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06-CV-00312-CMP

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

LUCKY BREAK WISHBONE CORPORATION,

Plaintiff,

v.

SEARS, ROEBUCK AND CO., a New York corporation and YOUNG & RUBICAM INC., a Delaware corporation,

Defendants.

CV6 0312 JLR

COMPLAINT FOR COPYRIGHT INFRINGEMENT, FALSE DESIGNATION OF ORIGIN, BREACH OF CONTRACT, UNJUST ENRICHMENT, AND VIOLATION OF THE WASHINGTON STATE CONSUMER PROTECTION ACT

JURY TRIAL REQUESTED

I. PARTIES

1. Plaintiff, Lucky Break Wishbone Corporation ("Lucky Break Wishbone"), is a Washington corporation with a principal place of business at 4400 S.W. Roxbury Place, Seattle, Washington 98136-2738.
2. Upon information and belief, Defendant, Sears, Roebuck and Co. ("Sears") is a New York corporation with its principal place of business at 3333 Beverly Road, B-5 317A, Hoffman Estates, Illinois 60179.
3. Upon information and belief, Defendant, Young & Rubicam Inc. ("Y&R") is a Delaware corporation with its principal place of business at 285 Madison Avenue, New York, New York 10017.

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II. JURISDICTION AND VENUE

4. This is an action arising out of the copyright laws of the United States, 17 U.S.C. § 501 *et seq.*, the Lanham Act, 15 U.S.C. § 1125(a), related state unfair competition and consumer protection laws, R.C.W. § 19.86 *et seq.*, and state common law.

5. This Court has subject matter jurisdiction pursuant to 17 U.S.C. § 501(a) and 15 U.S.C. § 1121; and 28 U.S.C. § 1331, as well as 1338(a) and (b).

6. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (c), and 1400(a) because the Defendants conduct business within this judicial district, and they or their agents or affiliates can be found in this judicial district. Acts giving rise to this complaint occurred within this judicial district.

III. FACTS

A. Plaintiff's Copyrighted Wishbone Sculpture

7. Lucky Break Wishbone developed a unique and original wishbone sculpture for the use and enjoyment of individuals worldwide who are familiar with the tradition of snapping the breastbone of a turkey to bring good luck or to fulfill a wish.

8. The Lucky Break Wishbone sculpture embodies certain idealistic characteristics of a dried turkey wishbone along with stylized accents to emphasize the item's aesthetic appeal, forming a truly unique work of art.

9. The Lucky Break Wishbone sculpture is also a widely successful novelty item, well-known throughout the United States and internationally.

10. The Lucky Break Wishbone sculpture is protected by a registered United States Copyright, Registration No. VA 1,325,348, said registration having an effective registration date of December 29, 2005. A copy of the United States Copyright Registration protecting the Lucky Break Wishbone sculpture is attached to this Complaint as Exhibit A.

11. Plaintiff, Lucky Break Wishbone, is the owner of U.S. Copyright Registration No. VA 1,325,348 by assignment. The Lucky Break Wishbone sculpture was completed in 2004 and first published November 6, 2004, in the United States.

1 12. Lucky Break Wishbone has extensively promoted its unique and original
2 sculpture in association with its name and mark LUCKY BREAK WISHBONE.

3 13. Through extensive advertising and promotion of the Lucky Break Wishbone
4 sculpture, consumers in the United States and internationally have come to recognize the
5 Lucky Break Wishbone sculpture as an indicator of goods and services originating with
6 Lucky Break Wishbone.

7 14. Lucky Break Wishbone sculptures are manufactured exclusively within the
8 United States.

9 **B. Acts Giving Rise to Defendants' Infringement**

10 15. Defendant, Sears, is one of the United States' largest retailers, selling a variety
11 of goods and providing a variety of services.

12 16. Defendant, Y&R, is a major advertising, marketing, and public relations firm
13 specializing in creating and carrying out promotional and marketing events on a variety of
14 scales.

