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

LIVE EYEWEAR, INC., a California
corporation,

Plaintiff,

vs.

DIOPTICS MEDICAL PRODUCTS, INC.,
a California corporation; FGX
INTERNATIONAL, INC., a Delaware
corporation; ESSILOR OF AMERICA,
INC., a Delaware corporation; DOES 1
through 10, inclusive,

Defendants.

CASE NO. CV

CV11-08182 PA (JLGx)
**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF FOR:**

FEDERAL CLAIMS:

- (1) PATENT INFRINGEMENT;
- (2) VIOLATION OF THE
COMPUTER
FRAUD AND ABUSE ACT;
- (3) TRADEMARK INFRINGEMENT;
- (4) VIOLATION OF 15 U.S.C. § 1125.

STATE CLAIMS:

- (5) VIOLATION OF THE
COMPUTER DATA ACCESS AND
FRAUD ACT;
- (6) TRADEMARK INFRINGEMENT
AND DILUTION;
- (7) COMMERCIAL
DISPARAGEMENT;
- (8) UNFAIR COMPETITION;

JURY TRIAL DEMANDED

1 Plaintiff Live Eyewear, Inc. ("Live Eyewear") for its complaint against Defendants,
2 alleges as follows:

3 INTRODUCTION

4 A. GENERAL INFORMATION

5 1. This case is about the bad actions of a large global company trying to suppress
6 a much smaller, California corporation in the over-prescription eyewear sunglasses market.
7 Live Eyewear is recognized in independent optical, in the vision industry and elsewhere as a
8 premier provider of over-prescription sunglasses, sunglass clips and related products and
9 Defendants are various legal subsidiaries of Essilor of America, Inc. ("Essilor"), a global
10 eyewear conglomerate.

11 2. Live Eyewear brings this lawsuit after Defendants have and continue to
12 repeatedly engage in unfair, deceptive and unlawful conduct directed at Live Eyewear.

13 3. Live Eyewear was conceived in June 2001 by Kieran Hardy ("Hardy") who
14 identified a demand for a quality, over-prescription-eyewear, sunglass in the independent
15 optical industry (Opticians, Ophthalmologists and Optometrists). Hardy solicited his idea to
16 several sunglass manufacturers who had an existing presence in the mass retail market but
17 who either lacked, or had been unsuccessful in the independent optical market.

18 4. At the time, one such manufacturer, Dioptics Medical Products, Inc. ("DMP")
19 had several brands known throughout the vision industry as mass market brands and as such,
20 DMP experienced difficulty in developing and placing product in the higher-end independent
21 optical market that would not support a mass market brand in high-end optical.

22 5. In late 2001, DMP's management agreed to partner with Hardy and to provide
23 initial funding for Live Eyewear. On November 28, 2001, Dioptics Holdings, Inc. formed
24 Live Eyewear, Inc. and appointed Hardy as the General Manager of Live Eyewear. Upon
25 information and belief, in November 2001, Dioptics Holdings, Inc. also owned DMP thereby
26 making Live Eyewear and DMP sister companies.

27 6. Hardy and DMP's management agreed that, to avoid cannibalization of the
28 optical and mass market segments, DMP would sell exclusively to mass market retailers and

1 Live Eyewear would design, manufacturer and sell to both the independent optical market and
2 to high-end sporting goods retailers. Furthermore, they agreed that Live Eyewear would offer
3 higher-quality products with extra features intended to distinguish Live Eyewear's sunglass
4 offerings from DMP's sunglass offerings.

5 7. To further distinguish the two companies, Live Eyewear resided in a separate
6 building, operated on a separate physical computer server and provided all of its own
7 marketing and other related materials – which were held exclusively on Live Eyewear's
8 server. Live Eyewear also provided all of its own fulfillment, accounting and other functions.

9 8. Administrative expenses for Live Eyewear were combined and conducted by
10 the existing DMP's administrative team to save overhead costs. Live Eyewear employees
11 were paid on DMP checks; they participated in DMP's 401k program and were insured
12 through DMP's insurance program.

13 9. For the engineering services, the boards of directors (comprised largely of the
14 shareholder owners) instructed Live Eyewear to utilize Eric Rhea ("Rhea"), for the sole
15 purpose of assisting Live Eyewear to develop unique and novel eyewear brands and designs
16 to differentiate Live Eyewear from DMP. While performing these services, Rhea or other
17 DMP employees improperly recorded all of Live Eyewear's intellectual property in DMP's
18 name alone.

19 10. In or around October 2005, Live Eyewear and DMP moved to the same
20 physical building. At this time, the boards of directors, seeking to benefit from the perceived
21 shared aims of the two companies, instructed DMP to perform Live Eyewear's accounting
22 and fulfillment operations in addition to the administrative and engineering services that were
23 already being performed. In exchange, Live Eyewear was billed a significant monthly
24 amount for the "shared services" rendered by DMP to Live Eyewear.

25 11. Although it was located in the same building as DMP, Live Eyewear remained
26 a separate legal entity. Its password-protected server was placed in the common server room,
27 but remained the property of Live Eyewear and access was controlled entirely by Live
28 Eyewear management. Live Eyewear independently created its own marketing materials,

1 point of purchase displays and other collateral marketing material and displays – the digital
2 elements of which resided on the Live Eyewear server.

