

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
(Electronically Filed)**

PROCOM HEATING, INC.)	
)	
	Plaintiff	
)	
vs.)	Case No. 1:13-cv-00163-JHM/HBB
)	Judge: Joseph M. McKinley
GHP GROUP, INC.)	Magistrate Judge: H. Brent Brennenstuhl
)	
	Defendant	
)	

SECOND AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

Plaintiff, ProCom Heating, Inc. (“ProCom” or “Plaintiff”), by counsel, for its Second Amended Complaint against Defendant, GHP Group, Inc. (“GHP” or “Defendant”), alleges as follows:

INTRODUCTION

1. This is an action for patent infringement under 35 U.S.C. § 271(a); false designation of origin under the Lanham Act, 15 U.S.C. § 1125(a); false advertising under the Lanham Act, 15 U.S.C. § 1125(a); and unfair competition under Kentucky common law. Plaintiff seeks monetary damages, enhanced damages (including treble damages), attorneys’ fees, costs, and permanent injunctive relief preventing continuing acts of infringement, false designation of origin and false advertising on the part of Defendant.

THE PARTIES

2. ProCom is a corporation organized and existing under the laws of Delaware, with its corporate headquarters in Brea, California and its primary manufacturing facility located at 2800 Griffin Drive, Bowling Green, KY 42101.

3. Upon information and belief, GHP is an Illinois Corporation with its principal place of business located at 6440 W. Howard Street, Nile, Illinois 60714.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction by virtue of the fact that this is a civil action under the Patent Act, 35 U.S.C. § 1 *et seq.*, and the Lanham Act, 15 U.S.C. § 1051 *et seq.*, jurisdiction being conferred in accordance with 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332 and 1338(a) and (b); and with respect to certain claims, supplemental jurisdiction under 28 U.S.C. § 1367.

5. The Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) because the parties are citizens of different states and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

6. GHP, upon information and belief, transacts business nationwide, including within the Commonwealth of Kentucky and including within this judicial district. Further, GHP's infringement of the patents in suit is occurring throughout the United States, including within the Commonwealth of Kentucky, and including within this judicial district. Specifically, infringing products are being sold and/or offered for sale at retail outlets in this judicial district.

7. Further, upon information and belief GHP, regularly solicits and conducts business in the Commonwealth of Kentucky, derives substantial revenue from goods sold in Kentucky, and has contracted to supply goods in the Commonwealth of Kentucky, namely, the products that are involved in the present lawsuit. In addition, GHP has caused tortious injury in the Commonwealth of Kentucky through actions taken in Kentucky and/or has caused tortious injury in Kentucky by actions taken outside the Commonwealth of Kentucky.

8. On information and belief, venue is properly laid in this Court under 28 U.S.C. §§ 1391(b) and (c), and/or 28 U.S.C. § 1400(b), because a substantial part of the events or omissions giving rise to the claims occurred within this District.

FACTS COMMON TO ALL CLAIMS

The Plaintiff and the Patents in Suit

9. ProCom manufactures and sells a variety of high quality heating and hearth products, including, *inter alia*, gas fire places, heaters and electric fire places. ProCom's philosophy of vertical integration of parts and components allows it to produce affordable high quality products and to support the aftermarket needs of customers.

10. ProCom is the leading manufacturer of vent-free appliances in the United States and has products sold in retail outlets throughout the United States, including within Kentucky.

11. One of ProCom's most successful products over the years has been its vent free, dual fuel fireplaces sold under the ProCom brand. ProCom's vent-free fireplaces are sold in a "compact" size (*see, e.g.*, Model No.'s EDP200T2-JA, EDP200T2-MO, BD23TCC-7-HC and BD23TCC-2-LO), an "intermediate" size (*see, e.g.*, Model No.'s FBD28TCC-M-HC and FBD28TCC-M-MO), and a "full" size (*see, e.g.*, Model No.'s FBD400TCC-M-HC and FBD400RTCC-M-MO).