15 17. On information and belief, Y&R had a contract with Sears to create and carry
16 out a promotion, which was to take place at Sears stores across the United States during the
17 week of the 2005 Thanksgiving Day Holiday, from Saturday, November 19, 2005, through
18 Wednesday, November 23, 2005 ("the Sears promotion").

19 18. In June 2005, representatives from Y&R contacted Lucky Break Wishbone in
20 connection with the Sears promotion.

21 19. In June 2005, representatives of Y&R purchased a sample of the Lucky Break
22 Wishbone sculpture with the intent to inspect said wishbone sculpture for its suitability for
23 use in the Sears promotion.

24 20. In June 2005, Lucky Break Wishbone sent several sample wishbone sculptures
25 by overnight delivery.

26 21. After receiving sample Lucky Break Wishbone sculptures, a representative of
27 Y&R requested an estimate from Lucky Break Wishbone for the cost of special

1 manufacturing of the wishbone sculptures to match a pantone color blue, including custom
2 printing in either white or black. The requested estimate was for the cost of "one million drop
3 shipped to three distribution points in 333k segments;" and for "two million drop shipped to
4 three distribution points in 666k segments."

5 22. In response to Y&R's request for a quote, Lucky Break Wishbone responded
6 on July 5, 2005, with a price quote.

7 23. The quote sent by Lucky Break Wishbone was acknowledged by Y&R, and on
8 July 15, 2005, a representative from Y&R asked if the Wishbone sculptures could be
9 distributed in a specially manufactured polymer bag or with a card having "condensed legal"
10 verbiage.

11 24. On July 19, 2005, Lucky Break Wishbone sent Y&R a revised price quote. A
12 second revised quote, based on additional requested product enhancements, was sent on
13 July 22, 2005. Y&R acknowledged receipt of the revised quotes and samples with special
14 packaging including legal verbiage, on July 25, 2005.

15 25. On August 4, 2005, a representative from Y&R sent a confirmatory
16 memorandum by electronic mail ("e-mail") accepting Lucky Break Wishbone's quote stating,
17 "we have gotten approval from the client and we look forward to doing business with you to
18 produce our blue wishbones." Lucky Break Wishbone reasonably relied on Y&R's
19 confirmatory memorandum dated August 4, 2005 as well as all other previous e-mails, by
20 making substantial beginnings and commitments for performance.

21 26. Reliance on Y&R's confirmatory memorandum of August 4, 2005 was
22 detrimental to Lucky Break Wishbone.

23 27. On August 5, 2005, a representative from Y&R sent an e-mail with shipping
24 details for the Wishbone sculptures and confirming a quantity of 1,140,000-1,330,000
25 Wishbone sculptures to 1,900 stores.
26
27

1 28. On August 11, 2005, a representative from Y&R verbally repudiated the
2 parties' agreement, indicating that Y&R discussed the possibility of having substitute
3 wishbone sculptures manufactured by "an offshore company."

4 29. After Y&R's repudiation of its agreement with Lucky Break Wishbone, Y&R
5 failed to perform under the agreement, causing Lucky Break Wishbone damage.

6 **C. Defendants' Infringing Activities**

7 30. On information and belief, Y&R sent samples of the Lucky Break Wishbone
8 sculpture or otherwise transmitted three-dimensional information describing the Lucky Break
9 Wishbone sculpture to an overseas manufacturer in China.

10 31. On information and belief, Y&R directed an overseas manufacturer in China to
11 copy the Lucky Break Wishbone sculpture for use in the Sears promotion.

12 32. On information and belief, the overseas manufacturer in China copied the
13 Lucky Break Wishbone sculpture and produced at least one million Lucky Break Wishbone
14 sculptures for use in the Sears promotion.

15 33. The packaging utilized by Y&R and Sears for the Sears promotion was
16 identical in size and shape to the packaging proposed by Lucky Break Wishbone and included
17 the identical legal verbiage first created and supplied by Lucky Break Wishbone.

