CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING DEPOSITED WITH THE UNITED STATES POSTAL SERVICE WITH SUFFICIENT POSTAGE AS FIRST-CLASS MAIL IN AN ENVELOPE ADDRESSED TO **BOX TTAB, NO FEE, COMMISSIONER FOR TRADEMARKS, 2900 CRYSTAL DRIVE, ARLINGTON, VIRGINIA 22202-3514,** ON MAY 7, 2004

NAME: TODD E. ADLER

SIGNATURE: Todd Adler

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

In the Matter of Application Serial No. 78/180,241
Published in the *Official Gazette* on July 22, 2003
Trademark: **ECOSPHERE**

J&J Technology, LLC, Opposer, v. Big Planet, Inc., Applicant.	Opposition No.: 91158317

Box TTAB, NO FEE
Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514

MOTION FOR SUSPENSION OF OPPOSITION DUE TO PENDING CIVIL ACTION IN FEDERAL COURT

Applicant Big Planet, Inc. ("Big Planet") respectfully requests that this opposition proceeding, Opp. No. 91158317, be suspended until termination of a pending civil action filed by Opposer J&J Technology, LLC ("J&J Technology") against Big Planet. The civil action involves issues which are likely to be dispositive of this opposition. If both

the opposition and the civil action move forward it will result in the unnecessary duplication of effort by the parties, the waste of judicial and administrative resources, and the possibility of inconsistent judgments by the Board and the federal court. This opposition should therefore be suspended until there is a final determination in the civil action.

TBMP § 510.02(a) states:

> Whenever it comes to the attention of the Board that a party or parties to a case pending before it are involved in a civil action which may have a bearing on the Board case, proceedings before the Board may be suspended until final determination of the civil action. . . . Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other proceeding will have a bearing on the issues before the Board.

See also, Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc., 330 F.3d 1333, 1336 (Fed. Cir. 2003) (opposition proceedings suspended pending resolution of civil action before district court). In this case, a final determination of the civil action will not only clearly have a bearing on this opposition, but will likely decide the key issues at the heart of this opposition.

In the notice of opposition in this proceeding, Opposer's primary allegations are that Opposer's predecessor-in-interest was the owner of the ECOSPHERE trademark at the time Applicant filed for the ECOSPHERE mark, and that Applicant was contractually restrained from filing such an application for the ECOSPHERE mark. Opposer's allegations are based on a July 10, 2001 contract between Applicant Big Planet and Opposer's claimed predecessor-in-interest. *See, e.g.,* attached Exhibit A, Notice of Opposition ¶¶ 3, 4, 5, 8, 9, 10, 11. Applicant has denied these allegations in its answer,

except for the existence of the July 10, 2001 contract. Thus, at the core of this opposition is a dispute as to who owns the ECOSPHERE trademark, what the terms were of the July 10, 2001 contract between Applicant and Opposer's claimed predecessor-in-interest, and the effects of the contract on the ownership of the ECOSPHERE trademark and on Applicant's filing of an application for the mark.

On September 18, 2003, before filing the notice of opposition, Opposer J&J Technology filed a complaint in the U.S. District Court for the Middle District of Tennessee (Case No. 3-03 0872) against Applicant Big Planet and its parent company. *See* attached Exhibit B. In the complaint, Opposer J&J Technology claims that it is the holder/owner of the ECOSPHERE trademark and further alleges a claim for fraud and misrepresentation that is based in part on Opposer's supposed trademark rights. *See* Exh. B, Complaint ¶¶ 9, 32, 34. In its amended answer, Applicant Big Planet denies that J&J Technology is the owner of the ECOSPHERE trademark, asserts the July 10, 2001 contract as governing the relationship between the parties, and asserts that J&J assigned any and all trademark rights in the ECOSPHERE mark to Big Planet. *See* Exhibit C, Amended Answer ¶¶ 5, 9, 16, Twelfth Defense.

The civil action will therefore decide, among other things, who owns the ECOSPHERE trademark and what the terms are of the July 10, 2001 contract regarding the ownership and assignment of the ECOSPHERE trademark as of the time Applicant Big Planet applied for the mark. Opposer itself has asserted the July 10, 2001 contract in the opposition and bases its claims on that contract. Since the issues of ownership and

contract interpretation to be decided in the civil action are the very same issues at the crux of the opposition, and since any decision made in the civil action could be binding on the Board[1], Applicant hereby requests that the opposition be immediately suspended until the civil action has terminated.

Respectfully submitted,

HELLER EHRMAN WHITE & McAULIFFE LLP

Dated: May 7, 2004

Beth M. Goldman
Todd E. Adler
333 Bush Street
San Francisco, California 94104
(415) 772-6555

Attorneys for Applicant

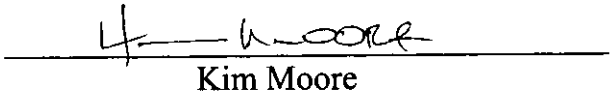
[1] *See* TBMP § 510.02(a).

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing MOTION FOR SUSPENSION OF OPPOSITION DUE TO PENDING CIVIL ACTION IN FEDERAL COURT was served upon Opposer's attorneys of record by facsimile (without exhibits) and by depositing a complete copy thereof in the United States Mail on May 7, 2004, first-class mail, postage prepaid, in an envelope addressed as follows:

Jordan S. Weinstein
Oblon Spivak McClelland Maiser & Neustadt, P.C.
1940 Duke Street
Alexandria, VA 22314

HELLER EHRMAN WHITE & McAULIFFE LLP



Kim Moore

EXHIBIT

A

Attorney Docket No.: 241030US56 **BOX TTAB FEE**

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

J&J TECHNOLOGY, LLC, Opposer, v. BIG PLANET, INC., Applicant.	Opposition No.: _____ Appln. Serial No. 78/180,241

Honorable Commissioner of Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

NOTICE OF OPPOSITION

J&J Technology, LLC, a limited liability company duly organized and existing under the laws of the State of Nevada, located and doing business at 621 Old Hickory Boulevard, Suite 9, Jackson, Tennessee 38305 (hereinafter "Opposer"), believing that it will be damaged by registration, hereby opposes Application Serial No. 78/180,241, filed October 30, 2002, under the Trademark Act of 1946, in the name of Big Planet, Inc. (hereinafter "Applicant"), published for opposition in the *Official Gazette* of July 22, 2003, Vol. 1272, No. 4, at Page TM 125, for the mark ECOSPHERE.

Opposer filed a Request for Extension of Time to File Notice of Opposition until September 20, 2003 in connection with the above-captioned application. Attached as Exhibit 1

10/24/2003 TSMITH 00000202 78180241
01 FC:6402 300.00 OP

is a copy of the official notice from the Trademark Trial and Appeal Board mailed August 21, 2003, approving the extension request. By clerical error, Opposer's name in the extension request was listed as "J&J **Technologies**, LLC," instead of "J&J **Technology**, LLC." A clerical error in the Opposer's name listed in an extension request will not preclude the Opposer from bringing an opposition that relies on the extension request. 37 CFR §2.102(b), TBMP §206.03.

The grounds of Opposition are as follows:

1. The Opposer, J&J Technology, LLC, is a corporation duly organized and existing under the laws of the State of Nevada, having its principal place of business at 621 Old Hickory Boulevard, Suite 9, Jackson, Tennessee 38305.

2. Commencing prior to Applicant's claimed date of first use, Opposer, through its predecessor-in-interest, was and is now engaged in the manufacture, distribution, sale, licensing, advertising and promotion in interstate commerce of proprietary, environmentally safe cleaning products.

3. Applicant entered into a contract dated July 10, 2001 with Opposer's predecessor-in-interest.

4. In the contract of July 10, 2001, Applicant acknowledges that Opposer's predecessor-in-interest is the owner of the ECOSPHERE mark. Also in the contract, Applicant accepts and Opposer's predecessor-in-interest grants a license to use the ECOSPHERE mark.

5. Provision 5.2.1 of the July 10, 2001 contract precluded Applicant from filing an application to register ECOSPHERE without the consent of Opposer's predecessor-in-interest.

6. The July 10, 2001 contract remained in force until December 23, 2002, when it was terminated by Applicant.

7. Upon information and belief, notwithstanding Opposer's rights in and to its mark, and notwithstanding the contractual obligation prohibiting Applicant from doing so, Applicant

filed an application on October 30, 2002, to register the trademark ECOSPHERE for all purpose cleaning preparations, carpet cleaning preparations, and glass cleaning preparations, in International Class 3. Said application was assigned Serial No. 78/180,241, and was published for Opposition in the Official Gazette of July 22, 2003 at Page TM 125.

8. On the date that Application Serial No. 78/180,241 was filed, Applicant was still contractually bound by Provision 5.2.1 of the July 10, 2001 contract not to file an application to register ECOSPHERE without the consent of Opposer's predecessor-in-interest.

9. Applicant was not the owner of the mark of Serial No. 78/180,241 at the time the application was filed, and therefore the application is void pursuant to Trademark Act Section 1(a)(1), 15 U.S.C. §1051(a)(1).

10. Applicant was legally estopped by contract from asserting ownership of the ECOSPHERE mark shown in Serial No. 78/180,241 at the time the application was filed.

11. Applicant acknowledged in the July 10, 2001 contract that it was not the owner of the ECOSPHERE mark, and that another party, Opposer's predecessor-in-interest, was the owner of the mark.

12. Applicant has committed fraud on the Patent and Trademark Office by willfully and intentionally making material false statements that induced the Patent and Trademark Office to approve the application for publication, namely, (a) by declaring under oath that no other person, firm, corporation or association has the right to use the mark in commerce, and (b) by declaring under oath that Applicant is the owner of the mark.

13. Any use of the ECOSPHERE mark claimed by Applicant prior to December 23, 2002, the termination date of the trademark license between Applicant and Opposer's predecessor-in-interest, is use that inures to the benefit of Opposer, by reason of the aforesaid license and the resulting licensor-licensee relationship.

14. Opposer has priority of use of the ECOSPHERE mark by virtue of Applicant's use of the ECOSPHERE mark prior to December 23, 2002, which inures to Opposer.

