

outdoor gear); and (3) Lamplight Farms Incorporated (outdoor torches, torch fuel, candles, lamps and related products). Each of these companies is a distinct entity engaged in a separate line of business.

4. Char-Broil, a Georgia limited liability company based in Columbus, Georgia, manufactures and sells Char-Broil® brand outdoor grills in the United States and Canada in direct competition with Defendant. Prior to 2004, Char-Broil was an unincorporated division of W.C. Bradley.

5. Upon information and belief, Defendant Weber-Stephen Products LLC is a Delaware limited liability company with its principal place of business in Palatine, Illinois that designs, develops, and manufactures outdoor grills and accessories sold under the Weber® brand name.

6. Upon information and belief, Defendant is the assignee of all rights and obligations relating to purported intellectual property formerly owned by its predecessor in interest, Weber-Stephen Products Company, including but not limited to the three-legged kettle grill configuration sold under Defendant's WEBER trademark, and claimed in U.S. Trademark Registration Nos. 1,478,530 (three-dimensional pictorial representation of kettle portion for "barbeque grills"), 1,479,505 (two-dimensional silhouette for "barbeque grills"), and 1,481,521 (three-dimensional pictorial representation of three-legged kettle grill design for "barbeque grills") (collectively, without conceding that Weber owns any rights in and to the purported marks, the "Weber Kettle Marks").

7. Upon information and belief, there is a continuity of control, employees, and interest between Defendant and prior iterations of the company such that all actions taken by Defendant's predecessor(s) in interest may be presumed to be known or knowable to Defendant.

BACKGROUND OF THE CASE

8. This case involves Plaintiffs' and Defendant's design, marketing, and sale of charcoal, "kettle" style grills.

9. In or around the early 1970s, Defendant's predecessor in interest applied for U.S. trademark application Serial No. 413,832, which covered the design of its barbecue grill, namely, a generally spherical kettle having a rounded cover, a triangular grillwork bottom shelf, and a tripod stand composed of straight, downwardly divergent legs.

10. In or around January 1971, W.C. Bradley's Char-Broil division (not a separate entity at the time) began selling a three-legged kettle-shaped grill called the WILLIAM WEBSTER KETTLE grill, named after a long-time W.C. Bradley employee.

11. On March 26, 1973, Defendant's predecessor in interest sued W.C. Bradley in the Northern District of Illinois for, among other things, patent infringement, trademark infringement, and unfair competition related to the alleged copying of Defendant's asserted three-legged kettle grill configuration.

12. The 1973 Illinois lawsuit subsequently was transferred to the Middle District of Georgia following W.C. Bradley's filing of a motion to dismiss for lack of personal jurisdiction and assigned Civil Action No. 1710. For the purposes of this pleading, this action will be referred to as the "Prior Action."

13. W.C. Bradley countersued in the Prior Action for, among other things, antitrust violations based on Defendant's predecessor's misrepresentations to the United States Patent and Trademark Office during its application that resulted in the patent being then-enforced against W.C. Bradley.

14. On the eve of trial, the parties settled the Prior Action. The parties negotiated and reached the settlement agreement on October 29, 1974 (the “1974 Agreement”) in the Middle District of Georgia. A true and correct copy of the 1974 Agreement is attached hereto as Exhibit A.

15. In the 1974 Agreement, neither party admitted the substance of the other’s claims and both parties agreed to a dismissal with prejudice of their respective claims. In further consideration, Defendant’s predecessor paid W.C. Bradley \$20,000. The 1974 Agreement allowed W.C. Bradley a period of time to sell off the accused product marketed under the WILLIAM WEBSTER name. Defendant’s predecessor waived past damages and granted W.C. Bradley a covenant not to sue under the asserted patent. Defendant’s predecessor further consented that W.C. Bradley “**shall have the right to continue to market a kettle grill, without restriction as to its configuration**, under names or trademarks other than WEBSTER, WILLIAM WEBSTER, and variants thereof. This right shall **include** a non-exclusive, non-transferable license under U.S. trademark application Serial No. 413,832, filed January 26, 1972, the trademark thereof, and under any registration that may issue therefrom **as well as any continuation or substitution of said application.**” [emphasis added].

JURISDICTION AND VENUE

16. Subject matter jurisdiction over the underlying controversy arises under 28 U.S.C. §§1331, 1332, 1337, 1367, and 2201, and 15 U.S.C. §§15 and 26.

17. Venue is proper in this District pursuant to 15 U.S.C. §22 and 28 U.S.C. §1391 because Weber inhabits, transacts business, resides, is found, or has an agent in this District, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

18. Upon information and belief, Weber regularly does or solicits business in the state of Georgia and derives substantial revenue from goods used or consumed in this state, including

by maintaining a network of Weber grill dealers in Georgia as well as advertising Weber grills in Georgia, including via its website accessible from Georgia at www.weber.com.

19. As set forth herein, one of the key issues in this case – Plaintiffs’ ability to make and sell a three-legged kettle grill – was also at issue in the Prior Action. Those claims were settled in this Court, with the terms of the settlement being memorialized in the 1974 Agreement.

20. The 1974 Agreement was filed of record in this Court to resolve the Prior Action.

21. Both W.C. Bradley and Weber abided by the 1974 Agreement for over forty (40) years.

22. Just as it had done in the Prior Action, Weber filed suit against W.C. Bradley on March 17, 2016 in the Northern District of Illinois (the “March 2016 Illinois Action”), raising essentially the same trade dress infringement claim as it did in the Prior Action.

23. Weber’s filing of the March 2016 Illinois Action was in violation of the 1974 Agreement and was anticompetitive.

24. Shortly after filing the March 2016 Illinois Action, Weber directed communications to Char-Broil in Columbus, Georgia and purported to disavow the 1974 Agreement.

25. Weber’s filing of the March 2016 Illinois Action and its anti-competitive communications regarding the 1974 Agreement were directed at Plaintiffs who maintain a principal place of business in the Middle District of Georgia, just as they have since their formation.

26. The tortious injury described in this Complaint was committed by Weber knowing that its victims, W.C. Bradley and Char-Broil, are long-time residents of Georgia and

that the harms suffered by W.C. Bradley and Char-Broil, including loss of reputation, goodwill, and economic harm, would be suffered in the state of Georgia.

