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7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 The Cupcakery, LLC, a Nevada limited
liability company,

11 Plaintiff,

12 v.

13 Andrea Ballus, an individual, and Sift: A
14 Cupcakery, a California limited liability
15 company.

16 Defendants.

Case No.

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF**

- (1) Trademark Infringement under 15 U.S.C. § 1115(c)
- (2) Unfair Competition under 15 U.S.C. § 1125(a)
- (3) Common Law Trademark Infringement
- (4) Deceptive Trade Practices under N.R.S. § 598.0903, et seq.
- (5) Breach of Contract
- (6) Fraud
- (7) Misappropriation of Trade Secrets under N.R.S. § 600A.030 et seq.
- (8) Intentional Interference with Prospective Economic Advantage

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23 For its complaint against Defendants, The Cupcakery, LLC (“The Cupcakery”)
24 complains and alleges as follows:

25 **NATURE OF ACTION**

26 This is an action for trademark infringement and unfair competition under federal
27 statutes, with pendent claims for common law trademark infringement, state deceptive
28 trade practices, breach of contract, fraud, misappropriation of trade secrets and intentional

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1 interference with prospective economic advantage. Plaintiff seeks damages, attorneys'
2 fees, costs, and preliminary and permanent injunctive relief.

3 **JURISDICTION**

4 1. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C.
5 §§1331 and 1338(a). This Court has supplemental jurisdiction over Plaintiff's state law
6 claims pursuant to 28 U.S.C. § 1367(a).

7 2. This Court has personal jurisdiction over Defendants based upon the
8 following: (a) Defendant, Andrea Ballus was employed by Plaintiff in Las Vegas, Nevada
9 during which time Defendant obtained skills and knowledge concerning Plaintiff's business;
10 (b) Defendant took the skills and knowledge she obtained from Plaintiff's business in Las
11 Vegas, Nevada, and opened the competing Defendant business in California knowing that
12 this would cause injury to Plaintiff in the State of Nevada; (c) Defendants operate a web site
13 on the Internet concerning their California business which is accessible to residents of the
14 State of Nevada, including Plaintiff's customers; and (d) a substantial portion of the
15 underlying facts and circumstances giving rise to Plaintiff's causes of action occurred in the
16 State of Nevada.

17 3. Venue is proper in the United States District Court for the District of Nevada
18 under 28 U.S.C. § 1391(b) and (c). Venue lies in the unofficial Southern Division of this
19 Court.

20 **PARTIES**

21 4. Plaintiff The Cupcakery is a Nevada limited liability company with its principal
22 place of business in Las Vegas, Nevada. The Cupcakery is a well-known gourmet cupcake
23 shop with three locations in Nevada and Texas.

24 5. Upon information and belief, Defendant Andrea Ballus ("Ballus") is an
25 individual residing in Cotati, California.

26 6. Upon information and belief, Defendant Sift: A Cupcakery is a California
27 limited liability company that conducts business in Cotati, California. Defendant regularly
28 conducts business in the State of Nevada via a web site on the World Wide Web, which is

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1 accessible to Nevada residents.

2 **ALLEGATIONS COMMON TO ALL COUNTS**

3 7. The Cupcakery is a gourmet cupcake shop with two locations in Las Vegas,
4 Nevada and one location in Frisco, Texas.

5 8. The Cupcakery owns the following pending trademark applications for THE
6 CUPCAKERY mark, including but not limited to:

- 7 a. THE CUPCAKERY (U.S. Ser. No. 77/562515) for retail and online retail
8 services;
- 9 b. THE CUPCAKERY (and Design) (U.S. Ser. No. 77/562561) for retail and
10 online retail services;
- 11 c. THE CUPCAKERY (U.S. Ser. No. 77/562520) for cakes and cupcakes; and
- 12 d. THE CUPCAKERY (and Design) (U.S. Ser. No. 77/562548) for cakes and
13 cupcakes.

