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 COURT OF THE CENTRAL DISTRICT OF CALIFORNIA

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8
 9 UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11
 12 TYR SPORT, INC., a California
 corporation,

13 Plaintiff,

14 v.

15 WARNACO SWIMWEAR, INC. dba
 16 SPEEDO USA, a Delaware corporation;
 UNITED STATES SWIMMING, INC.,
 17 an Ohio corporation; MARK
 SCHUBERT, an individual; ERIK
 18 VENDT, an individual; and DOES 1
 through 10, inclusive,

19 Defendants.

Case No. SACV08-00529 JVS (MLGx)

COMPLAINT FOR:

- (1) VIOLATIONS OF THE SHERMAN ACT [15 U.S.C. §§ 1 and 2];
- (2) VIOLATIONS OF THE CARTWRIGHT ACT [Cal. Bus. & Prof. Code § 16720, et seq.];
- (3) FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT [15 U.S.C. § 1125(a)];
- (4) BREACH OF CONTRACT;
- (5) TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS;
- (6) TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE;
- (7) TRADE LIBEL;
- (8) UNFAIR BUSINESS PRACTICES; AND,
- (9) INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

BY FAX

1 Plaintiff TYR SPORT, INC., for its causes of action against Defendants
2 WARNACO SWIMWEAR, INC. dba SPEEDO USA, UNITED STATES
3 SWIMMING, INC., MARK SCHUBERT, and ERIK VENDT (sometimes
4 collectively referred to as “Defendants”), alleges as follows:

5 **JURISDICTION AND VENUE**

6 1. This Court has jurisdiction over the subject matter of this action
7 pursuant to 28 U.S.C. section 1331 and 15 U.S.C. sections 15 and 1121(a). Venue is
8 proper in this District under 28 U.S.C. section 1391(b) in that one or more of the
9 Defendants resides in this District and the events giving rise to the claims asserted
10 herein were took place within this District or had effects within this District.

11 **THE PARTIES**

12 2. Plaintiff TYR SPORT, INC. (hereinafter, “TYR”) is a corporation duly
13 organized and existing under the laws of the State of California, having its principal
14 place of business in the County of Orange, State of California.

15 3. Plaintiff is informed and believes and, on that basis, alleges that
16 Defendant WARNACO SWIMWEAR, INC. dba “Speedo” or “Speedo USA”
17 (hereinafter, “SPEEDO”) is a corporation organized and existing under the laws of
18 the State of Delaware, having its principal place of business in the County of Los
19 Angeles, State of California. Plaintiff is further informed and believes and, on that
20 basis, alleges that Defendant SPEEDO was formerly known as “AUTHENTIC
21 FITNESS CORPORATION.”

22 4. Plaintiff is informed and believes and, on that basis, alleges that
23 Defendant UNITED STATES SWIMMING, INC. (hereinafter, “USA
24 SWIMMING”) is a corporation organized and existing under the laws of the State of
25 Ohio, having its principal place of business in Colorado Springs, Colorado. USA
26 SWIMMING is recognized by the United States Olympic Committee as the
27 “national governing body” (the “NGB”) of the sport of swimming, as that term is
28 used in the Ted Stevens Amateur Sports Act, 36 U.S.C. §.220522.

1 5. Plaintiff is informed and believes and, on that basis, alleges that
2 Defendant MARK SCHUBERT (hereinafter, "SCHUBERT") an individual whose
3 residence is in Colorado Springs, Colorado.

4 6. Plaintiff is informed and believes and, on that basis, alleges that
5 Defendant ERIK VENDT (hereinafter, "VENDT") is an individual whose residence
6 is in Ann Arbor, Michigan.

7 7. Plaintiff is unaware of the true names and capacities, whether
8 individual, associate, corporate, or otherwise, of Defendants Does 1 through 10,
9 inclusive, or any of them, and therefore sues said Defendants, and each of them, by
10 such fictitious names. Plaintiff will seek leave of this Court to amend this
11 Complaint when the same are ascertained.

12 8. Plaintiff is informed and believes and, on that basis, alleges that unless
13 otherwise specified, each of the Defendants, at all times herein mentioned, was the
14 agent, servant, trustee, principal, employee, and/or joint venturer of the other
15 remaining Defendants, that the acts of each Defendant were within the course and
16 scope of their agency, service, and employment and with the permission and consent
17 of each other Defendant, and that each Defendant has ratified the conduct of the
18 others.

19 **RELEVANT MARKETS AND EFFECTS ON COMMERCE**

20 9. The relevant product market is the market for high-end competitive
21 swimwear and accessories such as goggles, swim caps, training equipment, sport
22 and warm-up suits, sold to competitive swimmers in the professional, collegiate,
23 high school and club ranks. The relevant geographic market consists of the entire
24 United States and its territories. TYR is informed and believes and, on that basis,
25 that Speedo has significant market power within the relevant markets, with in excess
26 of 60% of the market share in the United States. Other manufacturers with a
27 presence in the relevant markets are TYR, Nike and Dolfin. Other major
28 manufacturers that have recently exited the competitive swimwear market in the

1 United States, at least in part as a result of Defendants' actions alleged herein, are
2 Adidas and Arena.

3 *Without Disclosing His Financial Relationship With SPEEDO, USA SWIMMING*
4 *Has Allowed SCHUBERT To Abuse His Position As National Team Coach To*
5 *Advocate For SPEEDO.*

6 10. Defendants have restrained trade in the relevant markets and
7 submarkets by unlawfully abusing the special position USA SWIMMING holds as
8 the NGB of the sport of swimming. Although Congress has mandated that an NGB
9 must be "independent" and "free from outside restraint," the conduct of defendants
10 in this case demonstrates that USA SWIMMING has allowed itself to be used by
11 one of its major sponsors, SPEEDO, as an instrumentality through which
12 competition in the competitive swimwear market has been restrained for the benefit
13 of SPEEDO.

14 11. USA SWIMMING and SPEEDO have combined to accomplish their
15 goal in several ways. One way in which USA SWIMMING has been used by
16 SPEEDO as an instrumentality to restrain trade is through sponsorship
17 opportunities. There can be only one NGB of a sport, and USA SWIMMING holds
18 a special position as the sole NGB of swimming in the United States. TYR is
19 informed and believes and, on that basis, alleges that USA SWIMMING and
20 SPEEDO have agreed that, in exchange for the substantial financial contributions
21 SPEEDO makes to USA SWIMMING, that USA SWIMMING must refuse to offer
22 sponsorship opportunities to competitors of SPEEDO, including the opportunity to
23 advertise in "Splash Magazine," the official publication of USA SWIMMING,
24 which is the most widely-distributed publication devoted to swimming in the
25 country. In fact, there have been instances where USA SWIMMING has gone so far
26 as to alter action or event photographs in Splash Magazine to remove the logos of
27 any competitor of SPEEDO.

28

1 12. Other ways in which SPEEDO'S competitors are denied sponsorship
2 opportunities with USA SWIMMING include the rights to have meets named after
3 the competitor, the right to have individual awards given in the competitors' name,
4 the right to advertise in meet programs, the right to provide promotional materials in
5 athlete/coaches bags and the right to have signage at USA SWIMMING events.

6 13. USA SWIMMING, SPEEDO and SCHUBERT have also combined to
7 engage in a campaign of falsely disparaging the products of SPEEDO'S
8 competitors, including TYR, for the purpose of inducing competitive swimmers to
9 refrain from doing business with SPEEDO'S competitors. USA SWIMMING and
10 SPEEDO have carried out this campaign through SCHUBERT in an especially
11 insidious and deceptive manner.

12 14. Specifically, in 2006, USA SWIMMING hired SCHUBERT, a highly
13 accomplished and respected swim coach, to be the National Team Head Coach and
14 General Manager, charged with, among other things, coaching the United States
15 National Teams and Olympic teams. On its face, USA SWIMMING'S hiring of
16 SCHUBERT appears to be a perfectly legitimate exercise of its function as the NGB
17 of swimming to promote the sport and to field competitive swim teams to compete
18 in the international and Olympic swimming events. Indeed, it is SCHUBERT'S air
19 of legitimacy that has made Defendants' anticompetitive scheme so effective.

20 15. Under the guise of acting in his capacity of National Team Head Coach
21 and General Manager, SCHUBERT has engaged in a campaign to use his position
22 with USA SWIMMING to promote the SPEEDO products and to encourage
23 swimmers to switch from competitors' products to SPEEDO products. SCHUBERT
24 has carried out this campaign by repeatedly making factual statements, with either
25 no factual support or with false, misleading and/or incomplete factual support,
26 disparaging the products of SPEEDO'S competitors. SCHUBERT has gone so far
27 as to state that Olympic hopeful swimmers who do not switch to SPEEDO are
28 wearing "inferior" equipment and are at risk of "staying home" during the Beijing

1 Olympic Games because of the inferiority of their equipment, and to “recommend”
2 that athletes breach contracts with SPEEDO’S competitors.

3 16. Among the specific statements and positions attributed to SCHUBERT
4 concerning the SPEEDO products and those of SPEEDO’S competitors are the
5 following (with emphasis added):

6 a. On September 21-28, 2007, at the United States Aquatic
7 Sports (“USAS”) convention, held in Garden Grove, California, a
8 coaches meeting was held where SCHUBERT advocated the virtues of
9 SPEEDO’S elite swimsuit technology and the results at the 2007 World
10 Swimming Championships held in Melbourne, Australia.

11 b. In December, 2007, a USA SWIMMING coaches meeting
12 was held in Dallas, where all coaches with swimmers on the national
13 Team were invited to attend. At that meeting, SCHUBERT used his
14 position as Head Coach to present a segment advocating the upcoming
15 new SPEEDO LZR technology, and SCHUBERT stated during that
16 presentation that SPEEDO was far ahead of all of its competitors on
17 swimsuit technology.

18 c. During the Short Course World Championships held in
19 Manchester, England, from April 9-13, 2008, SCHUBERT held a
20 mandatory team meeting where he advocated to team members that
21 they would have *a 2% advantage* if they wore the SPEEDO LZR
22 technology. SCHUBERT also arranged to have a fitting session during
23 the mandatory team meeting where athletes were instructed on how to
24 fit the SPEEDO LZR suit and position the SPEEDO LZR suit to the
25 body. TYR-sponsored athletes in attendance expressed discomfort at
26 SCHUBERT’S unsolicited comments.

27 d. SCHUBERT has been described on several occasions as
28 “one of the most outspoken supporters of the new [Speedo] swimsuit.”

1 Stepping squarely into the arena of commercial advocacy, SCHUBERT
2 has even stepped in to defend SPEEDO against criticism in the
3 marketplace, “labeling criticism a case of competitive sour grapes
4 instigated by other swimsuit manufacturers.”

5 e. SCHUBERT has gone so far as to suggest that he will use
6 his authority as Head Coach to mandate use of the SPEEDO
7 equipment. On April 13, 2008, the Boston Globe reported that
8 SCHUBERT stated he “will tell his team to wear Speedo at the US
9 trials.”

10 f. The April 16, 2008 Austin American-Statesman reported
11 that SCHUBERT said “U.S. swimmers who were using another brand
12 than Speedo had backed the wrong horse”

13 g. The April 8, 2008 SwimNews.com ran an article entitled
14 “Schubert: Clarity In The Costume Drama” which quoted SCHUBERT
15 as saying that swimmers who were not wearing Speedo suits “are
16 contracted to an *inferior product*”

17 h. An April 10, 2008 Associated Press wire story reported
18 that “Schubert said we will go so far as to recommend that every
19 American wear the Speedo suit at the Olympic trials in June—*even if*
20 *they are sponsored by another company.*”

21 i. The April 13, 2008 Times of London attributed the
22 following quote to SCHUBERT on the SPEEDO LZR suit: “My
23 advice to athletes is, ‘You have a black and white decision - the money
24 (which comes from swimmers sticking with their current sponsorship
25 deal) or the gold medal?’ And it's going to be a real test of character as
26 to what choice they make. *There is one manufacturer that's put*
27 *millions into research while the others are more into fashion.*”
28

1 j. SCHUBERT followed up on his assertion that SPEEDO is
2 the only serious equipment manufacturer that has invested in
3 technological innovation by stating “The other [swimwear] companies
4 just haven’t put the effort in. *They’ve focused more on fashion than*
5 *performance*. They need to get with it. It’s simple.”

6 k. On several occasions, SCHUBERT is reported to have
7 claimed the Speedo LZR gave swimmers “*a 2% advantage*” over the
8 suits of competitors. SCHUBERT has gone on to extrapolate from his
9 asserted (but unsupported) factual position that “[n]obody at this level
10 can afford to give up 2 per cent.”

11 l. SCHUBERT said he would recommend that every
12 American wear the Speedo suit at the US Olympic trials in June, with
13 the open threat that their position on the team could depend on their
14 choice of equipment: “I would strongly advise them to wear the
15 [Speedo] suit at trials, or they may end up at home watching on NBC.”

16 17. Because of SCHUBERT’S position of authority, purporting to act as
17 Head Coach on behalf of the NGB of their sport (i.e., an “independent” entity acting
18 “free from outside restraint”), competitive swimmers give SCHUBERT’S comments
19 a degree of credibility that would never attach to statements made by equipment
20 manufacturers (which are seen for what they are—marketing claims made in the
21 hopes of selling equipment.) Thus, swimmers who hear SCHUBERT tout the merits
22 of SPEEDO’S products naturally believe that he is acting as an objective, unbiased
23 representative of the NGB of their sport, and swimmers are therefore much more
24 likely to be persuaded by SCHUBERT’S comments than they would be by
25 statements made directly by SPEEDO.

26 18. SCHUBERT’S influence is summed up in an April 8, 2008 article in
27 SwimNews.com entitled “Suited For A Fast Trip Down Memory Lane,” which
28 includes the following discussion about SCHUBERT and the importance of his

1 comments about SPEEDO: “Before diving deeper, best . . . make it your business
2 to heed the words of Mark Schubert, head USA coach, and his no-nonsense take on
3 the matter. *His is the most important message to come out of this debate so far in*
4 *terms of every swimmer, coach and nation heading to Beijing* with ambition in
5 heart and mind. . . . Schubert makes clear that the [Speedo] suit DOES enhance
6 performance. No questions, no arguments, no point in swimmers emerging from
7 races saying ‘it doesn’t matter what you wear.’” (Emphasis added).

8 19. There is no question that the actions of SPEEDO, SCHUBERT and
9 USA SWIMMING have influenced swimmers to defect from their prior equipment
10 providers to SPEEDO irrespective of the truth or falsity of the statements made by
11 SCHUBERT. For instance, the Austin American-Statesman reported that Ian
12 Crocker, a world-class swimmer who now uses the Speedo LZR, has “said that even
13 if the Speedo LZR is not really faster, it could give a swimmer a psychological
14 edge.” The American-Statesman went on to quote Crocker: “If you think you have
15 a faster suit, then you do.”

16 20. That same sentiment was echoed by Orjan Madsen, head coach of the
17 German National Team. The Canadian Press reported on April 19, 2008 that
18 “[w]hether the German swimmers are disadvantaged against Speedo-clad rivals is
19 real or not, head coach Orjan Madsen thinks the belief is now firmly stuck in their
20 heads—and won’t be easy to dislodge.” The Canadian Press quoted Madsen as
21 saying “I don’t believe the best psychologists in the world can accomplish that.”

22 21. On April 25, 2008, The Australian ran an article entitled “Suit-ability
23 Playing With European Minds” and reported that “[t]he physical impact of the new
24 Speedo suit cannot be clearly quantified, but the psychological impact on swimmers
25 worldwide is already profound, judging by events in Europe this week.” Australian
26 National Team coach Alan Thompson noted that the Speedo suit “has probably
27 affected some people in that way (psychologically), I’m just glad we’re sponsored
28

1 by Speedo so our swimmers don't have this issue. . . . If you think a swimsuit is
2 going to beat you, it probably will.”

3 22. Unfortunately, the air of impartiality and legitimacy accorded
4 SCHUBERT and his statements is nothing more than an illusion created by USA
5 SWIMMING and SPEEDO. What USA SWIMMING, SPEEDO and SCHUBERT
6 have failed to disclose is that *SCHUBERT is a paid spokesman for SPEEDO*—one
7 of USA SWIMMING'S largest (if not the single largest) benefactors. What USA
8 SWIMMING, SPEEDO and SCHUBERT also have failed to disclose is that
9 *SCHUBERT'S comments about SPEEDO'S competitors are not true*. In fact,
10 other manufacturers of competitive swimwear—specifically including TYR—are
11 not, as SCHUBERT asserts, focused solely on fashion, and have products that are as
12 good as or better than the SPEEDO equipment being hyped by USA SWIMMING
13 and SPEEDO, through SCHUBERT.

14 *TYR Has A Long Legacy Of Innovative Product Development.*

15 23. The factual assertion made by SCHUBERT that only SPEEDO has
16 devoted significant effort to developing new and innovative technology is provably
17 false. Far from being “focused on fashion” as SCHUBERT has claimed, TYR has a
18 long history of technical innovation.

19 24. Among the technical innovations pioneered by TYR are (a) the first
20 utility patented, performance swim technology (the Aqua Shift, engineered for the
21 2004 Olympic Games); (b) the first performance swimwear company to decompose
22 elements of total drag: wave, form and pressure; (c) the first swim goggle designed
23 specifically for women, (The Femme T-72, which was recognized as a
24 Manufacturers Innovation Award Nominee); and (d) the TechnoFlex Goggles
25 Series, which are the first single-piece goggle to be made entirely from PVC.

26 25. TYR and its athletes have a demonstrated track record of success at the
27 highest levels of the sport, as evidenced by the following:
28

- 1 • At the 2004 Athens Olympic Games, TYR athletes collected 18
2 Olympic medals. These medals were earned in swimming, diving and
3 synchronized swimming;
- 4 • TYR represents over 50 professional athletes in the United States and
5 throughout the world. TYR's team of world renowned swimmers and
6 divers include 4-time Olympic Gold medalist Yana Klochkova, 2-time
7 Olympic medalist Amanda Weir, 2-time Olympic medalist Martina
8 Moravcova, Olympic Gold medalist Camelia Potec, World Champion
9 Leila Vaziri, Pan American Gold medalist Fran Crippen, Anastasia
10 Davydova and Anastasia Ermakova (2-Time Olympic Gold Medalists -
11 Duet & Team Synchronized Swimming); Nancilea Foster (4- Time
12 U.S. National Champion Diving); and Cassidy Krug (U.S. National
13 Champion Diving).
- 14 • Swimming in TYR equipment, Amaury Leveaux is the second fastest
15 man in history in the 50m Freestyle. Leveaux is the first and only
16 swimmer in history to go under 22 seconds in the 50m Freestyle LC
17 and go under 1:47 in the 200m Freestyle LC;
- 18 • At the collegiate and international level, TYR supports the most
19 decorated FINA World Cup athlete of all time, Martina Moravcova, a
20 3-Time FINA World Cup Champion, 10-Time NCAA Individual
21 Champion and 4-Time Olympian. She has earned the prestigious titles
22 of NCAA Swimmer of the Year and Honda Award Winner;
- 23 • The University of Auburn's Men and Women Swimming Teams
24 combined for 5 NCAA National Championships swimming in TYR
25 equipment.

26 26. The most recent and significant evidence of TYR's commitment to
27 innovation and technological advancement is the undisputed fact that TYR's new
28 Tracer Rise suit, which uses a polyurethane woven fabric technology similar to that

1 of the Speedo LZR, was launched in competition *several weeks before* the Speedo
2 LZR. Lost in the hype created by Defendants surrounding the Speedo LZR is the
3 fact that TYR athletes have set numerous world and national records while
4 swimming against athletes wearing the Speedo LZR. Among the significant
5 achievements by TYR athletes in the past three months—in direct competition with
6 athletes wearing the Speedo LZR—are:

- 7 • A world record by Doug Van Wie in the 4x100m freestyle relay;
- 8 • An American record by Mary DeScenza in the 200m butterfly, which
9 broke the longest standing American record;
- 10 • An American record by Mary DeScenza in the 800m freestyle relay;
- 11 • An American record by Robert Margalis and Doug Van Wie in the
12 800m freestyle relay;
- 13 • Three 2008 world champions: Mary DeScenza (200m butterfly); Peter
14 Marshall (50m backstroke) and Doug Van Wie (4x100 freestyle relay);
15 and
- 16 • Defying SCHUBERT'S claim that non-SPEEDO athletes would be
17 staying home for the Olympic Games, the first swimmer to qualify for
18 the 2008 United States Olympic team is Mark Warkentin, a TYR
19 athlete who qualified in TYR equipment.

20 27. Significant results in Tracer technology are not limited to just TYR
21 sponsored athletes. Non-sponsored athletes have also excelled when wearing Tracer
22 technology as evidenced by the recent breaking of the girl's National High School
23 record in the 200 yard Freestyle, a record previously held by World Champion Kate
24 Ziegler.

25 *SPEEDO Has Intentionally Disseminated False And Misleading Information To*
26 *Support Its Unfounded Claims Of Technical Superiority*

27 28. In addition to false and misleading statements made by SCHUBERT,
28 as alleged above, SPEEDO has disseminated false and misleading statements

1 through another significant marketing channel, team dealers. A substantial amount
2 of the sales of competitive swimwear products are made through team dealers, who
3 carry products of SPEEDO and its competitors, including TYR. In an effort to
4 mislead and deceive team dealers about the relative quality of SPEEDO'S products
5 in comparison to those of its competitors, SPEEDO has intentionally disseminated
6 false and misleading advertising materials directly to team dealers.

7 29. Some of SPEEDO'S advertising materials have been literally false. For
8 instance, on December 20, 2007, SPEEDO distributed promotional materials to its
9 team dealers purporting to be "a very thorough analysis of the suit statistics from the
10 Nationals three weeks ago." The document goes on to represent that the statistics
11 "show[] how we [SPEEDO] continue to dominate at the Senior National level."
12 However, the so-called "thorough analysis" SPEEDO claims to have undertaken is
13 literally false. Among other inaccuracies, SPEEDO omitted several races where the
14 results were unfavorable to them (and would undermine their claim of
15 "dominance"). For instance, SPEEDO omitted to include the results of the men's
16 1650 yard freestyle finals, where five of the eight finalists wore TYR (and only two
17 wore SPEEDO), and TYR athletes won all three medals, placing first, second, third,
18 fourth and sixth.

19 30. SPEEDO'S promotional materials sent to team dealers also
20 significantly misrepresented the number of athletes wearing its competitors'
21 equipment at the United States Nationals. For instance, SPEEDO understated the
22 number of athletes wearing TYR equipment (thus overstating the percentage of
23 athletes wearing SPEEDO) in the men's 200m back finals, the men's 200m
24 individual medley finals, the men's 50m freestyle finals and the men's 500m
25 freestyle, by more than 50%.

26 31. In other instances, SPEEDO has disseminated information that, while
27 not literally false, is likely to mislead its audience, including the team dealers who
28 are responsible for a substantial percentage of the sales, and the athletes themselves.

1 Typical of this kind of advertising are incomplete representations of statistics,
2 designed to misrepresent the effect of equipment on athletic performance. SPEEDO
3 routinely offers data showing that a large majority of swimmers who recently have
4 won meets or set records have done so in the SPEEDO equipment, and SPEEDO
5 has presented these data as evidence that SPEEDO'S equipment is superior.
6 However, SPEEDO fails to include other statistics that would be necessary in order
7 to put its selective data into context. For instance, SPEEDO neglects to mention that
8 a majority of the elite swimmers who participated in the relevant events were in
9 SPEEDO equipment. Thus, all things (including equipment) being equal, one would
10 expect that a majority of the medal winners would be SPEEDO athletes.

11 32. More importantly, SPEEDO fails to mention that it sponsors a
12 disproportionately high number of those athletes who are at the highest levels (such
13 as Michael Phelps) and are therefore the likely candidates to set meet or world
14 records. Failure to include the complete set of statistics that would be essential in
15 order to properly analyze the selective statistics disseminated by SPEEDO has
16 misled and is likely to continue to mislead the recipients of the data.

17 *The Actions of SPEEDO, USA SWIMMING and SCHUBERT Have Enabled*
18 *SPEEDO To Raise Prices And Limit Competition.*

19 33. The actions of USA SWIMMING, SPEEDO and SCHUBERT have
20 had the desired effects. Numerous elite swimmers—including several Olympic
21 medal winners—have worn the Speedo LZR in competition despite being under
22 contract to other manufacturers and have defected or are considering defecting from
23 their former equipment providers in favor of SPEEDO. Some athletes (including
24 Defendant VENDT) have followed through on SCHUBERT'S recommendation that
25 they breach contracts with their equipment providers in order to avoid “staying
26 home” during the Olympic Games. These highly-publicized events have had a
27 pervasive impact on the competitive swimwear market not only at the elite level, but
28 also at the collegiate, high school, club and summer league levels. Not only have

1 these events affected sales of the swimsuits themselves, but due to the high visibility
2 of the swimsuits, sales of accessories will be similarly affected because they are
3 inextricably connected.

4 34. SPEEDO's market power, and the impact the above-described events
5 have had on competition, is evident from the fact that SPEEDO has been able to
6 raise prices to a level well above any of its competitors, while actually increasing its
7 market share. SPEEDO'S LZR suit costs more than \$500, at least 20% more than
8 other competitive products, yet SPEEDO has succeeded not only in maintaining its
9 dominant market share, but actually has increased its share. Competitors in the
10 relevant markets have suffered antitrust injury because SPEEDO has acquired or
11 maintained its dominant market position, at the expense of other competitors in the
12 market, through unlawful conduct rather than as a result of superior skill, foresight
13 and industry. The unlawful conduct, which includes illegal combinations in
14 restraint of trade and false and misleading statements about competitors and their
15 products, is the type of conduct the antitrust laws are intended to prevent.

16 **FIRST CAUSE OF ACTION**

17 **(Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 Against**
18 **Defendants SPEEDO, USA SWIMMING, SCHUBERT**
19 **and DOES 1 through 5)**

20 35. Plaintiff realleges and incorporates herein by this reference as though
21 set forth in full each and every allegation contained in Paragraphs 1 through 34,
22 inclusive.

23 36. The actions of Defendants SPEEDO, USA SWIMMING and
24 SCHUBERT, as alleged hereinabove, constitute one or more unlawful contracts,
25 combinations or conspiracies to restrain trade in interstate commerce in the relevant
26 product and geographic markets and submarkets in violation of Section 1 of the
27 Sherman Act.
28

1 37. The actions of Defendants SPEEDO, USA SWIMMING and
2 SCHUBERT, as alleged hereinabove, caused injury not only to competition but to
3 TYR individually, by reason of which TYR has suffered actual damages in an
4 amount to be proved at trial, which damages shall be trebled and awarded to TYR as
5 provided in Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15.

6 38. Unless the actions of Defendants SPEEDO, USA SWIMMING and
7 SCHUBERT, as alleged hereinabove are enjoined, competition in the relevant
8 markets will continue to be irreparably harmed in a manner that cannot be
9 compensated in monetary damages.

10 **SECOND CAUSE OF ACTION**

11 **(Violation of Section 2 of the Sherman Act, 15 U.S.C. § 2**

12 **Against Defendant SPEEDO)**

13 39. Plaintiff realleges and incorporates herein by this reference as though
14 set forth in full each and every allegation contained in Paragraphs 1 through 38,
15 inclusive.

16 40. The actions of Defendant SPEEDO, as alleged hereinabove, constitute
17 a course of conduct designed to monopolize the market for high-end competitive
18 swimwear and accessories in the United States in violation of Section 2 of the
19 Sherman Act.

20 41. In engaging in the above-described conduct, SPEEDO has acted with
21 the specific intent to destroy competition in the market for high-end competitive
22 swimwear and accessories in the United States and, given SPEEDO'S dominant
23 market share as alleged above, and the fact that SPEEDO continues to benefit from
24 its undisclosed relationship with SCHUBERT, there is a dangerous probability that
25 SPEEDO'S efforts will succeed.

26 42. The actions of Defendant SPEEDO, as alleged hereinabove, have
27 caused injury not only to competition but to TYR individually, by reason of which
28 TYR has suffered actual damages in an amount to be proved at trial, which damages

1 shall be trebled and awarded to TYR as provided in Section 4 of the Clayton
2 Antitrust Act, 15 U.S.C. § 15.

3 43. Unless the actions of Defendants SPEEDO as alleged hereinabove are
4 enjoined, competition in the relevant markets will continue to be irreparably harmed
5 in a manner that cannot be compensated in monetary damages.

6 **THIRD CAUSE OF ACTION**

7 **(Violation of the Cartwright Act, Cal. Bus. & Prof. Code § 16720, et seq.**

8 **Against Defendants SPEEDO, USA SWIMMING, SCHUBERT**
9 **and DOES 1 through 5)**

10 44. Plaintiff realleges and incorporates herein by this reference as though
11 set forth in full each and every allegation contained in Paragraphs 1 through 43,
12 inclusive.

13 45. The actions of Defendants SPEEDO, USA SWIMMING and
14 SCHUBERT, as alleged hereinabove, constitute one or more unlawful combinations
15 of capital, skill or acts by two or more persons that have the effect of unreasonably
16 restraining trade.

17 46. The actions of Defendants SPEEDO, USA SWIMMING and
18 SCHUBERT, as alleged hereinabove, caused injury not only to competition but to
19 TYR individually, by reason of which TYR has suffered actual damages in an
20 amount to be proved at trial, which damages shall be trebled and awarded to TYR as
21 provided in Section 16750(a) of the Cartwright Act, Cal. Bus. & Prof. Code §
22 16750(a).

23 47. Unless the actions of Defendants SPEEDO, USA SWIMMING and
24 SCHUBERT, as alleged hereinabove are enjoined, competition in the relevant
25 markets will continue to be irreparably harmed in a manner that cannot be
26 compensated in monetary damages.

1 from TYR. As a former Olympic Silver Medalist, VENDT'S endorsement of TYR
2 products had significant value to TYR.

3 56. In the 2004 Olympic Games in Athens, VENDT again won a Silver
4 Medal wearing TYR equipment. At some point following the 2004 Olympic
5 Games, VENDT retired from competitive swimming.

6 57. In 2006, VENDT apparently decided to emerge from retirement and
7 elected to re-sign with TYR as his technical suit and equipment sponsor. On or
8 about December 31, 2006, TYR and VENDT entered into another endorsement
9 agreement (the "Endorsement Agreement") wherein TYR agreed to compensate
10 VENDT for his endorsement of TYR products and his agreement to wear TYR
11 equipment at meets and related events. TYR prepared and distributed, at significant
12 expense, promotional materials heralding the return of VENDT to the world of
13 competitive swimming and as a TYR-sponsored athlete.

14 58. On January 14, 2008, VENDT'S representative sent TYR a letter
15 announcing that VENDT would be wearing a Speedo FS Pro suit (the Speedo LZR
16 had not been launched at that time) at the Toyota Southern California Grand Prix
17 Swimming Competition at the Belmont Plaza Olympic Pool in Long Beach,
18 California scheduled for on January 18-21, 2008. VENDT'S threatened actions
19 were in violation of the terms of the Endorsement Agreement.

20 59. On January 17, 2008, TYR notified VENDT and his representative that
21 VENDT'S actions were an anticipatory breach of the Endorsement Agreement and
22 TYR exercised its right to terminate the Endorsement Agreement based on
23 VENDT'S breach.

24 60. TYR performed all of its obligations to VENDT under the
25 Endorsement Agreement except for those obligations that were excused by
26 VENDT'S breach.

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1 61. As a direct and proximate result of VENDT'S breach of the
2 Endorsement Agreement, TYR has suffered damages in an amount to be proved at
3 trial.

4 **SIXTH CAUSE OF ACTION**

5 **(Tortious Interference With Contractual Relations Against Defendants**
6 **SPEEDO, USA SWIMMING, SCHUBERT and DOES 5 through 10)**

7 62. Plaintiff realleges and incorporates herein by this reference as though
8 set forth in full each and every allegation contained in Paragraphs 1 through 61,
9 inclusive.

10 63. Defendants SPEEDO, SCHUBERT and USA SWIMMING were aware
11 of the Endorsement Contract between TYR and VENDT.

12 64. Defendants SPEEDO, SCHUBERT and USA SWIMMING acted in a
13 manner designed to induce VENDT to breach the Endorsement Contract with TYR
14 and defect to SPEEDO. Defendants' actions succeeded in that VENDT did, in fact,
15 breach the Endorsement Contract with TYR.

16 65. As a direct and proximate result of the actions of Defendants SPEEDO,
17 USA SWIMMING and SCHUBERT, TYR has suffered damages in an amount to be
18 proved at trial.

19 66. The actions of Defendants SPEEDO and SCHUBERT, as alleged
20 hereinabove, were done with oppression, fraud or malice within the meaning of
21 California Civil Code section 3294 such that an award of punitive or exemplary
22 damages is appropriate.

23 **SEVENTH CAUSE OF ACTION**

24 **(Tortious Interference With Prospective Economic Advantage Against**
25 **Defendants SPEEDO, USA SWIMMING, SCHUBERT**
26 **and DOES 5 through 10)**

27 67. Plaintiff realleges and incorporates herein by this reference as though
28 set forth in full each and every allegation contained in Paragraphs 1 through 66,

1 inclusive.

2 68. TYR has an economic relationship with coaches, team dealers and
3 athletes through which TYR was likely to benefit economically in the future.

4 69. Defendants SPEEDO, USA SWIMMING and SCHUBERT had
5 knowledge of TYR's relationship with the athletes, coaches and team dealers.

6 70. Defendants SPEEDO, USA SWIMMING and SCHUBERT engaged in
7 intentional, unlawful and deceptive acts designed to disrupt the economic
8 relationships TYR has with athletes, coaches and team dealers; namely, to induce
9 athletes, coaches and team dealers to refrain from doing business with TYR in favor
10 of SPEEDO.

11 71. The actions of Defendants SPEEDO, USA SWIMMING and
12 SCHUBERT have caused actual disruption of the relationships between TYR and
13 the athletes, coaches and team dealers.

14 72. As a direct and proximate result of the actions of Defendants SPEEDO,
15 USA SWIMMING and SCHUBERT, TYR has suffered damages in an amount to be
16 proved at trial.

17 73. The actions of Defendants SPEEDO and SCHUBERT, as alleged
18 hereinabove, were done with oppression, fraud or malice within the meaning of
19 California Civil Code section 3294 such that an award of punitive or exemplary
20 damages is appropriate.

21 **EIGHTH CAUSE OF ACTION**

22 **(Trade Libel Against Defendant SPEEDO, USA SWIMMING,**
23 **SCHUBERT and DOES 5 through 10)**

24 74. Plaintiff realleges and incorporates herein by this reference as though
25 set forth in full each and every allegation contained in Paragraphs 1 through 51, 64
26 and 70, inclusive.

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1 75. As alleged hereinabove, Defendants SPEEDO, SCHUBERT and USA
2 SWIMMING published false and misleading statements about TYR and its
3 products.

4 76. The false and misleading statements published by Defendants
5 SPEEDO, SCHUBERT and USA SWIMMING caused others, including coaches,
6 athletes and team dealer, not to deal with TYR.

7 77. Defendants SPEEDO, SCHUBERT and USA SWIMMING made the
8 false and misleading statements with knowledge of their falsity or with reckless
9 disregard to their falsity.

10 78. As a direct and proximate result of the actions of Defendants SPEEDO,
11 USA SWIMMING and SCHUBERT, TYR has suffered damages in an amount to be
12 proved at trial.

13 79. The actions of Defendants SPEEDO and SCHUBERT, as alleged
14 hereinabove, were done with oppression, fraud or malice within the meaning of
15 California Civil Code section 3294 such that an award of punitive or exemplary
16 damages is appropriate.

17 **NINTH CAUSE OF ACTION**

18 **(Unfair Business Practices Against Defendants SPEEDO,**
19 **USA SWIMMING, SCHUBERT and DOES 1 through 10)**

20 80. Plaintiff realleges and incorporates herein by this reference as though
21 set forth in full each and every allegation contained in Paragraphs 1 through 79,
22 inclusive.

23 81. The actions of Defendants SPEEDO, SCHUBERT and USA
24 SWIMMING, as alleged hereinabove, constitute fraudulent or unfair business
25 practices within the meaning of California Business & Professions Code section
26 17200.

27 82. By reason of the acts of Defendants alleged herein, Defendants have
28 wrongfully obtained economic benefits, at the direct expense of Plaintiff and to

1 Plaintiff's detriment, in an amount in excess of \$500,000, exclusive of interest and
2 costs, to be proven at trial. Plaintiff is entitled to restitution of the benefits
3 Defendants wrongfully obtained through their unlawful, unfair or fraudulent
4 business practices as alleged hereinabove.

5 83. By reason of the unlawful, unfair or fraudulent business practices of
6 Defendants alleged herein, Plaintiff has suffered, is suffering, and will continue to
7 suffer, irreparable damage unless Plaintiff is granted, preliminarily during the
8 pendency of this action, and thereafter permanently, an injunction preventing
9 Defendants from continuing their unlawful, unfair and/or fraudulent business
10 practices.

11 **TENTH CAUSE OF ACTION**

12 **(Injunctive Relief Against Defendants SPEEDO, USA SWIMMING,**
13 **SCHUBERT and DOES 1 through 10)**

14 84. Plaintiff realleges and incorporates herein by this reference as though
15 set forth in full each and every allegation contained in Paragraphs 1 through 53 and
16 62 through 83, inclusive.

17 85. By reason of the acts of Defendants alleged herein, TYR has suffered,
18 is suffering, and will continue to suffer, irreparable damage unless TYR is granted,
19 preliminarily during the pendency of this action, and thereafter permanently, an
20 injunction preventing Defendants from continuing their unlawful actions.

21 86. TYR therefore requests that this Court enter temporary or preliminary
22 injunctive relief enjoining Defendants and their agents, servants, employees,
23 members, limited partners, attorneys, parent, subsidiary, and related companies and
24 all persons acting for, with, by, through, or under them from, among other actions
25 (a) further disseminating false and misleading information about TYR and its
26 products; (b) allowing SCHUBERT to make any factual statements concerning any
27 high-end swimming equipment or manufacturers of such equipment, and from
28 suggesting to swimmers that their position on the United States Olympic Team

1 could be related to their choice of equipment. TYR reserves the right to expand on
2 the list of activities subject to injunctive relief as appropriate during the pendency of
3 this Action.

4 **PRAYER FOR RELIEF**

5 **WHEREFORE**, Plaintiff prays for relief as follows:

6 1. On the First, Second and Third Causes of Action, for treble damages
7 and for an award of reasonable attorneys' fees;

8 2. On the Fourth Cause of Action, for compensatory damages and for an
9 award of reasonable attorneys' fees;

10 3. On the Fifth Cause of Action, for compensatory damages and for
11 reasonable attorneys' fees;

12 4. On the Sixth, Seventh and Eighth Causes of Action, for compensatory
13 damages and punitive damages;

14 5. On the Ninth Cause of Action, for restitution of the benefits Defendants
15 wrongfully obtained through their unlawful, unfair or fraudulent business practices
16 compensatory damages or disgorgement of amounts by which Defendants were
17 unjustly enriched, in amounts to be proved at trial, along with punitive damages and
18 reasonable attorneys' fees;

19 6. On the Ninth Cause of Action, for preliminary and permanent
20 injunctive relief enjoining as set forth hereinabove;

21 7. For costs of suit incurred herein; and

22 8. For such other and further relief as the Court deems proper and just.

23 DATED: May 12, 2008

HEWITT & O'NEIL LLP
LAWRENCE J. HILTON
WILLIAM E. HALLE

24
25
26 By: 
Lawrence J. Hilton

27 Attorneys for Plaintiff TYR SPORT, INC.
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DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby demands a jury trial on all issues triable to a jury.

DATED: May 12, 2008

HEWITT & O'NEIL LLP
LAWRENCE J. HILTON
WILLIAM E. HALLE
JENNIFER SUN

By: 

Lawrence J. Hilton

Attorneys for Plaintiff TYR SPORT, INC.

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

TYR SPORT, INC., a California corporation,

PLAINTIFF(S)

WARNACO SWIMWEAR, INC. dba SPEEDO USA, a Delaware corporation; UNITED STATES SWIMMING, INC., an Ohio corporation; MARK SCHUBERT, an individual; ERIK VENDT, an individual; and DOES 1 through 10, inclusive,

DEFENDANT(S).

CASE NUMBER

SUMMONS

TO: DEFENDANT(S): WARNACO SWIMWEAR, INC. dba SPEEDO USA; UNITED STATES SWIMMING, INC., MARK SCHUBERT, AND ERIK VENDT

A lawsuit has been filed against you.

Within _____ days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint _____ amended complaint counterclaim cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Lawrence J. Hilton, Esq., whose address is Hewitt & O'Neil LLP 19900 MacArthur Blvd., Suite 1050; Irvine, CA 92612. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: _____

By: _____

Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].