

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
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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 District of Oregon on the following Patents or Trademarks:

DOCKET NO. CV 08-3089 CL	DATE FILED 8/15/08	U.S. DISTRICT COURT Oregon
PLAINTIFF Harry and David		DEFENDANT FTD Group, Inc., FTD, Inc., Florists' Transworld Delivery, Inc., and FTD. Com, Inc.
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 see copy of complaint		
2 <i>3 TMs pg. 3</i>		
3		
4		
5		

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

DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK HOLDER OF PATENT OR TRADEMARK
1	
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK Sheryl McConnell	(BY) DEPUTY CLERK	DATE 8/18/08
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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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Harry and David

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

HARRY AND DAVID, an Oregon
corporation,

Plaintiff,

v.

FTD GROUP, INC., a Delaware corporation;
FTD INC., a Delaware corporation;
FLORISTS' TRANSWORLD DELIVERY,
INC., a Michigan corporation; and FTD.COM,
INC., a Delaware corporation.

Defendants.

Civil No. **CV 08-3089** *Ch...*
COMPLAINT

(Trademark Infringement, False
Advertising, Unfair Competition,
Trademark Dilution)

1 - COMPLAINT

Plaintiff Harry and David ("Plaintiff" or "Harry and David"), by way of its Complaint against Defendant FTD Group, Inc. ("FTD Group"); FTD, Inc. ("FTD, Inc."); Florists' Transworld Delivery, Inc. ("FTD"); and FTD.Com, Inc. ("FTD.Com") (collectively, "Defendants"), 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 FTD Group is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 3113 Woodcreek Drive, Downers Grove, Illinois 60515. Defendant FTD, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 3113 Woodcreek Drive, Downers Grove, Illinois 60515. Defendant FTD is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at 3113 Woodcreek Drive, Downers Grove, Illinois 60515. Defendant FTD.Com is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 3113 Woodcreek Drive, Downers Grove, Illinois 60515. Defendants operate an on-line retail website at the URL www.ftd.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).

2 - COMPLAINT

4. Defendants are subject to personal jurisdiction in the state of Oregon because defendants direct their unlawful conduct into this district and their unlawful conduct causes injury within this district. Defendants have purposefully directed their unlawful conduct to the state of Oregon by advertising and soliciting business within this district through their unlawful use of plaintiff's marks as alleged below. Defendants also direct their business activities to the state of Oregon through the use of a fully interactive internet website, solicit business from web users within this district, and sell products to residents of 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 defendants 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, FRUIT-OF-THE-MONTH CLUB, and TOWER OF TREATS (collectively, "HARRY AND DAVID marks"). Plaintiff has eight 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), No. 1159530 (registration date June 30, 1981), and No. 0837603

(registration date October 24, 1967). Plaintiff is also the owner of Oregon Trademark Registration No. T9972 and Oregon Trademark Registration No. T9612, which cover the HARRY AND DAVID marks with the exception of TOWER OF TREATS.

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.

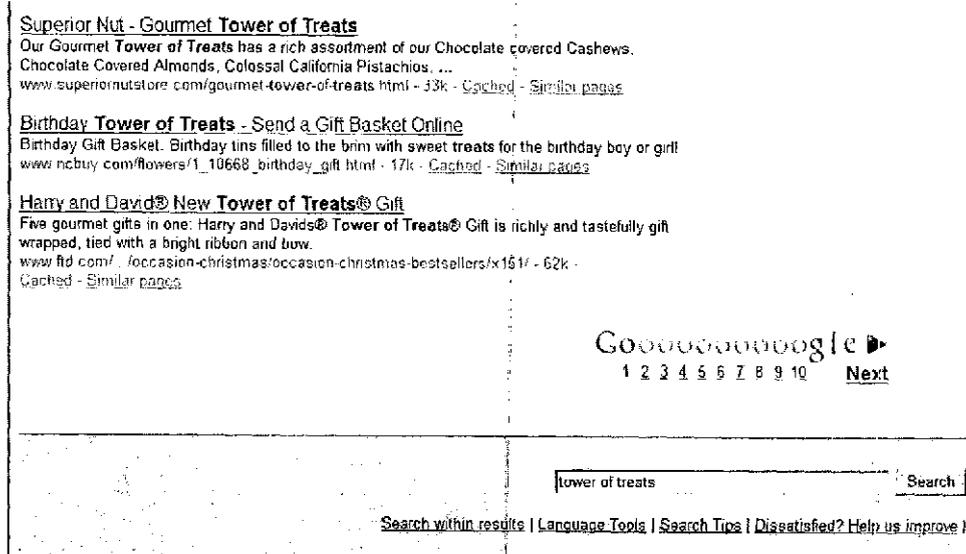
10. Plaintiff's HARRY AND DAVID marks are famous marks that transcend the specific classes of goods and services for which plaintiff has registered its HARRY AND DAVID marks.

