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Proceeding No.	92062506
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Filing Date	12/28/2015
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Part	1	of	1
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92062506

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

Edge Systems LLC,) Cancellation No.: 92062506

Petitioner,) Registration No.: 4,768,711

v.) Mark: BETA-HD

Rafael N. Aguila DBA Edge Systems,) I hereby certify that this correspondence
Respondent.) and all marked attachments are being
deposited with the United States Postal
Service as first-class mail in an envelope
addressed to: U.S. Patent and Trademark
Office, P.O. Box 1451 Alexandria, VA
22313-1451, on

December 23, 2015
(Date)

/LXK/
Lauren Keller Katzenellenbogen

PETITIONER'S OPPOSITION TO RESPONDENT'S
MOTION FOR SUSPENSION OF PROCEEDINGS

Edge Systems, LLC ("Petitioner"), by and through its undersigned counsel, hereby
opposes Respondent's Motion for Suspension of Proceedings on the grounds that the civil action
filed by Petitioners against Rafael N. Aguila d/b/a/ Edge Systems ("Respondent") does not
involve Registration No. 4,768,711. Thus, Respondent has not shown good cause to suspend the
present proceeding and the Motion to Suspend should be denied.

FACTUAL BACKGROUND

On November 26, 2014, Petitioner filed a Complaint against Respondent alleging, inter
alia, infringement of a number of Petitioner's patents and trademarks, in the U.S. District Court
for the Southern District of Florida ("the Complaint"). Mot., Ex. A. The case was assigned Case

No. 14-24517-CIV-MOORE/MCALILEY (“the Florida Action”). Respondent had not yet even applied for the registration at issue in this proceeding when Petitioner filed its Complaint in the Florida Action. Petition for Cancellation, Ex. B.

On December 1, 2014, after being served with the Complaint in the Florida Action, Respondent submitted an application for federal registration of the mark BETA-HD.¹ Petition for Cancellation, Ex. B. This application issued as Registration No. 4,768,711 (“the Registration”), the registration at issue in this proceeding, on July 7, 2015 – eight months after the Florida Action was filed. *Id.* Accordingly, none of the claims, defenses, or counterclaims in the Florida Action relates to Respondent’s Registration at issue here.

On August 4, 2015 Respondent filed a Motion in the Florida Action to Amend Defendant’s Answer and Counterclaims seeking to add claims for infringement of Respondent’s Registration. Ex. 1 at 58-59, ¶¶132-141. However, on October 8, 2015, the Southern District of Florida issued an order denying Respondent’s Motion to Amend. Ex. 2. Further, on October 26, 2015, the Southern District of Florida also dismissed Defendant’s affirmative defense of prior use of Petitioner’s various trademarks, including of the BETA-HD mark. *See* Ex. 3 at 15 (raising affirmative defense of prior use); Ex. 4 at 12-15 (order dismissing affirmative defense of prior use). Thus, the court in the Florida Action has already rejected Respondent’s attempt to raise issues relating to Respondent’s Registration in the Florida Action. *See* Mot. at Ex. A; Ex. 2.

Respondent may assert that there are overlapping issues because in the Florida Action Petitioner brought claims for infringement of *Petitioner’s* common law rights in the mark BETA-HD, a mark identical to Respondent’s mark at issue in this proceeding. However, Respondent did not even file the application that led to issuance of Respondent’s Registration for

¹ Respondent was served with the Complaint in the Florida Action on December 2, 2014 rather than December 19, 2014 as asserted in Respondent’s motion. *See* Mot. at 1.

the mark until after Petitioner filed and served the Complaint in the Florida Action. Thus, as discussed above, the invalidity of Respondent's Registration, the subject of this proceeding, is not at issue and will not be decided in the Florida Action. Respondent seeks to suspend this proceeding only to delay the cancellation of his fraudulently obtained Registration. Thus, suspending this proceeding would be highly prejudicial to Petitioner.

THIS PROCEEDING SHOULD NOT BE SUSPENDED

A Trademark Trial and Appeal Board ("Board") proceeding may be suspended if "a party or parties to a pending case are engaged in a civil action . . . which may have a bearing on the case." 37 C.F.R. § 2.117(a). Suspension of a Board proceeding pending the final determination of another proceeding is solely within the discretion of the Board. *Jodi Kristopher Inc. v. Int'l Seaway Trading Corp.*, 91 U.S.P.Q.2d 1957, 1959 (T.T.A.B. 2009). *See also* TBMP § 510.02(a) "All motions to suspend, regardless of circumstances, . . . are subject to the 'good cause' standard." *Id.*; *see also* TBMP § 510.03(a) ("[T]he Board generally will not approve a motion or stipulation to suspend filed after answer and before the discovery conference without a sufficient showing of good cause."). "[B]oth the permissive language of Trademark Rule 2.117(a) . . . and the explicit provisions of Trademark Rule 2.117(b) make clear that suspension is not the necessary result in all cases." *Id.* (citing *Boyds Collection Ltd. v. Herrington & Co.*, 65 U.S.P.Q.2d 2017, 2018 (T.T.A.B. 2003)).

Here, suspension is not appropriate because Respondent has not shown good cause for the suspension. *See id.*; TBMP § 510.03(a). The Florida Action is unrelated to this proceeding because Respondent's Registration did not issue until eight months after the Florida Action was filed. Thus, none of the claims, defenses, or counterclaims in the Florida Action relates to Respondent's Registration. Moreover, the District Court has already dismissed Respondent's affirmative defense of prior use of the BETA-HD mark and rejected Respondent's attempt to add

claims relating to this Registration. Thus, the validity of *Respondent's* Registration No. 4,768,711 will not be decided in the Florida Action.

Because the Florida Action is unrelated to this cancellation proceeding and will have no bearing on the present cancellation proceeding, Respondent has failed to meet his burden to show good cause for suspension of this proceeding. *See Jodi Kristopher*, 91 U.S.P.Q.2d at 1959; TBMP § 510.03(a).

Moreover, suspension of this cancellation proceeding would unduly prejudice Petitioner because it would needlessly delay this proceeding and the cancellation of Respondent's invalid Registration. As discussed above, the invalidity of Respondent's Registration is not even at issue in the Florida Action and will not be decided in that action. If this action is suspended, Petitioner will be forced to wait until after the Florida Action is decided before even this action is allowed to progress, and before Petitioner is allowed to pursue the relief it seeks here. Accordingly, Respondent's motion should be denied to avoid delay and prejudice to Petitioner.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Board deny the Motion for Suspension of Proceedings and continue this cancellation proceeding.

Dated: December 23, 2015

By: /LXK/
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Edge Systems LLC

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing **PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION FOR SUSPENSION OF PROCEEDINGS** upon Respondent's counsel of record by depositing a copy thereof in the United States Mail, first-class postage prepaid, on December 23, 2015, addressed as follows:

Rafael N. Aguila
5338 SW 57th Avenue
South Miami, FLORIDA 33155
UNITED STATES

Natalie B. Rodriguez

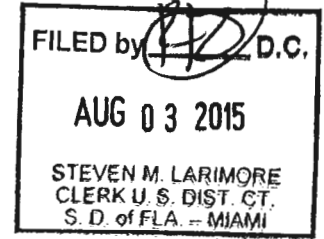
Natalie B. Rodriguez

22254040
121015

EXHIBIT 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 1:14-CIV-24517-KMM/MCALILEY



EDGE SYSTEMS, LLC, and
AXIA MEDSCIENCES, LLC,

Plaintiffs,

v.

Rafael Newton Aguila, a/k/a Ralph Aguila,
an individual, d/b/a Hydradermabrasion Systems,

Defendant.

Rafael Newton Aguila, a/k/a Ralph Aguila,
an individual, d/b/a Hydradermabrasion Systems,

Counter-Plaintiff,

v.

EDGE SYSTEMS, LLC;
AXIA MEDSCIENCES, LLC;
WESTON PRESIDIO SERVICE COMPANY, LLC;
VALEANT PHARMACEUTICALS INTERNATIONAL, INC.;
THE RITZ-CARLTON HOTEL COMPANY, LLC,

Counter-Defendants.

**MOTION TO AMEND DEFENDANT'S ANSWER AND COUNTERCLAIMS,
AND TO JOIN ADDITIONAL PARTIES**

Defendant/Counter-Plaintiff, Rafael Newton Aguila ("Aguila") requests that the Court allow leave for him to amend his answer and counterclaims and to join additional parties for the following reasons:

1. According to this Court's Scheduling Order (D.E. 104), "all motions to amend the pleadings or to join additional parties must be filed by the later of forty-five (45) days after the date of entry of this Order, or forty-five (45) days after the first responsive pleading by the last

responding defendant”. Because Aguila filed his answer on June 18, 2015 as D.E. 116, the final date to amend the pleadings or to join additional parties is today, August 3, 2015.

2. Aguila’s second amended answer and counterclaims is attached as Exhibit A along with this motion.
3. Allowing joinder and the amended counterclaims would serve the interests of judicial economy. Aguila is requesting to join pursuant to Fed. R. Civ. P. Rule 20 the following counterclaim defendants: WESTON PRESIDIO SERVICE COMPANY, LLC; VALEANT PHARMACEUTICALS INTERNATIONAL, INC.; and THE RITZ-CARLTON HOTEL COMPANY, LLC.
4. Aguila is requesting to add two new counts to his counterclaims. First, is “Count XV” for TRADEMARK INFRINGEMENT pursuant to 35 U.S.C. § 1114(1) against all counterclaim defendants. Aguila owns the registered U.S. trademarks for Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,711), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995). These trademarks are all being infringed by all of the counterclaim defendants.
5. The second new count is “COUNT XVI” for FALSE DESIGNATION OF ORIGIN pursuant to 35 U.S.C. § 1125(a) against all counterclaim defendants. Aguila owns the registered U.S. trademarks for Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,711), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995). These trademarks are all being infringed by all of the counterclaim defendants.
6. Aguila satisfies the requirements of Rule 20(a) because he seeks relief based on the same series of transactions and occurrences giving rise to his trademark infringement claims. Whether a claim falls within the same series of transactions or occurrences depends on their logical relationship. *Alexander v. Fulton Cnty., Ga.*, 207 F.3d 1303, 1323 (11th Cir.2000), overruled on other grounds by *Manders v. Lee*, 338 F.3d 1304 (11th Cir.2003). Although Rule 20(a) only requires that plaintiffs have any question of law or fact in common, here, the

questions of law and fact are nearly identical. Accordingly, Aguila meets Rule 20(a)'s requirements for permissive joinder.

7. Federal Rule of Civil Procedure 20(a)(2) describes the requirements for permissive joinder of defendants. It provides persons may be joined as defendants if: “(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.” This rule is designed “to promote trial convenience and expedite the resolution of lawsuits, thereby eliminating unnecessary lawsuits.” *Alexander*, 207 F.3d at 1324. “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).
8. Moreover, the Court may consider principles of fundamental fairness in assessing permissive joinder. These principles are encompassed, in part, by Rule 1 of the Federal Rules of Civil Procedure which requires the “just, speedy, and inexpensive determination of every action and proceeding.”
9. Aguila has a keen interest in proceeding against numerous Counter-Defendants in one lawsuit to reduce the costs of protecting its trademarks by avoiding multiple filing fees. The facts in Aguila’s counterclaim satisfy the “same transaction, occurrence, or series of transactions or occurrences” requirement for permissive joinder. Moreover, severing Defendants promotes efficiency as set forth above. For these reasons, the Court finds misjoinder.
10. Under Rule 20, a plaintiff is free to refuse or join proper parties: parties by whom or against whom claims arise from the same transaction or occurrence and will raise at least one common question of law or fact. Fed.R.Civ.P. 20(a)(1); *Moore's Federal Practice --- Civil* § 19.02(2)(b) (2009).

11. A decision whether to grant leave to amend is within the discretion of the district court.

Foman v. Davis, 371 U.S. 178, 182 (1962). However, the Supreme Court has put some limits on this discretion by emphasizing Federal Rule of Civil Procedure 15(a), which provides that leave to amend “shall be freely given when justice so requires.” *Id.* There must be a “justifying reason” for a court to deny leave to amend because the Supreme Court has held that “this mandate is to be heeded.” *Id.*; see also *Halliburton & Assoc. v. Henderson, Few & Co.*, 774 F.2d 441, 443 (11th Cir. 1985) (“substantial reason” to deny leave to amend is needed).

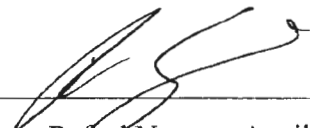
12. In *Grayson v. Kmart Corp.*, the Supreme Court indicated that in deciding whether to grant leave to amend, the Court may consider the following factors: undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previously permitted amendments, undue prejudice to the opposing party, and the futility of the amendment. 79 F.3d 1096, 1109 (11th Cir. 1996).

13. In addition, “Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions.” (quoting 28 U.S.C. § 1441 (reviser’s note)).

WHEREFORE, Aguila requests that this court grant his motion to amend his answers and counterclaims, and to join the three additional parties.

Respectfully submitted,

August 3, 2015



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CERTIFICATE OF SERVICE

I HEREBY certify that on August 3, 2014, I conventionally filed the foregoing document with the Clerk of the Court. I also certify that the foregoing document is being served this day on all counsel of record by U.S. mail and/or e-mail


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EXHIBIT A

(Second Amended Answer and Counterclaims)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 1:14-CIV-24517-KMM/MCALILEY

EDGE SYSTEMS, LLC, and
AXIA MEDSCIENCES, LLC,

Plaintiffs,

v.

Rafael Newton Aguila, a/k/a Ralph Aguila,
an individual, d/b/a Hydradermabrasion Systems,

Defendant.

_____/

Rafael Newton Aguila, a/k/a Ralph Aguila,
an individual, d/b/a Hydradermabrasion Systems,

Counter-Plaintiff,

v.

EDGE SYSTEMS, LLC;
AXIA MEDSCIENCES, LLC;
WESTON PRESIDIO SERVICE COMPANY, LLC;
VALEANT PHARMACEUTICALS INTERNATIONAL, INC.;
THE RITZ-CARLTON HOTEL COMPANY, LLC,

Counter-Defendants.

**SECOND AMENDED DEFENDANT/COUNTER-PLAINTIFF'S
ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

Defendant/Counter-Plaintiff, RAFAEL NEWTON AGUILA (“Aguila”), answer to
Plaintiffs/Counter-Defendants’ Original Complaint (“Complaint”) is as follows:

THE PARTIES

1. The allegations of paragraph 1 are denied.
2. The allegations of paragraph 2 are denied.
3. The allegations of paragraph 3 are admitted.
4. The allegations of paragraph 4 are denied.
5. The allegations of paragraph 5 are denied.

JURISDICTION AND VENUE

6. The allegations of paragraph 7 are denied.
7. The allegations of paragraph 8 are denied.
8. The allegations of paragraph 9 are denied.
9. The allegations of paragraph 10 are admitted.

GENERAL ALLEGATIONS

10. The allegations of paragraph 10 are admitted.
11. The allegations of paragraph 36 are denied.
12. The allegations of paragraph 12 are denied.
13. The allegations of paragraph 13 are denied.
14. The allegations of paragraph 14 are denied.
15. The allegations of paragraph 15 are denied.
16. The allegations of paragraph 16 are denied.
17. The allegations of paragraph 17 are denied.
18. The allegations of paragraph 18 are denied.
19. The allegations of paragraph 19 are denied.
20. The allegations of paragraph 20 are denied.
21. The allegations of paragraph 21 are denied.
22. The allegations of paragraph 22 are denied.
23. The allegations of paragraph 23 are denied.
24. The allegations of paragraph 24 are denied.
25. The allegations of paragraph 25 are denied.
26. The allegations of paragraph 26 are denied.

27. The allegations of paragraph 27 are denied.
28. The allegations of paragraph 28 are denied.
29. The allegations of paragraph 29 are admitted.
30. The allegations of paragraph 30 are denied.
31. The allegations of paragraph 31 are denied.
32. The allegations of paragraph 32 are admitted.
33. The allegations of paragraph 33 are admitted.
34. The allegations of paragraph 34 are denied.
35. Aguila admits that Plaintiff Edge Systems has generated over \$93 million in revenue over the last five years. Except as admitted therein, the remaining allegations of paragraph 35 are denied.
36. The allegations of paragraph 36 are denied.
37. The allegations of paragraph 37 are denied.
38. The allegations of paragraph 38 are denied.
39. The allegations of paragraph 39 are denied.
40. The allegations of paragraph 40 are denied.
41. The allegations of paragraph 41 are denied.
42. The allegations of paragraph 42 are denied.
43. The allegations of paragraph 43 are denied.
44. The allegations of paragraph 44 are denied.
45. The allegations of paragraph 45 are denied.
46. The allegations of paragraph 46 are admitted.
47. The allegations of paragraph 47 are denied.
48. The allegations of paragraph 48 are denied.
49. Aguila admits to applying for a trademark on November 1, 2014. Except as admitted therein, the remaining allegations of paragraph 49 are denied.
50. Aguila admits to using the website www-edge-systems.com. Except as admitted therein, the remaining allegations of paragraph 50 are denied.
51. The allegations of paragraph 51 are denied.
52. The allegations of paragraph 52 are admitted.
53. The allegations of paragraph 53 are denied.

54. The allegations of paragraph 54 are denied.
55. The allegations of paragraph 55 are denied.
56. The allegations of paragraph 56 are denied.
57. The allegations of paragraph 57 are admitted.
58. The allegations of paragraph 58 are denied.
59. The allegations of paragraph 59 are denied.
60. The allegations of paragraph 60 are denied.
61. The allegations of paragraph 61 are denied.
62. The allegations of paragraph 62 are denied.
63. The allegations of paragraph 63 are denied.
64. The allegations of paragraph 64 are denied.
65. The allegations of paragraph 65 are denied.
66. The allegations of paragraph 66 are denied.
67. The allegations of paragraph 67 are denied.
68. The allegations of paragraph 68 are denied.
69. The allegations of paragraph 69 are denied.
70. The allegations of paragraph 70 are denied.
71. The allegations of paragraph 71 are denied.
72. The allegations of paragraph 72 are denied.
73. The allegations of paragraph 73 are denied.
74. The allegations of paragraph 74 are denied.
75. The allegations of paragraph 75 are denied.
76. The allegations of paragraph 76 are denied.

FIRST CLAIM FOR RELIEF INFRINGEMENT OF THE PATENTS-IN-SUIT

77. The allegations of paragraph 77 are denied.
78. The allegations of paragraph 78 are admitted.
79. The allegations of paragraph 79 are denied.
80. The allegations of paragraph 80 are denied.
81. The allegations of paragraph 81 are denied.
82. The allegations of paragraph 82 are denied.

83. The allegations of paragraph 83 are denied.
84. The allegations of paragraph 84 are denied.
85. The allegations of paragraph 85 are denied.
86. The allegations of paragraph 86 are denied.
87. The allegations of paragraph 87 are denied.
88. The allegations of paragraph 88 are denied.
89. The allegations of paragraph 89 are denied.
90. The allegations of paragraph 90 are denied.
91. The allegations of paragraph 91 are denied.
92. The allegations of paragraph 92 are denied.
93. The allegations of paragraph 93 are denied.
94. The allegations of paragraph 94 are denied.

SECOND CLAIM FOR RELIEF TRADEMARK INFRINGEMENT

95. The allegations of paragraph 95 are denied.
96. The allegations of paragraph 96 are admitted.
97. The allegations of paragraph 97 are denied.
98. The allegations of paragraph 98 are denied.
99. The allegations of paragraph 99 are denied.
100. The allegations of paragraph 100 are denied.
101. The allegations of paragraph 101 are denied.
102. The allegations of paragraph 102 are denied.
103. The allegations of paragraph 103 are denied.
104. The allegations of paragraph 104 are denied.
105. The allegations of paragraph 105 are denied.

THIRD CLAIM FOR RELIEF

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

106. The allegations of paragraph 106 are denied.
107. The allegations of paragraph 107 are admitted.
108. The allegations of paragraph 108 are denied.
109. The allegations of paragraph 109 are denied.

- 110. The allegations of paragraph 360 are denied.
- 111. The allegations of paragraph 361 are denied.
- 112. The allegations of paragraph 362 are denied.
- 113. The allegations of paragraph 363 are denied.
- 114. The allegations of paragraph 364 are denied.
- 115. The allegations of paragraph 365 are denied.

FOURTH CLAIM FOR RELIEF

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

- 116. The allegations of paragraph 366 are denied.
- 117. The allegations of paragraph 367 are admitted.
- 118. The allegations of paragraph 368 are denied.
- 119. The allegations of paragraph 369 are denied.

FIFTH CLAIM FOR RELIEF

FRAUD ON THE U.S.P.T.O.

- 120. The allegations of paragraph 120 are denied.
- 121. The allegations of paragraph 121 are admitted.
- 122. The allegations of paragraph 122 are denied.
- 123. The allegations of paragraph 123 are denied.
- 124. The allegations of paragraph 124 are denied.
- 125. The allegations of paragraph 125 are denied.
- 126. The allegations of paragraph 126 are denied.

SIXTH CLAIM FOR RELIEF

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

- 127. The allegations of paragraph 127 are denied.
- 128. The allegations of paragraph 128 are admitted.
- 129. The allegations of paragraph 129 are denied.
- 130. The allegations of paragraph 130 are denied.
- 131. The allegations of paragraph 131 are denied.

GENERAL DENIAL

132. Except as expressly admitted herein, Aguila denies each and every allegation contained in Plaintiffs' Complaint.

DEMAND FOR JUDGMENT

133. Aguila denies that the Plaintiffs are entitled to the relief for which it please in paragraph 6 of its prayer.
134. Aguila denies that the Plaintiffs are entitled to the relief for which it please in paragraph 6 of its prayer.
135. Aguila denies that the Plaintiffs are entitled to the relief for which it please in paragraph 6 of its prayer.
136. Aguila denies that the Plaintiffs are entitled to the relief for which it please in paragraph 6 of its prayer.
137. Aguila denies that the Plaintiffs are entitled to the relief for which it please in paragraph 6 of its prayer.
138. Aguila denies that the Plaintiffs are entitled to the relief for which it please in paragraph 6 of its prayer.
139. Aguila denies that this demand should be made;
140. Aguila denies that this demand should be made;
141. Aguila denies that this demand should be made;
142. Aguila denies that this demand should be made;
143. Aguila denies that this demand should be made;
144. Aguila denies that this demand should be made;
145. Aguila denies that this demand should be made;
146. Aguila denies that this demand should be made;
147. Aguila denies that this demand should be made;
148. Aguila denies that this demand should be made;
149. Aguila denies that this demand should be made;
150. Aguila denies that this demand should be made;
151. Aguila denies that this demand should be made;

152. Aguila denies that this demand should be made;
153. Aguila denies that this demand should be made;
154. Aguila denies that this demand should be made;
155. Aguila denies that this demand should be made;
156. Aguila denies that this demand should be made.

DEMAND FOR JURY TRIAL

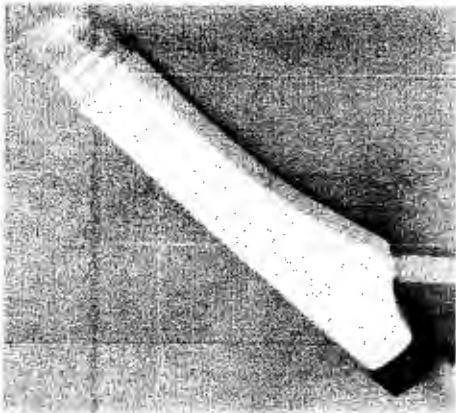
157. Defendant demands a trial by jury.

AFFIRMATIVE DEFENSES

158. Pursuant to Federal Rule of Civil Procedure 8(c), and without assuming any burden that it would not otherwise bear, and reserving its right to assert additional defenses, Aguila asserts the following defenses to Plaintiffs' Original Complaint.

FIRST DEFENSE - NON-INFRINGEMENT

159. Without waiving the right to raise additional bases for alleging non-infringement, Aguila has not and does not infringe any claim of the Plaintiffs' Patent for at least the reason that one or more claim limitations are not, and have not been, present in the Aguila's products. Aguila does not infringe, and has not infringed, literally or under the doctrine of equivalents; Aguila does not infringe, and has not infringed, directly, indirectly, jointly, or contributorily; Aguila does not induce, and has not induced, infringement. As noted above, the limitation of Claim 1 of the '620 patent requiring "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" means that the actual handpiece used by the appellees is different from what is mentioned in Claim 1 of the '620 patent. Instead of having an "abrasive fragment", the Plaintiffs' handpiece has smooth plastic tips with small ridges. Therefore, neither the Plaintiffs' nor the Aguila's handpiece meet every limitation of Claim 1 of the '620 without making any kind of claim construction analysis; (2) construing appellees' handpiece to contain an "abrasive fragment" when it has no abrasive materials that make contact with the skin.



Aguila's handpiece



Plaintiffs' handpiece

U.S. Patent 6,299,620

160. Claim 1 of U.S. Patent 6,299,620 (“’620 patent”) states that it is:

A system for treating surface layers of a patient’s skin, comprising: (a) an instrument body with a distal working end for engaging a skin surface; (b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto; (c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and (d) at least one outflow aperture in said skin interface in communication with a negative pressurization source.

161. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have “a skin interface portion of the working end comprising an abrasive fragment composition secured thereto” as taught by the ‘620 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘620 patent. For example, Aguila’s handpieces do not have any “abrasive fragment composition” that come into contact with the skin surface.

162. For example, Aguila would include a metal handpiece with an abrasive tip, but for only dry microdermabrasion, not to use with liquids. The metal handpieces did have diamond fragments on it to act as an abrasive. For the “wet” microdermabrasion, Aguila would only use the plastic handpiece with the special plastic tip and no diamond or abrasive material. Similar to the Hydrafacial MD. See Exhibit J, K, and L. As noted above, the limitation of Claim 1 of the ‘620

patent requiring "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" means that the actual handpiece used by the appellees is different from what is mentioned in Claim 1 of the '620 patent. Instead of having an "abrasive fragment", the Plaintiffs' handpiece has smooth plastic tips with small ridges. Therefore, neither the Plaintiffs' nor the Aguila's handpiece meet every limitation of Claim 1 of the '620 without making any kind of claim construction analysis; (2) construing appellees' handpiece to contain an "abrasive fragment" when it has no abrasive materials that make contact with the skin. According to the Merriam-Webster dictionary, the ordinary meaning of the term "**abrasive**" is defined as: "a substance (as emery or pumice) used for abrading, smoothing, or polishing".

U.S. Patent 8,337,513

163. Claim 1 of U.S. Patent 8,337,513 ("513 patent") states that it is:

A system for treating skin, comprising: a handheld device comprising a main body and a working end along a distal end of the main body; an outer periphery extending along the distal end of the handheld device; at least one surface element extending distally from the working end of the handheld device, said at least one surface element being positioned within an interior area circumscribed by the outer periphery; wherein the at least one surface element comprises at least one sharp edge configured to abrade skin when said handheld device is moved relative to a skin surface; and at least one opening along the working end of the handheld device; wherein the at least one opening is configured to be placed in fluid communication with a vacuum source via a passage way, said passage way being configured to convey debris away from the working end when said vacuum source is activated; and wherein substantially an entire circumference of the outer periphery is configured to contact a skin surface during a treatment procedure.

However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have "at least one surface element comprises at least one sharp edge configured to abrade skin" as taught by the '513 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '513 patent. For example, Aguila's handpieces do not have any "sharp edges" that come into contact with the skin surface.

U.S. Patent 7,678,120

164. Claim 1 of U.S. Patent 7,678,120 (“’120 patent”) states that it is:

A method for abrading skin of a patient, comprising: (a) placing a working end of a skin treatment device against the skin of the patient; (b) drawing the skin against an abrading surface on a skin interface on the working end of the skin treatment device by applying suction to the skin through an aspiration opening in the working end, the abrading surface comprising apexes extending upwardly from the abrading surface and the apexes having sharp edges; (c) moving the treatment device across the skin while the sharp edge of the apexes remain stationary with respect to the working end of the skin treatment device; (d) abrading the skin drawn against the sharp edge of the apexes while continuously applying suction through the aspiration opening; and (e) removing skin debris through the aspiration opening in the working end of the skin treatment device.

165. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have a feature that comprises “moving the treatment device across the skin while the sharp edge of the apexes remain stationary with respect to the working end of the skin treatment device” as taught by the ‘120 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘129 patent. For example, Aguila’s handpieces do not have any “sharp edges” that come into contact with the skin surface.

U.S. Patent 8,066,716

166. Claim 1 of U.S. Patent 8,066,716 (“’716 patent”) states that it is:

A system for treating a skin surface of a patient, comprising: an instrument body that comprises a main body and a working end, said working end comprising an outer periphery and a skin interface with an abrading structure, said abrading structure comprising a plurality of ridge elements, wherein said ridge elements are configured to abrade skin; and at least one aspiration opening at or near the skin interface coupled to a passageway that extends to a remote vacuum source configured to apply suction to the skin surface; wherein the outer periphery completely circumscribes the plurality of ridge elements and the at least one aspiration opening.

167. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have a feature that comprises “an instrument body that comprises a main body and a working

end, said working end comprising an outer periphery and a skin interface with an abrading structure, said abrading structure comprising a plurality of ridge elements, wherein said ridge elements are configured to abrade skin” as taught by the ‘716 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘716 patent. For example, Aguila’s handpieces do not have any “abrading structures” that come into contact with the skin surface.

U.S. Patent 7,789,886

168. Claim 1 of U.S. Patent 7,789,886 (“886 patent”) states that it is:

A method for treating a skin surface of a patient, comprising: (a) applying against the skin surface of a patient an instrument body with a longitudinal axis and a distal working end, said distal working end comprising a working surface that carries an abrading structure comprising a plurality of sharp elements for engaging and abrading the skin surface together with a vacuum source coupled to at least one aperture about said working surface, the abrading structure and the at least one aperture positioned within a raised outer periphery that completely circumscribes the abrading structure and the at least one aperture; (b) translating the working surface over the skin surface to thereby abrade the skin surface; and (c) contemporaneously actuating the vacuum source to thereby cause suction engagement of the skin surface against the raised outer periphery and the plurality of sharp elements of the working surface and to aspirate skin debris through the at least one aperture.

169. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have a feature or method that comprises “applying against the skin surface of a patient an instrument body with a longitudinal axis and a distal working end, said distal working end comprising a working surface that carries an abrading structure comprising a plurality of sharp elements for engaging and abrading the skin surface together with a vacuum source coupled to at least one aperture about said working surface, the abrading structure and the at least one aperture positioned within a raised outer periphery that completely circumscribes the abrading structure and the at least one aperture” as taught by the ‘886 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘886 patent. For example, Aguila’s handpieces do not have any “sharp elements” that come into contact with the skin surface.

U.S. Patent 6,641,591

170. Claim 1 of U.S. Patent 6,641,591 (“591 patent”) states that it is:

A system for treating the skin surface of a patient, comprising: (a) an instrument body with a distal working end that defines a skin interface portion for contacting the skin; (b) a first aperture arrangement in said skin interface consisting of at least one port in communication with a treatment media source; (c) a second aperture arrangement in said skin interface consisting of at least one port in communication with a vacuum source for removing treatment media and removed tissue from the skin interface; and (d) wherein the skin interface comprises an abrading structure with substantially sharp edges for abrading tissue.

171. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have a feature or method that comprises “wherein the skin interface comprises an abrading structure with substantially sharp edges for abrading tissue” as taught by the ‘591 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘591 patent. For example, Aguila’s handpieces do not have any “sharp edges” that come into contact with the skin surface.

SECOND DEFENSE - INVALIDITY

172. The claims of the Plaintiffs’ patents are invalid because they do not comply with the statutory requirements of patentability enumerated in the Patent Act of the United States, 35 U.S.C. §101 *et seq.* For example, and without waiving the right to raise additional bases for alleging invalidity, the claims of the patents are invalid under 35 U.S.C. §§ 102 and 103 in view of prior art references including, but not limited to, U.S. Patent Nos. 6,241,739; 4,378,804; and 5,037,431. The claims of the Plaintiffs’ patents are also invalid under 35 U.S.C. § 362 for reciting claim limitations not supported in the written description and/or which lack enablement. The Plaintiffs’ patents’ specifications do not include a complete written description of the claimed inventions. For example, their specifications do not include sufficient specificity and detail so that after reading the specification a person of ordinary skill in the relevant art can practice the invention without

undue experimentation. The specifications also do not set out the best way, or best mode, known to the inventor of practicing the invention. The claims of Plaintiffs' patents are ambiguous or indeterminate.

THIRD DEFENSE - EQUITABLE ESTOPPEL

173. Plaintiffs led Aguila to reasonably believe they did not intend to enforce the Plaintiffs' patent against Aguila by, among other things, failing to file a lawsuit since their first accusation in 2006 of patent infringement, and the second accusation in their cease and desist letter from January 2010. Aguila has relied on the conduct of the Plaintiffs.

174. Due to its reliance, Aguila would be materially prejudiced if Plaintiffs were permitted to proceed with their claim for infringement under the Patent Act because, at a minimum, Aguila has continued to accrue potential patent damages for its allegedly infringing use of his devices.

175. Based on the foregoing, Plaintiffs should be equitably estopped from pursuing patent infringement claims against Aguila.

FOURTH DEFENSE – LACHES

176. Plaintiffs' claims are barred in whole or in part by the doctrine of laches. The patent and trademark holder delayed in filing the lawsuit for an unreasonable length of time and the delay operated to the prejudice of Aguila. The Plaintiffs first threatened Aguila with a lawsuit for trademark and patent infringement in 2006. See Exhibit A. On January 2010, the Plaintiffs sent Aguila a cease and desist letter threatening a lawsuit for trademark infringement, dilution, patent infringement, unfair competition, copyright infringement, and violation of the ACPA. See Exhibit B.

177. The equitable defense of estoppel by laches may be applied to bar claims for trade dress or trademark infringement brought under the Lanham Act. *Kason Indus., Inc. v. Component*

Hardware Grp., Inc., 120 F.3d 3699, 1203 (36th Cir. 1997). A successful defense of laches requires proof of three elements: “(1) **a delay in asserting a right or claim**; (2) **that the delay was not excusable**; and (3) **that the delay caused the defendant undue prejudice.**” *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1517 (36th Cir. 1984); and *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes Inc.*, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992).

178. In the cease & desist letter, the Plaintiffs had asked for much more than the stoppage of all commerce by the Defendant on his websites. In fact, the Plaintiffs had demanded that the Defendant **(1)** immediately cease and desist any and all use of the marks HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6, or any other mark confusingly similar to our client's marks; **(2)** immediately take down all text and other copyrighted material belonging to Edge Systems from the <hydradermabrasian.com> domain and any other domains you control; **(3)** immediately take down all material from the domains <hydrapeel.com> and <hydropeel.com> and transfer the domains <hydrapeel.com> and <hydropeel.com> to Edge Systems; **(4)** immediately cease doing business as HydraPeel Systems and agree not to do business under a trade name confusingly similar to Edge Systems' marks; **(5)** immediately cease all manufacturing, sales, offers for sale, and importation of your hydradermabrasion products, and any other products covered by Edge Systems patents; **(6)** immediately destroy all products covered by Edge System's patents and provide us with documentation of such destruction; and **(7)** pay Edge Systems' damages, attorneys' fees, and costs incurred in connection with this matter.

179. Within a week of receiving the cease & desist letter, the Defendant spoke with the Plaintiffs and mentioned that he could sue them for common law trademark infringement because Aguila was the first to use the Edge Systems name and logo, in addition to being first to offer a serum-based microdermabrasion device in 2003. Soon thereafter, both sides agreed not to sue each. However, no agreement was signed. Importantly, Aguila never stopped selling after the Plaintiff's cease & desist letter. In fact, both the www.diamondskin.com and www.hydradermabrasion.com websites were still operational. In fact, in May 2010, Aguila sold one of his Hydradermabrasion devices to a customer. See Exhibit C. This invoice was kept as ordinary business records and are true by Aguila on direct knowledge. I had direct personal knowledge over this invoice, and that I wrote it at that time.

180. Because Aguila did not stop selling his products, even after Plaintiffs' Cease & Desist letter in January 2010, many of the legal claims (such as FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION) made by the Plaintiffs are time-barred under laches and equitable estoppel because of Florida's four year statute of limitations (Fla Stat. § 95.36).

181. Importantly, after March 2010, both parties never communicated with one another until the last half of 2014.

FIFTH DEFENSE - UNENFORCEABILITY

182. The claims of the Plaintiffs' patents are unenforceable because inequitable conduct was committed by the inventor, Mr. Shaddock, during prosecution of the application for the Plaintiffs' patent by the Plaintiffs and possibly others who owed a duty of candor and good faith to the U.S. Patent and Trademark Office ("PTO") pursuant to 37 C.F.R. 1.56.

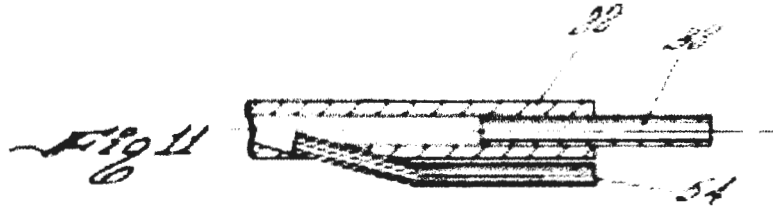
183. In particular, the Mr. Shaddock, who is a witness for the Plaintiffs, failed to disclose highly material prior art and were indisputably aware of. Their failure to disclose, detailed below, evidences intent to deceive the PTO. Plaintiffs claim that their '620 patent is being infringed by the Aguila's HydraDerm MD device. However, US Patent 6,241,739 ("the '739 patent) was filed with the USPTO on November 12, 1999, more than one month before Plaintiffs' '620 patent was filed on December 30th, 1999.

SIXTH DEFENSE – ANTICIPATION

184. Plaintiffs' patents are invalid because they are not novel because the exact claimed inventions were invented earlier by another person. For a patent claim to be invalid as anticipated, that prior art reference must disclose each element, either explicitly or inherently, as arranged in the claim. An inherent disclosure occurs where the element is not expressly disclosed but the practice of the prior art reference would inevitably include the element.

185. US Patent 6,241,739 (“the ‘739 patent”) was filed with the USPTO on November 12, 1999, more than one month before the ‘620 patent was filed on December 30th, 1999. The ‘739 patent clearly anticipates the ‘620 patent by mentioning the following:

“FIG. 36 shows a second tube 54 mounted on the treatment tip 22. The tube could be used to allow the metered use of chemicals to enhance the abrasion or supply of other liquids to reduce friction”.



Plaintiffs’ ‘620 Patent	Disclosure of U.S. Patent No. 6,241,739
<p>Preamble: A system for treating surface layers of a patient's skin, comprising:</p>	<p>The device for microdermabrasion comprises a hollow tube with and abrasive material permanent attached to a skin contacting end. The abrasive coated tip is moved over the skin surface While a vacuum is applied through the tube to the skin surface to remove cells abraded from the skin surface. The vacuum also causes the skin to be held in intimate contact With the abrasive tip during the treatment procedure.</p>
<p>(a) an instrument body with a distal working end for engaging a skin surface;</p>	<p>This is generally accomplished by the use of a tube having a treatment tip with an abrasive material permanently attached thereto. The term “tube” or “tubular” used herein refers to an elongated hollow structure of any cross section, which includes, but is not limited to, a round, oval, square or rectangle cross section.</p>

Plaintiffs' '620 Patent	Disclosure of U.S. Patent No. 6,241,739
(b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto;	The abrasive tip is rubbed over the skin surface being treated. The tube and related instrumentation also provides a vacuum collection and an optional filter system for collection of the skin cells removed by the procedure, the skin cells being aspirated through a hole or holes in the central portion of the abrasive tip.
(c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and	FIG. 36 shows a second tube mounted on the treatment tip. The tube could be used to allow the metered use of chemicals to enhance the abrasion or supply of other liquids to reduce friction.
(d) at least one outflow aperture in said skin interface in communication with a negative pressurization source.	A tubular device for performing micro-abrasion of a skin surface comprising a tubular device with a lumen there through, the tubular device having a first end with an abrasive surface and means on a second end thereof for attachment to a source of a vacuum to apply a negative pressure to a skin surface to be treated, said vacuum causing increased contact between the skin surface and the abrasive surface.

186. Additionally, US. Patent No. 4,378,804 (“the ‘804 patent”) anticipates the Plaintiffs’ patents by first claiming that liquid “is directed to a skin abrasion device which uses flowing water to rotate an abrasive brush and create a vacuum to remove loosened skin particles. The rotating brush is usually used in conjunction with a liquid detergent or medicinal compound applied to the skin surface being scrubbed”.

187. Also, US Patent No. 5,037,431 (“the ‘431 patent”) describes the use of a pressurized jet of a liquid, such as water or sterile saline, to fragment and remove diseased tissue without harming surrounding healthy tissue. This device operates in conjunction with vacuum aspiration to remove the liquid and fragmented tissue. Therefore, this prior art anticipates the Plaintiffs’ patents

SEVENTH DEFENSE – OBVIOUSNESS

188. The Plaintiffs’ patent claims are obvious because a person of skill in the art at the time of filing of the patent application would have considered the claimed invention to be obvious based on the state of the art at that time. The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.

EIGHTH DEFENSE – INEQUITABLE CONDUCT

189. The Plaintiffs, and Mr. Shadduck in particular, breached their duties of disclosure or candor to the USPTO when their patents were prosecuted. Because the patent application process is an *ex parte* process, applicants and their counsel must (1) cite all known material prior art to the patent examiner; (2) deal truthfully and with candor in making arguments or taking positions during prosecution.

190. The Plaintiffs and Mr. Shadduck had the intent to deceive the USPTO. Because they knew of the prior art reference; knew that it was material; and made a deliberate decision to withhold the information. If the USPTO had been aware of the undisclosed prior art, it would not have allowed the Plaintiffs’ claims.

