

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**M3 GIRL DESIGNS, LLC**  
**a Texas Limited Liability Company**  
**Plaintiff,**

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vs.

**CIVIL ACTION NO. 3-09CV2390-F**

**BLUE BROWNIES, LLC**  
**And KRISTA DUDTE,**  
**Defendants.**

**DEFENDANTS’ FIRST AMENDED ORIGINAL ANSWER TO PLAINTIFF’S FIRST  
AMENDED COMPLAINT**

Defendants Blue Brownies, LLC (“Blue Brownies) and Krista Dudte and Robert Dudte (“Dudte”) (collectively “Defendants”) file this First Amended Original Answer to Plaintiff’s First Amended Complaint and would respectfully show the Court as follows:

**I.**

**ANSWER**

An Order Granting Defendants’ Motion to Dismiss Plaintiff’s State Law Claims Due to Federal Preemption [Dkt. No. 42] was entered on October 4, 2010. To the extent the allegations of Plaintiff’s First Amended Complaint seek recovery under the prior Texas state law claims, no response is required by the above-named Defendants. A Final Consent Judgment [Dkt. No. 35] was entered on Plaintiff’s Original Complaint [Dkt. No. 1] against Charlotte Liles on July 21, 2010. To the extent the allegations of the First Amended Complaint are directed or relate to Plaintiff’s suit against Charlotte Liles, no response is required of the above-named Defendants. Plaintiff’s settlement with Defendant Charlotte Liles resulted in a final judgment [Dkt. No. 35] finally determining all issues involving Defendant Charlotte Liles and resulting in res judicata, collateral estoppel and claim preclusion.

Where there has been a final judgment on the merits, res judicata, or claim preclusion, precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Subject to said rulings, Defendants answer Plaintiff's First Amended Complaint as follows, denying the allegations contained therein unless explicitly admitted herein.

***Plaintiff's Party Allegations***

1. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in Paragraph 1 of the First Amended Complaint, and therefore deny each and every such allegation.

2. Defendants admit the allegations contained in Paragraph 2 of the First Amended Complaint.

3. Defendants admit that Charlotte Liles lives in Arkansas and was dismissed from this action, but deny each and every other allegation contained in Paragraph 3 of the First Amended Complaint.

4. Defendants admit the allegations contained in Paragraph 4 of the First Amended Complaint.

5. Defendants admit the allegations contained in Paragraph 5 of the First Amended Complaint.

6. Defendants deny the allegations contained in Paragraph 6 of the First Amended Complaint.

***Plaintiff's Jurisdiction and Venue Allegations***

7. Defendants admit that Plaintiff has asserted claims purporting to arise under the Trademark laws of the United States and Texas common law. Defendants deny that Plaintiff has

stated any claim for which relief can be granted and deny all alleged violations of any law as set forth in Paragraph 7 of the First Amended Complaint.

8. Defendants deny all alleged violations of any law as set forth in Paragraph 8 of the First Amended Complaint.

9. Defendants admit that they are subject to personal jurisdiction in this Court, and are presently unaware of any facts indicating that this Court lacks subject jurisdiction over this Action. Defendants deny each and every remaining allegation contained in Paragraph 8 of the First Amended Complaint.

10. Defendants admit that venue is proper in the Northern District of Texas.

***Plaintiff's Factual Background Allegations***

11. Defendants admit that Plaintiff was founded and started by Diane Bradshaw. Defendants deny the remaining allegations in Paragraph 11 of the First Amended Complaint.

12. Defendants admit the allegations contained in Paragraph 12 of the First Amended Complaint.

13. Defendants admit the allegations contained in Paragraph 13 of the First Amended Complaint.

14. Defendants deny the allegations contained in Paragraph 14 of the First Amended Complaint.

15. Defendants are without knowledge or information sufficient to admit or deny the allegations in Paragraph 15 of the First Amended Complaint concerning the origin of Plaintiff's business, and, therefore, deny such allegations.

16. Defendants deny the allegations contained in Paragraph 16 of the First Amended Complaint.

17. Defendants admit the allegations contained in Paragraph 17 of the First Amended Complaint.

18. Defendants deny the allegations contained in Paragraph 18 of the First Amended Complaint.

19. Defendants deny the allegations contained in Paragraph 19 of the First Amended Complaint.

20. Defendants deny the allegations contained in Paragraph 20 of the First Amended Complaint.

21. Defendants admit that they produce magnetic boards for displaying Defendants' bottle cap jewelry, but deny the remaining allegation contained in Paragraph 21 of the First Amended Complaint.

22. Defendants deny the allegations contained in Paragraph 22 of the First Amended Complaint.

23. Defendants deny the allegations contained in Paragraph 23 of the First Amended Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of the First Amended Complaint.

25. Defendants are without knowledge or information sufficient to admit or deny the allegations in Paragraph 25 of the First Amended Complaint concerning the origin of Plaintiff's business, and, therefore, deny such allegations.

26. Defendants admit that they have sold bottle caps with designs including letters on tie dye backgrounds, letters on cheetah spot backgrounds, letters on dot backgrounds, a cross, a peace sign, a peace finger, ballerina shoes, a guitar, a soccer ball, a basketball, a volleyball, a

football, cupcakes, ice cream cones, butterflies, a horse and a flower and the words cheer, peace, gymnastics, BFF and drama queen. Defendants deny the remaining allegations contained in Paragraph 26 of the First Amended Complaint.

27. Defendants admit they received letters from Plaintiff dated February 13, 2009 and May 15, 2009. Defendants deny the remaining allegations contained in Paragraph 28 of the First Amended Complaint.