12. This action involves, in part, allegations of infringement of the following U.S. Patents, which relate to ProCom's vent free, dual fuel fireplaces: U.S. Patent No. 7,967,006 entitled Dual Fuel Heater ("the '006 Patent"); U.S. Patent No. 7,967,007 entitled Heater Configured to Operate With a First or Second Fuel ("the '007 Patent"); U.S. Patent No. 7,434,447 entitled Oxygen Depletion Sensor ("the '447 Patent"); U.S. Patent No. 8,317,511 entitled Control Valves for Heaters and Fireplace Devices ("the '511 Patent"); U.S. Patent No. 7,730,765 entitled Oxygen Depletion Sensor ("the '765 Patent"); U.S. Patent No. 8,281,781 entitled Dual Fuel Heater ("the '781 Patent"); U.S. Patent No. 8,516,878 entitled Dual Fuel Heater ("the '878 Patent"); and U.S. Patent No. 8,764,436 entitled Valve Assemblies for Heating Devices ("the '436 Patent")(collectively, "the Patents").

13. ProCom is the owner of, and claims rights under, the '006 Patent, which was issued by the United States Patent and Trademark Office ("PTO") on June 28, 2011 in the name of inventor, David Deng. The '006 Patent issued from application serial no. 12/581,727 having a filing date of October 19, 2009. A copy of the '006 Patent was attached to the original Complaint **Exhibit 1** and is incorporated by reference herein.

14. The inventor assigned his rights, title and interest in and to the '006 Patent to "Continental Appliances, Inc. D.B.A. ProCom" ("Continental"), which Assignment was duly recorded in Assignment Records of the PTO on October 4, 2011 at Reel No. 027011 Frame No.0525. By virtue of that assignment, the '006 Patent was issued to Continental. Continental subsequently assigned its rights, title and interest in and to the '006 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '006 Patent.

15. By virtue of its ownership of the '006 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States embodiments of the inventions claimed in the '006 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '006 Patent.

16. ProCom is the owner of, and claims rights under, the '007 Patent, which was issued by the PTO on June 28, 2011 in the name of inventor, David Deng. The '007 Patent issued from application serial no. 12/724,353 having a filing date of March 15, 2010. A copy of the '007 Patent was attached to the original Complaint as **Exhibit 2** and is incorporated by reference herein.

17. The inventor assigned his rights, title and interest in and to the '007 Patent to "Continental Appliances, Inc. D.B.A. ProCom," which Assignment was duly recorded in

Assignment Records of the PTO on October 4, 2011 at Reel No. 027011 Frame No. 0461. By virtue of that assignment, the '007 Patent was issued to Continental. Continental subsequently assigned its rights, title and interest in and to the '007 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '007 Patent.

18. By virtue of its ownership of the '007 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States embodiments of the inventions claimed in the '007 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '007 Patent.

19. ProCom is the owner of, and claims rights under, the '447 Patent, which was issued by the PTO on October 14, 2008 in the name of inventor, David Deng. The '447 Patent issued from application serial no. 11/443,492 having a filing date of May 30, 2006. A copy of the '447 Patent was attached to the original Complaint as **Exhibit 3** and is incorporated by reference herein.

20. The inventor assigned his rights, title and interest in and to the '447 Patent to "Continental Appliances, Inc. D.B.A. ProCom," which Assignment was duly recorded in Assignment Records of the PTO on June 8, 2010 at Reel No. 024505 Frame No. 0021. By virtue of that assignment, the '447 Patent was issued to Continental Appliances, Inc. Continental subsequently assigned its rights, title and interest in and to the '447 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '447 Patent.

21. By virtue of its ownership of the '447 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States

embodiments of the inventions claimed in the '447 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '447 Patent.

22. ProCom is the owner of, and claims rights under, the '511 Patent, which was issued by the PTO on November 27, 2012 in the name of inventor, David Deng. The '511 Patent issued from application serial no. 12/644,997 having a filing date of December 22, 2009. A copy of the '511 Patent was attached to the original Complaint as **Exhibit 4** and is incorporated by reference herein.

23. The inventor assigned his rights, title and interest in and to the '511 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '511 Patent.

24. By virtue of its ownership of the '511 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States embodiments of the inventions claimed in the '511 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '511 Patent.

25. ProCom is the owner of, and claims rights under, the '765 Patent, which was issued by the PTO on June 8, 2010 in the name of inventor, David Deng. The '765 Patent issued from application serial no. 12/236,347 having a filing date of September 23, 2008. A copy of the '765 Patent was attached to the original Complaint as **Exhibit 5** and is incorporated by reference herein.