NINTH DEFENSE – TRADEMARK

191. Defendant affirmatively alleges that Plaintiffs’ trademarks were wrongfully issued by the USPTO. Plaintiffs’ trademarks are all descriptive of goods to which they apply and are incapable of functioning as a trademark as contemplated by the Trademark laws, and, therefore, the Plaintiffs have no right to the exclusive appropriation and use of such alleged trademarks. Furthermore, the Plaintiffs’ trademark have not acquired secondary meaning in the marketplace

and are merely descriptive. The Plaintiffs' trademarks are all in common use and are public property, except for the trademarks that belong to Aguila. In addition, the Plaintiffs engaged in fraud to receive their HydraFacial MD and HydroPeel trademarks. Lastly, their Edge System trademark is abandoned because they have not offered a device for sale with the name of Edge Systems for more than three (3) years.

192. The Plaintiffs have not used reasonable diligence in seeking relief. Aguila's use of his devices' trademarks have been in open, continuous, and extensive use by Aguila for more than 19 years prior to the filing of this action, since 1996, to the knowledge of the Plaintiffs, and Plaintiffs have made no attempt to obtain judicial determination of its alleged rights in respect to the use by the Aguila of the marks now complained of. Aguila has relied on Plaintiffs' acquiescence and delay and has continued its use of its trademarks and has invested substantial sums in reliance on Plaintiffs' acquiescence and delay.

193. In addition, the Defendant was already using the Edge logo and "Edge Systems" before the Plaintiffs as shown in the Aguila's invoice from 1996 (a true and correct copy of Aguila's business invoice from 1996 is attached as **Exhibit D**). This invoice was kept as ordinary business records and are true by Aguila on direct knowledge. That I had direct personal knowledge over them, and that I wrote them.

194. The Plaintiffs' "Edge System" trademark has been abandoned for more than five-years because they have sold no devices with the name of "Edge System".

195. Many of the other "common-law" trademarks that Plaintiffs claim for themselves, such as "Activ-4", "Antiox+", "Antiox-6", "Beta-HD", "DermaBuilder", "GlySal", were actually already being used in commerce by Aguila in 2003, as is shown by one of Aguila's invoice from January 2004. See Exhibit E. This invoice was kept as an ordinary business record and are true by Aguila on direct knowledge. I had direct personal knowledge over this invoice, and that I wrote it at that time.

TENTH DEFENSE – TRADE DRESS IS FUNCTIONAL

15 U.S.C. § 3625

196. Trade dress is protected under Section 43(a) of the Lanham Act. *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28–29 (2001); *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 3697, 1202 (36th Cir. 2004). Section 43(a) provides, in pertinent part, that:

“[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof ... which ... is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person ... shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act”.

15 U.S.C. § 3625(a)(1); see also *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209–10 (2000) (Trade dress is encompassed by the terms “symbol” and “device” in Section 43(a)(1)).

197. Importantly, 15 U.S.C. § 3625(a)(3) states that “[i]n a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional”.

198. It is a fact that the Plaintiffs’ devices are not registered on the principal register. Furthermore, the Plaintiffs’ Hydrafacial device’s trade dress is merely functional. For example, many medical devices have wheels at the base, and a touchscreen monitor on the top of the device. The blue colored plastic cover allows the bottles to be protected from accidentally touching the bottles during use. Lastly, a dark colored wheel-base hides any scuff marks from people’s shoes brushing against the base and leaving scuff marks on the base. Therefore, the plaintiff’s burden to establish that its proposed trade dress is non-functional according to 15 U.S.C. § 3625(a) has not been met.

199. To ensure that trade dress does not cause confusion among products, Congress passed §43(a) of the Lanham Act (now known as 15 U.S.C. § 3625(a)) prohibiting the “false designation”

of a product's origin. 15 U.S.C. § 3625(a) requires proving three elements in a trade dress infringement claim: first, that a consumer is likely to confuse the imitated product's trade dress with that of its competitor; second, that the imitated product's trade dress has inherent distinctiveness or has acquired secondary meaning; and, third, that the imitated trade dress is nonfunctional. The Plaintiffs' non-registered trade dress clearly does not meet the requirements of 15 U.S.C. § 3625(a). Firstly, the Plaintiffs' trade dress has not acquired secondary meaning. Secondly, the Plaintiffs' trade dress is merely functional.

200. Like word trademarks, trade dress can also be registered. In the case of litigation, defending against registered trade dress is significantly more difficult than defending against unregistered trade dress. Registration under Section 2 of the Lanham Act (15 U.S.C. § 1052) permits the plaintiff to sue under Section 32 (15 U.S.C. § 3614), while plaintiffs owning non-registered trade dress (or trademarks) must rely upon 15 U.S.C. § 3625(a). More importantly, the plaintiff who owns a registration in its trade dress need not prove the validity of such trade dress, as registration provides *prima facie* validity. In this case, the Plaintiffs do not have the luxury of their trade dress having *prima facie* validity because their trade dress is not registered with the USPTO.

201. Plaintiffs' trade dress has not acquired secondary meaning, and can be reasonably described as being a "generic" self-standing medical machine. In addition, any consumer confusion between Aguila's devices and the Plaintiffs' devices are the result of the Plaintiffs copying Aguila's trade dress. Aguila was the first in 2003 to begin selling a stand-alone medical device with a touchscreen monitor on top of a wheeled-base, with a series of bottles in the middle. See Exhibit E.

202. The Plaintiffs' trade dress is neither inherently distinctive and has not acquired distinctiveness through secondary meaning. To have acquired secondary meaning in the minds of the public, the primary significance of a product feature or term must be to identify the source of the product rather than the product itself. In this case, there is simply no evidence that customers identify the HydraFacial's trade dress with the Plaintiffs. There are no precedents in case law that recognizes the protectability of any product design as a trademark for that product without proof

of distinctiveness; that is, distinctiveness as an indication of origin, not simply that it is a distinctive design in the sense of being unusual.

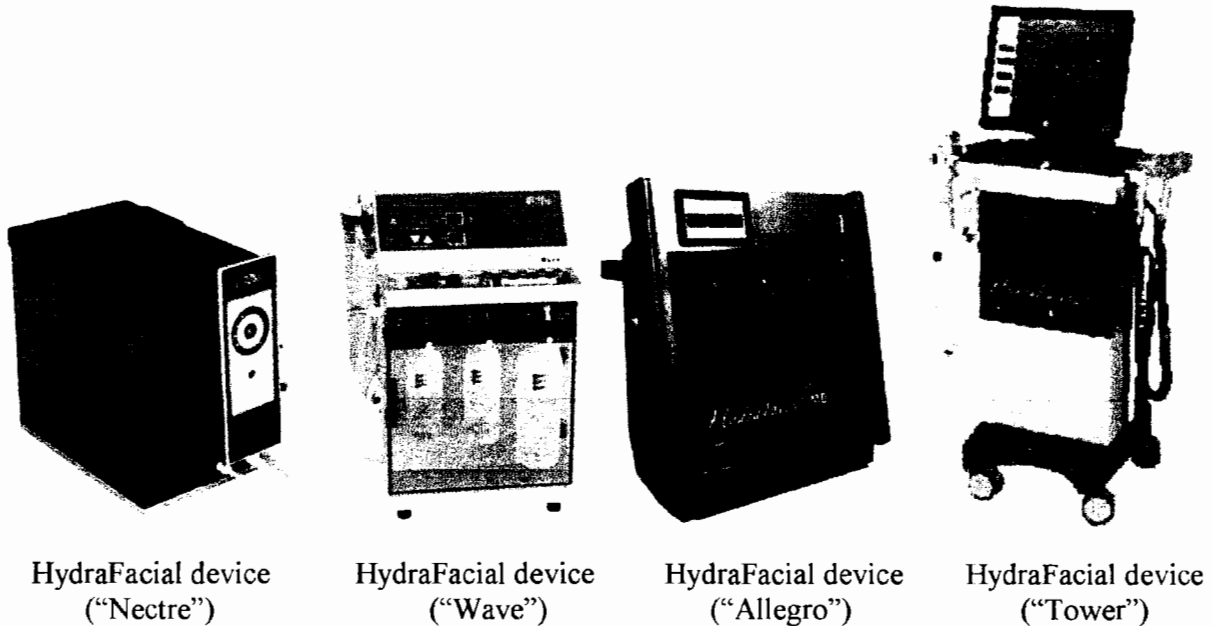
203. Importantly, the Plaintiffs are not accusing Aguila of copying any of their product packaging, but instead, the Plaintiffs accuse Aguila of copying their product configuration. In contrast, a fanciful or arbitrary trademark, having had no established meaning prior to its adoption as a trademark and serving no apparent purpose other than to identify (signify) the source, is legally presumed to achieve customer recognition and association immediately upon its adoption and use. In contrast, a product configuration cannot generally give rise to a similar presumption, as consumers usually appreciate a product's configuration for its contribution to the inherent appeal of the product, not (in the absence of secondary meaning) its signifying function. Thus, just as generic trademarks may be copied freely, functional trade dress may also be copied freely -- because both are important for preserving effective competition.

204. But the uniqueness of a product configuration is not enough by itself to make the configuration inherently distinctive. To be inherently distinctive, Plaintiffs' HydraFacial's product configuration must also be conceptually separable from the product, so that a consumer will recognize its symbolic (signifying) character. This requirement ensures that consumers unaware of any association of the product with a manufacturer (*i.e.*, where a configuration has no secondary meaning) will not become confused about whether a particular configuration may be trusted as an indicium of origin. To be conceptually separable, the product configuration must be recognizable by the consumer as an indicium of source, rather than a decorative symbol or pattern.

205. In fact, the Plaintiffs were the ones who copied Aguila's trade dress. Aguila first designed and placed into sale his HydraDerm device in 2003, which was copied by the Plaintiffs in 2005 with their HydraFacial device.

206. Lastly, Plaintiffs' HydraFacial device's trade dress comes in a number of configurations and forms. Misleadingly, the Plaintiffs only included one version of their HydraFacial device's trade dress (*i.e.*, the "Tower") in their complaint when, in fact, the HydraFacial has four different

trade dresses (e.g., the “Nectre”, the “Wave”, the “Allegro”, and the “Tower”). With the “Tower” design being the newest iteration of the Plaintiffs’ HydraFacial device.



ELEVENTH DEFENSE – UNCLEAN HANDS

207. In 2006, an employee of Edge Systems LLC named Marsha Colbert, used my credit card information to purchase several items for her own personal use. I have attached the police report (0603266) that I filed with the city of South Miami on this incident. Please also see Los Angeles Superior Court criminal case numbers LBNA070084-01 and XSONA070084-01. See Exhibit F.

208. In addition, Edge Systems LLC President, William Cohen verbally and physical threatened Aguila inside the courtroom on December 19, 2014, to pressure Aguila to agree and settle the case. See Exhibit G.

209. In addition, the Plaintiffs’ Hydrafacial device has more than 100 complaints, according to an FDA inspection report. Therefore, the Plaintiffs’ Hydrafacial device may be considered to be a danger to the public because of all the complaints. See Exhibit H. Importantly, one victim nearly lost their eye because of the Plaintiffs’ badly manufactured Hydrafacial device. See Exhibit I.

TWELFTH DEFENSE – TRADEMARK ABANDONMENT

210. Aguila is entitled to raise this affirmative defense because it is one of the enumerated defenses to an incontestable mark. See 15 U.S.C. § 3615(b)(2). Under the Lanham Act, a federally registered trademark is considered abandoned if its use has been discontinued with intent not to resume use. *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1545 (36th Cir.1984).

211. “The Edge System” trademark was abandoned because no products have been named “The Edge System” by the Plaintiffs for over three (3) years.

COUNTERCLAIM

1. Counter-Plaintiff, RAFAEL NEWTON AGUILA, (hereinafter, “Aguila”), sues Counter-Defendants, Edge Systems LLC (“Edge Systems LLC”) and Axia Medsciences (“Axia”), WESTON PRESIDIO SERVICE COMPANY, LLC (“Weston”), VALEANT PHARMACEUTICALS INTERNATIONAL, INC. (“Valeant”), THE RITZ-CARLTON HOTEL COMPANY, LLC, (“Ritz-Carlton”) and alleges:

2. Aguila is a resident of Germany.

3. On information and belief, Edge Systems LLC is a California LLC.

4. On information and belief Axia Medsciences is a Delaware LLC.

5. Weston Presidio Service Company, LLC is a Delaware-based company with headquarters in both California and Massachusetts. Weston is a “private equity fund” that focuses on portfolio management for pooled investment vehicles. Edge Systems LLC is a portfolio company of Weston Presidio. Weston Presidio provides growth capital to companies in the consumer, business services and industrial growth sectors. Since its founding in 1991, Weston Presidio has managed five investment funds aggregating over \$3.3 billion in total commitments. Weston Presidio’s website can be found at <http://www.westonpresidio.com>. Weston Presidio LLC purchased Edge Systems LLC on December 28, 2012. See Exhibit ___. Weston Presidio has written on its website, in reference to its Edge Systems portfolio company, that it “plans to invest heavily in the company's sales, marketing and training/education functions to help drive new unit sales and improve the productivity of the existing units. Weston Presidio sourced Edge through its proprietary network of operating partners and our investment is the first institutional capital into the business”. See Exhibit ___.

6. VALEANT PHARMACEUTICALS INTERNATIONAL, INC. (“Valeant”) is the owner of the “Obagi” trademark and “Obagi Skin Health Institute” located at 270 N. Canon Drive, Suite 100, Beverly Hills, CA 90210. The Obagi Skin Health Institute has been using the four Aguila trademarks with Aguila’s consent since at least 2012. Valeant is a corporation with its principal place of business at 400 Somerset Corporate Blvd., Bridgewater, NJ 08807

7. The Counter-Defendant The Ritz-Carlton Hotel Company, L.L.C. is a Delaware corporation with its principal place of business at 10400 Fernwood Road, Bethesda, Maryland 20817. Defendant Ritz-Carlton is registered to do business in the State of Florida under the name “The Ritz-Carlton Hotel Company, L.L.C.” and under the fictitious name of The Ritz-Carlton, South Beach.” Defendant Ritz-Carlton is, and was at all times relevant herein, the owner, operator, and controller of The Ritz-Carlton, South Beach, located at 1 Lincoln Road, Miami Beach, Florida 33139.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to: (1) 28 U.S.C. § 2201 and 2202, in that it is an action seeking a declaratory judgment of patent non-infringement and patent invalidity, under the United States Patent Act, 35 U.S.C. § 101 *et. seq.*; and (2) 28 U.S.C. §§ 1331 and 1338(a) in that this matter arises under an Act of Congress relating to patents.

9. This Court has personal jurisdiction over the Counter-Defendants because they (a) have a principal place of business located within this District; (b) have committed the acts complained of herein in this District; (c) transact business within this District; and/or (d) have conceded jurisdiction in a prior lawsuit filed in this District.

10. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and (c) in that a substantial part of the facts giving rise to the claims asserted herein occurred in this District.

11. Furthermore, in accordance with 28 U.S.C. § 1441, complete diversity exists between the Counter-Plaintiff and the Counter-Defendants, and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

12. Declaratory Judgment standing and jurisdiction under 28 U.S.C. § 2201 is valid because Edge Systems LLC and Axia Medsciences LLC have filed a lawsuit against Aguila for trademark infringement within this District.

BACKGROUND

13. Counter-Plaintiff Aguila owns the registered trademarks for **Activ-4** (USPTO Reg. No. 4,768,710), **Beta-HD** (USPTO Reg. No. 4,768,736), **Antiox-6** (USPTO Reg. No. 4,768,712), and **DermaBuilder** (USPTO Reg. No. 4,772,995) (“Aguila’s Registered Marks”).

14. Without Aguila’s permission, all of the Counter-Defendants have been using Aguila’s trademarks without his consent.

15. Aguila was born in Havana, Cuba and immigrated to the United States in 1980 with his parents. Currently, Aguila is a permanent resident of the Federal Republic of Germany and lives there with his wife and four-year old daughter.

16. Starting in 1996, while living in the United States, Aguila founded a number of small companies over the years that specialized in skin care treatments.

17. In 1996, Aguila began a company called Edge Systems (“original Edge Systems”), which had a distinctive logo that may be described as being a chevron-styled “E” formed by three horizontal triangles. See Exhibit D. Edge Systems’ main product was microdermabrasion machines used in skin care salons and spas.

18. However, one year later in 1997, a competitor in a California-based company began using the same name and logo as Aguila’s company (“copycat Edge Systems”). Aguila decided not to file a lawsuit against the doppelganger competitor because Aguila’s company lacked the funds to pay for an expensive trademark infringement lawsuit.

19. In 2003, Aguila began manufacturing devices that did not exfoliate like regular microdermabrasion machines, but instead were designed to simply apply liquids on to the skin surface using a smooth-tipped handpiece. See Exhibit E. Aguila began calling these machines with the term “hydradermabrasion” devices, so as to differentiate them from regular microdermabrasion machines. However, one year later in 2005, Aguila’s competitor, the California-based doppelganger of Aguila’s original Edge Systems, began selling a similar hydradermabrasion device with the name of “HydraFacial MD”. Copycat Edge Systems duplicated Aguila’s device’s trade dress, as well as many of the serum trade-names used by Aguila’s company. See Exhibit J, K, and L.

20. Nevertheless, both companies agreed to an unwritten “gentleman’s agreement” since 2005 to not sue one another, due to the problems that a large lawsuit would necessarily entail. Nevertheless, in 2006, the California-based Edge Systems accused Aguila of copying their

products in an e-mail. Aguila responded to this e-mail and the status quo was maintained. On January 2010, the California-based Edge Systems again accused Aguila of infringing their products in a Cease & Desist letter. Again, the status quo was maintained and no side agreed to make any changes. See Exhibit B. On December 18, 2012, the California-based Edge Systems LLC was purchased by Weston Presidio, a private equity firm, and their sales began to greatly increase thereafter.

21. The Counter-Defendant Axia owns the following U.S. patents: 6,299,620; 6,641,591; 7,678,120; 7,789,886; 8,066,716; and 8,337,513 (hereinafter referred to as the "Patents-in-suit").

22. Aguila has learned that the Defendants are all using his trademarked terms of Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,736), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995); without Aguila's permission.

23. Currently, Edge Systems LLC has a 98% monopoly in the "wet" microdermabrasion industry within both the United States and internationally.

24. Claim 1 of U.S. Patent 6,299,620 ("620 patent") states that it is:

A system for treating surface layers of a patient's skin, comprising: (a) an instrument body with a distal working end for engaging a skin surface; (b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto; (c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and (d) at least one outflow aperture in said skin interface in communication with a negative pressurization source.

25. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" as taught by the '620 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '620 patent. For example, Aguila's handpieces do not have any "abrasive fragment composition" that come into contact with the skin surface.

26. For example, Aguila would include a metal handpiece with an abrasive tip, but for only dry microdermabrasion, not to use with liquids. The metal handpieces did have diamond fragments on it to act as an abrasive. For the “wet” microdermabrasion, Aguila would only use the plastic handpiece with the special plastic tip and no diamond or abrasive material. Similar to the Hydrafacial MD. See Exhibit J, K, and L. As noted above, the limitation of Claim 1 of the '620 patent requiring “a skin interface portion of the working end comprising an abrasive fragment composition secured thereto” means that the actual handpiece used by the appellees is different from what is mentioned in Claim 1 of the '620 patent. Instead of having an “abrasive fragment”, the Plaintiffs’ handpiece has smooth plastic tips with small ridges. Therefore, neither the Plaintiffs’ nor the Aguila’s handpiece meet every limitation of Claim 1 of the '620 without making any kind of claim construction analysis; (2) construing appellees' handpiece to contain an “abrasive fragment” when it has no abrasive materials that make contact with the skin. According to the Merriam-Webster dictionary, the ordinary meaning of the term “**abrasive**” is defined as: “a substance (as emery or pumice) used for abrading, smoothing, or polishing”.

27. Claim 1 of U.S. Patent 8,337,513 (“’513 patent”) states that it is:

A system for treating skin, comprising: a handheld device comprising a main body and a working end along a distal end of the main body; an outer periphery extending along the distal end of the handheld device; at least one surface element extending distally from the working end of the handheld device, said at least one surface element being positioned within an interior area circumscribed by the outer periphery; wherein the at least one surface element comprises at least one sharp edge configured to abrade skin when said handheld device is moved relative to a skin surface; and at least one opening along the working end of the handheld device; wherein the at least one opening is configured to be placed in fluid communication with a vacuum source via a passage way, said passage way being configured to convey debris away from the working end when said vacuum source is activated; and wherein substantially an entire circumference of the outer periphery is configured to contact a skin surface during a treatment procedure.

28. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have “at least one surface element comprises at least one sharp edge configured to abrade skin” as taught by the ‘513 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘513 patent. For example, Aguila’s handpieces do not have any “sharp edges” that come into contact with the skin surface.

29. Claim 1 of U.S. Patent 7,678,120 (“’120 patent”) states that it is:

A method for abrading skin of a patient, comprising: (a) placing a working end of a skin treatment device against the skin of the patient; (b) drawing the skin against an abrading surface on a skin interface on the working end of the skin treatment device by applying suction to the skin through an aspiration opening in the working end, the abrading surface comprising apexes extending upwardly from the abrading surface and the apexes having sharp edges; (c) moving the treatment device across the skin while the sharp edge of the apexes remain stationary with respect to the working end of the skin treatment device; (d) abrading the skin drawn against the sharp edge of the apexes while continuously applying suction through the aspiration opening; and (e) removing skin debris through the aspiration opening in the working end of the skin treatment device.

30. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have a feature that comprises “moving the treatment device across the skin while the sharp edge of the apexes remain stationary with respect to the working end of the skin treatment device” as taught by the ‘120 patent. In fact, Aguila’s handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the ‘129 patent. For example, Aguila’s handpieces do not have any “sharp edges” that come into contact with the skin surface.

31. Claim 1 of U.S. Patent 8,066,716 (“’716 patent”) states that it is:

A system for treating a skin surface of a patient, comprising: an instrument body that comprises a main body and a working end, said working end comprising an outer periphery and a skin interface with an abrading structure, said abrading structure comprising a plurality of ridge elements, wherein said ridge elements are configured to abrade skin; and at least one aspiration opening at or near the skin interface coupled to a passageway that extends to a remote vacuum source configured to apply suction to the skin surface; wherein the outer periphery completely circumscribes the plurality of ridge elements and the at least one aspiration opening.

32. However, Aguila’s devices do not infringe on this claim because Aguila’s handpieces do not have a feature that comprises “an instrument body that comprises a main body and a working end, said working end comprising an outer periphery and a skin interface with an abrading structure, said abrading structure comprising a plurality of ridge elements, wherein said ridge elements are configured to abrade skin” as taught by the ‘716 patent. In fact, Aguila’s handpieces

do not have anything in common with any of the other subsections of found in Claim 1 of the '716 patent. For example, Aguila's handpieces do not have any "abrading structures" that come into contact with the skin surface.

33. Claim 1 of U.S. Patent 7,789,886 ("886 patent") states that it is:

A method for treating a skin surface of a patient, comprising: (a) applying against the skin surface of a patient an instrument body with a longitudinal axis and a distal working end, said distal working end comprising a working surface that carries an abrading structure comprising a plurality of sharp elements for engaging and abrading the skin surface together with a vacuum source coupled to at least one aperture about said working surface, the abrading structure and the at least one aperture positioned within a raised outer periphery that completely circumscribes the abrading structure and the at least one aperture; (b) translating the working surface over the skin surface to thereby abrade the skin surface; and (c) contemporaneously actuating the vacuum source to thereby cause suction engagement of the skin surface against the raised outer periphery and the plurality of sharp elements of the working surface and to aspirate skin debris through the at least one aperture.

34. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have a feature or method that comprises "applying against the skin surface of a patient an instrument body with a longitudinal axis and a distal working end, said distal working end comprising a working surface that carries an abrading structure comprising a plurality of sharp elements for engaging and abrading the skin surface together with a vacuum source coupled to at least one aperture about said working surface, the abrading structure and the at least one aperture positioned within a raised outer periphery that completely circumscribes the abrading structure and the at least one aperture" as taught by the '886 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '886 patent. For example, Aguila's handpieces do not have any "sharp elements" that come into contact with the skin surface.

35. Claim 1 of U.S. Patent 6,641,591 ("591 patent") states that it is:

A system for treating the skin surface of a patient, comprising: (a) an instrument body with a distal working end that defines a skin interface portion for contacting the skin; (b) a first aperture arrangement in said skin interface consisting of at least one port in communication with a treatment media source; (c) a second aperture arrangement in said skin

interface consisting of at least one port in communication with a vacuum source for removing treatment media and removed tissue from the skin interface; and (d) wherein the skin interface comprises an abrading structure with substantially sharp edges for abrading tissue.

36. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have a feature or method that comprises "wherein the skin interface comprises an abrading structure with substantially sharp edges for abrading tissue" as taught by the '591 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '591 patent. For example, Aguila's handpieces do not have any "sharp edges" that come into contact with the skin surface.

COUNT I - DECLARATION OF NON-INFRINGEMENT

Against Edge Systems, LLC and Axia Medsciences, LLC

37. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims as if fully set forth herein.

38. The Declaratory Judgment Act authorizes a federal court to "declare the rights and other legal relations of any interested party" in a "case of actual controversy". *See* 28 U.S.C. §2201. Without waiving the right to raise additional bases for alleging non-infringement, Aguila has not and does not infringe any claim of any of the Counter-Defendants' Patents for at least the reason that one or more claim limitations are not, and have not been, present in any of Aguila's accused devices. Aguila does not infringe, and has not infringed, literally or under the doctrine of equivalents; Aguila does not infringe, and has not infringed, directly, indirectly, jointly, or contributorily; Aguila does not induce, and has not induced, infringement.

U.S. PATENT 6,299,620

39. Claim 1 of U.S. Patent 6,299,620 ("620 patent") states that it is:

A system for treating surface layers of a patient's skin, comprising: (a) an instrument body with a distal working end for engaging a skin

surface; (b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto; (c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and (d) at least one outflow aperture in said skin interface in communication with a negative pressurization source.

40. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" as taught by the '620 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '620 patent. For example, Aguila's handpieces do not have any "abrasive fragment composition" that come into contact with the skin surface.

41. For example, Aguila would include a metal handpiece with an abrasive tip, but for only dry microdermabrasion, not to use with liquids. The metal handpieces did have diamond fragments on it to act as an abrasive. For the "wet" microdermabrasion, Aguila would only use the plastic handpiece with the special plastic tip and no diamond or abrasive material. Similar to the Hydrafacial MD. See Exhibit J, K, and L. As noted above, the limitation of Claim 1 of the '620 patent requiring "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" means that the actual handpiece used by the appellees is different from what is mentioned in Claim 1 of the '620 patent. Instead of having an "abrasive fragment", the Plaintiffs' handpiece has smooth plastic tips with small ridges. Therefore, neither the Plaintiffs' nor the Aguila's handpiece meet every limitation of Claim 1 of the '620 without making any kind of claim construction analysis; (2) construing appellees' handpiece to contain an "abrasive fragment" when it has no abrasive materials that make contact with the skin.



Aguila's handpiece

Counter-Defendant Edge Systems LLC's handpiece

42. According to the Merriam-Webster dictionary, the ordinary meaning of the term "abrasive" is defined as: "a substance (as emery or pumice) used for abrading, smoothing, or polishing".

U.S. PATENT 8,337,513

43. Claim 1 of U.S. Patent 8,337,513 ("513 patent") states that it is:

A system for treating skin, comprising: a handheld device comprising a main body and a working end along a distal end of the main body; an outer periphery extending along the distal end of the handheld device; at least one surface element extending distally from the working end of the handheld device, said at least one surface element being positioned within an interior area circumscribed by the outer periphery; wherein the at least one surface element comprises at least one sharp edge configured to abrade skin when said handheld device is moved relative to a skin surface; and at least one opening along the working end of the handheld device; wherein the at least one opening is configured to be placed in fluid communication with a vacuum source via a passage way, said passage way being configured to convey debris away from the working end when said vacuum source is activated; and wherein substantially an entire circumference of the outer periphery is configured to contact a skin surface during a treatment procedure.

44. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have "at least one surface element comprises at least one sharp edge configured to abrade skin" as taught by the '513 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '513 patent. For example, Aguila's handpieces do not have any "sharp edges" that come into contact with the skin surface.

U.S. PATENT 7,678,120

45. Claim 1 of U.S. Patent 7,678,120 ("120 patent") states that it is:

A method for abrading skin of a patient, comprising: (a) placing a working end of a skin treatment device against the skin of the patient; (b) drawing the skin against an abrading surface on a skin interface on the working end of the skin treatment device

by applying suction to the skin through an aspiration opening in the working end, the abrading surface comprising apexes extending upwardly from the abrading surface and the apexes having sharp edges; (c) moving the treatment device across the skin while the sharp edge of the apexes remain stationary with respect to the working end of the skin treatment device; (d) abrading the skin drawn against the sharp edge of the apexes while continuously applying suction through the aspiration opening; and (e) removing skin debris through the aspiration opening in the working end of the skin treatment device.

46. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have a feature that comprises "moving the treatment device across the skin while the sharp edge of the apexes remain stationary with respect to the working end of the skin treatment device" as taught by the '120 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '129 patent. For example, Aguila's handpieces do not have any "sharp edges" that come into contact with the skin surface.

U.S. PATENT 8,066,716

47. Claim 1 of U.S. Patent 8,066,716 ("716 patent") states that it is:

A system for treating a skin surface of a patient, comprising: an instrument body that comprises a main body and a working end, said working end comprising an outer periphery and a skin interface with an abrading structure, said abrading structure comprising a plurality of ridge elements, wherein said ridge elements are configured to abrade skin; and at least one aspiration opening at or near the skin interface coupled to a passageway that extends to a remote vacuum source configured to apply suction to the skin surface; wherein the outer periphery completely circumscribes the plurality of ridge elements and the at least one aspiration opening.

48. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have a feature that comprises "an instrument body that comprises a main body and a working end, said working end comprising an outer periphery and a skin interface with an abrading structure, said abrading structure comprising a plurality of ridge elements, wherein said ridge elements are configured to abrade skin" as taught by the '716 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '716

patent. For example, Aguila's handpieces do not have any "abrading structures" that come into contact with the skin surface.

U.S. PATENT 7,789,886

49. Claim 1 of U.S. Patent 7,789,886 ("886 patent") states that it is:

A method for treating a skin surface of a patient, comprising: (a) applying against the skin surface of a patient an instrument body with a longitudinal axis and a distal working end, said distal working end comprising a working surface that carries an abrading structure comprising a plurality of sharp elements for engaging and abrading the skin surface together with a vacuum source coupled to at least one aperture about said working surface, the abrading structure and the at least one aperture positioned within a raised outer periphery that completely circumscribes the abrading structure and the at least one aperture; (b) translating the working surface over the skin surface to thereby abrade the skin surface; and (c) contemporaneously actuating the vacuum source to thereby cause suction engagement of the skin surface against the raised outer periphery and the plurality of sharp elements of the working surface and to aspirate skin debris through the at least one aperture.

50. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have a feature or method that comprises "applying against the skin surface of a patient an instrument body with a longitudinal axis and a distal working end, said distal working end comprising a working surface that carries an abrading structure comprising a plurality of sharp elements for engaging and abrading the skin surface together with a vacuum source coupled to at least one aperture about said working surface, the abrading structure and the at least one aperture positioned within a raised outer periphery that completely circumscribes the abrading structure and the at least one aperture" as taught by the '886 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '886 patent. For example, Aguila's handpieces do not have any "sharp elements" that come into contact with the skin surface.

U.S. PATENT 6,641,591

51. Claim 1 of U.S. Patent 6,641,591 ("591 patent") states that it is:

A system for treating the skin surface of a patient, comprising: (a) an instrument body with a distal working end that defines a skin interface portion for contacting the skin; (b) a first aperture arrangement in said skin interface consisting of at least one port in communication with a treatment media source; (c) a second aperture arrangement in said skin interface consisting of at least one port in communication with a vacuum source for removing treatment media and removed tissue from the skin interface; and (d) wherein the skin interface comprises an abrading structure with substantially sharp edges for abrading tissue.

52. However, Aguila's devices do not infringe on this claim because Aguila's handpieces do not have a feature or method that comprises "wherein the skin interface comprises an abrading structure with substantially sharp edges for abrading tissue" as taught by the '591 patent. In fact, Aguila's handpieces do not have anything in common with any of the other subsections of found in Claim 1 of the '591 patent. For example, Aguila's handpieces do not have any "sharp edges" that come into contact with the skin surface.

COUNT II - DECLARATION OF INVALIDITY

Against Edge Systems, LLC and Axia Medsciences, LLC

53. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

54. The Declaratory Judgment Act authorizes a federal court to "declare the rights and other legal relations of any interested party" in a "case of actual controversy". *See* 28 U.S.C. §2201. The claims of the Counter-Defendants' Patents are invalid because they do not comply with the statutory requirements of patentability enumerated in the Patent Act of the United States, 35 U.S.C. §101 et seq. For example, and without waiving the right to raise additional bases for alleging invalidity, the claims of the Counter-Defendants' Patents are invalid under 35 U.S.C. §§ 102 and 103 in view of prior art references including, but not limited to, U.S. Patent Nos. 6,241,739; 4,378,804; and 5,037,431.

55. The claims of the Plaintiffs' Patent are also invalid under 35 U.S.C. § 362 for reciting claim limitations not supported in the written description and/or which lack enablement and indefiniteness.

COUNT III - DECLARATION OF UNENFORCEABILITY

Against Edge Systems, LLC and Axia Medsciences, LLC

56. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

57. The Declaratory Judgment Act authorizes a federal court to "declare the rights and other legal relations of any interested party" in a "case of actual controversy". *See* 28 U.S.C. §2201. The claims of the Counter-Defendants' Patents are unenforceable because inequitable conduct was committed during prosecution of the application for the Counter-Defendants' patents by named inventors John H. Shadduck, James Baker, Roger Ignon, and possibly others who owed a duty of candor and good faith to the U.S. Patent and Trademark Office ("PTO") pursuant to 37 C.F.R. 1.56.

58. In particular, John H. Shadduck, James Baker, and Roger Ignon failed to disclose highly material prior art that they authored themselves, and thus, were indisputably aware of. Their failure to disclose, detailed below, evidences intent to deceive the PTO.

59. Importantly, the Counter-Defendants' claim that they have priority over the '739 when that is not true. The named inventors and the Counter-Defendants' acted with the intent to deceive the PTO with their claim of priority over the '739 patent. Especially since the '739 patent was highly material to the patentability of all of the Counter-Defendants' Patents. The named inventors, the Counter-Defendants', and potentially others involved in the prosecution of the all of the Counter-Defendants' Patents -- deliberately withheld material information from the PTO in order to obtain a patent that they knew could not rightfully issue.

COUNT IV – ANTITRUST

(15 U.S.C. §§ 1, 2)
Against Edge Systems LLC

60. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

61. Edge Systems LLC controls a market share of more than 98% of the “wet” microdermabrasion market. Even though none of their patents prevent competitors from entering the “wet” microdermabrasion market.

62. Another source to inform the meaning of “competitive injury” is the term's use in analogous areas of law. Although the phrase is not identical, “injury to competition” is a common concept in antitrust law. See, e.g., *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 488 (8th Cir.1985); *Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 498 (10th Cir.1983). In that context, preventing market entry unquestionably qualifies as “injury to competition.” For example, the Supreme Court has held that injury to competition includes “creat[ing] barriers to entry of new competitors in the market.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), abrogated in part on other grounds by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). In addition, the Ninth Circuit has stated that “[v]ertical agreements that foreclose competitors from entering or competing in a market can injure competition by reducing the competitive threat those competitors would pose.” *Brantley v. NBC Universal, Inc.*, 675 F.3d 3692, 3698 (9th Cir.2012). Similarly, on another occasion the Ninth Circuit has reasoned that “[t]ying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.” *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912 (9th Cir.2008).

63. Under the federal antitrust laws, monopoly claims are analyzed under Section 2 of the Sherman Act. 15 U.S.C. § 2. The elements of a Section 2 monopoly violation include: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or

maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

64. Anticompetitive, price-fixing agreements between the Counter-Defendants and several other companies, have led to the continued high price of the Counter-Defendants' HydraFacial MD device. These agreements have hurt competition in the hydradermabrasion market.

65. Evidence shows that the Counter-Defendants are directly attempting to misuse their patents and trademarks for anticompetitive purposes and to unlawfully eliminate competition.

66. To establish monopolization or attempt to monopolize under § 2 of the Sherman Act, it is necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. In this case, the Counter-Defendants have created a monopoly over "Hydradermabrasion" treatments – which do not use an abrasive on the tip of the handpiece as required by the '620 patent. Counter-Defendants' patents and trademarks resulted in excluding Aguila and others from the hydradermabrasion market.

67. This current suit is just one of a series of lawsuits that the Counter-Defendants have initiated in their desire for monopolization of the marketplace. The Counter-Defendants' legal filings were made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment. For example, the following lawsuits were made by the Counter-Defendants in the Central District of California:

- a. 36-CV-04993 Edge Systems Corporation, et al v. Bio-Therapeutic Inc.;
- b. 14-CV-04428 Edge Systems LLC, et al v. Image MicroDerm, Inc.;
- c. 14-CV-04663 Edge Systems LLC, et al v. Naumkeag Spa & Medical Supplies, LLC.

68. The Counter-Defendants have created a monopoly in the hydradermabrasion industry by pressuring competitors to leave the market, or buying competitors off. For example, the profit-margins of the Counter-Defendants have not fallen in more than five (5) years. In a normal competitive market, their profit margins would tend to lower over time, and new competitors entered that market or industry. That is not the case in the hydradermabrasion marketplace. Thanks

to the Counter-Defendants' monopoly, they have gained excessive monopoly profits and damaged competition in the hydradermabrasion industry.

COUNT V -- FALSE PATENT MARKING

(35 U.S.C. § 292)

Against Edge Systems, LLC and Axia Medsciences, LLC

69. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

70. The false-marking statute, 35 U.S.C. § 292, makes unlawful various acts of falsely marking products with patent numbers. Under § 292(a), a person who violates the statute “[s]hall be fined not more than \$500 for every such offense.” Section 292(a) prohibits, in part, “mark[ing] upon ... in connection with any unpatented article, the word ‘patent’ or any word or number importing that the same is patented, for the purpose of deceiving the public.” 35 U.S.C. § 292(a). Section 292(b) provides a private right of action to enforce § 292(a) to any “person who has suffered a competitive injury as a result of a violation of this section.” 35 U.S.C. § 292(b).

Section 292(b)'s “competitive injury” standing requirement was added in 2036 by the America Invents Act (“AIA”). The parties do not dispute that Aguila was selling products (*i.e.* HydraDerm MD and the Hydradermabrasion MD) in direct competition with both Edge Systems LLC and Axia at the time that this suit was filed. Therefore, it is clear that Aguila suffered a “competitive injury” because of Edge Systems LLC and Axia’s false marking on both the HydraFacial handpiece and device.

71. False use of patent marking is statutorily prohibited under 35 U.S.C. § 292 as defined by whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article the word “patent” or any word or number importing the same is patented, for the purpose of deceiving the public.

72. The Counter-Defendants falsely marked articles as patented when they are unpatented, with the intent to deceive the public. In this case, there are fact issues as to whether the marked

products were, in fact, covered by claims of the patent. The articles that the Counter-Defendants marked with a patent are not covered by any claims of the patents listed on their articles. Those articles may be considered unpatented under Section 292 and thus exposed to a Patent False Marking claim. For example, their Hydrafacial handpiece does not have any kind of abrasive on it, which is a requirement of Claim 1 of their '620 patent. Nevertheless, the Counter-Defendants write the mark of the '620 patent on all of their Hydrafacial handpieces, as well as on the Hydrafacial device itself.

73. Aguila and the Counter-Defendants are competitors. Aguila suffered a competitive injury from Counter-Defendants' false marking, which chilled competition and confused potential buyers into fearing purchasing Aguila's products because Aguila's products have no patent markings. Counter-Defendants repeatedly told potential customers that their articles are the only ones that have a patent and they should avoid purchasing Aguila's product because the potential customer would be committing indirect infringement against Counter-Defendants' patents. *See Brooks v. Dunlop Manufacturing, Inc.*, 702 F.3d 624 (Fed. Cir. 2012).

**COUNT VI – DECLARATORY JUDGMENT FOR CANCELATION OF U.S.
TRADEMARK REGISTRATION NO. 3,500,086**

(15 U.S.C. § 1064)

Against Counter-Defendant Edge Systems LLC

74. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

75. Counter-Defendant Edge Systems LLC is the owner of U.S. Trademark Registration No. 3,500,086, which was registered with the U.S.P.T.O on September 9, 2008 on the Principal Register for the mark HYDROPEEL.

76. In making the registration, Edge Systems LLC knowingly caused its agent and attorneys to falsely assert that the term HydroPeel "cannot immediately convey any knowledge of Applicant's medical apparatus and instruments because a multi-step reasoning process must be employed by a would-be consumer to arrive at any conclusion about the goods". Edge Systems

LLC knew that this statement was false. Importantly, the false statement allowed for the USPTO to grant Edge Systems LLC their trademark.

77. The trademarked term “Hydropeel” clearly refers to a hydrating peeling, and should be considered to be generic in nature. The term “Hydropeel” is described by the Plaintiffs as referring to a “medical apparatus and instruments for resurfacing and nourishing tissue”. On September 07, 2005, the examining attorney wrote that the Hydropeel “*mark is merely descriptive as applied to the goods because it refers to a process carried out using the applicant’s goods and/or the function of the applicant’s goods*”. On March 2006, the Plaintiffs responded with the following argument:

“The applied-for mark HYDROPEEL cannot immediately convey any knowledge of Applicant’s medical apparatus and instruments because a multi-step reasoning process must be employed by a would-be consumer to arrive at any conclusion about the goods. That is, a consumer must make a mental leap if he is to make a connection between the mark HYDROPEEL and Applicant’s goods. That Applicant’s mark HYDROPEEL is suggestive is buttressed by the fact that “hydropeel” has no definition according to Outlook.com, a website that searches numerous online dictionaries at once. See the attached website printout from Outlook.com.

The literal meaning of Applicant’s mark HYDROPEEL **would be the peeling of either hydrogen or water**, and Applicant’s medical apparatus and instruments do not perform this apparently-impossible task”.

78. Regardless of the Plaintiffs’ argument that the term “Hydropeel” merely refers to “*the peeling of either hydrogen or water*”, any reasonable person can surmise that term “Hydropeel” refers to a “hydrating peel”, which is what their Hydrafacial device is designed to perform. This Court should therefore declare this trademarked term to be generic. In addition, the Plaintiffs’ committed fraud against the USPTO in order to receive this trademark.

