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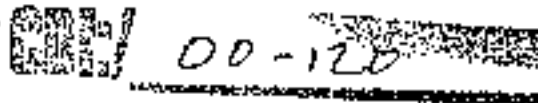
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November 24, 1999

VIA HAND DELIVERY

Lynn I. Levine, Esq.
Office of Unfair Import Investigations
U.S. International Trade Commission
500 E. Street, S.W., Room 401
Washington, D.C. 20436



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SECRETARY
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Re: In the Matter of Certain Spiral
Grilled Products Including Ducted
Fans and Components Thereof

Dear Ms. Levine:

Enclosed please find an original complaint for the above-referenced matter along with fourteen copies thereof. Also enclosed are the documentary and physical exhibits set forth in the complaint.

The appendices include (A) the Reissue '551 File History and (B) the Parent '324 File History. Attached are the required four copies of the '551 File History. We have ordered an expedited delivery of the certified copy of the '324 File History from the U.S. Patent and Trademark Office. We have enclosed a copy of this request at Appendix B.

We hereby request that Exhibit Nos. 6, 9, 15, and 21 be treated as confidential. These documents contain proprietary business information and have been stamped as "CONFIDENTIAL."

If there are any questions, or further discussion is requested, please let us know.

I, Joan M. Hall, acknowledge witnessing the signature of Lynn E. Eccleston on Wednesday, November 24, 1999

Joan M. Hall
Notary Public, District of Columbia
My Commission Expires 8-31-04

Enclosures

Sincerely,

Peter W. Gowdey
Lynn E. Eccleston

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

In the Matter of

CERTAIN SPIRAL GRILLED PRODUCTS)
INCLUDING DUCTED FANS AND
COMPONENTS THEREOF

Investigation No. _____

COMPLAINT OF VORNADO AIR CIRCULATION SYSTEMS, INC.
UNDER SECTION 337 OF THE TARIFF ACT OF 1930,
AS AMENDED, 19 U.S.C. § 1337

Filed on Behalf of Complainant:

Vornado Air Circulation Systems, Inc.
415 E. 13th
Andover, Kansas 67002

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Wichita, Kansas 67202
(316) 263-6400

Proposed Respondents:

Holmes Products Corp
233 Fortune Blvd.
Milford, MA 01757-1740
U.S.A.

Holmes Products (Far East) Ltd.
9th Floor, No. 9 Wing Hong St.
Cheung Sha Wan
Kowloon,
HONG KONG

Holmes Products (Far East) Ltd.
Taiwan Branch (Bahamas)
13F-2, 97 Chung Hsin Road
Section 4
Sanchung City, Taipei
Hsein, Taiwan
REPUBLIC OF CHINA

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DOCUMENTARY EXHIBITS

Exhibit No.	Description	Page Nos. & Paragraph Nos.
1	Certified Copy of U.S. Patent No. Re. 34,551	Page 5, para. 1
2	Certified Copy of the Assignment of U.S. Patent No. Re. 34,551	Page 5, para. 2
3	Declaration of Jeffrey Karceski	Page 5, para. 4
4	Infringement Claim Chart	Page 6, para. 6
5	Vornado Product Information	Page 7, para. 10
6	Confidential Declaration of Michael C. Coup	Page 11, para. 33
7	Declaration of Susan E. Smith	Page 12, para. 36
8	Certified Copy of '324 patent	Page 13, para. 44
9	Confidential License with Patton Electric Co.	Page 14, para. 52
10	PTO Trademark Registration, Reg. No. 1,697,509, (Plain View Design)	Page 16, para. 60
11	Notice of Abandonment for Trademark Reg. No. 1,697,509 (plain view design)	Page 16, para. 61
12	Vornado v. Duracraft, 1994 WL 1064319	Page 16, para. 61
13	Copy of Trademark Application Recently Filed in PTO (angled view design)	Page 16, para. 63
14	PTO Trademark Registration AIRTENSITY, Reg. No. 2,132,460	Page 16, para. 64
15	Confidential Vornado Wholesale Price Lists	Page 16, para. 66
16	Hecht's Baltimore Return	Page 18, para. 77
17	Truserve/Coast to Coast Nebraska Return	Page 18, para. 77
18	Target Return to Vornado	Page 18, para. 77
19	Genco/Target Return to Vornado from Indianapolis	Page 18, para. 77
20	Truserv/Waters True Value Return from Salina, Kansas	Page 18, para. 77
21	Confidential Competitive Marketing Analysis	Page 11, para. 33

APPENDICES

Appendix No.	Description	Page Nos. & Paragraph Nos.
A	'551 File History	Page 13, para 48
B	'324 File History	Page 13, para. 48

PHYSICAL EXHIBITS

Exhibit No.	Description	Page Nos. & Paragraph Nos.
A	Vornado 550 Compact Air Circulator Fan (#CR1-0001)	Page 7, para. 10
B	Vornado Electronic Vortex Heat, Model # EH1-0005-04	Page 7, para. 10
C	Holmes' BLIZZARD Oscillating Fan, Model # HAOF-90	Page 6, para. 6
D	Holmes' Power Heater, Model # HFH-298	Page 10, para. 28
E	Holmes' Power Accutemp Bedroom Heater, Model # HFH-299	Page 10, para. 28
F	Box for Vornado Electronic Vortex Heat, Model #EH1-0005-04	Page 12, para. 38

