

Exhibit 1

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

M3 GIRL DESIGNS, LLC

Plaintiff,

v.

BLUE BROWNIES, LLC

KRISTA DUDTE, and

ROBERT DUDTE

Defendants.

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CIVIL ACTION NO. 3-09CV2390-F

EXPERT REPORT OF SHERRI HAAB

My name is Sherri Haab, and I have been asked by counsel for Defendants, Blue Brownies, LLC, Krista Dudte, and Robert Dudte, to testify on several issues in this case based on my expertise in the craft industry, craft innovation, and craft and jewelry making and design, and my understanding of the facts in this case, as they relate to bottle cap magnets, bottle cap necklaces, and bottle cap jewelry. I reserve the right to supplement my report if and when additional information is disclosed to me.

I. BACKGROUND AND QUALIFICATIONS

I have been working as a craft book author, teacher, designer and product developer for over 20 years. My work has been published and broadcast through books and media including: Random House, Klutz, American Girl, Disney, Martha Stewart Radio, Home and Garden Network, DIY network and others.

My educational background is based in art. I studied illustration and design at Brigham Young University, Provo, UT and also studied privately at numerous conferences and art workshops during my early career. I studied the history of illustration, business, painting, ceramics, 2D and 3D art, as well as digital art.

I have written and published 26 books to date, with several titles selling over a million copies each. Award winning titles include: *The Incredible Clay Book* (Klutz), *The Art of Metal Clay*, *Metal Clay and Mixed Media Jewelry*, *The Art of Resin Jewelry*, *Beaded Macramé Jewelry* and *Designer Style Jewelry* (Watson Guptill). During the first 10 years of my career I wrote craft books exclusively for children, mostly for girls in the "tween" market. Later I started writing jewelry books and then books on other craft topics. My books are sold in all major book and craft stores worldwide. The books I have written have a reputation for being thorough, covering subjects in great detail making them staples in craft libraries.

Publishing honoraria's include *Craftrend's* 2006 & 2007 Best General Craft Book Award, *Publisher's Weekly* Cuffie Award, and *Oppenheim's* Toy Portfolio Gold Award. I was named as one of *Utah Valley Magazine's* 50 most fabulous people in 2008.

I have appeared in instructional DVD's on metal clay and resin (CCP videos) and appeared on television shows including: *The Carol Duvall Show* (HGTV), *Jewelry Making* (DIY), *Good Things Utah* (KTVX-ABC), *Studio 5* (KSL-NBC) and *Beads, Baubles and Jewels* (PBS) and *Jewelry TV* (JTV) to name a few.

I am well acquainted with the craft industry and have relationships with many personalities including authors, TV personalities and craft companies. I have consulted for many companies to test and market new products. I am known in the craft community as a pioneer in the fields of metal clay, resin and mixed media arts.

I teach jewelry making and have been doing so for the past 15 years; teaching at bead shows, conferences and art workshop, including jewelry making workshops internationally. I also lecture at conferences and art retreats.

Currently I am the owner and founder of Sherri Haab Designs LLC. Our company manufactures, distributes and retails our own line of craft products including exclusive materials we develop. I have developed and trademarked a craft product that transfers images onto metal, ITS®. With the help of my husband who is an electrical engineer, we have developed electronic devices for etching and electroplating metal. Our company designs tools and kits for the jewelry craft market, currently working on a line for major craft stores. We have four employees and I oversee day to day operations as well as develop new products and educational materials for our business.

On the subject of bottle caps and bottle cap jewelry, I have a long history and extensive experience crafting and teaching with bottle caps. I am the author of the book *Capsters* Exhibit C, which is a bestselling book dedicated entirely to the subject. The book contains the materials needed for making bottle cap crafts including instructions and ready to use art for decorating the inside surface of the caps. For the development of the book, I developed techniques, hired consultants to create projects and sourced kid friendly materials that all became part of the book. I also feature bottle cap projects in two other books, *Designer Style Jewelry* and *Clay So Cute*, which feature necklaces made using bottle caps. I have and still use bottle caps to teach classes on how to transfer images onto metal as well as filling bottle caps with images and resin just to name a few.

More details regarding my background, qualifications, and publications are provided in my resume attached as Exhibit A.

II. PREVIOUS EXPERT TESTIMONY

I have never previously testified as an expert at trial or by deposition.

III. COMPENSATION

For my time in this case, I am being compensated at a rate of \$125 per hour. I do not have a personal stake in this case and my compensation does not depend in any way on the outcome of this case. My opinions and the reasons for them are strictly based on my own personal, unbiased, objective judgments.

IV. FACTS AND DATA CONSIDERED

In forming my opinions, I considered facts and data from the materials referenced in this report as well as other materials listed in attached **Exhibit B**.

V. HISTORY AND PERSONAL KNOWLEDGE OF BOTTLE CAP JEWELRY

The first time I saw a jewelry item made from a bottle cap was sometime between 1995 and 1997 when I visited an art gallery while on a business trip. It was a bottle cap pin with a design featured inside the cap. The inside surface was covered with velvet fabric and rhinestones lined the inner rim. It had a little metal figure inside but was not filled with resin. My immediate thought was "Oh my gosh, they used a bottle cap for a jewelry bezel!" Because I made jewelry, anything that could be used for jewelry parts was intriguing to me. I never forgot that pin.

A few years later bottle caps hit the fashion circuit with bottle caps being used on belts, clothing and other accessories. Even purses were being fashioned out of bottle caps. Bottle caps were found in shopping malls at popular chain stores that cater to teens. My own daughter even had a belt with bottle caps riveted along it. In 1998 my friend Courtney Johnson, a school teacher, mentioned how popular bottle caps were with students. She saw them on kids in the halls at school and they were everywhere. I remembered the pin I had seen previously and relayed that idea to her. She suggested that we co-author a book to propose to Klutz, a publisher of craft books for kids, on the idea.

On April 15, 1999 we sent a formal book proposal **Exhibit J** to Klutz complete with finished examples of projects we made with bottle caps. The book was eventually published and titled *Capsters* **Exhibit C**. It took several years to convince the publisher to accept our proposal. In the meantime bottle caps were popping up everywhere including the scrapbooking industry. I saw the technique of art images being placed on the inside of the caps as a design element to be used for scrapbooks and magnets.

On April 25, 2003 I sent a book proposal to Watson Guptill Publications for a jewelry book idea, eventually published and titled *Designer Style Jewelry* **Exhibit D**. This book contained projects for bottle cap jewelry designs including necklaces and pins. The bottle caps used for the jewelry in this book were filled with paper images, glitter and rhinestones and then filled with clear epoxy resin.

During the year of 2003 when I was working on both of my books containing bottle cap projects, I had a discussion about bottle cap jewelry designs with a fellow craft author friend of mine Kathy Cano-Murillo aka "Crafty Chica" **Exhibit E**. She told me of a hurtful incident where someone told her she could not make bottle cap crafts because the idea was "owned" by them. Cathy had been making bottle caps filled with her own original "day of the dead" signature style bottle caps filled with images, glitter and resin at that time.

Another craft author, Laura Torres, published a craft book for tweens titled *Best Friends Forever* published by Workman in 2004 **Exhibit F**. This book includes a project for bottle cap magnets with images and glitter featured inside the cap.

The *Capsters* **Exhibit C** book proposal was finally accepted and in June of 2003, Courtney, my co-author and I began to write and complete the projects for the book. The book included everything from game pieces to jewelry. The images included in the book to be used as art

inside the bottle caps were created and selected by myself and Kevin Plottner, a contracted graphic designer working for Klutz. It should be noted here that the style of illustration was very unique to the bottle cap book. The illustrations were kid friendly with bright colors and the comic book style Klutz is known for. The book was published in 2005 and although I don't know the exact sales figures, most of my books that were published by Klutz sold 100s of thousands of copies in the US and abroad. Some of my books sold over a million and sometimes over two million copies. I was told by John Cassidy, the president of Klutz at the time, that the book was doing extremely well. Klutz has since done a spin off book titled *Mini Capsters*, which indicated to me that the first book sold well.

Shortly after the publication of this book I personally witnessed a huge surge in the popularity of bottle caps. People found bottle caps to be attractive because they were an ordinary found object that could be used for a bezel for jewelry, key chains and more. I have no doubt the book contributed to the knowledge of how to make bottle cap jewelry and inspired designs as witnessed in the surge of tween jewelry that was appearing in the market that was strikingly similar to the designs found in the book *Capsters* **Exhibit C**. Craft competitors that often published craft kits inspired by Klutz Books such as Alex® and Creativity for Kids® **Exhibit G** later released kits that looked very similar to the *Capsters* book.

In 2009 my clay craft book titled *Clay So Cute* **Exhibit H** was published by Watson Guptill publications. This book contained lots of tween craft projects made out of polymer clay. One of the projects was of bottle caps filled with clay designs and pictured as choker necklaces.

