
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

13-10112

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

Plaintiff-Appellant

v.

BLUE BROWNIES, LLC, an Arkansas Limited Liability Company;
KRISTA DUDTE, as individual residing in Arkansas; ROBERT DUDTE,

Defendant-Appellee

*Appeal from the United States District Court for the Northern District of
Texas in Case No. 3.09-CV-2390, Judge Royal Furgeson*

BRIEF OF APPELLANT M3 GIRL DESIGNS, LLC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Defendant-Appellee: Blue Brownies, LLC

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STATEMENT REGARDING ORAL ARGUMENT

Appellant, M3 Girl Designs, LLC respectfully requests oral argument on the pending appeal because this appeal involves a unique fact situation, which can be clarified at oral argument, as well as serious allegations of improper counsel arguments and conduct. The issues in this appeal also involve complicated orders and rulings from the Trial Court that apply uncertain legal standards, a paucity of binding precedent, and differing judicial approaches.

Clear guidance is needed for district courts in the Fifth Circuit Court of Appeals to properly decide when (a) a judgment as a matter of law, or in the alternative new trial, should be granted on trade dress functionality and trademark infringement issues, (b) the Defendants' conduct support a judgment as a matter of law, or in the alternative, new trial, and (c) the Court's evidentiary rulings and other orders from the Court support a judgment as a matter of law, or in the alternative, new trial.

Because consistent application of the law, and a ruling from this court, will further the underlying policies of the applicable legal rules, oral discussion of the underlying facts, the applicable legal rules, and the underlying policies would benefit this Court and the courts in the Fifth Circuit Court of Appeals.

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STATEMENT OF JURISDICTION

Appellant Plaintiff, M3 Girl Designs, LLC (“M3Girl”), asserted claims against Appellees, Blue Brownies, LLC, Krista Dudte, and Robert Dudte (collectively “Blue Brownies”), that included, *inter alia*, assertions under the trademark laws of the United States and related Texas State law. (*CR 1, at 40–49; CR 52, at 488-510; CR 72, at 1171–95*).¹ Appellee Blue Brownies asserted counterclaims for Lanham Act false advertising claims and Texas state unfair competition claims. Accordingly, the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1332(a), and 1338(a), as well as 28 U.S.C. § 1367 for all related state law claims.

The district court entered its Final Judgment on January 3, 2013, and denied the Appellant M3 Girl’s Motions for Judgment as a Matter of Law. (*CR 298–304, ER 5-10*). M3Girl filed its notice of appeal requesting review of JMOL denials and other Court rulings (*CR 305, ER 3*),² and therefore, this Court has jurisdiction 28 U.S.C. §1291.

¹ “CR” refers to the Clerk’s Record followed by the docket entry number of the cited document and, where appropriate, specific USCA5 record page numbers for the cited document. “ER” refers to the Excerpts of Record followed by the excerpt number for the cited document.

² Blue Brownies filed a notice of appeal on February 15, 2013, which is proceeding separately as Fifth Circuit appeal case no. 13-10182. (*CR 306*). This Court should consider consolidation of these appeals to conserve judicial resources.

STATEMENT OF THE ISSUES

Appellant M3 Girl identifies the following issues and questions that should be answered in this appeal.

Issue 1: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion, or in the alternative, motion for a new trial because Blue Brownies Defendants unfairly prejudiced the Appellant M3 Girl by their improper conduct, arguments, and actions?

Issue 2: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion, or in the alternative, motion for a new trial because certain evidentiary rulings and jury instructions handed down by the Court unfairly prejudiced the Appellant M3 Girl?

Issue 3: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion, or in the alternative, motion for a new trial because evidence supported a judgment in favor of Plaintiff M3 Girl Designs on the trade dress and trademark issues, as well as related state and ancillary claims?

Issue 4: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion requesting judgment on Appellee Blue Brownies' Counterclaim Nos. 1 and 3, which were untenable under the law and not the subject of any presentation of evidence at trial by the Defendants?

STATEMENT OF THE CASE

Madeline, Margot and Diane Bradshaw started a business, called M3 Girl Designs, that produced and sold bottlecap choker necklaces in 2006. Plaintiff filed this lawsuit against Appellee, Blue Brownies, Inc., Ms. Krista Dudte, Charlotte Liles, and Mr. Robert Dudte in December 2009 alleging, *inter alia*, that the Defendants had committed acts of trade dress infringement and trademark infringement under Federal and State law.

The bottlecap choker necklaces produced by the Plaintiff is pictured below left, and the product configuration trade dress is described in the five-prong definition set forth below. *Plaintiff's Trial Exhibit P-3D, ER 15.*

Trade Dress

Plaintiff
M3 Girl Designs



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

Defendant
Blue Brownies



(1) decorated bottle cap with a pink glitter background and silver crown, (2) the back side of a decorated bottle cap with the magnet visible, (3) a peace sign bottle cap attached to a black elastic choker necklace and (4) a pink elastic choker necklace connect to a fender washer and stuck the back of a bottle cap magnet. Except for the decorative designs inside the bottle caps, all bottle cap jewelry is the same.

The Plaintiff's trade dress definition included the following visual aspects of the Plaintiff's products, which reads:

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

P-3D, ER 15; CR 82, 1578. And, the Defendants' product is shown above right and was described by the Defendants as follows:

- (1) decorated bottle cap with a pink glitter background and silver crown,
- (2) the back side of a decorated bottle cap with the magnet visible,
- (2) a peace sign bottle cap attached to a black elastic choker necklace and
- (4) a pink elastic choker necklace connect to a fender washer and stuck the back of a bottle cap magnet.

P-3D, ER 15; CR 82, 1578-79; CR 83, Exh. I, 1652.

The Plaintiff’s product is called “Snap Caps,” which is covered by a U.S. Trademark Registration No. 3,626,432. (*P-1, below left*). Defendants produced the product shown below right, and sold that product under the trade name “Click-It Caps.” (*P-3D, P-217*).

Int. Cl.: 14
 Prior U.S. Cls.: 2, 27, 28 and 50
 United States Patent and Trademark Office Reg. No. 3,626,432
Registered May 26, 2009

TRADEMARK
PRINCIPAL REGISTER

SNAP CAPS

M3 GIRL DESIGNS, LLC (TEXAS LIMITED LIABILITY COMPANY)
 6462 ABERDEEN AVENUE
 DALLAS, TX 75230

FOR: JEWELRY, IN CLASS 14 (U.S. CLS. 2, 27, 28 AND 50)

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "CAPS", APART FROM THE MARK AS SHOWN.

SER. NO. 77-589,489, FILED 10-9-2008.



On July 19, 2010, Ms. Charlotte Liles agreed to a settlement with the Plaintiff; and, as part of the settlement, she agreed to the entry of a Consent Decree by the Court. *CR 34, 35, 360-66, ER 14*. Pursuant to the entered Consent Decree, Ms. Liles affirmatively stated that the Plaintiff’s claims of trademark and trade dress infringement, as well as other claims, were viable claims that asserted valid intellectual property rights. The District Court excluded the use of this Consent Decree, as entered, from the evidence at trial. *CR 185, 2881*.

The Defendants filed pleadings in the proceeding that included prejudicial evidentiary admissions, such as the Defendants' Answer that acknowledged the fact that the Plaintiff's trade dress protection existed as identified in the Plaintiff's trade dress definition, as well as affirmative admissions that the Defendants engaged and profited from acts of unfair competition.³ Defendants were notified about the existence of these admissions against their interests when the Plaintiff M3Girl Designs "admitted" the Defendants allegations in their active, live pleadings. *CR 139, Answer to Counterclaim, 2299-2300* (§291-293 admitted). Even though Blue Brownies Defendants never withdrew their admissions from the active, live pleadings, the Court excluded the use of these admissions from the case.⁴

A jury trial was held in June, 2012, and prior to the presentation of the case to the jury, Plaintiff requested a Rule 50(a) Judgment as a Matter of Law ("JMOL") on the issues answered by the jury, as well as a Rule 50(a) JMOL

³ See *Deft's Answers, CR 53, 514* (admits existence of trade dress defined in ¶13, Complaint, *CR 52, 490*); *CR 75, 1236* (Admits trade dress existence ¶13 to *CR 72*); *CR 53, 544* (¶291-293 admission to unfair competition by Defendants); *CR 75, 1267* (repeated ¶291-293 unfair competition admissions); *CR 138, 2262* (repeated ¶291-293 unfair competition admissions); *CR 139, 2299-2300* (Plaintiff answered ¶291-293 with Admitted); *CR 267, Vol. 1, June 18, 2012, Tr. 23:12-26:2* (admissions regarding trade dress existence); *CR 267, Vol. 1, June 18, 2012, Tr. 32:15-33:23* (admissions regarding own unfair competition and likely/actual consumer confusion).

⁴ *CR 267, Vol. 1, June 18, 2012, Tr. 90:19-93:8* (indicates position on exclusion of admissions in pleadings); *CR 268, Vol. 2, June 19, 2012, Tr. 2:2-17:9* (excludes admissions in pleadings with counsel discussion about viewing demonstrative boards); *CR 287, Vol. 5, June 25, 2012, Tr. 139:19-140:4* (cannot reference admissions).

motion on the Defendants' Counterclaims Count I and III. *See Judgment as a Matter of Law Motions, CR 247 and 248; CR 287, Vol. 5, June 25, 2012, Tr. 105:9-106:4, 108:17-109:3, Tr. 110:2-115:1.* The Court denied the Plaintiff's Rule 50 JMOL motions. *Orders, July 18, 2012, CR 259 and 260.* On June 27, 2012, the jury returned a Verdict in favor to the Defendants on the issues of trade dress functionality, trademark likelihood of confusion, common law claims (palming off and unfair competition), personal liability/willful infringement, and damages. *CR 258, Verdict.* Appellant Plaintiff subsequently requested a Rule 50(b) Judgment on the above-identified liability issues, as well as the Counterclaim Counts I and III. *CR 275 and 276, ER 11.* The district court entered its Final Judgment on January 3, 2013, denying the Appellant M3 Girl's JMOL Motions. (*CR 298-304*).

