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10 *Attorneys for Plaintiff*, Plaintiff
11 Kuyou Sports Goods Co., Ltd

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 KUYOU SPORTS GOODS CO. Ltd,

15 Plaintiff,
16 v.

17 FOUNTAIN, INC., a California
18 Corporation,

19 Defendants.

Case No.: 8:17-cv-426-JVS-KES

FIRST AMENDED COMPLAINT FOR

(1) DECLARATORY JUDGMENT
OF PATENT NON-
INFRINGEMENT;
(2) VIOLATION OF SECTION 43(a)
OF THE LANHAM ACT

DEMAND FOR JURY TRIAL

1 Plaintiff Kuyou Sports Goods Co., Ltd. (“Kuyou”), through counsel, hereby brings
2 its Complaint for (1) declaratory judgment of patent non-infringement; and (2) violation of
3 Section 43(a) of the Lanham Act against the entity known as Fountain, Inc., (“Fountain”),
4 and alleges as follows:

5 **INTRODUCTION**

6 1. This action seeks (1) a declaration of non-infringement of United States Patent
7 No. 9,077,877; and (2) a determination that Fountain violated Section 43(a) of the Lanham
8 Act.

9 **PARTIES**

10 2. Plaintiffs Kuyou is a Chinese company having its principal place of business
11 at No.168, Xiangrong Road, Songmushan Village, Dalang County, Dongguan, Guangdong,
12 China 523795.

13 3. According to the U.S.P.T.O assignment records, Defendant FOUNTAIN, INC.
14 is located at 6145 SHOUP AVENUE, UNIT #58, WOODLAND HILLS, CALIFORNIA,
15 but Plaintiff is without sufficient information to confirm the accuracy of this information.

16 **JURISDICTION AND VENUE**

17 4. This Complaint arises under the Patent Laws of the United States, 35 U.S.C. §
18 100 et seq., the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, § 43(a) of the
19 Lanham Act.

20 5. This Court has original jurisdiction over the subject matter of these claims
21 pursuant to 28 U.S.C. §§ 1331, 1338(a) and 2201(a).

22 6. This Court has personal jurisdiction over Fountain because it is a resident of
23 this state and this district.

24 7. Venue is proper in this District under 28 U.S.C. §§ 1391 (b), (c), and 1400 (b),
25 because a substantial part of the events giving rise to Kuyou’s claim occurred in this
26 district, and because Fountain is subject to personal jurisdiction here.

8. An immediate, real, and justiciable controversy exists between Kuyou and Fountain as to whether Kuyou is infringing or has infringed United States Patent No. 9,077,877 (“the ‘877 patent”).

PATENT IN SUIT

9. On its face, the ‘877 patent is entitled “Active headwear for detachably mounting an imaging device.” The ‘877 patent lists the following information, the truth or accuracy of which Plaintiff is unable to confirm:

Inventors: Fountain; Thomas Lee (Woodland Hills, CA)

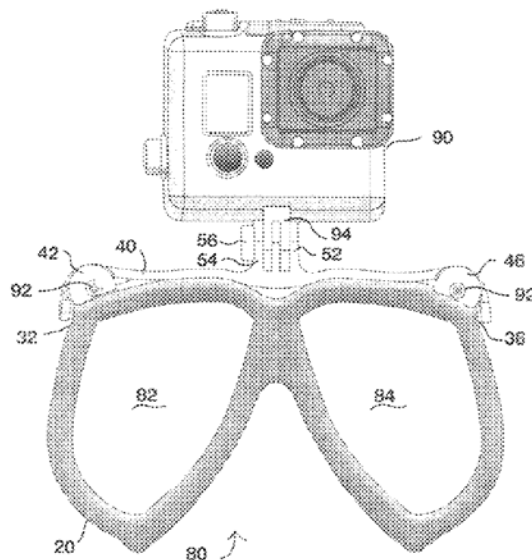
Assignee: Fountain, Inc. (Woodland Hills, CA)

Appl. No.: 13/987,215

Filed: July 10, 2013

Issued: July 7, 2015

10. The ‘877 patent is directed to a mounting system and method for securing a camera to a two-lens diving mask. In one embodiment, the mounting system includes a frame to which can be attached a head strap to form a diving mask. A digital camera or a video recorder is then secured to an attachment base in the mounting system to allow use thereof in a hands-free operating mode. Below is Figure 1 from the ‘877 patent:



11. A copy of the ‘877 patent is attached as Exhibit A.

12. According to the records at the United States Patent and Trademark Office, Fountain, Inc., is the assignee of the '877 patent.