I. INTRODUCTION

1. This complaint is filed by Vornado Air Circulation Systems, Inc. ("Vornado") pursuant to section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, based upon certain tortious acts, including without limitation, patent infringement, unfair competition and

trade dress infringement, based upon the actual and threatened importation, sale for importation, and/or sale after importation into the United States by proposed respondents Holmes Products Corporation ("Holmes U.S.A."), Holmes Products (Far East) Ltd. ("Holmes Far East"), and Holmes Products (Far East) Ltd. - Taiwan Branch (Bahamas) ("Holmes - Taiwan"), (collectively referred to as "Holmes" or "Respondents") of certain products, fans and heaters; that include a spiral grill, including certain ducted fans and components thereof, which infringe Vornado's U.S. Patent No. Re. 34,551 ("the Re. '551 patent") (Exh. 1), and Vornado's distinctive spiral grill trade dress rights.

2. Vornado Air Circulation Systems, Inc. ("Vornado") is the owner by assignment of the Re. '551 patent. See page 12, paragraph 46, below; Exh. 2. (See also Appendix A, file history of Re. '551).

3. By virtue of its manufacture, sale, and use in commerce of fans, heaters and other products including the spiral grill design, and its use throughout Vornado's advertising, Vornado is also the owner of rights in the trade dress associated with its distinctive spiral grill design.

4. Holmes, a direct competitor of Vornado, is a multi-million-dollar company and maintains that it has the number one market share in the sale of fans, heaters, humidifiers and air purifiers. Exh. 3 at Tab C.

5. On information and belief, since approximately Summer 1999, Holmes has imported and/or sold or offered for sale in the United States ducted fans which infringe at least claims 15, 21 and 22 of the Re. '551 patent, and fans and heaters that include a confusingly similar spiral grill design.

6. Holmes' infringement of Vornado's trade dress associated with its distinctive spiral grill design, combined with its immense manufacturing capacity and marketing power,

threatens Vornado's ability to effectively market in the United States, and sell its fans, heaters and other products that include Vornado's distinctive spiral grill design and threatens to destroy or substantially injure Vornado's business in the United States in violation of 19 U.S.C. § 1337 (a)(1)(A)(i). The manufacture, importation, and sale of at least one model of Holmes' fans in the United States, namely the BLIZZARD Fan, Model # HAOF-90 (Physical Exh. C), also infringes Vornado's Re. '551 patent, and such infringement is a violation of 19 U.S.C. § 1337 (a)(1)(B). Attached at Exh. 4 is a claim chart showing such infringement.

7. Vornado therefore requests that the Commission institute an investigation into Holmes' unfair acts of competition and patent infringement and requests permanent relief, including: (a) an order or orders excluding Holmes' ducted fans and components thereof that infringe Re '551 from entry into the United States; (b) a cease and desist order or orders prohibiting Holmes from importing, assembling, testing, selling, offering for sale, demonstrating, using, or assisting in any of these acts within the United States as to Holmes' infringing ducted fans and imported components thereof; (c) an order or orders excluding from entry into the United States all of Holmes' products that infringe Vornado's trade dress rights in its distinctive spiral grill design; and (d) a cease and desist order or orders prohibiting Holmes from importing, assembling, testing, selling, offering for sale, demonstrating, using, or assisting in any of these acts within the United States as to Holmes' products that infringe Vornado's rights in its distinctive spiral grill design.

II. COMPLAINANT

8. Vornado is a privately held Kansas corporation having its principal place of business at 415 East 13th Street, Andover, Kansas 67002, U.S.A.

9. Vornado designs, manufactures and markets proprietary consumer air circulator/ducted and oscillating fans, heaters, humidifiers and air cleaners, and is a recognized leader in these industries. Exh. 3 at Tab D.

10. Vornado's current product line consists of a variety of fans, three heaters, two humidifiers, and three air cleaner systems. The fans include the Vornado 280SS Classic Air Circulator, Vornado 280CSB convertible air circulator, the Vornado 510 compact air circulator (#CR1-0005-01), the Vornado 550 compact air circulator (#CR1-0001)(Physical Exh. A), the Vornado 610 whole room circulator (#CR1-0021-01), the Vornado 615 pedestal air circulator (#CR1-0027), the Vornado 710 whole room air circulator (#CR1-0029-02), the Vornado 750 whole room air circulator (#CR1-0023), Vornado 770 AVS Automatic Variable Whole Room Air Circulator (#CRI 0024 06), the Silver Swan Deco Oscillating Fan (#FA1 0003 13), the Traditions Table Fan (#1020 7081) and the Traditions Stand Fan (#1025 7081). The Vornado heaters include the Electronic Vortex Heat (#EH1-0005-04)(Physical Exh. B), the Vornado Vortex Heat (#EH1-0001-01), and Traditions Heat (#EH1-0011-09). The Vornado Vortex Humidifiers are available in a 2.5 gallon multi-room capacity (#HU1-0006-11) and a 4.5 gallon whole house capacity (#HU1-0007-11 and HU1-0009-11). Vornado makes three models of air cleaners that vary in size: The AQS 15 Air Quality System (#AC1-0005-02), the Vornado AQS 25 Air Quality System (#AC1-0001-02), the Vornado AQS 35 Air Quality System (#AC1-0002-01 and #4035-7081). Exh. 5.