STATEMENT OF THE FACTS

Appellant Plaintiff M3 Girl provides the following statement of facts in support of its appeal, which include: (1) evidence of non-functionality and trademark infringement, (2) the jury findings, (3) Defendants' misconduct and improper arguments, and (4) the Court's erroneous rulings.

1. Evidence of Non-Functionality and Trademark Infringement

During the proceedings and at trial, the Plaintiff presented extensive evidence regarding the non-functionality of its trade dress and trademark

infringement.⁵ The non-functionality of the Plaintiff's trade dress was found affirmatively by a lower Court's Order finding that the Plaintiff's bottlecap jewelry designs to be "arbitrary, incidental and ornamental. *Court's Order, CR. 120, (2012-2015), Dec. 6, 2011, p. 7 (2015)* ("the M3 Girl's jewelry is primarily "arbitrary, incidental, or ornamental").

Plaintiff's bottlecap jewelry designs were, likewise, found to be "non-functional" by the United States Patent & Trademark Office. *P-269, P270, ER 12, Exh. 6 to Resp. MSJ*. (Office Action response shows position that claims directed to bottlecap jewelry designs are considered to be non-functional). No expert testimony was provided by the Defendants that contradicted these non-functionality positions, and the testimony from M3 Girl's Manager, Ms. Diane Bradshaw, confirmed the fact repeatedly that the Plaintiff's bottlecap jewelry designs were non-functional. (*see note 5, supra*).

The Defendants' expert, Ms. Haab, also provided testimony that confirmed the non-functionality of the Plaintiff's trade dress. When Ms. Haab testified, she indicated that if parts of the Plaintiff's trade dress could be "rearranged, changed, or left out entirely" without affecting the ability of the bottlecap necklace to

⁵ Trade dress non-functionality: (1) Ms. Diane Bradshaw testimony (include cross, rebuttal) (*CR 267, Vol. 1, Tr. 62-88; CR 268, Vol. 2, Tr. 17-231; CR 289, Vol. 3, June 20, 2012, Tr. 2-101; CR 287, Vol. 5, Tr. 106-107*); Ms. Madeline Bradshaw testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 102-167*); Ms. Haab testimony (*CR 287, Vol. 5, Tr. 32-78, 81*); *Exhibits P-3D an P3E (offer of proof), P-269, and P-270 (ER 15 and 16)*.

function as a bottlecap choker necklace, then the Plaintiff's trade dress non-functional. *CR 287, Vol. 5, June 25, 2012, Tr. 35:7-45:2 (Tr. 42:4-6, Haab: "If the parts were arbitrary or ornamental, the parts could be rearranged, changed or left out entirely without affecting the product itself.")*. Ms. Haab then confirmed the possibility of such a "rearrangement, change or omission" of parts during her testimony with respect to Plaintiff's Exhibit 3E, which all established the fact that the Plaintiff's trade dress was non-functional by the very standards set by the Defendants' expert. *Exhibit P3-E, ER 16*.

The evidence of trademark infringement was extensive.⁶ The Defendants knew about the existence of M3 Girl Designs, shown at Dallas, Texas World Trade Center, Ms. Liles was a shopper registered at the World Trade Center, etc. For the same identical products, the Defendants adopted the trademark "Click It Caps," and claimed that its tradename was protectible by its "TM" designation. The comparison of the Defendants' trademark "Click It Caps" to the Plaintiff's Registered mark, "Snap Caps ®", was persuasive evidence of the trademark

⁶ Infringement: Ms. Diane Bradshaw testimony (*CR 267, Vol. 1, Tr. 62-88; CR 268, Vol. 2, Tr. 17-231; CR 289, Vol. 3, June 20, 2012, Tr. 2-101; CR 287, Vol. 5, Tr. 106-107*); Ms. Madeline Bradshaw testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 102-167*); Ms. Margot Bradshaw testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 269-272*); Ms. Krista Dudte testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 168 to CR 269, Vol. 4, June 21, 2012, Tr. 37*); Mr. Robert Dudte testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 214-263*); Ms. Morgan Ward testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 38-171*); *Exhibits P-1, P-3D, D-1, P-217, P-218 to P-229, D-1, D-317, D-236*.

infringement, especially when combined with evidence of prior knowledge and apparent bad faith intent in its adoption of the “Click It Caps” name.

Evidence was presented regarding the Plaintiff’s dilution claim, including the production of hazardous product and the return of defective product that was, for all intents and purposes, identical in form to the Plaintiff’s product and marketed using a confusingly similar trade name. Evidence was also presented at trial that supported the issues relating to trade dress secondary meaning⁷, unfair competition common law claims (including dilution and palming off)⁸, personal

⁷ Trade dress secondary meaning: Ms. Diane Bradshaw testimony (*CR 267, Vol. 1, Tr. 62-88; CR 268, Vol. 2, Tr. 17-231; CR 289, Vol. 3, June 20, 2012, Tr. 2-101; CR 287, Vol. 5, Tr. 106-107*); Ms. Madeline Bradshaw testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 102-167*); Ms. Margot Bradshaw testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 269-272*); Ms. Morgan Ward testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 38-171*); Ms. Haab testimony (*CR 287, Vol. 5, Tr. 32-78, 81*); *Exhibits P-15 to 21, 23, 25-26, 27B, 27F, 29-35, 54, 58, 60-62, 65, 68-69, 74, 78, 85-86, 88, 93-95, 101-103, 112, 115, 117-118, 126-127, 130-131, 148-149, P-174, 174A, 174C, 177, 185A, P-210, 210A-C, 211, 213F, 216, 216A; P-232 to 237, P-237A, P-319; D-117, D-188, D-189; D-175B, D-190.*

⁸ Palming off, dilution and unfair competition: Ms. Diane Bradshaw testimony (*CR 267, Vol. 1, Tr. 62-88; CR 268, Vol. 2, Tr. 17-231; CR 289, Vol. 3, June 20, 2012, Tr. 2-101; CR 287, Vol. 5, Tr. 106-107*); Ms. Madeline Bradshaw testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 102-167*); Ms. Morgan Ward testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 38-171*); Ms. Haab testimony (*CR 287, Vol. 5, Tr. 32-78, 81*) Ms. Krista Dudte testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 168 to CR 269, Vol. 4, June 21, 2012, Tr. 37*); Mr. Robert Dudte testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 214-263*); Ms. Reynolds testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 208-214*); *Exhibits P-1, P-3, 3A, 3D, D-1, P-217, P-218 to P-229, D-1, D-317, D-236; see also, P-15 to 21, 23, 25-26, 27B, 27F, 29-35, 54, 58, 60-62, 65, 68-69, 74, 78, 85-86, 88, 93-95, 101-103, 112, 115, 117-118, 126-127, 130-131, 148-149, P-174, 174A, 174C, 177, 185A, P-210, 210A-C, 211, 213F, 216, 216A; P-232 to 237, P-237A, P-319; D-117, D-188, D-189; D-175B, D-190.*

liability/willful infringement (personal liability and lack of good faith)⁹, and damages.¹⁰

2. Jury Findings

Despite evidence strongly favoring the Plaintiff's case, the jury found that the Plaintiff's trade dress was functional and there was no likelihood of confusion between the trademarks to support a trademark infringement claim. *CR 258, Verdict, CR 309*. As shown herein, the jury found in favor of the Defendants on all other issues, except the support for the Plaintiff's trademark registration.

3. Prejudice Arising from Defendant Blue Brownies' Actions

Plaintiff believes that the Defendants' improper conduct and arguments presented by the Defendants prejudiced the Plaintiff and its case, including the

⁹ Willfulness, Personal Liability, No Good Faith: Diane Bradshaw testimony (*CR 267, Vol. 1, Tr. 62-88; CR 268, Vol. 2, Tr. 17-231; CR 289, Vol. 3, June 20, 2012, Tr. 2-101; CR 287, Vol. 5, Tr. 106-107*); Ms. Krista Dudte testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 168 to CR 269, Vol. 4, June 21, 2012, Tr. 37*); Mr. Robert Dudte testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 214-263*); *Exhibits P-1, P-3, 3A, 3D, D-1, P-217, P-218 to P-229, D-1, D-317, D-236*; *see also, P-15 to 21, 23, 25-26, 27B, 27F, 29-35, 54, 58, 60-62, 65, 68-69, 74, 78, 85-86, 88, 93-95, 101-103, 112, 115, 117-118, 126-127, 130-131, 148-149, P-174, 174A, 174C, 177, 185A, P-210, 210A-C, 211, 213F, 216, 216A; P-232 to 237, P-237A, P-319; D-117, D-188, D-189; D-175B, D-190*.

¹⁰ Damages: Ms. Diane Bradshaw testimony (*CR 267, Vol. 1, Tr. 62-88; CR 268, Vol. 2, Tr. 17-231; CR 289, Vol. 3, June 20, 2012, Tr. 2-101; CR 287, Vol. 5, Tr. 106-107*); Ms. Madeline Bradshaw testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 102-167*); Ms. Krista Dudte testimony (*CR 289, Vol. 3, June 20, 2012, Tr. 168 to CR 269, Vol. 4, June 21, 2012, Tr. 37*); Mr. Robert Dudte testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 214-263*); Ms. Reynolds testimony (*CR 269, Vol. 4, June 21, 2012, Tr. 208-214*); *Exhibits P-1, P-3, 3A, 3D, D-1, P-217, P-218 to P-229, D-1, D-317, D-236, see also, Exhibits P-15 to 21, 23, 25-26, 27B, 27F, 29-35, 54, 58, 60-62, 65, 68-69, 74, 78, 85-86, 88, 93-95, 101-103, 112, 115, 117-118, 126-127, 130-131, 148-149, P-174, 174A, 174C, 177, 185A, P-210, 210A-C, 211, 213F, 216, 216A; P-232 to 237, P-237A, P-319; D-117, D-188, D-189; D-175B, D-190*.

creation and maintenance by one of the Defendants’ witnesses of a website disparaging the Plaintiff’s principals, the repeated invitations by Defendants’ counsel for the jury to search the Internet (presumably to find their disparaging website), the improper disclosure of unadmitted evidence to the jury, the “deceptive” and “unprofessional conduct” of Defendants’ counsel (as noted by the District Court), and the improper arguments and positions advocated by Defendants regarding punitive damages and assertion of claims.