KUYOU'S FULL-FACE SNORKELING MASK

13. Kuyou manufactures and sells numerous products for sports, recreation, and other activities. Relevant here is Kuyou's full-face snorkeling mask w/ camera mount, photographs of which are below. As can be seen, Kuyou's mask is designed to cover the full- face of the user, which allows the user to more comfortably breath during snorkeling activities without having to continuously clench a snorkel mouthpiece in the mouth. Kuyou's design also includes a full-face bulbous undivided viewing glass that allows a fuller field-of-view than possible with prior art products. The mask includes an integrated mount at the top edge for connecting a Go-Pro or other waterproof-type camera. Kuyou manufactures these masks, which it sells to various online retailers, who then resell the masks to the retail customers.



DEFENDANT FOUNTAIN'S SHAM ENFORCEMENT CAMPAIGN

14. Defendant Fountain is a non-practicing entity that has been heavily engaged in sham assertions of the '877 patent against multiple companies. According to written correspondence from Fountain's counsel, Fountain has "sued over 200 parties for infringing [the '877] patent, and our enforcement efforts are ongoing. Therefore, if you do not enter into a licensing arrangement with Fountain, Inc., we will expect you to cease sales of your infringing products and will file suit if you do not." Copies of exemplary correspondence from Fountain's counsel are attached as Ex. B and incorporated herein by reference.

15. Fountain's business model has been to contact online marketplaces such as Amazon.com that carry masks with camera mounts and – based on unfounded and untrue accusations that the accused masks infringe the '877 patent – utilize "take-down" procedures to force the online marketplace to cease sales of the accused masks. Copies of exemplary correspondence from Amazon is attached as Ex. C and incorporated herein by reference.

16. After Fountain interrupts the lawful efforts of Kuyou's online retailer to the accused full-face snorkel masks, Fountain's counsel then contacts the online retailer to demand an exorbitant "license" fee as a condition for Fountain ceasing its interfering conduct. Fountain has demanded a fee of \$11 for each mask sold. Ex. D. Fountain makes this demand despite that such masks frequently sell for \$30 (including the costs of shipping), i.e., an eye-popping royalty of nearly 50%. Ex. E.

17. As the attached correspondence illustrates, Fountain's meritless accusations of patent infringement have focused in particular on Plaintiff Kuyou's full-face snorkel masks.

18. Fountain has focused its attack on small online retailers of the Kuyou mask. On information and belief, Fountain has taken this tact because these small retailers have insufficient funds to mount a defense to Fountain's meritless claims and can be more easily bullied into paying Fountain's exorbitant demands.

1 19. And bullying is exactly what Fountain has done here. As one example, after
2 Fountain unfairly extracted a \$2,000 payment from one of Kuyou's online retailers using
3 false allegations of patent infringement, Fountain continued to hound the retailer for an
4 additional exorbitant royalty of \$11 per mask for all further mask sales. Ex. H. And when
5 the retailer was reluctant to provide its "pound of flesh," Fountain resorted bullying the
6 retailer with utterly false threats, including that the retailer's products would be removed
7 from Amazon "with no chance to re-list them." Portions of Fountain's aggressive and false
8 posturing are reproduced below:

9 My client has also not yet received a sales report or royalty payment for
10 September's sales.

11 You have 24 hours to send these items. If they are not received in that
12 time, we will declare you in breach of the license agreement, and your
13 Amazon listings will then be terminated in accordance with Section 14.15 of
14 the license agreement with no chance to re-list them. Given the severity of this
15 measure, we hope you will continue to pay my client the royalties it is owed.
16 Once we terminate your listings, there will be no chance to fix this.