11. On information and belief, fans are assigned Harmonized Tariff Schedule No. 8414.51.00, and heaters are assigned Harmonized Tariff Schedule No. 8516.29.00.

12. All of Vornado's products incorporate the distinctive spiral grill design, or a portion thereof, except for the Silver Swan oscillating fan, the Traditions oscillating table fan, the Traditions oscillating stand fan and the Traditions Heat.

13. Vornado fans were originally produced in the 1940's by the O.A. Sutton Corporation in Wichita, Kansas. That company ceased production in 1959.

14. Michael Coup, Vornado's current President and CEO, investigated the possibility of manufacturing a new product based on the original Vornado models. Exh. 3 at Tab D.

15. In October 1984, Mr. Coup contacted Richard Ten Eyck Associates, Ltd. of Wichita, the first designers of the original Vornado fans. Mr. Coup obtained market research to determine the size of the fan market.

16. The Ten Eyck company produced drawings of numerous grill designs, but Mr. Coup choose the spiral grill structure, because it visually represented air movement.

17. Also, Mr. Coup believed that a spiral grill structure helped to identify Vornado's product, because he considered the spiral's visual image suggestive of a swirling effect one would associate with "Vornado" -- a name derived from "vortex" and "tornado."

18. By the winter of 1986-87 a prototype fan had been produced and sufficient market research had been accomplished to convince Mr. Coup that such a product would be viable. A business plan was developed, and Vornado was formally incorporated in August of 1987. Exh. 3 at Tab D.

19. In 1988, \$500,000 was privately raised to begin operations for Vornado. Also, in 1988, after production tooling and marketing plans were completed, vendors were selected and test production began.

20. The first sales and shipment of Vornado fans including the spiral grill design occurred in November of 1988.

21. Vornado currently prices its fans to appeal to both the high end and lower end of retail and outlet markets. For example, Vornado fans range in retail price from approximately \$39 for the small spiral grill fan to \$129 for the large spiral grill air circulator.

22. Vornado has spent considerable time and effort advertising and touting its distinctive spiral grill design, the "AIR TENSITY" grill, as an indicator of source so that consumers will associate the grill design with Vornado. The spiral grill design is not only used on most of its products, but it is also touted in Vornado's brochures and promotional material, and is used in other ways, such as on Vornado's employee's business cards, on shipping containers, product boxes, stationary and on its Internet web site. Exh. 3 at Tab D.

23. Vornado's target customers include high-end retail stores like Macy's, Bloomingdale's, and Dillards, as well as low-end discount stores such as Bradlee's and Costco Warehouse Clubs.

III. PROPOSED RESPONDENTS

24. On information and belief, Holmes Products Corp. (Holmes U.S.A.) is a Massachusetts corporation, with its headquarters at 233 Fortune Blvd., Milford, MA 01757. Holmes U.S.A. is believed to be the parent company of the Holmes's companies identified in paragraphs 24 - 26.

25. On information and belief, Holmes Products (Far East) Ltd., a subsidiary of Holmes U.S.A. and its marketing division, is a corporation existing under the laws of Hong Kong. Holmes Products (Far East) Ltd.'s address is 9th Floor, No. 9 Wing Hong St., Cheung Sha Wan, Kowloon, Hong Kong.

26. On information and belief, Holmes Products (Far East Ltd.) - Taiwan Branch, a corporation of the Republic of China and a subsidiary of Holmes U.S.A. and Design Division, is responsible for Holmes' imports and exports. Holmes Products (Far East Ltd.) - Taiwan Branch address is 13F-2, 97 Chung Hsin Road, Section 4, Sanchung City, Taipei, Hsein, Taiwan, Republic of China.

27. The Holmes companies are named as Respondents because on information and belief, each plays an integral part in the manufacture, importation, distribution, sale and promotion of Holmes's products in the United States, including its electric fans, heaters, humidifiers, air cleaners, dehumidifiers, and related accessories. In particular, as part of its electric fan product line, Holmes imports to the United States from China¹, a ducted fan known as the BLIZZARD fan, Model # HAOR-90. Physical Exh. C. This fan, distributed and sold by Holmes in the United States, infringes the Re. '551 patent, and separately infringes Vornado's trade dress rights by employing a spiral grill design that copies and imitates Vornado's distinctive trade dress spiral image.

28. On information and belief, Holmes also manufactures in China, imports to the United States, distributes, promotes and sells products other than the BLIZZARD ducted fan, that include a spiral grill design. Among such other products are Holmes' Power Heater HFH 298 (Physical Exh. D) and Holmes' Bedroom Heater HFH 299. Physical Exh. E.

