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

Proceeding	91267067
Party	Defendant Vampire Family Brands, LLC
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Submission	Motion to Suspend for Civil Action
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Opposition Proceeding Number 91267067, Regarding Trademark Application No: 90067102

MPL BRANDS NV, INC.)	Opposition No. 91267067
)	
Opposer)	Motion to Suspend
v.)	Proceeding
)	
VAMPIRE FAMILY BRANDS, LLC.)	
)	
Applicant)	

MOTION TO SUSPEND

Applicant, Vampire Family Brands, LLC. (“VAMPIRE FAMILY BRANDS”) , moves the Board to suspend this proceeding pursuant to 37 C.F.R. § 2.117(a). As grounds for this motion, Applicant states that there currently exists a lawsuit between the same two parties in this Opposition Proceeding in which VAMPIRE FAMILY BRANDS, LLC has sued Opposer and other parties, and in which Opposer has raised the same issue of genericness in a Motion to Dismiss.

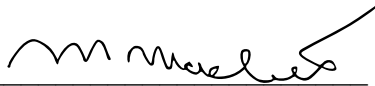
That lawsuit is entitled, *Vampire Family Brands, LLC v. MPL Brands, Inc., MPL Brands, NV, Inc. d/b/a Patco Brands, et al.* (Case No. 2:20-cv-09482) which was filed in the United States District Court for the Central District of California.

Respondent submits that the district court case will be dispositive of this opposition proceeding because the resolution of Opposer's genericness defense in the district court will be determinative of the issue of fraud on the USPTO. That is so because Opposer's claim of fraud is based entirely on its erroneous claim of genericness. Therefore for reasons of judicial economy and as required by 37 C.F.R. § 2.117(a), Applicant requests the Board to suspend proceedings until termination of the civil action.

A copy of both the aforementioned Complaint and Opposer's Motion to Dismiss are attached hereto.

Respectfully submitted for Vampire Family Brands, LLC
MACHAT & ASSOCIATES, P.C.

DATED: January 20, 2020

By: 

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 12

13 **IN THE UNITED STATES DISTRICT COURT**
 14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
 15 **WESTERN DIVISION**
 16

18	VAMPIRE FAMILY BRANDS, LLC,)	CIVIL ACTION NO.
19	Plaintiff,)	COMPLAINT FOR TRADEMARK
20	vs.)	INFRINGEMENT, UNFAIR
21	MPL BRANDS, INC., MPL BRANDS)	COMPETITION;
22	NV, INC. d/b/a PATCO BRANDS,)	DILUTION/TARNISHMENT;
23	AND PYRAMID INC.)	FALSE ADVERTISING; AND
24)	UNFAIR BUSINESS PRACTICES
25	Defendants.)	JURY TRIAL DEMANDED

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1 **COMPLAINT FOR TRADEMARK INFRINGEMENT; UNFAIR**
2 **COMPETITION; DILUTION/TARNISHMENT, FALSE ADVERTISING**
3 **AND UNFAIR BUSINESS PRACTICES**

4 Plaintiff VAMPIRE FAMILY BRANDS, LLC hereby alleges and asserts:

5
6 **I. JURISDICTION AND VENUE**

7 1. Plaintiff brings this action for injunctive relief and damages arising
8 out of the unauthorized, unfair, and deceptive competitive practices of Defendant,
9 in connection with the commercial use and exploitation of trademarks in violation
10 of the Lanham Act.

11 2. This action arises under the Trademark Laws of the United States,
12 including particularly, Sections 43 of the Lanham Act, 15 U.S.C. §1125 and 1114.
13 Jurisdiction is conferred on this Court by 15 U.S.C. Section 1121(a), by 28 U.S.C.
14 Section 1338(a), in that this case arises under the Trademark Laws of the United
15 States, 15 U.S.C. Sections 1051, *et seq.*, and by principles of pendent jurisdiction.
16 Venue is proper in this District under 28 U.S.C. §§ 1391(b) by virtue of the fact
17 that a substantial part of the events giving rise to the acts complained of herein
18 occurred in this District.

19 **II. THE PARTIES**

20 3. Plaintiff VAMPIRE FAMILY BRANDS, LLC (“VAMPIRE
21 FAMILY BRANDS”) is a Delaware Limited Liability Company with its main
22 business office located in Los Angeles County, California.

23 4. According to its website, Defendant MPL Brands NV, Inc. d/b/a Patco
24 Brands (“Patco Brands”) is a family owned and operated import, distribution,
25 marketing and sales company of a business type unknown that does business
26 throughout California, with substantial sales in Los Angeles, California.

27 5. Defendant MPL Brands, Inc (“MPL”) is upon information and belief,
28 a California Corporation, that does business throughout the United States and

1 throughout California. Upon information and belief Defendants MPL and Patco
2 Brands (collectively referred to herein as “Patco”) are affiliates of one another.
3 Upon information and belief, MPL owns and/or controls Patco Brands, and/or
4 MPL and Patco Brands are under common ownership and/or control, and
5 Defendants MPL and Patco Brands are alter egos of each other.

6 6. Defendant Pyramid Inc (“Pyramid”) is a California corporation that
7 does business as Ramirez Liquor and, upon information and belief, has three stores
8 in Los Angeles county. Upon information and belief, Pyramid is a customer of
9 Patco, and purchases the accused product from Patco.

10 7. At all times herein mentioned, Plaintiff is informed and believes and
11 based thereon alleges that, at all times herein mentioned, each of the defendants
12 sued herein, were the agents, servants, employees or attorneys of their co-
13 defendants, and in doing the things hereinafter alleged were acting within the
14 purpose, course and scope of such agency and employment, and with the authority,
15 permission and consent of their co-Defendants.

16 **III. FACTS GIVING RISE TO THIS ACTION**

17 **A. False Association**

18 8. Plaintiff VAMPIRE FAMILY BRANDS via its predecessors in
19 interest has been marketing food and beverages under the following brand names
20 for many years, including: VAMPIRE (for wines – US Trademark Registration
21 No. 2263907); DRACULA (for wine – US Trademark Registration No. 3319536);
22 VAMPYRE (for Spirits – US Trademark Registration No. 3082097); VAMPIRE
23 (for chocolate and coffee - US Trademark Registration No. 3669827) VAMPIRE
24 for Olive oil and Balsamic vinegar – US Trademark Registration No. 4776927);
25 VAMP H20 (for Water – US Trademark Registration No. 3895288); VAMPIRE
26 (for Restaurant and Bar Services – US Trademark Registration No. 3978444);
27

1 VAMPIRE (for Glass beverage-ware -- US Trademark Registration No. 3290011);
2 and VAMPIRE TACO (for Tacos – US Trademark Registration No. 4939034).

3 9. By virtue of its extended use in commerce, several of the
4 aforementioned registrations have become incontestable, including its registration
5 numbers 2263907, 3082097, 3290011, 3319536, 3669827, and 3978444

6 10. VAMPIRE FAMILY BRANDS also is the owner of the slogans
7 TASTE OF IMMORTALITY and SIP THE BLOOD OF THE VINE, (TM
8 Registrations 3167606 and 3079403, respectfully.) Both of these marks also have
9 become incontestable.

10 11. The origin of Vampire wine, and VAMPIRE FAMILY BRAND’s
11 claim of right goes back to 1988, when its founder released a French bottled
12 Algerian Syrah under the brand name Vampire. The first sale was to MCA
13 Records and Alice Cooper, and the wine was promoted under the slogan, “Sip the
14 Blood of the Vine.” Vampire Family Brand’s predecessors in interest began to use
15 the slogan “Taste of Immortality” by at least 1995, if not earlier. Although the
16 labels have changed over the years, along with the sourcing from Algeria to Italy to
17 Transylvania and finally to Napa, the marketing has remained playful.

18 12. As the source of Plaintiff’s wine shifted from Transylvania, Romania
19 to Napa, California, Plaintiff’s marketing evolved to emphasize that the quality of
20 the wine was actually extremely good, with Vampire wine having won numerous
21 gold medals throughout the years and winning scores of 90 Points and higher.

22 13. Plaintiff via its predecessors’ in interest expanded its wine and spirits
23 business into gourmet quality foods, including Vampire Fine Belgian Chocolate
24 and Vampire Gourmet Coffee (US Reg. No. 3669827) and Vampire Gourmet
25 Olive Oil and Vampire Gourmet Balsamic Vinegar (US. Reg. No. 4776927.)

26 14. Plaintiff has expanded into restaurant services (US Reg. No.
27 3978444), and Plaintiff actively licenses its VAMPIRE TACO mark (US. Reg. No.
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1 4939034) to a chain of approximately 70 restaurants that make a fantastic tasting
2 taco branded as Vampire Taco.

3 15. Plaintiff's natural zone of expansion includes other foods and
4 beverages, such as hot sauce, barbecue sauce, hamburgers, beers, and other
5 restaurant venues. Plaintiff has plans for each of these.

6 16. Plaintiff is also the owner of the US Registration No. 5444375 for the
7 word mark VAMPIRE for Pre-mixed alcoholic beverages, other than beer based,
8 and Prepared Alcoholic Cocktails. Plaintiff has a great tasting Gourmet Bloody
9 Mary cocktail, that it markets as its VAMPIRE Gourmet Bloody Mary Cocktail.

10 17. Plaintiff's VAMPIRE family of brands are available for the world to
11 see on its website VAMPIRE.COM and the U.S. Patent and Trademark Office, and
12 Plaintiffs' family of VAMPIRE Brands have received coverage in various national
13 magazines and newspapers, including Maxim, InStyle, Elle, Shape, Star Magazine,
14 the New York Times, the LA Times, the Houston Chronicle, The Star Tribune, The
15 Chicago Sun Times, and many more. In addition, Plaintiffs' VAMPIRE family of
16 brands have been shown on various national television shows, such as The View
17 with Oprah Winfrey, Anderson Cooper for approximately five minutes with
18 Ashley Greene from Twilight fame, CNN Headline News, MTV's Viva La Bam,
19 Food TV, and many more.

20 18. In 2017 Plaintiff began selling VAMPIRE Gourmet Bloody Mary
21 Cocktails in a can which are designed to be the go-to ready to drink premixed
22 bloody Mary, perfect for busy bars, outdoor venues, picnics, and anyone on the go
23 wanting a gourmet ready to drink bloody Mary cocktail.

24 19. Plaintiff also markets and sells wine branded as DRACULA and has
25 been doing so for more than a dozen years. Plaintiff is the owner of US Trademark
26 Registration No. 20070618 for Dracula for wine.

1 20. Recently, Plaintiff learned that defendants are unlawfully marketing
2 and selling a mixed alcoholic cocktail branded as VAMPIRO. Pictures of
3 defendant's VAMPIRO alcoholic cocktail in a can are attached as Exhibit A. The
4 accused cans of alcohol shown in Exhibit A were purchased in Los Angeles
5 County.

6 21. Notably, besides infringing upon Plaintiff's VAMPIRE family of
7 marks, defendant's packaging deceptively claims to be made from 100% Blue
8 Agave – a rare and expensive plant from which tequila is made from, giving the
9 false impression that the accused product is made from this natural ingredient.

10 22. In fact, the only natural ingredient in the accused product is water and
11 perhaps cane sugar. The front part of the can says the accused product is a fizzy
12 grapefruit cocktail with citrus and spice; yet no grapefruit nor citrus product is
13 listed as an actual ingredient – just natural flavors instead. The imitation flavoring
14 tarnishes plaintiff's VAMPIRE family of brands reputation for making gourmet
15 products. Plaintiff's VAMPIRE Gourmet Bloody Mary for example is made from
16 actual tomatoes – and not natural flavors.

17 23. Pyramid sells the accused VAMPIRO in its Los Angeles stores.
18 Defendant Pyramid has also sold Plaintiff's authentic VAMPIRE BLOODY
19 MARY COCKTAIL.

20 24. Plaintiff markets its brands through a national network of wholesalers,
21 and via the website: www.vampire.com. VAMPIRE wine sells for anywhere
22 between \$10 to \$15 per bottle nationally at retail stores. VAMPIRE wine is also
23 available in bars and restaurants on wine lists.

24 25. Plaintiff and its associates have worked hard to ensure that they put
25 the best wine in the bottle as possible. Over the last few years, Plaintiff's
26 VAMPIRE family of wines have received some great reviews and have won Gold
27 Medals, including Gold Medals at the San Francisco Chronical Wine Competition
28

1 for its VAMPIRE Merlot, VAMPIRE Cabernet Sauvignon, VAMPIRE Pinot Noir,
2 a Gold Medal and 92 Rating from the Los Angeles International Wine & Spirits
3 Competition awarded to VAMPIRE Cabernet Sauvignon, Gold Medals at the
4 Texas International Rodeo Wine Competition, and 92 ratings for its highest end
5 TRUEBLOOD Cabernet Sauvignon.

