enrichment claim requires an allegation that the plaintiff conferred a benefit upon

the defendant who had knowledge of the benefit. The Complaint does not allege that B&G conferred a benefit upon Airofog USA or that Airofog USA knew that the benefit had been conferred.

Twelfth Affirmative Defense

B&G failed to state a claim for relief for unjust enrichment in Count V because the Complaint additionally alleges the existence of a contract between B&G and Airofog USA, and asserts a claim for breach of contract. The unjust enrichment claim is redundant to B&G's breach of contract claim in Count VII.

Thirteenth Affirmative Defense

To the extent Count VI of the Complaint, alleging unfair competition by false advertising under Section 43 (a) of the Lanham Act, is based upon Airofog USA's use of the term "USA" in Airofog USA's corporate name (Airofog USA, LLC), such use is not false, not misleading, and not actionable under the Lanham Act. As paragraphs 3 and 6 of the Complaint alleges, Airofog USA is a Florida limited liability company with its principal place of business located within the Middle District of Florida, Tampa Division.

Fourteenth Affirmative Defense

B&G failed to state a claim for relief in Count VI of the Complaint because none of the alleged wrongs constitute actionable advertising under Section 43 (a) of the Lanham Act.

Fifteenth Affirmative Defense

The doctrine of unclean hands bars B&G from obtaining any equitable relief, including but not limited to, injunctive relief. First, it appears from the photograph in the Complaint of the partially peeled off "Made in China" label that someone scratched the label

off and caused the condition complained of in Counts I through VI. Additional facts demonstrating B&G's unclean hands are alleged with specificity in the Counterclaims, below.

Sixteenth Affirmative Defense

B&G has failed to state a claim for injunctive relief because it has failed to allege each of the four (4) required elements for injunctive relief in its Complaint.

Seventeenth Affirmative Defense

To the extent that B&G is found by the trier of fact to be entitled to any monetary award in its Complaint, such amount must be reduced by the amounts owed to Airofog USA under its Counterclaims.

COUNTERCLAIM

Defendant/Counterclaim Plaintiff, Airofog USA, LLC ("Airofog USA"), counterclaims against Plaintiff/Counterclaim Defendant, B&G Equipment Company, Inc. ("B&G"), and alleges as follows:

Parties

1. Airofog USA is a limited liability company organized and existing under the laws of the State of Florida, with its principal place of business at 15074 Aviation Loop Drive, Brooksville, FL 34604.

2. B&G is Delaware Corporation, with its principal place of business at 135 Region South Drive, Jackson, GA 30233.

Jurisdiction and Venue

3. This is an action for false designation of country of origin arising under the Lanham Act, 15 U.S.C. §§ 1125(a) and for related claims under the Florida Deceptive and Unfair Trade Practices Act, Section 501.201 *et seq.*, Florida Statutes (“FDUTPA”). This Court has jurisdiction over the Lanham Act claim pursuant to the provisions of Section 39 (a) of the Lanham Act, 15 U.S.C. § 1121. This Court has supplemental jurisdiction over the FDUTPA claim under 28 U.S.C. § 1338(b) because that claim is joined with a substantial and related claim under the Trademark Laws of the United States, 15 U.S.C. § 1051.

4. Venue for this Counterclaim is proper in this judicial district under 28 U.S.C. § 1391(b) and (c) and, to the extent that venue over the Complaint is deemed proper under 28 U.S.C. §1400(b), venue over Airofog USA’s Counterclaim is also proper under that statute.

5. Jurisdiction and venue are also proper in this judicial district because B&G filed suit, and therefore purposefully availed itself of the benefits of litigating, in this forum.

General Allegations

6. Airofog USA manufactures high quality equipment for pest control, public health, and plant protection, and supplies a comprehensive range of professional application equipment from compression sprayers to thermal foggers.

7. Airofog and B&G are competitors.

8. B&G maintains a website at <http://bgequip.com> (the “B&G Website”).

9. Upon information and belief, the B&G Website is accessible by consumers throughout the United States, including consumers in the State of Florida.

10. On the B&G Website, B&G advertises that has been providing products for the industrial and retail pest control market for more than 70 years.

11. B&G prominently markets, advertises, and promotes its products nationwide on the B&G Website as “Made in the USA”.

12. At the bottom of each webpage of the B&G Website, B&G advertises that, with regards to “B&G Parts and Products”:

B&G Parts and Products

Proudly, all B & G products are made 100% in the U.S.A. following the utmost in precision and quality. Please inquire for replacement parts availability

<http://bgequip.com> (“B&G’s 100% Made in USA Designation”).

13. Upon information and belief, B&G offers competitive products through the same channels of trade and directed to the same customers and/or prospective customers as Airofog USA.

