IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PHOCATOX TECHNOLOGIES, LLC, Plaintiff, v. JERRY D. WIERSIG, TODD M. HOFFMAN BIOCLEAN REMEDIATION, LLC (AL) and BIOCLEAN REMEDIATION, LLC (OK), Defendants.	)	CAUSE NO. 1:18-cv-1298

COMPLAINT AND DEMAND FOR JURY TRIAL

Comes now the Plaintiff, Phocatox Technologies, LLC ("Phocatox"), by counsel, and for their Complaint against Defendants, Jerry D. Wiersig, Todd M. Hoffman, BioClean Remediation, LLC (AL) and BioClean Remediation, LLC (OK) and Demand for Jury Trial, states as follows:

PARTIES

1. Plaintiff, Phocatox Technologies, LLC ("Phocatox"), is a corporation organized and existing under the laws of the State of Indiana, with its principal place of business at 160 West Carmel Dr., Suite 204, Carmel, IN 46032.

2. Phocatox has adopted and operates under the D/B/A of BioSweep.

3. Defendant, Jerry D. Wiersig, is an individual residing in Alabama at 12439 Capulet Court, Foley, Alabama 36535.

4. Defendant, Todd M. Hoffman, in an individual residing in Oklahoma at 15612 N.

Western, Edmond, OK 73013.

5. Defendant, BioClean Remediation, LLC ("BioClean Alabama" or "BioClean AL"), formerly known as Quality Air Protection, LLC, is a limited liability company organized and existing under the laws of the State of Alabama, with a principal place of business and registered office street address of 12439 Foley Court, Foley, Alabama 36535 and a registered office mailing address of P.O. Box 233, Magnolia Springs, Alabama 36555.

6. Defendant, BioClean Remediation, LLC ("BioClean Oklahoma" or "BioClean OK"), is a limited liability company organized and existing under the laws of the State of Oklahoma, with a principal place of business and registered office street address of 313 E. Edwards St., Suite A-8, Edmond, Oklahoma 73034.

JURISDICTION AND VENUE

7. Jurisdiction and venue are by agreement, consistent with the Franchise Agreement applicable in this matter (a true and accurate copy is attached hereto as Exhibit "A") which states "this Agreement shall be deemed to have been made and entered into in the State of Indiana, and all rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Indiana . . . Phocatox and the Franchise Owner agree that any litigation or other legal action to enforce or otherwise relating to this Agreement and the relationship of the parties hereunder shall be filed in the federal district court for the Southern District of Indiana in Indianapolis, Indiana. . . . and the Franchise Owner hereby consent to the jurisdiction of such courts. Exh. "A", pg. 72, Sections C & D.

8. Further, this is an action for trademark infringement and unfair competition

arising under sections 32(1) and 43(a) of the Lanham (Trademark) Act, 15 U.S.C. §§ 1114(a), 1125(a). This Court has subject matter jurisdiction over the federal trademark infringement and unfair competition claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

9. This Court has supplemental jurisdiction over the subject matter of Plaintiff's state law claims under 28 U.S.C. § 1367(a), in that those claims are so related to the Plaintiff's federal claims that they form part of the same case or controversy.

10. This Court has personal jurisdiction over Defendants by agreement; also, Defendants have also caused infringing services to be advertised in this judicial district; further, the causes of action asserted in this Complaint arise out of Defendants' contacts with this judicial district; and Defendants have caused tortious injury to Plaintiff in this judicial district.

11. Venue is proper in this Court pursuant to agreement; also, Defendants have caused infringing services to be advertised in this judicial district; further, the causes of action asserted in this Complaint arise out of Defendants' contacts with this judicial district; and Defendants have caused tortious injury to Plaintiff in this judicial district.

FACTUAL ALLEGATIONS

12. Plaintiff, Phocatox, is the manufacturer, licensor, and franchisor of odor removal and decontamination equipment and further provides odor removal services.

13. Phocatox's equipment and services are marketed and used under the U.S. federally registered trademark "BioSweep," with registration number 3,351,509 (granted December 11, 2007).

14. Phocatox has been in business since 2007 and has customers, as well as licensees and/or franchisees using its equipment and services inside and outside of the United States.

15. On May 23, 2013, Defendant, Bioclean AL, under its former name of Quality Air Protection, LLC, entered into a Franchise Agreement ("Agreement") with Plaintiff.

