

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WEBER-STEPHEN PRODUCTS LLC,

Plaintiff,

v.

SEARS HOLDINGS CORPORATION, and
SEARS, ROEBUCK AND CO.,

Defendants.

Case No. 1:13-cv-01686
Honorable Edmond E. Chang

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiff Weber-Stephen Products LLC complains of Defendants Sears Holdings Corporation and Sears, Roebuck and Co. as follows:

NATURE OF CASE

1. This Amended Complaint includes claims for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. This Complaint also includes claims for unfair competition, false designation of origin and trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). This Court has jurisdiction over these claims pursuant to 28 U.S.C. § 1331 and § 1338(a) and (b).

PARTIES

2. Weber-Stephen Products LLC ("Weber") is a Delaware limited liability company having its principal place of business at 200 East Daniels Road, Palatine, Illinois 60067.

3. Weber is a leading worldwide designer, developer, manufacturer and provider of outdoor gas, charcoal and electric grills and grilling accessories sold under the Weber® brand name. Weber's founder, George Stephen, began making and selling grills under the Weber® name in the 1950s. Since that time, Weber has developed and introduced numerous

revolutionary and iconic products, such as the Genesis® grills. Today, the Weber® brand has become one of America's most recognized and trusted brands in outdoor grills. As a result of its innovative research and development efforts in the field of outdoor grills, Weber holds numerous design and utility patents.

4. Weber owns and has standing to sue for infringement of United States Patent No. 8,347,874 B2, entitled "Grease Drip Pan and Gas Tank Blocker for a Barbecue Grill," which issued on January 8, 2013 (the "874 Patent").

5. Weber also owns and has standing to sue for infringement of United States Design Patent No. D564,834 S, entitled "Shroud for a Barbecue Grill," which issued on March 25, 2008 (the "834 Patent").

6. Weber also owns and has standing to sue for infringement of United States Design Patent No. D609,045 S, entitled "Grill," issued on February 2, 2010 (the "045 Patent").

7. Sears Holdings Corporation ("SHC") is a Delaware corporation having its principal place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.

8. Sears, Roebuck and Co. ("SRC") is a New York corporation having its principal place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179. SRC is registered to do business in the State of Illinois. SRC is a wholly owned subsidiary of SHC.

9. SHC and SRC are hereinafter collectively referred to as "Sears."

10. Sears, together with its subsidiaries, owns and operates Kmart and Sears retail stores, as well as the sears.com, kmart.com and kenmore.com websites. Among other things, Sears and its subsidiaries sell outdoor grills and accessories under the Kenmore® brand name.

11. Sears offers to sell and sells a line of products called Kenmore Elite 500 Series 3 Burner Dual Fuel Gas Grills. Sears offers to sell and sells the Kenmore Elite 500 Series 3 Burner Dual Fuel Stainless Steel Gas Grill, Item # 07123675000; the Kenmore Elite 500 Series 3

Burner Dual Fuel Espresso Gas Grill, Item # 07123674000; the Kenmore Elite 500 Series 3 Burner Dual Fuel Champagne Gas Grill, Item # 07129162000; the Kenmore Elite 500 Series 3 Burner Dual Fuel Carbon Grey Metallic Gas Grill, Item # 07129163000; the Kenmore Elite 500 Series 3 Burner Dual Fuel Vermillion Red Gas Grill, Item # 07129164000, and all other Sears or Kenmore grills with different model names or numbers but with the same or substantially the same designs, features, functionalities and/or appearance (collectively the “Accused Kenmore Elite 500 Series Gas Grills”).

12. Sears offers to sell and sells a line of products called Kenmore Elite 550 Series 3 Burner Dual Fuel Gas Grills. In or around February 2014, through its Simply Outdoors 2014 Catalog, Sears began offering to sell the Kenmore Elite 550 Series 3 Burner Dual Fuel Stainless Steel Gas Grill Item #071-33587, the Kenmore Elite 550 Series 3 Burner Dual Fuel Espresso Gas Grill Item #071-33586, the Kenmore Elite 550 Series 3 Burner Dual Fuel Champagne Gas Grill Item #071-33585, the Kenmore Elite 550 Series 3 Burner Dual Fuel Carbon Grey Metallic Gas Grill Item #071-33588, and the Kenmore Elite 550 Series 3 Burner Dual Fuel Vermillion Red Gas Grill Item #071-33589, and all other Sears or Kenmore grills with different model names or numbers but with the same or substantially the same designs, features, functionalities and/or appearance (collectively the “Accused Kenmore Elite 550 Series Gas Grills”).

