INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID ARB. No.

BUBBLEWASH LICENSING SERVICES, INC.
BUBBLEWASH AMERICAS, INC.

Claimants

vs.

THE REPUBLIC OF ECUADOR

Respondent

REQUEST FOR ARBITRATION

October 7, 2024

JGH Law Firm
Washington, DC

I. INTRODUCTION

1. Pursuant to Articles 25 and 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), Bubblewash Licensing Services, Inc. ("BWLS") and Bubblewash Americas, Inc. ("BWAM", and together with BWLS, the "Claimants"), hereby request the institution of arbitration proceedings against the Republic of Ecuador ("Ecuador"). The Claimants are wholly-owned subsidiaries of Bubblewash Corporation ("BWC"), a Korean incorporated company headquartered in Seoul, Korea. Together, BWLS, BWAM and BWC form part of the Bubblewash group of companies (collectively, "Bubblewash"), which is the world's largest manufacturer of washing machines and clothing care products.

2. The claims submitted by the Claimants in this arbitration arise under the Trade Promotion Agreement entered into between the United States of America and the Republic of Ecuador (the "US-Ecuador FTA" or "FTA"), which was signed by the parties on June 28, 2015, and entered into force on October 31, 2020.

3. The claims herein concern an extraordinary decision by the Supreme Court of Ecuador that Bubblewash should pay millions of dollars in damages to an Ecuadorian company for doing no more than invoking - in good faith - Ecuador's own trademark opposition procedure. The decision was a violation by Ecuador of its obligations under the US-Ecuador FTA and under customary international law, including its obligations (a) to accord fair and equitable treatment to the Claimants' investments, (b) to accord to the Claimants treatment no less favorable than accorded by Ecuador to its own investors and (c) not to expropriate the Claimants' investments absent prompt, adequate and effective compensation. As a result of those violations, the Claimants have suffered significant loss estimated at not less than USD 19.5 million.

II. THE PARTIES TO THE DISPUTE

A. The Claimants

4. The Claimants are U.S.-incorporated companies. BWLS is incorporated in the State of Delaware and BWAM is incorporated in the State of Colorado. Both Claimants maintain their principal place of business at 535 Forest Hill Drive, Denver, Colorado 30675, United States of America.

5. Bubblewash is the world's largest manufacturer of washing machine and clothing care products. Washing machines account for about 80% of Bubblewash sales worldwide,

and are primarily marketed under the BUBBLEWASH and SPINWASH brands, which are market-leading washing machine brands that are globally recognized for quality and innovation. Bubblewash spends significant time and resources protecting its brands through its robust approach to maintaining and defending its intellectual property rights all over the world. For example, approximately 25% of BWLS's income in 2023 went towards protection of its intellectual property rights.

6. BWLS is the owner of the SPINWASH trademark in all countries outside of the United States. The BUBBLEWASH trademark is held by BWC. Each of BWLS and BWC license their respective trademarks to other Bubblewash entities for production, sales, marketing and/or distribution. The rights to sell, market and distribute products under the BUBBLEWASH and SPINWASH trademarks in North, Central and South America (including Ecuador) are licensed by BWC and BWLS to BWAM.

7. BWAM is the parent company for all of the Bubblewash business units in North, Central, and South America. BWAM's subsidiaries, such as Bubblewash Mexico ("BWM"), manufacture, sell, distribute and market BUBBLEWASH and SPINWASH washing machines into different markets in the region. In Ecuador, Bubblewash and Spinwash washing machines are sold to third party distributors through BWM. Profits from BWM and the other regional subsidiaries flow back to BWAM. In tum, BWAM provides corporate services to the subsidiaries (such as legal and human resources).

8. In this arbitration, the Claimants are represented by JGH Law Firm LLP. All communications concerning this matter should be addressed to: JGH Law Firm, Main Square, Washington, D.C.

B. The Respondent

9. The Respondent in this arbitration is the Republic of Ecuador. Service of this Request for Arbitration may be made on the Government of Ecuador using the following contact details:

Sr. Presidente del Ecuador

Procurador General del Ecuador

III. STATEMENT OF FACTS

A. Bubblewash's Decision to Invest in Ecuador and the Americas

10. The Bubblewash Clothing Care Co. Ltd was established in Korea in 1951 and grew alongside the Korean housing and appliance industry to become Korea's largest

washing machine manufacturer by the early 1970s. It expanded across Asia, and in 1988 it acquired the Spinwash Clean Clothes Company, an international corporation founded in Toledo, Ohio, USA, in 1880, which produced SPINWASH brand washing machines and clothing care products. Through that acquisition, Bubblewash obtained a number of production sites across Central and South America and Europe.

11. SPINWASH was already a strong brand in its own right when it was acquired, and Bubblewash has maintained that brand, as well as its own market-leading BUBBLEWASH brand in markets worldwide. Part of Bubblewash's corporate strategy has been to expand and develop the Spinwash brand globally, alongside continued expansion of the Bubblewash brand.[5] This is achieved through the registration of the BUBBLEWASH and SPINWASH trademarks around the world, and the sale and distribution of trademarked products via subsidiaries in key international markets.

