

ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

LOUISE K. Y. ING 2394
MICHELLE N. COMEAU 9550
1001 Bishop Street, Suite 1800
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: ling@ahfi.com
mcomeau@ahfi.com

CHRISTOPHER D. MICKUS *Admitted pro hac vice*
LEE J. EULGEN *Admitted pro hac vice*
LAWRENCE E. JAMES, JR. *Admitted pro hac vice*
NEAL, GERBER & EISENBERG LLP
2 North LaSalle Street, Suite 1700
Chicago, Illinois 60602
Telephone: (312) 269-8000
Facsimile: (312) 578-2816
E-mail: CMickus@ngelaw.com
LEulgen@ngelaw.com
LJames@ngelaw.com

Attorneys for Plaintiff
THE ISLANDER GROUP, INC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

THE ISLANDER GROUP, INC.,

Plaintiff,

vs.

SWIMWAYS CORPORATION,

Case No. CV13-00094 LEK RLP
(Other Civil Action)

**FIRST AMENDED COMPLAINT;
DEMAND FOR JURY TRIAL;
EXHIBITS A-L; CERTIFICATE OF
SERVICE**

PACIFIC SOUVENIR GROUP, INC.,
dba HAWAII INTERCONTINENTAL
CORPORATION, NICHOLAS
CORISH and GERALD SUR,

Defendants.

JUDGE: Leslie E. Kobayashi

TRIAL: July 8, 2014

SWIMWAYS CORPORATION,

Counter-Plaintiff,

vs.

THE ISLANDER GROUP, INC.,

Counter-Defendant.

FIRST AMENDED COMPLAINT

Plaintiff The Islander Group, Inc., by its undersigned counsel, for its Complaint against Defendants, SwimWays Corporation, Pacific Souvenir Group, Inc. dba Hawaii Intercontinental Corporation, Nicholas Corish and Gerald Sur, alleges as follows:

NATURE OF THE CASE

1. This case is about the improper actions of a patent holder and its agents to thwart competition through unlawful means under the guise of asserting intellectual property rights. In reality, the conduct of the defendants was motivated by financial gain and was taken in an effort to prevent The Islander Group (“TIG”) from lawfully selling its products in the market to its own customers, as well as potential new customers. TIG brings this action for defamation, tortious interference with actual and prospective business relations, and conspiracy to interfere against SwimWays Corporation (“SwimWays”), Pacific Souvenir Group, Inc., dba Hawaii Intercontinental Corporation (“HIC”), and HIC’s sales representatives, Nicholas Corish (“Corish”) and Gerald Sur (“Sur”). TIG and SwimWays are competitors in the market of certain commonplace recreational sports products, including balls, paddle sport games, and flying discs designed and marketed for use on the beach and in the water. SwimWays distributes its recreational sports products in Hawai`i through its distributor, HIC.

2. As set forth in greater detail below, as TIG entered the market with its beach balls, paddles, and flying discs, which lawfully competed with SwimWays' products, the defendants devised an unlawful scheme to remove TIG from the market by falsely accusing TIG of patent and trade dress infringement, while simultaneously defaming TIG in communications to TIG's existing customers in the marketplace. SwimWays initiated the unlawful scheme by falsely communicating, in bad faith, to its Hawai'i distributor, HIC, that TIG's products infringed SwimWays' intellectual property rights. Upon information and belief, SwimWays instructed and/or permitted HIC to disseminate this false information to TIG's customers in the marketplace, while directly communicating false information concerning TIG's products to TIG's customers and threatened TIG's customers with legal action if they continued to sell TIG's products. HIC's participation in the scheme was motivated not only by SwimWays' instruction, but by HIC's self-interest in expanding its sales of SwimWays' products and increasing the revenue resulting from those increased sales. SwimWays, HIC, Corish and/or Sur made disparaging, defamatory, and misleading statements to TIG's customers concerning products manufactured and/or supplied by TIG, notwithstanding TIG's demands that the Defendants cease and desist from engaging in such actionable misconduct.

3. The misconduct of SwimWays, HIC, Corish and/or Sur give rise to separate claims for relief against each of them, as well as a claim for relief for conspiracy to interfere with TIG's actual and prospective business relations with its customers.

4. As a direct and proximate result of the Defendants' tortious misconduct, disparaging and defamatory statements, TIG's reputation with its customers has been unjustifiably tarnished, its brand harmed, and it already has incurred and will continue to incur actual damages. In this action, TIG seeks compensatory and punitive damages against the Defendants and each of them, as well as any other relief the Court deems just and appropriate.

THE PARTIES

5. TIG is Hawai'i-based company with its principal place of business located at 269 Pali'i Street, Mililani, Hawai'i 96789. TIG is engaged in the business of offering general and recreational merchandise and gift products for sale through mail order, catalogue, the internet and through direct sales to retailers. TIG is the main distributor in Hawai'i for certain name brand products, and its customers include brick-and-mortar stores such as Walmart, Kmart, Safeway, and KTA Superstores, as well as online retailers such as Amazon.com and Barnes & Noble.com.

6. SwimWays is a Virginia-based company with its principal place of business located at 5816 Ward Court, Virginia Beach, Virginia 23455. SwimWays is a leisure and recreational water products manufacturer. SwimWays' products include COOP neoprene sports balls—known as “Hydro Balls”—and other products to retailers for sale to consumers. COOP products are distributed in Hawai`i by authorized distributors, including HIC.

7. HIC is a Hawai`i-based company with its principal place of business located at 4428 Malaai, Honolulu, Hawai`i. HIC holds itself out as one of the largest direct importers of beach lifestyle items in Hawai`i and sells and/or distributes certain brand name products, including COOP Hydro Balls, as well as its own products of a similar genre. HIC is an authorized SwimWays and/or COOP distributor in Hawai`i.

8. Corish is an employee of HIC residing at 91-1036 Hamana Street, Ewa Beach, Hawai`i 96706-3938. Corish is a sales representative operating on behalf of HIC throughout Hawai`i.

9. Sur is an employee of HIC residing at 935 8th Avenue, Honolulu, Hawai`i 96816-7128. Sur is a sales representative operating on behalf of HIC throughout Hawai`i.

JURISDICTION AND VENUE

10. Jurisdiction and venue are appropriate in this Court because HIC, Corish, and Sur reside within the jurisdiction of this Court, SwimWays conducts business within the jurisdiction of this Court, and the acts giving rise to the causes of action set forth herein occurred in Hawai'i.

FACTS APPLICABLE TO ALL CLAIMS FOR RELIEF

11. As competitors in the recreational sports products market, TIG and SwimWays both sell and attempt to sell their respective products in many of the same retail establishments throughout Hawai'i. Those products include commonplace beach balls, paddles, and flying discs.

12. Just as TIG entered the market with beach balls, paddles, and flying discs competitive with SwimWays' products, as well as products made by other manufacturers and distributors, SwimWays and HIC worked in concert to unfairly and unlawfully interfere with TIG's business by originating false and bad faith claims of infringement against TIG, including the dissemination of false information to TIG's existing and prospective customers. Indeed, the goal of these defendants was to stop TIG's products from entering the market entirely, thereby eliminating competition for the commonplace beach balls and games offered by both TIG and SwimWays.

13. Interference with TIG's business and relations with TIG's customers began in June and July of 2012—just as TIG's products entered the market in Hawai'i—when SwimWays and HIC engaged in a series of email correspondences concerning TIG's products. Without conducting any meaningful legal analysis of the TIG's products, HIC and SwimWays had already begun characterizing TIG's products as “knock-offs,” and HIC complained to SwimWays that “[i]t's going to be an ugly summer if we are not able to stop [TIG's] product entering the market.”

14. HIC proceeded to aggressively implore SwimWays to prepare targeted cease and desist letters concerning the so-called “knock-offs,” and provided SwimWays with the contact information for TIG and TIG's current and prospective customers. HIC requested that SwimWays take action despite not owning any intellectual property rights to the SwimWays' products, and, on information and belief, without conducting any legal analysis regarding any purported infringement. In looking out for its bottom line, HIC proclaimed that “we must have this stopped now.”

15. In furtherance of SwimWays' and HIC's unlawful scheme, SwimWays sent a letter to TIG on August 7, 2012, claiming that certain products sold by TIG—known as the “Go Lolo” balls—infringed SwimWays' U.S. Patent Number 5,997,422 (the “422 Patent”). SwimWays also claimed in that letter that

other TIG products infringed SwimWays' purported trade dress in SwimWays' COOP-branded flying disc and paddle products.

16. Upon information and belief, SwimWays and HIC intended to use this letter as a basis to disseminate false information about TIG and TIG's products in the marketplace. Upon information and belief, HIC met with its sales force, including Corish and Sur, at which time the directive was given to disseminate the false information contained in the letter (as well as other false information about TIG) in an effort to interfere with TIG's existing and potential business relations with TIG's customers. HIC aggressively disseminated the false information in the marketplace through its sales people, including Corish and Sur.

17. Indeed, almost immediately after SwimWays falsely and in bad faith accused TIG of patent and trade dress infringement, HIC, Corish, and Sur began vigorously contacting TIG's customers and falsely informing these customers that TIG's "Go Lolo" balls infringed SwimWays' '422 Patent, or that TIG otherwise was infringing SwimWays' patents, and that TIG was a defendant in patent litigation regarding the products supplied by TIG to its customers. Upon information and belief, HIC, Corish, and Sur engaged in these unlawful acts for the benefit of HIC, and their actions were based on information provided by SwimWays with regard to SwimWays' purported intellectual property claims.

18. Corish engaged in these unlawful acts because he “did as he was instructed by his employer.” In fact, on or about August 15, 2012, HIC’s Corish informed Robin Cotter (“Cotter”), who was, at that time, employed by TIG, that it was his “responsibility” to inform any store where he saw a TIG “Go Lolo” ball that TIG’s products infringed SwimWays’ patent(s) and/or that TIG was a defendant in patent litigation with regard to its products. *See* Exhibit A, Email from Cotter to Coyne, dated August 22, 2012. Corish’s statement that it was his “responsibility” to take such actions demonstrates that he was instructed to take such actions by HIC, SwimWays, or both of them, as the nature of the statements he made would only be based on information from SwimWays. During this conversation with Cotter, Corish also informed Cotter that he already had left a message for the buyer for KTA Super Stores (“KTA”), a Hawaiian grocery store chain and customer of TIG, that TIG’s “Go Lolo” balls infringed SwimWays’ patent. *Id.*

19. On or about the same date, Cotter also learned from the department manager for Kmart—another TIG customer—that Corish had also informed Kmart that TIG’s “Go Lolo” balls infringed SwimWays’ patent(s).

20. On August 16, 2012, TIG’s sales representative in Hawai‘i received an email from the buyer for KTA instructing TIG to remove from KTA’s shelves TIG’s “Go Lolo” balls. The request was based, upon information and belief, on a

phone call to the KTA buyer from HIC's agent Corish during which Corish asserted that TIG's "Go Lolo" product purportedly infringed a SwimWays' patent. Upon information and belief, Corish made these false statements to TIG's customers, including the KTA buyer, because, among other reasons, SwimWays instructed HIC to propagate false information about TIG and TIG's products in the marketplace, or Corish and HIC understood that SwimWays knew, even without express instructions, that they would take such action in light of the pressure on HIC resulting from TIG's lawful competition.

21. At that time, TIG and KTA had an existing business relationship whereby KTA would purchase many different types of products from TIG. The business relationship between TIG and KTA has existed for nearly twenty years.

22. As a result of HIC's statements to KTA, TIG was required to and did remove the allegedly infringing products from KTA's stores.

23. During the same time, HIC, through its sales representatives, continued to defame TIG and spread misinformation about TIG in the marketplace, stating to Don Quijote and Beach Side Casuals—two other TIG customers—that TIG was a defendant in patent litigation and/or had willfully and illegally copied SwimWays' products. Upon information and belief, HIC made these false statements because, among other reasons, SwimWays instructed HIC to propagate false information about TIG and TIG's products in the marketplace, or HIC

understood that SwimWays knew, even without express instructions, that they would take such action in light of the pressure on HIC resulting from TIG's lawful competition.

24. HIC's sales representative, Sur, stated at or around this time, to Don Quijote's buyer, that TIG was a defendant in patent litigation and/or had willfully and illegally copied SwimWays' products. Upon information and belief, Sur made these false statements because, among other reasons, SwimWays instructed HIC to propagate false information about TIG and TIG's products in the marketplace, or Sur and HIC understood that SwimWays knew, even without express instructions, that they would take such action in light of the pressure on HIC resulting from TIG's lawful competition.

25. HIC's former sales representative, Sally Goodness, stated at or around this time, to the manager of Beach Side Casuals, that TIG was a defendant in patent litigation and/or had willfully and illegally copied SwimWays' products. Upon information and belief, Goodness made these false statements because SwimWays instructed HIC to propagate false information about TIG and TIG's products, or Goodness and HIC understood that SwimWays knew, even without express instructions, that they would take such action in light of the pressure on HIC resulting from TIG's lawful competition.

26. No such infringement exists, and, at the time that these false statements were made, TIG was not a defendant in patent litigation in connection with any SwimWays patent.

27. HIC's statements, including those of its employees, were false at the time that they were made to TIG's customers. Information provided by SwimWays to HIC and/or SwimWays' instruction to HIC, as well as HIC's subsequent statements, were made in bad faith, with the intent to harm TIG and prevent TIG from entering the market, and/or otherwise to interfere with TIG's existing and future business relationship with, at least, KTA, Kmart and Beach Side Casuals.

28. SwimWays and HIC acted in concert and conspired to interfere with TIG's existing and potential business relations with its customers through SwimWays' bad faith and baseless claims of patent and trade dress infringement, coupled with HIC's actions in propagating demonstrably false information about TIG and TIG's products in the marketplace, and the near simultaneous defamation and spread of misinformation by HIC, Corish, and Sur to TIG's existing customers.

29. The conduct of HIC, Corish, and Sur, as alleged herein, constitutes conduct by an agent of SwimWays acting with actual or apparent authority of SwimWays. The Hawai'i defendants are SwimWays' eyes and ears in Hawai'i,

and thus the actions of HIC, Corish, and Sur cannot be divorced from SwimWays so as to shield SwimWays from the damages caused by its agents.

30. After TIG learned of HIC's and HIC's employees' tortious misconduct, TIG's counsel sent a letter to counsel for SwimWays on August 20, 2012, demanding that SwimWays and its agents immediately cease and desist from defaming TIG and interfering with TIG's customer relationships. A true and correct copy of TIG's counsel's August 20, 2012 letter is attached hereto as Exhibit B.

31. That same day, SwimWays' counsel responded by letter to TIG's counsel and disavowed any responsibility for and knowledge of Corish's defamatory statements. A true and correct copy of SwimWays' counsel's August 20, 2012 letter is attached hereto as Exhibit C.

32. HIC's president, however, emailed SwimWays on August 21, 2012, explaining to SwimWays' legal counsel that Corish "is a bit territorial and I have placed a choker collar on him" and that she "placed a muzzle and duct tape over the[] mouth" of HIC's sales representatives. True and correct copies of HIC's emails to SwimWays' legal counsel, dated August 21, 2012, are attached hereto as Exhibit D.

33. On August 22, 2012, SwimWays' counsel again wrote to TIG's counsel. Although there is no dispute that HIC is SwimWays' Hawai'i distributor,

in that letter, SwimWays' counsel unequivocally stated that "Nick Corish is not an employee, representative or agent of SwimWays." A true and correct copy of SwimWays' counsel's August 22, 2012 letter is attached hereto as Exhibit E.

34. While SwimWays' counsel was disavowing the actions of HIC and its employees (which are, in fact, SwimWays' agents) to TIG's counsel, SwimWays continued to communicate with HIC by email regarding Corish's activity in the marketplace, stating among other things, that "if [Corish] needs talking points let me know – but the better approach would be for him to not discuss a pending legal matter." Exhibit D. In other words, SwimWays understood what HIC and its sales force was doing in Hawai'i, that Swimways preferred to control the message, and that the Hawai'i defendants should be careful. Notably, SwimWays did not unequivocally instruct HIC to stand down; instead, it only said that the "better approach" would be to not mention a "legal matter."

35. Indeed, HIC readily admitted to SwimWays that "a member of our sales team may have inadvertently caused serious damage to the fight." *See* Exhibit F, Email from Robynne Heulitt to Jeff Arias, dated October 5, 2012. In light of these allegations, it is clear that HIC and/or its employees were defaming TIG in the marketplace, and that SwimWays knew exactly what was going on.

36. On August 23, 2012, TIG's counsel sent a letter to HIC demanding that HIC and its employees, including Corish, immediately cease and desist from

defaming TIG and interfering with TIG's customer relationships. A true and correct copy of TIG's counsel's August 23, 2012 letter is attached hereto as Exhibit G.

37. HIC's counsel responded to TIG's August 23, 2012 letter on August 27, 2012, stating that "HI[C] instructed its sales team, including Mr. Corish, not to state that the Islander Group is a defendant in a patent infringement lawsuit, and not to state that the Islander Group willfully and illegally copied SwimWays' products." A true and correct copy of HIC's counsel's August 27, 2012 letter is attached hereto as Exhibit H. As set forth above, TIG later learned that HIC placed a proverbial "choker collar," "muzzle," and "duct tape" on Corish in an attempt to prevent him from further disseminating false information about TIG in the marketplace.

38. On September 18, 2012, TIG's counsel again wrote to SwimWays and explained that SwimWays' purported claims of infringement related to the '422 Patent, as well as its claims of trade dress infringement, were meritless and unreasonable. A true and correct copy of TIG's counsel's September 18, 2012 letter is attached hereto as Exhibit I. Although TIG's September 18, 2012 letter put SwimWays on notice as to the deficiencies in both its patent and trade dress claims and that TIG denied them entirely, SwimWays never responded to TIG's September 18, 2012 letter.

39. As a result of the fact that TIG had, by this time, clearly explained to SwimWays that its claims of infringement related to the '422 Patent and trade dress were meritless, coupled with SwimWays silence, TIG believed that the matter was resolved and that SwimWays and HIC had discontinued and would refrain from making further defamatory statements about TIG and attempting to harm TIG in the marketplace and otherwise interfere with its customer relationships.

40. SwimWays, however, continued to interfere with TIG's relationships with its customers and, in fact, broadened the scope of its interference to target specific TIG customers.

41. Specifically, SwimWays, through its Vice President, Business & Legal Affairs, sent letters on or about November 28, 2012, to several TIG customers—including KTA, Don Quijote and Times Supermarkets—implying that TIG's products infringed SwimWays' intellectual property rights and threatening, "as a result of this infringement," remedies including "recovery of [the customers'] profits, injunctive relief, recovery of costs and attorneys' fees, and the possibility of enhanced damages." A true and correct copy of SwimWays' November 28, 2012 letter to KTA is attached hereto as Exhibit J.

42. Like the statements made by HIC and/or its employees to TIG's customers, the statements made by SwimWays in the November 28, 2012

correspondence to TIG's customers were false and misleading. TIG's products do not infringe any intellectual property rights of SwimWays. Indeed, as set forth above, as of November 28, 2012, TIG already had responded to SwimWays' claims of infringement more than two months earlier, and SwimWays never responded.

43. In this regard, SwimWays knowingly continued with its concerted efforts to prevent TIG from competing in the market after it was on notice that its infringement claims may be (and in fact are) meritless. SwimWays' actions in continuing its campaign against TIG in this way were objectively baseless and in disregard of TIG's rights to compete openly in the market without unlawful interference.

44. Indeed, SwimWays did not file any action against TIG based on its purported patent and trade dress claims until after TIG was forced to initiate this lawsuit. In this regard, it is evident that SwimWays was more concerned with eliminating competition than it was with the protection of its so-called intellectual property rights.

45. Although SwimWays' November 28, 2012 letters to TIG's customers did not specifically identify TIG, the fact that these letters were sent to TIG's customers, as well as the concerted efforts of SwimWays, HIC and its employees

in the preceding four months make it clear that these letters were designed to interfere, disrupt and harm TIG's relations with its customers.

46. In a December 3, 2012 email from KTA to TIG, KTA specifically referenced and attached SwimWays' threatening letter regarding KTA offering TIG's products for sale in KTA stores. HIC's Corish, who previously defamed TIG when communicating with KTA and despite having no relationship to the business arrangement between TIG and its customer, was a recipient of KTA's email to TIG. A true and correct copy of KTA's December 3, 2012 email to TIG is attached hereto as Exhibit K. Upon information and belief, Corish, as SwimWays' Hawai'i distributor and pursuant to SwimWays' instruction to HIC, falsely accused TIG of infringement.

47. TIG later learned that SwimWays had prepared the November 28, 2012 letters specifically targeting TIG. In an email from HIC to SwimWays, HIC listed the stores carrying TIG's products and specifically requested that SwimWays prepare a "general letter" that would be sent to SwimWays' customers that were "thinking about carrying the knock offs." In this regard, it is clear that HIC and SwimWays were not just concerned with interfering with TIG's existing customers, they wanted to make sure they could threaten other potential customers even "thinking about" working with TIG. A true and correct copy of HIC's email

to SwimWays, dated November 6, 2012, is contained in the chain of emails attached hereto as Exhibit L.

48. Indeed, SwimWays knew precisely the impact of sending letters to TIG's customers. On October 26, 2012, SwimWays wrote to HIC and explained that recipients of these letters "are not as familiar with patent infringement and will not take that risk, so then to be safe, carry the 'non-infringed product.'" In this same communication, SwimWays explained further that this action "is potentially crippling to [TIG], because they then have no avenue to sell their products and are sitting on inventory with bills to pay." These communications evidence that SwimWays and HIC were not merely concerned with alleged intellectual property rights, so much as they were focused on eliminating competition and harming TIG financially. A true and correct copy of SwimWays' email to HIC, dated October 26, 2012, is contained in the chain of emails attached hereto as Exhibit L.

49. SwimWays' threatening letters had the desired effect. On December 3, 2012, the head buyer from KTA sent an email to TIG's Vice President of Sales instructing TIG to once again remove all of the TIG "Go Lolo" products from KTA stores and credit KTA as soon as possible.

50. After receipt of SwimWays' November 28, 2012 letter, Don Quijote required that all TIG products be immediately removed from the shelves of Don Quijote's stores.

51. As a result of the Defendants' repeated efforts to keep TIG out of the market and improperly disrupt and harm the existing relationships between TIG and its customers through bad faith and baseless claims of infringement, coupled with defamatory statements by HIC, Corish and/or Sur, and notwithstanding TIG's reasonable and well-reasoned demands that the Defendants cease and desist any further tortious misconduct, TIG has been forced to initiate this action.

FIRST CLAIM FOR RELIEF

(DEFAMATION AGAINST HIC)

52. TIG repeats and incorporates the allegations in Paragraphs 1 through 51.

53. Corish and Sur are employed by HIC as sales representatives.

54. At the time that Corish and Sur made statements to TIG's customers, as alleged herein, that TIG was a defendant in patent litigation, that TIG willfully and intentionally copied SwimWays' products, and/or that TIG's products infringed SwimWays' intellectual property rights, the statements were false and Corish and Sur knew the statements to be false, lacked reasonable grounds for believing the statements to be true, or acted negligently in failing to ascertain the truth before making the statements.

55. HIC is vicariously liable for the defamatory statements of its employees.

56. As a direct and proximate result of the defamatory statements of HIC's employees, TIG already has suffered actual damages, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products from their stores, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action to address HIC's defamation.

SECOND CLAIM FOR RELIEF

(DEFAMATION AGAINST CORISH)

57. TIG repeats and incorporates the allegations in Paragraphs 1 through 56.

58. At the time that Corish made statements to KTA and Kmart that TIG was a defendant in patent litigation, that TIG willfully and intentionally copied SwimWays' products, and/or that TIG's products infringed SwimWays' intellectual property rights, the statements were false and Corish knew them to be false, lacked reasonable grounds for believing the statements to be true, or acted negligently in failing to ascertain the truth before making the statements.

59. As a direct and proximate result of Corish's defamatory statements, TIG already has suffered actual damages, including the loss of revenue from lost

sales, the costs of providing credits to customers that demanded the removal of TIG's products from their stores, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action to address Corish's defamation.

THIRD CLAIM FOR RELIEF

(DEFAMATION AGAINST SUR)

60. TIG repeats and incorporates the allegations in Paragraphs 1 through 59.

61. At the time that Sur made statements to Don Quijote that TIG was a defendant in patent litigation, that TIG willfully and intentionally copied SwimWays' products, and/or that TIG's products infringed SwimWays' intellectual property rights, the statements were false and Sur knew them to be false, lacked reasonable grounds for believing the statements to be true, or acted negligently in failing to ascertain the truth before making the statements.

62. As a direct and proximate result of Sur's defamatory statements, TIG already has suffered actual damages, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products from their stores, the related costs and business expenses associated with

the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action to address Sur's defamation.

FOURTH CLAIM FOR RELIEF

**(TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS OR
EXPECTANCY AGAINST HIC)**

63. TIG repeats and incorporates the allegations in Paragraphs 1 through 62.

64. TIG has valid existing business relationships with its customers, including KTA Don Quijote, Beach Side Casuals, Times Supermarkets and Kmart, as well as a reasonable expectation that, absent the intentional misconduct alleged herein, these relationships will continue and provide a future economic benefit to TIG.

65. As the Hawai'i distributor for SwimWays, one of TIG's direct competitors, HIC had knowledge of the existing relationships between TIG and its customers.

66. HIC's tortious interference with TIG's relationships with its customers by making false, misleading, and defamatory statements was improper. HIC's motivations in engaging in the misconduct alleged herein was to advance its own interests and that of its supplier, SwimWays, by taking customers away from

TIG, increasing SwimWays' market share, thereby also benefitting HIC, and thus augmenting their sales and revenue, all to the detriment of TIG.

67. HIC acted with a purposeful intent and maliciously, intentionally, and without justification or excuse interfered with the relationship between TIG and its customers, as well as TIG's expectation that, in the absence of the misconduct alleged herein, these relationships would continue and provide a future economic benefit to TIG.

68. As a direct and proximate result of HIC's tortious misconduct, TIG's customers, including KTA and Don Quijote, demanded that TIG remove its products from their stores and TIG in fact removed its products from KTA and Don Quijote stores.

69. TIG already has suffered actual damages, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products from their stores, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action against other parties to protect TIG's interests against HIC's actual and attempted tortious interference.

FIFTH CLAIM FOR RELIEF

**(TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS OR
EXPECTANCY AGAINST SWIMWAYS)**

70. TIG repeats and incorporates the allegations in Paragraphs 1 through 69.

71. TIG has valid existing business relationships with its customers, including KTA Don Quijote, Beach Side Casuals, Times Supermarkets and Kmart, as well as a reasonable expectation that, absent the intentional and bad faith misconduct alleged herein, these relationships will continue and provide a future economic benefit to TIG.

72. As alleged herein, SwimWays had knowledge of the relationships between TIG and its customers based upon its efforts to identify TIG customers with the assistance of its agent, HIC.

73. SwimWays purposefully and in bad faith intended to interfere with the business relationships between TIG and its customers. As alleged herein, SwimWays interfered with TIG's relations with its customers, including KTA, Don Quijote, Beach Side Casuals, and Times Supermarkets, by falsely implying in letters to TIG's customers that TIG's "Go Lolo" product infringed the '422 Patent, and that other TIG products infringed SwimWays' trade dress, thereby threatening these customers and misleading them to believe that, if they sold TIG products,

they would be exposed to patent infringement litigation and damages claims by SwimWays.

74. SwimWays also interfered with TIG's existing business relationships with its clients by instructing HIC to disseminate false information about TIG and TIG's products in the marketplace, and actually directly disseminating defamatory and misleading statements about TIG in the marketplace through HIC, Corish, and/or Sur, its Hawai'i distributor(s) and agent(s).

75. SwimWays' tortious interference with TIG's relationships with its customers was carried out in bad faith, was improper, malicious, intentional, without justification or excuse, and served to advance SwimWays' own interests by taking customers away from TIG, increasing the market share of SwimWays, and thus augmenting its sales and revenue, all to the detriment of TIG.

76. SwimWays' actions as alleged herein were objectively and subjectively baseless. Its actions were objectively and subjectively baseless because its claims for patent infringement as articulated to TIG (and then disseminated in the market) are unsupportable given the claims in the '422 Patent and TIG's products, the nature of the products are commonplace, and because SwimWays was on notice that the purported claims of infringement were incorrect and unsustainable, but it nonetheless pursued its campaign against TIG in an effort to take TIG's customers or otherwise prevent TIG's entry into the market.

SwimWays' actions also were baseless because the information spread by SwimWays and its agents in Hawai'i was demonstrably false when made and because SwimWays interfered with TIG not by way of lawful competition, but instead by means of unlawful and misleading dissemination of false information either through itself or through its agent, HIC, which at all times was cloaked with SwimWays' actual or apparent authority.

77. As a direct and proximate result of SwimWays' tortious misconduct, TIG's customers demanded that TIG remove its products from their stores and TIG in fact removed its products.

78. TIG already has suffered actual damages, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products from their stores, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action against other parties to protect TIG's interests against SwimWays' actual and attempted tortious interference.

SIXTH CLAIM FOR RELIEF

(CONSPIRACY AGAINST HIC AND SWIMWAYS)

79. TIG repeats and incorporates the allegations in Paragraphs 1 through 78.

80. HIC and SwimWays combined, associated, agreed, mutually undertook or concerted together for the purpose of intentionally, willfully and maliciously injuring TIG in its reputation, trade and/or business, and to tortiously interfere with TIG's customer relationships, by falsely accusing TIG of infringement and making defamatory statements about TIG to TIG customers.

81. The actions of the HIC and SwimWays were, on information and belief, part of a mutual undertaking or preconceived plan, whereby SwimWays would accuse TIG of infringement and HIC, Corish and/or Sur would contact TIG's customers and falsely state that TIG actually infringed SwimWays' products and/or was a defendant in patent litigation based upon those products.

82. The attached exhibits and factual allegations herein demonstrate that SwimWays and HIC worked hand-in-hand in the campaign against TIG – SwimWays provided baseless claims of infringement as the patent holder, and HIC disseminated the false information about TIG in the market while acting in its capacity as SwimWays Hawai'i representative and agent.

83. HIC's and SwimWays' actions amounted to bad faith, were intentional, purposeful, without legal justification and were taken to injure TIG.

84. TIG already has suffered actual damages, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action against other parties to protect TIG's interests against the conspiracy of HIC and Swimways to wrongfully interfere, or attempt to wrongfully interfere, with the existing and future business relationships between TIG and its customers.

SEVENTH CLAIM FOR RELIEF

(UNFAIR METHODS OF COMPETITION AGAINST ALL DEFENDANTS UNDER HRS CHAPTER 480)

85. TIG repeats and incorporates the allegations in Paragraphs 1 through 84.

86. As set forth herein, the Defendants have engaged in tortious misconduct resulting in actual harm and injury to TIG's business and, unless remedied, likely will continue to harm TIG in the marketplace. As a result, TIG is faced with financial hardships as alleged herein.

87. The result of the Defendants' tortious misconduct and unfair methods of competition is the diminishment of TIG's financial resources, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products from their stores, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action to address the Defendants' actual and attempted tortious interference.

88. The Defendants' tortious misconduct constitutes unfair competition because it offends established public policy and the laws of this State prohibiting unlawful and/or improper interference with existing and potential business relationships and expectancy, as well as defamation, and otherwise is immoral, unethical, oppressive, unscrupulous or substantially injurious not just to TIG, but to TIG's customers and to the ultimate consumers of TIG's products.

89. The conduct of the Defendants has negatively impacted and will continue to negatively impact competition in the market of recreational sports products because retailers have been deceived or led to believe by the Defendants that they will face exposure to patent litigation in the event that they sell TIG products. As a result, TIG products have been removed from the shelves of retailers, thereby improperly limiting the competition for the sale of the goods in

the recreational sports products market, as well as improperly decreasing the choices for consumers.

90. In addition to harming TIG and negatively impacting retailers and consumers, the Defendants' tortious misconduct was, on information and belief, taken to increase its market share and eliminate competition by TIG.

91. Defendants' unfair methods of competition have caused TIG to suffer actual damages of over \$1,000.00, including the loss of revenue from lost sales, the costs of providing credits to customers that demanded the removal of TIG's products, the related costs and business expenses associated with the removal of its products from its customers' stores, including additional inventory and personnel-related expenses, harm to its reputation and brand, as well as the legal expenses associated with bringing this action to protect TIG's interests against Defendants' unfair methods of competition. Therefore, Defendants, and each of them, are liable to TIG for treble damages, as well as TIG's reasonable attorneys' fees and costs of suit.

WHEREFORE, Plaintiff The Islander Group requests that this Court enter judgment in its favor and against the Defendants, and each of them, for compensatory and punitive or treble damages, plus interest, as well as attorneys' fees and expenses, in an amount to be determined at trial, as well as for any further relief that the Court deems just and appropriate.

DATED: Honolulu, Hawai'i, July 23, 2013.

/s/ Louise K.Y. Ing
LOUISE K. Y. ING
MICHELLE N. COMEAU

CHRISTOPHER D. MICKUS
LEE J. EULGEN
LAWRENCE E. JAMES, JR.

Attorneys for Plaintiff
THE ISLANDER GROUP, INC.

DEMAND FOR JURY TRIAL

The Islander Group demands a trial by jury as to all claims alleged herein.

DATED: Honolulu, Hawai'i, July 23, 2013.

/s/ Louise K.Y. Ing
LOUISE K. Y. ING
MICHELLE N. COMEAU

CHRISTOPHER D. MICKUS
LEE J. EULGEN
LAWRENCE E. JAMES, JR.

Attorneys for Plaintiff
THE ISLANDER GROUP, INC.