28. Defendants deny the allegations contained in Paragraph 28 of the First Amended Complaint.

29. Defendants deny the allegations contained in Paragraph 29 of the First Amended Complaint.

***Plaintiff's State Trade Dress Infringement Claim (Count I)***

30. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

31. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in Paragraph 31 of the First Amended Complaint and, therefore, deny each and every such allegation.

32. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in Paragraph 32 of the First Amended Complaint and, therefore, deny each and every such allegation.

33. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in Paragraph 33 of the First Amended Complaint and, therefore, deny each and every such allegation.

34. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in Paragraph 34 of the First Amended Complaint and, therefore, deny each and every such allegation.

35. Defendants deny the allegations contained in Paragraph 35 of the First Amended Complaint.

36. Defendants deny the allegations contained in Paragraph 36 of the First Amended Complaint.

37. Defendants deny the allegations contained in Paragraph 37 of the First Amended Complaint.

38. Defendants deny the allegations contained in Paragraph 38 of the First Amended Complaint.

39. Defendants deny the allegations contained in Paragraph 39 of the First Amended Complaint.

40. Defendants deny the allegations contained in Paragraph 40 of the First Amended Complaint.

41. Defendants deny the allegations contained in Paragraph 41 of the First Amended Complaint.

42. Defendants deny the allegations contained in Paragraph 42 of the First Amended Complaint.

43. Defendants deny the allegations contained in Paragraph 43 of the First Amended Complaint.

44. Defendants deny the allegations contained in Paragraph 44 of the First Amended Complaint.

*Plaintiff's State Dilution by Blurring Claim (Count II)*

45. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

46. Defendants deny the allegations contained in Paragraph 46 of the First Amended Complaint.

47. Defendants deny the allegations contained in Paragraph 47 of the First Amended Complaint.

48. Defendants deny the allegations contained in Paragraph 48 of the First Amended Complaint.

49. Defendants deny the allegations contained in Paragraph 49 of the First Amended Complaint.

50. Defendants deny the allegations contained in Paragraph 50 of the First Amended Complaint.

51. Defendants deny the allegations contained in Paragraph 51 of the First Amended Complaint.

52. Defendants deny the allegations contained in Paragraph 52 of the First Amended Complaint.

53. Defendants deny the allegations contained in Paragraph 53 of the First Amended Complaint.

54. Defendants deny the allegations contained in Paragraph 54 of the First Amended Complaint.

55. Defendants deny the allegations contained in Paragraph 55 of the First Amended Complaint.

56. Defendants deny the allegations contained in Paragraph 56 of the First Amended Complaint.

57. Defendants admit the allegations contained in Paragraph 57 of the First Amended Complaint.

58. Defendants deny the allegations contained in Paragraph 58 of the First Amended Complaint.

*Plaintiff State Dilution by Tarnishment Claim (Count III)*

59. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

60. Defendants deny the allegations contained in Paragraph 60 of the First Amended Complaint.

61. Defendants deny the allegations contained in Paragraph 61 of the First Amended Complaint.

62. Defendants deny the allegations contained in Paragraph 62 of the First Amended Complaint.

63. Defendants deny the allegations contained in Paragraph 63 of the First Amended Complaint.

64. Defendants deny the allegations contained in Paragraph 64 of the First Amended Complaint.

65. Defendants deny the allegations contained in Paragraph 65 of the First Amended Complaint.

66. Defendants deny the allegations contained in Paragraph 66 of the First Amended Complaint.



67. Defendants deny the allegations contained in Paragraph 67 of the First Amended Complaint.

68. Defendants deny the allegations contained in Paragraph 68 of the First Amended Complaint.

69. Defendants deny the allegations contained in Paragraph 69 of the First Amended Complaint.

70. Defendants deny the allegations contained in Paragraph 70 of the First Amended Complaint.

71. Defendants admit the allegations contained in Paragraph 71 of the First Amended Complaint.

72. Defendants deny the allegations contained in Paragraph 72 of the First Amended Complaint.

73. Defendants deny the allegations contained in Paragraph 72 of the First Amended Complaint.

***Plaintiff's State "Palming Off" Claim (Count IV)***

74. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

75. Defendants deny the allegations contained in Paragraph 75 of the First Amended Complaint.

76. Defendants deny the allegations contained in Paragraph 76 of the First Amended Complaint.

77. Defendants deny the allegations contained in Paragraph 77 of the First Amended Complaint.

78. Defendants deny the allegations contained in Paragraph 78 of the First Amended Complaint.

79. Defendants deny the allegations contained in Paragraph 79 of the First Amended Complaint.

80. Defendants deny the allegations contained in Paragraph 80 of the First Amended Complaint.

81. Defendants deny the allegations contained in Paragraph 81 of the First Amended Complaint.

82. Defendants deny the allegations contained in Paragraph 82 of the First Amended Complaint.

83. Defendants deny the allegations contained in Paragraph 83 of the First Amended Complaint.

84. Defendants deny the allegations contained in Paragraph 84 of the First Amended Complaint.

85. Defendants deny the allegations contained in Paragraph 85 of the First Amended Complaint.

86. Defendants deny the allegations contained in Paragraph 86 of the First Amended Complaint.

***Plaintiff's State Unfair Competition Claim (Count V)***

87. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

88. Defendants deny the allegations contained in Paragraph 88 of the First Amended Complaint.

89. Defendants deny the allegations contained in Paragraph 89 of the First Amended Complaint.

90. Defendants deny the allegations contained in Paragraph 90 of the First Amended Complaint.

91. Defendants deny the allegations contained in Paragraph 91 of the First Amended Complaint.

