BULKY DOCUMENTS

(Exceeds 100 pages)

Proceeding/Serial No: 92052908

Filed: 9/1/2010

Title: REGISTRANT'S MOTION TO DISMISS.

Part 1 of 1

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

TTAB

TRIUMBARI CORPORATION,	**Cancellation No. 92052908**
Petitioner,	
v.	**REGISTRANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND SUPPORTING MEMORANDUM OF LAW**
JOSEPH J. NORTON,	
Registrant.	

REGISTRANT'S MOTION TO DISMISS

Registrant, Joseph J. Norton ("Registrant"), hereby moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Petition for Cancellation filed by Petitioner, Triumbari Corporation ("Petitioner"). By this motion, Registrant seeks an order dismissing the Petition for Cancellation filed against Registrant's Registration No. 3,323,848 which protects the trade dress configuration of Registrant's Bug Juice beverage bottle design. As set forth in Registrant's Memorandum of Law below, Petitioner is a mere intermeddler who has no standing to cancel Registrant's registration.

Moreover, the Petition for Cancellation is fatally deficient as a matter of law. From the face of the Petition, it is evident that Petitioner failed to plead a claim for cancellation on grounds of functionality, or to state a claim for fraud in compliance with Fed. R. Civ. P. 9(b). As Petitioner did not and cannot articulate any ground for the cancellation of registration of Registrant's registration, Registrant respectfully requests that the Board grant its motion to dismiss without leave to replead and dismiss this proceeding in its entirety.

[redacted]

09-01-2010

REGISTRANT'S MEMORANDUM OF LAW

I. PROCEDURAL BACKGROUND

A. PETITIONER'S INTERFERENCE IN RESPONDENT'S THIRD PARTY LITIGATION

This proceeding was instituted by Petitioner in the wake of Registrant's recent victory in an unrelated federal action pending in the United States District Court for the Western District of Michigan entitled *Bug Juice Brands, Inc. and Joseph J. Norton v. Great Lakes Bottling Company*, Civil Action No. 1:10-cv-229 (PLM) (W.D. Mich.) (hereinafter, "Federal Action"). In the Federal Action, Registrant and his related company ("Plaintiffs") brought claims against third party Great Lakes Bottling Company ("Great Lakes") for trademark and trade dress infringement, false designation of origin and unfair competition under the Lanham Act (15 U.S.C. §§ 1114 and 1125(a)), and trademark infringement and unfair competition under the statutory and common laws of the State of Michigan.

The Federal Action is based on Great Lakes' use of the name and mark JUNGLE JUICE and related packaging and labeling in connection with the promotion, marketing and sale of fruit flavored children's beverages in direct infringement of Plaintiffs' BUG JUICE® mark and trade dress, jungle slogan and jungle theme for fruit flavored children's beverages, and federal registrations therefor, including but not limited to the bottle configuration trade dress that is the subject of Registration No. 3,334,848. Great Lakes' infringing use of Registrant's bottle configuration trade dress is only one aspect of the infringing activity before the court in the Federal Action.

Petitioner claims that the Federal Action is "based, in part, on a claim that bottles manufactured by Petitioner infringe Registrant's purported trademark rights in the Bottle

Design," which apparently was the impetus for this proceeding. (Petition for Cancellation, ¶ 2). Petitioner's claim is false.

Petitioner is a complete stranger to the Federal Action. Contrary to Petitioner's implications, Petitioner was not named or referenced in Plaintiffs' Complaint, nor was Petitioner referenced in Plaintiffs' motion for preliminary injunction filed in the Federal Action. (Richard Decl. Exs. 1 and 2). Great Lakes did not refer to Petitioner in its Answer or move to join Petitioner as the manufacturer of the infringing bottles at issue, nor did Great Lakes make any reference to Petitioner in its opposition to Plaintiffs' motion for preliminary injunction. (Richard Decl. Exs. 3 and 4).

On June 2, 2010, the Honorable Paul L. Maloney conducted a hearing on Plaintiffs' motion for a preliminary injunction in the Federal Action. In issuing the preliminary injunction against Great Lakes, the Court held as follows:

> I must say I don't understand why we are here. I mean this is not even close. This is not even close. . . And I find Mr. DeWitt's [the president of Great Lakes] testimony to be totally incredible. To say that these two labels are serendipitous is total and complete nonsense. And I, if plaintiff wishes-- I'm going to issue the preliminary injunction, because I think plaintiff has met all prongs of the standard for a preliminary injunction, and has met all prongs for trade dress infringement. I do that based on this record, because there's been virtually no defense put up to the plaintiffs' case. The plaintiffs' case on all elements is compelling. And for the life of me, I do not understand why a federal court has dealt with this for four hours based on the proofs that the defendants have put on, and I think this is sanctionable. This is not even close. And as I say, I am shocked that we are here.

(Richard Decl. Ex. 5, at 170-171).

The parties in the Federal Action entered into a Final Judgment on Consent and Injunction on June 10, 2010. *See* Richard Decl. Ex. 6.

B. PETITIONER'S DEFICIENT ALLEGATIONS REGARDING STANDING

Petitioner's allegation regarding its standing to institute and maintain this proceeding is set forth below in its entirety:

> 2. Petitioner has standing to bring this proceeding and will be damaged if the registration is not cancelled because: a) the registration of the Bottle Design improperly gives the Registrant presumptive exclusive rights to a functional and non-distinctive design that should be available for all bottle manufacturers, including Petitioner, to use; and b) Registrant and his related company have brought a civil action against Great Lakes Bottling Company ("Great Lakes"), one of Petitioner's customers, that is based, in part, on a claim that bottles manufactured by Petitioner infringe Registrant's purported trademark rights in the Bottle Design and have obtained an injunction relating to the Bottle Design. Petitioner intends to challenge the injunction and seek a declaration that Registrant's registration is invalid in the action ("Civil Action").
>
> (Petition for Cancellation, ¶ 2).

Petitioner, a Canadian company, made no allegation that it has sold *in the United States* any bottle with a confusingly similar trade dress to that of Registrant. Petitioner made no allegation that it is a competitor of Registrant. Petitioner made no allegation that it has sold in interstate commerce any bottle with a confusingly similar trade dress to that of Registrant. Petitioner made no allegation that it has sold, sells or seeks to sell in the United States any bottle with a confusingly similar trade dress in connection with the same or related goods. In short, Petitioner made no allegation that it has established any rights in the United States or any other facts that would establish its standing to institute and maintain this proceeding.

Petitioner alleges only that it has sold "similar" bottles in some unidentified country since 1996 "and has been selling the bottle at issue for many years," again, in an unidentified country in connection with unidentified goods. (Petition for Cancellation, ¶ 3). Petitioner subsequently repeats that it "has been using a similar bottle design since at least 1996," again, without specifying that it has used confusingly similar trade dress in interstate commerce in connection with competing goods. (*Id.*, ¶ 32). As Petitioner is a Canadian company and failed to allege any

facts supporting a conclusion that it uses or seeks to use in the United States or interstate commerce trade dress that is confusingly similar to Registrant's trade dress, its request for cancellation of Registrant's registration so that the Registrant's trade dress is "available" for Petitioner to use in Canada or somewhere else in the world does not support the exercise of jurisdiction over this matter by the Board.

Moreover, Petitioner inexplicably claims that one of the bottles it manufactures is purportedly "protected by" Registrant's Registration No. 3,323,848. (Petition for Cancellation, ¶ 3). Registrant's trade dress registration does not "protect" any product of Petitioner.

Accordingly, Petitioner's purported basis for standing in this proceeding is non-existent.

C. PETITIONER'S FATALLY DEFICIENT FUNCTIONALITY CLAIM

Although Petitioner does not clear the initial hurdle of establishing its standing, an analysis of the four corners of the Petition for Cancellation confirms its fatal deficiency. First, Petitioner seeks cancellation of Registration No. 3,323,848 on the grounds that it disagrees with the Examining Attorney's conclusion that Registrant's bottle design configuration is entitled to federal registration. Petitioner's legal conclusions regarding functionality are devoid of any factual support. Moreover, the law is clear that Petitioner cannot substitute its judgment for that of the Examining Attorney, warranting dismissal of this claim.

D. PETITIONER'S FATALLY DEFICIENT FRAUD CLAIM

Second, Petitioner claims that Registrant committed fraud because Registrant did not disclose to the Examining Attorney that "Petitioner has been using a similar bottle design since at least 1996." (Petition for Cancellation, ¶ 32). On its face, Petitioner's claim of fraud is fatally deficient. Set forth below are Petitioner's allegations supporting its claim of fraud:

29. Registrant intentionally misrepresented material facts to the Examining Attorney in connection with this Registration and, upon information and belief, had these material facts been accurately represented, it would have caused the Examining Attorney to refuse to approve the Registration for publication.

30. In his response to a February 1, 2006 office action ("Response"), Registrant falsely claimed that his "bottle configuration has been in **exclusive and continuous use in interstate commerce for at least five years preceding the filing date of this application."** *See* Response at 3 (emphasis added).

31. Additionally, in a Declaration attached to the Response, Registrant falsely claimed that the Bottle Design has become distinctive as a result of his "**substantially exclusive and continuous use of the mark in interstate commerce."** *See* Response at Ex. 4 (emphasis added).

32. Both of the above statements are clearly false in that Petitioner has been using a similar bottle design since at least 1996.

33. Upon information and belief, the Examining Attorney relied upon the above-referenced arguments and exhibits of Registrant in approving the Registration for publication.

34. Upon further information and belief, Registrant willfully and deliberately made these false statements of material fact to the Examining Attorney.

35. Upon information and belief, had the Examining Attorney been made aware of these false statements of material fact, the Examining Attorney would not have approved the Registration for publication.

36. Upon information and belief, Registrant's submission of these false statements of material fact constitutes fraud on the Trademark Office.

Petitioner's claim of fraud falls woefully short of the standard imposed by Fed. R. Civ. P. 9(b). First, even accepting Petitioner's allegations as true on this motion, Petitioner's arguments regarding Registrant's failure to disclose the existence of Petitioner's bottles does not rise to the level of fraud. Second, Petitioner failed to allege that Registrant was aware of Petitioner, let alone that Registrant is aware that Petitioner uses confusingly similar trade dress in connection with competitive goods. As Petitioner failed to disclose that it has sold or sells bottles using confusingly similar trade dress in the United States, it is unclear from the face of the Petition for

Cancellation what facts Registrant purportedly should have disclosed to the Examining Attorney. Third, Petitioner failed to allege that it has suffered damage as a result of Registrant's purported fraud.

On its face, it is obvious that Petitioner's claim of fraud is fatally deficient. As Petitioner failed to state a cause of action for fraud, this count should be dismissed with prejudice, without leave to replead.

II. ARGUMENT

A. STANDARD FOR DISMISSAL PURSUANT TO FED. R. CIV. P. 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(6) and T.B.M.P. § 503.01, a motion to dismiss for failure to state a claim upon which relief can be granted may be filed before the movant's answer. "For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff." T.B.M.P. § 503.02.

In order to survive a motion to dismiss under Rule 12(b)(6), Petitioner "need only have alleged such facts as would, if proved, show 1) that [plaintiff] has standing to oppose registration of [defendant's] mark and 2) that a statutory ground for opposing such registration exists." *Duramax Marine, L.L.C. v. R.W. Fernstrum & Co.*, 2001 WL 431506, at *3 (T.T.A.B. April 26, 2001) (motion to dismiss granted where complaint failed to include any "specific allegations . . . that, if proved, would establish that registrant's merely descriptive mark has not become distinctive of applicant's services or that the primary significance of the proposed mark remains the original descriptive significance").

Bald conclusions fail to meet the notice pleading standard under Fed. R. Civ. P. 8. As the Supreme Court has recently articulated, "a plaintiff's obligation to provide the 'grounds' of his

'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). *See also*, *eCash Technologies, Inc. v. Guagliardo*, 210 F. Supp. 2d 1138, 1143 (C.D. Cal. 2001) ("the Court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations.").

On a Rule 12(b)(6) motion, "a court may consider documents which are not physically attached to the complaint but 'whose contents are alleged in [the] complaint and whose authenticity no party questions.'" *eCash Technologies*, 210 F. Supp. 2d at 1144 (internal citation omitted). As the Petition for Cancellation refers to the Federal Action, the documents that were filed in the Federal Action and are part of the public record cannot be disputed by Petitioner and may be considered by the Board on this motion.

With the foregoing framework for analyzing Petitioner's pleading in hand, it is clear that dismissal is warranted under Rule 12(b)(6). For the reasons set forth below, Petitioner has no standing to cancel the registration of Registrant's mark and its pleading is fatally deficient on multiple levels.

B. PETITIONER FAILED TO ALLEGE THAT IT HAS STANDING TO MAINTAIN THIS PROCEEDING

An essential element of proof in an opposition proceeding is that the Petitioner possess "a real interest" in the proceeding. *No Nonsense Fashions, Inc. v. Consolidated Foods Corp.*, 226 U.S.P.Q. 502, 504 (T.TA.B. 1985) (plaintiff failed to prove facts that satisfied the minimum requirement for standing).

As the Petition for Cancellation is devoid of any allegation that Petitioner engages in any business in the United States, there is no basis on which to conclude that Petitioner "is engaged

in any 'business' at all which would give it a real interest in the outcome of this proceeding." *Nobelle.com, LLC v. Qwest Communications, Int'l.*, 2003 WL 1789052, at *3, 66 U.S.P.Q.2d 1300 (T.T.A.B. Feb. 4, 2003) (petitioner failed to establish standing to cancel registration).

In order to ensure that the Petitioner has a real interest and is not merely an intermeddler, constitutional standing requires that the following three elements be met: "(1) the plaintiff must have suffered an injury in fact; (2) there must be a causal nexus between that injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable judicial decision." *Joint Stock Society v. UDV North America, Inc.*, 266 F.3d 164, 175 (3d Cir. 2001) (plaintiffs failed to establish Article III standing as they never marketed vodka in the United States and did not adduce evidence establishing that they were prepared to do so). The Petition for Cancellation is silent as to any damage suffered by Petitioner that was proximately caused by any conduct of Registrant.

As Professor McCarthy explains, "The issue in determining standing is not necessarily whether petitioner is entitled to registration or owns the mark, but rather whether the presumptions flowing from the registration are damaging to petitioner's legal and continuous use of that term." 3 *McCarthy on Trademarks and Unfair Competition*, § 20:46 (4th ed. 2010). As the Petition for Cancellation is devoid of any allegation that Petitioner has made "legal and continuous use" in the United States of the trade dress that is the subject of Registration No. 3,323,848, there is no claim of damage that would support Petitioner's standing to cancel the registration.

As the Petition for Cancellation contains no allegations that would support a claim that Petitioner has standing to seek the cancellation of Registrant's registration, this proceeding

should be dismissed in its entirety. If the Board is inclined to consider Petitioner's claims of functionality and fraud, Registrant has addressed below each of these fatally deficient claims.

C. PETITIONER FAILED TO STATE A CLAIM THAT REGISTRANT'S TRADE DRESS REGISTRATION SHOULD BE CANCELLED ON GROUNDS OF FUNCTIONALITY

In order to state a claim for cancellation on grounds of functionality, a claimant "must not only point to certain advantages of the . . . design, but also demonstrate that depriving them of these advantages will have a materially adverse impact upon their ability to compete effectively . . . ." *Northwestern Corp. v. Gabriel Mfg. Co., Inc.* No. 95 C 2004, 1996 WL 251433, at *6 (N.D. Ill. May 8, 1996). The Petition for Cancellation contains no allegations regarding specific advantages of Registrant's trade dress configuration or how those advantages would "adversely impact" Petitioner's ability to compete in the fruit flavored children's beverage market or how manufacturing a different bottle design would raise its production and marketing costs. *Id.* In the absence of such supporting factual allegations, Registrant's request for cancellation on grounds of functionality is grounded on nothing but mere legal conclusions, warranting dismissal. *Id.*

Moreover, to the extent that Petitioner's claim of functionality is based on its disagreement with the Examining Attorney's conclusion that Registrant's product configuration trade dress is protectable, after the Examining Attorney's analysis of the evidence submitted by Registrant in support of its application, such disagreement cannot form the basis of an *inter partes* proceeding. *FCH Enterprises, Inc. v. Douvris*, 2008 WL 4877075, at *4, Canc. No. 92/047,334 (T.T.A.B. Oct. 27, 2008) ("an allegation of the sufficiency of what was submitted in application is a technical question which is within the province of the examining attorney to determine and cannot form the basis of a proceeding before the Board [ ]"; where petitioner's

"allegations essentially request that the Board evaluate or re-evaluate the merits of" maintenance documents filed by respondent. respondent was entitled to summary judgment on claim of fraud).

As the Petitioner's barebones claim of functionality is not only deficient, but barred by Board precedent, this count should be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6).

D. PETITIONER FAILED TO STATE A CLAIM FOR FRAUD

An allegation of fraud must be stated with particularity pursuant to Fed. R. Civ. P. 9(b), which is applicable in Board proceedings under Trademark Rule 2.116(a). *Asian and Western Classics B.V. v. Selkow*, 2009 WL 3678263, 92 U.S.P.Q.2d 1478, Canc. No. 92048821 (T.T.A.B. Oct. 22, 2009); *Northwestern Corp.*, 1996 WL 251433, at *5 (deficient claim of functionality of trade dress dismissed).

A claim of fraud made "on information and belief" in the absence of any allegations of "'specific facts upon which the belief is reasonably based'" is insufficient. *Asian and Western Classics*, 92 U.S.P.Q.2d at 1479 (internal citation omitted). A claim of fraud made "on information and belief" violates Fed. R. Civ. P. 9(b), in that it raises only the "mere possibility" that a factual basis for the claim is likely. *Id.*. In this case, all of the salient allegations comprising Petitioner's claim of fraud are made "on information and belief." *See* Petition for Cancellation, ¶¶ 20, 33-36.

A party alleging fraud bears a "heavy" burden of proof. *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (overruling the Board's mere negligence standard set forth in *Medinol v. Neuro Vasx, Inc.* for finding fraud); *Enbridge Inc. v. Excelerate Energy LP*, 92 U.S.P.Q.2d 1537, 1540. Opp. No. 91170364 (T.T.A.B. Oct. 6, 2009).

Fraud must be proven "'to the hilt' with clear and convincing evidence.'" *Bose*, 580 F.3d at 1243. (internal citation omitted). As Professor McCarthy notes, fraud in the procurement of a trademark registration is often alleged, but "seldom proven." 6 *McCarthy, supra*, § 31:68.

Generally, in order to state a claim of fraud, a pleading must contain the following allegations: (1) a false representation regarding a material fact; (2) knowledge or belief that the representation is false; (3) an intention to induce listener to act or refrain from acting in reliance on the misrepresentation; (4) reliance on the misrepresentation; and (5) damage proximately resulting from such reliance. *eCash Technologies*, 210 F. Supp. 2d at 1149, 1150.

The Federal Circuit makes clear in *Bose* that, "Unless the challenger can point to evidence to support an inference of deceptive intent, it has failed to satisfy the clear and convincing evidence standard required to establish a fraud claim." 580 F.3d at 1246.

The specific ground for fraud alleged by Petitioner, namely, that Registrant should have notified the Examining Attorney that "Petitioner has been using a similar bottle design since at least 1996," requires an additional set of facts that must be alleged with particularity. (Petition for Cancellation, ¶ 32). Specifically, where a plaintiff is claiming that the declaration in defendant's application was executed fraudulently because of another use, the plaintiff must allege particular facts that would establish that:

> (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which it was not entitled.

Intellimedia Sports Inc. v. Intellimedia Corp., 43 U.S.P.Q.2d 1203, 1206 (T.T.A.B. 1997) (dismissing plaintiff's claim of fraud pursuant to Fed. R. Civ. P. 12(b)(6)). The Petition for Cancellation is devoid of *all* of the foregoing required factors.

It is hornbook law that, "If applicant has a good faith belief that it is the senior user, then the oath cannot be fraudulent." 6 *McCarthy*, *supra*, § 31:77. An applicant's failure to disclose to the PTO the asserted rights of another does not constitute fraud "unless such other person was known by applicant to possess a superior or clearly established right to use the same or a substantially identical mark for the same or substantially identical goods or services as those in connection with which registration is sought." *Intellimedia Sports*, 43 U.S.P.Q.2d at 1207. Once again, the Petition for Cancellation is devoid of any of the foregoing required factual allegations.

Petitioner failed to allege that it has established any rights in Registrant's trade dress, let alone that it has "clearly established" rights that render Registrant's registration fraudulent. *eCash Technologies*, 210 F. Supp. 2d at 1150 ("It is not enough that Defendants simply be able to show *some* common law rights to use the mark; they must be able to show that their rights were so 'clearly established' that Plaintiff's failure to disclose Defendants' rights to the PTO would have to constitute fraud"). Moreover, Petitioner failed to allege that it is using "the same or a substantially identical" trade dress, or that it is using such trade dress in connection with "the same or substantially identical goods" as Registrant's fruit flavored children's beverages.

"'[C]harges of fraud and non-disclosure [that rely on an applicant's alleged duty to disclose uses of the same mark by others] have uniformly been rejected.'" *eCash Technologies*, 210 F. Supp. 2d at at 1149 (citing 6 *McCarthy*, § 31:76 at 31-129).

To the extent that Petitioner seeks to argue that a third party in the United States might have some rights against Registrant (notwithstanding that Registrant is not aware of any such

third party), the possible rights of a third party do not afford Petitioner standing to petition to cancel the registration. *Colony Foods, Inc. v. Sagemark, Ltd.*, 735 F.2d 1336, 1340, 222 U.S.P.Q. 185 (Fed. Cir. 1984) (affirming dismissal of petition for cancellation); 3 *McCarthy*, *supra*, § 20:47.

Moreover, to the extent that Petitioner is claiming that Registrant engaged in fraud by purportedly withholding the alleged functionality of its trade dress product configuration from the PTO, such claim does not support a claim of fraud. *Northwestern Corp.*, 1996 WL 251433, at *5("Functionality is not a material fact per se which can be withheld from the PTO").

As Petitioner failed to allege each and every element required to sufficiently plead a cause of action for fraud, this count should be dismissed with prejudice. *eCash Technologies*, 210 F. Supp. 2d at 1151 (claim of fraud on the PTO dismissed with prejudice).

III. CONCLUSION

For the reasons set forth herein, Registrant requests that Petitioner's Petition for Cancellation be dismissed with prejudice, without leave to plead, and that this proceeding be dismissed in its entirety.

Dated: New York, New York
August 31, 2010

By: _____

Virginia R. Richard, Esq.
Lana C. Marina, Esq.
Sanjana Chopra, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-6700

Attorneys for Registrant
JOSEPH J. NORTON

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2010, a true and correct copy of the foregoing Registrant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and Supporting Memorandum of Law was duly served on counsel of record for Petitioner by U.S. first class pre-paid mail in an envelope addressed as follows:

Camille M Miller, Esq.
Cozen O'Connor, PC
1900 Market Street
Philadelphia, PA 19103

Denise Bolden

EXPRESS MAIL" mailing label number—EF321758899US
Date of Deposit September 1, 2010
I hereby swear that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

Denise Bolden

Signature

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

TRIUMBARI CORPORATION,	:	**Cancellation No. 92052908**
Petitioner,	:	
v.	:	
JOSEPH J. NORTON,	:	
Registrant.	:	

DECLARATION OF VIRGINIA R. RICHARD
IN SUPPORT OF REGISTRANT'S MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6)

VIRGINIA R. RICHARD, pursuant to the provisions of 28 U.S.C. § 1746, declares under penalty of perjury that the following is true and correct:

1. I am a partner with the law firm of Winston & Strawn LLP, counsel of record for Joseph J. Norton ("Norton"), the Registrant in the above-captioned proceeding.

2. I make this declaration upon my personal knowledge and belief. I am submitting this declaration in support of Registrant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) against Triumbari Corporation ("Triumbari"), the Petitioner in the above-captioned proceeding.

3. Attached hereto as Exhibit 1 is a copy of the Complaint filed by Norton and his related company, Bug Juice Brands, Inc. (hereinafter, "Plaintiffs") against third party Great Lakes Bottling Company (hereinafter, "Great Lakes") in the matter entitled *Bug Juice Brands,*

Inc. and Joseph J. Norton v. Great Lakes Bottling Company, Civil Action No. 1:10-cv-229 (W.D. Mich.) (PLM), which is currently pending before the United States District Court for the Western District of Michigan (hereinafter, "Federal Action").

4. Attached hereto is Exhibit 2 is a copy of the brief in support of Plaintiffs' motion for preliminary injunction against Great Lakes, filed on March 22, 2010 in the Federal Action.

5. Attached hereto as Exhibit 3 is a copy of the Answer filed by Great Lakes on March 29, 2010 in the Federal Action.

6. Attached hereto as Exhibit 4 is a copy of the brief in opposition to Plaintiffs' motion for preliminary injunction filed by Great Lakes on April 9, 2010 in the Federal Action.

7. On June 2, 2010, the Honorable Paul L. Maloney conducted a hearing on Plaintiffs' motion for a preliminary injunction in the Federal Action. Attached hereto as Exhibit 5 is a copy of the transcript of the June 2, 2010 hearing before Judge Maloney.

8. Attached hereto as Exhibit 6 is a copy of the Final Judgment on Consent and Injunction entered into by the parties in the Federal Action on June 10, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 8/31/10

VIRGINIA R. RICHARD

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BUG JUICE BRANDS, INC., and JOSEPH J. NORTON,

Plaintiffs,

v.

GREAT LAKES BOTTLING COMPANY,

Defendant.

Civil Action No. **1:10-cv-229**
Paul L Maloney
Chief U.S. District Judge

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
Attorneys for Plaintiffs Bug Juice Brands, Inc. and Joseph J. Norton
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700
(616) 831-1701 (fax)
gassd@millerjohnson.com
portingaa@millerjohnson.com

Of Counsel
Virginia R. Richard, Esq.
Lana C. Marina, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166-4193
T: (212) 294-6700
F: (212) 294-4700
vrichard@winston.com
lmarina@winston.com

COMPLAINT

Plaintiffs, Bug Juice Brands, Inc. and Joseph J. Norton (collectively, "Plaintiffs"), for their Complaint against Defendant Great Lakes Bottling Company ("Defendant") hereby allege as follows:

NATURE OF THE ACTION

1. This action arises out of Defendant's knowing and willful infringement of Plaintiffs' federal trademark registrations and deliberate copying of the distinctive jungle style trade dress and advertising theme that Plaintiffs have continuously used for the past 19 years in

connection with their highly popular BUG JUICE® brand fruit flavored beverages for children.

2. In a deliberate attempt to misappropriate and trade off the valuable goodwill that Plaintiffs have developed at enormous expense, Defendant is marketing fruit flavored beverages for children under the confusingly similar "JUNGLE JUICE" bottle and label design that are virtually identical to Plaintiffs BUG JUICE® brand trade dress, to the same target customers and in the same marketing channels. Defendants unlawful conduct has caused confusion in the trade and among consumers resulting in irreparable harm to Plaintiffs and will continue to cause Plaintiffs irreparable harm unless Defendant's unlawful conduct is enjoined.

3. To rectify this harm Plaintiffs in this action seek injunctive relief and damages based on trade dress and trademark infringement, false designation of origin, and unfair competition in violation of the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and trademark infringement and unfair competition under the Michigan Consumer Protection Act, Mich. Comp. Laws. § 445.901, *et. seq.*, and Michigan common law.

THE PARTIES

4. Plaintiff, Bug Juice Brands, Inc., is a corporation organized and existing under the laws of the State of Michigan with its principal place of business located at 770 Grand River, Suite 2, Brighton, Michigan 48114 ("Bug Juice").

5. Plaintiff Joseph J. Norton, is an individual who maintains offices at 7701 Grand River, Suite 2, Brighton, Michigan 48114 ("Norton"). Mr. Norton is and has at all times been the president of Bug Juice and is the owner of the federally registered trademarks at issue herein. Bug Juice and Norton are hereinafter collectively referred to as "Plaintiffs."

6. Bug Juice is the exclusive licensee of the federally registered trademarks at issue herein.

7. Upon information and belief, Defendant, Great Lakes Bottling Company, is a corporation organized and existing under the laws of the State of Michigan with its principal place of business located at 4460 44th Street SE, Suite A, Kentwood, Michigan 49512 ("Defendant" and/or "GLBC").

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338, and has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a) because those claims are substantially related to Plaintiffs' federal claims.

9. This Court has personal jurisdiction over Defendant because, upon information and belief, Defendant carries on a continuous and systematic part of its business in this district.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c) because, upon information and belief, Defendant is incorporated in the State of Michigan and carries on a continuous and systematic part of its business in this district.

BACKGROUND

A. PLAINTIFFS AND THEIR BUG JUICE® BRAND TRADEMARKS AND TRADE DRESS

11. Bug Juice manufactures and distributes a variety of fruit flavored beverages for children. The company was founded in 1991 and incorporated in 1998 by the company's president, Norton, who perceived a void in the market for children's beverages.

12. Displaying true entrepreneurial spirit, Norton conceived of the idea of a fruit juice flavored product targeted directly at children and began manufacturing and selling BUG JUICE® brand fruit flavored juice in petite specially designed child-size clear plastic bottles.

13. The BUG JUICE® brand bottles are adorned with brightly colored labels which feature the name "BUG JUICE" in large, cartoon/graffiti style lettering and an overall jungle design that consists of several large, green stylized jungle plant leaves with cute cartoon style insect characters poised on or about the leaves (the "Jungle Theme"). The color of the beverage contained in each BUG JUICE® brand bottle is color coordinated to the product flavor. For example, the BUG JUICE® brand beverage flavor "Fruity Punch" is bright red and the BUG JUICE® brand beverage flavor "Lemony Lime" is bright neon

green and both beverage colors are clearly visible in the clear plastic BUG JUICE® brand bottle. All of these foregoing elements were designed specifically to appeal to children.

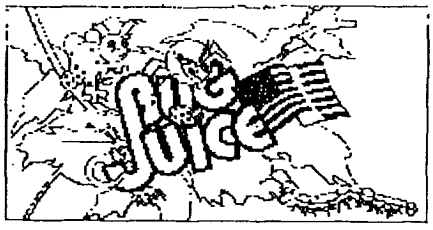
14. The BUG JUICE® brand beverages were an immediate hit, and distribution soon expanded from Michigan and the surrounding region to the southeast, Pacific northwest and California. Today, BUG JUICE® brand beverages are the number one selling fruit flavored juice drink in convenience stores nationwide and are available in half a dozen flavors featuring fun, intriguing and alliterative names such as "Leap'N Lem'N Ade," "Whistl'N Watermel'N," "Straw' Nana," "Lemony Lime" and "Outrageous Orange."

15. The enormous popularity of the BUG JUICE® brand is reflected in retail sales of BUG JUICE® brand products of $70 million in 2008 and $84 million in 2009. Overall, since the launch of Bug Juice products in 1991, sales of the BUG JUICE® brand products at the wholesale level have exceeded $300 million.

16. As a result of the tremendous sales volume and national distribution of BUG JUICE® brand beverages, Bug Juice has become one of the nation's premier manufacturers and distributors of children's beverages, namely fruit flavored juice products, including its BUG JUICE® brand beverages.

17. Norton is the owner and Bug Juice is the exclusive licensee of the following federal trademark registrations for the distinctive BUG JUICE® brand bottle design and

distinctive BUG JUICE® brand mark and labels (collectively, the "BUG JUICE® Marks"):

MARK	U.S. REG. NO.	REG. DATE	RECITATION OF GOODS
BUG JUICE Bottle Design Configuration 	3,323,848	October 30, 2007	Fruit flavored beverages, in Class 32
BUG JUICE Label Design 	3,455,247	June 24, 2008	Fruit flavored beverages, in Class 32
BUG JUICE Label Design 	3,732,786	December 29, 2009	Fruit flavored beverages, in Class 32

18. Plaintiffs' U.S. Trademark Registration Nos. 3,323,848, 3,455,247 and 3,732,786 are valid and subsisting and constitute prima facie evidence and conclusive proof of Plaintiffs' ownership of and exclusive right to use these marks on the products recited in the registrations. *See* Exhibit 1 attached hereto.

19. For the past 19 years, Bug Juice has sold its beverage products in the distinctive BUG JUICE® brand bottle design with the distinctive BUG JUICE® brand mark and label design, as shown below (the "BUG JUICE® Brand Trade Dress"):

20. The BUG JUICE® brand Trade Dress has a distinctive overall "look and feel" that consists, among other distinctive elements, of:

a. a clear specially designed and molded plastic bottle that (i) is rounded at the top below the circular cap with the wording "BUG JUICE" molded into the upper

section of the bottle; (ii) has a middle section that is narrower than the top and bottom sections; (iii) has a bottom section that is rounded and the same width as the top section; (iv) uses a bottom that is indented into the bottle; and (v) a paper or plastic label which wraps around the entire center indented portion of the bottle;

b. a label which bears the BUG JUICE® Marks and incorporates the BUG JUICE® Jungle Theme, specifically displaying (i) several large green stylized jungle plant leaves against a blue-green background; (ii) several brightly colored cartoon style insects poised on or about the large green stylized jungle plant leaves, each with a face reflecting a funny, friendly expression; (iii) the name BUG JUICE® in distinctive cartoon/graffiti style lettering placed at a slight diagonal across the front of the label; (iv) each letter of the BUG JUICE® name highlighted in a unique blend of the sunrise colors orange and yellow and outlined and shaded in black; (v) the unique name of each juice flavor on the lower right front side of the label in small, brightly colored block letters; (vi) the bottle size (10 oz.) on the lower left front side of the label; and

c. the bright color of each flavor of the BUG JUICE® brand beverage is clearly visible through the clear plastic BUG JUICE® brand bottle as it is coordinated to match each product flavor (i.e. BUG JUICE® brand Fruity Punch is bright red and BUG JUICE® brand Lemony Lime is bright neon green).

See Exhibit 2 attached hereto.

21. Plaintiffs' distinctive BUG JUICE® Brand Trade Dress has been in use for at least 19 years, has acquired secondary meaning, and is well-known.

22. BUG JUICE® brand beverage products featuring Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress are widely distributed throughout the United States through an extensive distribution network that includes wholesale food distributors and retail convenience and grocery stores.

23. The BUG JUICE® Marks and BUG JUICE® Brand Trade Dress are also featured on various in-store displays, such as barrel-shaped ice coolers, shelf strips, cooler door display racks, and danglers, and appear on merchandise such as T-shirts and baseball hats. These BUG JUICE® brand products are available for children's birthday parties, and have been widely offered at community fairs and other public events, including several charity and children's events in Grand Rapids, Michigan and other locations within this district. *See* Exhibits 3-4 attached hereto.

24. Throughout its 19 year history, Bug Juice has devoted a substantial amount of time, effort and money to design packaging and labeling that is distinctive, easily identifiable on the store shelf and specifically appeals to young children. The packaging and graphics of BUG JUICE® brand products are important elements in marketing such products, because they serve to distinguish Bug Juice's products from others, to represent and convey the quality and value of the products to consumers and represent a "fun treat" to children.

25. Since 1991, Bug Juice has spent approximately $64 million in connection with the advertisement and promotion of BUG JUICE® brand products in a variety of media throughout the United States including, for example, in-store banners and displays, print advertisements, promotional sponsorships and the internet via advertising on the company's website, located at <drinkbugjuice.com>. *See* Exhibits 3 and 5 attached hereto.

26. Bug Juice advertising and promotional materials regularly feature a large picture that reflects the BUG JUICE® Jungle Theme and a slogan that appears in large block letters colored in bright yellow which reads "FROM THE JUNGLES OF THE GREAT NORTH COAST COMES A DRINK ESPECIALLY FOR KIDS ..." (the "BUG JUICE® Brand Jungle Slogan") and is depicted below:

Plaintiffs' BUG JUICE® Brand Jungle Slogan further associates Plaintiffs' Jungle Theme with Bug Juice. *See* Exhibit 5 attached hereto.

27. As a result of Plaintiffs' continuous use of the BUG JUICE® Brand Jungle Slogan, BUG JUICE® Marks and BUG JUICE® Brand Trade Dress, BUG JUICE® products are routinely associated by wholesalers and distributors and other purchasers with the word "jungle" and Plaintiffs' Jungle Theme.

28. For example, for the past eleven years, Bug Juice has been an exhibitor at the National Association of Convenience Stores ("NACS") Annual Exhibition Shows. The BUG JUICE® Brand Jungle Slogan has been used on its banners at the show on a continuous basis since at least as early as 2003. NACS is an international trade association representing the convenience and petroleum retailing industry, with more than 2,200 retail and 1,800 supplier company members. NACS retail member companies do business in nearly 40 countries around the world, with the majority of members based in the United States. The NACS trade shows draw approximately 22,000 attendees annually, a large percentage of whom are involved in the purchasing decisions of the organizations they represent. *See* Exhibit 6 attached hereto.

29. The Bug Juice exhibition booth at the NACS shows and other trade shows features prominent displays of BUG JUICE® brand products and advertising and promotional materials, including a large blue-green banner displaying the BUG JUICE® Brand Trade Dress and featuring the BUG JUICE® Brand Jungle Slogan associating the BUG JUICE® brand with the "jungle" and Plaintiffs' Jungle Theme. *See* Exhibit 7 attached hereto.

30. In addition, each month for the past several years, Bug Juice has sent advertising flyers through the U. S. mail to more than 155,000 stores throughout the United States. These flyers feature pictures of the BUG JUICE® brand products in the BUG JUICE® Brand Trade Dress, and highlight the BUG JUICE® Brand Jungle Slogan and Jungle Theme. *See* Exhibit 8 attached hereto.