3 12. Despite Live Eyewear paying DMP to perform many of Live Eyewear's
4 operational tasks, Live Eyewear continued to push for bright-line separation between the two
5 companies and requested that the boards of directors formally assign to Live Eyewear that
6 intellectual property that had been developed by Live Eyewear, but improperly registered in
7 DMP's name. The parties entered into a Trademark Purchase and Assignment Agreement on
8 February 2, 2008 in which DMP transferred to Live Eyewear all of Live Eyewear's protected
9 trademarks and agreed to discontinue any further use of such trademarks.

10 13. In early September 2008, FGX International, Inc. ("FGX"), contacted
11 DMP/Live Eyewear management and expressed an interest in acquiring both DMP and Live
12 Eyewear. In preparation for a September 26, 2008 senior management meeting between
13 DMP, Live Eyewear and FGX, FGX requested and received extensive due diligence
14 regarding Live Eyewear, including, but not limited to, very specific and highly-confidential
15 documents concerning Live Eyewear's intellectual property, customer lists, procurement,
16 accounting and other business secrets. At this time Live Eyewear's disclosed its intention to
17 patent a two-shot, over-molded temple that it had in development.

18 14. On or around September 27, 2008, FGX informed DMP that it no longer
19 intended to purchase Live Eyewear. Hardy responded to the news by offering to purchase
20 Live Eyewear from the shareholders who, in turn, agreed to sell the company to Hardy.
21 Hardy demanded that Live Eyewear be disassociated with DMP without delay and further
22 demanded that DMP cease sending due diligence materials to FGX that concerned Live
23 Eyewear. FGX did not return any of the Live Eyewear due diligence that it had received in
24 advance of the purchase and FGX provided Live Eyewear no assurances at that time that FGX
25 destroyed the highly sensitive documents.

26 15. The closing of the FGX/DMP purchase transaction occurred on November 26,
27 2008.
28

1 16. As part of the closing, FGX/DMP and Live Eyewear entered into a confidential
2 Non-Disclosure Agreement in which FGX/DMP warranted that it would not use and would
3 destroy all confidential materials it had received from Live Eyewear in the due diligence
4 process or that contained Live Eyewear confidential information. Live Eyewear subsequently
5 received repeated assurances that FGX/DMP destroyed this information.

6 17. Neither FGX nor DMP destroyed Live Eyewear's confidential information as
7 they claimed and instead, profited from the confidential information when they used the
8 information to directly compete with Live Eyewear.

9 18. As part of the closing, Live Eyewear and DMP entered into a Patent Transfer
10 Agreement and a Patent License Agreement which transferred to Live Eyewear those patents
11 that DMP improperly applied for and received in DMP's name.

12 19. As part of the closing, Live Eyewear and DMP entered into a Transition
13 Services Agreement where DMP agreed to continue to provide Live Eyewear shared services
14 until a specific date or such time as Live Eyewear could successfully manage on its own.

15 20. Despite the shared services agreement and the bright-line distinction between
16 Live Eyewear and DMP, DMP employees requested access to Live Eyewear's secured
17 computer systems which included Live Eyewear's server space, Live Eyewear's account
18 management system (SysPro), and Live Eyewear's customer information systems without
19 permission. Live Eyewear's secured systems were under the control of the shared IT
20 department.

21 21. On at least one known instance, Jennifer Slosar ("**Slosar**"), a DMP employee,
22 contacted the shared IT department and demanded access to Live Eyewear's secured
23 computer servers. Slosar coerced the IT employees to give her access asserting that, if
24 necessary, she would bring in upper management to grant her request. Accordingly, Slosar
25 gained unauthorized access and proceeded to copy all of Live Eyewear's data which included,
26 among other things, Live Eyewear's protected intellectual property, graphic images, customer
27 account information and accounting data.
28

1 22. Beginning in early 2009, DMP began creating websites and other marketing
2 materials that prominently featured Live Eyewear's protected images and other valuable
3 property that resided exclusively on Live Eyewear's secured computer servers.

4 23. As a result of this illegal activity, Defendants repeatedly have engaged in
5 infringing conduct as Defendants' have used and continue to use, *inter alia*, Live Eyewear's
6 intellectual property and valuable trade secret information, including customer lists, in an
7 attempt to compete with Live Eyewear. Defendants' infringing and unfair conduct has
8 damaged Live Eyewear and inflicted irreparable harm for which Live Eyewear seeks, among
9 other remedies, an award of its actual damages, disgorgement of Defendants' profits from the
10 infringing sales, and injunctive relief.

11 24. As recent as September 13, 2011, DMP prominently features on its website a
12 photograph of a Live Eyewear product that was taken by Hardy himself that DMP neither has
13 the rights nor permission to use.

14 **B. THE U.S. UTILITY PATENT NO. 7,878,647 ("647 Patent")**

15 25. In or around July 2007, Hardy conceived and fully outlined a highly
16 specialized eyewear temple to further distinguish Live Eyewear's products from DMP's
17 products. Prior to Hardy's invention, specialty eyewear temples were largely comprised of
18 two different functional elements that were assembled using a "box" receiver and a temple
19 extension that would snap into the box receiver. Hardy conceived of the idea of utilizing a
20 two-shot, over-molding process whereby the temple extension would be molded directly into
21 the receiver making the completed product more durable and practical.