92. Defendants deny the allegations contained in Paragraph 92 of the First Amended Complaint.

93. Defendants deny the allegations contained in Paragraph 93 of the First Amended Complaint.

94. Defendants deny the allegations contained in Paragraph 94 of the First Amended Complaint.

95. Defendants deny the allegations contained in Paragraph 95 of the First Amended Complaint.

96. Defendants deny the allegations contained in Paragraph 96 of the First Amended Complaint.

97. Defendants deny the allegations contained in Paragraph 97 of the First Amended Complaint.

98. Defendants deny the allegations contained in Paragraph 98 of the First Amended Complaint.

99. Defendants deny the allegations contained in Paragraph 99 of the First Amended Complaint.

100. Defendants deny the allegations contained in Paragraph 100 of the First Amended Complaint.

101. Defendants deny the allegations contained in Paragraph 101 of the First Amended Complaint.

102. Defendants deny the allegations contained in Paragraph 102 of the First Amended Complaint.

103. Defendants deny the allegations contained in Paragraph 103 of the First Amended Complaint.

104. Defendants deny the allegations contained in Paragraph 104 of the First Amended Complaint.

***Plaintiff's Trademark Infringement 15 U.S.C. §1114 Claim (Count VI)***

105. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

106. Defendants admit the allegations contained in Paragraph 106 of the First Amended Complaint.

107. Defendants are without knowledge or information sufficient to admit or deny the allegations contained in Paragraph 107 of the First Amended Complaint and, therefore, deny each and every such allegation.

108. Defendants deny the allegations contained in Paragraph 108 of the First Amended Complaint.

109. Defendants deny the allegations contained in Paragraph 109 of the First Amended Complaint.

110. Defendants deny the allegations contained in Paragraph 110 of the First Amended Complaint.

111. Defendants deny the allegations contained in Paragraph 111 of the First Amended Complaint.

112. Defendants deny the allegations contained in Paragraph 112 of the First Amended Complaint.

113. Defendants deny the allegations contained in Paragraph 113 of the First Amended Complaint.

114. Defendants deny the allegations contained in Paragraph 114 of the First Amended Complaint.

115. Defendants deny the allegations contained in Paragraph 115 of the First Amended Complaint.

116. Defendants deny the allegations contained in Paragraph 116 of the First Amended Complaint.

117. Defendants deny the allegations contained in Paragraph 117 of the First Amended Complaint.

118. Defendants deny the allegations contained in Paragraph 118 of the First Amended Complaint.

119. Defendants deny the allegations contained in Paragraph 119 of the First Amended Complaint.

120. Defendants deny the allegations contained in Paragraph 120 of the First Amended Complaint.

***Plaintiff's False Designation/Description 15 U.S.C. §1125(a) Claim (Count VII)***

121. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

122. Defendants deny the allegations contained in Paragraph 122 of the First Amended Complaint.

123. Defendants deny the allegations contained in Paragraph 123 of the First Amended Complaint.

124. Defendants deny the allegations contained in Paragraph 124 of the First Amended Complaint.

125. Defendants deny the allegations contained in Paragraph 125 of the First Amended Complaint.

126. Defendants deny the allegations contained in Paragraph 126 of the First Amended Complaint.

127. Defendants deny the allegations contained in Paragraph 127 of the First Amended Complaint.

128. Defendants deny the allegations contained in Paragraph 128 of the First Amended Complaint.

129. Defendants deny the allegations contained in Paragraph 129 of the First Amended Complaint.

130. Defendants deny the allegations contained in Paragraph 130 of the First Amended Complaint.

131. Defendants deny the allegations contained in Paragraph 131 of the First Amended Complaint.

132. Defendants deny the allegations contained in Paragraph 132 of the First Amended Complaint.

133. Defendants deny the allegations contained in Paragraph 133 of the First Amended Complaint.

134. Defendants deny the allegations contained in Paragraph 134 of the First Amended Complaint.

*Plaintiff's False Designation/Description 15 U.S.C. §1125(a)  
(Trade Dress) Claim (Count VIII)*

135. Defendants incorporate by reference each and every one of the foregoing responses as though fully set forth at this point at length.

136. Defendants deny the allegations contained in Paragraph 136 of the First Amended Complaint.

137. Defendants deny the allegations contained in Paragraph 137 of the First Amended Complaint.

138. Defendants deny the allegations contained in Paragraph 138 of the First Amended Complaint.

139. Defendants deny the allegations contained in Paragraph 139 of the First Amended Complaint.

140. Defendants deny the allegations contained in Paragraph 140 of the First Amended Complaint.

141. Defendants deny the allegations contained in Paragraph 141 of the First Amended Complaint.

142. Defendants deny the allegations contained in Paragraph 142 of the First Amended Complaint.

143. Defendants deny the allegations contained in Paragraph 143 of the First Amended Complaint.

144. Defendants deny the allegations contained in Paragraph 144 of the First Amended Complaint.

145. Defendants deny the allegations contained in Paragraph 145 of the First Amended Complaint.

146. Defendants deny the allegations contained in Paragraph 146 of the First Amended Complaint.

147. Defendants deny the allegations contained in Paragraph 147 of the First Amended Complaint.

148. Defendants deny the allegations contained in Paragraph 148 of the First Amended Complaint.

149. Defendants deny the allegations contained in Paragraph 149 of the First Amended Complaint.

150. Defendants deny the allegations contained in Paragraph 150 of the First Amended Complaint.

151. Defendants deny that Plaintiff is entitled to any relief or judgment in its favor on any claims.

## II.

### **AFFIRMATIVE DEFENSES**

152. The First Amended Complaint, on one or more counts set forth therein, fails to state a claim upon which relief can be granted.



153. Plaintiff's claims are barred, in whole or in part, by doctrines of fair use, nominative fair use and/or descriptive use.

