

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CMSI, INC.,

Plaintiff,

v.

PACIFIC CYCLE, INC.,

Defendant.

CASE NO.: CV-06-00488 JLR

AMENDED COMPLAINT FOR:

1. FALSE DESIGNATION OF ORIGIN– 15 U.S.C. § 1125(a);
2. VIOLATION OF WASHINGTON’S CONSUMER PROTECTION ACT;
3. COMMON LAW UNFAIR COMPETITION;
4. INTENTIONAL INTERFERENCE WITH CONTRACT;
5. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS.

Plaintiff CMSI, Inc., by and through its counsel of record, Preston Gates & Ellis LLP, hereby alleges and avers as follows:

I. Jurisdiction and Venue

1. This is an action for false designation of origin and unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), violation of Washington’s Consumer Protection Act, R.C.W. § 19.86 *et seq.*, common law unfair competition, intentional interference with

AMENDED COMPLAINT - 1

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1 contract, and intentional interference with prospective economic relations.

2 2. This Court has original jurisdiction over the false designation of origin and
3 unfair competition claims pursuant to the Lanham Act under 28 U.S.C. §§ 1331 and 1338.
4 This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) for causes of action
5 arising under the law of the state of Washington, which are derived from a common nucleus
6 of operative facts and form part of the same case or controversy.

7 3. This Court also has diversity jurisdiction under 28 U.S.C.A. § 1332. Plaintiff
8 CMSI, Inc. (“CMSI”) is a corporation organized and existing under the laws of the state of
9 Washington, having its corporate headquarters in Preston, Washington. On information and
10 belief, Defendant Pacific Cycle, Inc. (“Pacific Cycle”) is a corporation organized under the
11 laws of the state of Delaware, having its principal place of business in Madison, Wisconsin.
12 The amount in controversy exceeds \$75,000.

13 4. Venue is proper under 28 U.S.C. § 1391, as Defendant Pacific Cycle does
14 business in, and is thus subject to personal jurisdiction in, the Western District of Washington.

15 **II. Statement of Facts**

16 5. CMSI is a manufacturer and wholesale distributor of motorized scooters sold
17 under the trade name “Twist N’ Go” (or TN’G) and various trademarks representing branded
18 model names. Two of its most popular models are the “Italian styled” Venice LX and Milano
19 models (collectively, the “TN’G Scooters”), as depicted in Exhibits A & B attached hereto.

20 6. CMSI entered into an exclusive contractual agreement with a Chinese
21 company, the Benzhou Group (“BZ”), to supply CMSI with the TN’G Scooters pursuant to
22 CMSI’s specifications for sale in the United States. CMSI assembled and road-tested the
23 TN’G Scooters in Washington and distributed them to customers through its dealership
24 network in the United States. A true and correct copy of CMSI’s agreement with BZ (the
25 “BZ Agreement”) is attached as Exhibit C. Pursuant to the BZ Agreement, CMSI oversaw
26

1 manufacturing of the TN’G Scooters by BZ and supplied BZ with designs and specifications
2 for, and even commissioned special tooling for certain parts to be incorporated into, the
3 Venice LX and Milano models so that they could be sold in the United States market. BZ and
4 CMSI entered into another agreement under which BZ would supply the Milano headlight
5 only to CMSI. A true and correct copy of this agreement is attached as Exhibit D. This
6 agreement and the BZ Agreement shall be referred to collectively as the “BZ Agreements”

7 7. The TN’G Scooters comply with the regulations of the United States
8 Environmental Protection Agency (“EPA”) and the United States Department of
9 Transportation (“DOT”). CMSI has expended substantial resources to comply with all
10 applicable regulations, including working extensively with BZ to make sure that the TN’G
11 Scooters were DOT and EPA compliant.

12 8. In or around January, 2004, CMSI was approached by Pacific Cycle, which
13 manufactured and sold bicycles under the Schwinn brand name, but not motorized scooters.
14 Pacific Cycle proposed to enter into a business relationship with CMSI in which scooters
15 produced by CMSI would be distributed under Pacific Cycle’s Schwinn brand name.