29. On information and belief, Holmes manufactures its products in China, including the infringing BLIZZARD fan and the infringing Power Heater and Bedroom Heater, where the company "owns and operates two very large factories in the Guangdong province in China - a

¹ On information and belief, Holmes either imports its ducted fans, spiral grilled fans and spiral grill heaters or components thereof into the United States or sells them for importation into the United States.

combined campus totaling almost 800,000 sq. ft. and housing more than 5,000 employees.” Exh. 3 at Tab C.

30. On information and belief, Holmes owns and operates one of the largest seasonal appliance factories in the world and has offices in Boston, London, Toronto, Taiwan and Hong Kong. Exh. 3 at Tab C.

31. On its Internet web site, Holmes boasts the highest compound annual growth rate in the appliance business between the years 1993 and 1996. Exh. 3 at Tab C.

32. Holmes also claims that it maintains #1 market share in its four major categories (i.e., heaters, fans, humidifiers, air purifiers). Exh. 3 at Tab C.

33. On information and belief, Holmes offers a comprehensive line of heaters, fans, humidifiers, air purifiers, and distributes product through all major retail channels in the United States, with a particular strength in the mass merchant and Do-It-Yourself/Hardware retailers. For example, Holmes distributes its products, including its infringing BLIZZARD fan, through retailers such as: Wal-Mart; Kmart; Target; Sears; Bed, Bath & Beyond; Staples; Office Depot; Home Place, among others. Exh. 3 at Tab C; Exh. 6; Confidential Exh. 21.

34. Globally, Holmes’ products are distributed throughout the United States, Europe, in the Pacific Rim, the Middle East and South America under the Holmes’ brand as well as OEM. Exh. 3 at Tab C.

35. On information and belief, Holmes advertises its fans and heaters in the United States through a number of mediums, including but not limited to the Internet, television (QVC Network), brochures, newspapers, magazines, and trade shows. Exh. 3 at Tab B; Exh. 7.

36. Holmes' fans, including its infringing BLIZZARD fan, are priced in retail stores at about \$20-\$30. Holmes' Power Heater retails for about \$20.00; Holmes' Bedroom Heater retails for about \$40.00. Exh. 3 at Tab C; Exh. 7.

37. On information and belief, Holmes derives substantial revenues from sales of fans and heaters.

IV. THE HOLMES AND VORNADO PRODUCTS AT ISSUE

38. Holmes and Vornado both manufacture products, including fans and heaters, which include a spiral grill structure. Physical Exhs. A-E.

39. Some of these fans are ducted. A fan is considered to be a "ducted fan" if it includes one or more ducted portions that collimate air flowing through the fan to create an air flow that projects a distance further than produced by a non-ducted fan.

40. Consumers prefer fans that effectively move air, fans that are safe and fans that permit easy access to the fan blades and motor so that the fans can be cleaned and repaired.

41. Vornado is an innovative designer of ducted and non-ducted fans that are safe and permit easy access to the interior for cleaning and repairing.

42. Vornado's fan design also permits the front grill and the inner cowling to be easily removed. In some cases this is permitted by deflecting four tabs positioned about the periphery of the outer cowling. Physical Exh. A and Exh. 1 at col. 1, lines 36-40. The four tabs can be deflected by finger pressure, allowing the front grill and inner cowling to be separated from the fan structure. Exh. 1 at col. 3, lines 3-7. The remote positioning of the tabs requires at least two separate hand operations to disengage the front grill and inner cowling from the fan structure, satisfying at least a second safety requirement for fan designs. Exh. 1 at col. 3, lines 7-10. Vornado's 600 and 700 series fans require a tool to remove the inner cowling. Once the front

grill and inner cowling are removed, the consumer has access to the interior of the fan, which is desirable should the fan require cleaning and repairing.

43. The overall configuration of Vornado's fan, including its innovative spiral grill design, is distinctive and acts as a source identifier for a wide spectrum of Vornado's products.

V. THE PATENT AT ISSUE

44. The Re. '551 patent is entitled "Ducted Fan," a certified copy of which is attached to this complaint as Exh. 1. The Re. '551 patent issued on February 22, 1994, and is a Reissue Patent of U.S. Patent No. 4,927,324 ("the '324 patent")(Exh. 8), which was surrendered upon the grant of the Re. '551 patent.

45. The Re. '551 patent legally issued to the inventors, Michael C. Coup, Gary P. Israel, Glen W. Ediger, and Donald J. Moore. Exh. 1.

46. The '324 patent was assigned to Vornado on January 8, 1989, as evidenced by the Assignment recorded with the United States Patent and Trademark Office ("USPTO") on January 9, 1989, at Reel 5017, Frames 458-459. A certified copy of the Assignment is attached as Exh. 2.

47. The reissue application, serial no. 07/886,320, was filed on May 21, 1992, within two years of issuance of the '324 patent. The application that matured into the '324 patent, serial no. 08/294,780, was filed on January 9, 1989, and issued on May 22, 1990. Accordingly, the Re. '551 patent will expire on January 9, 2009.

