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 UNITED BRANDS COMPANY, INC.

11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA

14 UNITED BRANDS COMPANY, INC.,
 15 Plaintiff,
 16 v.
 17 ANHEUSER-BUSCH, INC.
 18 Defendant.

CASE NO. 10-cv-02281-AJB-WMC

**SECOND AMENDED COMPLAINT FOR:
 FEDERAL DILUTION; FEDERAL TRADE
 DRESS AND TRADEMARK
 INFRINGEMENT AND FALSE
 DESIGNATION OF ORIGIN IN VIOLATION
 OF THE LANHAM ACT SECTION 43(A);
 FEDERAL COPYRIGHT INFRINGEMENT;
 CALIFORNIA TRADEMARK
 INFRINGEMENT AND DILUTION; UNFAIR
 COMPETITION UNDER CALIFORNIA
 BUSINESS AND PROFESSIONS CODE
 SECTION 17200 ET SEQ.; CALIFORNIA
 COMMON LAW TRADEMARK
 INFRINGEMENT; CALIFORNIA COMMON
 LAW UNFAIR COMPETITION**

DEMAND FOR TRIAL BY JURY

1 **INTRODUCTION**

2 1. This is an action for trademark infringement, copyright infringement, unfair
3 competition, and related claims. Plaintiff United Brands Company, Inc. (“United Brands”) is the
4 maker of the popular drink JOOSE, a flavored malt beverage which it has sold since 2006. The
5 most popular version of JOOSE is Plaintiff’s DRAGON JOOSE (see below).



16 2. Defendant Anheuser-Busch makes a competing flavored malt beverage called
17 TILT. For several years, Defendant sold the TILT product in silver cans that did not resemble
18 Plaintiff’s JOOSE or DRAGON JOOSE cans. In fact, until recently, Defendant’s product was
19 sold in a can featuring the design of a large streamlined letter “T” tilted at an angle emphasizing
20 the “TILT” name for its product.



1 3. Recently, however, Defendant completely changed the design and began selling
2 TILT in cans featuring a dragon design that closely resembles the design of Plaintiff's DRAGON
3 JOOSE cans (see below for new design). Defendant's use of these intentionally similar and
4 infringing design elements is likely to or has caused confusion as to source, affiliation, or
5 connection with Plaintiff, and also constitutes copyright infringement. Plaintiff brings this action
6 to prevent Defendant from infringing Plaintiff's marks and copyrights, and prevent confusion in
7 the marketplace, and to address related state and common law claims.



JURISDICTION AND VENUE

18 4. This is an action for: (a) federal trade dress and trademark infringement, and false
19 designation of origin arising under 15 U.S.C. § 1125(a); (b) federal dilution arising under 15
20 U.S.C. § 1125(c); (c) copyright infringement arising under 17 U.S.C. §§ 101 and 501; (d) dilution
21 arising under California Business & Professions Code § 14330 *et seq.*; (e) trademark infringement
22 arising under California Business & Professions Code § 14245 *et seq.*; (f) unfair competition
23 arising under California Business & Professions Code § 17200 *et seq.*, (g) trademark infringement
24 arising under the common law of the State of California; and (h) unfair competition arising under
25 the common law of the State of California.

26 5. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28
27 U.S.C. §§ 1331, 1338(a) and (b), and 1367(a).

28 6. Venue is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b) and (c).

1 **THE PARTIES**

2 7. Plaintiff UNITED BRANDS COMPANY, INC. (“United Brands”) is a California
3 corporation having its principal place of business at 5355 Mira Sorrento Place Ste. 270 San Diego
4 CA 92121. JOOSE BEVERAGE COMPANY is a division of United Brands.

5 8. United Brands is informed and believes, and on that basis alleges, that Defendant
6 Anheuser-Busch, Inc. is a Delaware corporation with a place of business at Executive Office, One
7 Busch Place, St. Louis, Missouri 63118-1852. Defendant is subject to the jurisdiction of this
8 Court by virtue of its substantial contacts with California, including its participation in the acts
9 and events occurring in this Judicial District as described herein.

10 **ALLEGATIONS FOR ALL CLAIMS FOR RELIEF**

11 **A. United Brands’ JOOSE Marks and Copyrights**

12 9. United Brands is a leader in the business of designing, producing and selling
13 alcoholic beverages, including flavored malt beverages.

14 10. In 2006, United Brands launched its JOOSE flavored malt beverage. United
15 Brands’ successful line of JOOSE flavored malt beverages has grown to include a variety of
16 products that prominently use United Brands’ JOOSE, and JOOSE and design trademarks. In
17 2007, United Brands launched its DRAGON JOOSE product, in the can shown above, and
18 continues to market and distribute this product today. The can features United Brands’ JOOSE,
19 JOOSE and design, and Dragon Design trademarks and Trade Dress elements which have
20 remained substantially unchanged since launch.

21 11. United Brands has devoted a great deal of time, money and resources to create and
22 market its JOOSE products, including DRAGON JOOSE, including its inherently distinctive
23 packaging design which sets the JOOSE brand products apart from its competition.

24 12. United Brands’ use on its DRAGON JOOSE product of the distinct color scheme,
25 stylized, archaic-style font, and dragon motif, makes the trade dress created by United Brands
26 inherently distinctive (“DRAGON JOOSE Trade Dress”). Some of the elements in the DRAGON
27 JOOSE Trade Dress that make it inherently distinctive include without limitation the following:

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- a. Prominent stylized graphic of a dragon surrounding the word mark JOOSE;
- b. The mark JOOSE in large white letters in a stylized, archaic font;
- c. The prominent use of a one-syllable word mark;
- d. The mark JOOSE is surrounded by a “shield” design as shown in the JOOSE and Design mark;
- e. The mark DRAGON JOOSE is also in a stylized font below the JOOSE and Design mark and is centered on the face of the can toward the bottom;
- f. A zig-zag line surrounds the alcohol volume content displayed at the top of the face of the can (e.g., “9.9% ALC/VOL”) above the logo;
- g. Use of a 24-ounce can;
- h. The alcohol volume content is also displayed within a small badge or banner just below the mark JOOSE; and
- i. A distinctive purple and black color scheme.

