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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200832
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>BRIGGS & STRATTON CORPORATION and KOHLER CO.,</p> <p style="text-align: center;">Opposers,</p> <p style="text-align: center;">v.</p> <p>HONDA GIKEN KOGYO KABUSHIKI KAISHA,</p> <p style="text-align: center;">Applicant.</p>	<p style="text-align: right;">Opposition No. 91200832 (parent)</p> <p style="text-align: right;">Opposition No. 91200146</p> <p style="text-align: right;">Application Serial No. 78924545</p>
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**REPLY BRIEF IN SUPPORT OF
OPPOSERS’ MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In its Application, Honda asks for the exclusive right to “the configuration of an engine with an overall cubic design” that, when viewed from the front, has “a slanted fan cover, the fuel tank located above the fan cover on the right, and the air cleaner located to the left of the fuel tank;” “[t]he air cleaner cover features a cube shape;” “[t]he carburetor cover features . . . a recessed area where control levers are located;” and “[t]he fuel tank is roughly rectangular.” However, the undisputed evidence before the Board on summary judgment establishes that mid-size, horizontal shaft utility engines with this overall configuration work better, making the Proposed Mark de jure functional.

It is undisputed that at least nine separate utility patents either claim or disclose features of the Proposed Mark, including the “overall cubic design” and the location and orientation of the main engine components. Furthermore, both Honda’s Design Memo and Italian Complaint describe the functional considerations that went into the design of the Proposed Mark. Even Honda’s experts agree that the overall configuration of the Proposed Mark is dictated by functional considerations.

Honda attempts to get around the patently functional overall configuration of the Proposed Mark by pointing to minor non-functional features, such as the style of beveling on the edges of the fuel tank or the placement of four small ribs on the carburetor cover. Such minor features, even if they are non-functional, are insufficient as a matter of law to render the overall Proposed Mark non-functional. Further, Honda’s actions in

asserting the Proposed Mark against third party engines having the same overall configuration but with different bevels, ribs and slants demonstrates that Honda itself takes a far broader view of the Proposed Mark than it lets on in its Opposition.

Honda also points to alternative designs to try to get around Opposers' evidence of functionality. But Honda only offers a few, legally insignificant number of third party engines with different overall configurations than the Proposed Mark. And importantly, even if Honda could point to more alternative designs, the Federal Circuit and Supreme Court have both made clear that once functionality is found under the traditional test, alternative designs are irrelevant.

Simply put, Honda's utility patents, as well as its admissions in its Design Memo, Italian Complaint, and sworn testimony establish that, taken as a whole, the Proposed Mark is functional.

ARGUMENT

I. HONDA HAS A "HEAVY BURDEN" TO OVERCOME THE PRESUMPTION OF FUNCTIONALITY

Because the evidence submitted by Opposers would, if unopposed, establish their right to summary judgment on the undisputed, material facts¹, Rule 56(e) prevents Honda from resting on mere denials or conclusory assertions; rather, Honda must proffer evidence showing that there is a genuine factual dispute to be tried. Fed. R. Civ. P. 56(e); *Enbridge, Inc. v. Excelebrate Energy Ltd. P'ship*, 92 U.S.P.Q.2d 1537, 1540 (T.T.A.B. 2009); *Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 U.S.P.Q.2d 1856, 1860 (T.T.A.B. 2007). Further, Rule 56 places the burden of showing non-functionality on Honda. *See McAirlaids, Inc. v. Kimberly-Clark Corp.*, No. 7:12-CV-00578 n. 3 (W.D. Va. July 19, 2013) (citing *Georgia Pac. Consumer Prods., LP v. Kimberly-Clark Corp.*, 647 F.3d 723, 727 (7th Cir. 2011) (quoting *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23,30 (2001))). Honda's burden is made heavier by the existence of utility patents covering prominent features of the Proposed Mark. 15 U.S.C. § 1052(e)(5); *TrafFix*, 532 U.S. at 29-30, (noting the "heavy burden [given the existence of utility patents] of showing that the [Proposed Mark] is not functional.") (emphasis added).

¹ See chart of Opposers' functionality evidence, correlating to each element of the Proposed Mark, at Exhibit 5 to Declaration of Robert N. Phillips ISO Reply Brief (Phillips Decl.) filed herewith.