(a) **Disparaging Website Created To Prejudice Plaintiffs:**

One of the Defendants’ witnesses created an Internet website that was dedicated to disparaging and insulting the Plaintiffs, and the creation and maintenance of this website was knowingly used by Defendants’ counsel to unfairly prejudice the jury against the Plaintiff.¹¹

(i) During the trial, the Defendants repeatedly invited jury to search the Internet, on their own, as a means of leading the jury to discover

¹¹ See CR 201 (3069), Motion Exclude Late Designated Witness, June 5, 2012, p. 3-4 (Defendants’ witness Meadors was author of Tabberone website); CR 214, Response to Motion to Exclude, June 9, 2012, p. 7-8 (3255) (acknowledges desire to present witness testimony from Tabberone website author, Meadors); ER 11-12, Website Print-Outs for www.Tabberone.com, Exhibit 9 to JMOL, CR 275, (disparaging and unfairly prejudicial Internet materials directed at Plaintiff’s principals created by one of Defendants’ witnesses), Exh. 8 to CR 96, Resp. to Summary Judgment Motion.

these disparaging Internet materials and prejudice the jury against the Plaintiff (with Plaintiff's objections),¹²

(ii) Defendants' improper suggestions for the jury to conduct Internet search about the Plaintiff and its products were recorded and recognized as inappropriate by the Court. The Court explicitly found that Defendants' counsel, Mr. Hanor, "kept going to the edge of propriety sometimes seeming to suggest that the jury search the Internet and go to stores ..." *CR 302, Order Denying Costs, Jan. 3, 2013, p. 3, ER 9.*

(b) Defendants Improper Display of Unadmitted Evidence:

Defendants' counsel, "Mr. Hanor[,] displayed Ms. Bradshaw's unredacted personal tax return to the jury despite the fact that it was not admitted into evidence," misled the Court about a non-existent Schedule C on that return, and engaged in deceptive and unprofessional conduct. *CR 302, p. 3-4, ER 9 (8371-72).*

(i) Defendants' counsel misled the Court into believing he wanted to show Schedule C from these tax returns, when in fact, no

¹² *CR 267, Vol. 1, June 18, 2012 Tr. 57:8-58:18, Defts:* "They are all over the internet. If you look at Esty. I don't know if you look at Esty is, but it's an online store." Plaintiff's counsel: "I object, your Honor. I think you instructed the jury not to look at the internet." Defts: "These right here are on sell right now in toy stores. You can buy them. I bought these on Amazon.com.", Plaintiff's counsel: "Object, your Honor. Now he's instructing people to go to stores and buy things."; *CR 288, Vol. 6, June 26, 2012, Tr. 35:4-5* (Defts: "You saw when you looked at their web site the you buy them separately, . . ."); *Tr.36:13-15* (Defts: "You have seen their web sites. You know that."); *Tr. 41:11-14* (Defts: "You look on the web site."); *Tr. 50:25* (Defts: "Look at the Blue Brownies web site."); *Tr. 52:23-25* ("Look at what we did regarding our site.").

Schedule C existed with respect to the returns being displayed. *Id.*, p. 3-4 (8371-72).

(ii) “[T]he Court gave Mr. Hanor clear instruction” to not display the entire return. *Id.* at p. 3-4 (8371-72) (“show only the Schedule C information...”). Despite the Court’s Order, Mr. Hanor continued to scroll through Ms. Bradshaw’s entire tax return in defiance of the Court’s ruling, presumably, to prejudice the Plaintiff by showing the extent of personal assets allegedly owned by the Plaintiff’s Manager.¹³

(iii) Defendant Plaintiff objected to the continuing display of the entire tax return with the Court’s confirmation that the subject tax return was not be admitted into evidence, which Mr. Hanor responded with improper statement to the Court. *See note 13, infra.*

(iv) The Court confirmed this conduct when it “verbally sanctioned” Mr. Hanor for his “deceptive conduct” and his “unprofessional conduct.” *Id.* at p. 4 (8372).

¹³ *CR 268, Vol. 2, June 19, 2012 Tr. 222:22-226:17* (after displaying the tax returns on the video display, Defts: “Now, this is your tax return for 2006?”, not admitted into evidence, still displaying tax return on video display, Defts: “Well, let’s look at the return and let’s look at the schedule.”, Court: “Let’s look only at the schedule, not the entire personal tax return.” Plaintiff’s Counsel: “Your Honor, now we’re scrolling through the entire thing.” Defts: “We’re going to the schedule.” Court: “Can’t we just get to the schedule.” Defts: “There is no Schedule C, and that’s the point I’m trying to make.” Plaintiff’s Counsel: “Your Honor, could we have it off the screen until we figure this out?, Court, “If there is no Schedule C, please take it down.” Court: “The 2006 and 2007 personal tax returns of Ms. Bradshaw will not be admitted into evidence” with further conversation to counsel and jury.).

(c) During closing argument, Defendants’ counsel argued that he found it offensive that Plaintiff would seek punitive damages. *Id.* Because defendants were wrongfully implying that Plaintiff was pursuing punitive damages,¹⁴ Plaintiff’s counsel stood during closing argument to object to this improper argument. The Court then told the jury that this closing argument was improper because punitive damages were not at issue in the case.

(d) Defendants also argued that trade dress claims were not part of the case when initially filed, when in truth, the Plaintiff’s trade dress allegations relating to the Lanham Act 43(a) product confusion and infringement were present in the initial Complaint filing.¹⁵

¹⁴ *CR 288, Vol. 6, June 26, 2012 Tr. 55:2-10*, Defts: “I tell you what I find offensive is their claim for punitive damages. That I find offensive.”; Court: “Punitive damages are not a part of this case any longer.” Defts: “All right. I’ll go with that. I agree with that.” Court: “Punitive damages are not part of this case. So we can’t talk about punitive damages anymore.”

¹⁵ *CR 288, Vol. 6, June 26, 2012 Tr. 38:11-21*, Defts: “The trade dress claims against Blue Brownies did not appear until over two years after they received their first cease and desist letter.” “The trade dress appeared in February of 2011.” “They weren’t being accused of trade dress, not at all.” “We’re just talking about copyrights and patents...”; but see, Complaint, *CR 1, p. 11, Count IV* (trademark and trade dress claims included in original Complaint, ¶ 65, Defendants are infringing Plaintiff rights by “offering confusingly similar product line using that tagline and other trademark or slogans that are likely to create consumer confusion.” ¶66, Defendants acts and business activities are likely to cause confusion between “Defendant’s products and services vis-à-vis the Plaintiff’s products.” (e.g. product trade dress confusion), compare, ¶67, create confusion between Plaintiff and Defendants’ businesses.

4. **Prejudicial Court Rulings**

Plaintiff also respectfully contends that it was prejudiced by significant evidentiary rulings and jury instructions issued by the District Court include the following:

(a) **Improper Exclusion of Defendants' Admission of Trade Dress:**

The District Court excluded the Defendants' evidentiary admissions that the Plaintiff's trade dress protection existed and covered the Plaintiff's defined trade dress product configuration. The Defendants filed pleadings in the proceeding that included prejudicial admissions and statements, such as the Defendants' Answer that acknowledged the fact that the Plaintiff's trade dress protection existed as identified in the Plaintiff's trade dress definition. *CR 267, Vol. 1, June 18, 2012, Tr. 23:12-26:2 (admissions regarding trade dress existence), see notes 3 and 4, supra.* The District Court excluded the use of this admission, as filed by the Defendants, from evidence at trial. *CR 267, Vol. 1, June 18, 2012, Tr. 90:19-93:8 (indicates position on exclusion of admissions in pleadings; CR 268, Vol. 2, June 19, 2012, Tr. 2:2-17:9 (excludes admissions in pleadings with counsel discussion about viewing demonstrative boards); CR 287, Vol. 5, June 25, 2012, Tr. 139:19-140:4 (cannot reference admissions).*

(b) **Improper Exclusion of Defendants' Admissions of Committing and Profiting from Unfair Competition:**

The Court's improperly excluded Defendants' evidentiary admissions, filed in their active pleadings, that affirmatively admitted that the Defendants committed acts of unfair competition, gained an unfair advantage in the marketplace from those acts, profited from those acts, and that those acts of unfair competition were likely to cause actual or likely deception in the marketplace. *CR 267, Vol. 1, June 18, 2012, Tr. 32:15-33:23 (admissions regarding own unfair competition and likely/actual consumer confusion, see notes 3 and 4, supra.* Defendants were notified about the existence of these admissions against their interests when the Plaintiff M3Girl Designs "admitted" the Defendants allegations in their active, live pleadings. (*See notes 3-4, supra.*) Even though Blue Brownies Defendants never filed amended allegations by withdrawing these admissions from the active, live pleadings, the Court excluded the use of these admissions from the case. *CR 267, Vol. 1, June 18, 2012, Tr. 90:19-93:8 (indicates position on exclusion of admissions in pleadings; CR 268, Vol. 2, June 19, 2012, Tr. 2:2-17:9 (excludes admissions in pleadings with counsel discussion about viewing demonstrative boards); CR 287, Vol. 5, June 25, 2012, Tr. 139:19-140:4 (cannot reference admissions).*

(c) **The Consent Decree Admissions:**

The Liles Consent Decree admissions were improperly excluded from the evidence in this matter. On July 19, 2010, Ms. Charlotte Liles agreed to the entry of a Consent Decree by the Court. Pursuant to the entered Consent Decree, Ms. Liles affirmatively stated that the Plaintiff's claims of trademark and trade dress infringement, as well as other claims, were viable claims that asserted valid intellectual property rights. *ER 14, CR 34-35, 360-66*. The Appellant Plaintiff M3 Girl Designs believes the District Court should not have excluded the use of this Consent Decree, as entered, from the evidence at trial. *CR 185, Mtn. Limine Granted*.