15. The mark shown in Serial No. 78/180,241 is a simulation and colorable imitation of, and so resembles Opposer's aforesaid ECOSPHERE trademark as to be likely, when applied to the goods of Applicant, to cause confusion or mistake or to deceive purchasers resulting in damage and detriment to Opposer and its reputation.

16. Upon information and belief, Opposer and Applicant are both engaged in the sale and promotion of their respective goods through the same channels of trade, and to the same general class of purchasers.

17. Opposer, upon information and belief, avers that its customers, and the public in general, are likely to be confused, mistaken or deceived as to the origin and sponsorship of Applicant's goods marketed under Applicant's alleged ECOSPHERE trademark and misled into believing that such goods are produced by, emanate from, or are in some way directly or indirectly associated with Opposer, to the damage and detriment of Opposer and its reputation.

18. Opposer, upon information and belief, avers that it will be damaged by the continued use and registration by Applicant of the mark set forth in Applicant's Trademark Application Serial No. 78/180,241, in that the mark is confusingly similar to Opposer's trademark and is used in connection with goods similar to the goods offered to the public by Opposer.

19. Opposer, upon information and belief, avers that it will be also be damaged by the continued use and registration of the mark by Applicant, because Applicant will gain thereby a claim of right to the mark which rightfully belongs to Opposer.

WHEREFORE, Opposer believes and avers that it is being and will continue to be damaged by registration of the mark in Application Serial No. 78/180,241, and requests that the

application be rejected, that no registration be issued thereon to Applicant, and that this Opposition be sustained in favor of Opposer.

Opposer has appointed Jordan S. Weinstein, a member of the law firm of OBLON, SPIVAK, McCLELLAND, MAIER & NEUSTADT, P.C., a member of the Bar of the Commonwealth of Virginia, to prosecute this opposition proceeding and to transact all business in and before the United States Patent and Trademark Office in connection herewith. Please address all correspondence to:

JORDAN S. WEINSTEIN
OBLON, SPIVAK, McCLELLAND, MAIER & NEUSTADT,P.C.
1940 Duke Street
Alexandria, Virginia 22314

The filing fee for this opposition in the amount of $300.00 is enclosed herewith. The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment, to Account No. 50-2014.

Respectfully submitted,

J&J TECHNOLOGY, LLC

By: Jordan S. Weinstein

Jordan S. Weinstein
Oblon, Spivak, McClelland,
Maier & Neustadt, P.C.
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Alexandria, Virginia 22314
(703) 413-3000
fax (703) 413-2220
e-mail: *tmdocket@oblon.com*

Date: September 22, 2003

JSW/CID/dlb I:\ATTY\JSW\J&J TECHNOLOGY\243070-241030US-NOP2.DOC

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Roberta S. Bren
OBLON SPIVAK MCCLELLAND MAIER & NEUSTADT
1940 Duke Street
Alexandria, VA 22314

Mailed: August 21, 2003

Serial No.: 78180241

Helen Johnson, Legal Assistant

The request to extend time to oppose is granted until **9/20/03** on behalf of potential opposer **J&J Technologies, LLC.**

Please do not hesitate to contact the Trademark Trial and Appeal Board for any questions relating to this extension.

TTAB

OBLON
SPIVAK
MCCLELLAND
MAIER
&
NEUSTADT
P.C.

ATTORNEYS AT LAW

JORDAN S. WEINSTEIN
(703) 412-6442
JWEINSTEIN@OBLON.COM

September 22, 2003

Honorable Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

Re: *J&J Technology, LLC v. Big Planet, Inc.*
Mark: ECOSPHERE
Opposition No.:
Class(es): 3
Atty Dkt. No.: 241030US56

Dear Commissioner:

We enclose the following for filing in the U.S. Patent and Trademark Office:

☑ Notice of Opposition to Serial No. 78/180,241

Also enclosed is our check for the required filing fee in the amount of $300.00.

The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment, to Account No. 50-2014.

Respectfully submitted,

OBLON, SPIVAK, MCCLELLAND,
MAIER & NEUSTADT, P.C.

Jordan S. Weinstein

JSW/dlb

09-22-2003
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #77

EXHIBIT

B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

2003 SEP 30 P 3:50

JIM HENRY and J & J TECHNOLOGY, LLC,

PLAINTIFFS,

v.

NU SKIN ENTERPRISES, INC., and BIG PLANET, INC.,

DEFENDANTS.

Civil Action Case No. 3-03 0872

JUDGE HAYNES
JUDGE BROWN

COMPLAINT

Plaintiffs, Jim Henry and J & J Technology, LLC, for their causes of action against the Defendants state as follows:

I.

PARTIES

1. Plaintiff, Jim Henry, (hereinafter referred to as "Henry"), is a citizen and resident of McEwen, Humphreys County, Tennessee.

2. Plaintiff, J & J Technology, LLC (hereinafter referred to as "J & J Technology"), is a foreign corporation with its principal place of business in Tennessee.

3. Defendant, Nu Skin Enterprises, Inc., (hereinafter referred to as "Nu Skin"), is a foreign corporation with its principal place of business at 75 W. Center Street, Provo, Utah 84601 with M. Truman Hunt as its registered agent.

4. Defendant, Big Planet, Inc., a Delaware corporation, is a wholly owned subsidiary of Nu Skin Enterprises, Inc. with its principal place of business at 75 W.

Center Street, Provo, Utah 84601 and its registered agent as C. T. Corporation System, 50 W. Broadway, 8th Floor, Salt Lake City, Utah 84101.

II.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action and the claims for relief set forth herein pursuant to 28 U.S.C. §1332 because the parties are citizens of different and diverse states, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

6. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because the Defendants came to and acted in Tennessee and the misrepresentations complained of herein were communicated, occurred in and were directed to the Plaintiffs in Tennessee within this judicial district and the wrongful acts of the Defendants were directed at Plaintiffs in Tennessee and were substantially carried out in Tennessee and caused damages to Plaintiffs within this judicial district and, further, the substantial acts, omissions and conduct complained of herein transpired, in material part, in Tennessee and within this judicial district.

III.

FACTUAL ALLEGATIONS

7. Plaintiff, Jim Henry, is the inventor, formulator, and developer of a series of unique, all-natural, non-toxic, environmentally safe cleaning and household products, which he had been developing and perfecting for decades.

8. Plaintiffs, Jim Henry and J & J Technology, are the owners of the formulas and hold the trademarks for the unique products which Henry and J & J Technology jointly developed.

9. Plaintiffs are the holders/owners of the Ecosphere trademark for the all-natural, non-toxic, environmentally safe products involved herein.

10. Defendant Nu Skin is a billion dollar direct selling company that markets premium quality personal care and nutrition products through a global network of over 550,000 independent sales representatives. Nu Skin conducts business in more than 30 countries worldwide.

11. The Defendant Nu Skin's mission, as publicly represented to its investors, vendors, shareholders, contractors, and as represented to Plaintiffs, is "to act as a force for good throughout the world" achieved "by selling exceptional products, providing rewarding direct selling business opportunities and supporting distributors, stockholders, consumers and employees in ways that improve their quality of life." The company and its representatives place great public and private emphasis on representations of integrity, social conscience, transparency in dealing, and truthfulness.

12. Defendant, Big Planet, is a corporation that develops, makes and markets business service and home-care products purportedly designed to improve the environment in which people live and work.

13. In early 2001, Defendant Nu Skin, acting through its employees, agents, and representatives, learned of the unique products invented and formulated by Jim Henry in McEwen, Tennessee and expressed an interest in expanding the business focus of

its wholly owned and controlled subsidiary Big Planet by marketing those products through its global network of independent sales representatives.

14. From February of 2001 through December of 2002, Defendants, Nu Skin and Big Planet, acting in concert made multiple, continuing, materially false representations to Plaintiffs in order to mislead Plaintiffs into disclosing to the Defendants the Plaintiffs' secret ingredients and mixing formulas for Plaintiffs' unique products in order that Defendants might steal and convert such secrets to Defendants' own use.

15. In March of 2001, Nu Skin designated its employee, Jason Jorgenson, as its "point person," agent and representative to evaluate the Plaintiffs' products and to coordinate the "new project development" between Henry and Nu Skin.

16. Defendants' agent, Jorgenson, in his capacity as Defendants' representative, contacted Plaintiffs in Tennessee and came to Plaintiffs' place of business in Tennessee to negotiate and coordinate the project which was represented to Plaintiffs to be a joint effort between Plaintiffs and Defendant Nu Skin to market Plaintiffs' environmentally safe products worldwide.[1]

17. Through a series of meetings in Tennessee and elsewhere and in communications directed to Plaintiffs in Tennessee via e-mail, telephone, and face-to-face meetings, the Defendants, acting through their agents and representatives and acting in concert with each other made false representations to Plaintiffs, which were

[1]The Defendants, through Jorgenson, obtained Henry's signature by fraudulent misrepresentations on a limited manufacturing and supply contract dated July 10, 2001. That contract provided for Henry to provide certain product in concentrate form only. That contract expired and Plaintiffs are not asserting any claims thereunder.

known to be false when made and upon which representations the Defendants knew that Plaintiffs were relying when made, for the undisclosed purpose of misleading and inducing Plaintiffs to reveal to Defendants the Plaintiffs' proprietary secret ingredients, mixing instructions, ingredient list, and alternative non-toxic ingredients and the makeup of the products in order that Defendants could convert same to their own use to the exclusion of Plaintiffs. Among the false representations made were the following:

a. That Plaintiffs would retain ownership and be the exclusive licensors of all of the unique products under the tradename, Ecosphere;

b. That Defendant, Big Planet, would be the marketer and promoter of the products to Nu Skin's distributors;

c. That Plaintiffs would be the worldwide developer and first refusal manufacturer of all products developed;

d. That in return for the disclosure of Plaintiffs' ingredient lists, Plaintiffs would have the exclusive right to manufacture and produce any new Ecosphere product lines worldwide;

e. That Defendants would pay to Plaintiffs through Big Planet a 10% commission of all retail sales price of products sold worldwide in exchange for Plaintiffs' disclosure of Plaintiffs' "secret Ingredient Lists;"

f. That Defendants anticipated and Plaintiffs could anticipate annual retail sales of $100,000,000 of the products;

g. That Plaintiffs would demonstrate the products to the March 2003 worldwide convention;

h. That Defendants would initially market Plaintiffs' products in the United States, Taiwan, and Canada, and, then, in Japan, Australia and Europe;

I. That Defendants had completed a "deal" to market three of the Plaintiffs' products in Japan;

j. That by mid-November, the marketing research had been completed for the major worldwide markets; and

k. Other representations which proved to be false.