12. In Ecuador, the BUBBLEWASH trademark was originally registered by BWC on October 11, 1978. The registered trademark has since been maintained and defended and has accordingly protected and distinguished BUBBLEWASH-branded washing machines and related clothing care products in Ecuador. Similarly, the SPINWASH trademark was originally registered by the Spinwash Clothing Care Company on December 20, 1997. Following the acquisition of the Spinwash Clothing Care Company by Bubblewash, the company changed its name to Bubblewash/Spinwash, Inc. and, in 2012, assigned its rights in the SPINWASH trademark to BWLS. This registration has been used since this date to protect and distinguish washing machines and related clothing care products bearing the Spinwash name in Ecuador.

13. Currently, BWAM, through its wholly-owned subsidiary, BWM, sells washing machines into Ecuador through authorized third party distributors.

B. Bubblewash's Approach to Intellectual Property Protection

14. There is significant value for companies in owning registered trademarks, the most obvious being the exclusive rights to use their trademarks in relation to the products or services for which they are registered. While trademark law is not globally uniform, in most jurisdictions, a registered trademark allows its holder to prevent unauthorized use of the mark in respect of products or services which are similar to the registered products or services. The applicable test is generally whether the unauthorized mark is "confusingly similar" to the registered mark. For a trademark holder, the value of exclusive rights to a trademark is approximately 50% greater than non-exclusive rights.

15. If Bubblewash is successful in opposing the registration of a confusingly similar mark, its standard course of action is to send the company that sought to register the mark a "reservation of rights letter." This letter notifies the applicant of Bubblewash 's exclusive rights to use its trademarks for washing machines or related products and reserves its right to take appropriate action to protect its trademark if it learns of subsequent unauthorized use by the applicant. If necessary, Bubblewash may then apply to the local court for an injunction enjoining the further sale of products bearing the unauthorized brand.

16. Bubblewash considers that washing machine brand names with the suffix -WASH are confusingly similar to the BUBBLEWASH or SPINWASH brands, and therefore has a general policy of opposing washing machine marks with such a "WASH" suffix in every jurisdiction in which it has registered its trademarks. As explained at paragraphs 14 and 18 above, different jurisdictions take different approaches to the protection of intellectual property rights, and a judgment must be made by the relevant authority in each case as to whether a mark is confusingly similar to Bubblewash's trademarks or not.

C. Bubblewash Opposed the Freshwash Trademark in the USA

17. On August 13, 2012, J.W.D. International, Inc. ("J.W.D. International"), a company incorporated in Florida, filed a U.S. trademark application with the United States Patent and Trademark Office to register the FRESHWASH mark for use in connection with washing machine products. Upon learning of the application through a trademark application monitoring service, Bubblewash, through its subsidiary BubbleBrands LLC ("BBB") (a US-incorporated company), filed an opposition action with the Trademark Trial and Appeal Board ("TTAB") on August 23, 2012, against J.W.D. International's application.

18. On August 30, 2012, while the opposition action was pending before TTAB, J.W.D. International voluntarily and with prejudice withdrew its trademark application for the FRESHWASH mark. Following the withdrawal, on October 13, 2012, TTAB sustained Bubblewash's opposition action and denied J.W.D. International's trademark application.

19. Following termination of the trademark opposition action, on November 3, 2012, attorneys for BBB wrote to J.W.D. International, putting it on notice of Bubblewash's objection to J.W.D. International's future attempts to register the FRESHWASH mark and its use of the mark in the U.S. and worldwide (subsequently referred to as “Reservation of Rights Letter”).

D. Bubblewash Opposed the FRESHWASH Trademark in Ecuador

20. On February 4, 2013, the General Directorate of Registration of Industrial Property for the Ecuadorian Trademark and Patent Office published an application for the registration of the FRESHWASH trademark in the Industrial Property Bulletin. The application, No. 12983476 dated May 6, 2012, was filed by Ropasuave Intertrade, S.A. ("Ropasuave") for the FRESHWASH mark for retail and industrial washing machines, along with other products, such as cleaning equipment.

21. On April 5, 2013, Bubblewash filed an opposition to the FRESHWASH mark in Ecuador on the grounds that it was confusingly similar to the BUBBLEWASH and SPINWASH marks. Ropasuave defended the opposition, and J.W.D. International and Washing Machine Group of Factories Ltd. ("JWD") joined the dispute as third-party interveners. Claimants understand that both J.W.D. International, a washing machine distributor, and JWD, a Chinese washing machine manufacturer, are part of the same business group as Ropasuave (the so-called Shengzen Group) and have agreements in place to register and sell FRESHWASH washing machines worldwide.