(d) **"Functionality" Trade Dress Jury Instruction:**

The Court's jury instruction regarding "trade dress functionality" included a list of possible evidence that would show "functionality," but did not include an equally-balanced listing of evidence that would show "non-functionality." *CR 254 (4078), p. 8 (3 prong listing)*. The Plaintiff objected to this instruction because this listing was tilted toward the Defendants' functionality position, but the Court overruled the objection and gave the unfairly biased jury instruction on "functionality." (*CR 288, Vol. 6, June 26, 2012, Tr. 119:24-121:16 (objection to three enumerated paragraphs at the end of the functionality instruction, overruled)*).

(e) **Court's Questions During Plaintiff's Examination:**

During the examination of the Defendants' expert, Ms. Haab, the Court interjected questions to the Plaintiff's counsel regarding the magnetic components on Plaintiff's product and the need to show economic non-functionality, when that issue was not being addressed with the expert at that time. *CR 287. Vol. 5, June 25, 2012, Tr. 53:19-55:24 (Court asks questions about relationship of magnets on Plaintiff and Defendants' products and how each "operates")*. The Court's emphasis on economics over the substitution and elimination of elements in the Plaintiff's trade dress undoubtedly prejudiced the Plaintiff by confusing the jury, as well as undermined the credibility of the Plaintiff and its counsel in front of the jury.

(f) **Exclusion of "Mock-Up" Evidence Showing Non-Functionality:**

The Court's exclusion of a cross-examination "mock-up" exhibit (*P3E, ER 16*) showing the alternative designs not incorporating all the elements of the Plaintiff's trade dress, yet still functioning as a bottlecap choker necklace, was improper. The "mock-up" exhibit was used as an impeachment exhibit with Defendants' expert, Ms. Haab, and showed the arbitrary, ornamental and non-functionality of the Plaintiff's bottle cap choker trade dress.

Because the Defendants' expert admitted that the Plaintiff's trade dress was non-functional if the trade dress elements could be substituted, eliminated or

replaced without interfering with the functionality of the choker necklace, the “mock-up” showing this substitution, elimination, and replacement of elements was evidence that should have been admitted into evidence. *CR 287, Vol. 5, June 25, 2012, Tr. 63:25-64:14 (addressing marking “mock-ups” of other bottlecap choker necklaces as exhibits) CR 288, Vol. 6, Tr. 2:21-25 (admit as “offer of proof” after arguments), Tr. 70:7-9 (“mock-up” impeachment exhibits marked as P3E), ER 16.*

5. JMOL For Defendants’ Counterclaims

There was no factual evidence provided to support the Defendants’ counterclaims. When asked about why no support had been provided, Defendant admitted that they had not presented any supporting evidence.

SUMMARY OF THE ARGUMENT

With respect to the Defendants’ presentation of their case, the Plaintiff is aware of the fact that:

A trial need not be perfect; *it must, however, be fair.*
Thus the Rules of Evidence require that the issues presented at trial be relevant to the matter in dispute, and be supported by admissible evidence that is *free of unfair prejudice.*

Magnivision, Inc. v. Bonneau Co., 115 F.3d 956, 958 (Fed. Cir. 1997) (emphasis added).

The Supreme Court in *In re Murchison*, 349 U.S. 133, 136 (1955), said: “A fair trial in a fair tribunal is a basic requirement of due process...” and “our system of law has always *endeavored to prevent even the probability of unfairness. . .*” (emphasis added). The Sixth Circuit cited *Murchison* Court in *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956), for the proposition that: "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case."

In the present case, the presentation of evidence and arguments by Defendants Blue Brownies was replete with unfair prejudice. The Defendants’ trial witnesses created disparaging websites profanely insulting the Plaintiff’s principals, and the Defendants repeatedly instructed the jury to “go search the Internet” presumably so the jury could find this website as part of their improper independent research. The Defendants also made improper arguments and conducted themselves, as the Court explicitly noted, in a “deceptive” and “unprofessional” manner. *See CR 302, Order Denying Costs, p. 3-4 (8371-72) (e.g. showing unadmitted exhibits to the jury, deceiving the Court as to the existence of a non-existent Schedule C to an income tax return, making improper closing arguments, inviting jurors to search the Internet).*

The Trial Court also contributed to this prejudicial effect by its improper exclusion of evidence, use of an imbalanced jury instruction on trade dress functionality, and its comments during the presentation of evidence. The cumulative effect of the Defendants' improper conduct, when combined with these Trial Court errors, was the destruction of the Plaintiff's ability to receive a fair trial.

The presentation of evidence that was over-whelming in favor of the Plaintiff on the issues of trade dress non-functionality and likelihood of trademark infringement. The positions taken by the Court, the United States Patent & Trademark Office, and the Defendants' expert all clearly established the non-functionality of the Plaintiff's jewelry trade dress. And, the likelihood of confusion of the marks, Snap Caps® infringed by Click It Caps, was also established by the evidence. Despite the clear evidence favoring the Plaintiff, the jury was prejudiced by these actions and rulings to the point where it found for the Defendants.

What tipped the balance in favor of the Defendants on these issues? Undoubtedly, the jury was unfairly biased against the Plaintiff by the Defendants' improper conduct at trial and the Court's evidentiary rulings, jury instructions and actions at trial. The points of error below were more than sufficient to tip the balance of the jury into favor of the Defendants when that jury should have been

provided a level playing field to judge the merits of this case. For the reasons set forth herein, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

ARGUMENTS AND AUTHORITIES

I. LEGAL STANDARD

a. JMOL Denials

A JMOL denial is reviewed *de novo*. *Arsement v. Spinnaker Exploration Co.*, 400 F.3d 238, 248 (5th Cir. 2005). "JMOL is proper when 'the facts and inferences point so strongly and overwhelmingly in favor of one party that the court concludes that reasonable jurors could not arrive at a contrary verdict.'" *Id.* at 248-49 (quoting *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 273 (5th Cir. 1997)); see also FED. R. CIV. P. 50(a).

b. New Trial Denial

The decision to grant or deny a motion for a new trial rests in the sound discretion of the trial judge; that discretion can be set aside upon a clear showing of abuse, which evinces an error of law in a ruling below. *Consol. Cos. v. Lexington Ins. Co.*, 616 F.3d 422, 435 (5th Cir. 2010). "A trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Black v. Pan Am. Labs., LLC*, 646 F.3d 254, 258-59

(5th Cir. 2011) (*quoting United States v. Caldwell*, 586 F.3d 338, 341 (5th Cir. 2009)).

c. Improper Conduct and Unfair Arguments by Defendants

The denial of a new-trial motion based on prejudicial acts is reviewed to determine whether a manifest injustice would result from allowing the verdict to stand. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 582 (5th Cir. 1993); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985)(reversed and remanded due to improper attorney conduct and arguments).

d. Jury Instructions

The district court's instructions to the jury and special interrogatories are reviewed for abuse of discretion. *Le Boeuf v. K-Mart Corp.*, 888 F.2d 330, 334 (5th Cir.1989); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir. 1994). Although we afford broad discretion in fashioning jury instructions, the trial court must nevertheless "instruct the jurors, fully and correctly, on the applicable law of the case, and ... guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth." *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir.1993) (*quoting* 9 Wright & Miller, *Federal Practice and Procedure* § 2556 (1971)); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir. 1994).

e. **Evidentiary Rulings**

The Fifth Circuit Court of Appeals reviews district court's evidentiary rulings for abuses of discretion. *United States v. Clark*, 577 F.3d 273, 287 (5th Cir. 2009) (citing *Freeman v. United States*, 556 F.3d 326, 341 (5th Cir. 2009)); *Price v. Rosiek Constr. Co.*, 509 F.3d 704, 707 (5th Cir. 2007); *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 265 (5th Cir. 2007)). If the Fifth Circuit finds an abuse of discretion, then the error is reviewed under the harmless error doctrine. *Id.* (citing *United States v. Sanders*, 343 F.3d 511, 517 (5th Cir. 2003)). Put another way, the Fifth Circuit reverses a district court's evidentiary rulings "where there has been a clear abuse of discretion," *McNeese v. Reading and Bates Drilling Co.*, 749 F.2d 270, 274 (5th Cir. 1985), "and the ruling has harmed the complaining party," *Farace v. Independent Fire Insurance Co.*, 699 F.2d 204, 211 (5th Cir. 1973).

II. POINTS OF ERROR

Appellant M3 Girl Designs respectfully requests a reversal of the District Court's denial of the Plaintiff's JMOL Motions, and remand of this case to the Trial Court for treatment in a manner consistent with this Court's view of the evidence, either to render judgment or to hold a new trial. The Points of Error will be reviewed in the order identified above in the "Issues Presented" Section.

A. Issue 1: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion, or in the alternative, motion for a new trial because Blue Brownies Defendants unfairly prejudiced the Appellant M3 Girl by their improper conduct, arguments, and actions?

When a jury is unduly influenced by erroneous argument or conduct, it is appropriate for us to order a new trial rather than remittitur. *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1341-42 (5th Cir. 1985) (reversed and remanded due to improper attorney conduct and arguments); *Evers v. Equifax*, 650 F.2d at 797; *Lowe v. General Motors Corp.*, 624 F.2d 1373, 1383 (5th Cir. 1980); *Brabham v. Mississippi*, 96 F.2d 210, 213 (5th Cir.1938). The denial of a new-trial motion based on prejudicial acts is reviewed to determine whether a manifest injustice would result from allowing the verdict to stand. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 582 (5th Cir. 1993); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985) (reversed and remanded due to improper attorney conduct and arguments).

Although decisions have deviated from the remittitur rule, *see, e.g., Edwards v. Sears, Roebuck and Co.*, 512 F.2d 276, 281-82 (5th Cir.1975); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1043 (5th Cir.1970), the better approach is to require a new trial on any issue infected by passion and prejudice and employ remittitur for those verdicts which are excessive, that is, so large as to be contrary to right reason. *See, e.g., Calderera v. Eastern Airlines, Inc.*, 705 F.2d

778, 784 (5th Cir. 1983); *Howell v. Marmpegaso Compania Naviera, S.A.*, 536 F.2d 1032, 1034 (5th Cir.1976).