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, Tower of Treats, or some variation thereof, into search engines such as Google (www.google.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 such as Google use proprietary algorithms to identify and sort relevant websites in what is often referred to as a "natural" search.

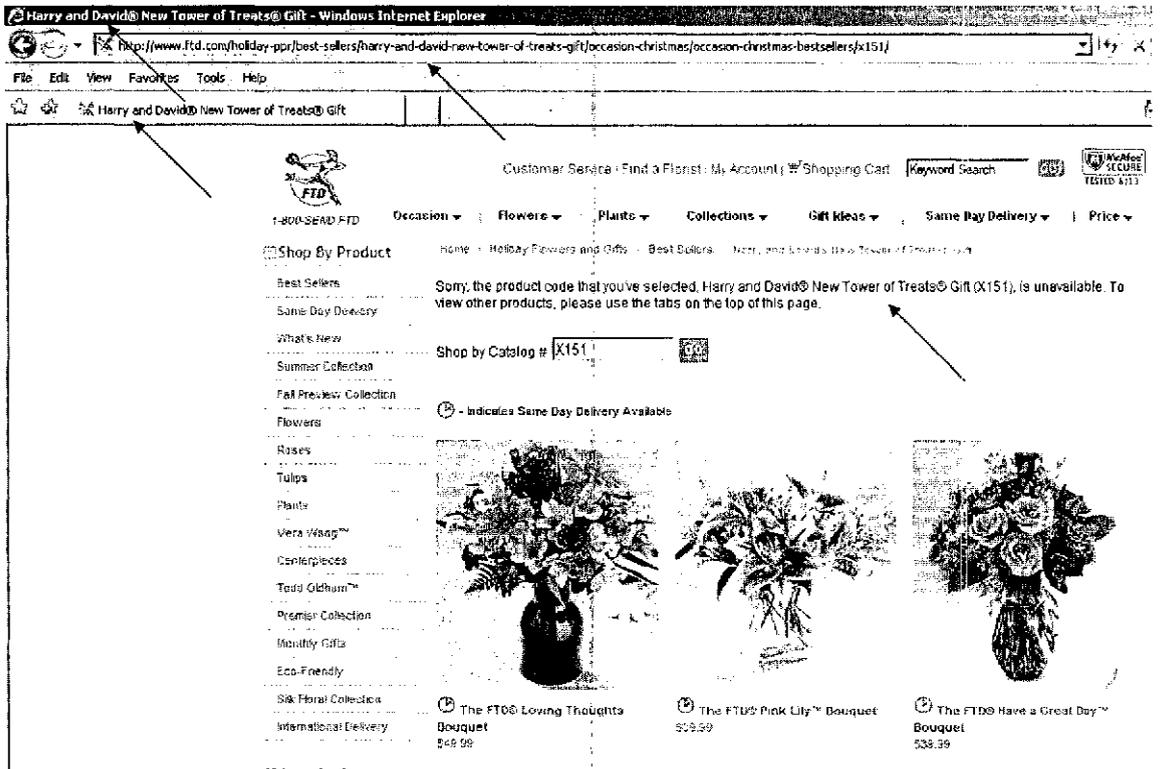
13. Defendants use the HARRY AND DAVID marks as metatags, page titles, domain or subdomain names (i.e., URL or URL extensions), and/or source coding for their retail website. Metatags are codes in the Internet HTML computer language intended to describe the content of a website. Metatags are used by Internet search engines to locate websites for Internet users looking for specific pages or products. By using the HARRY AND DAVID marks as metatags,