16. Quality Air Protection, LLC operated under the name BioSweep of the Gulf Coast.

17. The Agreement was signed on behalf of Bioclean AL by Defendant, Jerry Wiersig, who is the Managing Member and an owner of Bioclean AL.

18. Pursuant to the Agreement, the Franchisee had the right to use the BioSweep Trademark, together with all of the associated goodwill (BioSweep Trademark), as well as the machines manufactured by Plaintiff and the unique and proprietary procedures and means of operation, all as developed by Plaintiff, (BioSweep System) during the time of the Agreement. Exh "A", pg. 48.

19. The Agreement also noted "[t]he Franchise Owner acknowledges that the use of the BIOSWEEP System or the BIOSWEEP Trademark outside the scope of this Agreement without Phocatox's prior written consent is an infringement of Phocatox's exclusive right to use the BIOSWEEP System and the BIOSWEEP Trademark. The Franchise Owner expressly promises and agrees that, during the term of this Agreement and after its expiration or termination, the Franchise Owner shall not, directly or indirectly, commit an act of infringement or contest or aid in contesting the validity or ownership of the BIOSWEEP System or BIOSWEEP Trademark, or take any other action in derogation thereof." Exh "A", pg 58, Section C.

20. The Agreement also contained other restrictions and acknowledgements regarding the BioSweep System and Trademark. Exh "A", pg. 59, Section F and G; pg. 60, Section I.

21. Upon termination of the Agreement, "[t]he Franchise Owner shall cease using the BIOSWEEP Trademark, or any variation thereof, and shall not thereafter, directly or indirectly, represent to the public that the business is a BIOSWEEP Business or hold himself or herself out as a present or former franchise owner of Phocatox. . . The Franchise Owner shall immediately cease using, by advertising or in any other manner, any methods, procedures and techniques associated with the BIOSWEEP System in which Phocatox has a proprietary right, title or interest, and, in particular, the Franchise Owner shall cease using, without limitation, all signs, machines, vehicles, equipment, advertising materials, stationery, forms, and any other articles which display in any form the BIOSWEEP Trademark or other indicia associated with the BIOSWEEP System." Exh. A, pg. 69, Sections 1 & 2.

22. Additionally, after termination, "[t]he Franchise Owner agrees, in the event he or she operates any business, not to use any reproduction, copy or colorable imitation of the BIOSWEEP Trademark or the BIOSWEEP System in conjunction with such other business which is likely to cause confusion or mistake or to deceive, and further agrees not to utilize any trade dress or designation of origin or description or representation which falsely suggests or represents an association or connection with Phocatox. Further, the Franchise Owner shall make such modifications or alterations to the business premises, vehicles and machines immediately upon termination as may be necessary to prevent the operation of any business by himself or herself or others in derogation of this Part A.10 of this Section 12, and shall make such specific additional changes thereto as Phocatox may reasonably request for that purpose, including but

not limited to, removing or painting over any and all names, marks and insignia identifying Phocatox in any way so that the same are in no way visible." Exh."A", pg. 70, Section 8.

23. Furthermore, for two (2) years after termination the Franchisee will not "engage in activities, work or duties relative to, or otherwise support, the creation or operation of a business that is similar and competitive with the Franchise Owner's BIOSWEEP Business (as such was conducted prior to the expiration or termination of this Agreement), including any business that offers odor removal and / or indoor air and surface decontamination services" for the Franchise Owner's own account or in a relationship with any person or organization either in the Franchise Territory or any area that Phocatox has granted a license1 to any person or organization to operate a BioSweep business. Exh "A", pg. 70, Section B.

24. At the time of termination of the Agreement, see below, Plaintiff's business included odor eradication for mold odor, mold spores, as well as other odors, plus odor related to fire restoration and water damage, as well as surface decontamination and antimicrobial solutions.

25. The Agreement also provides that the "[t]he Franchise Owner shall pay Phocatox all damages, costs and expenses, including reasonable attorney's fees, incurred by Phocatox subsequent to the termination or expiration of this Agreement in obtaining damages, or injunctive or any other relief for the enforcement of any portion of this Section 12." Exh. "A", pg. 70, Section 9.

1 On January 23, 2008, Plaintiff had granted a license to Defendant, Todd Hoffman, via his former company M.E.S. Brokers, LLC, for the area of Central Oklahoma. A true and accurate copy is attached hereto as Exhibit "B". The license granted to Hoffman was terminated in March 2016 due to non-payment of fees.