In the present case, the Defendants presented manifestly improper and unfair arguments throughout the case, especially when the Defendants directed the jury repeatedly to “search the Internet” on their own presumably to find a highly disparaging website created by one of the Defendants’ trial witnesses. With the advent of electronic social media and the recognized problem of jurors conducting their own Internet searches (even after being advised not to conduct such searches by the Court), the Defendants’ conduct was undoubtedly intended to unduly prejudice the jury against the Plaintiff’s principals. Apart from these repeated invitations to find their disparaging website, the Defendants also improperly disclosed unadmitted evidence to the jury, engaged in “deceptive” and “unprofessional conduct” of Defendants’ counsel, and made improper arguments before the jury.

1. Disparaging Website Created To Prejudice Plaintiffs.

One of the Defendants’ witnesses created an Internet website that was dedicated to disparaging and insulting the Plaintiffs, and the creation and maintenance of this website was used by the Defendants to unfairly prejudice the jury against the Plaintiff.¹⁶ During the trial, the Defendants repeatedly invited jury

¹⁶ See note 9, *supra*.

to search the Internet, on their own, as a means of leading the jury to discover these disparaging Internet materials and prejudice the jury against the Plaintiff.¹⁷

The Defendants' improper suggestions for the jury to conduct Internet search about the Plaintiff and its products were confirmed by the Court. The Court explicitly found that Defendants' counsel, Mr. Hanor, "kept going to the edge of propriety sometimes seeming to suggest that the jury search the Internet and go to stores ..." *CR 302, Order Denying Costs, Jan. 3, 2013, p. 3, (8371-72)*. The Plaintiff's objections to this conduct are also noted in the record. *See note 12, supra*.

The request for jurors to search the Internet was pervasively presented to the jury throughout the Defendants' opening and closing arguments, and such conduct is a significant and primary concern to the judiciary as shown in the recent Federal Judiciary's issuance of specialized jury instruction on prohibitions against Internet usage by juries. *See Proposed Model Jury Instruction, Judicial Conference Committee on Court Administration and Case Management, June 2012, <http://legaltimes.typepad.com/files/model-jury-instructions.pdf>*.

The Defendants' request for the jury to "go to the Internet" is especially troubling given their close association with the author (a witness named on the Defendant's Witness List) of a disparaging website created as part of this case,

¹⁷ *See note 10, supra*.

which profanely insults the Plaintiff's principals and others associated with the Plaintiff. *See ER 11, CR 275, Exh. 9 to JMOL Motion, Tabberone Website (author/Defendant's witness acknowledging intentionally "insulting" website), ER 12, CR 96, Exh. 8. To Resp. to Mtn. Summary Jdt. (website).* Without a doubt, the Defendants surreptitiously directed jurors to a disparaging website created by one of their witnesses – a profanity-laced diatribe that could only cloud the impartiality of the jurors against the Plaintiffs. This was no accident. It was an intentional act to taint the jury against Appellant Plaintiff, and this issue is of exceptional importance in this “digital age” where parties (and their witnesses) should not be allowed to unfairly influence the jury's impartiality by such conduct.

The prejudice arising from such presentations of evidence and arguments is substantial, and no amount of corrective instructions by the Court is likely to cleanse this prejudice from the juror's mind. The Plaintiff maintained its objections to these errors by objecting to the improper invitations to “go to the Internet” and the improper publication of the Plaintiff's personal wealth statements. Certainly taken as a whole, all these tactics resulted in a miscarriage of justice, which should be corrected by this Court through the grant of a new trial or by granting other suitable relief.

2. **Defendants Improper Display of Unadmitted Evidence.**

Defendants' counsel, "Mr. Hanor[,] displayed Ms. Bradshaw's unredacted personal tax return to the jury despite the fact that it was not admitted into evidence," misled the Court about a non-existent Schedule C, and engaged in deceptive and unprofessional conduct at trial. For instance, Defendants' counsel misled the Court into believing he wanted to show the jury Schedule C from these tax returns when, in fact, no Schedule C existed with respect to the returns being displayed. *CR 302, Order Denying Costs, p. 3-4 (8371-72)*. "[T]he Court gave Mr. Hanor clear instruction" to not display the entire return. *Id. at p. 3-4* ("show only the Schedule C information...").

Despite the Court's Order, Mr. Hanor continued to scroll through Ms. Bradshaw's entire tax return on the overhead projector in front of the jury in direct defiance to the Court's prior ruling, with the apparent intention of prejudicing the Plaintiff with the jurors by showing the extent of personal assets allegedly owned by the Plaintiff's Manager, Ms. Diane Bradshaw.¹⁸ Plaintiff's counsel continued to object and ask for the tax return to be taken off the overhead display monitor. *See note 13, supra.*

Defendant Plaintiff objected to this display of the entire tax return, and the Court's confirmed again that the subject tax return was not admitted into evidence.

¹⁸ *See note 11, supra.*

In response to this ruling, Mr. Hanor made an improper statement to the Court. The Court confirmed that these improper statements and conduct took place when it noted the fact that it “verbally sanctioned” Mr. Hanor for his “deceptive conduct” and his “unprofessional conduct.” *Id.* The display of Mr. Bradshaw’s entire tax return, by the sheer number of pages and the extensiveness of the return itself, was meant to create an impression of Ms. Bradshaw as a person of “means” that does not need a ruling in her favor to this trademark case.

Undoubtedly, the lies to the Court, the improper display of multiple pages of a personal tax return, and the improper statements to the Court were meant to unduly prejudice the jury against the Plaintiff. These actions were no accident. It was another intentional act meant to taint the jury against Appellant Plaintiff. The Defendants should not be allowed to unfairly influence the jury’s impartiality by such conduct; and, as such, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

3. Improper Closing Argument.

It is “[a] particularly indefensible tactic” to use “closing arguments to bring before the jury damaging facts not in evidence and never established.” *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 284 (5th Cir. 1975). In this case, Defendants argued as part of their closing argument that Plaintiff was pursuing punitive damages, which Defendants’ counsel characterized as particularly offensive.

When he made that argument, punitive damages were no longer a part of the case.¹⁹

Because defendants were wrongfully implying that Plaintiff was pursuing punitive damages, Plaintiff's counsel stood during closing argument to object to this improper argument. The Court interjected an instruction to the jury in response to that action, and the Court indicated that the closing argument was improper because punitive damages were not at issue in the case.

In *Evers v. Equifax, Inc.*, 650 F.2d 793 (5th Cir. 1981), the Fifth Circuit affirmed a trial court's grant of a new trial, which was based on the Appellant's improper placement of the punitive damages issue before the jury after punitive damages were withdrawn from the case by the trial court. For the same reasons set forth in *Evers*, the Trial Court should have granted a new trial based on the inherent prejudice associated with the Defendants' conduct and arguments, including this punitive damage remark.

Despite the Court's instructions, the Defendants' statements were too prejudicial, when combined with their other improper conduct, to "put the cat back in the bag" because no instruction was going to remove the negative effect all this conduct was placing in the jury's mind. In analyzing the potential prejudicial impact on the jury, the Fifth Circuit has found that invoking arguments that exceed

¹⁹ See note 12, *supra*.

the limits of advocacy cause a prejudicial verdict, which can result in a reversible error. *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985) (prejudicial arguments resulted in prejudicial verdict, reversed and remanded). The Fifth Circuit has found that a prejudicial argument can result in a holding that the district court abused its discretion by not granting a new trial. *Id.* The Defendants should not be allowed to unfairly influence the jury's impartiality by such conduct; and, as such, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

4. *Other Improper Prejudicial Arguments*

Defendants also inaccurately argued during the trial that trade dress claims were not initially filed by the Plaintiff as part of their case,²⁰ when trade dress infringement allegations relating to the Lanham Act 43(a) product confusion and infringement were present in the initial Complaint filing.²¹ Defendants meant to imply that the Plaintiff's trade dress claims were an "after-thought," and not a serious claim for relief. This argument, like the other arguments, was meant to

²⁰ See note 13, *supra*.

²¹ Complaint, *CR 1*, p. 11, *Count IV* (trademark and trade dress claims included in original Complaint, ¶ 65, Defendants are infringing Plaintiff rights by "offering confusingly similar product line using that tagline and other trademark or slogans that are likely to create consumer confusion." ¶66, Defendants acts and business activities are likely to cause confusion between "Defendant's products and services vis-à-vis the Plaintiff's products." (e.g. product trade dress confusion), compare, ¶67, create confusion between Plaintiff and Defendants' businesses.

prejudice the Plaintiff's case by disparaging the Plaintiff instead of addressing the merits of the case.

5. *Cumulative Effect – Unfair Prejudice*

In the present case, the presentation of evidence and arguments by Defendants Blue Brownies was replete with unfair prejudice. The Defendants' trial witnesses created disparaging websites profanely insulting the Plaintiff's principals, and the Defendants repeatedly instructed the jury to "go search the Internet" presumably to allow the juror to find this website as part of their improper independent research. The Defendants also made improper arguments and conducted themselves, as the Court explicitly noted, in a "deceptive" and "unprofessional" manner.²²

These improper requests to search the Internet, coupled with the inaccurate statements about the pleadings and publication of personal wealth information to the jury from an unadmitted exhibit, appears to have been motivated by a desire to unduly prejudice the jurors against the Plaintiff and its principals. That desire appears to have been accomplished. The cumulative effect of the Defendants' improper conduct was the destruction of the Plaintiff's ability to receive a fair trial.

The presentation of evidence was over-whelming in favor of the Plaintiff on

²² See CR 302, Order Denying Fees, p. 3-4 (e.g. showing unadmitted exhibits to the jury, deceiving the Court as to the existence of a non-existent Schedule C to an income tax return, making improper closing arguments, inviting jurors to search the Internet).

the issues of trade dress non-functionality and likelihood of trademark infringement. The positions taken by the Court, the United States Patent & Trademark Office, and the Defendants' expert all clearly established the non-functionality of the Plaintiff's jewelry trade dress. And, the likelihood of confusion of the marks, Snap Caps® infringed by Click It Caps, was also established by the evidence. Despite the clear evidence favoring the Plaintiff, the jury was prejudiced by the Defendants' actions to the point where it found for the Defendants.