22. On July 21, 2014, the Eighth Civil Circuit Court of the First Judicial Circuit of Ecuador (the "Eighth Circuit Court") found that the mark was not capable of causing confusion among consumers and denied the opposition. Despite this ruling, the court also held that Bubblewash's opposition claim was not frivolous, and consequently did not order Bubblewash to pay the defendant's costs, as would have been permitted under Ecuadorian law.

23. Bubblewash filed an appeal immediately on receipt of the Eighth Circuit Court judgment. However, it ultimately decided to withdraw its appeal after considering the likelihood of its success in such a proceeding.

E. Ropasuave Filed a Damages Claim Against Bubblewash in Ecuador

24. On September 12, 2015, a year after the trademark opposition proceedings had closed, Ropasuave and JWD filed a claim against Bubblewash in the Eleventh Circuit Civil Court of the First Judicial Circuit of Ecuador seeking US$ 6,000,000 in damages plus attorney's fees and costs.

25. Ropasuave and JWD alleged that the trademark opposition proceedings initiated by Bubblewash had caused them to cease sales of FRESHWASH washing machines in Ecuador, Colombia, Chile, and Peru, resulting in loss of revenue in excess of US$ 8,000,000. In support of their claim, Ropasuave and JWD presented, amongst other things, testimony from staff and distributors who claimed that they had stopped selling washing machines during the opposition proceedings out of fear that their inventory of

FRESHWASH washing machines would be seized if they lost in the opposition proceedings. These claims were also supported by a third-party submission filed by J.W.D. International. Therein, J.W.D. International argued that Ropasuave and JWD's fears were justified on the basis of the Reservation of Rights Letter referenced in paragraph 19.

26. In its response, Bubblewash denied that its actions had caused Ropasuave and JWD to stop selling FRESHWASH-branded washing machines. Bubblewash had simply filed a lawful opposition action to Ropasuave's registration of the FRESHWASH mark. The consequence of that action, had it been successful, would have been to refuse registration of the FRESHWASH trademark in Ecuador. In order thereafter to prevent the unauthorized use of the FRESHWASH mark, Bubblewash would then have had to write to Ropasuave and JWD, requesting that they stop selling FRESHWASH-branded washing machines, and if necessary, apply to the Ecuadorian court seeking an injunction preventing further sales. However, since the opposition action was unsuccessful, no action enjoining the sale of FRESHWASH-branded washing machines had been (or indeed, could have been) taken by Bubblewash, thus there was no basis for Ropasuave and JWD's alleged "fear" of seizure. In the circumstances, if Ropasuave and JWD had chosen to stop selling FRESHWASH washing machines during the period of the opposition action, that decision could not be attributable to Bubblewash. Yet notwithstanding, Bubblewash presented expert evidence demonstrating that Ropasuave and JWD had in fact continued to sell FRESHWASH washing machines throughout Ecuador and Latin America during the period of the opposition, generating sales in excess of USD 17,000,000 between 2012 and 2016.

27. The Eleventh Circuit Court reviewed the evidence and rejected the claims brought by Ropasuave and JWD through its Judgment No. 429 on December 17, 2018. In its decision, the Eleventh Circuit Court agreed with Bubblewash that the mere "fear" of seizure was not enough to support a damages claim.

28. The Eleventh Circuit Court further held that Ropasuave and JWD had not in fact suffered any loss. Even if Ropasuave and JWD had made out an entitlement to claim damages on the basis of the trademark opposition action, their claim was unsustainable because they had not in fact suffered any loss.

29. On the above basis, the Eleventh Circuit Court rejected the damages claim filed by Ropasuave and JWD. It further proceeded to order Ropasuave and JWD to pay Bubblewash's costs (USD 371,000 in attorney's fees).

F. The First Superior Court Concurred with the Decision of the Eleventh Civil Circuit and Found in Favor of Bubblewash.

30. Ropasuave and JWD appealed the Eleventh Circuit Court's decision to the First Superior Court of the First Judicial District ("Superior Court") on January 5, 2019. In doing so, Ropasuave and JWD did not present new evidence on appeal. In written submissions, however, they argued that the Eleventh Circuit Court failed to give proper weight to certain testimony and documentary evidence. To this end, Ropasuave and JWD highlighted the testimony of sales employees, as well as the Reservation of Rights Letter referred at paragraph 19 above (addressed to J.W.D. International and not to Ropasuave or JWD), which they claimed was the basis for Ropasuave and JWD's "fear" that their washing machine inventory would be seized by Bubblewash.

31. In response, Bubblewash argued again (i) that neither Ropasuave nor JWD had proven that they had suffered loss given that they continued to sell FRESHWASH washing machines without restriction while the opposition action was pending; and (ii) that Ropasuave and JWD had failed to establish that Bubblewash had acted recklessly or negligently in protecting its trademark rights and that, in the opposition proceedings, the Eighth Circuit Court had specifically recognized that the action brought by Bubblewash was a good faith attempt to protect its intellectual property rights.