II. HONDA CANNOT AVOID A FINDING OF FUNCTIONALITY BY POINTING TO MINOR DESIGN CHOICES.

A. The Functionality Determination Assesses the Proposed Mark As a Whole.

Opposers agree with Honda that “a mark must be considered ‘as a whole’ and not by its individual elements when assessing functionality.” Dkt. 80 at 14 (citing 15 U.S.C. § 1052(e)(5) and *In re Hudson News Co.*, 39 U.S.P.Q.2d 1915, 1919 (T.T.A.B. 1996)). However, Honda’s brief² focuses largely on minor features of the Proposed Mark that Honda claims are arbitrary. *See* Dkt. 80 at 14-19. The Federal Circuit rejected this approach:

The case law of this court and its predecessor also establishes that before an overall product configuration can be recognized as a trademark, the *entire* design must be arbitrary or non de jure functional. The reason for this rule is self-evident — the right to copy better working designs would, in due course, be stripped of all meaning if overall functional designs were accorded trademark protection because they included a few arbitrary and nonfunctional features.

Textron, Inc. v. U.S. Int’l Trade Comm’n, 753 F.2d 1019, 1025 (Fed. Cir. 1985) (emphasis in original); *see also In re Becton, Dickinson, and Co.*, 675 F.3d 1368, 1374 (Fed. Cir. 2012) (“a mark possessed of significant functional features should not qualify for trademark protection where insignificant elements of the design are non-functional.”); *see also* Application Serial No. 77838661 at Phillips Decl. ¶ 10, Ex. 9 (citing *Textron*, USPTO rejected application to register back stretcher noting “a few arbitrary or otherwise nonfunctional features included with a product configuration mark do not affect a functionality determination where the evidence shows the overall design to be functional”). Here, the undisputed facts show that “the overall design of [the Proposed Mark] is dictated by utilitarian concerns,” and thus, the “configuration as a whole is functional and not registrable on that basis.” *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 U.S.P.Q.2d 1829, 1837 (T.T.A.B. 2013); *see also Secalt S.A. v. Wuxi Shenxi Constr. Machinery Co., Ltd.*, 668 F.3d 677, 685 (9th Cir. 2012) (where the arrangement of parts “is designed to result in superior performance, it is semantic trickery to say that there is still some sort of separate ‘overall appearance’ which is non-functional.”).

B. Honda’s Actions Show That it Considers the Mark to be the Basic Overall Configuration.

Honda’s actions in redesigning and enforcing the Proposed Mark show that Honda considers the Proposed Mark to be the basic overall configuration, not the minor design elements, such as the degrees of

² Honda’s opposition brief violates the Board’s rules because the caption page is not numbered and nine pages are single spaced. 37 CFR §2.126(a)(1) and (5). The brief also exceeds the 25 page limit. 37 CFR §2.127(a).

beveling or number of ribs, it notes in its brief. First, Honda recently redesigned the GX engine by removing the ribbing on the carburetor cover and altering some of the beveling around the edges of the engine. Phillips Decl. ¶9, Ex. 8. Despite these changes, Honda insists that the GX still embodies the Proposed Mark. Dkt. 56 ¶ 3, Ex. 2 at 253. Thus, Honda implicitly acknowledges that the four ribs and other arbitrary features are less important to the overall look of the Proposed Mark than its fundamental configuration. Second, Honda has asserted the Proposed Mark against a number of engines, including the Kohler SH265 (the alleged “knockoff” engine), which have the same basic overall configuration as the Proposed Mark, but have no ribbing and use far different beveling and other design elements. *See* 2/1/13 Daugherty Decl, Ex 27 and Phillips Decl. ¶13, Ex 12.

Honda seeks more than just exclusive rights to a design incorporating a fan cover slanted precisely at 42 degrees, and the other, exact features of what Honda now claims to be the Proposed Mark to avoid summary judgment, but a broader, permanent right to exclude from competition any engine that consumers are likely to confuse with overall look of the GX. Indeed, contrary to Honda’s assertion in its brief that it is not seeking trademark rights in the basic configuration of a horizontal shaft engine, Honda’s drawing and proposed description of the Proposed Mark fails to disclaim any of these functionally necessary and commonly used elements (i.e rectangular fuel tank on the top right, cube shaped air cleaner cover to the left, carburetor cover/recessed area with levers, and slanted fan cover below), and is described in extremely broad terms. Honda clearly seeks to control useful features of horizontal shaft utility engines, which flies in the face of the purpose for the functionality doctrine – “the preservation of competition.” *Valu Eng’g, Inc. v. Rexnord Corp.*, 61 U.S.P.Q. 2d 1422, 1428 (Fed. Cir. 2002).