13. Sears offers to sell and sells a line of products called Kenmore Elite 600 Series 4 Burner Dual Fuel Gas Grills. In or around January 2014, at least through its websites, Sears began offering to sell the Kenmore Elite 600 Series grills, specifically including the Kenmore Elite 600 Series 4 Burner Dual Fuel Stainless Steel Gas Grill; Item # 07133579000P Model # PG-40415SOL; Kenmore Elite 600 Series 4 Burner Dual Fuel Carbon Grey Metallic Gas Grill; Item # 07133578000P Model # PG-40415SOL; and Kenmore Elite 600 Series 4 Burner Dual Fuel Maroon Metallic Gas Grill; Item # 07133577000P Model # PG-40415SOL, and all other

Sears or Kenmore grills with different model names or numbers but with the same or substantially the same designs, features, functionalities and/or appearance (collectively the “Accused Kenmore Elite 600 Series Gas Grills”).

14. Sears offers to sell and sells a line of products called the Kenmore Elite 700 Series 5 Burner Dual Fuel Gas Grills. In or around January 2014, through its websites, Sears began offering to sell the Kenmore Elite 700 Series 5 Burner Dual Fuel Stainless Steel Gas Grill; Item # 07103358000P Model # PG-40406SRL, and all other Sears or Kenmore grills with different model names or numbers but with the same or substantially the same designs, features, functionalities and/or appearance (“the Accused Kenmore Elite 700 Series Gas Grills”).

JURISDICTION AND VENUE

15. The Court has personal jurisdiction over Sears because, among other things, it transacts business in this district at least by offering to sell, selling and/or advertising the accused products in such a way as to purposefully reach out to customers in Illinois and this judicial district through its retail stores located in this district, as well as through its websites, thus specifically committing acts of infringement in this judicial district. Sears is headquartered in this judicial district, has purposefully availed itself of the privilege of conducting business with residents of this judicial district and has established sufficient minimum contacts with the State of Illinois such that it should reasonably and fairly anticipate being brought into court in Illinois.

16. Venue is proper in this district under 28 U.S.C. §§ 1391(b)-(d) and 1400(b).

COUNT I – INFRINGEMENT OF U.S. PATENT NO. 8,347,874 B2

17. Weber repeats and incorporates by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

18. Sears offers to sell and sells propane fuel tanks for use with the Accused Kenmore Elite 500 Series Gas Grills.

19. The Accused Kenmore Elite 500 Series Gas Grills are barbeque grills.
20. The Accused Kenmore Elite 500 Series Gas Grills have cooking chambers.
21. The Accused Kenmore Elite 500 Series Gas Grills have frames or carts.
22. The Accused Kenmore Elite 500 Series Gas Grills' frames or carts have an interior volume large enough to store two (2) twenty (20) pound standard propane fuel tanks.
23. The Accused Kenmore Elite 500 Series Gas Grills have a tank blocking structure.
24. The Accused Kenmore Elite 500 Series Gas Grills have a grease cup bracket.
25. The Accused Kenmore Elite 500 Series Gas Grills' grease cup bracket prevents storage of two (2) twenty (20) pound standard propane fuel tanks in the interior volume of the frame or cart.
26. The Accused Kenmore Elite 500 Series Gas Grills' grease cup bracket holds a grease drip pan or grease cup which collects grease from the cooking chamber or grill head.
27. The Accused Kenmore Elite 500 Series Gas Grills' tank blocking structure or grease cup bracket is not suspended from the cooking chamber or grill head.
28. Sears has infringed and continues to infringe at least claims 1-4, 6-10 and 14-20 of the '874 Patent within the meaning of 35 U.S.C. § 271(a) through the foregoing activities including, without limitation, selling and offering to sell the Accused Kenmore Elite 500 Series Gas Grills and other grills with different model names or numbers but with the same or substantially the same designs, features and functionalities as the Accused Kenmore Elite 500 Series Gas Grills.
29. Weber has complied with notice provisions of 35 U.S.C. § 287.
30. Upon information and belief, Sears has been aware of the '874 Patent and its infringement thereof, yet has continued its unlicensed and unauthorized infringement with no regard to the '874 Patent or Weber's rights. This infringement continues today despite an