These representations were false and known to be false when made.

18. In reliance upon the above misrepresentations, the Plaintiffs disclosed to Defendants the ingredient lists (including alternative ingredients) along with safety data and assigned to Defendants the trademark use of Ecosphere for product sales in Canada.

19. During the period in which Defendants were making the representations, the Defendants, acting through Big Planet, were in fact converting the Plaintiffs' proprietary information and secrets and, after tricking Plaintiffs into disclosing the Plaintiffs' secret ingredients, mixing instructions and other information, began to, without Plaintiffs' knowledge or permission, conduct secret, independent laboratory testing and analysis of the Plaintiffs' products, to dilute Plaintiffs' products previously manufactured and supplied to them from concentrate to a diluted form, and to arrange other means of producing the products to the exclusion of Plaintiffs.

20. Immediately prior to providing the ingredient lists, Plaintiffs' specifically agreed to and accepted the 10% commission offered on all sales of Ecosphere products and agreed to and did release the ingredient lists in exchange for being the exclusive, worldwide producer and manufacturer of the products.

21. During the September 17-21, 2002 World Convention at the Delta Center in Salt Lake City, Utah, J & J Technology was, in fact, introduced as the manufacturer/owner of Jim Henry's Ecosphere products by Defendants. Demonstrations were made by Plaintiff to approximately 12,000 Nu Skin distributors from all over the world. In addition to the three major products, metal polish and jewelry

cleaner at the specific request of the Defendants were also introduced and demonstrated to the distributors.

22. On September 10, 2002, Robert Conlee, the President of Big Planet at the time, publicly described the Ecosphere products as a "major announcement" during his convention presentation. In addition to the three products on hand, he repeatedly told the audience of approximately 12,000 distributors that "we will add all purpose cleaner and laundry detergent" and that in the future Nu Skin/Big Planet would be announcing a "complete line of home products" under the Ecosphere line to be manufactured by Plaintiffs.

23. Prior to and after the convention, Plaintiffs J & J Technology and Henry worked diligently at the Defendants' request to formulate and produce these new products.

24. In addition and as a part of this convention, Alex Treharne announced that Nu Skin/Big Planet had already sold 55,000 of Plaintiffs' Ecosphere products in only three countries: the United States, Taiwan, and Canada. Treharne also announced that, in 2003, there would be a major push for the Japanese to live cleaner, safer lives and that this would be accomplished by implementing sales of the Ecosphere products through Defendants' network or distributors. The Japanese market was represented to the Plaintiffs to be a major business opportunity within itself.

25. Prior to leaving the convention, Plaintiffs were told to make plans to be in Japan for a March 2003 convention and to be ready to make a tour of multiple countries and 10-12 cities to demonstrate the products in the USA.

26. By late November 2002, Defendants had obtained almost all of Plaintiffs' proprietary information, ingredient lists, mixing solutions, alternative ingredients and had gained possession of and the benefit of generations of Plaintiff Henry's family's work and had converted such to the Defendants' own use.

27. On November 26, 2002, Defendants' agent Jorgenson called Plaintiffs in Tennessee and told him that Jorgenson had been forbidden by his superiors to discuss the business relationship between Defendants and Plaintiffs any further with Plaintiffs or Jorgenson would be fired.

28. On December 25, 2002, Defendants' agent Jorgenson called Plaintiff Henry in Tennessee and informed him that the Defendants' real intent all along had been to develop a line of products based on the Plaintiffs' secret proprietary information, ingredient lists, mixing instructions, alternative ingredients that Defendants had obtained from Plaintiffs and to drop the name Ecosphere if necessary. Jorgenson advised Plaintiff that "the ingredient list and mixing instructions will be very close if not identical to what you provided and they will make their own line under a new name."

29. Plaintiffs relied upon Defendants' misrepresentations and, as a direct result, were cheated out of extremely valuable and unique proprietary secrets, ingredient lists, trademarks, and, as a result, have suffered severe monetary damages.

CAUSES OF ACTION

COUNT I

FRAUD AND MISREPRESENTATION

30. The foregoing paragraphs 1 through 29 are incorporated herein by reference.

31. The Plaintiffs were fraudulently induced to spend countless hours, days and months developing new products for Defendants' worldwide distribution network, to disclose and provide secret and guarded ingredient lists, mixing instructions, and alternative ingredient lists, all the while being led to believe that Plaintiffs would be the developer and manufacturer of all new Ecosphere products and would also receive a 10% commission on of all worldwide sales of Ecosphere products.

32. In reliance upon the false and misleading representations made by the Defendants, the Plaintiffs supplied the Defendants with trademark, trade secrets, proprietary information, ingredient lists, mixing instructions, and alternative ingredients.

33. The acts of the Defendants amount to fraud and misrepresentation and directly resulted in the damages to and loss of Plaintiffs' properties.

34. The proprietary information, trademark, trade secrets, ingredient lists, mixing instructions, and alternative ingredients were of great value to Plaintiffs which they have now lost due to Defendants' wrongful actions.

35. As a direct and proximate result of the Defendants' actions, as set forth hereinabove and hereinafter, the Plaintiffs sustained injuries and damages which they

are entitled to recover compensatory and punitive damages in an amount to be determined by a jury.

COUNT II

BREACH OF CONTRACT

36. The foregoing paragraphs 1 through 35 are incorporated by reference herein.

37. When Defendants conveyed to Plaintiffs the offer of a 10% of retail sales commission on all worldwide sales of all Ecosphere products in exchange for Plaintiffs' disclosure of the secret ingredient lists for the Plaintiffs' unique products and Plaintiffs accepted same, such became an enforceable contract which was then partially performed by Plaintiffs when Plaintiffs turned over to Defendants the ingredient lists.

38. When Defendants conveyed an offer to Plaintiffs that, in exchange for Plaintiffs' ingredient list for the products, Plaintiffs would be the primary manufacturer of all new Ecosphere products in exchange for Plaintiffs' disclosure of the secret ingredient lists for the Plaintiffs' unique products and Plaintiffs accepted same, such became an enforceable contract which was then partially performed by Plaintiffs when Plaintiffs turned over to Defendants the ingredient list.

39. When Defendants conveyed an offer to Plaintiffs that, in exchange for Plaintiffs' secret ingredient list for the products, Plaintiffs would be the exclusive manufacturer of all Ecosphere product lines and Plaintiffs accepted same and released the secret ingredient list and alternative ingredient lists, etc., such became an enforceable contract which Plaintiffs had partially performed.

40. The actions and omissions of the Defendants as set forth hereinabove were a breach of these contracts.

41. The actions and omissions of the Defendants as described hereinabove were a breach of the covenant of good faith and fair dealing implied in all contracts.

42. Defendants breached the contracts and, as a direct and proximate result, Plaintiffs suffered damages for which they are entitled to recover compensation in an amount to be determined by a jury.

COUNT III

CIVIL CONSPIRACY

43. The foregoing paragraphs 1 through 42 are incorporated herein by reference.

44. The Plaintiffs aver that the Defendants Nu Skin and Big Planet acted in concert through the separate misrepresentations and roles within their deceptive scheme to misappropriate the Plaintiffs' secret proprietary information, ingredient lists, and mixing instructions and to use such information for their own benefit to the exclusion of Plaintiffs amounts to a civil conspiracy the direct result of which was:

a. fraud and misrepresentation; and

b. breach of contract;

45. As a direct and proximate result of the Defendants' concerted action, as set forth hereinabove and hereinafter, the Plaintiffs sustained injuries and damages for which it is entitled to recover compensatory and punitive damages in an amount to be determined by a jury.

COUNT IV

MISAPPROPRIATION OF TRADE SECRETS

46. All allegations set forth in paragraphs 1 through 45 hereinabove are incorporated herein by reference as here fully set forth.

47. The Defendants' appropriation of Plaintiffs' secret proprietary information, ingredients and mixing information wrongfully obtained by the Defendants through fraud and deceit in this case amounts to a misappropriation of trade secrets in violation of T.C.A. §47-25-1701.

48. The formulation, ingredients list, mixtures, compilation, method, and process of mixing of the Ecosphere products obtained from the Plaintiffs herein were trade secrets as defined by T.C.A. §47-25-1702(4). The actions of the Defendants amounts to acquisition, disclosure for use and/or use of the trade secrets of the Plaintiffs obtained by the Defendants for use by Defendants through improper means was acquired under circumstances whereby Defendants had a duty to maintain the secrets or limit the use of such secrets as set forth in T.C.A. §47-25-1702(1)(2).

49. The Defendants' actions violated the Uniform Trade Secrets Act as set forth in T.C.A. §47-25-1701 *et seq* and, therefore, entitle the Plaintiffs to recover damages for such misappropriation, including damages for actual losses plus unjust enrichment and exemplary damages, attorneys' fees, and costs pursuant to T.C.A. §§47-25-1704 and 1705.

CLAIMS FOR RELIEF

WHEREFORE, PLAINTIFFS PRAY:

1. That service of process issue requiring the Defendants to answer;

2. That a jury be empaneled to try this matter when the issues are joined;

3. That Plaintiffs recover judgment in Count I in an amount to be determined by a jury.

4. That Plaintiffs recover judgment in Count II in an amount to be determined by a jury.

5. That Plaintiffs recover judgment in Count III in an amount to be determined by a jury.

6. That Plaintiffs recover judgment in Count IV in an amount to be determined by the court and jury for compensatory and exemplary damages, attorneys' fees, loss profits, actual damages and unjust enrichment as set forth under the Uniform Trade Secrets Act found in T.C.A. §47-25-1701 *et seq.*

7. That the Plaintiffs be permitted to amend this Complaint as merited by additional investigation and discovery; and

RESPECTFULLY SUBMITTED this the 17th day of September, 2003.