III. THE OVERALL CONFIGURATION OF THE PROPOSED MARK IS FUNCTIONAL.

A. Honda’s Utility Patents Establish That The Proposed Mark Is Functional.

Honda does not dispute that its prior utility patents either claim or disclose the overall configuration of the Proposed Mark. Dkt. 79 ¶ 77. Contrary to Honda’s assertion, *see* Dkt. 80 at 20, the Board can consider not only the numbered claims in Honda’s utility patents, but also the disclosures in the written descriptions, drawings and abstracts, as well as statements made during prosecution of the patent. *AS Holdings, Inc.*, 107 U.S.P.Q.2d at 1834-35 (T.T.A.B. 2013); *In re Howard Leight Indus., Inc.*, 80 U.S.P.Q.2d 1507, 1510-11 (T.T.A.B. 2006); *M-5 Steel Mfg., Inc. v. O’Hagin’s Inc.*, 61 U.S.P.Q.2d 1086, 1096 (T.T.A.B. 2001). In

addition, “statements in a patent’s specifications illuminating the purpose served by a design may constitute equally strong evidence of functionality.” *Becton*, 675 F.3d at 1375. A review of Honda’s nine utility patents reveals the tremendous support they provide for a finding of functionality.³ *See* Dkt. 52 at 7-12.

In fact, Honda’s utility patents essentially dispose of the issue of functionality. *See In re Pingel Enterprise, Inc.*, 46 U.S.P.Q.2d 1811, 1814 (T.T.A.B. 1998) (existence of utility patents disclosing the utilitarian advantages of a proposed mark “is adequate, and frequently is conclusive or incontrovertible, evidence of de jure functionality.” Comparing features identified in the patents’ drawings with the features in the drawing of the Proposed Mark establishes that the patents’ claims involve components that are shown and described in the Application. Phillips Decl. Ex.6. Even Mr. Mieritz acknowledges that Honda’s patents disclose “the general shape of some of the components” of the Proposed Mark, along with “the general location of some components,” including the air cleaner, fuel tank, carburetor and controls, and the fan cover. Dkt. 79, ¶ 77. These features cannot be dismissed as “incidental details” in Honda’s utility patents. *See Dogloo, Inc. v. Doscocil Mfg. Co.*, 893 F. Supp. 9119, 919 (C.D. Cal. 1995). And any minor differences between the Proposed Mark and the utility patents do not save Honda from a finding of functionality. *See In re Becton*, 675 F.3d at 1375 (a patent may “undermine an applicant’s assertion that an applied-for mark is not de jure functional” even where it does not “claim the exact configuration for which trademark protection is sought”); *see also* Application Serial No. 8583907 at Phillips Decl. ¶ 11, Ex. 10 (citing *In re Becton*, USPTO rejected application to register step chair exercise equipment based upon utility patent that did not show exact configuration but illuminated the purpose of the box-like frame (i.e. to rest on the floor and provide support)).

B. The Overall Configuration of the Proposed Mark was Designed with Functionality in Mind.

The Design Memo and Italian Complaint both demonstrate that the shape and overall configuration of the GX engine was designed with functional considerations in mind. For example, the Design Memo and Italian Complaint discuss how the height of horizontal shaft engines is reduced by inclining their internal cylinders from lower right to upper left, *see* Dkt. 52 at 4-6, which incline is then tracked by their fan covers to blow air towards the cylinder head. Thus, even assuming the two documents “pertain to the internal operation of [the GX

³ *See also* Phillips Decl., ¶ 3 & Ex. 2 (tenth Honda utility patent noting that “a general-purpose engine needs to be compact in size so that a work machine does not become too large,” *id* at 1, 0006.).

engine], such operation nevertheless primarily dictates [its] overall outward appearance or design.” *In re Pingel*, 46 U.S.P.Q.2d at 1817; *see also Bose*, 772 F.2d 866, 873 (Fed. Cir. 1985) (“Logic dictates that the shape of a speaker enclosure which conforms to the shape of the sound matrix is an efficient and superior design as an enclosure and, thus, de jure functional, whether or not it contributes to the functionality of the sound system itself.”).

