AO 120 (Rev. 3/04)

TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	**REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK**

In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court OREGON on the following ☐ Patents or X Trademarks:

DOCKET NO.	DATE FILED	U.S. DISTRICT COURT
1:08-cv-3087 CL	08/15/08	OREGON

PLAINTIFF	DEFENDANT
Harry and David, an Oregon corporation	The Fruit Company Inc., an Oregon corporation

PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 See complaint		
2 7 TMs pg. 3		
3		
4		
5		

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY ☐ Amendment ☐ Answer ☐ Cross Bill ☐ Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1		
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4		
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK	(BY) DEPUTY CLERK	DATE
Sheryl S. McConnell		08/18/08

Copy 1—Upon initiation of action, mail this copy to Director **Copy 3—Upon termination of action, mail this copy to Director**
Copy 2—Upon filing document adding patent(s), mail this copy to Director **Copy 4—Case file copy**

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

CV '08 - 3087 - Ch

HARRY AND DAVID, an Oregon corporation,

Plaintiff,

v.

THE FRUIT COMPANY, INC., an Oregon corporation,

Defendant.

Civil No.

COMPLAINT

(Trademark Infringement, Unfair Competition, Trademark Dilution)

22618

Plaintiff Harry and David ("Plaintiff" or "Harry and David"), by way of its Complaint against Defendant The Fruit Company, Inc. ("Defendant" or "The Fruit Company"), states and alleges as follows:

THE PARTIES

1. Plaintiff Harry and David is a corporation duly organized and existing under the laws of the State of Oregon, with its principal place of business at 2500 South Pacific Highway, Medford, Oregon.

2. Defendant The Fruit Company is an Oregon corporation with its principal place of business at 2900 Van Horn Drive, Hood River, OR 97031. Defendant operates an online retail website at the URL http://www.thefruitcompany.com/.

JURISDICTION AND VENUE

3. This action arises under the Lanham Act, 15 U.S.C. §§ 1114 and 1125, and Oregon state law. This Court has subject matter jurisdiction under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. This Court has supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(a).

4. Defendant is subject to personal jurisdiction in the state of Oregon because defendant resides in this district.

5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims asserted occurred in this district. Venue is also proper in this district under 28 U.S.C. § 1391(b)(1) and (c) because defendant may be found in this district for purposes of personal jurisdiction as alleged above.

BACKGROUND

6. Plaintiff Harry and David is a premier gourmet food and fruit gifts purveyor and one of the nation's oldest catalog mail order companies. Plaintiff's brand name and registered trademarks are widely recognized to the consuming public of the United States.

7. Plaintiff owns the registered trademarks, HARRY AND DAVID, HARRY & DAVID, and FRUIT-OF-THE-MONTH CLUB (collectively, "HARRY AND DAVID marks"). Plaintiff has seven federal registrations for its HARRY AND DAVID marks in connection with goods and services in several international classes. Those registration numbers are: No. 3262655 (registration date July 10, 2007), No. 1529034 (registration date March 7, 1989), No. 1490371 (registration date May 31, 1988), No. 0793717 (registration date August 3, 1965), No. 0400009 (registration date February 9, 1943), No. 0905212 (registration date December 29, 1970), and No. 1159530 (registration date June 30, 1981). Plaintiff is also the owner of Oregon Trademark Registration No. T9972 and Oregon Trademark Registration No. T9612, which cover the HARRY AND DAVID marks.

8. Plaintiff's HARRY AND DAVID marks are incontestable, with the exception of No. 3262655.

9. Plaintiff's HARRY AND DAVID marks have secondary meaning.

10. Plaintiff's HARRY AND DAVID marks are famous marks that transcend the specific classes of goods and services for which plaintiff has registered its HARRY AND DAVID marks.

11. Internet users typically use a search engine to locate websites relevant to an inquiry by entering search terms into a search field. For example, customers and potential customers looking for plaintiff's Harry and David products may well simply type Harry and

David, Harry & David, Fruit-of-the-Month Club, or some variation thereof, into search engines such as Google (www.google.com), MSN (www.msn.com), or Yahoo (www.yahoo.com).

