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6
 7 **IN THE UNITED STATES DISTRICT COURT**
 8 **FOR THE DISTRICT OF ARIZONA**

9 MICHAEL PAPILLON d/b/a THE
 CELL PHONE JUNKIE,

10 Plaintiff,

11 vs.

12 DAVID SHYMATTA, d/b/a CELL
 13 JUNKIE

14 Defendant.

No.

**COMPLAINT FOR
 DECLARATORY JUDGMENT**

(NON INFRINGEMENT OF
 TRADEMARK, NON-DILUTION OF
 TRADEMARK AND TRADEMARK
 ABANDONMENT)

16 For his Complaint against Defendant David Shymatta, Plaintiff Michael Papillon
 17 avers as follows:

18 **PARTIES AND JURISDICTION**

19
 20 1 Plaintiff Michael Papillon (Plaintiff) is a citizen of the State of Arizona residing in
 21 Maricopa County at 4216 E. Desert Marigold Drive, Cave Creek, Arizona 85331.
 22

23 2 On information and belief, Defendant David Shymatta (Defendant) is a citizen of the
 24 State of Idaho, having an address at 210 Hwy 30, E Box 38, Inkom (Bannock County) Idaho
 25 83245.
 26



1 3 This Court has subject matter jurisdiction in this case under 15 U.S.C. § 1121 and
2 28 U.S.C. §§ 1331 and 1338(a). This complaint requests a declaratory judgment of non-
3 infringement under the Lanham Federal Trademark Act, 15 U.S.C. §§ 1051 *et seq.*, and the
4 Federal Trademark Dilution Act, 15 U.S.C. § 1125(c). Jurisdiction for declaratory judgment
5 is conferred pursuant to 28 U.S.C. § 2201(a).
6

7 4 This court has *in personam* jurisdiction over the parties. Plaintiff is a citizen of
8 Arizona. On information and belief, Defendant owns and operates a retail store under the
9 trade name CELL JUNKIE, which, according to Defendant, has sold tens of thousands of
10 products in the United States and abroad, some of which, on information and belief were
11 sold into Arizona. Defendant owns and operates a fully interactive web site
12 <www.celljunkie.com>, which is hosted by GoDaddy.com in Phoenix, Arizona and, on
13 information and belief, sells products into Arizona. Defendant also has purposefully availed
14 himself of the laws of the State of Arizona by sending a demand letter to Plaintiff in
15 Arizona, by filing a lawsuit in the State of Idaho and effecting personal service on Plaintiff
16 by hand delivery in Maricopa County, Arizona.
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18

19 **GENERAL ALLEGATIONS**
20

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22 5 Plaintiff Papillon publishes a blog titled THE CELL PHONE JUNKIE, which
23 operates from a website having the URL <www.cellphonejunkie.com>. Plaintiff's blog is a
24 free service that provides reviews of cell phones, cell phone accessories, and provides
25
26

1 podcasts regarding cell phones. Plaintiff's website offers a "premium" podcast for direct
2 download to electronic devices, such as a personal computer or iPod, for a small fee, the
3 proceeds of which are dedicated entirely to website maintenance.
4

5 6 On information and belief, Defendant Shymatta sells cell phone products and
6 accessories under the trade name "Cell Junkie." Defendant currently maintains a website
7 having the URL <www.celljunkie.com>. For at least some period of time, Symatta also sold
8 through the online retailer eBay.com. Defendant is the owner of a federal registration for the
9 mark CELL JUNKIE, registration number 3,351,212, registered on December 11, 2007 for
10 "retail store services featuring cell phone accessories." (The '212 Registration).
11

12 7 On or about February 25, 2010, Defendant sent a demand letter to Plaintiff demanding
13 that Plaintiff cease and desist using the name THE CELL PHONE JUNKIE in connection
14 with his blog. Defendant further demanded an accounting of Plaintiff's sales and profits. A
15 true and correct copy of the demand letter is attached hereto as **Exhibit A**.
16