31. As a result of these advertising and promotional efforts and the immense popularity of its BUG JUICE® brand products, Bug Juice has sold, since its inception in 1991, many millions of units of BUG JUICE® brand products featuring the unique Bug Juice Brand Trade Dress and Jungle Theme throughout the United States. For each of the past five years, BUG JUICE® brand beverages have been the top selling children's drinks in the convenience store trade channel in terms of the total number of units shipped to convenience store retailers. *See* Exhibit 9 attached hereto.

32. BUG JUICE® brand beverages were the top selling shelf-stable bottled fruit beverage products in convenience stores during 2008, with annual retail sales in excess of $77 million and, by 2009, BUG JUICE® brand products were the third most popular bottled fruit drinks in all food, drug, convenience store and mass retail channels with sales of $84 million. *See* Exhibit 10 attached hereto.

33. BUG JUICE® brand beverages were also among the top ten selling children's beverage products in each of the preceding five years, dating back to at least 2004. *See* Exhibit 9 attached hereto.

34. According to AC Nielsen, which is the recognized industry standard for retail sales data in the grocery/convenience store channel, in August 2004, BUG JUICE® brand beverages were among the top ten brands of all juice drinks sold in convenience stores nationwide. *See* Exhibit 9 attached hereto.

35. As a result of long use, extensive advertising and superior products, consumers associate the BUG JUICE® Marks and BUG JUICE® Brand Trade Dress all featuring the overall Jungle Theme exclusively with Bug Juice and view all of the foregoing elements as designating the exclusive source of origin of Bug Juice's products.

36. As a result of long use, extensive advertising and superior products, BUG JUICE® products marketed under the BUG JUICE® Marks and in the distinctive BUG JUICE® Brand Trade Dress, all featuring the overall Jungle Theme have achieved widespread consumer recognition in the marketplace and enjoy tremendous goodwill, reputation and brand awareness.

37. As a result of Bug Juice's extensive marketing, advertising, promotion and sales efforts, the BUG JUICE® Marks and BUG JUICE® Brand Trade Dress all featuring the overall Jungle Theme are recognized as marks exclusively associated with fruit flavored beverages for children originating with Bug Juice.

B. GLBC'S UNAUTHORIZED USE OF PLAINTIFFS' BUG JUICE® BRAND MARKS AND TRADE DRESS

38. Upon information and belief, GLBC is a corporation organized and existing under the laws of the State of Michigan, which was founded in 2007 and distributes water, flavored water and concentrated fruit drink products.

39. Upon information and belief, GLBC is manufacturing and distributing a fruit-flavored beverage for children under the stylized mark "JUNGLE JUICE" and utilizing the following trade dress elements:

a. clear plastic bottles featuring, among other things, rounded dome-shaped top and bottom sections, beneath a circular cap along with;

b. paper or plastic labels that display (i) large green stylized jungle leaves against a blue-green background and colorful, cartoon style jungle animals; (ii) the name "JUNGLE JUICE" placed at a slight diagonal across the front center of the label in large, cartoon/graffiti style letters that are colored in a blend of orange and yellow that depicts the color of a sunrise, and outlined and shaded in black; (iii) a jungle animal to the right of the "JUNGLE JUICE" name; (iv) fun, catchy and alliterative beverage names, such as "Orangutan Orange" and "Parrot Punch" in the lower right hand side of the label; (v) the bottle size (10 oz.) in the lower left hand side of the label; and

c. the color of each beverage is coordinated to match the beverage flavor (the "JUNGLE JUICE Trade Dress").

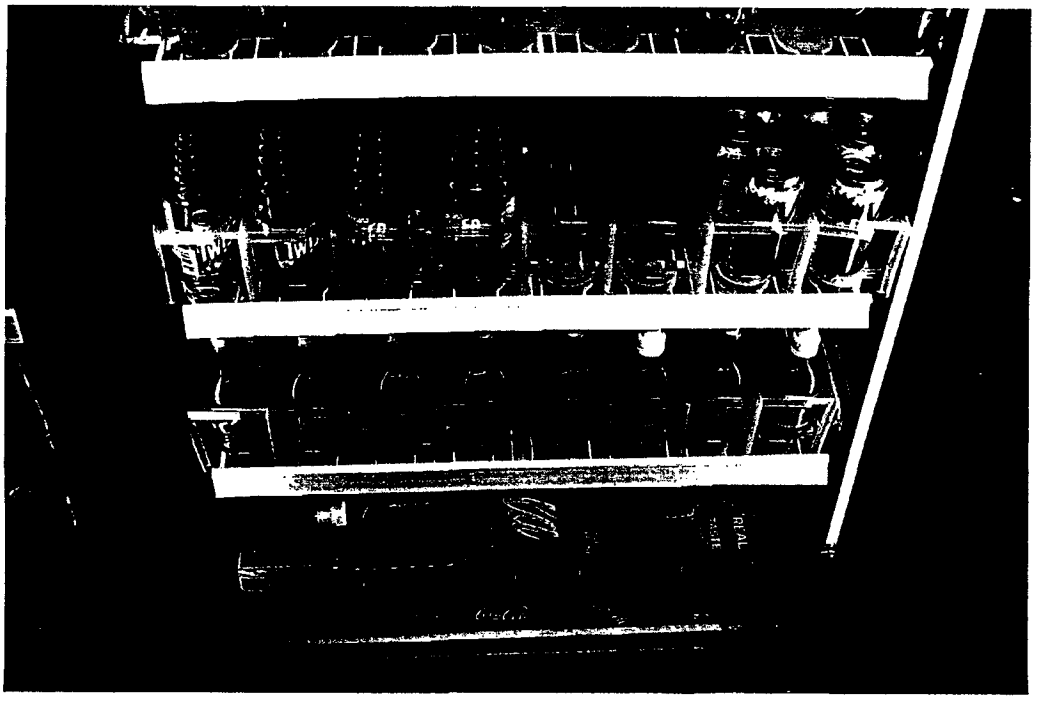
See Exhibit 11 attached hereto.

40. A depiction of the JUNGLE JUICE Trade Dress is shown below:

41. A depiction of the JUNGLE JUICE label design is shown below:

42. Depicted below is are side by side comparisons of Plaintiffs' BUG JUICE® brand products and Defendant's JUNGLE JUICE brand products:

43. Depicted below is a picture of Plaintiffs' BUG JUICE® brand products and Defendant's JUNGLE JUICE products as located side by side in the same beverage case in a convenience store setting in Michigan as of March 2010:



44. As depicted above, GLBC's "JUNGLE JUICE" products are marketed in molded plastic bottles which appear identical to the federally registered BUG JUICE® bottle design.

45. As depicted above, GLBC's "JUNGLE JUICE" mark and bottle label are virtually identical in color, lettering style and overall appearance to Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress.

46. As depicted above, GLBC'S JUNGLE JUICE Trade Dress is virtually identical to the BUG JUICE® Brand Trade Dress.

47. Upon information and belief, JUNGLE JUICE products are available for sale through distributors in Michigan, Ohio and Kentucky and may be purchased at convenience stores, grocery stores and gas stations in those states.

48. Upon information and belief, GLBC maintains a website at the domain name <junglejuicedrinks.com>. *See* Exhibit 12 attached hereto.

49. As between the parties, Norton and his licensee, Bug Juice, are the nationwide senior users of all of the elements of the BUG JUICE® Marks and BUG JUICE® Brand Trade Dress for fruit flavored beverages.

50. GLBC's offer of the identical goods to the identical target market under identical or nearly identical marks and trade dress is designed to and has led to actual confusion among the trade and consumers.

51. The astonishing similarity of GLBC's JUNGLE JUICE Trade Dress to the BUG JUICE® Brand Trade Dress confirms that GLBC intended to slavishly copy Plaintiffs' protectable trademarks and trade dress in order to trade on Plaintiff's goodwill.

C. PLAINTIFFS' NOTICE OF INFRINGEMENT TO DEFENDANTS

52. On January 7, 2010, counsel for Plaintiffs sent a letter to Defendant advising Defendant of Plaintiffs' federal trademark and copyright registrations and rights in their distinctive BUG JUICE® brand bottle design, labels and trade dress. In the letter, Plaintiffs requested, *inter alia*, that GLBC cease its unauthorized use of its infringing JUNGLE JUICE mark and JUNGLE JUICE Trade Dress. *See* Exhibit 13 attached hereto.

53. In its response, dated January 21, 2010, GLBC denied that its JUNGLE JUICE product label was substantially similar to the BUG JUICE® Marks and BUG JUICE® Brand Trade Dress, denied infringement and refused to cease use. *See* Exhibit 14 attached hereto.

54. Notwithstanding its actual knowledge of Plaintiffs' federal registrations for its BUG JUICE® Marks and BUG JUICE® Brand Trade Dress, as well as Plaintiffs' objections to its infringing use, Defendant continues to advertise and sell fruit-flavored beverages

bearing the confusingly similar JUNGLE JUICE Trade Dress in deliberate disregard of Plaintiffs' rights.

55. Upon information and belief, Defendant is using the JUNGLE JUICE mark in conjunction with the JUNGLE JUICE Trade Dress elements described above which are virtually identical to Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress and overall Jungle Theme, in an effort to trade upon the reputation of BUG JUICE® brand products and to imbue its business with the quality and reputation symbolized by Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress and thereby confuse purchasers of Defendant's JUNGLE JUICE products into believing that Defendant's products are the same as Plaintiffs' BUG JUICE® brand products or are associated with, sponsored by, or somehow related to BUG JUICE® brand products.

56. Defendant's misappropriation and use of the BUG JUICE® Marks, BUG JUICE® Brand Trade Dress and overall Jungle Theme in connection with fruit flavored beverages for children as described herein poses a direct threat to Plaintiffs' business and the goodwill and reputation Plaintiffs have achieved during the past 15 years through use of their federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress.

57. Defendant's use of the confusingly similar JUNGLE JUICE Trade Dress for children's fruit-flavored beverages is likely to cause confusion and mistake and/or deceive the

public as to the ownership and origin of Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress.

58. Defendant, with knowledge of the valuable reputation and goodwill symbolized by Plaintiffs' federally registered BUG JUICE® Marks, BUG JUICE® Brand Trade Dress and overall Jungle Theme and their exclusive association with Plaintiffs in connection with children's fruit-flavored beverages, adopted and used Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress and overall Jungle Theme to falsely identify its fruit-flavored beverages and to mislead the trade and consumers into believing that Defendant is Bug Juice or is licensed by or is associated with or under the control of Bug Juice.

59. Defendant's adoption and use of Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress are likely to dilute the distinctiveness of Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress and the goodwill attached to those marks and trade dress.

60. Defendant's infringement of Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress is causing irreparable injury to Plaintiffs.

61. Unless restrained, said conduct of Defendant, as above alleged, will cause confusion and will impair, if not destroy, the value of Plaintiffs' business and goodwill, all to the irreparable damage, loss and injury of Plaintiffs.

COUNT I

FEDERAL TRADEMARK INFRINGEMENT UNDER LANHAM ACT § 32, 15 U.S.C. § 1114

62. Plaintiffs repeat and reallege the allegations contained in Complaint paragraphs 1 through 61 inclusive, as though fully set forth herein.

63. Plaintiffs are, respectively, the owner and exclusive licensee of the registered trademarks for the distinctive BUG JUICE® brand bottle design and the distinctive BUG JUICE® brand mark and labels.

64. Defendant's use of the JUNGLE JUICE bottle and label design which are nearly identical to the distinctive BUG JUICE® brand bottle design and distinctive BUG JUICE® brand labels and variations thereof, in commerce and in connection with the offering, distribution and advertising of fruit flavored beverages marketed to children, is likely to cause confusion, or to cause mistake or to deceive, and it constitutes trademark infringement under the Lanham Act § 32, 15 U.S.C. § 1114.

65. Upon information and belief, the actions of Defendant described above have at all times relevant to this action been willful.

66. Upon information and belief, Defendant has profited and will continue to profit from the unlawful actions described above.

67. As a direct and proximate result of Defendant's unlawful actions described above, Plaintiffs have been and will continue to be damaged.

68. Defendant's unlawful actions as described above have caused and will continue to cause irreparable harm to Plaintiffs unless permanently enjoined.

69. Plaintiffs have no adequate remedy at law.

COUNT II

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER LANHAM ACT § 43(a), 15 U.S.C. § 1125(a) (TRADEMARKS)

70. Plaintiffs repeat and reallege the allegations contained in Complaint paragraphs 1 through 69 inclusive, as though fully set forth herein.

71. Plaintiffs are, respectively, the owner and exclusive licensee of the federally registered trademarks and common law rights in the trademarks for the distinctive BUG JUICE® brand bottle design and distinctive BUG JUICE® brand mark and labels.

72. Defendant's adoption and use of the JUNGLE JUICE bottle and label design and variations thereof, in commerce and in connection with the offering, distribution and advertising of fruit flavored beverages for children, is likely to cause confusion, or to cause mistake or to deceive as to affiliation, connection, or association of Defendant with Plaintiffs and/or the trademarks for the distinctive BUG JUICE® brand bottle design and

distinctive BUG JUICE® brand marks and labels, or as to the origin, sponsorship, or approval of Defendant's goods, services, or commercial activities by Plaintiffs.

73. Such actions constitute unfair competition, false designation of origin, and palming off in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

74. Upon information and belief, the actions of Defendant described above have at all times relevant to this action been willful.

75. Upon information and belief, Defendant has profited and will continue to profit from the unlawful actions described above.

76. As a direct and proximate result of the Defendant's unlawful actions described above, Plaintiffs have been and will continue to be damaged.

77. Defendant's unlawful actions as described above have caused and will continue to cause irreparable harm to Plaintiffs unless permanently enjoined.

78. Plaintiffs have no adequate remedy at law.

COUNT III

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER LANHAM ACT § 43(a), 15 U.S.C. § 1125(a) (TRADE DRESS)

79. Plaintiffs repeat and reallege the allegations contained in Complaint paragraphs 1 through 78 inclusive, as though fully set forth herein.

80. Plaintiffs are, respectively, the exclusive owner and licensee of rights in the BUG JUICE® Brand Trade Dress.

81. Defendant's use of the JUNGLE JUICE Trade Dress and variations thereof, in commerce in connection with the offering, distribution and advertising of Defendant's JUNGLE JUICE fruit flavored beverages to children, is likely to cause confusion, or to cause mistake or to deceive as to affiliation, connection, or association of Defendant with Plaintiffs, or as to the origin, sponsorship, or approval of Defendant's goods, services, or commercial activities by Plaintiffs.

82. Such actions constitute unfair competition, false designation of origin, and palming off in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

83. Upon information and belief, the actions of Defendant described above have at all times relevant to this action been willful.

84. Upon information and belief, Defendant has profited and will continue to profit from the unlawful actions described above.

85. As a direct and proximate result of the Defendant's unlawful actions described above, Plaintiffs have been and will continue to be damaged.

86. Defendant's unlawful actions as described above have caused and will continue to cause irreparable harm to Plaintiffs unless permanently enjoined.

87. Plaintiffs have no adequate remedy at law.

COUNT IV

UNFAIR COMPETITION AND TRADE PRACTICES UNDER MICHIGAN CONSUMER PROTECTION ACT

88. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 87, inclusive, as though fully set forth herein.

89. Defendant's acts, as described above, which have taken place and continue to take place in the State of Michigan and elsewhere throughout the United States, constitute willful and knowing unfair trade practices in violation of Mich. Comp. Laws § 445.901, *et. seq.*

90. Defendant's adoption of and use in commerce of the JUNGLE JUICE Trade Dress which is confusingly similar to the BUG JUICE® Marks, BUG JUICE® Brand Trade Dress and overall Jungle Theme in connection with fruit-flavored beverages for children, is likely to

cause confusion, mistake and/or deception or give the false and misleading impression that (a) the goods offered or sold by Defendant and Plaintiffs originate with or are under the control of a single source or are approved, backed or endorsed by a single source; and/or (b) Defendant is a subsidiary, or licensee of, or in some way associated with, connected or related to Plaintiffs.

91. Upon information and belief, Defendant adopted the JUNGLE JUICE Trade Dress which is confusingly similar to the BUG JUICE® Marks, BUG JUICE® Brand Trade Dress and overall Jungle Theme with the intent to trade upon Plaintiffs' reputation and goodwill.

92. Defendant adopted the JUNGLE JUICE Trade Dress in bad faith, with full knowledge of Plaintiffs' valuable rights in their BUG JUICE® Marks, BUG JUICE® Brand Trade Dress and overall Jungle Theme in an effort to trade upon the valuable reputation of the BUG JUICE® brand and to cause confusion in the trade and among consumers.

93. Defendant committed such acts, and continues to commit such acts, in the conduct of trade or commerce in the State of Michigan and elsewhere throughout the United States.

94. The conduct of Defendant, described above, has caused, and, if not enjoined will continue to cause irreparable damage to Plaintiffs and dilute the trading value of their BUG JUICE® Marks, BUG JUICE® Brand Trade Dress and Jungle Theme, causing loss of business, reputation and goodwill of Plaintiffs.

95. Plaintiffs have no adequate remedy at law.

COUNT V

COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

96. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 95, inclusive, as though fully set forth herein.

97. Defendant's acts, as described above, constitute unfair competition and trademark infringement under the common law of the State of Michigan.

98. Upon information and belief, the actions of Defendant described above have at all times relevant to this action have been willful.

99. As a direct and proximate result of the actions of Defendant alleged above, Plaintiffs have been damaged and will continue to be damaged.

100. The conduct of Defendant, described above, has caused, and, if not enjoined will continue to cause irreparable damage to the rights of Plaintiffs in their federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress and to the business, reputation and goodwill of Plaintiffs.

101. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs, Bug Juice Brands, Inc. and Joseph J. Norton, request that the Court enter judgment:

A. In favor of Plaintiffs and against Defendant on all of Plaintiffs' claims.

B. Preliminarily and permanently enjoining and restraining Defendant, its officers, agents, subsidiaries, servants, partners, employees, attorneys and all others in active concert or participation with them from:

1. Infringing Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress, in any manner including using the JUNGLE JUICE Trade Dress, plastic bottle and jungle print label, or any other name, mark or trade dress element consisting of or containing elements of Plaintiffs' federally registered BUG JUICE® Marks or the BUG JUICE® Brand Trade Dress elements by manufacturing, distributing, advertising, selling and offering for sale any merchandise which infringes said BUG JUICE® brand trademarks or trade dress;

2. Engaging in any course of conduct likely to cause confusion, deception or mistake, or to injure Plaintiffs' business reputation or to dilute the distinctive quality of Plaintiffs' federally registered BUG JUICE® Marks and BUG JUICE® Brand Trade Dress;

3. Engaging in any course of conduct likely to enable Defendant to benefit from the valuable goodwill and reputation established in Plaintiffs' BUG

JUICE® Marks, BUG JUICE® Brand Trade Dress and Bug Juice Jungle Theme;

4. Engaging in any course of conduct calculated or likely to mislead the public into believing that Defendant's goods are the same as or equivalent to Plaintiffs' goods;

5. Engaging in any course of conduct, whether explicit or implicit, which is calculated or likely to mislead the public into believing that Defendant is the same as, related to, connected with, affiliated with or somehow associated with Plaintiffs;

C. Ordering Defendant to destroy or otherwise dispose of:

1. Any goods or merchandise that pictures, reproduces, copies, adapts or displays Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress or any marks, labels or trade dress elements that are confusingly similar to or bear a substantial similarity to Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress;

2. Any molds, screens, patterns, plates, negatives or other materials used specifically for making or manufacturing products that display facsimiles of Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress or any marks, labels or trade dress elements that are confusingly similar to

or bear a substantial similarity to Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress;

3. Any sales and supplier or customer journals, ledgers, invoices, purchase orders, inventory control documents, bank records, catalogues, recordings of any type whatsoever, and all other business records and documents believed to concern the manufacture, purchase, advertising, sale or offering for sale of infringing JUNGLE JUICE Trade Dress;

D. Ordering that Defendant effectuate the recall, removal and return from commercial distribution and/or public display of:

1. Any goods, merchandise, vehicles or equipment that pictures, reproduces, copies, adapts, or displays Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress or any marks, labels or trade dress elements that are confusingly similar to or bear a substantial similarity to Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress;

2. Any promotional and advertising materials, including web pages, printed and digitized materials, labels, packages, wrappers, advertisements, letterhead, signage, wrappers, containers and all other materials or unauthorized items that reproduce, copy, adapt or display Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress or any marks, labels or trade dress elements that are confusingly similar to or bear a substantial

similarity to Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress;

3. Any molds, screens, patterns, plates or negatives or other materials used specifically for making or manufacturing products that display Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress or any marks, labels or trade dress elements that are confusingly similar to or bear a substantial similarity to Plaintiffs' BUG JUICE® Marks and BUG JUICE® Brand Trade Dress.

E. That Defendant be required to account for and pay over to Plaintiffs Defendant's profits and all damages sustained by Plaintiffs.

F. That Plaintiffs be awarded reasonable attorneys' fees, costs, expenses, and interest pursuant to 15 U.S.C. § 1117(a).

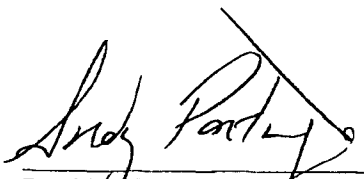
G. That Defendant make a full report to this Court of its compliance with the foregoing within 30 days of the judgment herein.

H. That Plaintiffs have such other and further relief as this court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand trial by jury in this action of all issues triable by jury in this matter.

Dated: March 5, 2010

By: 

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
MILLER JOHNSON
250 Monroe Avenue NW Suite 800
Grand Rapids, Michigan 49503-2250
Telephone: (616) 831-1717
Facsimile: (616) 831-1701
gassd@millerjohnson.com
portingaa@millerjohnson.com
Attorney for Plaintiffs
BUG JUICE BRANDS, INC. and
Joseph J. Norton

Of Counsel
Virginia R. Richard, Esq.
Lana C. Marina, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
Telephone: (212) 294-6700
Facsimile: (212) 294-4700
vrichard@winston.com
lmarina@winston.com

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BUG JUICE BRANDS, INC. and JOSEPH J. NORTON,

Plaintiffs,

v.

GREAT LAKES BOTTLING COMPANY,

Defendant.

Civil Action No. 10-CV-229 (PLM)

Honorable Paul L Maloney, Chief Judge

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
P.O. Box 306
Grand Rapids, Michigan 49501-0306
(616) 831-1700
(616) 831-1701 (fax)
gassd@millerjohnson.com
portingaa@millerjohnson.com

Of Counsel
Virginia R. Richard, Esq.
Sanjana Chopra, Esq.
Stephanie S. McCallum, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166-4193
T: (212) 294-6700
F: (212) 294-4700
vrichard@winston.com
schopra@winston.com
smccallum@winston.com

Attorneys for Plaintiffs Bug Juice Brands, Inc. and Joseph J. Norton

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page No.

Page No.

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Plaintiffs, Bug Juice Brands, Inc. and Joseph J. Norton ("Plaintiffs" or "Bug Juice"), submit this Brief in Support of Their Motion for Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

I. INTRODUCTION

This is an action for trademark and trade dress infringement, false designation of origin and unfair competition under the Lanham Act (15 U.S.C. §§ 1114 and 1125(a)), and trademark infringement and unfair competition under the statutory (Michigan Consumer Protection Act, Mich. Comp. Laws. § 445.901, *et seq.*), and common laws of the State of Michigan, brought by Plaintiffs against Defendant, Great Lakes Beverage Company ("GLB").

This court has jurisdiction pursuant to 15 U.S.C. §§ 1121, 1125(a), and 28 U.S.C. §§ 1331 and 1338. This court has supplemental jurisdiction over the claims brought pursuant to the statutory and common law of the State of Michigan pursuant to 28 U.S.C. § 1367(a). Venue is founded on 28 U.S.C. §§ 1391 (b) and (c) in that the claims arose in this district and, upon information and belief, Defendant is doing business in this judicial district.

This action arises from Defendant's use of the name and mark JUNGLE JUICE and related packaging and labeling in connection with the promotion, marketing and sale of fruit flavored children's beverages in direct infringement of Plaintiffs' BUG JUICE® mark and trade dress, jungle slogan and jungle theme for fruit flavored children's beverages, and Plaintiffs' federal registrations therefor.

As more fully set forth below, a preliminary injunction is required in order to bring an immediate halt to Defendant's egregious acts of deliberate and willful trademark and trade dress infringement and unfair competition under the Lanham Act and the common law of Michigan, which will cause immediate and irreparable injury to Plaintiffs if not enjoined by the Court.

II. FACTS

A. PLAINTIFFS' RIGHTS IN THEIR FAMOUS BUG JUICE® MARK AND TRADE DRESS

Plaintiffs have been engaged in the business of marketing, promoting and selling BUG JUICE® brand fruit flavored beverages for children since 1991. (Exhibit A, Declaration of Joseph J. Norton (hereinafter "Norton Decl.") ¶ 6)). BUG JUICE® brand fruit flavored beverages are the number one selling children's beverage in convenience stores nationwide and have a national reputation for high quality. (*Id.*). The name BUG JUICE® is famous for children's beverages in the beverage industry and among consumers. (*Id.* ¶ 25).

1. Early Use Of The BUG JUICE® Name And Marks

In 1991, Joseph J. Norton, a local Michigan entreprenеur, conceived the name BUG JUICE for fruit flavored children's beverages and designed packaging and labeling to appeal to children. (Ex. A, Norton Decl. ¶¶ 5-6). The BUG JUICE® brand trade dress designed by Mr. Norton is shown below:

Plaintiffs use the mark BUG JUICE® and representations of their BUG JUICE trade dress, jungle slogan and jungle theme on a wide variety of printed material, in-store displays, hats, t-shirts and a wide variety of promotional materials including monthly flyers sent to over 155,000 retail customers. (Ex. A, Norton Decl. ¶¶ 7-14).

2. Plaintiffs' Current Use Of Their Marks And Trade Dress

In 1998, Mr. Norton formed Bug Juice Brands Inc. and licensed it to use the BUG JUICE® marks and trade dress. (Ex. A, Norton Decl. ¶ 1).

Bug Juice markets 8 flavors of fruit flavored beverages under its BUG JUICE® brand. BUG JUICE® brand products are sold nationwide in convenience stores, in grocery stores and on the Internet. (*Id.* ¶ 6). BUG JUICE® brand products are sold at retail for approximately $0.99 per 10 oz. single serve bottle. (*Id.* ¶ 18).

In the year 2009 alone, retail sales of BUG JUICE® products exceeded $80 million. (*Id.* ¶ 16). Wholesale sales of BUG JUICE® products from 2000 to date exceed $400 million. (*Id.* ¶ 16). The BUG JUICE® brand trade dress consists of the following elements:

(a) a clear specially designed and molded child-sized plastic bottle that:

(i) is rounded at the top below the circular cap with the wording "BUG JUICE" molded into the upper section of the bottle;

(ii) has a middle section that is narrower than the top and bottom sections;

(iii) has a bottom section that is rounded and the same width as the top section; and

(iv) has a bottom that is indented into the bottle, together with,

(b) a paper or plastic label that bears the BUG JUICE® mark and label incorporating the BUG JUICE® jungle theme and:

(i) wraps around the entire center indented portion of the bottle;

(ii) contains a fanciful artistic representation of several large green stylized jungle plant leaves against a blue-green background;

(iii) contains a fanciful artistic representation of several brightly colored cartoon style insects poised on or around the large green stylized jungle plant leaves, each with a face reflecting a funny friendly expression;

(iv) features the mark BUG JUICE® in distinctive cartoon/graffiti style lettering placed at a slight diagonal across the front of the label;

(v) highlights each letter of the name BUG JUICE® in a unique blend of the sunrise colors orange and yellow;

(vi) outlines and shades each letter of the name BUG JUICE® in black;

(vii) shows the unique name of each BUG JUICE® beverage flavor on the lower right front side of the label in small, brightly colored block letters;

(viii) identifies the bottle size (10 oz.) on the lower left front side of the label; and

(xi) embodies a color scheme in which the color of each BUG JUICE® beverage is coordinated with the flavor name; for example, Bug Juice's "Lemony Lime" flavor is bright neon green and the bright neon green color of the beverage is visible through the clear plastic BUG JUICE® bottle design and forms a part of the overall trade dress of the BUG JUICE® product.

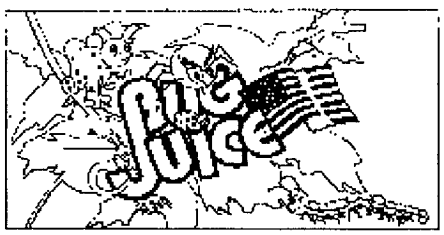
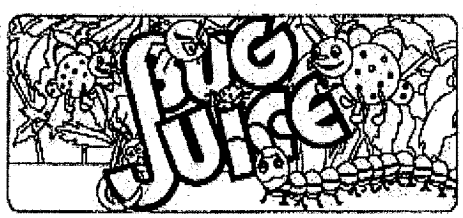
(Ex. A, Norton Decl. ¶ 5).

3. Plaintiffs' National Reputation And Customer Base

Plaintiff's long and extensive use of the BUG JUICE® brand mark and trade dress and substantial advertising expenditures for BUG JUICE® brand products are evidence of secondary meaning and distinctiveness of the BUG JUICE® brand trademark and trade dress. (Ex. A, Norton Decl. ¶¶ 19-21, 25). Plaintiffs' position as the top selling fruit flavored beverage in convenience stores is evidence of the widespread appeal, popularity and public recognition of BUG JUICE® brand products. (*Id.* ¶ 16).

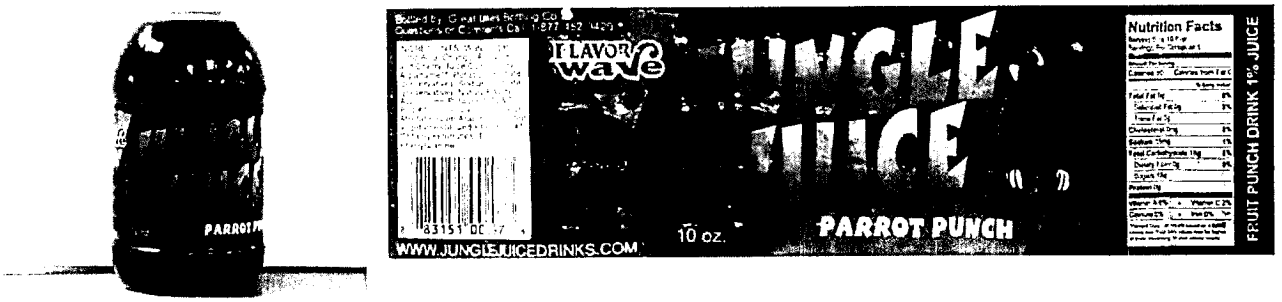
4. Plaintiffs' Federal Trademark Registrations

Plaintiff Joseph J. Norton is the owner of the following valid and existing federal registrations for the BUG JUICE® mark and trade dress:

MARK	U.S. REG. NO.	REG. DATE	RECITATION OF GOODS
BUG JUICE Bottle Design Configuration 	3,323,848	October 30, 2007	Fruit flavored beverages, in Class 32
BUG JUICE Label Design 	3,455,247	June 24, 2008	Fruit flavored beverages, in Class 32
BUG JUICE Label Design 	3,732,786	December 29, 2009	Fruit flavored beverages, in Class 32

B. DEFENDANT'S INFRINGING USE

In December 2009, Plaintiffs discovered that Great Lakes Beverage Company was using the name "JUNGLE JUICE" and the trade dress shown below in connection with the manufacture and sale of fruit flavored children's beverages. (Ex. A, Norton Decl. ¶ 26).



Defendant's JUNGLE JUICE trade dress includes the following elements of the BUG JUICE® brand trade dress and trades on the BUG JUICE® brand jungle theme and jungle slogan:

a. clear plastic bottles featuring, among other things, rounded dome-shaped top and bottom sections, beneath a circular cap, together with

b. paper or plastic labels that display (i) a fanciful artistic representation of large green stylized jungle leaves against a blue-green background and colorful, cartoon-style jungle animals; (ii) the name "JUNGLE JUICE" placed at a slight diagonal across the front center of the label in large, cartoon/graffiti-style letters that are colored in a blend of orange and yellow that depicts the color of a sunrise, and outlined and shaded in black; (iii) a fanciful artistic representation of a jungle animal to the right of the "JUNGLE JUICE" name; (iv) fun, catchy and alliterative beverage names, such as "Orangutan Orange" and "Parrot Punch" in the lower right hand side of the label; (v) the bottle size (10 oz.) in the lower left hand side of the label; and

c. the color of each beverage is coordinated to match the beverage flavor (the "JUNGLE JUICE Trade Dress").

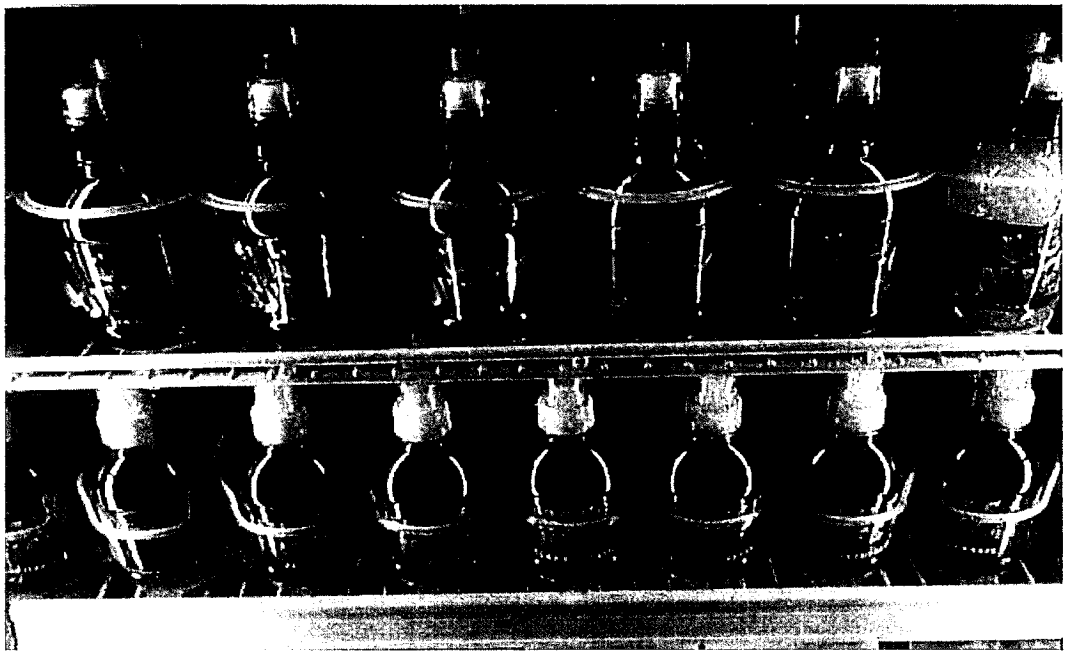
(Ex. A, Norton Decl. ¶ 27).

Plaintiffs sent a notice of infringement to GLB on January 7, 2010. (Ex. A, Norton Decl. ¶ 29). Despite Plaintiffs' objections, Defendant has refused to cease use of the name JUNGLE JUICE or the JUNGLE JUICE trade dress. (*Id.* ¶ 29). In fact, Defendant has instead advised Plaintiffs and local food brokers that it intends to continue using the JUNGLE JUICE name and trade dress despite actual and constructive knowledge of Plaintiffs' senior rights and federal registrations. (*Id.* ¶ 29; Exhibit B, Declaration of Virginia R. Richard (hereinafter "Richard Decl.") ¶¶ 4-5).

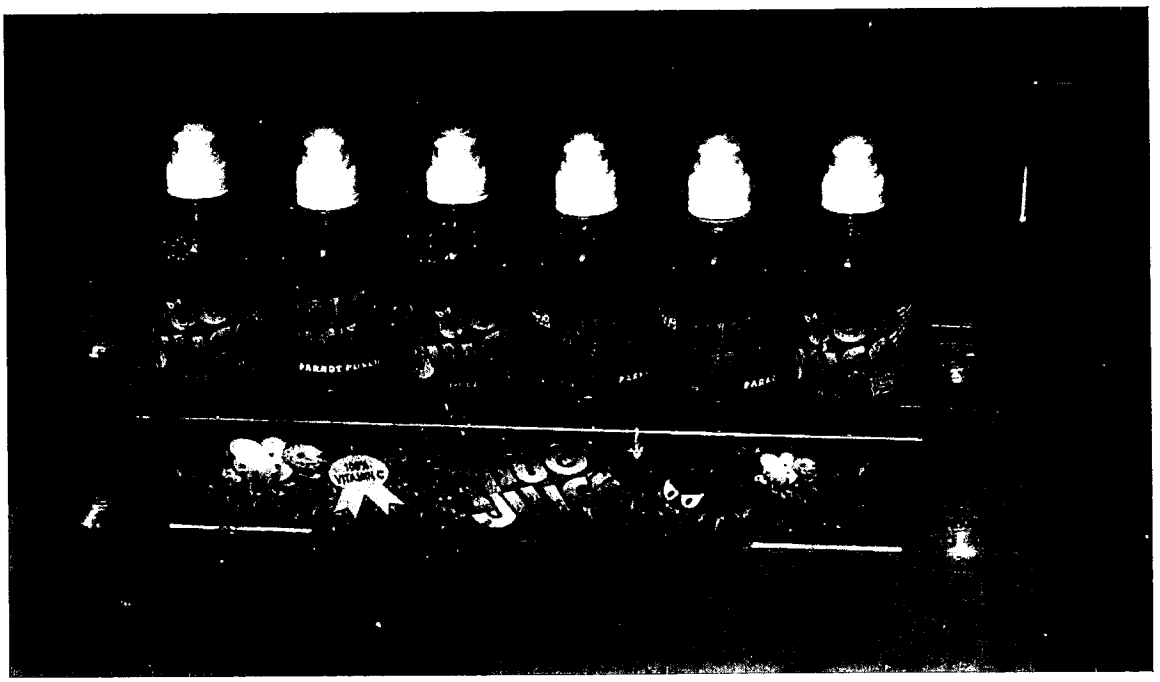
C. ACTUAL MARKETPLACE CONFUSION

1. Actual Confusion Among Members of the Trade

Defendant's JUNGLE JUICE beverages are sold in the same channels of trade as Plaintiffs' BUC JUICE® beverages. In fact, both products appear side-by-side on convenience store shelves (Ex. A, Norton Decl. ¶ 35) as shown in the photograph below:



Defendant's JUNGLE JUICE bottles have been stocked immediately above Plaintiffs' BUG JUICE℠ shelves by store clerks who apparently cannot discern any difference between the products of the parties. (Ex. A, Norton Decl. ¶ 36):



Further, retail store clerks have placed bottles of JUNGLE JUICE in refrigerator case door racks supplied by Bug Juice, which bear the famous BUG JUICE℠ mark and trade dress, further exacerbating the confusion and false association of JUNGLE JUICE products with BUG JUICE℠ brand products. (Ex. A, Norton Decl. ¶ 37). This intermingling of BUG JUICE® products and JUNGLE JUICE products on store shelves is evidence that retail store clerks believe the parties' products are the same or come from the same source. (Exhibit C, Declaration of Douglas Rehner (hereinafter "Rehner Decl.") ¶¶ 6-7; Exhibit D, Declaration of Douglas Filter (hereinafter "Filter Decl.") ¶ 6; Exhibit E, Declaration of Christine Zachos (hereinafter "Zachos Decl.") ¶¶ 5-7; Ex. A, Norton Decl. ¶¶ 35-38). A photo of a BUG JUICE® rack stocked with BUG JUICE℠ and JUNGLE JUICE products is shown below:

The side-by-side shelving of BUG JUICE™ and JUNGLE JUICE products and the stocking of JUNGLE JUICE products above Bug Juice's shelves and in Bug Juice's refrigerator door racks bearing the BUG JUICE™ mark is evidence of confusion in the trade. Assuming *arguendo* that store personnel know that the parties' products originate from different sources, consumers will not. (Ex. A, Norton Decl. ¶ 38).