18 34. On information and belief, Y&R and/or Sears created a photograph or image of
19 the Lucky Break Wishbone sculpture and used said photograph or image of the Lucky Break
20 Wishbone sculpture in newspaper promotional materials distributed nationwide in connection
21 with the Sears promotion. A sample of the newspaper promotional materials utilizing a
22 photograph or image of the Lucky Break Wishbone sculpture is attached to this complaint as
23 Exhibit B.

24 35. In numerous e-mails, Y&R acknowledged benefits received by Y&R through
25 information and industry know-how supplied by Lucky Break Wishbone, including precise
26 legal verbiage for the packaging, packaging sizes and shapes, packaging layouts, and other
27 dimensions for the specially manufactured Lucky Break Wishbone sculpture and packaging.

1 36. Defendants were not authorized to hire an overseas manufacturer in China or
2 anywhere else to copy the Lucky Break Wishbone sculpture.

3 37. Defendants were not authorized to use an image or photograph of the Lucky
4 Break Wishbone sculpture in any advertising or promotional literature.

5 38. Use by Sears of an image or photograph of the Lucky Break Wishbone
6 sculpture in its national advertising campaign likely confused consumers into believing that
7 the Lucky Break Wishbone sculpture used in connection with the Sears promotion originated
8 from Lucky Break Wishbone.

9 39. Use by Sears of an image or photograph of the Lucky Break Wishbone
10 sculpture falsely designated the origin of the actual Wishbone sculptures used in the Sears
11 promotion.

12 40. Sears and Y&R benefited from the use of the photograph or image of the
13 Lucky Break Wishbone sculpture in the Sears promotional advertising.

14 **IV. CAUSES OF ACTION**

15 **COUNT I**
16 **COPYRIGHT INFRINGEMENT**

17 41. Lucky Break Wishbone incorporates the allegations made in paragraphs 1-40
18 as if fully set forth herein.

19 42. Defendants have willfully committed copyright infringement under 17 U.S.C.
20 § 501 *et. seq.*, directly or by way of contributory liability, by the unauthorized practice or
21 execution of one or more exclusive rights owned by Lucky Break Wishbone set forth in
22 17 U.S.C. § 106, said exclusive rights having been perfected by U.S. Copyright Registration
23 No. VA 1,235,348 for the Lucky Break Wishbone sculpture.

24 **COUNT II**
25 **FALSE DESIGNATION OF ORIGIN**

26 43. Plaintiff Lucky Break Wishbone realleges paragraphs 1-40 as if fully set forth
27 herein.

1 44. Defendants' acts as alleged herein constitute a false designation of origin in
2 violation of 15 U.S.C. § 1125(a).

3 **COUNT III**
4 **BREACH OF CONTRACT**

5 45. Plaintiff Lucky Break Wishbone realleges paragraphs 1-40 as if fully set forth
6 herein.

7 46. Defendant Y&R breached its agreement with Lucky Break Wishbone to pay
8 for a quantity of specially manufactured Lucky Break Wishbone sculptures at a certain price
9 and for delivery according to other certain terms.

10 47. Plaintiff Lucky Break Wishbone made substantial beginnings of the special
11 manufacturing of goods and made other commitments for performance according to the
12 agreement.

13 **COUNT IV**
14 **UNJUST ENRICHMENT - QUASI CONTRACT**

15 48. Plaintiff Lucky Break Wishbone realleges paragraphs 1-40 as if fully set forth
16 herein.

17 49. Defendants received benefit through the use of the Lucky Break Wishbone
18 sculpture including, but not limited to, images thereof in its advertising and promotional
19 materials.

20 50. Defendants received benefit through the use of Lucky Break Wishbone's
21 specification and design for packaging and through the use of Lucky Break Wishbone's
22 condensed legal verbiage for use in the Sears promotion on all packaging.

