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RANDOLPH DIVISIONS INC.; and

HEARPOD, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CV13 00148 LEKBMK

CIVIL NO. _____

RANDOLPH DIVISIONS INC., a
Hawaii corporation; and HEARPOD,
INC., a Nevada corporation,

Plaintiffs,

v.

APPLE INC., a California
corporation

Defendant.

COMPLAINT FOR TRADEMARK
INFRINGEMENT, UNFAIR
COMPETITION AND DILUTION;
DEMAND FOR JURY TRIAL;
SUMMONS

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

MAR 28 2013

at 3 o'clock and 50 min. P.M.
SUE BEITIA, CLERK

**COMPLAINT FOR TRADEMARK INFRINGEMENT,
UNFAIR COMPETITION AND DILUTION**

Plaintiff RANDOLPH DIVISIONS INC. and Plaintiff HEARPOD, INC. (collectively, “Plaintiffs”), by and through their counsel Dwyer Schraff Meyer Grant & Green, bring this action for trademark infringement, unfair competition and dilution against Defendant APPLE INC. (“Defendant”) and allege as follows:

THE PARTIES

1. Plaintiff RANDOLPH DIVISIONS, INC. (“RDI”) is a corporation organized and existing under the laws of Hawaii.
2. Plaintiff HEARPOD, INC. (“HI”) is a corporation organized and existing under the laws of Nevada.
3. On information and belief, Defendant is a corporation organized and existing under the laws of the State of California.

NATURE OF ACTION

4. This action is for trademark infringement, unfair competition and dilution under the Trademark Act of 1946, as amended (Lanham Act, 15 U.S.C. § 1051 et seq.) and Hawaii law (i.e., HAW. REV. STAT. Chapters 480, 482, and 481-A, and the common law).

JURISDICTION AND VENUE

5. This court has jurisdiction pursuant to 15 U.S.C. §1121 (actions arising under the Trademark Act), and 28 U.S.C. §§ 1331, 1337, 1338(a) (acts of Congress relating to trademarks) and §1338(b) (pendant jurisdiction over unfair competition claims).

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391 (b) and (c) because the acts complained of herein have been committed and are being committed in, among other places, this Judicial District.

FACTUAL ALLEGATIONS

7. RDI and HI are both wholly owned by Randolph Wohlers (“Wohlers”), a resident of Hawaii.

8. RDI was formed in 1989 for the purpose of manufacturing, marketing and selling sound reproduction hearing aid apparatus.

9. On February 7, 2005, RDI filed an intent to use application with the United States Patent and Trademark Office (“USPTO”) for registration of the word mark “HEARPOD” in connection with sound reproduction hearing aid apparatus (“Plaintiff’s Mark”).

10. RDI first used Plaintiff’s Mark in connection with the marketing and sale of sound reproduction hearing aid apparatus sometime in March of 2005.

11. HI was formed in June of 2005 for the purpose of marketing and selling sound reproduction hearing aid apparatus on the Internet and in connection therewith RDI granted HI a license to use Plaintiff's Mark. Pursuant to said license, HI began selling sound reproduction hearing aid apparatus under Plaintiff's Mark.

12. While RDI has from time to time sold sound reproduction hearing aid apparatus under Plaintiff's Mark, most sales of sound reproduction hearing aid apparatus under Plaintiff's Mark have been, and continue to be, made by HI pursuant to HI's above noted license with RDI.

13. On November 13, 2007, the USPTO issued Registration No. 3336071 to RDI in IC 010 in connection with hearing aids ("Plaintiff's Registration").

14. Pursuant to § 15 of the Lanham Act (15 U.S.C. § 1065), Plaintiff's Registration has achieved "incontestable" status.

15. The sound reproduction hearing aid apparatus sold by RDI and HI under the Plaintiff's Mark are collectively referred to herein as the "Plaintiffs' Goods".

16. Through extensive advertising and promotional activities by HI in interstate commerce and media coverage of Plaintiffs' Goods as identified by Plaintiff's Mark, Plaintiff's Mark has become widely known as identifying the source of Plaintiffs' Goods.

17. Between 2005 and 2012, HI spent over \$625,000 on such advertising and promotion and Wohlers, on behalf of HI, created numerous YouTube videos, online articles, blog postings and other social media and online content promoting Plaintiffs' Goods under Plaintiff's Mark. This significant expenditure of time, money and media coverage has resulted in Plaintiff's Mark becoming a valuable asset of Plaintiffs and has generated over \$1.7 million in sales of Plaintiffs' Goods.

18. As a result of the distinctiveness of Plaintiff's Mark, HI's advertising and promotional activities, and media coverage of Plaintiffs' Goods as identified by Plaintiff's Mark, Plaintiff's Mark represents and embodies significant and valuable goodwill associated with Plaintiffs' Goods.

19. As a result of Plaintiffs' use and RDI's registration of Plaintiff's Mark, RDI has protectable trademark rights in and to Plaintiff's Mark under both federal and Hawaii law.

20. Sometime in the latter part of 2012, Defendant began using the designations "EARPODS" and "APPLE EARPODS" ("Defendant's Marks") in connection with the marketing and sale of apparatus used for, among other things, sound reproduction devices ("Defendant's Goods").

21. Both Plaintiffs' Goods and Defendant's Goods are similar in nature in that, among other things, they are inserted into the ears of their users and are used to facilitate and enhance the transmission of sounds to the users.

