

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

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U.S. DISTRICT COURT  
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\_\_\_\_\_)  
A & A TRUCK AND, )  
AUTO CENTER, INC., )  
a North Carolina corporation, )  
) )  
Plaintiff, )  
) )  
v. )  
) )  
MILLER INDUSTRIES, INC., )  
a Tennessee corporation, and )  
MILLER INDUSTRIES TOWING )  
EQUIPMENT, INC., )  
a Delaware corporation, )  
) )  
Defendants. )  
\_\_\_\_\_)

Civil Action. No. 3:03-CV-133

**AMENDED COMPLAINT**  
**(Jury Trial Demanded)**

Comes now, the Plaintiff A & A Truck & Auto Center, Inc. (hereinafter "Plaintiff") and files this Amended Complaint against Defendants Miller Industries, Inc. and Miller Industries Towing Equipment, Inc. (hereinafter collectively "Defendants"). A responsive pleading to Plaintiff's original Complaint has not yet been served, and therefore, Plaintiff files this first Amended Complaint without leave pursuant to Fed. R. Civ. P. 15(a). Plaintiff respectfully alleges and states the following:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C.

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§ 1338(a), 28 U.S.C. § 2201, and 28 U.S.C. § 2202.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

### **PARTIES**

3. Plaintiff A & A Truck & Auto Center, Inc. is a corporation organized and existing under the laws of the State of North Carolina, with its principal place of business at 4000 Sam Wilson Road, Charlotte, North Carolina 28214.

4. Defendant Miller Industries, Inc. is a corporation organized and existing under the laws of the State of Tennessee, with its principal place of business at 8503 Hilltop Drive, Ooltewah, Tennessee 37363. Defendant Miller Industries, Inc.'s registered agent for service of process is National Registered Agents, Inc., 1900 Church Street, Suite 400, Nashville, Tennessee 37203.

5. Defendant Miller Industries Towing Equipment, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 8503 Hilltop Drive, Ooltewah, Tennessee 37653. Defendant Miller Industries Towing Equipment, Inc.'s registered agent for service of process is National Registered Agents, Inc., 1900 Church Street, Suite 400, Nashville, Tennessee 37203.

6. Defendant Miller Industries, Inc. has sufficient contacts with North Carolina to satisfy the assertion of personal jurisdiction over it by this Court.

7. Defendant Miller Industries Towing Equipment, Inc. has sufficient contacts with North Carolina to satisfy the assertion of personal jurisdiction over it by this Court.

## FACTS

8. Plaintiff and Defendants are competitors in the business of manufacturing and selling tow trucks and carrier vehicles.

9. On March 18, 2003, legal counsel for Defendants sent, via Federal Express and facsimile transmission, a cease and desist letter to the President, Vice President of Sales, and National Sales Manager of Plaintiff. A copy of the letter is attached to this Complaint as Exhibit A, and is incorporated herein.

10. In the cease and desist letter of March 18, 2003, Defendants accused Plaintiff of patent infringement, trade dress infringement, unfair competition, deceptive business practice and fraud. In the letter, Defendants stated it would provide Plaintiff ten days in which to verify it has ceased the manufacture, distribution, sale and offer for sale of allegedly infringing towing products, and verify it has ceased the use of Defendants' alleged trade dress.

11. Notwithstanding Defendants' allowance of ten days to respond, Defendants sent another letter on March 24, 2003 to Plaintiffs, via facsimile transmission, reiterating the demands of the previous cease and desist letter. A copy of the letter of March 24, 2003 is attached to this Complaint as Exhibit B and is incorporated herein.

## COUNT ONE DECLARATION OF NONINFRINGEMENT OF PATENT

12. Paragraphs 1- 13 are incorporated by reference herein as though set forth in

their entirety.

13. In the cease and desist letter of March 18, 2003, Defendants claimed to have an intellectual property right in U.S. Patent No. 4,564,207, entitled “Hydraulic Wheel Lift System for Tow Vehicles” issued on January 14, 1986 (“the ‘207 patent”).

14. In the cease and desist letter of March 18, 2003, Defendants accused Plaintiff of wilful infringement of the ‘207 patent, and demanded that Plaintiff “immediately cease and desist any further manufacture, use, sale, offer for sale and associated commercial activities of the infringing products and parts...”