22 26. On August 1, 2007, Hardy conveyed to DMP's management that he had
23 created a number of new and unique features that Hardy intended to be used on the new Live
24 Eyewear product.

25 27. On or about August 3, 2007, Hardy met with Rhea and discussed the
26 redesigned Live Eyewear product which included Hardy's over-molded, two-shot temple
27 invention. Rhea agreed that Hardy's changes and updates would be unique to the products
28 and cautioned Hardy that, unless Hardy or Live Eyewear patented the changes, that once the

1 updated product hit the market anyone, including DMP, could purchase and knock-off
2 Hardy's invention.

3 28. Over the next few months, Rhea, at Hardy's direction, then proceeded to assist
4 Hardy and Live Eyewear to reduce Hardy's invention to practice. Live Eyewear began selling
5 products practicing the '647 patent on or after the April 11, 2008 Vision Expo East trade show
6 event in New York City. Hardy and Live Eyewear filed for patent protection of Hardy's
7 temple invention on April 9, 2009. The patent published on October 14, 2010 and U.S. Patent
8 No. 7,878,647 issued on February 1, 2011 for "a frame for eyewear, an associated temple and
9 the method for making the same."

10 29. Despite its full knowledge of Hardy's pending patent application, DMP and
11 FGX began selling products, including but not limited to, DMP's "Havens" line of sunglasses,
12 as early as October 7, 2009, that prominently featured Hardy's temple invention (now the
13 '647 Patent). On October 7, 2009, Live Eyewear informed Rhea that DMP was selling an
14 infringing product. DMP and FGX disregarded this notice and all further notices from Live
15 Eyewear concerning DMP's and FGX's infringing conduct.

16 30. Defendants' conduct was willful and malicious and has damaged Live
17 Eyewear and inflicted irreparable harm for which Live Eyewear seeks, among other remedies,
18 an award of its actual damages, attorneys' fees, compensatory damages from the infringing
19 sales, and injunctive relief.

20 PARTIES

21 31. Live Eyewear is a California corporation with its principal place of business
22 located at 3490 Broad Street, San Luis Obispo, California. Live Eyewear was founded in
23 2001 and is now recognized as a world leader in the over-prescription eyewear market.

24 32. Upon information and belief, DMP was and is a corporation organized and
25 existing under the laws of the State of California with its principal place of business in Rhode
26 Island and is a wholly-owned subsidiary of FGX.
27
28

1 33. Upon information and belief, FGX was and is a corporation organized and
2 existing under the laws of the State of Delaware with its principal place of business in Rhode
3 Island and is a wholly-owned subsidiary of Essilor.

4 34. Upon information and belief, Essilor was and is a corporation organized and
5 existing under the laws of the State of Delaware with its principal place of business in Rhode
6 Island and is a wholly-owned subsidiary of Essilor International SA, a France corporation.

7 35. Live is ignorant of the true names and capacities of Defendants sued herein as
8 Does 1 through 10, inclusive, and therefore sues said Defendants by such fictitious names.
9 Live will amend this Complaint, if necessary to allege their true names and capacities when
10 ascertained.

11 **JURISDICTION AND VENUE**

12 36. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and
13 1338(a) and 15 U.S.C. § 1121 because Live Eyewear's first cause of action arises under the
14 patent and trademark laws of the United States, 35 U.S.C. §§ 1 *et seq.*

15 37. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 18
16 U.S.C. § 1030(g) because Live Eyewear's second cause of action arises under the Computer
17 Fraud and Abuse Act, 18 U.S.C. §§ 1030 *et seq.*

18 38. This Court has supplemental subject matter jurisdiction over the pendent state
19 law claims under 28 U.S.C. § 1367 because these claims are so related to Live Eyewear's
20 claims under federal law that they form part of the same case or controversy and derive from a
21 common nucleus of operative facts.

22 39. Venue is proper in this federal district pursuant to 28 U.S.C. §§ 1391(b)-(c)
23 and 1400(b) as Defendants either maintain their principal place of business in this judicial
24 district, have done business in this judicial district, and have committed and continue to
25 commit acts of patent and trademark infringement in this judicial district, entitling Live
26 Eyewear to relief as set forth.

INTRADISTRICT ASSIGNMENT

40. Assignment to the Western Division is appropriate because the majority of claims and certain of the transactions, acts, practices and courses of business alleged below occurred within the Central District of California, including San Luis Obispo, California.

FACTUAL ALLEGATIONS

A. AS TO ALL CLAIMS:

41. In June 2001, Hardy identified a demand for a high-quality, over-prescription sunglass in the independent optical market. Hardy solicited his idea to several existing manufacturers, including DMP, for initial funding for his concept.

42. In November 2001, DMP agreed to form a separate company to be led by Hardy that would distinguish itself from DMP while giving DMP's shareholders access to the independent optical market.

43. Prior to its relationship with Hardy, DMP had tried, unsuccessfully, to place its own brands into the independent optical market.

44. On November 28, 2001, Dioptics Holdings, Inc. formed Live Eyewear, Inc., a California corporation. Dioptics Holdings, Inc. was the sole shareholder of Live Eyewear. Live Eyewear's board of directors appointed Hardy as Live Eyewear's General Manager.

45. Upon information and belief, at all times from its inception, Live Eyewear was and continues to operate as a separate legal entity from DMP.