17 8 Shortly after receiving the demand letter, Plaintiff conducted an on-line search and
18 discovered that: (1) the only specimen Defendant had submitted in support of his federal
19 trademark registration was an eBay store page; (2) the eBay store page was no longer valid;
20 (3) the address listed for the federal registration was no longer valid; and (4) there were no
21 business listings for CELL JUNKIE in the Inkom Idaho area (the purported location of
22 Defendant's business). A copy of the eBay page indicating the CELL JUNKIE store did not
23 exist is attached hereto as **Exhibit B**.
24
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1 9 In view of the foregoing information, on or about March 11, 2010, Plaintiff filed a
2 petition with the United States Trademark Office to cancel Defendant's registration for
3 CELL JUNKIE. The grounds alleged in the petition were that Defendant had apparently
4 abandoned the trademark altogether, or at least in Interstate Commerce. The Petition for
5 Cancellation was accepted by the United States Trademark Office Trademark Trial and
6 Appeal Board (TTAB) and was designated Cancellation Proceeding No. 92052188. A true
7 and correct copy of the Petition for Cancellation is attached hereto as **Exhibit C**.
8

9
10 10 Defendant answered the petition for Cancellation denying abandonment and
11 submitting evidence of use, all of which is dated after April of 2010, which is after the
12 Petition for Cancellation was instituted. A true and correct copy of the Answer to the
13 Petition for Cancellation is attached hereto as **Exhibit D**.

14
15 11 On information and belief, as of May 27, 2010 the web site <www.celljunkie.com>
16 had been "parked" by GoDaddy since March 6, 2007 until at least November 28, 2009 (the
17 closest date archived by the internet archives "wayback machine." (A screen shot of the
18 information obtained from the internet archives "wayback machine" is attached hereto as
19 **Exhibit E**) On information and belief, Defendant only began to use the website after he
20 became aware of the Cancellation action. Such use is not sufficient to overcome a
21 presumption of abandonment.
22

23 12 On or about February 27, 2010, Plaintiff also filed an application for registration of
24 his mark THE CELL PHONE JUNKIE for the services consisting of "Entertainment
25

1 services, namely, providing a radio program in the field of Comment and criticism on
2 cellular equipment, cellular providers, and cellular accessories via a global computer
3 network; Entertainment services, namely, providing an on-going radio program in the field
4 of Comment and criticism on cellular equipment, cellular providers, and cellular accessories;
5 On-line journals, namely, blogs featuring Comment and criticism on cellular equipment,
6 cellular providers, and cellular accessories.” Plaintiff’s application was designated
7 Application No. 77946630 (the ‘630 Application).
8

9
10 13 The ‘630 Application was duly examined, approved, and was published by the United
11 States Trademark Office on July 27, 2010 despite Defendant’s prior registration. On this
12 basis Plaintiff concludes that the United States Trademark Office does not believe there is a
13 likelihood of confusion between the ‘630 Application and the ‘212 Registration. A true and
14 correct copy of the Trademark Application and Registration Retrieval (TARR) data for the
15 ‘630 Application is attached hereto as **Exhibit F**.
16

17 14 On or about June 1, 2010, through his attorney, Plaintiff offered to resolve his
18 differences with Defendant by means of a “walk away” agreement in which Plaintiff would
19 dismiss the Cancellation proceeding and Defendant would agree not to oppose Plaintiff’s
20 Application. Defendant admits that his own attorney recommended this course of action to
21 him. (See **Exhibit G**)
22

23 15 On or about November 11, 2010 after discharging his attorney, Defendant filed a
24 Notice of Opposition *pro se* against the ‘630 Application on the grounds of likelihood of
25

1 confusion and dilution. The Notice of Opposition was designated Opposition Proceeding
2 No. 91197681. A true and correct copy of the Notice of Opposition is attached hereto as
3 **Exhibit G.**

4
5 16 On or about November 15, Defendant also filed a complaint *pro se* in the District of
6 Idaho (Case No. 4:10-CV-00565-BLW) alleging causes of action against Plaintiff for (1)
7 federal trademark infringement under the Lanham Act, 15 U.S.C. § 1114; (2) false
8 advertising, unfair competition, infringement, false designation of origin, and passing off; (3)
9 direct and contributory common law trademark infringement; (4) direct and contributory
10 common law unfair competition. A true and correct copy of the Complaint (less exhibits) is
11 attached hereto as **Exhibit H.**

12
13 17 On April 21, 2011 the Idaho district court dismissed Defendant's complaint for lack
14 on *in personam* jurisdiction over Plaintiff. A true and correct copy of the memorandum and
15 order dismissing Case No. 4:10-CV-00565-BLW is attached hereto as **Exhibit I.**

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17 18 Plaintiff has a real and immediate apprehension that he will be subject to further
18 lawsuits by Defendant in Idaho or other jurisdictions that may have the requisite minimum
19 contacts necessary to hale him to such other jurisdiction.