Since the publication of the books, I have taught many classes around the world on jewelry making. I use bottle caps in projects where the students use the cap as a bezel and fill it with

images and resin. I have taught and continue to teach techniques on how to transfer color laser images to the back of the bottle caps as well.

VI. MARKETS FOR BOTTLE CAP JEWELRY

The market for jewelry makers falls into four main categories, determined by where the jewelry is sold, the targeted customer, and the price: fine jewelry, costume jewelry, art jewelry, and craft jewelry. There are subcategories within each category, usually determined by function, material, or technique. For example, "bracelets" (function) is a subcategory of fine jewelry, and "diamond bracelets" (material), is a subcategory of fine jewelry bracelets. "Bracelets" would also be a subcategory of craft jewelry, with "macramé bracelets" (technique) as a subcategory of craft jewelry bracelets.

The following is a brief description of each category:

1. Fine Jewelry- Jewelry made of gold, silver, diamonds and precious stones. This jewelry is expensive because of the raw materials, and is often manufactured using industrial machines, tools and equipment. It is sold at fine jewelry stores and department stores.
2. Costume Jewelry- Jewelry made with plated metals, faux stones, plastic, and glass. This mass-produced, machine-manufactured, non-precious jewelry is more affordable than fine jewelry. Jewelry of this type is sold commonly in department and other retail stores.
3. Art Jewelry- Art jewelry is made of any material, precious or not. It consists of one- of-a-kind pieces or lines made by artists. Art jewelry is typically found in art or craft galleries, or sold at juried shows.
4. Craft Jewelry- Craft jewelry is often made from items that are found from the craft store such as beads and jewelry findings, along with found objects and handmade elements. This kind of jewelry is less expensive than art jewelry and less original. The jewelry is

based on techniques that are common to the craft community. This type of jewelry is typically sold at craft fairs and on websites like etsy.com.

Jewelry design categories sometimes overlap, and designs may originate in one category and then be adopted, or evolve into, another category. For example, the popularity of an art jewelry design may prompt excitement in the craft community causing the design to be adopted as a craft technique. Another example would be a piece of fine jewelry reproduced with a substitute or cheaper material, and then sold as costume jewelry.

In regard to the market for selling "bottle cap necklaces," in my opinion, this type of jewelry would appeal to a demographic of mostly girls ages 8-15, or the "tween" group. The necklaces would also be purchased by adults as gifts for tween girls. It is also my opinion that bottle cap necklaces would fit under the craft jewelry category to be sold on sites like etsy.com, as well as in retail stores to be sold as costume-type jewelry. Retail stores include any type, from museum gift shops, specialty stores or large chains like Target. The Plaintiff's jewelry is sold in specialty stores like Learning Express. Kmart is selling a similar product made by Bottle Cap Co **Exhibit I**. Whether the store is specialty or a large retail chain the market is the same target consumer. The *Capsters* book **Exhibit C**, was targeted for the same demographics and was sold in some of the same stores as the Plaintiff's bottle cap necklaces including Learning Express.

VII. PRODUCT CLASSIFICATION FOR BOTTLE CAP NECKLACES

I have been asked to give my opinion on the proper way to classify bottle cap necklaces of this type as a product. In forming my opinion, I was asked to consider the extent to which the overall design of Plaintiff's bottle cap necklaces are distinctive or instead reflect an idea, concept, or a generalized type of appearance. I was also asked to consider whether the overall design suggests

a particular genus or class of product, rather than individualized characteristics of a particular product.

Within both the art jewelry and craft jewelry categories that are referred to above in describing the market for bottle cap jewelry, there are many designs made of found objects, often referred to as "found object jewelry" "up-cycled jewelry" or "recycled jewelry". This type of jewelry is made of everyday objects and often consists of recycled items. Popular themes for jewelry of this type include jewelry made from old dominoes, game pieces, recycled soda cans, typewriter keys, old watch parts, hardware store parts, bottle caps, etc. Designs of this type are referred to by material since that is the focus of the piece. Jewelry made of bottle caps is simply referred to as "bottle cap jewelry".

It is my opinion that "bottle cap jewelry" fits under the categories of craft or costume jewelry since it had been adopted by the craft community in the early 2000s. Bottle cap jewelry started in fine art galleries, moved to costume jewelry market in the late 1990's and then finally to the craft market.

I would classify the plaintiff's jewelry as "bottle cap jewelry" or more specifically, "bottle cap necklaces" since this is a common idea based on using bottle caps in the design. It is also my opinion that bottle cap jewelry is recognized by techniques and materials commonly known to and used in the craft community.

VIII. METHOD AND MATERIALS FOR MAKING BOTTLE CAP NECKLACES

I have been asked to give my opinions on the Plaintiff's method and materials used for making bottle cap necklaces of the type in this case. In forming my opinions, I was asked to consider the extent to which Plaintiff's method and materials are proprietary and unique in comparison to known, common, and/or generic techniques and materials used by craft and jewelry makers.

A. Method for Making Bottle Cap Necklaces

Based on Diane Bradshaw's fax and process notes dated Jan 27, 2008 and the Plaintiff's patent application, the Plaintiff's method for making bottle cap necklaces is essentially as follows:

Steps for bottle cap summarized from notes:

1. Amazing goop adhesive is used to attach a magnet to the back of a bottle cap
2. Print out image on glossy printer paper (image can be hand drawn, photograph, picture from a magazine or prepared from clip art)
3. Punch out paper image with 1.25 inch round hole punch
4. Attach the image to the inside of the bottle cap using adhesive
5. Push the edges of the paper down around the inside edge of the bottle cap
6. Coat the paper surface with ModPodge
7. Optional-sprinkle with glitter
8. Use glue to attach rhinestones to the image
9. Spray the image with a layer of Plaid Clearcote Extra Thick Glaze

Steps for necklace cord, summarized from notes:

1. Cut one leg of a black opaque non-control top tight into 1 inch sections
2. Loop the 1 inch tight section around a 5/16 inch zinc washer
3. Attach the finished bottle cap product to the zinc washer

It is my opinion that this method for making a bottle cap necklace consists of known, common, and generic techniques used by craft and jewelry makers. I base this opinion on the following reasons.

The method that the Plaintiff uses to create bottle cap jewelry utilizes common techniques and materials that are well known to jewelry crafters. I describe methods for making bottle cap

jewelry in three of my project books: *Designer Style Jewelry* Exhibit D, *Capsters* Exhibit C and *Clay So Cute 2009* Exhibit H that are similar to those described by the Plaintiff. A bottle cap magnet project featured in the book, *Best Friends Forever*, 2004 by Laura Torres Exhibit F employs methods with the same idea. There are also many posts online featuring instructions for bottle cap jewelry designs that look similar to the projects from these books and to the Plaintiff's jewelry, such as this web post on craftster.org dated Nov. 22 2003 Exhibit S. I have personal knowledge of well-known craft personality Kathy Cano-Murillo aka "Crafty Chica," who was making bottle cap jewelry with a similar construction to the Plaintiff's design dating back to 2003 Exhibit E. Bottle cap projects were presented on TV shows like the "Carol Duvall Show" HGTV (Home Garden Network) which aired repeated episodes for many years (1994-2005). Exhibit K.

The book projects, web sites, and television shows mentioned as exhibits above share common techniques used to make jewelry featuring art in bottle caps. The idea of setting images in bottle caps and the steps associated with creating that look has been adopted over many years as a generic idea.

Although there are slight variations, they all rely on common techniques. For example, in my book, *Clay So Cute* Exhibit H, the bottle caps used to make the necklaces are filled with polymer clay instead of paper images. The similarity in this project to the Plaintiff's design is that it uses a short necklace (choker).

The generic steps are:

1. Attach a magnet to the back of the cap (if magnet is included in the design)
2. Print image (laser) on photo grade paper
3. Cut or punch the image to fit inside the bottle cap

4. Glue the image to the inside the cap
5. Coat the image with water-based sealer such as Mod Podge. (This protects the laser image; resin or finish poured directly over the image acts as a solvent, causing the ink to bleed or run.)
6. Fill the cap with glossy finish (preferably epoxy resin)
7. Attach jewelry findings (which are jewelry making parts) which are needed to attach to a necklace cord or other jewelry accessory.
8. Use fabric or cord cut to fit the desired length. Fasten or loop to the bottle cap for wearing.

If you compare the Plaintiff's method for creating bottle caps with the projects from the books (**Exhibit C and Exhibit D**) or from *Best Friends Forever* **Exhibit F**, the steps are similar, although the materials vary. For example, child safe materials were used in the *Capsters* book **Exhibit C**. I used tape to seal the image and then a non-toxic, water-based glaze was used to coat the image in the center of the bottle cap (looks like resin). This glaze is similar to water-based gloss sealers sold in craft stores. In *Clay So Cute* **Exhibit H** the caps are filled with polymer clay instead of paper images.