16 9. At Pacific Cycle’s request, CMSI’s top executives met with Pacific Cycle’s top
17 executives in February 2004 at a dealer trade show in Indianapolis. At the meeting, CMSI
18 described to Pacific Cycle its existing business model and a proposed business plan for the
19 Pacific Cycle-CMSI relationship. At this meeting, among other matters, CMSI disclosed that
20 it had an exclusive China source for its existing and proposed motor scooters and described its
21 experience homologating motor scooters to comply with EPA and DOT requirements.

22 10. After the meeting, Pacific Cycle continued to express interest in entering into a
23 business relationship with CMSI and expressed a desire to meet with CMSI at its principal
24 place of business in Washington.

25 11. After further discussions regarding a meeting in Washington, Pacific Cycle
26

1 abruptly notified CMSI that it had decided to go in a “different direction.”

2 12. CMSI later learned that Pacific Cycle’s “different direction” was to interfere
3 with CMSI’s contractual relationship with BZ, steal CMSI’s TN’G Scooters, and sell them
4 under the Schwinn brand name.

5 13. After elbowing CMSI out of its exclusive relationship with BZ, Pacific Cycle
6 began sourcing from BZ and marketing and distributing the Venice LX and Milano scooters
7 under the Schwinn brand name. The corresponding Schwinn models are the Collegiate and
8 Graduate respectively, as depicted in Exhibits E & F attached hereto (hereinafter, the
9 “Schwinn Scooters”). Aside from changing the nameplates, the Schwinn Scooters are
10 identical or nearly identical to their TN’G counterparts in all material respects. Indeed, some
11 of the very parts used to construct the Schwinn Scooters contain embossed “CMSI” initials
12 (the CMSI initials appear prominently on the headlight used on CMSI’s Milano model and
13 Pacific Cycle’s Graduate model).

14 14. The identity or near-identity between the TN’G Scooters and the Schwinn
15 Scooters has already caused actual confusion in the marketplace concerning the origin of the
16 Schwinn Scooters and the affiliation, connection or association of Pacific Cycles with CMSI.

17 15. Pacific Cycle obtained the Schwinn Scooters by interfering with CMSI’s
18 exclusive contractual relationships with BZ and convincing BZ to stop selling the TN’G
19 Scooters to CMSI and to sell them to Pacific Cycle instead.

20 16. In addition to interfering with CMSI’s contractual relations with BZ, Pacific
21 Cycle has recruited both existing CMSI dealers and dealers CMSI has targeted to sell TN’G
22 Scooters to sell the Schwinn Scooters.

23 17. CMSI has suffered significantly lower sales due to Pacific Cycle’s improper
24 conduct. CMSI has also incurred significant costs in obtaining products and components
25 from other alternate suppliers. And, Pacific Cycle has succeeded in diverting CMSI’s
26

1 resources away from selling and expanding sales of its popular scooter models. Instead,
2 CMSI has had to invest heavily in damage-control, suffering substantial lost profits and other
3 damages as a result.

4 **COUNT ONE**

5 **(FALSE DESIGNATION OF ORIGIN UNDER 15 U.S.C. § 1125(a))**

6 18. CMSI realleges paragraphs 1 through 17 of this Complaint as if fully set forth
7 herein.

8 19. By obtaining the TN’G Scooters from BZ and marking and promoting them
9 under the Schwinn name and brands, Pacific Cycle is engaging in reverse passing off which
10 constitutes a false designation of origin under Section 43(a) of the Lanham Act, 15 U.S.C. §
11 1125(a). That is, Pacific Cycle’s use of its Schwinn name and brands on the TN’G Scooters
12 in commerce is likely to cause confusion, or to cause mistake, or to deceive as to the
13 affiliation, connection, or association of Pacific Cycle with CMSI, or as to the origin,
14 sponsorship, or approval of Pacific Cycle’s goods, services, or commercial activities by
15 CMSI. Further, such confusion, mistake and/or deception have already occurred.

