

Serial No. 90121184

Mark: ARC

Applicant: R-Zero Systems, Inc.

RESPONSE TO OFFICE ACTION

This communication is in response to the Office Action from the Examining Attorney, dated December 14, 2020 regarding Application Ser. No. 90121184 for the mark ARC (“Applicant’s Mark”). Applicant R-Zero Systems, Inc. (“Applicant”) responds as follows:

LIKELIHOOD OF CONFUSION

A. Factual Background

1. Applicant and Its Use of the ARC Mark

Applicant is a biosafety company making hospital-grade interior disinfection available to businesses of all kinds. See Exhibit A-1. Applicant’s products use UV-C ultraviolet light with a wavelength from 200-280 nanometers to destroy or inactivate bacteria and viruses - from the seasonal flu to E. coli and SARS-CoV-2 - by disrupting the molecular bonds of their DNA and RNA. This prevents the viruses from reproducing or causing illness. See Exhibit A-2. Applicant proposes to use the ARC Mark in connection with a commercial disinfection device portrayed at Exhibit A-3. Consistent with this use, Applicant seeks to register ARC in connection with:¹

“Ultraviolet ray lamps used for sanitizing interiors of buildings, namely, hospital rooms, medical offices, commercial businesses, restaurants, hotels, and government building interiors, not for medical purposes; sanitizing apparatus using ultraviolet light for sanitizing commercial business, restaurant, hotel, and government building interiors, not for medical purposes” in International Class 11.

¹ Applicant adopts the identification proposed by the Examining Attorney in the Office Action.

2. Registrant and the Cited Mark

Arovast Corporation (“Cited Applicant”) owns Serial No. 88574681, filed on the basis of Section 1(b), for the ARC FORMULA (Stylized) mark (the “Cited Mark”) in connection with the following goods:

“Air cleaning units; Air cleaning units containing an air filter, ultraviolet lights and a photocatalytic filter; Air purifiers; Air purifiers for automobiles; Air purifying apparatus and machines; Air exchangers for cleaning and purifying air; Humidifiers; Air humidifying apparatus; Industrial air purifiers; Separators for the cleaning and purification of air” in International Class 11

Applicant’s investigation shows that the goods under the Cited Mark are sold on Amazon and at the website located at <https://www.levoit.com/airpurifiers>. While the description under this intent-to-use application alleges intent to use the Cited Mark with a number of types of devices in Class 11, these goods consist of low-cost air filtration goods sold by the Applicant to consumers. Further, examination of the offering of the Cited Mark shows that the actual goods offered by the Applicant are an ingredient in a carbon air filter used in connection with pet and food odors in homes. See Exhibit B-1. Advertising by the owner of the Cited Mark makes clear that the term “ARC” in the Cited Mark is intended as an initialism for “AirReComposition” in the phrase “AirReComposition Formula.” The owner of the Cited Mark makes this reference clear in its advertising material excerpted here:

Unique ARC Formula: Compared with other filters, Core P350-RF's deodorizing ability has increased by 60% through the *AirReComposition Formula*, which chemically decomposes the unpleasant odors in the air without worrying about second-hand pollution

See Exhibit B-2 (emphasis added). In other words, the mark “ARC FORMULA” refers to a component of carbon air filters that the Applicant for the Cited Mark sells as an “air re-composition formula.”

B. Applicant’s Mark and the Cited Mark Are Not Likely to Cause Confusion

As stated in *In re E. I. du Pont de Nemours & Co.*, the question of likelihood of confusion between marks is “not related to the nature of the mark but to its effect when applied to the goods of the applicant.” The only relevant application is made in the marketplace. “The words ‘when applied’ do not refer to a mental exercise, but to all of the known circumstances surrounding the use of a mark.” 476 F.2d 1357, 1360-61 (C.C.P.A. 1973). The *du Pont* factors significant to this case militate strongly against a finding of likelihood of confusion, including:

- (1) Applicant’s Mark conveys an entirely distinct commercial meaning relative to the Cited Mark and is visually different;*
- (2) Goods under Applicant’s Mark are completely unrelated to the goods under the Cited Mark; and*
- (3) Consumers of goods under Applicant’s Mark do not overlap with the consumers of goods under the Cited Mark.*

1. Applicant’s Mark Conveys an Entirely Distinct Commercial Meaning Relative to the Cited Mark and Is Visually Different

Differences in visual appearance and commercial meaning can render even identical marks not confusingly similar. This is true even when the relevant goods compete commercially, which is not the case here. For instance, in *Nautilus Group, Inc. v. Savvier, Inc.*, the Western District of Washington held that BODY FLEX for exercise bars was not confusingly similar to BOWFLEX for exercise machines; BOWFLEX brings to mind an archer flexing to pull back an

arrow, while BODY FLEX brings to mind a person flexing into different positions. 79 U.S.P.Q.2d 1850 (W.D. Wash. 2006). Similarly, in *Champagne Louis Roederer S.A. v. Delicato Vineyards*, the Federal Circuit affirmed the Board’s conclusion that the word marks “CRISTAL” and “CRYSTAL CREEK” were not confusingly similar, noting the Board’s finding that the marks evoked very different images in the minds of relevant consumers: while the former suggested the clarity of the wine within the bottle or the glass of which the bottle itself was made, the latter suggested a very clear (and hence probably remote from civilization) creek or stream. 148 F.3d 1373 (Fed. Cir. 1998). Critically for the case at hand, the meaning or connotation of a mark must be determined in relation to the named goods or services. *See* T.M.E.P. § 1207.01(b)(v); *In re Sears, Roebuck & Co.*, 2 U.S.P.Q.2d 1312, 1314 (TTAB 1987) (holding CROSS-OVER for bras and CROSSOVER for ladies’ sportswear not likely to cause confusion, noting that the term “CROSS-OVER” was suggestive of the construction of applicant’s bras, whereas “CROSSOVER,” as applied to registrant’s goods, was “likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which “crosses over” the line between informal and more formal wear... or the line between two seasons”). The reasoning of decisions such as the foregoing and other similar cases must be applied to the facts of this case.

Here, the term “ARC” in Applicant’s ARC mark conveys an entirely different commercial meaning than the “ARC” in the cited ARC FORMULA mark. This difference in impression is derived directly from the distinct natures of the goods sold under the two marks as well as the meaning expressly intended for the mark by the owner of the Cited Mark when it is advertised to consumers. The goods under the Cited Mark are *air filter-related goods* as evidenced by the plain language of its description of goods. On the other hand, Applicant’s

goods are *ultraviolet lamps used for interior sanitization of commercial buildings*. Evidence from the website of the owner of the Cited Mark shows that the term “ARC” in ARC FORMULA is intended to mean “AirReComposition.” See Exhibits B-1 and B-2. Not only does the term “ARC” in the Cited Mark represent the initialism for “air re-composition,” based upon the language of the advertising of the Cited Mark owner, but “air re-composition” refers specifically to the air filtration function of the goods under the description for the Cited Mark. In contrast, Applicant’s goods are *ultraviolet lamps used for interior sanitization of commercial buildings*. The nature of these goods means that “air” and “air re-composition” has no relevance to Applicant’s goods. Instead, the term “ARC” in Applicant’s Mark is an arbitrary term with no particular meaning in regard to Applicant’s goods.

The Federal Circuit has sanctioned the use of internet evidence in *ex parte* registration proceedings. *See, e.g., In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (“[i]nternet evidence is generally admissible and may be considered for purposes of evaluating a trademark”) (citations omitted). Moreover, the Board has found on numerous occasions that an identical term may take on a very different meaning as applied to related goods, overcoming a likelihood of confusion. *See In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (the Board held that the mark PLAYERS on men’s underwear and men’s shoes would not result in consumer confusion as to the source of the goods inasmuch a “‘PLAYERS’ for shoes implies a fit, style, color and durability adapted to outdoor activities. ‘PLAYERS’ for men’s underwear implies something else, primarily indoors in nature.”). Similarly, there is a strong tendency for prospective purchasers of goods under the Cited Mark to understand “ARC” in to refer to the air filter nature of the goods found in the description under the Cited Mark, i.e., “air re-composition.”