26. The inventor assigned his rights, title and interest in and to the '765 Patent to "Continental Appliances, Inc. D.B.A. ProCom," which Assignment was duly recorded in Assignment Records of the PTO on June 8, 2010 at Reel No. 024505 Frame No. 0021. By virtue

of that assignment, the '765 Patent was issued to Continental Appliances, Inc. Continental subsequently assigned its rights, title and interest in and to the '765 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '765 Patent.

27. By virtue of its ownership of the '765 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States embodiments of the inventions claimed in the '765 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '765 Patent.

28. ProCom is the owner of, and claims rights under, the '781 Patent, which was issued by PTO on October 9, 2012 in the name of inventor, David Deng. The '781 Patent issued from application serial no. 13/169,963 having a filing date of June 27, 2011. A copy of the '781 Patent was attached to the original Complaint as **Exhibit 6** and is incorporated by reference herein.

29. The inventor assigned his rights, title and interest in and to the '781 Patent to "Continental Appliances, Inc. D.B.A. ProCom," which Assignment was duly recorded in Assignment Records of the PTO on October 4, 2011 at Reel No. 027011 Frame No. 0525. By virtue of that assignment, the '781 Patent was issued to Continental Appliances, Inc. as shown on the face of the patent. Continental subsequently assigned its rights, title and interest in and to the '781 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '781 Patent.

30. By virtue of its ownership of the '781 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States

embodiments of the inventions claimed in the '781 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '781 Patent.

31. ProCom is the owner of, and claims rights under, the '878 Patent, which was issued by the PTO on August 27, 2013 in the name of inventor, David Deng. The '878 Patent issued from application serial no. 12/795,472 having a filing date of June 7, 2010. A copy of the '878 Patent was attached to the original Complaint as **Exhibit 7** and is incorporated by reference herein.

32. The inventor assigned his rights, title and interest in and to the '878 Patent to Continental Appliances, Inc. Continental subsequently assigned its rights, title and interest in and to the '878 Patent to ProCom, which Assignment was duly recorded in Assignment Records of the PTO on September 25, 2013 at Reel No. 031281 Frame No. 0761. By virtue of that assignment, ProCom is the record owner of the '878 Patent.

33. By virtue of its ownership of the '878 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States embodiments of the inventions claimed in the '878 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the '878 Patent.

34. ProCom is the owner of, and claims rights under, the '436 Patent, which was issued by the PTO on July 1, 2014 in the name of inventor, David Deng. The '436 Patent issued from application serial no. 13/662,290 having a filing date of October 26, 2012. A copy of the '436 Patent was attached to the First Amended Complaint as **Exhibit 10** and is incorporated by reference herein.

35. ProCom is the owner by assignment of all rights, title and interest in and to the '436 Patent.

36. By virtue of its ownership of the ‘436 Patent, ProCom has the right to exclude others from making, using, selling or offering to sell, or importing into the United States embodiments of the inventions claimed in the ‘436 Patent. ProCom has not authorized Defendant to make, use, sell or offer to sell, or import into the United States any invention under the ‘436 Patent.

37. Procom has placed the required statutory notice, pursuant to 35 U.S.C. § 287, on products manufactured and sold by it under the Patents.

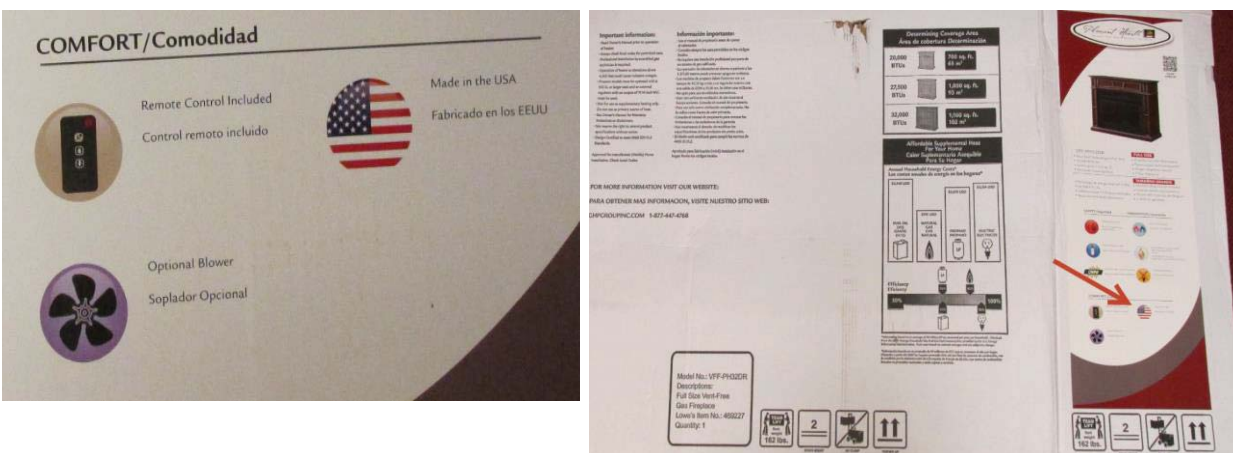
The Defendant and the Infringing Products