14 9. Plaintiff, The Cupcakery, has invested significant time and money in
15 developing THE CUPCAKERY marks and substantially more resources in promoting its
16 products and services in the United States. The result of these efforts has been the
17 establishment of a name and trademark that represents a business known as a provider of
18 high quality goods and exceptional customer service.

19 10. The Cupcakery began using the mark THE CUPCAKERY in connection with
20 its gourmet cupcake business through special order in December 2005, and since that time
21 has continuously used the mark in connection with the advertising and promotion of its
22 goods and services in the United States. Plaintiff began use of THE CUPCAKERY mark in
23 connection with retail store services in January 2006.

24 11. Based on its extensive use, Plaintiff owns the exclusive right to use THE
25 CUPCAKERY mark in connection with cupcakes and related retail store services.

26 12. On or about January 8, 2008, Defendant Ballus applied for a part-time
27 position with The Cupcakery in Las Vegas, NV. She was subsequently hired and on or
28 about January 8, 2008 entered into a Confidentiality Agreement ("Agreement"). The

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1 Agreement contains a non-disclosure provision and non-compete provision. See A true
2 and correct copy of the Agreement is attached hereto as **Exhibit 1**.

3 13. Upon information a belief, at the time Defendant Ballus was employed by
4 Plaintiff, she was also engaged in full-time employment with the company "Nestle Waters."

5 14. Upon information and belief, on February 8, 2008, and during her
6 employment with Plaintiff's The Cupcakery, Defendant Ballus registered SIFT: A
7 CUPCAKERY, LLC, with the California Secretary of State. See registration documents
8 attached here to as **Exhibit 2**.

9 15. Upon information and belief, on February 20, 2008, and during her
10 employment with Plaintiff's The Cupcakery, Defendant Ballus registered the domain name
11 <siftcupcakery.com> with GoDaddy.com, Inc. See Whois Registration documents attached
12 hereto as **Exhibit 3**. Subsequently, Defendant Ballus linked this domain name to a website
13 advertising and marketing Defendant Ballus' cupcake business under the name SIFT: A
14 CUPCAKERY. See Homepage for the Defendants' web site, attached hereto as **Exhibit 4**.

15 16. After working at Plaintiff's business for approximately two months, Defendant
16 Ballus terminated her employment with The Cupcakery. Upon information and belief, upon
17 her departure Defendant Ballus removed from her employee file numerous documents,
18 including the signature page of the Agreement all without The Cupcakery's knowledge or
19 authorization.

20 17. As an employee of Plaintiff, Defendant Ballus had access to the trade secrets
21 of The Cupcakery, which included knowledge of the cupcake recipes, business
22 development and marketing strategies, and customer lists.

23 18. Upon information and belief, immediately upon leaving Plaintiff's employ,
24 Defendant Ballus opened up a competing cupcake business in Cotati, California.
25 Defendant's competing business not only incorporated a confusingly similar trade mark, but
26 also similar trade dress to that of The Cupcakery.

27 19. Upon information and belief, Defendant Ballus used Plaintiff's trade secrets
28 and confidential information obtained during the course and scope of her employment at

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1 The Cupcakery to develop a competing cupcake business .

2 20. Upon information and belief, Defendant Ballus procured her employment with
3 The Cupcakery under false pretenses and in order to obtain such confidential information
4 and other trade secrets regarding Plaintiff's business model to aid in the development of
5 her own gourmet cupcake business.

6 21. On or about March 18, 2008, Defendants registered the domain name
7 <acupcakeaday.com> and subsequently linked that domain name to Defendants' web-blog
8 webpage. This blog discusses in detail Defendant Ballus' intentions to open a cupcake
9 business as early as December 2007, prior to her seeking employment with Plaintiff.
10 Importantly, the blog makes no mention of Defendant Ballus' employment with Plaintiff.
11 The blog tracks the development of Defendants' business in Cotati, California beginning
12 from the time Ballus was still residing in Las Vegas, NV, and working for the Plaintiff, until
13 the time of the competing shop's opening in or around April 2008. See printout of Ballus'
14 Blog attached hereto as **Exhibit 5**.