27. Personal jurisdiction over Defendant is proper under O.C.G.A. § 9-10-91.

28. The exercise of personal jurisdiction over Defendant is consistent with due process given Defendant's actions within Georgia, its knowledge that its actions would impact Plaintiffs in Georgia, and the fact that the 1974 Agreement forming the basis of this lawsuit was entered into by Defendant's predecessor to settle litigation Defendant's predecessor pursued in Georgia.

29. Defendant's business activities that are the subject of this action are within the flow of, and substantially have affected, interstate trade and commerce. Upon information and belief, Defendant designs, markets, sells, and ships products, including kettle grills, across state lines. Also, upon information and belief, Defendant sends and receives substantial payments across state lines involving the design, marketing, sales, and shipment of products, including kettle grills.

CHARCOAL GRILL MARKET

30. Plaintiffs and Defendant are fierce competitors in the \$2.5 billion a year market for outdoor consumer grills. A subset of that market includes the \$180 million a year market for so-called "portable" charcoal grills that typically feature three or four legs (as opposed to cart-style grills) and can have round, square, or rectangular grill bodies.

31. Portable charcoal grills are generally more affordable than gas grills with comparable cooking area, more portable than gas grills, and offer a richer, smokier grill flavor that many consumers prefer.

32. Portable charcoal grills are typically sold for between \$50 to \$200, depending on the grill's extra features and cooking area size.

33. Most sales of portable charcoal grills are of grills roughly 22 inches in diameter with about 360 square inches of cooking space.

34. To compete effectively in the overall charcoal grill market, it is important for manufacturers to be able to offer competitive options for consumers at each price point but, particularly at the mass market, high volume portable charcoal grill niche.

35. In the portable charcoal grill category, the only style of grill Weber sells is the so-called kettle grill, where both the bottom and top portions are generally spherical and typically are 18-26" in diameter, and has three legs.

36. Upon information and belief, Weber charges a premium for its charcoal kettle grills of between \$10 to \$50.

37. Certain functional attributes of a charcoal kettle grill resonate with some consumers.

38. For example, a kettle grill generally will provide more even heat across the cooking surface than a rectangular or square grill, where the heated air does not fully circulate in the corners of the grill.

39. A kettle grill heats more efficiently than other grill shapes because of its spherical shape which reduces the area through which heat can be lost. This allows consumers to use less charcoal when cooking.

40. Just like a three-legged table or a camera tripod, a three-legged kettle grill is inherently easier to level on uneven ground because three legs will always be in contact with the ground, whereas a four legged configuration allows one of the legs to not be in contact on uneven ground, making the grill wobble.

41. A kettle grill is less expensive to manufacture than other types of grills of comparable cooking area size because a kettle grill requires fewer pieces and less tooling, and so enables manufacturers to provide the consumer with lower priced but well performing products.

42. A three-legged kettle grill is also less expensive to manufacture than a four-legged kettle grill, by 5% to 9%, because the cost of materials is less and the manufacturing process is less involved.

43. Prices for portable charcoal kettle grills are distinct from other types of grills of similar cooking area and features.

44. Upon information and belief, a substantial portion of consumers believe that a charcoal kettle grill cooks food better than other styles of charcoal grills, as readily evident in public and consumer comments, and this is a perception that Weber has promoted through its own communications (even though it represented the opposite to the TTAB in obtaining the Weber Kettle Mark registrations), examples of which follow.

45. The Weber blog (www.weber.com/weber-nation/blog/unique-features-of-the-weber-charcoal-kettle) states that its charcoal kettle grill is “unique” for its features, and explains, “What’s the trick to getting the perfect inside temperature? First of all, **the circular angle of the domed lid allows for perfect convection.**” [emphasis added]

46. The April 6, 2016 Weber Summit Charcoal Grill press release, *Weber Introduces Next Generation Charcoal Grill*, touts, “We are so excited to bring these new grills to our customers—**providing true convection cooking that only Weber’s trademarked round shape can provide,**” said Kim Lefko, Chief Marketing Officer, Weber-Stephen Products LLC. [emphasis added]

47. AmazingRibs.com science advisor, Dr. Greg Blonder, observes, “Most people believe the Weber is a parabolic reflector, focusing heat emitted by the coals directly on the grill. A parabolic reflector is only effective when the heat source is tiny, intense and located at the focal point. This is not true in the case of the Weber, where the heat source is a sheet of coals spread over a large area. On the other hand, the Weber gets many things right. While the parabola won't create a beam of infra-red energy, the high almost vertical side walls reflect the infra-red image of the coals from side to side- like images of your head pinging back and forth between two mirrors at the barbershop. So this ‘reflection gallery effect’ does increase the heat intensity a bit compared to cooking over an open pit, where heat emitted to the sides is lost. The system is efficient, burning a minimum number of briquettes during cooking.”

48. *The Best Charcoal Grill* guide on The Sweet Home (www.thesweethome.com/review/best-charcoal-grill) states, in reference to the Weber kettle grill, “The kettle shape makes very efficient use of its small footprint, with a deep bowl that lets you stack charcoal off to one side to create hotter and cooler zones on the grill surface, which is essential for searing steaks and for generating the convection effect that makes the Weber a great smoker.”

49. A review in the October 17, 2015 Kansas City Star, *When it comes to grills, is gas or charcoal the best?*, explains, “Now I can’t tell you exactly why the Weber grill fared better. Maybe it was the kettle design that affected the airflow, smoke, convection and radiant cooking dynamics.”

50. Regarding the non-Weber Smoke Hollow 22.5” Kettle Charcoal Grill one commentator remarked, “The round, kettle-style design enhances the barbecue-grilling process

through natural convection, to provide even cooking and the BBQ flavor that your taste buds desire.”

51. Upon information and belief, another benefit of the spherical kettle grill shape is that it allows for easier collection of ashes.

52. Defendant’s unlawful conduct, as alleged herein, demonstrates that it regards portable charcoal kettle grills with three legs as distinct from other types of grills, as Defendant has selectively acted to exclude Plaintiffs and others from selling such grills but not different types of grills.