The addition of the term “FORMULA” in the Cited Mark also distinguishes the commercial meanings of the two marks. Dictionary.com defines the term “formula” to mean a “fixed or conventional *method* for doing something.” See Exhibit C (emphasis added). The owner of the Cited Mark has simply adopted the term “ARC” as an initialism to refer to its method of “air re-composition,” so that ARC FORMULA suggests a “formula for air re-composition.” Again, the term “formula” has no relevance to Applicant’s goods or to Applicant’s Mark. An “air re-composition formula” intended by the owner of the Cited Mark for its goods would be both illogical and inapplicable in the context of *ultraviolet lamps used for interior sanitization*.

In essence, the Cited Mark is a laudatory or aspirational phrase suggesting a feature or function of the specific air filter goods under the Cited Mark. Applicant’s goods do not encompass or relate to such goods. The fact that the owner of the Cited Mark intends ARC FORMULA to suggest this meaning is made clear by the advertising used by the Owner of the Cited Mark. Exhibits B-1 and B-2. Applicant’s ARC mark has no such suggestive meaning. Nothing about Applicant’s goods involve “air re-composition” or a “formula.” The meaning or connotation of a mark must be determined in relation to the named goods or services. See T.M.E.P. § 1207.01(b)(v); *In re Nat’l Data Corp.*, 224 U.S.P.Q. 749, 750 (Fed. Cir. 1985) (“marks must be compared in their entireties and must be considered in connection with the particular goods and services for which they are used”). In the context of the relevant goods, as applied for and used, the commercial impression generated by the Cited Mark is entirely different than Applicant’s Mark.

In addition to the difference in commercial meaning, the marks are different in visual appearance and as a result dissimilar phonetically. Applicant’s ARC mark contains only about

one third of the letters contained in the cited AIR FORMULA mark, and only one (1) syllable rather than four (4). The mark “AIR FORMULA” is also dominated by the much larger term “FORMULA.” Additionally, the term “FORMULA” relates directly to the meaning of “air re-composition” associated with the initialism “ARC” in the Cited Mark, as a “formula for air re-composition.” “[L]ikelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.” See *National Data*, 224 U.S.P.Q. at 751. There is no evidence or rational reason that a consumer encountering Applicant’s Mark AIR would somehow see “AIR FORMULA” as equivalent to “AIR.” Instead, a consumer will perceive and derive commercial meaning from the entire mark “AIR FORMULA.” These visual and auditory differences, combined with the fact that the marks relate to completely separate goods and convey distinct commercial impressions, render the marks wholly unlikely to be confused in the marketplace.

2. Goods Under Applicant’s Mark are Completely Unrelated to the Goods Under the Cited Mark

Applicant’s description of goods clearly indicates that the Mark is proposed in connection with ultraviolet lamps used for interior sanitization of commercial buildings. The only possible likeness between this identification of goods, and goods identified under the Cited Mark, is that the Cited Mark’s description also falls into International Class 11 as types of environmental control goods. However, this impermissibly oversimplifies the goods at issue. The Board has consistently held that it is insufficient that a particular broad class may describe the goods. *Calypso Technology Inc. v. Calypso Capital Management LP*, 100 USPQ2d 1213, 1221 (TTAB 2011) (where the Board held erroneous a finding of likely confusion of identical CALYPSO marks based in part on the fact that both products were used in the “financial field”).

See also *In re W.W. Henry Co.*, 82 U.S.P.Q.2d 1213, 1215 (TTAB 2007) (restating that it is insufficient to find confusion based on use of a generalized term covering both products).

Here, the Cited Mark is proposed for registration in connection with air filtration and closely related goods that affect air filtration. The air filtration nature of the goods under the Cited Mark is made clear in the materials showing how the owner of the Cited Mark offers the goods. See Exhibits B-1 and B-2.