13. The DRAGON JOOSE Trade Dress, including the copyrighted Dragon Design, is prominently featured in virtually all advertisements and promotions for the DRAGON JOOSE flavored malt beverage. The DRAGON JOOSE Trade Dress is used uniformly and consistently in every product and promotion in commerce in connection with United Brands’ DRAGON JOOSE flavored malt beverage product.

14. In addition to the trademark rights in the JOOSE Marks (defined below), United Brands also owns copyrights in the images and appearance of its Dragon Design. United Brands currently owns federal copyright registration numbers VA 1-737-466 and VA 1-736-747 for its Dragon Design, attached as Exhibits A-1 and A-2.

15. Since the launch of the original JOOSE flavored malt beverage in 2006 and the DRAGON JOOSE product in 2007, and prior to the acts of Defendant described herein, United Brands has continuously used the marks JOOSE, JOOSE and Design, the DRAGON JOOSE Trade Dress, the Dragon Design and DRAGON JOOSE and Design in interstate commerce in connection with its marketing, distribution and sales of flavored malt beverage products.

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1 16. United Brands is the owner of federal trademark registrations for its JOOSE
2 Marks, including the following:

3 Registration No. 3,263,454 for the mark JOOSE

4 Registration No. 3,465,813 for the mark JOOSE and Design

5 The marks JOOSE and JOOSE and Design are collectively referred to as the “JOOSE Marks”.
6 Copies of the federal trademark registrations are attached as Exhibits B-1 and B-2.

7 17. United Brands is also the owner of California state trademark registrations for its
8 DRAGON JOOSE Marks, including: (1) JOOSE; (2) JOOSE and Design; (3) DRAGON JOOSE;
9 and (4) Dragon Design (“State DRAGON JOOSE Marks”). Copies of the California state
10 trademark, registrations are attached as Exhibits C-1, C-2, C-3, and C-4.

11 18. The DRAGON JOOSE Trade Dress, the Dragon Design mark, the State DRAGON
12 JOOSE Marks, and the JOOSE Marks together comprise the DRAGON JOOSE Marks.

13 19. The DRAGON JOOSE Marks are inherently distinctive. In the alternative,
14 because of United Brands’ exclusive and extensive use of the DRAGON JOOSE Marks, they
15 have acquired considerable value and have become well known to the consuming public as
16 identifying United Brands exclusively, and uniquely, as the source of products to which the
17 DRAGON JOOSE Marks are applied. In this way, the DRAGON JOOSE Marks have acquired
18 secondary meaning and distinctiveness.

19 20. United Brands has spent substantial dollars in promoting its JOOSE flavored malt
20 beverages, including the DRAGON JOOSE Marks, both in California and nationwide. United
21 Brands’ promotional efforts include, for example, sales promotions, print media, on-line articles,
22 internet advertising, point-of-sale materials, contests, specialty items and attendance at trade
23 shows. The DRAGON JOOSE Marks are prominently featured in advertisements and promotions
24 for the DRAGON JOOSE flavored malt beverages and are prominently displayed on United
25 Brands’ specialty items. United Brands’ line of JOOSE flavored malt beverages has been
26 tremendously successful, with sales of flavored malt beverages totaling over \$160,000,000
27 dollars.

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1 21. United Brands' line of JOOSE flavored malt beverages is sold in 47 states,
2 including California.

3 22. United Brands, its distributors and retailers have continuously and exclusively
4 used the DRAGON JOOSE Marks to distinguish themselves as the source of goods and services
5 in connection with the DRAGON JOOSE Marks.

6 23. As a result of United Brands' substantial use and promotion of the flavored malt
7 beverages bearing the DRAGON JOOSE Marks, the DRAGON JOOSE Marks have become
8 famous. The JOOSE Marks have acquired great value as identifiers of United Brands' products
9 and serve to distinguish United Brands' JOOSE flavored malt beverages from those of others.
10 Customers in this Judicial District and elsewhere readily recognize United Brands' JOOSE Marks
11 as distinctive designations of the origin of United Brands' JOOSE flavored malt beverage. The
12 JOOSE Marks are assets of enormous value as symbols of United Brands and its quality products
13 and goodwill. The success of the JOOSE flavored malt beverages has made United Brands the
14 second largest seller of flavored malt beverages in the United States.

15 24. United Brands has never authorized or consented to any use by Defendant of the
16 DRAGON JOOSE Marks.

17 **B. Defendant's Infringement of United Brands' DRAGON JOOSE Marks**

18 25. United Brands is informed and believes, and on that basis alleges, that Defendant
19 is engaged in the business of producing, selling and/or distributing malt beverages, including
20 flavored malt beverages (hereinafter "Defendant's Products"), in this Judicial District and
21 elsewhere.

22 26. United Brands is informed and believes, and on that basis alleges, that in or about
23 August 2005 Defendant began marketing an alcoholic, malt-based flavored beverage, under the

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1 mark TILT. The TILT product came in two flavors and was sold in 16 ounce silver cans which
2 featured a stylized letter “T” which was tilted to the left, as shown below.



10 27. United Brands is informed and believes, and on that basis alleges, that for
11 approximately five years since launch, Defendant sold the TILT product using such silver cans
12 with the tilted “T”. Defendant then changed its packaging and design for the TILT product.

13 This new can featured a radically different look and design, as shown below. The new
14 can was also sold in a 16 ounce size, only.



24 28. United Brands is informed and believes, and on that basis alleges, that on or about
25 July 2010, Defendant began selling Defendant’s Products in the new, radically different looking
26 can, and also for the first time, in a 24 ounce size. United Brands is further informed and
27 believes, and on that basis alleges, that Defendant has introduced several new TILT colors and
28 cans using the same look and design as shown below.

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29. In particular, the new TILT designs and colors are substantially similar to United Brands' JOOSE products – which have always been sold only in a 24 ounce can – including DRAGON JOOSE, as shown below.



