

JS 44 (Rev. 12/07)

CIVIL COVER SHEET County in which action arose _____

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p>I. (a) PLAINTIFFS Exel North America, Inc.</p> <p>(b) County of Residence of First Listed Plaintiff <u>Wayne County, MI</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) Stephen D. Winter Winter PLC, 901 Livernois Street, Ferndale, MI 48220 (248) 298-0333</p>	<p>DEFENDANTS Graco Inc. Graco Minnesota Inc.</p> <p>County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
---	--

<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <p>(For Diversity Cases Only)</p> <table style="width:100%;"> <tr> <td style="width:33%;">Citizen of This State</td> <td style="width:10%;"><input type="checkbox"/> 1</td> <td style="width:10%;"><input type="checkbox"/> 1</td> <td style="width:33%;">Incorporated or Principal Place of Business In This State</td> <td style="width:10%;"><input type="checkbox"/> 4</td> <td style="width:10%;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4														
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5														
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6														

IV. NATURE OF SUIT (Place an "X" in One Box Only)							
CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES			
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes		

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) _____ 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 28 U.S.C. 2201-2202

Brief description of cause:
 Declaratory Judgment of patent non-infringement.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: August 4, 2009 SIGNATURE OF ATTORNEY OF RECORD: *Stephen D. Winter*

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

- Yes
- No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

- Yes
- No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes :

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

EXEL NORTH AMERICA, INC.

Plaintiff,

v.

GRACO INC.

and

GRACO MINNESOTA INC.

Defendants.

Civil Action No. _____

COMPLAINT

**COMPLAINT FOR DECLARATORY JUDGMENT
OF PATENT NON-INFRINGEMENT**

Plaintiff, Exel North America, Inc. ("Exel"), for its Complaint against Defendants, Graco Inc. ("Graco") and Graco Minnesota Inc. ("Graco Minnesota"), alleges as follows:

THE PARTIES

1. Exel is an Illinois corporation with its principal place of business at 45001 5 Mile Road, Plymouth, Michigan 48170.
2. On information and belief, Graco is a Minnesota corporation with its principal place of business at 88 – 11th Avenue Northeast, Minneapolis, Minnesota 55413.
3. On information and belief, Graco Minnesota is a Minnesota corporation with its principal place of business at 88 – 11th Avenue Northeast, Minneapolis, Minnesota 55413. On information and belief, Graco Minnesota is a wholly owned subsidiary of Graco.

4. Graco Minnesota is the owner of record of U.S. Patent No. 6,896,152 (“the ‘152 patent”). A copy of the ‘152 patent is attached hereto as Exhibit A.

5. Graco has held itself out to be the owner of the ‘152 patent.

6. Defendants have jointly enforced, in federal district court, at least one U.S. patent owned by Graco Minnesota.

JURISDICTION AND VENUE

7. This action for declaratory relief arises under 28 U.S.C. §§ 2201-2202 and the patent laws of the United States, 35 U.S.C. §§ 1, *et seq.*

8. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

9. Graco conducts a continuous and systematic part of its general business within Michigan, including in this district, utilizing at least ten distributors within this district and through company representatives who are resident within this district, and this Court has personal jurisdiction over Defendants.

10. On information and belief, Graco receives average annual revenues of more than three million dollars through sales in Michigan.

11. Exel’s declaratory claims arise out of or relate to Defendants’ actions in this district which Defendants’ purposefully directed at this district.

12. Venue in this district is proper under 28 U.S.C. §§ 1391(b) and (c).

BASIS FOR THIS ACTION

13. On May 24, 2005, the United States Patent and Trademark Office issued the ‘152 patent for an electronic plural component proportioner.

14. Graco considers that its Xtreme Mix product, or portions thereof, is covered by one or more claims of the '152 patent.

15. Graco's operation manuals for its Xtreme Mix products which it distributes to its Michigan customers are marked with the '152 patent number.

16. On April 17, 2009, Graco, through its Corporate Intellectual Property Counsel, sent a letter to Exel at its headquarters in Plymouth, Michigan, identifying and including a copy of the '152 patent, stating that Graco owns the '152 patent, identifying the PU3000 as "your product," asserting that the PU3000 "appears to be a copy of the Xtreme Mix product being sold by Graco," and urging Exel to seek legal counsel from its attorney.

17. On June 30, Exel, by counsel, sent a letter to Graco stating its belief that the PU3000 does not infringe any claim of the '152 patent and that, if Exel did not receive a response from Graco by July 30, 2009, Exel would consider Graco's non-response as an affirmative indication by Graco that the PU3000 is not covered by the '152 patent.

18. On July 16, 2009, Graco sent an email to Exel's counsel stating that Graco does not concede that Exel's product is not covered by the '152 patent.

19. Exel does not infringe the '152 patent and it has the right to make, use, import, sell and/or offer for sale its products without license from Defendants.

20. Exel intends to make, use, import, sell or offer for sale the PU3000 in the United States and has undertaken substantial steps in preparation for such activity.

21. The PU3000 does not infringe, directly or indirectly, any claim of the '152 patent.

22. As a result of Defendants' assertions and actions, an actual controversy exists as to whether Exel can proceed in making, using, importing, selling and/or offering for sale the PU3000 without infringing the '152 patent.

CLAIM FOR RELIEF

COUNT I: NON-INFRINGEMENT

23. Exel repeats, realleges and incorporates by reference the allegations contained in paragraphs 1-22 as though fully set forth herein.

24. The PU3000 does not infringe, directly or indirectly, any claim of the '152 patent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands:

i. Declaratory relief stating that:

(a) The '152 patent is not infringed by Exel;

(b) The manufacture, use, import, sale or offer for sale of the PU3000 does not infringe, directly or indirectly, any claim of the '152 patent; and

(c) Graco and Graco Minnesota, and those in active concert or participation with Graco or Graco Minnesota, including any licensees, are permanently enjoined from initiating patent infringement litigation against Exel based on the '152 patent, or initiating patent infringement litigation against any of Exel's customers, dealers, agents, distributors, manufacturers or suppliers based on the '152 patent, or threatening Exel or any of Exel's customers, dealers, agents, distributors, manufacturers or suppliers with patent litigation based upon the '152 patent, or charging Exel or any of Exel's customers, dealers, agents, distributors, manufacturers or suppliers either verbally or in writing with infringement of the '152 patent;


- ii. Costs, expenses and reasonable attorneys' fees; and
- iii. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

- 25. Plaintiff Exel demands a trial by jury on all issues so triable.

Dated: August 4, 2009

Respectfully submitted,



Stephen D. Winter (Bar No. P27342)
WINTER, PLC
901 Livernois Street
Ferndale, MI 48220
(248) 298-0333
winter@winterplc.com
Attorney for Plaintiff Exel North America

Of Counsel:

Douglas V. Rigler
Jeffrey R. Snay
YOUNG & THOMPSON
209 Madison Street
Suite 500
Alexandria, VA 22314
(703) 521-2297
drigler@young-thompson.com
jsnay@young-thompson.com