15. Plaintiff denies any such charge of infringement and asserts that it has the right to manufacture and sell such products unhampered and unmolested by Defendants.

16. There is a case of actual controversy within the meaning of 28 U.S.C. 2201(a) between Plaintiff and Defendants as to whether Plaintiff infringes the ‘207 patent as alleged by Defendants.

17. Upon information and belief, Defendants, either separately or jointly, do not own all right, title and interests in the ‘207 patent.

18. Calvin W. Russ is a joint inventor of the ‘207 patent.

19. Calvin W. Russ owns an undivided one-half interest in the ‘207 patent.

20. On January 2, 2003, Calvin W. Russ executed a license agreement with James C. Allison, Jr., President of Plaintiff. Said license agreement grants to Plaintiff the right to manufacture products covered by the ‘207 patent. Calvin W. Russ received valuable consideration for executing the license agreement.

21. Plaintiff cannot and does not infringe the ‘207 patent, because, *inter alia*, it

has the right to manufacture products covered by the '207 patent pursuant to the license agreement executed by Calvin W. Russ on January 2, 2003.

22. Plaintiff seeks pursuant to 28 U.S.C. §§ 2201 and 2202 a Declaratory Judgment of non-infringement of the '207 patent, including a declaration that Plaintiff's manufacture, use, sale, offer for sale and/or any other associated commercial activities relating to its "Scorpion Self Loader" product and/or any other products do not infringe the '207 patent.

**COUNT TWO**  
**DECLARATION OF NON INFRINGEMENT OF TRADE DRESS**

23. Paragraphs 1- 22 are incorporated by reference herein as though set forth in their entirety.

24. In the cease and desist letter of March 18, 2003, Defendants accused Plaintiff of infringing its "trade dress rights in...the unique and distinctive overall appearance and design of the tool boxes and aluminum body of its Vulcan® towing equipment used in connection with the patented wheel lift assemblies."

25. Plaintiff denies any such charge of trade dress infringement.

26. There is a case of actual controversy within the meaning of 28 U.S.C. 2201(a) between Plaintiff and Defendants as to whether Plaintiff infringes a protectable trade dress right of Defendants.

27. Plaintiff does not infringe Defendants' trade dress rights, because, *inter alia*, the features alleged by Defendants to be protected as trade dress are functional features that cannot be the subject of trade dress protection under federal or state law.

28. Plaintiff seeks pursuant to 28 U.S.C. §§ 2201 and 2202 a Declaratory Judgment of non-infringement of any alleged trade dress right of Defendants.

**COUNT THREE**  
**DECLARATION OF NO UNFAIR COMPETITION,**  
**DECEPTIVE BUSINESS PRACTICE OR FRAUD**

29. Paragraphs 1- 28 are incorporated by reference herein as though set forth in their entirety.

30. There is a case of actual controversy within the meaning of 28 U.S.C. 2201(a) between Plaintiff and Defendants as to whether Plaintiff has committed unfair competition, deceptive business practice or fraud.

31. In the cease and desist letter of March 18, 2003, Defendants accused Plaintiff of unfair competition, deceptive business practice and/or fraud by making allegedly false and misleading statements to the towing and repossession industry regarding the term of the '207.

32. Any alleged statements made by Plaintiff regarding the term of the '207 patent were not calculated to, nor did they in fact, provide to Plaintiff any competitive advantage in the marketplace.

33. Any alleged statements made by Plaintiff regarding the term of the '207 patent do not constitute unfair competition, deceptive business practice or fraud.

34. Plaintiff seeks pursuant to 28 U.S.C. §§ 2201 and 2202 a Declaratory

Judgment that Plaintiff has not committed unfair competition, deceptive business practice or fraud under federal or state law.

**COUNT FOUR**  
**UNFAIR COMPETITION**

35. Paragraphs 1- 34 are incorporated by reference herein as though set forth in their entirety.

36. At the time Defendants sent its cease and desist letter of March 18, 2003, and its follow up letter of March 24, 2003, Defendants knew it did not own all right, title and interests in the '207 patent.