Registrant's air filtration goods are completely unrelated to the ultraviolet lamps used for interior sanitization of commercial buildings under Applicant's Mark. Applicant's identification of goods narrowly proposes use in connection with "Ultraviolet ray lamps used for sanitizing interiors of buildings, namely, hospital rooms, medical offices, commercial businesses, restaurants, hotels, and government building interiors, not for medical purposes; sanitizing apparatus using ultraviolet light for sanitizing commercial business, restaurant, hotel, and government building interiors, not for medical purposes." Every aspect of Applicant's product as described in its specification of goods is an ultraviolet ray lamp used for sanitation of the interior of commercial buildings. These commercial interior sanitization goods that use ultraviolet lights are not interchangeable with the air filtration goods under the Cited Mark. There is no evidence in this case that ultraviolet ray lamps and the air filtration goods offered under the Cited Mark are offered by the same suppliers. Ultraviolet ray lamps use ultraviolet technology, while air filtration goods use air filters of various types. The technology is completely different and expertise in one area does not provide any advantage in the other area. For these reasons, Applicant's proposed, ultraviolet ray lamp goods under Applicant's Mark are completely unrelated to the air filtration goods under the Cited Mark.

3. Consumers of Goods Under Applicant's Mark Do Not Overlap with the Consumers of Goods Under the Cited Mark

The customer who approaches Applicant for its ARC goods is one who desires a ultra violet lamp for sanitization of commercial building interiors. The customer who approaches the owner of the Cited Mark, on the other hand, desires air filtration goods. The distinct goods at issue provide different functions for unrelated purposes. By its very nature, Applicant's ultraviolet lamps cannot remove particles or odors by filtering the air. Similarly, the goods under the Cited Mark do not act to sanitize commercial building interiors with ultraviolet lamps. Therefore, the customer who desires the air filter goods under the Cited Mark will not shop for an ultraviolet lamp used to sanitize commercial building interiors. Further, the customer who desires to sanitize building interiors will not shop for an air filtration device.

Even if it is hypothetically possible that a commercial building owner might seek out both air filter goods sold by the owner of the Cited Mark and Applicant's ultraviolet sanitization equipment, confusion is still unlikely. Applicant's goods by their nature are highly technical and involve specific performance characteristics in regard to dangerous pathogens. See Exhibits A-1 and A-2. There is no evidence that consumers upon encountering one or the other mark, and being familiar with the other, would assume that they emanated from the same source. First, customers would expect the two product areas to be based on distinct areas of expertise, and proficiency in ultraviolet lamps for sanitization does not provide expertise in air filtration. Second, purchasers of both goods need to shop for and determine the goods' characteristics and match them with their needs. This is well illustrated in *Edwards Lifesciences Corporation v. VigiLanz Corporation*. There, the Board held that any relation between "hospital" products under similar marks was superficial where the same customers "do not encounter the marks and

products; or, if they did, they would do so only in the context of a lengthy sales process leaving no room for misunderstanding about the sources of the respective products.” 94 U.S.P.Q.2d 1399, 1412 (T.T.A.B. 2010). Likewise, here, the customer shopping for a commercial sanitizer using ultraviolet light is not the same as the typical consumer who is looking for an air filter for her home. As in *VigiLanz*, even where a consumer encounters both sets of marks and products, she does so only with the immediate knowledge that Applicant’s goods perform different functions (and are used for different reasons) than goods under the Cited Mark.

CONCLUSION

Applicant has responded to all of the issues raised by the Examining Attorney in the Office Action mailed on February 29, 2016. Accordingly, because no likelihood of confusion exists between Applicant’s Mark and the Cited Mark, Applicant requests that its application for ARC be approved for publication.

Dated: December 31, 2020

Respectfully submitted,

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EXHIBIT A-1

The future of R-Zero

COVID-19 exposed how vulnerable we are to infectious diseases.

But the challenge is bigger than Coronavirus alone.

When it comes to infection prevention, we need a new normal.