page titles, domain or subdomain names, and/or source coding for their retail website, defendants increase the likelihood that an Internet user searching for Harry and David's website or Harry and David products will find defendants' own website featured prominently on the list of search results, as reflected below:



14. As indicated in the immediately preceding screen shot, the link to the page entitled "Harry and David® New Tower of Treats® Gift" appears as the tenth website on the first page of the Google search results. Both the page title and the text that immediately follows the page title use the HARRY AND DAVID marks.

15. When a user clicks on the link entitled "Harry and David® New Tower of Treats® Gift," the user is taken to defendants' retail website. As reflected in the screen shot below, the HARRY AND DAVID marks appear in the "blue bar" title to the website, the URL, the descriptive tab on Internet Explorer, and the published page viewable to the user:



16. Defendants' website also displays the following statement: "Sorry, the product code that you've selected, Harry and David® New Tower of Treats® Gift (X151), is unavailable. To view other products, please use the tabs on the top of this page." This text is designed to mislead the potential purchaser into believing that defendants offer Harry and David products for sale, including any Tower of Treats product, but are temporarily out of stock. Although defendants have in past offered certain Harry and David products for sale for limited periods of time, those programs ended. Thus, defendants do not offer any Harry and David products for sale. In addition, having enticed potential purchasers onto their site by promising Harry and David products, defendants then instruct the user on how to find defendants' own products offered for sale on defendants' website.

6 - COMPLAINT

17. Defendants' use of the HARRY AND DAVID marks is also reflected in the source coding for defendants' website, as indicated in the highlighted text in the screen shot below:

```
//-->
</script>
<title>Harry and David®; New Tower of Treats®; Gift</title>
<META NAME="description" CONTENT="Five gourmet gifts in one: Harry and David's®; Tower of Treats®; Gift is richly
<META NAME="keywords" CONTENT="fruit,fruit,fruit,fruit,apple,apple,apple,apples,apples,orange,orange,orange,oranges
<link rel="stylesheet" type="text/css" href="/350/ftd.css?markcode=350&design2007=1&design_apr2008=1&v=20080422">
<!-- stylesheet and javascript for tabbed content on product page -->
<link rel="stylesheet" type="text/css" href="/350/tabcontent_prod.css">
<script type="text/javascript" src="/350/tabcontent-prod.js"></script>
```

18. Internet search engines such as Google 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.

19. 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.

20. 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.

21. Defendants purchased plaintiff's trademarked terms HARRY AND DAVID, HARRY & DAVID, FRUIT-OF-THE-MONTH CLUB, and TOWER OF TREATS as keyword triggers from one or more search engine providers for the purpose of directing potential customers to defendant's retail site. On various dates—including December 27, 2007; May 16, 2008; July 18, 2008; July 19, 2008; July 25, 2008; and July 28, 2008—when a user typed in Harry & David, Harry and David, Fruit-of-the-Month Club, Tower of Treats, 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, an advertisement for defendants' on-line retail business appeared as a sponsored link. Examples of such advertisements entitled "FTD® Gourmet Gift Baskets" and "FTD® Official Site" are shown below:

Sponsored Links

#1 Gift Baskets Website
Handmade Gift Baskets from \$25
20% Off / Free S&H on select gifts!
www.WineCountryGiftBaskets.com

Gourmet Gift Baskets
Top Rated Gift Baskets Site
Award-Winning Products & Service.
GourmetGiftBaskets.com

FTD® Gourmet Gift Baskets
Gourmet Food Gift Baskets
Flowers From \$19.99 - Save Online
www.FTD.com

Google

fruit of the month club

Search

[Advanced Search](#)
[Preferences](#)

Web

Results 1 - 10 of about 15.