15 22. Upon information and belief, in or about March 2008, Defendants began using
16 the mark SIFT: A CUPCAKERY in commerce for goods and services that are identical to
17 those used in connection with Plaintiff's THE CUPCAKERY mark.

18 23. Upon information and belief, on August 19, 2008, Defendants filed a
19 trademark application with the United States Patent and Trademark Office to register the
20 mark SIFT: A CUPCAKERY in International Class 35 for retail bakery shops; retail stores
21 featuring cupcakes, Serial No. 77/550,747. See Copy of Defendant's Application, Serial
22 No. 77/550,747 attached hereto as **Exhibit 6**. ("Defendant's Application.")

23 24. As part of the federal trademark application for SIFT: A CUPCAKERY,
24 Defendants wrongfully declared that:

25 no other person, firm, corporation, or association has the right to use the mark
26 in commerce, either in the identical form thereof or in such near resemblance
27 thereto as to be likely, when used on or in connection with the goods/services
28 of such other person, to cause confusion, or to cause mistake, or to deceive;
and that all statements made of his/her own knowledge are true; and that all
statements made on information and belief are believed to be true.

1 See Defendant's Application p. 6.

2 25. Defendants made this wrongful declaration with the full knowledge of
3 Plaintiff's senior use of CUPCAKERY marks.

4 26. Defendants were aware when filing their federal trademark application that
5 use of SIFT: A CUPCAKERY mark for bakery goods including cupcakes, would be
6 confusingly similar to Plaintiff's THE CUPCAKERY mark for similar goods and services.

7 27. Defendants' mark is confusingly similar in sight, sound and meaning to
8 Plaintiff's mark, incorporates the entirety and/or the dominant portion of Plaintiff's mark and
9 utilizes a highly stylized font that is confusingly similar to the stylized font incorporated in
10 Plaintiff's design logo.

11 28. By using a mark that is confusingly similar to Plaintiff's trademark, Defendants
12 were and are attempting to confuse consumers as to the source or origin of her cupcakes
13 and those provided by Plaintiff.

14 29. By using a mark that is confusingly similar to Plaintiff's trademark, Defendants
15 were and are attempting to trade off of the goodwill established by Plaintiff.

16 30. Plaintiff's trademark at issue in this case was distinctive at the time
17 Defendants began their use of a confusingly similar mark.

18 31. Upon information and belief, the Defendant did not believe or have
19 reasonable grounds to believe that the use of a confusingly similar variation of Plaintiff's
20 trademark was a fair use or otherwise lawful.

21 **FIRST CLAIM FOR RELIEF**
22 (Trademark Infringement under the Lanham Act, 15 U.S.C. § 1125(c))

23 32. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set
24 forth herein.

25 33. Defendants' use in commerce of a mark identical and/or confusingly similar to
26 Plaintiff's CUPCAKERY trademark in connection with Defendant's web site, cupcakes, and
27 retail cupcake shop constitutes a reproduction, copying, counterfeiting, and colorable
28 imitation of Plaintiff's name and brand in a manner that is likely to cause confusion or

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1 | mistake or is likely to deceive consumers.

2 | 34. Defendants' use of Plaintiff's CUPCAKERY trademark has created a
3 | likelihood of confusion among consumers who may falsely believe that Defendants'
4 | business and/or goods and services are associated with Plaintiff's, or that Plaintiff sponsors
5 | or approves of Defendants' products or commercial activities when Plaintiff does not.

6 | 35. As a direct and proximate result of Defendants' infringement, Plaintiff has
7 | suffered, and will continue to suffer, monetary loss and irreparable injury to its business,
8 | reputation, and goodwill.

9 | **SECOND CLAIM FOR RELIEF**
10 | (Unfair Competition under Lanham Act § 1125(a))

11 | 36. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set
12 | forth herein.

13 | 37. Defendants' use in commerce of a mark identical and/or confusingly similar to
14 | Plaintiff's CUPCAKERY trademark in connection with Defendants' goods and services
15 | constitutes a false designation of origin and/or a false or misleading description or
16 | representation of fact, which is likely to cause confusion, cause mistake, or deceive as to
17 | affiliation, connection, or association with Plaintiff, or as to the origin, sponsorship, or
18 | approval of Defendants' products or commercial activities by Plaintiff.