6 26. Plaintiff has spent substantial amounts of time and money building up,
7 advertising, and promoting its brands. By virtue of the popularity of its brands, its
8 advertising, promotion, and sales, plus the popularity of its websites, including
9 vampire.com, Plaintiff has built up and own extremely valuable goodwill which is
10 symbolized by Plaintiff's various marks.

11 27. Defendant's intentional wrongful acts are harming Plaintiff's brands
12 reputation and are diluting the brands and are disparaging.

13 28. If defendants are not stopped from marketing food and beverages
14 using the VAMPIRO mark or a mark confusingly similar to Vampire (or Dracula),
15 then consumers will likely be confused about the source and origin of defendant's
16 products and services and mistakenly conclude that defendants' products or
17 services are produced by, or associated with Plaintiff and/or its licensees.

18 29. Alternatively, if defendants are not stopped from marketing beverages
19 using the VAMPIRO mark a mark confusingly similar to Plaintiff's VAMPIRE (or
20 DRACULA) marks, then consumers will likely be confused about the source and
21 origin of Plaintiff's (or its licensees') products and services and mistakenly
22 conclude that Plaintiff's (or its licensees') products or services are produced by, or
23 associated with defendants.

24 **B. False Advertising**

25 30. Also, besides defendants' false association of Vampiro described
26 above, defendants also falsely advertise and market their products in other ways.
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1 31. Defendant Patco sells vast amounts of beverages deceptively marked
2 as a ready-to-drink “Margarita” in this District, when in fact there is no tequila
3 contained within its so-called margarita. Margarita’s are made with tequila. In
4 order to save money and profit at the expense of deceiving the public, Patco has
5 elected to falsely call an alcoholic product a Margarita, substituting a foreign
6 substance, i.e., wine, into their so-called margarita.

7 32. A margarita is universally known to be made from tequila. It is an
8 accompaniment to Mexican cuisine and culture. While many may claim they make
9 the best margarita and there may be many ways to make a margarita, it is
10 universally recognized that the one defining and constant ingredient of a margarita
11 is tequila. Patco’s unlawful practice of selling FAKE MARGARITAS is an affront
12 to popular culture and must be stopped. This is in addition to forbidding
13 defendants from selling their deceptively and confusingly marked VAMPIRO
14 counterfeit product. A picture of the FAKE MARGARITAS on display at a
15 popular chain supermarket in Los Angeles is attached as Exhibit B.

16 33. The Patco defendants also deceptively use the word “cocktail” to sell
17 their wine-based beverage products. A “cocktail” is made with distilled spirits. By
18 calling their wine-based products a cocktail, the Patco defendants seek to deceive
19 the consumer into believing their products are a real cocktail.

20 34. Whereas Plaintiff’s Vampire Bloody Mary cocktail is authentic, as it
21 is made from real tomatoes and vodka, defendants margaritas and their infringing
22 unlawfully named VAMPIRO cocktail are not made from spirits, but instead from
23 wine, that the Patco defendants refer to as “agave wine” in print designed to be
24 overlooked by consumers.

25 35. The alcohol tax on distilled spirits is approximately ten times (if not
26 more) the tax on wine. The Patco defendants utilize the tax savings to present fake
27 margaritas and fake cocktails to benefit themselves, deceive the public into
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1 thinking they are consuming an authentic margarita and an authentic cocktail, and
2 unfairly compete with manufacturers of genuine cocktail products, including
3 Plaintiff.

4 36. The Patco defendant's deceptive advertising gives them an unfair
5 competitive advantage against Plaintiff and all other manufactures of alcoholic
6 cocktails who make their products from distilled spirits as they should, because the
7 Patco defendants are able to offer their fake cocktails at prices lower than would
8 ordinarily be the case as a result of their deceptive marketing tactics.

9 37. The Patco defendants' deceptive advertising harms consumers who
10 mistakenly buy defendants fake margaritas and fake cocktails thinking the products
11 were made from tequila or other distilled spirit. Many people do not bother or care
12 to read the fine print, and these people are taken advantage of by the Patco
13 defendants.

14 **COUNT I**
15 **VIOLATION OF LANHAM ACT 15 U.S.C. §1125(a)**

16 38. Plaintiff realleges the allegations in paragraphs 1 though 37.

17 39. Defendants have large resources with which to market and advertise
18 its goods and services. Defendants' resources vastly exceed those of Plaintiff.
19 Consequently, marketing and advertising efforts by Defendants are likely to
20 mislead consumers to believe that Plaintiff's goods and services may be
21 unauthorized use of trademarks that defendants own. If defendants are able to
22 continue their wrongful acts, consumers are likely to be misled to believe that
23 Plaintiff is misusing its *VAMPIRE* marks (*and/or DRACULA* mark).

24 40. Also, Defendants' use of the word VAMPIRO for a premixed
25 cocktail, so closely resembles Plaintiff's products and services (including
26 Plaintiff's VAMPIRE Gourmet Bloody Mary Cocktail) that the public is likely to
27 be confused and deceived, and to assume erroneously that defendants' goods are

1 those of Plaintiff, or that defendants are in some way connected with, sponsored
2 by, or affiliated with Plaintiff, all to Plaintiff's detriment and irreparable damage.

3 41. Defendants are not affiliated with, connected with, endorsed by, or
4 sponsored by Plaintiff, nor has Plaintiff approved or authorized any of the goods or
5 services offered or sold by defendants.

6 42. Plaintiff has no control over the nature and quality of the goods and
7 services offered and sold by defendants or its licensees. Any failure, neglect, or
8 default by defendants or its licensees in providing such products or services will
9 reflect adversely on Plaintiff as being the believed source of said failure, neglect,
10 or default, thereby hampering Plaintiff's efforts to continue to protect its
11 outstanding reputation and preventing Plaintiff from further building its reputation.
12 Said failure, neglect, or default will result in loss of revenue by Plaintiff, and loss
13 of value of Plaintiff's considerable expenditures to promote its goods and services
14 under the VAMPIRE mark, all to the irreparable harm of Plaintiff.

15 43. In fact, defendants marketing of its VAMPIRO alcoholic cocktail
16 interferes with Plaintiff's plans of releasing its own VAMPIRO tequila and
17 VAMPIRO alcoholic cocktails made from tequila.

18 44. Without the knowledge or consent of Plaintiff, Defendants have
19 marketed and sold in interstate commerce, and in commerce substantially affecting
20 interstate commerce, products and services branded under the name VAMPIRO
21 and continue to do so. Defendants have promoted, publicized, advertised, offered
22 for sale, and/or sold, products and services using the VAMPIRO mark through
23 persons not authorized, employed by, or associated in any way with Plaintiff and
24 have used the aforementioned trade name and trademark as a false designation and
false representation for food products.

25 45. None of defendants' activities complained of in this complaint have
26 been authorized by Plaintiff, and such unauthorized use by Defendants of
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1 Plaintiff's trademarks and/or trade names in interstate commerce, commerce
2 substantially affecting interstate commerce in this district, and elsewhere
3 throughout the United States, constitutes infringement and an inducement to
4 infringe Plaintiff's trademarks and/or trade names, and such activities are likely to
5 cause confusion, mistakes, and to deceive the public at large.

6 46. Upon information and belief, Defendants have acted with the
7 unlawful purpose of:

- 8 a. Improperly taking advantage of the valuable goodwill belonging to
9 Plaintiff;
- 10 b. Soliciting Plaintiff's customers and/or potential customers,
11 attempting to sell, and selling to such customers and potential
12 customers, goods and services marketed under the confusingly
13 similar VAMPIRE mark through persons not authorized by,
14 employed by, or associated in any way with Plaintiff;
- 15 c. Inducing others to infringe Plaintiff's trademarks and trade names;
16 and
- 17 d. Causing the goods of persons not authorized by, employed by, or
18 associated in any way with Plaintiff to be falsely represented as if
19 they were rendered, authorized, sponsored by, endorsed by, or
20 otherwise connected with Plaintiff and its licensed trademarks and
21 trade names.

22 47. Defendants' conduct, as alleged in this complaint, constitutes a
23 violation of 15 U.S.C. § 1125(a).

24 48. If Defendants are allowed to continue marketing and selling the
25 accused goods and services, Plaintiff will be damaged as alleged in this complaint,
26 and the Defendants will profit thereby. Furthermore, unless the Court permanently
27 enjoins Defendants conduct as alleged in this complaint, Plaintiff's business,
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1 goodwill, and reputation will suffer irreparable injury of an insidious and
2 continuing sort that cannot be adequately calculated and compensated in monetary
3 damages.

4 49. Defendants have hijacked Plaintiff's trademark. Hijacking Plaintiff's
5 VAMPIRE trademark improved the likelihood that consumers would pick up the
6 accused product in the store and buy it. Highjacking Plaintiff's VAMPIRE mark
7 (and using the Spanish spelling with an "o" instead of an "e" lowered defendants'
8 costs to advertise, market and promote while improving defendants' sales and
9 profits.

10 50. Defendants' aforementioned acts and conduct is being done willfully
11 and with an intent to ride on, and/or step on and demolish, the goodwill Plaintiff
12 has worked hard to develop. Plaintiff is therefore entitled to treble damages arising
13 therefore, disgorgement of defendants' profits, as well as reimbursement of
14 Plaintiff's attorneys' fees and costs.

15 51. The intentional nature of defendant's acts makes this an exceptional
16 case under 15 U.S.C. §1117(a).

17 52. The intentional nature of defendant's acts and conduct makes this a
18 case suitable for an award of Three Times Defendants' profits plus attorneys fees.

19 **COUNT II**

20 **VIOLATION OF LANHAM ACT 15 U.S.C. §1114**

21 **(Against All Defendants)**

22 53. Plaintiff repeats each allegation contained in paragraphs 1 through 52
23 as though set forth herein at length.

24 54. Defendants have engaged in, and continue to engage in, the wrongful
25 exploitation of Plaintiff's registered marks.

26 55. Defendants' goods are so closely related to Plaintiff's goods that the
27 public is likely to be confused, to be deceived, and to erroneously assume that

1 Defendants' marketing and sales of their VAMPIRO canned alcoholic beverage, as
2 packaged, advertised and promoted, are those of Plaintiff, or that Defendants are in
3 some way connected with, sponsored by, or affiliated with Plaintiff, all to
4 Plaintiff's detriment and irreparable damage.

5 56. Defendants are not affiliated with, connected with, endorsed by, or
6 sponsored by Plaintiff. Furthermore, Plaintiff has not approved any of the goods
7 or services offered or sold by Defendants.

8 57. Defendants aforesaid infringing conduct has been willful and with an
9 intent to ride on, and/or step on and demolish, the goodwill Plaintiff has worked
10 hard to develop. Defendants' aforesaid infringing conduct has been willful and
11 with knowledge that the sale, marketing, advertisement, and promotion of their
12 Vampiro branded cocktails will hinder the prospects of future commercial success
13 of Plaintiff's VAMPIRE family of brands, including its further foray into the food,
14 cocktail, spirits and restaurant space. Plaintiff is therefore entitled to treble
15 damages arising therefrom, as well as reimbursement of Plaintiff's attorneys' fees
16 and costs.

17 **COUNT III**

18 **VIOLATION OF LANHAM ACT 15 U.S.C. §1125(c)**

19 **(Against All Defendants)**

20 58. Plaintiff repeats each allegation contained in paragraphs 1 through 57
21 as though set forth herein at length.

22 59. Plaintiff's Vampire family of brands have appeared on The View,
23 Anderson Cooper, CNN Headline News, Entertainment tonight, MTV's Viva La
24 Bam, The Food Channel, A & E, and have been written up in widely circulated
25 magazines such as Star Magazine, Shape, Maxim, InStyle, Elle, Spin, Rolling
26 Stone, Marie Claire, Cosmo Girl, The Wine Enthusiast, and in regional
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1 newspapers such as the LA Times, the NY Times, the Houston Chronicle, and
2 others, and as such have developed a fame all of their own catapulting the Vampire
3 brand into the category of a famous mark.