Fruit-of-the-Month Club®

www.HarryandDavid.com Harry and David Legendary Fruit. Send a Gift that Lasts All Year.

Sponsored Links

FTD® Official Site

www.FTD.com Monthly Fruit Basket Delivery Satisfaction Guaranteed. Order Now!

22. When a user clicks on the titles of defendants' advertisements, the user is taken to the FTD retail website.

23. Defendants' retail website offers the web user the opportunity to purchase food products, fruit baskets, gift baskets, and related products from defendants, as shown in the following screen shots:



Customer Service | My Account | Shopping Cart

Keyword Search



1-800-SENO-FTD

Occasion | Flowers | Plants | Collections | Gift Ideas | Same Day Delivery | Price

Shop By Product

Shop By Occasion

More Gift Ideas

Best Sellers

Babies

Bath & Beauty / Spa

Candy / Snacks / Nuts

Chocolate Favorites

Calculators

Cookies / Cakes

For Him

Fresh Fruit

Gift Baskets

Home & Garden

Jewelry

Personalized Gifts

Pet Gifts

Teedy Bites, Funny Friends

Wine & Spirits

Showing 1 - 6 of 6 Items (1 - 6)

Gourmet Gift Baskets

Delight your friends and family with our spectacular selection of Gift Baskets. From the best gourmet food and orchard items, fresh to refrigerating desserts, discover great gifts for all your occasions!

Sort by: popularity | lowest price | highest price Indicates Same Day Delivery View All » Pages 1 | 2 | 3 | 4



Pleasure Perfection Summer Gourmet Basket
\$34.99



Pam's in the Park Summer Gourmet Basket
\$56.99



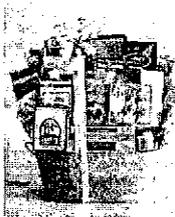
Brighten Your Day Bed Tray
\$52.99



Cherry Blossom Floral Gourmet Tower
\$59.99



Farms of Ireland Cheese Tray
\$30.99



Superstar Celebrations
\$99.99



Shop By Product

- Best Sellers
- Same Day Delivery
- What's New
- Summer Collection
- Dresses
- Recess
- Tulips
- Plants
- Concepts.com
- Local Charm™
- Flower Collection
- View more»
- Monthly Gifts
- Non-Friendly
- Get Floral Collection
- International Delivery



Monthly Fruit Gift Plan 5814

Check availability

1. Select your product option

- \$89.98 - 3-Month Fruit Plan
- \$129.98 - 6-Month Fruit Plan
- \$279.99 - 12-Months of Fruit

2. Where are you sending it?

ZIP code: (Required)
 Need help finding a ZIP code - click here >

Delivery is available by FedEx® (US) or UPS® in most areas

3. When should it arrive?



Not what you are looking for? < Back to Home Page

Shop by Occasion

- Make Gift Ideas
- Shop by Price
- International Delivery

Details | [Unsubscribe Policy](#) | [Subscription Policy](#)

The Ultimate Monthly Fruit Plan features only the finest fresh fruits available, hand-picked at the peak of their season. The Monthly Fruit Gifts are memorable reminders of your thoughtfulness all year through. You, friends, family, and colleagues will receive 3, 6 or 12 consecutive monthly shipments. You choose the plan. A letter will be sent announcing the arrival of your gift plan. The fruit will be delivered the third week of each month.

Monthly offerings include:

- January = Fuji & Empire Apple Combo-5 lb
- February = Navel Orange & Tangerines Citrus Combo-5 lb
- March = Long Stem Strawberries-3 lb
- April = Pineapple-7 lb
- May = Papaya & Mango Combo-4 lb
- June = Bing Cherries-3 lb
- July = White & Yellow Nectarine Combo-4 lb
- August = Roca & Dixie Plum Combo-3.5 lb

24. In fact, defendants do not offer any Harry and David products for sale. Instead, defendants use plaintiff's HARRY AND DAVID marks to generate traffic to defendants' competing FTD 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.