The bottle cap project in the book *Designer Style Jewelry* **Exhibit D** features the same water-based sealer (Mod Podge) that is mentioned in the Plaintiff's description for making bottle caps with paper images. Mod Podge is used to seal the images prior to adding a thick clear finish of epoxy resin. Most craftspeople prefer self-leveling epoxy resin for durable bottle cap jewelry. The Plaintiff describes using acrylic spray for a final finish coat, whereas I used epoxy resin in *Designer Style Jewelry* **Exhibit D** as a final finish. After examining the Plaintiff's samples, it

appears that epoxy resin was used as a finish instead of the spray that is written in the steps. Epoxy resin cures with a hard glass-like finish, which is more durable than a spray.

The fabric nylon cord the Plaintiff uses to create the necklace part of the bottle cap necklace is looped through the washer using a common larks head knot. This attachment can be seen in the necklace project in the book *Capsters* **Exhibit C** and in *Clay so Cute* **Exhibit H**. This attachment is a simple well known knot commonly used in jewelry designs that use cord or fiber. Even though certain steps, the type of sealer and finish used, and/or assembly may vary, the end results are visually similar. Someone who is familiar with crafts, like me, must examine competing products carefully to detect differences in method and/or materials. The arbitrary or decorative elements must have something very distinct, since the materials used to assemble the bottle caps do not make a visual impact.

An example of a site that uses the same common method and materials in a web tutorial is found on alphastamps.com. This is just one of many online sites describing how to make a bottle cap design with an image featured in the cap with a clear finish over the image. **Exhibit M**.

Materials for Making Bottle Cap Necklaces

Based on the materials I considered, Plaintiff's materials for making bottle cap necklaces are as follows as noted in Diane Bradshaw's fax process notes dated Jan 27, 2008 and Plaintiff's patent application:

1. Amazing Goop adhesive
2. ½ inch 13mm inch Bottle Cap
3. ProMag magnet
4. HP paper (image can be hand drawn, photograph, picture from a magazine or prepared from clip art)

5. Super Glue or Elmers Stix All
6. Mod Podge sealer
7. Glitter and rhinestones
8. Plaid Folk Art ClearCote Extra Thick Glaze
9. Opaque Black non-control top tights
10. 5/16 inch zinc washer

As documented in the books, *Capsters Exhibit C*, *Designer Style Jewelry Exhibit D* and *Best Friends Forever Exhibit F*, the most common method for a bottle cap necklace is to fill the inside of the cap with an image, cover it with clear resin and suspend the cap from a jewelry finding such as a neck cord. There are slight variations in materials used, but most of the craft community has come to a consensus on the process, as well as favored materials to produce a good result. Items such as the bottle cap cannot be substituted, or the final product would cease to be a bottle cap necklace.

The following is a list of the most common materials that are necessary for making bottle cap necklaces, whether it be a home crafter or a commercial producer:

1. Bottle caps

New caps have a sloped rim and are preferable to used caps because they can be bought in bulk and are easier to come by than used caps. Used caps also have a rim that is perpendicular to the base (this happens after the cap has been machined down over a bottle). Caps without a gasket are used so that design will sit flat on the inside of the cap. Caps are also void of printing from the maker's "brand" (however, sometimes a brand print is desired for design). No other material could be substituted here for a "bottle cap necklace."

2. Photo quality image printed on paper

The image featured in a bottle cap is printed on paper using original art, copyright-free or licensed clip art, or original, copyright-free, or licensed photographs.

3. Glue/Sealer (if required for type of printing ink used)

Sealers are products used to coat paper. Mod Podge is a common brand of a water-based acrylic medium that is used to glue the image to the cap and also to seal the image to keep laser inks from bleeding. If not used, epoxy resin will cause laser inks to bleed and the paper the image is printed on will turn transparent.

4. Finish gloss or glaze to protect image with a glass-like finish

The bottle cap necklaces on the market that contain images are almost always covered with a durable glossy finish. This is usually epoxy resin. It can be poured thick enough to hold dimensional elements like glitter or charms in place. It needs a bezel wall (sides of a bottle cap) to be contained. If a flat metal base were used instead of a bottle cap, the resin would flow off of the image.

Water-based gloss finishes can also be used, but they are not as durable. This is the type of coating we used in the Capsters book Exhibit C because epoxy resin is not safe for children to mix. A spray coating is mentioned in the Plaintiff's process steps, although the sample of the Plaintiff's bottle cap necklace that I examined appears to be epoxy resin.

5. Adhesive or epoxy to attach jewelry findings or parts (magnet, bail, loops, etc.).

Because a bottle cap is metal, a strong adhesive must be used to hold a magnet, loop or other finding to the cap. Popular adhesives like E6000 or quick setting epoxy resins are used to attach parts to the bottle cap.

6. Jewelry parts or findings to connect a bottle cap to the necklace

To attach a bottle cap to a necklace, a jewelry part or finding must be used. The plaintiff uses a magnet glued to the back of the cap, which is then attracted to a metal washer, which is attached to a neck cord. This idea is similar to the project from the book *Best Friends Forever Exhibit F* where the author uses a magnet on the back of a bottle cap as a means to affix it to a metal locker door.

7. Necklace cord

Bottle cap necklaces are made with various materials including chain, cord or fabric. The cord must be used in conjunction with a jewelry part or finding mentioned above that allows the bottle cap to be suspended from the necklace.

The Plaintiff uses a stretchy loop cord that is very simple. The first thought that comes to mind when viewing the stretchy fabric chokers used by both the Plaintiff and defendant is that it appears to look just like a "pot holder loop" which are stretchy bands made from the knit remnants at clothing factories and are sold in bags at craft stores for making woven pot holders. Klutz published a book titled *Pot Holders and Other Loopy Projects*, by Barbara Kane, 2003 **Exhibit L** that shows how to make potholders and other crafts using the fabric loops. This type of loop made of knit fabric is also sold as a hair accessory for children as plain, inexpensive headbands. Because this type of continuous nylon loop has been around for many years and used in several products it is easy to source. Following are examples of headbands and potholder loops made from similar materials of those used by the Plaintiff **Exhibit N**. The Plaintiff makes their cords from one inch strips of tights, which are similar to pantyhose. Pantyhose and tights have been used in craft projects for many years. I personally have used stretchy knit type fabrics in project books including crafts for kids. I used knit fabric for a necklace cord in a recent book

titled *Jewelry Upcycled* 2011 published by Watson Guptill and in the book *Felt Fabric and Fiber Jewelry* 2008 published by Watson Guptill. In *Clay So Cute* Exhibit H a thin solid-colored choker length cord was used as a choker style necklace. This idea shows bottle cap necklaces made and worn in the same fashion as the Plaintiff's design.

8. Optional arbitrary or decorative elements:

Small objects are often set into the cap such as glitter, charms, small toys, etc. These add dimension to the design. In both of my books that feature paper images in bottle caps, I added glitter and small rhinestones. Those materials, in particular, are the most common craft materials used in bottle cap designs. Charms and other small objects that are small enough to fit inside bottle caps are also used as decorative elements. The Plaintiff uses glitter, rhinestones and wiggly eyes to decorate some of the bottle cap designs pictured on their site.

Of the elements above that are needed to create bottle cap necklaces of suitable quality for selling, the type of cord and findings used would be determined by the intended purpose and use, and the labor and cost for the materials, in order to remain competitive in the market. The arbitrary decorative elements could be changed without affecting the necklace itself.

The bottle caps, paper images, sealer and finish are all necessary materials needed to create bottle cap necklaces with images in the cap. All of which have utilitarian benefit and if left out would not result in the image/resin type bottle caps jewelry style that has been made popular by the arts and crafts community.

IX. FEATURES AND OVERALL DESIGN OF BOTTLE CAP NECKLACES

I have been asked to give my opinions on the functionality of the features and overall design of bottle cap necklaces of this type. In forming my opinions, I was asked to consider the following:

(a) whether the features and their combination are essential to the use or purpose of bottle cap necklaces of this type; (b) whether the features and their combination affect the cost or quality of

bottle cap necklaces of this type; (c) whether Plaintiff's exclusive use of the features and their combination of bottle cap necklaces of this type would put competitors at a significant, non-reputation-related disadvantage in the market; (d) whether the features and their combination are arbitrary, incidental, or ornamental; and (e) to the extent any features are arbitrary, incidental, or ornamental, whether they are consistently used as distinctive design elements on all of the Plaintiff's bottle cap necklaces of this type.

A. Plaintiff's Five Elements of Alleged Trade Dress

Based on The Plaintiff's Second Amended Complaint and the other materials I considered, the Plaintiff alleges its trade dress consists of the following five elements:

1. a slim choker necklace, colored or white, fabric;
2. an attachment having a metallic sheen tied in a knot at the front of the [choker] necklace;
3. a conventional soft-drink bottle cap with crowned ridges around the edge;
4. the crowned ridges of the bottle cap positioned outwardly on the [choker] necklace with the internal surface of the bottle cap exposed; and/or
5. a raised projection having a geometric shape on the top surface of the bottle cap.