20
21 19 This is a case of actual controversy because Plaintiff must now choose between
22 abandoning his legitimate use of THE CELL PHONE JUNKIE (and the goodwill the name
23 has engendered over the years) or face the prospect of yet another lawsuit by Defendant in
24 another jurisdiction, with the possibility of damages accumulating in the interim.

1 20 This is also a case of actual controversy because the pending Cancellation and
2 Opposition proceedings now pending before the TTAB (an administrative court) are stayed
3 pending resolution of the infringement and abandonment allegations by an Article III Court.
4

5 21 A judgment from this court declaring Plaintiff's rights in the mark THE CELL
6 PHONE JUNKIE will serve a useful purpose in (a) clarifying and settling the legal rights of
7 Plaintiff and Defendant vis-à-vis their respective marks and (2) terminating and affording
8 relief from the uncertainty, insecurity, and controversy giving rise to this proceeding.
9

10
11 **COUNT ONE**
12 **Non-Infringement of Federal Trademark - 15 U.S.C. §1114**

13 22 Plaintiff incorporates herein the preceding averments.

14 23 There is no likelihood of confusion between Plaintiff's mark THE CELL PHONE
15 JUNKIE used in connection with Plaintiff's blog and other services on the one hand and
16 Defendants mark CELL JUNKIE used for retail store services on the other hand as alleged
17 by Defendant in (Case No. 4:10-CV-00565-BLW).
18

19 24 Additionally, because Plaintiff's blog THE CELL PHONE JUNKIE is in the nature of
20 a literary work, the title of which consumers *expect* to be descriptive of the content, Plaintiff
21 has a Constitutional right under the First Amendment to use the title THE CELL PHONE
22 JUNKIE irrespective of any trademark rights Defendant may have in the mark CELL
23 JUNKIE.
24

1 25 Defendant's demand that Plaintiff cease and desist using the mark THE CELL
2 PHONE JUNKIE and his demands for treble damages and other relief have caused and are
3 likely to cause injury to Plaintiff unless there is a determination regarding the rights and legal
4 restrictions concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE.
5

6 26 Defendant has damaged or is likely to damage Plaintiff's business reputation and/or is
7 likely to interfere with Plaintiff's use of the mark THE CELL PHONE JUNKIE unless there
8 is a determination regarding the rights and legal restrictions concerning Plaintiff's use of the
9 mark THE CELL PHONE JUNKIE.
10

11 27 By reason of the foregoing, a declaration of the rights and legal restrictions
12 concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE, is both necessary and
13 proper.
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16 **COUNT TWO**
Non-Dilution of Trademark - 15 U.S.C. §1125(c)
17

18 28 Plaintiff incorporates herein the preceding averments.

19 29 Defendant's Mark is not widely recognized by the general consuming public of the
20 United States as a designating Defendant as the source of the "Cell Junkie" retail store
21 services.
22

23 30 Defendant's Mark has not been advertized with the necessary duration, extent and
24 geographic reach necessary to render the mark "famous" within the meaning of § 43(c).
25
26

1 31 Defendant's demand that Plaintiff cease and desist using the mark THE CELL
2 PHONE JUNKIE and his demands for treble damages and other relief have caused and are
3 likely to cause injury to Plaintiff unless there is a determination regarding the rights and legal
4 restrictions concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE.
5

6 32 By reason of the foregoing, a declaration regarding the fame, or lack thereof, of
7 Defendants mark CELL JUNKIE is both necessary and proper.
8
9

10 **COUNT THREE**
11 **Non-Violation of Lanham Act §43(a) – 15 U.S.C. § 1125(a)**

12 33 Plaintiff incorporates herein the preceding averments.

13 34 Use by Plaintiff of the mark THE CELL PHONE JUNKIE for his blog and other
14 services does not constitute False Advertising, Unfair Competition, Infringement, False
15 Designation of Origin or Passing off as alleged by Defendant in (Case No. 4:10-CV-00565-
16 BLW)
17

18 35 Defendant's demand that Plaintiff cease and desist using the mark THE CELL
19 PHONE JUNKIE and his demands for treble damages and other relief have caused and are
20 likely to cause injury to Plaintiff unless there is a determination regarding the rights and legal
21 restrictions concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE.
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1 36 By reason of the foregoing, a declaration of the rights and legal restrictions
2 concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE, is both necessary and
3 proper.
4

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6 **COUNT FOUR**
7 **Non-Infringement of Common Law Trademark**

8 37 Plaintiff incorporates herein the preceding averments.
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10 38 Use by Plaintiff of the mark THE CELL PHONE JUNKIE for his blog and other
11 services does not constitute direct or contributory common law trademark infringement as
12 alleged by Defendant in (Case No. 4:10-CV-00565-BLW).