2. **Actual Confusion Among Consumers**

Consumers of the parties' products are parents of children aged 3-12 years old and children aged 7 to 12 years old. BUG JUICE™ and JUNGLE JUICE are sold in single 10 oz. bottles at approximately $0.99 per unit. (Ex. A, Norton Decl. ¶¶ 18, 41). These are "grab and go" products purchased on impulse. Supermarket purchasing studies show that the average consumer spends little time considering a "grab and go" product purchase and relies on the color

and graphics of the packaging rather than the brand names in making a purchasing decision. (Ex. A, Norton Decl. ¶ 40). Children and adults who rely on visual identification for products will likely assume, based on the identical trade dress of the parties' products, that JUNGLE JUICE is the same as BUG JUICE® or a line extension of BUG JUICE®. (*Id.* ¶ 41).

III. ARGUMENT

Plaintiffs' BUG JUICE® brand mark and trade dress are nationally known and famous marks because of 19 years of sales and continuous, extensive advertising of the marks by Plaintiffs. Defendant is attempting to ride on Plaintiffs' coattails, using Plaintiffs' BUG JUICE® trade dress and jungle theme with full knowledge of Plaintiffs' outstanding reputation and market leading position as the top selling children's fruit flavored beverage in convenience stores nationwide and Plaintiffs' federal registrations and common law rights in its BUG JUICE® brand name and trade dress. A preliminary injunction is necessary to halt Defendant's blatant unfair competition, which is causing Plaintiffs irreparable harm.

A. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

In deciding whether to grant a preliminary injunction, the following considerations are to be balanced by the court: (1) likelihood that the Plaintiffs will prevail on the merits; (2) extent of irreparable harm to the Plaintiffs due to the Defendant's conduct; (3) extent of irreparable harm to others if the injunction is issued; and (4) whether the public interest would be advanced by the issuance of the injunction. *Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association*, 110 F.3d 318, 322 (6th Cir. 1997) (affirming grant of preliminary injunction that enjoined declaratory judgment plaintiff from using service marks of defendant); *Upjohn Co. v. Am. Home Prods. Corp.*, No. 1:95:CV:237, 1996 U.S. Dist. LEXIS 8049, at *6-7 (W.D. Mich.

April 5, 1996) (preliminarily enjoining defendant from infringement of plaintiff's PROVERA mark for female hormone replacement products). These considerations are factors to be balanced, not prerequisites that must be met. *Upjohn*, 1996 U.S. Dist. LEXIS 8049, at *7. In this case, all four factors weigh strongly in favor of injunctive relief.

B. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

To establish trade dress infringement under 15 U.S.C. § 1114, Plaintiffs must demonstrate that the "misappropriated features of the dress (1) are inherently distinctive or have acquired distinction by virtue of secondary meaning in the marketplace; (2) are not functional; and (3) create a likelihood of confusion as to the source of defendant's goods." *Mexican Food Specialties, Inc. v. Festida Foods, Ltd.*, 953 F. Supp. 846, 849 (E.D. Mich. 1997) (preliminarily enjoining defendant's use and distribution of infringing trade dress for tortilla food product); *Windmill Corp. v. Kelly Foods Corp.*, 76 F.3d 380, Nos. 94-5874, 94-5890, 95-5137, 1996 WL 33251, at *3 (6th Cir. 1996) (affirming permanent injunction against defendant's use and distribution of infringing trade dress for cat treat products).

Because Plaintiffs' BUG JUICE® mark and BUG JUICE® trade dress are federally registered marks, Plaintiffs have satisfied the first two elements.

1. Inherently Distinctive or Distinctive By Virtue of Secondary Meaning

To protect a product's trade dress, a movant must show that the trade dress is either inherently distinctive *or* has acquired secondary meaning. *McNeil-PPC, Inc. v. Guardian Drug Company, Inc.*, 984 F.Supp. 1066, 1069 (E.D. Mich. 1997) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 773-76 (1992); *Mexican Food Specialties*, 953 F. Supp. at 849.

Secondary meaning can be presumed where, as here, it is apparent that Defendant intentionally copied Plaintiffs' trade dress. *McNeil-PPC*, 984 F. Supp. at 1069 (preliminarily enjoining defendant from using all packaging that infringes on plaintiff's LACTAID ULTRA trade dress rights and presuming secondary meaning from apparent intentional copying).

As the Court in *Mexican Food Specialties* observed, "since the choices that a producer has for packaging are ... almost unlimited, typically a trade dress will be arbitrary and fanciful and thus distinctive." *Id.* at 850 (citing *Paddington Corp. v. Attiki Importers & Distributors, Inc.*, 996 F.2d 577, 583 (2d Cir. 1993)). The Sixth Circuit has instructed that the "total impression" conveyed by the combination of lettering styles, colors and descriptive elements should be the focus of a district court's analysis of inherent distinctiveness. *Id.* In this case, Plaintiffs' BUG JUICE® trade dress is the subject of federal registrations and must be deemed inherently distinctive. See *id.* at 851 (finding that a contributing factor to the inherent distinctiveness of the plaintiff's product was that the plaintiff's mark was "registered and enjoyed[ed] incontestable status"); *see also Wolf Appliance, Inc. v. Viking Range Corp.*, No. 09-cv-697, 2010 WL 546782 (W.D. Wis. Feb. 11, 2010) (granting preliminary injunction against competitor and finding that federal trademark registration for trade dress featuring red knobs on high end stoves created presumption of validity and secondary meaning); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 7:72, 8:1 (4th ed. 2009).

2. Non-Functional

Plaintiffs' trade dress is non-functional – no element of Plaintiffs' trade dress affects the purpose, use, cost or quality of the BUG JUICE® product. *See McNeil-PPC.*, 984 F. Supp. at 1070 ("No evidence has been presented to suggest that [] any element of Plaintiff's LACTAID

ULTRA packaging has any effect on the use, purpose, cost or quality of the product"). Accordingly, Plaintiffs meet the second element for establishing trade dress infringement.

3. Likelihood Of Confusion

The Sixth Circuit has identified eight factors that serve as a "guide to help determine whether confusion would be likely to result from simultaneous use of the two contested [dresses.]" *Mexican Food Specialties*, 953 F. Supp. at 851 (citing *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988)); *see also Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991) ("These factors imply no mathematical precision, but are simply a guide to help determine whether confusion is likely."). The relevant factors are:

a. strength of plaintiff's mark

b. relatedness of the goods

c. similarity of the marks

d. evidence of actual confusion

e. marketing channels used

f. likely degree of purchaser care

g. defendant's intent in selecting the mark

h. likelihood of expansion of product lines.

Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 648 (6th Cir. 1982).

(a) Strength Of Plaintiffs' Mark

The BUG JUICE® mark and trade dress are federally registered marks. The fact that a mark is registered creates a presumption that the mark is not descriptive. *Hindu Incense v. Meadows*, 692 F.2d 1048, 1050 (6th Cir. 1983) (holding that federal registration of mark creates presumption of validity that cannot be rebutted by mere allegation that mark is descriptive and affirming permanent injunction against defendant's infringing use of plaintiff's GENIE mark for incense). A mark registered on the Principal Register is *prima facie* evidence of the validity of the registered mark and the registrant's exclusive right to use the registered mark in commerce in connection with the goods specified in the registration. *See* 15 U.S.C. § 1057(b). A federally registered trade dress is presumptive evidence of validity and non-functionality. *McCarthy*, at §§ 7:72, 8:1.

The BUG JUICE® mark and trade dress have been in continuous use for over 19 years and have been extensively advertised and promoted. The tremendous sales success of BUG JUICE® brand products is further evidence of the strength of the BUG JUICE® mark and trade dress. Because the BUG JUICE® trade dress is inherently distinctive and is protected under the Lanham Act, a secondary meaning analysis is not necessary. *See Hindu Incense*, 692 F.2d at 1050; *McNeil-PPC.*, 984 F. Supp. at 1069.

(b) Relatedness of the Goods

Plaintiffs and Defendant manufacture and sell fruit flavored children's beverages. The parties' goods are functionally identical, are sold in nearly identical packaging and are shelved together on convenience store shelves and refrigerator cases. Therefore, it is likely that a consumer would believe that Defendant's JUNGLE JUICE fruit flavored beverages are produced by Plaintiffs, sponsored by Plaintiffs or licensed by Plaintiffs. *See Mexican Food Specialties*,

953 F. Supp. at 853 ("In this case, as evidenced by the photographs, the two products appear to be *side-by-side* if not intermingled") (emphasis added); *McNeil-PPC,*, 984 F. Supp. at 1072 ("The close proximity of the products on the store shelf balances this factor in favor of Plaintiff.").

(c) Similarity of the Marks

Defendant's packaging for JUNGLE JUICE beverages and Plaintiffs' packaging for BUG JUICE beverages are functionality identical. In evaluating the similarity of the marks, a "court must determine whether the alleged infringing mark will be confusing to the public when singly presented." *Beer Nuts Inc. v. Clover Club Foods Co.*, 711 F.2d 934, 941 (10th Cir. 1983). While a side-by-side comparison is not the test, the evidence in this case shows that Plaintiffs' and Defendant's products are shelved side-by-side on store shelves and that Defendant's products are stocked in BUG JUICE® racks and above BUG JUICE® shelves in stores, all of which tends to lead consumers to believe that the products are the same or originate from the same source. *Mexican Food Specialties*, 953 F. Supp. at 852-53; *McNeil-PPC,* 984 F. Supp. at 1072.

Even in situations in which consumers view Defendant's JUNGLE JUICE bottle "singly," the overall appearance of the JUNGLE JUICE product and the BUG JUICE® product is so similar that it would confuse consumers "who do not have both marks before them" but who may have a "'general, vague or even hazy, impression or recollection of the other party's mark.'" *Wynn Oil Company*, 839 F.2d at 1188 (quoting *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 275 (7th Cir. 1976)).

Set forth below is a chart providing a historical perspective of cases in which packaging and labeling for non-alcoholic and alcoholic beverage products have been held to be confusingly similar:

Pernod Ricard USA, LLC v. White Rock Distilleries Inc. AKA Calico Jack, Ltd., No. 09-cv-2999 (S.D.N.Y. 2010) (MGC)	Opaque White Rum Bottle Design	Consent Judgment permanently enjoining defendant from selling infringing opaque white rum bottle
Nova Wines, Inc. v. Adler Fels Winery LLC, 467 F. Supp. 2d 965 (N.D. Cal. 2006)	Wine Bottle bearing labels containing representations of Marilyn Monroe	Preliminarily enjoining defendant from selling infringing wine bottle with representations of Marilyn Monroe on bottle label
Carillon Importers Ltd. v. Frank Pesce Group, Inc., 913 F. Supp. 1559 (S.D. Fla. 1996)	Vodka Bottle and Label Design	Preliminarily enjoining defendant from selling infringing vodka bottle with confusingly similar label design
Paddington Corp. v. Attiki Importers & Distributors, Inc., 996 F.2d 577 (2d Cir. 1993)	Ouzo Bottle and Label Design	Reversing district court's dismissal of plaintiff's claim that defendant's ouzo bottle and label design constituted trade dress infringement
Veryfine Products, Inc. v. Colon Brothers, Inc., 799 F. Supp. 240 (D.P.R. 1992)	Fruit Juice Bottle and Label Design	Awarding damages and permanently enjoining defendant from selling infringing fruit juice bottle with confusingly similar label design
Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc., 784 F. Supp. 231 (E.D. Pa. 1992)	Cordial Bottle Design	Permanently enjoining defendant from selling infringing cordial bottle in Pennsylvania and West Virginia
Source Perrier, S.A. v. Waters of Saratoga Springs, Inc., 217 U.S.P.Q. 617 (S.D.N.Y. 1982)	Mineral Water Bottle Design	Awarding damages and permanently enjoining defendant from selling infringing mineral water bottle
Squirt Co. v. The Seven-Up Company, 628 F.2d 1086 (8th Cir. 1980)	SQUIRT for carbonated grapefruit drink v. QUIRST for noncarbonated lemonade drink	Affirming permanent injunction against defendant's use of "QUIRST" mark for noncarbonated lemonade drink as infringement of plaintiff's "SQUIRT" mark used for carbonated grapefruit drink
RJR Foods, Inc. v. White Rock Corp., 603 F.2d 1058 (2d Cir. 1979)	Fruit Drink Label Design	Affirming injunction against defendant's use of confusingly similar label design for fruit punch beverage

The *RJR Foods, Inc. v. White Rock Corporation* and *Very Fine Products, Inc. v. Colon Brothers, Inc.* cases are very close on their facts to the present case, as they both involve the

slavish imitation by the defendant of the plaintiff's trade dress elements for fruit juice beverage products. *See RJR Foods*, 603 F.2d 1058 (affirming injunction against defendant's infringement of plaintiff's trade dress for its HAWAIIAN PUNCH FRUIT JUICY RED product); *Veryfine Products*, 799 F. Supp. 240 (enjoining defendant's use of trade dress for its COLOSO fruit juice product on grounds that it intentionally infringed plaintiff's trade dress for its VERY FINE fruit juice products).

(d) Actual Confusion Exists in the Marketplace

Plaintiffs have established the existence of actual confusion in this case at retail outlets, as shown by the intermingling of the parties' products on store shelves by supermarket personnel. (Ex. C, Rehner Decl.¶¶ 6-7; Ex. D, Filter Decl.¶ 6; Ex. E, Zachos Decl.¶¶ 5-7; Ex. A, Norton Decl. ¶¶ 35-38); *see also Mexican Food Specialties*, 953 F. Supp. at 852-53; *McNeil-PPC*, 984 F. Supp. at 1072. Evidence of actual confusion is the best evidence of likelihood of confusion. *Pita Delight, Inc. v. Salami*, 24 F. Supp. 2d 795, 801 (E.D. Mich. 1998) (enjoining defendant from infringing plaintiff's SHEIK mark for restaurant services featuring Middle Eastern cuisine). While it is often acknowledged that evidence of actual confusion is difficult to produce, where it is shown that actual confusion exists, the court is required to issue preliminary injunctive relief to protect the public.

(e) Identical Marketing Channels

Both parties market their products in the same channels of trade, namely, in convenience stores and grocery stores, to the same class of purchasers, namely, parents of children 3-12 years of age and children aged 7-12. Ex. A, Norton Decl. ¶¶ 35-38, 41-43.

As noted above, the parties' products are shelved next to each other on store shelves and Defendant's products are mistakenly stocked in Plaintiff's BUG JUICE® brand racks and directly above shelves labeled with the BUG JUICE® brand. (Ex. A, Norton Decl. ¶¶ 36-37). The parties identical marketing channels, and proximity of the products on store shelves, adds to the likelihood of confusion. *Mexican Food Specialties*, 953 F. Supp. at 852-53; *McNeil-PPC*, 984 F. Supp. at 1072. Confusion is likely to be heightened in this case, as both parties sell single serve "grab and go" beverages to children who are likely to select products based upon visual cues associated with the long familiar BUG JUICE® product lettering, color and package design, rather than by name.

(f) Minimal Degree Of Purchaser Care

The next factor to be considered is the likely degree of purchaser care in selecting a product. In general, the less care that a purchaser is likely to take in purchasing particular types of products, the greater the likelihood of confusion. In this case, both parties market fruit-flavored children's beverages that sell at average retail prices of $0.99 per unit. These products are impulse "grab and go" purchases made by busy parents with small children or by small children themselves in a quick service convenience store atmosphere.

The average consumer is not likely to exercise a high degree of care purchasing relatively inexpensive products in identical packaging situated side-by-side on store shelves or in refrigerator cases. *Mexican Food Specialties*, 953 F. Supp. at 852; ("[T]his court can rely on common sense and real life experience to conclude that the average customer is harried and not likely to exercise a high degree of care in purchasing an eighty-nine cent package of tortillas that are situated side by side."); *McNeil-PPC.*, 984 F. Supp. at 1071-72 ("Courts have adopted the general proposition that the average customer is likely not to exercise a high degree of care in

purchasing relatively inexpensive and virtually products situated side-by-side on a store shelf as in the case of Plaintiff's and Defendant's products in this case"). Given the nearly identical packaging and labeling of the parties' products, the products' shelf location and the identical customer base of parents of small children and the children themselves, it is highly likely that purchaser care is minimal and that these consumers easily would be confused.

(g) Defendant's Bad Intent

The next factor that courts in this circuit consider in the likelihood of confusion calculus is a defendant's intent in selecting its mark. Although intentional infringement is not necessary for a finding of likelihood of confusion, the presence of intent strengthens the likelihood of confusion. Defendant's slavish copying of Plaintiffs' federally registered BUG JUICE® brand bottle design and labeling and its overall jungle theme is strong evidence of intent. In addition, the fact that Defendant has refused to cease use of its infringing JUNGLE JUICE trade dress upon receipt of actual notice of Plaintiffs' federal registrations is further evidence of a deliberate intent to infringe. *Mexican Food Specialties*, 953 F. Supp. at 853 (finding "similarities" in defendant's trade dress no "mere coincidence" where defendants had "irrefutable knowledge of plaintiff's trade dress" and "where an endless number of packaging features were available to the defendants").

Courts have held that use of a mark with knowledge of another's prior use supports an inference of intentional infringement. *See, e.g., Audi AG v. D'Amato*, 381 F. Supp. 2d 644, 663-64 (E.D. Mich. 2005) (finding that defendant intended to infringe AUDI mark based on defendant's false statement on his website that he had a signed an agreement to use Audi's trade names, demonstrating defendant's awareness of the mark). The circumstantial evidence of intent

in this case is overwhelming. *See Frisch's Restaurants*, 670 F.2d. at 648-49 (holding that district court properly "inferred" intent to confuse on part of defendant).

(h) Expansion of Product Lines

In this case, Defendants' JUNGLE JUICE products directly compete with Plaintiffs' BUG JUICE® products, so this factor weighs in favor of a finding of infringement. *Wynn Oil Co. v. American Way Service Corp.*, 943 F.2d 595, 604 (6th Cir. 1991) (affirming district court's finding that likelihood of expansion is already a reality where parties directly compete).

In view of the foregoing, Plaintiffs have established that all eight *Frisch* factors strongly weigh in favor of a finding of trademark infringement under 15 U.S.C. § 1114 and that injunctive relief is warranted.

4. Unfair Competition Under 15 U.S.C. § 1125(a)

Likelihood of confusion is the essence of a claim for unfair competition under 15 U.S.C. § 1125(a). The same factors are considered under Section 1125(a) as are considered under Section 1114. *Lorillard Tobacco Co. v. Amouri's Grand Foods, Inc.*, 453 F.3d 377, 381 n.6 (6th Cir. 2006) (analysis of the likelihood of confusion under 15 U.S.C. § 1114 and § 1125 is the same). Accordingly, Plaintiffs have also demonstrated that Defendant has engaged in unfair competition under Section 1125(a).

5. The Elements of Common Law Unfair Competition

Under Michigan law, a common law claim of unfair competition involving federally registered marks should be evaluated under the eight factors discussed above. *American Way*, 943 F.2d at 605 (finding that the Michigan Supreme Court would evaluate a claim of unfair

competition under Michigan common law using the same factors as applied to unfair competition claims under federal law); *Two Men and a Truck/International, Inc. v. Two Men and a Truck/Kalamazoo, Inc.*, 949 F. Supp. 500, 504 (W.D. Mich. 1996) (granting summary judgment to franchisor plaintiff and finding franchisee defendant's use of trademarks after termination of franchise agreement constituted unfair competition under federal and state law). Because all eight *Frisch* factors favor Plaintiffs, Defendant has engaged in common law unfair competition in violation of Michigan law.

C. IRREPARABLE HARM TO PLAINTIFFS

Irreparable injury flows from loss of control over reputation and quality of the goods sold by the infringer and the "intangible damage done to plaintiff's mark--the symbols of the reputation and goodwill it has developed throughout the years." *Veryfine Products*, 799 F. Supp. at 258 (quoting *Geoffrey, Inc. v. Toys 'R Us*, 756 F. Supp. 661, 668 (D.P.R. 1991)). This impairment to goodwill and threatened loss of reputation cannot be quantified or satisfied by monetary damages. *DAP Products, Inc. v. Color Tile Manufacturing, Inc,.* 821 F. Supp. 488, 494 (S.D. Ohio 1993) ("The harm caused by loss of a trademark is, by its very nature, irreparable because once the trademark is lost, it is very unlikely that it can be regained"). Only injunctive relief can curtail the harm that arises from trademark infringement and unfair competition. *Circuit City Stores, Inc. v. CarMax, Inc.*, 165 F.3d 1047, 1056 (6th Cir. 1999) ("[A] court need only find that a defendant is liable for infringement or unfair competition for it to award injunctive relief.").

In the Sixth Circuit, a presumption of irreparable harm arises under the Lanham Act where, as here, a movant establishes a likelihood of confusion. *American Way*, 943 F. 3d at 608 (irreparable injury "ordinarily follows when a likelihood of confusion or possible risk to

reputation appears"); *McNeill-PPC*, 984 F. Supp. at 1074 (finding that a presumption of irreparable harm arises where a plaintiff demonstrates a likelihood of confusion from defendant's use of infringing trade dress). Plaintiffs have shown a likelihood of success on the merits of their trademark infringement and unfair competition claims. Accordingly, based on the likelihood of confusion arising from Defendant's use of its infringing JUNGLE JUICE mark and trade dress, there is a presumption of irreparable harm in this case.

D. HARM TO OTHERS

In determining whether the injunction requested will cause harm to others, a district court must consider the harm to the defendant in complying with the injunction. Should this Court grant an injunction, the harm to Defendant would be minimal compared to the harm that Plaintiffs would suffer if an injunction is not granted. Moreover, Defendant would be prohibited only from selling JUNGLE JUICE products using the infringing trade dress. It would not be precluded from selling fruit flavored beverages that do *not* infringe on Plaintiffs' rights. Consumers "will not be deprived of choices of brands" of fruit flavored beverages. *McNeill-PPC*, 984 F. Supp. at 1074 (harm to third parties was minimal where customers would not be deprived of brand choice); *Mexican Food Specialties*, 953 F. Supp. at 854 (finding harm to third parties minimal where defendant would only be precluded from selling its tortilla products in the infringing trade dress).

In allocating the risk of the harm, the law favors the Plaintiffs, the innocent producers of legitimate goods, over a party that knowingly and intentionally copied its competitor's trade dress and persisted in its illegal activity after actual notice of the Plaintiffs' federal trademark and trade dress rights.

E. PUBLIC INTEREST

As to the final preliminary injunction factor, the effect on the public interest, it too weighs strongly in favor of granting injunctive relief. "'Trademark infringement, by its very nature, adversely affects the public interest in the 'free flow' of truthful commercial information.'" *Mexican Food Specialties*, 953 F. Supp. at 854 (finding that the public has an interest in being free from confusion in the marketplace and granting preliminary injunction to enjoin trade dress infringement) (internal citations omitted). An injunction against the sale of JUNGLE JUICE products bearing the infringing trade dress would advance two fundamental purposes of trademark law: preventing consumer confusion and deception in the marketplace and protecting the trademark owner's property interest in the mark. In this case, because a substantial number of Plaintiffs' customers are young children, an injunction will serve to protect a vulnerable market.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that their motion for preliminary injunction be granted. Plaintiffs request that Defendant be enjoined from further use of the JUNGLE JUICE mark and trade dress until a decision is reached on the merits, thereby avoiding irreparable harm to Plaintiffs.

Dated: March 19, 2010

By: /s/ David J. Gass, Esq.

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
MILLER JOHNSON
250 Monroe Avenue NW Suite 800
Grand Rapids, Michigan 49503-2250
Telephone: (616) 831-1717

Facsimile: (616) 831-1701
gassd@millerjohnson.com
portingaa@millerjohnson.com
Attorney for Plaintiffs
Bug Juice Brands, Inc. and Joseph J. Norton

Of Counsel
Virginia R. Richard, Esq.
Sanjana Chopra, Esq.
Stephanie S. McCallum, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166-4193
T: (212) 294-6700
F: (212) 294-4700
vrichard@winston.com
schopra@winston.com
smccallum@winston.com

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BUG JUICE BRANDS, INC., and JOSEPH J. NORTON,

Plaintiffs,

v.

GREAT LAKES BOTTLING COMPANY,

Defendant.

Civil Action No.: 1:10-cv-229

Hon.: Paul L. Maloney

/

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
Attorneys for Plaintiffs Bug Juice Brands, Inc. and Joseph J. Norton
MILLER JOHNSON
250 Monroe Ave NW Ste 800
P.O. Box 306
Grand Rapids, MI 49501
(616) 831-1700
gassd@millerjohnson.com
portingaa@millerjohnson.com

Of Counsel
Virginia R. Richard, Esq.
Lana C. Marina, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-6700
vrichard@winston.com
lmarina@winston.com

Robert J. Sayfie (P45267)
Attorney for Defendant Great Lakes Bottling Company
Robert J. Sayfie PC
161 Ottawa Ave NW Ste 407
Grand Rapids, MI 49503
(616) 774-9244
robert@sayfie.com

/

DEFENDANT'S RESPONSIVE PLEADING

NATURE OF THE ACTION

1. Denied.

2. Defendant admits to marketing fruit flavored beverages for children under "Jungle Juice" but denies that it is confusingly similar to BUG JUICE and denies that any irreparable harm has been done to Plaintiffs as a result.
3. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

THE PARTIES

4. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.
5. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.
6. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.
7. Admitted.
8. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.
9. Admitted.
10. Admitted.

BACKGROUND

A. PLAINTIFFS AND THEIR BUG JUICE BRAND TRADMARKS AND TRADE DRESS

11. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

12. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

13. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

14. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

15. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

16. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

17. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

18. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

19. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

20. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

21. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

22. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

23. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

24. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

25. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

26. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

27. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

28. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

29. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

30. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

31. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

32. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

33. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

34. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

35. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

36. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

37. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

B. GLBC'S UNAUTHORIZED USE OF PLAINTIFFS' BUG JUICE BRAND MARKS AND TRADE DRESS

38. Admitted.

39. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation. Plaintiffs have used different bottles and caps. The label speaks for itself.

40. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation; Photograph is too poor of quality to be able to recognize trade dress.

41. Admitted.

42. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation; Photograph is too poor of quality to be able to recognize products.

43. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation; Photograph is too poor of quality to be able to recognize products.

44. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation; Photograph is too poor of quality to be able to recognize products.

45. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation; Photograph is too poor of quality to be able to recognize products.

46. Denied.

47. Admitted.

48. Admitted.

49. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation; Photograph is too poor of quality to be able to recognize products.

50. Denied.

51. Denied.

C: PLAINTIFFS' NOTICE OF INFRINGEMENT TO DEFEDANTS

52. Defendant admits that Plaintiff's counsel sent a letter to Defendant on January 7, 2010 containing unsupported allegations regarding the use of the JUNGLE JUICE mark and JUNGLE JUICE Trade Dress.

53. Defendant admits that his counsel responded to Plaintiffs' letter, denying the likelihood of confusion between Plaintiffs' and Defendant's marks after careful

evaluation of the *Frisch* factors. Defendant denies infringement also. The rest of this allegation is denied.

54. Defendant admits to advertising and selling fruit-flavored beverages but denies its Trade Dress is confusingly similar to Plaintiffs' and denies any deliberate disregard of Plaintiffs' rights.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

COUNT 1

FEDERAL TRADEMARK INFRINGEMENT UNDER LANHAM ACT § 32, 15 U.S.C. § 1114

62. Neither admit nor deny.

63. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

COUNT II

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER LANHAM ACT § 43(A), 15 U.S.C. § 1125(a) (TRADEMARKS)

70. No response needed.

71. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

72. Denied.

73. Denied that there are "such actions."

74. Denied.

75. Denied that there are any "unlawful actions."

76. Denied.

77. Denied.

78. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

COUNT III

FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER LANHAM ACT § 43(A), 15 U.S.C. § 1125(a) (TRADEDRESS)

79. No response needed.

80. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

81. Denied.

82. Denied.

83. Denied.

84. Denied that there are any "unlawful actions."

85. Denied.

86. Denied.

87. Defendant lacks knowledge or information sufficient to form a belief about the truth of this allegation.

COUNT IV

UNFAIR COMPETITION AND TRADE PRACTICES UNDER MICHIGAN CONSUMER PROTECTION ACT

88. No response needed.

89. Denied.

90. Denied.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

COUNT V

COMMON LAW TRADEMARK INFRINGEMENT AND UNFIAR COMPETITION

96. No response needed.

97. Denied.

98. Denied.

99. Denied.

100. Denied.

101. Denied.

WHEREFORE, Defendant requests that the Court dismiss Plaintiffs' complaint with prejudice, and costs and attorney fees awarded to Defendant.

Date: 3/24/2010

Duane DeWitt
President, Great Lakes Bottling Co.

Date: 3/26/2010

Robert J. Sayfie (P45267)
Attorney for Defendant
Robert J. Sayfie, P.C.
161 Ottawa Ave., N.W., Ste. 407
Grand Rapids, MI 49503
616-774-9244
robert@sayfie.com

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BUG JUICE BRANDS, INC., and
JOSEPH J. NORTON,

Plaintiffs,

v.

GREAT LAKES BOTTLING
COMPANY,

Defendant.

Civil Action No.: 1:10-cv-229

Hon.: Paul L. Maloney

/

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
Attorneys for Plaintiffs Bug Juice Brands, Inc. and Joseph J. Norton
MILLER JOHNSON
250 Monroe Ave NW Ste 800
P.O. Box 306
Grand Rapids, MI 49501
(616) 831-1700
gassd@millerjohnson.com
portingaa@millerjohnson.com

Of Counsel
Virginia R. Richard, Esq.
Lana C. Marina, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
(212) 294-6700
vrichard@winston.com
lmarina@winston.com

Robert J. Sayfie (P45267)
Attorney for Defendant Great Lakes Bottling Company
Robert J. Sayfie PC
161 Ottawa Ave NW Ste 407
Grand Rapids, MI 49503
(616) 774-9244
robert@sayfie.com

/

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Defendant, Great Lakes Bottling Company, submits this Brief in opposition to Plaintiffs' Brief in Support of their Motion for Preliminary Injunction.

I. INTRODUCTION

Plaintiffs lack cause of action for this suit. Plaintiffs have failed to offer substantial evidence to support their erroneous claims of infringement or show any reasonable link between Defendant's sale of JUNGLE JUICE and immediate and irreparable harm to the Plaintiffs.

II. FACTS

Defendant, Great Lakes Bottling Company, is a Michigan corporation, owned and operated by Duane Dewitt that manufactures, distributes, and sells a variety of bottled products that includes a line of FlavorWave beverages, including JUNGLE JUICE. Defendant has applied for the federally registered mark "FlavorWave JUNGLE JUICE." JUNGLE JUICE is distributed throughout Michigan, Ohio, and Kentucky and is available in six (6) flavors.

The JUNGLE JUICE trade dress is noticeably different from Plaintiffs' BUG JUICE trade dress. Both JUNGLE JUICE and BUG JUICE are packaged in clear, ten (10) ounce bottles. However, Plaintiffs' product has the words "BUG JUICE" engraved at the upper section of the bottle. Moreover, JUNGLE JUICE has a white circular cap while BUG JUICE's cap is navy. JUNGLE JUICE has a plastic label that wraps around the indented portion of the middle of the bottle. This label does not overlap, thus there is a small portion that is left bare. BUG JUICE's label wraps completely around the center of the bottle and overlaps on the backside, leaving no portion of the center

uncovered. JUNGLE JUICE's bottle has four (4) line indentations around the middle portion of the bottle that are covered by their label. However, these lines are clearly visible through the small portion uncovered by the label. JUNGLE JUICE's bottle also has five (5) lines indented on the bottom of the bottle with the beginning of each indentation visible when the bottle is upright. BUG JUICE's bottle is completely free of any line indentations either in the middle portion or the bottom of the bottle.

JUNGLE JUICE's label clearly displays a jungle theme consisting of trees with brown tree branches and large jungle leaves. For each different flavor, a picture of a corresponding animal is displayed on the JUNGLE JUICE label. BUG JUICE's label has a garden theme with small leaves in the background and pictures of five (5) bugs crawling on or around the word "BUG JUICE". BUG JUICE also has an American flag proudly displayed on the right side of their label. JUNGLE JUICE has no flag on their label. JUNGLE JUICE and BUG JUICE both use significantly different fonts on their labels. JUNGLE JUICE's font is more straight edged than BUG JUICE's font, which is more curved and rounded. In addition, on the BUG JUICE label, the letters B and J are connected. The straight, left side of the letter B comes down to form the upper case letter J. JUNGLE JUICE's lettering is complete separate. BUG JUICE's lettering has a thick black outline. JUNGLE JUICE's lettering has a thin black outline with a three dimensional (3D) shading effect.

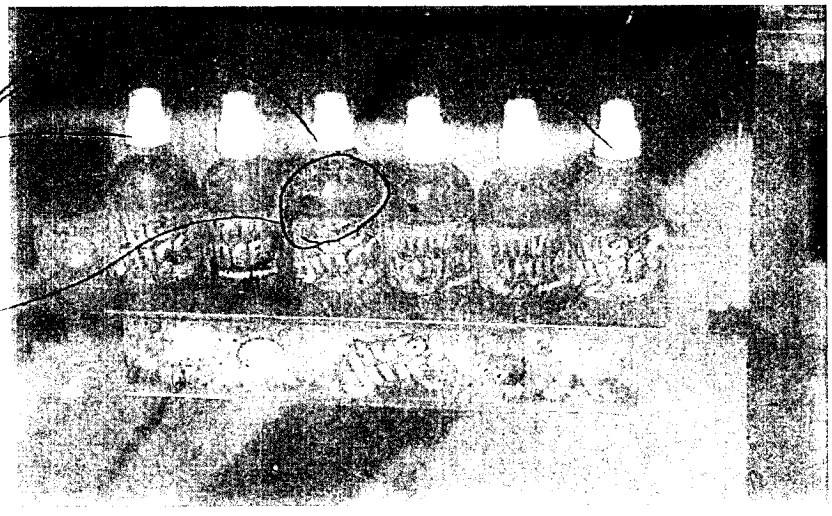
A. ACTUAL MARKETPLACE CONFUSION

From the photographs provided by Plaintiff Joseph J. Norton in his Declaration, it is apparent that the Plaintiffs may be trying to deceive this Court. These photographs

(shown on the next page) display refrigerator racks from two different locations, the top photograph from an Auto City store located at Grand River and 1696, Brighton, Michigan 48116 and the bottom photograph from a convenience store located at 13 Mile and Southfield Road, Beverly Hills, Michigan 48009. The handwritten text in blue ink is Defendant's interpretation of how the Plaintiffs "doctored" the photographs.

In both of the photographs (below), it is evident that the BUG JUICE bottle tops have been tampered with. As previously stated, BUG JUICE's bottles have navy blue bottle tops. The BUG JUICE bottles in these photographs have white bottle tops that are missing the tamper proof rings, which means that the white tops on the BUG JUICE bottles were removed from another bottle and placed on the BUG JUICE bottles. If the caps are removed by unscrewing them, then a ring on the bottom part of the cap separates from the cap.[1] Moreover, the fact that one of the BUG JUICE bottles is clearly missing a substantial amount of liquid provides more evidence that the bottles were tampered with and obviously staged by the Plaintiffs to be used to build their weak case against the Defendant. Their lack of real, substantial evidence has led the Plaintiffs to create false evidence, which calls into question the integrity of their entire case. Plaintiffs have failed to provide true evidence of actual confusion among members of the trade. Because of the Plaintiffs' obvious attempt to mislead the Court, it is difficult to discern which, if any, of their photographs are real.

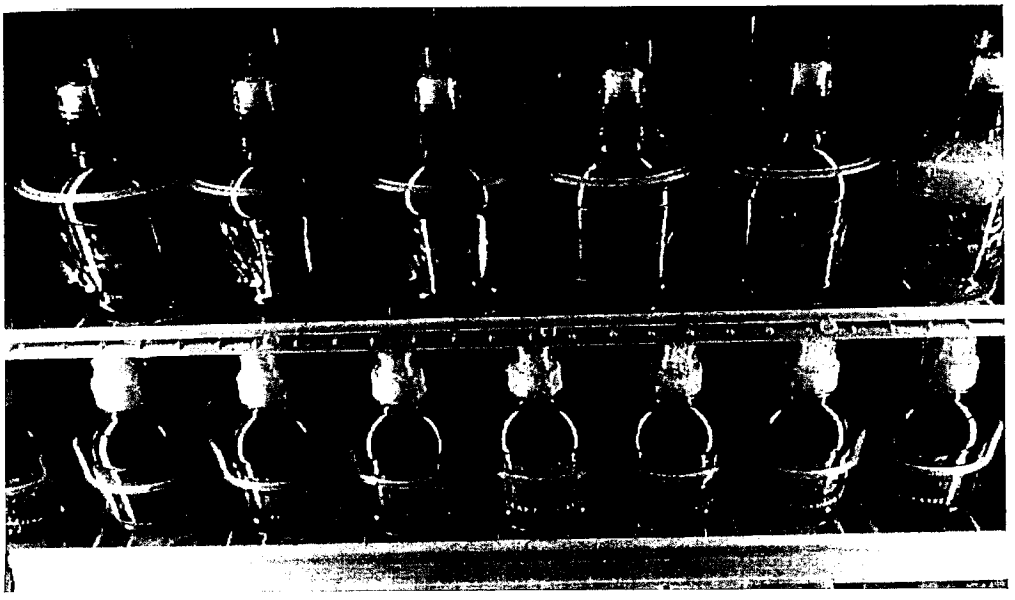
[1] See Affidavit of Duane Dewitt, Exhibit 1



37. Retail store clerks also stock BUG JUICE® refrigerator door case racks with both BUG JUICE® brand products and Jungle Juice products again creating a false association between Jungle Juice products and BUG JUICE® brand products as shown in the photograph below which I took on March 3, 2010 at a convenience store located at 13 Mile and Southfield Road, Beverly Hills, Michigan 48009.

[Page 16 of Moran Affidavit]

In the photograph below, Plaintiff Norton in his Declaration claims that BUG JUICE and JUNGLE JUICE were stocked at convenience store side-by-side. In this photograph the BUG JUICE tops do not appear to be tampered with; however, because it is obvious that the Plaintiffs' other photographs were fraudulent, it is highly likely that this arrangement of BUG JUICE and JUNGLE JUICE bottles was staged and also fraudulent. According to the Unclean Hands Doctrine, "it is essential that the plaintiff should not in his trademark, or in his advertisements and business, be himself guilty of any false or misleading representations; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court in equity", *Clinton E. Worden & Co. v. California Fig Syrup Co.*, 187 U.S. 516, 539-40, 23 S.Ct. 161, 168 (1903). Based on this doctrine, Plaintiffs have "unclean hands" and sanctions should be assessed and imposed for their misrepresentations. *King v IB Holdings Acquisition* 635 F. Supp.2d 651 (2009) (Plaintiff was sanctioned by dismissal of his complaint with prejudice due to purposely providing false information in his complaint).



Defendant's brief opposing expedited discovery also discusses this issue, and has pictures that further show evidence of the removal of the tamper-proof-ring.

III. ARUGMENT

Plaintiffs have no evidence to support their claims of irreparable harm caused by Defendant's production and sale of JUNGLE JUICE.

A. STANDARD FOR ISSUANCE FOR A PRELIMINARY INJUNCTION

In order to be granted a preliminary injunction, the following factors must be weighed by the court: (1) likelihood that the Plaintiffs will prevail on the merits; (2) extent of irreparable harm to the Plaintiffs due to the Defendant's conduct; (3) extent of irreparable harm to others if the injunction is issued; and (4) whether the public interest would be advanced by the issuance of the injunction.

B. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS

In order to sustain a claim of trade dress infringement, Plaintiffs "must prove by a preponderance of the evidence: (1) that its trade dress has obtained "secondary meaning" in the marketplace; (2) that the trade dress of the two competing products is confusingly similar; and (3) that the appropriated features of the trade dress are primarily nonfunctional." *Gray v. Meijer, Inc.*, 295 F.3d 641 (6th Cir. 2002).

1. "Secondary Meaning" in the Marketplace

Secondary meaning cannot be presumed in this case because Plaintiffs have failed to provide evidence that gives any reason to believe Defendant copied or intentionally copied Plaintiffs' trade dress. In contrast, Plaintiff intentionally copied Defendant's trade dress during the course of this litigation by changing their navy bottle tops to white bottle tops, as clearly seen in the photographs previously presented, with the purpose of strengthening their weak case with fraudulent evidence.

In anticipation that the Court will take into consideration inherent distinctiveness to determine the Plaintiffs' likelihood of success on the merits, Defendant counters Plaintiffs' claim that BUG JUICE's "trade dress is the subject of federal registrations and must be deemed inherently distinctive". Plaintiffs contend that lettering styles, colors, and descriptive elements should be the court's focus in determining inherent distinctiveness. However, lettering styles and colors are not a feature of Plaintiffs' trademarks and the only descriptive element Plaintiffs' have rights to is the engraved "BUG JUICE" words on the bottle, which Defendant does not use.

2. Trade Dress of the Two Competing Products

To establish trademark infringement within the meaning of the Lanham Act, Plaintiffs' must demonstrate that Defendant's mark "is likely to cause confusion among consumers regarding the origin [of Defendant's mark]." *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997) (citing 15 U.S.C. § 1114).

The determination of whether such confusion is likely, is performed by examining the eight *Frisch* factors: (1) "strength of the plaintiff's mark," (2) "relatedness of the

goods or services," (3) "similarity of the marks," (4) "evidence of actual confusion," (5) "marketing channels used," (6) "likely degree of purchaser care," (7) "the defendant's intent in selecting its mark," and (8) "likelihood of expansion of the product lines." *Jet*, 165 F.3d at 422 (citing *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982)). In conducting the *Frisch* balancing test, we must remember that "[t]hese factors imply no mathematical precision, but are simply a guide to help determine whether confusion is likely." *Homeowners Group, Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991).

a. **Weakness of Plaintiffs' Mark**

The BUG JUICE mark is not strongly recognized in the consuming public. Plaintiffs admit that BUG JUICE and JUNGLE JUICE are "grab and go" products that are solely purchased on impulse. Plaintiffs, in their Brief, provide that "supermarket studies show that the average consumer spends little time considering a 'grab and go' product purchase." It can be inferred from these statements that it is not the strength of Plaintiffs' mark or trade dress that has led to BUG JUICE's sales over the years but instead the "grab and go" purchasers who do not pay attention to what product they are buying.

b. **Relatedness of the Goods**

Both Plaintiff and Defendant may have trademarks on the same type of goods. However, Defendant's flavors have names that are distinct from Plaintiffs. Defendant's products have names such as "orangutan orange"

and "parrot punch." Although both the Plaintiff and Defendant sell fruit flavored children's beverages, the flavors are different. Moreover, Defendant's JUNGLE JUICE is much healthier for children than BUG JUICE. JUNGLE JUICE has eighty (80) calories and eighteen (18) grams of sugar per ten (10) ounce bottle. BUG JUICE has one hundred and forty two and a half (142.5) calories and thirty six and a fourth (36.25) grams of sugar per ten (10) ounce bottle. In no way are the goods identical as Plaintiffs claim.

c. **Lack of Similarity of the Marks**

Defendant's mark is noticeably different from Plaintiffs'. Plaintiffs' most noticeable mark is "BUG JUICE," while Defendant's is FLAVORWAVE JUNGLE JUICE. Even if Defendant's mark was only JUNGLE JUICE, there are 50% of the words different between the two marks. In addition, Plaintiffs' label has different colors with bugs and an American flag. Defendant's label has a different animal for each different juice flavor and no flag. There is no evidence that consumers, upon viewing JUNGLE JUICE and BUG JUICE either separately or together, would be confused to the origins of the products or believe they are related. Defendant's label is substantially different from Plaintiffs' in regards to theme, font, name, and pictures. The similarities between Plaintiffs' and Defendant's product are all completely functional, such as the size and shape of the bottle. The Declaration of Douglas Rehner does not establish the existence of actual confusion and carries little weight to the matter.

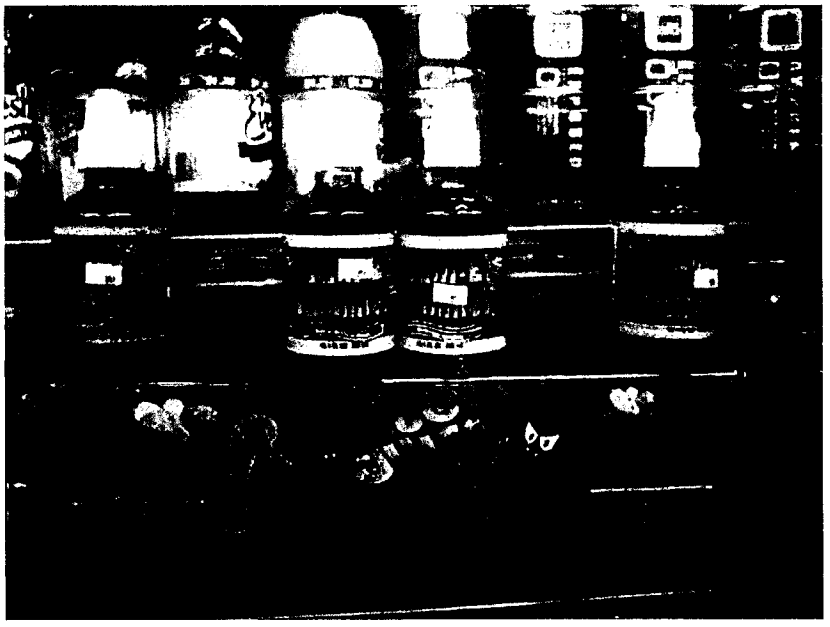
Rehner has never been confused by the products himself, but has only heard reports from unnamed sales staff of unnamed retailers stocking JUNGLE JUICE and BUG JUICE next to each other or "in some case have stocked bottles of JUNGLE JUICE on refrigerator door racks supplied by BUG JUICE" does not prove actual confusion. Even if this is true, JUNGLE JUICE is not the only children's fruit flavored beverage to be stocked on BUG JUICE refrigerator door racks (discussed below). The reason for stocking JUNGLE JUICE and BUG JUICE together is more likely to be because they are related products (fruit flavored children's beverages) and not because people cannot distinguish between the two.

d. Lack of Actual Confusion in the Marketplace

Any reasonable person confronted with JUNGLE JUICE and BUG JUICE would be able to discern the products from one another. Acknowledging the navy blue cap of BUG JUICE from the white cap of JUNGLE JUICE, along with reading the labels, the distinction between the two products is very clear. Displayed below are photographs taken at French Landing Liquor, a party store in Belleville, MI [2]. The product in the photographs, Tum-E Yummies, is another children's fruit flavored beverage that has a color label and similar bottle to JUNGLE JUICE and BUG JUICE. From this photograph, it becomes evident that any intermingling of products or confusion of product placement is due to the disorganized or negligent

[2] See Affidavit of Lea Ko, Exhibit 2.

stocking practices of store employees and does not prove actual confusion between products.



e. **Marketing Channels**

As previously stated, any reasonable person stocking shelves should be able to distinguish between JUNGLE JUICE and BUG JUICE from a quick glance at the different colored bottle tops and/or the label, which are noticeably different. Because of the mere fact that both Plaintiffs and Defendant produce fruit flavored children's beverages it is inevitable that both JUNGLE JUICE and BUG JUICE will exist in the same marketing channels, along with other marketed children's beverages.

f. Purchaser's Degree of Care

The purchasers are both the commercial establishments who shelve the product for resale, and the thirsty consumer. Therefore, with two layers of purchasers, (1) the commercial establishment, and (2) the end user, it is not likely that both will fail to see the difference between BUG JUICE and FLAVORWAVE JUNGLE JUICE, or JUNGLE JUICE.

g. Defendant's Intent/Lack of Bad Intent

Defendant has no bad intent. Other products, such as "Zoo Juice" and "Tum-E Yummies" exist on the market. It is common to use animals and colorful labels to market kids' products and food. Defendant decided on the name "FLAVORWAVE JUNGLE JUICE" and then hired a his son-in-law, who is a graphic designer by profession, to create the label for this product. His son-in-law who created the design does not work for Defendant or Mr. DeWitt. Defendant did not create the label himself nor offer any suggestions, remarks, or input into the design of the label. This clearly demonstrates Defendant's lack of intent to copy, use, or infringe on BUG JUICE's trademark or trade dress. Moreover, Defendant did not cease use of JUNGLE JUICE trade dress after allegations of infringement from the Plaintiffs because there is no evidence that Defendant has infringed upon Plaintiffs' trademark or trade dress; therefore, there is no reason for Defendant to cease use.

h. Product Line Expansion

> Defendant's and Plaintiffs' product exist in the same market, along with many other children's beverages being produced. JUNGLE JUICE is a fair competitor to BUG JUICE. It is probably not contested that both Plaintiffs and Defendant would like to sell as much of their product as possible but in no way can this be translated or interpreted into a finding of infringement.

Based on these facts, there is no likelihood of confusion between marks of Plaintiffs' and Defendant's. Based on the fraudulent photographs taken by Plaintiffs, it can be reasonably assumed that even they do not think JUNGLE JUICE is similar enough to BUG JUICE. Otherwise there would have been no reason to tamper with BUG JUICE's bottle tops to make it look more like JUNGLE JUICE.

3. Functionality of the Trade Dress

Defendant's bottle, part of JUNGLE JUICE's trade dress, serves a completely functional use. Because JUNGLE JUICE is marketed towards children, who have smaller hands than adults, the small ten (10) ounce size and cylindrical shape of the bottle makes it easier for children to hold on to while drinking. In addition, the pop-up bottle tops allow for only a small spill if the consumer loses their grip on the bottle. With regular bottle tops, once the top is removed, the beverage is susceptible to a major spill if the bottle is dropped. Because children are more likely to drop objects, especially larger objects, than adults are, the small bottle along with the pop-up top serves a very functional purpose for JUNGLE JUICE, which is a beverage specifically for children.

4. Unfair Competition Under 15 U.S.C. § 1125 (a)

Plaintiffs' have failed to demonstrate that Defendant has engaged in unfair competition under Section 1125 (a). JUNGLE JUICE is a reasonable competitor for BUG JUICE in regards to price and quality of beverage. As stated above, JUNGLE JUICE is a healthier alternative to BUG JUICE, with fewer calories and less grams of sugar per ten (10) ounces. This may be the motive of BUG JUICE to come after JUNGLE JUICE on such erroneous allegations. Plaintiffs had to stage false photographs to show enough similarities between JUNGLE JUICE and BUG JUICE during the course of this litigation. The intentional use of deceptive practices has made the Plaintiffs an unfair competitor to the Defendant.

5. The Elements of Common Law Unfair Competition

As Plaintiffs stated in their Brief, under Michigan law, a common law claim for unfair competition involving federally registered marks should be evaluated under the eight *Frisch* factors previously discussed. Because the eight factors do not favor the Plaintiffs, Defendant has not engaged in common law unfair competition.

C. IRREPARABLE HARM TO PLAINTIFFS

The Plaintiffs have failed to provide real evidence that they will suffer irreparable harm from Defendant's use of JUNGLE JUICE. Because there is no likelihood of confusion, or at least no high likelihood of confusion, the presumption of irreparable harm does not arise under the Lanham Act.

D. HARM TO OTHERS

Defendant has not knowingly nor intentionally copied Plaintiffs' trademark or trade dress. If this Court grants an injunction, the Defendant would ultimately suffer harm. Defendant is an innocent producer of children's fruit flavored beverages. Defendant's trade dress was designed by a third-party, which shows the lack of any intentional infringement. Moreover, the trade dress of JUNGLE JUICE and BUG JUICE are substantially and noticeably different. To grant a preliminary injunction would be unfair punishment because of the lack of just cause, subsequently harming the Defendant.

E. PUBLIC INTEREST

As a matter of public interest, Defendant's JUNGLE JUICE is more beneficial to the consumer as a healthier beverage than BUG JUICE, as previously stated. Actual consumer confusion has not arisen because of the similarities, or lack thereof, between JUNGLE JUICE and BUG JUICE. If any actual consumer confusion exists it is more likely because of disorganized stocking practices on account of store employees. The fact that another children's beverage, Tum-E Yummies, with a colorful label, small bottle, and pop up bottle top, was stocked in a cooler on a BUG JUICE rack, proves that any consumer confusion is due to employee negligence while stocking products.

IV. CONCLUSION

Based on the aforesaid, Defendant's oppose Plaintiffs' request for a motion for preliminary injunction. As the Plaintiffs have tried to make their product more similar to

Defendant's in the course of this litigation, with the purpose of deceiving the Court, Defendant's request that this Court take all facts into consideration when deciding on the motion for preliminary injunction.

Dated: 9 April 2010

/s/ Robert J. Sayfie
Robert J. Sayfie (P45267)
Attorney for Defendant Great Lakes Bottling Company
Robert J. Sayfie PC
161 Ottawa Ave NW Ste 407
Grand Rapids, MI 49503
(616) 774-9244
robert@sayfie.com

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

BUG JUICE BRANDS, INC.
and JOSEPH J. NORTON,

Plaintiffs,

v. CASE NO: 1:10-CV-229

GREAT LAKES BOTTLING COMPANY,

Defendant.

_____/

* * * *

HEARING ON MOTION

FOR PRELIMINARY INJUNCTION

* * * *

BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
June 2, 2010

KATHLEEN S. THOMAS, U.S. District Court Reporter
410 West Michigan Avenue, Kalamazoo, Michigan 49007
(269)385-3050

APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFFS:

VIRGINIA R. RICHARD
Winston & Strawn, LLP
200 Park Avenue
New York, New York 10166-4193

DAVID J. GASS
Miller Johnson
Calder Plaza Building
250 Monroe Avenue, N.W., Suite 800
P.O. Box 306
Grand Rapids, Michigan 49501-0306

STEPHANIE S. MCCALLUM
Winston & Strawn, LLP
35 West Wacker Drive
Chicago, Illinois 60601-9703

APPEARING ON BEHALF OF THE DEFENDANT:

ROBERT J. SAYFIE
Robert J. Sayfie, PC
161 Ottawa Avenue, N.W., Suite 407
Grand Rapids, Michigan 49503

I N D E X

Kalamazoo, Michigan

June 2, 2010

at approximately 1:32 p.m.

PROCEEDINGS

THE COURT: This is 10-229; Bug Juice Brands, Inc., et al. vs. Great Lakes Bottling Company. This matter is before the Court for a hearing on the plaintiffs' request for a motion for a preliminary injunction.

The record should reflect that the plaintiffs are represented by Attorney Stephanie McCallum, Attorney David Gass and Attorney Virginia Richard. The defendant is represented by Attorney Robert Sayfie.

As I said before, this is the date and time set aside for the hearing on the plaintiffs' motion for preliminary injunction.

Counsel, you may proceed.

MS. RICHARD: Thank you, your Honor.

Good afternoon. I'm Virginia Richard from Winston and Strawn, together with Stephanie McCallum and David Gass, we represent Plaintiffs Joseph Norton and Bug Juice Brands, Inc. Mr. Norton, who is the CEO of Bug Juice Brands, Inc., is at the counsel table with us, your Honor.

This is an action for a trademark infringement, trade dress infringement under Sections 32 and 43(a) of the

federal trademark statute, and unfair competition under the Michigan Consumer Protection Act and common law of unfair competition in the State of Michigan. Put in simple terms, this case involves the willful and deliberate piracy of the trade dress and good will of plaintiffs' famous Bug Juice children's fruit flavored beverage.

And, your Honor, if I may approach, this is plaintiffs' Bug Juice product, and this is the defendant's Jungle Juice product. We believe that a mere visual comparison of the two products amply demonstrates the striking similarity and intentional infringement which has occurred in this case. And if I may hand these--

THE COURT: Sure.

MS. RICHARD: --items up to the Court.

THE COURT: I promise I won't drink either one of them.

MS. RICHARD: You may enjoy it, you never know.

THE COURT: It wasn't meant to be any editorial comment about the quality of the product, it's just that it's a little untoward to have the Judge sipping on a--

Go ahead, counsel.

MS. RICHARD: Defendant is a newcomer to the fruit flavored beverage field. Defendant Great Lakes Bottling has copied plaintiffs' bottle design, label design, jungle

theme, and marketing strategy with knowledge that the plaintiff either constructive knowledge or actual knowledge of plaintiffs' rights.

Joseph Norton is the owner of numerous federal trademark registrations for the Bug Juice bottle design, the label designs, and the trademark, wordmark Bug Juice. Defendant is charged with constructive knowledge of those registrations under the Lanham Act. Plaintiffs' Bug Juice products have been marketed nationwide since 1991 and are the number one selling children's fruit flavored beverage in the convenience store market, which both parties agree is the channel of trade for this product-- primary channel of trade.

Mr. Norton will provide testimony as to the development of the product, its trade dress, advertising and spectacular sales success over the ensuing years.

Mr. Poe, who is seated in the witness area, Mr. Opalewski and Mr. Abraham, all of whom are associated with Bug Juice either as employees in the sales area or as employees of Bug Juice's distributor, Acosta, as sales representatives, will provide testimony regarding retailer, store clerk, and consumer confusion arising as a result of the defendant's use of the infringing trade dress and clear piracy. Evidence of actual confusion is the best evidence of likelihood of confusion.

To begin the story, we ask the Court to review the products of each party side by side as they appear in the marketplace on store shelves and draw its own conclusions regarding defendant's acts of piracy. Striking similarity leads to an inference of intentional copying.

Finally, we note that defendant's defense in this case seems to hinge on a claim that plaintiffs' tampered with evidence and committed fraud on the Court. Plaintiffs' deny these claims. Defendant was aware long before it submitted its opposition papers to this motion that plaintiffs used blue and white caps on their Bug Juice brand products. Its accusations regarding staged photographs are outrageous and unsupported by any proof.

Plaintiffs have satisfied every Frisch factor on the issue of trademark infringement, and although as noted in DAP vs. Color Tile, secondary meaning is not required to succeed in obtaining protection of unregistered trade dress under 43(a) under the Supreme Court's decision in Two Pesos. Mr. Norton's testimony will supply proof of substantial secondary meaning in the trade dress of plaintiffs' Bug Juice product. There is evidence of actual confusion--

THE COURT: Is it your position that it's disjunctive, either it's inherently distinctive or has acquired secondary meaning?

MS. RICHARD: Yes, your Honor.

THE COURT: Because there seems to be some, shall I say, inaccurate language in one of the Sixth Circuit opinions, which is posed Two Pesos and post Walmart, which would appear to indicate that it's a conjunctive analysis as opposed to a disjunctive.

MS. RICHARD: Well, my understanding certainly is that under Two Pesos, which was a departure from the earlier law, that there is no requirement for proof of secondary meaning for unregistered trade dress in order to entitle the plaintiff for protection. Because in that case, a newly introduced product would never succeed in trade dress protection. So yes, for unregistered trade dress inherently distinctive would get you over the barrier. But nevertheless, if you were a new product, you wouldn't need to establish secondary meaning in order to succeed in getting an injunction.

THE COURT: All right.

MS. RICHARD: Great Lakes' intent in selecting the bottle shape, label design, and jungle theme was clearly an effort to make its product look like Bug Juice. A presumption of likelihood of confusion follows from intentional coping. None of the features of the Bug Juice trade dress copied by Great Lakes is functional. A clear plastic bottle of a particular shape is not functional.

There is no claim that the Bug Juice label is functional. Further, Mr. Norton will provide evidence that there are numerous third party competitors on the market who use different bottle shapes and label designs for children's fruit flavored beverages. There is no claim that the Bug Juice bottle or label is essential to its use or purpose or affects the cost of the product.

A presumption of irreparable harm attaches once the moving party has demonstrated probable success on the merits as will be demonstrated here. Continued use by defendant of the Jungle Juice trade dress will result in the loss of plaintiffs' statutory and common-law trademark rights. The harm suffered by a loss of a trademark is by its very nature irreparable, as once lost, it is unlikely to be regained.

True trade dress cases, which are instructive and may be helpful to the Court because, at least with respect to the Veryfine case. It's virtually on all fours with this case it's a district of Puerto Rico case in which the Veryfine juice company dramatically changed its trade dress to revamp and modernize its image. It went from $7 million in sales in one year to $200 million in sales five years later as a result of this newly adopted trade dress. It moved from a larger size bottle a ten-ounce, single-serve glass bottle. And as a result of this

tremendous sales success, the defendant in Puerto Rico copied virtually line for line the plaintiffs' newly revamped trade dress. And the products were shelved side by side in convenience stores and supermarkets in Puerto Rico, and there was evidence that store clerks intermingled the products of the parties because they could not distinguish one from the other. There will be similar evidence in this case.

And another case closer to home in this circuit is the DAP case from the District of Ohio, involving a three and a half gallon bucket for mastic, which the plaintiff changed from a black or gray color to a red color with a white cap in order to revamp its image. It was tremendously successful, and the defendant simply copied it line for line, brought it into the marketplace and engendered as expected confusion.

Both cases involve both registered and unregistered trade dress as well as unsupported claims of functionality. And in each case, the Court drew an inference of intentional infringement from the striking similarity between the plaintiff's trade dress and the defendant's trade dress, as we ask the Court to do here.

Finally, we note that Judge Heyburn of the Western District of Kentucky in his April 2nd, 2010, opinion in the Maker's Mark red seal case, a case which is not cited

in our briefs because it is so recent, at 2010 WL 1407325, held that in the Sixth Circuit injunctive relief is the remedy of choice in trademark infringement and unfair competition cases as there is no adequate remedy at law for injury caused by defendant's continuing infringement. Preliminary injunctive relief in this case is the only adequate remedy to address the harm caused by defendant's infringing activities. There is no harm to third parties from such an injunction, and the public interests is served by the enforcement of trademark rights and the prevention of confusion.

So without further ado, your Honor, we would call Mr. Norton to the stand.

THE COURT: Mr. Sayfie, do you want to make a summary statement at this point or do you want to reserve until after the proofs of the plaintiff?

MR. SAYFIE: I would prefer to reserve, your Honor. Thank you.

THE COURT: Okay. That's fine.

All right. You may call your witness.

MS. RICHARD: Thank you.

Mr. Norton, please take the stand.

THE WITNESS: Over here?

MS. RICHARD: Your Honor, in the meantime, I have copies of the DAP case and the Veryfine case, if you care

to have them.

THE COURT: Sure. Why don't we swear the witness first and take it from there.

JOSEPH J. NORTON - PLAINTIFF - SWORN

COURT CLERK: You may have a seat. If you would state your full name, please, and spell it slowly for the record.

THE WITNESS: Yes. My name is Joseph John Norton, N-o-r-t-o-n.

THE COURT: Thank you.

Counsel.

DIRECT EXAMINATION

BY MS. RICHARD:

Q. Mr. Norton, would you please give the Court your home address and your current place of employment?

A. My home address is 699 Hannah, Birmingham, Michigan, zip is 48009. I am the owner, founder and CEO of Bug Juice Brands, Inc.

Q. And could you state your educational background beginning with college and identify the schools attended and degrees received, if any?

A. Yes. I went to the University of Cincinnati on a football scholarship. I received a degree in chemistry, and a degree in business. From there I went to the University of Michigan. I have an MBA in-- MBAs are general. I

have an MBA from the University of Michigan.
Q. Can you describe for the Court the scope of your responsibilities as CEO of Bug Juice Brands, Inc.?
A. All Bug Juice Brands, Inc.'s employees report directly to me. I am in charge of day-to-day operations, everything from chief cook and bottle washer.
Q. And can you give the Court a brief overview of your business background prior to founding Bug Juice Brands, Inc.?
A. Yes. I've worked in the plastics industry coming out of the University of Michigan making plastic door handles from for the car industry. From there I went to work for a company Absopure, that's in the marketing and manufacture of water in the Detroit area. From there, I went and with a few partners started a company that manufactured, designed and marketed clear plastic P-E-T bottles.
Q. And when was that, sir?
A. Roughly 1989 is when I would have stopped.
Q. And did there come a time when you determined that you wished to enter the market for fruit flavored children's beverages?
A. Yes. When I was working with Southeast Partners, which is a bottle manufacturing company, we worked with Snapple, we worked with Arizona Ice Tea and we worked with Mystic Ice

Teas. From there, while I was sitting around the table, they would have meetings with all of the manufacturers for their products, I learned quite a bit about the industry at that time, and from there thought it would be a good idea to get into manufacturing beverages.

Q. And when you made that determination, what steps did you take to enter the market for children's fruit flavored beverages?

A. At that time there was a niche, so to speak, for children's drinks. Arizona Ice Tea, Snapple, and Mystic Ice Teas, and hopefully the Court is familiar with them, were targeting their brands towards teenagers and grown-ups. We spent a lot of time looking around the market trying to figure out what might work, and we determined that a high end children's drink-- that there might be a niche for a high end children's drink.

Q. And having made that determination, what did you do in terms of designing the packaging and labeling for that product?

A. Well, that was our expertise at Southeast Partners, we did custom bottles, and we looked again at the market and thought what would work for a child. And at that time there were no ten ounce plastic bottles, PET bottles, and we said, you know, if we come up with ten ounce bottle that was kid friendly, and we designed the bottle

ourselves, we in fact for a while we manufactured the bottle ourselves. We also looked at logos, and I guess the term is trade dress, things like that-- I don't use those terms-- from a marketing standpoint, what bottle the kids would recognize, that they would know the name and that they could relate to. We analyzed. We looked at very-- many different names. We loved the jungle theme, and we also liked the idea of bugs. Kids-- all kids like bugs, all kids like leaves, all kids like jungles. So we put together the Bug Juice Brand and we applied for a trademark for that. And then we went back and looked at, while this was going on, we looked at what backgrounds we could use, and we thought, at that time, a jungle theme would be perfect with the Bug Juice logo, a jungle theme, and with bugs put on the bottle, and developed pretty much what you see today as a Bug Juice-- the Bug Juice package.

Q. And what steps did you take to develop the actual product that you put in this unique bottle and label design composition?

A. Well, we knew kids liked bright colors. We also knew that our market was going to be in the convenience class of trade, which is a very quick moving class of trade, and we wanted something bright that was distinctive on the shelf, and we also wanted something that when mom tasted it she

thought it tasted good, believe it or not. So we put a lot of time and effort into developing different flavors. The first flavor we came up with was the red fruit punch. That sold very well. We came up with the, I think the next one might have been orange, Outrageous Orange. Then we came out with, I think the green one, which would be Lemony Lime, and then grape, Grapey Grape, and so we developed a product over time, trying to meet the need-- trying to build a brand across the shelf and also to make it eye appealing to the children.

Q. And in connection with the development of both the product and the trade dress for the product, which you've described as the bottle and the label, did you also design a cap for the product?

A. No, at no time did we-- At that time-- Well, as of today, cap designs and cap shapes are owned by the cap manufacturers. They are manufacturers across the world that manufacture sport caps, flat caps, we have no claim on a cap. We've used many manufacturers and have been for almost 20 years.

Q. With respect to the color of the cap used in connection with the Bug Juice product from 1991 to date, have you fixed on a specific color for the use of that cap?

A. No. We have used white caps, blue caps, at one point from a marketing standpoint, we tried to match the cap with the

color of the product, for instance if it's a green product we wanted a green cap. As we grew, the people-- the co-packers we call them, the people who actually put Bug Juice together, they take all of our ingredients and everything and put them in the bottle and put a cap on it, it became too cumbersome for them to change from blue to yellow to green as we ran more and more product on their lines. So at that point, there was a decision made to go to a more standardized cap. The two most popular caps in the industry are the blue/white and the white/white. Pepsi uses the blue/white primarily and Nestle used the white/white. They were all available in the trade. Our co-packers had them on the floor. They came to us, they said can we switch caps, and we said certainly, it's not a problem. So for at least the past ten years we have been using both the blue/white the white/white, we use yellow, we have used green, red, blue, orange, purple, multiple different color caps.

Q. And currently over the last, say, five years, what color caps have been used in connection with Bug Juice products?

A. Blue/white and white/white.

Q. And does that use of cap color vary from co-packer to co-packer?

A. Yes, it does. And it also varies within a co-packer. We have one co-packer in Ohio right now that one of his lines

runs the blue/white caps-- and we can't figure this out-- and the other runs the white/white caps and has been, and they are two different manufacturers of machines, we own both machines, we bought them five, six, seven years ago, and we can't figure out why the white/white runs better on one machine and the blue/white runs better on another, so that's one instance where we have two caps in the same plant coming out a white/white on one line and a blue/white on the other. It's independent of the flavor at this point.

Also in Texas where we had a co-packer in the past, they would go back and forth between blue/white and white/white depending on what they were running in front of us, meaning that if they were running a product that was a water and it had a white/white cap, they would say as Bug Juice came down the line rather than stop and retool the entire capper and re-- basically retool the capper, they would just run Bug Juice right behind with a white/white cap, and sometimes we would get white/white caps and sometimes blue/white caps.

Q. Thank you.

THE COURT: Do I gather from your testimony that you don't care?

THE WITNESS: Exactly.

BY MS. RICHARD:

Q. Now, having developed the bottle design, the label design, the contents of the product, and that was all between 1990 and 1991; is that correct?

A. That is correct.

Q. What did you do next to market the product?

A. We are the first people out with that type of product. At that time, the industry was not-- didn't feel that they needed what we call to market ourselves as a high end children's drink. So literally, I went door to door. We started with a P.C. and my dog and I in Brighton, in a rented cottage, and started calling up wholesalers, and convenience store chains, and I would go visit them and try and tell them that they could make more money selling a Bug Juice product than they could anything else in their store. At that time, they had about a 60 percent margin, which was a very good margin. Coca Cola margins at that time were about 30 to 40 percent. And one by one, after meeting with them and having follow-up meetings and talking to them, we started developing a relationship with certain buyers, and they started trying Bug Juice. We had some luck with one customer particular, 7-Eleven, which most people here are familiar with, and they were a big group, and they basically put us nationally with their first order. Biggest order I ever got in my life up to that point, and they put us through the biggest wholesaler

in the country. And from that point on, Bug Juice started going very rapidly because they, at the time, were the leader in the industry, and what they did, people followed.

THE COURT: What year was that?

THE WITNESS: I want to say probably '92, '93.

BY MS. RICHARD:

Q. Now, after landing the 7-Eleven account, what did you do to further market Bug Juice products to the retail trade?

A. Well, when 7-Eleven picked it up, first of all, the retail trade, there is a couple ways to market the retail trade; one is literally going store to store to store, and for that-- after we picked up 7-Eleven, we could hire brokers at the time, and we would develop all kinds of fliers and handouts and things like that. They would go door to door with their people selling Bug Juice. There are trade shows today, and there were trade shows back then, and we would buy space in the trade shows. We would put up big booths. We would invite people to the booths, show them the products, show them-- take them all the way through the training process of how they can make more money with Bug Juice, why mom would buy it. We would-- Another part of the marketing plan in this class of trade is buying shelf space, so we would negotiate contracts with certain wholesalers and certain retailers to buy shelves of

product. We do that today as well. We develop mailing programs where we mail, on a monthly basis, anywhere from 125,000 to 150,000 direct mailers to the store.

With a kids drink, it's hard to market them in any way except at eye level. Radio doesn't work for a kid. Kids don't listen to radio. We looked at that. We looked at cable TV. Cable TV doesn't work for us, because we sell primarily through the convenience class of trade. So the children don't drive. So what we had to do is go directly to the C-store and put it right there, and we started off on lower shelves, because children are small, they would walk in the C-store, see the bright label, they would see the name Bug Juice, and see the jungle theme, and they said mom, can I have one of those? And the trick was, if mom tasted it and it tasted good, she would buy it twice. We were the only guys that figured that out. And it is true. Every time you buy for your kids or grandkids, if you taste it and it tastes bad, you won't buy two. So that was why it took so long to develop the flavors. We learned that from the Mystic ice tea guys.

So we started developing racks. We started developing fun things in the store. We had baseball caps we would hand out. We had T-shirts we would hand out. It was all done by word of mouth. Think of-- Well, soccer moms. Soccer moms go to soccer games, they have to buy a

product for all the kids on the soccer team. One mom shows up with Bug Juice one week, the next week hopefully the next mom who is in charge of buying it shows up with the Bug Juice. And they were easy to get to. They would stop by the convenience store on the way, they would buy twelve Bug Juices, go to the soccer game. Bug Juice is marketed all word of mouth.

Q. So in summary, the focus of the marketing at the retail level was in-store displays, shelf toppers, racks, the display of the product itself in slotting shelving which you had purchased-- Bug Juice Brands had purchased which is a form of in-store advertising as sort of mini billboard in the store and word of mouth?

A. Yes.

Q. Now, have the sales of Bug Juice grown substantially from 1991 to the present?

A. Yes. We started with zero and now we sell roughly $80 million a year worth.

Q. And in how many stores is Bug Juice Brand sold today?

A. Today roughly 70,000 to 80,000.

Q. And that's nationwide?

A. Nationwide.

Q. Is it sold outside of the United States?

A. Yes, it's sold in Canada and Mexico as well.

Q. Now, during this period of growth for the Bug Juice

product, did you arrange to obtain trademark registrations for any elements of the trade dress?