38. Upon information and belief, GHP is a manufacturer of electric and gas fireplaces, fireplace glass doors, fireplace accessories, gas stoves, electric and gas log sets, portable heating products, and barbeque grill products. GHP is a direct competitor of ProCom.

39. Upon information and belief, GHP manufactures infringing vent-free, dual fuel, products, including but not limited to gas fireplaces (e.g., Model Nos. VFF-PH20D, VFF-PH26D, VFF-PH32DR, VFF-PHIMD-2H, VFF-PH20D-C, VFF-PHFSDR-2c, VFF-PHCPD-2T, and VFF-PH26D-T) (collectively, “Accused Fireplaces”), gas stoves (e.g., Model Nos. VFS-PH20DT and VFS-PH30DT) (collectively, “Accused Stoves”), and gas log sets (e.g., Model Nos. VFL-CO18DT, VFL-CO24DT, VFL-HT24DR, VFL-HT30DR, and VFL-MD18DT) (collectively, “Accused Logs”) (the Accused Fireplaces, Accused Stoves, and Accused Logs collectively referred to as the “Accused Products”). GHP’s Accused Products compete directly with ProCom’s vent-free, dual fuel, fireplaces, stoves, and log sets.

Defendant’s Packaging of Its Accused Fireplaces

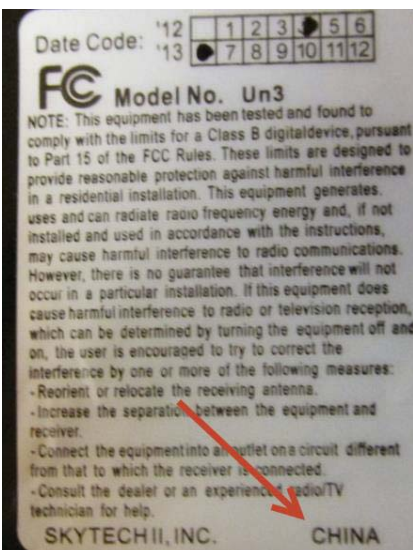
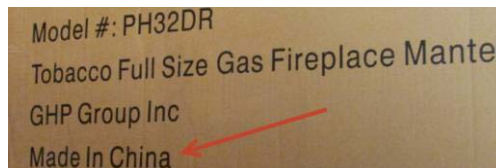
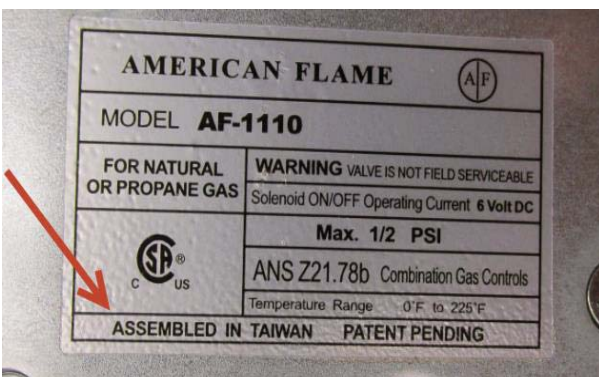
40. In connection with the product packaging of the Accused Fireplaces, GHP incorporates the term or designation “Made in the USA” and an image of the U.S. flag. Excerpts from the GHP fireplace packaging are depicted below:



41. Full photographs of the packaging of the Accused Fireplaces were attached to the original Complaint as collective **Exhibit 8** and are incorporated by reference herein.

42. Despite its representations that GHP's Accused Fireplaces are "Made in the USA," upon information and belief, all or virtually all of the parts of the Accused Fireplaces are manufactured and/or assembled outside of the United States.