13 39 Defendant's demand that Plaintiff cease and desist using the mark THE CELL
14 PHONE JUNKIE and his demands for treble damages and other relief have caused and are
15 likely to cause injury to Plaintiff unless there is a determination regarding the rights and legal
16 restrictions concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE.
17

18 40 By reason of the foregoing, a declaration of the rights and legal restrictions
19 concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE, is both necessary and
20 proper.
21

22 **COUNT FIVE**
23 **No Direct or Contributory Unfair Competition**

24 41 Plaintiff incorporates herein the preceding averments.
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1 42 Use by Plaintiff of the mark THE CELL PHONE JUNKIE for his blog and other
2 services does not constitute direct or contributory common law unfair competition as alleged
3 by Defendant in (Case No. 4:10-CV-00565-BLW).

4
5 43 Defendant's demand that Plaintiff cease and desist using the mark THE CELL
6 PHONE JUNKIE and his demands for treble damages and other relief have caused and are
7 likely to cause injury to Plaintiff unless there is a determination regarding the rights and legal
8 restrictions concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE.

9
10 44 Defendant has damaged or is likely to damage Plaintiff's business reputation and/or is
11 likely to interfere with Plaintiff's use of the mark THE CELL PHONE JUNKIE unless there
12 is a determination regarding the rights and legal restrictions concerning Plaintiff's use of the
13 mark THE CELL PHONE JUNKIE.

14 45 By reason of the foregoing, a declaration of the rights and legal restrictions
15 concerning Plaintiff's use of the mark THE CELL PHONE JUNKIE, is both necessary and
16 proper.
17

18 **COUNT SIX**
19 **Abandonment of Federal Trademark**

20 46 Plaintiff incorporates herein the preceding averments.
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22 47 Plaintiff abandoned his trademark CELL JUNKIE *inter alia* by abandoning his eBay
23 store and failing to operate a retail store from the web site <www.celljunkie.com>.
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1 48 On information and belief, only after receiving notice that Plaintiff had filed a
2 cancellation petition did Defendant “scramble” to begin using his website to sell products.

3 49 Use of a mark ‘solely to preserve’ trademark rights constitutes sham use, which
4 cannot be used to rebut a presumption of abandonment.
5

6 50 By reason of the foregoing, a declaration that Defendant’s mark CELL JUNKIE was
7 legally abandoned as of the filing date of the petition for Cancellation is both necessary and
8 proper.
9

10
11 WHEREFORE Plaintiff requests that judgment be entered in his favor and against Defendant
12 as follows:

13 A. Declaring that there is no likelihood of confusion between the mark THE CELL
14 PHONE JUNKIE and CELL JUNKIE for their respective services and that use by Plaintiff of
15 the mark THE CELL PHONE JUNKIE does not violate any law against trademark
16 infringement, unfair competition, false advertising, false designation of origin, dilution or other
17 legal right of Defendant;
18

19 B. Declaring that CELL JUNKIE is not a famous mark under the Federal
20 Trademark Dilution Act;
21

22 C. Directing the United States Patent and Trademark Office to enter judgment in
23 favor of Plaintiff in Opposition 91197681 directing the Office forthwith to register the ‘630
24 Application on the Principal Register;
25

1 D. Directing the United States Patent and Trademark Office to enter judgment in
2 favor of Plaintiff in Cancellation 92052188, directing the Office forthwith to cancel the ‘212
3 Registration;

4 E. Awarding Plaintiff his costs and reasonable attorneys’ fees incurred in connection
5 with this action; and
6

7 D. Awarding Plaintiff such other and further relief as this Court deems just and
8 proper.
9

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11 DATED this 27th day of April, 2011.

12 **HARTMAN TITUS PLC**

13 By: s/john d. titus

14 John D. Titus
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16 Scottsdale, Arizona 85251-3250
17 Attorneys for Plaintiff
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