LAW OFFICE OF J. HOUSTON GORDON

BY: _____

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Suite 300, Hotel Lindo Building
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BY:

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EXHIBIT

C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JIM HENRY and J & J TECHNOLOGY, LLC, Plaintiffs, vs. NU SKIN ENTERPRISES, INC., and BIG PLANET, INC., Defendants.	**AMENDED ANSWER** Civil No. 3-03 0872 Judge Campbell Judge Brown

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, amending as a matter of course and relating back (pursuant to Rule 15(c)) to the date of the original answer, Defendants Nu Skin Enterprises, Inc. ("Nu Skin") and Big Planet, Inc. ("Big Planet") hereby amend their prior response to Plaintiff's complaint ("Complaint"), including responsive answers and motions based on certain defenses, as follows. Nu Skin and Big Planet (collectively, "Nu Skin") reserve the right to further amend, to allege additional defenses or claims, and to file additional motions, as discovery and investigation may warrant.

FIRST DEFENSE

The Complaint fails to state a claim against Nu Skin upon which relief may be granted.

DCM

SECOND DEFENSE

Nu Skin responds to the allegations contained in the following indicated paragraphs of the Complaint:

PARTIES

1. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Nu Skin denies the allegations of paragraph 1.

2. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Nu Skin denies the allegations of paragraph 2.

3. Nu Skin admits that it is a Delaware corporation with its principal place of business at 75 West Center Street, Provo, Utah 84601, admits that M. Truman Hunt is its registered agent, and denies each and every remaining allegation contained in paragraph 3.

4. Big Planet admits that it is a Delaware corporation, admits that it is a wholly owned subsidiary of Nu Skin with its principal place of business at 75 West Center Street, Provo, Utah 84601, admits that C.T. Corporation System is its registered agent, and denies each and every remaining allegation contained in paragraph 4.

JURISDICTION AND VENUE

5. Nu Skin denies the allegations and legal conclusions contained in paragraph 5, and affirmatively alleges that pursuant to that certain Manufacturing and Supply Agreement dated July 10, 2001 (the "Manufacturing and Supply Agreement"), Plaintiffs agreed that jurisdiction over this dispute would lie exclusively in other courts.

The Manufacturing and Supply Agreement is referred to on page 4 of the Complaint, and is attached hereto as Exhibit "A."

6. Nu Skin denies the allegations and legal conclusions contained in paragraph 6, and affirmatively alleges that, pursuant to the Manufacturing and Supply Agreement, Plaintiffs agreed that the venue of any proceeding involving this dispute would lie exclusively in other locations.

FACTUAL ALLEGATIONS

7. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Nu Skin denies the allegations of paragraph 7.

8. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Nu Skin denies the allegations of paragraph 8.

9. Nu Skin denies the allegations of paragraph 9.

10. Nu Skin admits the allegations of paragraph 10.

11. Nu Skin is uncertain about the meaning that Plaintiffs may ascribe to the phrase "transparency in dealing", and therefore denies the allegations of paragraph 11 relating thereto for lack of information and belief, but otherwise admits the allegations of paragraph 11.

12. Nu Skin admits the allegations of paragraph 12.

13. Nu Skin denies the allegations of paragraph 13, except admits that Nu Skin and Jim Henry ("Henry") engaged in discussions regarding his environmentally-friendly cleaning products (the "Cleaning Products") after Henry approached Nu Skin with an opportunity to invest in the Cleaning Products.

14. Nu Skin denies the allegations of paragraph 14.

15. Nu Skin denies the allegations of paragraph 15, except admits that Jayson Jorgensen ("Jorgensen") was responsible for developing new products at Big Planet.

16. Nu Skin denies the allegations of paragraph 16, and its accompanying footnote.

17. Nu Skin admits that it met with Plaintiffs via e-mail and telephone and communicated with Plaintiffs through writing, and denies each and every remaining allegation contained in paragraph 17.

18. Nu Skin admits that Plaintiffs provided certain information to Nu Skin, that, pursuant to the Manufacturing and Supply Agreement, Plaintiffs agreed to assign to Nu Skin the right to use the "Ecosphere" trademark without geographic limitation, and denies each and every remaining allegation contained in paragraph 18.

19. Nu Skin admits that it properly conducted chemical tests on the Cleaning Products once Nu Skin discovered that yeasts and molds were growing because the Cleaning Products lacked necessary chemical preservatives, admits that it explored diluting the Cleaning Products from a concentrate form to a ready-to-use diluted version after Plaintiffs were unable to produce the Cleaning Products in a cost effective manner, alleges that Plaintiffs were aware of Nu Skin's attempts to produce diluted samples of some of the Cleaning Produces and that Plaintiffs did not object to these activities, and denies each and every remaining allegation contained in paragraph 19.

20. Nu Skin denies the allegations of paragraph 20, and alleges that it made no offer for sales commissions or any other type of contract whatsoever, except as provided by the Manufacturing and Supply Agreement.

21. Nu Skin admits that it held a World Convention at the Delta Center in Salt Lake City, Utah in September 2002 (the "Convention"), admits that Plaintiffs demonstrated the Cleaning Products to a number of Nu Skin distributors, and denies each and every remaining allegation contained in paragraph 21.

22. Nu Skin admits that the Cleaning Products were demonstrated at the Convention, admits that the Cleaning Products were discussed at the Convention, and denies each and every remaining allegation contained in paragraph 22.

23. For lack of knowledge or information sufficient to form a belief as to the truth thereof, Nu Skin denies the allegations of paragraph 23.

24. Nu Skin admits that from time to time it provided information to Plaintiffs regarding product sales and marketing concepts, but denies each and every remaining allegation contained in paragraph 24 for lack of information and belief.

25. Nu Skin admits that from time to time it provided information to Plaintiffs regarding product sales and marketing concepts, but denies each and every remaining allegation contained in paragraph 25 for lack of information and belief.

26. Nu Skin admits that Plaintiffs provided Nu Skin with certain information, and denies each and every remaining allegation contained in paragraph 26.

27. Nu Skin admits that towards the end of 2002, Jorgensen informed Plaintiffs that any further communications with Nu Skin should be to referred to Nu Skin's legal counsel, and denies each and every remaining allegation contained in paragraph 27.

28. Nu Skin admits that Jorgensen and Henry spoke on or about December 25, 2002 via telephone, and denies each and every remaining allegation contained in paragraph 28.

29. Nu Skin denies the allegations of paragraph 29.

CAUSES OF ACTION

COUNT I

FRAUD AND MISREPRESENTATION

30. Nu Skin incorporates the allegations of the preceding paragraphs.

31. Nu Skin denies the allegations of paragraph 31.

32. Nu Skin denies the allegations of paragraph 32.

33. Nu Skin denies the allegations of paragraph 33.

34. Nu Skin denies the allegations of paragraph 34.

35. Nu Skin denies the allegations of paragraph 35.

COUNT II

BREACH OF CONTRACT

36. Nu Skin incorporates the allegations of the preceding paragraphs.

37. Nu Skin denies the allegations of paragraph 37.

38. Nu Skin denies the allegations of paragraph 38.

39. Nu Skin denies the allegations of paragraph 39.

40. Nu Skin denies the allegations of paragraph 40.

41. Nu Skin denies the allegations of paragraph 41.

42. Nu Skin denies the allegations of paragraph 42.

COUNT III

CIVIL CONSPIRACY

43. Nu Skin incorporates the allegations of the preceding paragraphs.

44. Nu Skin denies the allegations of paragraph 44.

45. Nu Skin denies the allegations of paragraph 45.

COUNT IV

MISAPPROPRIATION OF TRADE SECRETS

46. Nu Skin incorporates the allegations of the preceding paragraphs.

47. Nu Skin denies the allegations of paragraph 47.

48. Nu Skin denies the allegations of paragraph 48.

49. Nu Skin denies the allegations of paragraph 49

THIRD DEFENSE

Nu Skin denies each and every allegation contained in the Complaint that is not specifically admitted herein.

FOURTH DEFENSE

Some or all of Plaintiffs' claims against Nu Skin are barred by estoppel, laches, and/or waiver.

FIFTH DEFENSE

Some or all of Plaintiffs' claims against Nu Skin are barred by applicable statutes of limitation.

SIXTH DEFENSE

Plaintiffs have failed to mitigate their damages, if any, as required by law.

SEVENTH DEFENSE

Some or all of Plaintiffs' damages, if any, were proximately caused in whole or in part, or are otherwise attributable to, the actions and/or omissions of Plaintiffs.

EIGHTH DEFENSE

Some or all of Plaintiffs' damages, if any, were proximately caused in whole or in part, or are otherwise attributable to, persons or entities other than Nu Skin, over whom Nu Skin had no control, and/or were the result of independent intervening causes.

NINTH DEFENSE

Plaintiffs' claims for damages, if any, are unacceptably speculative as a matter of law, including Plaintiffs' claim that its damages were proximately caused by the actions of Nu Skin.

TENTH DEFENSE

Some or all of Plaintiffs' claims are barred by the doctrines of unclean hands and/or equitable estoppel.

ELEVENTH DEFENSE

Some or all of Plaintiffs' claims against Nu Skin are barred by applicable statutes of frauds.

TWELFTH DEFENSE

Some or all of Plaintiffs' claims against Nu Skin are barred, in whole or in part, by Plaintiffs' assignment to Nu Skin of any and all trademark rights in the mark "Ecosphere."

THIRTEENTH DEFENSE

Plaintiffs have breached the Manufacturing and Supply Agreement by, among other things, failing to add necessary preservatives to the Cleaning Products.