79. Because Edge System LLC’s registration was obtained fraudulently, the registration of the mark must be canceled pursuant to 15 U.S.C. § 1064.

80. Additionally, Aguila believes it has been damaged by the challenged trademarks registrations because Edge Systems LLC is filing a lawsuit against Aguila for supposedly infringing this trademark.

81. *In re Bose Corp.*, 580 F.3d 1240 (Fed. Cir. 2009) established that to demonstrate fraud, the petitioner had to prove:

- a. The applicant/registrant made a false representation to the USPTO;
- b. The false representation is material to the registrability of the mark;
- c. The applicant/registrant had knowledge of the falsity of the representation; and
- d. The applicant/registrant made the representation with intent to deceive the USPTO.

**COUNT VII - DECLARATORY JUDGMENT FOR CANCELANON OF U.S.
TRADEMARK REGISTRATION NO. 4,364,466**

(15 U.S.C. §§ 1064)

Against Counter-Defendant Edge Systems LLC

Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

82. Edge Systems LLC is the owner of U.S. Trademark Registration No. 4,364,466, which was registered with the U.S.P.T.O on March 20, 2012 on the Principal Register for the mark VORTEX-FUSION.

83. In making the registration, Edge Systems LLC knowingly caused its agent and attorneys to falsely assert that the term Vortex-Fusion “has no meaning or significance in relation to the goods other than trademark significance”. Edge Systems LLC knew that this statement was false. In their advertisements, Edge Systems LLC was claiming that their HydraFacial handpiece exfoliated the skin by way of the vortex created by their handpiece during contact with the patient’s skin. Importantly, the false statement allowed for the USPTO to grant Edge Systems LLC their trademark.

84. The trademarked term “Vortex-Fusion” clearly refers to a vortex, and should be considered to be generic in nature, or at least descriptive in nature. The term “Vortex-Fusion” is described by the Plaintiffs as referring to a “microdermabrasion apparatus”. It was only recently registered on March 20th, 2012 so it is not considered “incontestable”. On November 3rd, 2036, the examining attorney wrote that the “*The applicant asserts the mark has no meaning or significance in relation to the goods other than trademark significance*”. Notwithstanding the examining attorney’s amendment, this Court should declare that this trademark is merely descriptive since it literally describes the action performed by the Hydrafacial or creating a “vortex” in their handpiece to increase their ability to “penetrate” into the epidermis.

85. Also, the Plaintiffs engaged in fraud on the USPTO to receive this trademark by making false claims to the USPTO reviewer that the term “Vortex” does not refer to a tornado-like effect of their handpiece. Therefore, this trademark term is merely descriptive and not arbitrary, as the Counter-Defendants led the reviewer to believe.

86. Because Edge System LLC’s registration was obtained fraudulently, the registration of the mark must be canceled pursuant to 15 U.S.C. § 1064.

87. Lastly, the 4,364,466 Registration should be cancelled pursuant to 15 U.S.C. Sections 1064 and 3619, because the term “Vortex-Fusion” is generic, and of common ordinary usage, in connection with goods, services, products, and derivatives thereof.

88. Additionally, Aguila believes it has been damaged by the challenged trademarks registrations because Edge Systems LLC is filing a lawsuit against Aguila for supposedly infringing this trademark.

**COUNT VIII - DECLARATORY JUDGMENT FOR CANCELATION OF U.S.
TRADEMARK REGISTRATION NO. 2,992,734**

(15 U.S.C. §§ 1064)
Against Edge Systems LLC

89. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

90. As was previously discussed, the Plaintiffs have not used the trademarked term “The Edge System” to describe any of their products for more than three (3) years. If the mark has not been used in U.S. commerce for a three-year consecutive period, then that is *prima facie* evidence that the mark has been abandoned in the United States. Although for the purposes of this lawsuit, the Counter-Defendants have begun referring to the HydraFacial MD device as “The Edge Machine”, even this is misleading because the Plaintiffs have never referred to the Hydrafacial device as “The Edge Machine” in any of their advertisements or manuals. Nevertheless, the fact remains that the Counter-Defendants do not sell any devices called “The Edge System”. This trademark should therefore be declared by this Court to be abandoned.

91. Under the Lanham Act, a federally registered trademark is considered abandoned if its use has been discontinued with intent not to resume use. *Citibank, N.A. v. Citibanc Grp.*, 724 F.2d 1540, 1545 (36th Cir.1984).

92. Because Edge System LLC’s registration was obtained fraudulently and they have not used the mark for over three years, the registration of the mark must be canceled pursuant to 15 U.S.C. § 1064.

93. Additionally, Aguila believes it has been damaged by the challenged trademarks registrations because Edge Systems LLC is filing a lawsuit against Aguila for supposedly infringing this trademark.

**COUNT IX - DECLARATION THAT THE COUNTER-DEFENDANTS’ “COMMON
LAW” TRADEMARK REGISTRATIONS ARE INVALID**

(28 U.S.C. § 2201)

Against Counter-Defendant Edge Systems LLC

94. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

95. Declaratory judgment actions are common in matters of trademark infringement. Frequently, these actions are brought by a party seeking a declaration that it is not infringing upon a trademark. *See* 10B Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* §2761 (3d ed. 1998).

96. “Activ-4”, “Antiox-plus”, “Antiox-6”, “Beta-HD”, “DermaBuilder”, “GlySal” were all developed and put into commerce by Aguila in 2003, before the Counter-Defendants. See Exhibit E. “Edge Systems” and the “Chevron “E” Logo” were developed and put into commerce by Aguila in 1996, before the Counter-Defendants. See Exhibit E. Therefore, the Counter-Defendants should be enjoined from using Aguila’s any of the previously mentioned trademarks because they were all previously placed into commerce by Aguila. Aguila therefore has priority over the Counter-Defendants “common law” trademarks previously mentioned in this court.

97. However, Edge Systems LLC has claimed to have ownership rights over these trademarks even though they never registered these trademarks with the USPTO. 16. In fact, Counter-Plaintiff Aguila owns the registered trademarks for Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,736), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995).

98. Additionally, Aguila believes it has been damaged by the challenged unregistered trademarks because Edge Systems LLC is filing a lawsuit against Aguila for supposedly infringing these trademark.

COUNT X - DECLARATORY JUDGMENT FOR CANCELATION OF U.S.

TRADEMARK REGISTRATION NO. 3,341,027

(15 U.S.C. § 1064)

Against Counter-Defendant Edge Systems LLC

99. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

100. Courts have applied tests that, although consistent with that in Bose, nevertheless differ from it in how they are framed. For example, in reversing a district court's application of a wilful blindness standard for fraud, the Eleventh Circuit has held that:

“An applicant commits fraud when he knowingly makes false, material representations of fact in connection with an application for a registered mark. Fraud further requires a purpose or intent to deceive the PTO in the application for the mark. The party seeking cancellation on the basis of fraud must prove its claim by clear and convincing evidence. This is necessarily a heavy burden, and any doubt must be resolved against the charging party”. *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of Saint John of Jerusalem, Knights of Malta, the Ecumenical Order*, 702 F.3d 1279, 1289 (36th Cir. 2012).

101. Similarly, the Ninth Circuit has applied a five-part test, which, despite not requiring clear and convincing evidence of fraud, otherwise may be as difficult to satisfy as that in Bose:

“To succeed on a claim for cancellation based on fraud, [the challenger] must adduce evidence of (1) a false representation regarding a material fact; (2) the registrant's knowledge or belief that the representation is false; (3) the registrant's intent to induce reliance upon the misrepresentation; (4) actual, reasonable reliance on the misrepresentation; and (5) damages proximately caused by that reliance”. *Hokto Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d 1085, 1097 (9th Cir. 2013).

102. The Counter-Defendant Edge Systems LLC misled and lied to the USPTO during their trademark application for the term “Hydrafacial MD” in 2005. See Exhibit M. On February 9, 2005, the Plaintiffs applied for a trademark for the term “Hydrafacial MD”. The trademark was subsequently registered on November 20, 2007. However, on September 12, 2005, the examining attorney for the USPTO sent the Plaintiffs a letter asking them to place a disclaimer for the term “Hydrafacial” since “it describes a feature of the goods, namely, that they are used to provide hydra facials”. Exhibit N. On March 13, 2006, the Plaintiffs responded to the USPTO's office action by arguing the following points:

“The term HYDRAFACIAL cannot immediately convey any knowledge of Applicant’s medical apparatus and instruments because a multi-step reasoning process must be employed by a consumers and potential consumers to arrive at any conclusion about the goods. That is, a consumer must make a substantial mental leap if he is to make any connection between the term HYDRAFACIAL and Applicant’s medical goods”.

“On the other hand, the terms “Hydra,” “hydra,” and “facial” do have recognized definitions. The definition of “Hydra” is:

1. Greek Mythology - The many-headed monster that was slain by Hercules.
2. A constellation in the equatorial region of the southern sky near Cancer, Libra, and Centaurus. Also called Snake.
3. A persistent or multifaceted problem that cannot be eradicated by a single effort.

The definition of “hydra” is “[a]ny of several small freshwater polyps of the genus Hydra and related genera, having a naked cylindrical body and an oral opening surrounded by tentacles.” The definition of “facial” is “[a] treatment for the face, usually consisting of a massage and the application of cosmetic creams.” See the attached dictionary definitions from The American Heritage® Dictionary of the English Language (4th ed. 2000).

Thus, the term HYDRAFACIAL has numerous literal meanings – e.g., **a facial for a many-headed monster from Greek mythology, a facial for a constellation**, etc. – but none of these literal definitions has any relevance to Applicant’s medical apparatus and instruments, and the Board has made it clear that the literal meaning of a mark must be considered in determining mere descriptiveness”. Exhibit O.

103. Notwithstanding the Plaintiffs’ claim that the term “HydraFacial” is not a generic term used to describe a “hydra facial” treatment, but instead means “a facial for a many-headed monster from Greek mythology”. On the Plaintiffs’ website, www.hydrfacial.com/faq.htm, the Plaintiffs drop all pretense that the term “Hydrfacial” is merely suggestive by stating the following:

“What is HydraFacial™?

The HydraFacial™ treatment is a new breakthrough in aesthetic technology. **It takes its name from the root word Hydrate; "to cause to take up moisture"**. This ability to moisturize the skin

separates the HydraFacial™ from all other skin resurfacing procedures. The HydraFacial™ treatment removes dead skin cells and extracts impurities while simultaneously bathing the new skin with cleansing, hydrating and moisturizing serums.

Why is HydraFacial™ good for my skin?

Hydration is the foundation of healthy, radiant skin. Irritation of the skin has been proven to increase signs of aging. **The HydraFacial™ is a hydrating and non-irritating treatment.**

Am I a candidate for this treatment?

The HydraFacial™ treatment is designed for all skin types.

Even the most sensitive skin easily tolerates the HydraFacial™ treatment. Your physician or skincare professional may choose specific treatment serums and/or customize the treatment for your unique skin conditions and needs. Consult your physician or skincare professional for a skin evaluation and sensitivity test.

104. “When the relevant public ceases to identify a trademark with a particular source of a product or service but instead identifies the mark with a class of products or services regardless of source, that mark has become generic and is lost as an enforceable trademark”. It is only common sense to see that the term “HydraFacial” refers to a facial that includes water or liquids for the purposes of performing a hydrating facial. Just like there are other types of facials such as “mud facials”, “caviar facials”, “chocolate facials”, or “European facials”. No reasonable person would think of allowing a term such as “mud facial” to be trademarked by a company.

105. Therefore, this is sufficient evidence to show that the Plaintiffs intentionally, willfully, and with bad faith, deceived the USPTO in receive the approval for the Hydrafacial trademark. In order to prove fraud on the PTO, the party seeking cancellation must show: “a false representation regarding a material fact, the registrant's knowledge or belief that the representation is false, the intent to induce reliance upon the misrepresentation and reasonable reliance thereon, and damages proximately resulting from the reliance”. “Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application.” *See Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986).

106. The Federal Circuit holds that a trademark is obtained fraudulently under the Lanham Act “only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO.” Subjective intent to deceive, however difficult it may be to prove, is an indispensable element in the analysis. Of course, “because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement.” *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008).

107. In *Torres*, the court cited various precedents—some persuasive, others binding on the court—and reemphasized several times that (1) fraud in trademark cases “occurs when an applicant knowingly makes false, material representations,” (2) the Lanham Act imposes on an applicant the obligation not to “make knowingly inaccurate or knowingly misleading statements,” and (3) a registrant must also “refrain from knowingly making false, material statements.” *Id.* at 48.

108. Because Edge System LLC’s registration was obtained fraudulently, the registration of the mark must be canceled pursuant to 15 U.S.C. § 1064.

109. Additionally, Aguila believes it has been damaged by the challenged trademarks registrations because Edge Systems LLC is filing a lawsuit against Aguila for supposedly infringing this trademark.

**COUNT XI - ACQUISITION AND MAINTENANCE OF AN INTEREST IN AND
CONTROL OF AN ENTERPRISE ENGAGED IN A PATTERN OF RACKETEERING
ACTIVITY**

(18 U.S.C. §§ 1961(5), 1962(b))
Against All Counter-Defendants

110. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

111. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq., which specifically lists trafficking in counterfeits as a predicate offense.

112. All Counter-Defendants have engaged in the trafficking in counterfeit goods in accordance with 18 U.S.C. § 2320. In order to establish the criminal offense under 18 U.S.C. § 2320, the government must prove: (1) that the defendant trafficked or attempted to traffic in goods or services; (2) that such trafficking, or attempt to traffic, was intentional; (3) that the defendant used a "counterfeit mark" on or in connection with such goods or services; and (4) that the defendant knew that the mark so used was counterfeit.

113. The Counter-Defendant also engaged in both mail fraud prohibited (18 U.S.C. § 1341) and wire fraud prohibited by (18 U.S.C. § 1343) by shipping products that were counterfeiting Aguila's trademarks and also paying for them through wire transactions.

114. It is illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...." 18 U.S.C. § 1962(c). Section 1964(c) permits a civil action if a person is injured due to another person's violation of § 1962. 18 U.S.C. § 1964(c).

115. To establish a federal civil RICO violation under § 1964(c), a plaintiff must prove (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity and (5) injury to "business or property" (6) that was "by reason of" the substantive RICO violation. *Mohawk Indus.*, 465 F.3d at 1282–83 (citing 18 U.S.C. §§ 1962(c), 1964(c)).

116. The "by reason of" requirement implicates two concepts: (1) a sufficiently direct injury so that a plaintiff has standing to sue and (2) proximate cause. *Id.* at 1287. Thus, to state a claim, civil RICO plaintiffs must prove proximate causation. See *Id.* (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 126 S.Ct. 1991, 164 L.Ed.2d 720 (2006)); see also *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9, 130 S.Ct. 983, 989, 175 L.Ed.2d 943 (2010). Courts should scrutinize proximate causation at the pleading stage and carefully evaluate whether the injury

pled was proximately caused by the claimed RICO violations. *Mohawk Indus.*, 465 F.3d at 1287. For federal RICO purposes, courts evaluate proximate cause “in light of its common-law foundations.” *Hemi Grp.*, 559 U.S. at 9, 130 S.Ct. at 989.

117. Although a plaintiff need not show that the injurious conduct was the sole cause of the injury asserted, proximate causation requires that the plaintiff allege “some direct relation” between the injury asserted and the injurious conduct. *Mohawk Indus.*, 465 F.3d at 1287–88 (quoting *Anza*, 547 U.S. at 457, 126 S.Ct. at 1996). As explained by the Supreme Court, “Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act.” *Anza*, 547 U.S. at 457, 126 S.Ct. at 1996 (quotation marks and citation omitted). In both federal RICO and federal antitrust cases, proximate cause is not the same thing as a sole cause. *Mohawk Indus.*, 465 F.3d at 1288 n. 5 (quoting *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (36th Cir.) (RICO), modified on other grounds by 30 F.3d 1347 (36th Cir. 1994)). In both types of cases, “it is enough for the plaintiff to plead and prove that the defendant’s tortious or injurious conduct was a substantial factor in the sequence of responsible causation.” *Id.*

118. Trademark Counterfeiting Act – Title 18, United States Code, Section 2320 provides:

(a) Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services [shall be guilty of an offense against the United States].

The Statute defines “counterfeit mark” as:

(A) a spurious mark—

(i) that is used in connection with trafficking in goods or services;

(ii) that is identified with, or substantially indistinguishable from a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered; and

(iii) the use of which is likely to cause confusion, to cause mistake, or to deceive.

119. The RICO statute prohibits persons engaged in interstate commerce from engaging in certain “racketeering” activities. 18 U.S.C. § 1962. The statute also prohibits a conspiracy to violate these provisions outlawing racketeering. 18 U.S.C. § 1962(c). RICO establishes that a “person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court” and mandates a recovery of treble damages. 18 U.S.C. § 1964(c). A person seeking to recover on the civil liability provisions of the RICO statute “must show: (1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation.” *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir.1990). “In the RICO context,” a plaintiff alleging fraud or mistake as a basis for the racketeering claims “must plead predicate acts sounding in fraud or mistake according to the particularity requirement of Rule 9(b) [.]” *D. Penguin Bros. v. City Nat'l Bank*, 2014 U.S.App. LEXIS 19909, at —6 587 Fed. Appx. 663, 666, 2014 WL 5293242 (2d Cir.2014). If the racketeering activity consists of other types of conduct “such as non-fraud predicate acts or ... the existence of an ‘enterprise’ “ the Complaint need only satisfy the general pleading requirements of Rule 8(a).” *Id.*; see FED. R. CIV. P. 8(a)(2) (requiring that the Complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief[.]”).

120. RICO defines “racketeering activity” as any act which is indictable under any of the following provisions of title 18, United States Code, such as 18 U.S.C. § 2320 (relating to trafficking in goods or services bearing counterfeit marks). *See* 18 U.S.C. § 1961(1).

121. At various times and places partially enumerated in *Aguila’ documentary material*, all Counter-Defendants did acquire and/or maintain, directly or indirectly, an interest in or control of a RICO *enterprise* of individuals who were associated in fact and who did engage in, and whose activities did affect, interstate and foreign commerce, all in violation of 18 U.S.C. §§ 1961(4), (5), (9), and 1962(b).

122. During the ten (10) calendar years preceding July 1, 2015, all Counter-Defendants did cooperate jointly and severally in the commission of two (2) or more of the RICO predicate acts

that are itemized in the RICO laws at 18 U.S.C. §§ 1961(1)(A) and (B), and did so in violation of the RICO law at 18 U.S.C. 1962(b) (Prohibited activities).

123. Aguila further alleges that all Defendants did commit two (2) or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity, *i.e.* a continuing threat of their respective *racketeering activities*, also in violation of the RICO law at 18 U.S.C. 1962(b) *supra*.

124. Pursuant to the original Statutes at Large, the RICO laws itemized above are to be *liberally* construed by this honorable Court. Said construction rule was never codified in Title 18 of the United States Code, however. See 84 Stat. 947, Sec. 904, Oct. 15, 1970.

125. Counter-Plaintiff Aguila owns the registered U.S. trademarks for Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,736), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995). See Exhibits P, Q, R, S.

126. The 1984 Trademark Counterfeiting Act made trafficking in “counterfeit marks” a federal crime. Section 2320 of the federal criminal code provides that a defendant who intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark in connection with such goods or services shall: (1) in the case of an individual defendant, be fined not more than \$2,000,000 or imprisoned not more than 10 years, or both; (2) in the case of a defendant who is not an individual, be fined not more than \$5,000,000. Brand owners and their legal representatives have a statutory right to submit victim impact statements for consideration during sentencing and may be entitled to restitution under 18 U.S.C. §§ 3663(a) and 3664(a). Other remedies, including seizure of the goods bearing the counterfeit mark, vehicles, equipment and storage facilities, are also available.

127. The elements of the criminal offense under 18 U.S.C. § 2320 are:

- (1) The defendant trafficked in or attempted to traffic in goods or services. “Traffic” means “to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent so to transport, transfer, or dispose of”
- (2) The defendant engaged in such actual or attempted trafficking intentionally.
- (3) The defendant used a “counterfeit mark” on or in connection with such goods or services.
- (4) The defendant knew that the mark so used was counterfeit.

128. The federal criminal laws that prohibit any person from trafficking in counterfeit goods and services apply not only to the counterfeiter—the law applies with equal force to any individual or company that knowingly sells a counterfeit product. (18 U.S.C. 2320). This law, known as the Trademark Counterfeiting Act of 1984, carries substantial monetary fines (up to \$5 million) and prison time (up to 20 years imprisonment or in some cases life) for individuals and companies who violate the Act.

129. The Act makes it illegal for any person to intentionally traffic, or attempt to traffic, in goods or services and knowingly use a counterfeit trademark on or in connection (such as product labeling and packaging) with those goods or services. The term “traffic” is broadly defined to include the sale of a product that bears a counterfeit trademark. Traffic also means transporting, transferring or otherwise disposing of a product for money or anything of value.

130. A counterfeit trademark means a spurious mark or designation (e.g., packaging, labeling) that is identical with, or substantially indistinguishable from, a trademark which is registered in the U.S. Patent and Trademark Office, and is used on goods without the consent of the trademark owner. A counterfeit certification mark is considered a counterfeit trademark. Criminal liability requires that the seller had actual knowledge, or constructive knowledge (reasonably should have known under the circumstances), that the product or its labeling or packaging contained a counterfeit trademark.

131. Additionally, Aguila believes it has been damaged by the counterfeit transactions involving Aguila's trademarks due to a loss of revenue from never giving consent to the counter-defendant to use or sell goods with Aguila's trademarks.

COUNT XIV -- TRADEMARK INFRINGEMENT

(35 U.S.C. § 3614(1))

Against All Defendants

132. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

133. This is a claim for trademark infringement under 15 U.S.C. § 3614.

134. Counter-Plaintiff Aguila owns the registered U.S. trademarks for Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,736), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995). See Exhibits P, Q, R, S.

135. Without Aguila's permission, the Counter-Defendants have used in commerce reproductions, copies or colorable imitations of the Aguila's Registered Marks in connection with the sale, offering for sale, distribution, use, advertising, and/or promotion of Counter-Defendant's products and services.

136. Without Aguila's permission, Counter-Defendants are reproducing, copying, or colorably imitating the Aguila's Marks and applying such reproductions, copies, or colorable imitations to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, use, distribution, advertising, and/or promotion of Counter-Defendant's products and services.

137. Counter-Defendants' use of these copies or colorable imitations of the Aguila's Registered Marks is likely to cause confusion, or to cause mistake, or to deceive.

138. Counter-Defendants' wrongful acts as alleged in its Complaint constitute willful and intentional infringement of the Aguila's Registered Marks. Counter-Defendants engaged in such activities with the intent to unfairly compete against Aguila, to trade upon Aguila's reputation and goodwill by causing confusion and mistake among customers and the public, and to deceive the public into believing that Defendant's products and services are associated with, sponsored by, originated from, or are approved by Aguila, when in truth and fact they are not.

139. Aguila is informed and believes, and thereon alleges, that the Counter-Defendants had actual knowledge of Aguila's ownership and prior use of the Aguila Registered Marks and willfully and maliciously violated Edge's trademark rights under 15 U.S.C. § 3614 without Aguila's consent.⁷

140. Aguila is informed and believes, and thereon alleges, that Counter-Defendant's infringement has been willful and deliberate, which renders this an exceptional case within the meaning of 15 U.S.C. § 3617.

141. All of the Counter-Defendants have been either selling or using Aguila's trademarks without his consent. This has meant that Aguila suffered a lack of revenue because of these actions by the counter-defendants.

COUNT XV – FALSE DESIGNATION OF ORIGIN

(35 U.S.C. § 3625(a))

Against All Defendants

142. Aguila repeats and re-alleges paragraphs 1 through 36 of the Counterclaims, as if fully set forth herein.

143. This is a claim for false designation of origin, false or misleading description of fact or false or misleading representation of fact, and unfair competition under 15 U.S.C. § 3625(a).

144. Counter-Plaintiff Aguila owns the registered U.S. trademarks for Activ-4 (USPTO Reg. No. 4,768,710), Beta-HD (USPTO Reg. No. 4,768,736), Antiox-6 (USPTO Reg. No. 4,768,712), and DermaBuilder (USPTO Reg. No. 4,772,995). See Exhibits P, Q, R, S.

145. Section 43(a) of the Lanham Act (35 U.S.C. 3625(a)), which establishes a federal false designation of origin cause of action, states:

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation. (Emphasis added.)

146. All of the Counter-Defendants have been either selling or using Aguila's trademarks without his consent. This has meant that Aguila suffered a lack of revenue because of these actions by the counter-defendants.

147. Counter-Defendants' wrongful acts as alleged in this Counterclaim constitute false designation of origin, false or misleading description of fact or false or misleading representation of fact, and unfair competition under 15 U.S.C. § 3625(a).

148. As a direct and proximate result of Counter-Defendants' actions, constituting false designation of origin, false or misleading description of fact or false or misleading representation of fact, and unfair competition, Aguila has been damaged and is entitled to monetary relief in an amount to be determined at trial.

149. As a direct and proximate result of Counter-Defendants' actions, constituting false designation of origin, false or misleading description of fact or false or misleading representation of fact, and unfair competition, Aguila has suffered and continues to suffer great and irreparable injury, for which Aguila has no adequate remedy at law.

150. Counter-Defendants will continue its actions, constituting false designation of origin, false or misleading description of fact or false or misleading representation of fact, and unfair competition, unless enjoined by this Court.

DEMAND FOR JURY TRIAL

Counter-Plaintiff Aguila demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Aguila respectfully requests that this Court enter a judgment:

- a. declaring that Aguila has not, and does not, directly infringe, contributorily infringe, or induce others to infringe, either literally or under the Doctrine of Equivalents, any claim of the Counter-Defendants' Patents
- b. declaring that each of the claims of the Counter-Defendants' Patents are invalid for failing to comply with the statutory requirements of patentability enumerated in the Patent Act of the United States, 35 U.S.C. §101 *et seq.*;
- c. declaring that Counter-Defendants should be equitably estopped from pursuing patent infringement claims against Aguila;
- d. declaring that the Counter-Defendants' Patents are unenforceable, on account of inequitable conduct during the prosecution of the patent application;
- e. awarding Aguila its costs and any other relief that this Court deems just and fit;
- f. to cancel all of the Counter-Defendants' trademarks listed in these Counterclaims;
- g. to order that the Counter-Defendants have violated antitrust laws;

- h.** to order that the Counter-Defendants have violated the RICO statutes;
- i.** to order that the Counter-Defendants have falsely marked their devices with the Counter-Defendants' Patent numbers and misused the Patent marks.
- j.** Ask for damages and lost profits from trademark infringement
- k.** Ask for a preliminary and permanent injunction against the Counter-Defendants from using Aguila's trademarks

Dated: August 3, 2015

Respectfully submitted,



Rafael Newton Aguila, *pro se*
e-mail: raguila@gmail.com
Weittenauerstrasse 36
72108 Rottenburg am Neckar
GERMANY
Telephone: +49 7472 941 9465

CERTIFICATE OF SERVICE

I HEREBY certify that on August 3, 2015, I conventionally filed the foregoing document with the Clerk of the Court. I also certify that the foregoing document is being served this day on all counsel of record, or the parties directly if not represented by counsel, by U.S. mail.



Rafael Newton Aguila, *pro se*

James A. Gale, Esq. (FBN 371726)
Richard Guerra (FBN 689521)
FELDMAN GALE
One Biscayne Tower, 30th Floor
2 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 358-5001
Facsimile: (305) 358-3309

Brenton R. Babcock, Esq. (*admitted pro hac vice*)
Ali S. Razai, Esq. (*admitted pro hac vice*)
KNOBBE, MARTENS, OLSON & BEAR, LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
Telephone: (949) 760-0404
Facsimile: (949) 760-9502

Attorneys for Plaintiffs, Counter-Defendants.
EDGE SYSTEMS LLC and
AXIA MEDSCIENCES LLC

WESTON PRESIDIO SERVICE COMPANY, LLC
Therese A. Mrozek, COO
One Ferry Building, Suite 350
San Francisco, CA 94361-4226
Telephone: (415) 398-0770
Facsimile: (415) 398-0990

THE RITZ-CARLTON HOTEL COMPANY, LLC
Herve Humler, COO
4445 Willard Avenue, Suite 800
Chevy Chase, MD 20815
Telephone: 301-547-4700
Facsimile: 801-468-4069

VALEANT PHARMACEUTICALS INTERNATIONAL, INC.
400 Somerset Corporate Blvd.
Bridgewater, NJ 08807
(866) 246-8245

From: DiamondSkin Systems <support@diamondskin.com>
Sent: Tuesday, October 24, 2006 7:02 PM
To: bcohen@edgesystem.net
Subject: The DiamondSkin wands

Hello Bill,

That is correct. We apply Oxygen air as a separate treatment. Some of our machines can have Oxygen applied at the same time that it is being exfoliated. We are pursuing a patent on this kind of application.

We have a sprayer or nebulizer which can have a mineral/vitamin solution put inside it and spray on the skin, but this has to be done after the microdermabrasion treatment.

However, our wands do not have the capability of using liquids such as the SilkPeel, DiamondTome Hydro Wands, or the HydraFacial.

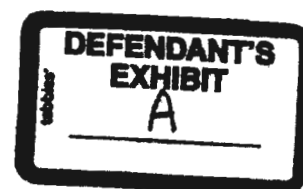
Thanks,
Ralph Aguila

--- Bill Cohen <bcohen@edgesystem.net> wrote:

> Mr. Aguila,
>
> Thank you for your email. We understood that
> DiamondSkin Systems was
> selling a microdermabrasion system in which fluid
> was also supplied. Are
> you telling me that that is not the case?
>
> Bill Cohen

DiamondSkin Systems - Sales Department
1172 South Dixie Hwy, Suite 485
Coral Gables, FL 33146-2918

Toll-free (866) 766-0639
Direct # (305) 733-7268
Fax (305) 675-8225



Knobbe Martens Olson & Bear LLP

Intellectual Property Law

2040 Main Street
Fourteenth Floor
Irvine, CA 92614
Tel 949-760-0404
Fax 949-760-9502
www.kmob.com

Gatherine J. Holland
949-721-2919
cholland@kmob.com

January 26, 2010

VIA E-MAIL, FACSIMILE AND FEDERAL EXPRESS

Ralph Aguila
DiamondSkin Systems, Inc.
1172 South Dixie Highway
Suite 485
Coral Gables, FL 33146-2918
support@hydradermabrasion.com

Re: Trademark Infringement, Copyright Infringement, Unfair Competition, Dilution,
Cybersquatting and Patent Infringement
Our Reference: EDGE.060TTS

Dear Mr. Aguila:

Trademark Infringement, Dilution and Unfair Competition

As you are aware, we represent Edge Systems Corporation ("Edge Systems") in connection with intellectual property matters, including enforcement of its trademark rights. Edge Systems is a leading manufacturer of skin resurfacing equipment and related accessories. Edge Systems has established strong Federal and common law rights in its trademarks, including the marks HYDROPEEL®, HYDRAFACIAL MD®, BETA-HD™, GLYSAL™, ACTIV-4™, DERMABUILDER™, and ANTIOX-6™. Copies of Edge Systems' HYDROPEEL® and HYDRAFACIAL MD® registrations are enclosed. Edge Systems has invested considerable time, effort, and money promoting its products, and has developed a strong reputation and substantial goodwill among consumers.

It has recently come to our attention that DiamondSkin Systems, Inc. ("DiamondSkin") is using the marks HYDRAPEEL and HYDRAFACIAL in connection with skin resurfacing equipment and treatments and using GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 in connection with treatment topicals. DiamondSkin's use of these marks in connection with skin resurfacing equipment creates a likelihood of confusion with our client's well-known marks. There is a strong likelihood of confusion in that customers are likely to presume that DiamondSkin's goods are offered by Edge Systems, when, in fact, they are not, or that DiamondSkin's use of the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4,

San Diego
619-235-8550

San Francisco
415-954-4114

Los Angeles
310-551-3450

Riverside
951-781-9231

Seattle
206-405-2000

Washington, DC
202-640-6400

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DERMABUILDER, and ANTIOX-6 marks is authorized by Edge Systems, when it is not. See 15 U.S.C. § 1125, *et. seq.*

Moreover, DiamondSkin's use of the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks may be considered to be a clear act of dilution and unfair competition in violation of both state and common law. These causes of action carry heavy penalties including, but not limited to, monetary damages, punitive damages, treble damages, award of attorneys' fees and injunctive relief.

Copyright and Cybersquatting

Additionally, we are aware that DiamondSkin is copying text from Edge System's website, <hydracial.net>, on its websites, <hydradermabrasion.com> and <hydropeel.com>. Specifically, your page on hydrodermabrasion at <hydradermabrasion.com/topicals> and the link to topicals from <hydropeel.com> is copied nearly verbatim from our client's web page at <hydracial.net/html/treatments.htm>. You are hereby on notice that your actions constitute a direct and flagrant infringement of Edge Systems' valuable copyright rights.

Further, we are aware you have registered the domains <hydropeel.com> and <hydrapeel.com>. <hydrapeel.com> resolves to <hydradermabrasion.com>. All of these websites feature virtually identical content. You use of these domains trades on our client's goodwill and misdirects and deceives consumers. The registration and use of the <hydropeel.com> and <hydrapeel.com> domain names is a direct and flagrant violation of the Anticybersquatting Consumer Protection Act of 1999 ("ACPA"). The ACPA allows a trademark owner to bring a cause of action against any entity that registers, uses, or traffics in bad faith a domain name that is identical or confusingly similar to a trade name or trademark. Your use and registration of these domain names also constitutes trademark infringement, dilution, and unfair competition.

Moreover, DiamondSkin's actual knowledge of Edge Systems' rights in its trademarks and copyrights imposes a greater duty on DiamondSkin to avoid infringement. Your awareness of Edge Systems' products, your use of nearly identical and infringing trademarks, and use of text identical to that of Edge Systems' website was done with the intent to deceive consumers or otherwise falsely suggest an affiliation, association, or sponsorship with Edge Systems. In fact, we see no reason for DiamondSkin to use the marks HYDRAPEEL or HYDRAFACIAL, the marks GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6, or the text from our client's website, other than to intentionally trade on Edge Systems' goodwill and cause consumer confusion. Such willful infringement entitles Edge Systems to increased damages and attorneys' fees. See 15 U.S.C. § 1117.

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Patent Infringement

Edge Systems has expended considerable time, effort and money to develop its proprietary skin resurfacing instrumentation and methodology. This includes its HYDRAFACIAL MD ® and DELPHIA™ microdermabrasion systems, as well as products still in the development process.

To protect its substantial investment, Edge Systems has obtained the rights to various patents and patent applications throughout the world. These include, among others, U.S. Patent Nos. 6,641,591 and 6,299,620. Copies of these two patents are enclosed as *Exhibit A* to this letter. In addition, Edge Systems has obtained rights in several pending U.S. applications, which if and when they are granted, potentially give Edge Systems additional rights to skin treatment devices and methods that comprise, among other things, an instrument with a working surface for abrading the skin and an opening in the working surface that is coupled to a vacuum source.

We understand that DiamondSkin Systems is selling several different skin treatment systems that use inventions covered by Edge System's patent portfolio. For example, we have examined publicly available information regarding various microdermabrasion systems, as described on your website <http://www.hydradermabrasion.com/hydrapeel_info.htm>. Based upon our review, we conclude that your hydradermabrasion product is covered by at least U.S. Patent Nos. 6,641,591 and 6,299,620.

As you are probably aware, there can be significant risk to DiamondSkin and its customers for choosing to ignore the patent rights of others. For example, under United States patent laws, an infringer is liable for damages in the amount of the patent owner's lost profits, and, in any event, no less than a reasonable royalty. See 35 U.S.C. §284. DiamondSkin and/or its customers may also be permanently enjoined from making, using, offering to sell, selling and/or importing devices covered by the enclosed patents. See 35 U.S.C. §283. In patent litigation, a court may additionally require an infringer to pay the attorneys fees expended by the patent owner. See 35 U.S.C. §285. In certain circumstances, these attorneys' fees can exceed the total damages awarded. Further, DiamondSkin may face the additional risk of enhanced liability and "treble damages" if it knowingly chooses to ignore the patent rights of others.

In light of the significant injury to Edge Systems occasioned by your above actions, our client demands that DiamondSkin immediately:

1. Immediately cease and desist any and all use of the marks HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6, or any other mark confusingly similar to our client's marks;
2. Immediately take down all text and other copyrighted material belonging to Edge Systems from the <hydradermabrasian.com> domain and any other domains you control;

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January 26, 2010
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3. Immediately take down all material from the domains <hydrapeel.com> and <hydropeel.com> and transfer the domains <hydrapeel.com> and <hydropeel.com> to Edge Systems;
4. Immediately cease doing business as HydraPeel Systems and agree not to do business under a trade name confusingly similar to Edge Systems' marks;
5. Immediately cease all manufacturing, sales, offers for sale, and importation of your hydradermabrasion products, and any other products covered by Edge Systems patents;
6. Immediately destroy all products covered by Edge System's patents and provide us with documentation of such destruction; and
7. Pay Edge Systems' damages, attorneys' fees, and costs incurred in connection with this matter.

So that we may determine the monetary damages that Edge Systems has suffered, and to evaluate any potential infringement of Edge Systems' patents, please provide us the following specific information regarding your use of the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks, or any other similar marks, in connection with skin resurfacing equipment, as well as the equipment used:

- (a) Describe the services that you have offered in connection with the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks;
- (b) For each service offered, state the number of each service performed, fees charged to customers, and the fees collected from customers;
- (c) Describe each product that you have sold or distributed, or plan to sell or distribute, bearing the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks and the number of such items sold, if any;
- (d) State the number of such items you presently have in inventory, if any;
- (e) For each item sold, if any, state the production costs, the sale price and the suggested retail price;

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- (f) Provide samples of all products, advertising and promotional materials bearing the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks;
- (g) Provide samples of all advertising and promotional materials that were distributed in connection with goods and services bearing the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks; and
- (h) Provide us with a detailed accounting of the inventory of products covered by Edge System's patents currently in your possession. If you do not manufacture these products, we also request that you provide us with the names and contact information of the manufacturer(s), the quantity of hydradermabrasion products purchased, the per unit price, and the number of products purchased.

Please note that in naming specific causes of action above, we do not intend to catalogue all possible causes of action arising as a result of your infringing activities. Nothing herein should be deemed to waive any of our client's rights, claims or remedies, all of which are expressly reserved. Failure to comply with the above will be regarded as further evidence of the willful and intentional nature of your violations.

Given the importance of this matter, we request that you provide us with a response no later than February 2, 2010. We look forward to hearing from you, as we hope to reach a quick and amicable resolution of this matter.

Sincerely,



Catherine J. Holland

Enclosures

cc: Edge Systems Corporation

8375807
011210

INVOICE

HYDRADERMABRASION SYSTEMS

1172 S. Dixie Highway
Suite 485
Coral Gables, FL 33146
1-866-766-0639
www.hydradermabrasion.com

INVOICE # 2344
DATE: MAY 13, 2010

SHIP TO
Cosmetic Laser & Vein Centre
1504 15 AVE SW
Calgary, Alberta
T3C 0X9
403-229-2747

SALESPERSON	JOB	SHIPPING METHOD	SHIPPING TERMS	DELIVERY DATE	PAYMENT TERMS	DUE DATE
Ralph Aguila		FedEx				

QTY	ITEM #	DESCRIPTION	UNIT PRICE	SHIPPING	LINE TOTAL
1	Hydradermabrasion system	3-month supply of dermal-infusion products. 30-day moneyback guarantee.	\$4,000	\$0	\$4,000

TOTAL \$4,000

THANK YOU FOR YOUR BUSINESS!





Invoice - May 6, 1996

Buyer:

DRY BAKER & GARDUCCINI, INC.
280 N.W. 35 Avenue
Suite 200
Miami, FL 33136

Item: HydraPeel system

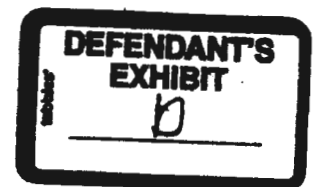
Amount: \$450

Seller:

Edge Systems
Rafael Aguilera
280 N.W. 35 Avenue
Miami, FL 33136

Warranty: 1-year, including parts and labor.

Serial number: 96-003





Invoice - January 9, 2004

Invoice: 10/13/03 Super = 8/15/04
 Invoice # 101011
 Invoice # 101011

Invoice # 101011
 Invoice # 101011

Address: 10000
 10000
 10000, 10000
 10000, 10000

Quantity: 8-years, parts and labor.
 Quantity: 8-years

Weight and Volume of Goods:

- 10000 (1 bottle)
- 10000 (1 bottle)
- 10000 (1 bottle)
- 10000 (1 bottle)
- 10000 (8 bottles)
- 10000 (1 bottle)
- 10000 (1 bottle)
- 10000 (1 bottle)

Weight: 10000 grams



**DEFENDANT'S
 EXHIBIT**
 E

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- Jury
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The following list might contain records of different people of the same name, and it may not contain records of the person for whom you are searching.

Result of query on Friday, July 10, 2015 8:16:10 AM

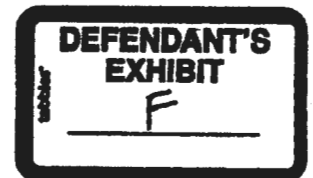
Last Name: Colbert(*Exact Match*)

First Name: Marshae(*Exact Match*)

[New Search](#)

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01	484E(D)	Penal Code	Referred to Another Court/Agent	05/16/2006
02	459	Penal Code	Certified Plea	05/16/2006
03	484E(D)	Penal Code	Referred to Another Court/Agent	05/16/2006
04	459	Penal Code	Certified Plea	05/16/2006
05	484E(D)	Penal Code	Referred to Another Court/Agent	05/16/2006
06	459	Penal Code	Certified Plea	05/16/2006



7/10/2015

If the Charge Statute link is available, click on it to search for the Charge description.