16 20. Pacific Cycle is wrongfully misappropriating and profiting from CMSI’s TN’G
17 Scooters and is further wrongfully depriving CMSI of not only sales, but also the value of the
18 TN’G name and brands and the goodwill that otherwise would stem from public knowledge
19 of the true source of the Schwinn Scooters.

20 21. Pacific Cycle’s actions have been knowing, willful and without CMSI’s prior
21 knowledge or consent and are therefore a willful violation of CMSI’s rights under Section
22 43(a) of the Lanham Act.

23 22. Pacific Cycle’s actions have damaged and will continue to damage CMSI’s
24 market, reputation and goodwill, in a manner and amount that cannot be fully measured or
25 compensated in economic terms. Such irreparable harm will continue unless Pacific Cycle’s
26

1 acts are restrained during the pendency of this action and thereafter.

2 **COUNT TWO**

3 **(VIOLATION OF WASHINGTON’S CONSUMER PROTECTION ACT)**

4 23. CMSI realleges paragraphs 1 through 22 of this Complaint as if fully set forth
5 herein.

6 24. Pacific Cycle’s actions constitute unfair methods of competition and/or unfair
7 or deceptive acts or practices in the conduct of trade or commerce, which are and continue to
8 be injurious to the public interest and which have caused damages and injury to CMSI in
9 violation of Washington’s Consumer Protection Act, R.C.W. 19.86.010 *et seq.*

10 25. Pacific Cycle’s actions have been knowing, willful, and without CMSI’s prior
11 knowledge or consent. Pacific Cycle’s actions have damaged and will continue to damage
12 CMSI’s market, reputation and goodwill, in a manner and amount that cannot be fully
13 measured or compensated in economic terms. Such irreparable harm will continue unless
14 Pacific Cycle’s acts are restrained during the pendency of this action and thereafter.

15 **COUNT THREE**

16 **(COMMON LAW UNFAIR COMPETITION)**

17 26. CMSI realleges paragraphs 1 through 25 of this Complaint as if fully set forth
18 herein.

19 27. Pacific Cycle has been “passing off” the TN’G Scooters as Schwinn Scooters.
20 By doing so, Pacific Cycle is wrongfully misappropriating and profiting from the talents and
21 workmanship of CMSI and is further wrongfully depriving CMSI of the advertising value of
22 the TN’G name and brands and the goodwill that otherwise would stem from public
23 knowledge of the true source of the Schwinn Scooters.

24 28. Pacific Cycle’s actions have damaged and will continue to damage CMSI’s
25 market, reputation and goodwill, in a manner and amount that cannot be fully measured or
26

1 compensated in economic terms. Such irreparable harm will continue unless Pacific Cycle's
2 acts are restrained during the pendency of this action and thereafter.

3 **COUNT FOUR**

4 **(INTENTIONAL INTERFERENCE WITH CONTRACT)**

5 29. CMSI realleges paragraphs 1 through 28 of this Complaint as if fully set forth
6 herein.

7 30. At all relevant times, the BZ Agreements were valid and existing exclusive
8 contracts between CMSI and its China supplier BZ, and there were business expectancies
9 between CMSI and BZ also.

10 31. Pacific had knowledge of the BZ Agreements, including their exclusivity
11 provisions, and CMSI's business expectancies with BZ and intended to induce their breach by
12 BZ.

13 32. BZ breached the BZ Agreements and disrupted and interfered with CMSI's
14 business expectancies by selling the Venice LX and Milano scooters to Pacific Cycle.

15 33. BZ's breaches of the BZ Agreements and interference with CMSI's business
16 expectancies were caused by Pacific Cycle's unjustified and wrongful conduct and CMSI has
17 been damaged by Pacific Cycle's wrongful conduct.