26. On, or about, November 13, 2017, the Agreement with Quality Air Protection, LLC and Defendant Wiersig was terminated.

27. Consistent with the post-termination aspects of the Agreement, the Defendants were restricted from competing with Plaintiff until November 2019.

28. It has recently been discovered that Defendant Wiersig and BioClean of Al are marketing and selling services which are competitive to Plaintiff, under the name BioClean Remediation.

29. Defendant Wiersig and BioClean of AL are advertising under the web domain www.biocleanremediationllc.com ("Site 1").

30. On this Site 1, Wiersig and BioClean of AL assert that they use "the best in class equipment, such as the BioSweep 900 . . . [t]he BioSweep 900 is a high performance air and surface decontamination system designed to safely eradicate biological contaminants, VOC's and off-gassing odors within any unoccupied zone or building." A true and accurate copy of this portion of Site 1 is attached hereto as Exhibit "C".

31. Additionally, on this Site 1, Wiersig and BioClean of AL assert that they are "the only providers of this BioSweep Service, so you can count on us to help you take back your home!" A true and accurate copy of this portion of Site 1 is attached hereto as Exhibit "D".

32. Further, on this Site 1, Wiersig and BioClean of AL include a link to a Yelp site. A true and accurate copy of this portion of Site 1 is attached hereto as Exhibit "E".

33. In clicking on the link, it takes the user to a Yelp site, which has been claimed, which means the owner acknowledges that they own it, for BioSweep of the Gulf Coast. A true and accurate copy of this portion of this Yelp Site is attached hereto as Exhibit "F".

34. BioSweep of the Gulf Coast is the former doing-business-as for Quality Air Protection, LLC; which is now BioClean of AL.

35. The website listed on this Yelp Account however, is not a BioSweep website, rather it is biocleanremediationllc.com. See Exhibit "F."

36. Also included on this site, which has been claimed by Defendant Wiersig and BioClean of AL, are no less than ten (10) uses of the BioSweep Trademark with the lead photo being one that prominently uses the BioSweep Trademark. A true and accurate copy of this portion of this Yelp Site is attached hereto as Exhibit "G".

37. Further, on this Site 1, Wiersig and BioClean of AL include a link to a Google+ site. See Exhibit "E".

38. In clicking on the link, it takes the user to a Google+ site, which is titled "BioClean Remediation, LLC" but uses and includes a reference to BioSweep trademark. A true and accurate copy of this portion of this Google+ Site is attached hereto as Exhibit "H".

39. Likewise, this Google+ site includes photos, all of which are shared publicly, of at least seven (7) instances of BioSweep equipment or trademarks. A true and accurate copy of this portion of this Google+ Site is attached hereto as Exhibit "I".

40. The use of the BioSweep trademarks and BioSweep System in this way by Defendant Wiersig and BioClean of AL, create the false impression that there is some relationship between BioClean of AL and Plaintiff.

41. The use of the BioSweep trademarks and BioSweep System in this way by Defendant Wiersig and BioClean of AL, create the false impression that this use is somehow authorized by Plaintiff, when no such authorization has been given.

42. It has also recently been discovered that that Defendant Wiersig and BioClean of Al are marketing and selling "franchises" of BioClean, for the purposes of competing with Plaintiff, which included holding a sales meeting and training in Florida.

43. Defendant, Todd Hoffman, is a former licensee of Plaintiff in Oklahoma (see Exhibit "B") and recently opened a BioClean franchise and is competing with Plaintiff under the authority or on behalf of Defendant Wiersig.

44. Upon information and belief, Defendant BioClean of OK is either owned or controlled by Defendant, Todd Hoffman.

45. Defendant Hoffman and BioClean of OK are advertising under the web domain www.biocleanremediation.com ("Site 2").

46. On this Site 2, Hoffman and BioClean of OK assert that they do "Permanent eradication of indoor odor within all environments, eradication of pathogens including MRSA, c.diff, fungi, fine particulate matter such as aerosols, smoke, fumes, dust, ash, pollen and volatile organic compounds. . . . " yet it is not mentioned anywhere on the site how this is done. A true and accurate copy of this portion of Site 2 is attached hereto as Exhibit "J".

46. However, Defendant Hoffman maintains a profile on LinkedIN, which is a widely used websites for commercial information about individuals and businesses, as well as networking.