154. Plaintiff's claims are barred, in whole or in part, on the basis that the marks or trade dress at issue are not distinctive, do not have secondary meaning, are not capable of becoming distinctive or acquiring secondary meaning and are functional or descriptive.

155. Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, acquiescence, and/or estoppel.

156. Defendants have not infringed any valid trademarks, or a trade dress of Plaintiff under federal or state law.

157. Plaintiff's claims are barred, in whole or in part, because Plaintiff's damages, if any, were not caused by Defendants.

158. Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

159. Plaintiff's claims for injunctive relief are barred, because Plaintiff cannot show that it will suffer any irreparable harm from Defendants' actions.

160. Without admitting that Plaintiff states a valid claim, Plaintiff is not entitled to equitable relief because Plaintiff has an adequate remedy at law, as the alleged injury or damage suffered by Plaintiff, if any, would be adequately compensated by damages.

161. Plaintiff's claims are barred, in whole or in part, because of a failure to mitigate damages, if such damages exist.

162. Plaintiff's claims are barred, in whole or in part, because Defendants are not liable for the acts of others over whom it had no control.

163. Plaintiff's claims are barred , in whole or in part, because the complained-of statements by Defendants constitute mere puffing or opinion(s).

164. Plaintiff's claims are barred, in whole or in part, by the First Amendment to the Constitution of the United States.

165. Without admitting that the First Amended Complaint states a claim, any remedies are limited to the extent that there is sought an overlapping or duplicative recovery pursuant to the various claims against Defendants for any alleged single wrong.

166. Plaintiff's punitive or enhanced damage request is barred to the extent that it violates due process under the United States Constitution.

167. Plaintiff's claims are barred, in whole or in part, by applicable "competitor's privilege."

168. Plaintiff's trade dress claim is barred as Plaintiff has no enforceable trade dress as Plaintiff's alleged trade dress is not inherently distinctive and/or has not acquired secondary meaning.

169. Plaintiff's claims are barred, in whole or in part, as none of Defendants' complained-of acts have caused any likelihood of confusion of relevant consumers.

170. Plaintiff's claims are barred, in whole or in part, due to truthful statements by Defendants.

171. Plaintiff's claims are barred, in whole or in part, because any infringement (which Defendants do not concede), if any, was innocent.

172. Plaintiff's trade dress claims are barred because the cited trade dress is in the public domain or, if enforceable at all, is owned by another.

173. Defendant incorporates its Counterclaim asserted against Plaintiff below as if fully set forth herein.

174. Defendants reserve the right to assert additional defenses based on information learned or gained during discovery.

175. One or more of the alleged works are merely business ideas or concepts that may not be copyrighted or trademarked.

176. One or more of Plaintiff's alleged works is merely a derivative or plagiarized work of substantially similar works created by third-parties and any alleged "incremental originality" is *de minimis* and does not uniquely identify Plaintiff.

177. Upon information and belief, Plaintiff's designs and bottle cap magnets, and necklaces and stands were in the public domain. Plaintiff is not entitled to protection in any design elements that are in the public domain.

178. Plaintiff has no copyright or trademark or patent or other exclusive right in the idea of depicting certain types of images (such as animal prints, letters, tie-dye, polka dots, crosses, megaphones, peace signs, ballet shoes, musical instruments, soccer balls, basketballs, volley balls, footballs, cupcakes, ice cream cones, butterflies, animals, and flowers) and/or common phrases or clichés (such as "BFF," "Peace," "Cheer," "Drama Queen," and "Gymnastics") within a bottle-cap or anything else.

179. Plaintiff has no trademark, trade dress, copyright or patent or other exclusive right in the "interchangeable functionality" of its products.

180. Explicit, step-by-step instructions for making bottle-cap magnets with images affixed to the interior (inside) of a bottle-cap were published and widely available to the public, including school kids in Dallas, Texas and surrounding area, no later than 2005.

181. The concept of bottle-cap magnets and use as jewelry is not unique to Plaintiff, and predates the formation of Plaintiff's business.

182. The concept of interchangeable jewelry is not unique to Plaintiff, and predates the formation of Plaintiff's business.

183. Plaintiff's trademark infringement and false designation claims are unenforceable against Defendants inasmuch as they are based on a word or phrase that is merely descriptive and thus not protected under the Lanham Act.

184. Plaintiff's claims are barred, in whole or in part, by illegality.

185. Defendants are entitled to recover their attorneys' fees and costs incurred in defending against Plaintiff's claims pursuant to 17 U.S.C. § 505.

### III.

#### **DEFENDANTS' COUNTERCLAIM**

##### **Jurisdiction and Venue**

186. Jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1332, 1338 and 1367, and 15 U.S.C. §§ 1116 and 1121.

187. The suit is based on a Federal question and statute, namely 15 U.S.C. §§ 1051 *et seq.*

188. This Court has pendent jurisdiction over the state claims herein under the provisions of 28 U.S.C. § 1338(b) because these claims are joined with substantial and related claims under the trademark laws of the United States, 15 U.S.C. §§ 1051 *et seq.*, and the other federal claims described herein

189. The amount in controversy exceeds the sum or value of \$75,000.00.

190. Venue is proper in the Northern District of Texas pursuant to 28 U.S.C. § 1391(b).

191. Furthermore, a substantial portion of the events giving rise to the causes of action described herein have occurred in and/or are continuing to occur in Dallas, Texas, located in the Dallas Division of the Northern District of Texas.

**Background**

***Defendants***

194. In about September of 2008, Krista Dudte purchased 3 magnetic bottle caps and one choker necklace from ladies at her daughter's elementary school in Arkansas.