30. In this way, Defendant's product packaging has become increasingly similar to that of United Brands. United Brands is further informed and believes, and on that basis alleges, that Defendant willfully and intentionally infringed its DRAGON JOOSE Marks by directly copying elements of the DRAGON JOOSE Marks and cans, in order to cause confusion among distributors, retailers and consumers and trade upon the goodwill created by United Brands in its DRAGON JOOSE Marks and products.

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1 31. Notably, the New TILT Design shares many similarities with the DRAGON
2 JOOSE Marks, both in overall appearance and in individual features. Among other similar
3 features:

4 (i) the TILT cans feature a stylized depiction of two dragons that surround the
5 trademark, just as the DRAGON JOOSE and Design mark and can prominently feature a dragon
6 surrounding the JOOSE and Design mark;

7 (ii) the word mark TILT utilizes a stylized archaic font similar to the one used for
8 the DRAGON JOOSE Marks, and that is different from the streamlined font previously used;

9 (iii) the word mark TILT is in white as is the mark JOOSE in white, and it is in a
10 stylized font similar to the font used on the JOOSE cans for the mark JOOSE and for the
11 particular product name (e.g., DRAGON JOOSE) and centered on the face of the can toward the
12 bottom;

13 (iv) Defendant's cans have a large letter "T" in a stylized font that resembles the
14 "J" in "JOOSE";

15 (v) there is a crown-like graphic above the "T" that is similar to the crown-like
16 shield design in the center of the JOOSE can, in which the mark JOOSE is displayed;

17 (vi) the new TILT cans use a similar color scheme consisting of a black
18 background with colored elements in the design features of the can, which the DRAGON JOOSE
19 products also employ; and

20 (vii) the new TILT cans are 24 ounce cans (together, "New TILT Design").

21 32. In addition, the cans share other similarities such as on the TILT cans there is a
22 description of the product in plain font on the bottom of the face of the can, just as there is on the
23 DRAGON JOOSE cans, and the alcohol volume content of the TILT cans is displayed at the top
24 of the face of the can in the same manner as the DRAGON JOOSE cans (e.g., "12% ALC/VOL")
25 within a badge or banner that has a zig-zag line, similar to how the alcohol content appears on the
26 DRAGON JOOSE cans.

27 33. These similarities are further exacerbated when Defendant's TILT cans are
28 situated adjacent to United Brands' JOOSE cans, which often happens at the retail stores. These

1 similarities are even more noticeable when Defendant's TILT cans are situated in refrigerators
2 and coolers that are decorated with JOOSE labels, display ads and other marketing and
3 promotional materials, and when Defendant's TILT cans are placed in facings in those
4 refrigerators that are labeled for JOOSE.

5 34. Notably, these new cans bearing the New TILT Design do not feature any tilting
6 "T" like the original TILT cans, nor any tilting object or design.

7 35. United Brands is informed and believes, and on that basis alleges, that Defendant
8 markets, distributes and sells its TILT beverage products to the same consumers and distributors,
9 and in the same sales channels and retail stores, as United Brands. The parties' products
10 described herein are directly competitive products.

11 **C. Defendant's Unlawful Moving and Removal of JOOSE Products**

12 36. In addition to the foregoing conduct by Defendant, United Brands is further
13 informed and believes, and on that basis alleges, that Defendant, either directly or through its
14 agent distributors or both, has moved or removed, and continues to move or remove, United
15 Brands' JOOSE products where they are set for display and sale in various retail establishments
16 located in California.

17 37. United Brands is informed and believes, and on that basis alleges, that since
18 approximately June 2010, Defendant has been moving or removing JOOSE products from store
19 shelves in various 7-Eleven, AM/PM, Chevron, and Shell stores, as well as independent liquor
20 stores located in San Diego, Orange, Los Angeles, Riverside, and San Bernardino counties, as
21 well as similar retail establishments in Northern California. Defendant's conduct remains
22 ongoing, pervasive, and continuous.

23 38. By way of specific example, since approximately March 2010, Granada Liquor—
24 an independent liquor store located in San Diego, California—has stocked two refrigerated
25 shelves entirely with JOOSE. Each shelf contains nine columns of JOOSE cans, each such
26 column known in the industry as a "facing." Such facings, as is generally the case with Granada
27 Liquor's, typically also include the point of sale advertising for the product that they contain.

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1 39. On information and belief, on or about October 18, 2010, a sales representative for
2 Defendant “cut” and removed JOOSE from four of those facings, replacing the JOOSE cans with
3 Defendant’s TILT product. The four facings then containing TILT were the four closest to the
4 refrigerator’s door handle and close to eye level. Thus, they were in the best product position for
5 that particular refrigerator. Defendant’s sales representative cut the JOOSE product, replacing it
6 with TILT, without authorization from Granada Liquor’s owner.

7 40. After discovering that the four JOOSE facings had been cut and replaced with
8 TILT, the TILT cans were moved to shelves that had been designated by Granada Liquor’s owner
9 for Defendant’s products and JOOSE cans were put back into the four facings designated for
10 JOOSE.

11 41. Upon information and belief, however, on or about November 2, 2010,
12 Defendant’s sales representative again cut and replaced the four JOOSE facings nearest the door
13 handle and close to eye level with TILT cans. Again, these actions were taken without
14 authorization by Granada Liquor’s owner.

15 42. Similarly, in or about June 2010 in Bakersfield, California, United Brands
16 discovered that its JOOSE product had been taken off of the shelves of a retailer there. United
17 Brands was informed by the store owner that he believed Defendant’s distributor had removed the
18 JOOSE cans. Though the JOOSE cans were replaced with TILT cans, the JOOSE point of sale
19 advertising had been left on the shelves. Upon information and belief, this and similar conduct
20 contributes to the consumer confusion caused by Defendant’s wrongful copying of the JOOSE
21 trade dress and copyrighted matter.

22 43. In or about June 2010, United Brands discovered that the owner of Sunshine
23 Liquor—located in Pasadena, California—had been misinformed by Defendant’s distributor that
24 JOOSE was going out of business, convincing the store owner that the JOOSE product should be
25 removed and replaced with TILT. Although the JOOSE cans were replaced with TILT, the
26 JOOSE point of sale advertising remained on the shelves then containing TILT, thereby
27 contributing to consumer confusion as to the source of the TILT product.