53. There are no widely used substitutes for portable charcoal kettle grills with three legs, and no other product significantly constrains the prices of such grills.

54. Defendant’s internal organization demonstrates that it regards the United States as distinct from other geographic areas as, upon information and belief, Defendant utilizes different and separate distribution systems and channels for the United States and other areas.

55. As a condition for the “privilege” of selling Weber products, Defendant has prohibited its retail distributors in the United States from selling Defendant’s products outside the contiguous 48 states.

56. The United States is the only geographic area within which purchasers located in the United States can reasonably and practicably turn to purchase portable charcoal kettle grills with three legs.

57. Char-Broil has less than 5% of the market for the sale of charcoal kettle grills with three legs in the United States which, upon information and belief, is second to Defendant in the market.

58. To compete effectively within the United States, manufacturers of portable charcoal kettle grills need distribution assets and relationships within the United States.

59. Through formal and informal enforcement of its Kettle Grill Mark registrations, Defendant has obtained patent-like protection in the United States over a functionally superior and less expensive to manufacture general design for which patent protection is no longer available.

60. Defendant has exploited and continues to exploit its fraudulently-obtained Kettle Grill Mark registrations to exclude manufacturers of three-legged charcoal kettle grills from entering or competing in the sales of such grills in the United States.

61. Secure from the threat of new competitors behind the barriers to entry, Defendant has charged consumers supra-competitive prices for portable, three-legged charcoal kettle grills in the United States.

THE CHAR-BROIL KETTLEMAN GRILL

62. At least two years were spent designing the Char-Broil® Kettleman® grill, first released to the market in September 2014.

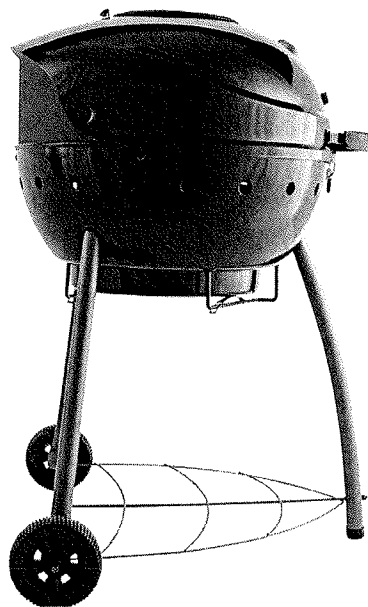
63. The Kettleman grill is functionally superior to any other kettle grill on the market, including the traditional Weber kettle grill design found in the Weber Kettle Marks.

64. As shown below, the Kettleman grill is a kettle grill, but very visually different from the Weber Kettle Marks and, moreover, those visual differences stem from functional improvements over the Weber kettle.

Weber Kettle

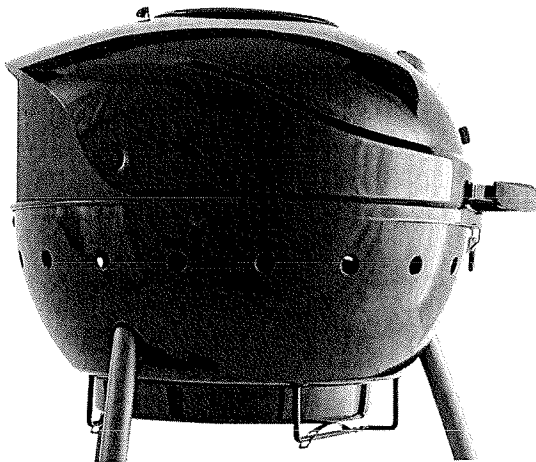


Char-Broil Kettleman



65. The overall shape of the Kettleman grill, including the contouring of the lid, the hinging of the lid to a rear baffle, and flat bottom, are derivative of the Char-Broil® Patio Bistro® Electric Grill which has been offered for sale since 1998.

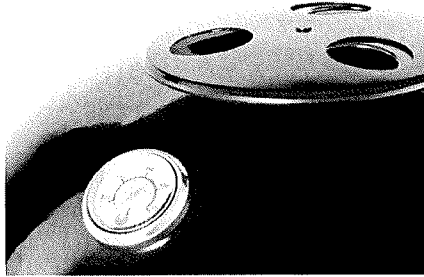
Char-Broil Kettleman



Char-Broil Patio Bistro



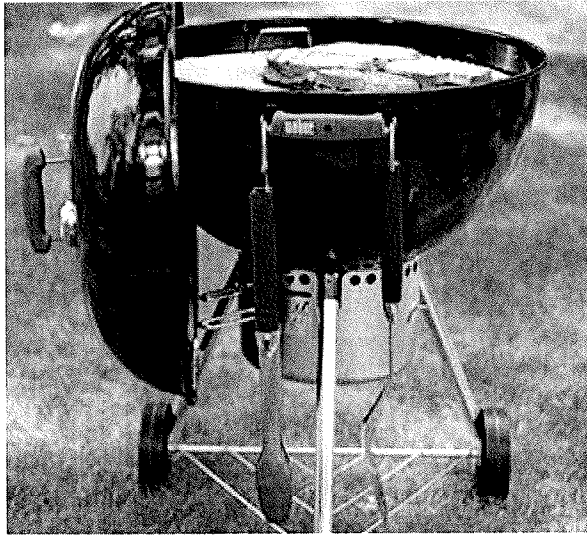
66. As shown below, the lid on the Kettleman grill has three large damper holes in the top of the lid, differentiated from the three small holes of the offset damper on the Weber kettle lids. This arrangement allows the dampers to control airflow better than the Weber kettle.



67. As shown below, the Kettleman grill has large, baffled air intake holes evenly placed around the bottom of the kettle with a continuous interior baffle. This allows for better control of air intake than the Weber kettle, particularly in windy conditions.