In addition to Plaintiff's second amended complaint, these elements are all described in the Plaintiff's patent application.

Element 1

The first element describes a stretchy continuous fabric loop. The Plaintiffs choker (choker is the term for a short necklace), is a stretchy continuous fabric loop which is worn around the neck. It is my opinion that the necklace or choker is a very functional part of the jewelry piece; without it you could not hang the bottle cap around your neck. I base this opinion on the following reasons: Its purpose is to suspend a pendant (in this case a bottle cap) around the neck. The fabric choker is made from inexpensive, commonly found materials. This type of neckpiece does not require jewelry findings such as a clasp or soldered parts, so it is the most economical choice for a choker-type necklace. It is stretchy, so one size fits all. If a competitor were to be required to change the stretchy loop by adding parts or findings, it would raise the manufacturing cost, putting them at a disadvantage in the market due to additional parts and labor.

Exhibit N shows headband loops and potholder loops that are affordable and easily obtained for crafting a suitable loop such as the Plaintiff's.

The necklace loop used by the Plaintiffs does not have anything arbitrary or distinctive about it. The necklace is offered in a variety of colors, but does not have an added decorative element to it. This leaves only the functional aspect of the necklace to consider. This feature is also described in the Plaintiff's patent application, which from my understanding of what a patent is for, suggests that it is functional.

Element 2

Based on my evaluation of the samples I viewed, the "attachment having a metallic sheen" appears to describe the metal washer of Plaintiff's bottle cap necklaces. It is used in conjunction with a magnet, which is glued to the back of the bottle cap. It is my opinion that the washer is functional based on the following:

A washer functions as a metal surface for the magnet to stick to. The combination of the washer and magnet create a mechanical connection, allowing a bottle cap to be hung from a necklace cord. When worn, the washer fits behind the bottle cap and is obscured from view. It is not part of the ornamental or overall appearance of the bottle cap necklace.

Because the Plaintiff's bottle cap necklaces are meant to be interchangeable by means of using a magnet, it is my opinion that the washer is purely functional and the most obvious choice for a bottle cap with a magnet for the following reasons: 1) It is a metal washer commonly found in hardware stores 2) It does not need to be custom made 3) It is inexpensive 4) A magnet will stick to it 5) It has the lowest labor cost because it already has a hole through which a cord can quickly be looped. This feature is also described in the Plaintiff's patent application, which from my understanding of what a patent is for, suggests that it is functional.

Element 3

The third element describes a bottle cap. It is my opinion that a bottle cap used for a bottle cap necklace is functional. I base this opinion on my expertise as a jewelry designer for the following reasons:

The bottle cap is actually serving as a jewelry bezel, which is a functional part of the piece and similarly described in Plaintiff's patent application. Even though the bottle cap is not being used for its original intended function (to cap a bottle of liquid) it is being utilized for a specific purpose (a bezel) in the context of jewelry making. A bezel is meant as a frame or setting for the decorative elements. A bezel holds a gem or stone in place on a piece of jewelry. A bezel is sometimes referred to as a "bezel setting" or "bezel cup." A turquoise ring is a good illustration of how a bezel functions. The ring consists of a band, which is the part that wraps around your finger, the bezel, which is the part that holds the turquoise stone in place, and the turquoise is the

decorative part. The band and bezel are functional; the turquoise is not. The bezel on the ring protects the edges of the turquoise stone, as well as wraps around the edges so the stone to hold it in place. Bezels are used for more than just stones; they can hold almost anything including glass, clay, resin or other small objects.

A bezel is usually made by soldering a strip of sheet metal around a flat base metal shape to create a frame or setting for a stone, gem, or other object. To make a traditional bezel, one must be able to use a torch, saw and other jewelry making tools that require advanced metalsmithing skills. A bottle cap is a perfect choice for those who are not metalsmiths. There are many other reasons a bottle cap is an attractive alternative to a traditional bezel: It is considered in the genre of "found objects" which has popular appeal to crafters, it is made of metal which is the material most often associated with jewelry, and bottle caps are readily available and are very inexpensive.

For a bottle cap necklace, the bottle cap serves as a bezel and functions to provide the following:

1. The edge of the bezel protects the resin coating from scratches.
2. It protects the glitter or rhinestones from being scraped off.
3. It protects the edge of the paper image from damage.
4. It provides a wall to allow dimensional layers or a thick coating of resin to be applied.
5. It reduces wear and tear to prolong the life of the jewelry piece.
6. It serves as the foundation or backing to place the design elements.

Many of my books feature easy-to-find, universally available, inexpensive materials. When I was working on ideas for jewelry making using found objects, I couldn't think of a better object than a metal bottle cap to use as an easy bezel. Nothing else matches the thickness of the metal or the size or shape that is appropriate for jewelry making. The bottle cap is inherently a perfect bezel

for making jewelry. It has only been in the last few years that pre-made bezels have been offered for sale in various shapes and metals from jewelry and bead shops. These are very expensive relative to bottle caps, and would not be a suitable alternative.

In the Expert Report of Steven E. Ross, he states that the Defendants could substitute, for a bottle cap, a less expensive alternative jewelry part. In paragraph 40 of his report, he states "in fact, the use of simple metal disks would be less expensive for the defendants than bottle caps." He gives price comparisons for bottle caps vs. flat aluminum disks that can be found from retail sources online. The bottle caps he shows for \$1.20 each in paragraph 40 of his report are bottle cap pendants sold by bottlecapco.com. The caps shown are not plain bottle caps, but rather caps manufactured with a pre-drilled hole and a jump ring attached. The addition of the hole and the ring increases the cost of the bottle cap sold in this form, and would interfere with the process of placing an image in the cap and pouring the finish. I am very familiar with sourcing and buying bottle caps, as I sell blank caps as part of my product line. We buy plain bottle caps from two sources: bottlecapco.com (which is the same one cited by Ross) and from beernut.com which is a home brewery supplier in Salt Lake City. It should be noted that most suppliers offer lower costs for buying in bulk. We buy a few hundred at a time and sometimes more. The breakdown for cost from bottlecapco.com is as follows: 1000 caps @ \$0.05. When we buy caps from beer nut we pay \$4.50 for a lb. bag which equates to a little less than .02 per cap.

I have quite a lot of experience buying flat aluminum shapes that are comparable to the ones shown by Steven Ross from the Etsy shop. He shows round aluminum disks with a hole for .30 per disk. I work with a manufacturer (craftedfindings.com) as a source for jewelry parts including flat metal shapes for jewelry making. We purchased 310 pieces for a bracelet kit in the summer of 2011. The pieces measure about 1 inch in size. The cost per piece was .60 each; we

could not get the manufacturer to go lower on the price. Part of the reason we went with flat aluminum disks is because we couldn't get another metal for less; aluminum was our best option. As listed in email dated 3/26/2009 M3 Girl Designs production costs, the Plaintiff pays .0091 for each bottle cap, which shows they can be purchased for far less than a flat metal blank.

It is my opinion that you cannot find a cheaper jewelry blank or bezel domestically than a bottle cap. The only way I can see possible to find something cheaper would be to source the bottle caps overseas and purchase industrial quantities. It could be possible to search a site like Etsy or eBay to find a dealer who is selling the blanks or bezels at bargain prices, but the source could not be considered reliable as products on these sites tend to be from private individuals rather than manufacturers or distributors that carry parts on a consistent, ongoing basis.

The main problem, though, is that comparing bottle caps to flat aluminum disks is like comparing apples to oranges. They are not the same. A flat disk might work well for a flat jewelry design that can withstand wear and tear, but a bottle cap serves as a bezel with raised edges, adding more versatility than a flat shape. A flat shape cannot function as a bezel, which is another disadvantage, in addition to cost. To make a design like the Plaintiff's bottle cap necklaces, a bezel is necessary to accommodate images and resin.

In the report by Steven Ross, he suggests in paragraphs 34-38 that there are plenty of options and alternatives for the Defendants to use for jewelry making to compete in the preteen and teen market including flat metal shapes and using bottle caps (as long as they were facing with the top outward). I strongly disagree with this assessment because the orientation of the cap is functional and necessary for resin filled designs. These suggestions miss the point of using a bezel. A flat surface does not serve the function of a bezel. And, bottle cap jewelry is a popular genre of found object jewelry, which no one should be limited to use.