4 60. Plaintiff's associates and predecessors in interest periodically work
5 with Hollywood film companies and engage in mutually beneficial promotions.
6 For example, Plaintiff's products have been found in the Blade films (starring
7 Wesley Snipes) and HBO's Trueblood Series, and Plaintiff has done promotions
8 connecting its VAMPIRE family of brands to films such as the Underworld series
9 of films (starring Kate Beckinsale) in addition to Blade Trinity, and it has had its
10 wines featured and poured at film premiers, including such as Quentin Tarrantino's
11 *Dusk Til' Dawn* and *Dark Shadows* (starring Johnny Depp.) A sampling of just
12 some of the press talking about Plaintiff's Vampire family of brands is attached as
13 Exhibit C.

14 61. Plaintiff fears that defendants' marketing excursions using the word
15 Vampiro as a mark for goods and services will cause consumers to believe that
16 Plaintiff's VAMPIRE branded wines and bloody Mary cocktail (and other goods
17 and services) are not of as high quality as they actually are and will tarnish, dilute
18 and otherwise damage the reputation of Plaintiff's goods and services. This will
19 lead to irreparable harm to Plaintiff's goodwill, reputation, and sales.

20 62. Plaintiff only uses high quality ingredients in all its VAMPIRE
21 branded products. It offers gourmet products. Plaintiff fears that defendants' use
22 of a cheap tequila imitation to add alcohol to the infringing product will interfere
23 with Plaintiff's ability to attract those producing serious first class Hollywood
24 films to want to do future joint promotions with Plaintiff and its family of
25 VAMPIRE brands.
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COUNT IV

**VIOLATION OF LANHAM ACT 15 U.S.C. §1125(A) FOR FALSE
ADVERTISING**

(Against The Patco Defendants)

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63. Plaintiff repeats each allegation contained in paragraphs 1 through 62 as though set forth herein at length.

64. The Patco defendants deceptive marketing of their products in commercial advertising and promotions, misrepresents the nature, characteristics, qualities, and geographic origin of its alcoholic beverage products.

65. The Patco defendants deceptive and false advertising gives Patco an unfair commercial advantage against their alcohol beverage competitors because the vast cost savings realized by Patco by using “wine” in a fake cocktail or fake margarita allows defendants to sell their imitation products at a cost far lower than would be the case if they sold authentic cocktails and authentic margaritas.

66. Even if a consumer learns that the Patco defendants’ fake cocktails or fake margaritas are made from wine after they pick up the product and read the fine print, at that point the consumer has already engaged with the product and has the product in his or her hand. and may be inclined to put it in the basket anyway and give it a try because of the cost savings. Moreover, on information and belief a substantial portion of the consuming public will not understand the difference between agave wine and a distilled spirit in a “cocktail” and will simply understand it to refer to a form of tequila or mescal. By contrast, if the Patco defendants fake cocktails or fake margaritas informed consumers up front that the product was a “Wine Spritzer” or a “Wine Margarita” like soy-milk says soy up front as opposed to hiding the fact that the milk is made from soy in fine print, then consumers would not so easily pick up the fake margaritas or fake cocktails as there would be

1 at least some type of notice that defendants are not selling a genuine “cocktail”
2 products made with one or more distilled spirits.

3 67. On information and belief, as a result of the false advertising of the
4 Patco defendants consumers are also deceived into buying what turns out to be a
5 surprise. Instead of purchasing a real margarita or a real cocktail, they might come
6 home and eventually realize that they bought instead a “fake” and be reluctant to
7 return it due to the inconvenience associated with that process.

8 68. As such, defendants’ marketing, promotion and sales of its Margartas
9 and cocktails violate the false advertising provisions of 15 USC 1125 (a).

10
11 **COUNT V**

12 **UNFAIR COMPETITION – COMMON LAW, AND CALIFORNIA**
13 **BUSINESS & PROFESSIONS CODE §§ 17200 et seq.**

14 **(Against All Defendants)**

15 69. Plaintiff repeats each allegation contained in paragraphs 1 through
16 68 as though set forth herein at length.

17 70. Defendants has engaged in unfair competition perpetrated against
18 Plaintiff by reason of the conduct alleged herein.

19 71. The unlawful and unfair conduct is injuring the goodwill of Plaintiff.

20 72. Defendants are each liable for the unfair competition, and/or are
21 liable for aiding and abetting such conduct.

22 73. By this conduct, Plaintiff has directly suffered injuries and each
23 Defendant has been unjustly enriched.

24 74. Plaintiff is entitled to restitution, the recovery of damages, and the
25 recovery of the profits earned by Defendants by virtue of their conduct.

26 75. As a consequence of the unfair competition by Defendants, Plaintiff
27
28

1 is suffering irreparable injury, by reason of which such conduct should be
2 enjoined.

3 76. Plaintiff is informed and believes, and on that basis allege, that the
4 aforementioned conduct of Defendants is willful, oppressive, fraudulent, and
5 malicious, and Plaintiff is therefore entitled to punitive damages.

6 77. Pursuant to California Business & Professions Code § 17203, Plaintiff
7 is therefore entitled to:

8 a. An Order requiring defendants to cease the acts of unfair competition
9 alleged herein.

10 b. An Order enjoining defendants from continuing to deceptively use the
11 words “margarita” and “cocktail” in the future.

12
13 c. Full restitution of all monies paid by consumers and retailers who
14 thought they were buying products made from tequila (with respect to margaritas)
15 and/or from distilled spirits (with respect to cocktails – other than tequila based)
16 received by defendants.

17 d. Interest at the highest rate allowable by law; and

18 e. The payment of Plaintiff’s attorneys’ fees and costs under, among
19 other provisions of law, Code Civ. Pro. § 1021.5, or otherwise to the extent
20 permitted by law.

21
22 **COUNT VI**

23 **UNFAIR COMPETITION – COMMON LAW, CALIFORNIA**
24 **BUSINESS & PROFESSIONS CODE §§ 17500 et seq.**

25 **(Against All Defendants)**

26 78. Plaintiff repeats each allegation contained in paragraphs 1 through
27 77 as though set forth here at length.

79. Defendants' use of the trade names and trademarks VAMPIRO and their use of the words margarita and cocktail misrepresents the nature, characteristics, identity, and source or sponsorship of Defendants' goods, constitutes aiding and abetting liability for deceptive, untrue, and misleading advertising and therefore constitutes a violation of, inter alia, California Business and Professions Code Section 17500 et seq. and California common law.

80. Defendants' use of the trade name and trademark VAMPIRE and their deceptive use of the words Margarita and cocktail are likely to deceive and will continue to deceive the consuming public. Defendants knew, recklessly disregarded, or reasonably should have known that such packaging, advertising, marketing, and promotion was untrue and/or misleading.

81. As a result of the conduct described above, Defendants have been and/or will be unjustly enriched at the expense of Plaintiff and the general public. The interests of the general public and Plaintiff are, therefore, closely related.

82. Defendants have been unjustly enriched, among other things, by the receipt of sales revenues from consumers who mistakenly thought that they were purchasing Plaintiff's VAMPIRE FAMILY of branded beverage-alcohol products or accessories, both in California and throughout the world, but instead were purchasing Defendants' goods which are promoted and sold through advertisements that affirmatively misrepresent, either directly or by implication, the nature, characteristics, identity, and source or sponsorship of the goods.

83. Additionally, Defendants have been unjustly enriched, by the receipt of sales revenues from consumers who mistakenly thought that they were purchasing a ready-to-drink "Margarita or Cocktail" but instead purchased a cheap imitation of a Margarita or Cocktail. Defendants' mislabeled "MARGARITAS" affirmatively misrepresent, either directly or by implication, the nature, characteristics, identity, and source or sponsorship of the goods.

1 84. Pursuant to Business and Professions Code §§ 17203 and 17535,
2 Plaintiff, on behalf of itself and the general public, which is unable effectively to
3 assert its interests, seeks an order of this Court ordering Defendants immediately to
4 cease such support for acts of unfair competition and false advertising, and
5 enjoining Defendants from continuing to import or export, distribute, market,
6 promote, advertise, offer for sale, and sell, Defendants' infringing beverage labels
7 and/or beverage accessory products that contain any of Plaintiff's trademarks (or
8 names confusingly similar to Plaintiff's trademarks) which falsely advertise or
9 conduct business via the unlawful, deceptive, unfair or fraudulent business acts and
10 practices, and the untrue and misleading advertising complained of herein.

11 Plaintiff additionally requests an order disgorging Defendants' ill-gotten gains and
12 restitution of all monies wrongfully acquired by Defendants by means of their
13 support of such acts of unfair competition and false advertising, damages, interest
14 and attorneys' fees.

15 85. Also, Pursuant to Business and Professions Code §§ 17203 and
16 17535, Plaintiff, on behalf of itself and the general public, which is unable
17 effectively to assert its interests, seeks an order of this Court ordering Defendants
18 immediately to cease such support for acts of unfair competition and false
19 advertising, and enjoining Defendants from continuing to market and sell beverage
20 products labeled and/or promoted and/or advertised or marketed as
21 MARGARITAS made with wine instead of tequila, which falsely advertise or
22 conduct business via the unlawful, deceptive, unfair or fraudulent business acts and
23 practices, and the untrue and misleading advertising complained of herein.

24 Plaintiff additionally requests an order disgorging Defendants' ill-gotten gains and
25 restitution of all monies wrongfully acquired by Defendants by means of their
26 support of such acts of unfair competition and false advertising, damages, interest
27 and attorneys' fees.

1
2 **WHEREFORE**, Plaintiff prays for judgment as follows:

3 1. That the Court adjudge and decree that Defendants have falsely
4 designated the origin of certain goods and services as those of Plaintiff, have made
5 and used false representations in connection with the sale, offering for sale,
6 promotion and advertising of such goods and services, and have unfairly competed
7 with Plaintiff at common law.

8 2. That the Court adjudge and decree that Defendants have infringed
9 Plaintiff's registered VAMPIRE (and Dracula) trademarks willfully and
10 intentionally.

11 3. That the Court adjudge and decree that Defendants unlawfully diluted
12 and diminished Plaintiff's rights in its VAMPIRE family of trademarks.

13 4. That the Court adjudge and decree that Defendants unlawfully
14 induced others to infringe upon Plaintiff's trademarks.

15 5. That the Court permanently enjoin Defendants, its agents, servants,
16 employees, attorneys, and all persons acting in concert or participation with them,
17 or with any of them from:

- 18 a. Using VAMPIRE, VAMPIRO, or any other word or words which
19 are similar to, or a colorable imitation of, Plaintiff's trade names
20 and marks, either alone, as part of, or together with, any other word
21 or words, (including Dracula), trademark, service mark, trade
22 name, or other business or commercial designation in connection
23 with the sale, offering for sale, advertising, and/or promotion of
24 beverage products and beverage accessories;
25 b. Selling, offering to sell, marketing, distributing, advertising and/or
26 promoting any FOOD or BEVERAGE product, goods or service
27
28

1 with the word VAMPIRE, VAMPIRO or DRACULA displayed on
2 any product, packaging, advertising or promotional materials;

- 3 c. Representing directly or indirectly by words or conduct that any
4 food or beverage product, goods or services offered for sale, sold,
5 promoted, or advertised by Defendants, is authorized, sponsored
6 by, endorsed by, or otherwise connected with Plaintiff;
7 d. Aiding or abetting in unfair competition against Plaintiff;
8 e. Aiding or abetting in false advertising; and
9 f. Inducing others to engage in any of these aforementioned acts.

10
11 **WITH RESPECT TO DEFENDANT PATCO'S**
12 **DECEPTIVE USE OF MARGARITA AND COCKTAIL:**

13
14 6. That the Court adjudge and decree that Defendants have falsely
15 designated the origin of certain goods and services as a MARGARITA and as a
16 Cocktail, have made and used false representations in connection with the sale,
17 offering for sale, promotion and advertising of such goods and services, and have
18 unfairly competed with beverage manufactures that use distilled spirits.

19 7. That the Court adjudge and decree that Defendants unlawfully
20 induced others to sell and market products as MARGARITAS and cocktails even
21 though no tequila or other distilled spirit was in the margaritas and cocktails.