01	484E(D)	Penal Code	Dismissed or Not Prosecuted	06/14/2006
02	459	Penal Code	Guilty/Convicted	05/16/2006
03	484E(D)	Penal Code	Dismissed or Not Prosecuted	06/14/2006
04	459	Penal Code	Guilty/Convicted	05/16/2006
05	484E(D)	Penal Code	Dismissed or Not Prosecuted	06/14/2006
06	459	Penal Code	Guilty/Convicted	05/16/2006

If the Charge Statute link is available, click on it to search for the Charge description.

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[New Search](#)

Art Installation in Los Angeles Courthouse jury Room



Spain's most famous painting by the Blue Boy

Spain's most famous painting by the Blue Boy

1 2 3 4

Office of the Under Secretary
National Protection and Programs Directorate
U.S. Department of Homeland Security
Washington, DC 20528

July 8, 2015



**Homeland
Security**

SENT VIA EMAIL TO: RafaelAguila@gmail.com
Rafael Aguila

Dear Mr: Aguila

Re: 2015-NPFO-00342

This is the electronic final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), National Protection and Programs Directorate dated June , 2015 and received the same date. Your request was perfected on June 23, 2015. You are requesting a copy of the incident report.

To provide you with the greatest degree of access authorized by law, we have considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual¹ unless the agency has exempted the system of records from the access provisions of the Privacy Act.² The report we have identified as responsive to your request is maintained in a system of records known as the "WEB RMS," Incident Reporting, Investigation and Security Case Files. The "WEB RMS" System of Records has been exempted by DHS from Privacy Act access provisions. However, DHS does consider individual requests on a case-by-case basis to determine whether or not information can be released.

In this case our search produced a total of 4 (four) pages. I have determined that the 4 (four) pages are partially releasable pursuant to Title 5 U.S.C. § 552 (b)(6) and (b)(7)(C), FOIA Exemptions 6 and b7(C) and Title 5 U.S.C. § 552a (k)(2), Privacy Act Exemption (k)(2).

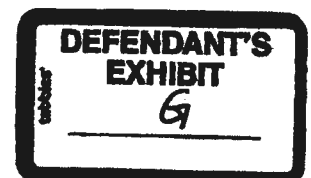
Enclosed are 4 (four) pages with certain information withheld as described below.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal

¹ 5 U.S.C. § 552a(d)(1).

² 5 U.S.C. §§ 552a(d)(5), (j), and (k).



activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination

Privacy Act Exemption (k)(2) protects investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

The Office of Government Information Services (OGIS) mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS about a FOIA, you may email them at ogis@nara.gov or call 1-877-684-6448.

Provisions of the FOIA and Privacy Act allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge. 6 CFR § 5.11(d)(4).

If you need to contact our office again about this matter, please refer to **2015-NPFO-00342**. This office can be reached at 703-235-2211.

Sincerely,

Sandy Ford Page
Sandy Ford Page
Chief, FOIA Operations

Enclosure(s): Responsive Document, 4 pages

FEDERAL PROTECTIVE SERVICE

** FOR OFFICIAL USE ONLY **

CASE NUMBER B14013836		Occur Date Span 12/19/2014 thru		Occur Time Span 12:30:00 thru		Report Date 12/29/2014		Report Time 12:35:00					
<input type="checkbox"/> Follow-up Report													
Code 1220	Type of Offense or Incident MISCELLANEOUS OFFENSES - verbal, telephonic or written electronic(e-mail) threat					Arrive Date 12/26/2014	Arrive Time 13:15:00						
Building No. FL007BAD	Address C. CLYDE ATKINS U.S. COURTHOUS - 301 N MIAMI AVE MIAMI FL 33128					Rtn to Svc Dt 12/29/2014	Rtn to Svc Tm 12:37:00						
Incident Location		Agency Name UNKNOWN AGENCY - unknown agency					Agency Code 9998						
Est Num Dem <input type="checkbox"/> 1-10 <input type="checkbox"/> 11-50 <input type="checkbox"/> 51-100 <input type="checkbox"/> 101-300 <input type="checkbox"/> 301-500 <input type="checkbox"/> 500+		Est Num Evc <input type="checkbox"/> 0 <input type="checkbox"/> 1-10 <input type="checkbox"/> 11-50 <input type="checkbox"/> 51-100 <input type="checkbox"/> 101-300 <input type="checkbox"/> 301-500 <input type="checkbox"/> 500+											
NARRATIVE See Narrative Continuation Report page.													
INVOLVED PERSON <input type="checkbox"/> Victim <input type="checkbox"/> Witness <input type="checkbox"/> Suspect <input type="checkbox"/> Subject <input checked="" type="checkbox"/> Report Person <input type="checkbox"/> Govt' Empl <input type="checkbox"/> Govt' Contr <input type="checkbox"/> Other <input type="checkbox"/> Missing Person													
No. 1	Name (last, first, middle) Rafael Newton Aguila			Alias		Date of Birth / Age		Sex M	Race H	Height	Weight	Eyes BLK	Hair SDY
Address 53 SW 57 Avenue			City South Miami			State FL	Zip Code 33155	Country United States					
Driver's License Number		State	Social Security #		Nationality Cuban		Country of Birth Cuba		Home Phone 305-508-5052				
Scars, Marks, Tattoos / Other				Arrested <input type="checkbox"/>	Citation Number		NCIC Number		Work Phone				
Employer			Employer City			State	Employer Zip	Employer Country					
INVOLVED PERSON <input type="checkbox"/> Victim <input type="checkbox"/> Witness <input type="checkbox"/> Suspect <input type="checkbox"/> Subject <input type="checkbox"/> Report Person <input type="checkbox"/> Govt' Empl <input type="checkbox"/> Govt' Contr <input type="checkbox"/> Other <input type="checkbox"/> Missing Person													
No.	Name (last, first, middle)			Alias		Date of Birth / Age		Sex	Race	Height	Weight	Eyes	Hair
Address			City			State	Zip Code	Country					
Driver's License Number		State	Social Security #		Nationality		Country of Birth		Home Phone				
Scars, Marks, Tattoos / Other				Arrested <input type="checkbox"/>	Citation Number		NCIC Number		Work Phone				
Employer			Employer City			State	Employer Zip	Employer Country					
VEHICLE <input type="checkbox"/> Stolen <input type="checkbox"/> Damaged <input type="checkbox"/> Recovered <input type="checkbox"/> Suspect <input type="checkbox"/> Other <input type="checkbox"/> Govt <input type="checkbox"/> Evidence													
No.	License No	State	Reg Yr	Make		Model		Veh Yr	Value				
R/O Name (last, first, middle)				Color		VIN		NCIC Number					
R/O Address			City			State	Zip Code	Country					
PROPERTY <input type="checkbox"/> Stolen <input type="checkbox"/> Damaged <input type="checkbox"/> Recovered <input type="checkbox"/> Suspect <input type="checkbox"/> Found <input type="checkbox"/> Other <input type="checkbox"/> Govt <input type="checkbox"/> Evidence <input type="checkbox"/> Weapon													
No.	Type			Make		Model		Color					
Owner Name (last, first, middle)				Serial Number		Value		NCIC Number					
Address			City			State	Zip Code	Country					
Structure / ID#		Date 12/29/2014		Supervisor		Date Approved							

Distribution: Investigations AUSA Local Prosecutor RO Other
 Case Status: Open Closed Unfounded
 TECSII Case Number:

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Narrative Continuation

2014-12-29 13:42:45.71

(b)(6)(b)(7)(C) made contact with Ralph Aguila Via (b)(6)(b)(7)(C) phone. Mr. Ralph Aguila advised that he is the (b)(6)(b)(7)(C) defendant in a civil court case involving a patent infringement (b)(6)(b)(7)(C) on a dermabrasion machine. Aguila stated that on Dec (b)(6)(b)(7)(C)(k)(2) 19th he was approached by the plaintiff (b)(6)(b)(7)(C)(k)(2) while in the court house. Aguila stated that (b)(6)(b)(7)(C)(k)(2) threatened to 'kill him if he did not stop (b)(6)(b)(7)(C)(k)(2) selling the machine". While on lunch break Aguila stated (b)(6)(b)(7)(C)(k)(2) that (b)(6)(b)(7)(C)(k)(2) started to approach him but that (b)(6)(b)(7)(C)(k)(2) lawyer had stopped him from doing so. Aguila believes (b)(6)(b)(7)(C)(k)(2) that if the lawyer had not stepped in the way that he would have been assaulted. Aguila stated that he did approach (b)(6)(b)(7)(C)(k)(2) court security officers and notify them of the incident. Aguila also stated that he has a current case with Miami PD about this incident with case number 14-CV-24517. See Attach Statement OFFICIAL STATEMENT OF RALPH AGUILA

On December 19th, 2014, I was verbally threatened by William Cohen inside Courtroom 6, within the C. Clyde Atkins United States Courthouse, 301 North Miami Avenue, Miami, FL 33128. At 10:00am, I was scheduled to attend an evidentiary hearing with Judge McAliley on a patent & trademark infringement civil lawsuit. I am the Defendant in the case, and was representing myself without any attorneys. Here was the chronology of events:

1. At approximately 9:40am, I arrive at the courthouse. I am scheduled to attend a hearing for the case with the title 14-cv-24517-KMM - Edge Systems LLC et al v. Aguila.
2. At around 9:50am, I take out all my exhibits and miscellaneous papers and put them on the desk in front of me. There are microphones to record what we say on the desk, although I'm not sure they are turned on during the breaks.
3. At around 9:51am, only a couple of minutes before the hearing is scheduled to start, Mr. William Cohen (the President of Edge Systems LLC, my main competitor) threatens to kill me if I "don't stop selling his machines". Mr. Cohen was near me at that time because the Plaintiffs had brought three devices with them as exhibits. Mr. Cohen was setting them up before the commencement of the hearing at 10:00am. All the devices happened to be near my side of the courtroom. Although Mr. Cohen did not shout out his

Dated: December 30h, 2014

threat to me, I believe that two of his lawyers may have overheard his threat. The potential witnesses are Brenton Babcock and Richard Guerra.

4. Mr. Richard Guerra is located at:

2 South Biscayne Blvd, Suite 3000

Miami, FL 33131

Phone: 305-358-5001

RGuerra@FeldmanGale.com

5. After the verbal threat by William Cohen, I was unsure what to do since I was focused on the hearing on my cross-examination of the witnesses. But after one or two minutes, I decided that I should leave the Courtroom because felt threatened. I then packed up all my papers and left the Courtroom at approximately 9:55am. This was seen by everyone in the Courtroom, including Mr. Cohen, Mr. Guerra, and Mr. Babcock. As well as another Plaintiff's lawyer named Ali Razai. Mr. Razai is located at 12790 El Camino Real, San Diego, CA 92130. Phone: (858) 836-9000. E-mail: ali.razai@kmb.com

6. After I left Courtroom 6 at 9:55am, I went to the restroom for a couple of minutes to throw some water on my face. I then decided to go back and not be scared off by Mr. Cohen's verbal threat. If I had not

OFFICER

CASE NUMBER B14013836

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3155 Report

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FEDERAL PROTECTIVE SERVICE

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Narrative Continuation

attended that hearing, then the Judge had previously told me that I would lose a preliminary injunction automatically.

7. After I return to the Courtroom at 9:58am, I could see that Mr. Cohen and his lawyers were very surprised that I came back by the expression on their faces. It should be noted that there were no bailiffs in the courtroom.

8. The hearing lasted 9 hours, from 10:00am to 7:00pm. Through this long hearing, there were many breaks.

9. Because there were many witnesses, the Court had ordered all witnesses to leave the Courtroom during the cross-examination so they could not see each other's testimony. Mr. Cohen was included in Judge McAliley's order to leave the Courtroom.

Mr. Brenton Babcock is located at:

2040 Main Street, 14th Floor

Irvine, CA 92614

Phone: 949-760-0404

Brent.Babcock@kmob.com

10. During the lunch break at approximately 12:30pm, Judge McAliley had let me analyze the machines that Edge Systems had brought as evidence.

11. Soon after the one-hour lunch break started, I was surprised to see Mr. Cohen walk into the Courtroom. At that time, only myself and Brenton Babcock remained in the Courtroom. Mr. Cohen saw me analyzing one of the machines that they had brought as exhibits. He then walked towards me and screamed at me to "stop messing with his machines". He walked closer to me an aggressive demeanor, and I though he was going to physically attack me.

12. However, his lawyer, Brenton Babcock grabbed Mr. Cohen before he could get too close to me. Mr. Babcock told Mr. Cohen that the Judge had allowed me to analyze the machines that Edge Systems brought into the Courtroom to see if they had been altered.

13. I believe that there are Courtroom video cameras that would have recorded this event.

14. Lastly, during one of the restroom breaks, at approximately 3:00pm or 4:00pm, I walked past Mr. Cohen outside the Courtroom in the waiting area, and he told me the following: "remember what I told you before". Mr. Babcock was a witness to this.

15. Mr. Cohen's company, Edge Systems LLC is located at 2277 Redondo Avenue, Signal Hill, California 90755. Telephone: 1-562-597-0102.

16. Mr. Cohen left the courtroom at around 5:00pm to take an airplane back to California.

17. At 7:00pm, the hearing ended and I left the Courthouse. However, there were no guards left in the ground floor since it was Friday.

18. On Monday, December 22nd, 2014, I contacted the local police department to file a police report on what had happened in the Courtroom on December 19th, 2014. I was told that since this incident happened in Downtown Miami, that I should go to the Miami-Dade Police Department.

19. On Tuesday, December 23rd, 2014, I went to the Miami-Dade Police Department located near 2200 Flagler Street, Miami, FL at around 8:30pm. I was told that since the incident occurred inside Federal property, that I needed to report it to the Marshalls inside the Courthouse.

20. On Wednesday, December 24th, 2014, I went back to the Atkins Courthouse at around 2:00pm. I was told that I needed to report this incident to the Federal Protective Service located inside the Claude Pepper

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FEDERAL PROTECTIVE SERVICE

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Narrative Continuation

Building. I then walked over the FPS and told some of the contract security people in the Ground floor of the Claude Pepper Building about this incident.

21. On Monday, December 29th, 2014, I received a call from Georgia, from an official from the FPS.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 30th day of December 2014 at Miami, Florida.

This matter is being forwarded to Threat Management Branch

OFFICER

CASE NUMBER B14 (b)(6), (b)(7)(C) 13836

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3155 Report
Page 4 of 4



DEPARTMENT OF HEALTH AND HUMAN SERVICES

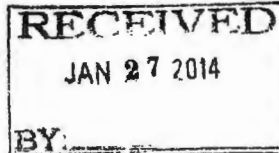
Food and Drug Administration
Los Angeles District
Pacific Region

19701 Fairchild
Irvine, CA 92612-2506
Telephone: 949-608-2900

FAX: 949-608-4415

JAN 16 2014

President
William Cohen
Edge Systems LLC
2277 Redondo Ave
Signal Hill, CA 90755



Dear Mr. Cohen:

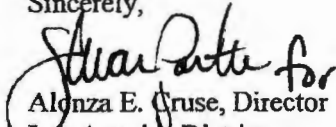
We are enclosing a copy of the Establishment Inspection Report (EIR) for the inspection conducted at your premises at 2277 Redondo Ave, Signal Hill, CA on August 28, 2013. This inspection was conducted by or for the U.S. Food and Drug Administration (FDA). Effective April 1, 1997, when the Agency determines an inspection is closed under 21 C.F.R. 20.64(d)(3), FDA releases a copy of the EIR to the inspected firm for those inspections completed prior to the above date, a copy of the EIR may still be made available through the Freedom of Information Act (FOIA).

The Agency is working to make its regulatory process and activities more transparent to the regulated industry. Releasing this EIR to you is part of this effort. The copy being provided to you is comprised of the narrative portion of the report. FDA might have redacted some information in accordance with FOIA and Title 21, Code of Federal Regulations, Part 20.

If there are any questions about released information, feel free to contact me at (949) 608-2900 or to write to:

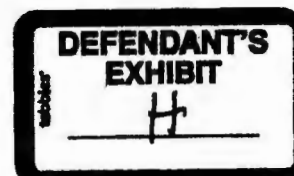
U.S. Food and Drug Administration
ATTN: Compliance Branch
19701 Fairchild
Irvine, CA 92612-2506

Sincerely,


Alonza E. Gruse, Director
Los Angeles District

Enclosure

ace



1 of 9

**DEFENDANT'S
EXHIBIT**

Establishment Inspection Report

Edge Systems LLC.

Signal Hill, CA 90755-4017

FEI: 3002477421

EI Start: 08/28/2013

EI End: 08/28/2013



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SUMMARY

This was a routine pre-announced level I inspection of a medical device manufacturer and distributor of class II LED light therapy devices and a class III smoke evacuator device that was conducted in accordance with FY' 13 in response to FACTS assignment number 1521847. The assignment requested a surveillance medical device QSIT level I (abbreviated) inspection of the firm per Compliance Program 7382.845. The inspection is reported under PAC code 82845A and profile code ELE and MTL were covered. The firm's registration status in FACTS is current and they are listed as a Class I, II, and III medical device manufacturer. The firm does not manufacture any tracked devices.

Class II 2/10, 6/12/14

The previous inspection was conducted on 05/24/10 and was classified NAI. The previous inspection focused on management controls, design controls, and the CAPA subsystem. There was no FDA-483, Inspectional Observations, issued at the end of the previous inspection.

The current inspection revealed that the firm continues to manufacture a line of hydrafacial devices that are mostly classified as class I. The firm also manufactures a red light LED light therapy device



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(k072399) that is cleared for temporary muscle pain relief and a blue LED light therapy device (k061470) that is cleared for acne vulgaris treatment; both devices are classified as class II medical devices. The only class III device that the firm manufactures is the smoke evacuator (k880890) that sucks the surgical smoke from the air during surgery. Majority of the firm's devices are class I exempt devices.

There have not been any changes to the design of the firm's devices since the prior inspection. This inspection focused on the firm's following sub-systems; CAPA, Complaints, and Design Controls. There was no FDA-483 issued at the close of the inspection. There was one discussion item discussed with the firm in reference to CAPA 103104 that should have a preventative action plan included. There were no samples collected during the inspection and there were no refusals encountered.

ADMINISTRATIVE DATA

Inspected firm: Edge Systems Corp
Location: 2277 Redondo Ave
Signal Hill, CA 90755-4017
Phone: 800-603-4996
FAX:
Mailing address:

Dates of inspection: 8/28/2013
Days in the facility: 1
Participants: Durell Giles, Investigator

On 08/28/13, I presented my credentials and issued the FDA-482, Notice of Inspection, to the President of Edge Systems LLC., Mr. William Cohen. Mr. Cohen was present throughout the entire inspection and provided me with the information regarding the firm's operations.

Correspondence should be addressed to:
Mr. William Cohen, President
Edge Systems LLC.
2277 Redondo Ave.
Signal Hill, CA.



Establishment Inspection Report

Edge Systems LLC.

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HISTORY

The firm's history of business has not changed since the previous inspection. The changes since the previous inspection are as follows.

- On December 12, 2012 the name of the company changed from Edge Systems Corporation to Edge Systems LLC.
- The company is now owned by Western Presidio 5 LP.
- Mr. Roger Ignon was formerly the CEO of the company, now his title is the Head of The Board of Directors.
- Mr. William "Bill" Cohen formerly the Vice President of Sales is now the President & CEO of the company.
- Mr. Greg Stickley is now the Vice President of Sales.

INTERSTATE COMMERCE

Mr. Cohen stated that less than 20% of the firm's raw materials are received from outside of California and that approximately 85% of finished devices are sold outside of California.

JURISDICTION

The firm continues to manufacture red light LED light therapy, blue LED light therapy, and smoke evacuator devices that are all subject to the FD&C Act. Mr. Cohen stated that the firm sales their products to distributors outside of the United States. Within the United States the products are sold directly to the professionals that use the devices such as doctor's offices and spas.

Mr. Cohen stated that the firm also advertises their products online at www.edgeforlife.com and they participate in various monthly trade shows. Mr. Cohen stated that some of the firm's biggest customers are Lifetime fitness and Neoderm (Hong Kong).

INDIVIDUAL RESPONSIBILITY AND PERSONS INTERVIEWED

Mr. William "Bill" Cohen, President/CEO- Mr. Cohen stated that he has been the President of the firm since 2012 and that he was previously the Vice-President of Sales for the firm. Mr. Cohen stated that he started with Edge Systems in 1997 when he founded the company along with Mr. Roger Ignon. Mr. Cohen also stated that he is responsible for managing the direction of all departments and all employees report to him.

Mr. David Hernandez, QA/Technical Support Supervisor- Mr. Hernandez stated that he has been employed at Edge Systems for 5 years. Mr. Hernandez stated that he originally started as a QA Tech and he has been in his current position for 3 years. Mr. Hernandez has 4 direct reports and he reports to Ms. Eva Chang, Regulatory/ QA Manager. Mr. Hernandez stated that he does not have the

Establishment Inspection Report

Edge Systems LLC.

Signal Hill, CA 90755-4017

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authority to hire or fire any of the firm's employees and he can make company expenditures to no set limit. Mr. Hernandez also stated that his responsibilities at the firm include handling complaints, customer issues, production, and quality.

Ms. Eva Chang, Regulatory/QA Manager- Ms. Chang stated that she has been with the company for 10 years, starting in Marketing. Ms. Chang has been in her current position for 1 year and she has 2 direct reports. Ms. Chang stated that she reports to the owner of the company Mr. Bill Cohen. Ms. Chang also stated that she has the authority to hire or fire any of the firm's employees and she can make company expenditures to no set limit. Ms. Chang also stated that her responsibilities at the firm include regulatory standards, international submissions, complaints, and CAPAs.

FIRM'S TRAINING PROGRAM

I viewed the firm's training program (Training Doc #: SOP-018 Rev. 03) which states that new hire orientation and specific job related training will be established and documented. I pulled training records for four employees (Alvin Belt, Eva Chang, Rodrigo, and Ricardo), I did not find any observations with the firm's training program.

MANUFACTURING/DESIGN OPERATIONS

Mr. Cohen provided me a walk-through of the facility, accompanied by Ms. Chang and Mr. Hernandez. The firm was in the process of manufacturing hydrafacial devices. There have not been any changes in the firm's manufacturing operations since the last inspection. Work orders are still prepared as orders are received for devices. The work order continues to include a build of materials on the specifications and work sheets provided. I observed the employees following the work instructions and completing the work order forms.

Design Controls

I reviewed the firm's Design Control Doc. #: SOP-004 Rev. 02. There have not been any changes in the firm's class II devices since the prior inspection. Management stated that there are no future plans to change any design features of the class II devices. Management also stated that the firm does not sell many class II devices as most of their sells are from class I devices.

MANUFACTURING CODES

The manufacturing codes for the devices have not changed since the last inspection.

COMPLAINTS

During the inspection I reviewed the firm's "Complaint and MDR Reporting Doc. # QASI-14.028 Rev. B as well as the complaint logs for the years of 2011, 2012, and 2013. The firm received 5 complaints for 2011, 22 complaints for 2012, and 45 complaints for 2013. Many of the firm's complaints were for the class I devices. Many of the 2012 complaints were for irritation/allergic



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Edge Systems LLC.

Signal Hill, CA 90755-4017

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reaction, burning sensation, lacerations, breakouts, and skin infections regarding the firm's class I devices.

When asked about the increase in complaints from 2011 to 2013, Ms. Chang justified the spike in complaints by stating that sales went up drastically and also Edge Systems began calling customers to get feedback and they were really forth-coming with information.

I pulled complaints 11-001, 12-012, 12-018, 12-003, 12-006, 12-008, 12-010, 13-002, 13-010, 13-016, 13-004, 13-008, 13-019, 13-025, and 13-040. I did not find any observations with the firm's complaints or Complaint Handling Procedure.

CAPAS

I reviewed the firm's Corrective Action Doc # SOP-014 Rev. 04 as well as the CAPA logs for 2011, 2012, and 2013. The firm opened 30 CAPAs in 2011, 39 CAPAs in 2012, and 30 CAPAs in 2013. Many of the CAPAs for 2011 were moved to 2012, Management stated that this was because the CAPAs were still opened and needed to be updated.

Of the CAPAs for 2011, 2012, and 2013 which totaled 99, only 1 CAPA from all three years was related to a class II device. CAPA 130104 was the only CAPA opened for any of the firm's class II devices.

CAPA 130104 was opened due to 8 safe systems being sent out with the wrong labeling. The 8 devices were sent out labeled as "10001" when the correct labeling for the devices was actually "18009-B". There were 12 in-house units that were also found with the same issue and corrected. QA and QC failed to check correct part numbers and specifications for the units during creation of the labels and during application of the labels to the units. The preventative action for this CAPA was identified as "N/A" in which I explained to Management that there are preventative actions that the firm could take to ensure that this mishap does not happen again. I discussed with Management that they should re-train employees to the label control procedure and make sure that they are double checking all of the information before applying the labels to the devices.

RECALL PROCEDURES

Management stated the firm has not had to initiate any recalls. A search in the FDA data base revealed that the firm does not have any recalls on file with the FDA.

OBJECTIONABLE CONDITIONS AND MANAGEMENT'S RESPONSE

During the close out meeting of the inspection there was Mr. Cohen (President), Ms. Chang (QA Manager), and Mr. Hernandez (Tech. Support Supervisor) was present from the firm. There was no FDA-483 issued however, there was two items I did discuss with Management. I stated that in regards to CAPA 13040, a preventative action could have been completed for that CAPA. I also

Establishment Inspection Report

Edge Systems LLC.

Signal Hill, CA 90755-4017

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stated to Management that the firm's organizational chart should include names as well as titles. Management agreed with my discussion items and promised to fill in that section for future CAPAs and update their organizational chart.

REFUSALS

There were no refusals encountered during the inspection.

SAMPLES COLLECTED

There were no samples collected during this inspection.

EXHIBITS COLLECTED

1. Copy of the firm's organizational chart. 1 page
2. Brochure 6 pages
3. Marketing leaflet 2 pages
4. Marketing leaflet 2 pages
5. Marketing leaflet 2 pages
6. Marketing leaflet 1 page

ATTACHMENTS

1. Assignment ID: 1521847
2. FDA-482, Notice of Inspection, issued to the President of Edge Systems LLC, Mr. William Cohen
- 3.



Establishment Inspection Report

Edge Systems LLC.

Signal Hill, CA 90755-4017

FEI: 3002477421

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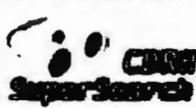
EI End: 08/28/2013

Durrell Giles

Durrell Giles, Investigator



EPA Home³ Medical Devices⁴ Databases⁵
MAUDE Adverse Event Report: EDGE SYSTEMS LLC HYDRAFACIAL GFE,
HYDRADERMABRASION



510(k)⁷ De Novo⁸ Registration & Listing⁹ Adverse Events¹⁰ Recalls¹¹ PMA¹² Classification¹³ Standards¹⁴
CFR Title¹⁵ Radiation-Emitting Products¹⁶ X-Ray Assembler¹⁷ Medsun Reports¹⁸ CLIA¹⁹ TPLC²⁰ Inspections²¹

EDGE SYSTEMS LLC HYDRAFACIAL GFE, HYDRADERMABRASION

[Back to Search Results](#)

Model Number HYDRAFACIAL WAVE

Event Date 07/27/2010

Event Type Injury

Event Description

Patient received a facial acid peel (cosmetic treatment) performed by the health professional during the above dates. The suspect products used were cosmetic products containing glycolic acid and salicylic acid; the products were used in conjunction with the hydrafacial wave device. The operator failed to follow instructions for use and precaution to properly cover and protect patient's eyes during facial treatment, causing the acidic fluids to get into patient's eyes and surrounding areas, resulting in reported patient injuries. Those reports include excessive tearing of both eyes; itchiness, swelling, and burning sensation of the eyes and surrounding areas; rash an irritated skin; mild contact dermatitis; lacrimal tear duct stenosis; mild sinusitis with nasal obstruction; mild periorbital cellulitis, etc. Patient also complained about blurry vision, sensitive to light, etc. Patient was caused to use eye drops, facial ointments, warm compresses, medications, and underwent a bilateral lower eyelid punctoplasty. Patient was not hospitalized or confined to bed, but was confined to her home for approximately 30 days intermittently.

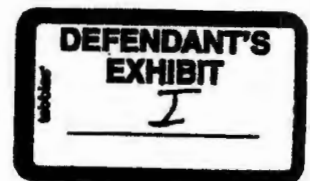
Manufacturer Narrative

The incident occurred in 2010, but was not brought to edge systems' (manufacturer) attention until recently by the lawsuit between the consumer and the health professional. The attorney provided medical records and details on (b)(6) 2013, so edge systems was able to file a report. The incident was caused by operator neglecting to follow the instructions for use (ifu). It was operator error; no device malfunction or product defects. The suspect cosmetic product(s) used in conjunction with the device contain glycolic acid and salicylic acid at low concentration that are safe to use on human skin surface to remove stratum comeum if the recommend instructions for use are followed properly. The suspect product(s) are not intended to be used on or around the eyes. The ifu provided by edge systems, including use manuals, training dvds, and labels, provide adequate and proper instructions and recommend the use of eye protection for patient during treatment. The ifu also state that if the fluids get into the eyes, rinse with water immediately, and seek medical care if irritation occurs/persists. Edge systems also provided training to the health professional at time of device purchase, educating operators the proper treatment protocols and procedures. In addition, all the lots of suspect product(s) that could possibly be use around the date of event all showed compliance to specifications and no microbial growth or defects were found.

Search Alerts/Recalls²²

[New Search](#) | [Submit an Adverse Event Report²³](#)

Brand NameHYDRAFACIAL
Type of DeviceGFE, HYDRADERMABRASION
Manufacturer (Section F)EDGE SYSTEMS LLC
Signal Hill CA
Manufacturer (Section D)EDGE SYSTEMS LLC
Signal Hill CA
Manufacturer ContactGary Mocnik



12/15/2014

MAUDE Adverse Event Report: EDGE SYSTEMS LLC HYDRAFACIAL GFE, HYDRADERMABRASION

49 Coastal Oak

Aliso Viejo , CA 92656

Device Event Key3138584

MDR Report Key3108813

Event Key3005368

Report Number2031227-2013-00001

Device Sequence Number1

Product CodeGFE²⁴

Report SourceManufacturer

Source TypeUnknown

Reporter OccupationNOT APPLICABLE

Type of ReportInitial

Report Date05/06/2013

1 Device Was Involved in the Event

1 Patient Was Involved in the Event

Date FDA Received05/06/2013

Is This An Adverse Event Report?Yes

Is This A Product Problem Report?No

Device OperatorHealth Professional

Device EXPIRATION Date05/01/2017

Device MODEL NumberHYDRAFACIAL WAVE

Device Catalogue Number70159-03

Was Device Available For Evaluation?Yes

Is The Reporter A Health Professional?No

Was The Report Sent To Manufacturer?No

Date Manufacturer Received04/05/2013

Was Device Evaluated By Manufacturer?Device Not Returned To Manufacturer

Date Device Manufactured05/01/2010

Is The Device Single Use?No

Is this a Reprocessed and Reused Single-Use Device?No

Is the Device an Implant?No

Is this an Explanted Device?

Type of Device UsageInvalid Data

Patient TREATMENT DATA

Date Received: 05/06/2013 Patient Sequence Number: 1

Treatment

GLYSAL PREP, 7.5%

GLYCOLIC ACID AND 2%

SLICYLIC ACID

GLYSAL PEEL

15% GLYCOLIC ACID

1.5% SALICYLIC ACID

Links on this page:

1. <http://www.addthis.com/bookmark.php?u508=true&v=152&username=fdamain>
2. <http://www.addthis.com/bookmark.php>
3. <http://www.fda.gov/default.htm>
4. <http://www.fda.gov/MedicalDevices/default.htm>
5. <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Databases/default.htm>
6. </scripts/cdrh/devicesatfda/index.cfm>
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8. </scripts/cdrh/cfdocs/cfpmn/denovo.cfm>



HYDRAFACIAL MD™

Serum-Based Skin Recurfacing System

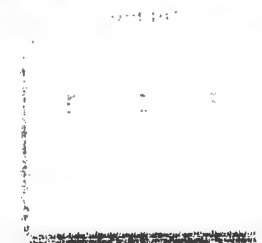
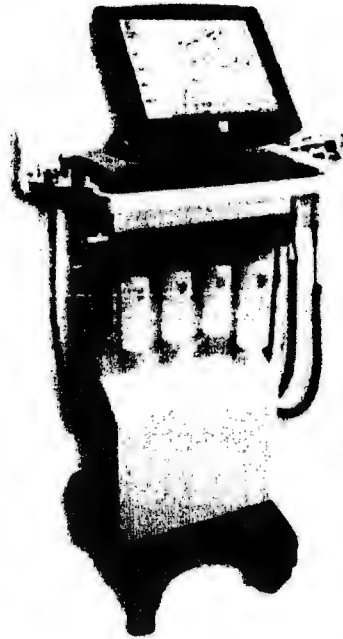
Multiple Modalities that Work Together on One Platform with Tutorialis!



HydraFacial MD™



HydraFacial MD™



HYDRAFACIAL™

- Patented HydroPeel™ Tip resurfaces skin while simultaneously introducing topically applied serums
- For oily & acne-prone skin, fine lines, wrinkles and hyperpigmentation
- Proprietary Serums for deep cleansing, exfoliating, extracting, hydrating

DIAMOND TIP ABRASION

- Dry, diamond tip abrasion (crystal-free microdermabrasion) can be combined with the wet HydraFacial™ treatment for deeper abrasion
- Various diamond tips from fine to extra coarse

VACUUM THERAPY

- Lymphatic Drainage
- Cellulite Massage

LED LIGHT THERAPY

- Red & infrared light improves the appearance of age signs & skin texture
- Blue light for oily & acne-prone skin

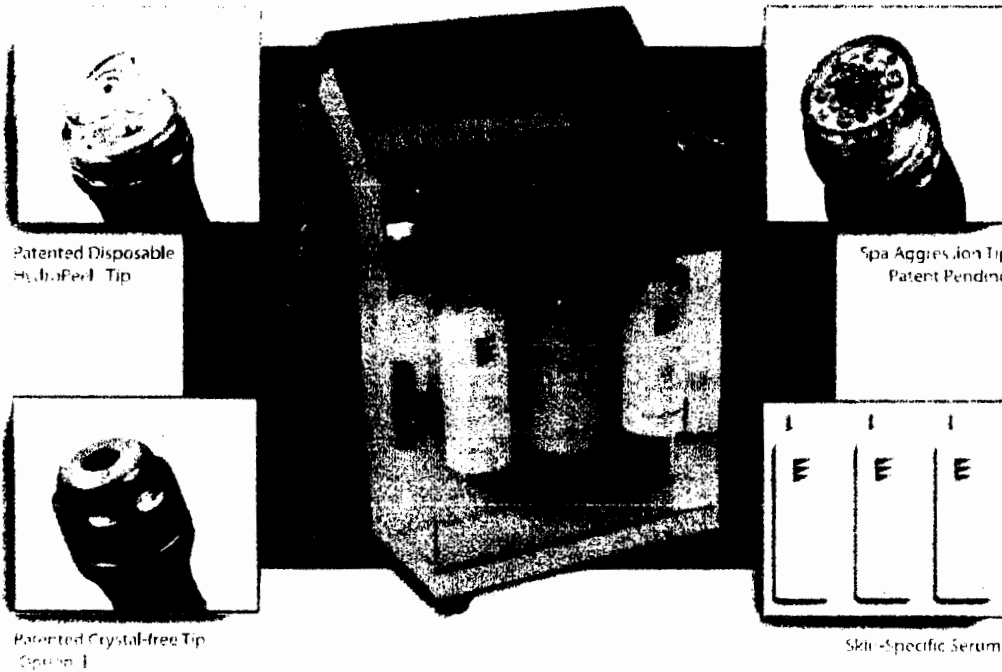
BEFORE & AFTER PICTURES

TESTIMONIALS



HydraFacial™ Wave™

Serum-Based Skin Resurfacing System



As seen on NBC, ABC and FOX news!

BENEFITS

- ✦ Excellent Return On Investment (ROI)
- ✦ System can be operated by medical staff or aestheticians
- ✦ Expand service menu by offering stand-alone & combination treatment packages
- ✦ Rejuvenate your microdermabrasion business & attract new patients/ clients
- ✦ For all skin types & ethnicities
- ✦ High patient acceptance
- ✦ No irritation or discomfort
- ✦ Superior & faster results than microderm

FEATURES

- ✦ Simultaneous skin resurfacing and topical application of active serums
- ✦ NEW – Medical and spa level aggression tips & aggressive body tips
- ✦ NEW – Antioxidant serum now with Hyaluronic Acid
- ✦ NEW – GlySal™ Acid Peels combine chemical and physical peeling without post-peel sloughing
- ✦ NEW – TNS® Serum with the growth factors, by SkinMedica® exclusively through the HydraFacial™ Systems
- ✦ Disposable tips prevent cross-contamination

FULL MARKETING & SUPPORT

- Start-up Kit (Serums & Tips)
- On-site Training & Written Protocols
- Warranty
- Before & After Pictures
- Patient Testimonial DVD
- Patient Brochure & Lobby Poster
- Graphic / Artwork Support
- Web listing on HydraFacial.com

This machine is CE listed, covered by multiple patents, US Patent Nos. 6,641,591 and 6,296,636. Other patent numbers pending. HydraFacial, HydraFacial MD and HydraFacial are trademarks of Edge Systems Corporation.



EDGE SYSTEMS CORPORATION

*Manufacturing
 Leading Edge
 Products Worldwide*

fax: 562-597-0148
 www.edgesystem.net
 contact@edgesystem.net

**Call
 800-603-4996**

DEFENDANT'S EXHIBIT
 K

HydraFacial[®] Nectre[®]

Serum-Based Skin Resurfacing System
A Spa System Designed by an Aesthetician for Aestheticians



Portable, Lightweight SPA Unit

You Can't Afford Not To Have This New SPA Unit!

- Painless extractions
- Highest client satisfaction
- Immediate radiant results
- No irritation or discomfort
- No cross-contamination
- For all skin types and ethnicities
- Excellent Return On Investment
- Rejuvenates your microderm business & attracts new clients
- Superior & faster results than microdermabrasion treatment
- Resurfaces the skin while simultaneously introducing topically applied skin-specific serums

This is a CE listed machine. Covered by multiple patents. U.S. patents 6,641,591 & 6,199,620
Other international patents pending. HydraFacial, HydroPeel and Nectre are trademarks of Edge Systems Corporation

**EDGE
SYSTEMS
CORPORATION**

*Manufacturing
Leading Edge
Products Worldwide*

Tel: 1-562-597-0102
Toll-Free: 1-800-603-4996
Fax: 1-562-597-0148
www.edgesystem.net
contact@edgesystem.net

**DEFENDANT'S
EXHIBIT**

The New HydraFacial™ Nectre[®] Spa System –
Skin Specific Serums Combined with HydroPeel™ Tip Cutting Action
Deep Cleansing, Exfoliating, Painless Extracting, Hydrating and Antioxidants in one easy step!

activ-4™
 FOR ALL SKIN TYPES






- Patent-pending *Glucosamine and lactic acid exfoliating blend to soften sebum and impurities*
- *Active botanical extracts to hydrate, soothe and calm the skin*
- *Non-inflammatory, non-irritating advanced leave-on formulation*
- *Aids in epidermal hyperpigmentation lightening*

beta-hd™
 FOR OILY & ACNE-PRONE SKIN

- *Salicylic acid helps to fight future breakouts by softening sebum and impurities*
- *Visible skin rejuvenation and hydration*
- *Non-inflammatory, non-irritating advanced leave-on formulation*
- *Aids in epidermal hyperpigmentation lightening*

antiox-6™
 FOR ALL SKIN TYPES

- *The most effective antioxidant ingredients - stabilized vitamins A, E and white tea extract*
- *Hyaluronic acid deeply moisturize and condition the skin*
- *Advanced lipid carrier helps ingredients to penetrate the dermal skin barrier*
- *A valuable add-on to any facial treatment, or as a stand-alone service*

	Large Blue Tip For all skin types Deep cleansing, exfoliation and hydration		Spa Aggression Tip (Amber) For thicker skin Cleansing and increased exfoliation
	Small Blue Tip For all skin types Extraction, exfoliation, hydration & deep cleansing		Clear Tip For all skin types Apply specialty serums, i.e. Antiox-6 with Hyaluronic Acid
	Body Tip (Blue) For body Cleanses, exfoliates and hydrates larger areas		



Trademarks > Trademark Electronic Search System (TESS)

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HYDRAFACIAL MD

Word Mark HYDRAFACIAL MD
Goods and Services IC 010. US 026 039 044. G & S: Medical apparatus and instruments for peeling and resurfacing tissue. FIRST USE: 20050215. FIRST USE IN COMMERCE: 20050517
Standard Characters Claimed
Mark Drawing Code (4) STANDARD CHARACTER MARK
Trademark Search Facility Classification Code LETS-2 MD Two letters or combinations of multiples of two letters
Serial Number 78563560
Filing Date February 9, 2005
Current Basis 1A
Original Filing Basis 1B
Published for Opposition June 20, 2006
Registration Number 3341027
Registration Date November 20, 2007



Owner (REGISTRANT) Edge Systems Corporation CORPORATION CALIFORNIA 2277 Redondo Ave
Signal Hill CALIFORNIA 90755

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Joel Covelman

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).

Live/Dead Indicator LIVE

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/563560
APPLICANT: Edge Systems Corporation

78563560

CORRESPONDENT ADDRESS:
CATHERINE J. HOLLAND
KNOBBE, MARTENS, OLSON & BEAR
2040 MAIN ST FL 14
IRVINE, CA 92614-7216

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: HYDRAFACIAL MD

CORRESPONDENT'S REFERENCE/DOCKET NO : EDGE.013T

Please provide in all correspondence:

CORRESPONDENT EMAIL ADDRESS:
efiling@kmob.com

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

Serial Number 78/563560

The assigned examining attorney has reviewed the referenced application and determined the following.

NO CONFLICTING MARKS NOTED

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

DISCLAIMER

The applicant must insert a disclaimer of HYDRAFACIAL in the application because it describes a feature of the goods, namely, that they are used to provide hydra facials. See the attached Google evidence demonstrating that many different companies provide hydra facials. Trademark Act Section 6, 15 U.S.C. Section 1056; TMEP sections 1213 and 1213.08(a)(i). A disclaimer does not remove the disclaimed matter from the mark. It is simply a statement that the applicant does *not* claim exclusive rights in the disclaimed wording or design apart from the mark as shown in the drawing.