37. Defendants, as demonstrated in its cease and desist letter, are sophisticated entities well-versed in intellectual property matters and represented by legal counsel in this regard. Defendants knew, or reasonably should have known, that under U.S. Patent Law, Defendants, as a co-owner of the '207 patent, could not maintain an action for infringement against Plaintiff, or anyone else, without the participation of co-owner Calvin W. Russ. Despite this knowledge, Defendants attempted to enforce the '207 patent against Plaintiff. It is apparent that Defendants did so without consulting co-owner Calvin W. Russ, as Mr. Russ had voluntarily executed a license to Plaintiff. Furthermore, had Defendants consulted Mr. Russ before making their threats of infringement they would have learned of the license to Plaintiff. Defendants' misleading representations with regard to the nature of their rights in the '207 patent, and their attempt to enforce the '207 patent against Plaintiff when they knew, or reasonably should have known, it could not legally do so constitutes Unfair Competition in violation of North Carolina General

Statute §75-1.1 and 15 U.S.C. 1125(a). Plaintiff has suffered damages for such unfair competition.

38. Defendants have accused Plaintiff of infringing Defendants' alleged trade dress rights in the design and appearance of its Vulcan Intruder 810 product when they knew, or reasonably should have known, they had no such trade dress rights. At the time of making these accusations of trade dress infringement, Defendants knew, or reasonably should have known, that the design of the Vulcan Intruder 810 product is functional, is in the public domain, and is not novel, and therefore not protectable as trade dress. Despite this knowledge, Defendants have publicly accused Plaintiff of trade dress infringement. Furthermore, Defendants have publicly stated that Plaintiff's Scorpion Self Loader product is inferior to Defendants product without any factual basis whatsoever. These false and misleading representations regarding Plaintiff's product and its alleged infringement of Defendant's trade dress constitutes Unfair Competition in violation of North Carolina General Statute §75-1.1 and 15 U.S.C. 1125(a). Plaintiff has suffered damages for such unfair competition.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays:

A. That this Court declare that Plaintiff has not infringed the '207 patent, and that Plaintiff may manufacture, use, sale, offer for sale products embodied by the '207 patent pursuant to the license executed by co-owner Calvin W. Russ.

B. That this Court declare that Plaintiff has not infringed any trade dress rights of Defendants.



C. That this Court declare that Plaintiff has not committed unfair competition, deceptive business practice or fraud.

D. That Defendants, their agents, servants, employees, and attorneys and all those in active concert or participation with it, be enjoined, pending trial, from instituting, prosecuting or threatening any action against Plaintiff.

E. That Defendants, their agents, servants, employees, attorneys and all those in active concert or participation with them; be enjoined from alleging that Plaintiff has infringed or infringes the '207 patent, or has committed trade dress infringement, unfair competition, deceptive business practice, or fraud.

F. That Plaintiff be awarded judgment against Defendants for damages resulting from Defendants unfair competition.

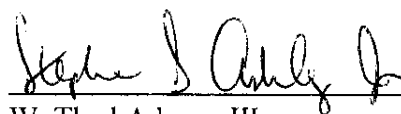
G. That this Court award Plaintiff interest, costs, and such further relief that this Court deems just and equitable;

H. That all triable issues be tried by jury.

Date: May 15, 2003

Respectfully submitted

ADAMS EVANS P.A.



W. Thad Adams, III  
Stephen S. Ashley, Jr.  
2180 Two Wachovia Center  
301 S. Tryon Street  
Charlotte, NC 28282  
Tel: (704) 375-9249  
Fax: (704) 375-0729

*Attorneys for Plaintiff*

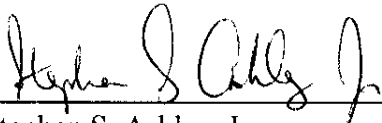
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Plaintiff's AMENDED COMPLAINT was duly served upon counsel for the Defendants via first class mail, postage paid, addressed as follows:

Kurt E. Lindquist II  
Stephen R. Calkins  
Kilpatrick Stockton, LLP  
3500 One Wachovia Center  
301 South College Street  
Charlotte, NC 28202-6001

Thomas G. Scavone  
Christopher J. Lee  
Paul C. Gibbons  
Brady J. Fulton  
Niro, Scavone, Haller & Niro  
181 West Madison Street, Suite 4600  
Chicago, Illinois 60602

This the 15<sup>th</sup> day of May, 2003

  
\_\_\_\_\_  
Stephen S. Ashley, Jr.