17 *Id.*

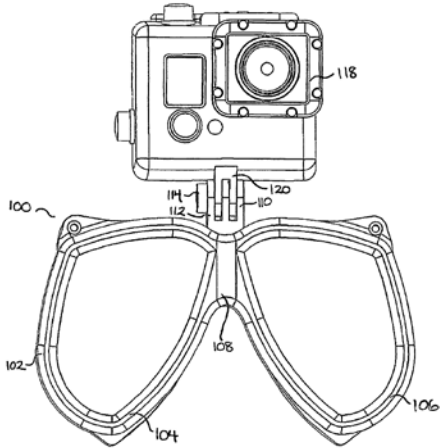

18 20. As a result of Fountain's wrongful conduct and relentless and false
19 accusations of patent infringement against Kuyou and its products, Fountain has caused
20 significant harm and lost sales to Kuyou as well as resellers of Kuyou's products.
21 Fountain's enforcement campaign has indeed placed a cloud on Kuyou's lawful sales of its
22 dive mask products; threatened Kuyou's business and relationships with its customers and
23 partners; harmed Kuyou's sales of its dive mask products; and created a justiciable
24 controversy between Kuyou and Fountain.

25 21. For all these reasons, an actual controversy exists between Kuyou and
26 Fountain regarding the alleged infringement of any claim of the '877 patent.
27
28

KUYOU DOES NOT INFRINGE THE '877 PATENT

22. Kuyou's products do not infringe any claim of the '877 patent. As the attached correspondence shows, Fountain has alleged that Kuyou's full-face snorkel mask infringes claims 6-8 of the '877 patent. Ex. F, Letter from counsel for Fountain ("We have prepared and attached a preliminary claims chart showing our assessment of how your client's full-face mask with GoPro mount product infringed claims 6 through 8 of the patent.")

23. Fountain's infringement allegations are false, which can be readily demonstrated through even a cursory comparison of these claims against Kuyou's product. In particular, as shown in the table below, the Kuyou masks do not meet the critical limitations of the '877 patent claims, which are all directed to a traditional style masks having a right lens and a left lens connected together by a nosepiece.

Claim Limitation	Representative '877 patent disclosure	Kuyou Full-Face Mask
<p>6. A mounting assembly, suitable for securing an imaging device to a head of a user, said mounting assembly comprising: an integrated headwear frame and attachment base ;</p> <p>wherein said integrated headwear frame and attachment base further has a right lens frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by nosepiece</p>	 <p style="text-align: center;">Fig. 10</p> <p>“Another embodiment of the invention, where the headwear frame and attachment base are integrated (i.e., not separable), with an imaging device attached to the attachment base, is shown in FIG. 10 (front view). Mounting assembly 100 includes frame 102 and a right lens frame 104 attached to a left lens frame 106 by a nosepiece 108. Two or more engagement tabs 110 and adjacent retainer engagement tab 112, including a boss 114 configured to hold a fastening device, may be provided at the top of the nosepiece 108.”</p>	<p>Fountain’s claimed invention is directed specifically to a two-pane dive mask having both “a right lens frame [104] and a left lens frame [106].” And the claims explicitly describe that “the right lens frame is attached to the left lens frame by nosepiece [108].”</p>  <p>But as plainly shown above, Kuyou’s full-face mask is not a traditional two-pane dive mask. Rather, it is a full-face mask having only one bulbous transparent front shield with a single surrounding frame. The Kuyou mask thus lacks multiple critical limitations recited in the ‘877 patent claims: it does not have a right lens frame; it does not have a left lens frame; and it does not have a connecting nosepiece therebetween.</p>

1 25. Claim 6 of the ‘877 patent thus requires “a right lens frame and a left lens
2 frame, wherein the right lens frame is attached to the left lens frame by nosepiece.” The
3 Kuyou full-face snorkel mask, however, lacks each of these required elements. The Kuyou
4 mask therefore cannot infringe claim 6 of the ‘877 patent, or claims 7 and 8, which depend
5 from claim 6.

6 26. As noted above, Fountain has never contended that Kuyou’s products infringe
7 Claims 1 through 5 of the ‘877 patent. Ex. F. Nor could it make such an accusation.
8 Claim 1 of the ‘877 patent recites:

- 9 1. A mounting assembly, suitable for securing an imaging device to a head of
10 a user, said mounting assembly comprising:
11 a headwear frame configured for placement over a face of the user, said
12 headwear frame having a first mounting rim disposed at a first side of
13 said headwear frame and a second mounting rim disposed at a second
14 side of said headwear frame;
15 and an attachment base, said attachment base including at least two
16 engagement tabs configured to mate with a camera mount, said
17 attachment base further including a first clamp configured to mate with
18 said first mounting rim and a second clamp configured to mate with said
19 second mounting rim,
20 wherein said first clamp comprises a through hole to align with a
21 through hole in said first mounting rim and said second clamp
22 comprises a through hole configured to align with a through hole
23 in said second mounting.