FOURTEENTH DEFENSE

Plaintiffs have failed to make efforts that are reasonable under the circumstances to maintain the secrecy of the information it alleges Nu Skin has misappropriated as required by the Uniform Trade Secrets Act, T.C.A. § 47-25-1701 *et seq.*

FIFTEENTH DEFENSE AND MOTION

Plaintiffs' claims are not properly before this court and must be dismissed or stayed, inasmuch as the Plaintiffs have failed to follow the alternative dispute procedures mandated by paragraph 17.1 of the Manufacturing and Supply Agreement. Nu Skin hereby moves this court for a dismissal or stay of this proceeding pursuant to 9 U.S.C. § 3 and other applicable law, which motion shall be further supported by a separately captioned motion and memorandum in support thereof.

SIXTEENTH DEFENSE AND MOTION

Paragraph 17.9 of the Manufacturing and Supply agreement provides that Plaintiffs' claims can only be pursued in a different venue. Thus, these claims must be dismissed, stayed, or transferred to a proper venue. Nu Skin hereby moves this court for a dismissal, stay, or transfer of venue pursuant to 28 U.S.C. § 1404(a) and other applicable law, which motion shall be further supported by a separately captioned motion and memorandum in support thereof.

SEVENTEENTH DEFENSE AND MOTION

Plaintiffs' claims must be dismissed inasmuch as the parties contractually agreed in the Manufacturing and Supply Agreement that the state courts located in Utah County, Utah or any Federal District Court in Utah would have exclusive personal jurisdiction and venue over any dispute related to the validity, interpretation or performance of the Agreement and such forum is more just and convenient for resolution of this dispute. Nu Skin hereby moves this court for a dismissal, stay, or transfer of venue pursuant to applicable law, which motion shall be further supported by a separately captioned motion and memorandum in support thereof.

EIGHTEENTH DEFENSE AND MOTION

Pursuant to the Manufacturing and Supply Agreement, Plaintiffs' claims must be dismissed for lack of subject matter jurisdiction and lack of personal jurisdiction. Nu Skin hereby moves this court for a dismissal of this action pursuant to applicable law, which motion shall be further supported by a separately captioned motion and memorandum in support thereof.

WHEREFORE, Nu Skin denies it has caused any damage to Plaintiffs or that Plaintiffs are entitled to recover any damages or other relief from Nu Skin, Nu Skin requests that the Complaint be dismissed with prejudice and on the merits, and that Nu Skin be awarded its costs and attorneys' fees incurred in defending this action, together with such other and further relief as the Court may deem appropriate.

DATED this 8th day of December, 2003.

PARR WADDOUPS BROWN GEE & LOVELESS

By: _____ w/permission MEH

Robert S. Clark (UT#4015)
D. Chad McCoy (UT#8997)
185 South State Street, Suite 1300
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Attorneys for Defendants

KING & BALLOW

By: _____

Mark E. Hunt, Esq.
1100 Union St. Plaza
315 Union Street
Nashville, TN 37201
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2003, a copy of the foregoing **AMENDED ANSWER** was served upon the following by U.S. Mail, first class postage prepaid:

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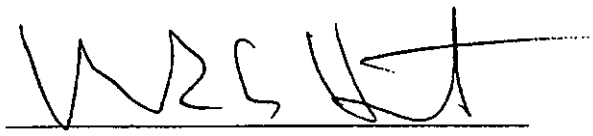

EXHIBIT A

J.M. HENRY AND COMPANY, INC.
MANUFACTURING AND SUPPLY AGREEMENT

This Manufacturing and Supply Agreement ("Agreement") dated this 10th day of July, 2001 ("Effective Date") by and between J.M. Henry and Company, Inc. ("Manufacturer"), a Tennessee corporation with its principal place of business at 1915 Primo Lane, McEwen, Tennessee, 37101 and Big Planet, Inc. ("Big Planet"), a Delaware corporation having its principal place of business at 75 West Center Street, Provo, Utah 84601. Manufacturer and Big Planet are sometimes hereinafter referred to as "Party" or "Parties."

RECITALS

A. Big Planet is in the business of marketing various products through its network of independent Representatives. Big Planet desires to market privately labeled cleaning products that are manufactured by Manufacturer;

B. Manufacturer is in the business of manufacturing, packaging and supplying proprietary, environmentally safe, cleaning Products. Manufacturer is willing to privately label said Products so that they may be sold under Big Planet's name and by its Representatives; and

C. Big Planet and Manufacturer mutually desire that Manufacturer manufacture, package, and supply the Products exclusively to Big Planet pursuant to the terms and conditions of this Agreement.

AGREEMENT

In consideration of the terms and conditions contained herein, the Parties agree as follows:

1 DEFINED TERMS. Unless the context otherwise requires, the following terms, when used in this Agreement, shall have the respective meanings specified below:

1.1 "Action" means any claim, action, suit, complaint, arbitration, inquiry, proceeding or investigation by or before any Governmental Authority.

1.2 "Affiliate" means any Person that directly or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with such specified Person, including subsidiaries and parents.

1.3 "Control" means the right to exercise, directly or indirectly, the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise.

1.4 "Confidential Information" means all information of either Party or their Affiliates, or confidential information belonging to a third party of which either Party or their Affiliates are bound by an obligation of confidentiality, that is confidential, special, unique, proprietary, gives either Party or their Affiliates a competitive advantage and/or enhances either Parties' or their Affiliates' good will, whether designated confidential or not, and whether written, oral or obtained by viewing each other's premises, data or information, and includes, but is not limited to formulae, revisions of same, processes and methods as well as business plans, financial data, product development plans, marketing plans and strategies, distributor or representative lists, manufacturing methodologies, research data and any other information of either Party.

1.5 "Direct Sales Channel" means the direct sales marketing method of distribution leading directly to the sale of products to the ultimate consumer by an authorized distributor or sub-distributor of a company which procures such sales through an offer or solicitation made personally by such distributor or his personal web site at a location other than a place of business dedicated principally to the sale of said company's products or to the retail sale of products generally.

1.6 "Environmental Laws" means any and all present and future federal, state, and local laws, statutes, ordinances, orders, decrees, regulations, permits, guidance documents, policies, and any other requirements of governmental authorities relating to health, safety, the environment or to any Hazardous Substance.

1.7 "Formula" means the secret, proprietary formula used to manufacture the Products.

1.8 "Governmental Authority" means any domestic or foreign national, federal, state, municipal or local or other government, governmental, regulatory or administrative authority, agency or commission, or any court, tribunal, or judicial or arbitration body having proper jurisdiction.

1.9 "Governmental Order" means any order, writ, judgment, injunction, decree, stipulation, determination or award entered by or with any Governmental Authority.

1.10 "Hazardous Substance" means (i) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, or otherwise classified pursuant to any Environmental Laws as a "hazardous substance," "hazardous material," "hazardous waste," "toxic substance," and "contaminant," as well as any formulation not mentioned herein intended to define, list or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, or toxicity; and (ii) any other chemical, material or substance that, because of its quantity, concentration, or physical or chemical characteristics, exposure to which is limited or regulated for health and safety reason by any governmental authority, or which poses a significant present or potential hazard to human health or safety or to the environment if released into the workplace or the environment.

1.11 "Law" means any domestic or foreign national, federal, state, municipal or local or other statute, law, ordinance, regulation, code, rule, order or other requirement or rule of law, including Environmental Laws.

1.12 "Minimum Purchase Order" means that any Big Planet order shall be a minimum of five thousand Units of each specific Product ordered from Manufacturer.

1.13 "Person" means an individual, partnership, joint venture, corporation, limited liability company, trust, unincorporated organization or other entity.

1.14 "Products(s)" shall mean those products listed on Schedule 1.14.

1.15 "Representative" means the independent contractors that market Big Planet's products and services, including the Products.

1.16 "Specifications" refers to all standards prescribed by the Manufacturer for the formulation, manufacture and preparation of the Products and containers which are set forth on Schedule 1.16.

1.17 "Trademarks" means the trademarks, tradenames, copy-righted material, distinctive packaging and

label designs, belonging to each Party.

1.18 "Unit" means a separate package of each Product, in concentrate form, that is provided to Big Planet in a new plastic double neck dispenser together with a separate empty new 16-oz plastic spray bottle together with instructions and private labeling on both the dispensers and spray bottles.

2 PURCHASE AND SHIPPING.

2.1 Commencing on 7-11, 2001, Big Planet shall, from time to time under the terms hereof, place orders with Manufacturer, and Manufacturer shall manufacture, process, bottle, package and deliver pursuant to such orders, certain Products as specified in attached Schedule 1.14 in strict compliance with the Specifications. The composition and quality of the Products shall be in accordance with the Specifications set forth in Schedule 1.16. Except for the requirement of the Minimum Purchase Order amount, Big Planet shall not be subject to any minimum purchase requirements or minimum sales requirements. From time to time during the term and any renewal term of this Agreement, the parties hereto may add to or modify the Products listed in Schedule 1.14 by mutual agreement in writing.

2.2 Each Unit of Product shall be packaged in concentrate form in a new plastic double neck dispenser together with a separate empty new 16-oz plastic spray bottle together with instructions and private labeling on both the dispensers and spray bottles. The specific variety, type, pack, and bottle size for each Product to be supplied under this Agreement shall be in accordance with the Specifications set forth in Schedule 1.16. Subject to the prior written approval of Manufacturer, the contents of the labeling shall contain at a minimum the language on current Manufacturer products that are similar to the Products. Big Planet shall create the artwork and language for the labels and provide it to Manufacturer. The Parties agree that the labeling shall contain language similar to the language set forth in attached Schedule 2.2.

2.3 The price per Unit of Products is set forth on Schedule 1.14 of this Agreement. Manufacturer shall invoice Big Planet for the Products. Payment terms shall be net thirty (30) days from receipt of the invoice.

2.4 Manufacturer acknowledges and agrees that, because of the competitive nature of the market for the Products, time is of the essence of this Agreement. Manufacturer shall manufacture and have ready for shipment any and all Products within thirty (30) days from the receipt of an order from Big Planet, with the exception of the first order which shall by ready for shipment within forty-five (45) days from the receipt of the order. The Products shall be shipped F.O.B. Big Planet's Affiliate's warehouse in Provo, Utah or if to another specified warehouse, then the shipping costs shall be mutually agreed to by the Parties. Manufacturer shall furnish to Big Planet sufficient information to verify shipment of Products. Manufacturer shall bear the risk of loss or damage to any Products until the same has been delivered to Big Planet's Affiliate's warehouse in Provo, Utah.