22 8. That the Court permanently enjoin Defendants, its agents, servants,
23 employees, attorneys, and all persons acting in concert or participation with them,
24 or with any of them from:

- 25 a. Using the word "MARGARITA", in connection with the sale,
26 offering for sale, advertising, and/or promotion of beverage
27

1 products unless those products are made from tequila instead of
2 wine;

3 b. Selling, offering to sell, marketing, distributing, advertising
4 and/or promoting any BEVERAGE product labeled as a
5 “MARGARITA” if the alcohol contained within the product is not
6 exclusively tequila;

7 c. Aiding or abetting in the sales of beverage products falsely labeled
8 as Cocktails;

9 d. Using the word “cocktail”, in connection with the sale, offering for
10 sale, advertising, and/or promotion of beverage products unless
11 those products are made from distilled spirits instead of wine;

12 e. Selling, offering to sell, marketing, distributing, advertising and/or
13 promoting any BEVERAGE product labeled as a “cocktail” if the
14 alcohol contained within the product is not a distilled spirit;

15 f. Aiding or abetting in the sales of beverage products falsely labeled
16 as cocktails;

17 g. Aiding or abetting in false advertising; and

18 h. Inducing others to engage in any of these aforementioned acts.

19 **WITH RESPECT TO DEFENDANTS UNLAWFUL USE OF VAMPIRO,**
20 **COCKTAIL, AND MARGARITA:**

21 9. That the Court award an amount to be determined at trial but at least
22 an amount equivalent to treble the amount of Defendants’ illicit profits or
23 Plaintiff’s lost profits, whichever is greater.

24 10. That the Court award an amount to be determined at trial but at least
25 an amount equal to the cost of prospective corrective advertising to cover a
26 national campaign of advertising and promotion to make up for the damage done
27 by defendants advertising and promotion.

1 11. That the Court award Judgment against Defendants for the full costs
2 of this action, including the attorney's fees reasonably incurred by Plaintiff.

3 12. That the Court Order such other, further and different relief as the
4 nature of this action may require and as the Court may deem just and proper.

5 13. That the Court retain jurisdiction of this action for the purpose of
6 enabling Plaintiff, in its discretion, to apply to this Court at any time for such
7 further orders and directions as may be necessary or appropriate for the
8 interpretation or execution of any Order entered in this action, for the modification
9 of any such Order, for the enforcement of compliance therewith, and/or for the
10 punishment of any violation thereof.

11 Respectfully submitted,
12 MACHAT & ASSOCIATES, P.C.

13 Dated: October 15, 2020

By: _____ s/Michael Machat

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26 Email: dave@hdmnlaw.com

27 Attorneys for Plaintiff
28 Vampire Family Brands LLC

DEMAND FOR JURY TRIAL

Plaintiff hereby requests a trial by jury on all issues raised by the Complaint.

Respectfully submitted,

Dated: October 15, 2020

By: s/Michael Machat____

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EXHIBIT A

(Pictures of the Accused Product Purchased in

Los Angeles)



Nutrition Facts/Datos de Nutrición

Servings/Raciones: 1, **Serv. size/Tamaño por ración: 1 can/lata (355mL)**, Amount per

servings/Cantidad por ración: **Calories/Calorías 210,**

Total Fat/Grasa Total 0g (0% DV), Sat. Fat/Grasa

Saturada 0g (0% DV), **Trans Fat/Grasa Trans** 0g, **Cholesterol**

Colesterol 0mg (0% DV), **Sodium/Sodio** 260mg (10% DV),

Total Carb./ Carbohidrato Total 19g (6% DV), Fiber/Fibra

0g (0% DV), Total Sugars/ Azúcares Totales 19g (Includes 19g

Added Sugars/Incluye 0g azúcares añadidos, 38% DV),

Protein/ Proteínas 0g, Vitamin D/Vitamina D

(0% DV), Calcium/ Calcio (1% DV), Iron/Hierro (0% DV),

Potassium/Potasio (10% DV).

INGREDIENTS: MINERAL WATER, 100% AGAVE WINE, CANE SUGAR, CITRIC ACID, GUM ARABIC, NATURAL FLAVORS & SODIUM BENZOATE.

INGREDIENTES: AGUA MINERAL, VINO AGAVE 100%, AZÚCAR DE CAÑA, ÁCIDO CÍTRICO, GOMA ÁRABE, SABORES NATURALES Y BENZOATO DE SODIO.

BOTTLED BY / EMBOTELLADO POR: MAGAVE TEQUILA, AV ESPAÑA #1135, COLONIA MODERNA, CP 44190, GUADALAJARA, JALISCO, MEXICO

IMPORTED BY / IMPORTADO POR: MPL BRANDS NV, INC., LAS VEGAS, NV 89109

GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY CAUSE HEALTH PROBLEMS.



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EXHIBIT B
**(THE FAKE MARGARITAS on display at a
supermarket in Los Angeles)**



FRESH FOR EVERYONE
SAVE 30%
11.42 7.99

FRESH FOR EVERYONE
SAVE 30%
11.42 7.99

FRESH FOR EVERYONE
SAVE 30%
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FRESH FOR EVERYONE
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FRESH FOR EVERYONE
SAVE 30%
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FRESH FOR EVERYONE
SAVE 30%
11.42 7.99

JUST ADD ICE!
MADE WITH 100% DE AGAVE WINE
REAL LIME JUICE
GLUTEN FREE
12-750mL BOTTLES

MADE WITH 100% DE AGAVE WINE
NATURAL FLAVORS
GLUTEN FREE
12-750mL BOTTLES

MADE WITH 100% DE AGAVE WINE
NATURAL FLAVORS
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12-750mL BOTTLES

MADE WITH 100% DE AGAVE WINE
NATURAL FLAVORS
GLUTEN FREE
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MADE WITH 100% DE AGAVE WINE
REAL LIME JUICE
GLUTEN FREE
JUST ADD ICE!

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EXHIBIT C

Sampling of Plaintiff's Press

VAMPIRE WINE ON ANDERSON COOPER

December 13, 2016



Ashley Green from Twilight with Anderson Cooper on the Anderson Cooper Live show. For the Thanksgiving interview she presented him with a pie and he presented her with the bottle of Vampire Cabernet Sauvignon shown on the table.

VAMPIRE WINE ON THE VIEW

ca:
is 1





Vampire
2014 CALIFORNIA
CABERNET
SAUVIGNON

UNDERWORLD
BLOOD WARS
PROTECT THE BLOODLINE
IN 3D AND REALD 3D
IN THEATERS 01.06
SWEEPSTAKES
ENTER THE VAMPIRE VINEYARDS UNDERWORLD BLOOD WARS SWEEPSTAKES
GO TO VAMPIRE.COM



Hot WINE

What's the celebratory drink of choice for the cast and crew of HBO's *True Blood*? No, it's not a bloody mary, it's Vampire cabernet from Vampire Vineyards in California. The smooth (no bite!) fruit-forward red was served at a cast party for the hit series — and would make a fang-tastic choice for any Halloween get-together. \$11, vampire.com





PARTY TIME
BLOODY GOOD

• Host a Halloween soirée with vino from **Vampire Vineyards**. Choose from 15 blends, including Vampire chardonnay (\$30), Trueblood pinot noir (\$30), and Dracula syrah (\$30). For beer lovers, there's **Witches' Brew** golden ale (\$13, at vampire.com). And don't forget the tunes! May we suggest "Monster Mash"?

VAMP[®] N·R·G

BLADE[™] TRINITY

Own it on DVD April 26th

Win a trip to TRANSYLVANIA SWEEPSTAKES

Trip for 2 to Transylvania (Romania) The VAMPIRE Tour includes airfare, hotel and tours of Dracula's castle and tomb!

5 First Prizes. Each winner will receive a Blade 3-pack DVD set including: Blade 1, Blade 2 and Blade Trinity.

10 Second Prizes. Each winner will receive a 12 pack of Vamp and a Vamp Team Shirt.

10 Third Prizes. Each winners will receive a Blade Trinity DVD



Own it on DVD



April 26th

To enter got to www.bladetriity.com/trip or vampire.com



Blade, Marvel, TM & © 2005 MARVEL



A Time Warner Company
© MMV NLHE, Inc. All Rights Reserved.

VAMP[®] N·R·G

Available at
7-Eleven



No purchase necessary. Promotion ends 9/1/05. Must be legal U.S. resident 18 or older. Enter and see Official Rules at <http://www.bladetriity.com/trip> for additional eligibility restrictions, prize description/restrictions/ARV, odds and complete details. Void where prohibited.

SEX • SPORTS • BEAUTY • TARGETS • CLOTHES • ASPARAGUS

MILKIM

FOR MEN

ATOMIC SEX!

Drop the big one on her tonight!
This is not a test...

THAT '70s SHOW'S MILA KUNIS shakes her groove thing!

JACKASS: THE MOVIE Crash the set with us—and let the Oscar race begin!

"UH...WHO ORDERED A BALL GAG?" Ninja sabotage techniques to take down your coworkers!

BONUS!

TV'S SEXIEST GIRLS

Come grab our big, fat fall TV preview package!



A WINE WITH BITE

By No. 1 Wine Guy

For the original red vampire without a hint of vampire stink...

The 2003 Vampire Transylvania Pinot Noir (55) is a... [text continues]



The red and the white 2003... [text continues]

Would you, could you, with these 10?

- Shopping list
- 2003 Pinot Noir
 - 2003 Cabernet Sauvignon
 - 2003 Merlot
 - 2003 Chardonnay
 - 2003 Sauvignon Blanc
 - 2003 Riesling
 - 2003 Pinot Grigio
 - 2003 Shiraz
 - 2003 Zinfandel
 - 2003 Malbec



From Romania come two very fun wines that trapped in a bottle the "blood of the vine." The Vampire Romania Merlot Red (58) smells perfectly fine, of Fuji apple, cotton candy, pumpkin and orange rind. The taste is surprising, with pumpkin spicing. But notes of orange peel and apple and its light pleasant body make it wine for enjoying, perhaps at a party.

At the personal risk of being called dour, I wondered how Vampire could make Pinot Noir. But lo and behold, came a bottle try way, and the 2003 Vampire Transylvania Pinot Noir (55) made my tasting day. Full of fruit, light of body, nicely balanced it is, tasting of cherry and chocolate with a medium long finish.



2003 Vampire Romania Merlot Red (58)

2003 Vampire Transylvania Pinot Noir (55)

... [text continues]





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6 *Attorneys for Defendant*
7 **MPL BRANDS NV, INC.**

8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

11
12 VAMPIRE FAMILY BRANDS, LLC,
13 Plaintiff,

14 vs.

15 MPL BRANDS, INC., MPL BRANDS
16 NV, INC. d/b/a PATCO BRANDS,
AND PYRAMID INC.
17 Defendants.

Case No. 2:20-cv-09482-DMG-AS
[Assigned to Honorable Dolly M. Gee]

**DEFENDANT MPL BRANDS NV,
INC. D/B/A PATCO BRANDS’
12(B)(6) MOTION TO DISMISS
PLAINTIFF’S FIRST, SECOND,
THIRD, AND FIFTH CAUSES OF
ACTION ALLEGING
TRADEMARK INFRINGEMENT,**

**REQUEST FOR JUDICIAL
NOTICE (FILED
CONCURRENTLY)**

**DECLARATION OF COURTNEY
STUART-ALBAN (FILED
CONCURRENTLY)**

**DECLARATION OF JOSÉ LUIS
LEÓN (FILED CONCURRENTLY)**

Date: January 22, 2021
Time: 9:30 a.m.
Location: 350 West 1st Street
Courtroom 8C, 8th Floor
Los Angeles, CA 90012

Complaint filed: October 15, 2020

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on January 22, 2021 at 9:30 a.m. or as soon
3 thereafter as counsel may heard in the courtroom of the United States District Judge
4 Hon. Dolly M. Gee, at Courtroom 8C, 8th Floor of the United States District Court
5 for the Central District of California, located at the First Street United States
6 Courthouse, 350 West 1st Street, Los Angeles, California, 90012, Defendant MPL
7 BRANDS NV, INC. d/b/a PATCO BRANDS (hereinafter “Patco Brands”) hereby
8 moves to dismiss – (Count I for Trademark Infringement under 15 U.S.C. § 1125(a)
9 [Lanham Act § 43(a)], Count II for Infringement of Registered Trademark under 15
10 U.S.C. § 1114 [Lanham Act § 32], Count III for Dilution by Tarnishment under 15
11 U.S.C § 1125(c) [Lanham Act § 43(c)], and Count V for Unfair Competition under
12 California Business and Professions Code §§ 17200 et seq. (hereafter “Trademark
13 Claims”).

14 In addition to this motion, Patco Brands is concurrently filing a joinder in co-
15 defendant MPL Brands’ motion to dismiss Plaintiff’s false advertising claims,
16 namely Count IV for False Advertising under 15 U.S.C. §1125(A), Count V for
17 Unfair Competition under California Business and Professions Code §§ 17200 et
18 seq., and Count VI for Unfair Competition under California Business and
19 Professions Code §§ 17500 et seq. (hereafter “False Advertising Claims”).