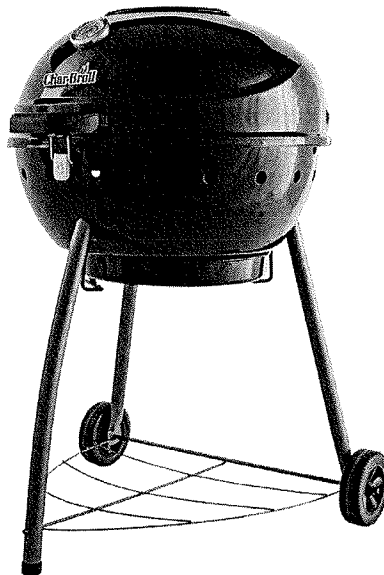
Weber Kettle



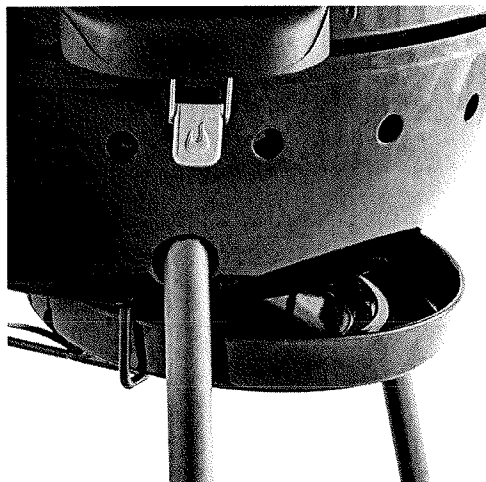
Char-Broil Kettleman



68. As shown below, the Kettleman grill has three equidistant legs descending from the sides of the kettle, two straight legs with wheels and one arcuate leg. These legs are noticeably different from the three straight, non-equidistant legs of the Weber kettle, which descend from the bottom of the kettle with one leg being forward and the other two back.

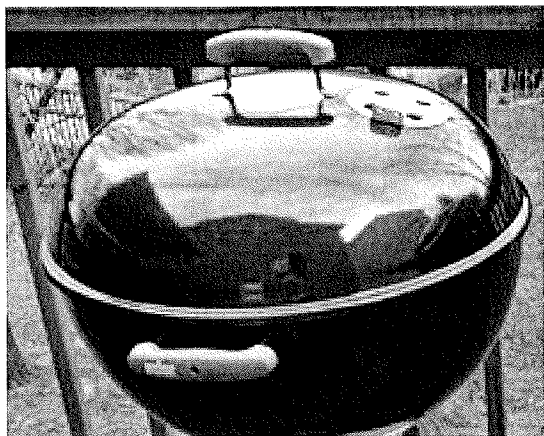


69. As shown below, the Kettleman grill has an ash pan integrated with the bottom of the kettle, as opposed to the separate ash pan on the Weber kettle. In order to integrate this larger diameter, shallow ash pan, the bottom of the Kettleman grill is truncated at a higher point than the Weber kettle, which is a more complete, spherical shape. This allows for easier collection, transport, and disposal of ashes with the Kettleman grill.



70. As shown below, the Weber kettles have two side handles and a lid handle, as opposed to the single handle on the side of the Kettleman grill lid. Since the Kettleman grill lid has an incorporated latch that locks it to the bottom, this allows a single handle to take the place of the three handles on the Weber kettle. This also allows for an overall sleeker design aesthetic.

Weber Kettle



Char-Broil Kettleman



THE 1974 LAWSUIT AND SETTLEMENT

71. As set forth above, the 1974 Agreement was reached between the parties herein (or their predecessors in interest) to resolve the Prior Action.

72. In the 1974 Agreement, Defendant's predecessor consented that W.C. Bradley "shall have the right to continue to market a kettle grill, **without restriction as to its configuration**, under names or trademarks other than WEBSTER, WILLIAM WEBSTER, and variants thereof. This right shall **include** a non-exclusive, non-transferable license under U.S. trademark application Serial No. 413,832, filed January 26, 1972, the trademark thereof, and under any registration that may issue therefrom **as well as any continuation or substitution of said application.**" [emphasis added].

73. In order to license a trademark, a trademark owner needs to ensure that it retains the ability to exercise control over the quality of goods and/or services associated with its mark.

74. The licensing of a trademark without retaining the ability to exercise control over the quality of goods and/or services associated with the mark is considered a "naked license" constituting abandonment of the trademark purportedly licensed.

75. The 1974 Agreement contained no quality control provision.

76. Trademark Application Serial No. 413,832 was rejected by the Examining Attorney for the United States Patent and Trademark Office ("USPTO"), which rejection was upheld by the Trademark Trial and Appeal Board ("TTAB") on September 3, 1974, in *In re Weber-Stephen Products Co.*, 184 USPQ 509 (TTAB 1974), because "the overall configuration of applicant's grill, as presented for registration, is essentially functional in character and that hence it does not possess the necessary attributes of a proprietary trademark."

HISTORY OF THE WEBER KETTLE MARK REGISTRATIONS

77. In October, 1979, Defendant's predecessor filed the applications that resulted in the Weber Kettle Mark registrations. All of the applications, which covered a three-legged kettle grill configuration, were finally rejected by the Examining Attorney on the grounds that they were functional and lacked secondary meaning, and were barred by the 1974 decision rejecting Serial No. 413,832.

78. In connection with the prosecution before the Examining Attorney, Defendant's predecessor made the following representations in an October 13, 1981 response to Office Action dated April 9, 1981:

The famous Weber Kettle grill was developed by George R. Stephen approximately 25 years ago. The shape of this grill was unique at its conception and has become distinctive of the product of Weber-Stephen Products Company through the millions of dollars invested in sales and advertising over the last 25 years. Applicant's annual advertising expenditures have reached approximately 4 million dollars per year and include national television advertising campaigns. To Applicant's knowledge it is, with two exceptions, the only manufacturer of this distinctively shaped grill in the United States. One exception involves a company in the Southeastern United States which is specifically licensed by Applicant to use its distinctive design. The other exception involves a company in Chicago, Illinois which is the subject of a litigation based on an infringement of this design by Applicant. Weber-Stephen Products Company regards the distinctive appearance of its grill in its trademark rights and firmly believes that others' use of such a shape is likely to cause confusion, mistake or to deceive the public.

79. Upon information and belief, the underlining and other emphasis were applied to the original document by the Examining Attorney, who found the representations by Defendant's predecessor regarding it being "the only manufacturer of this distinctively shaped grill in the United States" with the exception of "a company in the Southeastern United States which is specifically licensed by Applicant to use its distinctive design," and a third party that it was in the process of suing for infringement to be highly relevant and material to a determination of registrability.