23 51. Defendants have not provided compensation to Lucky Break Wishbone for the
24 use of the Lucky Break Wishbone sculpture in their advertising and promotional materials nor
25 have Defendants provided Lucky Break Wishbone compensation for use of Lucky Break
26 Wishbone's specially designed packaging and condensed legal verbiage.
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COUNT V
VIOLATION OF THE WASHINGTON STATE
CONSUMER PROTECTION ACT

52. Plaintiff Lucky Break Wishbone realleges paragraphs 1-40 as if fully set forth herein.

53. Infringing acts alleged herein were carried out collectively by Defendants to deceive the consuming public into believing that the Lucky Break Wishbone sculptures used in the Sears promotion originated with Lucky Break Wishbone.

54. The infringing acts of the Defendants as described herein affect the public interest and are therefore in violation of the Washington Consumer Protection Act ("CPA"), § 19.86 *et seq.*

V. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Lucky Break Wishbone prays for the following relief:

A. An order entering judgment in Lucky Break Wishbone's favor and awarding Lucky Break Wishbone damages in an amount sufficient to compensate Lucky Break Wishbone for the expected benefit of its contract with Y&R for the Sears promotion or alternatively, an amount sufficient to compensate Lucky Break Wishbone for the substantial beginnings and commitments made in furtherance of the agreement to provide specially manufactured goods;

B. An order entering judgment in favor of Lucky Break Wishbone and awarding damages in an amount sufficient to compensate Lucky Break Wishbone for Defendants' willful acts of copyright infringement as alleged herein pursuant to and consistent with all relevant federal laws, including but not limited to, Title 17, U.S.C. §§ 502, 503 and 504;

C. An order entering judgment in favor of Lucky Break Wishbone and granting Lucky Break Wishbone its attorneys' fees and costs in connection with all applicable laws including 17 U.S.C. § 505; 15 U.S.C. § 1117; and R.C.W. § 19.090 *et seq.*;

D. An order entering judgment in favor of Lucky Break Wishbone and enjoining any further acts of infringement of the copyright in the Lucky Break Wishbone sculpture and

1 further ordering the destruction of all articles used (such as molds or data models) in the acts
2 of infringement, consistent with remedies available under 17 U.S.C. § 503 and 15 U.S.C.
3 § 1118, and further ordering that defendants supply Lucky Break Wishbone with a written
4 certification that all articles used in the infringement have been destroyed.

5 E. An order entering judgment in favor of Lucky Break Wishbone and enjoining
6 Defendants from any further acts falsely designating the origin of their products in violation
7 of 15 U.S.C. § 1125(a);

8 F. An order entering judgment in Lucky Break Wishbone's favor and enhancing
9 any damages awarded in this case up to three times the actual amount awarded consistent with
10 the statutes providing such remedies for willful infringement found in 17 U.S.C. § 504(c);
11 15 U.S.C. § 1117; and R.C.W. § 19.86 *et seq.* and any other applicable federal or state law;
12 and

13 G. Such other further relief the Court may deem just and proper.

14 **VI. JURY DEMAND**

15 Plaintiff Lucky Break Wishbone hereby demands a trial by jury of all issues so triable.

16 Dated this 6th day of March 2006.

17
18 CHRISTENSEN O'CONNOR
19 JOHNSON KINDNESS^{PLLC}

20
21 

22 Mark P. Walters, WSBA No.: 30,819
23 Christensen O'Connor Johnson Kindness^{PLLC}
24 1420 Fifth Avenue, Suite 2800
25 Seattle, WA 98101-2347
26 Telephone: 206.682.8100
27 Fax: 206.224.0779
E-mail: walterm@cojk.com,
courtdocs@efiling.com
Attorney for Plaintiff

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

FORM VA

For a Work of the Visual Arts
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

VA 1-325-348



EFFECTIVE DATE OF REGISTRATION

DEC 29 2005
Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ∇ **Lucky Break Wishbone** NATURE OF THIS WORK ∇ See Instructions **Sculpture**

PREVIOUS OR ALTERNATIVE TITLES ∇

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ∇

If published in a periodical or serial give: Volume ∇ Number ∇ Issue Date ∇ On Page ∇

2 a NAME OF AUTHOR ∇ **Paraflex, Inc.** DATES OF BIRTH AND DEATH Year Born ∇ Year Died ∇

NOTE

Under the law the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer for other person from whom the work was prepared as "author" of that part, and leave the space for date of birth and death blank.