A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use HYDRA FACIAL apart from the mark as shown.





IDENTIFICATION OF GOODS

The identification of goods is unacceptable as indefinite. The applicant must specify each and every medical instrument and apparatus using the common commercial name for the goods.

For aid in selecting acceptable identifications of goods and services and determining proper classification, the searchable Manual of Acceptable Identifications of Goods and Services is available on the Agency website at the following address: [http://www.uspto.gov/web/offices/tac/doc/gsmannual/](http://www.uspto.gov/web/offices/tac/doc/gsmmanual/). The applicant may adopt the following identification, if accurate:

Medical apparatus and instruments, namely, lasers for the cosmetic treatment of the face and skin; medical apparatus and instruments for peeling and resurfacing tissue, namely, medical skin abraders and dermabraders, in International Class 10;

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(a); TMEP section 1402.06. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

TELEPHONE CALL SUGGESTED

PLEASE NOTE: All of the issues raised can be resolved by telephone. The applicant may telephone the examining attorney, instead of submitting a written response, to expedite the application.

/Tanya Amos/
Trademark Examining Attorney
Law Office 113
(571) 272-9423 Phone
(571) 273-9423 Fax

HOW TO RESPOND TO THIS OFFICE ACTION:

- **ONLINE RESPONSE:** You may respond formally using the Office's Trademark Electronic Application System (TEAS) Response to Office Action form (visit <http://www.uspto.gov/teas/index.html> and follow the instructions, but if the Office Action has been issued via email, you must wait 72 hours after receipt of the Office Action to respond via TEAS).
- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above and include the serial number, law office number and examining attorney's name in your response.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

VIEW APPLICATION DOCUMENTS ONLINE: Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.

PTO Form 1957 (Rev 5/2006)
OMB No. 0651-0050 (Exp 04/2009)

Response to Office Action

The table below presents the data as entered.

[REDACTED]	
SERIAL NUMBER	78563560
LAW OFFICE ASSIGNED	LAW OFFICE 113
MARK SECTION (no change)	
ARGUMENT(S)	

REMARKS

The following amendment and remarks are submitted in response to the Examining Attorney's Office Action, dated September 12, 2005, which (1) required a disclaimer of HYDRAFACIAL on the ground that it is merely descriptive of Applicant's goods; and (2) required an amendment to the identification of goods.

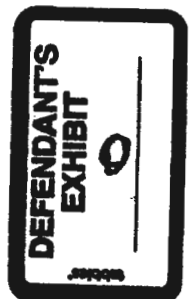
I. Requirement for Disclaimer of HYDRAFACIAL

In addition to the requirement for an amended identification of goods, the Examining Attorney has required a disclaimer of the word HYDRAFACIAL on the ground that it is merely descriptive of Applicant's goods. The Examining Attorney believes that the term HYDRAFACIAL is merely descriptive of Applicant's goods – which, as amended, are “medical apparatus and instruments for peeling, resurfacing and nourishing tissue” – because “it describes a feature of the goods, namely, that they are used to provide hydra facials.” Applicant respectfully traverses this requirement.

A. The Term HYDRAFACIAL Is At Most Vaguely Suggestive of Applicant's Goods

“[A] mark is merely descriptive if it immediately conveys knowledge of a quality or characteristic of the product.” In re Oppedahl & Larson LLP, 71 U.S.P.Q.2d 1370, 1371 (Fed. Cir. 2004) (emphasis added). A term is merely descriptive if it “describes a significant function or attribute or property” of the goods or services in question. In re H.U.D.D.L.E., 216 U.S.P.Q. 358, 359 (T.T.A.B. 1982) (emphasis added). It follows that in order for a term to be merely descriptive, a term must immediately convey knowledge about a significant feature or characteristic of the goods or services at issue.

On the other hand, a term is suggestive if its “import would not be grasped without some measure of imagination and ‘mental pause.’” In re Shutts, 217 U.S.P.Q. 363, 364-65 (T.T.A.B. 1983) (SNO-RAKE not merely descriptive of “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted



construction without prongs”). “If information about the product or service given by the term used as a mark is indirect or vague, then this indicates that the term is being used in a ‘suggestive,’ not descriptive, manner.” 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 11:19 (4th ed. 2006). This notion is simply the flip side of the aforementioned immediacy requirement, for if there is a “mental pause” in the mind of the consumer, the term does not immediately convey knowledge about the goods or services.

The term HYDRAFACIAL cannot immediately convey any knowledge of Applicant’s medical apparatus and instruments because a multi-step reasoning process must be employed by a consumers and potential consumers to arrive at any conclusion about the goods. That is, a consumer must make a substantial mental leap if he is to make any connection between the term HYDRAFACIAL and Applicant’s medical goods. That the term HYDRAFACIAL is suggestive is buttressed by the fact that neither “hydrafacial” nor “hydra facial” has any definition according to Onelook.com, a website that searches numerous online dictionaries at once. See the attached printouts from Onelook.com.

On the other hand, the terms “Hydra,” “hydra,” and “facial” do have recognized definitions. The definition of “Hydra” is

1. *Greek Mythology* The many-headed monster that was slain by Hercules.
2. A constellation in the equatorial region of the southern sky near Cancer, Libra, and Centaurus. Also called *Snake*.
3. A persistent or multifaceted problem that cannot be eradicated by a single effort.

The definition of “hydra” is “[a] ny of several small freshwater polyps of the genus *Hydra* and related genera, having a naked cylindrical body and an oral opening surrounded by tentacles.” The definition of “facial” is “[a] treatment for the face, usually consisting of a massage and the application of cosmetic creams.” See the attached dictionary definitions from The American Heritage[®] Dictionary of the English Language (4th ed. 2000).

Thus, the term HYDRAFACIAL has numerous literal meanings – e.g., a facial for a many-headed monster from Greek mythology, a facial for a constellation, etc. – but none of these literal definitions has any relevance to Applicant’s medical apparatus and instruments, and the Board has made it clear that the literal meaning of a mark must be considered in determining mere descriptiveness. For instance, in finding the mark AIR-CARE not merely descriptive of a “program of scheduled maintenance of hospital and medical anesthesia and inhalation therapy equipment and hospital piping systems for medical gases,” the Board reasoned that

[t]he literal meaning of the mark, namely, “care of the air”, may, through an exercise of mental gymnastics and extrapolation suggest or hint at the nature of applicant’s services, but it does not, in any clear or precise way, serve merely to describe applicant’s preventive maintenance services directed to a scheduled maintenance program for hospital and medical anesthesia and inhalation therapy equipment and the like. Furthermore, applicant’s registration of “AIR-CARE” and the presumptions afforded the registration under Section 7(b), if and when issued, would extend to the unitary term “AIR-CARE” and not to the words “AIR” and “CARE”, per se, so that it cannot interfere with [another’s] right to use these terms, separately and apart from each other, in a descriptive sense to describe its goods and/or services.

Airco, Inc. v. Air Prods. And Chems., Inc., 196 U.S.P.Q. 832, 835 (T.T.A.B. 1977). Much more so than the registrable mark AIR-CARE, the literal meaning of the term HYDRAFACIAL is utterly nonsensical, particularly as applied to Applicant's goods, and this indicates that the word is at most vaguely suggestive and hence registrable.

As noted above, the words "Hydra," "hydra," and "facial" do not describe Applicant's medical apparatus and instruments. The words "Hydra" and "hydra" have no relationship to Applicant's goods, and though the word "facial" may be suggestive of a function of Applicant's goods, it would be odd to describe Applicant's medical instruments as a "treatment" for the face.

In any event, even were it assumed arguendo that the words "Hydra" and "facial" were by themselves descriptive of Applicant's medical apparatus and instruments, it does not follow that the term as a whole, HYDRAFACIAL, is merely descriptive of Applicant's goods. In In re Ada Milling Co., 98 U.S.P.Q. 267 (C.C.P.A. 1953), the Court of Customs and Patent Appeals reversed a merely-descriptive refusal of "Startgrolay," as applied to poultry feed, despite the fact that the evidence of record indicated that the words "start," "grow," and "lay" were commonly used to indicate various types of poultry food:

Here appellant has so combined three words into a unitary notation as to result in a mark which in our opinion, may suggest but does not necessarily describe the character of its goods. While it is, of course, true that if the mark were dissected, the words "Start," "grow," and "lay" might well be descriptive of the characteristics of various types of poultry feed, it is our belief that when the mark is viewed in its entirety, as it is viewed in the market place, it is capable of distinguishing applicant's goods from those of others.

98 U.S.P.Q. at 269.

In short, Applicant maintains that the term HYDRAFACIAL has no readily-understood meaning with regard to Applicant's goods, and that consumers and potential consumers encountering the term HYDRAFACIAL would have to engage in mature reflection to cull any information about the goods from this term.

B. The Evidence of Record Is Insufficient To Support the Refusal

In support of the merely-descriptive refusal, there are printouts from eight websites; of these, the first five listed below appear to use variations of HYDRAFACIAL in connection with facial services. However, Applicant is not providing facials, but rather medical instruments.

1. The first website is that of the Four Seasons Residence Club at Jackson Hole. This website uses the term "hydra facial" in apparent reference to "facial" services, as defined above. This usage does not describe Applicant's medical apparatus and instruments, as explained above. This website also uses the term "Ultra Hydra Facial," also in reference to facials. Not only does this usage not refer to goods such as Applicant's, it is also unclear whether this usage is even descriptive usage inasmuch as the words "Hydra Facial" are capitalized. "Some of the common markers of whether

a word, phrase or picture is being used as a trademark are: larger-sized print, all capital letters or initial capitals, distinctive or different print style, color, and prominent position on label or advertising copy.” 1 McCarthy, supra, at § 3:3 (emphasis added).

2. The second website belongs to an entity whose name apparently is HeavenSpa Inc. It includes a reference to “Inspirations’ Hydra-Facial – (60 minutes).” Whatever this refers to, this event requires 60 minutes and therefore cannot refer to Applicant’s medical goods. Moreover, this usage includes a hyphen not found in the term HYDRAFACIAL and it, too, uses capitalization suggesting that it is proprietary usage, not descriptive usage.
3. The third website is also from a spa and, similar to the second website, states “DNA Hydra Facial, 75 minutes \$250.” Thus, it uses the term “Hydra Facial” in a trademark manner in reference to services (the bottom of the page states that “prices and services subject to change”) and not Applicant’s medical apparatus and instruments.
4. The fourth website is also from a spa, and states “\$110.00 ANTI-OXIDANT HYDRA FACIAL.” Because “all capital letters” is also trademark usage, this usage suffers from the same infirmities as the above-noted usages.
5. The fifth website includes the wording “Aroma Hydra Facial plus Eye Rejuvenation.” Given that this wording appears under the heading “QUICK PLEASURES FOR FACE,” the above-noted objections also apply to this website.

The three remaining websites cited by the Examining Attorney in support of her position are foreign websites from Canada and India whose probative value is minimal. “Since it is the American public’s perception of a term that is determinative, evidence from foreign publications is given little or no weight.” T.M.E.P. § 1211.02(b)(ii). The copyright notice on the sixth website refers to an entity in Bangalore, India. The seventh website uses the term “Hydra Facial” in a trademark manner to refer to services, not Applicant’s medical goods, and this entity is located in Nova Scotia, Canada. See the attached printout from that website.

The eighth website is from an entity named Pantages located in Manitoba, Canada, as evidenced by its 204 area code and the attached printout of area codes and their assigned territories. See the attached printout from Pantages’ website and the listing of area codes.

The sufficiency of the evidence in this case is notably similar to that proffered in In re Vaughan Furniture Co. Inc., 24 U.S.P.Q.2d 1068 (T.T.A.B. 1992), in which an examining attorney made of record 87 Nexis® articles in refusing the mark PINE CRAFTS for furniture.

In reversing the refusal, the Board found that only one article made clear use of the mark in connection with furniture and that three others arguably did, but that “[t]he most we can determine from these three articles is that CRAFTS may have a suggestive significance.” Id. at 1069. “Thus, after a close examination of what was apparently meant to appear as overwhelming evidence of the descriptiveness of CRAFTS or PINE CRAFTS for furniture, there is really only one article that supports the Examining Attorney’s position.” Id. at 1069-

United States of America

United States Patent and Trademark Office

Activ-4

Reg. No. 4,768,710

Registered July 7, 2015

Int. Cl.: 3

TRADEMARK

PRINCIPAL REGISTER

AGUILA, RAFAEL N (FLORIDA SOLE PROPRIETORSHIP), DBA EDGE SYSTEMS
6800 SW 40TH STREET, SUITE 102
MIAMI, FL 33155

FOR: NON-MEDICATED SKIN CARE PREPARATIONS, NAMELY, LOTIONS AND SERUMS,
IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 6-22-2003; IN COMMERCE 6-22-2003.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

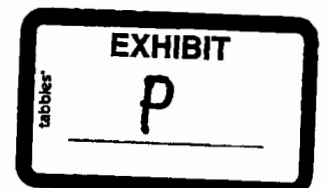
SER. NO. 86-467,532, FILED 12-1-2014.

ESTHER QUEEN, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office



United States of America

United States Patent and Trademark Office

Beta-HD

Reg. No. 4,768,711

Registered July 7, 2015

Int. Cl.: 3

TRADEMARK

PRINCIPAL REGISTER

AGUILA, RAFAEL N (FLORIDA SOLE PROPRIETORSHIP), DBA EDGE SYSTEMS
6800 SW 40TH STREET, SUITE 102
MIAMI, FL 33155

FOR: NON-MEDICATED SKIN CARE PREPARATIONS, NAMELY, LOTIONS AND SERUMS,
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THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

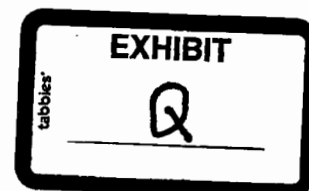
SER. NO. 86-467,563, FILED 12-1-2014.

ESTHER QUEEN, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office



United States of America

United States Patent and Trademark Office

Antiox-6

Reg. No. 4,768,712

Registered July 7, 2015

Int. Cl.: 3

TRADEMARK

PRINCIPAL REGISTER

AGUILA, RAFAEL N (FLORIDA SOLE PROPRIETORSHIP), DBA EDGE SYSTEMS
6800 SW 40TH STREET, SUITE 102
MIAMI, FL 33155

FOR: NON-MEDICATED SKIN CARE PREPARATIONS, NAMELY, LOTIONS AND SERUMS,
IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 6-22-2003; IN COMMERCE 6-22-2003.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

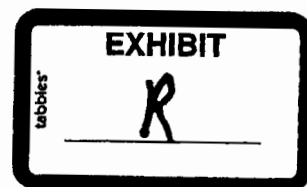
SER. NO. 86-467,584, FILED 12-1-2014.

ESTHER QUEEN, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office



United States of America

United States Patent and Trademark Office

DermaBuilder

Reg. No. 4,772,995

Registered July 14, 2015

Int. Cl.: 3

TRADEMARK

PRINCIPAL REGISTER

AGUILA, RAFAEL N (FLORIDA SOLE PROPRIETORSHIP), DBA EDGE SYSTEMS
6800 SW 40TH STREET, SUITE 102
MIAMI, FL 33155

FOR: NON-MEDICATED SKIN CARE PREPARATIONS, NAMELY, LOTIONS AND SERUMS,
IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 6-22-2003; IN COMMERCE 6-22-2003.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PAR-
TICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 86-467,627, FILED 12-1-2014.

ESTHER QUEEN, EXAMINING ATTORNEY



Michelle K. Lee

Director of the United States
Patent and Trademark Office



EXHIBIT 2

From: cmecfautosender@flsd.uscourts.gov

Sent: Thursday, October 08, 2015 8:59:29 AM (UTC-08:00) Pacific Time (US & Canada)

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Subject: Activity in Case 1:14-cv-24517-KMM Edge Systems LLC et al v. Aguila Order on Motion to Amend/Correct

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U.S. District Court

Southern District of Florida

Notice of Electronic Filing

The following transaction was entered on 10/8/2015 at 11:59 AM EDT and filed on 10/8/2015

Case Name: Edge Systems LLC et al v. Aguila

Case Number: [1:14-cv-24517-KMM](#)

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Document Number: 154(No document attached)

Docket Text:

PAPERLESS ORDER. THIS CAUSE came before the Court upon Defendant's Motion to Amend Defendant's Answer and Counterclaims and to Join Additional Parties [135]. Plaintiffs filed a response [137] in opposition to Defendant's motion asserting that Defendant's request for leave to amend to add counterclaims and join additional parties is based on fraudently-obtained trademarks and is therefore made in bad faith. Defendant filed a Reply largely focused on the merits of his trademark applications and asserting that leave to amend should be granted. This Motion is therefore ripe for review. Federal Rule of Civil Procedure 15(a)(2) permits a party to amend its pleadings by leave of court or by written consent of the adverse party. The decision to grant or deny a motion to amend pleadings is within the sound discretion of the trial court. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). The policy of the federal rules is to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading. *Id.* Thus, unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial. *Id.* A substantial reason could include "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of the amendment." *Grayson v. Kmart Corp.*, 79 F.3d 1086, 1110 (11th Cir. 1996). The Court finds a substantial reason to deny Defendant's motion for leave to amend. Defendant's proposed Second Amended Answer and Counterclaims ("SAAC") includes new counterclaims for

trademark infringement and false designation of origin, and amends Defendant's counterclaims alleging RICO violations. The SAAC also seeks to add three additional parties to the lawsuit as counter-defendants: Weston Presidio Service Company, LLC; Valeant Pharmaceuticals International, Inc.; and The Ritz-Carlton Hotel Company, LLC. Notably, the only claims against the proposed counter-defendants are the new counterclaims Defendant is seeking to include as part of his amended pleadings. Several of the factors for denying leave to amend are present in this case. Although there has been no showing of undue delay in Defendant's filing, the remaining factors militate against granting Defendant's motion to amend. Defendant provides no factual support to suggest that he has a legitimate basis to assert any claims against the three proposed counter-defendants rendering such an amendment futile. Further, the absence of any specific factual pleadings with respect to the proposed counter-defendants gives rise to an inference of bad faith on Defendant's part. Defendant relies on four trademark registrations he obtained over Plaintiffs' marks using Plaintiffs' images as the basis for his amended counterclaims as well as potentially fraudulent documents in support of those trademarks. Defendant's proposed amendment not only exhibits bad faith, but also appears to demonstrate a continuous disregard for the judicial process which threatens the integrity of the judicial system. Additionally, Defendant's proposed SAAC would cause an undue prejudice to Plaintiffs by virtue of the amendment. Accordingly, upon consideration of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Motion to Amend Defendant's Answer and Counterclaims and to Join Additional Parties [135] is DENIED. Defendant is cautioned that further dilatory tactics and bad faith filings before this Court could lead to sanctions for abusive practices under this Court's inherent authority to regulate litigation before it. Signed by Chief Judge K. Michael Moore on 10/8/2015. (mgn)

1:14-cv-24517-KMM Notice has been electronically mailed to:

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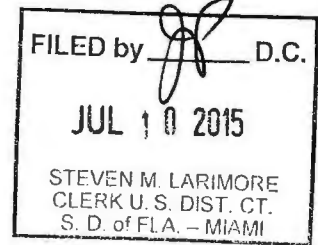
Rafael Newton Aguila
Weittenauerstrasse 11
72108 Rottenburg am Neckar

Germany

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:14-cv-24517-KMM/McAliley



EDGE SYSTEMS, LLC,
a California limited liability company,
and AXIA MEDSCIENCES, LLC,
a Delaware limited liability company,

Plaintiffs,

v.

Rafael Newton Aguila, a/k/a Ralph Aguila,
an individual, d/b/a Hydradermabrasion Systems,

Defendant.

Rafael Newton Aguila, a/k/a Ralph Aguila,
an individual, d/b/a Hydradermabrasion Systems,

Counter-Plaintiff,

v.

EDGE SYSTEMS, LLC,
a California limited liability company,
and AXIA MEDSCIENCES, LLC,
a Delaware limited liability company,

Counter-Defendants.

Amended **DEFENDANT'S ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS**

Defendant/Counter-Plaintiff, RAFAEL NEWTON AGUILA ("Aguila"), answer to
Plaintiffs' Original Complaint ("Complaint") is as follows:

THE PARTIES

1. The allegations of paragraph 1 are denied.
2. The allegations of paragraph 2 are denied.
3. The allegations of paragraph 3 are admitted.

4. The allegations of paragraph 4 are denied.
5. The allegations of paragraph 5 are denied.

JURISDICTION AND VENUE

6. The allegations of paragraph 7 are denied.
7. The allegations of paragraph 8 are denied.
8. The allegations of paragraph 9 are denied.
9. The allegations of paragraph 10 are admitted.

GENERAL ALLEGATIONS

10. The allegations of paragraph 10 are admitted.
11. The allegations of paragraph 11 are denied.
12. The allegations of paragraph 12 are denied.
13. The allegations of paragraph 13 are denied.
14. The allegations of paragraph 14 are denied.
15. The allegations of paragraph 15 are denied.
16. The allegations of paragraph 16 are denied.
17. The allegations of paragraph 17 are denied.
18. The allegations of paragraph 18 are denied.
19. The allegations of paragraph 19 are denied.
20. The allegations of paragraph 20 are denied.
21. The allegations of paragraph 21 are denied.
22. The allegations of paragraph 22 are denied.
23. The allegations of paragraph 23 are denied.
24. The allegations of paragraph 24 are denied.
25. The allegations of paragraph 25 are denied.
26. The allegations of paragraph 26 are denied.
27. The allegations of paragraph 27 are denied.
28. The allegations of paragraph 28 are denied.
29. The allegations of paragraph 29 are admitted.
30. The allegations of paragraph 30 are denied.
31. The allegations of paragraph 31 are denied.

32. The allegations of paragraph 32 are admitted.
33. The allegations of paragraph 33 are admitted.
34. The allegations of paragraph 34 are denied.
35. Aguila admits that Plaintiff Edge Systems has generated over \$93 million in revenue over the last five years. Except as admitted therein, the remaining allegations of paragraph 35 are denied.
36. The allegations of paragraph 36 are denied.
37. The allegations of paragraph 37 are denied.
38. The allegations of paragraph 38 are denied.
39. The allegations of paragraph 39 are denied.
40. The allegations of paragraph 40 are denied.
41. The allegations of paragraph 41 are denied.
42. The allegations of paragraph 42 are denied.
43. The allegations of paragraph 43 are denied.
44. The allegations of paragraph 44 are denied.
45. The allegations of paragraph 45 are denied.
46. The allegations of paragraph 46 are admitted.
47. The allegations of paragraph 47 are denied.
48. The allegations of paragraph 48 are denied.
49. Aguila admits to applying for a trademark on November 1, 2014. Except as admitted therein, the remaining allegations of paragraph 49 are denied.
50. Aguila admits to using the website www-edge-systems.com. Except as admitted therein, the remaining allegations of paragraph 50 are denied.
51. The allegations of paragraph 51 are denied.
52. The allegations of paragraph 52 are admitted.
53. The allegations of paragraph 53 are denied.
54. The allegations of paragraph 54 are denied.
55. The allegations of paragraph 55 are denied.
56. The allegations of paragraph 56 are denied.
57. The allegations of paragraph 57 are admitted.
58. The allegations of paragraph 58 are denied.

- 59. The allegations of paragraph 59 are denied.
- 60. The allegations of paragraph 60 are denied.
- 61. The allegations of paragraph 61 are denied.
- 62. The allegations of paragraph 62 are denied.
- 63. The allegations of paragraph 63 are denied.
- 64. The allegations of paragraph 64 are denied.
- 65. The allegations of paragraph 65 are denied.
- 66. The allegations of paragraph 66 are denied.
- 67. The allegations of paragraph 67 are denied.
- 68. The allegations of paragraph 68 are denied.
- 69. The allegations of paragraph 69 are denied.
- 70. The allegations of paragraph 70 are denied.
- 71. The allegations of paragraph 71 are denied.
- 72. The allegations of paragraph 72 are denied.
- 73. The allegations of paragraph 73 are denied.
- 74. The allegations of paragraph 74 are denied.
- 75. The allegations of paragraph 75 are denied.
- 76. The allegations of paragraph 76 are denied.

FIRST CLAIM FOR RELIEF INFRINGEMENT OF THE PATENTS-IN-SUIT

- 77. The allegations of paragraph 77 are denied.
- 78. The allegations of paragraph 78 are admitted.
- 79. The allegations of paragraph 79 are denied.
- 80. The allegations of paragraph 80 are denied.
- 81. The allegations of paragraph 81 are denied.
- 82. The allegations of paragraph 82 are denied.
- 83. The allegations of paragraph 83 are denied.
- 84. The allegations of paragraph 84 are denied.
- 85. The allegations of paragraph 85 are denied.
- 86. The allegations of paragraph 86 are denied.
- 87. The allegations of paragraph 87 are denied.

- 88. The allegations of paragraph 88 are denied.
- 89. The allegations of paragraph 89 are denied.
- 90. The allegations of paragraph 90 are denied.
- 91. The allegations of paragraph 91 are denied.
- 92. The allegations of paragraph 92 are denied.
- 93. The allegations of paragraph 93 are denied.
- 94. The allegations of paragraph 94 are denied.

SECOND CLAIM FOR RELIEF TRADEMARK INFRINGEMENT

- 95. The allegations of paragraph 95 are denied.
- 96. The allegations of paragraph 96 are admitted.
- 97. The allegations of paragraph 97 are denied.
- 98. The allegations of paragraph 98 are denied.
- 99. The allegations of paragraph 99 are denied.
- 100. The allegations of paragraph 100 are denied.
- 101. The allegations of paragraph 101 are denied.
- 102. The allegations of paragraph 102 are denied.
- 103. The allegations of paragraph 103 are denied.
- 104. The allegations of paragraph 104 are denied.
- 105. The allegations of paragraph 105 are denied.

THIRD CLAIM FOR RELIEF

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

- 106. The allegations of paragraph 106 are denied.
- 107. The allegations of paragraph 107 are admitted.
- 108. The allegations of paragraph 108 are denied.
- 109. The allegations of paragraph 109 are denied.
- 110. The allegations of paragraph 110 are denied.
- 111. The allegations of paragraph 111 are denied.
- 112. The allegations of paragraph 112 are denied.
- 113. The allegations of paragraph 113 are denied.
- 114. The allegations of paragraph 114 are denied.

115. The allegations of paragraph 115 are denied.

FOURTH CLAIM FOR RELIEF

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

116. The allegations of paragraph 116 are denied.

117. The allegations of paragraph 117 are admitted.

118. The allegations of paragraph 118 are denied.

119. The allegations of paragraph 119 are denied.

FIFTH CLAIM FOR RELIEF

FRAUD ON THE U.S.P.T.O.

120. The allegations of paragraph 120 are denied.

121. The allegations of paragraph 121 are admitted.

122. The allegations of paragraph 122 are denied.

123. The allegations of paragraph 123 are denied.

124. The allegations of paragraph 124 are denied.

125. The allegations of paragraph 125 are denied.

126. The allegations of paragraph 126 are denied.

SIXTH CLAIM FOR RELIEF

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION

127. The allegations of paragraph 127 are denied.

128. The allegations of paragraph 128 are admitted.

129. The allegations of paragraph 129 are denied.

130. The allegations of paragraph 130 are denied.

131. The allegations of paragraph 131 are denied.

GENERAL DENIAL

Except as expressly admitted herein, Aguila denies each and every allegation contained in Plaintiffs' Complaint.

DEMAND FOR JUDGMENT

A. Aguila denies that this demand should be made;

- B. Aguila denies that a judgment should be entered that declares that the Defendant has infringed U.S. Patent Nos. 6,299,620, 6,641,591, 7,678,120, 7,789,886, 8,066,716 and 8,337,513;
- C. Aguila denies that preliminary and permanent injunctions should be granted against the Defendant for the supposed infringement of U.S. Patent Nos. 6,299,620, 6,641,591, 7,678,120, 7,789,886, 8,066,716, and 8,337,513;
- D. Aguila denies that the Plaintiffs should be awarded for damages for Defendant's supposed infringement of U.S. Patent Nos. 6,299,620, 6,641,591, 7,678,120, 7,789,886, 8,066,716 and 8,337,513;
- E. Aguila denies that a declaration should be made stating that the Defendant's supposed infringement of U.S. Patent Nos. 6,299,620, 6,641,591, 7,678,120, 7,789,886, 8,066,716 and 8,337,513 was willful, and that this is not an exceptional case under 35 U.S.C. § 285;
- F. Aguila denies that this demand should be made;
- G. Aguila denies that this demand should be made;
- H. Aguila denies that this demand should be made;
- I. Aguila denies that this demand should be made;
- J. Aguila denies that this demand should be made;
- K. Aguila denies that this demand should be made;
- L. Aguila denies that this demand should be made;
- M. Aguila denies that this demand should be made;
- N. Aguila denies that this demand should be made;
- O. Aguila denies that this demand should be made;
- P. Aguila denies that this demand should be made;
- Q. Aguila denies that this demand should be made;
- R. Aguila denies that this demand should be made;
- S. Aguila denies that this demand should be made;
- T. Aguila denies that this demand should be made;
- U. Aguila denies that this demand should be made;
- V. Aguila denies that this demand should be made;
- W. Aguila denies that this demand should be made;
- X. Aguila denies that this demand should be made.

DEMAND FOR JURY TRIAL

Defendant demands a trial by jury.

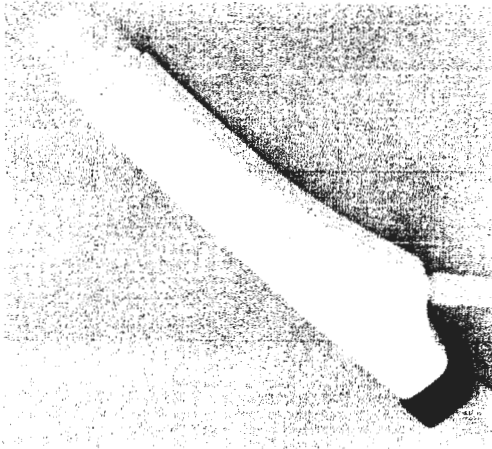
AFFIRMATIVE DEFENSES

Pursuant to Federal Rule of Civil Procedure 8(c), and without assuming any burden that it would not otherwise bear, and reserving its right to assert additional defenses, Aguila asserts the following defenses to Plaintiffs' Original Complaint.

FIRST DEFENSE - NON-INFRINGEMENT

Without waiving the right to raise additional bases for alleging non-infringement, Aguila has not and does not infringe any claim of the Plaintiffs' Patent for at least the reason that one or more claim limitations are not, and have not been, present in the Aguila's products. Aguila does not infringe, and has not infringed, literally or under the doctrine of equivalents; Aguila does not infringe, and has not infringed, directly, indirectly, jointly, or contributorily; Aguila does not induce, and has not induced, infringement.

As noted above, the limitation of Claim 1 of the '620 patent requiring "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" means that the actual handpiece used by the appellees is different from what is mentioned in Claim 1 of the '620 patent. Instead of having an "abrasive fragment", the Plaintiffs' handpiece has smooth plastic tips with small ridges. Therefore, neither the Plaintiffs' nor the Aguila's handpiece meet every limitation of Claim 1 of the '620 without making any kind of claim construction analysis; (2) construing appellees' handpiece to contain an "abrasive fragment" when it has no abrasive materials that make contact with the skin.



Aguila's handpiece



Plaintiffs' handpiece

According to the Merriam-Webster dictionary, the ordinary meaning of the term “**abrasive**” is defined as: “a substance (as emery or pumice) used for abrading, smoothing, or polishing”.

SECOND DEFENSE - INVALIDITY

The claims of the Plaintiffs' patents are invalid because they do not comply with the statutory requirements of patentability enumerated in the Patent Act of the United States, 35 U.S.C. §101 *et seq.* For example, and without waiving the right to raise additional bases for alleging invalidity, the claims of the patents are invalid under 35 U.S.C. §§ 102 and 103 in view of prior art references including, but not limited to, U.S. Patent Nos. 6,241,739, 4,378,804, and 5,037,431. The claims of the Plaintiffs' patents are also invalid under 35 U.S.C. § 112 for reciting claim limitations not supported in the written description and/or which lack enablement. The Plaintiffs' patents' specifications do not include a complete written description of the claimed inventions. For example, their specifications do not include sufficient specificity and detail so that after reading the specification a person of ordinary skill in the relevant art can practice the invention without undue experimentation. The specifications also do not set out the best way, or best mode, known to the inventor of practicing the invention. The claims of Plaintiffs' patents are ambiguous or indeterminate.

THIRD DEFENSE - EQUITABLE ESTOPPEL

Plaintiffs led Aguila to reasonably believe they did not intend to enforce the Plaintiffs' patent against Aguila by, among other things, failing to file a lawsuit since their first accusation in 2006 of patent infringement. Aguila has relied on the conduct of the Plaintiffs.

Due to its reliance, Aguila would be materially prejudiced if Plaintiffs were permitted to proceed with their claim for infringement under the Patent Act because, at a minimum, Aguila has continued to accrue potential patent damages for its allegedly infringing use of his devices.

Based on the foregoing, Plaintiffs should be equitably estopped from pursuing patent infringement claims against Aguila.

FOURTH DEFENSE – LACHES

Plaintiffs' claims are barred in whole or in part by the doctrine of laches. The patent holder delayed in filing the lawsuit for an unreasonable length of time and the delay operated to the prejudice of Aguila. The Plaintiffs first threatened Aguila with a lawsuit for trademark and patent infringement in 2006. See Exhibit A. On January 2010, the Plaintiffs sent Aguila a cease and desist letter threatening a lawsuit for trademark infringement, dilution, patent infringement, unfair competition, copyright infringement, and violation of the ACPA. See Exhibit B.

In the cease & desist letter, the Plaintiffs had asked for much more than the stoppage of all commerce by the Defendant on his websites. In fact, the Plaintiffs had demanded that the Defendant **(1)** immediately cease and desist any and all use of the marks HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6, or any other mark confusingly similar to our client's marks; **(2)** immediately take down all text and other copyrighted material belonging to Edge Systems from the <hydradermabrasian.com> domain and any other domains you control; **(3)** immediately take down all material from the domains <hydrapeel.com> and <hydropeel.com> and transfer the domains <hydrapeel.com> and <hydropeel.com> to Edge Systems; **(4)** immediately cease doing business as HydraPeel Systems and agree not to do business under a trade name confusingly similar to Edge Systems' marks; **(5)** immediately cease all manufacturing, sales, offers for sale, and importation of your hydradermabrasion products, and any other products covered by Edge Systems patents; **(6)** immediately destroy all products covered

by Edge System's patents and provide us with documentation of such destruction; and (7) pay Edge Systems' damages, attorneys' fees, and costs incurred in connection with this matter.

Within a week of receiving the cease & desist letter, the Defendant spoke with the Plaintiffs and mentioned that he could sue them for common law trademark infringement because Aguila was the first to use the Edge Systems name and logo, in addition to being first to offer a serum-based microdermabrasion device in 2004. Soon thereafter, both sides agreed not to sue each. However, no agreement was signed. Importantly, Aguila never stopped selling after the Plaintiff's cease & desist letter. In fact, both the diamondskin.com and hydradermabrasion.com websites were still operational. In fact, in May 2010, Aguila sold one of his Hydradermabrasion devices to a customer. See Exhibit C. This invoice was kept as ordinary business records and are true by Aguila on direct knowledge. I had direct personal knowledge over this invoice, and that I wrote it at that time.

Because Aguila did not stop selling his products, even after Plaintiffs' Cease & Desist letter in January 2010, many of the legal claims (such as FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION) made by the Plaintiffs are time-barred under laches and equitable estoppel because of Florida's four year statute of limitations (Fla Stat. § 95.11).

FIFTH DEFENSE - UNENFORCEABILITY

The claims of the Plaintiffs' patent are unenforceable because inequitable conduct was committed during prosecution of the application for the Plaintiffs' patent by the Plaintiffs and possibly others who owed a duty of candor and good faith to the U.S. Patent and Trademark Office ("PTO") pursuant to 37 C.F.R. 1.56.

In particular, the Plaintiffs failed to disclose highly material prior art and were indisputably aware of. Their failure to disclose, detailed below, evidences intent to deceive the PTO.

Plaintiffs claim that their '620 patent is being infringed by the Aguila's HydraDerm MD device. However, US Patent 6,241,739 ("the '739 patent) was filed with the USPTO on November 12, 1999, more than one month before Plaintiffs' '620 patent was filed on December 30th, 1999.

SIXTH DEFENSE – ANTICIPATION

Plaintiffs’ patents are invalid because they are not novel because the exact claimed inventions were invented earlier by another person. For a patent claim to be invalid as anticipated, that prior art reference must disclose each element, either explicitly or inherently, as arranged in the claim. An inherent disclosure occurs where the element is not expressly disclosed but the practice of the prior art reference would inevitably include the element.

US Patent 6,241,739 (“the ‘739 patent”) was filed with the USPTO on November 12, 1999, more than one month before the ‘620 patent was filed on December 30th, 1999. The ‘739 patent clearly anticipates the ‘620 patent by mentioning the following:

“FIG. 11 shows a second tube 54 mounted on the treatment tip 22. The tube could be used to allow the metered use of chemicals to enhance the abrasion or supply or other liquids to reduce friction”.



Plaintiffs’ ‘620 Patent	Disclosure of U.S. Patent No. 6,241,739
<p>Preamble: A system for treating surface layers of a patient’s skin, comprising:</p>	<p>The device for microdermabrasion comprises a hollow tube with and abrasive material permanent attached to a skin contacting end. The abrasive coated tip is moved over the skin surface While a vacuum is applied through the tube to the skin surface to remove cells abraded from the skin surface. The vacuum also causes the skin to be held in intimate contact With the abrasive tip during the treatment procedure.</p>
<p>(a) an instrument body with a distal working end for engaging a skin surface;</p>	<p>This is generally accomplished by the use of a tube having a treatment tip with an abrasive material permanently attached thereto. The term “tube” or “tubular” used herein refers to an elongated hollow structure of any cross section, which includes, but is not limited to, a round, oval, square or rectangle cross section.</p>

Plaintiffs' '620 Patent	Disclosure of U.S. Patent No. 6,241,739
(b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto;	The abrasive tip is rubbed over the skin surface being treated. The tube and related instrumentation also provides a vacuum collection and an optional filter system for collection of the skin cells removed by the procedure, the skin cells being aspirated through a hole or holes in the central portion of the abrasive tip.
(c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and	FIG. 11 shows a second tube mounted on the treatment tip. The tube could be used to allow the metered use of chemicals to enhance the abrasion or supply or other liquids to reduce friction.
(d) at least one outflow aperture in said skin interface in communication with a negative pressurization source.	A tubular device for performing micro-abrasion of a skin surface comprising a tubular device with a lumen there through, the tubular device having a first end with an abrasive surface and means on a second end thereof for attachment to a source of a vacuum to apply a negative pressure to a skin surface to be treated, said vacuum causing increased contact between the skin surface and the abrasive surface.

Additionally, US. Patent No. 4,378,804 (“the ‘804 patent”) anticipates the Plaintiffs’ patents by first claiming that liquid “is directed to a skin abrasion device which uses flowing water to rotate an abrasive brush and create a vacuum to remove loosened skin particles. The rotating brush is usually used in conjunction with a liquid detergent or medicinal compound applied to the skin surface being scrubbed”.

Also, US. Patent No. 5,037,431 (“the ‘431 patent”) describes the use of a pressurized jet of a liquid, such as water or sterile saline, to fragment and remove diseased tissue without harming surrounding healthy tissue. This device operates in conjunction with vacuum aspiration to remove the liquid and fragmented tissue. Therefore, this prior art anticipates the Plaintiffs’ patents

SEVENTH DEFENSE – OBVIOUSNESS

The Plaintiffs’ patent claims are obvious because a person of skill in the art at the time of filing of the patent application would have considered the claimed invention to be obvious based

on the state of the art at that time. The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.

EIGHTH DEFENSE – INEQUITABLE CONDUCT

The Plaintiffs and their asserted patents breached its duties of disclosure or candor to the USPTO when their patents were prosecuted. Because the patent application process is an ex parte process, applicants and their counsel must (1) cite all known material prior art to the patent examiner; (2) deal truthfully and with candor in making arguments or taking positions during prosecution.

The Plaintiffs had the intent to deceive the USPTO. Because they knew of the prior art reference; knew that it was material; and made a deliberate decision to withhold the information. If the USPTO had been aware of the undisclosed prior art, it would not have allowed the Plaintiffs' claims.

NINTH DEFENSE – TRADEMARK

Defendant affirmatively alleges that Plaintiffs' trademarks were wrongfully issued by the USPTO. Plaintiffs' trademarks are all descriptive of goods to which they apply and are incapable of functioning as a trademark as contemplated by the Trademark laws, and, therefore, Plaintiffs have no right to the exclusive appropriation and use of such alleged trademarks. Furthermore, the Plaintiffs' trademark have not acquired secondary meaning in the marketplace and are merely descriptive. The Plaintiffs' trademarks are all in common use and are public property.

The Plaintiffs have not used reasonable diligence in seeking relief. Aguila use of his devices' trademarks have been in open, continuous, and extensive use by Aguila for more than 19 years prior to the filing of this action, to the knowledge of the Plaintiffs, and Plaintiffs have made no attempt to obtain judicial determination of its alleged rights in respect to the use by the Aguila of the marks now complained of. Aguila has relied on Plaintiffs' acquiescence and delay and has continued its use of its trademarks and has invested substantial sums in reliance on Plaintiffs' acquiescence and delay.

In addition, the Defendant was already using the Edge logo and "Edge Systems" before the Plaintiffs as shown in the Aguila's invoice from 1996 (a true and correct copy of Aguila's business invoice from 1996 is attached as **Exhibit D**). This invoice was kept as ordinary

business records and are true by Aguila on direct knowledge. That I had direct personal knowledge over them, and that I wrote them.

The Plaintiffs' "Edge System" trademark has been abandoned for more than five-years because they have sold no devices with the name of "Edge System".