80. Defendant's predecessor continued to misrepresent the nature of the 1974 Agreement to the USPTO. On or about May 29, 1986, Defendant's predecessor filed a Request for Reconsideration in response to Office Action of November 25, 1985, in which it argued that the configuration was not functional because, "Finally, W.C. Bradley Enterprises, Inc., sued by Applicant in the mid-1970's, took a license agreement from Applicant in settlement of the suit and continued to manufacture kettleshaped grills pursuant to such license agreement until a few years ago when it ceased manufacturing kettle-shaped grills." In that same document, Defendant's predecessor argued that the configuration was distinctive because, "With the exception of one competitor in the early '70's who was sued and later took a license from Applicant, Applicant was the exclusive marketer of grills having the distinctive shape shown in the subject application for at least 20 years."

81. In that response and other filings during prosecution of the Weber Kettle Marks, Defendant's predecessor listed all other parties it had sued and attached for the record all of the judgments it had obtained -- except for the 1974 Agreement publicly filed in its lawsuit with W.C. Bradley before this Court.

82. Defendant's predecessor continued to misrepresent the 1974 Agreement to the TTAB. Defendant's predecessor appealed the Final Rejection of the Weber Kettle Mark trademark to the TTAB, arguing in its November 17, 1986 Applicant's Brief on Consolidated Appeal, "Finally, W.C. Bradley Enterprises, Inc., sued by Weber in the mid-1970's, took a license agreement from Weber in settlement of the suit and continued to manufacture kettle-shaped grills pursuant to such license agreement until a few years ago when it ceased manufacturing kettle-shaped grills," immediately followed by, "The number of parties who chose to copy Weber's kettle configuration and then subsequently agreed to recognize its rights and cease copying the configuration is entitled to significant weight...."

83. Defendant's predecessor relied on the "license agreement" with W.C. Bradley throughout its appeal brief, arguing:

- "The only manufacturers found in the ads submitted by the Examiner are two of the manufacturers against which Weber has taken legal action. Moreover, Bradley, the manufacturer of the "Char-Broil" grill shown in the ads, was a licensee of Weber and has subsequently ceased making kettle shaped grills."
- "Further evidence of the inherent distinctiveness of the kettle configuration is the extended period of time Weber marketed its kettle configuration without being copied. With one exception, which was licensed by Weber, Weber was the sole manufacturer of kettle grills for over twenty years."
- "With the exception of one competitor in the early '70's who was sued and later took a license from Weber, Weber was the exclusive marketer of grills having the distinctive shape shown in the subject application for at least 20 years."

84. Later in the appeal brief, Weber traces its enforcement history, noting the consent judgments and default judgments and attaching all of these judgments, except for a recently reached settlement agreement and the 1974 Agreement with W.C. Bradley.

85. In its appeal brief, Weber also made representations that the spherical shape of the kettle grill was not functional, contrary to the later representations it made to consumers as set forth in paragraphs 45-46 above.

86. The TTAB, in reversing the Examining Attorney and allowing registration of the Weber Kettle Marks, expressly relied upon the representations made by Defendant's predecessor regarding the lack of functional superiority of the kettle grill and its "license" with W.C. Bradley, finding:

In addition, the record shows that applicant has filed infringement actions against more than ten parties who, in recent years, have sold barbecue grills substantially identical in configuration to applicant's involved configuration. All of those actions ended favorably to applicant, either by the entry of a default judgment against the defendant, or (in one case) with the defendant becoming a licensee of applicant (the licensee has since gone out of business), or by a consent decree in which the defendant consented not to use any configuration which is the same as or confusingly similar to applicant's. *In re Weber-Stephen Products Co.*, 3 USPQ2d 1659 (TTAB 1987)

87. The TTAB further relied on the consent agreements made of record by Defendant's predecessor, remarking, "we note applicant's statement, on page 7 of its response filed April 1, 1983, that in the present application it is not attempting to claim exclusive rights in covered grills or even in circular or spherical covered grills, but rather seeks only protection of its own unique shape. This statement is borne out by a number of consent agreements in infringement suits filed by applicant, as discussed hereafter."

88. The TTAB further noted that "with respect to applicant's tripod leg arrangement (with one leg being forward and the other two back), that there is absolutely no evidence in the record to show that it is functionally superior to, or simpler or cheaper to manufacture than, other

available leg designs, such as single leg pedestals, four leg designs, or equidistant three-leg designs.”

89. Upon information and belief, Defendant’s predecessor never corrected the TTAB’s mistaken impression that W.C. Bradley had “gone out of business” and, moreover, never provided a copy of the 1974 Agreement to anyone at the USPTO in connection with its attempt to register any three-legged kettle grill configuration mark.

90. Upon information and belief, Defendant’s predecessor knowingly and intentionally withheld the 1974 Agreement from the USPTO during its prosecution of the Weber Kettle Mark applications because it knew that, had the USPTO seen the broad consent to use and/or naked license contained in the 1974 Agreement, it would not have granted Defendant’s predecessor the right to register the Weber Kettle Marks.

91. Upon information and belief, following the 1974 Agreement, Defendant and its predecessor embarked upon a strategy of using the court system and competitors’ fear of litigation to broadly enforce trademark rights it claimed in the Weber Kettle Marks against any competitor offering a three legged kettle grill.

92. Upon information and belief, since being granted registrations for the Weber Kettle Marks, Defendant and its predecessor have relied upon those registrations to enforce its monopoly on three-legged kettle grills against any competitor offering a three legged kettle grill, including those offering equidistant three leg designs with a different overall spherical shape like the Kettleman grill offered by Char-Broil and described by the TTAB in its 1987 decision as outside the scope of Weber’s Kettle Mark registrations.

93. Upon information and belief, since being granted registrations for the Weber Kettle Marks, Defendant and its predecessor have relied upon those registrations to enforce its

monopoly by opposing the registration of trademarks featuring four-legged kettle grill silhouettes described by the TTAB in its 1987 decision as outside the scope of Weber's Kettle Mark registrations, including by filing opposition proceeding Nos 91099633 and 91092648 against Porcelain Metals Corporation and Jwu Shin Industrial Co., Ltd., respectively, with the TTAB.