43. Indeed, the following pictures depict selected parts of GHP's Accused Fireplaces – indicating that the part at issue was manufactured outside of the United States:



44. Full photographs of the dual fuel fireplace parts referenced above were attached to the original Complaint as collective **Exhibit 9** and are incorporated by reference herein.

Lowes Terminates Its Contract with ProCom for the Winter 2013/2014 Line

45. In and around January, 2013, representatives of ProCom met with representatives of Lowe's to discuss the upcoming winter line of ProCom products that would be sold in Lowe's retail outlets – including ProCom's patented, dual fuel, gas fireplaces.

46. It was at this time that ProCom was informed that Lowe's was no longer going to carry ProCom's dual fuel fireplaces for the coming, 2013/2014 season. Instead, Lowe's was going to carry certain of GHP's Accused Fireplaces.

47. Upon information and belief, GHP's Accused Fireplaces first appeared for sale at Lowe's, including but not limited to the Lowe's located at 150 American Lane, Bowling Green, Kentucky 42104, on or about August 15, 2013, and are available for sale at that location as of the filing of this Complaint.

48. Upon information and belief, GHP's Accused Fireplaces first appeared for sale on the Lowe's website, located at <http://www.lowes.com>, on August 16, 2013.

COUNT I
Infringement of the '006 Patent
(35 U.S.C. § 271(a))

49. ProCom repeats and realleges paragraphs 1 through 48 of this Second Amended Complaint as if set forth herein.

50. Upon information and belief, GHP, without permission or license from ProCom, has unlawfully and wrongfully made, sold or offered for sale, and unlawfully imported, and is now making, selling or offering for sale, and unlawfully importing, in direct competition with ProCom within the United States, including within this judicial district, the Accused Products.

51. On information and belief, the Accused Fireplaces and/or Accused Stoves contain, embody and employ the invention(s) described and claimed in the '006 Patent, in violation of

ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '006 Patent, including but not necessarily limited to claim 1, to the great loss and injury to ProCom.

52. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Fireplaces and/or Accused Stoves within the United States including within this judicial district constitutes infringement of the '006 Patent as aforesaid.

53. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '006 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT II
Infringement of the '007 Patent
(35 U.S.C. § 271(a))

54. ProCom repeats and realleges paragraphs 1 through 53 of this Second Amended Complaint as if set forth herein.

55. On information and belief, the Accused Fireplaces and/or Accused Stoves contain, embody and employ the invention(s) described and claimed in the '007 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '007 Patent, including but not necessarily limited to claim 5, to the great loss and injury to ProCom.

56. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Fireplaces and/or Accused Stoves within the United States including within this judicial district constitutes infringement of the '007 Patent as aforesaid.

57. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '007 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT III
Infringement of the '447 Patent
(35 U.S.C. § 271(a))

58. ProCom repeats and realleges paragraphs 1 through 57 of this Second Amended Complaint as if set forth herein.

59. On information and belief, the Accused Fireplaces and/or Accused Stoves contain, embody and employ the invention(s) described and claimed in the '447 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '447 Patent, including but not necessarily limited to claim 1, to the great loss and injury to ProCom.

60. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to

make, use, sell or offer to sell, the Accused Fireplaces and/or Accused Stoves within the United States including within this judicial district constitutes infringement of the '447 Patent as aforesaid.

61. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '447 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT IV
Infringement of the '511 Patent
(35 U.S.C. § 271(a))

62. ProCom repeats and realleges paragraphs 1 through 61 of this Second Amended Complaint as if set forth herein.

63. On information and belief, the Accused Fireplaces and/or Accused Stoves contain, embody and employ the invention(s) described and claimed in the '511 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '511 Patent, including but not necessarily limited to claim 1, to the great loss and injury to ProCom.

64. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Fireplaces and/or Accused Stoves within the United States including within this judicial district constitutes infringement of the '511 Patent as aforesaid.

65. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '511 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT V
Infringement of the '765 Patent
(35 U.S.C. § 271(a))

66. ProCom repeats and realleges paragraphs 1 through 65 of this Second Amended Complaint as if set forth herein.

67. On information and belief, the Accused Fireplaces and/or Accused Stoves contain, embody and employ the invention(s) described and claimed in the '765 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '765 Patent, including but not limited to claim 1, to the great loss and injury to ProCom.

68. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Fireplaces and/or Accused Stoves within the United States including within this judicial district constitutes infringement of the '765 Patent as aforesaid.

69. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '765 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and

sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT VI
Infringement of the '781 Patent
(35 U.S.C. § 271(a))

70. ProCom repeats and realleges paragraphs 1 through 69 of this Second Amended Complaint as if set forth herein.

71. On information and belief, Defendant's Accused Products contain, embody and employ the invention(s) described and claimed in the '781 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '781 Patent, including but not necessarily limited to claims 1 and 13, to the great loss and injury to ProCom.

72. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Products within the United States including within this judicial district constitutes infringement of the '781 Patent as aforesaid.

73. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '781 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is

not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT VII
Infringement of the '878 Patent
(35 U.S.C. § 271(a))

74. ProCom repeats and realleges paragraphs 1 through 73 of this Second Amended Complaint as if set forth herein.

75. On information and belief, the Accused Products contain, embody and employ the invention(s) described and claimed in the '878 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '878 Patent, including but not necessarily limited to claims 1 and 14, to the great loss and injury to ProCom.

76. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Products within the United States including within this judicial district constitutes infringement of the '878 Patent as aforesaid.

77. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '878 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT VIII
Infringement of the '436 Patent
(35 U.S.C. § 271(a))

78. ProCom repeats and realleges paragraphs 1 through 77 of this Second Amended Complaint as if set forth herein.

79. On information and belief, the Accused Products contain, embody and employ the invention(s) described and claimed in the '436 Patent, in violation of ProCom's exclusive rights thereunder, and infringe at least one claim of ProCom's '436 Patent, including but not necessarily limited to claim 1, to the great loss and injury to ProCom.

80. Upon information and belief, GHP's unlawful making, selling or offering for sale, or contributing to the making, using, selling or offering to sell, or unlawfully inducing others to make, use, sell or offer to sell, the Accused Products within the United States including within this judicial district constitutes infringement of the '436 Patent as aforesaid.

81. Upon information and belief, GHP has derived, received, and will unless restrained and/or enjoined derive and receive from the aforesaid infringement of the '436 Patent, substantial gains, profits, and advantages, including gains profits and advantages from regular making and sales of infringing devices within this judicial district, in amounts to be proven at trial. As a direct and proximate result of the aforesaid infringement, ProCom has been, and will be, greatly damaged and has been, and will be, deprived and prevented from receiving, if such further infringement is not restrained and enjoined by this Court, all the gains and profits to which ProCom is lawfully entitled and which they would have derived and received, but for the aforesaid infringement by GHP.

COUNT IX
Willful Patent Infringement
(35 U.S.C. § 284)

82. ProCom repeats and realleges paragraphs 1 through 81 of this Second Amended Complaint as if set forth herein.

83. Upon information and belief, GHP had notice and knowledge of the Patents, but despite such notice and knowledge has deliberately made, used, sold, offered for sale and/or imported the Accused Products, and thereby has infringed and continues to infringe, has induced others to infringe and continues to induce others to infringe, and/or has contributed to the infringement and continues to contribute to infringement of the Patents.

84. Because GHP has infringed or induced others to infringe or contributed to the infringement of the Patents despite notice and knowledge thereof, GHP's infringement, inducement of infringement and/or contributing to the infringement of the Patents has been, and continues to be, willful, deliberate, and in conscious disregard for the rights of ProCom under the Patents.

COUNT X
False Designation of Origin
(15 U.S.C. § 1125(a))

85. ProCom repeats and realleges paragraphs 1 through 84 of this Second Amended Complaint as if set forth herein.

86. The aforesaid acts of GHP, including but not limited to its use of the designation "Made in the USA" and/or depiction of the U.S. flag on product packaging, in interstate commerce, constitutes a false designation of origin and/or a false or misleading description of fact which is likely to cause confusion or to cause mistake, or to deceive as to the origin of its goods within the meaning of 15 U.S.C. § 1125(a)(1)(A).

87. Such conduct is unfair competition in violation of the Lanham Act as it constitutes a false description or designation of origin of such goods, services and commercial activities by falsely identifying them as manufactured in and/or consisting of parts manufactured in and/or assembled in the United States when all or virtually all of the Defendant's Accused Fireplaces were manufactured outside of the United States.

88. The aforesaid acts of GHP have a substantial effect on interstate commerce.

89. Upon information and belief, the aforesaid acts of GHP were knowing, deliberate, willful, intended to cause mistake or to deceive, and in disregard of ProCom's rights.