24 Ex. A.

25 27. As can be seen, claim 1 requires “first and second clamps.” Claim 2, which
26 depends from claim 1, likewise requires these “first and second clamps.” The same is true
27 of claims 3 and 4, which both include similar language regarding “first and second
28

1 clamps.” *Id.* But Kuyou’s product does not include such “first and second clamps” and
2 Fountain does not and cannot contend otherwise.

3 28. Fountain has been repeatedly notified of the deficiencies in its infringement
4 allegations. Ex. G. For example, Kuyou has explicitly pointed out that its mask lacks the
5 required elements set forth in Claim 6, including “a right lens frame and a left lens frame,
6 wherein the right lens frame is attached to the left lens frame by nosepiece.” *Id.* But
7 Fountain has simply brushed over this critical deficiency, making the claim that – while
8 missing numerous elements of the ‘877 patent claims – the Kuyou mask nonetheless
9 infringes under the “Doctrine of Equivalents.” Ex. F. As explained below, Fountain’s
10 reliance on the “Doctrine of Equivalents” borders on absurd.

11 29. The doctrine of equivalents is curbed by two important and related legal
12 doctrines.

13 30. First, the doctrine of claim vitiation prevents application of the doctrine of
14 equivalents in a way that would completely eliminate a claim element – i.e., renders the
15 claim limitation inconsequential or ineffective. This doctrine has its roots in the all
16 elements rule: “[e]ach element contained in a patent claim is deemed material to defining
17 the scope of the patented invention, . . . the doctrine of equivalents must be applied to
18 individual elements of the claim, not to the invention as a whole.” *Warner-Jenkinson Co. v.*
19 *Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (U.S. 1997). As stated in *Warner- Jenkinson*, “if
20 a theory of equivalence would entirely vitiate a particular claim element, partial or
21 complete judgment should be rendered by the court, as there would be no further material
22 issue for the jury.” *Id.* at 39, fn.8.

23 31. Second, the doctrine of prosecution history estoppel limits the broad
24 application of the doctrine of equivalents by barring an equivalents argument for subject
25 matter relinquished when a patent claim is narrowed during prosecution. *Conoco, Inc. v.*
26 *Energy & Envtl. Int’l, L.C.*, 460 F.3d 1349, 1363 (Fed. Cir. 2006) (citations omitted). The
27 Federal Circuit has recognized that prosecution history estoppel can occur during
28 prosecution in one of two ways: (1) by making a narrowing amendment to the claim

1 (“amendment-based estoppel”) or (2) by surrendering claim scope through argument to the
 2 patent examiner (“argument-based estoppel”). *Id.*

3 32. Both claim vitiation and prosecution history estoppel apply here to preclude
 4 Fountain’s attempted reliance on the doctrine of equivalents.

5 33. Regarding the doctrine of claim vitiation, the Kuyou mask does not include a
 6 right frame, it does not include a left frame, and it does not include nosepiece connecting
 7 the two. This is not a situation where the missing claim elements required by the ‘877
 8 patent claims can somehow be equated to other equivalent elements in the Kuyou mask.
 9 To the contrary, applying the doctrine of equivalents in the manner proposed by Fountain
 10 would remove these limitations entirely. There can be no equivalence in this situation.

11 34. Regarding the doctrine of prosecution history estoppel, at least amendment-
 12 based estoppel precludes the doctrine of equivalents here. As originally presented,
 13 Defendant Fountain sought to patent exactly what it now seeks to claim through the
 14 doctrine of equivalents, a mounting assembly comprising a frame placed over the face of
 15 the user, which includes two engagement tabs for connecting a camera. This can be seen in
 16 Fountain’s originally filed claims 10, 11, 12, and 13 from its initial patent application,
 17 which are reproduced below:

18
 19 10. A mounting assembly, suitable for securing an imaging device to the head of a
 user, said mounting assembly comprising:

20 an integrated headwear frame and attachment base, wherein said
 21 headwear frame is configured for placement over the face of a user, and
 22 wherein said attachment base includes at least two engagement tabs, and
 wherein the engagement tabs are configured to mate with a camera mount.