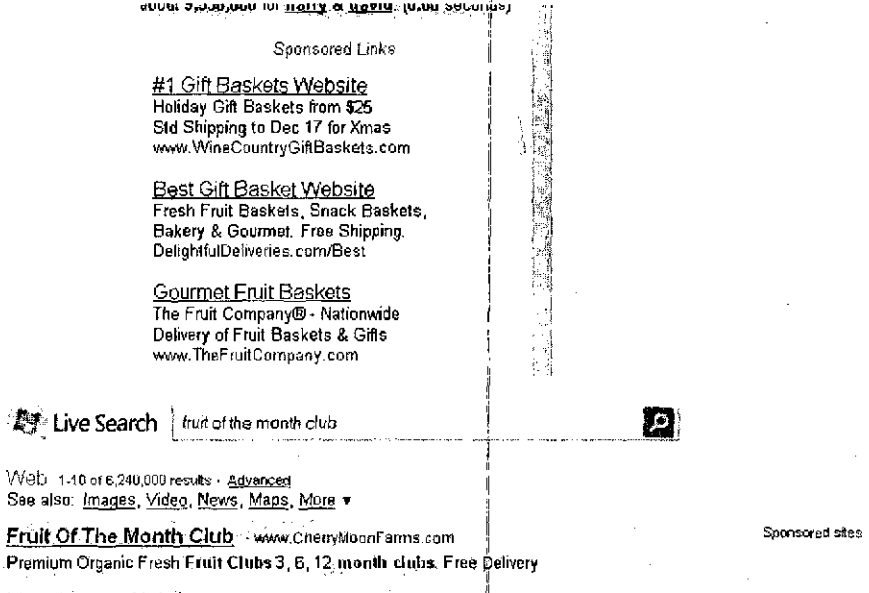
12. The search engine then uses the word or phrase to find websites that have terms that are the same or similar to the search terms. Internet search engines use proprietary algorithms to identify and sort relevant websites in what is often referred to as a "natural" search.

13. Internet search engines also engage in advertising sales in which the search engines sell search keywords—or keyword triggers—to advertisers. An internet retail business can purchase a keyword trigger that causes an advertisement for the business to appear when a user types in the keyword that the business purchased. The advertisements then appear as sponsored links directly above or to the side of the natural search results. In this way, purchasing keyword triggers allows retail sellers to target potential customers with certain interests by causing the sellers' advertisements to appear in response to search terms typed into the search engine that match keyword triggers purchased by advertiser.

14. Because clicking on a sponsored link results in a visit to the advertiser's retail site and a potential sale for the advertiser, the merchant advertisers pay the search engine for each time an internet user clicks on their sponsored links. The per-click payment scheme is payment for a referral or a "lead" for prospective customer.

15. The internet search engines sell keyword triggers without distinguishing between trademarked and non-trademarked terms. The search engines' policy regarding the purchase of keyword triggers by an advertiser mandates that the advertiser's website must be relevant to the term purchased. The determination of what is relevant is an arbitrary and subjective judgment by the search engine. Search engines sell plaintiff's registered and famous marks, including its HARRY AND DAVID marks, as keyword triggers.

16. Defendant purchased plaintiff's trademarked terms HARRY AND DAVID, HARRY & DAVID, and FRUIT-OF-THE-MONTH CLUB as keyword triggers from one or more search engine providers for the purpose of directing potential customers to defendant's retail site. On numerous dates—including, but not limited to, December 15, 2007; December 19, 2007; December 21, 2007; March 18, 2008; April 4, 2008; April 28, 2008; May 7, 2008; July 18, 2008; July 21, 2008; July 23, 2008; and July 28, 2008—when a user typed in Harry & David, Harry and David, Fruit-of-the-Month Club, or some variation thereof (including misspellings, non-hyphenated terms, and typographical errors like Hary and David or Harry nad David) as search terms in Google, MSN, and Yahoo, advertisements for defendant's on-line retail business appeared as sponsored links. Examples of such advertisements entitled "Gourmet Fruit Baskets," "Monthly Fruit Club," and "Fruit Club Month" are shown below:



SPONSOR RESULTS

Fruit-of-the-Month Club®
Harry and David Legendary Fruit. Send a Gift that Lasts All Year.
www.HarryandDavid.com

Fruit Club Month
Beautifully Packaged & Displayed World's Finest Fresh Fruit.
www.TheFruitCompany.com

Fruit Of The Month Club
Search, Shop and Save Fruit Of The Month Club.
shopping.yahoo.com

17. When a user clicks on the titles of defendant's advertisements, the user is taken to defendant's retail website for The Fruit Company.

18. Defendant's retail website offers the web user the opportunity to purchase food products, fruit baskets, gift baskets, or related products from defendant, as shown in the following screen shot:

19. Defendant does not offer for sale any of plaintiff's Harry and David products. In fact, defendant does not sell any of plaintiff's products. Instead, defendant uses plaintiff's HARRY AND DAVID marks to generate traffic to defendant's competing retail website from individuals who were searching for Harry and David products or the Harry and David website, with the likely intent to purchase Harry and David products.

20. Defendant's use of plaintiff's HARRY AND DAVID marks as keyword triggers is a use in commerce.

21. Defendant's use of plaintiff's HARRY AND DAVID marks as keyword triggers is likely to and does cause customer confusion. Customers searching for Harry and David products are directed to defendant's retail website, which is neither affiliated with nor authorized by plaintiff to use its HARRY AND DAVID marks. Users may assume that defendant's retail website is authorized to use plaintiff's HARRY AND DAVID marks, or is affiliated with and may offer Harry and David products. Furthermore, defendant offers a competitive line of food products, fruit products, gift baskets, and related mail-order food products for sale. Consumers may assume that defendant's products have the same qualities and attributes as plaintiff's food and fruit products sold under the HARRY AND DAVID marks and/or are sponsored or licensed by, or affiliated with, plaintiff.

22. Even customers who, upon arriving at defendant's website, realize that they are not at a website that sells plaintiff's Harry and David products have been initially confused and deceived into visiting the defendant's website, where they may purchase defendant's competitive products.

23. Defendant seeks and receives a direct material benefit from the use of plaintiff's marks as keyword triggers, such as receiving more visits from customers for its products, which are in direct competition with plaintiff's products.

FIRST CLAIM FOR RELIEF

(Federal Trademark Infringement—15 U.S.C. § 1114(1)(a))

24. Plaintiff realleges paragraphs 1 through 23.

25. Defendant's use of plaintiff's HARRY AND DAVID marks as keyword triggers is a use in commerce of plaintiff's registered Harry and David marks that is likely to cause customer confusion or mistake, or to deceive.

26. Defendant is thus liable under 15 U.S.C. § 1114(1)(a) for infringement of plaintiff's registered HARRY AND DAVID trademarks.

27. Pursuant to 15 U.S.C. § 1117(a), plaintiff is entitled to recover defendant's profits and the costs of the action.

28. Because defendant's actions in using plaintiff's registered HARRY AND DAVID marks as keyword triggers was intentional and in bad faith, the court should enter an award of enhanced damages under 15 U.S.C. § 1117(a)(3) in an amount up to three times the actual damages.

29. This case is an exceptional case under 15 U.S.C. § 1117(a)(3), and plaintiff should be awarded its reasonable attorney fees.

30. In addition, because plaintiff's remedies under 15 U.S.C. § 1117(a), while necessary, are not sufficient to fully protect plaintiff's continuing interest in preserving its marks against future infringements by defendant, plaintiff is entitled to an injunction against defendant's use in the future of plaintiff's registered HARRY AND DAVID marks, or any colorable imitation or confusingly similar variation of plaintiff's HARRY AND DAVID marks, as keyword triggers for any advertisement for the sale of any product other than genuine Harry and David products. Plaintiff is also entitled to an injunction prohibiting any other infringing use such as in or as the title for any advertisement for the sale of any product other than genuine Harry and David products.