47. In Hoffman's LinkedIN profile it answers the question as to how BioClean supposedly does its service when it asserts that Hoffman is a "Air and Surface Decontamination Specialist" at **BioSweep** of Oklahoma, from 2006 until the **present**. A true and accurate copy of this profile is attached hereto as Exhibit "K" (emphasis added).

48. BioSweep of Oklahoma was the trade-name Defendant Hoffman used when he was an authorized licensee of Plaintiff.

49. The use of the BioSweep trademark and implied connection to the BioSweep System in this way by Defendant Hoffman and BioClean of OK, create the false impression that there is some relationship between BioClean of OK and Plaintiff.

50. The use of the BioSweep trademark and implied connection to the BioSweep System in this way by Defendant Hoffman and BioClean of OK, create the false impression that this use is somehow authorized by Plaintiff, when no such authorization has been given.

51. Upon information and belief, Defendant Wiersig and BioClean of AL have conducted their advertising on Site 1 continuously since the Agreement was terminated.

52. Upon information and belief, Defendant Hoffman and BioClean of OK have conducted their advertising on Site 2 continuously since at, or near, the time the Agreement was terminated.

53. Plaintiff has invested substantial time, effort, and financial resources to develop, promote, and market its BioSweep Trademark and BioSweep System.

54. As a result of Plaintiff's efforts, the BioSweep Trademark and BioSweep System have become assets of substantial value as a symbol of Plaintiff, its quality products, and its goodwill.

55. Currently, Plaintiff has at least twenty-six (26) franchisees in the United States and a total of forty-one (41) franchisees/licensees worldwide, enjoying the benefits of Plaintiff's efforts noted above.

56. As a result of Defendants actions, Plaintiff has already experienced one instance of confusion in the marketplace and expect more.

57. Defendants are providing confusing advertising on Site 1 and Site 2, within this judicial district, particularly raising the question whether their activities are sanctioned or condoned by Plaintiff.

58. Defendants' activities have continued for months and there is no reason to believe that this infringing activity will stop without court intervention.

59. Defendants' use of Plaintiff's BioSweep trademarks and the BioSweep System, despite their knowledge of the marks and system via the Agreement (Exhibit "A") and license (Exhibit "B"), demonstrate a deliberate intent to willfully infringe Plaintiff's rights and a deliberate intent to willfully contribute to the infringement by others of Plaintiff's trademark rights and to the BioSweep System and to continue wrongfully competing with Plaintiff.

COUNT I

Federal Trademark Infringement – Principal Register
Defendants Wiersig and BioClean of AL

60. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

61. Plaintiff registered the name BioSweep on the Principal Register, Registration No. 3,351,509.

62. Plaintiff's use of the BioSweep Trademark and the related BioSweep System distinguishes Plaintiff's services and equipment from its competitors and identifies Plaintiff as

the source of these services and goods.

63. Plaintiff has maintained continuous and exclusive use of the BioSweep Trademark and the related BioSweep System, and as a result, the trademark and system has been accepted and is recognized as symbolizing Plaintiff's services and equipment.

64. The use by Defendant Wiersig and BioClean of AL of the BioSweep Trademark and System in commerce to advertise, promote, market and sell its services and franchises throughout the United States, including in Alabama and Indiana, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and these Defendants.

65. These Defendant are intentionally and willfully using Plaintiff's marks and system in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

66. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with lost franchisees or other sales.

67. The actions of these Defendants, if not enjoined, will continue.

COUNT II

Federal Trademark Infringement – Principal Register
Defendants Hoffman and BioClean of OK

68. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

69. Plaintiff registered the name BioSweep on the Principal Register, Registration No. 3,351,509.

70. Plaintiff's use of the BioSweep Trademark and the related BioSweep System distinguishes Plaintiff's services and equipment from its competitors and identifies Plaintiff as the source of these services and goods.

71. Plaintiff has maintained continuous and exclusive use of the BioSweep Trademark and the related BioSweep System, and as a result, the trademark and system has been accepted and is recognized as symbolizing Plaintiff's services and equipment.

72. The use by Defendant Hofmann and BioClean of OK of the BioSweep Trademark and System in commerce to advertise, promote, market and sell its services and franchises throughout the United States, including in Oklahoma and Indiana, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and these Defendants.

73. These Defendant are intentionally and willfully using Plaintiff's marks and system in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

74. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with lost franchisees or other sales.