Influenza, norovirus, E. coli, common cold, and other common infectious diseases impact nearly 100 million Americans every year. Cumulatively, poor health costs US employers \$530 billion annually.

At R-Zero, we've developed a suite of solutions designed to greatly reduce the staggering damage each one of those viruses causes to our health and the health of our economy.

We're establishing a new standard for public health. One to address and overcome the challenges we face today and in the future.

We are a biosafety company dedicated to making safer everyday spaces and common places. We thoughtfully design the most effective technologies and protocols to reduce our world of deadly pathogens—today and forever.

<https://rzero.com/about/> (December 30, 2020)

EXHIBIT A-2

Scientists have known about UV-C's power to disinfect for over a century.

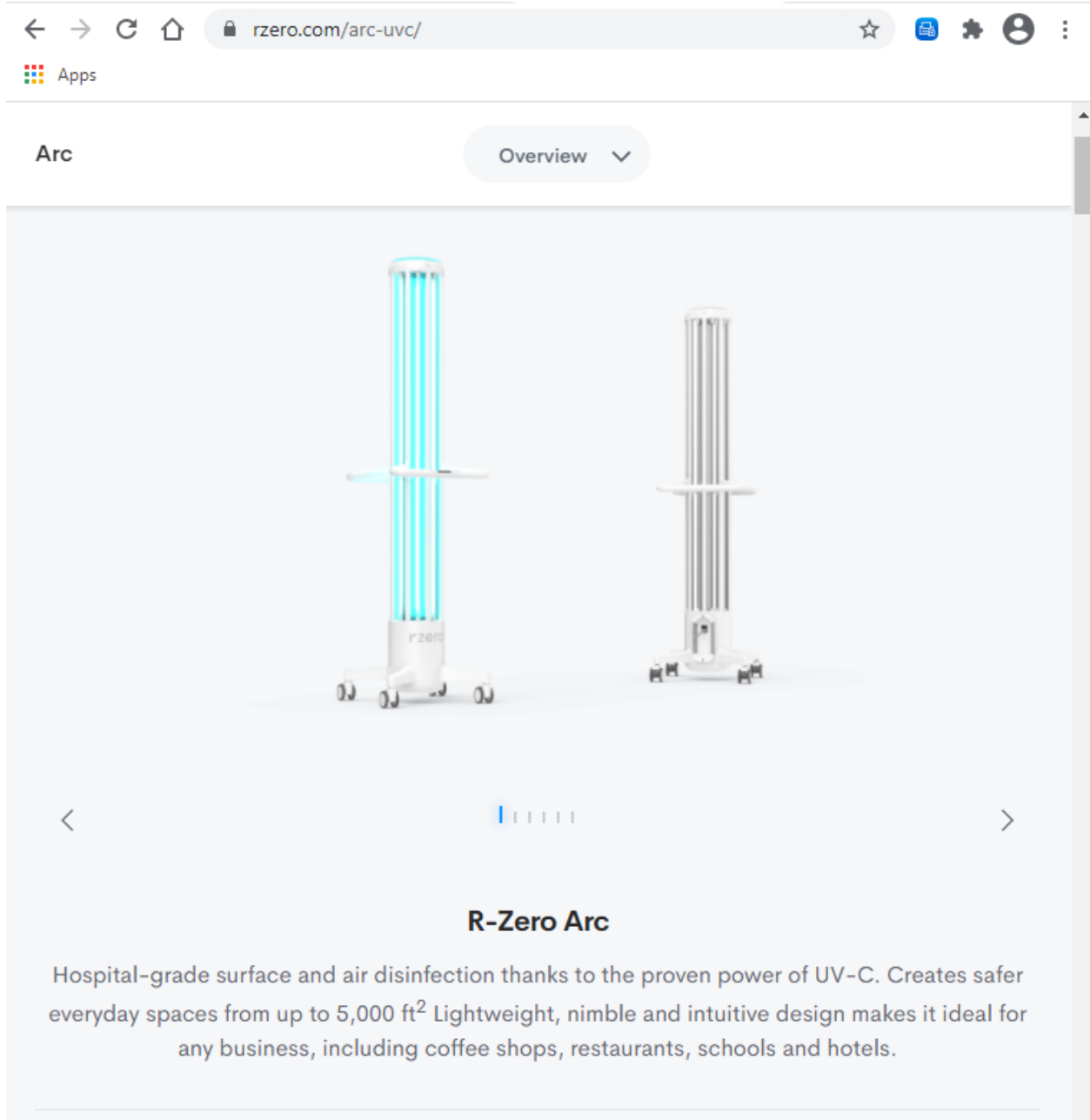
UV-C is ultraviolet light with a wavelength from 200-280 nanometers. It destroys or inactivates bacteria and viruses—from the seasonal flu to E. coli and SARS-CoV-2 —by disrupting the molecular bonds of their DNA and RNA. This prevents the viruses from reproducing or causing illness.