25. Defendants' use of plaintiff's HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers is a use in commerce.

26. Defendants' use of plaintiff's HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers is likely to and does cause customer confusion. Customers searching for Harry and David products are directed to defendants' FTD retail website, which is neither affiliated with nor authorized by plaintiff to use its HARRY AND DAVID marks. Users may assume that defendants' retail website is authorized to use plaintiff's HARRY AND DAVID marks, or is affiliated with and may offer Harry and David products. Furthermore, defendants offer a competitive line of food products, fruit products, gift baskets, and related mail-order food products for sale. Consumers may assume that defendants' 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.

27. Even if consumers realize after arriving at defendants' website that they are not at a website that sells plaintiff's Harry and David products, defendants' use of plaintiff's HARRY AND DAVID marks captures consumers' initial attention and diverts them to defendants' site, where they may purchase defendants' competitive products.

28. Defendants seek and receive a direct material benefit from their use of plaintiff's marks as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers, such as receiving more visits from customers for their products, which are in direct competition with plaintiff's products.

FIRST CLAIM FOR RELIEF

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

29. Plaintiff recites paragraphs 1 through 28.

30. Defendants' use of plaintiff's HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers is a use in commerce of plaintiff's registered Harry and David marks in connection with defendants' goods that is likely to cause purchasers and potential purchasers confusion or mistake, or to deceive purchasers and potential purchasers.

31. Even if consumers are not ultimately confused or deceived as to the source of defendants' goods, defendants' use of plaintiff's HARRY AND DAVID marks is calculated to capture the initial attention of consumers and divert them to defendants' website, where they may purchase defendants' products.

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

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

34. Because defendants' use of plaintiff's registered HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or 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.

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

36. 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 defendants, plaintiff is entitled to an injunction against defendants' 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 metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers, unless defendants are authorized to, and do, offer genuine Harry and David products for sale. Plaintiff is also entitled to an injunction prohibiting any other infringing use by defendants such as in or as the title of any website or any advertisement for the sale of any product other than genuine Harry and David products.

SECOND CLAIM FOR RELIEF

(Unfair Competition/Trademark—15 U.S.C. § 1125(a)(1)(A))

37. Plaintiff realleges paragraphs 1 through 28.
38. Defendants' uses of plaintiff's HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers is a use in commerce that is likely to cause confusion or mistake, or to deceive as to the affiliation, connection, or association of defendants with plaintiff, or as to the origin, sponsorship, or approval of defendants' goods by plaintiff.
39. Even if customers are not ultimately confused or deceived as to the source of defendants' goods, defendants' use of plaintiff's HARRY AND DAVID marks is calculated to capture the initial attention of consumers and divert them to defendants' website, where they may purchase defendants' products.
40. Defendants are thus liable under 15 U.S.C. § 1125(a)(1)(A) for unfair competition by its uses of plaintiff's registered HARRY AND DAVID trademarks.
41. Pursuant to 15 U.S.C. § 1117(a), plaintiff is entitled to recover defendants' profits and the costs of the action.

42. Because defendants' use of plaintiff's registered HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or 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.

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

44. 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 defendants, plaintiff is entitled to an injunction against defendants' 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 metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers, unless defendants are authorized to, and do, offer genuine Harry and David products for sale. Plaintiff is also entitled to an injunction prohibiting any other infringing use by defendants such as in or as the title of any website or any advertisement for the sale of any product other than genuine Harry and David products.

THIRD CLAIM FOR RELIEF

(Unfair Competition/False Advertising—15 U.S.C. § 1125(a)(1)(B))

45. Plaintiff realleges paragraphs 1 through 28.

46. Defendants' statement on its website "Sorry, the product code that you've selected, Harry and David® New Tower of Treats® Gift (X151), is unavailable. To view other products, please use the tabs on the top of this page" is a false or misleading statement of fact in a commercial advertisement about defendants' own or another's product.