objectively high likelihood that Sears' actions constitute infringement of the '874 Patent. This objectively high likelihood of infringement was either known or so obvious that it should have been known to Sears. To date, Sears has not presented any competent advice of counsel upon which it has relied; nor has it presented any reasonable defense of non-infringement, invalidity or unenforceability. Sears' infringement of the '874 Patent has been willful, deliberate and objectively reckless.

31. Sears' infringement of the '874 Patent by selling and offering to sell the Accused Kenmore Elite 500 Series Gas Grills has injured Weber and Weber is entitled to recover damages adequate to compensate it for such infringement, but in no event less than a reasonable royalty.

32. Sears' infringing activities have injured and will continue to injure Weber, unless and until this Court enters an injunction prohibiting further infringement and, specifically, enjoining further manufacture, use, sale, offer for sale and/or importation of products that come within the scope of the claims of the '874 Patent.

COUNT II – INFRINGEMENT OF U.S. DESIGN PATENT NO. D564,834 S

33. Weber repeats and incorporates by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

34. The '834 Patent claims an "ornamental design for a shroud for a barbeque grill."

35. The Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills have a shroud or lid.

36. Figure 1 of the '834 Patent is shown on the left below, and the shroud or lid of one of the Accused Products is shown on the right below, as depicted in the parts diagram of the Kenmore Elite Use & Care Guide, Models 146.2367 4310/146.23675310, p. 15.

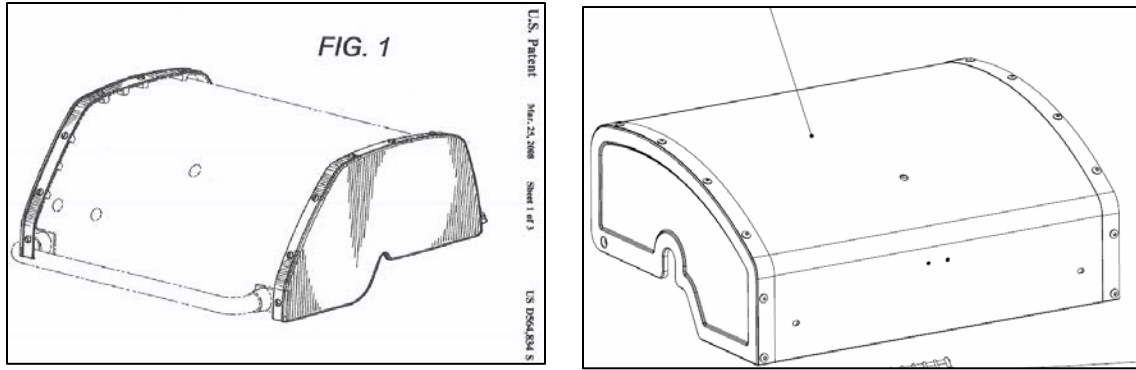


Figure 1 of '834 Patent

Kenmore Elite Stainless and Espresso Grills

37. The Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills' shroud or lid design has appropriated the ornamental design for a shroud for a barbeque grill as shown and described in the '834 Patent.

38. In the eye of the ordinary observer, giving such attention as a purchaser usually gives, the ornamental design for a shroud for a barbeque grill claimed in the '834 Patent and the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills' shroud or lid design are substantially the same; the resemblance is such as to deceive an ordinary observer, inducing him to purchase one supposing it to be the other.

39. Sears has infringed and continues to infringe the ornamental design for a shroud for a barbeque grill claimed in the '834 Patent within the meaning of 35 U.S.C. § 271(a) through the foregoing activities including, without limitation, selling and offering to sell the Kenmore Elite Gas Grills lines of products including, without limitation, the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills, and other grills with different model names or numbers but with the same or substantially the same shroud or lid designs.