Element 4

The fourth element describes the inside or recessed area of a bottle cap or “a bottle cap with the internal surface exposed” as described by the Plaintiff. This element consists of a product feature that is serving a function. I base my opinion on the following reasons:

It is the most common and the most logical orientation for a bottle cap to be used for jewelry. The cap is being used as a jewelry bezel, which has a raised rim to frame or surround the design. It is also necessary to be oriented with the internal surface facing outward to allow it to hold resin and other decorative elements placed in the cap. It is the only way the bottle cap will serve as a functional bezel. It is not a unique design or new way of using the bottle cap for jewelry that is arbitrary or decorative. This feature is also described in the Plaintiff's patent application, which from my understanding of what a patent is for, suggests that it is functional.

In paragraph 34 of Steven Ross' report, he refers to the photos in paragraph 33 which depict bottle cap necklaces with images printed on the top of the cap (with the crowned ridges not facing outward but towards the wearer). He suggests that it is not necessary to use a bottle cap with the crowned ridges facing outward to make jewelry. The samples in the photos do not use a bottle cap for the purpose of a bezel. This orientation depicted could not be filled with resin or dimensional elements and would limit design possibilities. Furthermore it is difficult to transfer images to a flat metal surface (like the top of a bottle cap) without using industrial equipment and expensive processes. It can be done as a craft technique but it is a skill that takes a lot of time and many steps. Paper images could be applied but would be less durable as the paper would not be protected with the edge or rim of a bezel.

There are only two ways a bottle cap can face to make a bottle cap necklace. As depicted in paragraph 33 of Steven Ross' report, many people decorate the top side of the bottle cap for

many reasons. It would certainly be a significant competitive disadvantage if only the Plaintiff had the right to decorate the inside of bottle caps, which would have nothing to do the reputation of the Plaintiff.

Element 5

The fifth element describes a raised projection having a geometric shape on the top surface of the bottle cap. In examining the Plaintiff's bottle cap necklaces, this appears to be the magnet glued to the back of the bottle cap.

It is my opinion that the magnet is functional. It is a means of attaching the bottle cap to a necklace when used with a metal washer (listed as element 2). It also allows the wearer to remove the bottle cap and replace it with another quite easily. I base this opinion on the following reasons:

To create an interchangeable system for a necklace, there would be very few ways of accomplishing the same task. An artist might use some material like Velcro (hook and loop system) but it's hard to get Velcro to stick to metal permanently. It also wears out over time and becomes less effective. Other solutions would involve mounting snaps, hooks, or a slot system. The snaps would be likely to come off over time because of the torque applied when taking the bottle cap off and on. Hooks would need to be a secure type such as a lobster claw finding or karabiner type clip that would be affixed to the bottle cap and would stay attached to the necklace without slipping off. A hook of this type would also require extra parts and labor. All of these solutions are inferior and inefficient. A magnet would be the most economical solution for parts and labor.

The magnet is not part of the overall appearance of the necklace and is not viewed when worn. It doesn't have an ornamental purpose when used as a connective device on the back of the bottle cap; therefore, it is purely functional just as it is described in the Plaintiff's patent application.

B. Features That Are Arbitrary, Incidental, or Ornamental

It is my opinion that the variety of colors for the nylon chokers and numerous artistic designs on the inside of the bottle caps are the only arbitrary, incidental, or ornamental elements of Plaintiff's bottle cap necklaces of this type. Based on the materials I considered, these elements are not part of the Plaintiff's alleged trade dress. For example, there isn't a certain color of nylon choker used by the Plaintiff or anything distinct about the artistic designs on the inside of its bottle caps. There is nothing consistent about the colors or artistic designs used on the Plaintiff's bottle cap necklaces.

All of the features that are listed as trade dress are functional parts of a bottle cap necklace as described in the section above. The choker necklace is functional but does not have a distinct color associated with it that is universally applied to all of the designs. The washer is not seen and is part of the mechanics of the necklace. The bottle cap serves as a bezel and provides a function. The orientation of the bottle cap facing outward, with the internal surface exposed, serves as a functional bezel. The raised geometric projection is a magnet, which serves as a part of the mechanical connection with the use of the washer.

In contrast, the colors for the nylon chokers and the numerous artistic designs on the inside of the bottle caps could be changed in an infinite number of ways without affecting the functionality of the bottle cap necklaces.

An example of jewelry that is constructed with arbitrary features can be found in the work of Susan Lenart Kazmer, well known mixed media artist, who uses found objects in her work.

Susan often uses broken pencils in her necklaces to make a statement **Exhibit O**. An ordinary pencil functions as a writing instrument. Susan uses pencils as an ornamental element in her jewelry pieces. The pencil has no function, as it is not necessary for the construction or use of the necklace. It could easily be replaced with another artistic element.

The Plaintiff's bottle cap necklace uses a bottle cap which is not functioning as a typical bottle cap for a beverage but it is used as a functional bezel which is not expendable; it is needed to make a "bottle cap necklace". The arbitrary features that would not be necessary would be manifest in the art inside the bottle cap as something distinct and the color or decorations to set the necklace apart from all others.

C. Overall Design/Appearance of Plaintiff's Bottle Cap Necklaces

It is my understanding that trade dress refers to the overall appearance of a product and can be non-functional if the functional features are combined in an arbitrary, incidental, or ornamental way. Based on the materials I considered, the Plaintiff alleges trade dress in a product that can be seen as a complete bottle cap necklace or as separate bottle caps and necklaces of this type displayed at the point of sale. In forming my opinions as to each of these scenarios, I have also considered the overall design/appearance of the Plaintiff's complete bottle cap necklaces as well as the Plaintiff's separate bottle caps and necklaces of this type.

Bottle Cap Necklaces

It is my opinion that the overall design/appearance of the Plaintiff's bottle cap necklace is functional for the following reasons:

A necklace is functional in that it is an accessory meant to be worn around the neck, just as a bracelet is worn around a wrist or a ring around a finger. It serves as an adornment meant to

make a statement about the person wearing it. It also is worn to compliment clothing as part of an outfit.

In addition to adornment, a necklace or any other piece of jewelry provides the means to fill a personal, social or spiritual need. A few examples of the functions jewelry provides for these needs:

1. It provides the function of identifying someone as part of a group, community or social status. Tribal jewelry has been worn for this purpose in many cultures for centuries.
2. It can have religious or spiritual significance, like a rosary necklace.
3. Jewelry is worn and given to others as a token of love, loyalty or other sentimental reasons, like a wedding or promise ring.
4. Wearing jewelry provides the wearer with a sense of identity and self-esteem. It makes them feel good about themselves and their image.

Jewelry that contains imagery like the Plaintiff's necklaces creates a personal connection with the person who buys and wears it. Tween girls are especially fond of this type of jewelry as they are of the age that they are forming their identity. They like jewelry that makes a statement and says who they are.

Part of functionality is that the jewelry piece must be constructed in such a way that it serves the purpose it was intended for and must meet certain criteria to be worn properly for the design. At the same time the aesthetic qualities help construct the image or identity the individual desires to display.

One of the needs filled by the Plaintiff's necklaces in addition to tweens relating to imagery to form identity is the added creative experience of participating in the creative process. When viewing the overall appearance of the Plaintiff's bottle cap necklaces, a finished necklace in

which the consumer has participated in the assembly is represented. The components consist of two parts for consumer to select and assemble: a pre-made bottle cap magnet with image inside the cap and a colored cord with a washer attached.

The consumer is participating in a craft activity by selecting a bottle cap with an image and then selecting a favorite colored cord to compliment the bottle cap to complete the design. It is a very simple "craft kit" which provides the function of giving a person the satisfaction of participating in the creative process of making a piece of jewelry to wear. The bottle cap craft kits, Capsters, Cap It Off (Alex) and Pop Art (Creativity for Kids) Exhibits C,G provides the same function although there are more steps to make the final jewelry pieces.

The Plaintiff describes their trade dress as a list of five separate elements. Each of these elements is functional on its own, and each part is important for the construction of the bottle cap necklace. If the parts were arbitrary or ornamental, the parts could be re-arranged, changed or left out entirely without affecting the product itself. If any one of the five items listed as trade dress were left out of a bottle cap necklace, it would be missing a much needed part and would not work as well if at all. For example, if a large number of people were given the same five bottle cap necklace elements independent of each other, they would all come up with one logical way to assemble the parts. This exercise is a good example of what designates a craft based on techniques. The end result will be the same if it is going to be a working bottle cap necklace. It's a process for creating something like a recipe with ingredients that make the final product function.

Separate Bottle Caps

It is my opinion that the overall design/appearance of Plaintiff's separate bottle caps is functional. I base this opinion on the following reasons:

The bottle caps as displayed for sale consist of a bottle cap filled with an image, covered with a resin finish with a magnet attached to the back. The bottle cap serves as a bezel, or frame, to hold the image and the resin in the cap. The magnet glued to the back of the cap is a functional part used to connect the bottle cap to metal. The arbitrary part of the bottle cap is the art or design featured inside the bottle cap. Since the art in each cap is different and does not have something distinctly unique relating to all of the bottle caps, there is not an overall design element that stands out above function. A bottle cap magnet must have a magnet on the back, so those parts are inseparable and are functional, because it is a bezel meant to hold something and a magnet meant to stick to something. At the point of sale where the magnets are sold unattached to a necklace cord, a consumer might buy the bottle cap to simply use as a magnet instead of for jewelry. The bottle cap magnet by itself is functional, as magnets have many purposes such as being used to hold paper on a refrigerator as one example.