46. Upon information and belief, on November 28, 2001, Dioptics Holdings, Inc. was the sole shareholder of DMP.

47. On December 16, 2005, Dioptics Holdings, Inc. transferred its entire interest in Live Eyewear to DMP. After the transfer, DMP was the sole shareholder of Live Eyewear.

48. On April 1, 2007, DMP transferred its entire interest in Live Eyewear to Richard T. Niner ("Niner") and Ronald G. Strackbein ("Strackbein") who, upon information and belief, were DMP's sole shareholders.

49. From Live Eyewear's formation to the sale of Live Eyewear to Hardy, Live Eyewear and DMP employees, management and shareholders have been largely intertwined.

1 50. Upon information and belief, in October 2005, the boards of directors agreed
2 that, in place of Live Eyewear hiring its own administrative, marketing, engineering and other
3 administrative employees, Live Eyewear would pay DMP a significant monthly amount that
4 the companies classified as a “shared services” payment.

5 51. In exchange for Live Eyewear’s monthly “shared services” payment, DMP
6 agreed to provide services to Live Eyewear in the form of, among others, human resources,
7 accounting, billing, administrative, information technology and engineering services.

8 52. As part of the shared services agreement and at Live Eyewear’s direction, Rhea
9 assisted Hardy and Live Eyewear with implementing Hardy’s inventions and facilitating in
10 the patent process.

11 53. Rhea provided no independent invention to Live Eyewear.

12 54. DMP and Live Eyewear agreed that DMP would separately bill Live Eyewear
13 for trademarks, patents, molds, and all other intellectual property (“Intellectual Property”) that
14 it procured on Live Eyewear’s behalf.

15 55. Prior to October 2007, DMP registered all Live Eyewear Intellectual Property
16 in DMP’s name or in the name of DMP’s CEO, Henry Lane (“Lane”).

17 56. Live Eyewear took over filing for its own trademarks in October 2007.

18 57. On February 1, 2008, the boards of directors directed Live Eyewear and DMP
19 to enter into a Trademark Purchase and Assignment Agreement in which DMP would assign
20 to Live Eyewear each of Live Eyewear’s trademarks that had been previously filed by DMP.

21 58. Live Eyewear and DMP properly executed a Trademark Purchase and
22 Assignment Agreement on February 1, 2008.

23 59. Upon information and belief, in early September 2008, FGX expressed its
24 interest in purchasing both DMP and Live Eyewear and entered into negotiations to purchase
25 both companies.

26 60. In advance of its proposed purchase of Live Eyewear, FGX requested highly-
27 confidential information from Live Eyewear as part of its due diligence process, which
28

1 included information concerning Live Eyewear's pending and existing patents, customer lists,
2 business plans and other highly-sensitive confidential information.

3 61. On or around September 25, 2008, Hardy provided FGX the highly-
4 confidential information as requested by FGX.

5 62. After receiving Live Eyewear's confidential information, including
6 information concerning Live Eyewear's intellectual property and customer lists, FGX stated
7 that it no longer intended to acquire Live Eyewear.

8 63. FGX did not return the confidential information it received from Live Eyewear
9 during FGX's due diligence process.

10 64. After FGX received Live Eyewear's valuable confidential information and
11 then abandoned its decision to purchase Live Eyewear, Hardy agreed to purchase Live
12 Eyewear from Niner and Strackbein.

13 65. FGX's purchase of DMP closed on November 26, 2008.

14 66. The FGX/DMP closing documents included a confidentiality agreement,
15 whereby FGX agreed to return or destroy and not to use those due diligence materials
16 received by FGX from Live Eyewear.

17 67. The FGX/DMP closing documents also included, *inter alia*: (i) a Patent
18 License Agreement between Live Eyewear and DMP; (ii) a Patent License Agreement
19 between DMP and Live Eyewear; (iii) a Patent Assignment Agreement between Live
20 Eyewear, DMP, Strackbein and Niner (backdated to September 30, 2008) (collectively, (i),
21 (ii), and (iii) constitute the "**Patent Transfer Agreements**"); and (iv) a Transition Services
22 Agreement.

23 68. The Patent Transfer Agreements transferred to Live Eyewear those Live
24 Eyewear patents that DMP applied for and improperly received in DMP's name and provided
25 each party a limited license to use the patented technology of the other.

26 69. Nowhere in the Patent Transfer Agreements does Live Eyewear transfer to
27 DMP or FGX any right to use the technology now patented as the '647 Patent.
28

1 70. Upon information and belief, nowhere in the closing documents does Live
2 Eyewear or DMP transfer to FGX any right to use the technology now patented as the '647
3 Patent.

4 71. The Transition Services Agreement required DMP to continue to provide Live
5 Eyewear certain shared services until a specific date or until Live Eyewear could successfully
6 operate without DMP's assistance.

7 72. On December 1, 2008, Niner and Strackbein each transferred his entire interest
8 in Live Eyewear to Live Eyewear's current owner, Hardy.

9 73. Live Eyewear officially vacated the building it shared with DMP on January 1,
10 2009 leaving its secured computer server with the assurances from FGX/DMP that the shared
11 IT department would erase the server and all data on the server.

12 74. Upon information and belief, on at least one known instance, Slosar, a DMP
13 employee, contacted the shared IT department and demanded access to Live Eyewear's
14 secured computer servers.

15 75. Upon information and belief, Slosar coerced the IT employee to give her
16 access asserting that, if necessary, she would bring in upper management to grant her request.

17 76. Upon information and belief, Slosar gained unauthorized access to and
18 proceeded to copy all of Live Eyewear's data which included, among other things, Live
19 Eyewear's protected intellectual property, graphic images, customer account information and
20 accounting.

21 77. Beginning in early 2009, Defendants began creating websites and other
22 marketing materials which prominently featured Live Eyewear's protected images and other
23 valuable property that resided exclusively on Live Eyewear's secured computer servers.

24 **B. LIVE EYEWEAR'S '647 PATENT**

25 78. In or around July 2007, Hardy conceived and fully outlined a highly
26 specialized eyewear temple to further distinguish Live Eyewear's products from DMP's
27 products.
28

1 79. Hardy's idea consisted of utilizing a two-shot, over-molding process whereby
2 the temple extension would be molded directly into the receiver making the completed temple
3 product more durable and practical.

4 80. In an email dated August 1, 2007, Hardy conveyed to DMP's management that
5 he had created a number of new and unique features that Hardy intended to be used on the
6 new Live Eyewear product.

7 81. On or about August 3, 2007, Hardy met with Rhea and discussed the
8 redesigned Live Eyewear product which included Hardy's over-molded two-shot temple
9 invention.

10 82. In an email dated August 14, 2007 to Hardy, Rhea stated that, "I agree with
11 that collectively (SIC), the list of changes / updates that you listed below will create a
12 distinctive look for the Cocoons product line and further separating "look" for the Cocoon
13 glasses from the Dioptics (SolarShield) glasses."

14 83. In the August 14, 2007 email, Rhea also cautioned Hardy noting that, "unless
15 you [Hardy] apply for and are granted a patent for these changes or updates, I [Rhea] cannot
16 guarantee that Dioptics or other companies will not make similar changes."

17 84. Rhea then assisted Hardy, at Hardy's direction, to reduce Hardy's invention to
18 practice over the next several months. Rhea was required to and provided Hardy weekly
19 written summaries of Rhea's efforts in implementing each of Hardy designs and inventions
20 including the temple invention.

21 85. On April 11, 2008, Live Eyewear first debuted products practicing the temple
22 invention during the Vision Expo West tradeshow in New York City.

23 86. On or around September 18, 2008, Hardy disclosed Live Eyewear's intention
24 to patent a two-shot, over-molded temple that it had in development as required by FGX
25 during its due diligence process.

26 87. Live Eyewear filed for patent protection of Hardy's temple invention on April
27 9, 2009.

1 88. The '647 patent published on October 14, 2010 and U.S. Patent No. 7,878,647
2 issued on February 1, 2011 for "a frame for eyewear, an associated temple and the method for
3 making the same."

4 89. DMP and FGX began selling products, including but not limited to, DMP's
5 "Havens" line of sunglasses, sometime before October 7, 2009, that practice the '647 Patent.

6 90. On October 7, 2009, Live Eyewear informed Rhea that DMP was selling an
7 infringing product.

8 91. Defendants disregarded this notice and continued to sell infringing products.

9 92. On or about August 2, 2010, Live Eyewear and Defendants began to discuss
10 the issues arising out of the eventual issuance of the '647 Patent.

11 93. On or about August 2, 2010, Rhea contacted Sunsight Glasses ("Sunsight"),
12 the overseas manufacturer that provides manufacturing services for both Live Eyewear and
13 Defendants.

14 94. Upon information and belief, Rhea told Sunsight that if they did not sign an
15 affidavit identifying FGX as the inventor of the '647 Patent, Sunsight would no longer be
16 allowed to produce glasses for FGX.

17 95. Upon information and belief, Sunsight refused to sign the affidavit.
18

19 **B. LIVE EYEWEAR'S TRADEMARKS**

20 96. Live Eyewear owns the OVERX trademark, U.S. Trademark Reg. No.
21 3,931,129, in International Class 009 for "Sunglasses."

22 97. Live Eyewear owns the OVERX trademark, U.S. Trademark Reg. No.
23 2,688,860, in International Class 009 for "Sunglasses."

24 98. Live Eyewear owns the FLEX2FIT trademark, U.S. Trademark Reg. No.
25 2,823,329, in International Class 009 for "Flexible temples for eyewear sold as an integral
26 component of optical frames and sunglass frames."
27
28

99. Live Eyewear owns the 360° OF UV PROTECTION trademark, U.S. Trademark Reg. No. 3,752,922, in International Class 009 for “Frames for sunglasses; sunglass lenses; sunglasses.”

100. Live Eyewear owns the VISTANA trademark, U.S. Trademark Reg. No. 3,178,655, in International Class 009 for “Sunglasses, clip-on sunglasses, protective eyewear, and eyeglass cases.”

101. Live Eyewear owns the COCOONS trademark, U.S. Trademark Reg. No. 2,712,055, in International Class 009 for “Sunglasses.”

102. Live Eyewear owns the ISOLATE YOUR EYES trademark, U.S. Trademark Reg. No. 2,713,652, in International Class 009 for “Sunglasses.”

COUNT I
PATENT INFRINGEMENT
(Infringement of U.S. Utility Patent No. 7,878,647)

103. Live Eyewear incorporates by reference each and every allegation in the preceding paragraphs.

104. On February 1, 2011, United States Utility Patent No. 7,878,647 was duly and legally issued for an invention entitled: Frame for Eyeglasses, Associated Temple, and Method of Making the Same. Live Eyewear is the assignee of the '647 patent and holds all rights and interest in the '647 patent. Exhibit A is a true and correct copy of the '647 patent.

105. Defendants have directly and/or indirectly infringed and continue to infringe the '647 patent through the manufacture, use, sale, importation and/or offer for sale of products that replicate both Live Eyewear's temple and Live Eyewear's manufacturing method which is protected by the '647 patent.

106. Live Eyewear is informed and believes that Defendants have sold and/or made offers to sell products infringing the '647 patent in this judicial district.

107. Defendants had full knowledge of the '647 patent at all times during Live Eyewear's prosecution of the patent up to and through the '647 patent's issuance to Live Eyewear. At all times after Live Eyewear's publication of the '647 patent and with full

1 knowledge of Live Eyewear's pending patent, Defendants, utilizing Live Eyewear's patented
 2 methods, made, used and sold and continue to make, use and sell, product that infringes the
 3 '647 patent thereby entitling Live Eyewear to a reasonable royalty pursuant to 35 U.S.C. §
 4 154 for all infringing products sold between publication and issuance of the '647 patent.

5 108. Defendants' infringement of Live Eyewear's exclusive rights to the '647 patent
 6 has caused and continues to cause damage to Live Eyewear in an amount to be determined at
 7 trial.

8 109. Defendants' infringement as alleged will continue to cause immediate and
 9 irreparable harm to Live Eyewear for which there is no adequate remedy at law, unless this
 10 Court enjoins and restrains such activities.

11 110. Defendants' infringement of the '647 patent is willful and deliberate in that its
 12 knowing infringement of the patent is objectively reckless and the objectively-defined risk
 13 was known or should have been known to Defendants, entitling Live Eyewear to enhanced
 14 damages pursuant to 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting
 15 this action pursuant to 35 U.S.C. § 285.

16 111. As a direct and proximate cause of Defendants' infringement of the '647
 17 patent, Live Eyewear has suffered economic injury and damages in an amount to be proven at
 18 trial.

19 **COUNT II**
 20 **VIOLATION OF FEDERAL COMPUTER FRAUD AND ABUSE ACT**
 21 **(18 U.S.C. §§ 1030(a))**

22 112. Live Eyewear incorporates by reference each and every allegation in the
 23 preceding paragraphs.

24 113. Defendants have violated the Computer Fraud and Abuse Act, 18 U.S.C. §
 25 1030(a)(2)(C), by intentionally accessing a computer used for interstate commerce or
 26 communication, without authorization or by exceeding authorized access to such a computer,
 27 and by obtaining information from such a protected computer.

28 114. Defendants have violated the Computer Fraud and Abuse Act, 18 U.S.C. §
 1030(a)(4), by knowingly, and with the intent to defraud Live Eyewear, accessing a protected

1 computer, without authorization or by exceeding authorized access to such a computer, and by
2 means of such conduct furthered the intended fraud and obtained one or more things of value,
3 including but not limited to Live Eyewear's confidential intellectual property and customer
4 lists.

5 115. Defendants have violated the Computer Fraud and Abuse Act, 18 U.S.C. §
6 1030(a)(5)(A)(ii) & (iii) by intentionally accessing a protected computer without
7 authorization causing damage to Live Eyewear, recklessly or without due regard for their
8 actions.

9 116. The computer system or systems that Defendants accessed as described above
10 constitute a "protected computer" within the meaning of 18 U.S.C. § 1030(e)(2).

11 117. Live Eyewear has suffered damage and loss by reason of these violations,
12 including, without limitation, harm to its reputation, good will, and other losses and damage
13 in an amount to be proven at trial.

14 **COUNT III**
15 **TRADEMARK INFRINGEMENT**
16 **(15 U.S.C. §§ 1114-1117)**

17 118. Live Eyewear incorporates by reference each and every allegation in the
18 preceding paragraphs.

19 119. Without Live Eyewear's consent, Defendants have used, in connection with
20 the sale, offering for sale, distribution or advertising of its products, designs and other marks
21 that infringe upon Live Eyewear's registered OVERX, FLEX2FIT, ISOLATE YOUR EYES,
22 and 360° OF UV PROTECTION trademarks.

23 120. Defendants' use of Plaintiff's trademarks includes use in Defendant's website
24 metadata.

25 121. These acts of trademark infringement have been committed with the intent to
26 cause confusion, mistake, or deception, and are in violation of 15 U.S.C. § 1114.

27 122. Live Eyewear is informed and believes, and on that basis alleges that
28 Defendants' infringement of Live Eyewear's trademarks has been and continues to be
intentional, willful and without regard to Live Eyewear's trademark rights.

123. Live Eyewear is informed and believes, and on that basis alleges that Defendants have gained profits by virtue of its infringement of Live Eyewear's trademarks.

124. Live Eyewear will suffer and is suffering irreparable harm from Defendants' infringement of the Live Eyewear trademarks insofar as Live Eyewear's invaluable goodwill is being eroded by Defendants' continuing infringement. Live Eyewear has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position, confusion of potential customers and good will flowing from Defendants' infringing activities. Pursuant to 15 U.S.C. § 1116, Live Eyewear is entitled to an injunction against Defendants' continuing infringement of Live Eyewear's trademarks. Unless enjoined, Defendants will continue its infringing conduct.

125. Because Defendants' actions have been committed with intent to damage Live Eyewear and to confuse and deceive the public, Live Eyewear is entitled to treble its actual damages or Defendants' profits, whichever is greater, and to an award of costs and, this being an exceptional case, reasonable attorneys' fees pursuant to 15. U.S.C. § 1117(a) and 1117(b). Alternatively, Live Eyewear is entitled to the maximum statutory damages allowed under 15 U.S.C. § 1117(c). Live Eyewear will make its election at the appropriate time before final judgment.

COUNT IV
VIOLATION OF 15 U.S.C. § 1125(a)
(Trade Dress Infringement, False Advertising, Unfair Competition)

126. Live Eyewear incorporates by reference each and every allegation in the preceding paragraphs.

127. Live Eyewear is the owner of federally registered and common law rights throughout the United States in Live Eyewear’s trademarks and trade dress (“Live’s IP”) through their use and promotion in interstate commerce.

128. Live's IP is well known among eye care professionals and, over its 10-year existence, has come to be associated exclusively with Live Eyewear and Live Eyewear products.

1 129. Live's IP has become distinctive of Live Eyewear's products and distinguishes
2 Live Eyewear's product from those offered by others.

3 130. Live's IP is non-functional.

4 131. Live Eyewear directly competes with Defendants in the same commercial
5 markets and for the same consumers.

6 132. Defendants' unauthorized use, sale and distribution of goods using Live's IP or
7 materials nearly identical to Live's IP has caused actual customer confusion and is likely to
8 continue to cause confusion, mistake, or to deceive consumers as to the source of Defendant's
9 goods, or as to Live Eyewear's affiliation, connection, association, sponsorship, or approval
10 of such goods.

11 133. Defendants' unauthorized use, sale and distribution of goods in a manner
12 nearly identical to Live's IP constitutes false advertising, trade dress infringement and unfair
13 competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

14 134. Live Eyewear is informed and believes, and on that basis alleges, that
15 Defendants' infringement of Live's IP has and continues to be intentional, willful and without
16 regard to Live Eyewear's trademark and trade dress rights.

17 135. Live Eyewear is informed and believes, and on that basis alleges, that
18 Defendants have gained profits by virtue of its infringement of Live's IP.

19 136. Live Eyewear also has sustained damages as a direct and proximate result of
20 Defendants' infringement of Live's IP in an amount to be proven at trial.

21 137. Pursuant to 15 U.S.C. § 1116, Live Eyewear is entitled to an injunction against
22 Defendants' continuing infringement of Live's IP. Unless enjoined, Defendants will continue
23 their infringing conduct.

24 138. Because Defendants' actions have been committed with intent to damage Live
25 Eyewear and to confuse and deceive the public, Live Eyewear is entitled to treble its actual
26 damages or Defendants' profits, whichever is greater, and to an award of costs and, this being
27 an exceptional case, reasonable attorneys' fees pursuant to 15 U.S.C. § 1117(a) and 1117(b).
28 Alternatively, Live Eyewear is entitled to the maximum statutory damages allowed under 15

1 U.S.C. § 1117(c). Live Eyewear will make its election at the appropriate time before final
2 judgment.

3 **COUNT V**
4 **COMPUTER DATA ACCESS AND FRAUD ACT**
5 **(California Penal Code § 502)**

6 139. Live Eyewear incorporates by reference each and every allegation in the
7 preceding paragraphs.

8 140. Defendants have violated California Penal Code § 502(c)(2) by knowingly and
9 fraudulently, and without permission, accessing, taking, copying, and making use of
10 programs, data, and files from Live Eyewear's computers, computer system and/or computer
11 network.

12 141. Defendants have violated California Penal Code § 502(c)(3) by knowingly,
13 fraudulently, and without permission accessing and using Live Eyewear's computer services.

14 142. Defendants have violated California Penal Code § 502(c)(6) by knowingly,
15 fraudulently, and without permission providing, or assisting in providing, a means of
16 accessing Live Eyewear's computers, computer system, and/or computer network.

17 143. Defendants have violated California Penal Code § 502(c)(7) by knowingly,
18 fraudulently, and without permission accessing, or causing to be accessed, Live Eyewear's
19 computers, computer system, and/or computer network.

20 144. Live Eyewear owns the intellectual property and other data that was obtained
21 by Defendants as alleged above.

22 145. As a direct and proximate result of Defendants' unlawful conduct within the
23 meaning of California Penal Code § 502, Defendants have caused damage to Live Eyewear in
24 an amount to be proven at trial. Live Eyewear is also entitled to recover its reasonable
25 attorneys' fees pursuant to California Penal Code § 502(e).

26 146. Live Eyewear is informed and believes that the aforementioned acts of the
27 Defendants were willful and malicious in that Defendants' acts described above were done
28 with the deliberate intent to injure Live Eyewear's business and improve its own. Live
Eyewear is entitled to punitive damages.

1 147. Live Eyewear has suffered irreparable injury from these acts, and due to the
 2 continuing threat of such injury, has no adequate remedy at law, entitling Live Eyewear to
 3 injunctive relief

4
 5 **COUNT VI**
 6 **CALIFORNIA TRADEMARK INFRINGEMENT AND DILUTION**
 7 **(Cal. Bus. & Prof. Code §§ 14245, 14247, 14250)**

8 148. Live Eyewear incorporates by reference each and every allegation in the
 9 preceding paragraphs.

10 149. Defendants' infringement of Live Eyewear's federal and state trademarks
 11 ("Trademarks") is likely to cause consumer confusion and dilution of Live Eyewear's
 12 Trademarks in violation of California Business & Professions Code Sections 14245 and
 13 14247.

14 150. Defendants infringed and diluted Live Eyewear's Trademarks with knowledge
 15 and intent to cause confusion, mistake or deception.

16 151. Defendants conduct is aggravated by that kind of willfulness, wantonness,
 17 malice and conscious indifference to the rights and welfare of Live Eyewear for which
 18 California law allows the imposition of exemplary damages.

19 152. Pursuant to Cal. Business & Professions Code §§ 14247 and 14250, Live
 20 Eyewear is entitled to injunctive relief and damages in the amount of three times Defendants'
 21 profits and three times all damages suffered by Live Eyewear by reason of Defendants
 22 manufacturer, use, display or sale of infringing goods.

23 **COUNT VII**
 24 **COMMERCIAL DISPARAGEMENT**

25 153. Live Eyewear incorporates by reference each and every allegation in the
 26 preceding paragraphs.

27 154. Defendants, in particular, Rhea, have knowingly made and continue to make
 28 false and misleading statements about Live Eyewear which are for the direct commercial
 benefit of Defendants.

155. Defendants knew that Rhea's false and misleading statements about Live Eyewear were false at the time they were made and published.

156. Defendants, in making the false and misleading statements, and engaging in the acts of conduct as described above, have done so with the specific intent of substantially and irreparably injuring the goodwill, business and reputation of Live Eyewear, and for the direct and immediate commercial benefit of Defendants.

157. Live Eyewear has been already been damaged as a direct, proximate, substantial and foreseeable result of the false and misleading statements, and the acts and conduct of Defendants in an amount to be proven at trial.

158. The false and misleading statements, and the acts and conduct of Defendants have been and are being made and committed with oppression and malice, so as to require and justify an award of exemplary damages in favor of Live Eyewear in an amount to be proven at trial.

COUNT VIII
UNFAIR COMPETITION
(Cal. Bus. & Prof. Code § 17200)

159. Live Eyewear incorporates by reference each and every allegation in the preceding paragraphs.

160. Defendants' business practices as alleged above constitute unfair competition and unfair business practices in violation of Section 17200 *et seq.* of the California Business and Professions Code.

161. Pursuant to the California Business and Professions Code § 17203, Live Eyewear is entitled to enjoin these practices. Without injunctive relief, Live Eyewear has no means by which to control Defendants unlawful sales of infringing products. Similarly, Live Eyewear has no way to control the confusion created by Defendants' infringement of Live Eyewear's trademarks and other intellectual property. Live Eyewear is therefore entitled to injunctive relief prohibiting Defendants from continuing such acts of unfair competition pursuant to California Business and Professions Code § 17203.

PRAYER FOR RELIEF

WHEREFORE, Live Eyewear prays for the following relief:

A. The judgment be entered in favor of Live Eyewear that the accused Defendants have infringed and are infringing the '647 patent in violation of 35 U.S.C. § 271;

B. That Live Eyewear be granted an accounting of all damages sustained as a result of the accused Defendants; infringement of the '647 Patent as alleged;

C. That Live Eyewear be awarded actual damages with prejudgment interest according to proof, and enhanced damages pursuant to 35 U.S.C. § 284;

D. That a permanent injunction be issued pursuant to 35 U.S.C. § 283 enjoining Defendants, their officers, agents, servants, employees and all other persons acting in concert or participation with them from further infringement of the '647 Patent;

E. That this case be decreed an "exceptional case" within the meaning of 35 U.S.C. § 285, and that reasonable attorneys' fees, expenses, and costs be awarded to Live Eyewear;

F. That Live Eyewear be awarded the extent of the accused Defendants' total profits pursuant to 35 U.S.C. § 289;

G. Awarding Live Eyewear actual and statutory damages for trademark and trade dress infringement as determined at trial.

H. Awarding Live Eyewear a permanent injunction against sales of all of Defendants' infringing products and requiring Defendants to recall all such products sold to the public as a result of its statutory and common law unfair competition.

I. Awarding Live Eyewear actual damages as a result of Defendants' common law unfair competition;

J. Awarding Live Eyewear treble damages for Defendants' willful acts;

K. Awarding Live Eyewear its reasonable attorneys' fees and costs; and

L. Awarding Live Eyewear such other relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff Live Eyewear, Inc. hereby demands a trial by jury of all issues triable by jury pursuant to Federal Rule of Civil Procedure 38(b).

Dated: October 3, 2011

Respectfully submitted,

LIVE EYEWEAR, INC.

By: 

Jay Laurence Raftery, Jr.

Attorney for Plaintiff
LIVE EYEWEAR, INC.