18 **COUNT FIVE**

19 **(INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC**
20 **ADVANTAGE)**

21 34. CMSI realleges paragraphs 1 through 33 of this Complaint as if fully set forth
22 herein.

23 35. Pacific Cycle intentionally and knowingly has interfered with CMSI's
24 prospective relationships with dealers by recruiting dealers to sell the Schwinn Scooters who
25 were either existing TN'G Scooter dealers or dealers targeted by CMSI to sell the TN'G
26

1 Scooters.

2 36. Pacific Cycle's interference with these relationships has been wrongful
3 because Pacific Cycle acquired relations with the dealers through its sale of the Schwinn
4 Scooters wrongfully misappropriated from CMSI through intentional interference with
5 CMSI's exclusive contract with BZ.

6 37. Pacific Cycle's wrongful interference with CMSI's relationships with dealers
7 has damaged CMSI.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiff CMSI, Inc. respectfully prays that this Court enter judgment
10 against Pacific Cycles, Inc., and provide other relief as follows:

11 1. an award of all damages resulting from all of the activities complained of in
12 this Amended Complaint;

13 2. an award of damages and other monetary remedies under 15 U.S.C. § 1117(a)
14 including all of Pacific Cycle's profits earned from the sale of Schwinn Scooters and all
15 related products, the damages sustained by CMSI and the costs of this action, including a
16 trebling of such monetary relief and that the Court determine that this is an exceptional case
17 and award CMSI its reasonable attorney's fees;

18 3. an award of all of CMSI's costs, including reasonable attorney's fees in
19 accordance with RCW 19.86.090;

20 4. an order preliminarily and permanently enjoining Defendant Pacific Cycle, its
21 officers, agents, affiliates, employees, representatives, and all persons in active concert or
22 participation with any of them from importing, selling, marketing or promoting the Schwinn
23 Scooters, falsely designating the origin of its products, improperly using CMSI's name on its
24 scooter parts, tortiously interfering with CMSI's business expectancies, and violating
25 Washington's Consumer Protection Act; and
26

1 5. such other and further relief as this Court deems just, lawful or equitable.

2 **JURY DEMAND**

3 Plaintiff hereby demands a trial by jury of all issues so triable in this case.

4 DATED this 16th day of May, 2006.

5 PRESTON GATES & ELLIS LLP

6
7 By /s/ Marc C. Levy

8 Gregory F. Wesner, WSBA #30241

Marc C. Levy, WSBA #19203

9 Jonathan Harrison, WSBA #31390

10 Attorneys for CMSI, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2006, I caused to be served to the parties listed below, CMSI, INC.'s AMENDED COMPLAINT, and also filed the same with the Clerk of the U.S. District Court for the Western District of Washington using the CM/ECF Filing System which will send electronic notification of such filing to the following:

Kenneth Roessler,
kroessler@forsberg-umlauf.com
FORSBERG & UMLAUF

Roy Andrew Umlauf
rumlauf@forsberg-umlauf.com
FORSBERG & UMLAUF

David A. Rammelt
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KELLEY DRYE & WARREN

Kenn Brotman
kbrotman@kelleydrye.com
KELLEY DRYE & WARREN

DATED this 16th day of May, 2006.