75. The actions of these Defendants, if not enjoined, will continue.

COUNT III

Trademark Infringement – Common Law
Defendants Wiersig and BioClean of AL

76. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

77. The BioSweep System is a distinctive common law mark that distinguishes Plaintiff's goods and services from its competitors and identifies Plaintiff as the source of these proprietary machines and procedures.

78. Plaintiff has maintained continuous and substantially exclusive use of the BioSweep System since 2007, and as a result, this system has been accepted and is recognized as symbolizing Plaintiff's goods and services.

79. The use by Defendants Wiersig and BioClean of AL implying that that they use or have access to the BioSweep System in commerce to advertise, promote, market and sell its services throughout the United States, including in Alabama and Indiana, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and these Defendants.

80. These Defendants are intentionally and willfully using Plaintiff's common law marks in an attempt to capitalize on the quality of Plaintiff's goods and services and Plaintiff's goodwill.

81. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with franchise sales or other sales of its goods and services.

82. The actions of these Defendants, if not enjoined, will continue.

COUNT IV

Trademark Infringement – Common Law
Defendants Hoffman and BioClean of OK

83. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

84. The BioSweep System is a distinctive common law mark that distinguishes Plaintiff's goods and services from its competitors and identifies Plaintiff as the source of these proprietary machines and procedures.

85. Plaintiff has maintained continuous and substantially exclusive use of the BioSweep System since 2007, and as a result, this system has been accepted and is recognized as symbolizing Plaintiff's goods and services.

86. The use by Defendants Hoffman and BioClean of OK implying that that they use or have access to the BioSweep System in commerce to advertise, promote, market and sell its services throughout the United States, including in Oklahoma and Indiana, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and these Defendants.

87. These Defendants are intentionally and willfully using Plaintiff's common law marks in an attempt to capitalize on the quality of Plaintiff's goods and services and Plaintiff's goodwill.

88. Plaintiff has suffered and continues to suffer damages in an amount to be proven

at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with franchise sales or other sales of its goods and services.

89. The actions of these Defendants, if not enjoined, will continue.

COUNT V

Contributory Trademark Infringement – All Defendants

90. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

91. Plaintiff registered the BioSweep name in 2007 on the Principal Register of the United States Patent and Trademark Office, Registration No. 3,351,509.

92 This name and the related BioSweep System are distinctive marks that distinguishes Plaintiff's goods and services from its competitors and identifies Plaintiff as the source of such good and services.

93. Plaintiff has maintained continuous and substantially exclusive use of the BioSweep name and System, and as a result, these marks has been accepted and recognized as symbolizing Plaintiff's goods and services.

94. Defendants' business of seeking and marketing BioClean franchises to potential franchisees throughout the United States, including Indiana, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff, Defendants and potential franchisees.

95. Defendants are intentionally and willfully causing potential BioClean franchisees,

if they advertise as the current BioClean Defendants have done, to infringe Plaintiff's marks in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

96. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with lost franchises and other sales of its goods and services.

97. The actions of Defendants, if not enjoined, will continue.

COUNT VI

Breach of Franchise Agreement – All Defendants

98. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

99. Plaintiff had a valid, binding Franchise Agreement ("Agreement") which includes certain post-termination restrictions as well as prohibitions as to the use of the BioSweep Trademark and BioSweep System. A true and accurate copy is attached hereto as Exhibit "A".

100. Pursuant to the Agreement, the Franchisee had the right to use the BioSweep Trademark, together with all of the associated goodwill (BioSweep Trademark), as well as the machines manufactured by Plaintiff and the unique and proprietary procedures and means of operation, all as developed by Plaintiff, (BioSweep System) during the time of the Agreement. Exh "A", pg. 48.

101. The Agreement also noted "[t]he Franchise Owner acknowledges that the use of the BIOSWEEP System or the BIOSWEEP Trademark outside the scope of this Agreement

without Phocatox's prior written consent is an infringement of Phocatox's exclusive right to use the BIOSWEEP System and the BIOSWEEP Trademark. The Franchise Owner expressly promises and agrees that, during the term of this Agreement and after its expiration or termination, the Franchise Owner shall not, directly or indirectly, commit an act of infringement or contest or aid in contesting the validity or ownership of the BIOSWEEP System or BIOSWEEP Trademark, or take any other action in derogation thereof." Exh "A", pg 58, Section C.

102. The Agreement also contained other restrictions and acknowledgements regarding the BioSweep System and Trademark. Exh "A", pg. 59, Section F and G; pg. 60, Section I.