A. Yes. We trademarked obviously the brand name, the logo, the label, the bottle. I think we've---

Q. Do you have your binder up there?

A. I do not.

Q. Could I direct you to Tab 4.

MS. McCALLUM: Your Honor, may I approach. I have a copy for the Court and counsel.

THE WITNESS: Can I get another one?

MS. McCALLUM: Yes.

THE WITNESS: Great. Thanks. Sorry about that.

THE COURT: That's all right.

THE WITNESS: Small binder.

BY MS. RICHARD:

Q. I promise, we won't go through the whole thing.

Okay. If you could go to Tab 4, you'll see a federal registration certificate for the Bug Juice bottle design, which bears Registration No. 3,323,843, is that a registration which you own, Mr. Norton?

A. Yes.

Q. Okay. And does the registration certificate itself provide a description of the trade dress of the Bug Juice bottle design which is protected by that registration?

A. On the second page?

Q. Yes.
A. Yes, it does.
Q. It does.
And is there a claim to a particular cap configuration?
A. No, we can't do that. We don't own the caps and other people own those rights.
Q. And if you will go to Tab 5 of the binder, you'll see a registration certificate for Registration No. 3,455,247 for a Bug Juice label design which bears an American flag. Do you see that, sir?
A. Yes, I do.
Q. And is that a registration which you own?
A. Yes.
Q. And is that label design in use today?
A. Yes, it is.
MS. RICHARD: And, your Honor, I call the Court's attention to the fact that the sample product that you have before you contains the Bug Juice label with the American flag design.
BY MS. RICHARD:
Q. If you go to Tab 6, that is a certificate of registration for Registration No. 3,732,786 for another Bug Juice label design. Do you see that, sir?
A. Yes.

Q. Is that a registration which you own?
A. Yes.
Q. And is that label design in current use by Bug Juice?
A. Yes.
Q. Do you use both label designs, the one shown at Tab 5 and the one shown at Tab 6, simultaneously?
A. Simultaneously meaning from different times, yes. Yes.
Q. But throughout the year they are used continuously?
A. Yes.
Q. And if you go to Tab 7 there is a registration certificate Registration No. 3,786,339, for the word mark Bug Juice in a particular type font. Do you see that, sir?
A. Yes.
Q. Is that a registration which you own?
A. That is, and that took a lot of time to develop.
Q. That particular--
A. That was what kind of started it all. Brings back a lot of good memories. That was-- nowadays they might call it hip hop, back then we thought it was kind of cartoony and kind of graffiti that was the terms you would use when you talk to label designers then, now they call it hip hop, but it was designed to appeal to kids.
Q. And that representation of the type font for the Bug Juice word mark is still in use, sir?
A. Yes.

Q. And I ask you to take a look at the registration certificate at Tab 8 which is Registration No. 3,329,158 for the Lite Bug Juice label design?
A. Yes.
Q. Is that a registration which you own, sir?
A. Yes.
Q. And is that label design in use today?
A. Yes.
Q. And if you look at Tab 9, there is a registration certificate, Registration No. 3,317,139 for Lite Bug Juice, is that a registration which you own?
A. Yes.
Q. And is that marked in use today?
A. Yes.
Q. Now, as the owner of these registrations for various elements of the Bug Juice trade dress, have you granted Bug Juice Brands, Inc., the right to use those marks?
A. Yes.
Q. And is that pursuant to a license?
A. Yes.
Q. And as the owner of those marks, do you control the nature and quality of the goods sold under those marks by Bug Juice Brands, Inc.?
A. I do.
Q. And how do you do that?

A. I run Bug Juice as well. I protect them.
Q. Okay. Now, is there a particular Bug Juice Brand message which is embodied both in the registered marks, which we have reviewed, as well as other materials published by Bug Juice?
A. Yes. When we started Bug Juice, we loved the jungle theme, and since we are in the great north coast is what we call the Great Lakes in Michigan, at least we do that to the rest of the country, we said "from the jungles of the great north coast comes a drink especially for kids" and we have used that since we started selling Bug Juice. It's on 99 percent of our, I call them trade rag advertisements, which is direct store mailings, it's on our banners that we use at convention shows, at one point it was even on our letterhead. It's kind of our theme.
Q. If you would go to Tab 10 of your binder, sir. There is a photograph of a booth at an MCT trade show. Can you tell us what that photograph represents?
A. Well, that's our what we call the giant Bug Juice banner. It's designed specifically for trade shows and/or being shown off in a convenience store. It's got our logo up on the left-hand corner, our saying-- our slang saying "from the jungles of the great north coast." And then it's got the Bug Juice logo in the middle. It's got some renderings of Bug Juice bottles it looks like with green

caps there. It looks like that was from a long time ago my guess.

Q. Well, if you look at the actual photograph, which appears at Tab 10, under the word photo index, underneath it there is a wording "MCT Wholesale Buying Show 2003 photo," does that refresh your recollection as to the approximate date of that photograph?

A. Would have been then.

Q. Now, with respect to the Bug Juice bottle design, which is shown in the registration certificate at Tab 4, are the elements of that bottle design set forth with particularity in the registration certificate itself?

A. Yes.

Q. And have the elements of that bottle design been copied by the defendant?

A. Yes.

Q. And how do you know that, sir?

A. I can look at the bottle shape, it looks identical to ours.

Q. And with respect to the label designs, which appear at Tabs 5 and 6 of your binder, do they accurately reflect the label designs that are currently in use by Bug Juice?

A. Yes.

Q. And have those label designs, in your opinion, been copied?

A. Yes.
Q. By defendants?
A. Yes, even down to the shading of the letters.
Q. In addition to the shading of the letters, what other elements of label designs?
A. They have a jungle theme going on, which it seems to me exactly like ours. I guess if you just look at the bottle, it's pretty, to me, it's self evident. They shade their-- their letter shaping is very similar to ours. The letter shading is identical to ours. They have leaves in the background, which is identical to ours. And they have the shape of the container which is identical to ours.
Q. Okay. If you would go to Tab 12 of your binder, sir. There is a photograph of Bug Juice beverage Fruity Punch flavor. Do you see that?
A. Yes, I do.
Q. And is that an accurate representation of the Bug Juice trade dress?
A. Yes, it is.
Q. And do you note on that particular photograph the omission of a tamper-proof ring?
A. I see that.
Q. And can you tell the Court how it is that these photographs were made of the products without tamper-proof rings?

A. Certainly. You had called-- We had notified you that we had an issue we felt with somebody copying our product. You said can you send samples of your product. We are a marketing office, we have samples laying all over, we have people touching the samples we have all kinds of things going on with them. It seems to me that that bottle was taken off of a desk. That bottle may have been opened prior to being sent to you. There are some instances where if a bottle is older, product will evaporate out of the bottle, and the bottle will concave in, especially if it's sitting on a desk, and if you open the bottle, you open it and let air in so the bottle puffs back up. People aren't going to consume these obviously, and then you put the cap back on.

MS. RICHARD: Your Honor, if I may approach the witness.

BY MS. RICHARD:

Q. Mr. Norton, are these bottles of Bug Juice which are 6.75 fluid ounce bottles representative of the phenomenon that you described about concaving?

A. Yes.

Stuff evaporates out of the top right around the tamper-evident ring. For marketing purposes what they would do is open this up, pop the bottle, get it back round, put it back on. The ring may or may not go back on

with it.
Q. So with respect to the photographs that are shown at Tab 12, first four which do not appear with tamper-proof rings, were those photographs tampered with in any way?
A. I don't believe so, no.
Q. And were those bottles tampered with in any way?
A. No.
Q. Then if you'll go to the next photograph in order in that group under Tab 12, it's a Bug Juice beverage Berry Raspberry flavor, is that an accurate representation of a Bug Juice product bearing a cap with a tamper-proof ring intact?
A. Is that one there? I can't find it in here quickly. Is that it?
Q. That's it.
A. Yes.
Q. Okay. And Berry Raspberry flavor is a current flavor?
A. Yes.
Q. And then the next product in order is Bug Juice beverage Straw'Nana flavor?
A. Yes.
Q. Is that an accurate representation of a Bug Juice product?
A. Yes.
Q. With the tamper-proof ring intact?
A. Yes.

Q. And is the Straw'Nana flavor currently sold by Bug Juice?
A. Yes, it is.
Q. And how long has that flavor been sold?
A. Oh, two or three years.
Q. Since at least 2007?
A. Yes.
Q. Okay. May I ask you to take a look at the documents which appear under Tab 16, sir.
A. Okay.
Q. And the first document appears to be dated February 17, 2009, in the upper right-hand corner. Do you see that, sir?
A. Yes.
Q. Can you tell the Court what this document is and whether it's been maintained in the ordinary course of business as a business record by Bug Juice Brands, Inc.?
A. Yes, it's-- we call it a shipper, they call it a shipping manifest. That is a list of what was shipped into one of our co-packers, it looks to be Ohio Beverage.
Q. What was actually the subject of this document?
A. We shipped in 1.7 million white/white sport caps.
Q. And was that shipment pursuant to an order placed by Bug Juice Brands or by the co-packer?
A. Most likely in this case by the co-packer. That co-packer has the ability to order caps at will.

Q. And the next physical page of that exhibit under Tab 16, can you tell the Court what that represents?
A. It's a shipper going to the same co-packer with blue/white caps and white/white caps.
Q. And the date of that shipment?
A. Ship date looked to be May 6th, 2009.
Q. And the subsequent documents in this group of documents, are they all the same type of documents orders to cap manufacturers to produce white caps and blue caps for Bug Juice products long prior to the date on which the Jungle Juice product was launched, correct?
A. Yes.
Q. And if you go to Tab 17, can you identify that document for the Court?
A. Yes, this is an inventory list or a partial list of our inventory at one of our co-packers. It's got down here in the left it says "Ohio Beverage O.B." You come across, it says I think right in the middle it says, "Items: Caps white total, 600,000." It has the value $15,000. It's got the general ledger date or the date we would have received that inventory notification from our co-packer, 12/9, 2004.
Q. Okay. And just for the Court's information, are these representative samples of documents relating to the purchase of white caps and blue caps by Bug Juice over the

years?
A. Yes.
Q. Now, can you tell the Court what the total wholesale sales of Bug Juice Brand products have been from 1991 to 2009?
A. I'll estimate 400 million.
Q. And the sales at retail in 2008, what were they, sir?
A. Eighty to 90 million.
Q. And the sales at retail in 2009?
A. Eighty to 90 million.
Q. Now, are you aware of any competitor products sold in the children's beverage market in 2009 that were similar in trade dress to Bug Juice Brand products?
A. I am not.
Q. And what advertising expenditures have been made, if any, by Bug Juice Brands from 1991 to date?
A. Probably $60 to $70 million.
Q. And as we discussed earlier, those advertising expenditures were on in-store displays, shelf toppers, end cap displays, trade shows, hats and T-shirts, and anything else?
A. Well, mailings.
Q. And the geographic scope of that advertising was what, sir?
A. National.
Q. And the channels of trade for the Bug Juice product, have

they expanded since the introduction in 1991?
A. The channels of trade, meaning number of wholesalers?
Q. No, the actual channels of trade meaning convenience stores, grocery stores?
A. Yes, sure. We started out in convenience stores, we run in and outs periodically. In and out is a short-term shelf placement at a Kroger, at a, Walmart, at a Sam's Club. We have done that, oh, for the past probably five, six, seven years now.
Q. And are Bug Juice products sold on the internet?
A. Yes, they are.
Q. And where are they sold on the internet, sir?
A. We have a website. It is for when mom wants to have a birthday party and Johnny likes Bug Juice, rather than having to go to the grocery store or to the primarily where we sell, the gas station, and pay top dollar for Bug Juice and buying them individually, they can come on our website, they can buy a couple cases of Bug Juice, they can buy hats, they can buy T-shirts. We even offer a package for 12 kids or 24 kids and we ship the entire package to the house.
Q. And I direct your attention to Tab 20 of the binder. Is that document a physical representation of the internet website maintained by Bug Juice Brands in your binder, sir?

A. Yes.
Q. Now, did there come a time when you learned of the presence of a product called Jungle Juice on the market?
A. Yes. I would say early this year.
Q. And how did that product come to your attention?
A. I think the first time we heard it was a customer called in and was confused and asked us if we had a new flavor or something like that, we said no. My guess is that we-- I'm sure I got hold of Steve or got hold of one of our employees and said what is going on why--

MR. SAYFIE: I'll object to hearsay.

THE COURT: Is it offered for the truth of the matter?

MS. RICHARD: No, it's offered for what is said, sir.

THE COURT: And then what the witness did?

MS. RICHARD: Yes.

THE COURT: All right. Under those circumstances, I'll overrule.

Go ahead.

THE WITNESS: So we tried to find out what it was. Competitive threats happen from time to time. I believe we also had a C-store call. Again, I don't answer the phone all of the time, most of-- some of this information is said to me from my employees. And then we started to

do more research, and at that time, we had some samples sent to us.

Q. And when you received the sample, what was your impression of the product?

A. I was shocked. To me it's an exact copy of our product. I thought it was meant to deceive our customers.

Q. And what did you do after observing the sample?

A. I contacted my attorneys.

Q. And did you--

A. Tried to get--

Q. Did you provide or instruct--

A. I did. I asked them to see what legal remedy we might have to stop this.

In our business, it's very dangerous to have someone put out a product that's very similar to yours, because. I can't control what they do with it, and we had no idea who the company was, where it was coming from. All we knew is that it looked very similar to ours, and we were very concerned about it. We actually had some confusion with people saying they bought Jungle Juice thinking it was our product, and Jungle Juice has things in it that we won't put in our product, and they are, were very concerned about it.

Q. And specifically what ingredients in the Jungle Juice product caused you concern?

A. I think it's caused by the aspertame, but it's called phenylalanine.
Q. And what is the cause for concern with respect to those ingredients?
A. They are-- Well, there are certain people who are deathly allergic to them, and if they have them, they die within a few hours. They are also, in the industry, especially for children, because from what I understand, and I'm not a Ph.D., we looked at those products and we decided against them a long time ago, and we have since learned that there are quite a few opinions regarding whether or not that is a safe product to put in any beverage or any food. If you look at a can of Diet Coke, it has it in it, but it's labeled very prominently. They have to tell people. People have to know you have that product in there. Bug Juice never carried it. Our product is-- it can be very dangerous for children if they have that allergy, so we don't put it in.
Q. Now, you've observed the Jungle Juice label. Is there any warning on the label with respect to aspertame or phenylalanine-- I can't even pronounce it?
A. Looks like on the bottom of the label. Well, not out front, no, not so you would know when you bought it. If you thought it was a Bug Juice product, you wouldn't even look for it. We've been doing this for 20 years, we have

never put anything like that in our product.
Q. And just to recap. The target consumer market for Bug Juice products is children aged what?
A. Three to 12 and their parents and their grandparents.
Q. And the target retail market is convenience stores; is that correct?
A. Yep.
Q. Would you characterize the Bug Juice product as an impulse product?
A. Yes. When you walk into a C-store, there are-- We have been doing this quite awhile. When you do studies, people walk in the C-store and they glance, they don't research the product. Especially if it's a brand they are aware of. So what they will do is they will walk in, they will scan the door we call it, where the cold box is, and say there's a Bug Juice, they'll reach down and grab it, they know what it is. They go out. They will do same thing for a Diet Coke or a Coke. But it's, literally some studies show it to be a fraction of a second, some studies show it to be about a second and a half. But we all do it, it's an impulse. It's kind of like when you open up the fridge and you go for an apple, if there's not an apple, you go for an orange. It's your fridge, you know what is in there. That is our concern because if people are confusing, and we think they are, that product with

our product, we have no control over it and I-- that is not good stuff.

Q. Now, has Bug Juice Brands, Inc., or you personally, granted any license or authorization or approval to the manufacturer of Jungle Juice to use the Bug Juice trade dress elements to market its product?

A. No.

Q. And have you been made aware of the scope of distribution of the Jungle Juice product since learning of its existence?

A. We know-- We know it has traversed about-- and again, it's a moving target because we have to get our information, it's not our product, we don't control it, we get our information back either secondhand through people who visited stores and consumers call in and say they purchased it somewhere. My knowledge is it's probably in 13 states right now, roughly.

Q. That's up from how many states at the beginning of this year?

A. I thought it was just one.

Q. So it's a moving target, as you said, and sort of a viral progression?

A. Yes.

Q. Now, during the course of your investigation of this use, did you ask your sales representatives, both your

employees and your distributor's sales representatives, to monitor the marketplace to determine how the presence of Jungle Juice was affecting sales of Bug Juice products?

A. We have. That's a moving target right now. We do know that if we have, for instance, if we purchased a shelf in the store, and which is a contract that we have to agree to, and let's say the shelf costs a hundred dollars and there is ten facings and our clerks go into the store and half of them now are Bug Juice and half of them the Jungle Juice, because for confusion purposes, they put the Jungle Juice where the Bug Juice goes, we feel we probably lost half of the sales in that store.

Q. And you have no control over the shelving in any particular convenience store?

A. Correct.

Q. By store clerks?

A. Correct.

THE COURT: Well, if you bought the whole shelf, how does the Jungle Juice end up there?

THE WITNESS: The store clerk.

THE COURT: Are you entitled to the whole shelf? You bought it?

THE WITNESS: Yes. Exactly. And by confusion they will think-- We typically launch a new flavor every year or new flavors. This past year we launched the product is

called the Wicked Sours. We will discount and do a sales promotion on Wicked Sours. They know that would go in the Bug Juice rack. If they have another product that looks very similar to ours and it comes in the back or in the door or somebody's purchases it, this is the clerk, not the buyer, they think it's Bug Juice and put it in as a flavor of Bug Juice in our shelving.

THE COURT: I understand.

BY MS. RICHARD:

Q. Okay. Having conducted this investigation, learning of consumer confusion, learning of retail store clerks and owner confusion, did you instruct counsel to notify Jungle Juice manufacturer of infringement?

A. Yes, I did.

Q. And what was the response of the manufacturer of Jungle Juice to that notice?

A. They continued to grow their brand and continued to market it.

Q. And as a result of that response, what did you do?

A. We filed suit to try and get them to stop.

Q. And how has Bug Juice Brands, Inc., and you personally been harmed by the presence of Jungle Juice on the market?

A. Well, the most important thing to me, it's not the most-- I think it is the most important, my concern is the confusion in the marketplace, that's my first concern, is

that people are buying Jungle Juice thinking it's Bug Juice. I can't control what Jungle Juice does. I have nothing to do with their manufacturing, nothing to do with their quality control, nothing to do with what goes on the label or in the bottle. When you're dealing with children and you're dealing with parents and grandparents, if they pick a product up and hey think it's ours, and they don't like what is in it or don't like the way it tastes or something is wrong with the product, we will lose that customer forever. People are very protective of their kids. We are very protective of our products. That to me is the primary problem.

Secondary problem is the fact that we pay for our shelf space, we are not getting our shelf space. Their product is in our shelf space.

Third thing is, I mean, to me, we have a brand name, we have a trademark, we spent almost 20 years building it, they are stealing from us.

MS. RICHARD: Thank you. I have no further questions.

Your witness.

THE COURT: Counsel, you may inquire.

MR. SAYFIE: Thank you.

CROSS EXAMINATION

BY MR. SAYFIE:

Q. Good afternoon.

In the complaint in this case-- Do you recall reviewing that complaint before it was filed?

A. Yes.

Q. And what about your declaration signed with the complaint?

A. Yes.

Q. All right. Can you turn to Tab 2 in the large binder.

A. Uh-huh.

Q. And particularly Page 10.

A. Page 2, Page 10, okay.

Q. So under C, you'll see there are reference to new declaration three trademarks, correct?

A. Yes.

Q. Isn't it true that color is not claimed as a feature of any of the marks?

A. Yes. It's not claimed in here, but I know the photographs had them.

Q. Okay. Why do you think color is claimed as a feature?

A. I don't think it is. I'm sorry, the answer is yes.

Q. So color is not part of the trademark, correct?

A. Correct.

Q. You testified that in selecting bottles you went through some process, whatever that was. Why did you do that?

A. I used to design bottles for a living.
Q. But why did you go through a process to select a type of bottle?
A. I wanted it to be kid friendly. I wanted it to mainly be distinctive. And I wanted it to show off the bright colors of our product and our logo.
Q. And your logo is what?
A. I think it's the whole label.
Q. Okay. Does the bottle serve any purpose?
A. It makes us distinctive.
Q. Does it hold liquid?
A. Yes.
Q. Why not make it like-- How many ounces is an average pop, if you were to buy a can of pop?
A. I don't know.
Q. Okay. What about an average can or bottle of pop or bottle of beer? No idea?
A. Are you-- I don't know.
Q. Okay. Do you understand the question?
A. Yes. You're asking me what I think the average size of a container is.
Q. You have no idea what an average pop is, if you go buy a can of pop, how many ounces, correct?
A. In a convenience store, it could be a 16 ounces, in a grocery store, it could be 12.

Q. Okay. Now, why not have a 16 ounce kids bottle?
A. I don't think a kid can drink 16 ounces.
Q. So the volume serves function then, correct?
A. Maybe.
Q. Okay. Who makes your bottles?
A. Constar.
Q. Who?
A. Constar.
Q. Okay. I just want to spell-- Can you spell that?
A. C-o-n-s-t-a-r.
Q. Does a label serve any purpose?
A. Yes.
Q. What purpose?
A. It makes the bottle and our product distinctive.
Q. Is there any required information on a label?
A. I would assume so, yes. There are labeling laws.
Q. What on your label is required, to your understanding?
A. I'm not a label attorney, probably-- The ingredient list I know is important. The nutrition panel is important. Ounces are important. Things like that, things of that nature.
Q. Okay. So would it be fair to say that a label serves some function and purpose?
A. I would assume so.
Q. Do you know what drink contains more sugar, Bug Juice or

Jungle Juice?
A. I have no idea.
Q. Can we turn to Tab No. 12 in the large binder.
Now, would it be fair to say, and I think you've testified that there is no tamper-proof ring on this picture; is that correct?
A. Seems to be that way, yes.
Q. Isn't that cap one cap that you can lift up a collar, if you want to call it that, and then drink out of it without unscrewing the entire cap?
A. What?
Q. For example, I can lift up this clear plastic thing and then this white collar lifts up, I believe, and then I can drink it?
A. Yes.
Q. All right. Isn't that cap the same?
A. I don't know. I can't tell.
Q. Okay.
A. Looks like it, yes.
Q. All right. So there would be no reason for anyone to entirely unscrew the cap just to drink out of that?
A. I'm sorry?
Q. There would be no reason for me to unscrew this white cap to drink out of that bottle, correct?
A. There would be no reason for you to do-- I'm missing the

point.
Q. To unscrew this cap, to unscrew it. Is it threaded on?
A. Yes, it's threaded on.
Q. There is no reason for me to unscrew it to drink out of this, correct?
A. I've seen people do it all the time.
Q. Okay. But I could simply-- Wouldn't most people lift this up and lift up this white thing and then simply drink out of that?
A. Not necessarily. There is a cap like that that we used for years that had a foil seal on it and the foil seal would, you would have to unscrew the cap, take the foil seal off, put the cap back on, then pop the top.
Q. Okay. Did that--
A. There's different versions of caps.
Q. Did that have that seal?
A. I'm not sure.
Q. Did you happen to read our reply brief to this motion?
A. It would have been a long time ago, if I did.
Q. Okay. No problem.

In that reply brief, a Miss Leah Coe went into a store in Belleville where she lived and took a picture of an, I guess, a door, a freezer. I don't know if they're in freezers or refrigerators, and there next to the Bug Juice were Tum-E Yummies labeled under the Bug Juice

display. Did you ever hear of a drink call Tum-E Yummies?

MS. RICHARD: I believe-- Objection, misleading. Would you show him a photograph so he can address it.

MR. SAYFIE: Yes. I'm sorry.

Okay. May the record reflect that I'm showing the witness Page 13 of defendant's response to plaintiffs' motion for a preliminary injunction.

THE COURT: Sure.

MS. McCALLUM: Counsel, if you want, it's at Tab 74 of the binder in front of him.

MR. SAYFIE: All right. Let's look at Tab 74. Thanks.

MS. McCALLUM: Uh-huh.

BY MR. SAYFIE:

Q. And Page 13 of Tab 74.

A. Yes.

Q. Okay. Now, if you're-- Okay. See that picture on Page 13?

A. Yes, I do.

Q. Okay. Do you know what that product is?

A. Tum-E Yummie?

Q. Yes.

A. Yes.

Q. What is it?
A. It's a competitor of ours.
Q. All right. Now, the picture shows that they are in a Bug Juice kind of a display, correct?
A. Yes, it does.
Q. Did you-- Do you know or typically would you have done so, purchased that shelf space?
A. I would assume if we have a rack in the store, we probably have a contract with them.
Q. Okay. And so if you see this or you become aware of it, what do you do to take care of that problem?
A. I'm not aware of that problem, so.
Q. But if you were to become aware of it, what would you do?
A. It's the first time I've seen that. I would probably ask them to remove the Tum-E Yummie.
Q. So the problem would be with the convenience store clerk with their basically stocking practices, would that be fair to say?
A. No, it could be any number of reasons why that's there.
Q. All right. What would they be?
A. Well, if you look at the rack, we have-- this is the picture of the rack. I don't know what I would do. I would probably try and educate the clerk. I might say, first of all, why would you have a rack of Bug Juice with Tum-E Yummie in it? Where is the Bug Juice on the shelf

behind the rack? The pictures you have, there is no Bug Juice in the store even, to my knowledge, what I can see.

Q. In the picture--

A. But there is no Bug Juice in that store, I don't know how they would even have our racks. That would be my first question. Why would my racks be in your store, if you don't carry Bug Juice?

Q. You would ask them that, right?

A. I sure would.

Who took the photograph?

Q. Leah Coe, lives in Ann Arbor.

THE COURT: It could be a good news story, your product is sold out.

THE WITNESS: Could be.

MR. SAYFIE: That's true.

THE WITNESS: Thank you. I hope so. That would be the answer we are looking for, isn't it. It's on order. It's coming in.

BY MR. SAYFIE:

Q. Let's see. Let's go to Tab 2 of the binder, please. Can you turn to Page 16, please. I'm looking at the top picture. I think we all have our own source, if we need to get a better picture.

Above Paragraph 37. All right. Do you see the Bug Juice on the far left, the bottle?

A. I am having trouble telling which one is Bug Juice and which one is not in that photograph up there.
Q. Do you see the bottle on the far left?
A. Yes.
Q. Do you see the one next to it on the right?
A. Yes.
Q. Okay. Okay. Now, can you read the difference between Bug Juice and Jungle Juice?
A. Uh-huh.
Q. All right. Which ones are Bug Juice?
A. The ones that say Bug Juice.
Q. All right. Would that be-- I guess we will reference that going from left to right, number one, three and six?
A. Yes.
Q. Okay. And the others are Jungle Juice, correct?
A. Yes.
Q. And do you see the tamper-proof rings on the Jungle Juice bottles?
A. Yes.
Q. And is it fair to say that you do not see the tamper-proof rings on the Bug Juice bottles?
A. Yes.
Q. Why is that?
A. I have no idea.
Q. Okay. Who stocked those? Who put those bottles there?

A. I have no idea.
Q. Can you state unequivocally that no person replaced or removed Bug Juice's blue caps with the white caps in this picture?
A. What?
Q. Can you state unequivocally that no one replaced Bug Juice's blue caps with white caps to make them look more similar for this lawsuit?
A. I don't know who put them there.
Q. So you cannot say that, correct?
A. Correct.
Q. All right. Now, who took the picture?
A. I believe I did.
Q. Is it possible for you to find out who put those bottles there?
A. Those things go up and go down, I don't know.
Q. But--
A. Probably not at this point. That happened a long time ago.
Q. All right. Do you know the store it happened at though, right?
A. I believe so. I took quite a few pictures that day.
Q. All right. But I would think that the store would have records of employees that worked in that time period and they could be asked, did you put the bottles here? Or is

it your understanding of the store that is not how the employees-- there is no records kept like that?

A. I don't know.

Q. Okay. Now, have your sales over the past year been decreasing or increasing, sales of Bug Juice?

A. We sell in 50 states, more than 50 states. What market are you talking about? We look at our company market by market. Are you asking in general or?

Q. Well, let's use the reference that you used. Earlier you testified that you were selling, I don't know, made $80 million or $90 million dollars or "X" amount of dollars, what was the basis for that, I guess, of those sales, that number?

A. The wholesaler basically we look at what we sell to the wholesaler and look at what they sell out. I believe those numbers came directly from either Nielsen Rating Service or IRI, which is another rating service. It's a standard in the industry. If you ask Pepsi what they sell or Coke, they always use the rating services numbers.

Q. Okay. How does-- All right. So let's use their numbers. Over the past year, using the rating service numbers, how have your sales been going?

A. Over the past year?

Q. Uh-huh.

A. Nationally?

Q. Well, using-- I don't know, the rating system.
A. They do market by market, and they also do it nationally. The national numbers we are talking about--
Q. Let's go national.
A. I think we are down about five percent this year. Category is down about 16, or maybe we are up three percent and the category is down 15. I don't have the exact number.
Q. Okay. When you say category, what does that mean?
A. The juice category.
Q. For what juice?
A. Juices sold in convenience stores.
Q. Okay. Would that include Jungle Juice and Tum-E Yummies?
A. I would assume so.
Q. Would it include cranberry juice?
A. I would assume so.
Q. Okay. Orange juice?
A. I don't know if that falls in that category, it used to, depending on which rating agency you look at.
Q. All right. Now, is it possible that a purchaser were to choose to purchase Jungle Juice over Bug Juice because they liked the taste of Jungle Juice better?
A. I don't know.
Q. Okay. Is it possible for someone, they may purposely choose the Tum-E Yummie drink over the Bug Juice because

they like that drink better?
A. I don't know.
Q. You don't know if that's possible.
Is it possible that someone may choose Jungle Juice over Bug Juice because they don't want sugar?
A. I don't know.
Q. Okay. You are aware that your product has sugar in it, is that right?
A. Yes.
Q. Okay. And I think it's-- the label here says 29 grams, is that-- would that be fair to say that's what is in here?
A. I would say that's probably what is in there.
Q. Earlier you testified that there were studies done about people purchasing the product, you had a term for it where it was somewhat of a quick purchase, kind of. Do you remember the term you used?
A. I'm sorry?
Q. You had a name for, you said there was a study done, and people found this was kind of a quick purchase, there was a term you used to describe that type of purchase. Do you remember what that was?
A. There are many terms for it, impulse is as good as any.
Q. Okay. Tell us about this study; Who did it? When was it done?
A. Boy, there have been many done. As far back as when I got

my MBA from Michigan, it was taught in three or four classes that I had in marketing. It is the whole basis of a C-store marketing strategy. It's also the reason why when you go by a grocery store, at the check-out counter the gum is where it is, because it's called an impulse, item or at least it's in that category. I'm willing to bet there have been thousands of studies on it I can't name just one. I do know it's taught in a course at Michigan and it's taught in a course at Harvard. It's taught in every graduate marketing program in the country.

Q. And what is-- How is that relevant here?

A. I'm sorry?

Q. How is that relevant with your product?

A. I don't know what you are talking about.

Q. Okay. You know, your product, are you saying--

A. How is that being taught in school relevant?

Q. How is it relevant to this lawsuit?

A. How is what relevant?

Q. The studies you just talked about?

A. It's how C-stores operate. It's the whole concept behind the way the C-store is laid out. It's the entire concept, marketing concept of C-store especially the cold area.

Q. Are you aware of any that specifically address your product studies?

A. No.
Q. Okay.
MR. SAYFIE: Excuse me.
(Pause in proceedings.)
BY MR. SAYFIE:
Q. Are you aware of the health risks of sugar?
A. No.
Q. Have you ever heard of diabetes?
A. Yes.
Q. Would a diabetic want a product with sugar on a normal dietary basis or not want a product with sugar?
A. I don't know. I've heard the term. I think there are two kinds. That's my extent.
Q. Okay. What other competitors are there other than Jungle Juice and Tum-E Yummie for your Bug Juice product?
A. I believe we have a-- you know, could we bring them up? Can I ask that? We have some we can show you on the screen. We have them here.
MS. McCALLUM: Your Honor, may I approach the witness?
THE WITNESS: This one is a Kraft product Kool-Aid Kool Bursts, right there. That's a competitor of ours. Hawaiian Punch and their packaging, that's a competitor of ours sold in C-stores. Belly Washers is a competitor of ours sold in C-stores, very different looking packaging.

Juicy Juice, which is owned by Nestle, which is a competitor of ours. This is a ten ounce package, very distinct, no confusion. Those are some of them. I'm sure there are more.

Q. All right. But have these all come on the market in the past two years, these products that you are talking about right now?

A. Boy, I think Kool-Aid Kool Bursts have probably been around 20 years. Belly Washers, I don't know, they have been around maybe five or six years. Hawaiian Punch is older than anyone in this room my guess is. Juicey Juice, Nestle has been around forever. They are the largest food company in the world, to my knowledge. I don't know when this packaging came out, but they have been around quite awhile. Actually I think the ten ounce Juicy Juice is new within the past two years, to be quite frank.

Q. Do you have a Zoo Juice up there? Not up there, but have you heard of a Zoo Juice?

A. I have one right here.

Q. All right.

THE COURT: What is the name of that stuff?

THE WITNESS: Zoo Juice, Z-o-o. Zoo juice.

That again has a very distinctive bottle shape and logo.

MR. SAYFIE: Okay. All right. I have no further

questions. Thanks.

THE COURT: Counsel, you may inquire on redirect.

MS. RICHARD: Thank you.

REDIRECT EXAMINATION

BY MS. RICHARD:

Q. Mr. Norton, on cross you were asked about these third party beverage products. Are they sold in convenience stores, to your knowledge?

A. Yes.

Q. And over the years that you've been marketing Bug Juice, have you encountered any confusion in the convenience store trade channel or among consumers with respect to the trade dress used by those competitor products which counsel asked you about on cross?

A. I have not.

MS. RICHARD: No further questions, your Honor.

THE COURT: Mr. Sayfie.

MR. SAYFIE: Nothing. Thank you, your Honor.

THE COURT: Explain to me, Mr. Norton, why you are not concerned about Zoo, that's Z-o-o, Juice, for purposes of the record, and Juicy Juice?

THE WITNESS: Well, if you look at Juicy Juice, their packaging is very different than ours. If you-- There is no confusion. I mean we don't like to compete with them obviously. We are competitors. But if mother is going to

go in and they don't have a lot of time, that does not look like Bug Juice. This bottle here has a distinctive neck to it to set it apart from Bug Juice actually. The background is bright red, it is not jungle like. The letters do not look like our letters. You know, the actual-- the it looks different. There is always competition in every market, you know, these are distinct products.

THE COURT: If we could put Paragraph 37 back, the picture above Paragraph 37 in the declaration on the screen. That is the one.

MS. McCALLUM: There you are.

THE COURT: Thank you very much.

Why don't we dim the lights so we can see it-- so I can see it. Not speaking for everyone.

COURT CLERK: It's not working.

THE COURT: Okay. That's good enough.

Mr. Norton, I think you told me you took that picture?

THE WITNESS: I believe I did, sir.

THE COURT: Okay. Explain the circumstances of taking that picture.

THE WITNESS: Driving around in my car frantically trying to get pictures for submittal. Not uncommon if you're doing store checks to check 40 or 50 stores a day.

So you drive around, typically as soon as you see the product, you snap a picture and go on. That would explain that to me. I mean it's not-- really sometimes you go in the store, sometimes the product is in the back, sometimes the display is in the front, sometimes they are at the register, sometimes they are behind glass, sometimes they are in the cold box product for sale.

THE COURT: So your product is sometimes sold outside the cold box?

THE WITNESS: No, it's displayed outside the cold box. It's an advertisement.

THE COURT: So this picture is taken of product in a cold box?

THE WITNESS: No, that doesn't look to be a cold box to me, no. That looks like it's hanging on a window at a C-store.

If you drive up to an-- If I may?

THE COURT: Go ahead.

THE WITNESS: If you drive up to a convenience store and you walk up to the convenience store, there is all kinds of things hanging on glass inside. They put it on the inside so it stays, doesn't walk at night. You'll see one that maybe everyone here in the room might be familiar with, if you buy dip, chew, they will have containers of chew on the inside. It's not for sale, but it's-- the

glass is over here, the counter is over here and everybody buys everything over here, but it's on the glass. As you walk in the door, as you walk by, you see it. Banners will be there. We have banners we put up. The door clings-- we call those door clings-- are excellent advertisers. It shows the bottle, shows the name, shows everything. Usually if that's there, there is also Bug Juice in the cold box.

THE COURT: All right. So that is not a picture of Bug Juice in a cold box?

THE WITNESS: No, doesn't look like it, no.

THE COURT: Okay. Could we-- Is it possible for you to hone in on, for lack of a better state to pick, Michigan in terms of your sales?

THE WITNESS: Oh.

THE COURT: Are you able to do that?

THE WITNESS: I don't have it off-- I'll give you an estimate. I'm going to assume we do $3-1/2 million in sales in Michigan, maybe $6 million. I'm just taking a percentage in my head of what we do nationally. So three and a half to six right now. I can get you the correct number.

THE COURT: Over the past year, your sales nationwide are down five percent?

THE WITNESS: Roughly.

THE COURT: And you said the category was down 16. Now, that's all juice products?

THE WITNESS: I believe so.

THE COURT: Not necessarily just the juice products that are targeted to children?

THE WITNESS: Correct. We are lumped into that juice category.

THE COURT: So there is no carve out, if you will, for children's juice products?

THE WITNESS: No.

THE COURT: And this is limited, those numbers are limited to juice in convenience stores?

THE WITNESS: Yes. Yes, they break it out both ways.