32. The Superior Court issued its decision on May 23, 2021. It concurred with the decision of the Eleventh Circuit Court and found in favor of Bubblewash. In particular, it held that in order for there to be a valid claim for damages merely on the basis of filing a legal action, there must be *"substantial evidence in order to establish the existence of real damages caused and the existence of fault or negligence by the agent and the causal link between the action and the damage caused."* The court held that Ropasuave and JWD had not met this burden since they had not demonstrated *"recklessness, fraud or gross negligence in the Defendants' conduct when opposing the registration of the trademark."* Accordingly, the Superior Court dismissed the appeal and Ropasuave and JWD were again ordered to pay Bubblewash's costs.

G. Ropasuave and JWD Appealed to the Supreme Court of Ecuador

33. On January 3, 2022, Ropasuave and JWD appealed to the Supreme Court of Ecuador ("Supreme Court"). Again, Ropasuave and JWD did not introduce new evidence, and their arguments mirrored those made before the First Superior Court: that important evidence put forth by them at trial had not been properly considered by the Eleventh Circuit Court. This evidence included:

- The Reservation of Rights Letter referenced at paragraph 19, above that, again, was sent to J.W.D. International Inc. and not Ropasuave or JWD, and simply advised that Bubblewash would likely oppose the registration and/or use of the Freshwash mark elsewhere.
- An accounting report by Yolanda Diaz and expert evidence submitted by Roberto Nunez, both adduced by Ropasuave and JWD, which concluded that Ropasuave and JWD had reduced sales of Freshwash washing machines in the amount of USD 7,168,270.56 from 2013-2016 on account of the trademark opposition filed by Bubblewash.
- Resolution 8 by the First Superior Court of the Judicial District accepting Bubblewash's withdrawal of the appeal of the trademark opposition decision.
- Oral testimony from Ropasuave employees to the effect that they were unable to sell FRESHWASH washing machines due to the opposition action filed by Bubblewash.
- Oral testimony by two managers stating that they ceased selling washing machines out of "fear" that Bubblewash would seize their inventory due to the Reservation of Rights Letter and their belief that such action had been taken by Bubblewash in Guatemala, New Zealand, and other countries.

34. Ropasuave and JWD requested that the Supreme Court review the evidence *de novo* and issue a finding that Bubblewash *"recklessly opposed"* the FRESHWASH trademark, resulting in losses for Ropasuave and JWD. In response to the appeal, Bubblewash repeated the arguments made before the Eleventh Circuit Court and the First Superior Court. In relation to the Reservation of Rights Letter, they argued that it should not be considered by the Supreme Court because it:

- Had not properly been admitted into evidence in the lower court proceedings, and consequently Bubblewash had not been able to make any submissions as to that evidence;
- Was addressed to J.W.D. International, an entity that was not party to the Ecuadorian opposition proceedings, and was properly written to that party following Bubblewash's successful opposition proceedings in the U.S.;
- Was, in any case, no more than a reservation of rights and contained no actionable threats.

H. The Supreme Court Reversed the Lower Courts and Issued a Judgment Against Bubblewash

35. On May 28, 2022, the Supreme Court issued its judgment overturning the decisions of

the Eleventh Circuit Court and the First Superior Court. The Supreme Court accepted the argument put forward by Ropasuave and JWD that certain key evidence had not been "*appreciated"* by the lower courts and conducted a *de novo* review of all the evidence presented.

36. On the question of recklessness, the Supreme Court gave decisive weight to the Reservation of Rights Letter. The Supreme Court also referred to the resolution of the Intellectual Property Appellate Court accepting Bubblewash's withdrawal of the appeal of the trademark opposition decision as evidence of bad faith. Lastly, the Supreme Court gave weight to the evidence of Ropasuave and JWD employees who claimed that Bubblewash had used their position as a large multinational investor to cause them to cease sales of FRESHWASH washing machines, despite the fact that such evidence was unsubstantiated and indeed contradicted by clear evidence on the record showing continued sales.

37. In its decision, the Supreme Court did not consider evidence submitted by Bubblewash nor the decisions of the Eleventh Circuit Court and the First Superior Court, which found that Bubblewash had not acted recklessly in opposing the trademark, and that Ropasuave and JWD had not suffered any harm caused by the trademark opposition action.

38. The Supreme Court found in Ropasuave and JWD's favor, and imposed a penalty on Bubblewash in the amount of exactly US$ 6,000,000 in damages and US$ 567,000 in attorney's fees-roughly equivalent to 65% of Bubblewash's annual sales in Ecuador, or 94% of their annual trademark income for the Spinwash brand-for which BWC and BWLS were jointly and severally liable. However, the Supreme Court's decision was arbitrary and unjust: it considered evidence that was improperly admitted, such as the Reservation of Rights Letter, and gave overwhelming credit to Ropasuave 's and JWD's expert report, which was rejected by the lower courts. Moreover, the Supreme Court gave no weight to the substantial evidence submitted by Bubblewash showing that neither Ropasuave nor JWD sustained damages due to the filing of the trademark opposition action against the FRESHWASH mark.