Many of the other "common-law" trademarks that Plaintiffs claim for themselves, such as "Activ-4", "Antiox+", "Antiox-6", "Beta-HD", "DermaBuilder", "GlySal", were actually already being used by Aguila in 2004, as is shown by one of Aguila's invoices from January 2004. See Exhibit E. This invoice was kept as ordinary business records and are true by Aguila on direct knowledge. I had direct personal knowledge over this invoice, and that I wrote it at that time.

In addition, the Plaintiffs engaged in fraud to receive their Hydrafacial trademark.

TENTH DEFENSE – TRADE DRESS IS FUNCTIONAL

15 U.S.C. § 1125

15 U.S.C. § 1125(a)(3) states that "[i]n a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional". Clearly, the Plaintiffs' Hydrafacial device's trade dress is functional. For example, many medical devices have wheels at the base, and a touchscreen monitor on the top of the device. The blue colored plastic cover allows the bottles to be protected from accidentally touching the bottles during use. Lastly, a dark colored wheel-base hides any scuff marks from people's shoes brushing against the base and leaving scuff marks on the base. Therefore, the plaintiff's burden to establish that its proposed trade dress is non-functional according to 15 U.S.C. § 1125(a) has not been met.

To ensure that trade dress does not cause confusion among products, Congress passed §43(a) of the Lanham Act (now known as 15 U.S.C. § 1125(a)) prohibiting the "false designation" of a product's origin. 15 U.S.C. § 1125(a) requires proving three elements in a trade dress infringement claim: first, that a consumer is likely to confuse the imitated product's trade dress with that of its competitor; second, that the imitated product's trade dress has inherent distinctiveness or has acquired secondary meaning; and, third, that the imitated trade dress is nonfunctional. The Plaintiffs' non-registered trade dress clearly does not meet the requirements of 15 U.S.C. § 1125(a). Firstly, the Plaintiffs' trade dress has not acquired secondary meaning. Secondly, the Plaintiffs' trade dress is merely functional.

Like word trademarks, trade dress can also be registered. In the case of litigation, defending against registered trade dress is significantly more difficult than defending against unregistered trade dress. Registration under Section 2 of the Lanham Act (15 U.S.C. § 1052) permits the plaintiff to sue under Section 32 (15 U.S.C. § 1114), while plaintiffs owning non-registered trade dress (or trademarks) must rely upon 15 U.S.C. § 1125(a). More importantly, the plaintiff who owns a registration in its trade dress need not prove the validity of such trade dress, as registration provides *prima facie* validity. In this case, the Plaintiffs do not have the luxury of their trade dress having *prima facie* validity because their trade dress is not registered with the USPTO.

Plaintiffs' trade dress has not acquired secondary meaning, and can be reasonably described as being a "generic" self-standing medical machine.

In addition, any consumer confusion between Aguila's devices and the Plaintiffs' devices are the result of the Plaintiffs copying Aguila's trade dress. Aguila was the first in 2004 to begin selling a stand-alone medical device with a touchscreen monitor on top of a wheeled-base, with a series of bottles in the middle. See Exhibit E.

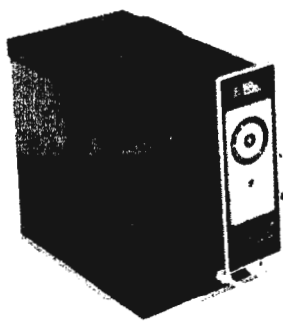
The Plaintiffs' trade dress is neither inherently distinctive and has not acquired distinctiveness through secondary meaning. To have acquired secondary meaning in the minds of the public, the primary significance of a product feature or term must be to identify the source of the product rather than the product itself. In this case, there is simply no evidence that customers identify the HydraFacial's trade dress with the Plaintiffs. There are no precedents in case law that recognizes the protectability of any product-design as a trademark for that product without proof of distinctiveness; that is, distinctiveness as an indication of origin, not simply that it is a distinctive design in the sense of being unusual.

Importantly, the Plaintiffs are not accusing Aguila of copying any of their product packaging, but instead, the Plaintiffs accuse Aguila of copying their product configuration. In contrast, a fanciful or arbitrary trademark, having had no established meaning prior to its adoption as a trademark and serving no apparent purpose other than to identify (signify) the source, is legally presumed to achieve customer recognition and association immediately upon its adoption and use. In contrast, a product configuration cannot generally give rise to a similar presumption, as consumers usually appreciate a product's configuration for its contribution to the inherent appeal of the product, not (in the absence of secondary meaning) its signifying function. Thus, just as

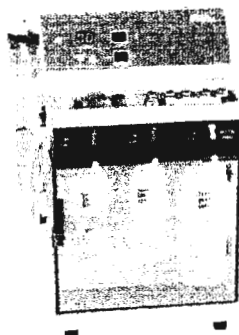
generic trademarks may be copied freely, functional trade dress may also be copied freely -- because both are important for preserving effective competition.

But the uniqueness of a product configuration is not enough by itself to make the configuration inherently distinctive. To be inherently distinctive, Plaintiffs' HydraFacial's product configuration must also be conceptually separable from the product, so that a consumer will recognize its symbolic (signifying) character. This requirement ensures that consumers unaware of any association of the product with a manufacturer (*i.e.*, where a configuration has no secondary meaning) will not become confused about whether a particular configuration may be trusted as an indicium of origin. To be conceptually separable, the product configuration must be recognizable by the consumer as an indicium of source, rather than a decorative symbol or pattern.

Lastly, Plaintiffs' HydraFacial device's trade dress comes in a number of configurations and forms. Misleadingly, the Plaintiffs only included one version of their HydraFacial device's trade dress (*i.e.*, the "Tower") in their complaint when, in fact, the HydraFacial has four different trade dresses (*e.g.*, the "Nectre", the "Wave", the "Allegro", and the "Tower"). With the "Tower" design being the newest iteration of the Plaintiffs' HydraFacial device.



HydraFacial device
("Nectre")



HydraFacial device
("Wave")



HydraFacial device
("Allegro")



HydraFacial device
("Tower")

ELEVENTH DEFENSE – UNCLEAN HANDS

In 2006, an employee of Edge Systems LLC named Marshae Colbert, used my credit card information to purchase several items for her own personal use. I have attached the police report (0603266) that I filed with the city of South Miami on this incident. Please also see Los Angeles Superior Court criminal case numbers LBNA070084-01 and XSONA070084-01. See Exhibit F.

In addition, Edge Systems LLC President, William Cohen verbally and physical threatened Aguila inside the courtroom on December 19, 2014, to pressure Aguila to agree and settle the case. See Exhibit G.

In addition, the Plaintiffs' Hydrafacial device has more than 100 complaints, according to an FDA inspection report. Therefore, the Plaintiffs' Hydrafacial device may be considered to be a danger to the public because of all the complaints. See Exhibit H. Importantly, one victim nearly lost their eye because of the Plaintiffs' badly manufactured Hydrafacial device. See Exhibit I.

COUNTERCLAIM

Counter-Plaintiff, RAFAEL NEWTON AGUILA, (hereinafter, "Aguila"), sues Counter-Defendants, Edge Systems LLC ("Edge Systems LLC") and Axia Medsciences ("Axia"), and alleges:

1. Aguila is a resident of Germany.
2. On information and belief, Edge Systems LLC is a California LLC.
3. On information and belief Axia Medsciences is a Delaware LLC.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to: (1) 28 U.S.C. § 2201 and 2202, in that it is an action seeking a declaratory judgment of patent non-infringement and patent invalidity, under the United States Patent Act, 35 U.S.C. § 101 *et. seq.*; and (2) 28 U.S.C. §§ 1331 and 1338(a) in that this matter arises under an Act of Congress relating to patents.

5. This Court has personal jurisdiction over Edge Systems LLC and Axia LLC in that Edge Systems LLC and Axia LLC: (a) have a principal place of business located within this District;

(b) have committed the acts complained of herein in this District; (c) transact business within this District; and/or (d) have conceded jurisdiction in a prior lawsuit filed in this District.

6. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and (c) in that a substantial part of the facts giving rise to the claims asserted herein occurred in this District.

BACKGROUND

7. Aguila is a permanent resident of the Federal Republic of Germany and lives there with his wife and four-year old daughter. Starting in 1996, while living in the United States, Aguila founded a number of small companies over the years that specialized in skin care treatments. In 1996, Aguila began a company called Edge Systems (“original Edge Systems”), which had a distinctive logo that may be described as being a chevron-styled “E” formed by three horizontal triangles. See Exhibit D. Edge Systems’ main product was microdermabrasion machines used in skin care salons and spas.

8. However, one year later in 1997, a competitor in a California-based company began using the same name and logo as Aguila’s company (“copycat Edge Systems”). Aguila decided not to file a lawsuit against the doppelganger competitor because Aguila’s company lacked the funds to pay for an expensive trademark infringement lawsuit.

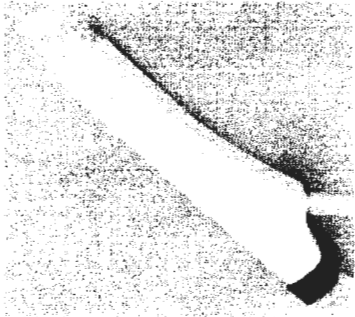
9. In 2004, Aguila began manufacturing devices that did not exfoliate like regular microdermabrasion machines, but instead were designed to simply apply liquids on to the skin surface using a smooth-tipped handpiece. See Exhibit E. Aguila began calling these machines with the term “hydradermabrasion” devices, so as to differentiate them from regular microdermabrasion machines. However, one year later in 2005, Aguila’s competitor, the California-based doppelganger of Aguila’s original Edge Systems, began selling a similar hydradermabrasion device with the name of “HydraFacial MD”. Copycat Edge Systems duplicated Aguila’s device’s trade dress, as well as many of the serum trade-names used by Aguila’s company. See Exhibit J, K, and L.

10. Nevertheless, both companies agreed to an unwritten "gentleman's agreement" since 2005 to not sue one another, due to the problems that a large lawsuit would necessarily entail. Nevertheless, in 2006, the California-based Edge Systems accused Aguila of copying their products in an e-mail. Aguila responded to this e-mail and the status quo was maintained. In 2009, the California-based Edge Systems again accused Aguila of infringing their products in a Cease & Desist letter. Again, the status quo was maintained and no side agreed to make any changes. See Exhibit B. On 12-18-2012, the California-based Edge Systems was purchased by Weston Presidio, a private equity firm, and their sales began to greatly increase thereafter.

COUNT I - DECLARATION OF NON-INFRINGEMENT

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims as if fully set forth herein. Without waiving the right to raise additional bases for alleging non-infringement, Aguila has not and does not infringe any claim of any of the Plaintiffs' Patents for at least the reason that one or more claim limitations are not, and have not been, present in any of Aguila's accused devices. Aguila does not infringe, and has not infringed, literally or under the doctrine of equivalents; Aguila does not infringe, and has not infringed, directly, indirectly, jointly, or contributorily; Aguila does not induce, and has not induced, infringement.

For example, Aguila we would include a metal handpiece with an abrasive tip, but for only dry microdermabrasion, not to use with liquids. The metal handpieces did have diamond fragments on it to act as an abrasive. For the "wet" microdermabrasion, Aguila would only use the plastic handpiece with the special plastic tip and no diamond or abrasive material. Similar to the Hydrafacial MD. See Exhibit J, K, and L. As noted above, the limitation of Claim 1 of the '620 patent requiring "a skin interface portion of the working end comprising an abrasive fragment composition secured thereto" means that the actual handpiece used by the appellees is different from what is mentioned in Claim 1 of the '620 patent. Instead of having an "abrasive fragment", the Plaintiffs' handpiece has smooth plastic tips with small ridges. Therefore, neither the Plaintiffs' nor the Aguila's handpiece meet every limitation of Claim 1 of the '620 without making any kind of claim construction analysis; (2) construing appellees' handpiece to contain an "abrasive fragment" when it has no abrasive materials that make contact with the skin.



Aguila's handpiece



Plaintiffs' handpiece

According to the Merriam-Webster dictionary, the ordinary meaning of the term “**abrasive**” is defined as: “a substance (as emery or pumice) used for abrading, smoothing, or polishing”.

COUNT II - DECLARATION OF INVALIDITY

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

The claims of the Plaintiff's Patent are invalid because they do not comply with the statutory requirements of patentability enumerated in the Patent Act of the United States, 35 U.S.C. §101 et seq. For example, and without waiving the right to raise additional bases for alleging invalidity, the claims of the Plaintiffs' Patents are invalid under 35 U.S.C. §§ 102 and 103 in view of prior art references including, but not limited to, U.S. Patent Nos. 6,241,739; 4,378,804; and 5,037,431.

The claims of the Plaintiffs' Patent are also invalid under 35 U.S.C. § 112 for reciting claim limitations not supported in the written description and/or which lack enablement and indefiniteness.

COUNT III - DECLARATION OF UNENFORCEABILITY

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

The claims of the Plaintiffs' Patents are unenforceable because inequitable conduct was committed during prosecution of the application for the Plaintiffs' patents by named inventors

John H. Shadduck, James Baker, Roger Ignon, and possibly others who owed a duty of candor and good faith to the U.S. Patent and Trademark Office (“PTO”) pursuant to 37 C.F.R. 1.56.

In particular, John H. Shadduck, James Baker, and Roger Ignon failed to disclose highly material prior art they authored themselves, and thus, were indisputably aware of. Their failure to disclose, detailed below, evidences intent to deceive the PTO.

Importantly, the Plaintiffs claim that they have priority over the ‘739 when that is not true. The names inventors and the Plaintiffs acted with the intent to deceive the PTO with their claim of priority over the ‘739 patent. Especially since the ‘739 patent was highly material to the patentability of all of the Plaintiffs’ Patents. The names inventors, the Plaintiffs, and potentially others involved in the prosecution of the all of the Plaintiffs’ Patents -- deliberately withheld material information from the PTO in order to obtain a patent that they knew could not rightfully issue.

COUNT IV – ANTITRUST
(15 U.S.C. § 2.)

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

Under the federal antitrust laws, monopoly claims are analyzed under Section 2 of the Sherman Act. 15 U.S.C. § 2. The elements of a Section 2 monopoly violation include: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Anticompetitive, price-fixing agreements between the Counter-Defendants and several other companies, have led to the continued high price of the Plaintiffs’ HydraFacial device. This agreement hurt competition.

Evidence shows that the Plaintiffs are directly attempting to misuse their patents and trademarks for anticompetitive purposes and to unlawfully eliminate competition.

To establish monopolization or attempt to monopolize under § 2 of the Sherman Act, it is necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. In this case, the Plaintiffs have a monopoly over “Hydradermabrasion” treatments – which do not use an abrasive on the tip of the handpiece.

Counter-Defendants' patents and trademarks resulted in excluding Aguila and others from the market.

This current suit is just one of a series of lawsuits that the Counter-Defendants have initiated in their desire for monopolization of the marketplace. The counter-Defendants' legal filings were made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment.

The Counter-Defendants have created a monopoly in the hydradermabrasion industry by pressuring competitors to leave the market, or buying competitors off. For example, the profit-margins of the Counter-Defendants have not fallen in more than five (5) years. In a normal competitive market, their profit margins would tend to lower as the years progresses and new competitors entered that market or industry. That is not the case in the hydradermabrasion marketplace. Thanks to the Counter-Defendants' monopoly, they have gained excessive profits and damaged competition in the Hydradermabrasion industry.

COUNT V -- PATENT FALSE MARKING
(35 U.S.C. § 292)

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

False use of patent marking is statutorily prohibited under 35 U.S.C. § 292 as defined by whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article the word "patent" or any word or number importing the same is patented, for the purpose of deceiving the public.

The Counter-Defendants falsely marked articles as patented when they are unpatented, with the intent to deceive the public. The articles that the Counter-Defendants marked with a patent are not covered by any claims of the patents listed on their articles. Those articles may be considered unpatented under Section 292 and thus exposed to a Patent False Marking claim. For example, their Hydrafacial handpiece does not have any kind of abrasive on it, which is a requirement of Claim 1 of their '620 patent. Nevertheless, the Counter-Defendants write the mark of the '620 patent on all of their Hydrafacial handpieces.

Aguila and the Counter-Defendants are competitors. Aguila suffered a competitive injury from Counter-Defendants' false marking, which chilled competition and confused potential buyers into fearing purchasing Aguila's products because Aguila's products have no patent markings. Counter-Defendants repeatedly told potential customers that their articles are the only ones that have a patent and they should avoid purchasing Aguila's product because the potential customer would be committing indirect infringement against Counter-Defendants' patents. *See Brooks v. Dunlop Manufacturing, Inc.*, 702 F.3d 624 (Fed. Cir. 2012).

COUNT VI - CANCELANATION OF U.S. TRADEMARK REGISTRATION No. 3,500,086
(15 USC § 1064)

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

The trademarked term "Hydropeel" clearly refers to a hydrating peeling, and should be considered to be generic in nature. The term "Hydropeel" is described by the Plaintiffs as referring to a "medical apparatus and instruments for resurfacing and nourishing tissue". On September 07, 2005, the examining attorney wrote that the Hydropeel "*mark is merely descriptive as applied to the goods because it refers to a process carried out using the applicant's goods and/or the function of the applicant's goods*". On March 2006, the Plaintiffs responded with the following argument:

"The applied-for mark HYDROPEEL cannot immediately convey any knowledge of Applicant's medical apparatus and instruments because a multi-step reasoning process must be employed by a would-be consumer to arrive at any conclusion about the goods. That is, a consumer must make a mental leap if he is to make a connection between the mark HYDROPEEL and Applicant's goods. That Applicant's mark HYDROPEEL is suggestive is buttressed by the fact that "hydropeel" has no definition according to Outlook.com, a website that searches numerous online dictionaries at once. See the attached website printout from Outlook.com.

The literal meaning of Applicant's mark HYDROPEEL **would be the peeling of either hydrogen or water**, and Applicant's medical apparatus and instruments do not perform this apparently-impossible task.

Regardless of the Plaintiffs' argument that the term "Hydropeel" merely refers to "*the peeling of either hydrogen or water*", any reasonable person can surmise that term "Hydropeel" refers to a "hydrating peel", which is what the Hydrafacial device is designed to perform. This Court should therefore declare this trademarked term to be generic.

In addition, the Plaintiffs' committed fraud against the USPTO in order to receive this trademark.

COUNT VII - CANCELATION OF U.S. TRADEMARK REGISTRATION No. 4,114,466
(15 USC § 1064)

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

The trademarked term "Vortex-Fusion" clearly refers to a vortex, and should be considered to be generic in nature, or at least descriptive in nature. The term "Vortex-Fusion" is described by the Plaintiffs as referring to a "microdermabrasion apparatus". It was only recently registered on March 20th, 2012 so it is not considered "incontestable". On November 3rd, 2011, the examining attorney wrote that the "*The applicant asserts the mark has no meaning or significance in relation to the goods other than trademark significance*". Notwithstanding the examining attorney's amendment, this Court should declare that this trademark is merely descriptive since it literally describes the action performed by the Hydrafacial or creating a "vortex" in their handpiece to increase their ability to "penetrate" into the epidermis.

Also, the Plaintiffs engaged in fraud on the USPTO to receive this trademark by making false claims to the USPTO reviewer that the term "Vortex" does not refer to a tornado-like effect of their handpiece. Therefore, this trademark term is merely descriptive and not arbitrary, as the Counter-Defendants led the reviewer to believe.

COUNT VIII - CANCELATION OF U.S. TRADEMARK REGISTRATION No. 2,992,734
(15 USC § 1064)

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

As was previously discussed, the Plaintiffs have not used the trademarked term "The Edge System" to describe any of their products for more than three (3) years. If the mark has not been

used in U.S. commerce for a three-year consecutive period, then that is *prima facie* evidence that the mark has been abandoned in the United States. Although for the purposes of this lawsuit, they have begun referring to the HydraFacial device as “The Edge Machine”, even this is misleading because the Plaintiffs have never referred to the Hydrafacial device as “The Edge Machine” in any of their advertisements or manuals. Nevertheless, the fact remains that the Plaintiffs do not sell any devices called “The Edge System”. This trademark should therefore declare this trademarked term to be abandoned.

**COUNT IX - DECLARATION OF THAT THE PLAINTIFFS’ “COMMON LAW”
TRADEMARK REGISTRATIONS**

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

“Activ-4”, “Antiox+”, “Antiox-6”, “Beta-HD”, “DermaBuilder”, “GlySal”, “Edge Systems”, “Chevron “E” Logo” were all developed and put into commerce by Aguila in 2004, and before the Plaintiffs. Therefore, the Plaintiffs should be enjoined from using Aguila’s any of the previously mentioned trademarks that were first put into commerce by Aguila. See Exhibit E.

**COUNT X - CANCELATION OF U.S. TRADEMARK REGISTRATION No. 3,341,027
(15 USC § 1064)**

Aguila repeats and re-alleges paragraphs 1 through 10 of the Counterclaims, as if fully set forth herein.

The Plaintiffs lied to the USPTO during their trademark application for the term “Hydrafacial MD” in 2005. See Exhibit M. On February 9, 2005, the Plaintiffs applied for a trademark for the term “Hydrafacial MD”. The trademark was subsequently registered on November 20, 2007. However, on September 12, 2005, the examining attorney for the USPTO sent the Plaintiffs a letter asking them to place a disclaimer for the term “Hydrafacial” since “it describes a feature of the goods, namely, that they are used to provide hydra facials”. Exhibit N. On March 13, 2006, the Plaintiffs responded to the USPTO’s office action by arguing the following points:

“The term HYDRAFACIAL cannot immediately convey any knowledge of Applicant’s medical apparatus and instruments because a multi-step reasoning process must be employed by a consumers and potential consumers to arrive at any conclusion about the goods. That is, a consumer must make a substantial mental leap if he is to make any connection between the term HYDRAFACIAL and Applicant’s medical goods”.

“On the other hand, the terms “Hydra,” “hydra,” and “facial” do have recognized definitions. The definition of “Hydra” is:

1. Greek Mythology - The many-headed monster that was slain by Hercules.
2. A constellation in the equatorial region of the southern sky near Cancer, Libra, and Centaurus. Also called Snake.
3. A persistent or multifaceted problem that cannot be eradicated by a single effort.

The definition of “hydra” is “[a]ny of several small freshwater polyps of the genus Hydra and related genera, having a naked cylindrical body and an oral opening surrounded by tentacles.” The definition of “facial” is “[a] treatment for the face, usually consisting of a massage and the application of cosmetic creams.” See the attached dictionary definitions from The American Heritage® Dictionary of the English Language (4th ed. 2000).

Thus, the term HYDRAFACIAL has numerous literal meanings – e.g., **a facial for a many-headed monster from Greek mythology, a facial for a constellation**, etc. – but none of these literal definitions has any relevance to Applicant’s medical apparatus and instruments, and the Board has made it clear that the literal meaning of a mark must be considered in determining mere descriptiveness”. Exhibit O.

Notwithstanding the Plaintiffs’ claim that the term “HydraFacial” is not a generic term used to describe a “hydra facial” treatment, but instead means “a facial for a many-headed monster from Greek mythology”. On the Plaintiffs’ website, www.hydrafacial.com/faq.htm, the Plaintiffs drop all pretense that the term “Hydrafacial” is merely suggestive by stating the following:

“What is HydraFacial™?

The HydraFacial™ treatment is a new breakthrough in aesthetic technology. **It takes its name from the root word Hydrate; ”to**

cause to take up moisture". This ability to moisturize the skin separates the HydraFacial™ from all other skin resurfacing procedures. The HydraFacial™ treatment removes dead skin cells and extracts impurities while simultaneously bathing the new skin with cleansing, hydrating and moisturizing serums.

Why is HydraFacial™ good for my skin?

Hydration is the foundation of healthy, radiant skin. Irritation of the skin has been proven to increase signs of aging. **The HydraFacial™ is a hydrating and non-irritating treatment.**

Am I a candidate for this treatment?

The HydraFacial™ treatment is designed for all skin types. Even the most sensitive skin easily tolerates the HydraFacial™ treatment. Your physician or skincare professional may choose specific treatment serums and/or customize the treatment for your unique skin conditions and needs. Consult your physician or skincare professional for a skin evaluation and sensitivity test.

“When the relevant public ceases to identify a trademark with a particular source of a product or service but instead identifies the mark with a class of products or services regardless of source, that mark has become generic and is lost as an enforceable trademark”. It is only common sense to see that the term “HydraFacial” refers to a facial that includes water or liquids for the purposes of performing a hydrating facial. Just like there are other types of facials such as “mud facials”, “caviar facials”, “chocolate facials”, or “European facials”. No reasonable person would think of allowing a term such as “mud facial” to be trademarked by a company.

Therefore, this is sufficient evidence to show that the Plaintiffs intentionally, willfully, and with bad faith, deceived the USPTO in receive the approval for the Hydrafacial trademark. In order to prove fraud on the PTO, the party seeking cancellation must show: “a false representation regarding a material fact, the registrant's knowledge or belief that the representation is false, the intent to induce reliance upon the misrepresentation and reasonable reliance thereon, and damages proximately resulting from the reliance”. “Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application.” *See Torres v. Cantline Torresella S.r.l.*, 808 F.2d 46, 48 (Fed. Cir. 1986).

The Federal Circuit holds that a trademark is obtained fraudulently under the Lanham Act “only if the applicant or registrant knowingly makes a false, material representation with the

intent to deceive the PTO.” Subjective intent to deceive, however difficult it may be to prove, is an indispensable element in the analysis. Of course, “because direct evidence of deceptive intent is rarely available, such intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement.” *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008).

In *Torres*, the court cited various precedents—some persuasive, others binding on the court—and reemphasized several times that (1) fraud in trademark cases “occurs when an applicant knowingly makes false, material representations,” (2) the Lanham Act imposes on an applicant the obligation not to “make knowingly inaccurate or knowingly misleading statements,” and (3) a registrant must also “refrain from knowingly making false, material statements.” *Id.* at 48.

COUNT XI - ACQUISITION AND MAINTENANCE OF AN INTEREST IN AND CONTROL OF AN ENTERPRISE ENGAGED IN A PATTERN OF RACKETEERING ACTIVITY

18 U.S.C. §§ 1961(5), 1962(b)

Aguila now re-alleges each and every allegation as set forth above, and hereby incorporates same by reference, as if all were set forth fully herein. Substance prevails over form.

At various times and places partially enumerated in Aguila’ *documentary material*, all Counter-Defendants did acquire and/or maintain, directly or indirectly, an interest in or control of a RICO *enterprise* of individuals who were associated in fact and who did engage in, and whose activities did affect, interstate and foreign commerce, all in violation of 18 U.S.C. §§ 1961(4), (5), (9), and 1962(b).

During the ten (10) calendar years preceding March 1, 2003 *A.D.*, all Defendants did cooperate jointly and severally in the commission of two (2) or more of the RICO predicate acts that are itemized in the RICO laws at 18 U.S.C. §§ 1961(1)(A) and (B), and did so in violation of the RICO law at 18 U.S.C. 1962(b) (Prohibited activities).

Plaintiff further alleges that all Defendants did commit two (2) or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity, *i.e.* a continuing threat of their respective *racketeering activities*, also in violation of the RICO law at 18 U.S.C. 1962(b) *supra*.

Pursuant to the original Statutes at Large, the RICO laws itemized above are to be *liberally* construed by this honorable Court. Said construction rule was never codified in Title 18 of the United States Code, however. See 84 Stat. 947, Sec. 904, Oct. 15, 1970.

Respondeat superior (principal is liable for agents' misconduct: knowledge of, participation in, and benefit from a RICO enterprise).

COUNT XII - CONDUCT AND PARTICIPATION IN A RICO ENTERPRISE
THROUGH A PATTERN OF RACKETEERING ACTIVITY:
18 U.S.C. §§ 1961(5), 1962(c)

Aguila now re-alleges each and every allegation as set forth above, and hereby incorporates same by reference, as if all were set forth fully herein. Substance prevails over form.

At various times and places partially enumerated in Aguila's *documentary material*, all Counter-Defendants did associate with a RICO *enterprise* of individuals who were associated in fact and who engaged in, and whose activities did affect, interstate and foreign commerce.

Likewise, all Counter-Defendants did conduct and/or participate, either directly or indirectly, in the conduct of the affairs of said RICO *enterprise* through a *pattern of racketeering activity*, all in violation of 18 U.S.C. §§ 1961(4), (5), (9), and 1962(c).

During the ten (10) calendar years preceding March 1, 2003 *A.D.*, all Counter-Defendants did cooperate jointly and severally in the commission of two (2) or more of the RICO predicate acts that are itemized in the RICO laws at 18 U.S.C. §§ 1961(1)(A) and (B), and did so in violation of the RICO law at 18 U.S.C. 1962(c) (Prohibited activities).

Plaintiff further alleges that all Counter-Defendants did commit two (2) or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity, *i.e.* a continuing threat of their respective *racketeering activities*, also in violation of the RICO law at 18 U.S.C. 1962(c) *supra*.

Pursuant to 84 Stat. 947, Sec. 904, Oct. 15, 1970, the RICO laws itemized above are to be *liberally* construed by this honorable Court. Said construction rule was never codified in Title 18 of the United States Code, however. *Respondeat superior* (as explained above).

**COUNT XIII - CONSPIRACY TO ENGAGE IN A PATTERN OF RACKETEERING
ACTIVITY:**

18 U.S.C. §§ 1961(5), 1962(d)

Aguila now re-alleges each and every allegation as set forth above, and hereby incorporates same by reference, as if all were set forth fully herein. Substance prevails over form.

At various times and places partially enumerated in Aguila's *documentary material*, all Counter-Defendants did conspire to acquire and maintain an interest in a RICO *enterprise* engaged in a *pattern of racketeering activity*, in violation of 18 U.S.C. §§ 1962(b) and (d).

At various times and places partially enumerated in Aguila's *documentary material*, all Counter-Defendants did also conspire to conduct and participate in said RICO *enterprise* through a *pattern of racketeering activity*, in violation of 18 U.S.C. §§ 1962(c) and (d).

See also 18 U.S.C. §§ 1961(4), (5) and (9).

During the ten (10) calendar years preceding March 1, 2003 *A.D.*, all Counter-Defendants did cooperate jointly and severally in the commission of two (2) or more of the predicate acts that are itemized at 18 U.S.C. §§ 1961(1)(A) and (B), in violation of 18 U.S.C. 1962(d).

Aguila further alleges that all Defendants did commit two (2) or more of the offenses itemized above in a manner which they calculated and premeditated intentionally to threaten continuity, *i.e.* a continuing threat of their respective *racketeering activities*, also in violation of 18 U.S.C. 1962(d) (Prohibited activities *supra*).

Pursuant to 84 Stat. 947, Sec. 904, Oct. 15, 1970, the RICO laws itemized above are to be *liberally* construed by this honorable Court. Said construction rule was never codified in Title 18 of the United States Code, however. *Respondeat superior* (as explained above).

DEMAND FOR JURY TRIAL

Counter-Plaintiff demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Aguila respectfully requests that this Court enter a judgment:

- a. declaring that Aguila has not, and does not, directly infringe, contributorily infringe, or induce others to infringe, either literally or under the Doctrine of Equivalents, any claim of the Plaintiffs' Patents
- b. declaring that each of the claims of the Plaintiffs' Patents are invalid for failing to comply with the statutory requirements of patentability enumerated in the Patent Act of the United States, 35 U.S.C. §101 *et seq.*;
- c. declaring that Plaintiffs should be equitably estopped from pursuing patent infringement claims against Aguila;
- d. declaring that the Plaintiffs' Patents are unenforceable, on account of inequitable conduct during the prosecution of the patent application;
- e. awarding Aguila its costs and any other relief that this Court deems just and fit;
- f. to cancel all of the Plaintiffs' trademarks;
- g. to order that the Plaintiffs have violated antitrust laws;
- h. to order that the Plaintiffs have violated the RICO statutes;
- i. to order that the Plaintiffs have falsely marked their devices with the Plaintiffs' Patent numbers and misused the Patent marks.

Dated: July 10, 2015


Respectfully submitted,



Rafael Newton Aguila
e-mail: raguila@gmail.com
Weittenauerstrasse 11
72108 Rottenburg am Neckar
GERMANY
Telephone: +49 7472 941 9465

CERTIFICATE OF SERVICE

I HEREBY certify that on July 10, 2015, I conventionally filed the foregoing document with the Clerk of the Court. I also certify that the foregoing document is being served this day on all counsel of record by U.S. mail.


Rafael Aguila, *pro se*

James A. Gale, Esq. (FBN 371726)
Richard Guerra (FBN 689521)
FELDMAN GALE
One Biscayne Tower, 30th Floor
2 South Biscayne Blvd.
Miami, FL 33131
Telephone: (305) 358-5001
Facsimile: (305) 358-3309

Attorneys for Plaintiffs,
EDGE SYSTEMS LLC and
AXIA MEDSCIENCES LLC

Brenton R. Babcock, Esq.
(admitted pro hac vice)
Ali S. Razai, Esq.
(admitted pro hac vice)
KNOBBE, MARTENS, OLSON & BEAR, LLP
2040 Main Street, Fourteenth Floor
Irvine, CA 92614
Telephone: (949) 760-0404
Facsimile: (949) 760-9502

From: DiamondSkin Systems <support@diamondskin.com>
Sent: Tuesday, October 24, 2006 7:02 PM
To: bcohen@edgesystem.net
Subject: The DiamondSkin wands

Hello Bill,

That is correct. We apply Oxygen air as a separate treatment. Some of our machines can have Oxygen applied at the same time that it is being exfoliated. We are pursuing a patent on this kind of application.

We have a sprayer or nebulizer which can have a mineral/vitamin solution put inside it and spray on the skin, but this has to be done after the microdermabrasion treatment.

However, our wands do not have the capability of using liquids such as the SilkPeel, DiamondTome Hydro Wands, or the HydraFacial.

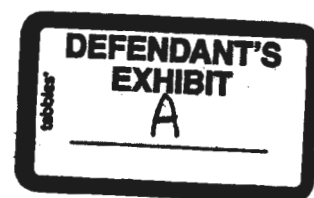
Thanks,
Ralph Aguila

--- Bill Cohen <bcohen@edgesystem.net> wrote:

> Mr. Aguila,
>
> Thank you for your email. We understood that
> DiamondSkin Systems was
> selling a microdermabrasion system in which fluid
> was also supplied. Are
> you telling me that that is not the case?
>
> Bill Cohen

DiamondSkin Systems - Sales Department
1172 South Dixie Hwy, Suite 485
Coral Gables, FL 33146-2918

Toll-free (866) 766-0639
Direct # (305) 733-7268
Fax (305) 675-8225



Knobbe Martens Olson & Bear LLP

Intellectual Property Law

2040 Main Street
Fourteenth Floor
Irvine, CA 92614
Tel 949-760-0404
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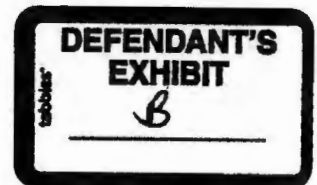
TO: Ralph Aguila
 FIRM: Diamondskin Systems, Inc.
 FACSIMILE NO.: (305) 675-8225
 OUR REF.: EDGE.010TTS
 YOUR REF.:
 FROM: Catherine J. Holland
 OPERATOR: Moira Timney NO. OF PAGES: 6 (incl. cover sheet)
 DATE: February 4, 2010 TIME:

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MESSAGE:

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415-954-4114

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310-551-3450

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Seattle
206-405-2000

Washington, DC
202-640-6400

Knobbe Martens Olson & Bear LLP

Intellectual Property Law

2040 Main Street
Fourteenth Floor
Irvine, CA 92614
Tel 949-760-0404
Fax 949-760-9502
www.kmob.com

Catherine J. Holland
949-721-2919
cholland@kmob.com

January 26, 2010

VIA E-MAIL, FACSIMILE AND FEDERAL EXPRESS

Ralph Aguila
DiamondSkin Systems, Inc.
1172 South Dixie Highway
Suite 485
Coral Gables, FL 33146-2918
support@hydradermabrasion.com

Re: Trademark Infringement, Copyright Infringement, Unfair Competition, Dilution,
Cybersquatting and Patent Infringement
Our Reference: EDGE.060TIS

Dear Mr. Aguila:

Trademark Infringement, Dilution and Unfair Competition

As you are aware, we represent Edge Systems Corporation ("Edge Systems") in connection with intellectual property matters, including enforcement of its trademark rights. Edge Systems is a leading manufacturer of skin resurfacing equipment and related accessories. Edge Systems has established strong Federal and common law rights in its trademarks, including the marks HYDROPEEL®, HYDRAFACIAL MD®, BETA-HD™, GLYSAL™, ACTIV-4™, DERMABUILDER™, and ANTIOX-6™. Copies of Edge Systems' HYDROPEEL® and HYDRAFACIAL MD® registrations are enclosed. Edge Systems has invested considerable time, effort, and money promoting its products, and has developed a strong reputation and substantial goodwill among consumers.

It has recently come to our attention that DiamondSkin Systems, Inc. ("DiamondSkin") is using the marks HYDRAPEEL and HYDRAFACIAL in connection with skin resurfacing equipment and treatments and using GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 in connection with treatment topicals. DiamondSkin's use of these marks in connection with skin resurfacing equipment creates a likelihood of confusion with our client's well-known marks. There is a strong likelihood of confusion in that customers are likely to presume that DiamondSkin's goods are offered by Edge Systems, when, in fact, they are not, or that DiamondSkin's use of the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4,

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619-235-8550

San Francisco
415-954-4114

Los Angeles
310-551-3450

Riverside
951-781-9231

Seattle
206-405-2000

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202-640-6400

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Ralph Aguila
January 26, 2010
Page -2-

DERMABUILDER, and ANTIOX-6 marks is authorized by Edge Systems, when it is not. See 15 U.S.C. § 1125, et. seq.

Moreover, DiamondSkin's use of the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks may be considered to be a clear act of dilution and unfair competition in violation of both state and common law. These causes of action carry heavy penalties including, but not limited to, monetary damages, punitive damages, treble damages, award of attorneys' fees and injunctive relief.

Copyright and Cybersquatting

Additionally, we are aware that DiamondSkin is copying text from Edge System's website, <hydradfacial.net>, on its websites, <hydradermabrasion.com> and <hydropeel.com>. Specifically, your page on hydrodermabrasion at <hydradermabrasion.com/topicals> and the link to topicals from <hydropeel.com> is copied nearly verbatim from our client's web page at <hydradfacial.net/html/treatments.htm>. You are hereby on notice that your actions constitute a direct and flagrant infringement of Edge Systems' valuable copyright rights.

Further, we are aware you have registered the domains <hydropeel.com> and <hydrapeel.com>. <hydrapeel.com> resolves to <hydradermabrasion.com>. All of these websites feature virtually identical content. You use of these domains trades on our client's goodwill and misdirects and deceives consumers. The registration and use of the <hydropeel.com> and <hydrapeel.com> domain names is a direct and flagrant violation of the Anticybersquatting Consumer Protection Act of 1999 ("ACPA"). The ACPA allows a trademark owner to bring a cause of action against any entity that registers, uses, or traffics in bad faith a domain name that is identical or confusingly similar to a trade name or trademark. Your use and registration of these domain names also constitutes trademark infringement, dilution, and unfair competition.

Moreover, DiamondSkin's actual knowledge of Edge Systems' rights in its trademarks and copyrights imposes a greater duty on DiamondSkin to avoid infringement. Your awareness of Edge Systems' products, your use of nearly identical and infringing trademarks, and use of text identical to that of Edge Systems' website was done with the intent to deceive consumers or otherwise falsely suggest an affiliation, association, or sponsorship with Edge Systems. In fact, we see no reason for DiamondSkin to use the marks HYDRAPEEL or HYDRAFACIAL, the marks GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6, or the text from our client's website, other than to intentionally trade on Edge Systems' goodwill and cause consumer confusion. Such willful infringement entitles Edge Systems to increased damages and attorneys' fees. See 15 U.S.C. § 1117.

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Ralph Aguila
January 26, 2010
Page -3-

Patent Infringement

Edge Systems has expended considerable time, effort and money to develop its proprietary skin resurfacing instrumentation and methodology. This includes its HYDRAFACIAL MD ® and DELPHIA™ microdermabrasion systems, as well as products still in the development process.

To protect its substantial investment, Edge Systems has obtained the rights to various patents and patent applications throughout the world. These include, among others, U.S. Patent Nos. 6,641,591 and 6,299,620. Copies of these two patents are enclosed as *Exhibit A* to this letter. In addition, Edge Systems has obtained rights in several pending U.S. applications, which if and when they are granted, potentially give Edge Systems additional rights to skin treatment devices and methods that comprise, among other things, an instrument with a working surface for abrading the skin and an opening in the working surface that is coupled to a vacuum source.

We understand that DiamondSkin Systems is selling several different skin treatment systems that use inventions covered by Edge System's patent portfolio. For example, we have examined publicly available information regarding various microdermabrasion systems, as described on your website <http://www.hydradermabrasion.com/hydra Peel_info.html>. Based upon our review, we conclude that your hydradermabrasion product is covered by at least U.S. Patent Nos. 6,641,591 and 6,299,620.

As you are probably aware, there can be significant risk to DiamondSkin and its customers for choosing to ignore the patent rights of others. For example, under United States patent laws, an infringer is liable for damages in the amount of the patent owner's lost profits, and, in any event, no less than a reasonable royalty. See 35 U.S.C. §284. DiamondSkin and/or its customers may also be permanently enjoined from making, using, offering to sell, selling and/or importing devices covered by the enclosed patents. See 35 U.S.C. §283. In patent litigation, a court may additionally require an infringer to pay the attorneys fees expended by the patent owner. See 35 U.S.C. §285. In certain circumstances, these attorneys' fees can exceed the total damages awarded. Further, DiamondSkin may face the additional risk of enhanced liability and "treble damages" if it knowingly chooses to ignore the patent rights of others.

In light of the significant injury to Edge Systems occasioned by your above actions, our client demands that DiamondSkin immediately:

1. Immediately cease and desist any and all use of the marks HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6, or any other mark confusingly similar to our client's marks;
2. Immediately take down all text and other copyrighted material belonging to Edge Systems from the <hydradermabrasian.com> domain and any other domains you control;

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January 26, 2010
Page -4-

3. Immediately take down all material from the domains <hydrapeel.com> and <hydropeel.com> and transfer the domains <hydrapeel.com> and <hydropeel.com> to Edge Systems;
4. Immediately cease doing business as HydraPeel Systems and agree not to do business under a trade name confusingly similar to Edge Systems' marks;
5. Immediately cease all manufacturing, sales, offers for sale, and importation of your hydradermabrasion products, and any other products covered by Edge Systems patents;
6. Immediately destroy all products covered by Edge System's patents and provide us with documentation of such destruction; and
7. Pay Edge Systems' damages, attorneys' fees, and costs incurred in connection with this matter.