THE COURT: Do you know the methodologies of the studies that you were referring to on the impulse purchases?

THE WITNESS: It's a-- What do I want to say?

THE COURT: If you can just describe it for me generally.

THE WITNESS: Sure. You walk into a C-store, you're bombarded by advertisements. Every product there is its own advertisement. That's how you advertise those products. You-- if you're thirsty, they want you-- the biggest draw in a C-store is the cold box. I'm calling

the cold box the refrigerated section with the beverage, that's why it's in the back of the C-store.

MS. RICHARD: Your Honor, if you would like to take a look at Exhibit 45 in your binder, and we will put it up on the screen, it's a representation of Bug Juice and Jungle Juice in a C-store setting, which is taken on March 3rd, 2010.

THE COURT: Maybe that will inform the analysis. Okay.

THE WITNESS: That's in the cold box. What they want to do if you own C-stores, you want to draw the people-- first of all, you want to get them away from pumping gas, so you sell them, I hate to say it, cigarettes because a lot of people go in C-stores for cigarettes, and you give them juice because it's a hot day. They get out of the car, go in the C-store. Most people in this room will say the same thing, you walk in a C-store you're walking toward the cold back, but your eye grabs things. They call that impulse. You may walk past a Snickers candy bar. It's there for a reason, sometimes it's in a barrel right by the register. You didn't want a Snickers bar, but you see the Snickers bar. You say, you know, what, that looks good. You grab a Snickers bar. You go back to buy a Coke. In Bug Juice's case, you got Johnny in the car. I can't get Johnny a Coke. I don't feel good

serving Johnny a Coke. I'll get him a Bug Juice. You reach down, right along there, you glance down, you grab the Bug Juice and turn around, you pay your bill, you walk out. Most people don't go to convenience store to shop long term. They are in and out, that's called impulse buying.

They will have combs by the register. You don't go to a convenience store to buy a comb, you say geez, I might need a comb, you grab the comb. That's why it's by te register.

Suckers are great impulse items. They put them there-- You don't go to the store to buy suckers. Even in grocery stores, they put the suckers on the way out. That does two things; Johnny sees it as he's walking out of the store, asks mommy for it or mommy says oh, what the heck, I'll grab a sucker, I forgot to get dessert or something. That is the methodology behind impulse. It's not like buying a car where you say I'm going to analyze General Motors this and, you know, or Cadillac versus this and something else versus that, those are called big ticket purchases that people put a lot of thought into.

THE COURT: And the bottom line of these studies is that the average person approaching that cold box spends, if I heard your testimony correctly, a second to a second and a half?

THE WITNESS: It's amazing. And they do it-- A lot of times they watch their eyes. They'll put cameras on the doors and watch people's eyes. And this is even better. Your eye goes to one side, most people's first. When you walk up to-- When you walk up to a barrage, your eye will go this way or this way, different people go different ways, but there is a-- studies have shown people's eyes will go to one, and they start there and they will work there way, some people go like this, some go like this, everybody does it a little different, but there are categories of people, and so there are-- there are-- What do I want to say. There are people that make a living off of this, deciding what goes where in those doors.

THE COURT: Thank you.

Miss Richard, any further questions?

MS. RICHARD: No further questions for this witness.

THE COURT: Mr. Sayfie?

MR. SAYFIE: Nothing further, your Honor.

THE COURT: All right. Mr. Norton, you may step down, sir, with the Court's thanks.

THE WITNESS: Thank you, sir.

Leave this here?

THE COURT: That will be fine.

THE WITNESS: Thank you.

MS. RICHARD: Plaintiff calls Cliff Opalewski, please.

CLIFFORD OPALEWSKI- PLAINTIFFS' WITNESS - SWORN

COURT CLERK: Please have a seat. State your full name and spell it slowly for the record.

THE WITNESS: My name is Clifford Charles Opalewski. The last name is O-p-a-l-e-w-s-k-i.

DIRECT EXAMINATION

BY MS. RICHARD:

Q. Mr. Opalewski, could you state your residence address for the record, please.

A. I live at 1420 Thurston, Wolverine Lake, Michigan.

Q. What is your current place of employment?

A. I work for Acosta Sales and Marketing. I am the senior unit manager for Acosta Sales and Marketing.

Q. What is Acosta Sales and Marketing?

A. We are basically a broker. We are manufacturers reps. And we do merchandising for major manufacturers. We are basically their sales team.

Q. And how long have you been employed by Acosta?

A. I've been employed by Acosta for eight years.

Q. What is your territory, sir?

A. I have lower Michigan, and I also have northwestern Ohio, and northeastern Indiana.

Q. And can you briefly outline your employment history prior

to working for Acosta and after finishing your formal education?

A. Sure. I worked for Chatham Food Stores in the Detroit area. I worked for them for 18 years, started as a bagger, ended up as an assistant manager. Went from there to sold beer, then sold vending services, and then was hired by Paul Inman Associates to Marketing Specialists, and now to Acosta Sales and Marketing.

Q. And, sir, did you attend college?

A. I did. I went to Michigan State four years and majored in criminal justice.

Q. Now, with respect to your prior employment history and your current employment at Acosta, have you had experience with the convenience store channel of trade?

A. I have. I've been working in the convenience store trade for seven years now.

Q. And what, in your opinion, distinguishes the convenience store trade from other retail food channels?

A. The convenience store is, it's hard to describe, it's almost like the old grocery stores where you go in and you sell to the individual owner rather than sell to a major chain, and then they make the decisions for all of their stores.

Q. And in terms of the consumer, how is the convenience store different from the regular retail food channels?

A. It's actually different because they don't do their major shopping there, and they do their impulse buying there.
Q. And would you agree with Mr. Norton's description of impulse buying as it relates to the convenience store chain or channel?
A. I do, because that's basically what my team, my sales team does. We put stuff where people are, you know, where we try to get them to buy it.
Q. By impulse?
A. By impulse.
Q. And can you tell us, did there come a time when you became responsible for selling Bug Juice Brand products in your area?
A. I have been responsible for selling Bug Juice since I've taken over as the C-store supervisor at Acosta Sales and Marketing.
Q. And are you familiar with advertising and promotion for Bug Juice Brand products?
A. I am to the point where the small advertising that we do in the stores, we are the people that hang those door coolers you were looking at. We hang store danglers. We do the facings on the shelf. We put in the new items, and we maintain what we have put on the shelf.
Q. And you were in the courtroom when Mr. Norton described payment for slotting fees in convenience stores, were you

not?
A. Yes.
Q. Are you familiar with slotting fees, sir?
A. Yes, we do. We have small contracts that we offer to the independent store owners.
Q. And what is the quid pro quo for those contracts with the store owner?
A. Basically we talk to the store owner, get them to put Bug Juice in eight facings on the shelf, and we pay them $25. And we do that-- they must maintain that space for a year.
Q. And do you and the individuals who work for you in your territory police those slottings and facings that you have contracts for?
A. We do, and we have people that visit the stores on a regular basis.
Q. In addition to providing advertising and promotional materials to stores and placing those materials in stores on behalf of Bug Juice and selling the Bug Juice products, does your staff monitor marketplace activity on behalf of Bug Juice?
A. We do.
Q. And what type of monitoring and reporting is done?
A. We go and we look at competition. If we see some competition on the shelf, we actually have a chain of

command that we go through. So when it gets reported to me, I report it to our business managers, and that goes for any other client that we represent also.

Q. And approximately how many other clients in addition to Bug Juice do you represent in your territory?

A. Minimum of 15, maybe more.

Q. And can you identify some of those clients to the Court?

A. Nestle Foods is one, Proctor and Gamble, Just Born Candy, Nestle Candy, obviously Bug Juice. We also have Simply Orange, which is a different-- another juice from the Coca Cola Company.

Q. And when you say you report marketplace competitive activity up the chain of command, does that include reporting to Bug Juice managers as well?

A. What I do is I report to our manager who will then report to the Bug Juice manager.

Q. And did there come a time when you learned of the existence of a product called Jungle Juice?

A. I did.

Q. And when did you first learn of Jungle Juice?

A. It would be about September of 2009.

Q. And at that time, what was your reaction when you first saw it?

A. Well, our first reaction was-- the thing is that my sales people out on the street have cameras and they sent me a

picture of the competition. This is the new competition in the area that we are finding. And I was amazed that I had to look through the picture to find the difference to figure out what it was in the first place that they were showing me.

Q. When you received a photograph from the field back in the fall of 2009, it was a photograph of both Bug Juice and Jungle Juice in a marketplace setting?

A. Correct. They had taken a picture of one of the stores that they had contracted Bug Juice for--

MR. SAYFIE: I'll object just to the extent there may be hearsay in his answer.

THE COURT: Well, I think he is reacting to what people told him. I haven't heard anything out of anybody else's mouth at this point.

MR. SAYFIE: Thank you.

BY MS. RICHARD:

Q. And would you describe for the Court what you did in analyzing the photograph to determine whether there was a distinction or difference between the two products?

A. Well, once I realized what the difference was, the first person I contacted was our business managers and let them know about it and let them, you know, ask them if they had seen it. Kind of gave them the picture and let them pass it on.

Q. And were you concerned about the appearance of this product in the marketplace?
A. I was.
Q. And why is that?
A. Just because it looks so much the same, and because the people were putting it in the places that we were used to having our items in.
Q. What do you mean putting it in the places where you were used to having your items?
A. As a matter of fact, I think we were a bit slow in catching the item, because we had contracted for certain facings on a shelf, and those items were starting to show up where we had contracted for those facings, and it was just put into our spot.
Q. And no one discerned the difference between Bug Juice and Jungle Juice, is that what you are saying?
A. That's correct.

MR. SAYFIE: Object to hearsay.

THE COURT: I'll sustain that objection.

BY MS. RICHARD:

Q. Now, did there come a time when you reported the presence of Jungle Juice on the marketplace to Mr. Poe who was an employee of Bug Juice?
A. Actually the first time I reported it was when I was in a manager's meeting and I had taken the picture with me and

took it and showed it to Ken Naylor, and Ken Naylor and Steve had seen it at the time then.

Q. And approximately when was that?

A. That was September-- that would be October, a few weeks later.

Q. And did Mr. Poe or Mr. Naylor provide you with any instructions?

A. Just to get them some bottles sent, get some bottles sent over to the Bug Juice office.

Q. And did you, in fact, obtain samples?

A. We did.

Q. Okay. And after meeting with Mr. Poe and Mr. Naylor and obtaining the samples, what did you do, if anything, to monitor the presence of Jungle Juice on the market in your trading area?

A. Well, our direct response is to make sure that those items aren't in the area that we have contracted for. So our reps would go out and move that item out of our space, and we would let the managers know about it. If it was an owner of a small chain of stores, maybe five, six, ten stores, we would talk to them, and if they were individual stores, we would let them know what the difference was.

Q. And did you report what you were finding in the marketplace with respect to the stocking of Bug Juice and Jungle Juice on store shelves to Mr. Poe?

A. We have, yes, indirectly.
Q. Okay. And I ask you to turn to Tab 47 of the binder.
Are you there, sir?
A. Yes.
Q. Take a look at the photograph at Tab 47 and tell us if you can identify it, sir?
A. Yes, this is a picture. I have a hand-held computer that people contact me on, and I had received an email from Steve, and he asked if I would take a picture of Bug Juice and the different colors of caps on it.
Q. Okay. And you took this photograph as indicated at Tab 47 on April 23rd, 2010; is that correct?
A. That is correct.
Q. And this was in Indiana, sir?
A. Correct. That's Indiana Food Mart, and I just-- when I got the email, I happened to be right there, and I took the picture instantly.
Q. Does this photograph represent the number of facings on the lower level of the Bug Juice product all in a row?
A. Yes.
Q. And as you see the photograph, are the flavors of Bug Juice lined up one after the other in each ranking in this photograph?
A. Actually this is an untouched photo. I mean I didn't do anything with it, I just took the picture.

Q. Okay. But the way the facings are organized, are they Straw'Nana in one slot, Grapey Grape in another slot?
A. Yes.
Q. And is that the manner in which Bug Juice Brands request that its products be displayed?
A. Correct.
Q. Not intermingled with other products?
A. Right.
Q. Okay. I ask you to take a look at the photograph at Tab 48 and tell us, if you can, identify that photograph, sir?
A. This was the very next store, and it was the next store that I went to and took the photograph.
Q. And did you change any of the slotting of the products in this photograph at all?
A. No. No, this is a picture of the shelf.
Q. Exactly as it appeared?
A. Exactly as it appeared. I happened to be working with one of my rep. I was working with my Ft. Wayne rep.
Q. And the slotting arrangement as shown in this particular photograph, is that the slotting arrangement which is the approved arrangement by Bug Juice Brand?
A. Correct.
Q. So it's each individual flavor lined up in each slot?
A. Correct.
Q. Now, are you aware of any lost sales-- retail sales to

Jungle Juice as a result of the launch of that product?
A. As far as total numbers, I couldn't say yes or no, but I can-- we talk about impulse sales again. When somebody walks into a store and has a minute to look at the area and sees basically the same color, same everything on the shelf, all they have to do is reach down and grab without looking, and I think that we could lose sales that way.
Q. And with respect to store sales, to actual store owners, has Bug Juice lost sales to store owners as result of the introduction of Jungle Juice?
A. I have had a store owner tell me that he was taking Bug Juice out and putting in Jungle Juice.
Q. Did he tell you why?
A. He said because the kids didn't know the difference and he could make an extra dime.
Q. Beg your pardon?
A. He could make extra money on it.
MR. SAYFIE: Objection.
THE COURT: What is your objection, counsel?
MR. SAYFIE: He was testifying as to what I think someone told him.
THE COURT: Is it offered for the truth of the matter?
MS. RICHARD: No, your Honor, it's offered for what was said.

THE COURT: Then why is it relevant?

MS. RICHARD: Why is it relevant?

THE COURT: Right.

MS. RICHARD: Because it shows the state of mind of the store owner, which is the store owner believed that the products looked the same, he could purchase it at a cheaper price, make more money, and the consumer would be confused.

THE WITNESS: They would be none the wiser.

MS. RICHARD: None the wiser.

THE COURT: But that all goes to the truthfulness of the statement that the gentleman made, right?

MS. RICHARD: Well, it goes-- whether you believe him or don't believe him, the fact of the matter is he made the statement.

MR. SAYFIE: I'm not sure the witness testified with regard to price.

THE COURT: I'm sorry, counsel?

MR. SAYFIE: I'm not sure-- she indicated he testified regarding the price, I don't think he did.

THE COURT: Well, I think it's hearsay, so I'm going to sustain the objection.

MR. SAYFIE: Thank you.

BY MS. RICHARD:

Q. Now, are you aware of situations in which Bug Juice

products have been removed from slots which they previously paid for and Jungle Juice products have been put in their place in those slots?

A. Yes.

Q. And what, if anything, have you done to rectify that situation?

A. We go back in the cooler and take the stuff out and put our stuff back in.

Q. And how frequently have you had to do that over the past six months?

A. Quite a few times.

THE COURT: Can you give me an estimate?

THE WITNESS: Maybe once a day.

THE COURT: For how long?

BY MS. RICHARD:

Q. Over the past six months?

A. Yes.

Q. And have you had conversations with store clerks or store owners with respect to your having to replace Jungle Juice products with Bug Juice products in slots that were assigned to Bug Juice?

MR. SAYFIE: I'll object to the extent the answer calls for hearsay testimony.

THE COURT: Well, again, I think the statement made to the witness, if it's offered for the truth of the

matter asserted, is hearsay.

MS. RICHARD: I'm asking if he has had these conversations, your Honor, not what the response was.

THE COURT: Okay. You're right. Overruled on that question.

MR. SAYFIE: Thank you, your Honor.

THE WITNESS: Yes, we have had conversations with people putting them in the Bug Juice area.

MS. RICHARD: Thank you.

No further questions, your Honor.

THE COURT: Mr. Sayfie, go ahead, sir.

MR. SAYFIE: Thank you, your Honor.

CROSS EXAMINATION

BY MR. SAYFIE:

Q. If you could go to Tab 47, can you tell us what drinks are in the lower shelf? I'm sorry, let's go from left to right.

A. You mean each one?

Q. Yes. There's only one, two, three, four, five, six, seven, eight of them.

A. Well, it should be-- I think that's Bug Juice Pink Lemonade and Grapey Grape, and then Wicked Sour, Blue Raspberry.

Q. Is Wicked Sour, is that one of your products?

A. Wicked Sour is Bug Juice's new sour items. And then there

is next to the next one is the other Wicked Sour, then we Wicked Sour Lemonade, and that should be Fruit Punch, and I'm not quite sure.

Q. On the far right?

A. Yes, on the far right.

Q. All right. Now, is it possible that some of the C-store managers are replacing Bug Juice with Jungle Juice because it tastes better?

A. Couldn't tell you that.

Q. You also testified that you couldn't say either way if Bug Juice was losing sales to Jungle Juice, correct?

A. I said they could be, yes.

Q. They could be, but they may not be, is that fair to say?

A. No, not really.

Q. Why not?

A. Because I think they are losing sales.

Q. And is it possible that the C-store managers or owners may be replacing Bug Juice with Jungle Juice because maybe there's a better profit there?

A. I don't know that for sure.

Q. But it's possible?

A. I don't know what's in their mind.

Q. Is making money ever in their mind?

A. If you're in business, money is-- making money is always in your mind.

Q. All right. Is Jungle Juice one of your clients?
A. No.
Q. How often-- How long has Bug Juice been a client?
A. For as long as I've been the C-store supervisor, which has been seven years.
Q. Seven years?
A. Yes.
Q. Do you have any competitors of Bug Juice that are clients of, is it Acosta Sales?
A. Correct.
Q. How is that spelled?
A. A-c-o-s-t-a.
Q. Any competitors of Bug Juice that are clients of Acosta Sales?
A. We have items in the juice section, not in the kid's juice section. Well, actually we do. We have Juicy Juice by Nestle.
Q. Okay. So that's a client?
A. Correct.
Q. So the kid's juice manufacturers that are clients of Acosta Sales have Bug Juice and Nestle, correct?
A. Nestle. Nestle has so many items, it's hard to remember what they've got.
Q. You mentioned a slotting fee, you mentioned $25, I think?
A. Correct.

Q. Can you explain that. Was that $25 you give them for what, how long a time period, a month?
A. No. $25 for keeping a facing-- eight facings for us for a year.
Q. A facing is what?
A. Each section that you see on the shelf there is a facing.
Q. Okay. So on the bottom there is eight facings?
A. Correct.
Q. Let's see, let's go to Tab 74 and Page 13?
A. You said Page 13?
Q. Page 13, yes.
A. Okay.
Q. All right. Now, what is that picture of?
A. Looks like Tum-E Yummies in one of our cooler door racks.
Q. Is that a facing?
A. It isn't a rack.
Q. So do you sell the store that Bug Juice rack or how does that work?
A. I don't even know what store this is from.
Q. But are you aware of those Bug Juice racks?
A. I am aware of the racks.
Q. How do they get in the stores?
A. My sales reps put them in.
Q. All right. Your sales rep, do they charge for that?
A. No.

Q. Okay.
A. It's a merchandising tool.
Q. All right. And I would assume that you would want Bug Juice products to be placed on there?
A. Correct.
Q. Now, what is the if you see that, for example, Tum-E Yummies, is that a Coke product, by the way?
A. Yes.
Q. Do you sell Coke products?
A. No.
Q. If you see that, what do you do? Bug Juice is a client of yours, you're at this store?
A. We take those out and put them back on the shelf and then fill that with Bug Juice.
Q. You take those Tum-E Yummies out and put them where?
A. Back to wherever the Tum-E Yummie is on the shelf.
Q. Okay.
A. Because they have like a spot for them.
Q. So are your clients-- They are not your clients, but what is a convenience store in relation to what you do? What do you call them, customers?
A. Correct.
Q. All right. Are your customers strictly convenience stores?
A. Yes.

MR. SAYFIE: Thank you. No further questions.

THE COURT: Ms. Richard.

MS. RICHARD: I have no further questions.

Thank you, Mr. Opalewski.

THE COURT: You may step down, sir, with the Court's thanks.

(At 3:32 p.m., witness excused.)

THE COURT: Ms. Richard.

MS. RICHARD: Thank you.

Plaintiffs call Ed Abraham.

THE COURT: Anyone need a break?

MS. RICHARD: If you would like to, your Honor, that's fine.

THE COURT: I'm just asking. I'm ready to keep going. I don't see any hands, so we will continue.

EDWARD ABRAHAM - PLAINTIFFS' WITNESS - SWORN

COURT CLERK: Please state your name and spell it slowly for the record.

THE WITNESS: My name is Edward Abraham. Last name is A-b-r-a-h-a-m.

DIRECT EXAMINATION

BY MS. RICHARD:

Q. Mr. Abraham, could you state your home address for the record, please?

A. It's 9070 North Saginaw Road, Mt. Morris, Michigan.

Q. And are you currently employed?
A. Yes, I am.
Q. By whom are you employed?
A. Acosta Sales and Marketing.
Q. And how long have you been employed by Acosta?
A. Almost two years.
Q. And what is your position there, sir?
A. Territory manager.
Q. And what is your territory?
A. Genesse County, Saginaw County, northern Oakland County, Lapeer County. Basically the whole Flint tri-cities area.
Q. And prior to being employed by Acosta, were you employed, sir?
A. Yes.
Q. And what was your prior employer?
A. I was a route sales rep at Frito Lay.
Q. And what were the duties of the route sales rep for Frito Lay?
A. I was a route salesperson for the convenience store division; just delivered, stocked chips, just sold chips, sold racks.
Q. And how long approximately have you been involved in sales to convenience stores?
A. Almost seven years.
Q. Now, the geographic scope of your duties at Acosta is

limited somewhat to the State of Michigan; is that correct?

A. Yes.

Q. And approximately how many stores do you service within that territory?

A. Approximately about 250, 260.

Q. And how many different types of brands do you sell to those stores?

A. A number. We sell-- We represent probably 15 companies.

Q. And are they major brand holders?

A. Yes.

Q. Is Bug Juice Brands among them?

A. Yes, it is.

Q. Can you tell the Court your educational background beginning with college?

A. I have a two-year degree in business management from Mott College.

Q. Now, with respect to the responsibilities that you have for sales of Bug Juice Brand products, can you describe the scope of your responsibilities in that area?

A. What we do is we-- the stores-- we try to make sure the stores have Bug Juice in the store for sale for the impulse buy for the children.

Q. And are you responsible for making sure that these slots purchased by Bug Juice are filled with Bug Juice product?

A. Yes.
Q. And have you since the introduction of Jungle Juice experienced any difficulty with respect to such slotting?
A. Yes.
Q. And can you describe for the Court the difficulties that you've experienced?
A. Ever since I noticed Jungle Juice on the market, a lot of our spacing has been taken away, our slotting, by Jungle Juice.
Q. And what, if anything, have you done to address that issue?
A. Just tried to educate the store owner or manager on the benefits of Bug Juice.
Q. And have you asked to have the Jungle Juice removed from the juice slots?
A. Yes.
Q. Approximately how frequently have you had to do that?
A. Pretty frequently actually.
Q. Once a week, twice a week?
A. No, probably about six or seven times a week.
Q. And approximately when did you first learn of the existence of Jungle Juice?
A. It was about the fall of '09, about September, October of '09.
Q. And when you learned of its existence, did you report it

to your manager at Acosta?
A. Yes, I did.
Q. Did you also report it to anyone within the Bug Juice Brands organization?
A. No, I didn't. That's not--
Q. Did you receive at any time instructions from anyone within the Bug Juice Brands organization to monitor the marketplace and keep track of activity with respect to Jungle Juice?
A. Just from my manager.
Q. From Cliff Opalewski?
A. Yes.
Q. And where during the course of your sales activities have you observed Jungle Juice beverages being sold?
A. At various locations. At a lot of locations.
Q. In Michigan?
A. Yes.
Q. Anyplace else?
A. No.
Q. I ask you to take a look at the binder in front of you and Tab 49, can you identify the photograph that appears at Tab 49 in the binder, sir?
A. Yes.
Q. What is that photograph?
A. Looks like a picture I took at a-- one of my stores.

Q. Okay. And is it an accurate representation of the facings that appeared in that store for Bug Juice and Jungle Juice on the date of the photograph?
A. Yes.
Q. Okay. And is this an example of the usurpation of Bug Juice facings by Jungle Juice in the convenience store setting?
A. Yes, it is.
Q. And when you saw this display, what did you do?
A. Just took the picture and emailed it to Cliff and let him know what was going on.
Q. Did you have any conversation with anyone in the store management with respect to this display?
A. Yes, I did.
Q. And what did you say to the store manager or store clerk?
A. I just said, you know, you guys are under contract with us, with Bug Juice, and now you have Jungle Juice in your slots. I said what is up with that, and he said well--

MR. SAYFIE: I'll object, hearsay.

BY MS. RICHARD:

Q. Proceed.
A. He said, "I don't know. I couldn't tell the difference."
Q. The store clerk said to you, "I couldn't tell the difference between Jungle Juice and Bug Juice"?
A. Yes.

Q. Now, are you aware of lost sales as a result of the presence of Jungle Juice on the market?
A. I'm not personally aware of the numbers, but I would imagine there is some lost sales.
Q. And what about loss of reputation to Bug Juice as a result of the sale of Jungle Juice products?
A. Yes, there is definitely a loss of reputation.
Q. Why is that?
A. Just a lot of people want to know what the Jungle Juice is and I say well, it's just a competitor. And they say well, we--

MR. SAYFIE: I'll object to hearsay.

BY MS. RICHARD:

Q. Proceed.
A. Well, they said they wish it would just be exclusively Bug Juice.

MS. RICHARD: No further questions.

THE COURT: Mr. Sayfie.

MR. SAYFIE: Thank you.

CROSS EXAMINATION

BY MR. SAYFIE:

Q. Now you testified that you're aware of lost sales to Jungle Juice?
A. Not to Jungle Juice.
Q. Okay. You're aware of just Bug Juice is losing sales,

correct?

A. Right.

Q. Can you identify all of the specific causes of that?

A. No.

Q. No?

A. No.

Q. All right. Are you aware of Tum-E Yummies, the Tum-E Yummie product?

A. Yes.

Q. Are you aware that-- Have you ever seen that-- Well, let me ask you this question: If you want to go to Tab 74, Page 13, and can you tell us what that is a picture of?

A. Looks like Tum-E Yummies in a Bug Juice rack.

Q. All right. So who stocks those?

A. I don't know.

Q. I mean does Tum-E Yummie put them there or the C-store manager?

A. Could be either.

Q. So that is also true with when other products are there as well, correct?

MS. RICHARD: Objection, vague and ambiguous.

THE COURT: Excuse me?

MS. RICHARD: Vague and ambiguous, your Honor, as to the question when other products are there.

THE COURT: Why don't you rephrase it.

MR. SAYFIE: Okay.

BY MR. SAYFIE:

Q. When products other than Tum-E Yummies, hypothetically, if they were to be placed on the Bug Juice rack, would it also be fair to say that the C-store manager or clerk or employee may have placed them there?

A. I suppose.

Q. Who else would have done it?

A. Salesperson maybe. Maybe the Coke guy did that.

Q. Who?

A. Maybe the Coke guy put it there.

Q. The Coke rep?

A. Yes, they sell Tum-E Yummie.

Q. Right.

What is your knowledge of the lost sales of Bug Juice?

A. I don't know the exact numbers.

Q. You just know-- You testified that they are losing sales, correct?

A. I said I would imagine they were.

Q. All right. What time period are we talking about?

A. Since they entered my market back in September of last year until now.

Q. And did you hear Mr. Norton's testimony?

A. Yes.

Q. All right. About the category, sales being down?
A. Uh-huh.
Q. What do you recall him saying about that?
A. I don't know.
Q. Okay. If the category sales were down 15 percent, does that-- do you understand that to mean all of the juices in that category are down on average of 15 percent?
A. Sure.

MR. SAYFIE: All right. No further questions.

THE COURT: Ms. Richard.

MS. RICHARD: Yes, just one further question, your Honor.

REDIRECT EXAMINATION

BY MS. RICHARD:

Q. Mr. Abraham, if you go to Tab 21 of the binder. Are you there?
A. Yep.
Q. Can you tell the Court what that photograph is, sir?
A. That's a picture I took at one of my accounts on April 23rd, 2010.
Q. April 23rd or April 15th?
A. I'm sorry, I was looking at the wrong date. Yes, you're right, April 15th.
Q. Okay. And is this an example of the shelving of Bug Juice and Jungle Juice in the convenience store channel that you

have experienced over the past several months?
A. Yes, it is.
Q. Okay. And the facings that are depicted here, are those facings that were paid for by Bug Juice, to your knowledge?
A. Yes, it is.
Q. They were?
A. Yes.
Q. And the advertising piece to the right-hand side of the photograph which has the wording Wicked Sour and Bug Juice, is that an advertising piece that would have been placed there by someone from Acosta?
A. Yes, I put that there.
Q. You put it there?
A. Yes, I did.
Q. And why did you put it in that particular location?
A. Because that's where we put them, right near the Bug Juice so people know it reflects the price.
Q. And when you observed this intermingling of Bug Juice and Jungle Juice products, in facings and slottings that had been paid for by Bug Juice, what did you do?
A. Just brought it to the manager's attention.
Q. And did you request him to replace the Jungle Juice with Bug Juice?
A. Yes, I did.

MS. RICHARD: Thank you. No further questions.

MR. SAYFIE: Thank you.

THE COURT: Any questions?

MR. SAYFIE: Nothing further, your Honor. Thanks.

THE COURT: Mr. Abraham, you may step down, sir, with the Court's thanks.

(At 3:46 p.m., witness excused.)

THE COURT: Ms. Richard.

MS. RICHARD: Thank you, your Honor.

Plaintiffs call Steve Poe.

STEVEN POE - PLAINTIFFS' WITNESS - SWORN

COURT CLERK: Have a seat, please. If you would state your full name and spell is slowly for the record.

THE WITNESS: Stephen, with a V, Wesley Poe.

DIRECT EXAMINATION

BY MS. RICHARD:

Q. Mr. Poe, could you please state your full home address for the record?

A. 27709 Royal Forest Drive, that's Westlake, one word, Ohio 44145.

Q. And are you currently employed, sir?

A. I am.

Q. By whom are you employed?

A. Bug Juice Brands.

Q. And what is your position with Bug Juice Brands?

A. I'm director of Bug Juice Brands for the eastern region.
Q. And how long have you been with Bug Juice Brands?
A. Almost two years.
Q. And as director of Bug Juice Brands for the eastern region, what is the scope of your responsibilities?
A. I'm primarily in charge of managing Acosta, which as we have heard, is the broker for nationally, and I'm in charge of the eastern third of the United States. Managing a broker, also responsible for sales for the eastern third of the country, and basically overall management of the Bug Juice business.
Q. And could you tell the Court what your educational background is, beginning with college and the degrees received and the schools attended?
A. I graduated from Ohio Wesleyan University with a bachelor of arts degree.
Q. And after graduating from Ohio Wesleyan, were you employed, sir?
A. Yes.
Q. And can you give the Court a description of your work experience in the food and beverage industry?
A. I started working for Unilever in 1980, and I worked for them for 28 years, held various positions throughout that 28 years. I was district manager, regional manager, trade market manager. I was responsible for national brands for

two years. And worked in many various channels.
Q. Now, with respect to your position as manager of national brands, what brands were you responsible for at Unilever?
A. I had responsibility for in various positions, but in some of the regional positions, I had responsibility for brands such as Ragu, Dove bar soap, Ben and Jerry's, Lipton Ice Tea, and many other well known national brands.
Q. Now, are you familiar with the term brand equity?
A. I am.
Q. And would you say, based on your experience at Unilever, that Dove bar soap, Hellman's mayonnaise, and Ragu products have brand equity?
A. I would.
Q. And what is the characteristic of brand equity, sir?
A. To me, brand equity would, I guess, the bottom line that we would go on at Unilever and on today would be trust in a brand, so you have trust and then really the quality of the product. So if you look at a Dove bar soap, over a number of years the consumer has come to trust that brand, and the quality of the brand has always been top notch as well, and that's led to the consumer really having full acceptance of the brand over a long period of time.
Q. And since being employed by Bug Juice Brands, Inc., have you formed an opinion as to whether or not Bug Juice has brand equity?

A. Yes, I would say Bug Juice has extremely strong brand equity.
Q. And why is that?
A. Even though I've only been around the company two years, when I first started with Bug Juice, based upon some of my history with Unilever, I was really impressed by the strength of the brand. It seemed that over 20 years the brand had been built on a platform of trust, a platform of the kids always know where to go to find the Bug Juice on the store shelves, and the quality of the brand has been great. I attend-- frequently I attend trade shows, talk to customers, and really everyone I've talked to, for the most part, has a high high degree of trust in the brand.
Q. Now, did there come a time when you learned of the existence of a product called Jungle Juice?
A. Yes.
Q. And when was that?
A. It was in the fall of 2009.
Q. And how did you learn of its existence?
A. Cliff Opalewski mentioned it to me. And I also saw a number of photos that was sent in from the Acosta Sales and Marketing team.
Q. And when you received those photographs from Mr. Opalewski and the Acosta sales team, were you able to differentiate between Bug Juice and Jungle Juice on viewing those

photos?

A. Initially when I received the first photo initially, I thought it was just a picture of Bug Juice, and that was really with my first take, and then after looking at it for a little bit longer period of time, realized that it was a competitive brand, so I ended up going back to some of the people that had sent me the photos asking for more information. And I also forwarded a copy of it to Ken Naylor, who is your national manager, and also forwarded a copy to Joe Norton as well.

Q. What was Mr. Naylor's reaction to the photographs of the Bug Juice and Jungle Juice brands?

A. Ken and I talked on the phone, and he said he was amazed. I mean, he said it looks exactly like Bug Juice, and he said, you know, we have got to-- his first thing was we have got to send this to Joe immediately.

Q. And after those conversations that you had with Mr. Naylor, what did you do to address this situation in the marketplace?

A. A few things. You know, we wanted to find out as much about it as possible. So I had requested from Acosta marketing team to send me any photos that they found with Jungle Juice in the stores. And we also wanted-- or I wanted to find out really where it was marketed or sold geographically, so I asked some of the Acosta people to

send me some information to that effect.
Q. In fact, did you receive photographs from the Acosta sales team reflecting conditions in the marketplace?
A. I did.
Q. I ask you to take a look at Page 21 of the binder. Is that one of the photographs which you received from the Acosta sales team?
A. Yes.
Q. Reflecting marketplace conditions?
A. Yes.
Q. And what, if anything, did you do after receipt of that photograph?
A. I forwarded the photograph along, and it gave me a good idea of really what was happening in the marketplace.
Q. And what was happening in the marketplace that you could discern from this photograph?
A. Well, we started learning that because the products looked so similar that there was a lot of confusion in the marketplace, so we wanted to really try to drill down and find out how much confusion existed, how widespread the problem was, was it just at independent stores or was it at chains, and so it involved asking a lot of questions.
Q. And what did you ultimately learn as a result of that investigation?
A. Ultimately learned that there was confusion in the

marketplace and that we had some issues that we had to address.

Q. And can you describe for the Court the types of confusion that you unearthed as a result of the investigation?

A. Yes. I mean we had, I mean one chain, for example, was Friendship Foods, and I had received a call from David Sapalla who is an Acosta rep in Ohio and said that--

MR. SAYFIE: I'll object to hearsay.

THE WITNESS: David was--

THE COURT: I'll take the answer. Go ahead.

THE WITNESS: David just told me that Friendship Foods was considering switching to Jungle Juice and discontinuing Bug Juice. So what I did was I ended up setting up a meeting with the owner/manager of Friendship Foods at an upcoming trade show, and we had about a twenty minute meeting. And at that meeting, he said that he had a strategy in place. And part of my job is obviously to try to either gain access for Bug Juice in chains and assist Acosta where ever I can, or another part of my job is if we are losing distribution on Bug Juice is try to re-establish distribution. So I talked to this gentleman, and over the course of twenty minutes, he told me that-- and this was in his words, he said, because the products look so similar and because the case cost, the cost for Jungle Juice is lower than Bug Juice, he would be able to

replace Bug Juice with Jungle Juice and make more money. And his numbers were he said if he sold 70 or 71 percent of what he sold with Bug Juice, then he was going to be more profitable.

Q. And were you able to convince the owner of Friendship Foods to retain Bug Juice in his stores?

A. No.

Q. And how many stores were involved in that?

A. I'm going to say approximately 18.

Q. And did you encounter any other similar situations in the marketplace in which chains made a decision to go with Jungle Juice on the same basis as the Friendship decision?

A. Yes, there was another chain called EZ Energy, and they are a 42 store chain in Ohio, and they took the same strategy. It was their manager felt like it was the products looked alike, and I got this information from David Sapalla, but they replaced Bug Juice with Jungle Juice and then discontinued Bug Juice in all 42 stores.

Q. And in addition to this retailer sales situation, did you become aware of confusion at the consumer level?

A. Yes.

Q. And what consumer confusion was brought to your attention?

A. We had one from there was an article in the Grand Rapids Press, which there was some consumer reaction to that article, and a couple consumers had written in on their

own subsequent to the article just saying that--

MR. SAYFIE: I'll object to hearsay.

THE COURT: Well, I'm not sure it's going to be hearsay. Go ahead. I'll take the answer.

THE WITNESS: Okay. One consumer had written in saying that she had-- the woman had sent her husband to the convenience store to buy Bug Juice and the husband came home with Jungle Juice, and this is someone who on their own decided that they were so upset because they had been a loyal Bug Juice customer over the years and wanted to point out the fact that they were-- because the husband just went in and grabbed the Bug Juice where it normally was, the woman wanted to point out that to beware and that also that Jungle Juice also contained aspertame.