14. Upon information and belief, statements such as “Made in the USA” like B&G’s 100% Made in USA Designation are likely to influence consumers’ purchasing decisions.

15. B&G’s 100% Made in USA Designation regarding the parts and products it manufactures and sells is an unqualified statement to the public that all of the parts and products it manufactures and sells are actually of U.S. origin.

16. Under Federal Trade Commission regulations, a product must be “all or virtually all” produced in the U.S. to bear a lawful “Made in the USA” designation.

17. B&G’s products and parts are not all or virtually all of entirely U.S. origin.

18. Significant components of B&G's products, as well as parts for those B&G products, are manufactured outside of the U.S.

19. B&G's products contain more than a *de minimus* or negligible amount of non-U.S. origin materials, components, or parts.

20. B&G imports components for many of its products, and parts, from Taiwan and China as shown in bills of lading which are publicly available. Attached hereto as Composite Exhibit "A" are examples of Bills of Lading filed by B&G showing the "Origin Country" for the products described in the Bills of Lading as Taiwan. Also attached as Composite Exhibit "B" are examples of Bills of Lading filed by B&G showing the "Origin Country" for the products described in the Bills of Lading as China.

21. As a result, B&G's 100% Made in USA Designation is deceptive, false, and misleading to consumers ("B&G's False Designation of Origin").

22. B&G does not qualify, in any way, its designation of origin representation to avoid consumer deception.

23. By using and continuing to use B&G's False Designation of Origin, B&G creates a false impression or understanding for consumers as to the origin of its products and parts.

24. B&G's actions create a likelihood of confusion and deception that all of its products and parts were "Made in the USA."

25. By using and continuing to use B&G's False Designation of Origin, B&G is competing unfairly with Airofog USA.

26. Airofog USA has retained the law firm of Fee & Jeffries, P.A. to vindicate its rights against B&G, and Airofog USA is obligated to pay their attorneys a reasonable attorneys' fee for their services.

27. All conditions precedent to the maintenance of this action have been performed or have been excused or waived.

COUNT I
False Designation of Origin
Violation of Section 43 (a) of the Lanham Act, 15 U.S.C. § 1125(a), et seq.

28. Airofog USA realleges and incorporates by reference the allegations contained in paragraphs 1 through 27 above.

29. B&G deliberately markets, promotes, and advertises its products and parts in interstate commerce as "Made in the USA".

30. B&G's False Designation of Origin constitutes the intentional use of words, terms, names, symbols and devices and combinations thereof, false designation of origins, and false and misleading misrepresentations of fact that are likely to cause confusion, or to cause mistake, or to deceive as to the origin of B&G's products and parts, in violation of Section 43 (a) of the Lanham Act, 15 U.S.C. § 1125(a).

31. B&G's False Designation of Origin constitutes the use of words, terms, names, symbols and devices and combinations thereof, false designation of origin, and false and misleading representations of fact that in commercial advertising or promotion, misrepresents the nature, characteristics or qualities of B&G's products and parts or other commercial activities.

32. B&G's False Designation of Origin constitutes false designation of origin, false and misleading descriptions and representations and false advertising in violation of Section 43 (a) of the Lanham Act, 15 U.S.C. § 1125 (a).

33. Airofog USA is a competitor to B&G which believes that, as a direct and proximate result of B&G's false designation of origin, Airofog USA has been, or is likely to be, substantially injured in its business including loss of revenues and profits.

34. B&G's aforesaid acts have caused and are causing irreparable harm and damage to Airofog USA and, unless permanently enjoined by this Court, Airofog USA will continue to be irreparably injured.

35. Airofog USA has no adequate remedy at law as damages alone cannot fully compensate Airofog USA for B&G's harmful conduct.

36. Unless enjoined by this Court, B&G and those acting in concert with it will continue to make its false designation of origin, false and misleading descriptions and representations, and false advertising of the source or origin of its products and parts, to Airofog USA's irreparable injury.

37. B&G's aforesaid acts have been committed in bad faith and with the intent to cause confusion, mistake, and/or to deceive, and B&G will continue to engage in such acts unless enjoined by this Court.

38. Airofog USA has no adequate remedy at law to prevent the injuries caused by the continuing unlawful conduct of B&G.

39. Given the clear and willful violation of the rights of Airofog USA by B&G, Airofog USA will likely prevail on the merits of this action.

40. The balance of the hardships and the public interest requires that B&G immediately cease the dissemination of B&G's False Designation of Origin.