/s/ Marc C. Levy
Marc C. Levy

EXHIBIT A



EXHIBIT B

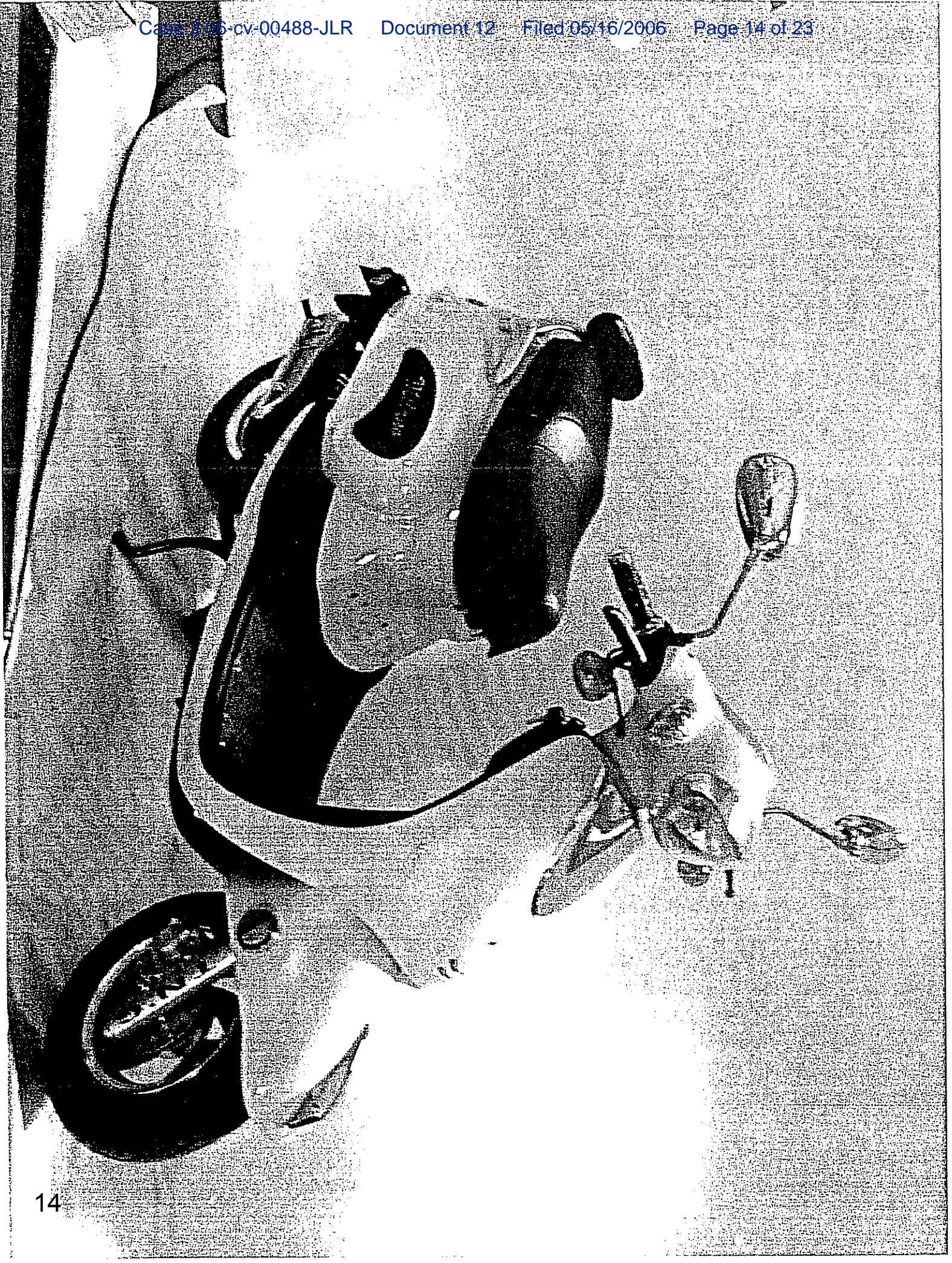
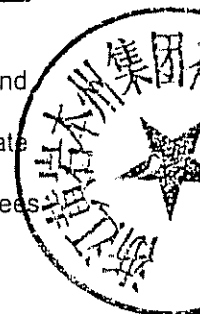


EXHIBIT C

CLASSIC MOTORCYCLES & SIDECARS, INC.