3 TERM. This Agreement shall commence on the Effective Date and shall remain in effect until Big Planet gives Manufacturer thirty (30) days prior written notice of its intent to terminate this Agreement. Upon termination of this Agreement, Big Planet shall be responsible for any Products ordered pursuant to this Agreement, and shall be responsible for any surplus of unused labels, bottles, or other raw materials; provided, however, that (i) said surplus must have been procured by Manufacturer in order to fulfill an issued Big Plant purchase order, and (ii) said surplus is unique to Big Planet's Product and can not be used

for any other customer of Manufacturer.

4 EXCLUSIVITY. Manufacturer hereby grants to Big Planet the exclusive right to sell or otherwise distribute the Products throughout the world in the Direct Sales Channel. This right shall extend to Big Planet's Affiliates and their independent distributors. Big Planet shall have complete and sole discretion as to the resale of the Products, including the pricing of the Products, the advertising, marketing, sales, and distribution of the Products and the expense it incurs in connection therewith.

5 TRADEMARKS.

5.1 Manufacturer will use Big Planet's Trademarks only in conjunction with packaging and labeling the Products to be sold to Big Planet. Big Planet may use Manufacturer's appropriate Trademarks to market the Products.

5.2 Eco Sphere Trademarks.

5.2.1 Registration and License. Immediately upon execution of this Agreement, Manufacturer shall use its best efforts to register and maintain (during the term of this Agreement) the trade name and trademark "Eco Sphere" (collectively "Eco Sphere Trademarks") in international class 3 and other relevant classes, as may be described in attached Schedule 5.2, as amended, at its sole cost and expense, which reasonable and necessary expenses shall be reimbursed by Big Planet; provided, however, that upon the mutual agreement of the parties, Big Planet may, at its sole cost and expense, conduct and maintain said registration of the Eco Sphere Trademarks on behalf of Manufacturer. In the event the parties agree that Big Planet shall conduct and maintain said registration of the Eco Sphere Trademarks on behalf of Manufacturer, then (a) Manufacturer hereby grants Big Planet a limited power of attorney to make such filings, or (b) if the parties agree, then Manufacturer shall execute all documents necessary for said filings. Manufacturer hereby grants to Big Planet an exclusive, world-wide license to use the Eco Sphere Trademarks in all classes of trade during the term of this Agreement, including, but not limited to, marketing the Products under the brand name "Eco Sphere", advertising, promoting and marketing the Products using the Eco Sphere Trademarks.

5.2.2 Assignment. Manufacturer further acknowledges and understands that Big Planet is relying on the assignment of the Eco Sphere Trademarks to it upon the expiration or termination of this Agreement for any reason as a material inducement to Big Planet to enter into this Agreement, and therefore, Manufacturer agrees that simultaneous with the execution of this Agreement, it shall execute an assignment that shall be held by Big Planet and made effective on (i) the date of expiration or termination of this Agreement for whatever reason, or (ii) upon the written request of Big Planet, which assigns and transfers to Big Planet, the entire right, title and interest in and to all Eco Sphere Trademarks, wherever filed in the world, for Ten and no/100 Dollars ($10.00).

5.3 This Agreement shall not be construed to give either Party any vested right, title, or interest in any of the other Parties' except to the extent and in the manner, time, and places each Party is authorized and permitted to use the other Parties Trademarks, subject to the provisions of this Agreement.

6 MANUFACTURING. Manufacturer shall manufacture, package, and label the Products in compliance with the Specifications and all other applicable Laws.

6.1 Manufacturer shall furnish all raw ingredients and provide all labor, materials and equipment to manufacture, package and label the Products.

6.2 All ingredients used for the performance of the manufacturing obligations shall conform to the Specifications. Manufacturer agrees that the Products are biodegradable, non-toxic, non-flammable, non-carcinogenic, and non-hazardous under applicable Laws, and that Big Planet may advertise the Products as safe, non-toxic, all-natural, and bio-degradable. Manufacturer will not change any ingredients or in any way make alterations to the Specifications without first notifying Big Planet of such change. In the event either Manufacturer or Big Planet learns of any issue relating to a potential safety hazard or unsafe condition in any of the Products, or is advised of such by Government Authorities having jurisdiction over such Products, it shall immediately advise the other Party and provide any relevant information

6.3 Manufacturer shall execute a certificate of analysis in a form agreeable to both Parties for each batch/or lot of Products. These certificates of analysis shall be sent with each shipment of Products. The certificates shall confirm that said batch/lot of Products have been tested pursuant to acceptable testing standards for the industry and meet the Specifications set forth herein.

6.4 The Products manufactured by Manufacturer shall not be adulterated within the meaning of any applicable Law.

6.5 Manufacturer shall manufacture all Products ordered by Big Planet hereunder at a processing facility at_____ , or at such other facility as shall be mutually agreed by Big Planet and Manufacturer.

7 INSPECTION AND QUALITY CONTROL.

7.1 Big Planet and its representatives shall have the right, upon giving reasonable notice, during regular business hours, to enter upon and examine the plants and other facilities where the Products are produced, packaged, and stored, and to make any further examination reasonably necessary to properly ascertain whether the Products comply with Specifications. Big Planet may observe and examine all operating methods, quality control procedures, and production and inventory records, relevant to the business conducted pursuant to this Agreement.

7.2 Big Planet shall have the right to inspect such goods and to reject any or all of the Products, which do not conform to the Specifications. Products so rejected may be returned to Manufacturer at its expense. In the event Big Planet receives Products whose defects or nonconformity is not apparent on examination and resulting in deterioration of its finished Products, Big Planet reserves the right to require the replacement as well as payment of damages.

8 RECORD KEEPING.

8.1 Manufacturer shall keep all records required by good manufacturing practices as required by applicable Law and industry standards in the United States.

8.2 Manufacturer shall maintain retained samples of each lot of Products produced under the terms of

this Agreement for as long as reasonably requested by Big Planet.

8.3 Manufacturer shall maintain vendor supplied certificates of analysis with full traceability to Product lots produced by Manufacturer for Big Planet under this Agreement for as long as reasonably requested by Big Planet.

8.4 Manufacturer shall maintain results of all assays conducted on both raw material and components utilized in the production of the Products and shall maintain said records for as long as reasonably requested by Big Planet.

8.5 If required by Big Planet, Manufacturer shall provide all documentation in the form required for international product registration of the Products. Documents required may include, but not be limited to quality certificates and analytical methodology; however, nothing herein will be construed as requiring the Manufacturer to disclose the formulas to the Products.

9 TRAVEL

9.1 In the event Big Planet requests that a representative of Manufacturer travel on behalf of Big Planet, Big Planet shall reimburse Manufacturer for air fare, ground transportation, lodging and meals pursuant to its travel policy, as may be amended from time to time. Big Planet will not be required to reimburse Manufacturer for travel expenses that are non-compliant with its travel policy.

10 REPRESENTATIONSAND WARRANTIES.

10.1 Manufacturer Representations and Warranties. Manufacturer represents and warrants that:

10.1.1 Organization, Authority and Qualification. Manufacturer is a corporation duly organized, validly existing and in good standing under the laws of the State of Tennessee, and has all necessary corporate power and authority to enter into this Agreement, to carry out its obligations hereunder and to consummate the transactions contemplated hereby. Manufacturer is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the properties owned or leased by it or the operation of its business makes such licensing or qualification necessary. The execution and delivery by Manufacturer of this Agreement, the performance by Manufacturer of its obligations hereunder, and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action. This Agreement has been duly executed by an authorized officer of Manufacturer, and constitutes a legal, valid and binding obligation of said party, enforceable against said party in accordance with its terms.

10.1.2 No Conflict. The execution, delivery and performance of this Agreement by Manufacturer does not and will not (i) violate, conflict with or result in the breach of any provision of the charter or bylaws (or similar organizational documents) of Manufacturer, (ii) conflict with or violate any Law, regulation, statute, ordinance or other requirement of law of any Government Authority or Governmental Order of any jurisdiction applicable to Manufacturer, any of its Affiliates, or the assets, properties or business of Manufacturer, and its Affiliates, or (iii) conflict with, result in any breach of, constitute a default, or require any consent or approval (or an event which with the

giving of notice or lapse of time or both would become a default) under any note, bond, mortgage, deed of trust, indenture, contract, agreement lease, sublease, license, sublicense, permit, franchise or other instrument or arrangement to which Manufacturer, or any of its Affiliates is a party to, or which would materially affect Manufacturer's ability to perform its obligations hereunder; and there is no other outstanding agreement by Manufacturer granting to any other Person a right to make, use or sell Products in the Direct Sales Channel anywhere in the world.

10.1.3 No Litigation. There are no Actions by or against Manufacturer, or any Affiliate of Manufacturer or the Products, or in any way affecting the business of Manufacturer, pending before or threatened to be brought by or before any Governmental Authority other than the collection of customer accounts carried out in the ordinary course of business.

10.1.4 Functionality of Products. All of the Products described in Schedule 1.14, when manufactured, shall be ready for market and will perform functionally as described in this Agreement and any and all marketing literature of Manufacturer. The Products shall conform to the promises, descriptions and statements of fact made on the containers and labels of the Products. The user documentation furnished by Manufacturer is compatible with the Manufacturer's Products.

10.1.5 Compliance with Laws. Manufacturer and its Affiliates have conducted and continue to conduct their business in compliance with all Laws and Governmental Orders, and neither Manufacturer nor any of its Affiliates is in material violation of any Law or Governmental Order, and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against any of them alleging any failure so to comply. Manufacturer has obtained and currently possesses all material licenses, permits, certificates, authorities and approvals necessary to operate its business as currently conducted including, without limitation, all required licenses, permits, certificates, approvals and authorities.