SECOND CLAIM FOR RELIEF

(Federal Unfair Competition—15 U.S.C. § 1125(a))

31. Plaintiff realleges paragraphs 1 through 23.

32. Defendant's use of plaintiff's HARRY AND DAVID marks as keyword triggers is a use in commerce in connection with defendant's goods that is likely to cause customer confusion or mistake, or to deceive as to the affiliation, connection, association, sponsorship, or approval of defendant's goods by plaintiff.

33. Defendant is thus liable under 15 U.S.C. § 1125(a) for unfair competition by its uses of plaintiff's registered HARRY AND DAVID trademarks.

34. Pursuant to 15 U.S.C. § 1117(a), plaintiff is entitled to recover defendant's profits and the costs of the action.

35. Because defendant's actions in using plaintiff's registered HARRY AND DAVID marks as keyword triggers was intentional and in bad faith, the court should enter an award of enhanced damages under 15 U.S.C. § 1117(a)(3) in an amount up to three times the actual damages.

36. This case is an exceptional case under 15 U.S.C. § 1117(a)(3) and plaintiff should be awarded its reasonable attorney fees.

37. In addition, because plaintiff's remedies under 15 U.S.C. § 1117(a), while necessary, are not sufficient to fully protect plaintiff's continuing interest in preserving its mark against future acts of unfair competition by defendant, plaintiff is entitled to an injunction against defendant's use in the future of plaintiff's registered HARRY AND DAVID marks, or any colorable imitation or confusingly similar variation of plaintiff's HARRY AND DAVID marks, as keyword triggers for any advertisement for the sale of any product other than genuine Harry and David products. Plaintiff is also entitled to an injunction prohibiting any other infringing use such as in or as the title for any advertisement for the sale of any product other than genuine Harry and David products.

THIRD CLAIM FOR RELIEF

(Federal Trademark Dilution—15 U.S.C. § 1125(c))

38. Plaintiff realleges paragraphs 1 through 23.

39. Plaintiff's HARRY AND DAVID marks are famous marks under the common law and under the factors described for protection against dilution in 15 U.S.C. § 1125(c)(2)(A) and transcend the specific classes of goods and services for which plaintiff has registered its HARRY AND DAVID marks.

40. Defendant's use of plaintiff's HARRY AND DAVID marks as keyword triggers is a use in commerce of plaintiff's registered and famous HARRY AND DAVID marks.

41. Defendant's use of plaintiff's HARRY AND DAVID marks began after plaintiff's HARRY AND DAVID marks became famous.

42. Defendant's use of plaintiff's HARRY AND DAVID marks is likely to cause dilution by blurring of Harry and David's famous HARRY AND DAVID marks under 15 U.S.C. § 1125(c)(2)(B). Defendant is using plaintiff's exact or virtually the same marks; plaintiff's marks have acquired substantial distinctiveness since their first use in commerce; plaintiff exclusively uses its HARRY AND DAVID marks on Harry and David products; the HARRY AND DAVID marks are highly recognized; defendant intended to create an association with plaintiff's marks in order to divert business to itself; and there is no actual association between defendant and plaintiff.

43. Pursuant to 15 U.S.C. § 1125(c)(1) and (5), plaintiff is entitled to an injunction against defendant's use in the future of plaintiff's registered HARRY AND DAVID marks, or any colorable imitation or confusingly similar variation of plaintiff's HARRY AND DAVID marks, as keyword triggers for any advertisement for the sale of any product other than genuine

Harry and David products. Plaintiff is also entitled to an injunction prohibiting any other use the dilutes plaintiff's HARRY AND DAVID marks such as in or as the title for any advertisement for the sale of any product other than genuine Harry and David products.