23 11. The mounting assembly of claim 10, wherein said integrated headwear frame
 24 and attachment base further has a right lens frame and a left lens frame, wherein the
 right lens frame is attached to the left lens frame by a nosepiece.

25 12. The mounting assembly of claim 11, wherein said attachment base further has
 26 a retainer engagement adjacent to the at least two engagement tabs.

27 13. The mounting assembly of claim 12, wherein the engagement tabs and the
 28 retainer engagement tab are spaced apart so as to define open transverse slots
 suitable for the insertion of a camera mount.

1 35. The examiner, however, issued an office action rejecting claim 10 over the
2 prior art, noting that U.S. Pat. Publication No. 20080192114 to Pearson et al. included each
3 and every one of the elements set forth in originally filed Claim 1 as well as originally filed
4 Claim 10:

5 Claims 1-2, 4-5 are rejected under 35 U.S.C. 102(a)(1) as being anticipated by
6 U.S. Patent Publication No. 2008/0192114 to Pearson et al. (Pearson).

7 Regarding claim 1, 10, Pearson '114 discloses a mounting assembly (Fig. 14)
8 suitable for securing an imaging device to the head of a user, the mounting assembly
9 comprising: a headwear frame as shown in Fig. 14, configured for placement over a
10 face of the user, the headwear frame having a first mounting rim (1402) disposed at a
11 first side of the frame and a second mounting rim (opposite side) disposed at a second
12 attachment base further including a first clamp (left) configured to mate with the first
13 mounting rim and a second clamp (right) configured to mate with the second mounting
14 rim.

15 36. The examiner, however, noted that originally-filed claim 13, would be
16 allowable if rewritten to also include each limitation found in the preceding claims, i.e.,
17 each and every limitation found in claims 10, 11, 12, and 13. This includes the limitations
18 in question here: “a right lens frame and a left lens frame, wherein the right lens frame is
19 attached to the left lens frame by nosepiece.”

20 37. Importantly, Fountain did not dispute the examiner’s characterization of the
21 Pearson reference as disclosing each and every element of original claim 10. To the
22 contrary, it “gratefully” acknowledged the examiner’s finding of allowable subject matter
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1 and presented an entirely new claim, original claim 13, which was renumbered as claim 6
2 when the '877 patent was issued:

3 13. (Currently amended) A mounting assembly, suitable for securing an imaging
4 device to a head of a user, said mounting assembly comprising:

5 an integrated headwear frame and attachment base, wherein said headwear frame is
6 configured for placement over a face of a user, and wherein said attachment base includes at
7 least two engagement tabs, and wherein the engagement tabs are configured to mate with a
8 camera mount;

9 wherein said integrated headwear frame and attachment base further has a right lens
10 frame and a left lens frame, wherein the right lens frame is attached to the left lens frame by a
11 nosepiece;

12 wherein said attachment base further has a retainer engagement adjacent to the at least
13 two engagement tabs;

14 The mounting assembly of claim 12, wherein the engagement tabs and the retainer
15 engagement tab are spaced apart so as to define open transverse slots suitable for the insertion of
16 a camera mount.

17 38. As shown above, Fountain amended his claims to overcome the prior art,
18 adding the very same limitations Fountain now seeks to ignore through the doctrine of
19 equivalents.

20 39. Fountain's conduct during prosecution epitomizes prosecution history
21 estoppel. *Honeywell Int'l Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131 (Fed. Cir.
22 2004) (*en banc*) (rewriting of dependent claims into independent form coupled with the
23 cancellation of the original independent claims creates a presumption of PHE.)

24 40. Fountain thus cannot credibly assert infringement of the '877 patent, whether
25 literally or under the doctrine of equivalents.

26 **FIRST COUNT**

27 **(Declaration of Non-Infringement of the '877 Patent)**

28 41. Kuyou restates and incorporates by reference the allegations in the preceding
paragraphs of this Complaint as if fully set forth herein.

42. Fountain claims to own all rights, title, and interest in the '877 patent, a copy of which is attached hereto as Exhibit A.