90. GHP's continued unauthorized use of the designation "Made in the USA" and/or depiction of the U.S. flag on product packaging, in interstate commerce, for goods which compete with ProCom's goods in commerce, infringes upon ProCom's goodwill, reputation, and rights; creates a likelihood of injury to ProCom's business reputation; causes a likelihood of confusion as to the origin of GHP's goods; and otherwise unfairly competes with ProCom. If such actions are continued, they will cause irreparable and substantial damage to ProCom and will result in GHP being unjustly enriched and unlawfully deriving profits and gains.

91. GHP's aforementioned actions have caused and will continue to cause irreparable injury to ProCom if GHP is not restrained by this Court from violations of ProCom's rights. ProCom has no adequate remedy at law and therefore seeks injunctive relief from this Court under 15 U.S.C. § 1116 and such monetary relief to which it is entitled pursuant to 15 U.S.C. § 1117, including treble actual damages, reasonable attorneys' fees and costs.

COUNT XI
False Advertising
(15 U.S.C. § 1125(a))

92. ProCom repeats and realleges paragraphs 1 through 91 of this Second Amended Complaint as if set forth herein.

93. The aforesaid acts of GHP, including but not limited to its use of the designation “Made in the USA” and/or depiction of the U.S. flag on product packaging and/or advertising for products sold in interstate commerce, constitutes a false designation of origin, false or misleading description of fact, or a false or misleading representation of fact, which misrepresents the nature, qualities, and/or geographic origin of GHP’s goods, services, or commercial activities within the meaning of 15 U.S.C. §1125(a)(1)(B).

94. Such representations and/or descriptions tend to mislead and/or deceive consumers regarding the nature, quality and/or geographic origin of GHP’s products.

95. Such representations and/or descriptions are material to and/or likely to influence a consumer’s decision to purchase GHP’s products and/or a retailer’s decision to supply or sell GHP’s products to consumers.

96. GHP’s false advertising in connection with its sale and offer for sale of the Defendant’s Accused Fireplaces is damaging to ProCom’s goodwill and reputation; creates a likelihood of injury to ProCom’s business and product reputation; and otherwise unfairly competes with ProCom. If such actions are continued by GHP, it will cause irreparable and substantial damage to ProCom and consumers and will result in GHP being unjustly enriched and unlawfully deriving profits and gains.

97. GHP’s aforementioned actions have caused and will continue to cause irreparable injury to ProCom if GHP is not restrained by this Court from violations of ProCom’s rights. ProCom has no adequate remedy at law and therefore seeks injunctive relief from this Court pursuant to 15 U.S.C. § 1116 and such monetary relief to which it is entitled pursuant to 15 U.S.C. § 1117, including treble actual damages and reasonable attorneys’ fees.

COUNT XII
Common Law Unfair Competition

98. ProCom repeats and realleges paragraphs 1 through 97 of this Second Amended Complaint as if set forth herein.

99. The aforesaid acts of GHP, including but not limited to its use of the designation “Made in the USA” and/or depiction of the U.S. flag on product packaging and/or advertising for products sold in interstate commerce, and in the Commonwealth of Kentucky, constitutes unfair competition under Kentucky common law.

100. Such conduct by GHP, directed to ProCom, was and is beyond normal and fair competition.

101. Such conduct by GHP was perpetrated with malice toward ProCom and with intent to injure ProCom in its business and/or reputation.

102. Such conduct is beyond and outside the ordinary course of business competition and lacks common business integrity and thereby is a violation of the common law of Kentucky.

103. Such conduct is of such an improper and unfair nature that it would be viewed by a reasonably prudent businessman with a critical and suspicious eye, and thereby is a violation of the common law of Kentucky.

104. As a further direct and proximate result of this wrongful conduct, ProCom has suffered damages in an amount that is not presently ascertainable but which shall be proved at the time of trial.

105. As a direct and proximate result of GHP’s wrongful conduct, ProCom is suffering immediate and irreparable injury, harm and damage, and will continue to suffer injury, harm and damage, unless GHP is restrained from its present conduct. ProCom has no adequate remedy at law, and no previous application for injunctive relief has been refused by any court.

106. Further, the foregoing conduct of GHP was/is knowing, intentional and deliberate, committed in utter disregard of the rights of ProCom, thereby rendering GHP liable to ProCom for punitive and exemplary damages.