44. In addition, because, on information and belief, defendant first used plaintiff's HARRY AND DAVID marks in commerce after October 6, 2006 and because defendant willfully intended to trade on the recognition of plaintiff's famous HARRY AND DAVID marks, pursuant to 15 U.S.C. § 1125(5)(A) and (B)(i), plaintiff is also entitled to the remedies set forth in 15 U.S.C. § 1117(a).

45. Under 15 U.S.C. § 1117(a), plaintiff is entitled to recover defendant's profits and the costs of the action.

46. Because defendant's actions in using plaintiff's registered HARRY AND DAVID marks as keyword triggers was intentional and in bad faith, the court should enter an award of enhanced damages under 15 U.S.C. § 1117(a)(3) in an amount up to three times the actual damages.

47. This case is an exceptional case under 15 U.S.C. § 1117(a)(3) and plaintiff should be awarded its reasonable attorney fees.

FOURTH CLAIM FOR RELIEF

(State Trademark Infringement—ORS 647.095)

48. Plaintiff realleges paragraphs 1 through 23.

49. Defendant's unauthorized use in commerce of plaintiff's HARRY AND DAVID marks is likely to confuse and deceive consumers, or cause consumers to believe mistakenly that defendant and/or its products are affiliated, connected, or associated with plaintiff or approved by plaintiff.

50. Defendant is thus liable under ORS 647.095 for infringement of plaintiff's registered HARRY AND DAVID marks.

51. Pursuant to ORS 647.105, plaintiff is entitled to recover the greater of $10,000 or the sum of: (1) an amount not to exceed three times the profits derived by defendant from the wrongful use of plaintiff's HARRY AND DAVID marks; and (2) an amount not to exceed three times all damages suffered by plaintiff because of defendant's wrongful use of plaintiff's HARRY AND DAVID marks.

FIFTH CLAIM FOR RELIEF

(State Trademark Dilution—ORS 647.107)

52. Plaintiff realleges paragraphs 1 through 23.

53. Defendant's use of plaintiff's HARRY AND DAVID marks is likely to cause injury to plaintiff's business reputation and/or dilution of the distinctive quality of plaintiff's HARRY AND DAVID marks. Defendant is using plaintiff's exact or virtually the same marks; plaintiff's marks are famous and have acquired substantial distinctiveness since their first use in commerce; plaintiff exclusively uses its HARRY AND DAVID marks on Harry and David products; the HARRY AND DAVID marks are highly recognized; defendant intended to create an association with plaintiff's marks in order to divert business to itself; and there is no actual association between defendant and plaintiff.

54. Pursuant to ORS 647.107, plaintiff is entitled to an injunction against defendant's use in the future of plaintiff's registered HARRY AND DAVID marks, or any colorable imitation or confusingly similar variation of plaintiff's HARRY AND DAVID marks, as keyword triggers for any advertisement for the sale of any product other than genuine Harry and David products. Plaintiff is also entitled to an injunction prohibiting any other use that dilutes

the distinctive quality of plaintiff's HARRY AND DAVID marks such as in or as the title for any advertisement for the sale of any product other than genuine Harry and David products.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment as follows:

1. Awarding plaintiff up to three times defendant's profits and up to three times the amount found as actual damages for defendant's infringement of plaintiff's registered Harry and David marks, unfair competition, and willful dilution by blurring of plaintiff's famous marks, as stated herein.

2. Entering an injunction against (1) defendant's use in the future of plaintiff's registered HARRY AND DAVID marks, or any colorable imitation or confusingly similar variation of plaintiff's HARRY AND DAVID marks, as keyword triggers for any advertisement for the sale of any product other than genuine Harry and David products, and (2) any other infringing use or use that dilutes the distinctive quality of plaintiff's HARRY AND DAVID marks such as in or as the title for any advertisement for the sale of any product other than genuine Harry and David products.

3. Awarding plaintiff its costs of the action and its reasonable attorney fees; and

4. Awarding plaintiff such other and further relief as the court deems equitable, just, and appropriate.

DATED: August 15, 2008.

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