94. Upon information and belief, neither Defendant nor its predecessor ever disclosed the existence of the 1974 Agreement to the third party competitors it sued for infringement of the Weber Kettle Mark registrations or in opposing the registration of kettle grill trademarks by third party competitors.

95. Upon information and belief, had the broad consent contained in the 1974 Agreement been disclosed to competitors, Defendant and its predecessor would have been estopped from claiming that third party competitors utilizing a kettle grill of any configuration were infringing any rights owned by Defendant and its predecessor.

96. At the very least, upon information and belief, third party competitors sued by Defendant and its predecessor would not have readily granted broad consent or default judgments to Defendant and its predecessor, had they known of the defenses available to them under the 1974 Agreement.

97. Sidelineing W.C. Bradley during its attempts to register the Weber Kettle Marks was critical to Defendant's ultimate success because, as the TTAB was careful to note:

Our conclusion in this ex parte proceeding would not, of course, preclude us from reaching a different result in a subsequent inter partes proceeding brought with respect to these same applications by a competitor of applicant, if the competitor were able to present evidence showing that applicant's configuration is, in fact, superior to other available designs and that competitors need to be able to use it to compete effectively.

98. Protected by the 1974 Agreement, W.C. Bradley had no incentive to challenge Defendant's predecessor's registration of the Weber Kettle Marks.

99. Ignorant of the provisions of the 1974 Agreement, third party competitors were unaware of their ability to challenge the registration of the Weber Kettle Marks on the grounds of the naked licensing and/or estoppel set forth in the 1974 Agreement.

100. As a known and direct result of Defendant and its predecessor's misrepresentations regarding functional superiority and the 1974 Agreement during prosecution of the Weber Kettle Mark registrations and subsequent failure to disclose the contents of the 1974 Agreement as it enforced the Weber Kettle Marks and registrations thereof against third party competitors, Defendant and its predecessor were able to obtain a monopoly position in the charcoal grill market, obtaining over 50 % of the market for charcoal grills and at least 80% of the market for kettle grills.

DEFENDANT'S ILLINOIS LAWSUITS

101. As indicated above, Defendant filed the March 2016 Illinois Action in the Northern District of Illinois against Plaintiffs, for sale of the Char-Broil Kettleman grill, alleging trademark infringement, dilution, and related claims based on the Weber Kettle Marks. That lawsuit was assigned Case No. 1:2016-cv-03389.

102. In lieu of serving the complaint, Tom Koos, the CEO of Defendant, contacted Christine Robins, President and CEO of Char-Broil located in Columbus, Georgia, by phone to discuss the filing and later forwarded the complaint by email to Ms. Robins.

103. After reviewing the 1974 Agreement, Defendant denied that a license existed, and purported to terminate "any and all license rights allegedly granted under the 1974 Agreement, effective IMMEDIATELY." The alleged termination was communicated to Plaintiffs at 3:11 PM on April 20, 2016.

104. Also on April 20, 2016, Defendant dismissed without prejudice Case No. 1:2016-cv-03389 and filed a new lawsuit that same day as Case No. 1:2016-cv-04483 (the "April 2016

Illinois Action”). Plaintiffs have incurred expenses defending the case, and anticipate having to spend millions of dollars to defend the action.

105. Defendant failed to identify the second lawsuit as a related case to the earlier-filed lawsuit, and it was assigned a new judge.

106. The only substantive difference between the two complaints is a paragraph, added to the second lawsuit, alleging:

Defendants do not have any license rights to use the Weber Kettle Marks, the Other Weber Marks, or any 3-legged grill design that is confusingly similar thereto. To the extent that Defendants had any such license rights (which they did not), Weber formally and lawfully terminated any and all license rights prior to filing this Complaint.

107. As a result of Defendant’s actions, Plaintiffs have been the subject of media attention drawn to Defendant’s accusations, including an article in Crain’s Chicago Business noting, “Weber-Stephen Products is trying to turn up the heat on a competitor for allegedly stealing a design at the heart of the company’s line-up: the bulbous grill that’s held up by three legs.” The article goes on to imply that Weber owns a *patent* in the three legged kettle grill design.

108. Given the two years or more of detailed design work that went into Char-Broil’s development of a functionally superior charcoal grill design, the accusation that Plaintiffs are “stealing” Weber’s (allegedly patented) design is particularly damaging to Plaintiffs’ reputation for innovation.

109. Upon information and belief, Defendant’s actions have or will cause Plaintiffs lost sales.

110. In addition to damage to their reputation and goodwill caused by Defendant’s actions and potential lost sales, Plaintiffs have had to devote internal resources, engage attorneys

to defend against Defendant's claims, and incurred other costs, all of which are difficult to ascertain but in any event exceed \$75,000.

COUNT ONE

Breach of Contract

111. Plaintiffs reassert and reallege all of the allegations contained in the foregoing paragraphs as though the same were fully set forth herein.

112. This claim arises under Georgia common law.

113. The 1974 Agreement was made for the purpose of settling litigation and, accordingly, its terms were intended to be perpetual obligations upon the parties and their respective successors.

114. Defendant's current denial of the existence of a license for the Weber Kettle Marks is in direct contrast to its claim, during the prosecution of the applications that resulted in registrations for those marks, that Plaintiffs' use was licensed by Defendant.

115. Alternatively, Defendant's purported termination of the 1974 Agreement and filing of a lawsuit for trademark infringement that same day was not a reasonable exercise of any termination rights under the 1974 Agreement, to the extent a right to terminate exists.

116. Defendant's purported termination of the 1974 Agreement and its 2016 lawsuits constitute a breach of the 1974 Agreement.

117. Upon information and belief, Defendant's actions were done and continue to be done willfully, with full knowledge of Plaintiffs' rights under the 1974 Agreement and with the express intent to oppress Plaintiffs and interfere with their ability to lawfully compete in the marketplace.

118. As a result of Defendant's actions, Plaintiffs have been damaged in an amount that is currently difficult to ascertain but in any event exceeds \$75,000.