In 1903, the Nobel Prize for Medicine was awarded to Niels Ryberg Finsen for his work using concentrated light to treat lupus vulgaris. Since then, UV-C has been used extensively for disinfecting water, air and surfaces to destroy a whole host of harmful pathogens. Hospitals have some of the highest disinfection standards in the world and UV-C has been a critical part of their multi-modal approach to reducing Hospital Acquired Infections for decades.

More recently, UV-C has been recognized by the CDC and FDA as an approved method for disinfecting N95 masks and other medical supplies during the coronavirus pandemic.

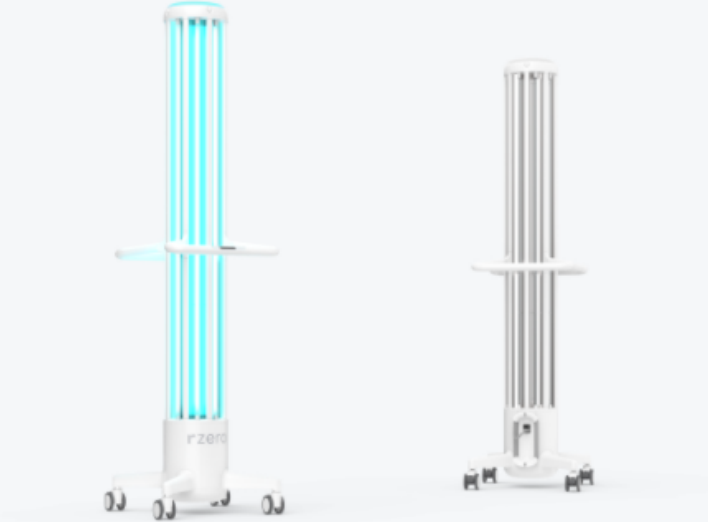
<https://rzero.com/science/> (December 30, 2020)

EXHIBIT A-3



Arc

Overview ▾



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R-Zero Arc

Hospital-grade surface and air disinfection thanks to the proven power of UV-C. Creates safer everyday spaces from up to 5,000 ft² Lightweight, nimble and intuitive design makes it ideal for any business, including coffee shops, restaurants, schools and hotels.

<https://rzero.com/arc-uv/> (December 30, 2020)

EXHIBIT B-1

Amazon.com: LEVOIT Air Purifier x +

amazon.com/LEVOIT-Core-P350-RF-Allergies-Eliminator/d... ☆

Apps

Amazon Home Shop by Room Discover Shop by Style Home Décor Furniture Kitchen & Dining Bed & B

MEDIFY AIR Medify MA-35 Air Purifier with H13 HEPA Filter - a... \$25 off cou

Home & Kitchen > Heating, Cooling & Air Quality > Parts & Accessories > Air Purifier Parts & Accessories

3 Stage Filtration
Customized 360° filter for pet allergies

- New Fine Non-Woven Fabric Pre-Filter**
Captures dust, floating pet hair, pet dander.
- H13-Grade True HEPA Filter**
Traps dust mites, smoke.
- Activated Carbon Filter with ARC Formula**
Absorbs and decomposes pet odors, cooking smell, cat litter smell.