BY MS. RICHARD:

Q. Take a look at Tab 50, Mr. Poe.

A. Yes.

Q. Can you identify the document which appears at Tab 50?

A. Yes, that is the article from the Grand Rapids Press.

Q. And can you identify the comments which appear at Page-- second physical page of the document at Tab 50?

A. Yes, those are the comments that I was referring to, at least one of them.

Q. And is there another set of comments to that article that was contained?

A. Yes.
Q. And can you tell the Court what that comment is?
A. Yes, basically it was they feel like the consumer should have the right to choose based on different ingredients and cost. If Jungle Juice is better for the kids and less expensive, it sounds like a no brainer. So basically it was just another consumer that was upset that there is some confusion.
Q. And the comment that you've previously referred to from the housewife or mother whose husband picked up Jungle Juice when told to go to the store to purchase Bug Juice, and when confronted with that the husband responded, "I thought they were just different flavors." Is that a reaction that you have encountered before?
A. Yes, from a number of sources.
Q. And is that reaction consistent with the shelving of Bug Juice products on store shelves with Jungle Juice products?
A. Yes.
Q. Now, as a person who has been involved with the marketing of famous national brands for many many years, have you formed an opinion as to the harm to the reputation of the Bug Juice Brand which is likely to occur as a result of the activities of Jungle Juice in the marketplace?
A. Yes. I think, you know, based upon, like you said my

experience at Unilever, even though I've only been with Bug Juice a couple years now, based upon what I've seen in my two years, Bug Juice over the years, as Joe Norton alluded to spending $60, $70, $80 million on starting from the grass roots with a brand, where you had no, trust and you had basically nothing going for the brand at all, and over a period of two decades building trust in the brand, and in building quality. And the trust that I've seen that's been developed over time has taken a lot of effort. So, you know, the ingredients is one thing, I mean because if a customer will buy a bottle of Jungle Juice because they are confused, and they go home and they thought they had Bug Juice and they have bought Jungle Juice, and at the end of the day they are not happy with the product Jungle Juice for whatever reason, we may never get that customer back again. So obviously takes a long time to establish trust, and it can take very short period of time to destroy it.

Q. And is this situation of harm and likelihood of harm as a result of this marketplace condition exacerbated by the fact that Bug Juice is primarily promoted by word of mouth?

A. Yes, that was basically-- I guess that's how the whole really brand equity was started. And if we had-- I guess when there is major problems with a Tylenol in the past or

some other products, those kind of companies have the financial wherewithal to do massive TV campaigns or massive radio campaigns. We don't do TV. Kids don't really listen to radio. It hasn't really-- It's been deemed it is not that effective for kids, so it's been very important for us that kids, mothers, grandmothers, that they all have a very good trust of the product and word of mouth saying that I like it, that you know, I tried this Bug Juice. I mean it happens over a long period of time. It's not just a week or a month or even a year, it happens over a long period of time that that-- that those customers, that those kids tell their friends and their friends tell their friends and so, you know, I've only been around a couple years, but the trust that I've seen built up with this brand is really sensational.

Q. And reputational harm can occur as a result of unsatisfactory experience with Jungle Juice, either because of the taste, because of the quality, because of the method of sales, or because of the ingredients, and that can harm Bug Juice, correct?

A. Absolutely.

MS. RICHARD: No further questions.

THE COURT: Mr. Sayfie.

MR. SAYFIE: Thank you.

CROSS EXAMINATION

BY MR. SAYFIE:

Q. If a consumer were to like the taste of Jungle Juice better than Bug Juice, would that enhance the reputation of Bug Juice?

A. I don't think I'm qualified to answer that. I don't know.

Q. I think-- all right. You testified that if the taste of Jungle Juice was not desirable to a consumer, that it may harm the reputation of Bug Juice, right?

A. I think I said it could be if any one ever a number of factors, so if the aspertame became a problem if, the person became allergic, became sick, you know, I was just trying to say any one of a number of issues.

Q. But likewise, if any one of those things actually the product-- the consumer liked better, that would enhance the reputation of Bug Juice, correct?

A. If the consumer liked Jungle Juice you are saying?

Q. Yes.

A. I guess if a consumer likes any product it would enhance that product.

Q. But I think you're-- Let me ask you this, I guess, just to clarify: First of all, do you think that the Bug Juice reputation is harmed by Jungle Juice?

A. I think that is a possibility.

Q. Okay. It's also possible, is it not, that the reputation may be enhanced by Bug Juice (sic.)?
A. I can't manage in how that would happen.
Q. Okay. How would the reputation be harmed by Jungle Juice?
A. Bug Juice has developed a trust with a customer over 20 years, so for whatever reason that the customer picks a Jungle Juice out of our shelving because of confusion, instead of the Bug Juice, and for whatever reason the customer doesn't like the Jungle Juice, maybe he doesn't even realize they are drinking a Jungle Juice and they think it's a Bug Juice, whatever reason that is, potentially we are losing a consumer forever.
Q. If they don't like the Jungle Juice?
A. Which they thought was probably a Bug Juice.
Q. If they actually liked the Jungle Juice, then the next time they went to the store and bought Bug Juice because they thought it was Bug Juice initially, that would actually enhance Bug Juice's reputation?
A. We don't have any-- our biggest concern is we don't have any control over what Jungle Juice does with their product, so we prefer to be separate. And we are not-- that's not occurring right now in the marketplace. So it's hard to predict what problems could exist or would exist. But, you know, since we have nothing to do with Jungle Juice, it's a negative proposition for us.

Q. Okay. Have you talked to anyone that's ever said Jungle Juice tastes better than Bug Juice?
A. I never have. Including my daughters.
Q. All right. Now you've heard what Mr. Norton said about a this product being an impulse product?
A. I did.
Q. And so in summary, you have no evidence that Jungle Juice product damaged the reputation of Bug Juice, correct?
A. I cannot say that.
Q. Okay. Why not?
A. No, because I don't know.

MR. SAYFIE: Okay. Thank you.

MS. RICHARD: No redirect, your Honor.

THE COURT: All right. Thank you.

Mr. Poe, you may step down with the Court's thanks.

(At 4:11 p.m., witness excused.)

THE COURT: Miss Richards.

MS. RICHARD: Your Honor, plaintiff rests.

THE COURT: All right. Why don't we take 15 minutes and we will resume at 25 after.

MR. SAYFIE: Thank you.

COURT CLERK: All rise. Court's in recess.

(At 4:11 p.m., recess.)

(At 4:28 p.m., proceedings continued.)

THE COURT: We are back on the record in 10-229.

Mr. Sayfie.

MR. SAYFIE: Thank you, your Honor.

Brief statement?

THE COURT: Yes, sir.

MR. SAYFIE: Thank you.

The evidence has indicated that plaintiffs have no claim to color in their trademark. The evidence has indicated that the bottle is functional, the label is functional, as was discussed in our brief.

We stand by our allegation that the picture that we have discussed with three caps where the tamper-proof rings are removed, the white ones on the Bug Juice, and we will get testimony regarding that as well, and the three others on the Jungle Juice was doctored. In fact, Mr. Norton himself couldn't testify otherwise. And if the Court finds that to be the case, under the Supreme Court decision we have cited, Worden vs. Cal Syrup, W-o-r-d-e-n, Worden vs. California Syrup, 187 U.S. 516, 539-540, that if plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of the court in equity.

Evidence has shown and will show that it's not confusion between the two products, but simply sloppy stocking practices, which may cause products to be stocked

all over the place. For example, we saw picture of Tum-E Yummies stocked in a Bug Juice shelf.

And as discussed in our brief, there is also evidence that the labels are different. The evidence has indicated that no one can testify that the reputation of Bug Juice has been damaged. Mr. Poe couldn't testify to that. Mr. Abraham couldn't testify that there was any lost sales. And we only have one witness to call, your Honor.

Thank you.

THE COURT: All right. Thank you.

You may call your witness.

MR. SAYFIE: We would like to call Mr. Duane J. DeWitt.

THE COURT: Step forward, sir.

DUANE DEWITT - DEFENDANT - SWORN

THE COURT: Please have a seat.

Please state your full name, and spell it slowly for the record.

THE WITNESS: Duane James DeWitt, D-u-a-n-e J-a-m-e-s D-e-W-i-t-t, address is 2586 13-Mile Road, Marion, Michigan 49665.

DIRECT EXAMINATION

BY MR. SAYFIE:

Q. Good afternoon. Did you review the plaintiffs' complaint in this case?

A. Yes, I did.
Q. And you prepared an affidavit and signed an affidavit which was filed in our response, do you remember that?
A. Yes.
Q. And did you intentionally copy the plaintiffs' trademark?
A. No.
Q. Or any of their marks?
A. No, none whatsoever.
Q. Describe how you came up with the-- briefly with the liquid formula--
A. The liquid formula.
Q. --for the products?
A. The same formula we use in our gallon products that we do, FlavorWave gallons, and my operations manager I hired, he worked for Deans Food for 30 years, and he was telling me when we decided to start doing the juice products that they back in the '70s, the product was made with granulated sugar and then they switched to high fructose corn syrup and they lost sales. And everything that's going on with the physicians, you know, the doctors and they are saying about the high fructose for obesity being bad, so I come up with the formula through Northview Labs, it's the same formula they sell currently to Deans Foods or Country Fresh, whoever it may be, we use basically the same formula.

MS. RICHARD: Excuse me, your Honor, I cannot hear the witness.

MR. SAYFIE: Speak a little louder.

THE COURT: The base of that mike moves, so if you want to get the mike a little bit closer.

THE WITNESS: Sorry, sir.

THE COURT: You can scoot forward a little bit so we can hear you.

THE WITNESS: Okay.

So with that being said, the dairy companies using that formula and we use the same formula. And I know aspertame was brought up a couple times, but it's in Coke products and Diet Coke, Diet Pepsi, so we don't feel that part is bad. And with, you know, the major companies like Deans and Country Fresh basically using the same type of formula through the same supplier that we get it from, so that's how we come up with that.

BY MR. SAYFIE:

Q. All right.

Referring to Tab 74 in that binder, Page 5, it's the page with the two pictures on it.

A. Yes.

Q. Do you recall discussing this with our office?

A. Yes, I do.

Q. And did your affidavit address any of this at all?

A. Yes, it did.
Q. Okay. Tell us what we are looking at?
A. Looking at--
Q. Top picture only?
A. Top picture only. We are looking at a Bug Juice display, suction cup holder on the inside of a door cooler shelf with their product and my product staged, you know, and it's definitely plain that the tamper-proof rings have been removed from their product and, of course, mine is not, you know.
Q. Just real briefly, what about the bottom picture?
A. I'm having a hard time seeing it, and having a hard time seeing it here.

Is that the one with the product missing out of the bottle?

Q. I don't want to answer that question, but if you can answer, go ahead.
A. Yes. Okay. Yes, definitely, Number 2-- Bottle 2, the liquid is missing out of the bottle.
Q. Is that how a product like juice would normally be sold?
A. Absolutely not.
Q. All right. Now, let's see, after Page 18 is Exhibit 1, which is your affidavit?
A. Yes.
Q. Can you read from your Paragraph 9, which is on Page 3 of

your affidavit?

A. "Therefore, it is my opinion that all of the above reference pictures in which Bug Juice has white caps, the plaintiffs have replaced their blue caps with the white caps. This replacement of the caps makes much of the declaration of the plaintiffs untrue." And then the pictures showed examples.

Q. All right. So in summary, is it your testimony that this picture was staged for purposes of this lawsuit?

A. Absolutely.

Q. What are you asking the Court to do?

A. I'm asking the Court to dismiss it on the grounds that it was tampered with, staged.

Q. You mean their motion?

A. Yes, their motion.

Q. Clarify.

A. Yes.

Q. Tell us a little bit about the labels themselves between--

First of all, are you aware of the Bug Juice label?

A. Yes.

Q. Are you aware of your label?

A. Yes.

Q. Are there differences?

A. Oh, definitely. The whole label is different.

Q. Are you aware that the Bug Juice, there's been testimony

from the plaintiff himself that there is no trademark to any color of the Bug Juice label?

A. Right.

Q. Other than-- What other differences, just highlight a few of them that you're aware of?

A. I have jungle animals, the font is different, I have no bugs at all-- no bugs whatsoever on my label. It was-- I basically, it was I come up with Jungle Juice from my daughter, who is now 18, she used to watch it daily when she was a little girl, Jungle Juice, the story book, so that's how--

Q. I'm sorry, you said she watched what?

A. The movie Jungle Juice.

Q. Jungle Book?

A. Jungle Book, I'm sorry.

Q. Just slow down. Speak just in the microphone.

Okay. Go ahead and explain.

A. Yes, so anyway she used to watch all the time when she was a little girl, so that's how I come up with the name Jungle Juice.

The fonts, like I say, the fonts is different. We have no leaves, it's all trees. It was taken from-- I bought the background from Big Stock Photo.com.

Q. That's what your label is taken from?

A. Yep, yep. So I purchased the background through that. I

cannot remember what the font style is, which I know it's different.

Q. Does yours have an American flag on it?

A. No, absolutely not.

Q. All right. So you purchased the label from Big Stock Photo.com?

A. Yes, the background.

Q. All right.

A. On the label.

And then the animals were taken off, it's a program comes, you purchase, it's Corel Draw.

Q. Corel Draw, C-o-r-e-l D-r-a-w?

A. That is correct.

Q. And did you hire a third party to assist you in making the label?

A. Yes, Image Graphics.

Q. Is that owned by your stepson?

A. Stepson, Dion Mitchell, yes.

Q. And did he and you together design the label?

A. Yes, we did.

MR. SAYFIE: Thank you. I have no further questions.

THE COURT: Ms. Richard.

MS. RICHARD: Thank you, your Honor.

CROSS EXAMINATION

BY MS. RICHARD:

Q. Mr. DeWitt, when did you first enter the bottled water business?

A. 2008.

Q. Could you speak up, I'm really having difficulty hearing you.

A. 2008.

Q. 2008?

A. Yes.

Q. And how did you happen to enter that business?

A. I bought it through, it was a company that was bankrupt, and I bought it to get it going again.

Q. And prior to purchasing this bankrupt company, you had no previous existence in the marketing or selling of bottled water, flavored water or fruit juices; is that correct?

A. That is correct.

Q. Okay. And you had no prior experience in designing labels for such products; is that correct?

A. That is correct.

Q. And you had no prior experience in designing bottles for such products; is that correct?

A. That is correct.

Q. And am I correct that Great Lakes Products, such as Jungle Juice, are sold in convenience stores?

A. Yes.
Q. Okay. And prior to 2008, did you have any experience selling products in convenience stores?
A. No.
Q. You have to speak up, sir.
A. No. No.
Q. And from time to time since 2008, have you had an opportunity to attend convenience store trade shows?
A. Oh, yes.
Q. Yes?
A. Yes.
Q. And what trade shows have you attended, sir?
A. I have been to a Laurel Food Show. I've been to-- there was one just over in Detroit, I can't remember the name of it. We was at the one here in-- up at Grand Rapids a couple months ago, INK in Toledo I was at.
Q. And have you attended any National Association of Convenience Stores trade shows?
A. We also had one show we did a big one out in Vegas, it was for Federated Food Groups. I guess yes, actually the one in Grand Rapids, I think it was more towards the convenience stores, and also the one in Detroit-- Novi, I guess it was. I can't remember what the name of it was. Maybe you know.
Q. The trade show that you attended in Las Vegas, was that a

National Association of Convenience Stores trade show?
A. I believe it's grocery chains.
Q. Okay. And was Bug Juice Brands present at that trade show?
A. I don't believe so.
Q. Okay. When was the first time you learned of the existence of Bug Juice Brands?
A. Oh, you know, I don't know, because I never really have drank it. So I didn't really know of the existence. I don't know. I mean I can't-- I guess I can't honestly answer that.

THE COURT: You can't answer the question when you became aware of Bug Juice?

THE WITNESS: When I became aware of it?

THE COURT: That was the question.

THE WITNESS: I don't know, it probably could have been years ago, I mean.

BY MS. RICHARD:

Q. Years ago?
A. Maybe. I mean it seems like I remember a friend of mine he drank it, and I said what are you drinking something like that for? He said, "I don't know, I just like it." I just thought it was kind of strange that an older person would drink it. I guess maybe that was probably when I first-- and I couldn't tell you what year that was.

Q. Okay. And you testified on direct that you chose the name Jungle Juice because your daughter, who is how old, sir?
A. Now she's 21.
Q. At some point in her youth watched a TV show or movie called the Jungle Book?
A. Yes, that is correct.
Q. And how did you come to think of the Jungle Book?
A. Just animals and, you know, with the name, with the-- to, you know, recognize it against the Leap Frog Lime the Gorilla Grape, you know, all my animals are based from jungles.
Q. Right.
A. Africa.
Q. So you bought this bankrupt company in 2008?
A. Uh-huh.
Q. You started selling bottled water. And did you sell the bottled water to convenience stores?
A. Yes, we do.
Q. And then you started selling flavored water?
A. Yes, that is correct.
Q. And when approximately did you begin selling flavored water?
A. At the same time. It was-- We had the product.
Q. 2008?
A. Yes.

Q. And you sold the flavored water to convenience stores?
A. That is correct.
Q. And did your company deliver these products directly to convenience stores?
A. My company don't deliver, no.
Q. Who did?
A. H.D. Hackney, a few different distributors.
Q. And what convenience stores did you sell your products to?
A. There are some C-stores. I know some, a couple up at Evart that has it. There's a lot of them in Grand Rapids, Northern Falls label. We do a lot of private label too, so we do Sleeping Bear label. I mean we do tons of different labels, so.
Q. Okay. And after you entered the business of selling bottled water and flavored water in approximately 2008 and sold those products to convenience stores, did you have occasion to visit any convenience stores?
A. To see my product in there? I guess I don't understand the question.
Q. To see your product in the convenience stores, how it was shelved, how it was marketed, to see it in relationship to competitive products?
A. No, not really.
Q. You did not?
A. No.

Q. Okay. And did there come a time that you decided that you wanted to market a fruit flavored beverage drink?
A. Yes.
Q. And when was that?
A. 2009, early 2009, I believe it was.
Q. And when you made the decision to go into the fruit flavored beverage drink market, did you survey the marketplace to find out what competition was there?
A. Just kind of, yeah, I would say, you know, with the gallons and then with the kids drink to see, you know, if we thought there would be something out there for us, and with our product not having high fructose with the granulated sugar, it's a healthier product for the kids, so I thought it was perfect to do. So that's what I came out with it in the ten ounce and the gallons.
Q. Now, specifically did you go out into the marketplace and purchase any competitive products that you thought you would be in the marketplace with when you entered?
A. No.
Q. None at all?
A. None at all.
Q. And at that time in early 2009, who did you view as the competitors of the Jungle Juice product that you were proposing to market?
A. I guess I really didn't. I was just, like I said, I

bought this company, it was in bankruptcy, and I was pushing the water, doing new products, taking it out in different areas where it's never been before. I went out-- DSD Distributors is who distributes my product. I've literally went out and rode around with their sales people. That's-- I'm pretty aggressive. I like to, you know, I want to make the company grow and create jobs, and that was the reason.

Q. Now, did there come a time when you made a decision to file an application to register the mark Jungle Juice?

A. Yes, we did shortly after we put it together, right about the same time, I believe.

Q. Well, approximately when was that, sir?

A. Last year.

Q. And did you conduct a trademark search prior to applying to register that mark?

A. Yes.

Q. You did?

A. Yes.

Q. And did that trademark search show that there were registrations on the principal register for the brand Jungle Juice?

A. I don't recollect that, no.

Q. What kind of trademark search did you conduct?

A. Well, we had it done through-- Well, actually Mr. Sayfie

had that done last, what was it, early year, and I had it-- we did it through the, what is the on-line deal. I'm trying to think what the name is. There is an on-line company or attorneys on-line that does trademarks, and that's originally who we went through to do it. And I decided at that point that, you know, when they had questions about different parts of it, you know, that I didn't understand, I said well, I better get an attorney that I can actually see here and talk instead of one on the internet, and at that point is when I hired Robert Sayfie.

Q. Let's just get the timing straight.

You or someone in your organization did an on-line trademark search; is that correct?

A. Yes.

Q. Before you filed the application?

A. Yes, Jamie Adrianse, an ex employee.

Q. I'm sorry, I can't hear you.

A. Jamie Adrianse.

Q. Jamie?

A. Adrianse.

Q. Conducted the search?

A. Yes. She was an employee of mine.

Q. She's an employee, she's not an attorney, correct?

A. Correct.

Q. And did she also file the application to register the mark Jungle Juice?
A. On-line, yes.
Q. On-line?
A. Yes.
Q. And what was her position with your company at that time?
A. She was the office manager.
Q. Office manager?
A. Yes. Her and I started the company together.
Q. She's not an officer of the company?
A. No.
Q. I ask you to take a look at Tab 72 of the binder, sir. Do you see that, sir?
A. Yes.
Q. And is that a copy of the application which Jamie Adrianse filed on behalf of Great Lakes Bottling Company to register the mark FlavorWave Jungle Juice?
A. Yes, I believe so.
Q. Yes, sir, or no, sir?
A. Yes.
Q. Yes, it is.

And subsequently was that application rejected?

A. It was on hold. It wasn't rejected, to my understanding, it was, they was doing some more search.
Q. Is that registration currently subject to rejection?

A. It's on hold. They have not rejected it. It's on hold.
Q. Well, I ask you to take a look at the office action under Tab 72, which is dated March 22nd, 2010. Do you see that, sir?
A. What page?
Q. These are not numbered pages. You are going to have to go, it's towards the end of that tab, probably about four pages from the end of the tab.
A. Yes.
Q. Do you see that, sir?
A. Uh-huh.
Q. And if you go to the second page of that office action, in the center of the page above the heading "Disclaimer"?
A. Uh-huh.
Q. It says, "However, the refusal to register under Trademark Act Section 2(d) based on registration number 2,613, 585 is continued and maintained." Do you see that, sir?
A. Where at? I guess I'm not seeing it.
Q. Immediately above the heading in the center of the page, "Disclaimer"?
A. Okay. Oh, yes. Yes. All right.
Q. Okay. And do you understand that to be a rejection, sir?
A. Not a rejection, just it says must now be addressed.
Q. It's a refusal to register. Do you understand that, sir?
A. No. My understanding it was just, it had to be

investigated more.
Q. How did you reach that understanding?
A. Just that's what I come up with or what I was-- I took it.
Q. So the word refusal doesn't mean refusal to you, it's we are taking it under consideration?
MR. SAYFIE: I object to relevance, I guess.
THE COURT: Overruled.
BY MS. RICHARD:
Q. Is that your understanding?
A. Yes.
Q. Okay. I ask you to go to the last page under Tab 72.
A. Okay.
Q. Do you see that page. That is a representation of the certificate of Registration No. 2,613,585 for the mark Jungle Juice, do you see that, sir?
A. What line, No. 2 or 3? Response? Yes, the response?
Q. No, it's the last page of Tab 73, sorry.
A. Oh, 73?
Q. Yes, sorry.
A. Yes.
Q. Have you ever seen that registration certificate before, sir?
A. Yes, I guess.
Q. When was the first time you saw it?

A. Probably when I got all of this, I would think, when they sent it to me and I went and seen Mr. Sayfie.
Q. Sometime in August of 2009, sir?
A. Yes, it could have been.
Q. Sometime prior to the date on which you launched the Jungle Juice product?
A. This could be.
Q. Yes or no, sir?
A. Yes.
Q. Yes.

And did you notice at the time in August of 2009 the goods for which this registration of the mark Jungle Juice was made?

A. Yes.
Q. It includes fruit flavored, non-alcoholic drinks, correct?
A. Correct.
Q. And notwithstanding the existence of this federal registration for a product which is identical to the product which you proceeded to launch, you were unconcerned about violating the registrants rights?
A. I don't feel my product is identical. I feel it's different. We have one percent concentrate. We don't use high fructose corn syrup. We use granulated sugar. There is a huge difference in my product.
Q. So there is a difference between your Jungle Juice product

and the Jungle Juice product marketed by the registrant of Registration No. 2,613,585, but they are both fruit-flavored beverages, correct?

A. Wasn't that a concentrate?

Q. That is the difference?

A. Yes.

Q. Now, you were aware of this registration and yet you went ahead and launched Jungle Juice.

Were you also aware of the sale of Bug Juice at the time you launched Jungle Juice?

A. Yes.

Q. You were.

And when did you first become aware of the sale of Bug Juice?

A. I thought we asked that earlier when. I can't remember what year that was, when the guy was drinking it.

Q. Okay. But immediately prior to the launch of Jungle Juice, did you see Bug Juice product in the marketplace?

A. Yes, I seen a lot of different products, that is correct.

Q. I'm asking you specifically prior to the launch of Jungle Juice did you see Bug Juice products in the marketplace?

A. Yes. Yes.

Q. And did you direct anyone on your behalf to buy samples of Bug Juice products?

A. No.

Q. Did you direct anyone on your behalf who was involved in designing the bottle or the label for the Jungle Juice product to purchase Bug Juice products in the marketplace?
A. No.
Q. All right. Now, who is it that you claim designed the Jungle Juice label?
A. Myself and my stepson Dion.
Q. What is your stepson's full name?
A. Dion Mitchell.
Q. Dion Mitchell?
A. Uh-huh.
Q. And what is his age, sir?
A. Thirty-eight-- nine.
Q. And what is his place of employment?
A. Image Graphics.
Q. And where is that located?
A. Evart.
Q. Evart, what?
A. Michigan.
Q. And was Dion Mitchell involved in the development of the Jungle Juice bottle design?
A. No.
Q. Who was involved in the development of that?
A. The bottle design was done-- I buy all of my bottles through Tranberry in Ontario Plastic in Canada, and they

have that size of bottle. We bottle six ounces up to 1.5 liters, and they have that particular ten ounce bottle, and that is the bottle we used because that is the company we buy the bottles from.

Q. Why did you choose ten ounce?

A. Pardon?

Q. Why did you choose a ten ounce bottle?

A. They are all out there seems to be about that size, the kids sizes, ten or twelve ounces. We just happened to pick that size. I don't know if it was-- I can't remember if it was--

Q. I thought you just testified earlier that you didn't investigate the marketplace before bringing out this product?

A. I just went off the size that the company that I bought the bottles from, they told me that that is the size that they standardly sell is the ten ounce bottle.

Q. Okay. So you didn't investigate the marketplace, you just relied on your bottle manufacturer--

A. I just went off what the bottle company said.

Q. --to tell you the proper size for a child's fruit flavored beverage product, is that your testimony, sir?

A. I don't know. I guess I don't understand.

Q. Yes or no, sir?

A. Do you want to repeat that again, please.

Q. You didn't investigate the marketplace, you simply relied on the advice of your bottle supplier as to the appropriate size--

A. Dion may have said--

Q. --bottle for a child's fruit flavored beverage; is that correct?

A. Yes.

Q. Yes.

Now, with respect to the label design. You claim that you worked with Dion Mitchell to develop the label design?

A. Yes.

Q. What did you do with Mr. Mitchell specifically to develop the Jungle Juice label design? And let's just go through each and every element, if we can. Do you have a sample before you?

A. Yes, I do. No, I guess I don't.

MS. McCALLUM: May I approach, your Honor?

BY MS. RICHARD:

Q. All right. Who made the decision to use this pressure sensitive label and wrap it around the center portion of the bottle, which you claim was designed by your bottle manufacturer?

A. That is the style label that we can run on our equipment pressure is sensitive.

Q. And what other bottles of this size and shape were you using at the time you developed the Jungle Juice product?
A. None of the ten ounce, we did eights, twelves.
Q. And what other products were you using this size label on at the time you produced the Jungle Juice product?
A. We do private label. I mean I can't accurately answer that. I mean we run this size label on a lot of different products.
Q. Can you give us any examples?
A. Probably some Northern Falls label. Most of it would be a private label, I would-- I've got literally hundreds and hundreds of different labels from different customers that we bottle for, including this product.
Q. And all of them use this size label on a ten ounce bottle wrapped around the center portion of the bottle, which is indented; is that correct?
A. Yes, that's correct. I-- We do Zoo Juice with this same style label. I think you guys have a Zoo Juice here. Actually, this is my label on here on the Zoo Juice.
Q. You bottle the Zoo Juice product?
A. Yes, that is correct.
Q. How long have you bottled Zoo Juice?
A. We have been bottling that for-- started in December.
Q. December?
A. December of '09.

Q. So that was after the launch of the Jungle Juice product?
A. This is correct.
Q. Okay. Let's look at the background graphic.
A. Okay.
Q. On the Jungle Juice label.
A. Uh-huh.
Q. And there are leaves, correct?
A. Trees and plants.
Q. All right. And there's a green background; is that correct?
A. Green, correct, yes.
Q. And a further background of blue; is that correct?
A. Sky blue, correct, from the sky.
Q. And your testimony is that the green leaves and the tree design came from a particular software program?
A. No, it's a Big Stock Photo.com. You can go on there, and I have the number, you can actually look at the whole photo. I believe there might have been some mushrooms or something like that in there that we removed because we didn't want mushrooms in there.
Q. All right. And who designed the Jungle Juice font and color way and shading?
A. Dion and myself. I guess I-- to be honest, I don't really remember if it was Dion or me. I'm assuming it was probably him, because he just picked different fonts and

he looked at them, and when you build something, you know, you try different colors, you try different whatever, and this is the font he came up with, and we both liked it.

Q. How do you account for the remarkable similarity between the font, the coloring and the shading of the Jungle Juice name on your product and the Bug Juice name on the Bug Juice product?

A. I don't know. I've noticed afterwards they are all kind of the same with the Tum-E Yummies and mine and yours, but that's just the colors. I think actually Dion come up with the colors.

Q. Dion?

A. Yes.

Q. Where is Dion? Why isn't he here today?

A. He wasn't asked to come.

Q. Was he just too busy to come to court?

A. I don't know. He wasn't asked.

Q. Did you ask him to come?

A. No. No, I didn't.

Q. Didn't think it was important?

A. No, because the label is completely different. There is, you know, vibrant colors is on just about every label out there on different things. The fonts is different. The background is different. The product inside the bottle is different. The bottle itself is different.

Q. What font is the Jungle Juice wording?
A. I would have to ask him.
Q. You don't know?
A. I don't know. That's correct, I don't know.
Q. But Dion couldn't make it here today?
A. I didn't ask Dion to come here today. He wasn't asked to come.
Q. Did you ask Dion to file a declaration in support of your opposition to the motion for preliminary injunction?
A. No, I told him maybe we may at some point, I guess. But I guess I didn't know. This is the first time I've ever been in something like this.
Q. What about your bottling manufacturer, your bottle manufacturer, did you ask the bottle manufacturer to submit a declaration in support of your opposition to the motion for preliminary injunction explaining its role in connection with the designing with the bottle?
A. I believe we got a date of when they designed the bottle or used the bottle, and it was prior to the them registering their bottle, and it's a different bottle, and it was done, I believe it was like two-- I can't remember right offhand.
Q. It just wasn't important, the date on which your bottle manufacturer--
A. It was way before you guys--

Q. --your bottle manufacturer--
A. It was way before it was you guys were claiming the registration of the your bottle.
Q. So you were aware of the date of registration of the Bug Juice bottle at the time that you were designing your bottle?
A. No, no.
Q. Well, when did you become aware of the date of registration of the Bug Juice bottle?
A. Coming in here.
Q. And at that time you went back to your bottle manufacturer and asked whether or not its design predated the date of registration of the Bug Juice bottle design?
A. Yes.
Q. You did?
A. Yes.
Q. And who did you ask?
A. The owner of the company, Dominic.
Q. What is the owner's name?
A. Dominic.
Q. Dominic what?
A. I don't know his last name.
Q. You don't.

And where does Dominic live?

A. Canada.

Q. And where in Canada?
A. I don't know for sure exactly. Is it-- That's not-- What is it? Oh shoot, I don't know. I can't think right now what the name.
Q. Where is Dominic's company located?
A. In Canada.
Q. Where?
A. I guess if I could see a map I could tell you. I don't know the name of the company.

THE COURT: Could you nail it down to a province?

THE WITNESS: It's right straight across the east, right northeast of, you take 104 up there, and I don't know why I cannot think of the name of the town right now.

BY MS. RICHARD:

Q. You just don't know where Dominic's company is located?
A. Yes, I know it's in Canada. You take 401. I've never been there so.
Q. Do you have invoices showing purchases of the Jungle Juice bottle design from Dominic's company in Canada?
A. Purchasing the design?
Q. Yes.
A. Purchasing of the bottle. The design, we don't purchase any designs. We have used, like I say, we use eight ounce bottles clear up to 1.5 liters that they produce.

Q. Okay.
A. And we buy them all from them.
Q. Do you have invoices showing purchases of actual ten ounce bottles of the bottle design used for the Jungle Juice product from Dominic's company in Canada?
A. Yes.
Q. And why is it that those invoices are not in evidence?
A. I don't know, maybe--

Do we have any in there, Bob?

MR. SAYFIE: You need to just-- If you don't know, just say you don't know. If you, do answer the question.

THE WITNESS: Don't know.

BY MS. RICHARD:

Q. Okay. And do you have any invoices showing the purchase of the label design?
A. Don't know.
Q. No.

Do you have any invoices showing the purchase of the labels bearing the Jungle Juice label design?

A. No.
Q. Why not?
A. Didn't bring any.

THE COURT: Excuse me.

THE WITNESS: I said I didn't bring any. I didn't--

BY MS. RICHARD:

Q. And from what company did you purchase the Jungle Juice labels?
A. Standard.
Q. Standard what?
A. Label Company.
Q. Where is Standard Label located?
A. Elkhart, Indiana.
Q. And when did you receive the first shipment of Jungle Juice labels from Standard Label?
A. I don't know.
Q. You don't remember?
A. I don't remember, no.
Q. Was it sometime in August?
A. It was sometime in 2009, I don't remember when.
Q. Would you take a look at Page-- or Tab 74, please, and it's Page 14 of defendant's response to plaintiffs' motion for preliminary injunction. Do you see that, sir?
A. Which one?
Q. It's Item G, "defendant's intent/lack of bad intent." Do you see that?
A. Uh-huh.
Q. Did you read this response before it was filed with the Court, sir?
A. Yes.
Q. Okay. The response says in the third sentence, "Defendant

decided on the name 'FlavorWave Jungle Juice' and then hired his son-in-law, who is a graphic designer by profession, to create the label for this product." Did you hire your son-in-law to create the label for this product, sir?

A. Well, I-- Actually he works in the building that I own and I don't charge him rent, but he does label designs for me, private label, and any labels and stuff that I need designed. So that's how he gets paid is I let him stay in the building I have.

Q. Okay. So was it your son-in-law who created the label or was it Dion, your stepson?

A. Dion, my stepson.

Q. So this statement in your opposition brief that--

A. Must have been an oversight.

Q. --hired his son-in-law?

A. Yes, must have been an oversight. I'm sorry.

Q. An oversight?

A. Yes, I guess I didn't even pay attention. It was an oversight.

Q. Okay. And was it an oversight to omit your son-in-law's name?

A. No.

Q. What is your son-in-law's name?

A. Dion.

Q. I thought that was your stepson?
A. It is my stepson. That's why I said it was a misprint with son-in-law. It's my stepson, not son-in-law. It was a misprint, and I overlooked it.
Q. This was just a mistake?
A. Yes.
Q. And you overlooked it?
A. I must have overlooked it, yes.
Q. Okay. And then it goes on to read, "His son-in-law who created the design does not work for defendant or Mr. DeWitt." But that is contrary to the statement that you just made that he actually does work for you and he does create your labels?
A. No, he does not actually work for me indirect because he is not on salary. Like I say, I let him use the building that I have, and then in return he does favors for me, like doing design work. Favors because I don't charge him for rent.
Q. All right.
A. I believe in helping him out and he believes in, you know, helping me.
Q. Now, Mr. DeWitt, you testified that Bug Juice Brands and Mr. Norton have tampered with evidence in this case; is that correct?
A. Yes. Well, someone-- The pictures have been tampered

with.

Q. Someone tampered?

A. Someone tampered, yes.

Q. You are not accusing Mr. Norton or Bug Juice Brands with tampering with anything; is that correct?

A. Someone did, I don't know who did.

Q. You don't know who?

A. Yes.

Q. And the basis for your claim of tampering is that you represented to the Court that Bug Juice products are sold with blue caps; is that correct?

A. The particular product that they was compared against, yes, is sold with a blue cap. The-- I can go to probably 30 different C-stores around here and bring you in that particular bottles that are in that picture are blue capped. Generally the-- I've noticed is the white caps on the Bug Juice is on the Lite Bug Juice, that the blues are pretty much on all the others. And as you was flipping through there, I kind of noticed on the one invoice when you was showing that they do purchase the white sport caps, that the volumes on the invoice was like huge in the blue, and just real small in the white. So I would assume that, you know, being that I've always seen them, you know, on the Lite and not the regular product, that it was pretty obvious that them were tampered with.

THE COURT: Pretty obvious what?

THE WITNESS: That they were tampered with. Like I say, you can probably go to 35 different C-stores and every one of them that particular product that's in them pictures will have a blue cap on it.

THE COURT: Did you hear Mr. Norton's explanation as to the differences in the colors of the caps?

THE WITNESS: Yes.

THE COURT: Do you have any reason to disbelieve that testimony?

THE WITNESS: Yes.

THE COURT: What is the basis for your belief? What is your basis to disbelieve that testimony?

THE WITNESS: Because the-- you mean without the tamper rings on or the white?

THE COURT: I asked you about the colors of the caps.

THE WITNESS: Okay. Just because every store I've seen it in they are blue caps, not white caps. Only white caps I see on their product is on their Lite, not the standard that was showed in the picture in the exhibit.