20 Patco Brands submits this motion under the standard governed by Federal
21 Rule of Civil Procedure 12 (b)(6), on the grounds that the Court may dismiss the
22 claims against Patco Brands based on its sale of the GRAN AGAVE MIX vampiro
23 cocktail for failure to state a claim upon which relief can be granted based on the
24 evidence attached to the Complaint and judicially-noticed documents. This motion
25 shall be based on this Notice of Motion, the accompanying Memorandum of Points
26 and Authorities, Request for Judicial Notice, Declaration of Courtney Stuart-Alban,
27 and Joinder in MPL Brands Inc.’s Motion to Dismiss, the anticipated reply papers,
28

1 all materials that may be properly considered in connection with this motion, and
2 oral argument at the hearing.

3 Dated: December 23, 2020 **BLAKELY LAW GROUP**
4 By: /s/ Courtney Stuart-Alban
5 Brent H. Blakely
6 Courtney Stuart-Alban
7 *Attorneys for Defendant*
8 *MPL Brands NV, Inc.*
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28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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I. INTRODUCTION.....2

II. FACTUAL BACKGROUND3

 a. Vampire Family Brands and the Trademark Infringement Claims Alleged in the Complaint.3

 b. Vampiro is a Generic Word that is the Name of a Popular Drink, and Patco Brands Uses “Vampiro” as the Generic Name of the Drink.7

III. LEGAL STANDARD12

 a. Motion to Dismiss under Fed. R. Civ. P. Rule 12 b (6).....12

 b. Summary Judgment Standard13

IV. THE COURT SHOULD DISMISS THE TRADEMARK CLAIMS FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6), BECAUSE THE COMPLAINT ALLEGES NO ACTIONABLE “USE” OF A TRADEMARK.....14

 a. The Court should dismiss the Trademark Claims because the only alleged “use” of “vampiro” is generic and thus not actionable.14

 i. *Patco Brands has Submitted Judicially-Noticeable Evidence Sufficient to Establish that Patco Brands’ use of the word Vampiro is Generic*.....16

 b. The Court should dismiss the Trademark Claims because the only alleged “use” of “vampiro” constitutes fair use as a matter of law.....18

 c. The Court is able to dismiss the claims at the pleading stage without going outside of the Complaint.19

 d. In the Alternative, the Court May Look Outside the Pleadings to Find that Patco Brands’ Use of the Word Vampiro is Nonactionable.20

V. THE COURT SHOULD DISMISS THE FALSE ADVERTISING CLAIMS AGAINST PATCO BRANDS.....21

VI. CONCLUSION22

TABLE OF AUTHORITIES

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8 611 F.2d 296 (9th Cir. 1979)..... 15

9 *Ashcroft v. Iqbal,*

10 556 U.S. 662 (2009) 12

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12 189 F.3d 868 (9th Cir. 1999)..... 14

13 *Bada Co. v. Montgomery Ward & Co.,*

14 426 F.2d 8 (9th Cir. 1970)..... 15

15 *Bell Atl. v. Twombly,*

16 550 U.S. 544 (2007) 12

17 *Boston Duck Tours, LP v. Super Duck Tours, LLC*

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1 (C.D. Cal. 2013)20

2 *Intel Corp. v. Terabyte Int'l, Inc.*,

3 6 F.3d 614 (9th Cir. 1993)..... 15

4 *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*,

5 543 U.S. 111 (2004) 19

6 *Loglan Inst. Inc. v. Logical Language Grp. Inc.*,

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8 *Marvin Ginn Corp. v. Int'l Assn. of Fire Chiefs, Inc.*,

9 782 F.2d 987 (Fed. Cir. 1986)..... 15

10 *Mattel, Inc. v. MCA Records*,

11 296 F.3d 894 (9th Cir. 2002)..... 15

12 *Moss v. U.S. Secret Serv.*,

13 572 F.3d 962 (9th Cir. 2009)..... 13

14 *Schwan's IP, LLC v. Kraft Pizza Co.*,

15 460 F.3d 971 (8th Cir. 2006)..... 17, 18

16 *Threshold Enters. v. Pressed Juicery, Inc.*

17 445 F.Supp.3d 139 (N.D.Cal. 2020) 19

18 *Weiss Noodle Co. v. Golden Cracknel and Specialty Co.*,

19 290 F.2d 845 (1961) 16

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21 No. 12-cv-258, 2013 U.S. Dist. LEXIS 19414, 2013 WL 566817 (W.D.N.C.

22 Feb. 13, 2013).....20

23 *Yak v. Bank Brussels Lambert*,

24 252 F.3d 127 (2d Cir. 2001)..... 13

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15 U.S.C. § 1115(b)(4) 18, 19

5 U.S.C. § 1064(3)..... 15

Other Authorities

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant MPL BRANDS NV, INC. d/b/a PATCO BRANDS (hereinafter
3 “Patco Brands”) respectfully submits this Memorandum of Points and Authorities in
4 Support of its Rule 12(b)(6) Motion to Dismiss the trademark claims alleged in
5 Plaintiff’s Complaint under the Lanham Act and California state law, specifically:
6 Count I for Trademark Infringement under 15 U.S.C. § 1125(a) [Lanham Act §
7 43(a)], Count II for Infringement of Registered Trademark under 15 U.S.C. § 1114
8 [Lanham Act § 32], Count III for Dilution by Tarnishment under 15 U.S.C §
9 1125(c) [Lanham Act § 43(c)], and Count V for Unfair Competition under
10 California Business and Professions Code §§ 17200 et seq. (hereafter “Trademark
11 Claims”).

12 In addition to this motion, Patco Brands is concurrently filing a joinder in co-
13 defendant MPL Brands’ motion to dismiss Plaintiff’s false advertising claims,
14 namely Count IV for False Advertising under 15 U.S.C. §1125(A), Count V for
15 Unfair Competition under California Business and Professions Code §§ 17200 et
16 seq., and Count VI for Unfair Competition under California Business and
17 Professions Code §§ 17500 et seq. (hereafter “False Advertising Claims”).

18 Patco Brands had no involvement in the production or sale of the Rancho La
19 Gloria products, which products are the primary focus of the False Advertising
20 Claims alleged in the Complaint. To the extent that the Complaint alleges False
21 Advertising Claims against Patco Brands’ GRAN AGAVE MIX vampiro cocktail,
22 however, the same arguments that MPL Brands makes in its Motion to Dismiss the
23 Advertising Claims also apply to dismiss the claims against Patco Brands based on
24 its GRAN AGAVE MIX vampiro cocktail., as explained herein and in Patco
25 Brands’ Joinder filed concurrently herewith.

26 //
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28 //

1 **I. INTRODUCTION**

2 Plaintiff’s attorney, Michael Machat, is the owner of Vampire Family Brands
3 (“VFB”), the plaintiff in this case. In the Complaint, VFB alleges ownership of at
4 least a dozen different vampire-related marks, which it says it uses in commerce on
5 a variety of disparate goods ranging from wine and coffee to olive oil and balsamic
6 vinegar to glassware and tacos. Mr. Machat’s reach as a litigator, however, appears
7 to extend much further than plaintiff’s actual product sales in the marketplace, as
8 gleaned from a review of judicially-noticeable sources filed concurrently herewith.
9 In this case, VFB brings claims of trademark infringement based on a VAMPIRE
10 Gourmet Bloody Mary Cocktail product that VFB claims to sell in commerce, but
11 which it is clear from judicially-noticeable evidence that it has never sold in
12 commerce.

13 Litigation is undoubtedly a profitable enterprise for Mr. Machat. Trademark
14 litigation is particularly expensive to defend against and doing so is almost never
15 insurable. Mr. Machat enjoys a significant financial benefit from his ability to
16 litigate at his own cost against alleged competitors, many of whom, it can be
17 presumed, prefer to settle for the “nuisance value” of the case, rather than pay the
18 enormous costs required to defend against infringement claims, even when the
19 claims are weak. In this case, however, Mr. Machat has gone too far, and the Court
20 can and must dismiss the claims without granting VFB leave to amend, because
21 amendment would be futile.

22 In this case, VFB alleges trademark infringement claims against defendants
23 based on Patco Brands’ use of the word “vampiro” in connection with the sale of a
24 pre-packaged cocktail. But Patco Brands does not use the word “vampiro” as a
25 trademark. As the Court can determine from the complaint and judicially-noticeable
26 materials, the word “vampiro” is a generic word for a popular mixed drink. Indeed,
27 as the record even at the pleading stage shows, Patco Brands markets and sells just
28

1 one version of the popular vampiro cocktail, which it does under the GRAN
2 AGAVE MIX trademark.

3 Plaintiff pleads facts in the Complaint that fail to state a claim upon which
4 relief can be granted under the Lanham Act or California law. Even if Plaintiff
5 holds valid trademark rights in certain VAMPIRE Marks for a variety of unrelated
6 goods, such trademark rights do not give Plaintiff the right to block the sale in the
7 United States of any and all variations of the popular Mexican cocktail, the vampiro.
8 To the contrary, the law is clear that Patco Brands’ First Amendment rights supplant
9 any trademark rights VFB may hold in the VAMPIRE Marks. “Trademark rights do
10 not entitle the owner to quash an unauthorized use of the mark by another who is
11 communicating ideas or expressing points of view.” (*L.L. Bean, Inc. v. Drake*
12 *Publrs., Inc.* (1st Cir. 1987) 811 F.2d 26, 29. (citations omitted).

13 For the reasons alleged herein, the Court should dismiss the Trademark
14 Claims alleged in the Complaint, without leave to amend, because any amendment
15 would be futile as would be further discovery. There is no potential evidence that
16 Plaintiff could put forth to show that it is entitled to exclude the sale of the popular
17 “vampiro” cocktail in the United States – sold by its popular, generic name in
18 connection with another registered trademark, in this case, GRAN AGAVE MIX.

19 **II. FACTUAL BACKGROUND**

20 **a. Vampire Family Brands and the Trademark Infringement Claims**
21 **Alleged in the Complaint.**

22 As the Complaint alleges, Patco Brands is a family owned and operated
23 import, distribution, marketing and sales company. Complaint at ¶ 4.

24 According to the Complaint, VFB owns a variety of federally-registered
25 trademarks related to the word Vampire (the “Vampire Marks”), which VFB claims
26 to use in connection with a wide variety of disparate goods, including, chocolate,
27 coffee, olive oil, balsamic vinegar, water, restaurant and bar services, glass beverage
28 ware, tacos, wine, and spirits. Complaint at ¶ 8.

1 Judicially-noticeable documents from the United States Patent and Trademark
2 Office (“USPTO”) show that plaintiff’s attorney, Michael Machat, is the equitable
3 owner of VFB and the family of VAMPIRE Marks. *See* Request for Judicial Notice
4 filed concurrently herewith (“RFJN”) at Ex. 1.

5 According to the Complaint, Plaintiff has primarily used its VAMPIRE Marks
6 in connection with the sale of wine, while the source of the wine has been
7 inconsistent, moving repeatedly over the years “from Algeria to Italy to Transylvania
8 and finally to Napa.” Complaint at ¶¶ 11-12.

9 One of the Marks VFB claims to have registered more recently is “US
10 Registration No. 5444375 for the word mark VAMPIRE for Pre-mixed alcoholic
11 beverages, other than beer based.” Complaint at ¶ 16. Plaintiff alleges in
12 connection with this Mark for Pre-mixed alcoholic beverages, it “has a great tasting
13 Gourmet Bloody Mark cocktail that it markets as the VAMPIRE Gourmet Bloody
14 Mary Cocktail. *Id.*

15 Plaintiff claims that it “began selling its VAMPIRE Gourmet Bloody Mary
16 Cocktails in a can which are designed to be the go-to ready to drink premixed
17 bloody Mary, perfect for busy bars, outdoor venues, picnics, and anyone on the go
18 wanting a gourmet ready to drink bloody Mary cocktail.” *Id.* at ¶18.

19 Plaintiff alleges it sells its products on its website located at
20 www.vampire.com. *See id.* at ¶ 17 (stating the “VAMPIRE family of brands are
21 available for the world to see on its website VAMPIRE.COM), *see also id.* at ¶ 24
22 (“Plaintiff markets its brands through a national network of wholesalers, and via the
23 website: www.vampire.com”) (hereafter the “VFB Website”). Plaintiff thus
24 incorporates the contents of the “vampire.com” website by reference into its
25 complaint.