COUNT TWO

Injunctive Relief

119. Plaintiffs reassert and reallege all of the allegations contained in the foregoing paragraphs as though the same were fully set forth herein.

120. This claim arises under Georgia common law.

121. The 1974 Agreement was made for the purpose of settling litigation and, accordingly, its terms were intended to be perpetual obligations upon the parties and their respective successors.

122. The 1974 Agreement was filed in the record of this Court to resolve the Prior Action.

123. Defendants are judicially estopped from denying the terms of the 1974 Agreement.

124. Plaintiffs are entitled to a permanent injunction strictly enforcing the terms of the 1974 Agreement.

COUNT THREE

Expenses of Litigation under O.C.G.A. § 13-6-11

125. Plaintiffs reassert and reallege all of the allegations contained in the foregoing paragraphs as though the same were fully set forth herein.

126. This claim arises under O.C.G.A. § 13-6-11.

127. Defendant's purported termination of the 1974 Agreement and its 2016 lawsuits constitute a bad faith breach of the 1974 Agreement.

128. Despite multiple attempts by Plaintiffs to resolve the dispute, Defendant has been stubbornly litigious and caused Plaintiffs unnecessary trouble and expense.

129. Accordingly, pursuant to O.C.G.A. § 13-6-11, Plaintiffs are entitled to recovery of their expenses of litigation.

COUNT FOUR

Attempted Monopolization under 15 U.S.C. §2

130. Plaintiffs reassert and reallege all of the allegations contained in the foregoing paragraphs as though the same were fully set forth herein.

131. The relevant product market consists of the market for the sales of portable charcoal kettle grills with three legs. These grills feature a unique combination of characteristics, including the spherical shape that provides a superior cooking environment, requires less charcoal for heating compared to other types of grills, and facilitates the collection of ashes; and three legs that enable the grills to be portable and easier to level on uneven ground,. The kettle grills also are priced different from other types of grills, with three-legged kettle grills costing less to manufacture, yet selling to consumers for premium prices. This market is recognized by industry participants and consumers, including Defendant admitting that the kettle shape is functionally “unique,” and numerous consumer reviews reflecting consumer preference for kettle grills. The sales of portable charcoal kettle grills with three legs comprising the relevant product market are not reasonably interchangeable with charcoal grill products of other forms or types.

132. The relevant geographic market consists of the United States. Among other reasons, the United States is distinct from other geographic areas as shown by Defendant utilizing separate distribution channels for the United States and other areas and Defendant prohibiting distributors in the United States from selling Defendant’s products outside the United States. These commercial realities, plus the fact that consumers in the United States cannot practically turn to purchase portable charcoal kettle grills outside of the United States, limit the

reasonable interchangeability of the sale of portable charcoal kettle grills between the United States and other geographic areas.

133. Defendant has attempted, and continues to attempt, to possess market power in the market for the sale of portable charcoal kettle grills in the United States and maintains a dominant position in that market. Defendant has acted with the specific intent to monopolize and has used, and is using, its market dominance in an attempt to eliminate competition in the sale of portable charcoal kettle grills in the United States.

134. Defendant's attempt to monopolize through predatory conduct includes, but is not limited to, the following overt acts: (a) making misleading statements and deliberately omitting material information during USPTO and TTAB proceedings regarding portable charcoal kettle grills with three legs; (b) impeding and excluding competitors by acting to enforce trademarks in and to the portable charcoal kettle grill with three leg product configuration in suits concerning such grills, when Defendant knew or should have known that the trademarks were invalid and/or were procured through fraud; (c) initiating and pursuing litigation to impede and exclude competitors from the market when Defendant knew or should have known that the litigation was objectively baseless because it was premised on trademarks that were invalid and/or were procured through fraud; (d) taking actions and making clearly false statements that Defendant knew or should have known would result in disparagement of Plaintiff and its kettle grill product; and (e) breaching and violating the 1974 Agreement without any valid business justification as part of Defendant's anticompetitive effort to impede and exclude competition.

135. Defendant's attempt to monopolize has had success in restricting, excluding, and foreclosing competition, and there is a dangerous probability of success of the Defendant monopolizing the market for the sale of portable charcoal kettle grills in the United States.

136. Defendant's attempt to monopolize and the predatory acts in furtherance of this scheme serve no purpose other than to unreasonably restrain trade and monopolize business markets and constitute a violation of § 2 of the Sherman Act, and such violation and the effects thereof are continuing.

137. As a direct and proximate result of Defendant's continuing violation of § 2 of the Sherman Act, entry and innovation by competitors in the market has been blocked or impeded, the output of portable charcoal kettle grills in the United States has been reduced, consumers have paid supracompetitive prices for grills, and Plaintiffs have suffered injury and damages in an amount to be proven at trial.

138. Plaintiffs seek money damages from Defendant for these violations. Such damages represent the loss of reputation and goodwill, lost sales and potential lost sales, and the internal costs, attorney fees and other costs associated with defending themselves from Defendant's anticompetitive actions. These actual damages should be trebled under § 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT FIVE

Monopolization under 15 U.S.C. §2

139. Plaintiffs reassert and reallege all of the allegations contained in the foregoing paragraphs as though the same were fully set forth herein.

140. The relevant product market consists of the market for the sales of portable charcoal kettle grills with three legs. These grills feature a unique combination of characteristics, including the spherical shape that provides a superior cooking environment, requires less charcoal for heating compared to other types of grills, and facilitates the collection of ashes; and three legs that enable the grills to be portable and easier to level on uneven ground. The kettle

grills also are priced different from other types of grills, with kettle grills costing less to manufacture, yet selling to consumers for premium prices. This market is recognized by industry participants and consumers, including Defendant admitting that the kettle shape is functionally “unique,” and numerous consumer reviews reflecting consumer preference for kettle grills. The sales of portable charcoal kettle grills with three legs comprising the relevant product market are not reasonably interchangeable with charcoal grill products of other forms or types.

141. The relevant geographic market consists of the United States. Among other reasons, the United States is distinct from other geographic areas as shown by Defendant utilizing separate distribution channels for the United States and other areas and Defendant prohibiting distributors in the United States from selling Defendant’s products outside the United States. These commercial realities, plus the fact that consumers in the United States cannot practically turn to purchase portable charcoal kettle grills outside of the United States, limit the reasonable interchangeability of the sale of portable charcoal kettle grills between the United States and other geographic areas.