General Requirements for CMSI Licensing Agreement:

1. Must be actively interested in export and have a willingness to devote resources to supply what the export market needs.
2. Must understand that to export into western countries (sophisticated, highly regulated markets) they must be willing to continuously support the customer/importer with much more than the actual vehicles. This list of support items includes the following:
 - a. Parts catalogs with drawings, part numbers, costs per part - USA
 - b. Owners Manuals with drawings, photos, and specs. and updated to include the unique, DOT and EPA and USA parts
 - c. Service Manuals (Repair Manuals) for each engine and body style (also updated for the private label and unique USA specs.)
 - d. Agreement to NOT change any of these parts numbers or drawings until and unless CMSI agrees in writing before the change.
 - e. Exclusivity for the models being purchased and any proprietary designed products. Minimum annual purchase volumes apply.
 - f. Must be able to provide printed material per our requirements. (manuals, brochures, hang tags, instructions, etc)
3. Must be willing and able to offer at least 45 day (after clearing U.S. Customs) payment terms. Payment is guaranteed by International Commercial Letter of Credit drawn on acceptable U.S. Bank.
4. Must be able to pack and crate products, including parts as well as vehicles, into well protected, non wood, palletized crates. Crated boxes must have printed material on the box that meets our specs.
5. Must have an English speaking and reading/writing "Project Coordinator" who will be the contact person from CMSI.
6. Must agree to the CMSI Inspection Protocol and Inspections by CMSI Inspector. Inspector has the authority to stop the line and reject products being produced for CMSI.



7. Must agree to allowing CMSI to license their facility and to the attachment of CMSI Certification Labels and other US Gov. required labels listing CMSI as the manufacturer.
8. Must agree to forward all inquiries concerning CMSI's marketing area to CMSI for contact and negotiations.
9. Must meet CMSI quality requirements for vehicles and parts.
10. Must guarantee parts and vehicles from defects during the first ¹² ___ months and supply any defective parts needed, free of charge following a normal warranty policy.
11. Must have R & D abilities to meet 2006 US EPA Emission Standard.

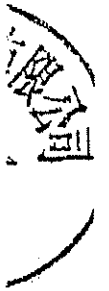
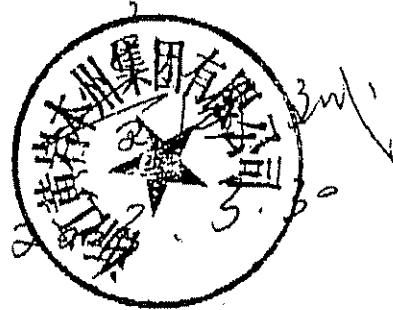


EXHIBIT D

Milano (CS125T-5) DOT Headlamp Agreement

Party A: Benzhou Group(BZ)

Party B: Classic Motorcycles & Sidecars, Inc.(CMSI)

For the joint-development of Milano(CS125T-5)DOT Headlamp tooling by BZ and CMSI, terms of the project are as follows:

- A: The initial 50% of the Tooling Fee (i.e.50% of RMB150,000=RMB 75,000):
 - Party A pays RMB 37,500
 - Party B pays RMB 37,500

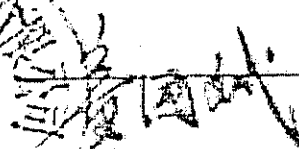
The balance 50% of the Tooling Fee (i.e. RMB 75,000): RMB37,500 will be paid over the next 5000 sets of headlight ordered by Party B or RMB7.50(=USD\$1.00)added to the price of headlight either bought separately or installed on scooter.

- B: Party A agrees not to sell this Milano DOT Headlight & Lens assembly to anyone other than Party B.

- C: Party A will provide copies of the jute test reports that show the headlight assembly being produced from the above tooling, meets all FMVSS as outlined in CFR 49 Std 571.108 Std No.108:Lamps, reflective devices and associated equipment.