48. A certified copy and three additional copies of the file history for the Re. '551 patent (together with the references cited by the Examiner during prosecution of that application) accompany this complaint as Appendix A. A certified copy and three additional copies of the

file history of the parent '324 patent (together with the references cited by the Examiner during prosecution of that application) accompany this complaint as Appendix B.

49. Of the twenty-four claims in the Re. '551 patent, independent claims 15, 21, and 22 are most pertinent to Holmes' ducted BLIZZARD fan. In general, all three claims recite a base member including a motor and a bladed propeller (or impeller). Each of the claims recites a duct positioned upstream or behind the bladed propeller. The claims also recite an outer cowling connected to the duct and require an inner cowling removably connected to the fan structure. Claims 15 and 22 recite additional elements such as a grill at the discharge end of the inner cowling. All these claims as well as dependent claims 16-20 and claim 24 are infringed by the Holmes BLIZZARD fan.

50. A claim chart showing how claims 15-24 read on Holmes' ducted BLIZZARD fan accompanies this complaint as Exhibit 4. That claim chart is accompanied by a colorized comparison between the claim language, Holmes' infringing BLIZZARD fan, and Vornado's commercial fan, which is covered by the Re. '551 patent.

51. Vornado did not file any foreign counterpart applications for the Re. '551 patent. Vornado also did not file any foreign counterpart applications for the '324 patent.

52. Vornado granted a non-exclusive license under the Re. '551 patent as part of a settlement of a lawsuit initiated under the '324 patent against Patton Electric Co. Inc. See pg. 19, paragraph 89 *infra*. On information and belief, Patton is no longer producing any such licensed fans. Confidential Exh. 9.

VI. INFRINGEMENT OF VORNADO'S Re. '551 PATENT

53. During the past several months, Vornado has become aware of the activities of Holmes and its infringement of Re. '551 patent. Holmes' ducted BLIZZARD fan, infringes at least claims 15-24 of the Re. '551 patent, literally or under the doctrine of equivalents. Exh. 4.

54. On information and belief, Holmes showed the BLIZZARD fan to certain of its customers at the January 1999 Chicago Housewares Show and began distribution of this fan in the United States in spring 1999.

55. On information and belief, Holmes again displayed the BLIZZARD fan in August 1999 at the Chicago Hardware Show.

56. A physical sample of Holmes' BLIZZARD fan accompanies this complaint and is identified as Complainant's Physical Exhibit C. This exhibit was obtained at The Home Place store located in Alexandria, Virginia. Exh. 3 at Tab A.

57. Holmes sells the infringing BLIZZARD fan nationwide through retailers such as Wal-Mart, Kmart, Target, Sears, Bed, Bath & Beyond, the Home Place, "do it yourself chains," drugstores, and hardware stores. Holmes' own web site states: "Holmes offers a comprehensive line of heaters, fans, humidifiers, air purifiers, and air distribution products through all major retail channels in the United States, with particular strength in the mass merchant and DIY/Hardware retailers." Exh. 3 at Tab C.

VII. THE TRADE DRESS AT ISSUE

58. Since 1988, and long prior to the acts of Holmes complained of herein, Vornado has manufactured, marketed and sold in the United States its products, having a distinctive spiral grill design. Complainant's Physical Exhibit A, that accompanies this complaint, is Vornado's 550 model fan or compact air circulator.

59. The style and design of its innovative spiral grill is arbitrary, fanciful, legally non-functional and distinctive and, as a result, serves to distinguish Vornado's fans from those sold by its competitors.

60. On June 30, 1992, the U.S. Patent and Trademark Office ("PTO") issued Registration No. 1,697,509 for the plain view of Vornado's spiral grill design. Exh. 10.

61. Although Vornado has continuously and extensively promoted and used the spiral grill design to act as a source identifier, it expressly abandoned Reg. No. 1,697,509, for the plain view of its spiral grill design, due to a lawsuit between Vornado and Duracraft. *See infra* at p. 18, para. 83. Exh. 11; Exh. 12.

62. Vornado's express abandonment of the plain view design registration did not in any way interrupt its use of the spiral grill design on its products.

63. On November 17, 1999, Vornado filed a trademark application to register a two-dimensional angled view spiral grill design. Vornado uses this mark extensively on all its product packaging, advertising pamphlets and brochures, stationary and business cards. Exh. 13.

64. Vornado also owns and uses its federally registered trademark, AIRTENSITY, Reg. No. 2,132,460, for "grills, being parts of portable electric fans." Exh. 14.

65. There are a variety of alternative grill designs available to Vornado's competitors.

66. Vornado's spiral grill design is promoted extensively in the United States by its costly national advertising campaign and includes its use on print advertising, product packaging, price lists, brochures, and elsewhere. Physical Exh. F; Exh. 5; Exh. 15.

67. Moreover, Vornado consistently uses the actual spiral grill along with the angled view design on all of its products, except its Traditions line of products and the Silver Swan fan. Physical Exh. F.

68. Since Vornado's creation of the spiral grill in 1987, Vornado has continuously made a concerted effort to advertise and tout its spiral grill design.