10.1.6 Manufacturing Agreement/Intellectual Property.

10.1.6.1 Manufacturing Agreement. Manufacturer shall manufacture the Products at a facility that it owns, leases or has the legal right to use, or has a valid and binding agreement in place with a third party for the manufacturing of the Products. Manufacturer has a sufficient inventory of raw materials necessary to manufacture the Products or has valid and binding agreements in place with reliable suppliers of the raw materials intended to be used by Manufacturer or necessary for, or otherwise material to the manufacture of the Products to be provided hereunder. Manufacturer has, and shall maintain during the term and any renewal term of this Agreement, the capability to manufacture package and deliver to Big Planet Minimum Purchase Orders of the Products.

10.1.6.2 Intellectual Property. All copyrights, trademarks, service marks, trade names, patents, trade secrets and other intellectual and proprietary rights necessary to conduct Manufacturer's business as presently operated, to use the Formula in the production of the Products, and manufacture the Products to be provided hereunder, including, without limitation, all intellectual and other

proprietary rights to its products, is owned by Manufacturer, properly licensed by Manufacturer pursuant to a valid license or in the public domain, and no such license will expire during the term of this Agreement or is of such a nature that it can be readily obtained from another source. Neither Manufacturer nor any of its Affiliates is infringing upon the intellectual and proprietary rights of any other party, and there is no claim or action by any person, pending or threatened, alleging any such infringement. The Formula used to provide the Products offered by Manufacturer is proprietary to Manufacturer, and no other person has the right to use such Formula.

10.1.7 Full Disclosure. Manufacturer is not aware of any facts which pertain specifically to it or any Affiliate, their business, or the Products or any other matter affecting them which could reasonably be expected to have a material adverse affect on (i) the ability of Big Planet to market the Products, and (ii) the business of Manufacturer or its ability to provide the Products hereunder. No representation or warranty of Manufacturer set forth in this Agreement, nor any written statement or certificate furnished or to be furnished to Big Planet contains or will contain any untrue statement of fact, or omit or will omit to state a material fact necessary to make the statements contained herein or therein, taken as whole and light of the circumstances under which they were made, not misleading.

10.1.8 Products. The Products, under the provisions of such Laws, may be lawfully shipped and/or sold in interstate commerce and conform in all respects to the requirements of such laws, and the rules and regulations issued pursuant thereto. In the event a breach of this provision, Big Planet may return such Products to Manufacturer and Manufacturer shall assume all cost of transportation and handling both ways and reimburse Big Planet for any such cost paid by Big Planet.

10.1.9 All materials, ingredients, supplies, and packaging materials utilized in the manufacture of Products sold hereunder shall be delivered to Big Planet in a condition of merchantable quality, free from defect in materials, workmanship, manufacture and fit for their intended use. The Products are biodegradable, non-toxic, non-flammable, non-carcinogenic, and non-hazardous under applicable Laws. The Products may be advertised as safe, non-toxic, all natural, and biodegradable. The Products, and each article comprising each Unit, shall not bear or contain any additive, pesticide, or other substance as of the date of such delivery which makes the Product unsafe for use as intended by this Agreement. The Products shall be of the same grade and quality as similar products marketed by the Manufacturer under same or similar name of "J.M. Henry and Company" or "Primo International."

10.2 Big Planet Representations and Warranties. Big Planet represents and warrants that:

10.2.1 Organization, Authority and Qualification. Big Planet is a corporation duly organized, validly existing and in good standing under the laws of the Delaware, and has all necessary corporate power and authority to enter into this Agreement, to carry out its obligations hereunder and to consummate the transactions contemplated hereby. Big Planet is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the properties owned or leased by it or the operation of its business makes such licensing or qualification necessary. The execution and delivery

by Big Planet of this Agreement, the performance by Big Planet of its obligations hereunder, and the consummation of the transactions contemplated hereby have been duly authorized by all necessary corporate action. This Agreement has been duly executed by an authorized officer of Big Planet, and constitutes a legal, valid and binding obligation of Big Planet, enforceable against such party in accordance with its terms.

10.2.2 No Conflict. The execution, delivery and performance of this Agreement by Big Planet do not and will not (i) violate, conflict with or result in the breach of any provision of the charter or bylaws (or similar organizational documents) of Big Planet, (ii) conflict with or violate any Law, regulation, statute, ordinance or other requirement of law of any Government Authority or Governmental Order of any jurisdiction applicable to Big Planet, its Affiliates or its assets properties or business, including without limitation to the business to be performed under this Agreement and the business to be transferred to Big Planet hereunder in such a manner which would have a material adverse affect on its business or assets, or (iii) conflict with, result in any breach of, constitute a default, or require any consent or approval (or an event which with the giving of notice or lapse of time or both would become a default) under any note, bond, mortgage, deed of trust, indenture, contract, agreement lease, sublease, license, sublicense, permit, franchise or other instrument or arrangement to which Big Planet or any of its Affiliates is a party that would materially affect Big Planet's ability to perform under this Agreement.

10.2.3 Intellectual Property. All copyrights, trademarks, service marks, trade names, patents, trade secrets and other intellectual and proprietary rights material to Big Planet's business as presently conducted is owned by Big Planet, properly licensed by Big Planet or in the public domain. Neither Big Planet nor its Affiliates is infringing upon the copyrights of any third party which could reasonably be expected to have a material adverse affect on the business of Big Planet.

10.2.4 Full Disclosure. Big Planet is not aware of any facts which pertain specifically to it, or any Affiliate, their business or any other matter affecting them which could reasonably be expected to have a material adverse affect on (i) the ability of Big Planet to market the Products, and (ii) the business of Big Planet or its ability to perform its obligations under the Agreement. No representation or warranty of Big Planet set forth in this Agreement, nor any written statement or certificate furnished or to be furnished to Manufacturer contains or will contain any untrue statement of fact, or omit or will omit to state a material fact necessary to make the statements contained herein or therein, taken as whole and light of the circumstances under which they were made, not misleading.

11 RETURNS. Manufacturer shall not be obligated to accept any returns of Products from Big Planet unless such Products are defective.

12 INDEMNIFICATION.

12.1 Manufacturer's Indemnity. Manufacturer shall indemnify and hold harmless Big Planet and its Affiliates, and each of its respective directors, employees, stockholders, agents, and its customers from and against any and all liabilities, losses, claims, damages, costs, expenses,

interest, awards and judgments, including but not limited to expenses of investigation, settlement, litigation, and attorney's fees incurred in connection therewith, (including, but not limited to, costs and attorneys' fees but excluding any amounts recovered by an indemnified party from any third-party insurer for such liability), arising out of resulting from or relating to: (i) any breach of any representation or warranty made by Manufacturer under this Agreement; (ii) any personal injury or wrongful death claims on the Products in connection with the use, manufacture, sale or distribution of the Products; (iii) from all consumer claims arising from the use of the Products; (iv) any infringement, alleged infringement, violation, or alleged violation by the Products, Formula, or any other intellectual property provided hereunder of any patent, copyright, trademark, trade secrets or other proprietary right of any third party; (v) any infringement, alleged infringement, violation, or alleged violation by Product packaging, labeling or package insert material or modification made by Manufacturer unless requested by Big Planet; or (vi) Manufacturer's misbranding, which results in the Products not conforming to the label information furnished by Big Planet to Manufacturer. In the event any claim is asserted or any suit or action brought or which Manufacturer may be required to indemnify Big Planet, its Affiliate or its customers under this Agreement, Big Planet shall promptly notify Manufacturer of such claim or suit, Manufacturer upon receipt of such notice, shall undertake in conjunction with Big Planet (if Big Planet desires) the defense of such suit for the settlement of any such claim at Manufacturer's own cost and expense.

12.2 Big Planet's Indemnity. Big Planet shall indemnify and hold harmless Manufacturer and its Affiliates, and each of its respective directors, employees, stockholders, agents, and its customers from and against any and all liabilities, losses, claims, damages, costs, expenses, interest, awards and judgments, including but not limited to expenses of investigation, settlement, litigation, and attorney's fees incurred in connection therewith, (including, but not limited to, costs and attorneys' fees but excluding any amounts recovered by an indemnified party from any third-party insurer for such liability), arising out of , resulting from or relating to: (i) any breach of any representation or warranty made by Big Planet under this Agreement; (ii) from all consumer claims arising from the use of the Products if the cause is the result of the sole negligence of Big Planet; or (iii) any infringement, alleged infringement, violation, or alleged violation by the Big Planet Trademarks, or any other intellectual property provided hereunder of any patent, copyright, trademark, trade secrets or other proprietary right of any third party. In the event any claim is asserted or any suit or action brought or which Big Planet may be required to indemnify Manufacturer, or its Affiliate's under this Agreement, Manufacturer shall promptly notify Big Planet of such claim or suit, Big Planet upon receipt of such notice, shall undertake in conjunction with Manufacturer (if Manufacturer desires) the defense of such suit for the settlement of any such claim at Big Planet's own cost and expense.

13 CONFIDENTIALITY.

13.1 Neither Party shall disclose nor appropriate to its own use, or to the use of any third party at any time during or subsequent to the term of this Agreement, any Confidential Information of the other except to employees or agents who require the same for purposes of performing under this Agreement, without the prior written consent of the disclosing Party. The Parties agree to take every reasonable precaution to prevent the unauthorized disclosure of Confidential Information to any third party.

13.1.1 The obligations set forth in this paragraph shall not apply to any information which:

13.1.1.1 Is or becomes part of the public domain through no act of the disclosing Party; or

13.1.1.2 Is or may be rightfully or legally disclosed subsequent to the receipt thereof from the disclosing Party by a third party not having a confidential relationship to the disclosing Party with respect thereto; or

13.1.1.3 The receiving Party can demonstrate by written proof was known to it, other than through disclosure by a third party not having a confidential or fiduciary relationship to disclosing Party with respect thereto, prior to gaining access to the Confidential Information.

13.2 The Parties hereby acknowledge that unauthorized disclosure or use of the Confidential Information will cause substantial and irreparable injury to the disclosing Party, that money damages will not adequately compensate for such injury, and that the disclosing Party is entitled to, among other remedies, immediate injunctive and other equitable relief for any breach of this paragraph.