COUNT XIII
Injunctive Relief

107. ProCom repeats and realleges paragraphs 1 through 106 of this Second Amended Complaint as if set forth herein.

108. Upon a finding that GHP's Accused Products infringe the Patents, ProCom is entitled to an order under 35 U.S.C. § 283 permanently enjoining GHP from making, selling or offering for sale, and unlawfully importing the Accused Products into the United States.

COUNT XIV
Accounting

109. ProCom repeats and realleges paragraphs 1 through 108 of this Second Amended Complaint as if set forth herein.

110. ProCom demands an accounting of all earnings achieved by GHP as a consequence of GHP's manufacture, sale, importing, and use of the Accused Products which results in infringement of the Patents.

RELIEF REQUESTED

WHEREFORE, Plaintiff, ProCom Heating, Inc., requests a judgment in its favor and against ***Defendant, GHP Group, Inc.***, ordering:

A. That Judgment be entered in favor of Plaintiff and against Defendant on Counts I through XIV of the Second Amended Complaint;

B. That Defendant, and each of its officers, directors, agents, servants, employees and representatives, and those persons in active concert or participation with them or any of them, be permanently enjoined and restrained from directly or indirectly making or causing to be made,

offering for sale, selling or causing to be sold, importing or causing to be imported, or using or causing to be used any product in accordance with or embodying any invention(s) set forth and claimed in the Patents, including the Accused Products;

C. That Defendant be directed to account to, and pay, Plaintiff for all gains, profits and advantages realized by Defendant from its manufacturing and marketing of the Accused Products resulting in infringement of the Patents and unlawful use and practice of the invention(s) patented in and by the Patents, from the beginning of marketing the Defendant's Dual Accused Products, and other products or necessary accessories sold in connection therewith, and other products which infringe the Patents and accessories sold therewith, up to and including the time of trial;

D. That, in addition, Defendant be ordered to pay to Plaintiff such damages as have been sustained by Defendant as a result of said infringement by Defendant up to the time of trial;

E. That all damages awarded to Plaintiff for Defendant's infringement of the Patents be trebled by the Court pursuant to 35 U.S.C. § 284;

F. That Plaintiff recover its damages sustained as a result of Defendant's false designation of origin, false advertising and unfair competition under federal, state and common law and that the Court exercise its discretion and enter a judgment for such additional sums as the Court shall find to be just, according to the egregious nature of the acts of Defendant;

G. That Defendant be directed to account to, and pay, Plaintiff the Defendant's profits arising from Defendant's false designation of origin, false advertising and unfair competition under federal, state and common law and that the Court exercise its discretion and enter a judgment for such additional sums as the Court shall find to be just, according to the egregious nature of the acts of Defendant;

H. That the Court treble the actual damages awarded to Plaintiff pursuant to 15 U.S.C. § 1117(a);

I. That Defendant be required to recall from any and all channels of trade, any and all packaging, advertising or promotional materials using the “Made in the USA” designation and/or an image of an American flag, in connection with the Defendant’s Accused Fireplaces, and to take affirmative steps to dispel any false suggestion that the Defendant’s Accused Fireplaces are made in the United States, including, but not limited to, all necessary and appropriate corrective advertising measures;

J. That Plaintiff recovers its reasonable attorneys’ fees pursuant to 15 U.S.C. § 1117(a) and/or 35 U.S.C. § 285;

K. That Plaintiff recovers its costs and disbursements herein;

L. That Plaintiff recovers prejudgment interest; and

M. That Plaintiff be awarded such other and further relief as the Court may deem just and proper.

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY FOR ALL ISSUES SO TRIABLE

Dated: February 29, 2016

Respectfully submitted,

/s/Robert J. Theuerkauf
James R. Higgins, Jr. (KY Bar No. 31790)
Robert Theuerkauf (KY Bar No. 89068)
Daniel Redding (KY Bar No. 93234)
MIDDLETON REUTLINGER, P.S.C.
401 S. 4th Street, Suite 2600
Louisville KY 40202
Phone: (502) 584-1135
Fax: (502) 561-0442
E-mail: jhiggins@middletonlaw.com
E-mail: rtheuerkauf@middletonlaw.com
E-mail: dredding@middletonlaw.com
COUNSEL FOR PLAINTIFF
PROCOM HEATING, INC.