Roll over image to zoom in

VIDEO

LEVOIT Air Purifier Core P350-RF, 3-in-1 H13 True HEPA Filter for Pet Allergies, New Fine Non-Woven Fabric Pre, Odor Eliminator with ARC Formula, White, Medium

Visit the LEVOIT Store
★★★★★ 625 ratings
Amazon's Choice for "levoit ..."

Price: **\$35.79** & **FREE Shipping**. Details & **FREE Returns**

Get \$60 off instantly: Pay \$0.00 upon approval for the Amazon Rewards Visa Card. No

(<https://www.amazon.com/LEVOIT-Core-P350-RF-Allergies-Eliminator/dp/B087R7ZFPB>)

(December 30, 2020)

EXHIBIT B-2



Roll over image to zoom in



- **Unique ARC Formula:** Compared with other filters, Core P350-RF's deodorizing ability has increased by 60% through the AirReComposition Formula, which chemically decomposes the unpleasant odors in the air without worrying about second-hand pollution

LEVOIT Air Purifiers for Home Allergies and Pets with ARC Formula, Core P350 & H13 True HEPA Filter, Core P350-RF

Visit the LEVOIT Store

★★★★★ 37 ratings

Amazon's Choice for "levoit pet"

Bundle Price: **\$155.78**

Get \$60 off instantly: Pay \$95.78 upon approval for the Amazon Rewards Visa Card. No annual fee.

Style Name: **Air Purifier + Replacement Filter**

- Use brand-new and genuine Levoit air purifier to maintain the best performance and to ensure what you're buying is worthy of your investment. You can contact LEVOIT for replacement if Amazon shipped you a used one. LEVOIT, as the brand owner, we NEVER sell second-hand nor used air purifiers to Amazon.com.
- Genuine Replacements: Search for "B087R7ZFPB" or "Core P350-RF" for levoit 3-in-1 customized pet filter to ensure excellent performance. The convenient check filter indicator informs you when it might be time for a new filter. Filters should be replaced every 6-8 months
- Perfect Gift for Pet Families: Ideal for pet allergies, improve your air quality and help you and your pets relieve allergic symptoms such as sneezing, coughing, sinuses and heavy breathing. Ozone-free, approved by CARB, ETL listed and CA PROP 65 certified
- Unique ARC Formula: Compared with other air purifiers, Core P350's deodorizing ability has increased by 60% through the AirReComposition Formula in the activated carbon filter, which chemically decomposes the unpleasant pet odors in the air without worrying about second-hand pollution
- Customized Filter for Pet Allergies: Exclusively designed for Levoit Core P350 air purifier to maintain its peak performance. With cost-effective price to save much cost for your all year round air cleaning need. It is recommended to replace filters for every 6-8 months

<https://www.amazon.com/LEVOIT-Purifiers-Allergies-Formula-P350-RF/dp/B08DNX5NL7>

(December 30, 2020)

EXHIBIT C

formula [fawr-myuh-luh] [SHOW IPA](#)

[SEE SYNONYMS FOR formula ON THESAURUS.COM](#)

noun, plural **for·mu·las**, **for·mu·lae** • [fawr-myuh-lee].

- 1 a set form of words, as for stating or declaring something definitely or authoritatively, for indicating procedure to be followed, or for prescribed use on some ceremonial occasion.
- 2 any fixed or conventional method for doing something:
His mystery stories were written according to a popular formula.
- 3 **Mathematics.**
 - a a rule or principle, frequently expressed in algebraic symbols.
 - b such a symbolic expression.
- 4 **Chemistry.** an expression of the constituents of a compound by symbols and figures.:
Compare empirical formula, molecular formula, structural formula.
- 5 a recipe or prescription:
a new formula for currant wine.
- 6 a special nutritive mixture, especially of milk, sugar, and water, in prescribed proportions for feeding a baby.

<https://www.dictionary.com/browse/formula> (December 30, 2020)