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1 44. In or about June 2011, United Brands similarly discovered that its JOOSE product
2 had been removed and replaced with TILT at Northridge Liquor in Northridge California. Again,
3 the JOOSE point of sale advertising remained on the shelves then containing TILT. According to
4 the store manager, a representative of Defendant had replaced the JOOSE product with TILT
5 without the store manager's knowledge.

6 45. Defendant's conduct in removing and replacing JOOSE with TILT in various retail
7 establishments in Orange County has been so widespread and pervasive that one of United
8 Brands' distributors for that county will no longer carry JOOSE because of the extra efforts it
9 must undertake to restock the facings designated for JOOSE.

10 46. Defendant's conduct has not been limited to California. For example, United
11 Brands is informed and believes, and on that basis alleges, that Defendant has engaged, and
12 continues to engage, in similar conduct in Maricopa County and Pima County, Arizona.

13 47. By way of specific examples, in or about August 2011, Defendant's distributor
14 agents removed four brands of JOOSE from the shelves of the Maricopa Shell station located on
15 John Wayne Parkway, Maricopa, Arizona, and replaced those brands with four brands of TILT.
16 Similarly, in or about August 2011, Defendant's distributor agents removed United Brands' TILT
17 product from two different 7-Elevens located on Speedway Boulevard in Tucson, Arizona. Upon
18 information and belief, Defendant's agents were not authorized to remove United Brands'
19 products at any of these locations.

20 48. In either moving or removing JOOSE products, Defendant's conduct violates the
21 California Alcoholic Beverage Control Act, Federal Alcohol Administration Act, and related state
22 and federal regulations.

23 **D. Effect of Defendant's Activities on United Brands and the Consuming Public**

24 49. Defendant's unauthorized use of the New TILT Design falsely indicates to the
25 purchasing public that Defendant, its business, and/or its products, originate with United Brands,
26 or are affiliated, connected or associated with United Brands, or are sponsored, endorsed or
27 approved by United Brands, or are in some manner related to United Brands and its products.

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1 50. Defendant's unauthorized use of the New TILT Design is likely to cause
2 confusion, to cause mistake, or to deceive customers and potential customers of the parties, at
3 least as to the affiliation, connection or association of Defendant with United Brands, or as to the
4 origin, sponsorship, or approval of Defendant's products and commercial activities by United
5 Brands.

6 51. Defendant's unauthorized use of the New TILT Design falsely designates the
7 origin of Defendant's products. Defendant's unauthorized use of the New TILT Design enables it
8 to trade on and receive the benefit of goodwill built up at a great effort and expense over many
9 years by United Brands, and to gain acceptance for its business and products not solely on their
10 own merits, but on the reputation and goodwill of United Brands and its products.

11 52. Defendant has been and will continue to be unjustly enriched at United Brands'
12 expense by its unauthorized use of the New TILT Design.

13 53. Defendant's unauthorized use of the New TILT Design in the manner described
14 deprives United Brands of the ability to control the nature and quality of products provided under
15 the JOOSE Marks, and places the valuable reputation and goodwill of United Brands in the hands
16 of Defendant, over which United Brands has no control.

17 54. Unless restrained by this Court, these acts of Defendant will continue, and will
18 continue to cause irreparable injury to United Brands and to the public, for which there is no
19 adequate remedy at law.

20 55. United Brands is informed and believes, and on that basis alleges, that without
21 permission or authority from United Brands, Defendant has infringed United Brands' DRAGON
22 JOOSE Marks in interstate commerce by producing and marketing Defendant's Products bearing
23 the New TILT Design.

24 56. United Brands is informed and believes, and on that basis alleges, that Defendant's
25 unauthorized use of the New TILT Design is intended to trade upon the goodwill and substantial
26 recognition associated with United Brands' DRAGON JOOSE and JOOSE flavored malt
27 beverages.

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1 57. United Brands is informed and believes, and on that basis alleges, that Defendant
2 is using the New TILT Design in an attempt to associate its products with United Brands or
3 otherwise trade upon United Brands' reputation.

4 58. United Brands is informed and believes, and on that basis alleges, that Defendant's
5 use of the New TILT Design is designed to cause confusion, mistake or deception.

6 59. By virtue of the acts complained of herein, Defendant has created a likelihood of
7 injury to United Brands' business reputation, caused a strong likelihood of consumer confusion as
8 to the source of origin or relationship of United Brands' and Defendant's goods, diluted United
9 Brands' famous DRAGON JOOSE Marks, and has otherwise competed unfairly with United
10 Brands.

11 60. United Brands is informed and believes, and on that basis alleges, that Defendant's
12 acts complained of herein are willful and deliberate.

13 61. Defendant's acts complained of herein have caused damage to United Brands in an
14 amount to be determined at trial, and such damages will continue to increase unless Defendant is
15 enjoined from its wrongful actions.

16 62. Defendant's acts complained of herein have caused United Brands to suffer
17 irreparable injury to its business. United Brands will suffer substantial loss of goodwill and
18 reputation unless and until Defendant is preliminarily and permanently enjoined from the
19 wrongful actions complained of herein.

20 **FIRST CLAIM FOR RELIEF**

21 **(Trade Dress Infringement and False Designation of Origin)**

22 **Under 15 U.S.C. § 1125(a)**

23 63. United Brands repeats, realleges, and incorporates by reference the allegations set
24 forth in Paragraphs 1 through 62 as though fully set forth herein.