26 The home page of the VFB Website features the sale of VAMPIRE wine, but
27 does not offer spirits, or pre-packaged, spirits-based drinks for sale. The VFB
28 Website has tabbed headings that read: Red Wines // White Wines // Trueblood

1 Wine // Dracula Wine // Wine Club // Vampire, Chocolate // The Novel. Four of the
2 six headings relate to the sale of wine, one to the sale of chocolate, and the last,
3 “The Novel,” references a vampire-themed novel that was apparently written by Mr.
4 Machat’s wife, whom he dubs the Vampire Countess. *See* RFJN Ex. 2.

5 If the internet user scrolls down to the bottom of the home page, there are
6 additional links that are less conspicuous than the top tabs. One of those is a link for
7 “THE BLOODY MARY.” *Id.* When the user clicks on the BLOODY MARY link,
8 the landing page (“Bloody Mary Landing Page”) is a picture of a canned beverage
9 that appears to be a VAMPIRE Bloody Mary Cocktail. *See* RFJN Ex. 3.

10 The Bloody Mary Landing Page does not, however, offer the canned cocktail
11 for sale to consumers, or tell them where they can buy it. Instead, the landing page
12 invites users who are “INTERESTED IN INVESTING?” to “CHECK OUT OUR
13 OFFERING.” *See* RFJN Ex. 3. The Landing Page offers consumers an opportunity
14 to click through and “Invest in the Company Now,” and it also offers them a web
15 address to visit to learn more: “Invest.VampireBloodyMary.com.” *Id.*

16 The Landing Page includes embedded testimonial videos and multiple
17 paragraphs of sales-pitch puffery about the potential bloody mary cocktail the
18 company *wants to produce* and offer for sale in the marketplace, complete with high
19 end natural ingredients. However, the VFB Website makes clear that VFB first
20 needs to raise money from investors to produce the drink, which plaintiff has not
21 sold in commerce to date. *Id.*; *see also* MPL Brands’ RFN.

22 The last sentence of the Landing Page states: “*Vampire® Vineyards’ latest*
23 *offshoot, The Real Bloody Mary Company is offering consumers an opportunity to*
24 *“Own a Piece of the Tomato” with its newest product, the Vampire Gourmet*
25 *Bloody Mary Cocktail,*” where “Own a Piece of the Tomato” is an active link. *Id.*

26 When the user clicks the active link, the user is directed to
27 <https://www.startengine.com/the-real-bloody-mary-co-llc> (the “Bloody Mary
28 Investor Website”). The Bloody Mary Investor Website heavily markets to

1 investors seeking consumer investments in amounts ranging from \$125 to \$5,000 or
2 more, offering perks ranging from a “very rare Vampire.com Bumper Sticker” to
3 “the opportunity to attend a super fun Bloody Mary Festival as our VIP guest and a
4 lifetime 15% discount on all Vampire.com purchases.” **See RFJN Ex. 4.**

5 In the Complaint, Plaintiff alleges that it “learned that defendants are
6 unlawfully marketing and selling a mixed alcoholic cocktail branded as
7 VAMPIRO.” It attaches what it alleges are “pictures of defendant’s VAMPIRO
8 alcoholic cocktail in a can” Complaint at ¶ 20. The image, however, is a poor
9 quality and does not show a clear image of the product label. For the Court’s
10 reference, Patco Brands has attached a true and correct copy of the label for its
11 GRAN AGAVE MIX vampiro product. **See RFJN, Ex. 22.**

12 The Complaint further alleges that “Defendant’s [sic] *intentional* wrongful
13 acts are harming Plaintiff’s brands reputation and are diluting the brands and are
14 disparaging.” Complaint at ¶ 27 (emphasis added); *see also id* at ¶¶ 51, 57. The
15 Complaint alleges no facts, however, that support its conclusory allegation that
16 Patco Brands’ acts were intentional. *See generally* Complaint.

17 The Complaint does not allege actual confusion but claims that if “defendants
18 are not stopped from marketing food and beverages using the VAMPIRO mark or a
19 mark confusingly similar to Vampire (or Dracula), then consumers will likely be
20 confused about the source and origin of defendant’s products and services and
21 mistakenly conclude that defendants’ products or services are produced by, or
22 associated with Plaintiff and/or its licensees.” Complaint ¶ 28; *see also id.* at ¶ 48
23 (“If Defendants are allowed to continue marketing and selling the accused goods
24 and services, Plaintiff will be damaged as alleged in this complaint and the
25 Defendants will profit thereby.”)

26 Alternatively, the Complaint alleges, “if defendants are not stopped from
27 marketing beverages using the VAMPIRO mark or a mark confusingly similar to
28 Plaintiff’s VAMPIRE (or DRACULA) marks, then consumers will likely be

1 confused about the source and origin of Plaintiff’s (or its licensees’) products and
2 services and mistakenly conclude that Plaintiff’s (or its licensees’) products or
3 services are produced by, or associated with defendants.” Complaint ¶ 29.

4 The Complaint alleges four different trademark infringement claims: Count I
5 for Trademark Infringement under 15 U.S.C. § 1125(a) [Lanham Act § 43(a)];
6 Count II for Infringement of Registered Trademark under 15 U.S.C. § 1114
7 [Lanham Act § 32]; Count III for Dilution by Tarnishment under 15 U.S.C. §
8 1125(c) [Lanham Act § 43(c)], and Count V for Unfair Competition under
9 California common law and Business and Professions Code §§ 17200 et seq. (the
10 “Trademark Claims”). All of the Trademark Claims alleged in the Complaint fail
11 for the same reason; the only use alleged by the Plaintiff in this action is generic use
12 or, in the alternative, fair use, as a matter of law.

13 To the extent false advertising claims are alleged against Patco Brands based
14 on the vampiro cocktail product, those claims fail for the same reasons provided in
15 MPL Brands’ Motion to Dismiss the False Advertising Claims, which motion Patco
16 Brands has joined. *See* Patco Brands’ Joinder, filed concurrently herewith.

17 **b. Vampiro is a Generic Word that is the Name of a Popular Drink,**
18 **and Patco Brands Uses “Vampiro” as the Generic Name of the**
19 **Drink.**

20 In the Complaint, Plaintiff complains that defendants are “selling a mixed
21 alcoholic cocktail branded as VAMPIRO.” Complaint at ¶ 20. In support, Plaintiff
22 attaches an exhibit to the Complaint, which is a photograph of the allegedly-
23 infringing “vampiro” cocktail. *See id.* at Exhibit A.

24 An examination of Exhibit A, however, shows a canned beverage marketed
25 and sold, *i.e.* “branded” under the GRAN AGAVE MIX trademark, which is
26 conspicuous and placed on the top center of the can. *See* Complaint, Exhibit A; *see*
27 *also* RFJN, Ex. 22.

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1 As can be determined by reference to judicially-noticeable documents, the
2 GRAN AGAVE MIX trademark, which is affixed prominently to the top of the
3 accused product in Exhibit A, is registered to CORPORATIVO DESTILERIA
4 SANTA LUCIA, S.A. DE C.V. (“Santa Lucia”). *See RFJN Ex. 5.*

5 Exhibit A to the Complaint also shows that the product is bottled in Jalisco,
6 Mexico, and that it is imported by MPL Brands, NV, which is the defendant in this
7 action doing business as Patco Brands. *See Complaint, Exhibit A at p. 2; see also*
8 *RFJN, Ex. 22.*

9 As explained in the concurrently-filed declaration of José Luis León, Santa
10 Lucia is an independent distillery in Jalisco, Mexico, which produces its own,
11 branded tequilas, and various private label tequilas and related products for
12 companies who sell those products. *See Declaration of José Luis León (“León*
13 *Decl.”) at ¶¶ 1-2.*

14 Santa Lucía in fact produces several ready-to-drink cocktails for Patco
15 Brands, including a vampiro cocktail sold under the brand “Gran Agave Mix” (the
16 “Gran Agave Vampiro”). Vampiro is the generic name for one of the most popular
17 mixed drinks in Mexico, along with the margarita, paloma, and tequila sunrise. *Id.*
18 *at ¶ 3.*

19 Santa Lucia owns the GRAN AGAVE MIX trademark under which the
20 accused vampiro product is sold in the United States, and it licenses the right to use
21 the GRAN AGAVE MIX Mark to defendant Patco Brands. *See id.* at ¶ 5.

22 As Mr. León explains, the purpose behind Gran Agave Vampiro was to create
23 a new drink, based upon one of Mexico’s most popular mixed drinks. *Id.* at ¶ 4.
24 Indeed, Brown-Forman, one of the largest American-owned companies in the wine
25 and spirits business (traded on the New York Stock Exchange under BFB), also
26 produces vampiro and paloma ready-to-drink cocktails under the brand name “El
27 Jimador New Mix.” El Jimador’s vampiro and paloma cocktails are currently sold
28 in Mexico and Canada. *See id.* at ¶ 5, Ex. A; *see also RFJN Ex. 14.*

1 As also explained in Mr. León’s declaration, “a vampiro cocktail can be made
2 many different ways, but the typical formulation includes tequila, citrus juice, spices
3 and/or sangrita, a Mexican drink originating in Jalisco which itself can be made
4 using a variety of different ingredients, including tomato, orange, grapefruit and/or
5 lime juices, chiles, jalapeños and/or hot sauce.” León Decl. at ¶ 6.

6 The Court does not need to rely on the testimony of Mr. León, however, to
7 determine that the word “vampiro” is used by Patco Brands in a generic or fair use
8 capacity, such that the Complaint fails to state a claim upon which relief can be
9 granted. Patco Brands has concurrently filed a request for judicial notice, which
10 contains sufficient evidence to show that the public perception of “vampiro” is as a
11 spiced cocktail. The Court therefore has sufficient information to determine at the
12 pleading state that Patco Brand’s use of “vampiro” is as a generic name for a
13 particular type of drink, or in the alternative, constitutes fair use, and it thus can and
14 should dismiss the Trademark Claims as a matter of law, without granting plaintiff
15 further discovery or leave to amend. There is no amendment or further discovery
16 that could possibly show either that Patco Brands is using the vampiro word as a
17 trademark or that plaintiff has trademark rights in the word “vampiro.”

18 *i. Evidence Capable of Judicial Notice*

19 Patco Brands has filed a Request for Judicial Notice in which it asks the Court
20 to take judicial notice of numerous representative examples of the use of the word
21 “vampiro” in commerce as the generic name of a spiced cocktail that is popular in
22 Mexico and the United States.

23 The Wikipedia entry for “Vampiro (cocktail),” for instance, explains, among
24 other things, that “[t]he *Vampiro is popular in Mexico and is the national drink.*
25 Mexicans named the cocktail Vampiro (‘vampire’) because the Viuda de Sanchez
26 juice mixer’s red colour is reminiscent of blood.” *See RFJN at 7.* Wikipedia also
27 makes clear that there are many variations of the drink.

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1 For instance, Wikipedia explains, under a heading called “Variants,” that
 2 “[s]ome bartending guides suggest adding a shot of tomato juice, fresh-squeezed
 3 orange and lime juice, grenadine syrup, hot pepper sauce and freshly-ground black
 4 pepper to the glass, and omitting the Mexican sangrita.” *Id.* And Wikipedia
 5 describes another variant, where the “blood-red drink is a blend of ...pisco, tequila,
 6 lemon, pineapple, Ramazzotti amaro and chicha morada, a sweet, tart, nonalcoholic
 7 Peruvian drink made from purple corn.” *See id.*

8 In addition, Patco Brands has provided the Court with the following
 9 judicially-noticeable evidence to support its position that the public perceives the
 10 word “vampiro” as the generic word for a type of spicy cocktail that is very popular
 11 in Mexico and is increasingly popular in the United States.

12 **Public Perception Evidence Offered in Patco Brands’ Request for Judicial
 13 Notice**

14 <http://www.allrecipes.com/recipe/221159/vampiros-mexicanos-mexican-vampires>

15 **See RFJN Ex. 8**

Titled: Vampiro Mexicanos (Mexican Vampires) “If you are looking for a real Mexican cocktail, you just found it! This drink combines . . .”

17 <http://www.marthastewart.com/870096/vampiro>

18 **See RFJN Ex. 9**

Recipe for a “Vampiro” with no branded elements.

20 <http://www.diffordsguide.com/cocktails/recipe/2024/vampiro> **See**

21 **RFJN Ex. 10**

Recipe for a “Vampiro” with no branded elements.