195. The name of their company was Click-A-Rooz. *See* <http://www.facebook.com/pages/Click-A-Rooz/56106161119>. It was run by Heather Steel Bakelekos and Shannon Johnson Walters of Little Rock, Arkansas.

196. After looking at the concept, Blue Brownies thought it was a fun idea and started thinking of ideas of what could be put inside the caps.

197. Blue Brownies shopped at Hobby Lobby and Michaels for charms & buttons that would fit inside the 1" round bottle cap. Blue Brownies ordered its first bottle caps on October 7, 2008.

198. Blue Brownies spent some time looking on Ebay to see who else was making the caps. While looking, Blue Brownies found a person who was making bottle caps that hung on a chain (not magnetic) and that sealed the inside of them with liquid resin or epoxy.

199. After some research, Blue Brownies found a suitable epoxy at Michaels and started experimenting with it. Blue Brownies made one hundred (100) or so caps and went to a local craft show to see how it would do.

200. The process for making its bottle cap jewelry includes several steps.

201. The process begins with an unembellished bottle cap as shown below.



202. The next step is to affix a magnet to the back of the bottle cap with some type of adhesive.



203. Designs and artwork are then added to the interior of the bottle cap.

204. A clear resin is applied to the artwork to protect it.

205. Small figures or synthetic jewels may be applied before or after the resin is applied.

206. Once magnetized and decorated, bottle cap jewelry can be attached to the magnetic metal element of a choker necklace.

207. The shiny metal element, shown below, is nothing more than a standard fender washer on an elastic band that snaps onto the magnetic component on the back of the bottle cap to releaseably hold the jewelry item in place on the wearer's body or neck.



208. The bottle cap elements can be interchanged among different choker necklaces or bracelets, depending on the size of the elastic bands, and other apparel items or mounts with magnetic metal elements as customers see fit.

209. The stretchable cord used for Plaintiff's necklaces is a standard craft supply item that long predates Plaintiff's copying of this staple article and is sold by companies like [www.artfire.com](http://www.artfire.com).

210. Plaintiff is not the first person to use a standard steel fender washer purchased from a hardware store as a necklace attachment, and necklaces with washers are also sold by [www.artfire.com](http://www.artfire.com).

211. From late October to early December of 2008, Blue Brownies worked on different designs which were sold at several craft stores and to a local store in Little Rock, Arkansas.

212. The web site and the official formation of Blue Brownies did not take place until January 2009. Krista Dudte and Charlotte Liles were the founding members. Robb Dudte has assisted in the technical aspects of manufacturing the Blue Brownies bottle caps.

213. In the beginning, Krista Dudte and Charlotte Liles were both involved in developing and making the designs or the inside portion of the caps.

214. The Blue Brownie's cap designs incorporated a piece of scrapbook paper cut into a 1" circle and decorations, such as a brad, raised letter, charm, button, or anything else that

would fit into the 1” circle. The scrap paper was glued to the inside of the bottle cap and then the epoxy was poured over it. The decorations were usually added.

215. Blue Brownies has experimented with glue, changed magnet sizes, started using printed inserts, and the designs have evolved, but the same basic method and design principles are used. Blank bottle caps and magnets are available from such companies as [www.bottlecapco.com](http://www.bottlecapco.com) and [www.outsidethemargins.com](http://www.outsidethemargins.com).

216. The majority of Blue Brownies’ designs were put together by either Krista Dudte or Charlotte Liles. There has been a phrase, or school logo that has been requested by a customer and Blue Brownies has made them at their request or suggestion.

217. The first time that Blue Brownies heard of M3 Girl Designs was December of 2008.

*Plaintiff*

218. Plaintiff represents to have begun selling bottle cap jewelry in July of 2006.

219. Diane Bradshaw registered the domain name [www.m3girldesigns.com](http://www.m3girldesigns.com) on January 21, 2007.

220. Plaintiff, M3 Girl Designs, LLC, was formed January 14, 2008 by Diane Wilson Bradshaw.

221. Plaintiff is managed and operated and controlled by Diane Bradshaw.

222. Plaintiff, M3 Girl Designs, LLC, is a Texas limited liability company with a principal place of business at 14456 Midway Road, Farmers Branch, Texas, 75244.

221. Plaintiff filed an application to register THE ORIGINAL INTERCHANGEABLE BOTTLE CAP NECKLACE for jewelry on October 10, 2008 claiming a date of use of July 15, 2008.



222. Plaintiff filed an application to register SNAP CAPS for jewelry on October 9, 2008 claiming a date of use of July 15, 2008.

223. Plaintiff advertises that “When 10 year old Maddie Bradshaw had a desire to decorate her locker with something creative, Snap Caps® bottle cap necklaces were born.”

224. Plaintiff also advertises that “With \$300 of her own money and a unique idea, Maddie’s SNAP CAPS® have turned M3 Girl Designs into a national brand, selling 50,000 necklaces per month in less than two year’s time.”

225. Plaintiff also advertises that “Sassy and vibrant, Margot Bradshaw was inspired by her sister’s ingenuity and started designing her own collections for the company at 6 years old. Her collections include tween favorites such as ‘The Jonas Brothers’ and the ‘Peace & Love’ series. Since opening the business in 2006, Margot has progressively become more involved in the organization, maintains good grades and is active in school sports and social activities.”

226. Plaintiff advertises that Ms. Madeline Bradshaw was the original inventor of bottle cap magnets and interchangeable bottle cap jewelry and initially started Plaintiff’s business in 2006 as part of a fourth-grade school project while attending The Hockaday School in Dallas, Texas.