19 | 38. By using Plaintiff's CUPCAKERY mark with the knowledge that Plaintiff owns
20 | and has used, and continues to use, its trademark in Las Vegas, and across the United
21 | States, Defendants have intended to cause confusion, cause mistake, or deceive
22 | consumers.

23 | 39. As a direct and proximate result of such unfair competition, Plaintiff has
24 | suffered, and will continue to suffer, monetary loss and irreparable injury to its business,
25 | reputation, and goodwill.

26 | **THIRD CLAIM FOR RELIEF**
27 | (Common Law Trademark Infringement)

28 | 40. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set

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1 | forth herein.

2 | 41. By virtue of having used and continuing to use its trademark, Plaintiff has
3 | acquired common law rights in that mark.

4 | 42. Defendants' use of a mark identical and/or confusingly similar to Plaintiff's
5 | CUPCAKERY trademark infringes Plaintiff's common law rights in its trademark, and this
6 | use is likely to cause confusion, mistake, or deception among consumers, who will believe
7 | that Defendants' cupcakes and/or retail cupcake services originate from, or are affiliated
8 | with, or endorsed by Plaintiff when, in fact, they are not.

9 | 43. As a direct and proximate result of Defendants' infringement of Plaintiff's
10 | common law trademark rights under Nevada and other common law, Plaintiff has suffered,
11 | and will continue to suffer, monetary damages and irreparable injury to its business,
12 | reputation, and goodwill.

13 | **FOURTH CLAIM FOR RELIEF**
14 | (Deceptive Trade Practices
under N.R.S. § 598.0915)

15 | 44. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set
16 | forth herein.

17 | 45. Upon information and belief, Defendant Ballus procured employment with
18 | Plaintiff in January 2008, with the purpose of gaining inside knowledge and trade secrets
19 | concerning the operation of Plaintiff's business, including customer lists, marketing
20 | strategies and business models.

21 | 46. Upon information and belief, in February 2008, while working for Plaintiff's
22 | business, Defendant Ballus began developing a competing business including registering
23 | the SIFT: A CUPCAKERY, LLC with the California Secretary of State, and the domain
24 | name <siftacupcakery.com>.

25 | 47. Upon information and belief, when Defendant Ballus left Plaintiff's employ she
26 | took with her key documents from her employee file, and key information concerning
27 | Plaintiff's business.

28 | 48. Upon information and belief, immediately upon leaving Plaintiff's employ in

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1 around March 2008, Defendant Ballus opened and began operating the competing
2 Defendant business in Cotati, California under a confusingly similar trademark.

3 49. Upon information and belief, in the course of operating their business,
4 Defendants knowingly made false representations as to affiliation, connection and/or
5 association with Plaintiff by using a mark confusingly similar to Plaintiff's trademark and
6 otherwise engaged in deceptive trade practices.

7 50. As the direct and proximate result of Defendants' conduct, Plaintiff has
8 suffered, and will continue to suffer, monetary damages and irreparable injury to its
9 business, reputation, and goodwill.

10 **FIFTH CLAIM FOR RELIEF**
11 (Breach of Contract)
(Against Defendant Ballus)

12 51. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set
13 forth herein.

14 52. On or around January 8, 2008, Defendant Ballus procured employment with
15 Plaintiff's The Cupcakery, in Las Vegas, Nevada.

16 53. As a condition of her employment with Plaintiff's The Cupcakery, Defendant
17 Ballus entered into a Confidentiality Agreement.

18 54. The Confidentiality Agreement contained several Non-Disclosure and Non-
19 Compete Provisions regarding Plaintiff's confidential business information and trade
20 secrets.

21 55. Defendant Ballus breached the express provisions of the Agreement by
22 developing and operating a competing business in violation of the terms of the non-
23 compete provision.