So that we may determine the monetary damages that Edge Systems has suffered, and to evaluate any potential infringement of Edge Systems' patents, please provide us the following specific information regarding your use of the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks, or any other similar marks, in connection with skin resurfacing equipment, as well as the equipment used:

- (a) Describe the services that you have offered in connection with the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks;
- (b) For each service offered, state the number of each service performed, fees charged to customers, and the fees collected from customers;
- (c) Describe each product that you have sold or distributed, or plan to sell or distribute, bearing the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks and the number of such items sold, if any;
- (d) State the number of such items you presently have in inventory, if any;
- (e) For each item sold, if any, state the production costs, the sale price and the suggested retail price;

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- (f) Provide samples of all products, advertising and promotional materials bearing the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks;
- (g) Provide samples of all advertising and promotional materials that were distributed in connection with goods and services bearing the HYDRAPEEL, HYDRAFACIAL, GLYSAL, ACTIV-4, DERMABUILDER, and ANTIOX-6 marks; and
- (h) Provide us with a detailed accounting of the inventory of products covered by Edge System's patents currently in your possession. If you do not manufacture these products, we also request that you provide us with the names and contact information of the manufacturer(s), the quantity of hydradermabrasion products purchased, the per unit price, and the number of products purchased.

Please note that in naming specific causes of action above, we do not intend to catalogue all possible causes of action arising as a result of your infringing activities. Nothing herein should be deemed to waive any of our client's rights, claims or remedies, all of which are expressly reserved. Failure to comply with the above will be regarded as further evidence of the willful and intentional nature of your violations.

Given the importance of this matter, we request that you provide us with a response no later than February 2, 2010. We look forward to hearing from you, as we hope to reach a quick and amicable resolution of this matter.

Sincerely,



Catherine J. Holland

Enclosures

cc: Edge Systems Corporation

8375807
011210

INVOICE

HYDRADERMABRASION SYSTEMS

1172 S. Dixie Highway
 Suite 485
 Coral Gables, FL 33146
 1-866-766-0639
www.hydradermabrasion.com

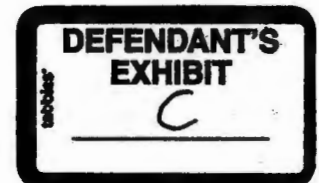
INVOICE # 2344
 DATE: MAY 13, 2010

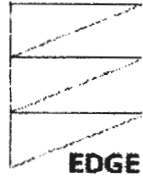
SHIP TO
 Cosmetic Laser & Vein Centre
 1504 15 AVE SW
 Calgary, Alberta
 T3C 0X9
 403-229-2747

SALESPERSON	JOB	SHIPPING METHOD	SHIPPING TERMS	DELIVERY DATE	PAYMENT TERMS	DUE DATE
Ralph Aguila		FedEx				

QTY	ITEM #	DESCRIPTION	UNIT PRICE	SHIPPING	LINE TOTAL
1		Hydradermabrasion system 3-month supply of dermal-infusion products. 30-day moneyback guarantee.	\$4,000	\$0	\$4,000
TOTAL					\$4,000

THANK YOU FOR YOUR BUSINESS!





Invoice - May 6, 1996

Buyer:

FRANCIS de CAPPUCINI, Inc.
782 N.W. 43 Avenue
Suite 200
Miami, FL 33126

Item: HydraPeel system

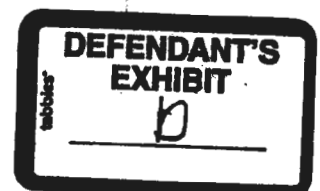
Amount: \$450

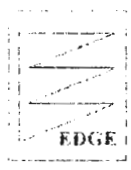
Seller:

Edge Systems
Rafael Aguila
2860 SW 35 Avenue
Miami, FL 33133

Warranty: 1-year, including parts and labor.

Serial number: 96-003





Invoice - January 9, 2004

Buyer: Brunice Duran - Skin Care
11111 SW 8th
Miami, FL 33145

Item: HydraDerm MD system
11/11/03

Seller: Edge Systems
Rafael Aquila
2960 S.W. 35 Ave.
Miami, FL 33132

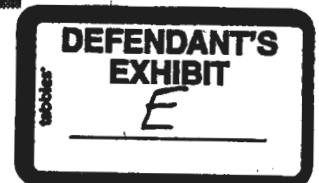
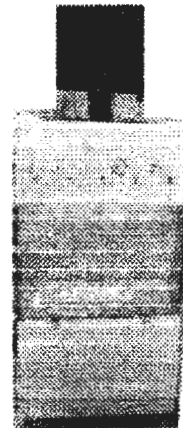
Warranty: 3-years, parts and labor.
Serial number: 121001

Details of items sold:

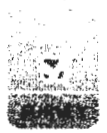
- Art/MSA (6 bottles)
- Beau-D (6 bottles)
- Beau-D (6 bottles)
- Antiox-Plus (6 bottles)
- Disinfectant (6 bottles)
- GlySal (6 bottles)
- PermaBuilder (3 bottles)
- Soare filter (2 units)

HydraDerm MD microdermabrasion:

- 11/11/03
- 11/11/03
- 11/11/03
- 11/11/03
- 11/11/03
- 11/11/03



Search



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Result of query on Friday, July 10, 2015 8:16:10 AM

Last Name: Colbert(*Exact Match*)
First Name: Marshae(*Exact Match*)

[New Search](#)

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01	484E(D)	Penal Code	Referred to Another Court/Agent	05/16/2006
02	459	Penal Code	Certified Plea	05/16/2006
03	484E(D)	Penal Code	Referred to Another Court/Agent	05/16/2006
04	459	Penal Code	Certified Plea	05/16/2006
05	484E(D)	Penal Code	Referred to Another Court/Agent	05/16/2006
06	459	Penal Code	Certified Plea	05/16/2006



If the Charge Statute link is available, click on it to search for the Charge description.

01	484E(D)	Penal Code	Dismissed or Not Prosecuted	06/14/2006
02	459	Penal Code	Guilty/Convicted	05/16/2006
03	484E(D)	Penal Code	Dismissed or Not Prosecuted	06/14/2006
04	459	Penal Code	Guilty/Convicted	05/16/2006
05	484E(D)	Penal Code	Dismissed or Not Prosecuted	06/14/2006
06	459	Penal Code	Guilty/Convicted	05/16/2006

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Art Showcased in
Los Angeles Courthouse jury Rooms



"Spawn" by Ewan Young
2003 1st Place Ticker

ARTS
PROGRAM

Office of the Under Secretary
National Protection and Programs Directorate
U.S. Department of Homeland Security
Washington, DC 20528

July 8, 2015



Homeland
Security

SENT VIA EMAIL TO: RafaelAguila@gmail.com
Rafael Aguila

Dear Mr: Aguila

Re: 2015-NPFO-00342

This is the electronic final response to your Freedom of Information Act (FOIA) request to the Department of Homeland Security (DHS), National Protection and Programs Directorate dated June , 2015 and received the same date. Your request was perfected on June 23, 2015. You are requesting a copy of the incident report.

To provide you with the greatest degree of access authorized by law, we have considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual¹ unless the agency has exempted the system of records from the access provisions of the Privacy Act.² The report we have identified as responsive to your request is maintained in a system of records known as the "WEB RMS," Incident Reporting, Investigation and Security Case Files. The "WEB RMS" System of Records has been exempted by DHS from Privacy Act access provisions. However, DHS does consider individual requests on a case-by-case basis to determine whether or not information can be released.

In this case our search produced a total of 4 (four) pages. I have determined that the 4 (four) pages are partially releasable pursuant to Title 5 U.S.C. § 552 (b)(6) and (b)(7)(C), FOIA Exemptions 6 and b7(C) and Title 5 U.S.C. § 552a (k)(2), Privacy Act Exemption (k)(2).

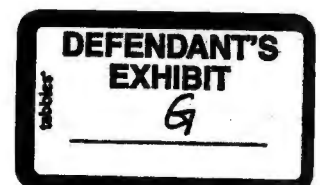
Enclosed are 4 (four) pages with certain information withheld as described below.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal

¹ 5 U.S.C. § 552a(d)(1).

² 5 U.S.C. §§ 552a(d)(5), (j), and (k).



activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination

Privacy Act Exemption (k)(2) protects investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence.

You have a right to appeal the above withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

The Office of Government Information Services (OGIS) mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS about a FOIA, you may email them at ogis@nara.gov or call 1-877-684-6448.

Provisions of the FOIA and Privacy Act allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge. 6 CFR § 5.11(d)(4).

If you need to contact our office again about this matter, please refer to **2015-NPFO-00342**. This office can be reached at 703-235-2211.

Sincerely,

Sandy Ford Page
Sandy Ford Page
Chief, FOIA Operations

Enclosure(s): Responsive Document, 4 pages

FEDERAL PROTECTIVE SERVICE

** FOR OFFICIAL USE ONLY **

CASE NUMBER B14013836		Occur Date Span 12/19/2014 thru	Occur Time Span 12:30:00 thru	Report Date 12/29/2014	Report Time 12:35:00
<input type="checkbox"/> Follow-up Report					
Code 1220	Type of Offense or Incident MISCELLANEOUS OFFENSES - verbal, telephonic or written electronic(e-mail) threat			Arrive Date 12/26/2014	Arrive Time 13:15:00
Building No. FL0078AD	Address C. CLYDE ATKINS U.S. COURTHOUS - 301 N MIAMI AVE MIAMI FL 33128			Rtn to Svc Dt 12/29/2014	Rtn to Svc Tm 12:37:00
Incident Location		Agency Name UNKNOWN AGENCY - unknown agency			Agency Code 9998
A		Est Num Dem <input type="checkbox"/> 1-10 <input type="checkbox"/> 11-50 <input type="checkbox"/> 51-100 <input type="checkbox"/> 101-300 <input type="checkbox"/> 301-500 <input type="checkbox"/> 500+ Est Num Evc <input type="checkbox"/> 0 <input type="checkbox"/> 1-10 <input type="checkbox"/> 11-50 <input type="checkbox"/> 51-100 <input type="checkbox"/> 101-300 <input type="checkbox"/> 301-500 <input type="checkbox"/> 500+			
NARRATIVE See Narrative Continuation Report page.					

INVOLVED PERSON Victim Witness Suspect Subject Report Person Gov't Empl Gov't Contr Other Missing Person

No.	Name (last, first, middle)	Alias	Date of Birth / Age	Sex	Race	Height	Weight	Eyes	Hair
1	Rafael Newton Aguila			M	H			BLK	SDY
Address 53 SW 57 Avenue		City South Miami	State FL	Zip Code 33155	Country United States				
B	Driver's License Number	State	Social Security #	Nationality Cuban	Country of Birth Cuba	Home Phone 305-508-5052			
Scars, Marks, Tattoos / Other			Arrested <input type="checkbox"/>	Citation Number	NCIC Number	Work Phone			
Employer		Employer City		State	Employer Zip	Employer Country			

INVOLVED PERSON Victim Witness Suspect Subject Report Person Gov't Empl Gov't Contr Other Missing Person

No.	Name (last, first, middle)	Alias	Date of Birth / Age	Sex	Race	Height	Weight	Eyes	Hair
Address		City	State	Zip Code	Country				
B	Driver's License Number	State	Social Security #	Nationality	Country of Birth	Home Phone			
Scars, Marks, Tattoos / Other			Arrested <input type="checkbox"/>	Citation Number	NCIC Number	Work Phone			
Employer		Employer City		State	Employer Zip	Employer Country			

VEHICLE Stolen Damaged Recovered Suspect Other Govt Evidence

C	No.	License No	State	Reg Yr	Make	Model	Veh Yr	Value
R/O Name (last, first, middle)		Color		VIN		NCIC Number		
R/O Address		City	State	Zip Code	Country			

PROPERTY Stolen Damaged Recovered Suspect Found Other Govt Evidence Weapon

D	No.	Type	Make	Model	Color
Owner Name (last, first, middle)		Serial Number		Value	NCIC Number
Address		City	State	Zip Code	Country

Structure / ID#	Date 12/29/2014	Supervisor	Date Approved
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Narrative Continuation

2014-12-29 13:42:45.71

(b)(6)(b)(7)(c) made contact with Ralph Aguila Via (b)(6)(b)(7)(c) phone. Mr. Ralph Aguila advised that he is the (b)(6)(b)(7)(c) defendant in a civil court case involving a patent infringement on a dermabrasion machine. Aguila stated that on Dec (b)(6)(b)(7)(c)(k)(2) 19th he was approached by the plaintiff (b)(6)(b)(7)(c)(k)(2) while in the court house. Aguila stated that (b)(6)(b)(7)(c)(k)(2) threatened to 'kill him if he did not stop (b)(6)(b)(7)(c)(k)(2) selling the machine". While on lunch break Aguila stated that (b)(6)(b)(7)(c)(k)(2) started to approach him but that (b)(6)(b)(7)(c)(k)(2) lawyer had stopped him from doing so. Aguila believes (b)(6)(b)(7)(c)(k)(2) that if the lawyer had not stepped in the way that he would have been assaulted. Aguila stated that he did approach (b)(6)(b)(7)(c)(k)(2) court security officers and notify them of the incident. Aguila also stated that he has a current case with Miami PD about this incident with case number 14-CV-24517. See Attach Statement OFFICIAL STATEMENT OF RALPH AGUILA

On December 19th, 2014, I was verbally threatened by William Cohen inside Courtroom 6, within the C. Clyde Atkins United States Courthouse, 301 North Miami Avenue, Miami, FL 33128. At 10:00am, I was scheduled to attend an evidentiary hearing with Judge McAliley on a patent & trademark infringement civil lawsuit. I am the Defendant in the case, and was representing myself without any attorneys. Here was the chronology of events:

1. At approximately 9:40am, I arrive at the courthouse. I am scheduled to attend a hearing for the case with the title 14-cv-24517-KMM - Edge Systems LLC et al v. Aguila.
2. At around 9:50am, I take out all my exhibits and miscellaneous papers and put them on the desk in front of me. There are microphones to record what we say on the desk, although I'm not sure they are turned on during the breaks.
3. At around 9:51am, only a couple of minutes before the hearing is scheduled to start, Mr. William Cohen (the President of Edge Systems LLC, my main competitor) threatens to kill me if I "don't stop selling his machines". Mr. Cohen was near me at that time because the Plaintiffs had brought three devices with them as exhibits. Mr. Cohen was setting them up before the commencement of the hearing at 10:00am. All the devices happened to be near my side of the courtroom. Although Mr. Cohen did not shout out his

Dated: December 30h, 2014

threat to me, I believe that two of his lawyers may have overheard his threat. The potential witnesses are Brenton Babcock and Richard Guerra.

4. Mr. Richard Guerra is located at:

2 South Biscayne Blvd, Suite 3000

Miami, FL 33131

Phone: 305-358-5001

RGuerra@FeldmanGale.com

5. After the verbal threat by William Cohen, I was unsure what to do since I was focused on the hearing on my cross-examination of the witnesses. But after one or two minutes, I decided that I should leave the Courtroom because felt threatened. I then packed up all my papers and left the Courtroom at approximately 9:55am. This was seen by everyone in the Courtroom, including Mr. Cohen, Mr. Guerra, and Mr. Babcock. As well as another Plaintiff's lawyer named Ali Razai. Mr. Razai is located at 12790 El Camino Real, San Diego, CA 92130. Phone: (858) 836-9000. E-mail: ali.razai@kmob.com

6. After I left Courtroom 6 at 9:55am, I went to the restroom for a couple of minutes to throw some water on my face. I then decided to go back and not be scared off by Mr. Cohen's verbal threat. If I had not

OFFICER

CASE NUMBER B14013836

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3155 Report

Page 2 of 4

FEDERAL PROTECTIVE SERVICE

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Narrative Continuation

attended that hearing, then the Judge had previously told me that I would lose a preliminary injunction automatically.

7. After I return to the Courtroom at 9:58am, I could see that Mr. Cohen and his lawyers were very surprised that I came back by the expression on their faces. It should be noted that there were no bailiffs in the courtroom.

8. The hearing lasted 9 hours, from 10:00am to 7:00pm. Through this long hearing, there were many breaks.

9. Because there were many witnesses, the Court had ordered all witnesses to leave the Courtroom during the cross-examination so they could not see each other's testimony. Mr. Cohen was included in Judge McAliley's order to leave the Courtroom.

Mr. Brenton Babcock is located at:

2040 Main Street, 14th Floor

Irvine, CA 92614

Phone: 949-760-0404

Brent.Babcock@kmob.com

10. During the lunch break at approximately 12:30pm, Judge McAliley had let me analyze the machines that Edge Systems had brought as evidence.

11. Soon after the one-hour lunch break started, I was surprised to see Mr. Cohen walk into the Courtroom. At that time, only myself and Brenton Babcock remained in the Courtroom. Mr. Cohen saw me analyzing one of the machines that they had brought as exhibits. He then walked towards me and screamed at me to "stop messing with his machines". He walked closer to me an aggressive demeanor, and I though he was going to physically attack me.

12. However, his lawyer, Brenton Babcock grabbed Mr. Cohen before he could get too close to me. Mr. Babcock told Mr. Cohen that the Judge had allowed me to analyze the machines that Edge Systems brought into the Courtroom to see if they had been altered.

13. I believe that there are Courtroom video cameras that would have recorded this event.

14. Lastly, during one of the restroom breaks, at approximately 3:00pm or 4:00pm, I walked past Mr. Cohen outside the Courtroom in the waiting area, and he told me the following: "remember what I told you before". Mr. Babcock was a witness to this.

15. Mr. Cohen's company, Edge Systems LLC is located at 2277 Redondo Avenue, Signal Hill, California 90755. Telephone: 1-562-597-0102.

16. Mr. Cohen left the courtroom at around 5:00pm to take an airplane back to California.

17. At 7:00pm, the hearing ended and I left the Courthouse. However, there were no guards left in the ground floor since it was Friday.

18. On Monday, December 22nd, 2014, I contacted the local police department to file a police report on what had happened in the Courtroom on December 19th, 2014. I was told that since this incident happened in Downtown Miami, that I should go to the Miami-Dade Police Department.

19. On Tuesday, December 23rd, 2014, I went to the Miami-Dade Police Department located near 2200 Flagler Street, Miami, FL at around 8:30pm. I was told that since the incident occurred inside Federal property, that I needed to report it to the Marshalls inside the Courthouse.

20. On Wednesday, December 24th, 2014, I went back to the Atkins Courthouse at around 2:00pm. I was told that I needed to report this incident to the Federal Protective Service located inside the Claude Pepper

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FEDERAL PROTECTIVE SERVICE

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Narrative Continuation

Building. I then walked over the FPS and told some of the contract security people in the Ground floor of the Claude Pepper Building about this incident.

21. On Monday, December 29th, 2014, I received a call from Georgia, from an official from the FPS.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 30th day of December 2014 at Miami, Florida.

This matter is being forwarded to Threat Management Branch

OFFICER

CASE NUMBER B14013836

(b)(6), (b)(7)(c)

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3155 Report

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

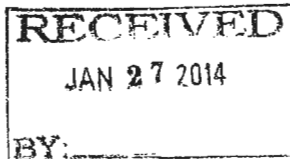
Food and Drug Administration
Los Angeles District
Pacific Region

19701 Fairchild
Irvine, CA 92612-2506
Telephone: 949-608-2900

FAX: 949-608-4415

JAN 16 2014

President
William Cohen
Edge Systems LLC
2277 Redondo Ave
Signal Hill, CA 90755



Dear Mr. Cohen:

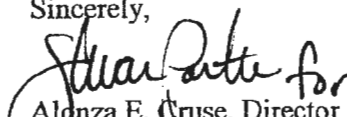
We are enclosing a copy of the Establishment Inspection Report (EIR) for the inspection conducted at your premises at 2277 Redondo Ave, Signal Hill, CA on August 28, 2013. This inspection was conducted by or for the U.S. Food and Drug Administration (FDA). Effective April 1, 1997, when the Agency determines an inspection is closed under 21 C.F.R. 20.64(d)(3), FDA releases a copy of the EIR to the inspected firm for those inspections completed prior to the above date, a copy of the EIR may still be made available through the Freedom of Information Act (FOIA).

The Agency is working to make its regulatory process and activities more transparent to the regulated industry. Releasing this EIR to you is part of this effort. The copy being provided to you is comprised of the narrative portion of the report. FDA might have redacted some information in accordance with FOIA and Title 21, Code of Federal Regulations, Part 20.

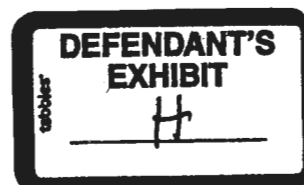
If there are any questions about released information, feel free to contact me at (949) 608-2900 or to write to:

U.S. Food and Drug Administration
ATTN: Compliance Branch
19701 Fairchild
Irvine, CA 92612-2506

Sincerely,


Alonza E. Gruse, Director
Los Angeles District

Enclosure





Establishment Inspection Report
Edge Systems LLC.
Signal Hill, CA 90755-4017

FEI: 3002477421
EI Start: 08/28/2013
EI End: 08/28/2013



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SUMMARY

This was a routine pre-announced level I inspection of a medical device manufacturer and distributor of class II LED light therapy devices and a *Class II* smoke evacuator device that was conducted in accordance with FY' 13 in response to FACTS assignment number 1521847. The assignment requested a surveillance medical device QSIT level I (abbreviated) inspection of the firm per Compliance Program 7382.845. The inspection is reported under PAC code 82845A and profile code ELE and MTL were covered. The firm's registration status in FACTS is current and they are listed as a Class I, II, and II medical device manufacturer. The firm does not manufacture any tracked devices.

The previous inspection was conducted on 05/24/10 and was classified NAI. The previous inspection focused on management controls, design controls, and the CAPA subsystem. There was no FDA-483, Inspectional Observations, issued at the end of the previous inspection.

The current inspection revealed that the firm continues to manufacture a line of hydrafacial devices that are mostly classified as class I. The firm also manufactures a red light LED light therapy device

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Edge Systems LLC.
Signal Hill, CA 90755-4017

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(k072399) that is cleared for temporary muscle pain relief and a blue LED light therapy device (k061470) that is cleared for acne vulgaris treatment; both devices are classified as class II medical devices. The only class III device that the firm manufactures is the smoke evacuator (k880890) that sucks the surgical smoke from the air during surgery. Majority of the firm's devices are class I exempt devices.

There have not been any changes to the design of the firm's devices since the prior inspection. This inspection focused on the firm's following sub-systems; CAPA, Complaints, and Design Controls. There was no FDA-483 issued at the close of the inspection. There was one discussion item discussed with the firm in reference to CAPA 103104 that should have a preventative action plan included. There were no samples collected during the inspection and there were no refusals encountered.

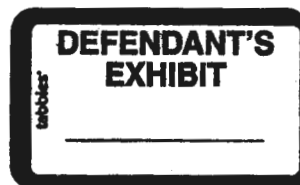
ADMINISTRATIVE DATA

Inspected firm: Edge Systems Corp
Location: 2277 Redondo Ave
Signal Hill, CA 90755-4017
Phone: 800-603-4996
FAX:
Mailing address:

Dates of inspection: 8/28/2013
Days in the facility: 1
Participants: Durell Giles, Investigator

On 08/28/13, I presented my credentials and issued the FDA-482, Notice of Inspection, to the President of Edge Systems LLC., Mr. William Cohen. Mr. Cohen was present throughout the entire inspection and provided me with the information regarding the firm's operations.

Correspondence should be addressed to:
Mr. William Cohen, President
Edge Systems LLC.
2277 Redondo Ave.
Signal Hill, CA.



Establishment Inspection Report

Edge Systems LLC.
Signal Hill, CA 90755-4017

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HISTORY

The firm's history of business has not changed since the previous inspection. The changes since the previous inspection are as follows.

- On December 12, 2012 the name of the company changed from Edge Systems Corporation to Edge Systems LLC.
- The company is now owned by Western Presidio 5 LP.
- Mr. Roger Ignon was formerly the CEO of the company, now his title is the Head of The Board of Directors.
- Mr. William "Bill" Cohen formerly the Vice President of Sales is now the President & CEO of the company.
- Mr. Greg Stickley is now the Vice President of Sales.

INTERSTATE COMMERCE

Mr. Cohen stated that less than 20% of the firm's raw materials are received from outside of California and that approximately 85% of finished devices are sold outside of California.

JURISDICTION

The firm continues to manufacture red light LED light therapy, blue LED light therapy, and smoke evacuator devices that are all subject to the FD&C Act. Mr. Cohen stated that the firm sales their products to distributors outside of the United States. Within the Unites States the products are sold directly to the professionals that use the devices such as doctor's offices and spas.

Mr. Cohen stated that the firm also advertises their products online at www.edgeforlife.com and they participate in various monthly trade shows. Mr. Cohen stated that some of the firm's biggest customers are Lifetime fitness and Neoderm (Hong Kong).

INDIVIDUAL RESPONSIBILITY AND PERSONS INTERVIEWED

Mr. William "Bill" Cohen, President/CEO- Mr. Cohen stated that he has been the President of the firm since 2012 and that he was previously the Vice-President of Sales for the firm. Mr. Cohen stated that he started with Edge Systems in 1997 when he founded the company along with Mr. Roger Ignon. Mr. Cohen also stated that he is responsible for managing the direction of all departments and all employees report to him.

Mr. David Hernandez, QA/Technical Support Supervisor- Mr. Hernandez stated that he has been employed at Edge Systems for 5 years. Mr. Hernandez stated that he originally started as a QA Tech and he has been in his current position for 3 years. Mr. Hernandez has 4 direct reports and he reports to Ms. Eva Chang, Regulatory/ QA Manager. Mr. Hernandez stated that he does not have the

Establishment Inspection Report

Edge Systems LLC.
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authority to hire or fire any of the firm's employees and he can make company expenditures to no set limit. Mr. Hernandez also stated that his responsibilities at the firm include handling complaints, customer issues, production, and quality.

Ms. Eva Chang, Regulatory/QA Manager- Ms. Chang stated that she has been with the company for 10 years, starting in Marketing. Ms. Chang has been in her current position for 1 year and she has 2 direct reports. Ms. Chang stated that she reports to the owner of the company Mr. Bill Cohen. Ms. Chang also stated that she has the authority to hire or fire any of the firm's employees and she can make company expenditures to no set limit. Ms. Chang also stated that her responsibilities at the firm include regulatory standards, international submissions, complaints, and CAPAs.

FIRM'S TRAINING PROGRAM

I viewed the firm's training program (Training Doc #: SOP-018 Rev. 03) which states that new hire orientation and specific job related training will be established and documented. I pulled training records for four employees (Alvin Belt, Eva Chang, Rodrigo, and Ricardo), I did not find any observations with the firm's training program.

MANUFACTURING/DESIGN OPERATIONS

Mr. Cohen provided me a walk-through of the facility, accompanied by Ms. Chang and Mr. Hernandez. The firm was in the process of manufacturing hydradfacial devices. There have not been any changes in the firm's manufacturing operations since the last inspection. Work orders are still prepared as orders are received for devices. The work order continues to include a build of materials on the specifications and work sheets provided. I observed the employees following the work instructions and completing the work order forms.

Design Controls

I reviewed the firm's Design Control Doc. #: SOP-004 Rev. 02. There have not been any changes in the firm's class II devices since the prior inspection. Management stated that there are no future plans to change any design features of the class II devices. Management also stated that the firm does not sell many class II devices as most of their sells are from class I devices.

MANUFACTURING CODES

The manufacturing codes for the devices have not changed since the last inspection.

COMPLAINTS

During the inspection I reviewed the firm's "Complaint and MDR Reporting Doc. # QASI-14.028 Rev. B as well as the complaint logs for the years of 2011, 2012, and 2013. The firm received 5 complaints for 2011, 22 complaints for 2012, and 45 complaints for 2013. Many of the firm's complaints were for the class I devices. Many of the 2012 complaints were for irritation/allergic



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reaction, burning sensation, lacerations, breakouts, and skin infections regarding the firm's class I devices.

When asked about the increase in complaints from 2011 to 2013, Ms. Chang justified the spike in complaints by stating that sales went up drastically and also Edge Systems began calling customers to get feedback and they were really forth-coming with information.

I pulled complaints 11-001, 12-012, 12-018, 12-003, 12-006, 12-008, 12-010, 13-002, 13-010, 13-016, 13-004, 13-008, 13-019, 13-025, and 13-040. I did not find any observations with the firm's complaints or Complaint Handling Procedure.

CAPAS

I reviewed the firm's Corrective Action Doc # SOP-014 Rev. 04 as well as the CAPA logs for 2011, 2012, and 2013. The firm opened 30 CAPAs in 2011, 39 CAPAs in 2012, and 30 CAPAs in 2013. Many of the CAPAs for 2011 were moved to 2012, Management stated that this was because the CAPAs were still opened and needed to be updated.

Of the CAPAs for 2011, 2012, and 2013 which totaled 99, only 1 CAPA from all three years was related to a class II device. CAPA 130104 was the only CAPA opened for any of the firm's class II devices.

CAPA 130104 was opened due to 8 safe systems being sent out with the wrong labeling. The 8 devices were sent out labeled as "10001" when the correct labeling for the devices was actually "18009-B". There were 12 in-house units that were also found with the same issue and corrected. QA and QC failed to check correct part numbers and specifications for the units during creation of the labels and during application of the labels to the units. The preventative action for this CAPA was identified as "N/A" in which I explained to Management that there are preventative actions that the firm could take to ensure that this mishap does not happen again. I discussed with Management that they should re-train employees to the label control procedure and make sure that they are double checking all of the information before applying the labels to the devices.

RECALL PROCEDURES

Management stated the firm has not had to initiate any recalls. A search in the FDA data base revealed that the firm does not have any recalls on file with the FDA.

OBJECTIONABLE CONDITIONS AND MANAGEMENT'S RESPONSE

During the close out meeting of the inspection there was Mr. Cohen (President), Ms. Chang (QA Manager), and Mr. Hernandez (Tech. Support Supervisor) was present from the firm. There was no FDA-483 issued however, there was two items I did discuss with Management. I stated that in regards to CAPA 13040, a preventative action could have been completed for that CAPA. I also

Establishment Inspection Report

Edge Systems LLC.
Signal Hill, CA 90755-4017

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stated to Management that the firm's organizational chart should include names as well as titles. Management agreed with my discussion items and promised to fill in that section for future CAPAs and update their organizational chart.

REFUSALS

There were no refusals encountered during the inspection.

SAMPLES COLLECTED

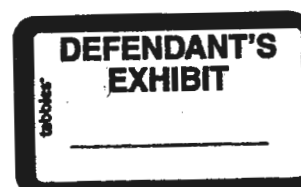
There were no samples collected during this inspection.

EXHIBITS COLLECTED

1. Copy of the firm's organizational chart. 1 page
2. Brochure 6 pages
3. Marketing leaflet 2 pages
4. Marketing leaflet 2 pages
5. Marketing leaflet 2 pages
6. Marketing leaflet 1 page

ATTACHMENTS

1. Assignment ID: 1521847
2. FDA-482, Notice of Inspection, issued to the President of Edge Systems LLC, Mr. William Cohen
- 3.



Establishment Inspection Report

Edge Systems LLC.

Signal Hill, CA 90755-4017

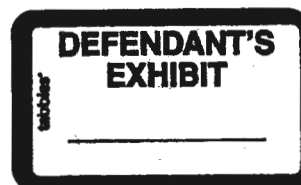
FEI: 3002477421

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Durrell Giles

Durrell Giles, Investigator



[FDA Home](#)³
[Medical Devices](#)⁴
[Databases](#)⁵
MAUDE Adverse Event Report: EDGE SYSTEMS LLC HYDRAFACIAL GFE, HYDRADERMABRASION



[510\(k\)](#)⁷
[DeNovo](#)⁸
[Registration & Listing](#)⁹
[Adverse Events](#)¹⁰
[Recalls](#)¹¹
[PMA](#)¹²
[Classification](#)¹³
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[Radiation-Emitting Products](#)¹⁶
[X-Ray Assembler](#)¹⁷
[Medsun Reports](#)¹⁸
[CLIA](#)¹⁹
[TPLC](#)²⁰
[Inspections](#)²¹

EDGE SYSTEMS LLC HYDRAFACIAL GFE, HYDRADERMABRASION

[Back to Search Results](#)

Model Number HYDRAFACIAL WAVE

Event Date 07/27/2010

Event Type Injury

Event Description

Patient received a facial acid peel (cosmetic treatment) performed by the health professional during the above dates. The suspect products used were cosmetic products containing glycolic acid and salicylic acid; the products were used in conjunction with the hydrafacial wave device. The operator failed to follow instructions for use and precaution to properly cover and protect patient's eyes during facial treatment, causing the acidic fluids to get into patient's eyes and surrounding areas, resulting in reported patient injuries. Those reports include excessive tearing of both eyes; itchiness, swelling, and burning sensation of the eyes and surrounding areas; rash an irritated skin; mild contact dermatitis; lacrimal tear duct stenosis; mild sinusitis with nasal obstruction; mild periorbital cellulitis, etc. Patient also complained about blurry vision, sensitive to light, etc. Patient was caused to use eye drops, facial ointments, warm compresses, medications, and underwent a bilateral lower eyelid punctoplasty. Patient was not hospitalized or confined to bed, but was confined to her home for approximately 30 days intermittently.

Manufacturer Narrative

The incident occurred in 2010, but was not brought to edge systems' (manufacturer) attention until recently by the lawsuit between the consumer and the health professional. The attorney provided medical records and details on (b)(6) 2013, so edge systems was able to file a report. The incident was caused by operator neglecting to follow the instructions for use (ifu). It was operator error, no device malfunction or product defects. The suspect cosmetic product(s) used in conjunction with the device contain glycolic acid and salicylic acid at low concentration that are safe to use on human skin surface to remove stratum corneum if the recommend instructions for use are followed properly. The suspect product(s) are not intended to be used on or around the eyes. The ifu provided by edge systems, including use manuals, training dvds, and labels, provide adequate and proper instructions and recommend the use of eye protection for patient during treatment. The ifu also state that if the fluids get into the eyes, rinse with water immediately, and seek medical care if irritation occurs/persists. Edge systems also provided training to the health professional at time of device purchase, educating operators the proper treatment protocols and procedures. In addition, all the lots of suspect product(s) that could possibly be use around the date of event all showed compliance to specifications and no microbial growth or defects were found.

Search Alerts/Recalls²²

[New Search](#) | [Submit an Adverse Event Report](#)²³

Brand NameHYDRAFACIAL
Type of DeviceGFE, HYDRADERMABRASION
Manufacturer (Section F)EDGE SYSTEMS LLC
 Signal Hill CA
Manufacturer (Section D)EDGE SYSTEMS LLC
 Signal Hill CA
Manufacturer ContactGary Mocnik



49 Coastal Oak
Aliso Viejo , CA 92656

Device Event Key3138584

MDR Report Key3108813

Event Key3005368

Report Number2031227-2013-00001

Device Sequence Number1

Product CodeGFE²⁴

Report SourceManufacturer

Source TypeUnknown

Reporter OccupationNOT APPLICABLE

Type of ReportInitial

Report Date05/06/2013

1 Device Was Involved in the Event

1 Patient Was Involved in the Event

Date FDA Received05/06/2013

Is This An Adverse Event Report?Yes

Is This A Product Problem Report?No

Device OperatorHealth Professional

Device EXPIRATION Date05/01/2017

Device MODEL NumberHYDRAFACIAL WAVE

Device Catalogue Number70159-03

Was Device Available For Evaluation?Yes

Is The Reporter A Health Professional?No

Was The Report Sent To Manufacturer?No

Date Manufacturer Received04/05/2013

Was Device Evaluated By Manufacturer?Device Not Returned To Manufacturer

Date Device Manufactured05/01/2010

Is The Device Single Use?No

Is this a Reprocessed and Reused Single-Use Device?No

Is the Device an Implant?No

Is this an Explanted Device?

Type of Device UsageInvalid Data

Patient TREATMENT DATA

Date Received: 05/06/2013 **Patient Sequence Number:** 1

Treatment

GLYSAL PREP, 7.5%

GLYCOLIC ACID AND 2%

SLICYLIC ACID

GLYSAL PEEL

15% GLYCOLIC ACID

1.5% SALICYLIC ACID

Links on this page:

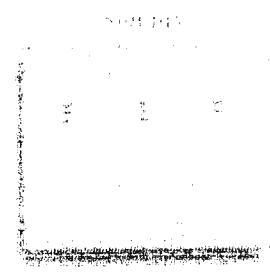
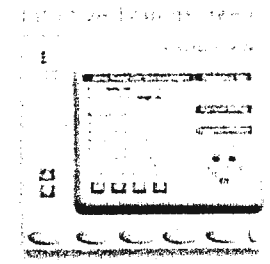
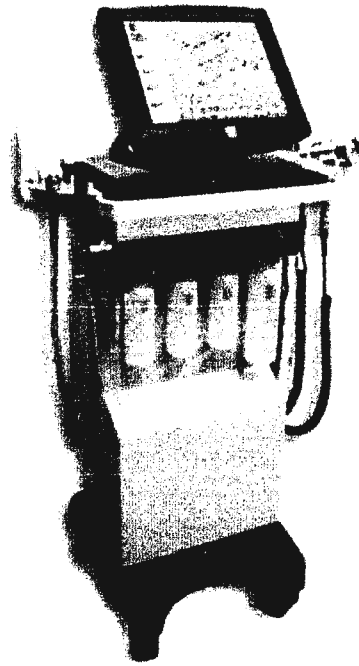
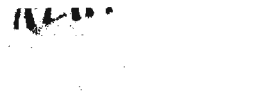
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7. </scripts/cdrh/cfdocs/cfPMN/pmn.cfm>
8. </scripts/cdrh/cfdocs/cfpmn/denovo.cfm>



HYDRAFACIAL MD™

Serum-Based Skin Resurfacing System

Multiple Modalities that Work Together on One Platform with Tutorial!



HYDRAFACIAL™

- Patented HydroPeel™ Tip resurfaces skin while simultaneously introducing topically applied serums
- For oily & acne-prone skin, fine lines, wrinkles and hyperpigmentation
- Proprietary Serums for deep cleansing, exfoliating, extracting, hydrating

DIAMOND TIP ABRASION

- Dry, diamond tip abrasion (crystal-free microdermabrasion) can be combined with the wet HydraFacial™ treatment for deeper abrasion
- Various diamond tips from fine to extra coarse

VACUUM THERAPY

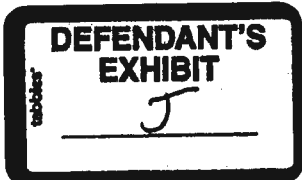
- Lymphatic Drainage
- Cellulite Massage

LED LIGHT THERAPY

- Red & infrared light improves the appearance of age signs & skin texture
- Blue light for oily & acne-prone skin

BEFORE & AFTER PICTURES

TESTIMONIALS



HydraFacial™ Wave™

Serum-Based Skin Resurfacing System



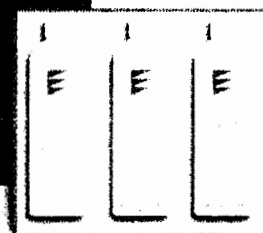
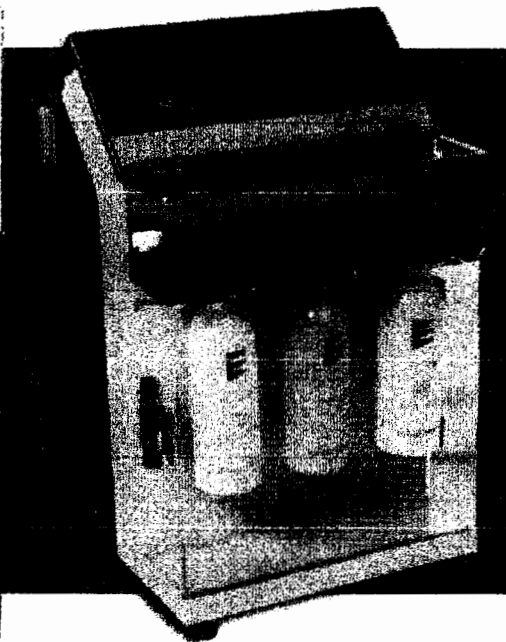
Patented Disposable HydroPeel™ Tip



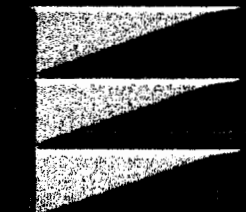
Spa Aggression Tip Patent Pending



Patented Crystal-free Tip (Option II)



Skin-Specific Serums



As seen on NBC, ABC and FOX news!

BENEFITS

- ✔ Excellent Return On Investment (ROI)
- ✔ System can be operated by medical staff or aestheticians
- ✔ Expand service menu by offering stand-alone & combination treatment packages
- ✔ Rejuvenate your microdermabrasion business & attract new patients/ clients
- ✔ For all skin types & ethnicities
- ✔ High patient acceptance
- ✔ No irritation or discomfort
- ✔ Superior & faster results than microderm

FEATURES

- ✔ Simultaneous skin resurfacing and topical application of active serums
- ✔ NEW – Medical and spa level aggression tips & aggressive body tips
- ✔ NEW – Antioxidant serum now with Hyaluronic Acid
- ✔ NEW – GlySal™ Acid Peels combine chemical and physical peeling without post-peel sloughing
- ✔ NEW – TNS® Serum with the growth factors, by SkinMedica® exclusively through the HydraFacial™ Systems
- ✔ Disposable tips prevent cross-contamination

FULL MARKETING & SUPPORT

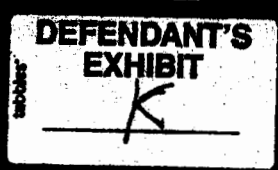
- Start-up Kit (Serums & Tips)
- On-site Training & Written Protocols
- Warranty
- Before & After Pictures
- Patient Testimonial DVD
- Patient Brochure & Lobby Poster
- Graphic / Artwork Support
- Web listing on HydraFacial.com

EDGE SYSTEMS CORPORATION

**Manufacturing
Leading Edge
Products Worldwide**

fax: 562-597-0148
www.edgesystem.net
contact@edgesystem.net

**Call
800-603-4996**



This machine is CE listed. Covered by multiple patents. U.S. Patent Nos. 6,641,591 and 6,298,620. Other patent numbers pending. HydraFacial, HydraFacial MD and HydroPeel are trademarks of Edge Systems Corporation.