The Design Memo also shows that Honda itself correlates a cubic engine with compactness. The Memo states that “Product Characteristics and Features” of the GX include “compact, light cubic engine;” that “Technical Means to Achieve [the] Objective[]” of a “compact” engine include a “box-type component configuration;” and that “Product Features and Characteristics” include a “Cubic OHV engine that is . . . compact . . .” Dkt. 54, Ex. 17 at AHGX0061285, 287 & 308. Mr. Conner also associated the two concepts, testifying that a reason for locating the fuel tank on top of the engine was to “minimize the cube,” and that an overall cubic design is going to be more compact than other shapes because it will have less empty, wasted space. *See* Dkt. 56, Ex. 2 at 387, 406; Phillips Decl. ¶ 4, Ex. 3 at 469-70; *Secalt S.A.* 668 F.3d at 684 (“cube-shaped gear box is simply housing.”). Moreover, even the drawing of the proposed new engine on p. 3 of the Design Memo (Dkt. 54, Ex. 17 at AHGX0061285), which was created long before the project ever reached Honda’s styling group, looks essentially the same as the Proposed Mark (as well as the preferred embodiment in Honda’s expired ‘385 utility patent), further underscoring that the overall configuration is clearly functional.

Honda’s mischaracterizes the Design Memo based on speculative and conclusory declarations signed by Honda employee Fujita (who did not prepare the Design Memo, was not in the department responsible for its preparation, and did not consult any of its authors on its meaning) and Honda’s paid expert Mieritz (who has no personal knowledge of Honda’s engine design process, contradicted his previous deposition testimony that the overall configuration is functional, and does not deny any of the relevant functions of the Proposed Mark as disclosed by Honda’s utility patents). *See Constellation Brands, Inc. v. Arbor Hill Assocs., Inc.*, 2006 WL 1355820, n.3 (T.T.A.B. 2006)(citing *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)) (rejecting as a sham an affidavit that contradicted prior deposition testimony).

C. The Prior District Court Proceedings Involved Different Marks and Legal Standards, and Therefore Are Entitled to No Weight.

The proceedings in California and Mississippi federal courts cited at the outset of Honda's brief have no preclusive effect on the decision currently before the Board, and they should be given no weight. In both cases, Honda's alleged trade dress was three dimensional (as opposed to Honda's two dimensional Proposed Mark here), consisting of ten elements. Dkt. 81 Ex. C. Order, at 2-3 n.2. Only three of these elements are included in the Proposed Mark. These three elements -- the shape of the fan cover and fuel tank, and the position and orientation of the major engine components -- are clearly taught by Honda's nine utility patents; whereas it was the existence of numerous other, unpatented elements that the Proposed Mark does not disclose -- including the valve cover design, color of oil fill cap, muffler heat shield, oil alert system, number of air cooling fins, and the trapezoidal base pad -- that led the California court to deny summary judgment. *Id.* at p. 10:8-12.

The courts also applied different legal standards than the Board will use here. In the Central District of California case, the Court found that "[t]o avoid summary judgment, Honda need only make 'some showing of nonfunctional features' of its trade dress." *Id.* at p. 7:22-25. Here, under Federal Circuit law, the standard is exactly the opposite: the existence of only a few minor non-functional elements does not render the claimed design non-functional. *See supra*. In such an instance, the district court decision loses any preclusive effect. *Larami Corp. v. Talk To Me Programs, Inc.*, 36 U.S.P.Q.2d 1840, *14 (T.T.A.B. 1995) (district court finding concerning priority of use not binding in view of differences in interpretation of Trademark Act § 7(c) by Board and court).

DaimlerChrysler Corp. v. Maydak, cited by Honda, is inapposite. There, an opposition proceeding before the Board had been suspended while the same parties litigated the same issues in an infringement action in court, and the Board cited TBMP § 510.02(a) as the basis for deferring to the court's decision once that action had been resolved. 86 U.S.P.Q.2d 1945, 1950 (T.T.A.B. 2008). Here, there is no identity of parties, the issues are different, and TBMP § 510 does not apply.

D. The Cited Design Patents Are Irrelevant.

Honda mistakenly argues that the existence of certain design patents "creates a presumption" that the Proposed Mark is not functional. Dkt. 52 at 3, 22. However, the three-dimensional design patents relied on by Honda claim numerous design elements that are missing from the two-dimensional Proposed Mark. Thus, no

presumption exists, and the design patents do not overcome the presence of Honda's utility patents.