40. Weber has complied with notice provisions of 35 U.S.C. § 287.

41. Upon information and belief, Sears has been aware of the '834 Patent and its infringement thereof, yet has continued its unlicensed and unauthorized infringement with no regard to the '834 Patent or Weber's rights. This infringement continues today despite an objectively high likelihood that Sears' actions constitute infringement of the '834 Patent. This objectively high likelihood of infringement was either known or so obvious that it should have been known to Sears. To date, Sears has not presented any competent advice of counsel upon which it has relied; nor has it presented any reasonable defense of non-infringement, invalidity or unenforceability. Sears' infringement of the '834 Patent has been willful, deliberate and objectively reckless.

42. Sears' infringement of the '834 Patent by selling and offering to sell the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills has injured Weber and Weber is entitled to recover damages adequate to compensate it for such infringement, but in no event less than a reasonable royalty, as permitted under 35 U.S.C. § 284, as well as damages for design patent infringement as permitted under 35 U.S.C. § 289.

43. Sears' infringing activities have injured and will continue to injure Weber, unless and until this Court enters an injunction prohibiting further infringement and, specifically, enjoining further manufacture, use, sale, offer for sale and/or importation of products that come within the scope of the design claimed in the '834 Patent.

COUNT III – INFRINGEMENT OF U.S. DESIGN PATENT NO. D609,045 S

44. Weber repeats and incorporates by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

45. The '045 Patent claims an "ornamental design for grill."

46. The Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills are grills.

47. Figure 2 of the '045 Patent is shown on the far left below, and two Accused Kenmore Elite 500 Series Gas Grills are shown on the right below, as depicted on Sears' [www.kenmore.com](http://www.kenmore.com/outdoors-grills-smokers-gas-grills/s-1040208?adCell=W2&adCell=W2#viewItems=12&pageNum=1&sortOption=ORIGINAL_SORT_ORDER&&filter=Brand/Kenmore+Elite&lastFilter=Brand) website. See http://www.kenmore.com/outdoors-grills-smokers-gas-grills/s-1040208?adCell=W2&adCell=W2#viewItems=12&pageNum=1&sortOption=ORIGINAL_SORT_ORDER&&filter=Brand/Kenmore+Elite&lastFilter=Brand, and related URLs.



Figure 2 of '045 Patent

Kenmore Elite Stainless and Espresso Grills

48. The Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills' design has appropriated the ornamental design for a grill as shown and described in the '045 Patent.

49. In the eye of the ordinary observer, giving such attention as a purchaser usually gives, the ornamental design for a grill claimed in the '045 Patent and the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills' design are substantially the same; the resemblance is such as to deceive an ordinary observer, inducing him to purchase one supposing it to be the other.

50. Sears has infringed and continues to infringe the ornamental design for a grill claimed in the '045 Patent within the meaning of 35 U.S.C. § 271(a) through the foregoing activities including, without limitation, selling and offering to sell the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills and other grills with different model names or numbers but with the same or substantially the same designs as the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills.

51. Weber has complied with notice provisions of 35 U.S.C. § 287.

52. Upon information and belief, Sears has been aware of the '045 Patent and its infringement thereof, yet has continued its unlicensed and unauthorized infringement with no regard to the '045 Patent or Weber's rights. This infringement continues today despite an objectively high likelihood that Sears' actions constitute infringement of the '045 Patent. This objectively high likelihood of infringement was either known or so obvious that it should have been known to Sears. To date, Sears has not presented any competent advice of counsel upon which it has relied; nor has it presented any reasonable defense of non-infringement, invalidity or unenforceability. Sears' infringement of the '045 Patent has been willful, deliberate and objectively reckless.

53. Sears' infringement of the '045 Patent by selling and offering to sell the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills has injured Weber and Weber is entitled to recover damages adequate to compensate it for such infringement, but in no event less than a reasonable royalty, as permitted under 35 U.S.C. § 284, as well as damages for design patent infringement as permitted under 35 U.S.C. § 289.

54. Sears' infringing activities have injured and will continue to injure Weber, unless and until this Court enters an injunction prohibiting further infringement and, specifically, enjoining further manufacture, use, sale, offer for sale and/or importation of products that come within the scope of the design claimed in the '045 Patent.