These points of error were more than sufficient to tip the balance of the jury into favor of the Defendants when the jury should have been provided with a level playing field to judge the merits of this case. For the reasons set forth herein, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief. *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238 (5th Cir. 1985) (combined effect of prejudicial arguments resulted in prejudicial verdict, reversed and remanded).

B. Issue 2: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion, or in the alternative, motion for a new trial because certain evidentiary rulings and jury instructions given by the Court unfairly prejudiced the Appellant M3 Girl?

Plaintiff also respectfully contends that evidentiary rulings and jury instructions given in the present case support the need for a new trial. A new trial is a means of preventing injustice. *United States v. Flores*, 981 F.2d 231, 237 (5th

Cir. 1993). As *Wright & Miller* states that Rule 59 gives the Court “ample power to prevent” a miscarriage of justice. 11 C. Wright & A. Miller, Federal Practice and Procedure § 2803 at 31-32 (1973); see *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 191 (5th Cir. 1965); *Delta Engineering Corp. v. Scott*, 322 F.2d 11, 15 (5th Cir. 1963).

The Trial Judge, in the present case, should have ordered a new trial for the interests of justice. The interests of justice support a new trial in the present case for several reasons, which include the following: (1) the improper exclusion of admissions in the Defendants’ pleadings, (2) the exclusion of impeachment evidence showing non-functionality of the Plaintiff’s trade dress, (3) the improper interjection of comments during cross examination, and (4) an unbalanced jury instruction on trade dress functionality. All of these rulings, when combined with the Defendants’ improper conduct, made it impossible for the Plaintiff to receive a fair trial. This Court should reverse and remand this case to the Trial Court for a new trial.

1. Improper Exclusion of Evidence

The "trial court's discretion to admit or exclude evidence is generally broad, but competent evidence cannot be excluded without a sound and acceptable reason." *Davidson Oil Country Supply Co. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir.1990); see also *Folks v. Kirby Forest Ind. Inc.*, 10 F.3d 1173, 1181 (5th

Cir.1994). In the present case, admissions made in the Defendants' pleadings should have been considered as evidence in this matter, but these admissions in the Defendants' pleadings were excluded from evidence by the Trial Court. Namely, the Defendants filed pleadings in the proceeding that included prejudicial admissions and statements, such as the Defendants' Answer that acknowledged the fact that the Plaintiff's trade dress protection existed as identified in the Plaintiff's trade dress definition. *CR 267, Vol. 1, June 18, 2012, Tr. 23:12-26:2 (admissions regarding trade dress existence), see notes 3 and 4, supra.*

The District Court excluded the use of this admission, as filed by the Defendants, from evidence at trial. *CR 267, Vol. 1, June 18, 2012, Tr. 90:19-93:8 (indicates position on exclusion of admissions in pleadings; CR 268, Vol. 2, June 19, 2012, Tr. 2:2-17:9 (excludes admissions in pleadings with counsel discussion about viewing demonstrative boards); CR 287, Vol. 5, June 25, 2012, Tr. 139:19-140:4 (cannot reference admissions).* The Court also excluded the Liles Consent Decrees. Defendants filed these admissions in active pleadings, and affirmatively admitted that the Defendants committed acts of unfair competition, gained an unfair advantage in the marketplace from those acts, profited from those acts, and that those acts of unfair competition were likely to cause actual or likely deception in the marketplace. *See note 3-4, supra., also, CR 268, Vol. 1, June 18, 2012, Tr.*

32:15-33:23 (*admissions regarding own unfair competition and likely/actual consumer confusion.*)

Defendants were notified about the existence of their admissions against their interests in the pleadings when the Plaintiff M3 Girl Designs “admitted” the Defendants allegations. Even though Blue Brownies Defendants never filed amended allegations withdrawing these admissions from the active pleadings, the Court excluded the use of these admissions from the case. *See id., supra. P. 38* (citations to exclusion orders).

The Trial Court excluded this evidence over the Plaintiff assertion that the Defendants’ statements, made in the active Counterclaims, Answers and Expert Reports, should be considered as evidence by the jury. The Fifth Circuit has held that even a withdrawn admission in an answer constitutes evidence that can be used at trial.²³ It is also well-settled law that admissions in an answer may be deemed judicial admissions, binding on the party who makes them, if not an evidentiary admissions.²⁴ Considerable authority from other courts establishes that a withdrawn admission constitutes, at the very least, evidence.²⁵

²³ *See, e.g., Campbell v. Sonat Offshore Drilling*, 979 F.2d 1115, 1119-20 (5th Cir. 1992); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 n.5 (5th Cir. 1983) (admissions “have value only as evidentiary admissions.”); *Rex-Tech Int’l, LLC v. Rollings*, 451 Fed. Appx. 340, 347 (5th Cir. 2011) (superceded pleading can be considered evidence); *Ganz v. Lyons Pshp., LP*, 969 F. Supp. 981, 988 (N.D. Tex. 1997).

²⁴ *See Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1984) (per curiam) (“[F]actual assertions in pleadings are . . . judicial admissions *conclusively* binding on the party that made them. Facts that are admitted in the pleadings are no longer at issue.”); *Mo. Hous. Dev.*

Based on this authority, the admissions in the Defendants' pleadings should have been admitted into evidence and it was a prejudicial error to forbid the jury from considering the evidentiary weight of such statements after they were introduced into the record. The Court's improper exclusion of these admissions had a significant prejudicial impact on the Plaintiff's case before the jury.

Further, Plaintiff attempted to introduce a "mock-up" impeachment exhibit P-3E composed of two bottlecap choker necklaces, each proving the fact that one or more of the five elements in the Plaintiff's trade dress definition could be left off or substituted with other components. *ER 16, Exhibit P-3E*. According to Defendants' expert, Ms. Haab, such substitution or omission of elements from the trade dress definition demonstrated the "ornamentality" and "arbitrary" nature of the Plaintiff's trade dress, which means the trade dress is not functional. *CR 288,*

Comm'n, v. Brice, 919 F.2d 1306, 1314 (8th Cir. 1990) ("Even if the post-pleading evidence conflicts with the evidence in the pleadings, admissions in the pleadings *are binding on the parties and may support summary judgment against the party making such admissions.*" (emphasis added); *see also Davis*, 823 F.2d at 108 (holding that plaintiffs were bound by admissions in pleadings); *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) ("[A] party is bound by the admissions in his pleadings.").

²⁵ *See, e.g., E. Natural Gas Corp. v. Aluminum Co. of Am.*, 126 F.3d 996, 1001 (7th Cir. 1997) (observing that prior pleadings "are admissible in a civil action as evidentiary admissions"); *Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (holding that defendant's admissions "create an additional issue of material fact"); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 n.5 (5th Cir. 1983) (Admissions made in superseded pleadings "have value only as evidentiary admissions."); *Van Deelen v. Johnson*, No. 05-CV-4039, 2008 U.S. Dist. LEXIS 85519, 2008 WL 4683022, at *5 (D. Kan. Oct. 22, 2008) (Plaintiff's prior pleadings "may be introduced as substantive evidence pursuant to Fed. R. Evid. 801(d)(2)."); *see also, Nisbet v. Van Tuyl*, 224 F.2d 66, 71-72 (7th Cir. 1955) (holding that superseded pleadings cease to be judicial admissions for the purposes of a motion for summary judgment, but noting that they may be introduced at trial as a prior statement).

Vol. 5, June 25, 2012, Tr. 35:7-45:2 (Tr. 42:4-6, Haab: "If the parts were arbitrary or ornamental, the parts could be rearranged, changed or left out entirely without affecting the product itself."); see also, CR 120, Court's Order, Dec. 6, 2011, p. 7 (2015) ("the inclusion of decorated bottlecaps in M3Girl's jewelry is primarily "arbitrary, incidental, or ornamental").

The admissions of the Defendants, as well as the mock-up bottlecap choker necklace exhibits, P-3E, showing the absence of trade dress elements (evidences the non-functionality, arbitrary, and ornamental nature of the Plaintiff's trade dress) were highly relevant and should have been considered by the jury to determine that the Plaintiff's trade dress was non-functional. But, this evidence and mock-up exhibit was excluded from evidence by the Court's rulings. *See exclusion citations, supra.*

Erroneous evidentiary rulings by a trial judge can be treated as harmless only if the error "does not affect the substantial rights of the parties." *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 469 (5th Cir. 1985)(reversed, remanded for new trial based on erroneous evidentiary rulings); Fed. R. Civ. P. 61. In the present case, the excluded admissions directly contradict the defenses raised by the Defendants at trial, as well as the ultimate jury findings of functionality, no trademark infringement and no unfair competition. The errors identified above undoubtedly affected the Plaintiff's substantial rights, and admission of these

significant admissions and evidence “could easily have tipped the balance in favor of finding liability.” *Id.* This Court “cannot say with conviction that this evidence did not affect the jury's determination, [which means] the result of this trial cannot stand. *Id.* (citing *Brown v. Miller*, 631 F.2d 408, 412-13 (5th Cir.1980)). For the reasons set forth herein, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

2. Comments by Court

Plaintiff M3 Girl Designs also respectfully submits that certain questioning by the Court directed to Plaintiff's counsel during the cross-examination of the Defendants' expert, Ms. Sherri Haab, unfairly tipped the scales in favor of the Defendants. Namely, Plaintiff was conducting a cross-examination of the Defendants' expert regarding the simple substitution of elements in the Plaintiff's trade dress, which Ms. Haab had admitted would be evidence of non-functionality.