25 64. United Brands' use on its DRAGON JOOSE product of the distinct color schemes,
26 stylized, archaic-style font, and dragon motif, makes the DRAGON JOOSE trade dress created by
27 United Brands inherently distinctive. Some of the non-functional elements in the DRAGON
28 JOOSE Trade Dress that make it inherently distinctive include without limitation the following:

- 1 a. Prominent stylized graphic of a dragon surrounding the word mark JOOSE;
- 2 b. The mark JOOSE in large white letters in a stylized, archaic font;
- 3 c. The prominent use of a one-syllable word mark;
- 4 d. The mark JOOSE is surrounded by a “shield” design as shown in the
- 5 JOOSE and Design mark;
- 6 e. The mark DRAGON JOOSE is also in a stylized font below the JOOSE
- 7 and Design mark and is centered on the face of the can toward the bottom;
- 8 f. Use of a 24-ounce can;
- 9 g. A zig-zag line surrounds the alcohol volume content displayed at the top of
- 10 the face of the can (e.g., “9.9% ALC/VOL”) above the logo;
- 11 h. The alcohol volume content is also displayed within a small badge or
- 12 banner just below the mark JOOSE; and
- 13 i. A distinctive purple and black color scheme.

14 65. United Brands has used in interstate commerce an inherently distinctive product
15 packaging in connection with the sale and marketing of DRAGON JOOSE brand flavored malt
16 beverage.

17 66. Consumers recognize United Brands’ DRAGON JOOSE product by its
18 packaging, which has remained substantially the same since the product was launched.

19 67. Defendant’s use of trade dress that infringes specifically on the DRAGON JOOSE
20 Trade Dress has confused and is likely to continue to cause confusion or to cause mistake, or to
21 deceive the consuming public into believing that Defendant’s goods are authorized, sponsored,
22 affiliated with or approved by United Brands. These acts constitute trade dress infringement of
23 the DRAGON JOOSE Trade Dress in violation of 15 U.S.C. § 1125(a).

24 68. Defendant created a false designation of origin by using in commerce, without
25 United Brands’ permission, the New TILT Design in connection with the advertisement, offering
26 for sale and/or sale of Defendant’s Products. United Brands is informed and believes, and on that
27 basis alleges that Defendant did so with the intent to trade upon United Brands’ reputation and
28 goodwill by causing confusion and mistake among customers and the public, and to deceive the

1 public into believing that Defendant's products are associated with, sponsored by or approved by
2 United Brands, when they are not. These acts constitute false designation of origin in violation of
3 15 U.S.C. § 1125(a).

4 69. United Brands is informed and believes, and on that basis alleges, that Defendant
5 had actual knowledge of United Brands' ownership and prior use of its DRAGON JOOSE Marks,
6 and without the consent of United Brands, has willfully violated 15 U.S.C. § 1125(a).

7 70. Defendant's aforementioned acts have injured United Brands and damaged United
8 Brands in an amount to be determined at trial.

9 71. By its actions, Defendant has irreparably injured United Brands. Such irreparable
10 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court
11 from further violation of United Brands' rights, for which United Brands has no adequate remedy
12 at law.

13 **SECOND CLAIM FOR RELIEF**

14 **(Trademark Infringement Under 15 U.S.C. § 1125(a))**

15 72. United Brands hereby repeats, realleges, and incorporates by reference Paragraphs
16 1 through 71 as though fully set forth herein.

17 73. Defendant has used a symbol and device, to wit, a dragon design trademark in
18 commerce that is identical to and/or confusingly similar to United Brands' Dragon Design Mark,
19 without United Brands' permission (see images of United Brands' DRAGON JOOSE can and
20 Defendant's new cans, above).

21 74. Defendant has infringed United Brands' Dragon Design Mark by using United
22 Brands' Dragon Design Mark and/or confusingly similar marks in connection with the
23 manufacturing, distributing, selling and/or promoting of Defendant's Products without the
24 permission of United Brands.

25 75. United Brands is informed and believes, and on that basis alleges, that Defendant's
26 acts are designed to trade upon United Brands' reputation and goodwill by causing confusion and
27 mistake among customers and the public, and to deceive the public into believing that

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1 Defendant's Products are associated with, sponsored by or approved by United Brands, when they
2 are not.

3 76. United Brands is informed and believes, and on that basis alleges, that Defendant
4 had actual knowledge of United Brands' ownership and prior use of United Brands' Dragon
5 Design Mark.

6 77. By virtue of the acts complained of herein, United Brands is informed and
7 believes, and on that basis alleges, that Defendant has intentionally infringed United Brands'
8 Dragon Design Mark and caused a likelihood of confusion among the consuming public, thereby
9 committing common law trademark infringement.

10 78. Defendant's aforementioned acts have injured United Brands and damaged United
11 Brands in an amount to be determined at trial. By its actions, Defendant has irreparably injured
12 United Brands. Such irreparable injury will continue unless Defendant is preliminarily and
13 permanently enjoined by this Court from further violation of United Brands' rights, for which
14 United Brands has no adequate remedy at law.

15 **THIRD CLAIM FOR RELIEF**

16 **(Federal Dilution Under 15 U.S.C. § 1125(c))**

17 79. United Brands repeats, realleges, and incorporates by reference the allegations set
18 forth in Paragraphs 1 through 78 as though fully set forth herein.

19 80. DRAGON JOOSE is the most popular and recognized of United Brands' JOOSE
20 line of products. Since its launch in 2007, DRAGON JOOSE has comprised a significant
21 percentage of sales of all of the JOOSE line of products.

22 81. United Brands' DRAGON JOOSE Marks are famous, and became famous prior to
23 the acts of Defendant complained of herein.

24 82. United Brands JOOSE products and DRAGON JOOSE Marks have appeared in
25 several on-line and print magazines and newspapers.

26 83. United Brands products are sold under its DRAGON JOOSE Marks in 47 states.
27 United Brands advertises its products as explained above in each of those states.

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1 84. Products sold under its DRAGON JOOSE Marks are recognized by the consuming
2 public on a nation-wide basis as originating from one source.

3 85. United Brands owns registrations for both its JOOSE and JOOSE and Design
4 marks.

5 86. Defendant's unauthorized commercial use of the DRAGON JOOSE Marks in
6 connection with the advertisement, offering for sale and/or sale of Defendant's Products has
7 caused and is likely to continue to cause dilution of the distinctive quality of the famous
8 DRAGON JOOSE Marks.

9 87. Defendant's aforementioned acts are likely to tarnish, injure, or trade upon United
10 Brands' business, reputation or goodwill, and to deprive United Brands of the ability to control its
11 DRAGON JOOSE Marks.