24 56. Defendant Ballus breached the express provisions of this Agreement by
25 disclosing Plaintiff's confidential information to the public and unfairly and improperly using
26 Plaintiff's confidential information and/or trade secrets to compete with Plaintiff's business.

27 57. As a result of Defendant Ballus' breach, Plaintiff has been damaged and
28 continues to suffer damage.

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1 58. Plaintiff has been forced to employ counsel to enforce its rights under the
2 Agreement and, therefore, Plaintiff is entitled to reasonable attorneys fees and costs
3 incurred herein.

4 **SIXTH CLAIM FOR RELIEF**
5 (Fraud)
6 (Against Defendant Ballus)

7 59. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set
8 forth herein.

9 60. Upon information and belief, Defendant Ballus procured employment with
10 Plaintiff in January 2008, with the purpose of gaining inside knowledge and trade secrets
11 concerning the operation of Plaintiff's business, including marketing strategies and
12 business models.

13 61. Upon information and belief, in February 2008, while working for Plaintiff's
14 business, Defendant Ballus began developing a competing business including registering
15 the SIFT: A CUPCAKERY, LLC with the California Secretary of State, and the domain
16 name <siftacupcakery.com>.

17 62. Upon information and belief, when Defendant Ballus left Plaintiff's employ she
18 took with her key documents from her employee file, and key information concerning
19 Plaintiff's business.

20 63. Upon information and belief, immediately upon leaving Plaintiff's employ in
21 around March 2008, Defendant Ballus opened and began operating the competing
22 Defendant business in Cotati, California under a confusingly similar trademark.

23 64. On March 3, 2008, Defendant Ballus disclosed in her blog that she and her
24 husband made the decision to move back to Northern California in late December 2007,
25 and immediately before procuring employment with the Plaintiff. Defendant also states in
26 the March 3, 2008 blog entry, that shortly thereafter, she began considering employment
27 opportunities in California and decided instead to open her own cupcake shop.

28 65. To procure employment with Plaintiff's The Cupcakery, Defendant Ballus
represented that she need a part-time job to earn additional money. At no time during her

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1 employment with Plaintiff, did Defendant Ballus disclose her intent to move back to
2 California. At no time during her employment with Plaintiff, did Defendant Ballus disclose
3 to Plaintiff of her intent to open a competing cupcake business. At no time during her
4 employment with Plaintiff did Defendant Ballus disclose that she had registered the SIFT: A
5 CUPCAKERY, LLC with the California Secretary of State, and the <siftcupcakery.com>
6 domain name.

7 66. Defendant Ballus' omissions constitute intention misrepresentations to
8 Plaintiff.

9 67. Defendant Ballus' intentional misrepresentations to Plaintiff were material to
10 the decision to hire Defendant, since Plaintiff would have never hired Defendant had
11 Defendant revealed her true intentions to obtain confidential business information from
12 Plaintiffs to use to open a competing cupcake business.

13 68. Upon information and belief, when Defendant Ballus made her
14 representations to Plaintiff with the clear knowledge that those representations were false.

15 69. Upon information and belief, Defendant Ballus intended that Plaintiff rely on
16 Defendant's misrepresentations in that Defendant's ability to obtain the job hinged on those
17 representations.

18 70. Upon information and belief, Defendant Ballus made her misrepresentations
19 with the intent to defraud and deceive Plaintiff and its agents.

20 71. Plaintiff reasonably and detrimentally relied on Defendant Ballus'
21 misrepresentations by hiring Defendant and exposing her to Plaintiff's confidential
22 information, trade secrets and business strategies.

23 72. As a result of Defendant's misrepresentations, Plaintiff has suffered, and will
24 continue to suffer, monetary damages and irreparable injury.

25 73. Based on the intentional, willful and malicious nature of Defendant's actions,
26 Plaintiff is entitled to recover exemplary damages and reasonable attorneys' fees and costs
27 incurred in connection with this action.

28 ///

SEVENTH CLAIM FOR RELIEF
(Misappropriation of Trade Secrets under
N.R.S. § 600A.030 et seq.)
(Against Defendant Ballus)

74. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth herein.