Separate Necklaces (Without Bottle Caps)

It is my opinion that the overall design/appearance of the Plaintiff's separate necklaces of this type (without bottle caps) is functional. I base this opinion on the following reasons:

The cord/washer combination is not meant to be worn alone. The parts are used to suspend a featured bottle cap around the wearer's neck. The cord does not have any feature about it that is arbitrary, incidental or ornamental, except for the color. The washer attached to the necklace loop is there so that the magnet on the back of the bottle cap will stick to it, thus attaching the bottle cap to the necklace cord. The washer is not part of the decorative ornamentation. It is hidden from view when used as intended, with placement behind the bottle cap to serve as a connective device.

X. QUALITY OF BOTTLE CAP NECKLACES

I have been asked to give my opinions on the quality of Defendants' bottle cap necklaces, and the "Fun-cap-u-lous" bottle cap necklaces made by H.E.R. Accessories, in comparison to the Plaintiff's bottle cap necklaces. To help form my opinions, I was given the following physical samples:

1. Blue Brownies Exhibit P

The necklaces are made bottle caps with images inside. In addition to the graphic design inside each bottle cap, other elements are added such as small rhinestones, dimensional charms or flat shapes layered over a background design. Resin covers the image and fills the bottle cap. Two black cords types were examined: 1. Continuous stretchy loop type 2. Cord with clasp attached. Both have a metal washer attached to the cord. Magnets are glued to the back of the bottle caps.

2. Snap Cap Exhibit Q

The (basketball design) necklace was made using a bottle cap with an image inside. A rhinestone was also in the cap for decoration. Resin covers the image and fills the bottle cap. A continuous stretchy loop type cord with a metal washer attached to the cord. Magnet is glued to the back of the bottle cap.

3. Fun-cap-u-lous Exhibit R

Pink package Fun-Cap-U-Lous kit with bottle caps inside and a stretchy choker necklace with clasp on the choker and metal washer attached. The bottle caps have graphic design images inside with a thin layer of resin in the cap, no embellishments. A magnet is glued to the back of each bottle cap. Two single necklaces of this brand were also examined.

I examined the bottle caps made by Blue Brownies **Exhibit P** (13 actual pieces) and viewed the Defendant's website: www.bluebrownies.com. Some of the bottle caps contain a single paper image with a single large rhinestone added for dimension. Many of the bottle caps also include a

dimensional charm or shape which is layered over the background image. For example there are metal charms, plastic charms, cutouts and dimensional monogram letters to name a few that are set into the resin.

Exhibit Q shows a photo of the actual bottle cap necklace I examined. I also viewed the Plaintiff's websites: www.m3girldesigns.com and www.snapcapsonline.com. All of the designs inside the bottle caps appear to be single image (1 layer of paper) with one or more rhinestones glued on to embellish the design.

I examined samples of Fun-cap-u-lous Bottle Caps **Exhibit R**. The images inside the caps appear to be printed using an offset printer used for large commercial print runs. This type of printing is ink based and has a flat, less rich quality than a laser printer offers. The caps are also filled with a very thin layer of resin, which drops the perceived value (people like shiny thick resin). The bottle caps are not actual caps but stamped and chrome plated in the shape of a bottle cap. The shine of the chrome finish makes the product appear "cheaper" than a real bottle cap which has a softer metal sheen.

Defendants' Bottle Cap Necklaces

It is my opinion that the Defendant's bottle cap necklaces are equal to the quality of the Plaintiff's bottle cap necklaces. It is also my opinion that some of the Defendant's bottle cap necklaces are of higher value. I base my opinions on the following observations:

Some of the defendant's bottle cap designs contain dimensional objects that look like metal bracelet charms, plastic toys or scrapbook pieces that add more dimension to the designs. The addition of the charms to some of the Defendant's designs would cost more to produce as well as add a perceived retail value in my opinion.

“Fun-cap-u-lous” Bottle Cap Necklaces

It is my opinion that the “Fun-cap-u-lous” bottle cap necklaces made by H.E.R. Accessories are of lower quality than the quality of Plaintiff’s bottle cap necklaces. I base this opinion on the following observations:

The images inside the Fun-cap-u-lous Bottle Caps appear to be printed using an offset printer which is used for large commercial print runs. This type of printing is ink based and has a flat, less rich quality than a laser printer would offer, which is what I believe the Plaintiff uses for Snap Caps. The caps are also filled with a very thin layer of resin, which I believe drops the perceived value (thick resin looks more like glass and enhances the design inside the bottle cap). The bottle caps do not appear to be actual caps but rather metal that is cast or stamped in the shape of a bottle cap and then chrome plated. The shine of the chrome finish makes the product appear “cheaper” than a real bottle cap which has a soft metal sheen. In fine jewelry made of real gold or silver, a shiny metal finish is appealing but in costume jewelry shiny plated finishes often have the opposite effect by looking “fake”. The bottle caps don’t look real with this finish. The Fun-Cap-U-Lous brand does feature a clasp on the cord which may increase perceived value over a continuous loop design with no clasp.

Overall the differences between the three brands are that Blue Brownies contains charms or dimensional items added to some of their designs and that the Fun-Cap-U-Lous brand sample sold in the pink package has a clasp added to the cord. The other differences relate to materials and quality which are explained above.

XI. ORIGINALITY OF THE ARTISTIC DESIGNS ON INSIDE OF PLAINTIFF’S BOTTLE CAPS

I have been asked to give my opinion on the originality of the artistic designs on the inside of Plaintiff’s bottle caps. In forming my opinions, I was asked to consider the extent to which

Plaintiff's artistic designs consist of material that is hand-drawn, clip art, photographs, and images readily available and accessible from other sources. Based on the materials I considered, it is my opinion that many of the Plaintiff's artistic designs partially or fully include the use of clip art, photographs, and other images that are not hand-drawn and not original. I base this opinion on the following reasons:

In reviewing the sources of the clip art and comparing the art in the bottle caps from Exhibits 15, 16 and 65 from Madeline Bradshaw's deposition, the art is the same.

I considered a few of the images from Exhibit 65 in Madeline Bradshaw's deposition taken from Microsoft's Office clip art library and read Microsoft's policies on use in the legal and terms of use page associated with the images. In section 17 of Microsoft Services agreement it states that "You may not: (i) sell, license, or distribute copies of the media elements by themselves or as a product if the primary value of the product is the media elements". It has a link for permissions to use the images and the rules that apply. If clip art is used by permission, "Used with permission from Microsoft" has to be included with the image.

The Plaintiff uses clip art taken from Microsoft as well as other sources which they would not be able to use as original art if copied from a clip art source and could not use at all unless the permission terms were followed.

Based on Diane Bradshaw's fax and process notes dated Jan 27 2008 and the Plaintiff's patent application, the Plaintiff uses clip art and photographs for its designs on the inside of bottle caps. In the patent application, paragraph 0031, it states that one of the images included for the design of the bottle caps is "picture from a magazine". It is my opinion that unless the Plaintiff were to own or license the copyright for the picture from a magazine they would be infringing on the

publication. As someone well acquainted with magazine publishing, images cannot be used without permission.

XII. CONCLUSION

Bottle cap jewelry is a generic idea that has been popular for many years dating back from the mid-1980s and possibly earlier. It became widespread in the fashion/craft community in the late 1990s to early 2000s. Since the techniques for making bottle cap jewelry pieces are pretty straight forward and easy to replicate the art has expanded widely and is considered in the public domain. It is my opinion that there is no one entity that comes to mind in the general public as the source or originator of bottle cap jewelry, including the bottle cap necklaces in this case. In my extensive research needed for fact checking in all of my books that deal with bottle caps, I never found a source for anyone who started the idea. I am well acquainted with the arts and crafts community and many of my peers use bottle caps in jewelry making classes and in their own projects. This idea is generally shared freely within that community.

A great majority of the bottle cap jewelry designs on the market feature the same basic design: a paper image is placed in the cap, a few sparkles added and then resin poured over the top to provide a glass like finish. This technique is considered a craft and it is hard to distinguish one maker from the next. Often the art aimed at teens and kids has a similar look to it. Generic clip art designs that do not feature a certain illustrative style or artist are most often used making it even harder to distinguish one maker from another.