12 88. Defendant's aforementioned acts have injured United Brands and damaged United
13 Brands in an amount to be determined at trial.

14 89. By its actions, Defendant has irreparably injured United Brands. Such irreparable
15 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court
16 from further violation of United Brands' rights, for which United Brands has no adequate remedy
17 at law.

18 **FOURTH CLAIM FOR RELIEF**

19 **(Copyright Infringement Under 17 U.S.C. § 101 and 501)**

20 90. United Brands repeats, realleges, and incorporates by reference the allegations set
21 forth in Paragraphs 1 through 89 as though fully set forth herein.

22 91. The New TILT Design prominently displays a dragon design that surrounds the
23 name of the beverage and comprises the vast majority of the front side of the product can. In this
24 way, the New TILT Design is substantially similar to the Dragon Design and Dragon Design with
25 Logo Copyrights (collectively, "Dragon Design Copyrights") used on United Brands' DRAGON
26 JOOSE product cans which also prominently feature a dragon design that surrounds the name of
27 the beverage, comprising the vast majority of the front side of the product can.

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1 92. The specific designs that are the subject of the Dragon Design Copyrights are
2 artistically unique, with the head of the dragon at the top of the name of the beverage. The
3 dragon design is the entirety of the Dragon Design copyright, and is the principle part of the
4 Dragon Design with Logo copyright.

5 93. As the DRAGON JOOSE product has been available to consumers since 2007,
6 Defendant has had access to the Dragon Design Copyrights.

7 94. The New TILT Design looks substantially similar to United Brands' Dragon
8 Design Copyrights.

9 95. The New TILT Design is a substantial copy of the whole of the Dragon Design
10 copyright, and a material part of the Dragon Design and Logo copyright.

11 96. By its actions alleged above, Defendant has infringed and/or will continue to
12 infringe the Dragon Design Copyrights within the meaning of 17 U.S.C. § 501 by its copying,
13 distribution, creation of derivative works from, and/or publicly display of the new TILT product
14 cans featuring the New TILT Design on the product packaging and advertising.

15 97. Such infringement is willful in that Defendant knew or should have known that
16 their actions alleged above would infringe the Dragon Design.

17 98. United Brands will continue to sustain damage as a result of Defendant's
18 infringing acts. Defendant's wrongful conduct has also deprived and will continue to deprive
19 United Brands of opportunities for expanding its sales and goodwill.

20 99. Pursuant to 17 U.S.C. § 502, United Brands is entitled to an injunction restraining
21 Defendant, its officers, agents, employees, and all persons acting in concert with Defendant, and
22 each of them, from copying, distributing, creating derivative works
23 from, and/or publicly displaying TILT product cans featuring the New TILT Design on the
24 product, packaging and advertising, in violation of the copyright laws.

25 100. Furthermore, pursuant to 17 U.S.C. § 504, United Brands is entitled to recover
26 from Defendant the damages United Brands has sustained and will sustain, and all profits, gains
27 and advantages derived by Defendant as a result of Defendant's infringement of the Dragon
28 Design Copyrights, in amount to be proven at trial.

1 101. By its actions, Defendant has irreparably injured United Brands. Such irreparable
2 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court
3 from further violation of United Brands' rights, for which United Brands has no adequate remedy
4 at law.

5 **FIFTH CLAIM FOR RELIEF**

6 **(California Statutory Dilution Under**

7 **Business & Professions Code § 14245, et seq.)**

8 102. United Brands repeats, realleges, and incorporates by reference the allegations set
9 forth in Paragraphs 1 through 101 as though fully set forth herein.

10 103. This is an action for trademark dilution arising under California Business &
11 Professions Code § 14247.

12 104. United Brands' DRAGON JOOSE Marks are distinctive. The JOOSE and Design
13 mark and the Dragon Design mark are inherently distinctive. The JOOSE mark has acquired
14 distinctiveness through United Brands' marketing and promotion efforts in California.

15 105. United Brands' line of JOOSE flavored malt beverages has been tremendously
16 successful both nationally and in California.

17 106. DRAGON JOOSE is the most popular and recognized of United Brands' JOOSE
18 line of products. Since its launch in 2007, DRAGON JOOSE has comprised a significant
19 percentage of sales of all of the JOOSE line of products.

20 107. United Brands JOOSE products and DRAGON JOOSE Marks have appeared in
21 several on-line and print magazines and newspapers.

22 108. United Brands products are sold under its DRAGON JOOSE Marks in 47 states.
23 United Brands advertises its products as explained above in each of those states.

24 109. As a result of United Brands' substantial use and promotion of the flavored malt
25 beverages bearing the DRAGON JOOSE Marks, the DRAGON JOOSE Marks have become
26 famous, and became famous prior to the acts of Defendant complained of herein. The JOOSE
27 Marks have acquired great value as identifiers of United Brands' products and serve to
28 distinguish United Brands' JOOSE flavored malt beverages from those of others. Customers in

1 this Judicial District and elsewhere in California readily recognize United Brands' JOOSE Marks
2 as distinctive designations of the origin of United Brands' JOOSE flavored malt beverage.

3 110. Defendant's unauthorized commercial use of the New TILT Design in connection
4 with the advertisement, offering for sale and/or sale of Defendant's Products, has caused and is
5 likely to continue to cause dilution of the distinctive quality of the famous DRAGON JOOSE
6 Marks.

7 111. Defendant's aforementioned acts are likely to tarnish, injure or trade upon United
8 Brands' business, reputation or goodwill, and to deprive United Brands of the ability to control its
9 DRAGON JOOSE Marks.

10 112. United Brands is informed and believes, and on that basis alleges, that Defendant
11 had actual knowledge of United Brands' ownership and prior use of United Brands' federally
12 registered JOOSE Marks, and without the consent of United Brands, has willfully violated
13 California Business and Professions Code § 14247.

14 113. Defendant's aforementioned acts have injured United Brands and damaged United
15 Brands in an amount to be determined at trial.

16 114. By its actions, Defendant has irreparably injured United Brands. Such irreparable
17 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court
18 from further violation of United Brands' rights, for which United Brands has no adequate remedy
19 at law.

20 115. Pursuant to California Business & Professions Code § 14247 et seq., United
21 Brands is entitled to injunctive relief throughout the State of California.

22 116. Pursuant to California Business & Professions Code § 14247 et seq., Defendant
23 may be required to pay to United Brands up to three times its profits from, and up to three times
24 all damages suffered by reason of, the wrongful manufacture, use, display or sale of its New TILT
25 Design.

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1 **SIXTH CLAIM FOR RELIEF**

2 **(California Statutory Trademark Infringement Under**

3 **Business & Professions Code § 14245)**

4 117. United Brands hereby repeats, realleges, and incorporates by reference Paragraphs
5 1 through 116 as though fully set forth herein.

6 118. United Brands is the owner of the California state trademark registrations for the
7 State DRAGON JOOSE Marks listed above.

8 119. This is an action for trademark infringement arising under California Business &
9 Professions Code § 14245.

10 120. Defendant has used in commerce, without permission of United Brands,
11 trademarks, including product packaging, that is identical to and/or confusingly similar to United
12 Brands' California State DRAGON JOOSE Marks. Defendant has infringed United Brands'
13 California State DRAGON JOOSE Marks and created a false designation of origin by using
14 United Brands' DRAGON JOOSE Marks and/or confusingly similar marks in connection with
15 the manufacturing, distributing, selling and/or promoting of Defendant's Products without the
16 permission of United Brands. United Brands is informed and believes, and on that basis alleges,
17 that Defendant's acts are designed to trade upon United Brands' reputation and goodwill by
18 causing confusion and mistake among customers and the public, and to deceive the public into
19 believing that Defendant's Products are associated with, sponsored by or approved by United
20 Brands, when they are not.

21 121. United Brands is informed and believes, and on that basis alleges, that Defendant
22 had actual knowledge of United Brands' ownership and prior use of United Brands' federally and
23 state registered JOOSE Marks, and without the consent of United Brands, has willfully violated
24 California Business and Professions Code § 14245.

25 122. Defendant's aforementioned acts have injured United Brands and damaged United
26 Brands in an amount to be determined at trial.

27 123. By its actions, Defendant has irreparably injured United Brands. Such irreparable
28 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court

1 from further violation of United Brands' rights, for which United Brands has no adequate remedy
2 at law.

3 124. Pursuant to California Business & Professions Code § 14247 et seq., United
4 Brands is entitled to injunctive relief throughout the State of California.

5 125. Pursuant to California Business & Professions Code § 14247 et seq., Defendant
6 may be required to pay to United Brands up to three times its profits from, and up to three times
7 all damages suffered by reason of, the wrongful manufacture, use, display or sale of its TILT
8 products.

9 **SEVENTH CLAIM FOR RELIEF**

10 **(California Statutory Unfair Competition Under**
11 **Business & Professions Code § 17200)**

12 126. United Brands repeats, realleges, and incorporates by reference the allegations set
13 forth in Paragraphs 1 through 125 as though fully set forth herein.

14 127. This is an action for unfair competition arising under California Business &
15 Professions Code § 17200 *et seq.*

16 128. United Brands is informed and believes, and on that basis alleges, that by adopting
17 product packaging that resembles and infringes the DRAGON JOOSE Marks, Defendant's
18 unlawful conduct has deceived or is likely to deceive purchasers into believing that Defendant's
19 TILT product and United Brands' JOOSE product are related, and/or that Defendant's TILT
20 product is affiliated with, associated with, and/or sold by United Brands. United Brands is
21 informed and believes, and on that basis alleges, that Defendant has intentionally caused a
22 likelihood of confusion among the purchasing public in this Judicial District and elsewhere,
23 thereby unfairly competing with United Brands in violation of California Business & Professions
24 Code § 17200 *et seq.*

25 129. Further, as alleged in more specific detail above and as a separate basis for
26 liability, United Brands is informed and believes, and on that basis alleges, that Defendant has
27 unlawfully, unfairly, and fraudulently moved or removed JOOSE products to the detriment of
28 United Brands and to the benefit of Defendant, in violation of the California Alcoholic Beverage

1 Control Act, Federal Alcohol Administration Act, and related state and federal regulations.
2 Defendant has thus engaged in unfair competition and an unlawful and/or unfair business practice
3 in violation of Sections 17200 *et seq.* of the California Business and Professions Code.

4 130. Defendant's aforesaid actions constitute unlawful, unfair, malicious or fraudulent
5 practices. As a result of Defendant's acts of unfair competition, United Brands has been injured
6 and lost money or property in an amount to be determined at trial.

7 131. Further, by these actions, Defendant has irreparably injured United Brands. Such
8 irreparable injury will continue unless Defendant is preliminarily and permanently enjoined by
9 this Court from further violation of United Brands' rights, for which United Brands has no
10 adequate remedy at law.

11 **EIGHTH CLAIM FOR RELIEF**

12 **(California Common Law Trademark Infringement)**

13 132. United Brands hereby repeats, realleges, and incorporates by reference Paragraphs
14 1 through 131 as though fully set forth herein.

15 133. Defendant has used in commerce, without permission of United Brands,
16 trademarks, including product packaging, that is identical to and/or confusingly similar to United
17 Brands' DRAGON JOOSE Marks.

18 134. United Brands is informed and believes, and on that basis alleges, that Defendant's
19 acts are designed to trade upon United Brands' reputation and goodwill by causing confusion and
20 mistake among customers and the public, and to deceive the public into believing that
21 Defendant's Products are associated with, sponsored by or approved by United Brands, when they
22 are not.

23 135. United Brands is informed and believes, and on that basis alleges, that Defendant
24 had actual knowledge of United Brands' ownership and prior use of United Brands' DRAGON
25 JOOSE Marks.

26 136. By virtue of the acts complained of herein, Defendant has intentionally infringed
27 United Brands' DRAGON JOOSE Marks and caused a likelihood of confusion among the
28 consuming public, thereby committing California state common law trademark infringement.