227. Madeline Bradshaw, commonly called Maddie, who was born in about 1996, represents to have founded Plaintiff.

228. Plaintiff was actually founded by her mother, Diane Bradshaw.

229. Plaintiff copied the old idea of bottle cap magnets and jewelry in 2006.

230. The Plaintiff’s story is merely a marketing plan by Diane Bradshaw to front her teenage daughters as the inventors of bottle cap magnets and jewelry, which were well know craft items for decades before 2006, were not unique, and were already on sale in the market.

231. Plaintiff advertises that it is run by Madeline Bradshaw and her sister, Margot Bradshaw who was born in about 2001.

232. Plaintiff was actually founded by Madeline Bradshaw's mother, Diane Bradshaw.

233. Plaintiff is not managed and operated and controlled by teenagers and sisters Madeline E. Bradshaw and Margot Bradshaw.

234. Diane Bradshaw came up with the marketing plan of having her teenage daughters be the front persons and spokespersons for Plaintiff.

235. Maddie Bradshaw has not been running Plaintiff, a multi-million dollar a year company, while completing grade school and participating on the swim team at The Hockaday School in Dallas.

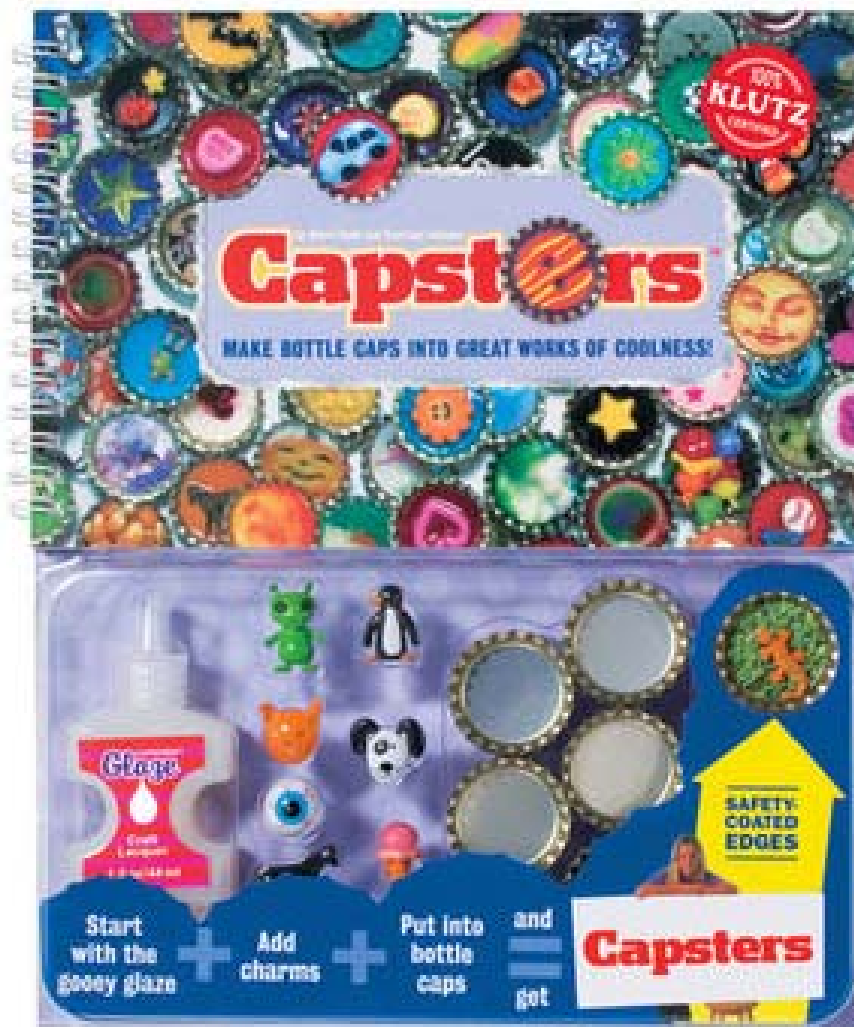
236. The bottle cap jewelry allegedly represented by Plaintiff was not invented by Plaintiff and is not a novel idea as required by the United States patent laws to be protectable and patentable.

237. Prior art consisting of both patents and non-patent literature demonstrates that the bottle cap magnets are not patentable subject matter.

238. Plaintiff has stated that it has pending patent applications on its jewelry.

239. Plaintiff has no pending patent applications on its jewelry.

240. Klutz, a large company dedicated to creating how-to books packaged with the tools of their trade, published a bottle cap magnet and jewelry making kit in 2005 called CAPSTERS which disclosed the old idea of decorating the inside of bottle caps and using them in jewelry and with magnets. A photo of the CAPSTERS bottle cap kit is shown below.



241. Plaintiff's nominal principal, Madeline Bradshaw, was about 9 years old when the CAPSTERS kit was published.

242. The CAPSTERS kit was marketed nationwide in 2005 by Klutz and were sold and marketed in Dallas, Texas in 2005 and 2006.

243. Additionally, several prior art patents deal specifically with magnetic changeable jewelry.

244. Schlinger et al.'s U.S. patent No. 5,806,346 issued September 15, 1998, and titled *Magnetic Pendant Necklace Set and Manufacture* discloses a pendant necklace which uses magnets to provide secure attachment between the necklace's pendant clasp and a removable and interchangeable pendant ornament.

245. Additionally, Crosley et al.'s U.S. patent No. 4,912,944, issued April 3, 1990 and titled *Magnetic Jewelry* invention, discloses a decorative item held by magnetic attraction to a base element for the purpose of interchangeability. Like Plaintiff's bottlecap jewelry, only the decorative portion in the Crosley invention contains a magnet allowing it to be affixed to a metal surface material.