“Absent identity between the design patent and the proposed mark, the presumption [of non-functionality] loses force.” *In re Becton*, 675 F.3d at 1375 ; *see also Secalt S.A.*, 668 F.3d at 685 (rejecting design patent argument in part because “purported trade dress does not even match the design in the patent.”). Indeed, the *Morton-Norwich* and *3M* cases cited by Honda both involved instances where the design patent was essentially identical to the applied-for trade dress. *See In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1342 n. 3 (C.C.P.A. 1982); *In re 3M Co.*, 2012 WL 1881484, *4 (T.T.A.B. May 10, 2012).

Honda's design patents are decidedly not identical to the Proposed Mark. While the Proposed Mark shows only the front of the engine, the design patents are three-dimensional, revealing the claimed designs from a variety of angles. Indeed, the patents claim six sides of the engine design, not just the front. Because they are not identical to (or even in the same dimension as) the Proposed Mark, the design patents do not create a presumption of non-functionality, and do not help Honda carry its heavy burden. *See In re Becton*, 675 F.3d at 1375 (“the ‘similar’ design patents lack sufficient evidentiary value to overcome the strong conclusion in this case that BD's utility patents underscore the functionality of significant elements of the proposed mark.”). Even if the Proposed Mark were identical to the design patents, “[c]ourts have uniformly held that a design patent, without more, is insufficient to prove that a design is nonfunctional.” *Secalt S.A.*, 668 F.3d at 685.

E. Because The Proposed Mark Satisfies The Traditional Test For Functionality, Alternative Designs Are Irrelevant.

Honda points to competing engines that are arranged somewhat differently from the Proposed Mark as evidence that alternative designs exist. Dkt. 80 at 23, Dkt. 79 at ¶¶ 38-60, 75. As an initial matter, however, regardless of whether the designs of other engines are available and functionally-equivalent, the Board need not consider them because the Proposed Mark satisfies the traditional test for functionality.

“[A] product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article,” and “once a product feature is found to be functional under this ‘traditional rule,’ ‘there is no need to proceed further to consider if there is competitive necessity for the feature,’ and consequently ‘[t]here is no need . . . to engage . . . in speculation about other design possibilities. . . . Other designs need not be attempted.’” *Valu Eng'g*, 61 U.S.P.Q. 2d at 1427 (Fed. Cir. 2002) (quoting *Qualitex Co. v. Jacobson Prods. Co.* 514 U.S. 159, 165 (1995) and *TrafFix*, 532 U.S. at 34. As discussed, the shape and overall

configuration of the Proposed Mark is both essential to its use or purpose and affects the quality of the GX engine.

Likewise, both the Federal Circuit and Supreme Court make clear that where the other *Morton-Norwich* factors support a finding of functionality, “there is no need to consider the availability of alternative designs.” *In re Becton*, at 1376; *TrafFix*, 532 U.S. at 24, 31; *see also Kistner Concrete Prods. v. Contech Arch Tech. Inc.*, 97 U.S.P.Q.2d 1912 (T.T.A.B. 2011) (“in view of respondent’s utility patents, the existence of alternative designs need not be considered.”); *see also* Application Serial No.78254832 at Phillips Decl. ¶12, Ex 11 (citing *Trafix* and *Valu Engineering*, USPTO rejected an application to register a wine glass configuration finding that the presence of alternative designs does not mean that applicant’s design is not functional). The *Morton-Norwich* factors support a finding of functionality here. In addition to Honda’s utility patents, Honda continues to promote the utilitarian aspects of the GX’s basic configuration, stating in an August 2013 news release, for example, that its general purpose engines like the GX “feature outstanding reliability, excellent quality, and a compact design that ensures compatibility with a wide range of installations.” Phillips Decl., ¶ 2, Exh. 1 (emphasis added).

