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10 UNITED STATES DISTRICT COURT -EASTERN DISTRICT OF CALIFORNIA

11 H & M GOPHER CONTROL, a California  
12 general partnership, ALLEN HURLBURT,  
13 an individual

14 Plaintiffs,

15 vs.

16 BENCHMARK PEST CONTROL, INC, a  
17 California corporation; ANDREW  
18 OZANICH, an individual,

19 Defendants.

Case No. 1:17-CV-01700-LJO-JLT

STIPULATED FINAL CONSENT  
JUDGMENT AND PERMANENT  
INJUNCTION

(Doc. 28)

20  
21 Plaintiffs H & M Gopher Control (“H & M Gopher”) and Allen Hurlburt (“Hurlburt”) on  
22 the one hand and defendants Benchmark Pest Control, Inc., (“Benchmark”) and Andrew  
23 Ozanich (“Ozanich”) on the other hand, having entered into a confidential settlement agreement  
24 dated March 29, 2019, (“Settlement Agreement”) having considered the facts and applicable law  
25 and having agreed to the entry of this stipulated final consent judgment and permanent  
26 injunction (“Consent Judgment”),

27 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

28 Findings of Fact

1           1.       This is an action for, inter alia, patent infringement, trademark infringement,  
2 unfair competition, and false designation of origin arising under the laws of the United States  
3 and this Court has jurisdiction over the subject matter pursuant to 28 U.S.C. §§ 1331 and  
4 1338(a)-(b) and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

5           2.       Venue lies in this district pursuant to 28 U.S.C. §§ 1391(b) and/or 1401(b) in that  
6 the Defendants reside in this district and/or a substantial part of the events at issue in this case  
7 occurred within this district.

8           3.       H & M Gopher is a California general partnership with its principal place of  
9 business in of Modoc County, California.

10          4.       Hurlburt is an individual residing in Modoc County, California and is a general  
11 partner in H&M along with his wife Virginia Massey.

12          5.       Benchmark is a corporation organized under the laws of the State of California  
13 with a principal place of business in Bakersfield, California.

14          6.       Defendant Ozanich is the sole shareholder and an officer, director and employee  
15 of Benchmark.

16          7.       On September 1, 2009, the United States Patent and Trademark Office issued  
17 United States Patent Number 7,581,349, titled “Method and Apparatus for using Pressurized  
18 Exhaust Gases to Control Rodents” (hereinafter the “‘349 Patent”).

19          8.       Hurlburt is the owner and sole inventor of the ‘349 Patent and is the president of  
20 H&M.

21          9.       The ‘349 Patent pertains to devices and methods for controlling rodents using  
22 pressurized exhaust gases from an internal combustion engine. The gasses are compressed and  
23 injected under pressure into underground burrows of rodents. The rodent tunnels fill with a very  
24 high concentration of injected exhaust gases, such as carbon monoxide, within just a few  
25 seconds, quickly overwhelming and exterminating all rodents within the rodent tunnels.

26          10.       In 2005, Hurlburt developed the tradename H & M GOPHER CONTROL and the  
27 trademark PERC. Hurlburt authorized his business H&M to act as an exclusive licensee to use  
28 the tradename H & M GOPHER CONTROL in connection with its business activities and the

1 trademark PERC in connection with the gopher control systems sold by H&M and protected by  
2 the '349 Patent.

3 11. In addition to its longstanding common law rights in the H & M GOPHER  
4 CONTROL trade name. Hurlburt owns United States trademark registration number 4097962  
5 for the trade name H & M GOPHER CONTROL and United States trademark registration  
6 number 4086472 for the trademark PERC. Both registrations have become incontestable under  
7 the provisions of 15 U.S.C. § 1065. Both trademarks are valid and subsisting and neither  
8 registration has ever been cancelled and are hereinafter collectively referred to as the  
9 “trademarks-in-suit.”

10 12. H&M is the exclusive licensee for the trademarks-in-suit and is also the exclusive  
11 licensee of the '349 Patent.

12 13. Ozanich and Benchmark have manufactured and used eight pressurized exhaust  
13 gas rodent control machines (hereinafter “Accused Products”), as depicted in Exhibit 5 to the  
14 complaint filed on December 18, 2017, and further set forth in the photographs attached as  
15 Exhibit A-1 hereto. {Attach photos BENCHMARK\_00901, 00902, 00903}

16 14. The Accused Products have were used in commerce with the PERC trademark and  
17 H & M GOPHER CONTROL tradename prominently displayed on them.

#### 18 Permanent Injunction

19 15. Benchmark and Ozanich shall disassemble the eight Accused Devices and shall  
20 deliver to H&M the eight motors, cooling coils, compressors and belt guards from the  
21 disassembled Accused Devices.

22 16. Pursuant to the Patent Act, 35 U.S.C. §283 and the Lanham Act, 15 U.S.C. § 1121  
23 and 28 U.S.C. §§ 1331 and 1338(a)and 35 U.S.C. Sec 1 et seq, Benchmark and Ozanich,  
24 together with their officers, members, directors, agents, servants, employees, and affiliates  
25 thereof, representatives and attorneys, and all persons acting or attempting to act in concert or  
26 participation with them, are permanently enjoined and restrained from making, using, offering to  
27 sell, selling, or distributing within the United States, its territories and possession, or by  
28 importing into the United States, its territories and possession, the Accused Products, or any

1 other goods that are no more than colorable variations thereof and that infringe the '349 Patent  
2 or trademarks-in-suit, during the life of the '349 Patent or trademarks-in-suit.

3 Miscellaneous Provisions

4 17. This Consent Judgment shall finally conclude and dispose of this litigation, and, as  
5 to Plaintiff and Defendants, this Consent Judgment shall be entitled to issue and claim  
6 preclusion effect in future litigation or future proceedings before the United States Patent &  
7 Trademark Office related to the Accused Products and trademarks-in-suit.

8 18. This Court retains exclusive jurisdiction of this action for the purpose of insuring  
9 compliance with this Consent Judgment.

10 19. No appeal shall be taken by any party from this Consent Judgment, the right to  
11 appeal from this Consent Judgment being expressly waived by the Parties.

12 20. Each party shall bear its own costs and attorney's fees.

13 21. Nothing herein shall be construed as a release as to any third party.

14 22. Final Judgment shall be entered hereto, forthwith, without further notice.

15 The Clerk is directed to enter this Final Consent Judgment and Permanent Injunction forthwith  
16 and to close this action.

17  
18 IT IS SO ORDERED.

19 Dated: April 8, 2019

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE