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Filing date: **07/14/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding.	91199702
Applicant	Plaintiff Highlife Distributing LLC d/b/a Top K2
Other Party	Defendant KTW ENTERPRISES, LTD

### **Motion for Suspension in View of Civil Proceeding With Consent**

The parties are engaged in a civil action which may have a bearing on this proceeding. Accordingly, Highlife Distributing LLC d/b/a Top K2 hereby requests suspension of this proceeding pending a final determination of the civil action. Trademark Rule 2.117.

Highlife Distributing LLC d/b/a Top K2 has secured the express consent of all other parties to this proceeding for the suspension and resetting of dates requested herein.

Highlife Distributing LLC d/b/a Top K2 has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

### **Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Respectfully submitted,  
/Timothy L. Boller/  
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07/14/2011

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

HIGHLIFE DISTRIBUTING LLC d/b/a	)	
Top K2,	)	
	)	Opposition No. 91199702
Opposer,	)	
	)	Serial No. 85/057245
v.	)	
	)	STIPULATED MOTION TO SUSPEND
KTW ENTERPRISES, LTD.,	)	PROCEEDINGS
	)	
Applicant.	)	
	)	
<hr/>		Attorney Docket No. 450102.801

TO THE COMMISSIONER FOR TRADEMARKS  
TRADEMARK TRIAL AND APPEAL BOARD

Opposer Highlife Distributing LLC, respectfully requests this Opposition be suspended pending disposition of the civil action *Bouncing Bears Botanicals, Inc. et al. v KTW Enterprises, Ltd. et al.*, pending in the U.S. District Court for the District of Kansas, Case No. 10-cv-04138-MLB-KMH. Because this Civil Action will determine whether Applicant can even claim any ownership in the mark claimed by Application Serial No. 85/057245 which is the subject of this Opposition the parties submit that the Civil Action has a material effect on this Opposition. A copy of the Complaint filed in said action is submitted with this Motion. Counsel for Applicant, KTW Enterprises, Ltd., consents to this motion and has authorized the undersigned counsel to indicate his consent.

DATED this 14th day of July, 2011.

Respectfully submitted,

SEED IP Law Group PLLC

/Timothy L. Boller/

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Attorneys for Opposer

HIGHLIFE DISTRIBUTING LLC d/b/a Top K2

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2011, the foregoing STIPULATED MOTION TO SUSPEND PROCEEDINGS was served upon Applicant's attorney of record by depositing same with the U.S. Postal Service, first-class postage prepaid, addressed as follows:

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/Anne Calico/  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

BOUNCING BEAR BOTANICALS, INC., )  
JONATHAN SLOAN, AND )  
BRAD MILLER, )  
 )  
Plaintiffs, )  
vs. )  
 )  
KTW ENTERPRISES, LTD., )  
RYAN SCOTT (ALSO KNOWN AS BO SCOTT), )  
AND ALEX DIMOV (DOING BUSINESS AS )  
ALLEGRAND ENTERPRISES), )  
Defendants. )  
\_\_\_\_\_ )

Case No. 10-CV-4138-MLB/KMH

**COMPLAINT**

COME NOW, Plaintiffs, by and through their attorneys, Stevens & Brand, L.L.P., and for their complaint state as follows:

**PARTIES**

1. Plaintiff Bouncing Bear Botanicals, Inc. (“BB”) is a corporation duly organized under the laws of the state of Kansas, with its principal place of business in Lawrence, Kansas.
2. Plaintiff Jonathan Sloan is an individual residing in Lawrence, Kansas, and is the president and sole shareholder of BB.
3. Plaintiff Brad Miller is an individual residing in Innsbrook, Missouri.
4. Defendant KTW Enterprises, Ltd. (“KTW”) is an Oregon corporation conducting business in this district and elsewhere. Its registered agent is Ryan Scott, 3857 Bass Lane, Lake Oswego, Oregon.

5. On information and belief, Defendant Ryan Scott, also known as Bo Scott, is an officer of and directs the operations of KTW (or, alternatively, Defendant KTW and Defendant Scott are alter egos), and resides at 3857 Bass Lane, Lake Oswego, Oregon. See Exhibit A1 (post office address confirmation).

6. On information and belief, Defendant Alex Dimov does business as Allegrand Enterprises in this district and elsewhere, has a business address of P.O. Box 364654, North Las Vegas, Nevada, and resides at 4132 Laurel Hill Dr., North Las Vegas, Nevada. See Exhibit A2 (post office address confirmation).

### **JURISDICTION AND VENUE**

7. This Court has jurisdiction over the Lanham Act claims set forth below by virtue of 15 U.S.C. § 1121, 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a), and over other claims set forth below by virtue of 28 U.S.C. § 1338(b) and pendent jurisdiction. Additionally, jurisdiction in this matter is invoked under 28 U.S.C. § 1332, diversity of citizenship. The matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs. The Court has supplemental jurisdiction over the claims based on Kansas law pursuant to 28 U.S.C. § 1367.

8. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c) because a substantial part of the events giving rise to this action occurred in this district and the Defendants are doing business and/or reside in this district.

### **STATEMENT OF FACTS**

9. Plaintiffs created, produced and distributed certain incense products of a proprietary nature having unique herbal and affective properties (the "Original Incense Products"). The Original Incense Products are of a particular design and quality that are relatively low cost and are sold to consumers throughout the United States and world (with certain exclusions mentioned below).

10. Plaintiffs created and began using the trademark "K2" (the "Word Mark") in connection with the Original Incense Products in March 2009. Plaintiffs began using the Word

Mark in interstate commerce in March 2009 when they first distributed the Original Incentive Products in packaging bearing the Word Mark to customers throughout the United States. Plaintiffs have continued to use the Word Mark in interstate commerce since that time, personally and/or through licensees and sublicensees.

11. The Word Mark was originally an arbitrary designation for the Original Incentive Products, but one which carries with it certain suggestive connotations.

12. Upon the creation of the Original Incentive Products, Plaintiffs caused to be created the design of various graphics and logos incorporating the Word Mark (the "Design Marks"). (The Word Mark and Design Marks are referred to collectively herein as the "Trademarks"). Plaintiffs began using the Design Marks in connection with the Original Incentive Products in interstate commerce in April, 2009 when they first distributed the Original Incentive Products in packaging bearing the Design Marks to customers throughout the United States. Plaintiffs have continued to use the Design Marks in interstate commerce since that time, personally and/or through licensees and sublicensees. See Exhibit B (drawings of the Trademarks).

13. The Design Marks, as used in the packaging of the Original Incentive Products, have a particular impact on the eye, carry suggestive and particular connotations to the brain, and constitute trade dress.

14. Plaintiffs lawfully marketed the Original Incentive Products throughout the United States and abroad through great effort and expense in order to create name recognition and market value for the Original Incentive Products and Trademarks. Such efforts have brought attention upon Plaintiffs, and accompanying direct and indirect costs.

15. Plaintiffs have registered domain names for the Original Incentive Products. Plaintiff BB registered the domain names k2smokeblend.com and k2blend.com on May 3, 2009. Plaintiff BB, doing business as K2 Botanicals, registered the domain name k2botanicals.com on May 15, 2009. Plaintiff BB registered the domain name k2blends.com on

July 17, 2009. See Exhibit C (registration receipts). Plaintiff Miller currently owns the following domain names/websites: k2botanicals.com, k2authentic.com, jaguarbrandk2.com, k2authenticincense.com, k2botanicalincense.com, k2classic.com, k2genuine.com, k2kush.com, k2original.com, k2peruviangold.com, originalk2incense.com, and worldsbestk2.com.

16. Plaintiffs' marketing efforts have resulted in a market and customers who have been conditioned and otherwise associate the Trademarks with the Original Incense Products.

17. Plaintiffs have granted non-exclusive licenses to use the Trademarks to several individuals and entities in the United States.

18. Plaintiffs and/or their licensees and sublicensees have offered goods under the Trademarks nationally since March 2009 and the Trademarks are well-known throughout the United States.

19. Plaintiffs used the Trademarks to promote K2 at the CHAMPS trade show on August 10-13, 2009 in Las Vegas, Nevada. See Exhibit D (photograph of Plaintiffs' trade show booth).

20. Plaintiffs granted a non-exclusive license to use the Trademarks to an Argentinean business, Inca Tea, on or about September, 2009. Inca Tea used the Trademarks to market the Original Incense Products overseas. Inca Tea took orders for the Original Incense Products, which orders were filled by Plaintiffs. Plaintiffs also transferred the k2smokeblend.com, k2blend.com, k2botanicals.com and k2blends.com domain names to Inca Tea on or about September, 2009.

21. In March 2010, Plaintiffs granted a non-exclusive license to use the Trademarks to Driftwood Distributing, Inc, an Indiana corporation. On July 20, 2010, Driftwood Distributing, Inc. granted a non-exclusive sublicense to use the Trademarks to Driftwood Enterprises, Inc., an Indiana corporation. Driftwood Enterprises, Inc. continues to use the Trademarks in interstate commerce.

22. Defendant Dimov entered the incense market by doing business with Plaintiffs. Dimov was a wholesale customer of Plaintiffs from at least as early as September 2009 until December 2009, purchasing Original Incense Products from BB which were designated, ordered, shipped and delivered with the Trademarks. See Exhibit E (emails from Dimov ordering K2 from Plaintiffs). In January 2010, Dimov ordered Original Incense Products from Henry Rankovic, which order was actually filled by Plaintiff BB. See Exhibit F (receipt for shipment from BB to Rankovic).

23. Defendant Scott entered the incense market by doing business with Plaintiffs. Defendant Scott was a wholesale customer of Plaintiffs from December 2009 until February 2010. Scott first purchased the Original Incense Products from Plaintiffs by telephone calls to Plaintiffs in Kansas in December 2009, and later purchased the Original Incense Products from Plaintiffs by email. See Exhibit G. The Original Incense Products Scott purchased from Plaintiffs were designated, ordered, shipped and delivered with the Trademarks.

24. In an email to Plaintiffs dated January 30, 2010, Defendant Scott ([boscott270@gmail.com](mailto:boscott270@gmail.com)) referred to incense products of Plaintiffs' competitors as "fake K2." See Exhibit H.

25. In late 2009, Plaintiffs and Defendant Dimov discussed Plaintiffs' possible assignment or license of the Word Mark to Dimov.

26. On January 22, 2010, Defendant Dimov ([allegrand@cox.net](mailto:allegrand@cox.net)) sent an email to Plaintiff Sloan stating, among other things, that "K2 is 100% yours" and "we both know before You [sic] there was no K2." See Exhibit I.

27. On January 24, 2010, Defendant Dimov ([allegrand@cox.net](mailto:allegrand@cox.net)) sent an email to K2 Fire Shop ([info@k2fire.com](mailto:info@k2fire.com)) stating, among other things, that the "K2 brand name is [Plaintiff] Jon [Sloan]'s." See Exhibit J.

28. On January 27, 2010, after Plaintiffs had decided not to assign or license the Word Mark to Defendant Dimov, Plaintiffs received a letter from an attorney for Dimov. In the

letter, Dimov's attorney alleged that Plaintiffs breached an agreement "to sell [Dimov] the distribution name rights of the K2 products." See Exhibit K. Plaintiffs did not respond to the letter, and received no more correspondence from Dimov's attorney.

29. On January 31, 2010, Plaintiff Sloan received from Defendant Dimov ([allegrand@cox.net](mailto:allegrand@cox.net)) an email in which Dimov admitted that Plaintiff began selling K2 before Dimov did. See Exhibit L.

30. Plaintiffs' Trademarks and Original Incense Products have received extensive national and local publicity in the press (including television and newspaper) and various other forms of media since at least as early as November, 2009, and continue to receive extensive national press coverage and media exposure. The Trademarks are well-known throughout the United States.

31. Defendant Scott incorporated KTW Enterprises, Ltd. under Oregon law on February 2, 2010.

32. On or about February, 2010, Defendants began to independently market, sell and distribute incense products similar to the Original Incense Products (the "Imitation Incense Products") under the Word Mark and Design Marks. The Imitation Incense Products are different in quality from the Original Incense Products and contain different ingredients.

33. The word mark used by Defendants in connection with the Imitation Incense Products is identical to Plaintiffs' Word Mark. As such, it is identical in appearance, pronunciation, and suggestion.

34. The design marks used by Defendants in connection with the Imitation Incense Products are identical to Plaintiffs' Design Marks. As such, they are identical in appearance, pronunciation, the verbal translation of the picture and design, and suggestion.

35. Defendants' exact duplication and use of the Trademarks reveal that Defendants' actions and efforts described herein were intentional and confuse consumers.

36. Defendants have used the Trademarks prominently in their advertising and to market to Plaintiffs' customers.

37. Defendants do not purchase the Imitation Incense Products from any of the Plaintiffs.

38. Defendants' use of the Trademarks has been without the consent/permission of any of the Plaintiffs.

39. Defendants have registered the domain names and operate the websites k2incense.org, k2wholesale.com, k2verified.org, k2-incense.com, k2incenseblend.com, herbalk2incense.com, k2cafe.com, and k2fire.com. Defendants operate interactive websites offering products called "K2 Sex," "K2 Solid Sex on the Mountain" and "K2 Sky" specifically for sale in the state of Kansas. The websites advertise "new K2 products" as "Legal in ALL 50 US States (including Kansas and North Dakota)" and as "Legal Everywhere in the world, including Kansas, UK, etc." At [www.k2-incense.com](http://www.k2-incense.com), Defendants state: "HELP US DISTRIBUTE [THE NEW K2 PRODUCTS] & BECOME THE NEXT MILLIONAIRE IN YOUR TOWN WITHIN A MONTH! HELP US FLOOD RUSSIA, UK, KANSAS, LOUISIANA, KENTUCKY WITH OUR NEW PRODUCTS!" See Exhibit M.

40. On June 8, 2010, Defendant KTW filed an application with the U.S. Patent and Trademark Office to register the Word Mark. In the application, KTW falsely claimed to be the owner of the Word Mark and stated that no other person had the right to use the Word Mark in commerce. KTW, which was not incorporated until February 2, 2010, falsely stated in the application that it had begun using the Word Mark in commerce no later than March 27, 2009. See Exhibit N (trademark application, including specimens of mark).

41. Defendants personally know of Plaintiffs' rights in the Trademarks. On June 25, 2010, counsel for Plaintiffs sent a letter to Defendants' counsel demanding that Defendant KTW withdraw its application to register the Word Mark and that Defendants discontinue use of the Word Mark. See Exhibit O. Defendants refused.

42. In July 2010, Defendant Scott asked Inca Tea to assign the Trademarks and related trade dress to Scott by signing an Intellectual Property Assignment Agreement and Royalty Agreement. Scott had signed the documents and dated them July 14, 2010. See Exhibit P. Defendants therefore did not attempt to obtain ownership of the Trademarks until after KTW had filed a trademark application asserting that it already owned the Word Mark.

43. As a mere non-exclusive licensee of Plaintiffs, Inca Tea did not own the Trademarks and did not have the right to transfer the Trademarks to Defendants.

44. Defendants misrepresent the origin of the Word Mark, claiming that they are the “original and only manufacturer of authentic K2” and that they are the only “owner of the K2 incense brand name.” Such misrepresentations seek to take advantage of Plaintiffs’ Trademarks, marketing and other efforts in creating a market for the Original Incense Products. See Exhibit Q (examples of Defendants’ website advertising).

45. The Imitation Incense Products are substantially similar to the Original Incense Products, but are inferior in design and quality to the Original Incense Products.

46. Defendants are able to sell the Imitation Incense Products by misappropriating the Trademarks.

47. Consumers are confused as to the origin of the Imitation Incense Products, and are led to believe that the Imitation Incense Products are the Original Incense Products.

48. Defendants have made false and defamatory statements about Plaintiffs on various websites, claiming that Plaintiffs are guilty of counterfeit, fraud, misrepresentation and criminal activity. See Exhibit R.

49. Plaintiffs BB and Miller filed an application to register the Word Mark with the U.S. Patent and Trademark Office on August 6, 2010. See Exhibit S1. As stated in the application, Plaintiffs BB and Miller are the owners of the Word Mark, and were the first parties to use the Word Mark in connection with the sale of incense.

50. On October 1, 2010, BB obtained a Kansas trademark registration on the Mark. See Exhibit S2.

51. On October 4, 2010, Merlene Miller placed an order for “K2 Solid Sex on the Mountain” at Defendants’ website, k2incense.org.

52. On October 4, 2010, Defendants shipped an order of “K2 Solid Sex on the Mountain” to Merlene Miller in Lawrence, Kansas. See Exhibit T (email order confirmations). The order was shipped from P.O. Box 364654, North Las Vegas, Nevada. See Exhibit U (email shipping confirmation and photocopies of mailing envelope and product package). The U.S. Postal Service lists the holder of P.O. Box 364654 as Allegrand Enterprises. See Exhibit V (U.S. Postal Service boxholder confirmation). Miller received the shipment in Lawrence, Kansas on or about October 12, 2010.

53. Despite actual knowledge of Plaintiffs’ rights in the Trademarks, Defendants are still actively involved with the continued willful infringement of such rights and other unlawful acts complained of herein.

54. As a result of personally directing the infringing activities, Defendant Scott is jointly and severally liable with Defendant KTW for the judgment to be rendered.

55. All of the above paragraphs are incorporated into each Count below.

**CLAIMS**

**COUNT I**

**Violation of 15 U.S.C. § 1125(a)**

**Federal Unfair Competition and False Advertising**

56. Defendants’ use of copies of the Trademarks in interstate commerce without the consent of Plaintiffs, for the purpose of manufacturing and/or selling counterfeit and infringing merchandise, has caused and continues to cause confusion, mistake, and deception in the minds of the public.

57. The misappropriation of the Trademarks by Defendants on and in connection with goods substantially identical or similar to those of Plaintiffs is part of a deliberate plan to trade on the valuable goodwill established in the Trademarks. With knowledge of Plaintiffs' ownership of the Trademarks, and with the deliberate intention to unfairly benefit from the goodwill generated thereby, the actions of Defendants have been carried out in willful disregard of Plaintiffs' rights.

58. Defendants' foregoing use of copies of the Trademarks is a use in interstate commerce of words and/or symbols, a false designation of origin, and/or a false description or representation. Such use has misled and deceived, and will continue to mislead and deceive, the public as to the origin of Defendants' goods, and has caused the public to mistakenly believe that Defendants' business activities and goods originate from, are sponsored by, or are in some way associated with Plaintiffs. By imitating, counterfeiting, and infringing Plaintiffs' Trademarks in interstate commerce, Defendants have violated 15 U.S.C. § 1125(a).

59. Defendants' actions described above have resulted in profits to Defendants and have thereby deprived Plaintiffs of revenue to which they are entitled.

60. Defendants' unauthorized use of the Trademarks on goods substantially similar to those of Plaintiffs was and is being conducted with full knowledge of Plaintiffs' rights. Thus, Defendants have willfully infringed and are infringing such rights in violation of 15 U.S.C. § 1125(a).

61. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained and are entitled to the remedies provided for in 15 U.S.C. § 1116 *et seq.*

## COUNT II

### Violation of 15 U.S.C. § 1125(c)

#### Federal Trademark Dilution

62. Plaintiffs' Trademarks have been famous and distinctive from at least as early as November, 2009.

63. Defendants' use of the Trademarks in interstate commerce has been for their own commercial gain.

64. Defendants began using the Trademarks after the Trademarks became famous.

65. Defendants' use of the Trademarks in connection with the counterfeit and infringing merchandise dilutes (and presents a likelihood of dilution of) the distinctive quality and value of and tarnishes the public image of the Trademarks, and harms the reputation of Plaintiffs.

66. Defendants adopted and are displaying the Trademarks with full knowledge of Plaintiffs' rights to their famous marks and with the willful intention to trade on Plaintiffs' reputation as embodied in the Trademarks or to cause dilution of the Trademarks. Thus, Defendants have willfully violated Plaintiffs' rights under 15 U.S.C. § 1125(c).

67. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained and are entitled to the remedies provided for in 15 U.S.C. §§ 1117, 1118, and 1125(c).

### COUNT III

#### Violation of U.S.C. § 1125(a)

#### Federal Trade Dress Infringement

68. Defendants' use of exact copies of the Design Marks in interstate commerce without the consent of Plaintiffs, for the purpose of manufacturing and/or selling counterfeit and infringing merchandise, has caused and continues to cause confusion, mistake, and deception in the minds of the public.

69. Plaintiffs' Design Marks, which constitute trade dress, are inherently distinctive and have acquired secondary meaning, i.e., consumer association of the dress with a single source.

70. Plaintiffs' Design Marks as used in packaging are nonfunctional.

71. By imitating, counterfeiting, and infringing Plaintiffs' trade dress in interstate commerce, Defendants have violated 15 U.S.C. § 1125(a).

72. Defendants' actions described above have resulted in profits to Defendants and have thereby deprived Plaintiffs of revenue to which they are entitled.

73. Defendants' unauthorized use of Plaintiffs' trade dress on goods substantially identical or similar to those of Plaintiffs was and is being conducted with full knowledge of Plaintiffs' rights. Thus, Defendants have willfully infringed and are infringing such rights in violation of 15 U.S.C. § 1125(a).

74. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained and are entitled to the remedies provided for in 15 U.S.C. § 1116 *et seq.*

#### COUNT IV

##### Violation of U.S.C. § 1125(d)

##### Federal Trademark Cyberpiracy

75. The Word Mark has been famous and distinctive from at least as early as November 2009.

76. Defendants have registered and used the domain names k2incense.org, k2wholesale.com, k2verified.org, k2-incense.com, k2incenseblend.com, herbalk2incense.com, k2cafe.com, and k2fire.com with the bad faith intent to profit from the use of the Word Mark.

77. Defendants' use of domain names that are confusingly similar to the Word Mark is likely to cause consumers mistakenly to believe that the k2incense.org, k2wholesale.com, k2verified.org, k2-incense.com, k2incenseblend.com, herbalk2incense.com, k2cafe.com, and k2fire.com websites are sponsored or approved of by Plaintiffs, or that k2incense.org, k2wholesale.com, k2verified.org, k2-incense.com, k2incenseblend.com, herbalk2incense.com, k2cafe.com, and k2fire.com are otherwise affiliated with or have obtained permission from Plaintiffs. Defendants' use of these domain names incorporating "K2" is also dilutive of Plaintiffs' Word Mark.

78. By engaging in the activities described above, Defendants are engaging in cyberpiracy in connection with products distributed in interstate commerce in violation of 15 U.S.C. § 1125(d).

79. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained and are entitled to the remedies provided for in 15 U.S.C. § 1125(d).

#### COUNT V

##### Unfair Competition

80. Defendants' use of copies of the Trademarks constitutes passing off, infringement and misappropriation of the Trademarks actionable under the law of unfair competition.

81. Defendants' individual acts as pleaded above taken together create a cumulative effect that adds up to unfair competition and shows Defendants' bad intent.

82. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained, and are entitled to monetary and equitable remedies.

#### COUNT VI

##### Misappropriation

83. Plaintiffs invested substantial time, effort and money in creating, developing and popularizing the Trademarks.

84. Defendants appropriated the fruits of Plaintiffs' labor at little or no cost, and Defendants passed off their product as the "original" and only "authentic" K2 manufactured and sold by Plaintiffs.

85. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained, and are entitled to monetary and equitable remedies.

#### COUNT VII

##### Defamation

86. Defendants have made false and defamatory statements about Plaintiffs to third persons by means of comments posted on various websites, including websites operated by Defendants, claiming that Plaintiffs are guilty of counterfeit, fraud, misrepresentation and criminal activity.

87. Defendants' statements were made with actual malice and the specific intent to injure Plaintiffs.

88. Defendants' defamatory statements about Plaintiffs have harmed Plaintiffs' business and personal reputations.

89. By reason of the foregoing, Plaintiffs have been injured in an amount not yet ascertained, and are entitled to monetary and equitable remedies.

#### COUNT VIII

##### Violation of K.S.A. § 81-213

##### Revised Kansas Trademark Act (Trademark Infringement)

90. Plaintiff BB validly registered the Word Mark in Kansas on October 1, 2010.

91. Defendants use a mark identical to the Word Mark in internet marketing in this state.

92. On October 4, 2010, Defendants shipped to Merlene Miller in Lawrence, Kansas a product called K2, the packaging of which bore a copy of the Word Mark.

93. Defendants have used, without the consent of BB, a reproduction, counterfeit, or copy of the Word Mark in connection with the sale, distribution, offering for sale, or advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods.