I. Bubblewash's Efforts to Overturn the Supreme Court Ruling

39. On June 16, 2022, Bubblewash challenged the judgment by filing a motion for clarification and modification before the Supreme Court of Ecuador (the "First Appeal Motion"). The First Appeal Motion was based on a provision of the judicial code

permitting a judicial body to modify or clarify its own decision with respect to its calculation of interest, damages, or an award of fees. To this end, Bubblewash argued that the Supreme Court's decision did not explain how it arrived at the perfectly round figure of US$ 6,000,000 in damages, or what portion of damages were attributable to losses claimed by Ropasuave and JWD, and thus requested clarification through a remand to the lower court.

40. On September 30, 2022, in a separate action, Bubblewash filed before the Supreme Court an appeal titled *Recurso de Revision* (the "Second Appeal Motion"). The Second Appeal Motion was based on a provision of the judicial code permitting a party to challenge a judgment of an Ecuadorian court in circumstances where a party was unable to present decisive evidence during initial proceedings. To this end, Bubblewash requested that the Supreme Court nullify the judgment on the ground that the Court admitted the Reservation of Rights letter as evidence without observing the requisite legal formalities.

41. Despite Bubblewash's efforts, on November 28, 2022, the Supreme Court denied the First Appeal Motion on the grounds that the relevant provision of Ecuadorian law only allowed modification of damages awards based on manifest error, which the Supreme Court did not find in the judgment of May 28, 2022.

42. Similarly, on March 16, 2024, the Supreme Court dismissed the Second Appeal Motion, this time on the ground that the relevant provision of the judicial code did not apply to judgments of the Supreme Court. While refusing to revise the judgment, the Supreme Court did acknowledge the unfairness of the judgment issued by the Supreme Court against Bubblewash, emphasizing *"the need to work in a legal reform that responds to new paradigms of change with respect to the scrutiny of the decisions from the high judicial courts."*

J. Bubblewash's Attempts to Resolve the Matter Through Diplomatic Channels

43. Following the initial Supreme Court decision, Bubblewash communicated with the U.S. and Korean embassies in Ecuador regarding this troubling decision and the excessive penalty. These discussions resulted in dialogue between the U.S. Ambassador to Ecuador and the Chief Justice of the Ecuadorian Supreme Court in July 2022. Bubblewash understands that the U.S. Ambassador expressed the United States' concerns regarding the Supreme Court decision, and that the Chief Justice of the Supreme Court acknowledged the excessive penalty and conveyed that he would consider the possibility

of modifying the decision.

44. Bubblewash also presented its concerns to the Office of the United States Trade Representative ("USTR") through oral and written statements for the Special 301 Report.[1] In its statements, Bubblewash explained its rationale for opposing the FRESHWASH trademark, the subsequent damages litigation, and the impact of the excessive penalty not only on Bubblewash but on other entities with trademark rights in Ecuador and in the region. As a result, the USTR's Special 301 Report for 2023 reported:

"Of additional concern is a report that significant punitive damages were imposed on the owner of a trademark registered in Ecuador in connection with that owners efforts to oppose the registration and use of a second mark which has been found to be confusingly similar in other marks. . . .[T] he damage award may discourage other legitimate trademark owners from entering the market out of concern that defending their marks will result in punitive action."

45. In a letter on May 4, 2023, Bubblewash requested the USTR to initiate WTO infringement procedures against Ecuador because of the violation of Art. 16(1) of the TRIPS Agreement. The U.S. government received several complaints from other U.S. companies distributing auto parts, agricultural equipment, pharmaceutical products, and computer parts, where the national courts in Ecuador had adopted decisions revoking trademark protections of foreign companies and granting requests from domestic companies for their trademark protection. In the specific case of Bubblewash, the U.S. government has announced that it will file a complaint to have a WTO Panel review the Ecuadorian Supreme Court’s decision on the BUBBLEWASH.

46. Bubblewash continues to pursue resolution through diplomatic channels. On September 12, 2024, the JGH Law Firm wrote to the Ecuadorian Ambassador to the U.S. in an attempt to progress matters, but no response has been received to date. Just prior to filing this Request for Arbitration, Bubblewash sent to the Ambassador copies of letters from Bubblewash's representatives in the U.S. House of Representatives and U.S. Senate to the USTR. These letters express the representatives' concern regarding the

[1] The Special 301 Report is the result of an annual review of the state of intellectual property rights protection and enforcement in U.S. trading partners around the world, which the Office of the United States Trade Representative conducts pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, the Uruguay Round Agreements Act, and the Trade Facilitation and Trade Enforcement Act of 2015 (19 U.S.C. § 2242).

excessive penalty and arbitrary decision of the Supreme Court and its potential implications, and encourage settlement of the matter through diplomatic channels.