23 http://www.vice.com/en_us/article/kbkpmv/everyone-drinks-vampire-cocktails-out-of-plastic-bags-in-this-tiny-mexican-town

24 **See RFJN Ex. 11**

Article titled: “*Everyone Drinks Vampiro Cocktails Out of Plastic Bags in This Tiny Mexican Town.*”
 “Many places sell vampiros now, but thanks to word of mouth, Hernández’s stand remains the most popular in town.”

27 <http://noseychef.com/2019/10/26/vampiro/>

28 “The *Vampiro is the national drink of Mexico*. It is said to have been invented

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<p>See RFJN Ex. 12</p>	<p>by Oscar Hernández on his food stall in San Luis Soyatlán. This was around about 1978.”</p>
<p>https://www.quericavid.com/recipes/vampiro-cocktail/b5d9c468-627f-4626-b474-12248162cc15</p> <p>See RFJN Ex. 13</p>	<p>Recipe for “Vampiro Cocktail,” stating: “However, Vampiro has become an appealing drink for all occasions. When you have the pleasure of tasting a sip of Vampiro, your senses will experiment the mix of sweet, citrus and spicy flavors found in it. It’s an explosion of flavors worthy of sharing, one that includes an attractive red color due to the addition of tomato juice to the mix. Enjoy!”</p>
<p>https://www.eljimador.com/our-tequilas/#new-mix</p> <p>See RFJN Ex. 14</p>	<p>Offering “New Mix” prepared alcoholic drinks in a can, which include a “paloma, a margarita, and a vampiro.”</p>
<p>https://www.adrianasbestrecipes.com/vampiro-cocktail/</p> <p>See RFJN Ex. 15</p>	<p>“Vampiro Cocktail Mexican Drink” “During the summer months, we would spend time as a family in my uncle’s house in Cuernavaca where we would organize many pool parties while my aunt would cook for us her famous <u>enchiladas</u> potosinas on the grill and the adults would enjoy a vampiro <u>cocktail</u> made with Don Julio tequila.</p>
<p>https://www.masterclasses.com/articles/vampiro-cocktail-recipe</p> <p>See RFJN Ex. 16</p>	<p>How to Make a Vampiro: Simple Vampiro Cocktail Recipe</p>
<p>http://www.nibblesandfeasts.com/2019/10/russian-vampire-vampiro-ruso/</p> <p>See RFJN Ex. 17</p>	<p>Vampiros, or vampires are one of my favorite drinks to make with grapefruit soda. Normally, this drink is made with tequila but I decided to take advantage of the rich and smooth taste of Prairie Organics Vodka for this cocktail.</p>

<p>1 https://www.bbcgoodfood.com/recipes/vampiro</p> <p>2 o</p> <p>3</p> <p>4 See RFJN Ex. 18</p>	<p>Recipe for “Vampiro cocktail” with no branded elements. “Blend tequila and mescal with passata, lime and lemon juice, grenadine, Worcestershire sauce and Tabasco to make this vibrant red, Halloween-inspired cocktail.”</p>
<p>5 https://recipe.awesome-drinks.com/recipe/vampiro/</p> <p>6</p> <p>7</p> <p>8 See RFJN Ex. 19</p>	<p>How To Make The Vampiro. “The original design was a combination of tequila and a homemade sangrita, however, the use of orange juice with tomato juice and spices in this cocktail recipe bring those together...”</p>
<p>9 https://mermaidsandmojitos.com/vampiro-tequila-cocktail-with-jalisco-sangrita/ See</p> <p>10</p> <p>11 RFJN Ex. 20</p>	<p>“Vampiro Tequila Cocktail with Jalisco Sangrita Recipe”</p>
<p>12 Vampiro Cocktail –</p> <p>13 Google Search</p> <p>14 See RFJN Ex. 21</p>	<p>A printout of search result pages for a search for “vampiro cocktail” on Google.com.</p>

15 III. LEGAL STANDARD

16 a. Motion to Dismiss under Fed. R. Civ. P. Rule 12 b (6)

17 A court may dismiss a complaint for “failure to state a claim upon which
 18 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A complaint fails to state a claim
 19 under Rule 12(b)(6) where it does not contain “enough facts to state a claim for
 20 relief that is plausible on its face.” *Bell Atl. v. Twombly*, 550 U.S. 544, 547
 21 (2007). The plausibility standard is not akin to a probability requirement, but it asks
 22 for more than a sheer possibility that a defendant has acted unlawfully. The court
 23 should not accept unreasonable inferences or unwarranted deductions of fact.
 24 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that “[t]hreadbare recitals of the
 25 elements of a cause of action, supported by mere conclusory statements, do not
 26 suffice”).

27 If the facts pled only support an inference that the defendant is “possibly”
 28 liable—or that the defendant’s acts are merely “consistent with” the alleged

1 misconduct—the claims are not “plausible” and must be dismissed. *Id*; *see also*
2 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (“In sum, for a
3 complaint to survive a motion to dismiss, the non-conclusory factual content, and
4 reasonable inferences from that content, must be plausibly suggestive of a claim
5 entitling the plaintiff to relief.”) (internal quotation marks omitted).

6 In ruling on a 12(b)(6) motion, a court may consider the complaint as well as
7 “any written instrument attached to the complaint as an exhibit or any statements or
8 documents incorporated in it by reference.” *Zdenek Marek v. Old Navy (Apparel)*
9 *Inc.*, 348 F.Supp.2d 275, 279 (S.D.N.Y. 2004) (citing *Yak v. Bank Brussels Lambert*,
10 252 F.3d 127, 130 (2d Cir. 2001) (internal quotations omitted); Fed. R. Civ. P. 10(c)
11 (“A copy of a written instrument that is an exhibit to a pleading is a part of the
12 pleading for all purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*,
13 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall*
14 *of Tempe, Inc.*, 583 F.2d 426 (9th Cir. 1978) (“[M]aterial which is properly
15 submitted as part of the complaint may be considered” in ruling on a Rule 12(b)(6)
16 motion to dismiss).

17 In addition to documents attached to the complaint or incorporated therein,
18 the Court may also consider documents that are the proper subject of judicial notice.
19 The examination of such documents (attached to the pleadings or admitted by
20 judicial notice) in a motion for judgment on the pleadings does not transform the
21 motion into one for summary judgment. *Yang v. Dar Al-Handash Consultants*, 250
22 F. App'x 771, 772 (9th Cir. 2007).

23 **b. Summary Judgment Standard**

24 In the alternative, however, if the Court does not grant Patco Brands’
25 concurrently-filed Request for Judicial Notice, or the Court does not otherwise find
26 there to be grounds sufficient to grant Patco Brand’s Motion to Dismiss under Rule
27 12(b)(6), the Court may ‘convert’ the motion to a motion for summary judgment,
28 such that the Court consider matters outside the pleadings, including the declaration

1 of José Luis León, and grant it as a matter of law. Fed. R. Civ. Proc. 12(d); *see also*,
2 *e.g.*, *Hamilton Materials, Inc. v. Dow Chem. Corp.* 494 F3d 1203, 1207 (9th Cir.
3 2007)

4 **IV. THE COURT SHOULD DISMISS THE TRADEMARK CLAIMS FOR**
5 **FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6),**
6 **BECAUSE THE COMPLAINT ALLEGES NO ACTIONABLE “USE”**
7 **OF A TRADEMARK.**

8 The Complaint alleges four separate causes of action against defendants that
9 are based on trademark infringement. Three of those claims are under the Lanham
10 Act (counts I-III) and one is under California state law (Count V). However, the
11 same analysis and elements apply in California trademark and unfair business
12 practices claims as those that apply in federal trademark claims. *See Century 21*
13 *Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th Cir. 1988); *Avery Dennison*
14 *Corp. v. Sumpton*, 189 F.3d 868, 874 (9th Cir. 1999). The Court should therefore
15 dismiss all of the Trademark Claims for the reasons set forth below.

16 **a. The Court should dismiss the Trademark Claims because the only**
17 **alleged “use” of “vampiro” is generic and thus not actionable.**

18 Generic terms, which refer to the general class or category of the product,
19 have been said to be “so useful to businesses selling the same product that no
20 amount of money poured into promoting customers’ association of generic terms
21 with a particular source can justify ‘depriving competing manufacturers of the
22 product of the right to call an article by its name.’” *In Hyuk Suh v. Choon Sik Yang*
23 987 F.Supp. 783, 791 (N.D.Cal. 1997) (*citing Abercrombie & Fitch Co. v. Hunting*
24 *World, Inc.* 537 F.2d 4, 9 (2d Cir. 1976)). Plaintiff’s complaint, however, asks the
25 Court to do just that: deprive Patco Brands of the right to call its vampiro cocktail by
26 its generic name, “vampiro.” *See* Complaint ¶¶ 8-29.

27 Trademark law cannot and does not protect the generic usage of a word,
28 because “it is the source-denoting function which trademark laws protect, and

1 nothing more.” *Anti-Monopoly, Inc. v. Gen. Mills Fun Group*, 611 F.2d 296, 301
2 (9th Cir. 1979). As the Ninth Circuit has explained, one competitor must “not be
3 permitted to impoverish the language of commerce by preventing his fellows from
4 fairly describing their own goods.” *Bada Co. v. Montgomery Ward & Co.*, 426 F.2d
5 8, 11 (9th Cir. 1970), *Cert. denied*, 400 U.S. 916 (1970); *see also Mattel, Inc. v.*
6 *MCA Records*, 296 F.3d 894, 900 (9th Cir. 2002) (“The trademark owner does not
7 have the right to control public discourse whenever the public imbues his mark with
8 a meaning beyond its source-identifying function.”); Indeed, “allowing the party
9 seeking protection to monopolize such language would prevent competitors from
10 adequately describing their own products.” *Intel Corp. v. Terabyte Int’l, Inc.*, 6 F.3d
11 614, 618 (9th Cir. 1993). Yet this is exactly what Plaintiff asks the Court to do here.

12 An alleged mark is generic when its primary significance to the relevant
13 consuming public is not as “a source indicator,” but as a generic designation for the
14 goods or services at issue. 15 U.S.C. § 1064(3). In the context of evaluating
15 whether a particular mark warrants trademark protection, there is a two-part test
16 used to determine whether a designation is generic: (1) what is the genus of goods or
17 services at issue; and (2) does the relevant public understand the designation
18 primarily to refer to that genus of goods or services? *H. Marvin Ginn Corp. v. Int’l*
19 *Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 990 (Fed. Cir. 1986).

20 Under the doctrine of foreign equivalents, moreover, a word commonly used
21 in another language as the generic name of a product cannot be imported into the
22 United States and transformed into a valid trademark. Generic names in languages
23 other than English have often been held to be generic for the American trade. For
24 example, the term HA-LUSH-KA means egg noodles in Hungarian. It was held
25 generic as a name for egg noodles sold in the United States, the Court of Customs
26 and Patent Appeals stating that “no one can be granted the exclusive use of the name
27 of an article, either in our native tongue or its equivalent in any foreign language.”
28

1 *See* 2 McCarthy on Trademarks and Unfair Competition § 12:41 (5th ed.) citing
2 *Weiss Noodle Co. v. Golden Cracknel and Specialty Co.*, 290 F.2d 845, 847 (1961).

3 Patco Brands is not asking the Court to strip a trademark holder of trademark
4 property rights, which is the fact pattern in which genericness is typically analyzed
5 under case law and which has a higher burden of proof. Here, the Court need only
6 find that Patco Brand’s use of the word “vampiro,” as alleged in the Complaint, is
7 not a “trademark use,” but generic use, in order to dismiss the Trademark Claims as
8 a matter of law, without leave to amend. The generic analysis used to determine a
9 mark’s registrability is nevertheless helpful to establish that Patco Brands’ use of the
10 word “vampiro” is generic.