69. As a result of Vornado's extensive advertisement of the spiral grill design, Vornado has reinforced for the consuming public Vornado's association with its spiral grill design.

70. Vornado's advertising and promotion of its distinctive spiral grill has caused the public and consumers to associate that distinctive grill with Vornado and its products.

71. Vornado, through its extensive advertising, has created a reputation for quality products, including fans and heaters, among the public and consumers.

72. As a result of Vornado's extensive advertising of its spiral grill, and in addition to the inherent distinctiveness of the spiral grill, Vornado's grill has also developed secondary meaning. Therefore, the public and consumers throughout the nation associate the distinctive grill design with Vornado.

73. Vornado's distinctive spiral grill represents Vornado and acts as a source indicator. The spiral grill design also serves as a public guarantee of Vornado's high standards in quality and represents the substantial good will of Vornado.

VIII. INFRINGEMENT OF THE TRADE DRESS AT ISSUE

74. Holmes is a competitor of Vornado in the sale of electric fans and related seasonal products, including heaters.

75. On information and belief, since Summer 1999, Holmes has manufactured in China, imported into the United States and marketed, sold and offered for sale in the United States, fans and heaters having a confusingly similar spiral grill to that of Vornado's spiral grill.
Physical Exhs. C-E.

76. This similarity creates a likelihood of confusion between Holmes' and Vornado's products.

77. There have been dozens of instances of actual confusion including, but not limited to: (a) July 5, 1999, Hecht's, in Baltimore, Maryland, returned a Holmes' BLIZZARD fan to Vornado, Exh. 16 (Merchandise Claim Packaging Slip); (b) August 6, 1999, Truserv/Coast to Coast, in Aurora, Nebraska, returned Holmes' BLIZZARD fan to Vornado, Exh. 17; (c) August 25, 1999, Target, in Indianapolis, Indiana, returned Holmes' BLIZZARD fan to Vornado, Exh. 18 ("Defective Manifest"); (d) September 8, 1999, Genco/Target, in Indianapolis, Indiana, returned Holmes' BLIZZARD fan to Vornado, Exh. 19 ("Defective Manifest"); (e) September 13, 1999, Truserv/Waters True Value, in Salina, Kansas, returned Holmes' BLIZZARD fan to Vornado, Exh. 20 ("Vornado Return Authorization").

78. By using a confusingly similar spiral grill on its products, Holmes has wrongfully misappropriated the good will, reputation and valuable distinctive image of Vornado and its products bearing its distinctive spiral grill. As a result, it is likely that Holmes has and will continue to confuse the public into believing that Holmes' products with a spiral grill are really Vornado's products.

79. On information and belief, like Vornado, Holmes advertises its infringing products throughout the United States in magazines, newspapers, at trade shows, the Internet, as well as through other mediums.

80. On information and belief, because Holmes and Vornado sell in many of the same stores, Holmes is targeting many of the same consumers with its infringing products that include the spiral grill. Confidential Exh. 21.

81. The acts of Holmes set out above constitute a false designation of origin and sponsorship of such goods, amounting to unfair competition in violation of Vornado's trade dress rights under the Lanham Act, 15 U.S.C. §1125(a).

IX. LITIGATION

82. The Federal Circuit, in Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1364, 50 U.S.P.Q.2d 1672, 1678 (Fed. Cir. 1999), recently held that Federal Circuit law controls when determining whether patent law conflicts with other federal statutes or preempts state law causes of action. Id. at 1673. In so holding, the Federal Circuit overruled, en banc, prior decisions in which the Federal Circuit held that regional circuit law governs in resolving such issues. Id.

83. The Midwest case is relevant to the instant case, because it trumps the Tenth Circuit in Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498 (10th Cir. 1995); See also lower court decision, Vornado Air Circulation Systems, Inc. v. Duracraft Corp., 1994 WL 1064319 (D. Kan. Mar. 4, 1994) attached at Exh. 12.

84. In Duracraft, following regional law then existing, the Tenth Circuit held that the trade dress claimed by Vornado in its fans' grill structure incorporated features claimed by Vornado's utility patent (the '324 patent) and, as a result, those features were necessarily functional and could not, as a matter of law, be protected by Vornado as trade dress. Duracraft involved Vornado's ducted fans, which are covered by some of the claims of the Re. '551 patent.

85. However, the Federal Circuit recently questioned the validity of this Tenth Circuit

decision, stating that:

The Tenth Circuit **stands alone** in holding to the contrary, ruling that trade dress protection is unavailable for a product configuration that is claimed in a patent and is a 'described, significant inventive aspect' of the patented invention, even if the configuration is nonfunctional.

Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356, 1364 (Fed. Cir. 1999) (emphasis added).

86. In particular, Midwest, following Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118, 9 U.S.P.Q.2d 1897 (1989), held that

a product may be entitled to trade dress protection for distinctive, nonfunctional features, even if the product is, or has been, the subject of a patent.

Id. at 1364.

