

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

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

v.

Hon.: Paul L. Maloney

GREAT LAKES BOTTLING
COMPANY,

Defendant.

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**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

Defendant, Great Lakes Bottling Company, responds to the motion for preliminary injunction filed by the Plaintiffs, Bug Juice Brands Inc. and Joseph J. Norton, as follows:

Plaintiffs move on the grounds that Defendant has infringed on Plaintiffs' BUG JUICE mark and trade dress. Plaintiffs claim that Defendant's JUNGLE JUICE packaging is nearly identical to Plaintiffs' BUG JUICE mark is without merit. As will be specified in the accompanying Brief, there are distinct differences in the two marks, in the label and bottle design, that clearly show a lack of infringement by the Defendant on Plaintiffs' marks.

Plaintiffs' claims are based off claims to rights they do not possess. Because a trade dress is not federally registered, Plaintiffs have no legal rights to their trade dress. Thus, Plaintiffs cannot claim common law rights to the type of bottle that is used by the Defendant, as well as many other children's beverage manufacturers and distributors in the United States. Plaintiffs do have a federally registered mark on the BUG JUICE bottle design configuration. However, Plaintiffs' mark is specific to the engraved wording "BUG JUICE" on the upper section of the bottle. Defendant does not use this mark on the JUNGLE JUICE bottle so there is no violation of Plaintiffs' mark in that regard. Plaintiffs' mark is a word mark, not a design mark. Aside from the fact that Plaintiffs' BUG JUICE design label does not contain a jungle slogan or a jungle theme like Defendants' JUNGLE JUICE, color is not a feature of Plaintiffs' mark so their argument regarding the comparison of color on the two products is null.

There is no evidence or reason to believe that Plaintiffs have or will suffer any immediate or irreparable harm due to Defendant's manufacturing, distributing, and

selling of JUNGLE JUICE. In lieu of the facts presented above, Defendant respectfully requests that the Court deny Plaintiffs' motion for Preliminary Injunction.

Date: 9 April 2010

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

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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.



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

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EXHIBIT 1

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AFFIDAVIT OF DUANE J. DEWITT

1. I am the President of Great Lakes Bottling Company.
2. It is my understanding that Food and Drug Administration requires drinks such as Jungle Juice, to have tamper-proof caps, so that a purchaser can visually inspect whether the cap has been removed before purchase.
3. I have read the plaintiffs' complaint, motion for the preliminary injunction, and the supporting affidavits.
4. Our product, FlavorWave Jungle Juice is sold and distributed with white tamper-proof caps.
5. If the caps are removed by unscrewing them, then a ring on the bottom part of the cap separates from the cap.
6. The pictures of the Bug Juice drinks with the white caps do not have the ring, such as on page 9 and 10 of the plaintiffs' motion for the preliminary injunction.
7. Other locations of the Bug Juice bottles with white caps missing the tamper-proof ring are located at:
 - a. Declaration of Joseph J. Norton, pages 2, 16, and most of his exhibits;
 - b. Declaration of Douglas Rehner, pages 2;
 - c. Declaration of Douglas Filter, page 2;
 - d. Declaration of Christine Zachos, page 2; and
 - e. Plaintiffs' complaint, pages 7, 16, and possibly others.
8. Page 15 of Plaintiffs' motion shows Bug Juice with blue caps, and Jungle Juice with white caps. Bug Juice's blue caps cover the portion of the bottle above the flange. Where the tamper-proof ring is removed, there is an exposed area above the flange.

9. Therefore, it is my opinion that in all of the above-referenced pictures in which Bug Juice has white caps, the plaintiffs have replaced their blue caps with white caps.

10. This replacement of the caps makes much of the declarations by Plaintiff untrue.

For example:

of the parties' products that I took on March 9, 2010 at an Auto City store located at Grand River and 1696, Brighton, Michigan 48116 is displayed below:



36. Retail store clerks stock Defendant's Jungle Juice products above shelf talkers for BUG JUICE® products, mixed together with Plaintiffs' BUG JUICE® products, thereby creating a false association between Jungle Juice products and BUG JUICE® products as shown in the photograph below which I took on March 9, 2010 at an Auto City store located at Grand River and 1696, Brighton, Michigan 48116.



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.



16

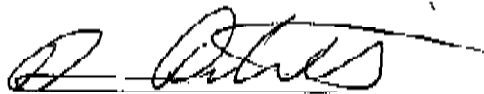
11. Paragraphs 36 and 37 of Mr. Norton's declaration refer to pictures that he took, and states that clerks stock the drinks together as shown in the photographs. This is not true because (1) the Bug Juice drinks have no tamper-proof rings on them; (2) one of the Bug Juice drinks has some liquid removed (third bottle from the left in the middle photograph; second bottle from the left in the lower photograph); (3) it is my understanding that it is against the law to sell drinks without tamper-proof rings.

12. It is evident that Bug Juice's blue caps have been replaced with white caps, as the white caps on the Bug Juice drinks have no tamper-proof ring, which indicates that the caps were removed from another drink.

VERIFICATION

STATE OF MICHIGAN)
) SS:
COUNTY OF KENT)

On this 3rd day of April, 2010, before me a notary public in and for said County and State, personally appeared Duane J. DeWitt who made oath that he has read the foregoing Affidavit, that he knows the contents thereof and those contents are true to his own knowledge, except as to those matters stated to be upon information and belief, and as to those matters he believes them to be true.


Duane J. DeWitt



OSCEOLA
Notary Public, Kent County, MI
My Commission Expires:

LADONNA McLACHLAN
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF OSCEOLA
My Commission Expires April 21, 2013
Acting in the County of OSCEOLA

STATE OF MICHIGAN)
) SS:
COUNTY OF OSCEOLA)

EXHIBIT 2

UNITED STATES DISTRICT COURT
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AFFIDAVIT OF LEA KO

1. I am employed by Robert J. Sayfie, P.C.
2. On 3 April 2010, I was in a convenience store called French Landing Liquor in Bellville, Michigan, where I took the 4 photographs below.



3.



4.



5.



6.

7. I do not know any employees that work there, and I did not arrange or rearrange the bottles, or ask anyone to rearrange the bottles in the photographs.

8. Aside from rotating the bottles so the labels were facing the camera, I did not touch or move the bottles or stage this arrangement.

VERIFICATION

STATE OF MICHIGAN)
) SS:
COUNTY OF KENT)

On this 5 day of April, 2010, before me a notary

public in and for said County and State, personally appeared Lea Ko who made
oath that she has read the foregoing Affidavit, that he knows the contents thereof
and those contents are true to his own knowledge, except as to those matters
stated to be upon information and belief, and as to those matters he believes
them to be true.

Lea Ko
Lea Ko

Amy Ziemer

Notary Public, Kent County, MI
My Commission Expires: 12/20/2013

STATE OF MICHIGAN)
) SS:
COUNTY OF Kent)