K. Payment of Damages by Bubblewash

47. Having exhausted all possible opportunities under Ecuadorian law to have the Supreme Court judgment reversed or modified, Bubblewash expected that Ropasuave would request payment. On or around June 15, 2024, counsel for Ropasuave and JWD contacted Bubblewash's Ecuadorian lawyers, requesting payment of the damages awarded by the Supreme Court. On June 29, 2024, a representative of BWAM was separately contacted through the professional networking website Linkedln by a Mr. Pablo Picavia, requesting contact details so that a payment request for the damages could be made. Accordingly, Bubblewash contacted Ropasuave and JWD in early August 2024 to confirm who should receive payment, and on August 19, 2024 notified them of its intention to pay the full amount of the award.[55] In its letter, Bubblewash stated:

"this payment only applies to the Judgment of May 28, 2022, ordered by the Civil Chamber of the Supreme Court of Ecuador in accordance with the civil process alluded to, and does not constitute an agreement or settlement between the parties. Similarly, we express that Bubblewash Corporation and Bubblewash Licensing Services, Inc., reserve their rights under International law, including the U.S.-Ecuador Trade Promotion Agreement."

48. Accordingly, Bubblewash, through its subsidiary BWLS, which was jointly and severally liable for the judgment, paid the damages award to Ropasuave and JWD on August 19, 2024.

I. Additional Patent Litigation in Bolivia About the Freshwash Brand

49. On July 1, 2013, the Bolivian Industrial Trademark and Patent Office published another application for the registration of the FRESHWASH trademark. Just as had happened in Ecuador, the Bolivian application, No. 98765, dated March 10, 2013, was filed by the Ecuadorian company Ropasuave for the FRESHWASH mark for retail and industrial washing machines, along with other products, such as cleaning equipment.

50. On July 20, 2013, Bubblewash filed an opposition to the FRESHWASH mark in Bolivia on the grounds that it was confusingly similar to the BUBBLEWASH and SPINWASH marks. Just as in Ecuador a few months earlier, Ropasuave defended the opposition, and J.W.D. International and JWD joined the dispute as third-party interveners.

51. The summer 2013 coincided with the opening of five new, large shopping malls in La

Paz, Oruro, and Santa Cruz de la Sierra, the largest cities in the country. The shopping mall operators in all five locations was a U.S. retail company, which pre-ordered 600 of the Bubblewash and 250 of the Spinwash machines for the opening day, with more orders guaranteed to follow. Bubblewash complied and delivered these machines to Bolivia.

52. Ropasuave filed a request for provisional measures before the Bolivian courts, and the First Instance Court of the Circuit of La Paz granted that request on June 10, 2013, ordering Bubblewash to refrain from further importing any of its branded washing machines.

53. After obtaining the favorable injunction in Bolivia, Ropasuave requested from the Ecudorian courts an anti-suit injunction to order Bubblewash to refrain from pursuing its trademark claims in Bolivia against the Ecuadorian company. The Tenth Circuit Court of Quito granted the injunction on September 10, 2013. In doing so, the Tenth Circuit Court even went beyond what Ropasuave had asked the court to decide upon by ordering Bubblewash to not pursue any trademark claim in Bolivia nor in any other jurisdiction against the Ecuadorian company of Ropasuave while the proceedings in Bolivia for the Bolivian trademark application were still not final and enforceable. It imposed a penalty of $1,000 per day of delay in which Bubblewash did not comply with the injunction.

54. Bubblewash initially did not comply with the order, and continued delivery of the washing machines to the new Bolivian malls. However, after 2015 it ceased exporting washing machines to Bolivia.

55. In addition, Bubblewash also lost the trademark dispute in Bolivia on the merits. The courts followed the decision of the Ecuadorian Supreme Court and held that the FRESHWASH brand was not sufficiently similar to the BUBBLE- or SPINWASH brands to support a trademark infringement claim against Ropasuave. Since Bolivia already denounced the BIT with the U.S., Bubblewash abandoned the idea of pursuing neither diplomatic nor judicial pathways to secure its rights in that country.

L. Loss Suffered by Bubblewash

56. As a consequence of the Supreme Court decision and the penalty imposed therein, BWAM and BWLS have suffered loss and damage in excess of USD 19,500,000. This sum includes the US$ 6,567,000 in damages and fees that were ordered by the Supreme Court, as well as an estimate of the loss that has been and will be incurred by BWLS and BWAM as a result of the Ecuadorian decisions affecting both the investment in Ecuador

and in Bolivia. Such resulting loss arises from a number of inter-related factors, including the following.

57. First, the damages awarded to Ropasuave and JWD in this case represented over 65% of Bubblewash's annual sales in Ecuador. This has a direct and substantial impact on the ability of the U.S. Bubblewash entities to re-invest in their business and grow their brands as they had intended to do before the Supreme Court decision.