Bottle caps filled with images can be found everywhere and are made into belts, bracelets, pins, magnets and necklaces. Bottle cap jewelry has been around for many years as mentioned in this report. This Plaintiff's necklaces do not stand out from any other bottle cap accessories that are filled with images and then finished with resin. The overall design/appearance of the Plaintiff's jewelry does not feature anything decoratively that sets them apart from other bottle cap

necklaces on the market. Bottle cap necklaces are a popular craft items made using well-known techniques. I believe they are so popular with the craft community and with small cottage industries because they are easy to make and the materials are easy to find. The Plaintiff's chokers are simply a combination of craft ideas. The bottle cap necklaces are sold as components that allow the consumer to participate creatively in the final design by putting selected components together.

From what I understand trade dress to be, the Plaintiff's bottle cap necklaces overall would need to have elements that were non-functional, ornamental or arbitrary that identify it as their source. The designs inside the cap, some added ornamentation or something special about the color or decoration of the neck cord would be the parts of the necklace that are not functional. Many of the Plaintiff's designs are common clip art designs and do not have a distinct illustrative style that would make them stand out as from a particular artist or designer. The color of the cord would need to be a universal identifiable mark that would set the necklaces apart as distinct in the market.

It is also my understanding that the ornamental or arbitrary elements or features of the overall design would need to identify the source rather than referring to the product itself. Since bottle cap necklaces have been crafted in a similar style by many individuals for years, I do not see a distinct feature that is identifiable that makes the Plaintiff's necklaces stand out from the rest.

Bottle cap necklaces are like many craft ideas; they are technique and material based.

In my arts and crafts experience and training I was taught over and over again the principles of protecting artistic expression. Even though I am not an attorney, as a craft book author and teacher I have to be ever mindful of the laws regarding intellectual property. When I create projects for books I know I can use craft techniques, materials and methods because they are

ideas. It is my understanding that ideas and techniques generally cannot be claimed as intellectual property because the idea itself cannot be copyrighted and does not have anything arbitrary, ornamental or incidental intrinsically about it. Techniques and materials are necessary and/or functional elements needed to create a final idea or product. The artistic expression that is added to embellish an idea is the ornamental or the arbitrary part that can make it unique. This part is the visual statement that sets the idea apart but is not necessary for the function of the creation.

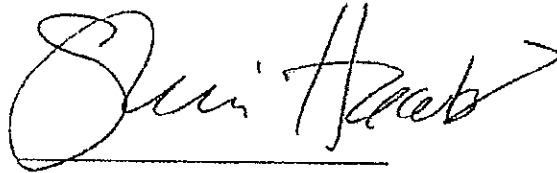
I do know that some things are protected by patent but it my understanding that generally craft ideas are not protected because they rely on known processes and techniques that are in the public domain. From my own experience I know that patents are very stringent in the requirements and very difficult to achieve. The Plaintiff applied for a patent (Bradshaws' Utility Patent Application 2/1/2008) but has never achieved receiving a patent for bottle cap necklaces.

In my opinion it is highly unlikely that the Plaintiff's came up with this idea without seeing it somewhere first. With the widespread popularity of bottle cap jewelry designs and the distribution of media and book projects, many people are familiar with this craft and have been since the late 1990s.

I have personal knowledge of the origination of the ideas and projects contained in the following books: *Capsters*, *Designer Style Jewelry*, *Clay So Cute* and *Best Friends Forever*. All of these titles were written before the Plaintiff introduced their bottle cap necklaces in the market. The books mentioned above contain all of the elements claimed as trade dress which are functional. I strongly disagree, and do not see how, the Plaintiff can claim ownership of and exclusive right to use the ideas that were already documented in widely published books aimed at the tween market and sold in the same retail locations.

Dated: March 30, 2012

Respectfully,

A handwritten signature in black ink, appearing to read "Sherri Haab", written over a horizontal line.

Sherri Haab

EXHIBIT A

Sherri Haab

2043 East 725 South
Springville, UT 84663
801 592 6007

Email: shaab@sherrihaab.com
www.sherrihaab.com

Published Books:

The Incredible Clay Book, Sherri Haab and Laura Torres, Klutz Press, ©1994

Awards for this book:

Publisher's Weekly CUFFIES-1994

Book builders West Book Show-1995

1994 National Parenting Publications Award Honors Winner

Over 1 million copies sold

Publisher's Weekly #1 Bestseller; March and June 1995

Nail Art, Sherri Haab, Klutz Press, ©1997

Awards for this book:

Parent's Choice Award 1998

YALSA American Library Association, 1999

Publisher's Weekly Bestseller

Specialty Retailer Top Toy of the Year

Over 1 million copies sold

#1 Best Seller, San Francisco Chronicle, Dec. 1997, March 1998

Arts and Crafts Recipes, Sherri Haab and Laura Torres, Klutz Press, ©1998

Awards for this book:

Parent's Council Award

Create Anything With Clay, Sherri Haab and Laura Torres, Klutz Press, ©1999

Awards for this book:

National Parenting Publications Gold Award, 1999

Oppenheim Toy Portfolio Gold Award

Family Fun Toy Awards, 1999

The Shrinky Dinks Book, Sherri Haab, Klutz Press, ©1999

Awards for this book:

Parent's Guild Children's Media Award

Life Works Magazine, 2000

Wire O Mania, Sherri Haab and Laura Torres, Klutz Press, ©2000

Awards for this book:

Today's Toy Test Winner

Light Switches Gone Crazy, Sherri Haab, Klutz Press, ©2000

Awards for this book:

National Parenting Publications Honor Award

A Nick Jr. Magazine Top 25 Toy

Oppenheim Toy Portfolio Gold Award

Recommended by Parent Council

Looney Pops, Sherri Haab, Klutz Press, ©2001

Making Mini Books, Sherri Haab, Klutz Press, ©2002

Awards for this book:

Oppenheim Toy Portfolio Gold Awards

National Parenting Publications Gold Award

Picture Bracelets, Sherri Haab, Klutz Press, ©2003

The Art of Metal Clay, Sherri Haab, Watson Gupitll Publications, February 2003

Award: Top 5 finalist for Craftrends "Best General Craft Book for 2004"

Designer Style Jewelry, Sherri Haab, Watson, September 2004

Award: Craftrends "Best General Craft Book for 2006"

The Hip Handbag Book, Sherri Haab, Watson Gultill, September 2004

Designer Style Handbags, Sherri Haab, Watson Gupitll Publications, May 2005

Dangles and Bangles, Sherri Haab, Watson Gupitll Publications, May 2005

Award: Voice of Youth Advocates-Nonfiction Honor List 2006

Capsters, Sherri Haab & Courtney Johnson, Klutz August 2005

The Art of Resin, Sherri Haab, Watson Gupitll Publications Spring 2006

Award: Craftrends "Best General Craft Book for 2007"

Way to Crochet, Sherri Haab, Watson Gupitll Publications Spring 2006

Macramé, Sherri Haab, Watson Gupitll Publications Fall 2006

Metal Clay Mixed Media, Sherri Haab, Watson Gupitll Fall 2006

Felt Fabric and Fiber Jewelry, Sherri Haab, Watson Gupitll Summer 2008

Clay so Cute, Sherri Haab with Michelle Haab, Watson Gupitll Summer 2009

Sherri Haab Jewelry Inspirations, Sherri Haab, Watson Gupitll Winter 2010

The Art of Metal Clay, Revised, Sherri Haab, Watson Guptill Spring 2010

Jewelry Upcycled, Sherri Haab and Michelle Haab, Watson Guptill 2011

The Art of Resin Clay Jewelry, Sherri, Rachel and Michelle Haab, WG 2011

Book Contributor

Beading Across America, "Miss Utah" Macrame Bee Project, Kalmbach 2011

Design Consulting:

Simple Sewing, Klutz Press, ©1999

Pumpkins Gone Crazy, Klutz Press©1999

Beaded Bobby Pins, Klutz Press, ©1999

Beadlings, Klutz Press, ©2000

Joe Bender, Brenda Bender and Fender Bender, Klutz Press, ©2000

Painted Rocks, Klutz Press, ©2000

Googly Eyes, Klutz Press, ©2003

Simply Embroidery, Klutz Press, ©2003

Metal Clay Supply, various projects, tutorials and product development including booklet
"Bronze and Copper Clay"

Metal Clay Findings-2 kits and design consulting, product development

Magazines:

American Girl, Crafts for "Deck the Halls", pg. 22-29, November/December 1997

American Girl, "Ways to warm up", pg.12-17, November/December 1998

American Girl, Mini-Purses, April/May 2001

Family Fun, "Deck the Halls", pg. 88-94, December 1995

Family Fun, "A Honeybee Tea", pg. 20, April 1998

Craft, "I-pod Pouch"

Crafts and Things "Fabric Bracelet" Feb 2009

Stringing, "Clay Flower Necklace, Image Transfer on Sea Glass" August 2009

Sew News "Fabric Necklace"

Bead and Button Magazine, Expert Article Resin

Bead and Button Magazine, Expert Article Electroforming Feb 11

Handcrafted Jewelry Nov 09

Handcrafted Jewelry Bangle Project?