- D: On the headlight lens of this Milano DOT Headlight, the following markings are required:

DOT
 Jue
 BZ CMSI-0001
 Made in china

Signed by Party A: 
 Date: 2003.04.21



Signed by Party B: 
 Date: 

EXHIBIT E

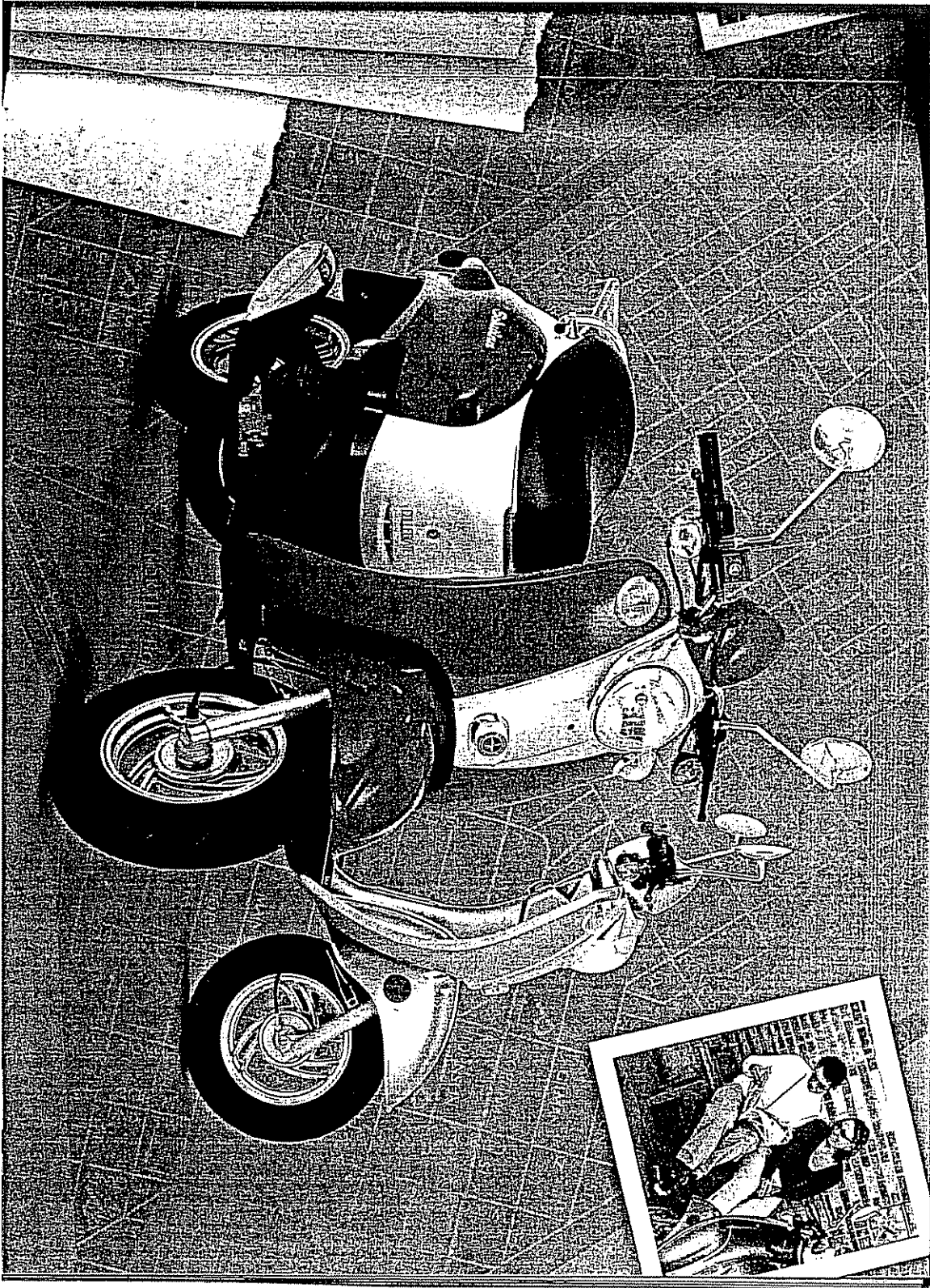


EXHIBIT F