Even assuming, *arguendo*, that the third-party designs are relevant, “the mere fact that other designs are available does not necessarily mean that applicant’s design is not functional.” *In re Van Valkenburgh*, 97 U.S.P.Q.2d 1757, 1763 (T.T.A.B. 2011) (citing *In re Bose*, 227 U.S.P.Q. 1, 5-6 (Fed. Cir. 1985)); *see also In re Mars*, 105 U.S.P.Q.2d 1859, 1866 (T.T.A.B. 2013); *Kistner Concrete Prods. v. Contech Arch Tech. Inc.*, 97 U.S.P.Q.2d 1912 (T.T.A.B. 2011). Opposers do not contend that there is no way to design a mid-sized, horizontal shaft engine other than the Proposed Mark. However, the possibility of alternative beveling, angles, or other minor engine features does not detract from the undisputed, functional advantages of having the fuel tank on top to the right, the fan cover slanting upward to the left, and other fundamental elements of the Proposed Mark and engines that compete with the GX. *See In re Lincoln Diagnostics, Inc.*, 30 U.S.P.Q.2d 1817, 1824 (T.T.A.B. 1994) (citing *In re Vico Prods. Mfg. Co.*, 229 U.S.P.Q. 364, 368 (T.T.A.B. 1985)); Phillips Decl. ¶5, Ex. 4 (curvature of equipment edges functional for safety). Indeed, upon closer review, Honda’s expert declaration presents only one type of alternative design to the overall configuration of the Proposed Mark: engines that have a drop down panel air filter in the front rather than a cartridge air filter on top.

Dkt. 79 ¶75 (compare Kawasaki, Briggs INTEK, Subaru EX 35 to Proposed Mark, Subaru EX 17 and Kohler Command Pro). This does not weigh heavily in its favor. *See In re Lincoln Diagnostics Inc.*, 30 U.S.P.Q.2d at 1824-1825 (describing seven alternative designs as “very limited” and not precluding a finding of functionality).

Even if all competitor designs discussed in Mr. Mieritz’s declaration are relevant alternatives, “the availability of alternative designs does not convert a functional design into a non-functional design.” *Valkenburgh*, 97 U.S.P.Q.2d at 1763 (citing *TraFFix*, 532 U.S. at 34) (finding a proposed mark functional where the mark was previously disclosed by a utility patent and was an “efficient and superior design,” despite the presence of “well over 85” alternative designs); *see also Rawlings Sporting Goods Co., Inc. v. Birmingham*, Cancellation No. 92051353 (T.T.A.B. July 26, 2011) (where utility patent establishes functionality of proposed mark, “the availability of other designs” fails to raise a genuine dispute of material fact sufficient to defeat summary judgment of functionality). As in *Valkenburgh*, registration of the Proposed Mark should be denied because it is functional and would improperly hinder competition. *See* 2/1/13 Daugherty Decl, Ex. 24 (third party engines) and Phillips Decl, ¶8, Ex. 7 (comparison of ‘385 Patent and third party engines).

CONCLUSION

For the foregoing reasons, as well as those set forth in their initial brief, Opposers respectfully request that the Board grants its motion for summary judgment of functionality.

Dated: October 15, 2013

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CERTIFICATE OF SERVICE

I hereby certified that a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF OPPOSERS' MOTION FOR SUMMARY JUDGMENT was served on the following counsel of record by depositing same in the U.S. mail, first class postage prepaid, this 15th day of October, 2013:

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRIGGS & STRATTON CORPORATION and
KOHLER CO.,

Opposers,

v.

HONDA GIKEN KOGYO KABUSHIKI
KAISHA,

Applicant.

Opposition No. 91200832 (parent)

Opposition No. 91200146

Application Serial No. 78924545

**OPPOSERS' NOTICE OF FILING AND SERVICE OF DECLARATION OF ROBERT
N. PHILLIPS IN SUPPORT OF REPLY BRIEF ON MOTION FOR SUMMARY
JUDGMENT BY MAIL**

Opposers Briggs & Stratton Corporation and Kohler Co. ("Opposers") hereby notify the Board and Applicant that on October 15, 2013 they filed and served by mail a Declaration of Robert N. Phillips in Support of Reply Brief on Motion for Summary Judgment and exhibits thereto. The declaration is being filed manually because it includes color exhibits.

Dated: October 15, 2013

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CERTIFICATE OF SERVICE

I hereby certified that a true and correct copy of the foregoing OPPOSERS' NOTICE OF FILING AND SERVICE OF DECLARATION OF ROBERT N. PHILLIPS IN SUPPORT OF REPLY BRIEF ON MOTION FOR SUMMARY JUDGMENT BY MAIL OPPOSERS' MOTION FOR SUMMARY JUDGMENT was served on the following counsel of record by depositing same in the U.S. mail, first class postage prepaid, this 15th day of October, 2013:

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