47. Defendants' statement actually deceived or has the tendency to deceive a substantial segment of defendants' audience.

48. Defendants' deception is material, in that it is likely to influence a consumer's purchasing decision.

49. Defendants caused the false or misleading statement to enter interstate commerce.

50. Plaintiff has been or is likely to be injured as a result of the false or misleading statement, either by diversion of sales from itself to defendants or a lessening of the goodwill associated with plaintiff's products.

51. Defendants are thus liable under 15 U.S.C. § 1125(a)(1)(B) for false or misleading advertising.

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

53. Because defendants' use of plaintiff's registered HARRY AND DAVID marks in its advertising 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.

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

55. 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 false or misleading advertising by defendants, plaintiff is entitled to an injunction against defendants' 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, in any advertisement for the sale of any product other than genuine Harry and David products.

FOURTH CLAIM FOR RELIEF

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

56. Plaintiff realleges paragraphs 1 through 28.

57. 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.

58. Defendants' use of plaintiff's HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers is a use in commerce of plaintiff's registered and famous HARRY AND DAVID marks.

59. Defendants' use of plaintiff's HARRY AND DAVID marks began after plaintiff's HARRY AND DAVID marks became famous.

60. Defendants' 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). Defendants are 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; defendants intended to create an association with plaintiff's marks in order to divert business to themselves; and there is no actual association between defendants and plaintiff.

61. Pursuant to 15 U.S.C. § 1125(c)(1) and (5), plaintiff is entitled to an injunction against defendants' 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 metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers, unless defendants are authorized to, and do, offer genuine Harry and David products for sale. Plaintiff is also entitled to an injunction prohibiting any other infringing use by defendants such as in or as the title of any website or any advertisement for the sale of any product other than genuine Harry and David products.

62. In addition, because, on information and belief, defendants first used plaintiff's HARRY AND DAVID marks in commerce after October 6, 2006 and because defendants 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).

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

64. Because defendants' use of plaintiff's registered HARRY AND DAVID marks as metatags, page titles, domain or subdomain names, source coding, and/or 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.

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

FIFTH CLAIM FOR RELIEF

(State Trademark Infringement—ORS 647.095)

66. Plaintiff realleges paragraphs 1 through 28.

67. Defendants' 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 defendants and/or their products are affiliated, connected, or associated with plaintiff or approved by plaintiff.

68. Defendants are thus liable under ORS 647.095 for infringement of plaintiff's registered HARRY AND DAVID marks.

69. 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 the defendants 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 defendants' wrongful use of plaintiff's HARRY AND DAVID marks.

SIXTH CLAIM FOR RELIEF

(State Trademark Dilution—ORS 647.107)

70. Plaintiff realleges paragraphs 1 through 28.

71. Defendants' 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. Defendants are 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; defendants intended to

create an association with plaintiff's marks in order to divert business to themselves; and there is no actual association between defendants and plaintiff.

72. Pursuant to ORS 647.107, plaintiff is entitled to an injunction against defendants' 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 metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers, unless defendants are authorized to, and do, offer genuine Harry and David products for sale. Plaintiff is also entitled to an injunction prohibiting any other infringing use by defendants such as in or as the title of any website or 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 defendants' infringement of plaintiff's registered Harry and David marks, false or misleading advertising, unfair competition, and willful dilution by blurring of plaintiff's famous marks, as stated herein.

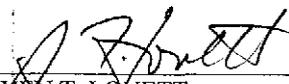
2. Entering an injunction against (1) defendants' use in the future of plaintiff's registered HARRY AND DAVID marks, or any colorable imitation or confusingly similar variation of plaintiff's HARRY AND DAVID marks, as metatags, page titles, domain or subdomain names, source coding, and/or keyword triggers, unless defendants are authorized to, and do, offer genuine Harry and David products for sale, 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 of any website or 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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