94. Defendants have reproduced, counterfeited, or copied the Word Mark and applied such reproduction, counterfeit or copy to labels, packages, wrappers and advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods.

95. Defendants' acts were committed with the intent to cause confusion or mistake or to deceive. Defendants willfully intended to trade on Plaintiffs' reputation or to cause dilution of the famous mark, and Plaintiffs are therefore entitled to the remedies set forth in K.S.A. § 81-215. Such remedies include an injunction to restrain the manufacture, use, display and sale of counterfeits or imitations of the Trademarks, and all profits derived from or all damages suffered by reason of such wrongful manufacture, use, display, or sale.

96. Defendants committed their wrongful acts with knowledge or in bad faith, and Plaintiffs are therefore entitled to an amount not to exceed three times such profits or damages.

#### COUNT IX

##### Violation of K.S.A. § 81-214

##### Revised Kansas Trademark Act (Trademark Dilution)

97. Plaintiffs' Trademarks are distinctive and famous according to a number of factors, including, but not limited to, the degree of acquired distinctiveness of the Trademarks in this state; the duration and extent of use of the Trademarks in connection with the goods with which the Trademarks have been used; the duration and extent of publicity of the Trademarks in this state; the geographical extent of the trading area in which the Trademarks are used; the channels of trade for the goods with which the Trademarks are used; the degree of recognition of the Trademarks in the trading areas and channels of trade in this state used by Plaintiffs and Defendants; the nature and extent of use of the same or similar marks by third parties; and the fact that the Word Mark is the subject of a state registration in this state.

98. As owners of a famous mark, Plaintiffs are entitled to an injunction against Defendants' commercial use of the Trademarks, as such use began after the Trademarks became famous and caused dilution of the distinctive quality of the Trademarks.

99. Defendants willfully intended to trade on Plaintiffs' reputation or to cause dilution of the Trademarks, and Plaintiffs are therefore entitled to the remedies set forth in K.S.A. § 81-

215. Such remedies include an injunction to restrain the manufacture, use, display and sale of counterfeits or imitations of the Trademarks, and all profits derived from or all damages suffered by reason of such wrongful manufacture, use, display, or sale.

100. Defendants committed their wrongful acts with knowledge or in bad faith, and Plaintiffs are therefore entitled to an amount not to exceed three times such profits or damages.

#### COUNT X

##### Interference with Prospective Business Advantage and Business Expectancies

101. Plaintiffs and their licensees and sublicensees have been in the incense market, and have expected to continue selling Original Incense Products to customers.

102. Defendants have known of Plaintiffs' relationships and expectancies due to Defendants' prior dealings with Plaintiffs.

103. Defendants have intentionally misappropriated the Trademarks and personally profited from their use, directly interfering with the Plaintiffs' business relationships and expectancies which, but for the Defendants' conduct, the Plaintiffs were reasonably certain would have continued in the future.

104. Defendants, through improper or illegal means, intentionally induced or attempted to induce a breach of these contractual or prospective business relationships by contacting customers of Plaintiffs and the Original Incense Products market and interfering with those relationships, without justification.

105. Defendants acted with either an evil motive or with a reckless indifference to Plaintiffs' rights.

106. As a direct and proximate result of Defendants' activities, Plaintiffs have been damaged in the form of lost sales, a watered down market, and other damages.

#### COUNT XI

##### Injunctive Relief

107. Plaintiffs are the owners of the Trademarks, have a protectable interest in them, and have not authorized Defendants to use them.

108. Defendants are engaging in the unauthorized use of the Trademarks by placing them in and on their product and by using them in marketing and sales efforts.

109. Because Defendants have appropriated exact copies of the Trademarks, Defendants' use of the Trademarks is likely to and actually does cause confusion among the general public and those purchasing the products.

110. Plaintiffs are substantially likely to prevail on the merits of the claims asserted herein against Defendants.

111. Plaintiffs have no adequate remedy at law and will be irreparably harmed if an injunction is not entered against Defendants because, *inter alia*:

- a. monetary damages alone are not an adequate remedy to deter Defendants from impermissibly using the Trademarks and associating them with goods which are not of the same or comparable quality or blend as the Original Incense Products;
- b. the damages Plaintiffs will suffer by Defendants' actions will be difficult to measure, cannot be fully redressed by a monetary award, and cannot be fully repaired by paying monetary damages;
- c. the balance of the harms favors entry of an injunction against Defendants -- greater harm will occur to Plaintiffs if an injunction is not issued than will occur to Defendants if enjoined as requested; and
- d. the public interest will be harmed if Defendants are permitted to misrepresent the products in commerce and mislead consumers as to their source, characteristics and quality.