HydraFacial™ Nectre®

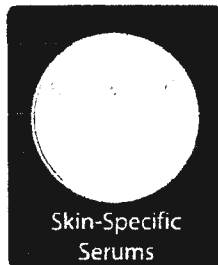
Serum-Based Skin Resurfacing System
A Spa System Designed by an Aesthetician for Aestheticians



"iPod" Style Vacuum Control



Disposable HydroPeel™ Tip



Skin-Specific Serums



Portable, Lightweight SPA Unit



**EDGE
SYSTEMS
CORPORATION**

*Manufacturing
Leading Edge
Products Worldwide*

You Can't Afford Not To Have This New SPA Unit!

- *Painless extractions*
- *Highest client satisfaction*
- *Immediate radiant results*
- *No irritation or discomfort*
- *No cross-contamination*
- *For all skin types and ethnicities*
- *Excellent Return On Investment*
- *Rejuvenates your microderm business & attracts new clients*
- *Superior & faster results than microdermabrasion treatment*
- *Resurfaces the skin while simultaneously introducing topically applied skin-specific serums*

Tel: 1-562-597-0102
Toll-Free: 1-800-603-4996
Fax: 1-562-597-0148
www.edgesystem.net
contact@edgesystem.net

This is a CE listed machine. Covered by multiple patents. U.S. patents 6,641,591 & 6,299,620
Other international patents pending. HydraFacial, HydroPeel and Nectre are trademarks of Edge Systems Corporation.

**DEFENDANT'S
EXHIBIT**
L

**The New HydraFacial™ Nectre® Spa System –
Skin Specific Serums Combined with HydroPeel™ Tip Cutting Action
Deep Cleansing, Exfoliating, Painless Extracting, Hydrating and Antioxidants in one easy step!**

activ-4™

FOR ALL SKIN TYPES

- Patent-pending Glucosamine and lactic acid exfoliating blend to soften sebum and impurities
- Active botanical extracts to hydrate, soothe and calm the skin
- Non-inflammatory, non-irritating advanced leave-on formulation
- Aids in epidermal hyperpigmentation lightening



beta-hd™

FOR OILY & ACNE-PRONE SKIN

- Salicylic acid helps to fight future breakouts by softening sebum and impurities
- Visible skin rejuvenation and hydration
- Non-inflammatory, non-irritating advanced leave-on formulation
- Aids in epidermal hyperpigmentation lightening








antiox-6™

FOR ALL SKIN TYPES

- The most effective antioxidant ingredients - stabilized vitamins A, E and white tea extract
- Hyaluronic acid deeply moisturize and condition the skin
- Advanced lipid carrier helps ingredients to penetrate the dermal skin barrier
- A valuable add-on to any facial treatment, or as a stand-alone service



	<p>Large Blue Tip For all skin types Deep cleansing, exfoliation and hydration</p>		<p>Spa Agression Tip (Amber) For thicker skin Cleansing and increased exfoliation</p>
	<p>Small Blue Tip For all skin types Extraction, exfoliation, hydration & deep cleansing</p>		<p>Clear Tip For all skin types Apply specialty serums, i.e. Antiox-6 with Hyaluronic Acid</p>
	<p>Body Tip (Blue) For body Cleanses, exfoliates and hydrates larger areas</p>		



TESS (Trademark Electronic Search System) is a trademark search system that allows users to search for trademarks in the USPTO database.

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TESS was last updated on Sun Nov 23 03:20:57 EST 2014

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Start List At: OR Jump to record: **Record 4 out of 5**

TSDR	ASSIGN Status	TTAB Status
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(Use the "Back" button of the Internet Browser to return to TESS)

HYDRAFACIAL MD

Word Mark HYDRAFACIAL MD

Goods and Services IC 010. US 026 039 044. G & S: Medical apparatus and instruments for peeling and resurfacing tissue. FIRST USE: 20050215. FIRST USE IN COMMERCE: 20050517

Standard Characters Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Trademark Search Facility Classification Code LETS-2 MD Two letters or combinations of multiples of two letters

Serial Number 78563560

Filing Date February 9, 2005

Current Basis 1A

Original Filing Basis 1B

Published for Opposition June 20, 2006

Registration Number 3341027

Registration Date November 20, 2007



Owner (REGISTRANT) Edge Systems Corporation CORPORATION CALIFORNIA 2277 Redondo Ave
Signal Hill CALIFORNIA 90755

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Joel Covelman

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).

Live/Dead Indicator LIVE

TESS HOME	NEW USER	STRUCTURED	FREE FORM	BROWSE DICT	SEARCH OG	TOP	HELP	CURR LIST
NEXT LIST	FIRST DOC	PREV DOC	NEXT DOC	LAST DOC				

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 78/563560
APPLICANT: Edge Systems Corporation

78563560

CORRESPONDENT ADDRESS:
CATHERINE J. HOLLAND
KNOBBE, MARTENS, OLSON & BEAR
2040 MAIN ST FL 14
IRVINE, CA 92614-7216

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: HYDRAFACIAL MD

CORRESPONDENT'S REFERENCE/DOCKET NO : EDGE.013T

Please provide in all correspondence:

CORRESPONDENT EMAIL ADDRESS:
efiling@kmob.com

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

Serial Number 78/563560

The assigned examining attorney has reviewed the referenced application and determined the following.

NO CONFLICTING MARKS NOTED

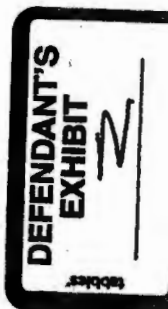
The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02.

DISCLAIMER

The applicant must insert a disclaimer of HYDRAFACIAL in the application because it describes a feature of the goods, namely, that they are used to provide hydra facials. See the attached Google evidence demonstrating that many different companies provide hydra facials. Trademark Act Section 6, 15 U.S.C. Section 1056; TMEP sections 1213 and 1213.08(a)(i). A disclaimer does not remove the disclaimed matter from the mark. It is simply a statement that the applicant does *not* claim exclusive rights in the disclaimed wording or design apart from the mark as shown in the drawing.

A properly worded disclaimer should read as follows:

No claim is made to the exclusive right to use HYDRA FACIAL apart from the mark as shown.





IDENTIFICATION OF GOODS

The identification of goods is unacceptable as indefinite. The applicant must specify each and every medical instrument and apparatus using the common commercial name for the goods.

For aid in selecting acceptable identifications of goods and services and determining proper classification, the searchable Manual of Acceptable Identifications of Goods and Services is available on the Agency website at the following address: [http://www.uspto.gov/web/offices/tac/doc/gsmannual/](http://www.uspto.gov/web/offices/tac/doc/gsmmanual/). The applicant may adopt the following identification, if accurate:

Medical apparatus and instruments, namely, lasers for the cosmetic treatment of the face and skin; medical apparatus and instruments for peeling and resurfacing tissue, namely, medical skin abraders and dermabraders, in International Class 10;

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(a); TMEP section 1402.06. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

TELEPHONE CALL SUGGESTED

PLEASE NOTE: All of the issues raised can be resolved by telephone. The applicant may telephone the examining attorney, instead of submitting a written response, to expedite the application.

/Tanya Amos/
Trademark Examining Attorney
Law Office 113
(571) 272-9423 Phone
(571) 273-9423 Fax

HOW TO RESPOND TO THIS OFFICE ACTION:

- **ONLINE RESPONSE:** You may respond formally using the Office's Trademark Electronic Application System (TEAS) Response to Office Action form (visit <http://www.uspto.gov/teas/index.html> and follow the instructions, but if the Office Action has been issued via email, you must wait 72 hours after receipt of the Office Action to respond via TEAS).
- **REGULAR MAIL RESPONSE:** To respond by regular mail, your response should be sent to the mailing return address above and include the serial number, law office number and examining attorney's name in your response.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov>.

VIEW APPLICATION DOCUMENTS ONLINE: Documents in the electronic file for pending applications can be viewed and downloaded online at <http://portal.uspto.gov/external/portal/tow>.

GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.

PTO Form 1957 (Rev 5/2006)
OMB No. 0651-0050 (Exp 04/2009)

Response to Office Action

The table below presents the data as entered.

SERIAL NUMBER	78563560
LAW OFFICE ASSIGNED	LAW OFFICE 113
MARK SECTION (no change)	
ARGUMENT(S)	

REMARKS

The following amendment and remarks are submitted in response to the Examining Attorney's Office Action, dated September 12, 2005, which (1) required a disclaimer of HYDRAFACIAL on the ground that it is merely descriptive of Applicant's goods; and (2) required an amendment to the identification of goods.

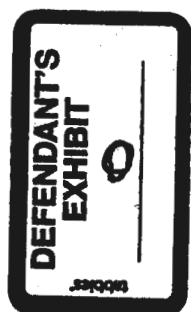
I. Requirement for Disclaimer of HYDRAFACIAL

In addition to the requirement for an amended identification of goods, the Examining Attorney has required a disclaimer of the word HYDRAFACIAL on the ground that it is merely descriptive of Applicant's goods. The Examining Attorney believes that the term HYDRAFACIAL is merely descriptive of Applicant's goods – which, as amended, are “medical apparatus and instruments for peeling, resurfacing and nourishing tissue” – because “it describes a feature of the goods, namely, that they are used to provide hydra facials.” Applicant respectfully traverses this requirement.

A. The Term HYDRAFACIAL Is At Most Vaguely Suggestive of Applicant's Goods

“[A] mark is merely descriptive if it immediately conveys knowledge of a quality or characteristic of the product.” In re Oppedahl & Larson LLP, 71 U.S.P.Q.2d 1370, 1371 (Fed. Cir. 2004) (emphasis added). A term is merely descriptive if it “describes a significant function or attribute or property” of the goods or services in question. In re H.U.D.D.L.E., 216 U.S.P.Q. 358, 359 (T.T.A.B. 1982) (emphasis added). It follows that in order for a term to be merely descriptive, a term must immediately convey knowledge about a significant feature or characteristic of the goods or services at issue.

On the other hand, a term is suggestive if its “import would not be grasped without some measure of imagination and ‘mental pause.’” In re Shutts, 217 U.S.P.Q. 363, 364-65 (T.T.A.B. 1983) (SNO-RAKE not merely descriptive of “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted



construction without prongs”). “If information about the product or service given by the term used as a mark is indirect or vague, then this indicates that the term is being used in a ‘suggestive,’ not descriptive, manner.” 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 11:19 (4th ed. 2006). This notion is simply the flip side of the aforementioned immediacy requirement, for if there is a “mental pause” in the mind of the consumer, the term does not immediately convey knowledge about the goods or services.

The term HYDRAFACIAL cannot immediately convey any knowledge of Applicant’s medical apparatus and instruments because a multi-step reasoning process must be employed by a consumers and potential consumers to arrive at any conclusion about the goods. That is, a consumer must make a substantial mental leap if he is to make any connection between the term HYDRAFACIAL and Applicant’s medical goods. That the term HYDRAFACIAL is suggestive is buttressed by the fact that neither “hydrafacial” nor “hydra facial” has any definition according to Onelook.com, a website that searches numerous online dictionaries at once. See the attached printouts from Onelook.com.

On the other hand, the terms “Hydra,” “hydra,” and “facial” do have recognized definitions. The definition of “Hydra” is

1. *Greek Mythology* The many-headed monster that was slain by Hercules.
2. A constellation in the equatorial region of the southern sky near Cancer, Libra, and Centaurus. Also called *Snake*.
3. A persistent or multifaceted problem that cannot be eradicated by a single effort.

The definition of “hydra” is “[a] ny of several small freshwater polyps of the genus *Hydra* and related genera, having a naked cylindrical body and an oral opening surrounded by tentacles.” The definition of “facial” is “[a] treatment for the face, usually consisting of a massage and the application of cosmetic creams.” See the attached dictionary definitions from The American Heritage[®] Dictionary of the English Language (4th ed. 2000).

Thus, the term HYDRAFACIAL has numerous literal meanings – e.g., a facial for a many-headed monster from Greek mythology, a facial for a constellation, etc. – but none of these literal definitions has any relevance to Applicant’s medical apparatus and instruments, and the Board has made it clear that the literal meaning of a mark must be considered in determining mere descriptiveness. For instance, in finding the mark AIR-CARE not merely descriptive of a “program of scheduled maintenance of hospital and medical anesthesia and inhalation therapy equipment and hospital piping systems for medical gases,” the Board reasoned that

[t]he literal meaning of the mark, namely, “care of the air”, may, through an exercise of mental gymnastics and extrapolation suggest or hint at the nature of applicant’s services, but it does not, in any clear or precise way, serve merely to describe applicant’s preventive maintenance services directed to a scheduled maintenance program for hospital and medical anesthesia and inhalation therapy equipment and the like. Furthermore, applicant’s registration of “AIR-CARE” and the presumptions afforded the registration under Section 7(b), if and when issued, would extend to the unitary term “AIR-CARE” and not to the words “AIR” and “CARE”, per se, so that it cannot interfere with [another’s] right to use these terms, separately and apart from each other, in a descriptive sense to describe its goods and/or services.

Airco, Inc. v. Air Prods. And Chems., Inc., 196 U.S.P.Q. 832, 835 (T.T.A.B. 1977). Much more so than the registrable mark AIR-CARE, the literal meaning of the term HYDRAFACIAL is utterly nonsensical, particularly as applied to Applicant's goods, and this indicates that the word is at most vaguely suggestive and hence registrable.

As noted above, the words "Hydra," "hydra," and "facial" do not describe Applicant's medical apparatus and instruments. The words "Hydra" and "hydra" have no relationship to Applicant's goods, and though the word "facial" may be suggestive of a function of Applicant's goods, it would be odd to describe Applicant's medical instruments as a "treatment" for the face.

In any event, even were it assumed arguendo that the words "Hydra" and "facial" were by themselves descriptive of Applicant's medical apparatus and instruments, it does not follow that the term as a whole, HYDRAFACIAL, is merely descriptive of Applicant's goods. In In re Ada Milling Co., 98 U.S.P.Q. 267 (C.C.P.A. 1953), the Court of Customs and Patent Appeals reversed a merely-descriptive refusal of "Startgrolay," as applied to poultry feed, despite the fact that the evidence of record indicated that the words "start," "grow," and "lay" were commonly used to indicate various types of poultry food:

Here appellant has so combined three words into a unitary notation as to result in a mark which in our opinion, may suggest but does not necessarily describe the character of its goods. While it is, of course, true that if the mark were dissected, the words "Start," "grow," and "lay" might well be descriptive of the characteristics of various types of poultry feed, it is our belief that when the mark is viewed in its entirety, as it is viewed in the market place, it is capable of distinguishing applicant's goods from those of others.

98 U.S.P.Q. at 269.

In short, Applicant maintains that the term HYDRAFACIAL has no readily-understood meaning with regard to Applicant's goods, and that consumers and potential consumers encountering the term HYDRAFACIAL would have to engage in mature reflection to cull any information about the goods from this term.

B. The Evidence of Record Is Insufficient To Support the Refusal

In support of the merely-descriptive refusal, there are printouts from eight websites; of these, the first five listed below appear to use variations of HYDRAFACIAL in connection with facial services. However, Applicant is not providing facials, but rather medical instruments.

1. The first website is that of the Four Seasons Residence Club at Jackson Hole. This website uses the term "hydra facial" in apparent reference to "facial" services, as defined above. This usage does not describe Applicant's medical apparatus and instruments, as explained above. This website also uses the term "Ultra Hydra Facial," also in reference to facials. Not only does this usage not refer to goods such as Applicant's, it is also unclear whether this usage is even descriptive usage inasmuch as the words "Hydra Facial" are capitalized. "Some of the common markers of whether

a word, phrase or picture is being used as a trademark are: larger-sized print, all capital letters or initial capitals, distinctive or different print style, color, and prominent position on label or advertising copy.” 1 McCarthy, supra, at § 3:3 (emphasis added).

2. The second website belongs to an entity whose name apparently is HeavenSpa Inc. It includes a reference to “Inspirations’ Hydra-Facial – (60 minutes).” Whatever this refers to, this event requires 60 minutes and therefore cannot refer to Applicant’s medical goods. Moreover, this usage includes a hyphen not found in the term HYDRAFACIAL and it, too, uses capitalization suggesting that it is proprietary usage, not descriptive usage.
3. The third website is also from a spa and, similar to the second website, states “DNA Hydra Facial, 75 minutes \$250.” Thus, it uses the term “Hydra Facial” in a trademark manner in reference to services (the bottom of the page states that “prices and services subject to change”) and not Applicant’s medical apparatus and instruments.
4. The fourth website is also from a spa, and states “\$110.00 ANTI-OXIDANT HYDRA FACIAL.” Because “all capital letters” is also trademark usage, this usage suffers from the same infirmities as the above-noted usages.
5. The fifth website includes the wording “Aroma Hydra Facial plus Eye Rejuvenation.” Given that this wording appears under the heading “QUICK PLEASURES FOR FACE,” the above-noted objections also apply to this website.

The three remaining websites cited by the Examining Attorney in support of her position are foreign websites from Canada and India whose probative value is minimal. “Since it is the American public’s perception of a term that is determinative, evidence from foreign publications is given little or no weight.” T.M.E.P. § 1211.02(b)(ii). The copyright notice on the sixth website refers to an entity in Bangalore, India. The seventh website uses the term “Hydra Facial” in a trademark manner to refer to services, not Applicant’s medical goods, and this entity is located in Nova Scotia, Canada. See the attached printout from that website.

The eighth website is from an entity named Pantages located in Manitoba, Canada, as evidenced by its 204 area code and the attached printout of area codes and their assigned territories. See the attached printout from Pantages’ website and the listing of area codes.

The sufficiency of the evidence in this case is notably similar to that proffered in In re Vaughan Furniture Co. Inc., 24 U.S.P.Q.2d 1068 (T.T.A.B. 1992), in which an examining attorney made of record 87 Nexis® articles in refusing the mark PINE CRAFTS for furniture.

In reversing the refusal, the Board found that only one article made clear use of the mark in connection with furniture and that three others arguably did, but that “[t]he most we can determine from these three articles is that CRAFTS may have a suggestive significance.” Id. at 1069. “Thus, after a close examination of what was apparently meant to appear as overwhelming evidence of the descriptiveness of CRAFTS or PINE CRAFTS for furniture, there is really only one article that supports the Examining Attorney’s position.” Id. at 1069-

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 1:14-cv-24517-KMM

EDGE SYSTEMS LLC, a California
limited liability company, and AXIA
MEDSCIENCES, LLC, a Delaware limited
liability company

Plaintiffs,

v.

RAFAEL NEWTON AGUILA, a/k/a Ralph
Aguila, an individual, d/b/a/
Hydradermabrasion Systems,

Defendant.

**ORDER GRANTING PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S
COUNTERCLAIMS AND STRIKE AFFIRMATIVE DEFENSES**

THIS CAUSE came before the Court upon Plaintiffs' Motion to Dismiss Defendant's Counterclaims and to Strike Defendant's Affirmative Defenses (ECF No. 134). Defendant filed a Response (ECF No. 138) and Plaintiffs replied (ECF No. 143). The Motion is now ripe for review. UPON CONSIDERATION of the Motion, the pertinent portions of the Record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND¹

Plaintiffs Edge Systems LLC ("EDGE") and Axia MedSciences, LLC ("Axia") brought this action against Defendant Rafael Newton Aguila ("Aguila") seeking damages and injunctive

¹ The facts of this case have been previously set out in the Court's order denying Defendant's Motion to Dismiss. (ECF No. 110). For brevity's sake, the Court will only reiterate the facts most pertinent to the instant motion.

relief for trademark, trade dress, and patent infringement.² *See generally* Compl. (ECF No. 1). Edge designs and sells skin health devices, including spa and skin treatment products and hydradermabrasion systems. *Id.* ¶ 10. Edge’s premier product is its HydraFacial MD® hydradermabrasion system (the “Edge Machine”). *Id.* ¶ 12. Edge’s Machine incorporates technology that is claimed in six U.S. patents, owned by Plaintiff Axia and exclusively licensed to Edge. One of the key patents for purposes of this motion is U.S. Patent No. 6,299,620 (the “’620 Patent”) which was duly issued by the U.S. Patent and Trademark Office (“PTO”) on October 9, 2001. *Id.* ¶ 38. Edge is the exclusive licensee of the ’620 Patent. *Id.*

Since its founding, Edge has continuously operated under the trade name “Edge Systems,” and used the mark EDGE SYSTEMS in connection with the sale and promotion of its products. *See* Pls.’ Mot. to Dismiss (ECF No. 134). Edge has used variations of its chevron-styled “E” logo since 1999. *Id.* at 2.

In October 2014, Plaintiffs became aware that Defendant Rafael Aguila was selling a hydradermabrasion machine known as the HydraDerm MD or Hydradermabrasion MD (“Defendant’s Machine”), which uses the same system and trade dress as Plaintiffs’ Machine. Defendant’s Machine also incorporates the use of serums that have identical or substantially similar names as those used in the Edge Machine. Additionally, Defendant sells his machines using the same name as Plaintiff Edge—“Edge Systems”—and the same chevron style logo that Edge uses. Defendant concedes his use of the same or nearly identical trademarks and trade dress as Plaintiffs, but claims that he is the first to use these marks and associated trade dress.

² Plaintiff Axia’s interest in this matter appears to be confined to its claim of patent infringement, whereas Plaintiff Edge has claims of both patent and trademark infringement. In order to avoid confusion, the Court will reference both Plaintiffs in its analysis of Defendant’s counterclaims and affirmative defenses, rather than distinguish which Plaintiff is relevant to a particular claim.

On December 2, 2014, this Court granted Plaintiffs motion for an *ex parte* temporary restraining order against Aguila. (ECF No. 15). In the order, this Court found that “[w]ithout the consent or authority of Edge, [Aguila] has been using the Edge Marks and Edge Trade Dress in connection with the sale, offering for sale, distribution, advertising, and/or promotion of microdermabrasion and hydradermabrasion systems and serums and solutions for microdermabrasion and hydradermabrasion systems.” *Id.* ¶ 15. This Court further held that Axia’s patent is likely infringed, *see id.* ¶ 20, and Aguila’s continued unauthorized use of Edge’s trademarks and trade dress, as well as Axia’s patent, “will cause immediate and irreparable harm to Edge,” *id.* ¶¶ 16, 21. As a result, this Court immediately enjoined Aguila from several activities, including “[u]sing, copying, simulating, or in any way infringing the Edge Marks or the Edge Trade Dress”; “[u]sing ‘Edge’ as the name or part of the name of its business”; as well as “[f]iling or prosecuting any trademark application at the United States Patent and Trademark Office for any of the Edge Marks or the Edge Trade Dress.” *Id.* at 6.

On January 29, 2015, after an extensive hearing where both sides presented testimony and other evidentiary support, Magistrate Judge McAliley issued a Report and Recommendation to this Court recommending the Court grant Plaintiffs’ application for preliminary injunction.³ (ECF No. 81). Finding that Plaintiffs satisfied their burden in establishing the four elements required to obtain a preliminary injunction, this Court granted Plaintiffs’ application for preliminary injunction. (ECF No. 90). In addition to Aguila’s previously restricted activities, the preliminary injunction prevented Aguila from “[m]aking, using, offering for sale, selling within the United States, or importing into the United States, any product that infringes on U.S.

³ Notably, Judge McAliley did not “find Defendant’s claim that he was the first to use the disputed marks credible.” (ECF No. 81 at 6). Judge McAliley reasoned that the assertion “that Defendant stumbled upon the same unusual names and logo for the same or highly similar products just before Plaintiffs did cannot be believed.” *Id.* at 13. This Court agrees.

Patent No. 6,299,620, including but not limited to the ‘HydraDerm MD’ or ‘Hydradermabrasion MD’ product.” *Id.* at 2.

On July 10, 2015, Defendant filed an Amended Answer, Affirmative Defenses and Counterclaims against Plaintiffs (ECF No. 128). Defendant’s amended pleading included counterclaims for: declaration of unenforceability (Count III), antitrust (Count IV), patent false marking (Count V), cancellation of trademark registrations (Counts VI–VIII, and X), declaration of trademark rights (Count IX), and violations of the federal RICO statute (Counts XI–XIII). Defendant’s Answer also includes the following affirmative defenses: unenforceability (Fifth), inequitable conduct (Eighth), prior use of trademarks (Ninth), and unclean hands (Eleventh). Plaintiff seeks to dismiss the counterclaims and strike the affirmative defenses on the basis that they consist mostly of legal conclusions unsupported by specific factual allegations.

II. STANDARDS OF REVIEW

A. Motions to Dismiss

A motion to dismiss a counterclaim for failure to state a claim is treated the same as a motion to dismiss a complaint. *Geter v. Galardi S. Enters., Inc.*, 43 F. Supp. 3d 1322, 1325 (S.D. Fla. 2014) (citation omitted). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). When considering a motion to dismiss, the court must accept all of the plaintiff’s allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). A complaint must also contain enough facts to indicate the presence of the required elements. *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1302 (11th Cir. 2007). However, “[a] pleading that offers ‘a formulaic recitation of elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

“[C]onclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal.” *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

B. Motions to Strike

Pursuant to Federal Rule of Civil Procedure 12(f), a court “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Courts enjoy broad discretion when considering a motion to strike. *Morrison v. Exec. Aircraft Refinishing Co.*, 434 F. Supp. 2d 1314, 1317–18 (S.D. Fla. 2005). However, striking a defense from a pleading is a drastic remedy generally disfavored by courts unless “required for the purposes of justice.” *Regions Bank v. Commonwealth Land Title Ins. Co.*, No. 11-23257-CIV, 2012 WL 5410609, at *2 (S.D. Fla. Nov. 6, 2012) (internal citation and quotation omitted). For that reason, a motion to strike an affirmative defense is typically denied unless the defense (1) has no possible relation to the controversy, (2) may cause prejudice to one of the parties, or (3) fails to satisfy the general pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. *Marley v. Jetshares Only, LLC*, No. 10-23178-CIV, 2011 WL 2607095, at *1 (S.D. Fla. June 30, 2011).

III. ANALYSIS

A. Plaintiffs’ Motion to Dismiss Defendant’s Counterclaims

Plaintiffs seek to dismiss eleven of the thirteen counterclaims Defendant brings in the instant action.⁴ For completeness and clarity, the Court will address each challenged counterclaim below.

⁴ Defendant’s brief response to Plaintiffs’ motion only states that “the arguments that the plaintiffs make against the new claims are not logical or based on any case law.” (ECF No. 138). Additionally, Defendant attempted to overcome any alleged pleading deficiencies by filing a

1. Count III – Declaration of Unenforceability

Defendant asserts a counterclaim (Count III) requesting a declaration of unenforceability based on Plaintiffs' alleged inequitable conduct during the prosecution of the '620 patent application. Plaintiffs argue that such an allegation is unquestionably false. According to Plaintiffs, the entire basis of Defendant's inequitable conduct theory is that U.S. Patent No. 6,241,739 ("the '739 patent") was not submitted during the prosecution of the '620 patent.⁵ Defendant alleges that three named inventors of the '620 patent failed to disclose highly material prior art they authored themselves thus exhibiting an intent to deceive the PTO. Plaintiffs respond by alleging that Defendant fails to plead any facts showing that any individual acted with the requisite intent necessary to plead inequitable conduct. Further, Plaintiffs argue that Defendant has not established how the '739 patent is material to patentability.

In order to prevail on a claim of inequitable conduct, a party must prove that the patent applicant misrepresented or omitted material information with the specific intent to deceive the PTO. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011) (en banc). The essential elements of an inequitable conduct claim reinforce the fact that it must be pled with particularity under Rule 9(b). *Ferguson Beauregard/Logic Controls, Div. of Dover Res., Inc. v. Mega systems, LLC*, 350 F.3d 1327, 1344 (Fed. Cir. 2003). In fact, "[a] pleading that simply avers the substantive elements of inequitable conduct, without setting forth the particularized factual bases for the allegation, does not satisfy" the heightened pleading rules. *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326-27 (Fed. Cir. 2009). The Federal

Second Amended Answer and Counterclaims ("SAAC") which the Court denied on the grounds of bad faith, undue prejudice, and futility. (ECF No. 154).

⁵ The Court takes judicial notice of the fact the '739 patent was filed with the PTO on November 12, 1999, approximately one month prior to the filing of Plaintiffs' '620 patent. *See* Fed. R. Evid. 201. The Court also judicially notices the fact that the named inventor of the '739 patent, contrary to Defendant's assertions, is Stephen Waldron.

Circuit has emphasized that “[i]ntent and materiality are separate requirements.” *Therasense*, 649 F.3d at 1290.

Defendant’s pleadings on this counterclaim are insufficient as a matter of law. To begin with, Defendant has failed to plead with particularity the essential elements of an inequitable conduct cause of action. Defendant’s pleadings are devoid of any facts permitting an inference that there was an intent to deceive by any specific individual when submitting the ’620 patent application to the PTO. Additionally, Defendant has failed to adequately allege how the ’739 patent is material to the patentability of the ’620 patent. Lacking sufficient particularity, Defendant’s counterclaim for a declaration of unenforceability based on inequitable conduct (Count III) is dismissed.

2. Count IV – Antitrust

Defendant’s counterclaim for Antitrust (Count IV) pursuant to 15 U.S.C. § 2 alleges that Plaintiffs are engaged in anticompetitive price-fixing agreements with other companies that results in diminished competition and increased prices for Plaintiffs’ products. To support this allegation, Defendant cites to the fact that Plaintiffs’ profit-margins in the hydradermabrasion industry have not fallen in more than five years. Defendant alleges this economic performance is indicative of a monopolized marketplace. Plaintiffs respond to this allegation by asserting that mere enforcement of patent rights cannot give rise to a valid claim for monopolization. Further, Plaintiffs argue that Defendant’s monopolization claim is insufficient as a matter of law as it does not include specific facts that create a plausible inference that (1) Plaintiffs “knowingly and willingly” misrepresented or omitted material facts to the PTO; (2) the Patent Office granted the patent in justifiable reliance on the misrepresentation, and that Plaintiffs are seeking to enforce a patent with knowledge that the patent was procured by fraud.

The Court agrees that Defendant has failed to plead any facts relating to these required elements, much less facts sufficient to make Defendant's counterclaim plausible on its face. Nor has Defendant adequately pleaded facts sufficient to establish the elements of a monopolization claim under Section 2 of the Sherman Act. *See Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1293–94 (11th Cir. 2004) (noting that a monopolization claim has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"). Instead, Defendant offers the Court only conclusory allegations that are insufficient to withstand a motion to dismiss. Accordingly, Defendant's counterclaim for Antitrust (Count IV) must be dismissed.

3. Count V – Patent False Marking

Defendant's counterclaim for patent false marking (Count V) under 35 U.S.C. § 292 alleges that Plaintiffs falsely marked articles as patented when they are unpatented, with the intent to deceive the public. Specifically, Defendant alleges that Plaintiffs' Hydrafacial handpiece does not have any kind of abrasive on it, which is a requirement of Claim 1 of the '620 patent. Plaintiffs respond to this allegation by noting that Defendant has not alleged the requisite level of intent to support this claim.

A cause of action for false marking consists of two elements: "(1) marking an unpatented article and (2) intent to deceive the public." *Plasticos Vandux De Colombia, S.A. v. Robanda Int'l*, No. 10-60188-CIV, 2010 WL 5392646, at *2 (S.D. Fla. Dec. 21, 2010) (quoting *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1300 (Fed. Cir. 2009)). "Intent to deceive is a state of mind arising when a party acts with sufficient knowledge that what it is saying is not so and consequently that the recipient of its saying will be misled into thinking that the statement is true." *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352 (Fed. Cir. 2005). As a

claim for false marking is based on an intent to deceive, a party asserting such a claim must also meet the heightened pleading requirements of Rule 9(b). *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1309 (Fed. Cir. 2011).

Defendant has failed to sufficiently plead specific facts demonstrating that Plaintiffs' have exhibited the purposeful deceit necessary for this cause of action. Defendant instead merely alleges that Plaintiffs' product does not meet all the requirements of Claim 1 of the '620 patent and offers a bare-bones conclusion that Plaintiffs falsely marked articles with an intent to deceive. The allegations of this counterclaim for false marking do not meet the strict pleading requirements of Rule 9(b), and Count V must be dismissed.

4. Counts VI–VIII, and X – Cancellation of Trademark Registrations

Defendant asserts four counterclaims under 15 U.S.C. § 1064 seeking the cancellation of four of Plaintiffs' registered trademarks. Defendant alleges in Count VI that Plaintiffs' trademark "Hydropeel" should be considered to be generic in nature. In Count VII, Defendant asserts that Plaintiffs' trademark "Vortex-Fusion" should also be considered as generic or descriptive in nature. Count VIII asserts that Plaintiffs' trademarked term "The Edge System" has been abandoned for more than three years. Lastly, Count X seeks cancellation on the alleged basis that Plaintiffs intentionally, willfully, and with bad faith, deceived the PTO in order to receive approval for the "Hydrafacial" trademark. Plaintiffs respond to all four counts by asserting that Defendant's cancellation claims should be dismissed as they all lack allegations of an essential element.

A party seeking cancellation of a trademark must prove that it has standing and that there are valid grounds for canceling the registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000). As the more liberal of the essential elements of this cause of action, standing only requires "that the party seeking cancellation believe that it is likely to be damaged

by the registration.” *Id.* One way that a party can demonstrate a belief in likely damage is “by establishing a direct commercial interest.” *Id.* All of Defendant’s trademark cancellation counterclaims lack allegations suggesting that Defendant believes it will be damaged by the challenged trademark registrations. Accordingly, Counts VI–VIII, and X are dismissed for failure to state a claim.

5. Count IX – Declaration of Trademark Rights

Defendant’s counterclaim for declaration of trademark rights over Plaintiffs’ “common law” trademark registrations (Count IX) alleges that Defendant developed and put into commerce all of the challenged marks prior to Plaintiffs use of the trademarks.⁶ In support of this claim, Defendant offers an invoice for the sale of a HydraDerm MD system dated January 9, 2004, that references the marks that Defendant is seeking a declaratory judgment over. Plaintiffs initially argue that Defendant is procedurally barred from asserting this claim as Defendant failed to plead the basic elements for a claim for declaratory judgment. Additionally, Plaintiffs seek dismissal of this counterclaim on the grounds that Defendant has committed fraud on the Court by relying on a fraudulent exhibit to support the claim.

The Declaratory Judgment Act provides that “any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). A trial court maintains broad discretion over whether or not to exercise jurisdiction over these types of claims. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). “If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon that

⁶ The marks that Defendant seeks a declaratory judgment over are: “Activ-4,” “Antiox+,” “Antiox-6,” “Beta-HD,” “DermaBuilder,” “GlySal,” “Edge Systems,” and the Chevron E Logo used by Edge.

court to proceed to the merits before . . . dismissing the action.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995); *see also Medmarc Cas. Ins. Co. v. Pineiro & Byrd PLLC*, 783 F. Supp. 2d 1214, 1216 (S.D. Fla. 2011).

Defendant’s counterclaim for a declaratory judgment does not serve a useful purpose. Courts routinely dismiss counterclaims “that contain repetitious issues already before the court by way of the complaint or affirmative defenses.” *Medmarc*, 783 F. Supp. 2d at 1217. Because the counterclaim is wholly duplicative of Defendant’s Ninth affirmative defense, the Court declines to exercise its discretion over this claim. Therefore, Count IX of Defendant’s counterclaim must be dismissed.

6. Counts XI–XIII – Violations of the Federal RICO Statute

Defendant also asserts three counterclaims (Counts XI–XIII) for alleged violations of the Racketeer Influenced and Corrupt Organizations (“RICO”) Act. Specifically, Defendant asserts counterclaims for violations of 18 U.S.C. §§ 1962(b), (c), and (d). In response, Plaintiffs note that none of Defendant’s RICO counterclaims include any facts upon which a claim of relief can be granted. Additionally, Plaintiffs argue that all of the RICO counterclaims are devoid of any factual pleading stating that Defendant has suffered an injury. Instead, Plaintiffs contend that Defendant merely recites the language of the statute in the form of conclusory allegations.

In order to establish a federal civil RICO violation under 18 U.S.C. §§ 1962(a)-(d) “the plaintiff ‘must satisfy four elements of proof: ‘(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.’” *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir.2006) (quoting *Jones v. Childers*, 18 F.3d 899, 910 (11th Cir.1994)). In addition to the aforementioned substantive elements, a party bringing a civil RICO claim must also satisfy the requirements of 18 U.S.C. § 1964(c), which requires the party to show (1) requisite injury to

business or property, and (2) that such injury was by reason of the substantive RICO violation(s). *Id.* at 1283.

Defendant's counterclaims (Counts XI–XIII) provide nothing more than “[t]hreadbare recitals of the elements of a cause of action” and are insufficient as a matter of law. *See Iqbal*, 556 U.S. at 678. Defendant does not plead any supporting facts for each of the civil RICO counterclaims, let alone facts sufficient to state a claim to relief that is plausible on its face. “[N]aked assertions devoid of further factual enhancement” will not survive a motion to dismiss. *Id.* (internal quotation marks omitted). Therefore, Counts XI–XIII of Defendant's counterclaim are dismissed.

B. Plaintiff's Motion to Strike Defendant's Affirmative Defenses

Plaintiffs assert that Defendant alleged mere legal conclusions unsupported by specific factual allegations in the affirmative defenses challenged here. The Court will now address each in turn.⁷

Defendant's Ninth affirmative defense (prior use of trademarks) alleges that Plaintiffs' trademarks were wrongfully issued by the PTO. In support of this affirmative defense Defendant asserts that: (1) Plaintiffs' trademarks are all descriptive of goods to which they apply and are thus incapable of being trademarks; (2) Plaintiffs' trademarks are all in common use and are public property; and (3) Plaintiffs have failed to use reasonable diligence to seek protection of their alleged rights. Lastly, Defendant claims that he was already using the Edge logo and Edge Systems name before the Plaintiffs. Plaintiffs once again assert that Defendant is relying on a

⁷ Defendant's Fifth affirmative defense (unenforceability) and Eighth affirmative defense (inequitable conduct) allege that Plaintiffs engaged in inequitable conduct during the prosecution of the '620 patent application before the PTO. These affirmative defenses are duplicative of Defendant's counterclaim for inequitable conduct (Count III). Since the Court already determined the inequitable conduct counterclaim was insufficient as a matter of law, these affirmative defenses must be stricken. *See Fed. R. Civ. P. 12(f)*.

fraudulent exhibit to support the factual allegations relating to the prior use of Plaintiffs' trademarks. As a result, Plaintiffs seek to strike the Ninth affirmative defense on the grounds Defendant is attempting to perpetrate a fraud on this Court.

“Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions.” *Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir. 1986); *see also* Fed. R. Civ. P. 11. In fact, “[t]he court has a responsibility to prevent single litigants from unnecessarily encroaching on the judicial machinery needed by others.” *Procup*, 792 F.2d at 1074. Federal courts have used their inherent power to dismiss claims based on a party’s fabrication of evidence. *See Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (cause of action dismissed for “fraud on the court” where plaintiff attached a bogus agreement to the complaint); *see also Vargas v. Peltz*, 901 F. Supp. 1572, 1581 (S.D. Fla. 1995); *Sun World, Inc. v. Olivarrria*, 144 F.R.D. 384, 390 (E.D. Cal. 1992) (default judgment appropriate where plaintiff submitted false document and committed perjury in furtherance of fraud); *Eppes v. Snowden*, 656 F.Supp. 1267, 1279 (E.D. Ky. 1986) (defendant’s answer and counterclaim stricken where defendant committed “fraud on the court” by producing “backdated” letters).

The Court is unconvinced that the exhibits Defendant offers in support of the Ninth affirmative defense are authentic. Prior testimony by the Defendant and the Report and Recommendation issued by Judge McAliley only highlight the Court’s grave concerns over Defendant’s willingness to manufacture evidence and abuse the judicial process. Clear and convincing evidence has been presented that Defendant knowingly advanced a document of questionable authenticity and relied upon it in Defendant’s pleadings. Such repeated submissions of fraudulent documents and testimony form a sufficient basis for the Court to strike

the Ninth affirmative defense. *See Vargas*, 901 F. Supp. at 1582 (“Litigants must know that the courts are not open to persons who would seek justice by fraudulent means.”) (citation omitted).

Defendant’s Eleventh affirmative defense (unclean hands) asserts three allegations against Plaintiffs. First, that in 2006, one of Plaintiffs’ employees made fraudulent purchases with Defendant’s credit card. Second, Defendant alleges that Plaintiff Edge’s President “verbally and physically threatened” Defendant earlier in this cause of action. Lastly, Defendant alleges that Plaintiffs’ Hydrafacial device has more than 100 complaints and therefore is a danger to the public.

Plaintiffs are correct in stating that to properly assert an affirmative defense of unclean hands, “the defendant must demonstrate that the plaintiff’s wrongdoing is directly related to the claim against which it is asserted.” *Pujals ex rel. El Rey De Los Habanos, Inc. v. Garcia*, 777 F. Supp. 2d 1322, 1332 (S.D. Fla. 2011). After all, the unclean hands doctrine “closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 329–30 (1994).

Here, the alleged wrongdoing by Plaintiffs, or their employees, has no direct relation to the claims asserted by Plaintiffs in the Complaint. The Court therefore concludes that Defendant’s Eleventh affirmative defense is insufficient and should be stricken.


C. CONCLUSION

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Plaintiffs’ Motion to Dismiss and Strike Affirmative Defenses (ECF No. 134) is GRANTED as follows:

1. Defendant’s Counterclaims (Counts III through XIII) are DISMISSED WITH PREJUDICE.

2. Defendant's Fifth, Eighth, Ninth, and Eleventh Affirmative Defenses are hereby stricken.
3. Defendant has until November 6, 2015, to replead the stricken defenses.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of October, 2015.



K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

cc: All counsel of record