During that cross-examination, the Court interjected, *sua sponte*, its own questions to Plaintiff's counsel about the costs of the magnetic components on Plaintiff's product, which was not mentioned in Ms. Haab's prior admission and undermined the credibility of the Plaintiff and its counsel in front of the jury (*CR 288, Vol. 5, June 25, 2012, Tr. 53:19-55:24 (Court asks questions about relationship of magnets on Plaintiff and Defendants' products and how each "operates."*)).

A United States District Judge “must always be careful to maintain both his objectivity and the appearance of neutrality when he does intervene in a proceeding.” *Dixon v. International Harvester Co.*, 754 F.2d 573, 585 (5th Cir.1985); *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 471 (5th Cir. 1985). “Because of his position the trial judge necessarily exercises a great deal of influence over the jury. They may consider his lightest word or intimation to be controlling.” *Newman v. A.E. Staley Manufacturing Co.*, 648 F.2d 330, 334-35 (5th Cir.1981).

In *Newman*, the Fifth Circuit agreed with the Defendants “that the remarks of the trial judge here were so biased against them as to affect the basic fairness of the trial by leading the jury to conclude that the judge favored plaintiff's position. *Id.* at 336. The Fifth Circuit in *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 473 (5th Cir. 1985), finds that:

sound judicial husbandry counsels that we indicate these remarks went far beyond the bounds of exemplary trial conduct by the district judge. Despite the admonishment in the instruction at the close of the case, these comments could be interpreted by the jury as attributing an unwarranted degree of incompetence and obfuscation of issues to defense counsel that could weigh against accepting the defenses offered on behalf of their clients. Perhaps the recitation of these highlights will suffice to prevent any recurrence.

Id. at 473. In the present case, these judicial comments unfairly prejudiced the Plaintiff's case, and for that reason, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

3. Jury Instructions Erroneous

In the present case, the jury instruction on functionality included three pointed exemplary statements requested by the Defendants on what the jurors could consider to determine the functionality issue, but all three points were directed to supporting the Defendants' position that the Plaintiff's trade dress was "functional" under the law. *CR 254, Inst. No. 1, p. 8 (4078)* (three prongs all directed to functional findings). During the Jury Charge conference, Plaintiff objected to the unfair tilting of these instructions toward the Defendants' position, and objected to the "points" on page 8 of the instructions for that reason. *CR 288, Vol. 6, Tr. 119:24-121:16* (objection).

These points, which were all directed to "functionality" in a one-sided analysis, should have been omitted, or at least, counter-balanced with statements in the jury instructions regarding what the jury should consider to determine "non-functionality." The Court overruled the objection, and left the points of "functionality" in the instruction, but Plaintiff believes that these positions unfairly tipped the balance on the functionality issue in favor of the Defendants.

In the present case, this instruction tainted the entire jury charge and resulted in a "no" answer that prevented the jury from answering other questions and prevented the jury from answering the functionality question in the Plaintiff's favor. *Cruthirds v. RCI, Inc.*, 624 F.2d 632, 636 (5th Cir.1980) (affirmed the grant

of a new trial where jury instructions included fundamental error). The three prongs in the functionality jury question misled, prejudiced, and confused the jury by unfairly pointing them in the direction of a “functionality” finding. *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir.1993); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir. 1994).

The case law of this circuit indicates that when the jury instruction is improper, the Fifth Circuit is compelled to reverse where "the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir.1985); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1097 (5th Cir. 1994). That is exactly the case here. For that reason, this case should be reversed and remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

4. Cumulative Prejudice From Trial Court Rulings

In addition to the Defendants’ improper conduct, the Trial Court improperly excluded evidence, used of an imbalanced jury instruction on trade dress functionality, and interjected its comments into the record during the presentation of evidence. The cumulative effect of the Defendants’ improper conduct, when combined with these Trial Court errors, was the destruction of the Plaintiff’s ability to receive a fair trial. *See EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1092-93

(5th Cir. 1994) (reversed and remanded because of an improper exclusion of evidence); *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 473 (5th Cir. 1985).

The substantial rights of Appellant M3 Girl Designs were affected by these errors. *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 349 (5th Cir.1983). As shown below in Error Point 3, the evidence clearly favored the Plaintiff and the Defendants' evidence was insufficient to support the jury's findings. *See infra., Point 3*. Under the harmless error doctrine, the errors shown in Point Nos. 1 and 2 significantly and substantially harmed the Plaintiff, and those errors should be reversed. *United States v. Sanders*, 343 F.3d 511, 517 (5th Cir. 2003)); *McNeese v. Reading and Bates Drilling Co.*, 749 F.2d 270, 274 (5th Cir. 1985). For the reasons set forth herein, this case should be remanded to the Trial Court for a retrial, or if this Court deems it appropriate, other suitable relief.

C. Issue 3: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion, or in the alternative, motion for a new trial because evidence supported a judgment in favor of Plaintiff M3 Girl Designs on the trade dress and trademark issues, as well as related state and ancillary claims?

The sufficiency of the Plaintiff's evidence on the issues of liability, as well as the insufficiency of the Defendants' evidence, are relevant to the Court's denial of the Plaintiff's JMOL motion and the existence of no harmless error in the context of the above-identified errors Point nos. 1 and 2. The party requesting the JMOL must show that substantial evidence does not support the jury's findings.

Foradori v. Harris, 523 F.3d 477, 485 (5th Cir. 2008); *Downey v. Strain*, 510 F.3d 534, 543 (5th Cir. 2007). In denying a motion for a new trial, a “trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence.” *Black v. Pan Am. Labs., LLC*, 646 F.3d 254, 258-59 (5th Cir. 2011) (quoting *United States v. Caldwell*, 586 F.3d 338, 341 (5th Cir. 2009)).

The jury findings on trade dress functionality and trademark likelihood of confusion, as well as ancillary findings of unfair competition and damage-related findings, should be reversed because these findings are not supported by sufficient reliable evidence. The great weight of evidence supports a contrary conclusion, and the Plaintiff’s request for a judgment as a matter of law should have been granted.

1. Trade Dress Non-Functionality

The first test for functionality is the “traditional test,” which asks if the trade dress is essential to the use or purpose of the article or if it significantly affects the cost or quality of an article. *Bd. of Supervisors v. Smack Apparel*, 550 F.3d 465 (5th Cir. 2008); *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526 (5th Cir. 1998). The second test is the “competitive necessity” test. *Id.* In this second test for functionality, the trade dress features would be functional if that trade dress would put competitors at a significant non-reputation-related disadvantage. *Id.* This test

asks the question about whether the trade dress configuration, if protected, would hinder competition by preventing others from competing effectively in the sale of goods.

Under both tests for functionality applied in the present case, the jury's findings of "functionality" of the Plaintiff's trade dress are not supported by substantial evidence. In fact, all the reasonable and reliable evidence presented at trial supports a finding of non-functionality. Moreover, the jury's verdict on functionality is against the great weight of evidence, which supports a new trial to avoid a miscarriage of justice.

During the proceedings and at trial, the Plaintiff presented extensive evidence regarding the non-functionality of its trade dress and trademark infringement.²⁶ The non-functionality of the Plaintiff's trade dress was found affirmatively by a lower Court's Order finding that the Plaintiff's bottlecap jewelry designs to be "arbitrary, incidental and ornamental. *CR 120, Dec. 6, 2011, p. 7 (2015)* ("M3Girl's jewelry is primarily "arbitrary, incidental, or ornamental, and non-functional"), the Defendants' expert (Ms. Haab), and the United States Patent & Trademark Office. *ER 12, CR 96, Resp. to Mtn. for Summary Jdt., Exh. 6, also, P-269, P270* (Patent Office Action response shows position that claims directed to bottlecap jewelry designs are considered to be non-functional).

²⁶ Trade dress non-functionality: *see note 3, supra*.

No expert testimony was provided by the Defendants that contradicted these non-functionality positions, and the testimony from M3 Girl's Manager, Ms. Diane Bradshaw, confirmed the fact repeatedly that the Plaintiff's bottlecap jewelry designs were non-functional. *See note 5, supra., see also, Haab Test., CR 287, Vol. 5, June 25, 2012, Tr. 35:7-45:2 (Tr. 42:4-6, Haab: "If the parts were arbitrary or ornamental, the parts could be rearranged, changed or left out entirely without affecting the product itself."); see also, CR 120, Dec. 6, 2011, p. 7 (2015) ("the inclusion of decorated bottlecaps in M3Girl's jewelry is primarily "arbitrary, incidental, or ornamental"); see also, ER 16, Exhibit P-3E.*

All of the above evidence shows there is insufficient evidence to support the jury's verdict on trade dress functionality. For the above reasons, the Plaintiff requests a reversal and remand on the above issues.

2. Trade Dress and Trademark Likelihood of Confusion

Likelihood of confusion for the purposes of determining infringement relies on an analysis of the total image and impression created by the Defendants' trademark and trade dress in the eye and mind of the ordinary purchaser of goods compared to the Plaintiff's trade dress.²⁷ In the present case, the jury's findings of

²⁷ In making this determination, several factors are considered, including: (1) strength or weakness of Plaintiff's trade dress, (2) similarity of trade dresses, (3) similarity of goods/services, (4) similarity of outlet and purchasers, (5) similarity of advertising media, (6) any evidence of actual confusion, (7) Defendants' intent in adopting trade dress, (8) similarity of distribution channels, (9) degree of purchaser care. *Sun-Fun Prods., Inc. v. Suntan Research & Dev. Inc.*, 656 F.2d 186, 189-190 (5th Cir. 1981); *Extreme Lashes v. Xtended Beauty, Inc.*, 576 F.

no trademark infringement are not supported by substantial evidence. In fact, all the reasonable and reliable evidence presented at trial supports a finding of both trade dress and trademark infringement. Moreover, the jury's verdict on no trademark infringement is against the great weight of evidence, which supports a new trial to avoid a miscarriage of justice.²⁸

The evidence presented at trial, as identified above, supports all but one factor in the likelihood of confusion test, especially the Defendants' intent that is shown in the Interrogatory Responses and other admissions. All of the above evidence shows there is insufficient evidence to support the jury's verdict of no trademark infringement. For the above reasons, the Plaintiff requests a reversal and remand on the likelihood of trademark and trade dress confusion issues.²⁹

The Defendants knew about the existence of M3 Girl Designs, shown at Dallas, Texas World Trade Center, because Defendant Ms. Liles was a shopper registered at the World Trade Center, etc. For the same identical products, the Defendants adopted the trademark "Click It Caps," and claimed that its tradename was protectible by its "TM" designation. The comparison of the Defendants' trademark "Click It Caps" to the Plaintiff's Registered mark, "Snap Caps ®", was

3d 221, 226-27 (5th Cir. 2005) (citing *Smack Apparel v. Bd. of Trustees*, 550 F.3d at 478 (5th Cir. 2000)); *Marathon Mfg. Co. v. Enerlite Prods. Corp.*, 767 F.2d 214, 218 (5th Cir. 1985); *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 235-36 (5th Cir. 2010).