COUNT XII

Declaratory Judgment

112. Defendants have asserted a right to use the Trademarks in commerce, as exemplified by their product labeling, marketing, websites, trademark application, and general use of the Trademarks in connection with the Imitation Incense Products.

113. There is a genuine dispute among the parties as to the ownership of the Trademarks, specifically whether Defendants have misappropriated them, are authorized to otherwise use them on their products and in their marketing, and are authorized to register them as Defendants' trademarks.

114. Plaintiffs request that the Court declare the rights and other legal relations between the parties in this case concerning the Trademarks, along with all other necessary or proper relief based on the declaratory judgment or decree.

### COUNT XIII

#### Unjust Enrichment

115. Plaintiffs performed and provided significant and material work and effort in creating the Trademarks and their value.

116. Defendants knew, or should have known, of the benefit being conferred by Plaintiffs.

117. Defendants have been unjustly enriched by the labor, work and effort of Plaintiffs, for which Defendants have not paid.

118. Plaintiffs are entitled to judgment against Defendants, and each of them, for the benefit conferred upon Defendants.

### RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor against Defendants, jointly and severally, as follows:

A. That Plaintiffs are the owners of the entire right, title, and interest in and to the Trademarks.

B. That Plaintiffs' rights in the Trademarks are valid, enforceable, and have been infringed by Defendants, and that Defendants have violated relevant federal and state laws and regulations.

C. That Defendants, their agents, servants, employees, attorneys and all persons in active concert or participation with them, be preliminarily and permanently enjoined and restrained from: (1) using the Trademarks and other designations, designs, and indicia which are likely to cause confusion, mistake, or deception with respect to Plaintiffs' rights; (2) diluting the distinctive quality of Plaintiffs' Trademarks; (3) further acts of cyberpiracy; and (4) otherwise infringing rights in the Trademarks, and competing unfairly with Plaintiffs.

D. That Plaintiffs' application for federal registration of the Trademarks should be approved, and that Defendant KTW's application for federal trademark registration should be denied.

E. That Defendants willfully infringed Plaintiffs' rights.

F. That Defendants be required to pay to Plaintiffs such damages, statutory or otherwise, together with prejudgment interest thereon, as Plaintiffs have sustained as a consequence of Defendants' wrongful acts, and to account for and return to Plaintiffs any money, profits, and advantages wrongfully gained by Defendants.

G. That all damages sustained by Plaintiffs be trebled pursuant to 15 U.S.C. § 1117 and K.S.A. § 81-215.

H. That Defendants be required to pay to Plaintiffs attorneys' fees, expenses, and costs incurred in this action as provided in 17 U.S.C. § 505 and 15 U.S.C. § 1117.

I. That Defendants deliver up for impoundment during the pendency of this action, and for destruction and/or discontinuance upon entry of judgment, all products, packaging, labels, literature, advertising, websites and other materials which infringe Plaintiffs' rights, falsely designate source or origin, or otherwise facilitate Defendants' unfair competition with Plaintiffs.

J. That Defendants be directed to file with this Court and serve on Plaintiffs within thirty (30) days after the service of an injunction a written report under oath setting forth in detail the manner and form in which Defendants have complied with this injunction.

K. That Plaintiffs be granted such further relief as the Court may deem appropriate.

**JURY TRIAL DEMAND**

Plaintiffs request a jury trial on all questions of fact raised by their complaint.

**DESIGNATION OF PLACE OF TRIAL**

Plaintiffs designate Topeka, Kansas as the place of trial.

**PLAINTIFF'S RULE 7.1 STATEMENT**

Plaintiff, Bouncing Bear Botanicals, Inc., states that it has no parent corporation nor does a publicly held corporation own 10% or more of the stock in the company.

Respectfully submitted,

/s/ Rebecca J. Wempe  
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