87. Accordingly, the Federal Circuit's decision in Midwest strongly suggests that Vornado's trade dress in its spiral grill is protectable despite the fact that Vornado has patent rights related to a ducted fan. This is especially so where the spiral grill here involved does not contain any patentable feature.

88. The Re. '551 patent has not been the subject of any litigation, and no other domestic or foreign court or agency proceeding has been initiated. The validity and enforceability of the Re. '551 patent has never been questioned in court.

89. Prior to its surrender before issuance of the Re. '551 patent, the validity and enforceability of the '324 patent had never been questioned in court. However, the '324 patent was the subject of one litigation which settled before trial.²

² Vornado Air Circulation Systems, Inc. v. Patton Electric Co., Inc., Civil Action No. 91-1322 (U.S. Dist. Kansas); Settled by agreement, dated October 31, 1991.

X. IMPORTATION

90. Holmes BLIZZARD fans and heaters, all contain labeling stating they are manufactured in China. Physical Exh. C. Holmes admittedly maintains manufacturing facilities in the Guangdong province in China. Exh.3 at Tab C. Therefore, on information and belief, Holmes manufactures the infringing fans and heaters at its Guangdong facility in China and then unlawfully imports them into the United States for sale.

XI. DOMESTIC INDUSTRY

A. Significant Development and Manufacturing Activities Take Place In the United States

91. Of the 19 different products Vornado now manufactures, two models of oscillating fans, and a small spot heater, none of which include the spiral grill, and none of which include the patented features claimed in the Re. '551, are the only Vornado products made overseas. All other products, including Vornado's air circulator/ducted fans, are made or assembled in Andover, Kansas, U.S.A. Further, Vornado acquires 85% of its electric motors in the United States as well as all of its variable speed motors. In addition, Vornado purchases 100% of its heating elements from Italy and 100% of its power cords from China.

92. Vornado's manufacturing, research and development, assembly, sales, distribution, marketing, servicing, warranty work and dealer and customer support all take place within the United States.

93. In its corporate offices in Andover, Kansas, Vornado's 100 or more employees utilize expanded and updated production facilities that have about 112,000 square feet of available space, and systems to produce, service, sell, distribute and design fans, heaters, air cleaners, humidifiers, and air circulators.

94. From these facilities in Andover, Kansas, Vornado conducts research and development activities associated with its business and products, with about 7,000 square feet dedicated to that particular function.

B. Vornado's Development Process In The United States

95. The development and manufacture of Vornado's products can be broken down into the following basic processes: 1) product design, 2) development of prototype, 3) prototype testing, 4) development of tooling, and 5) product assembly.

96. Product design activity involves collecting information from Vornado's existing and projected customer base, completing a product definition that is both desirable and manufacturable, and the development of the actual design of the product. Product design includes hand and computer conceptualization, drawings and layout work.

97. While these activities require some capital equipment, the most crucial contributor to success is the Vornado personnel involved and their ability to define, create and design a successful product. Vornado personnel located in Wichita, accordingly, make an invaluable contribution to the production and improvement of Vornado's fans, heaters and other products.

98. Prototype development involves conception of new ideas, producing drawings and/or a physical prototype using handmade pieces, injection-molding technology or other part fabrication techniques, and the subsequent assembling of prototype parts. Each of these prototyping activities takes place by Vornado personnel located in Wichita.

99. Prototype testing takes place in the Andover, Kansas plant. The prototypes are tested for RPM, airflow, power consumed, noise, temperature, UL motor requirements and endurance. The prototypes are examined for fit and finish, prior to mold design.

100. Once a prototype has been approved for commercial development, tooling is manufactured for the product. The tooling for Vornado domestic products is made in the United States in small shops.

101. The Vornado products include motors, some of which are made in the United States by motor manufacturers and some of which are made in China.

102. Some of the Vornado products include tubular bases. Those bases are fabricated in Vornado's Andover, Kansas shop. Other Vornado parts are made in the United States in small shops and shipped to Andover, Kansas where they are assembled, boxed and shipped.

103. The Silver Swan fan and Traditions fans are manufactured in China and shipped to Vornado's facilities in Andover, Kansas, where they are distributed.

C. Vornado Has Significant Investments in Plant, Equipment, Engineering, and Research and Development Within the United States.

104. Vornado's principal corporate offices in Andover, Kansas also house the design, testing and business aspects of Vornado's fans.

105. Vornado has made significant investment in its plant, testing, research and development, servicing, warranty, manufacturing and sales facilities.

D. Vornado's Promotion, Distribution and Sales Activity in The United States

106. Vornado extensively promotes its products throughout the United States.

107. Specifically, Vornado invests a significant amount annually in advertising its products throughout the United States, through the Internet, television, radio, newspapers, catalogs, magazines, at trade shows, and through word of mouth. Confidential Exh. 6.

108. Revenues from sales of fans are the primary source of revenue for Vornado. Vornado derives 87% of its revenues from sales of its products with a spiral grill design with about 50% of its revenues from sales of ducted fans.

109. Today, in the United States, Vornado annually sells many thousand units of its air circulator/ducted fans that are covered by Re. '551, amounting to a significant amount in annual revenue.