²⁸ See notes 3-4, *supra*.

²⁹ Infringement: see note 4, *supra*.

persuasive evidence of the trademark infringement, especially when combined with evidence of prior knowledge and apparent bad faith intent in its adoption of the “ClickIt Caps” name.

3. Trade Dress Secondary Meaning

Secondary meaning means that the Plaintiff M3 Girl Designs’ trade dress is distinctive and consumers associate M3 Girl Designs’ Product Trade Dress with its source, M3 Girl Designs.³⁰ In the present case, all the reasonable and reliable evidence presented at trial supports a finding of trade dress secondary meaning, as shown above. The evidence presented at trial supports the trade dress secondary meaning. Because this question was not answered by the jury and the evidence on secondary meaning supports the need for a jury’s finding for Plaintiff, this Court should grant the Plaintiff’s Motion for a New Trial on this issue.

4. Palming Off, Dilution and Unfair Competition

Under Texas law, a claim of “palming off” (or “passing off”) is essentially a common law cause of action for trademark infringement. *Dixiepig Corp. v. Pig Stand Co.*, 31 S.W.2d 325 (Tex. Civ. App.—Dallas 1930), *cert. denied*, 283 U.S. 831 (1931). This tort is based on the unauthorized use of the plaintiff’s trademark

³⁰ *Amazing Spaces*, 608 F. 3d at 248, *accord Zatarains v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983), and *Aloe Creme Labs., Inc. v. Milsan, Inc.*, 423 F.2d 845, 850 (5th Cir. 1970).

or trade name. *Graham v. Mary Kay Inc.*, 25 S.W.3d 749, 753 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

In order to establish dilution, M3 Girl Designs must establish ownership of a distinctive trade dress and a likelihood of dilution, with a determination of whether a product trade dress is distinctive enough under Texas Law to support a claim for dilution, considering the following factors: (1) whether the trade dress is distinctive, (2) length of time the user has employed the mark, (3) the scope of the user's advertising and promotions, (4) the nature and extent of the first user's business, and (5) the scope of the first user's reputation. *Pebble Beach*, 942 F. Supp. 1513, 1564 (S.D. Tex. 1996); *Advantage Rent-A-Car, Inc. v. Enter. Rent-A-Car, Co.*, 238 F.3d 378, 380-381 (5th Cir. 2001). Unfair competition is “the 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.” *Johnny Stewart Game Calls, Inc.*, 865 at 217 (quoting *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 14 (5th Cir. 1974)).

In the present case, the jury's findings on palming off and unfair competition are not supported by substantial evidence. In fact, all the reasonable and reliable evidence presented at trial supports a finding of dilution, palming off, and unfair competition.³¹ Moreover, the jury's verdict on these issues is against the great

³¹ Palming off, dilution and unfair competition: *see note 6, supra*.

weight of evidence, which supports a new trial to avoid a miscarriage of justice.

See notes 3-4, supra. Moreover, the jury's verdict on the issues of palming off and unfair competition were negatively affected by their erroneous findings on trademark and trade dress liability issues, which resulted from the Defendants improper actions and arguments.

Evidence was presented regarding the Plaintiff's dilution claim, including the production of hazardous product and the return of defective product that was, for all intents and purposes, identical in form to the Plaintiff's product and marketed using a confusingly similar trade name. And, evidence was also presented at trial that supported the issues relating to trade dress secondary meaning.³²

All of the above evidence shows there is insufficient evidence to support the jury's verdict on palming off and unfair competition. For the above reasons, the Plaintiff requests a reversal and remand on the dilution, palming off and unfair competition issues.

5. Fair Use, Personal Liability, and Willfulness

Personal liability is determined based on whether the Defendants were personally involved in the infringement; and, by "personally involved," either or both of the Dudtes must have individually directed, controlled, ratified,

³² Trade dress secondary meaning: *see note 5, supra.*

participated in, or been the moving, active conscious force behind the Defendants' infringement. Conduct is malicious if it is accompanied by ill will, spite, or if it for the purpose of injuring another, conduct is in reckless disregard of the Plaintiff's trademark and trade dress rights if, under the circumstances, it reflects willful indifference to the Plaintiff's rights or the Defendants act in the face of a perceived risk that its actions will violate the Plaintiff's trademark or trade dress rights. Infringement is willful if it is malicious, fraudulent, deliberate, or with the intent to cause consumer confusion.

In the present case, the jury's findings on personal liability and willfulness are not supported by substantial evidence. In fact, all the reasonable and reliable evidence presented at trial supports a finding of no "fair" use, personal liability for the Dudtes, and willfulness infringement.³³ Moreover, the jury's verdict on the issues of personal liability and willfulness were likely negatively affected by the erroneous findings on trademark and trade dress liability and these findings are against the great weight of evidence, which supports a new trial to avoid a miscarriage of justice.

The Defendants actions exhibited bad faith when they started a business based on the Plaintiff's trade dress, and fully admit to having access and knowledge about the Plaintiff's trade dress in 2008 before starting their business in

³³ Willfulness, Personal Liability, No Good Faith: *see note 7, supra*.

2009. *See note 7, supra.* All of the above evidence, and that set forth in the Statement of Fact, shows there is insufficient evidence to support the jury's verdict on personal liability and willfulness. For the above reasons, the Plaintiff requests a reversal and remand on the personal liability and willfulness infringement issues.

6. Damages

Upon a finding of liability, damages should have included any award of lost profits with relevant factors to be considered being: (1) the gross revenue of the Defendants for its infringing actions, and, (2) any substantiated expenses related to the Blue Brownies business. In the present case, the jury's finding of no damages is not supported by substantial evidence. The erroneous findings on liability had a negative impact on the jury's damages findings.

Despite that fact, all the reasonable and reliable evidence presented at trial supports a finding of at least the Defendants' profits, which is the measure of damages.³⁴ The jury's verdict of no damages is against the great weight of evidence, which supports a new trial to avoid a miscarriage of justice. *See also, notes 3-4, supra.* (Defendants admit and acknowledge profiting from their acts of unfair competition).

³⁴ Damages: *see note 8, supra.*

All of the above evidence, and that set forth in the Statement of Fact, shows there is insufficient evidence to support the jury's verdict of no damages. For the above reasons, the Plaintiff requests a reversal and remand on the damages issue.

D. Issue 4: Did the Court err by not granting the Appellant M3 Girl's JMOL Motion requesting judgment on Appellee Blue Brownies' Counterclaim Nos. 1 and 3, which were untenable under the law and not the subject of any presentation of evidence at trial by the Defendants?

Defendants' false advertising and unfair competition Counterclaims, Counts I and III, were based on allegedly false statements. *See Statements Nos. 1-7 on page 5* of the Joint Pretrial Order, *CR 192*. Plaintiff objected to these late designations when filed on June 4, 2012 (*see Joint Pretrial Order, p. 19*), but Plaintiff also indicated that these Counts were frivolous and legally unsupportable.

Defendants never presented any evidence to support these counterclaims, (sufficient evidence) presented by Defendants. Moreover, none of these alleged false advertising and unfair competition statements are actionable as Section 43(a) false advertising claims because none of these statement are directed to the Plaintiff's end-product.

The Supreme Court in *Dastar*, the Fifth Circuit, the Federal Circuit, and a multitude of other courts agree that 43(a) claims must be directed to the end-product itself, not directed to statements about the Plaintiff's business initiation, control, or operations and not directed to statements about the origin or source of

the artwork, technology or innovations incorporated into the products. The holding in *Dastar* that the word 'origin' in § 43(a)(1)(A) refers to producers of the end-products, rather than authors, necessarily implies that the words “nature, characteristics, [and] qualities” in § 43(a)(1)(B) cannot be read to refer to authorship of the content inside the end-products because if authorship were a 'characteristic[]' or 'qualit[y]' of a work, then the very claim *Dastar* rejected under § 43(a)(1)(A) would have been available under § 43(a)(1)(B).³⁵

The Defendants counterclaims were never supported by evidence submitted by the Defendants, and these counterclaims cannot, as a matter of law, give rise to a claim for false advertising or unfair competition under §43(a) or Texas state law, respectively. The Plaintiff requested a Rule 50(a) and a Rule 50(b) Judgment as a Matter of Law on these Counterclaims, which was denied by the Trial Court when it entered a take nothing Final Judgment on January 3, 2013. *CR 304*. It is respectfully submitted that the Appellant Plaintiff should have been granted a judgment in its favor on these counterclaims, and as such, Plaintiff requests that this Court render a Judgment in its favor on these counterclaims.

³⁵ *Antidote Int'l v. Bloomsbury Publ., PLC*, 467 F. Supp. 2d 394, 399-400 (5th Cir. 2007); *see Monsanto Co. v. Syngenta Seeds, Inc.*, 443 F. Supp. 2d 648, 652-53 (D. Del. 2006).

III. CONCLUSION

For the foregoing reasons, the Appellant Plaintiff M3 Girl respectfully requests that this matter be reversed and remanded in part and reversed and rendered in part.

Dated: May 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that, on May 14, 2013, I have filed an original copy of the foregoing INITIAL BRIEF IN SUPPORT OF APPELLANT M3 GIRL DESIGNS, by EM/ECF filing with the Court and served the foregoing upon counsel by electronic mail (by agreement) as follows:

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