43. As demonstrated above and in the attached exhibits (Exs. B, C, D, and E), Fountain has repeatedly and relentlessly accused Kuyou and its products of infringing the '877 patent, in that Kuyou "makes, uses, sells, offers for sale, imports, exports, supplies and/or distributes within the United States" its full face snorkel mask.

44. A substantial, immediate, and real controversy therefore exists between Kuyou and Fountain regarding whether any Kuyou product infringe or have infringed the '877 patent. A judicial declaration is necessary to determine the parties' respective rights regarding the '877 patent.

45. Kuyou seeks a judgment declaring that its products do not directly or indirectly infringe any claim of the '877 patent.

SECOND COUNT

(Violation of Section 43(a) of the Lanham Act)

46. False allegations of patent infringement, when made in bad faith, violate the unfair competition provision under § 43(a) of the Lanham Act. *Zenith Elecs. Corp., v. Exzec, Inc.*, 182 F.3d 1340, 1354 (Fed. Cir. 1999). Elements of this claim include:

- a. That the defendant . . . made a false or misleading statement of fact in commercial advertising or promotion about the plaintiff's goods or services;
 - b. That the statement actually deceives or is likely to deceive a substantial segment of the intended audience;
 - c. that the defendant caused the statement to enter interstate commerce;
- and
- d. that the statement results in actual or probable injury to the plaintiff.

Id. at 1348.

47. As detailed above, Defendant Fountain has made false or misleading statements of fact to Amazon and others regarding Kuyou's goods or services, specifically that Kuyou's products infringe the '877 patent.

1 48. Fountain made these false statements of fact regarding patent infringement in
2 bad faith. As explained above, Fountain's allegations of patent infringement are
3 objectively baseless in that the '877 patent was plainly not infringed by Kuyou's products.
4 These allegations were also subjectively baseless in that Fountain knew or should have
5 known that Kuyou's products did not infringe the '877 patent. As explained above,
6 Fountain was specifically advised by Kuyou that its products did not and could not infringe
7 the '877 patent. And Kuyou further advised Fountain of the multitude of reasons Kuyou's
8 products did not and could not infringe the '877 patent.

9 49. Fountain's false statements actually deceived or were likely to deceive
10 Amazon and others.

11 50. Fountain's false and deceptive statements were unquestionably material, e.g.,
12 Amazon indeed removed Kuyou's products because of Fountain's deception and Kuyou's
13 online retailers have either purchased less of Kuyou's accused products or stopped
14 purchasing these products entirely as a result of Fountain's statements.

15 51. By making these knowingly deceptive statements to third-party Amazon and
16 others, including Kuyou's online retailers, Fountain has caused these false and deceptive
17 statements to enter interstate commerce.

18 52. By Fountain's conduct, Fountain has caused actual or probable injury to
19 Kuyou, including damaging irreparably its relationships with its online retailers, preventing
20 both Kuyou and Kuyou's online retailers from being unable to sell Kuyou's accused full-
21 face snorkel mask, causing the removal of Kuyou's products from Amazon and elsewhere,
22 and causing Kuyou's online retailers to either purchase less of Kuyou's accused products or
23 to stop purchasing these products entirely. Kuyou has therefore suffered damages a result
24 of Fountain's conduct, including lost sales of its accused full-face snorkel masks.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Kuyou prays for judgment and relief as follows:

27 A. Declaring that Kuyou's products do not infringe any claim of the '877 patent;
28

1 B. Declaring that judgment be entered in favor of Kuyou and against Fountain on
2 each of Kuyou's claims;

3 C. Finding that this an exceptional case under 35 U.S.C. § 285;

4 D. Declaring that Fountain has violated Sec. 43(a) of the Lanham Act;

5 E. Awarding treble damages to Kuyou, as well as its costs and attorneys' fees
6 incurred in connection with this action; and

7 F. Such further and additional relief as the Court deems just and proper.

8
9 Dated: June 5, 2017

ONE LLP

10 By: /s/ Nathaniel L. Dilger
11 Nathaniel L. Dilger
12 Attorney for Plaintiff,
13 Kuyou Sports Goods Co., Ltd
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JURY DEMAND

Plaintiff Kuyou hereby demands a jury trial on all issues and claims so triable.

Dated: June 5, 2017

ONE LLP

By: /s/ Nathaniel L. Dilger
Nathaniel L. Dilger
Attorney for Plaintiff,
Kuyou Sports Goods Co., Ltd