Illustrations:

Kids Travel, Klutz Press ©1994 Illus. for "Pencil and Paper Games" p. 36 (also back cover)

111

Family Fun Magazine, ©November 1995 Illus. for "A Hand Crafted Crèche" pp. 110-

Hullabaloo, Klutz Press ©1995 Illus. for "Long Way Home" pp. 44-47

Cootie Catcher, Klutz Press, "clay food", ©1997

The Friend, pg.30, ©1997

The Friend, pg.19, ©1997

Magic Spoon Cookbook, pg. 22-23, pg. 44-45, pg.55, Klutz Press ©1997

Sticker Book, pg. 12, Klutz Press, ©1997

The ABC's in Rhyme, Chant, and Song, pg. 14, pg.29, Houghton Mifflin 1999

Bedroom Astronomy, pg. 29, pg. 59, Klutz Press, ©2000

Eek There's A Mouse in the House, pg. 163, Houghton Mifflin 2000

Teaching and Certifications:

PMC Certified Instructor

Art Silver Clay Instructor

Society of Children's Book Writers and Illustrators, conference teacher

Children's craft workshops: Borders Book Store, Barnes and Noble, Read Leaf

Bookstore, local libraries and schools.

PMC Conference 2004 "How to Publish Your Artwork"

Art Material and Methods Show 2004-Pasadena, CA "Metal Clay Workshop"

Art and Soul Conference 2005-Portland, OR "Metal Clay Bezel Frames Workshop"

Art and Soul Conference 2006-2007, 2008, 09, 10,11

Interweave-Beadfest

Puget Sound Bead Festival

Art Unraveled, Phoenix, AZ

Various bead shops nationwide

Internationally-United Kingdom, Scotland, Ireland, Netherlands, Switzerland

Kalmbach-Bead and Button Show Milwaukee, WI

Television and Radio:

Aleene's Creative Living, Show #99-1953, aired 8/3/99, clay demonstration

Good Things Utah, ABC TV, aired 2/28/04, Metal clay charm bracelets, Duct Tape

Purses, 12/30/04, Beaded Floral Bracelets 2/05

Carol Duvall Show, HGTV, #1733 May 2005, July 25 2005, #1824, Dec 2005 #1903

DIY Jewelry Making, #504-July 25, 26, 30 2005-Metal Clay Rings, #508 Crocheted

Jewelry

Beads Baubles and Jewels-PBS Stations #701-2 Pearls and Macramé Bracelet, 711-6

Macramé Earrings, Needle Felted Heart, Precious Metal Starfish Necklace

Martha Stewart Radio, August 2009

Craftcast Webinars, Metal Clay, Etching

Fox

Channel 5

Jewelry TV (JTV) shopping channel, sold ITS kits and Etching Kits

Press Honors:

Utah Valley Magazine's "50 Most Fabulous People" March/April 2008

Craftrends ACE award "Best General Craft Book" for 2007

Craftrends ACE award "Best General Craft Book" for 2006

EXHIBIT B

MATERIALS CONSIDERED

1. Plaintiff's expert reports:
 - Expert Report of Steven E. Ross (Dated 02/28/2012)
 - Expert Report of Morgan K. Ward (Dated 02/28/2012)
2. Pleadings:
 - Plaintiff's Second Amended Complaint (Document 72; Filed 05/13/2011)
 - Defendants' Second Amended Answer (Document 75; Filed 06/03/2011)
3. Physical specimens of bottle cap necklaces:
 - 1 M3 Girl Designs bottle cap necklace (clipart basketball design)
 - 13 Blue Brownies bottle caps with 1 choker necklace
 - 2 "Fun-cap-u-lous" bottle caps and 2 necklaces sold at Claire's
 - 1 package of "Fun-cap-u-lous" bottle caps with necklace sold at Toys R Us
4. "Fun-cap-u-lous" materials:
 - "Fun-cap-u-lous" trademark registration documents (M3G 03366-03402)
5. Books, kits and other publications:
 - CPSC, Guide to the Consumer Product Safety Improvement Act (CPSIA) for Small Businesses, Resellers, Crafters and Charities (2009)
 - Barbara Kane, *Potholders and Other Loopy Projects* (Klutz 2003)
 - Sherri Haab, *Capsters Book* (Klutz 2005)
 - Sherri Haab, *Designer Style Jewelry Book* (Watson Guptill 2004)
 - Laura Torres, *Best Friends Forever* (Workman 2004)
 - Sherri Haab, *Clay So Cute Book* (Watson Guptill 2009)
 - Alex Toys craft kits
 - Creativity for Kids craft kits
6. Patents:
 - U.S. Patent No. 468,258 on Bottle-Sealing Device (dated Feb. 2, 1892) (BB 002599-002606)
 - U.S. Patent No. 4,912,944 on Magnetic Jewelry (dated Apr. 3, 1990)
 - U.S. Patent No. 4,982,581 on Coupling Device for Ornamental Piece (dated Jan. 8, 1991)
 - U.S. Patent No. 5,685,174 on Decorative Connector and Method for Affixing Same (dated Nov. 11, 1997)
 - U.S. Patent No. 5,806,346 on Magnetic Pendant Necklace Set and Manufacture (dated Sep. 15, 1998) (BB 002611-002615)
 - U.S. Patent No. 6,594,871 on Jewelry with Replaceable Ornamentation (dated Jul. 22, 2003)
7. Patent application documents:
 - Fax of Diane Bradshaw with handwritten flowchart of bottle cap process (Dated 01/27/2008) (M3G 03944-03951)

- Bradshaws' Utility Patent Application for "Interchangeable Bottle Cap Jewelry" (Dated 02/01/2008) (M3G 03830-03865)
- 8. M3 Girl Designs email regarding its production costs and rates (dated 03/26/2009) (M3G 45570-45574)
- 9. Blue Brownies sources [for bottle cap jewelry materials]
- 10. Articles:
 - Chicago-Sun Times, A New Twist for Bottle Caps, July 12, 1992 (BB 002531-002532)
 - New York Live, [pictures of bottle cap jewelry by Janet Cooper], May 16, 1993 (BB 002533)
 - The Paper, [article about Janet Cooper, "bottle cap lady"], Dec., 1993 (BB 002535-002538)
 - National Examiner, Girl, 13, Turns Bottlecaps into Big Biz, July 20, 2009 (M3G 02116)
- 11. Web pages:
 - Craftster.org forum posts from 2003 for topic: Bottle Cap Magnets (BB 002539-002545)
 - Miscellaneous web pages and references regarding bottle cap jewelry (BB 002563-002568)
 - Blue Brownies' web pages (BB 001942-001958)
 - Crafty Chica, www.thecraftychica.blogspot.com, "Banned from Bottlecaps!" (Nov. 30, 2003)
 - K Mart web pages showing Bottle Cap Co products (on Mar. 28, 2012)
 - Alphastamps.com project web page, "Bottle Cap Jewelry Tutorial" (on Mar. 28, 2012)
 - Thiseclecticlife.com post, "A Cook Can't Have Too Many Potholders" (Oct. 10, 2009)
 - Squirrelcheeksboutique.com web page listing skinny nylon stretchy headbands (on Mar. 28, 2012)
 - Etsy.com web page listing 24 skinny, stretchy knit headbands (on Mar. 28, 2012)
 - Susanlenartkazmer.net web gallery showing Pencil Necklaces by Susan Lenart Kazmer (on Mar. 28, 2012)
 - Microsoft.com, Use of Microsoft Copyrighted Content (Nov. 13, 2009)
 - Microsoft.com, Microsoft Services Agreement (Aug. 1, 2010)
 - en.Wikipedia.org, Pendant (on Mar. 29, 2012)
 - US Copyright Office website, www.copyright.gov (on Mar. 28, 2012)
- 12. Other documents regarding bottle cap necklace competitors:
 - M3 Girl Designs email regarding Pippi Tails (dated 10/14/2008) (M3G 38705-38706)
 - M3 Girl Designs email regarding Purple Mountain Ice (12/03/2009) (M3G 33821-33822)

- Pippitails.com / BubblegumDivas.com web pages and documents (BB 003212-3228)
 - Alex Toys web pages (BB 003291-003292)
 - Purple Mountain Sweaters Ice Caps web pages (BB 002633-002637)
 - Bottle Cap Co. web pages (BB 002649-002652, 003267-003274)
 - Klutz Capsters Original Proposal letter dated 4/15/1999 sent to John Cassidy
President, Klutz
13. Bottle cap artwork exhibits:
- Madeline Bradshaw deposition Exhibit 15
 - Madeline Bradshaw deposition Exhibit 16
 - Madeline Bradshaw deposition Exhibit 19
 - Madeline Bradshaw deposition Exhibit 20
 - Madeline Bradshaw deposition Exhibit 21
 - Madeline Bradshaw deposition Exhibit 22
 - Madeline Bradshaw deposition Exhibit 65