1 137. Defendant's aforementioned acts have been fraudulent, oppressive and malicious,
2 and have injured United Brands and damaged United Brands in an amount to be determined at
3 trial.

4 138. By its actions, Defendant has irreparably injured United Brands. Such irreparable
5 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court
6 from further violation of United Brands' rights, for which United Brands has no adequate remedy
7 at law.

8 **NINTH CLAIM FOR RELIEF**

9 **(California Common Law Unfair Competition)**

10 139. United Brands repeats, realleges, and incorporates by reference the allegations set
11 forth in Paragraphs 1 through 138 as though fully set forth herein.

12 140. United Brands is informed and believes, and on that basis alleges, that by adopting
13 product packaging that resembles and infringes the trademark, trade dress, and copyrights of
14 United Brands, Defendant's unlawful conduct has deceived or is likely to deceive purchasers into
15 believing that Defendant's TILT product and United Brands' JOOSE product are related, and/or
16 that Defendant's TILT product is affiliated with, associated with, and/or sold by United Brands.
17 By deceiving the purchasing public as to the source of origin of its TILT product, Defendant
18 unfairly competes against United Brands in violation of California common law.

19 141. By its actions, Defendant has irreparably injured United Brands. Such irreparable
20 injury will continue unless Defendant is preliminarily and permanently enjoined by this Court
21 from further violation of United Brands' rights, for which United Brands has no adequate remedy
22 at law.

23 142. Defendant's willful acts of unfair competition under the common law of the State
24 of California constitute fraud, oppression and malice. Accordingly, United Brands is entitled to
25 exemplary damages pursuant to California Civil Code § 3294(a).

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PRAYER FOR RELIEF

WHEREFORE, United Brands prays for relief as follows:

1. That Defendant be adjudged to have infringed United Brands’ DRAGON JOOSE and DRAGON JOOSE and Design Marks, in violation of federal and California state law;

2. That Defendant be adjudged to have willfully and deliberately infringed United Brands’ DRAGON JOOSE and DRAGON JOOSE and Design Marks in violation of federal and California state law;

3. That Defendant be adjudged to have competed unfairly with United Brands and used a false designation of origin, false or misleading description of fact, and/or false or misleading representation of fact in violation of federal and California state law;

4. That Defendant be adjudged to have willfully and deliberately competed unfairly with, and used a false designation of origin, false or misleading description of fact, and/or false or misleading representation of fact, in violation of federal and California state law;

5. That Defendant be adjudged to have diluted United Brands’ DRAGON JOOSE Marks, in violation of federal and California state law;

6. That Defendant be adjudged to have willfully and deliberately diluted United Brands’ DRAGON JOOSE Marks in violation of federal and California state law;

7. That Defendant, its officers, agents, employees and all persons acting or claiming to act on its behalf under its direction or authority, and all persons acting or claiming to act in concert or in participation with it or any of them, be preliminarily and permanently enjoined and restrained from infringing United Brands’ DRAGON JOOSE Marks in any manner in the sale, promotion, distribution, purchase, or advertising of Defendant’s products, and specifically, enjoined from using the New TILT Design;

8. That Defendant, its officers, agents, employees and all persons acting or claiming to act on its behalf under its direction or authority, and all persons acting or claiming to act in concert or in participation with it or any of them, be permanently enjoined and restrained from

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1 or engaging in acts of unfair competition with United Brands relating to use of the New TILT
2 Design by Defendant in any manner, in the sale, promotion, distribution, purchase or advertising
3 of Defendant's goods;

4 9. That Defendant be required to turn over and deliver up to the Court or to a Court-
5 designated party during the pendency of this action all infringing materials in its custody and
6 control (including records documenting the manufacture, sale or receipt of infringing items) and
7 to turn over for destruction all infringing matters and all matters used to make infringing materials
8 as well as turn over and deliver any and all materials in its possession, custody or control, or that
9 of its owners, officers, agents, brokers, or employees, that would, if used, or marketed or
10 otherwise distributed, violate the injunctive relief granted herein, for ultimate destruction of such
11 items;

12 10. That Defendant be required to publish notice to all distributors, brokers, retailers,
13 tradeshows, sellers, and other customers or others in the trade who may have seen, or heard of
14 Defendant's use of the New TILT Design, or registered for or purchased any of Defendant's
15 products which were marketed using the New TILT Design, which notice shall disclaim any
16 connection with United Brands and shall advise them of the Court's injunction order and of
17 Defendant's discontinuance from all use of the New TILT Design;

18 11. That Defendants be ordered to pay the costs of corrective advertising;

19 12. That Defendant be ordered to pay damages in the amount of their infringing profits
20 and/or reasonable royalties, increased by the Court by such amount as the Court deems to be just,
21 together with United Brands' actual damages, which, according to the circumstances of this case,
22 should be increased or trebled, including trebling of damages pursuant to 15 U.S.C. § 1117(b);

23 13. That Defendant be ordered to pay damages in the amount of their infringing profits
24 and/or reasonable royalties, increased by the Court by such amount as the Court deems to be just,
25 together with its profits from, the wrongful manufacture, use, display or sale of its TILT products,
26 and that Defendant be ordered to pay United Brands' actual damages, which, according to the
27 circumstances of this case, should be increased or trebled, including trebling of damages pursuant
28 to California Business & Professions Code § 14250;

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- 14. For an award of costs and reasonable attorneys' fees; and
- 15. For all other relief the Court deems just and proper.

Dated: September 16, 2011

DLA PIPER LLP (US)

By: s/Nancy O. Dix
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JURY TRIAL DEMAND

Pursuant to Rule 38(a) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury of all issues triable of right by a jury.

Dated: September 16, 2011

DLA PIPER LLP (US)

By: s/Nancy O. Dix
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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper US LLP, 401 B Street, Suite 1700, San Diego, California 92101. On September 16, 2011, I served the within document(s):

SECOND AMENDED COMPLAINT

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, for delivery via overnight/express service carrier at San Diego, California addressed as set forth below.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below on this date before the close of normal business hours.
- I hereby certify that on the below date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants, if any, in this action.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on September 16, 2011, at San Diego, California.


Debra Stitche