58. Second, the decision of the Ecuadorian Supreme Court and the Tenth Circuit Court of Quito may be followed in other Latin American countries as a matter of government policy. Many countries in Latin America have historically followed each other's lead in the implementation of protectionist trade policies in the area of intellectual property rights, and the decision of the Ecuadorian Supreme Court operates as a *de facto* protectionist device, allowing potentially confusingly similar marks to enter into the market because intellectual property rights holders are unwilling to risk significant, apparently arbitrary, penalties for their good faith use of the legal mechanisms intended to preserve those rights. This view is consistent with views taken by the U.S. government. For example, in 10 of the last 11 years, the USTR in its Special 301 report has placed Latin American countries on the "priority watch list" for their failure to abide by international standards on intellectual property protections.

59. Third, the decision of the Ecuadorian Supreme Court to impose damages for the good-faith use of Ecuador's own trademark opposition proceedings is likely to result in more trademark applications that are similar and confusingly similar to the Bubblewash mark, both in Ecuador and elsewhere in Latin America. Ropasuave and J.W.D. International, through the so-called Shengzen Group, operate all over the Americas.[62] There is therefore a significant risk that the Shengzen Group will seek to achieve the same result in those and other jurisdictions across the region. Other unrelated competitors are also likely to use this opportunity to follow the Shengzen Group's lead and try to enter the various washing machine markets in the region by filing and using similar and confusingly similar trademarks. This is clearly demonstrated by Ropasuave’s action in Bolivia.

60. The Ecuadorian injunction against Bubblewash’s actions in Bolivia ultimately caused it to cease sales in Bolivia. The market in Bolivia was very promising, as Bubblewash was one of the first companies to extensively sell washing machines and potentially leading to wide profit margins there. All these losses are valued at about $7,000,000, which Bubblewash claims to have reimbursed in this investment arbitration as part of its

damages claim.

61. Accordingly, the risk that similar decisions may be issued in other countries makes it much costlier for Bubblewash to invest not only in Ecuador, but in other countries in Latin America.

IV. ECUADOR HAS BREACHED ITS OBLIGATIONS UNDER THE FTA

A. The Objectives of the US-Ecuador FTA

62. The Preamble to the US-Ecuador FTA sets forth the objects and purpose of the FTA, stating that *inter alia* both governments are resolved to *"ensure a predictable commercial framework for business planning and investment;"* and *"foster creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights."*

B. The Investment Protections Provided by the US-Ecuador FTA Include Protection Against Expropriation Without Prompt, Adequate, and Effective Compensation, Treatment in Accordance with Customary International Law, Including Fair and Equitable Treatment, Treatment No Less Favorable Than Accorded by Ecuador to its Own Investors, and Most-Favored-Nation Treatment

63. Article 10.5 of the US-Ecuador FTA requires Ecuador to accord to investments covered by the FTA treatment in accordance with customary international law, including fair and equitable treatment. Article 10.5(2)(a) provides: *""fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."*

64. Article 10.3 of the US-Ecuador FTA requires Ecuador to treat investors and investments covered by the FTA no less favorably than it treats Ecuadorian investors and investments.

65. Article 10.7 of the US-Ecuador FTA requires Ecuador not to subject investments of U.S. investors to direct or indirect expropriation, unless such expropriation is for a public purpose, is carried out in a non-discriminatory manner, on payment of prompt, adequate and effective compensation and in accordance with due process of law and the minimum standards of treatment contained in Article 10.5 of the FfA.

C. Ecuador has Violated its Obligations to BWAM and BWLS Under the FTA

66. It is a basic tenet of public international law that the actions of national courts are attributable to the state. As set out in paragraphs 61-63 above, Ecuador, through its judicial system, has violated its obligations under the FTA to U.S. investors BWLS and BWAM. In particular, the Supreme Court decision was arbitrary and unreasonable, and violated the most basic principles of due process. It was thereby discriminatory to U.S. investors in order to benefit a Ecuadorian entity.

67. Further, the Supreme Court decision involved a flagrant breach of the obligation to accord fair and equitable treatment to foreign investors, namely BWLS and BWAM, and constituted a denial of justice by Ecuador. In order to ensure the protections under the FTA, Ecuador has an obligation to maintain a judicial system that allows the effective exercise of the substantive rights granted to its foreign investors. In the manifest injustice of the Supreme Court decision, Ecuador violated that obligation.

68. BWLS and BWAM have been deprived of the full enjoyment of their investments in Ecuador. In particular, the Supreme Court decision has effectively deprived BWLS and BWAM the ability to oppose confusingly similar trademark applications, which in turn has resulted in the diminution of value of the SPINWASH and BUBBLEWASH trademarks. The Supreme Court decision has been challenged by BWLS and BWAM but has been upheld, and Ecuador has failed to take any step to review that decision, restore the rights of BWLS and BWAM, or compensate BWLS and BWAM for the expropriation of their rights.

69. Bubblewash's losses arising from the Supreme Court are USD 6,567,000. The diminution in value of BWLS and BWAM's trademarks and its business losses in the region has been estimated at no less than USD 14,000,000. BWLS and BWAM are accordingly entitled to compensation to restore them to the position they would have been in had the wrong not occurred.