13.3 Manufacturer agrees that its relationship as a manufacturer for Big Planet is confidential and that it will take all necessary steps to ensure that all employees or agents who require information regarding the relationship with Big Planet are advised of and shall protect the confidentiality thereof and shall not disclose said relationship nor discuss the relationship with a third party, including Big Planet's Representatives, without the express prior written consent of Big Planet.

14 INSURANCE

14.1 Manufacturer will maintain comprehensive and general business liability insurance coverage, including product liability, with a carrier rated A or better by the Best Key Rating Guide and listing Big Planet as an additional insured on the policy. The policy shall include Statutory Workers' Compensation, Employer's Liability, Product Liability and Comprehensive Commercial General Liability in an amount not less than $2,000,000.00 per occurrence and $3,000,000.00 in the aggregate. Manufacturer shall furnish Big Planet with a certificate of insurance evidencing the above coverages prior to commencement of any production hereunder. Such certificate shall contain a clause for notification of Big Planet ten (10) days in advance of any cancellations or change in coverage.

14.2 Certificates of insurance shall be mailed to the address set forth on the first page of this Agreement to the attention of Big Planet Legal Department.

15 RELATIONSHIP BETWEEN THE PARTIES.

15.1 Nothing in this Agreement shall be construed to create an agency, partnership, joint venture, or other similar relationship between Manufacturer and Big Planet. Manufacturer is an independent contractor. Accordingly, neither Party shall be liable for any debts, accounts, obligations or other liabilities or torts of the other Party, or its agents or employees, except as this Agreement may otherwise expressly provide.

16 EVENTS FOLLOWING TERMINATION.

16.1 The following shall occur upon the expiration or termination of this Agreement:

16.1.1 All rights and privileges granted to each Party under this Agreement shall immediately cease and terminate; provided, however, that Big Planet shall have twelve (12) months to sell out its inventory of stock on hand.

16.1.2 Manufacturer shall discontinue the use of Trademarks of Big Planet and any items bearing Trademarks of Big Planet; and

16.1.3 Any indebtedness of either Party to the other not already due shall become immediately due and payable as of the effective date of termination of this Agreement for any reason. In no event shall either Party be liable for any debts of the other Party to its customers or its other creditors, except as otherwise provided in this Agreement.

16.1.4 The following sections of this Agreement shall survive termination of this Agreement: 3 6.2, 7.2, 10.1.4, 10.1.8, 10.9, 11, 12, 13, 16, 17.1, 17.9, and 17.16 and any other provisions, or parts thereof, which, by their nature, should survive cancellation, termination, or expiration shall also survive.

17 GENERAL.

17.1 **Alternative Dispute Resolution (ADR).** In the event of a dispute between the Parties arising out of or related to this Agreement the Parties shall set up an initial negotiation meeting to negotiate, in good faith, a settlement of the dispute. If, within thirty (30) days after such meeting, the Parties have not succeeded in settling the dispute, they shall submit the dispute to mediation in accordance with the procedures of a mutually acceptable neutral ADR provider not affiliated with either Party. If the Parties are not successful in settling the dispute within thirty (30) days after the mediation session, then the dispute shall be submitted to binding arbitration under a mutually agreed to organization not affiliated with either Party. The Parties shall share equally the cost of any mediator or ADR provider and the costs of any arbitration process in the event of any legal action or arbitration. Each Party shall be responsible for its own attorney's fees and costs associated with any mediation or arbitration. Notwithstanding the foregoing, either party may bring an action for injunctive or equitable relief in a court of law. The Parties acknowledge and agree that any limitation of liability between Parties as to punitive damages, as set forth in this paragraph, shall not apply to the indemnification provisions of Section 11 pertaining to claims of third parties that result from injury, damage or death to an ultimate user or other person caused by the Products sold by the Manufacturer to Big Plant. SUBJECT TO THE PRECEDING SENTENCE, THE ARBITRATOR SHALL NOT AWARD ANY PARTY PUNITIVE, EXEMPLARY, INDIRECT, MULTIPLIED OR CONSEQUENTIAL DAMAGES, AND EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT TO SEEK SUCH DAMAGES.

17.2 **Assignment.** Neither this Agreement, nor any right or interest herein may be assigned by either Party without the express written consent of the other Party except as otherwise provided for in this Agreement; provided, however, that Big Planet may assign this Agreement to an Affiliate without the consent of Manufacturer, provided that Big Planet remains responsible to Manufacturer under the terms of this Agreement.

17.3 **Authorship.** This Agreement has been reviewed by attorneys representing the respective

Parties and therefore shall not be construed in favor of or against any Party hereto based on the sole or primary authorship of this Agreement being the work of one Party hereto.

4 **Counterparts.** This Agreement may be executed in several counterparts each of which so executed shall be deemed to be an original, and in each case such counterpart shall constitute but one and the same instrument. This Agreement may also be executed in several facsimile counterparts each of which so executed shall be deemed to be an original, and in each case such facsimile counterpart shall constitute but one and the same instrument; however, at the request of Big Planet, the Parties agree to execute an original hard copy of the same date after the facsimile counterparts have been executed.

5 **Effect of Invalidity.** The invalidity of any portion of this Agreement will not and shall not be deemed to affect the validity of any other provision. In the event that any provision of this Agreement is held to be invalid, the Parties agree that the remaining provisions shall be deemed to be in full force and effect as if they had been executed by both Parties subsequent to the expungement of the invalid provision.

6 **Entire Agreement.** This Agreement, in combination with the purchase orders issued pursuant hereto, represent the entire agreement between Big Planet and Manufacturer and supersedes all their prior oral and written arrangements and agreements. This Agreement may not be modified or amended, except by further written instrument or by an amendment to this Agreement signed by each of the Parties hereto.

7 **Exhibits and Schedules.** Any reference to a Schedule or Exhibit shall refer to a Schedule or Exhibit to this Agreement unless the context clearly provides otherwise. All Schedules and Exhibits are incorporated by reference into this Agreement and shall be binding upon the Parties except as otherwise expressly provided in this Agreement or the Schedule or Exhibit. No Schedule or Exhibit may be amended without the written consent of the other Party.

8 **Force Majeure.** Failure of either Party to perform any of the provisions of this Agreement by reason of any of the following shall not constitute an event of default or breach of this Agreement: strikes, picket lines, boycott efforts, fires, floods, accidents, war (whether or not declared) revolution, riots, insurrections, acts of God, acts of government (including without limitation any agency of department of the United States of America), acts of the public enemy, scarcity or rationing of gasoline or other fuel or vital products, inability to obtain materials or labor, or other causes which are reasonably beyond the control of the defaulting Party.

9 **Governing Law.** The validity of this Agreement and the interpretation and performance of all of its terms shall be governed by the substantive and procedural laws of the State of Utah. Each Party expressly submits and consents to exclusive personal jurisdiction and venue in the courts of Utah County, State of Utah or in any Federal District Court in Utah.

10 **Headings.** Section headings are for convenience only and are not to be construed as part of this Agreement.

11 **Incorporation of Recitals.** The Recitals set forth above are incorporated herein by this reference.

12 **Notices.** Any such notice or demand, required or permitted by Law, or by provision in this

Agreement, shall be made in writing, and shall be served either by personal delivery, by certified mail, by overnight delivery, or by electronic or facsimile communication with a confirming copy sent by mail, return receipt requested. When served by certified mail, service shall be deemed to have been made when three business days after deposit in the regular receptacle of the United States Postal Service and addressed to the Parties at the addresses set forth above. When serviced by personal delivery or overnight delivery, service shall be deemed to have been made on the date of such delivery. When served by electronic communication, the notice shall be effective on the date sent. Any Party may, upon written notice to the other, change its address for such mailing. The addresses and telephone numbers for purposes of this paragraph are as follows:

Big Planet, Inc.
75 West Center Street, Suite 200
Provo, UT 84601
Attention: Jack Peterson
With a copy to the attention of the
General Counsel at the same address

J.M. Henry and Company, Inc.
1915 Primo Lane
McEwen, TN 37101
Attn: Jim Henry

17.13 **No Waiver.** Any failure by either Party hereto to exercise any of its rights hereunder shall not be construed as a waiver of such rights, nor shall any such failure preclude exercise of such rights, nor shall any such failure preclude exercise of such rights at any later time.

17.14 **Plural Terms.** Feminine or neuter pronouns shall be substituted for those of masculine form or vice versa and the plural shall be substituted for the single number or vice versa in any place or places in which the context may require such substitution.

17.15 **Publicity.** Neither Party shall publicize the existence of this Agreement, including any sales promotions, advertising, use of each other's name, logos or Trademarks, without the written consent of the other. All press release materials shall be jointly reviewed and approved before distribution.

17.16 **Taxes.** Any and all taxes, excises, assessments, levies, imports, duties, costs, charges, and penalties, which may be assessed, levied, demanded, or imposed by any governmental agency in connection with this Agreement, shall be paid by the Party upon which they are imposed and shall be the sole obligation of such Party.

In Witness Whereof, the Parties have executed this Agreement effective the day and year first above written.

J.M. HENRY AND COMPANY, INC.

By: J.M. Henry
Its: President

BIG PLANET, INC.

By: Jack Peterson
Its: COO

G:con11/J.M. Henry Manufacturing Agreement/7-10-01/saj

TTAB

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

In the Matter of Application Serial No. 78/180,241
Published in the *Official Gazette* on July 22, 2003
Trademark: **ECOSPHERE**

J&J Technology, LLC, Opposer, v. Big Planet, Inc., Applicant.	Opposition No.: 91158317

Box TTAB, NO FEE
Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514

05-10-2004
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #22

TRANSMITTAL LETTER

Dear Sir or Madam:

We are attorneys representing Big Planet, Inc. Enclosed is a MOTION FOR SUSPENSION OF OPPOSITION DUE TO PENDING CIVIL ACTION IN FEDERAL COURT.

Please address all correspondence to me at the address below. Please stamp the enclosed postcard to evidence your receipt of this document.

Respectfully submitted,
HELLER EHRMAN WHITE & McAULIFFE LLP

Dated: May 7, 2004

By: _____

Beth M. Goldman
Todd E. Adler
333 Bush Street
San Francisco, California 94104
(415) 772-6555