41. The threatened injury to Airofog USA outweighs any potential harm to B&G.

WHEREFORE, Airofog USA respectfully requests that this Court:

A. Enter judgment in favor of Airofog USA that B&G engaged in false designation of origin in violation of Section 43 (a) of the Lanham Act;

B. Enter judgment that B&G's acts have been, and continue to be, willful and deliberate;

C. Grant preliminary and permanent injunctive relief enjoining B&G, its agents, servants, and employees, and those people in active concert or participation with them, from:

- (1) using any deceptive, false, or misleading designation, description, or representation regarding the source or sponsorship of its goods and/or services, including representations that its products and/or parts are "100% Made in the USA" or "100% Made in USA";
- (2) causing a likelihood of confusion or misunderstanding as to the source or sponsorship of B&G's goods and/or services,; and
- (3) otherwise unfairly competing with Airofog USA.

D. Enter judgment requiring B&G to offer up for destruction all articles, displays, advertisements, labels, signs, prints, packages, packaging, wrappers, receptacles, brochures, catalogs, plates, molds, uniforms, and logo items in its possession or control which contain B&G's False Designation of Origin or "100% Made in USA" representation, as provided by Section 36 of the Lanham Act, 15 U.S.C. § 1118;

E. Enter judgment requiring B&G to file with the Court and to serve upon Airofog USA's counsel within thirty days after entry of any injunction or order, a written report made under oath setting forth in detail the manner in which B&G has complied with such injunction or order pursuant to Section 34 of the Lanham Act, 15 U.S.C. § 1116(a);

F. Enter judgment

- (1) awarding to Airofog USA such actual damages as it has sustained by reason of B&G's acts in violation of Section 43 (a) of the Lanham Act, 15 U.S.C. § 1125(a), including but not limited to, disgorgement of B&G's profits, Airofog USA's lost profits, and the costs of this action;
- (2) awarding to Airofog USA treble its actual damages for B&G's false designation of origin and false and misleading statements;
- (3) awarding to Airofog USA its attorneys' fees in bringing and maintaining this action, which should be deemed exceptional;
- (4) requiring B&G to account to Airofog USA for any and all profits derived from sales of its products and parts that B&G falsely designated as "100% Made in the USA", and to compensate Airofog for all damages sustained by reason of B&G's aforesaid acts and acts complained of herein, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117.

G. Enter judgment ordering B&G to compensate Airofog USA for the advertising or other expenses necessary to dispel any confusion caused by B&G's unlawful

acts, including the costs of an appropriate corrective advertising campaign, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117; and

H. Grant to Airofog all such other and further relief as this Court deems just and necessary.

COUNT II

Violation of Florida's Deceptive and Unfair Trade Practices Act, F.S. § 501.201 *et seq.*

42. Airofog USA realleges and incorporates by reference the allegations contained in paragraphs 1 through 27, and 30 through 41 above, as if set forth fully herein.

43. B&G's dissemination of B&G's False Designation of Origin in connection with the sales of its products and sales of its parts, constitute deceptive and unfair practices under Florida's Deceptive and Unfair Trade Practices Act, Section 501.201 *et seq.*, Florida Statutes.

44. Specifically, B&G's dissemination of B&G's False Designation of Origin in connection with the sale of its products and sales of its parts, goes against public policy and are immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers.

45. As a direct and proximate result of B&G's deceptive and unfair practices, Airofog USA has been, and continues to be, damaged by B&G's dissemination of B&G's False Designation of Origin in connection with the sales of its products and sales of its parts.

WHEREFORE, Airofog USA respectfully requests that this Court:

A. Enter judgment in favor Airofog USA and find that B&G engaged in deceptive and unfair trade practices in violation of Florida's Deceptive and Unfair Trade Practices Act, Section 501.201 *et seq.* Florida Statutes;

B. Grant preliminary and permanent injunctive relief enjoining B&G, its agents, servants, and employees, and those people in active concert or participation, from engaging in the activities of B&G described herein that constitute deceptive and unfair trade practices under Section 501.201 *et seq.*, Florida Statutes;

C. Enter judgment in favor of Airofog USA awarding it such damages as it has sustained by reason of B&G's deceptive and unfair trade practices, including but not limited to, compensatory damages, attorneys' fees, and costs; and

D. Grant to Airofog USA all such other and further relief as this Court deems just and necessary.

JURY DEMAND

Airofog USA hereby demands a jury trial on all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 19, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to **Amanda E. Reagan** and **Fredrick H.L. McClure**, DLA Piper LLP, 3111 W. Dr. Martin Luther King Jr. Blvd., Suite 300, Tampa, FL 33607 (fredrick.mcclure@dlapiper.com, amy.reagan@dlapiper.com), and via email to: **Darius C. Gambino**, DLA Piper LLP, 1650 Market St., Suite 4900, Philadelphia, PA 19103 (darius.gambino@dlapiper.com), *counsel for Plaintiff*.

s/ Richard E. Fee

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