BY MS. RICHARD:

Q. All right. Now, Mr. DeWitt, that's interesting testimony, but your prior testimony was that you didn't survey the marketplace prior to developing--

A. No, this was after.
Q. --Jungle Juice. Just let me finish.
--prior to developing the Jungle Juice product, correct?
A. Correct.
Q. So from all of the period of time that Bug Juice has been on the market, from 1991 until early 2009, you did not turn your attention to that product and you don't know for a fact what colors caps that product was marketed in, do you?
A. For the last few months-- Well, since I started it, yes, I have focused to it, but before that, no, I did not focus to it at all.
Q. So you cannot address any of Mr. Norton's testimony with respect to multicolored caps and the use of blue colored caps and white caps prior to January, 2009, correct?
A. Correct. That is correct.
Q. Yes. Okay.
So your conclusion of tampering based on your assumption that Bug Juice Brand products are always marketed in blue caps was simply an assumption, not fact?
A. No, the fact is that tamper-proof rings are missing off them pictures and the juice product is missing out of that, and there is no store around that would even put a product like that in a door cooler to sell with product

missing. I don't even know if it's legal with the FDA to even do it. I'm pretty sure the tamper ring has to be on there.

Q. But my question did not go to missing tamper-proof rings. My question went to the fact that prior to January, 2009, you had no knowledge of what color caps Bug Juice Brand products were in, and it was only after this action was filed that you investigated and came to a conclusion that Bug Juice products were always sold in blue caps, correct?

A. No, that's not correct, because before this injunction was filed, and like I said, I was out riding around with different companies and seeing the different product, the Zoo Juice, the Lizard Juice, whatever it was, Tum-E Yummies, or your product, I distinctly brought out that yours was, every one I seen had blue caps, except for the Lite. The Lite was the only ones that I seen with white on it.

Q. And your survey--

A. Prior to me doing this, no, I had no.

Q. All right. And your survey of Bug Juice products was confined to what area, sir?

A. Michigan.

Q. Okay. So you have no idea what color caps are used in connection with Bug Juice products in, say, for example, California or Indiana or?

A. Maybe Indiana, I maybe seen it in Indiana, you know, Ohio maybe, I don't know.
Q. Big your pardon?
A. I said in Indiana probably. I haven't been out to California since I was a little kid, so I wouldn't have seen it in California, but Indiana and Ohio, yes, I've seen it in blue in both of them states.
Q. And you were present when Mr. Norton gave testimony that his product is marketed nationwide?
A. That it is or isn't?
Q. That it is marketed nationwide?
A. Yes.
Q. Do you have any reason to doubt that it's marketed nationwide?
A. I don't know, no.
Q. Now, do you dispute that Bug Juice products are marketed with white caps, sir?
A. Not in-- No, I guess not around here. The Lites are the only ones I've seen it on.

THE COURT: Excuse me?

THE WITNESS: The Lite, the Bug Juice Lite-- I think they've got a bottle back there-- Any Bug Juice Lite you'll find in the store that I've seen has all had white caps on it in the Lite version.

BY MS. RICHARD:

Q. And the products in front of you are Bug Juice products with white caps, correct?
A. Yes. I mean I don't-- yes. They could be Bug-- I don't know how they were put on, if they were put on assembly line or put on before they came in here, I have no clue.
Q. And are you saying that it was your stepson's, son-in-law, whatever his relationship is with you, who determined the color for the lettering on the Jungle Juice product?
A. I don't remember.
Q. You didn't have any role in that?
A. I was there, yes, but I don't remember the coloring and how that come about.
Q. What role did you have in developing the shading for those letters on that product?
A. I don't know. We just-- I said vibrant colors, and he said well-- I don't remember-- I really don't remember.
Q. You don't remember?
A. No.
Q. And were you, when you finally made a comparison between Jungle Juice and Bug Juice, were you startled by the similarity in the lettering and the coloring?
A. I noticed that Tum-E Yummies, too, exact same, so they are all kind of vibrant colors. I'm like wow, what are the odds of that. Maybe he knew. I don't know. I can't answer for Dion--

Q. Would you answer my question, please?
A. --but I did not.
Q. Did you hear my question?
A. Yes.
Q. The question is: When you finally compared the Jungle Juice label to the Bug Juice label, which occurred at some time after, according to your testimony, you launched the product, were you startled by the similarity between the labels?
A. No.
Q. You were not?
A. No.
Q. You thought it was normal that there were many other products in the marketplace that looked identical?
A. Yes, they don't look identical. They are different.
Q. Did they look highly similar?
A. There is a ton of products out there that's highly similar.

THE COURT: Answer the question, sir.

THE WITNESS: No. I mean no, I wasn't startled. All of them I've seen like that are basically the same.

BY MS. RICHARD:

Q. Now, sir, would you go to Tab 36 of the binder, please.

Can you tell the Court what Tab 36 consists of, sir?

A. That looks like my website picture.

Q. Okay. And the Jungle Juice flavors that appear?
A. Uh-huh.
Q. On the first page, what prompted you to adopt those flavors?
A. To what is that?
Q. What prompted you to adopt those flavors? Why did you choose those flavors?
A. Them flavors are standard in the Belly Wash industry that we run in our gallons. I run in our FlavorWave gallons the same flavors, identical.
Q. So you have gallon versions of each and every one of these flavors?
A. Yes, I do.
Q. And the colors of those flavors, are those standard colors as well?
A. Yes.
Q. Okay. Notwithstanding, they are nearly identical to the colors of the liquid?
A. No, these come off my gallon FlavorWave, Belly Wash product. It's the exact same product, same color.
Q. But you don't have any evidence of that here today?
A. It's in stores.
Q. It's in stores?
A. Yes.
Q. Okay.

A. This is a product, like I said before, it's bought through Northville Labs, that sells to Dean's Foods, Country Fresh, whoever wants to buy it, I guess even Bug Juice could, if they choose to.

Q. Are those gallon jugs of Belly Washers, as you call it, on your website?

A. I believe they are in here, aren't they? If you took all the pictures, I believe the gallons were in there. Yes, last page in that shows all of the gallons right above it, the blue, the pink, the orange.

Q. And these gallon jugs of Belly Wash product, they are opaque; is that correct?

A. Yes.

Q. So you don't see the vivid color of the products as you do in the Jungle Juice product in these gallon jugs, right?

A. Yes, the colors are the same. I have the same colors.

Q. I'm asking you through the jug, which is opaque. You've admitted it's opaque. Are the colors as vivid through these gallon jugs, as they are in the Jungle Juice bottle?

A. Yes.

Q. Yes or no?

A. Yes.

Q. Notwithstanding the photograph?

A. Well, the pictures don't give the actual product justice, I guess, but.

Q. So the gallon jugs are clear plastic?
A. No, PT. Or no, not PT, no. Milk jugs.
Q. So they are milk jugs, they are opaque?
A. A what?
Q. Opaque?
A. Okay.
Q. So you would not see a vivid color through an opaque milk jug, would you?
A. Oh, no, no, probably not.
Q. Okay. So the labels on these gallon jugs, would you say the same product as the Jungle Juice product, are they Jungle Juice labels?
A. No, FlavorWave gallons.
Q. That's a different brand name?
A. Yes.
Q. Completely?
A. Yes.
Q. This is a product that you've been manufacturing for how long?
A. Last year, 2009.
Q. How is it that you didn't use the FlavorWave label, which appears on the gallon jugs, on your ten ounce product?
A. We wanted, like they talked about, kids to make it exciting for the kids, just the same way Zoo Juice did and the rest of them. This cooler, these guys here, just

vibrant colors and animals, jungle animals for the kids, to help the sales.

Q. Okay. So there came a time obviously after you were sued that you became very aware of the different flavors of Jungle Juice products, correct?

A. Made aware of the different flavors? I don't understand the question.

Q. Well, there are Jungle Juice products?

A. Yes.

Q. Lemony Lime, Grapey Grape, Fruity Punch. Correct? Are you familiar with the flavor names?

A. No.

Q. You are not?

A. No, they are not my names. Mine are Gorilla Grape.

Q. Your names are what?

A. Different. Them ain't the names of my product.

Q. They are completely different?

A. I don't know what they are. I've never heard them.

Q. Never compared them?

A. No.

Q. Okay. And did there come a time when you decided to develop a new flavor for your line of Jungle Juice products?

A. We have talked about it. I have had a sales guy put it on there to come up with-- he was talking a couple difference

ones, one was the mango and strawberry banana, there was a couple different ones. We haven't did anything with it.

Q. Okay. Well, if you go to the page which is immediately prior to the page we were discussing before with the gallon jugs of FlavorWave product, there is a new flavor name contest. And it says, "We have a new flavor to introduce soon, Straw'Nana." Where did that name come from, sir?

A. Scott Jarlsma, my sales guy.

Q. Scott Jarlsma, your sales guy?

A. Yes.

Q. Did Scott tell you where he had gotten the name?

A. No.

Q. Did he advise you that Bug Juice had been selling a product with the name Straw'Nana?

A. No.

Q. Since 2007?

A. No. No.

Q. Now that you know that, are you going to remove this from your website?

A. Oh, yes, I wouldn't have Straw'Nana on there. I don't like the name personally myself anyway.

Q. Okay. Now, you've heard a lot of testimony here today from sales people who have encountered confusion in the trade and mis-shelving of product, particularly Jungle

Juice product in slots allocated to Bug Juice. What action, if any, do you intend to take to address those issues?

A. Let me address the whole thing. The confusion that was brought up from you guys, and understandably, you know, because that's were we are here, you had testified that you would say that the store clerks, which none of them were here to testify that it was because my product looked similar to theirs, I am aware of what they pay for Zoo Juice, I'm aware of what they pay for Bug Juice, I'm $2 a case cheaper. So that's why my product is going out in the fashion that it is. Also, with the no high fructose corn syrup in it.

I have two little kids now, a three-year-old and a five-year-old, we don't let them have any high fructose corn syrup at all.

So, you know, with that being said, you know, there is-- I don't believe the product is being put in the market because it looks the same. We have no control of how, like Mr. Norton here, he don't have no control how the product gets in there. They had pictures of the Tum-E Yummies in his cooler shelf display. You know, we can, you know, try to address it. I would say to, you know, if they could keep it in a different area. I know they put in my product, and I'm assuming, I guess I can assume,

that if they are going to discontinue Bug Juice that they are not going to throw their Bug Juice out, they are probably going to sell it until the product is depleted, and then they are going to continue with my product. You know, I'm quite a bit, like I say, I'm a lot cheaper a case than what the standard people around there has been paying for Bug Juice.

Q. Okay. Well, let's just go through a few elements here. So your product, the Jungle Juice product, and the Bug Juice product are both sold in convenience stores, correct?

A. Yes.

Q. And in certain instances they are shelved together on the same refrigerator shelves?

A. Yes.

Q. Yes?

A. According to the pictures.

Q. Yes.

And they are both marketed in clear plastic, ten ounce bottles of the same shape?

A. Yes.

Q. And they both use circular sports caps?

A. Yes.

Q. And the Jungle Juice label has a jungle theme, correct?

A. Yes.

Q. And the Bug Juice label has a jungle theme, correct?
A. I don't think so. It don't look jungle to me whatsoever. Bugs can be found out in the desert. My jungle animals you find them in Africa only. You don't find them in Michigan. You don't find them out in the desert. You don't find gorillas in the desert. Pink flamingos, tree frogs, what is the other ones, hippopotamus.
Q. All right. Now, Mr. DeWitt, you've apparently conducted some sort of investigation in the marketplace. When the Jungle Juice product is shelved on a refrigerator case shelf, is the animal visual apparent?
A. Could be. I guess it depends on how it's set in there.
Q. Have you noticed an animal visual apparent on any of the photographs that we've seen here this afternoon?
A. I don't remember.
Q. You don't remember?
A. No.
Q. Okay. And both parties' products have the name in orange and yellow, bright lettering, shaded with black, correct?
A. Yes.
Q. Do you know of any other products in the marketplace that have all the similarities that you've just attested to, other than your product?
A. Tum-E Yummies.
Q. And what is it about Tum-E Yummies that's similar?

A. The shading of the label of the fonts is, the orange to the yellow.
Q. Does Tum-E Yummies have a jungle theme?
A. I don't believe they do.
Q. And you would agree that both Jungle Juice and Bug Juice are impulse purchases and grab and go items in convenience store settings?
A. I don't know if I would or not. You know, it's a kids' product, they all are. Not necessarily.
Q. People deliberate?
A. There is a lot of parents I'm sure that wouldn't even let their kids drink it, either one of them, because they want them to drink water or something, you know, orange juice. You know, I guess I can't answer that. I'm not in that profession, so I cannot answer that.
Q. What profession is that, sir?
A. The profession of the studies for the surveys, you know.
Q. Oh. Are you in the profession of marketing fruit flavored children's beverages?
A. I'm in the profession to sell products in fruit flavored and water, yes.
Q. And is the Bug Juice product and the Jungle Juice product marketed to the same class of purchaser, namely, children ages three to twelve?
A. I think of it as-- Yes, probably three to twelve, I would

say.

Q. And their parents and grandparents?

A. I would doubt if a parent or grandparent would drink it.

Q. Okay. And with respect to confusion, is it your view that confusion exists in the marketplace simply because store clerks are negligent in shelving?

A. Yes, I would say.

MS. RICHARD: Okay. I have no further questions.

THE COURT: Mr. Sayfie.

MR. SAYFIE: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. SAYFIE:

Q. All right. Is Dion Mitchell your stepson?

A. Yes, he is. Well, ex-wife. I still consider him my stepson.

Q. But our response mentions son-in-law. He is not your son-in-law?

A. No.

Q. That was a typo, should have been stepson?

A. Yes, it was.

Q. Is he employed by Great Lakes Bottling Company, the defendant in this case?

A. No.

MR. SAYFIE: I think the bottles from my table were taken over here. Can I approach and grab those?

THE COURT: Sure.

BY MR. SAYFIE:

Q. Your-- What is the name of your product?

A. Pardon?

Q. What is the name of your product?

A. Jungle Juice-- FlavorWave Jungle Juice.

Q. And what is the plaintiffs' product name?

A. Bug Juice.

Q. There are differences in the name?

A. Yes.

Q. What are they?

A. Mine is jungle, relates to the jungle, theirs relates to bugs.

Q. And you heard plaintiff testify that color is not a claim in their trademark, correct?

A. Correct.

MR. SAYFIE: No further questions.

MS. RICHARD: Just one last question.

RECROSS EXAMINATION

BY MS. RICHARD:

Q. Mr. DeWitt, to be clear, your testimony is that in no way did you or your stepson/son-in-law copy any aspect of the Bug Juice trade dress that we have discussed here today?

A. That is correct.

Q. The bottle design, the label design, the jungle theme, the

font, the lettering, and the coloring of the lettering?
A. This is correct.
Q. And you had no intention whatsoever of trading on the good will developed by Bug Juice?
A. None.
Q. Over 20 years?
A. None whatsoever.
Q. And you had actually no knowledge of that good will before you embarked on this new venture, correct?
A. No.

THE COURT: How much money have you spent to promote your product?

THE WITNESS: We have-- In promotion. Right offhand, I don't know. Quite a bit. I guess into trade shows and maybe $50,000 or $60,000.

THE COURT: Am I given to understand that you filed an application sometime in 2009, which did not result in an affirmative registration?

THE WITNESS: Yes. My understanding it got put on hold because--

THE COURT: It was placed on hold in May of 2009, and then you got a refusal to register continued March 22nd of 2010?

THE WITNESS: Yes.

THE COURT: But you continued, when your registration

was on hold, you continued your plans to market the Jungle Juice product?

THE WITNESS: Yes. It was my understanding it was on hold because of the court procedures that we are going through now.

THE COURT: What court procedures?

THE WITNESS: Being here, being sued by Bug Juice, that the trade company put it on hold.

THE COURT: I thought the application was placed on hold in May of '09. Did I misinterpret?

MS. RICHARD: No, your Honor.

MR. SAYFIE: If you don't know, I mean I don't want to put words in his mouth.

THE COURT: No, I'm not going to put words in his mouth.

Let's get Tab 72 up there again. And let's go to the document that indicates, I think it's dated May 11, that says it's on hold.

THE WITNESS: Oh, I remember now. My understanding was that it was on hold, they was waiting on future more investigation of the product. That was my understanding.

THE COURT: Didn't have anything to do with the lawsuit?

THE WITNESS: No, up until this year.

THE COURT: As of May, you know your registration is

on hold and you continued to proceed under the assumption that you are going to use the Jungle Juice label?

THE WITNESS: Yes.

THE COURT: All right. You get the refusal to register in March of 2010, the refusal to register is continued, yet you continued to market the Jungle Juice product?

THE WITNESS: I don't think-- We haven't really marketed anymore since then.

THE COURT: Well, you're selling it, right?

THE WITNESS: Oh, yes. Okay. Yes, correct.

THE COURT: When did you become aware of the fact that there was a prior Jungle Juice registered?

THE WITNESS: Become aware of it when the last year, but it was a-- our register was FlavorWave Jungle Juice, all one word, and theirs was a concentrate and ours is not a concentrate, so that is when we decided to continue on with the name. I believe Bob sent in a thing to continue on with it, and then when the suit come in for me to stop on it, that's-- and I remember I had asked Bob, I said well, where are we at on that, and he said they have halted it until the outcome of the case.

THE COURT: I don't have any further questions.

Mr. Sayfie.

MR. SAYFIE: Just briefly.

REDIRECT EXAMINATION

BY MR. SAYFIE:

Q. Is it your understanding that this Jungle Juice registration that is registered, we have discussed it, correct?

A. Yes.

Q. It's not owned by the plaintiffs-- Is it your understanding it's owned by the plaintiffs or not, this Jungle Juice mark?

A. Right, no, it's not.

Q. Is it owned by them, yes or no?

A. No.

Q. Okay. It's another party, correct?

A. Right.

Q. All right. I just wanted to clarify that.

Thanks.

THE COURT: Does it impress you, sir, that it is somewhat reckless to continue marketing a product or selling a product under those circumstances?

THE WITNESS: No, it has not. You know, I'm not-- You mean impressed by--

THE COURT: You're what?

THE WITNESS: No, I'm not impressed. I'm just, you know, I have a facility that I'm trying to keep open and keep it operational and keep the employees to make my

payments.

THE COURT: Okay. Thank you. I have nothing further.

MS. RICHARD: We have nothing further, your Honor.

We leave our briefs and the submissions that we have made today in addition to the evidence of the witnesses, and the products themselves tell the story.

THE COURT: All right. Mr. Sayfie, did you have any more questions of your client?

MR. SAYFIE: No, thank you.

THE COURT: All right. You may step down, sir.

(At 5:45 p.m., witness excused.)

THE COURT: All right. Ms. Richard, did you want to argue any further?

MS. RICHARD: Nothing further, your Honor.

THE COURT: Mr. Sayfie, go ahead, sir.

MR. SAYFIE: No, our evidence is presented. We are complete. Thanks.

THE COURT: Is there some reason why Mr. Mitchell is not here?

MR. SAYFIE: No.

THE COURT: Well, he is the creator of this label, isn't he, from your client's standpoint?

MR. SAYFIE: Yes.

THE DEFENDANT: Well, I am too, I mean him and I

both.

THE COURT: Mr. DeWitt, I'm asking your counsel questions.

THE COURT: Apparently he had a major piece of this action, right, from your client's perspective?

MR. SAYFIE: He was part of the creator of the label, that's correct.

THE COURT: But he is not here to testify under oath to that effect?

MR. SAYFIE: No.

THE COURT: And I'm asking you, is there a reason why not, in light of the criticality of his potential testimony?

MR. SAYFIE: I think Duane's testimony was going to address the label situation. Now, we were going to file a motion for a-- to file a sur-reply brief and file an affidavit by Dion Mitchell, but I didn't think there was good cause to do such. I didn't see any new arguments that were espoused in the reply that we could then open that up. And in doing that, we had Dion Mitchell prepare an affidavit and sign it, and we do have it here. So if the Court and plaintiff would like to see it, I do have it for submission to the Court.

THE COURT: Well, the difficulty, of course, with that is the time and date set aside for the hearing on the

preliminary injunction, and of course the affidavit can't be cross examined, so I'm not interested in seeing an affidavit at this point in time.

MR. SAYFIE: All right.

THE COURT: I must say, I'm-- in light of the centrality apparently of this witness's potential testimony, I am very surprised that he is not-- that he is not here. But that's a matter, obviously you gave it some thought and made the decision that you made.

Mr. Sayfie, any other argument, sir?

MR. SAYFIE: No, your Honor. Thanks.

THE COURT: All right. Well, we have been here now, with a short 15 minute break, we've been on this record for four hours, and I must say I don't understand why we are here. I mean this is not even close. This is not even close.

The-- And I find Mr. DeWitt's testimony to be totally incredible. To say that these two labels are serendipitous is total and complete nonsense.

And I, if plaintiff wishes-- I'm going to issue the preliminary injunction, because I think plaintiff has met all prongs of the standard for a preliminary injunction, and has met all prongs for trade dress infringement. I do that based on this record, because there's been virtually no defense put up to the plaintiffs' case. The

plaintiffs' case on all elements is compelling. And for the life of me, I do not understand why a federal court has dealt with this for four hours based on the proofs that the defendants have put on, and I think this is sanctionable. This is not even close. And as I say, I am shocked that we are here.

Now, what I'm going to ask counsel to do-- I will issue an opinion, if you wish, but what I'm going to ask you to do is meet with counsel for the plaintiff and come up with a preliminary injunction that you can agree upon in light of what my ruling will be. I recognize you don't want to stipulate to it, but in light of what my ruling might be, or what my ruling is, but that would save the Court time, and frankly, will cut off the sanctions for attorney fees that I will grant the plaintiff under the circumstances here. This defense is frivolous, and I so find.

I don't do this often, but this is not even close. So I'm going to direct Mr. Sayfie, if you wish, I'll give you 24 hours to decide whether you want to cooperate with Ms. Richard and her co-counsel on coming up with the terms of a preliminary injunction. If you don't want to do that, I understand that, but then I will go ahead and I'll proceed to issue my opinion and issue my own injunction.

But, and as I've said, if the plaintiff wishes, I'm

going to entertain a motion for sanctions based on my findings I've made here today.

Anything further for today, Miss Richard?

MS. RICHARD: No, your Honor.

THE COURT: Mr. Sayfie?

MR. SAYFIE: Will our stipulation regarding the proposed order and preliminary injunction be due within 24 hours?

THE COURT: No, just you need to consult with your client as to whether you want to cooperate with Ms. Richard regarding the terms of a P.I. If you do, that's fine, you can go ahead and work on it, and I'll await the-- I'll await the product of your deliberations. So I'm giving you 24 hours to decide. If you can just let Ms. Richard and my office know whether you're willing to do that or not, and I would hope that by no later than Monday we could get a preliminary injunction entered.

MR. SAYFIE: Well, I can say right now that we do agree to cooperate.

THE COURT: All right. That's fine. That will be of some assistance to the Court.

All right. We are adjourned. Thank you.

MR. SAYFIE: Thank you, your Honor.

MS. RICHARD: Thank you, your Honor.

MS. McCALLUM: Thank you, your Honor.

COURT CLERK: All rise.

Court is adjourned.

(At 5:53 p.m., proceedings were concluded.)

KATHLEEN S. THOMAS, U.S. District Court Reporter
410 West Michigan Avenue, Kalamazoo, Michigan 49007
(269)385-3050

REPORTER'S CERTIFICATE

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

Kathleen S. Thomas, CSR-1300, RPR
U.S. District Court Reporter
410 West Michigan
Kalamazoo, Michigan 49007

EXHIBIT 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BUG JUICE BRANDS, INC., AND JOSEPH J. NORTON,

Plaintiffs,

Civil Action No. 10-CV-229 (PLM)

v.

GREAT LAKES BOTTLING COMPANY,

Defendant.

FINAL JUDGMENT ON CONSENT AND PERMANENT INJUNCTION ORDER

The Court hereby enters the ORDER below, based on the following facts:

A. In 1991, Plaintiff Joseph J. Norton began manufacturing and selling BUG JUICE® brand fruit flavored children's beverages in petite specially designed child-size clear plastic bottles. In 1998, Plaintiff Norton founded Plaintiff Bug Juice Brands, Inc. and granted it the exclusive right to use the BUG JUICE® names, marks and trade dress in connection with fruit flavored children's beverage products. In 2005, Plaintiffs Joseph J. Norton and Bug Juice Brands, Inc. (collectively "Plaintiffs") introduced and began manufacturing and selling LITE BUG JUICE® fruit flavored children's beverage products.

B. All BUG JUICE® brand fruit flavored children's beverage products are packaged in the same distinctive packaging (the "BUG JUICE® Brand Trade Dress"):

C. The BUG JUICE® Brand Trade Dress includes the following elements:

(a) a clear specially designed and molded plastic bottle that (i) is rounded at the top below the circular cap with the wording "BUG JUICE" molded into the upper section of the bottle; (ii) has a middle section that is narrower than the top and bottom sections; (iii) has a bottom section that is rounded and the same width as the top section; (iv) uses a bottom that is indented into the bottle; and (v) a paper or plastic label which wraps around the entire center indented portion of the bottle;

(b) a label which bears the BUG JUICE® marks and incorporates the BUG JUICE® jungle theme, specifically displaying (i) several large green stylized jungle plant leaves against a blue-green background; (ii) several brightly colored cartoon style insects poised on or about the large green stylized jungle plant leaves, each with a face reflecting a funny, friendly expression; (iii) the name BUG JUICE® in distinctive cartoon/graffiti style lettering placed at a slight diagonal across the front of the label; (iv) each letter of the BUG JUICE® name highlighted in a unique blend of the sunrise colors orange and yellow and outlined and shaded in black; (v) the unique name of each juice flavor on the lower right front side of the label in small, brightly colored block letters (collectively (b)(i)-(b)(v) shall be referred to as the "Jungle Theme"); (vi) the bottle size (10 oz.) on the lower left front side of the label; and

(c) the bright color of each flavor of the BUG JUICE® brand beverage is clearly visible through the clear plastic BUG JUICE® brand bottle as it is coordinated to match each product flavor (i.e. BUG JUICE® brand Fruity Punch is bright red and BUG JUICE® brand Lemony Lime is bright neon green).

D. Plaintiffs' distinctive BUG JUICE® Brand Trade Dress has been in use for at least 19 years, has acquired secondary meaning, and is well-known. The BUG JUICE® Brand Trade Dress is one of the most important ways in which consumers identify the BUG JUICE® brand on the shelf. Plaintiffs devote a great deal of marketing resources to ensure that their BUG JUICE® products are easily visible where sold,

and that that the BUG JUICE® Brand Trade Dress stands in sharp contrast to other children's beverage products on store shelves. In this way, potential new customers easily locate the product, recognize it from its distinctive and familiar trade dress and want to try it. Likewise, the unique BUG JUICE® Brand Trade Dress enables returning customers to easily identify the BUG JUICE® brand without the requirement of sifting through a sea of visually similar bottles. The BUG JUICE® Brand Trade Dress represents and conveys the quality and value of the product to consumers.

E. The elements of the BUG JUICE® Brand Trade Dress are registered on the Principal Register of the Unites States Patent & Trademark Office ("USPTO") as United States Trademark Registration Nos. 3,323,848 (BUG JUICE bottle configuration), 3,455,247 (BUG JUICE label design), 3,732,786 (BUG JUICE label design), 3,786,339 (BUG JUICE & Design), 3,317,139 (LITE BUG JUICE) and 3,329,158 (LITE BUG JUICE label design) (collectively the "BUG JUICE" Marks).

F. BUG JUICE® brand beverage products featuring Plaintiffs' BUG JUICE® Brand Trade Dress are widely distributed throughout the United States through an extensive distribution network that includes wholesale food distributors and retail convenience and grocery stores.

G. The BUG JUICE® Brand Trade Dress is also featured on various in-store displays, such as barrel-shaped ice coolers, shelf strips, cooler door display racks, and danglers, and appear on merchandise such as T-shirts and baseball hats. BUG JUICE® brand products are available for children's birthday parties, and have been

widely offered at community fairs and other public events, including several charity and children's events in Grand Rapids, Michigan and other locations within this district.

H. Since 1991, Plaintiffs have spent approximately $64 million in connection with the advertisement and promotion of BUG JUICE® brand products in a variety of media throughout the United States including, for example, in-store banners and displays, print advertisements, promotional sponsorships and the internet via advertising on the company's website, located at <drinkbugjuice.com>.

I. Since their introduction to the marketplace, BUG JUICE® brand products have enjoyed steady sales growth. In 2009 retail sales of BUG JUICE® brand products were over $84 million. The BUG JUICE® brand is widely recognized as a market leader in fruit flavored children's beverages in the convenience store channel.

J. Plaintiffs thus own valid, strong and enforceable rights in the BUG JUICE® Brand Trade Dress.

K. Defendant Great Lakes Bottling Company ("Defendant") adopted the trade dress that appears below in connection with its JUNGLE JUICE fruit flavored children's beverage products (the "JUNGLE JUICE Trade Dress"):

L. The JUICE Trade Dress includes the following elements:

(a) clear plastic bottles featuring, among other things, rounded dome-shaped top and bottom sections, beneath a circular cap along with;

(b) paper or plastic labels that display (i) large green stylized jungle leaves against a blue-green background and colorful, cartoon style jungle animals; (ii) the name "JUNGLE JUICE" placed at a slight diagonal across the front center of the label in large, cartoon/graffiti style letters that are colored in a blend of orange and yellow that depicts the color of a sunrise, and outlined and shaded in black; (iii) a jungle animal to the right of the "JUNGLE JUICE" name; (iv) fun, catchy and alliterative beverage names, such as "Orangutan Orange" and "Parrot Punch" in the lower right hand side of the label; (v) the bottle size (10 oz.) in the lower left hand side of the label; and

(c) the color of each beverage is coordinated to match the beverage flavor (the "JUNGLE JUICE Trade Dress").

M. On March 5, 2010, Plaintiffs filed the Complaint in this action against Defendant, alleging, *inter alia*, trade dress infringement, false designation of origin, and unfair competition pursuant to the Lanham Act, 15 U.S.C. § 1051, *et seq.*, and the

common law of the State of Michigan. On March 29, 2010, Defendant filed its Answer.

N. On March 22, 2010, Plaintiffs filed its Motion for Preliminary Injunction and related submissions pursuant to Federal Rule of Civil Procedure 65(a) against Defendant. Defendant filed its Opposition to the Motion for Preliminary Injunction and related submissions on April 9, 2010. Plaintiffs' filed a Reply in Support of their Motion for Preliminary Injunction and related submissions on April 23, 2010.

O. On June 2, 2010, the Court held a hearing whereby the parties presented their arguments and proffered documentary evidence and witness testimony. The Court granted Plaintiffs' Motion for Preliminary Injunction and entered a minute order in respect thereof on June 3, 2010 and the Defendant has agreed to the entry of a permanent injunction.

P. Defendant represents that it has ceased the manufacture and sale of infringing JUNGLE JUICE products.

Q. Because the Parties wish to resolve this action for trade dress infringement and unfair competition, without the necessity of a trial, they jointly request entry of this Consent Decree.

Based upon the consents of the parties and their attorneys, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. This Court has original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332 and 1338. This Court has personal jurisdiction over Defendant because Defendant carries on a continuous

and systematic part of its business in this district. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c) because Defendant is incorporated in the State of Michigan and carries on a continuous and systematic part of its business in this district.

2. The overall look and appearance of Plaintiffs' BUG JUICE® Brand Trade Dress depicted herein constitutes valid and enforceable trade dress and Plaintiffs are the sole owners of all right, title, and interest in such trade dress.

3. Defendant and all those in active concert or participation with Defendant (including, but not limited to, Defendant's officers, directors, agents, servants, wholesalers, distributors, retailers, employees, representatives, attorneys, subsidiaries, related companies, successors, assigns and contracting parties and shareholders) are immediately and permanently enjoined, on a worldwide basis, from engaging in any of the following acts:

   (a) Manufacturing, distributing, shipping, advertising, marketing, promoting, selling or otherwise offering for sale the JUNGLE JUICE products in the JUNGLE JUICE Trade Dress or in any other trade dress that is confusingly similar thereto (the "Infringing JUNGLE JUICE Products"), or registering such JUNGLE JUICE Trade Dress as intellectual property (including but not limited to trademarks, copyrights, designs, domain names or any other form of tangible or intangible property) in any jurisdiction worldwide; and

   (b) Manufacturing, distributing, shipping, advertising, marketing, promoting, selling, or otherwise offering for sale any fruit flavored children's

beverage product in any trade dress featuring (i) a clear molded plastic bottle that is rounded at the top with a middle section that is narrower than the top and bottom sections and a bottom section that is rounded and the same width as the top section, (ii) a label bearing the BUG JUICE Jungle Theme or BUG JUICE Marks shown at Section B above and described at Section C(b) above, or (iii) cartoon/graffiti style lettering that is confusingly similar to the BUG JUICE® Brand Trade Dress described in Sections B and C above or registering any trade dress featuring such elements as intellectual property (including but not limited to trademarks, copyrights, designs, domain names or any other form of tangible or intangible property) in any jurisdiction worldwide; and

(c) Applying for registration of any intellectual property (including but not limited to trademarks, copyrights, designs, domain names or any other form of tangible or intangible property) in any jurisdiction worldwide that is confusingly similar to the BUG JUICE® Brand Trade Dress; and

(d) Representing, by any means whatsoever, that any products manufactured, distributed, shipped, advertised, marketed, promoted, sold or offered for sale by Defendant are Plaintiffs' products or vice versa, and from otherwise acting in a way likely to cause confusion, mistake or deception on the part of retailers, purchasers or consumers as to the origin or sponsorship of such products; and

(e) Doing any other acts or things calculated or likely to cause confusion or mistake in the minds of the public or to lead retailers, purchasers or

consumers into the belief that Defendant's products come from Plaintiffs or are somehow sponsored or licensed by, or associated or affiliated with, Plaintiffs or their products; and

(f) Otherwise unfairly competing with Plaintiffs.

4. Defendant shall insure that its distributors immediately cease all sales of Infringing JUNGLE JUICE Products, remove all inventory of Infringing JUNGLE JUICE Products from the marketplace and make best efforts to insure that all inventory of Infringing JUNGLE JUICE Products is removed from retail stores by July 1, 2010.

5. Defendant shall immediately remove all inventory of Infringing JUNGLE JUICE Products from retail stores and in the possession of its distributors together with any labels, packaging, advertisements, and other materials, including any webpages or digitized materials, which refer or relate to the Infringing JUNGLE JUICE Products.

6. Defendant shall issue a recall notice in the form annexed hereto as Exhibit A to all sales representatives, sales managers, distributors and retailers within five (5) days of entry of this Order.

7. On July 15, 2010, Defendant shall file with the Court and serve on Plaintiffs' attorneys a report in writing under oath setting forth (a) the actions taken by Defendant to comply with the terms herein, (b) providing the Court and Plaintiffs with copies of all recall notices issued by Defendant, and (c) providing a detailed inventory of all recalled Infringing JUNGLE JUICE Products maintained by

Defendant at on offsite warehouse facility and the location of that facility ("Inventory").

8. Defendant shall place all recalled Inventory of the Infringing JUNGLE JUICE Products in an off-site warehouse facility and maintain such Inventory at that location until such time as it is removed by Plaintiffs as provided herein. Plaintiffs may remove said Inventory from Defendant's offsite warehouse facility for destruction at anytime after July 20, 2010 and the parties shall cooperate with each other to arrange for the timely removal of said Inventory for destruction. If Plaintiffs do not remove the inventory by July 30, 2010, then Defendant may destroy the product.

9. Defendant shall immediately cease all use of the mark JUNGLE JUICE and withdraw U.S. Application Serial Number 77/733,702 for the mark FLAVORWAVE JUNGLE JUICE within five (5) days of the entry of this Order.

10. Any claims asserted in this litigation other than those resolved through this Consent Decree and Permanent Injunction shall be dismissed with prejudice, each party to bear its own costs and attorneys fees.

11. Jurisdiction is retained by the Court to ensure compliance with the terms of this Consent Decree and Permanent Injunction. If either party is found to have violated any term of this Consent Decree and Permanent Injunction, the non-breaching party shall be entitled to recover its reasonable attorneys' fees and costs in connection with such violation and the enforcement thereof.

12. There shall be no appeal from this Consent Decree and Permanent Injunction.

SO ORDERED this 10th day of June, 2010

/s/ Paul L. Maloney
Honorable Paul L. Maloney
U.S. District Court Judge

The undersigned consent to the entry of this Consent Decree and Permanent Injunction without further notice.

On behalf of:

Joseph J. Norton, Individually and as President of Bug Juice Brands, Inc., Plaintiffs.

By: /s/ Joseph J. Norton

Date: June 9, 2010

As Counsel for Joseph J. Norton and Bug Juice Brands, Inc.

By: /s/ David J. Gass

Date: June 9, 2010

David J. Gass, Esq. (P34582)
D. Andrew Portinga, Esq. (P55804)
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
P.O. Box 306
Grand Rapids, Michigan 49501-0306
T: (616) 831-1700
F: (616) 831-1701
gassd@millerjohnson.com
portingaa@millerjohnson.com

Of Counsel:
Virginia R. Richard, Esq.
Stephanie S. McCallum, Esq.
Sanjana Chopra, Esq.
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166-4193
T: (212) 294-6700
F: (212) 294-4700

On behalf of:

Great Lakes Bottling Company, Defendant.

By: /s/ DuaneDeWitt

Date: June 9, 2010

As Counsel for Great Lakes Bottling Company

By: /s/ Robert J. Sayfie

Date: June 9, 2010

Robert J. Sayfie, Esq.
ROBERT J. SAYFIE, P.C.
Attorney at Law
Waters Building
161 Ottawa Ave., N.W.
Suite 407
Grand Rapids, MI 49503
T: (616) 774-9244
F: (616) 774-9202
Robert@sayfie.com