142. Defendant possesses monopoly power over the sale of portable charcoal kettle grills between the United States. Upon information and belief, Defendant holds over 90% of the market for portable charcoal kettle grills with three legs in the United States.

143. Defendant has obtained, enhanced, and maintained its dominance in the sale of portable, three-legged charcoal kettle grills in the United States through the unlawful conduct alleged herein. Defendant has abused and continues to abuse that power to maintain and enhance its market dominance by exclusionary conduct that includes, but is not limited to, the following overt acts: (a) making misleading statements and deliberately omitting material information during USPTO and TTAB proceedings regarding portable charcoal kettle grills with three legs;

(b) impeding and excluding competitors by acting to enforce trademarks in and to the portable charcoal kettle grill with three leg product configuration in suits concerning such grills, when Defendant knew or should have known that the trademarks were invalid and/or were procured through fraud; (c) initiating and pursuing litigation to impede and exclude competitors from the market when Defendant knew or should have known that the litigation was objectively baseless because it was premised on trademarks that were invalid and/or were procured through fraud; (d) taking actions and making clearly false statements that Defendant knew or should have known would result in disparagement of Plaintiff and its kettle grill product; and (e) breaching and violating the 1974 Agreement without any valid business justification as part of Defendant's anticompetitive effort to impede and exclude competition.

144. As a direct and proximate result of Defendant's continuing violation of § 2 of the Sherman Act, entry and innovation by competitors in the market has been blocked or impeded, the output of portable charcoal kettle grills in the United States has been reduced, consumers have paid supracompetitive prices for grills, and Plaintiffs have suffered injury and damages in an amount to be proven at trial.

145. Plaintiffs seek money damages from Defendant for these violations. Such damages represent the loss of reputation and goodwill, lost sales and potential lost sales, and the internal costs, attorney fees and other costs associated with defending themselves from Defendant's anticompetitive actions. These actual damages should be trebled under § 4 of the Clayton Act, 15 U.S.C. § 15.

COUNT SIX

Unfair Competition under Georgia Common Law

146. Plaintiffs reassert and reallege all of the allegations contained in the foregoing paragraphs as though the same were fully set forth herein.

147. This claim arises under Georgia common law.

148. In order to compete effectively in the charcoal grill market, competitors (including Plaintiffs) need the freedom to offer a functionally superior kettle grill because, among other things, kettle grills have certain advantages over rectangular or square grills, consumers perceive functional benefits to kettle grills, and three-legged kettle grills, in particular, are functionally easier to level on uneven ground than kettle grills with four legs.

149. Upon information and belief, Defendant obtained its Weber Kettle Marks and registrations thereof by misrepresenting the functional superiority of the kettle grill design and the 1974 Agreement to the USPTO, the courts, and third party competitors.

150. For forty years, Defendant has enforced its fraudulently obtained and maintained Weber Kettle Marks and registrations thereof against competitors.

151. By purporting to terminate the 1974 Agreement and suing Plaintiffs for the alleged infringement of the Weber Kettle Marks, Defendant seeks to enforce its illicitly-gained trademarks against Plaintiffs.

152. Upon information and belief, Defendant's actions were done and continue to be done willfully, with full knowledge of Plaintiffs' rights under the 1974 Agreement and with the express intent to oppress Plaintiffs and interfere with their ability to lawfully compete in the marketplace.

153. As a result of Defendant's actions, Plaintiffs have been harmed by a loss of reputation and goodwill, potential lost sales, and the internal costs, attorney fees and other costs associated with defending themselves from Defendant's actions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

1. Grant a temporary restraining order, preliminary injunction and, following trial on the merits, a permanent injunction restraining and enjoining Defendant and any and all principals, officers, agents, servants, employees, attorneys, representatives, successors and assigns of Defendant, and all those in privity, concert or participation with Defendant and all those who receive actual notice of the order, from:

- (i). enforcing the Weber Kettle Marks against Plaintiffs or any competitor;
- (ii) engaging in any conduct that tends falsely to represent that; or is likely to confuse, mislead, or deceive purchasers, Defendant's customers, and/or members of the public to the effect that Plaintiffs copied or "stole" Defendant's kettle grill design;
- (iii) breaching the 1974 Agreement;
- (iv) violating the Sherman Act or otherwise competing unfairly with Plaintiffs in any manner; and
- (v) assisting, aiding or abetting another person or business entity in engaging or performing any of the activities enumerated in subparagraphs (i) through (iv) above.

2. Find that Defendant has breached the 1974 Agreement.

3. Find that Defendant has breached the 1974 Agreement in a manner permitting Plaintiffs' recovery of their expenses of litigation under O.C.G.A. § 13-6-11.

4. Find that Defendant has acted in restraint of trade in violation of the Sherman Act, Section 2.

5. Find that Defendant has competed unfairly in violation of Georgia law by the acts complained of herein.

6. Require Defendant to disseminate corrective advertising, at Defendant's expense and subject to Plaintiffs' approval, that informs consumers, the trade and the public at large of Defendant's unlawful conduct as complained of herein and of the judgment requiring Defendant to cease such unlawful conduct, and/or require Defendant to pay Plaintiffs' costs in producing and disseminating such corrective advertising.

7. Direct Defendant to file with this Court and serve on counsel for Plaintiffs, within thirty (30) days after entry of the Injunction, a written report under oath setting forth in detail the manner in which Defendant has complied with the foregoing paragraphs.

8. Award to Plaintiffs their damages caused by Defendant's acts complained of herein, including an award of treble Plaintiffs' damages for Defendant's violation of the Sherman Act.

9. Award to Plaintiffs their attorneys' fees and all of Plaintiffs' costs and expenses of litigation.

10. Grant to Plaintiffs such other and further relief as the Court may deem just, proper and equitable under the circumstances.

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiffs hereby demands a jury trial on all issues so triable.

Dated: June 14, 2016

Respectfully submitted,

**PAGE, SCRANTOM, SPROUSE,
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