**COUNT IV - FEDERAL TRADE DRESS INFRINGEMENT, UNFAIR COMPETITION
AND FALSE DESIGNATION OF ORIGIN**

55. Weber repeats and incorporates by reference the allegations contained in the preceding paragraphs as if set forth fully herein.

56. This Court has jurisdiction over the subject matter of this claim for trade dress infringement, unfair competition and false designation of origin arising under Section 43(a) of the Lanham Act, codified in 15 U.S.C. § 1125(a).

57. Sears is fully aware of the popularity of the Weber Genesis® gas grills and the clear association of the Genesis® grill design with that line of products. The Weber Genesis® grill design obtained secondary meaning well prior to Sears' introduction of the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills. Sears intentionally copied and offered in interstate commerce gas grill products that create the same overall visual effect and appearance as the family of grills in Weber's Genesis® line. Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills were designed to have the same distinctive overall appearance and look as the Weber Genesis® products and are confusingly similar in total image, appearance and overall aesthetic look. As a result, the public is, and is likely to be, confused.

58. A side-by-side comparison of the Genesis® grill design and two of the Sears Accused Kenmore Elite 500 Series Gas Grills is shown below:



Weber Genesis® S310



Kenmore Elite Stainless Grill



Weber Genesis® S330



Kenmore Elite Espresso Grill

59. Sears has used in commerce, and continues to use in commerce, the Weber Genesis® grill design to unfairly benefit from Weber's success by selling the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills bearing the same design in this jurisdiction and throughout the United States.

60. Sears could have selected an alternative aesthetic design and achieved the same functionality as its current Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore

Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills.

61. The Weber Genesis® grill design is non-functional.

62. Sears has used Weber's Genesis® grill design on its Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills with the express intent to pass off Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills as those of Weber and to cause confusion and mislead the purchasing public into believing that Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills are authorized, sponsored, affiliated with, or associated with Weber, and to trade upon Weber's reputation for high-quality grill products and to improperly appropriate Weber's valuable trade dress rights.

63. Sales of Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills are likely to cause consumer confusion because of the similarity in appearance and look between Sears' and Weber's products. Consumers will believe that the Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills are manufactured, licensed, affiliated with or sponsored by Weber or are being placed on the market with Weber's consent and/or actual or implied authority. As a result, Weber has been and will continue to be irreparably injured by Sears' improper acts.

64. Sears has willfully, deliberately, and with predatory intent, created such confusion by copying and reproducing the distinctive and unique design and overall product appearance of Weber's Genesis® grills; and has advertised and sold, and threatens to advertise and sell, its products so as to cause public confusion and deception for a substantial portion of the people who perceive the advertisements, which confusion and deception is likely to influence purchase decisions. Further, Sears' sales and offers for sale of its Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills have caused and threaten to cause Weber the loss of its valuable goodwill and reputation for making and selling distinctive, unique and high-quality grill products under the Genesis® design.

65. Sears' aforesaid acts constitute unfair competition and the use in commerce of false designations of origin and false and/or misleading descriptions or representations, tending to falsely or misleadingly describe and/or represent Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills as those of Weber in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

66. Sears' wrongful acts will continue unless enjoined by this Court.

67. Weber has no adequate remedy at law and is suffering irreparable harm and damage as a result of the aforesaid acts of Sears in an amount to be determined at trial.

68. The Weber Genesis® grill design obtained secondary meaning well prior to Sears' introduction of its Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills.

69. Weber has expended considerable time, effort and resources to design and develop unique and inherently distinctive appearances for its Genesis® grill products including, without limitation, their distinctive features identified in paragraph 70 below. See, e.g., paragraph 58, incorporated herein by reference. The Genesis® grill design has been featured prominently in Weber's in-store, on-site and other advertisements and promotions for its gas grill product line. This unique trade dress has become associated with the success of Weber's Genesis® grill products and has become an indication of a single, high-quality source for those products in the minds of the relevant purchasing public.

70. Since 2007, Weber's Genesis® line has incorporated the following unique design features, which individually and in combination and sub-combinations, constitute Weber's asserted trade dress in this action: 1) Metal bands bordering the edges of the grill shroud with exposed rivets/fasteners; 2) Shiny door edges on the grill cart; 3) Shiny horizontal tubular handles for the door and lid handles; and 4) Product logo in lower right corner of the side table.