Was this contribution to the work a "work made for hire"? Yes No

AUTHOR'S NATIONALITY OR DOMICILE Name of Country **Citizen of > USA** OR **Resided in >**

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK Anonymously? Yes No Pseudonymously? Yes No

NATURE OF AUTHORSHIP Check appropriate box(es). See instructions

3-Dimensional sculpture Map Technical drawing
 2-Dimensional artwork Photograph Text
 Reproduction of work of art Jewelry design Architectural work
 Design on flexible material

b NAME OF AUTHOR ∇ DATES OF BIRTH AND DEATH Year Born ∇ Year Died ∇

Was this contribution to the work a "work made for hire"? Yes No

AUTHOR'S NATIONALITY OR DOMICILE Name of Country **Citizen of >** OR **Resided in >**

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK Anonymously? Yes No Pseudonymously? Yes No

NATURE OF AUTHORSHIP Check appropriate box(es). See instructions

3-Dimensional sculpture Map Technical drawing
 2-Dimensional artwork Photograph Text
 Reproduction of work of art Jewelry design Architectural work
 Design on flexible material

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED **2004** ∇ Year This information must be given in all cases.

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK **November 5 2004** ∇ Month ∇ Day ∇ Year ∇ **USA** ∇ Nation

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the author as the author given in space 2. ∇ **Lucky Break Wishbone Corp. 4400 S.W. Roxbury Place Seattle, WA 98136**

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ∇ **By Written Agreement**

APPLICATION RECEIVED **DEC 29 2005**
 ONE DEPARTMENT RECEIVED
 TW **DEC 29 2005**
 FUNDS RECEIVED

MORE ON BACK ∇ Complete all applicable spaces (numbers 5-8) on the reverse side of this page. Do NOT WRITE HERE

EXAMINED BY [Signature] FORM VA
 CHECKED BY _____
 CORRESPONDENCE
 Yes

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 COPYRIGHT
 OFFICE USE
 ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.


PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?
 Yes No If your answer is "Yes," why is another registration being sought? (Check appropriate box) **5**
 a. This is the first published edition of a work previously registered in unpublished form.
 b. This is the first application submitted by this author as copyright claimant.
 c. This is a changed version of the work, as shown by space 6 on this application.
 If your answer is "Yes," give: Previous Registration Number Year of Registration

DERIVATIVE WORK OR COMPILATION Complete both space 6a & 6b for a derivative work; complete only 6a for a compilation. **6**
 a. **Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates. **See instructions before completing this space.**
 N/A
 b. **Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.
 N/A

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account. **7**
 Name Account Number
 N/A N/A

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP
 Faye L. Tomlinson
 Christensen O'Connor Johnson Kindness ^{PLLC}
 1420 Fifth Avenue, Suite 2800, Seattle, WA 98101-2347 LBWC-4-6122
 Area Code & Telephone Number > 206.595.1717 **Do not to give your daytime phone number**

CERTIFICATION I, the undersigned, hereby certify that I am the **8**
 check only one
 author
 other copyright claimant
 owner of exclusive right(s)
 authorized agent of Lucky Break Wishbone Corp.
 Name of author or other copyright claimant, or owner of exclusive right(s)
 of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date If this application gives a date of publication in space 3, do not sign and submit it before that date.
 Faye L. Tomlinson date 12/27/05
 Handwritten signature (X)


MAIL
 CERTIFICATE
 TO
 Certificate
 will be
 mailed in
 window
 envelope

Name
 Christensen O'Connor Johnson Kindness ^{PLLC}
 Number/Street/Apt
 1420 Fifth Avenue, Suite 2800
 City/State/Zip
 Seattle WA 98101-2347

9
 Complete all necessary forms
 Pay your registration fee in space 4
 1. Application form
 2. Workable/usable (not filing fee in check or money order payable to Registrar of Copyrights
 3. Two sets of material
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