V. THE PREREQUISITES FOR COMMENCEMENT OF ARBITRATION HAVE BEEN MET

A. The Claimants are U.S. "Investors" in Ecuador under the FTA

70. Article 10.29 of the FTA provides:

"investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual

national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."

71. Article 2.1 of the FTA provides:

"enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association."

72. BWLS and BWAM are "Investors" for the purposes of the FTA. They are enterprises duly constituted under the laws of Delaware, USA and Colorado, USA respectively, and they have made investments in Ecuador.

B. The Claimants' ownership of the SPINWASH trademark and rights to sell, market and distribute BUBBLEWASH and SPINWASH branded products in Ecuador are "Investments" under the FTA

73. Article 10.29 further provides:

"investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."

74. BWLS and BWAM's investments in Ecuador, being intellectual property rights and distribution licenses and agreements with Ecuadorian entities, constitute *"investments"* under the FTA (Article 10.29(f) and (g) in particular).

C. The Parties Have Consented to Arbitration Under the FTA

75. Article 10.17 of the FTA provides,

"1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of'

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article 11 of the New York Convention for an "agreement in writing;" and

(c) Article I of the Inter-American Convention for an "agreement"."

76. Accordingly, Ecuador has consented to arbitration under the FTA.

77. The Claimants hereby consent to arbitration in accordance with the procedures set out in the FTA pursuant to Article 10.18(2)(a).

D. The Parties Have Failed to Reach an Amicable Settlement of the Dispute

78. Article 10.15 of the FTA provides, *"In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation."*

79. Article 10.16(2) provides, *"At least 90 days before submitting any claim to arbitration under this Section, a claimant shall delivery to the respondent a written notice of its intention to submit the claim to arbitration."*

80. Article 10.16(3) provides,

"Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) Under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention."

81. As described above, the events giving rise to this claim took place on or around May 28, 2022, the date on which the Supreme Court issued its decision.

82. Both the United States and Ecuador are parties to the ICSID Convention.

83. The 90 day period stipulated in Article 10.15(2) of the FTA for submission of a claim to arbitration expired on December 29, 2023. Accordingly, BWLS and BWAM are entitled

and hereby submit their dispute with Ecuador to arbitration under the ICSID Convention and governed by the ICSID Rules of Procedures for Arbitration Proceedings.

VI. CONSIDERATIONS ABOUT THE MERITS

A. Expropriation

84. The measures of the judiciary of Ecuador were tantamount to expropriation pursuant to the TPA.

B. Fair and Equitable Treatment

85. The Supreme Court's treatment of the case on appeal shows that it acted recklessly and arbitrarily, amounting to a breach of the fair and equitable treatment requirement pursuant to the TPA. In addition, the injunction preventing Bubblewash to pursue its legitimate trademark claims in Bolivia also breached the fair and equitable treatment provision.

C. National Treatment and MFN

86. While Bubblewash was prevented from its enjoyment of registered trademark rights in Ecuador and indirectly also in Bolivia through the two judgments and orders of Ecuador's courts, while the domestic companies not only in the economic sector of home appliances but also in other sectors did enjoy extensive protection, is both a breach of the national and most favored nation treatment standards pursuant to the TPA.

VII. CONSTITUTION OF THE ARBITRAL TRIBUNAL

87. Article 10.19 of the FTA provides that the arbitral tribunal shall be constituted of three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, to be appointed by agreement of the disputing parties:

88. The Claimants hereby appoint Prof. Bennett as an arbitrator. Prof. Bennett's contact details are as follows:

Prof. John Bennett
Professor of Intellectual Property Law
University of Aberdeen, United Kingdom

VIII. PLACE OF ARBITRATION

89. Article 10.20 of the FTA provides that the disputing parties may agree on the legal

place of the arbitration.

90. The Claimants hereby propose that the arbitration proceedings be held in Washington, D.C.

IX. LANGUAGE OF THE PROCEEDINGS

91. Pursuant to Rule 22 of the ICSID Rules of Procedure for Arbitration Proceedings, the Claimant hereby proposes that the language of the arbitration and all proceedings be English.

X. REQUEST FOR RELIEF

92. The actions and omissions of the Respondent constitute violations of its obligations to BWLS and BWAM under the US-Ecuador FTA, in particular Articles 10.3, 10.5 and 10.7.

93. For the reasons set out above, BWLS and BWAM respectfully request the Arbitral Tribunal to render an award:

- Declaring that Ecuador has violated its obligations under the FTA;
- Ordering Ecuador to pay an amount in excess of USD 19,500,000 in damages;
- Ordering Ecuador to pay interest on any amount awarded to BWLS and BWAM;
- Ordering Ecuador to pay attorney's fees and expenses arising from these proceedings; and
- Granting any further or other relief to BWLS and BWAM that the Arbitral Tribunal shall deem just and proper.

Respectfully submitted,

JGH Law Firm
October 7, 2024