*Attorney for Plaintiff*

NIRO, SCAVONE, HALLER & NIRO

RAYMOND P. NIRO  
THOMAS G. SCAVONE  
TIMOTHY J. HALLER  
WILLIAM L. NIRO  
JOSEPH N. HOSTENY, III  
ROBERT A. VITALE, JR.  
JOHN C. JANKA  
PAUL K. VICKREY  
DEAN D. NIRO  
RAYMOND P. NIRO, JR.  
KEITH A. VOGT  
PATRICK F. SOLON  
ARTHUR A. GASEY  
CHRISTOPHER J. LEE

181 WEST MADISON STREET-SUITE 4600  
CHICAGO, ILLINOIS 60602-4515

TELEPHONE (312) 236-0733

FACSIMILE (312) 236-3137

March 18, 2003

DAVID J. SHEIKH  
VASILIOS D. DOSSAS  
ROBERT P. GREENSPOON  
SALLY WIGGINS  
RICHARD B. MEGLEY, JR.  
MATTHEW G. McANDREWS  
PAUL C. GIBBONS  
WILLIAM W. FLACHSBART  
BRADY J. FULTON  
GREGORY P. CASIMER  
DOUGLAS M. HALL  
DINA M. HAYES  
FREDERICK C. LANEY

**By Federal Express and Facsimile Transmission (704) 393-1744**

James C. Allison, Sr.  
President  
AATAC, Inc.  
4000 Sam Wilson Rd.  
Charlotte, NC 28214

**By Federal Express and Facsimile Transmission (704) 393-1744**

James Allison, III  
Vice President of Sales  
AATAC, Inc.  
4000 Sam Wilson Rd.  
Charlotte, NC 28214

**By Federal Express and Facsimile Transmission (704) 393-1744**

Donald Stephenson  
National Sales Manager  
AATAC, Inc.  
4000 Sam Wilson Rd.  
Charlotte, NC 28214

Re: United States Patent No. 4,564,207 and Vulcan® Trade Dress

Dear Sirs:

We represent Miller Industries in the enforcement of its intellectual property rights relating to towing and repossession equipment, including its patent and trade dress rights. One such right is United States Patent Number 4,564,207, entitled "Hydraulic Wheel Lift System for Tow Vehicles" and issued on January 14, 1986 ("the '207 patent"). I enclose a copy of the '207 patent for your review.

Exhibit A

March 18, 2003

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Another important aspect of Miller Industries' intellectual property rights is its trade dress rights in, among other things, the unique and distinctive overall appearance and design of the tool boxes and aluminum body of its Vulcan® towing equipment used in connection with the patented wheel lift assemblies. As a result of Miller Industries' advertising and promotional efforts and, as importantly, the substantial publicity associated with this product, the towing and repossession equipment industry has come to associate the appearance and design of the Vulcan® tool boxes and aluminum body with Miller Industries.

We have recently learned that your company, AATAC, has been offering for sale wheel lift products that are covered by one or more of the claims of the '207 patent, including the "Scorpion Self Loader" product, which is admittedly "modeled after the Vulcan Intruder." AATAC's manufacture, use, sales, offers for sale and other associated commercial activities in the United States constitute infringement of the '207 patent. Because your company is admittedly aware of the '207 patent, your company's commercial activities in support of the Scorpion Self Loader product constitute willful patent infringement. Therefore, it is imperative that AATAC immediately cease and desist any further manufacture, use, sale, offer for sale and associated commercial activities of the infringing products and parts, including the Scorpion Self Loader product.

Furthermore, AATAC has been making false and misleading statements to the towing and repossession industry regarding the term of the '207 patent to induce third parties to purchase AATAC's infringing self loader products, including a false statement by one of AATAC's officers that "the patent is up on Jan 14<sup>th</sup> [2003]...." In addition to the patent issues raised above, this may constitute unfair competition, deceptive business practice and fraud.