103. Upon termination of the Agreement, "[t]he Franchise Owner shall cease using the BIOSWEEP Trademark, or any variation thereof, and shall not thereafter, directly or indirectly, represent to the public that the business is a BIOSWEEP Business or hold himself or herself out as a present or former franchise owner of Phocatox. . . The Franchise Owner shall immediately cease using, by advertising or in any other manner, any methods, procedures and techniques associated with the BIOSWEEP System in which Phocatox has a proprietary right, title or interest, and, in particular, the Franchise Owner shall cease using, without limitation, all signs, machines, vehicles, equipment, advertising materials, stationery, forms, and any other articles which display in any form the BIOSWEEP Trademark or other indicia associated with the BIOSWEEP System." Exh. A, pg. 69, Sections 1 & 2.

104. Additionally, after termination, "[t]he Franchise Owner agrees, in the event he or she operates any business, not to use any reproduction, copy or colorable imitation of the BIOSWEEP Trademark or the BIOSWEEP System in conjunction with such other business

which is likely to cause confusion or mistake or to deceive, and further agrees not to utilize any trade dress or designation of origin or description or representation which falsely suggests or represents an association or connection with Phocatox. Further, the Franchise Owner shall make such modifications or alterations to the business premises, vehicles and machines immediately upon termination as may be necessary to prevent the operation of any business by himself or herself or others in derogation of this Part A.10 of this Section 12, and shall make such specific additional changes thereto as Phocatox may reasonably request for that purpose, including but not limited to, removing or painting over any and all names, marks and insignia identifying Phocatox in any way so that the same are in no way visible." Exh."A", pg. 70, Section 8.

105. Furthermore, for two (2) years after termination the Franchisee will not "engage in activities, work or duties relative to, or otherwise support, the creation or operation of a business that is similar and competitive with the Franchise Owner's BIOSWEEP Business (as such was conducted prior to the expiration or termination of this Agreement), including any business that offers odor removal and / or indoor air and surface decontamination services" for the Franchise Owner's own account or in a relationship with any person or organization either in the Franchise Territory or any area that Phocatox has granted a license2 to any person or organization to operate a BioSweep business. Exh "A", pg. 70, Section B.

106. At the time of termination of the Agreement, see below, Plaintiff's business included odor eradication for mold odor, mold spores, as well as other odors, plus odor related to

2 On January 23, 2008, Plaintiff had granted a license to Defendant, Todd Hoffman, via his former company M.E.S. Brokers, LLC, for the area of Central Oklahoma. A true and accurate copy is attached hereto as Exhibit "B". The license granted to Hoffman was terminated in March 2016 due to non-payment of fees.

fire restoration and water damage, as well as surface decontamination and antimicrobial solutions.

107. The Agreement also provides that the "[t]he Franchise Owner shall pay Phocatox all damages, costs and expenses, including reasonable attorney's fees, incurred by Phocatox subsequent to the termination or expiration of this Agreement in obtaining damages, or injunctive or any other relief for the enforcement of any portion of this Section 12." Exh. "A", pg. 70, Section 9.

108. On, or about, November 13, 2017, the Agreement with Quality Air Protection, LLC and Defendant Wiersig was terminated.

109. Defendants have breached the Agreement by using the BioSweep Trademark and referencing the BioSweep System without authorization or approval.

110. Defendants have also breached the Agreement by improperly competing against Plaintiff during a period in which such competition was forbidden.

111. Defendants have further breached the Agreement by using the name "BioClean" which is confusingly similar to BioSweep.

112. Plaintiff has been damaged by Defendants' intentional and improper breach of the Agreement.

113. The actions of the Defendants are willful and wanton and in reckless disregard of the rights of Plaintiff, entitling Plaintiff to punitive damages.

COUNT VII

Conspiracy
Defendants Wiersig and Defendant Hoffman

114. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

115. Defendants Wiersig and Hoffman agreed in concert for the purpose of willfully and maliciously injuring Plaintiff in its reputation, trade and business.

116. Defendants Wiersig and Hoffman acted intentionally, purposely and without lawful justification.

117. Defendants Wiersig and Hoffman did this by, among other things, improperly misappropriating and infringing the BioSweep Trademark and BioSweep System and unfairly competing with Plaintiff.