110. Vornado also sells many thousand units of its products that incorporate its distinctive spiral grill design, amounting to a substantial amount in annual revenue.

111. In addition to selling products in retail stores, Vornado has recently opened up stores that exclusively sell its own products, including the products at issue in this case. In November 1999, Vornado opened stores in Sevierville, Tennessee and in Kenosha, Wisconsin. These two stores each have three employees and approximately 2000 square feet of space. A similar store is planned for early 2000 in Riverhead, New York.

112. National distribution of Vornado's products is provided by hundreds of accounts in the United States, representing thousands of U.S. outlets in department, hardware, specialty, warehouse and catalog stores. Confidential Exh. 6.

E. The Threat To The Domestic Industry

113. Holmes' great size, its enormous manufacturing capacity, and market clout makes it easier for Holmes to lock up partners and market position, allowing it quickly to achieve placements and marketing successes for which Vornado competes.

114. Accordingly, Vornado seeks permanent relief excluding such infringing Holmes's ducted fans from entry and sale in the United States.

XII. INJURY

115. Because Holmes has only recently introduced the infringing products in United States interstate commerce, Vornado is unable to quantify the extent of damage to its business. However, based on the fact that both Holmes and Vornado market and sell competing products

in the same channels of trade to the same customers, Holmes threatens to cause substantial injury to the domestic industry. Some injury has already occurred.

116. For example, until October 1999, both Holmes and Vornado sold their products to Target. In November 1999, however, Vornado lost its account to Target, and now Target only markets and sells Holmes ducted fans having a spiral grill design.

117. Vornado also has lost sales through QVC. QVC has a TSV (Today's Special Value) product which is shown on television repeatedly during the day. In 1998, Vornado fans were given the TSV slot on occasions. In 1999, the Holmes Blizzard fan was given a TSV slot instead of Vornado. On information and belief, a two-pack of Holmes' Blizzard fans were sold on QVC during the TSV for \$35.00.

118. Attached at Confidential Exhibit 22 is a listing of other retail stores that currently stock and sell both Holmes and Vornado products.

119. Accordingly, as Holmes importation and sales in the United States of infringing products increases, such action and activity, threaten to cause substantial injury to Vornado's domestic industry.

XIII. RELIEF SOUGHT

WHEREFORE, by reason of the foregoing, Vornado requests that the United States International Trade Commission:

(a) institute an investigation pursuant to section 337 of the Tariff Act of 1930, as amended, with respect to violations of that section by Holmes based upon the importation into the United States, the sale for importation, or the sale within the United States after importation of ducted fans that infringe U.S. Patent No. Re. 34,551 as well as any of Holmes' products that infringe Vornado's protected trade dress in its distinctive spiral grill;

(b) schedule and conduct a hearing or hearings on said unlawful acts and, following said hearing or hearings;

(c) issue permanent exclusion orders excluding entry into the United States of said imported ducted fans and products including a spiral grill and components thereof that infringe said patent and trade dress;

(d) issue permanent cease and desist orders prohibiting Holmes from selling in the United States any of said imported ducted fans, products including a spiral grill and components thereof that infringe said patent and trade dress; and

(e) issue such other and further relief as the Commission deems just and proper based on the facts determined by the investigation and the authority of the Commission.

PILLSBURY MADISON & SUTRO

Dated: 11/24/99

By: 

Peter W. Gowdey
Lynn E. Eccleston
Jeffrey D. Karceski
Lisa A. Dunner
Attorneys for Complainant
VORNADO AIR CIRCULATION
SYSTEMS, INC.

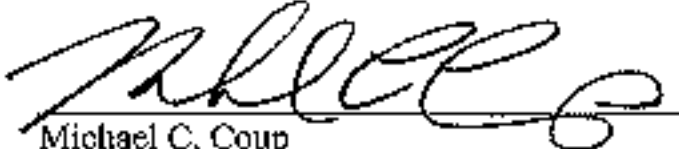
VERIFICATION

I, Michael C. Coup, am President and Chairman of the Board of Vornado Air Circulation Systems, Inc. ("Vornado"). I am duly authorized to sign this complaint on behalf of Vornado. I have read the complaint and am aware of its contents and to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, I hereby certify as follows:

1. This complaint is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation;
2. The claims and other legal contentions in the complaint are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and
3. The allegations and other factual contentions in the complaint have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 23, 1999.


Michael C. Coup
President and Chairman of the Board
Vornado Air Circulation Systems, Inc.

UNITED STATES
INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

OFFICE OF THE SECRETARY

PHYSICAL EXHIBITS SUBMITTED BY LYNN ECCLESTON of
Pillsbury, Madison & Sutro

ON BEHALF OF VORNADO AIR Circulation Systems
INC

IN (INVESTIGATION) OR (DOCKET NO.) 2103

GIVEN TO DU II

Exhibit # A (2)
 B (2)
 C (2)
 D (1)
 E (1)
 F (2)

Untitled Exhibits (2) (Holmes Bedroom)

RECEIVED BY *Patricia Lee*

DATE 11/26/99

RETURNED: _____

DATE: _____