In addition, AATAC's towing equipment designed to be used with the Scorpion Self Loader product incorporates and mimics the unique the Vulcan® tool box and aluminum body design of Miller Industries. This constitutes an illegal infringement of Miller Industries' trade dress rights under the federal and state statutes and common law, and such use is likely to cause confusion, to cause mistake and to deceive as to the affiliation, connection or association of your company's products with Miller Industries and as to the origin, sponsorship or approval of your company or your company's products and services by Miller Industries.

As a result of the unauthorized use of Miller Industries' trade dress, Miller has suffered and will continue to suffer damages and irreparable harm for which there is no adequate remedy at law. Therefore, it is imperative that your company immediately cease and desist any further use of the unique and distinctive overall appearance and design of the tool boxes and aluminum body or "back half" of its Vulcan® towing equipment used in connection with the patented wheel lift assemblies.

Miller Industries always seeks to amicably and promptly resolve all issues regarding its intellectual property rights without the need to engage in litigation. Thus, Miller Industries will provide you 10 days in which to verify that AATAC has ceased the manufacture, distribution, sale and offer for sale of the towing products that infringe the '207 patent, including the Scorpion Self

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Loader product. In addition, Miller Industries will provide AATAC 10 days in which to verify that AATAC has ceased its use of Miller Industries' trade dress and that all advertisements, circulars, brochures, catalogs, or other promotional or advertising items or materials showing or including Miller Industries' trade dress have been destroyed.

Please understand that this matter is extremely important to Miller Industries. Please have your counsel contact us immediately to discuss these issues. We look forward to your prompt response.

Sincerely,



Christopher J. Lee

CJL/amr

cc: Thomas G. Scavone, Esq.  
Frank Madonia, Esq.  
Jeffrey Badgley

**NIRO, SCAVONE, HALLER & NIRO**

181 WEST MADISON STREET-SUITE 4800

CHICAGO, ILLINOIS 60602-4515

TELEPHONE (312) 236-0733

FACSIMILE (312) 236-1117

March 24, 2003

RAYMOND F. NIRO  
 THOMAS G. SCAVONE  
 TIMOTHY J. HALLER  
 WILLIAM L. NIRO  
 JOSEPH N. MORTENY, III  
 ROBERT A. VITALE, JR.  
 JOHN C. JANKA  
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 KEITH A. YOGG  
 PATRICK F. SOLOM  
 ARTHUR A. GASEY  
 CHRISTOPHER J. LEE

DAVID J. KRIDER  
 VASILIOS D. DOSSAS  
 ROBERT E. GREENSPON  
 SALLY WIGGON  
 RICHARD H. BEELEY, JR.  
 MATTHEW G. McANDREWS  
 PAUL C. GIBSON  
 WILLIAM W. FLAHERTY  
 BRADY J. FULTON  
 GREGORY P. CADOMBEK  
 THOMAS E. HALL  
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 FREDERICK C. LANEY

**Facsimile Transmission (704) 393-1744**

James C. Allison, Sr.  
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Donald Stephenson  
 National Sales Manager  
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 4000 Sam Wilson Rd.  
 Charlotte, NC 28214

Re: United States Patent No. 4,564,207 and Vulcan® Trade Dress

Dear Sirs:

On March 18, 2003, we sent you a letter informing you, among other things, that your company was infringing Miller Industries' patent and trade dress rights and requesting that your company immediately cease and desist any further act of patent and trade dress infringement, unfair competition and deceptive business practice. In that letter, we also informed you that it was imperative that you have your counsel contact us immediately to discuss these issues.

Exhibit B

03/24/2003 09:54 FAX

NIRD SCAVONE

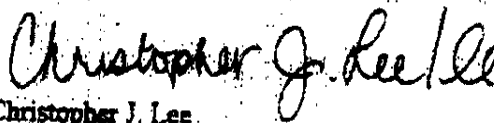
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March 24, 2003

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To date, we have not heard from anyone from or on behalf of AATAC. As we stated in our earlier letter, this matter is extremely important to Miller Industries and we would like to address the matter immediately with AATAC. In view of the urgent nature of this matter, Miller Industries will deem AATAC's failure to respond to its March 18, 2003 letter in a timely manner as an indication that AATAC is not interested in an amicable resolution of these disputes.

Sincerely,



Christopher J. Lee

CJL/arr

cc: Thomas G. Scavone, Esq.  
Frank Madonia, Esq.  
Jeffrey Badgley