11 *i. Patco Brands has Submitted Judicially-Noticeable Evidence*
12 *Sufficient to Establish that Patco Brands’ use of the word*
13 *Vampiro is Generic.*

14 The relevant public’s perception has been said to be the “primary
15 consideration” in determining whether a term is generic for the purpose of
16 determining its registrability. *Loglan Inst. Inc. v. Logical Language Grp. Inc.*, 902
17 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). Evidence to show the relevant
18 purchasing public’s understanding of a term or phrase may be obtained from “any
19 competent source,” such as dictionary definitions, trade journals, newspapers, and
20 other publications. *See, e.g., In re Dial-A-Mattress Operating Corp.*, 240 F.3d
21 1341, 1344-45 (Fed. Cir. 2001) (identifying dictionary definitions, trade journals,
22 newspapers, and other publications as competent sources to show the relevant
23 purchasing public's understanding of a term or phrase). Three types of evidence are
24 “typically considered integral to the genericism determination: uses (1) by the media
25 and other third parties, (2) within the industry generally, and (3) [by the parties
26 themselves].” *Boston Duck Tours, LP v. Super Duck Tours, LLC* 531 F.3d 1, 19 (1st
27 Cir. 2008); *See, e.g., Schwan's IP, LLC v. Kraft Pizza Co.*, 460 F.3d 971, 975 (8th

1 Cir. 2006) (discussing the relevance of newspaper articles using the phrase “brick
2 oven” to name a type of pizza rather than a specific brand).

3 In this case, the word “vampiro” is a direct Spanish translation for the English
4 word “vampire.” See RFJN, Ex. 6. Patco Brands has submitted judicially-noticeable
5 materials sufficient to show that the word “vampiro” is used in commerce to refer to
6 a spiced cocktail, and it is not used as a source indicator for any particular brand.
7 Specifically, the RFJN evidence includes the Wikipedia page for “vampiro
8 (cocktail),” which explains that “[t]he *Vampiro is popular in Mexico and is the*
9 *national drink*. Mexicans named the cocktail Vampiro (‘vampire’) because the
10 Viuda de Sanchez juice mixer’s red colour is reminiscent of blood.” See RFJN,
11 Ex 7. The doctrine of foreign equivalents discussed above prevents Plaintiff from
12 “owning” this foreign word translation.

13 The Wikipedia page also makes clear that there are many variations of the
14 drink. For instance, Wikipedia explains, under a heading called “Variants,” that
15 “[s]ome bartending guides suggest adding a shot of tomato juice, fresh-squeezed
16 orange and lime juice, grenadine syrup, hot pepper sauce and freshly-ground black
17 pepper to the glass, and omitting the Mexican sangrita.” *Id.* Wikipedia further
18 describes another variant, where the “blood-red drink is a blend of ...pisco, tequila,
19 lemon, pineapple, Ramazzotti amaro and chicha morada, a sweet, tart, nonalcoholic
20 Peruvian drink made from purple corn.” See *id.*

21 In addition, the RFJN presents evidence of a printout of a Google Search
22 results page, which shows pages of search result *hits* in response to a search for
23 “vampiro cocktail,” all of which demonstrate generic use, none of which show the
24 use of the use of the term as a trademark, by Plaintiff, or anyone else. The RFJN
25 includes representative examples of 10 different websites, all of which include
26 unique recipes in the English language, ostensibly directed to American and other
27 English-speaking consumers, for a version of the “vampiro cocktail,” including such
28

1 notable sources for recipes such as allrecipes.com (Ex. 8), Martha Stewart (Ex. 9),
2 and *Difford's Guide* (Ex. 10), among others. See RFJN at Exs. 8-21.

3 Patco Brands has also submitted evidence that El Jimador, a brand owned by
4 Brown-Forman, one of the largest American-owned companies in the wine and
5 spirits business (traded on the New York Stock Exchange under BF.B), also
6 produces “vampiro” as well as paloma ready-to-drink cocktails under the brand
7 name, “El Jimador New Mix.” See León Decl. at ¶ 6, Ex. 6; see also **RFJN 14**.

8 The cumulative judicially-noticeable evidence is “probative of generic use
9 because the more members of the public see a term used by competitors in the field,
10 the less likely they will be to identify the term with one particular producer.” *Boston*
11 *Duck Tours, LP v. Super Duck Tours, LLC* 531 F.3d 1, 19-20 (1st Cir. 2008)
12 (finding “duck tours” was used to refer to amphibious tours, not one particular
13 company) (quoting *Classic Foods Int'l Corp. v. Kettle Foods, Inc.*, 468 F. Supp. 2d
14 1181, 1190 (C.D. Cal. 2007)); *Schwan's IP*, 460 F.3d at 975 (finding generic use of
15 a term by a company's competitors is indicative of public perception). Here, there is
16 substantial evidence that “vampiro” is prominently used in commerce to refer to a
17 generic spiced cocktail, and the Court should dismiss the claims on this basis.

18 **b. The Court should dismiss the Trademark Claims because the only**
19 **alleged “use” of “vampiro” constitutes fair use as a matter of law.**

20 Even if the Court were to find the term “vampiro” is descriptive, as opposed
21 to generic, Patco Brands’ use of “vampiro” as alleged in the Complaint is subject to
22 the classic fair use defense set forth in 15 U.S.C. § 1115(b)(4), as a matter of law.

23 The Lanham Act was not intended to deprive commercial speakers of the
24 ordinary utility of descriptive words. “Applying the ‘classic fair use’ defense, ‘[a]
25 junior user is always entitled to use a descriptive term in good faith in its primary,
26 descriptive sense other than as a trademark.’ *Cairns v. Franklin Mint Co.*, 292 F.3d
27 1139, 1150 (9th Cir. 2002). A use of trademark is allowed as a matter of law where
28 its use is (1) other than as a trademark, (2) descriptive of the defendant’s goods, and

1 (3) in good faith. 15 U.S.C. § 1115(b)(4).” *KP Permanent II, supra*, 408 F.3d at
2 609.

3 Moreover, the fair use exception applies even in instances where a plaintiff
4 can demonstrate a likelihood of confusion, which is not the case here. As the
5 Supreme Court explained, “if any confusion results, that is a risk the plaintiff
6 accepted when it decided to identify its product with a mark that uses a well known
7 descriptive phrase.” (Citations). *KP Permanent Make-Up, Inc. v. Lasting*
8 *Impression I, Inc.*, 543 U.S. 111, 121–22 (2004).

9 Here, for all of the reasons described in section IV (a) above, and
10 demonstrated by the judicially-noticeable evidence, the Court must find that Patco
11 Brands is using the word “vampiro” (i) other than as a trademark, namely, it is using
12 it to call to mind the popular, generic name for a spicy cocktail that is popular in
13 Mexico and the United States. Rather, as shown by the judicially-noticeable
14 evidence filed concurrently herewith, the “vampiro” designation is (ii) descriptive of
15 the defendant’s goods.

16 Finally, the Complaint alleges no factual support for its claims of bad faith
17 intentional infringement. To the contrary, the evidence is clear that Patco Brands’
18 use of the word “vampiro” to describe its vampiro cocktail to consumers who know
19 it by its common name, was in good faith. The claims in the Complaint cannot
20 stand in light of the fact that vampiro is a generic word, or in the alternative,
21 descriptive, and refers to a drink commonly known by consumers as the “vampiro.”
22 15 U.S.C. § 1115(b)(4); *see also, e.g., KP Permanent II, supra*, 408 F.3d at 609.

23 **c. The Court is able to dismiss the claims at the pleading stage**
24 **without going outside of the Complaint.**

25 While it may be “somewhat unusual” to dismiss a complaint on the grounds
26 of genericness [or fair use] at the pleading stage, there is precedent to support the
27 Court doing so here. *See Threshold Enters. v. Pressed Juicery, Inc.* 445 F.Supp.3d
28 139, 154 (N.D.Cal. 2020)); *see also Closed Loop*, 589 F.Supp.2d at 1220 (granting

1 motion to dismiss after examining judicially-noticed documents and concluding
2 mark generic); *Image Online Design, Inc. v. Internet Corp. for Assigned Named and*
3 *Numbers*, No. 12-cv-8968-DDP-JC, 2013 U.S. Dist. LEXIS 16896, 2013 WL
4 489899, at *7-8 (C.D. Cal. 2013) (granting motion to dismiss after determining
5 proposed mark “.WEB” was generic for internet services); *Whipple v. Brigman*, No.
6 12-cv-258, 2013 U.S. Dist. LEXIS 19414, 2013 WL 566817, at *4-5 (W.D.N.C.
7 Feb. 13, 2013) (granting motion for judgment on the pleadings after finding mark
8 generic); *Energy Intelligence Group v. UBS Fin. Servs.*, No. 08-cv-1497-DAB, 2009
9 U.S. Dist. LEXIS 48495, 2009 WL 1490603, at *4-6 (S.D.N.Y. 2009) (granting
10 motion to dismiss because mark generic).

11 The Court may review the complaint as well as any exhibits attached thereto
12 without converting the motion to one for summary judgment. The examination of
13 such documents (attached to the pleadings or admitted by judicial notice) in a
14 motion for judgment on the pleadings does not transform the motion into one for
15 summary judgment. *Yang v. Dar Al-Handash Consultants*, 250 F. App’x 771, 772
16 (9th Cir. 2007).

17 **d. In the Alternative, the Court May Look Outside the Pleadings to**
18 **Find that Patco Brands’ Use of the Word Vampiro is**
19 **Nonactionable.**

20 Federal Rule of Civil Procedure 12(b)(6) specifically gives courts the
21 discretion to accept and consider extrinsic materials offered in connection with these
22 motions, and to convert the motion to one for summary judgment when a party has
23 notice that the district court may look beyond the pleadings. *See Hamilton*
24 *Materials Inc. v. Dow Chem. Corp.* 494 F.3d 1203, 1207 (9th Cir. 2007). Plaintiff
25 has such notice here, and Patco Brands ask that the Court use its discretion to
26 consider the extrinsic materials, in the event the Court determines that it requires
27 evidence beyond that offered in Patco Brands’ Request for Judicial Notice.

28

1 **V. THE COURT SHOULD DISMISS THE FALSE ADVERTISING**
2 **CLAIMS AGAINST PATCO BRANDS.**

3 The Rancho La Gloria products are the primary focus of the False Advertising
4 claims alleged in the Complaint. To the extent that the Complaint alleges False
5 Advertising Claims against the GRAN AGAVE MIX vampiro cocktail, however,
6 the same arguments that MPL Brands makes in its Motion to Dismiss the False
7 Advertising Claims also apply to dismiss the false advertising claims against Patco
8 Brands based on its GRAN AGAVE MIX vampiro cocktail.

9 As explained in MPL Brands’ Motion, Plaintiff does not have constitutional
10 or statutory standing to bring its claims, because Plaintiff has not alleged that it has
11 suffered any harm, nor could it. In its Complaint, Plaintiff alleges that the false
12 advertising harmed Plaintiff’s Vampire Gourmet Bloody Mary cocktail, which
13 supposedly contains real tomatoes and vodka. [Complaint ¶¶ 34-35.] However,
14 judicially-noticeable facts conclusively establish that Plaintiff is not currently selling
15 Vampire Bloody May Cocktail, and has not ever done so. *See* RFJN 3-4.

16 Moreover, Plaintiff does not and cannot identify a “false statement” on the
17 label for the GRAN AGAVE Mix vampiro cocktail. The front label of the accused
18 product expressly states that it is made from: “100% Agave Wine, Mineral Water,
19 Natural Spice, and Citrus Flavor.” *See* Patco Brands’ RFJN at Ex. 22. Separately,
20 the label also states “THE VAMPIRO COCKTAIL IS AN AUTHENTIC
21 MEXICAN MASTERPIECE THAT INCLUDES HINTS OF GRAPEFRUIT,
22 LIME & SPICES, FIZZY MINERAL WATER & 100% AGAVE WINE.” *Id.*

23 In any event, because Patco Brands is named as a defendant in the False
24 Advertising Claims and Plaintiff falsely alleges that MPL Brands and Patco Brands
25 are alter egos of one another, MPL Brands files this joinder and adopts and
26 incorporates by reference all arguments set forth in said Motion and supporting
27 papers in support of dismissal of the False Advertising Claims against defendant
28 Patco Brands, on the same grounds provided for the dismissal of the False

1 Advertising claims against MPL Brands.

2 **VI. CONCLUSION**

3 For all the foregoing reasons, Defendant Patco Brands respectfully requests
4 that the Court dismiss the above-defined “Trademark Infringement Claims”
5 pursuant to Fed. R. Civ. P. 12(b)(6), with prejudice, and that it dismisses any
6 remaining false advertising claim against Patco Brands for the reasons provided in
7 MPL Brands’ Motion to Dismiss, which Patco Brands has joined. See Patco Brands’
8 Joinder filed concurrently herewith. In the alternative, the Court may convert this
9 motion to one for summary judgment and dismiss the claims against Patco Brands
10 on the basis that there is no material fact in dispute such that all of the claims
11 alleged against Patco Brands fail as a matter of law.

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Dated: December 23, 2020

BLAKELY LAW GROUP

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