71. Sears' selection and use of substantially similar looks and appearances for its Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills is likely to mislead and confuse the public as to the source, sponsorship and/or affiliation of Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills. Because of the nearly-identical look of Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills to Weber's non-functional trade dress associated with Weber's Genesis® grill products, the public is likely to believe that Sears' Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore

Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills are in some way affiliated or associated with, or sponsored by Weber.

72. Sears' actions have been and are willful and deliberate.

73. Sears' wrongful acts will continue unless enjoined by this Court.

74. Weber has suffered, and will continue to suffer, substantial and irreparable harm and damage as a result of Sears' infringement of Weber's Genesis® grill trade dress, in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Weber respectfully asks this Court to enter judgment against Sears, and against its subsidiaries, successors, parents, affiliates, officers, directors, agents, servants and employees, and all persons in active concert or participation with them, granting the following relief:

Counts I-III – Patent Infringement Claims

- A. That judgment be entered in favor of Weber and against Sears on each claim made in the Complaint;
- B. An award of damages adequate to compensate Weber for the infringement that has occurred, but in no event less than a reasonable royalty as permitted by 35 U.S.C. § 284, together with prejudgment interest from the date the infringement began;
- C. Additional damages for design patent infringement as permitted under 35 U.S.C. § 289;
- D. Increased damages as permitted under 35 U.S.C. § 284;
- E. A finding that this case is exceptional and an award to Weber of its reasonable attorneys' fees and costs as provided by 35 U.S.C. § 285;

- F. A preliminary and permanent injunction prohibiting Sears from infringing the patents in suit; and
- G. Such other relief to which Weber is entitled under law, and any other and further relief that this Court or a jury may deem just and proper.

Count IV – Lanham Act Claims

- H. That judgment be entered in favor of Weber and against Sears on each claim made in the Complaint;
- I. That the Court order that Sears be immediately and permanently enjoined from:
 - (1) using the Weber Genesis® trade dress rights or designs confusingly similar thereto;
 - (2) advertising (over the Internet, through catalogs, or otherwise), selling, importing, exporting, using, accepting orders for or offering to sell products in conjunction with, or under, the Genesis® grill design and appearance, including but not limited to the Sears Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills;
 - (3) engaging in any conduct that tends falsely to represent that, or is likely to confuse, mislead, or deceive purchasers, Sears' customers, and/or members of the public to believe that, the actions of Sears, the products sold by Sears, or Sears itself is connected with Weber, is sponsored, approved, or licensed by Weber, or is in some way connected or affiliated with Weber;
 - (4) otherwise competing unfairly with Weber in any manner;

- J. That Weber be awarded damages in an amount sufficient to compensate it for the injuries it has sustained by reason of Sears' unlawful acts, including Weber's loss of goodwill, loss of past and/or future sales, and damages caused by Sears' acts of trade dress infringement and unfair competition. That Weber be awarded increased damages based upon the intentional and willful nature of Sears' conduct of the kind complained of herein. That Weber be awarded all gains, profits and advantages received by Sears from the sale of the Accused Kenmore Elite 500 Series Gas Grills, Accused Kenmore Elite 550 Series Gas Grills, Accused Kenmore Elite 600 Series Gas Grills, and Kenmore Elite 700 Series Gas Grills and any other products that infringe upon Weber's trade dress rights;
- K. That Weber be awarded all additional remedies provided for in 15 U.S.C. § 1117;
- L. That Sears be ordered to (a) send to its customers and the general public corrective statements approved by Weber, correcting all false statements made and all misrepresentations made concerning the Weber Genesis® design; (b) disclaim any association between Sears and Weber and/or Weber's products; and, (c) recall and make reasonable efforts to obtain the return of any confusingly similar products from its customers; and
- M. That the Court provide Weber with such other and further relief as it deems just and proper, or that Weber may be entitled to under the law, including but not limited to attorneys' fees, costs and interest.

JURY DEMAND

Weber demands a trial by jury on all issues presented in this Complaint.

Respectfully submitted,

/s/ Raymond P. Niro, Jr.

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