22. Both Plaintiffs and Defendant utilize similar channels of trade, to wit: the internet and social networks, to market and sell their respective goods to the public.

23. Both Plaintiff's Mark and Defendant's Marks are similar in sound, appearance and connotation.

24. Given the similarity between: a) Plaintiffs' Goods and Defendant's Goods; b) Plaintiff's Mark and Defendant's Marks; and c) HI's channels of trade and Defendant's channels of trade, Defendant's Marks are likely to cause confusion, mistake or deception in connection with, and to dilute the distinctiveness of, Plaintiff's Mark to the damage of Plaintiffs.

25. Defendant's actions are in violation of the Lanham Act, Hawaii statutory law and the common law and unlawfully trade on Plaintiff's Mark and the reputation and goodwill associated therewith.

26. Granting injunctive relief on Plaintiffs' behalf benefits the public interest in upholding Plaintiffs' valuable rights in its intellectual property and protects consumers from the deception, confusion and mistake which naturally arise as a result of the Defendant's actions.

**TRADEMARK INFRINGEMENT UNDER
THE LANHAM ACT AND HAWAII LAW**

27. Plaintiffs restate and reallege each and every allegation contained in paragraphs 1-26, as if fully recited in this paragraph.

28. This claim arises under § 32(1) of the Lanham Act (15 U.S.C. § 1114), §43(a) of the Lanham Act (15 U.S.C. § 1125) and HAW. REV. STAT. Chapter 482, and is for trademark infringement.

29. Defendant has used in commerce a colorable imitation of Plaintiff's Mark and a word, term, name and false designation of origin in a manner which is likely to cause confusion, mistake or deception and therefore constitutes trademark infringement under the Lanham Act and Hawaii law.

UNFAIR COMPETITION

30. Plaintiffs restate and reallege each and every allegation contained in paragraphs 1-29, as if fully recited in this paragraph.

31. This claim is for unfair competition under 15 U.S.C. § 1125 and HAW. REV. STAT. Chapters 480 and 481-A, by Defendant by virtue of Defendant's unauthorized use of a word which is likely to cause confusion, mistake or deception, or as to the affiliation, connection, or association of Defendant with Plaintiffs, or as to the origin, sponsorship, or approval of Defendant's Goods, or commercial activities by another person.

32. Defendant's usage of a colorable imitation of Plaintiff's Mark as alleged herein constitutes unfair competition under the Lanham Act and Hawaii law.

DILUTION

33. Plaintiffs restate and reallege each and every allegation contained in paragraphs 1-32, as if fully recited in this paragraph.

34. This claim is for dilution under federal and state law.

35. Plaintiff's Mark is "famous" within the meaning of 15 U.S.C. § 1125(c) and HAW. REV. STAT. § 482-32.

36. Defendant's actions as alleged in this Complaint commenced after Plaintiff's Mark became "famous" and cause dilution of the distinctive quality of Plaintiff's Mark thereby causing damage to Plaintiffs and entitling Plaintiffs to injunctive and other relief as provided by law.

WHEREFORE, Plaintiffs pray:

1. That pursuant to 15 U.S.C. § 1116, HAW. REV. STAT. §§ 482-32 and 33, and the equity jurisdiction of this court, Defendant and its officers, agents, employees, representatives, and all persons in privity therewith be permanently enjoined and restrained from using in connection with the sale, offering for sale, distribution, exhibition, display or advertising of Defendant's Goods, through the Internet or otherwise, Defendant's Marks, or any other marks, words or symbols

which are confusingly or deceptively similar to, or colorably imitative of, Plaintiff's Mark.

2. That pursuant to 15 U.S.C. § 1117 and HAW. REV. STAT. §§ 482-32 and 33, Defendant be directed to provide an accounting to Plaintiffs and to pay over to Plaintiffs, Defendant's profits and any and all damages which Plaintiffs have sustained by consequence of Defendant's actions, as enumerated herein.

3. That Defendant and its officers, agents, employees, or representatives, and all persons in privity with Defendant not destroy but deliver up to this Court, pursuant to 15 U.S.C. § 1118 and HAW. REV. STAT. § 482-33, all packaging, advertising and promotional materials, computer programs (in any language or format), labels, and any other printed or electronic matter of any nature, and any products in their possession bearing or using Defendant's Marks or any other marks, words or symbols which are confusingly or deceptively similar to, or colorably imitative of, Plaintiff's Mark, for the purposes of destruction thereof.

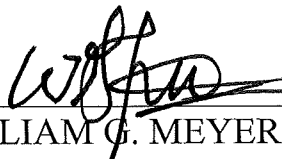
4. That due to the willful nature of Defendant's actions the amount of actual damages be trebled as provided for in 15 U.S.C. § 1117 and HAW. REV. STAT. § 482-33.

5. That pursuant to 15 U.S.C. § 1117 and HAW. REV. STAT. § 482-33, Defendant be required to pay to Plaintiffs all costs of this action, including their attorneys' fees and disbursements incurred herein.

6. That Defendant be required to file with this Court and serve on Plaintiffs a report in writing and under oath setting forth in detail the manner and form in which Defendant has complied with the terms of the permanent injunction.

7. That Plaintiffs be granted such other and further relief as this court deems just and equitable.

DATED: Honolulu, Hawaii, March 28, 2013.



WILLIAM G. MEYER III

PAUL A. SCHRAFF

Attorneys for Plaintiffs

RANDOLPH DIVISIONS INC.; and
HEARPOD, INC.