246. The Schlinger patent discloses a magnetic pendant necklace with removable and interchangeable pendant ornaments. The Crosley patent discloses creating magnetic attraction by using only one magnet and a magnetic surface. Additionally, the Crosley patent discloses the desirability of interchangeable jewelry.

247. The 2005 *Capster* book also discloses making bottle cap art and using it for jewelry and attaching magnets to make it bottle cap magnets.

248. In view of this prior art, the Bradshaw sisters are not remotely the first creators or inventors of either bottle cap magnets jewelry or interchangeable magnetic jewelry.

249. Therefore, even if Plaintiff had submitted a patent application, the application would have been denied in light of the prior art since Plaintiff or the Bradshaws are not remotely the first inventor.

250. In any event, it is now too late for Plaintiff to receive any type of patent protection because it introduced its idea into the public domain over one year ago and cannot now file for patent protection.

251. Accordingly, neither federal patent law nor state unfair competition law can prevent Defendants' competition with Plaintiff through the sale of similar competing products.

252. The idea of magnetic jewelry has been in public domain since before the 1990s so it is not available for patent protection.

253. Plaintiff has represented that Defendant copied its copyrighted jewelry designs.

254. Plaintiff obtained three United States federal copyright registrations and have represented that they cover the interchangeable bottle cap necklaces, their unique artwork, and a magnetic "keeper" board, which include United States Copyright Registration Nos. VA 1-665-063, VA 1-684-413, and VA 1-665-059.

255. Plaintiff represents it has been assigned all rights to the above-identified Copyright Registrations.

256. Plaintiff has also represented that apart from the uniqueness of producing jewelry on the interior (inside) of the bottle cap and allowing for those jewelry designs to be interchanged with other jewelry designs, Plaintiff produces unique artwork that is covered by one or more of the above-identified U.S. Copyright Registrations, including (but not limited to): "Letters on Tye Dye," "Letters on Cheetah Spots," "Letters on Blue Polka Dots" "Crosses (7 versions)," "Cheer," "Peace Sign," "Peace," "Peace Fingers," "Ballerina Shoes," "Guitar," "I Love Gymnastics," "Soccer Ball," "Basketball," "Volleyball," "Football," "BFF (best friends forever)," "Cupcakes (3 versions)," "Ice Cream Cone," "Butterfly (4 versions)," "Horses," "Drama Queen," "Flowers (4 versions).

257. Plaintiff also represents it produces three versions of unique "keeper" magnetic boards that hold the bottlecap jewelry designs having a magnetic backing.

258. Plaintiff has represented that the Defendants have purposefully, willfully and with bad faith intent copied the jewelry designs created by the Plaintiff, including using the unique concept of selling jewelry designs on the interior (inside) of the bottle cap.

259. Plaintiff has also represented that the Defendants have purposefully, willfully and with bad faith intent copied the jewelry design created by the Plaintiff, including using the unique concept of selling jewelry designs on the interior (inside) of the bottle cap and allowing for those jewelry designs to be interchanged with other jewelry designs.

260. Plaintiff has also represented that the Defendants have purposefully, willfully and with bad faith intent copied the jewelry design created by the Plaintiff, including selling jewelry designs on the interior (inside) of the bottle cap that has the following designs (but not limited to): “Letters on Tye Dye,” “Letters on Cheetah Spots” “Letters on Blue Polka Dots” “Crosses (4 versions),” “Cheer,” “Peace Sign,” “Peace,” “Peace Fingers,” “Ballerina Shoes,” “Guitar,” “Gymnastics,” “Soccer Ball,” “Basketball,” “Volleyball,” “Football,” “BFF (best friends forever),” “Cupcakes (3 versions),” “Ice Cream Cone (3 versions),” “Butterfly (2 versions),” “Horses (2 versions),” “Drama Queen,” “Flowers (4 versions).”

261. Plaintiff has also represented that the Defendant also produces four versions of unique “keeper” magnetic boards that hold the bottlecap jewelry designs having a magnetic backing.

262. Plaintiff knew that Defendants did not copy any copyrighted jewelry designs or other protectable and proprietary products and that its allegations were false.

263. Plaintiff has misled the public to believe that it is managed and operated and all of the designs in its bottle caps are by teenagers Madeline E. Bradshaw and Margot Bradshaw.

264. Plaintiff’s designs in its bottle caps are in large part plagiarized from clip art.

265. Over one hundred (100) of the “original” designs of Plaintiff are taken from clip art such as contained in Microsoft clip art.

266. Plaintiff brought an untenable copyright lawsuit, including state law claims equivalent to the U.S. copyright claims, against Defendants.

267. Plaintiff caused Defendants tens of thousands of dollars in attorney fees in defending against the untenable copyright and equivalent state law claims.

268. The Court dismissed the equivalent state law claims because they were preempted by Federal laws.

269. After Plaintiff received discovery requests from Defendants and causing Defendants tens of thousands of dollars in attorney fees regarding the untenable copyright claims, Plaintiff amended its claims by dropping its copyrighted claims.

270. Plaintiff’s bottle cap necklaces are not the original interchangeable bottle cap necklace.

**COUNT I: VIOLATION OF LANHAM ACT SECTION 43(a) (False Advertising)**

271. Defendants repeat and hereby reallege the above factual allegations, as if fully set forth herein.

272. One or more of Plaintiff’s advertisements and representations to the public are literally and/or impliedly false, and misleading and in direct violation of Section 43(a) of the Lanham Act which provides in relevant part that “[a]ny person who, in connection with any goods or services . . . uses in commerce any . . . false or misleading description of fact or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another

person's goods, services, or commercial activities, shall be liable to a civil action by any person who believes that he or she is likely to be damaged by such act."