118. Plaintiff has been damaged as a result of these actions and should be compensated.

COUNT VII

Federal Unfair Competition

119. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

120. Defendants' improper use of the BioSweep Trademark and implying they have the BioSweep System, in commerce to advertise, promote, market, supply and sell its goods and services throughout the United States including Indiana, creates a likelihood of confusion,

deception, or mistake among consumers as to the source and association between Plaintiff and Defendants.

121. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademark, and injury to Plaintiff's business in lost revenue associated with franchise sales or other sales of its good and services.

122. By improperly using the BioSweep Trademark and BioSweep System, Defendants are intentionally and willfully using Plaintiff's marks in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

COUNT VIII

Indiana Unfair Competition

123. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

124. Plaintiff has a right, by fair and honest business methods, to compete with Defendants.

125. Defendants have engaged in acts of infringement and misappropriation of Plaintiff's BioSweep Trademark and BioSweep System, in derogation of Plaintiff's common law and statutory rights.

126. Defendants' acts of infringement occurred during the conduct of trade or commerce.

127. Defendants' acts of misappropriation and infringement constitutes unfair

competition.

128. As a direct and proximate result of Defendants' acts of misappropriation and infringement, Plaintiff has been damaged and is likely to be further damaged, specifically through the loss of its competitive advantage in the market and revenue associated with sales of franchises or sales of its goods and services.

129. The actions of Defendants are willful and wanton and in reckless disregard of the rights of Plaintiff entitling Plaintiff to punitive damages.

PRAYER FOR RELIEF

WHEREFORE, in consideration of the foregoing, Plaintiff respectfully requests that this Court enter an Order granting it the following relief:

a) Enter a judgment that Plaintiff's BioSweep Trademark has been and continues to be infringed by Defendants in violation of 15 U.S.C. § 1125(a);

b) Enter a judgment that Defendants' infringements constitute federal unfair competition in violation of 15 U.S.C. § 1125(a);

c) Enter a judgment in excess of $100,000.00 that Defendants' infringements violate Plaintiff's Principal Register, Registration No. 3,351,509;

d) Enter a judgment that Defendants' infringements constitute unfair competition in violation of Indiana law;

e) Temporarily and permanently enjoin and restrain Defendants and each of its agents, employees, officers, attorneys, successors, assigns, affiliates, and any persons in privity or acting in concert or participation with any of them from using the BioSweep Trademark or implying they use the BioSweep System to market, advertise, distribute or identify Defendants' goods and services where that designation would create a likelihood of confusion, mistake or deception with Plaintiff's marks;

f) Pursuant to 15 U.S.C. § 1116(a), direct Defendants to file with the Court and serve on Plaintiff within thirty (30) days after issuance of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendants have complied with the injunction;

g) Pursuant to 15 U.S.C. § 1118, require Defendants and all others acting under Defendants' authority, at its cost, be required to deliver up and destroy all products, devices, literature, advertising, labels and other materials in its possession bearing the infringing BioSweep Trademark or implying they use the BioSweep System;

h) Award Plaintiff all damages it sustained as a result of Defendants' acts of infringement and unfair competition, in excess of $2,000,000.00, said amount to be trebled, together with prejudgment interest, pursuant to 15 U.S.C. § 1117;

i) Award Plaintiff all profits received by Defendants from sales and revenues of any kind made as a result of its infringing actions, said amount to be trebled, after an accounting pursuant to 15 U.S.C. § 1117;

j) Award treble actual damages and profits pursuant to 15 U.S.C. § 1117(b) because Defendants' conduct was willful within the meaning of the Lanham Act;

k) Award Plaintiff its attorney fees and costs pursuant to 15 U.S.C. § 1117, because of the exceptional nature of this case resulting from Defendants' deliberate infringing actions;

l) Enter Judgment that Defendants breached the Agreement; enter judgment in Plaintiff's favor and award damages in an amount authorized by law, including exemplary damages; award Plaintiff reasonable attorney fees and costs against Defendants; and grant Plaintiff all other legal and equitable relief for which Plaintiff is entitled;

m) Enter Judgment that Defendants Wiersig and Hoffman improperly conspired to damage Plaintiff and award damages in an amount authorized by law, including exemplary damages; award Plaintiff reasonable attorney fees and costs against Defendants; and grant Plaintiff all other legal and equitable relief for which Plaintiff is entitled;

n) Grant Plaintiff such other and further relief as the Court may deem just and necessary under the circumstances.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands trial by jury on all issues so triable.

REDDING LAW, LLC

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Electronically filed.

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