75. Defendant Ballus, as an employee of Plaintiff, had access to the trade secrets and confidential business information of The Cupcakery.

76. Defendant Ballus, acquired Plaintiff's trade secrets during the course and scope of her employment at The Cupcakery.

77. Defendant Ballus was aware that the information she received as part of her employment at The Cupcakery was confidential in nature and constituted trade secrets because she was required to sign a Confidentiality Agreement.

78. Defendant Ballus misappropriated Plaintiff's trade secrets by using those trade secrets to develop a competing business and website for her own personal use and benefit.

79. Plaintiff seeks an Order from this Court compelling Defendants to return to Plaintiff any and all trade secret information obtained from Plaintiff.

80. Plaintiff seeks injunctive relief prohibiting Defendant from further use of Plaintiff's misappropriated trade secrets.

81. As a result of Defendant's misrepresentations, Plaintiff has suffered, and will continue to suffer, monetary damages and irreparable injury.

82. Based on the intentional, willful and malicious nature of Defendant's actions, Plaintiff is entitled to recover exemplary damages and reasonable attorneys' fees and costs incurred in connection with this action.

EIGHTH CLAIM FOR RELIEF
(Intentional Interference with
Prospective Economic Advantage)

83. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth herein.

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1 84. Upon information and belief, Defendant Ballus procured employment with
2 Plaintiff specifically to obtain information concerning the development and operation of
3 Plaintiff's business, including marketing strategies and business plans for a gourmet
4 cupcake business.

5 85. Upon information and belief, Defendants intentionally used confidential
6 information and trade secrets obtained from Plaintiff in their competing business to gain an
7 unfair advantage over Plaintiffs, and to interfere with Plaintiff's business.

8 86. Upon information and belief, Defendants committed acts intended or
9 designed to disrupt Plaintiff's prospective economic advantage arising from their business
10 activities and/or the provision of their goods and services.

11 87. Defendants' actions have disrupted or are intended to disrupt Plaintiff's
12 business by, among other things, confusing consumers into believing that Defendants'
13 goods and services are endorsed by or somehow affiliated with Plaintiff.

14 88. Defendants have no legal right, privilege or justification for their conduct.

15 89. As a direct and proximate result of Defendants' intentional interference with
16 Plaintiff's prospective economic advantage, Plaintiff has suffered, and will continue to
17 suffer, monetary damages and irreparable injury.

18 90. Based on the intentional, willful and malicious nature of Defendants' actions,
19 Plaintiff is entitled to recover exemplary damages and reasonable attorneys' fees and costs
20 incurred in connection with this action.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff respectfully prays that the Court grant the following relief:

23 A. A preliminary and permanent injunction prohibiting Defendants, their
24 respective officers, agents, servants, employees and/or all persons acting in concert or
25 participation with them, or any of them, from using Plaintiff's trademark or confusingly
26 similar variations thereof, alone or in combination with any other letters, words, letter
27 strings, phrases or designs, in commerce or in connection with any business or for any
28 other purpose (including, but not limited to, on web sites and in domain names);

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B. An order from this Court that Defendants abandon their federal trademark application, Serial No. 77/550,747 SIFT: A CUPCAKERY for bakery goods and services, and issue an injunction against Defendants from filing for any state or federal registration of a confusingly similar mark;

C. A preliminary and permanent injunction prohibiting Defendants, their respective officers, agents, servants, employees and/or all persons acting in concert or participation with them, or any of them, from using Plaintiff's trade secrets and/or confidential business information in any manner whatsoever;

D. An order from this Court that Defendants return to Plaintiff any and all confidential and/or trade secret information Defendants obtained from Plaintiff, or to destroy all such information to Plaintiff's satisfaction;

E. An award of compensatory, consequential, statutory, and punitive damages to Plaintiff in an amount to be determined at trial;

F. An award of interest, costs and attorneys' fees incurred by Plaintiff in prosecuting this action; and

G. All other relief to which Plaintiff is entitled.

DATED: May 5, 2009.

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/s/ F. Christopher Austin, Esq.

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