273. Pursuant to 15 U.S.C. § 1117, Defendant is entitled to damages for Plaintiff's Lanham Act violations, an accounting of profits made by Plaintiff, as well as, recovery of costs and reasonable attorneys' fees incurred in this action.

274. Plaintiff's acts are willful, wanton, and calculated to deceive, and are undertaken in bad faith, making this an exceptional case entitling Defendant to recover additional damages and its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117.

275. Unless enjoined by this Court, Plaintiff's acts will irreparably injure Defendants.

276. Pursuant to 15 U.S.C. § 1116, Defendants are entitled to preliminary and permanent injunctive relief to Plaintiff's continuing acts.

**COUNT II: Copyright Infringement – Attorney Fees**

277. Defendants repeat and hereby reallege the above factual allegations, as if fully set forth herein.

278. Defendants are the prevailing party on Defendants untenable copyright claims.

279. Under 17 USC § 505, the court may award a reasonable attorney's fee to the prevailing party which includes a defendant.

280. The courts in Texas typically award attorney fees to the prevailing plaintiff or defendant in a copyright suit.

281. There was bad faith on the Plaintiff's part in prosecuting the action.

282. There was no substantial similarities in the designs of Plaintiff and Defendants.

283. Plaintiffs claimed copyrights in designs it copied from others like Microsoft and other clip art companies.



284. An example of the bad faith is found in Plaintiff's copyright registrations which do not adequately identify what is registered.

285. There was no colorable basis for a claim of infringement.

286. There was a good faith attempt by the Defendants to avoid infringement.

287. Plaintiff knew or should have known that its copyright claims were untenable.

288. Defendants request that the Court award Defendants attorney fees and costs as the prevailing party on the copyright claim.

### **COUNT III: State Unfair Competition**

289. Defendants repeat and hereby reallege the above factual allegations, as if fully set forth herein.

290. Texas unfair competition is an umbrella for all statutory and non-statutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.

291. The Defendants have gained an unfair advantage in the marketplace by their acts of unfair competition.

292. The Defendants have profited from their acts of unfair competition.

293. The Defendants acts of unfair competition were perpetrated to cause actual or likely deception of consumers in the market.

294. In undertaking the conduct complained of in this action, Plaintiff continues to willfully, knowingly and intentionally violate Texas state unfair competition laws.

295. The Defendants have been damaged by the Plaintiff's actions, and the Defendants are entitled to compensatory and enhanced damages (as well as attorney fees and costs) resulting

from the Plaintiff's knowing, willful, and intentional violation of Texas state unfair competition laws.

296. The Plaintiff's actions in committing unfair competition have damaged, and will continue to damage, the Defendants' business.

297. The Plaintiff's acts have caused and will continue to cause injury to Defendants for which Defendants are entitled to relief that includes damages, enhanced damages and attorney fees, which should be awarded to the Plaintiff.

298. The Plaintiff's actions have caused and will continue to cause immediate and irreparable injury to Defendants for which Defendants are entitled to injunctive relief.

299. The Defendants are entitled a preliminary and permanent injunction against any further violations Texas state unfair competition laws committed by Plaintiff, or anyone acting in concert with Plaintiff.

#### **JURY DEMAND**

300. Defendant hereby demands a trial by jury.

#### **IV.**

#### **PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the parties pray for judgment that:

- A. Plaintiff take nothing by its claims against Defendants;
- B. Pursuant to 15 U.S.C. § 1116, Plaintiff, its officers, agents, employees, servants, attorneys, successors, and assigns, and all others in privity or acting in concert or active participation with them, be preliminarily and permanently enjoined from:
  1. Directly or indirectly falsely advertising or making false statements in connection with Plaintiff's goods and services or engaging in unfair competition;

2. Inducing others to directly or indirectly falsely advertise or from making false statements in connection with Plaintiff's goods and services or engaging in unfair competition;
3. Making or inducing others to make any false, misleading or deceptive statement of fact, or representation of fact in connection with the promotion, advertisement, display, sale, offering for sale, manufacture, production, circulation or distribution of Plaintiff's goods and services or that Plaintiff's goods or services have some quality or feature which they do not have;

C. Plaintiff be adjudged to have falsely advertised or made false statements in connection with Plaintiff's goods and services and have engaged in unfair competition and be required to pay Defendants:

1. Their actual damages and any profits of Plaintiff resulting from said falsely advertising or making false statements in connection with Plaintiff's goods and services, pursuant to 15 U.S.C. § 1117(a) or alternatively, statutory damages in an amount to be determined by this Court, pursuant to 15 U.S.C. §1117(c);
2. Three times the actual damages of Defendant resulting from said false designation of origin, pursuant to 15 U.S.C. § 1117(a) and (b);
3. Compensatory and enhanced damages;

D. Plaintiff be ordered to take corrective action to correct any erroneous impression the public may have derived concerning the false advertising or making false statements in connection with Plaintiff's goods and services, including without limitation the placement of corrective advertising;

E. Defendants be awarded their attorneys' fees, costs, and pre-and post-judgment interest; and

F. Defendants be awarded such other relief as the Court deems just and equitable.

Respectfully submitted,

Charles W. Hanor  
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/charles w hanor/

By \_\_\_\_\_

Charles W. Hanor  
Texas Bar No. 08928800

ATTORNEYS FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

Per Fed.R.Civ.P. 5(b), I certify that on the 14th day of March, 2011, I electronically filed per Local Rule 5.1(d) of the Northern District of Texas the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following:

D. Scott Hemingway  
Eugenia S. Hansen  
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1717 Main Street, Suite 2500  
Dallas, TX 75201  
Counsel for Plaintiff

/charles w hanor/

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**Charles W. Hanor**