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5 **UNITED STATES DISTRICT COURT**  
6 **EASTERN DISTRICT OF CALIFORNIA**  
7 **(Sacramento Division)**

9 **THE WINE GROUP LLC,**  
10 a Delaware Limited Liability Company,  
11 **Plaintiff,**

12 v.

13 **LEVITATION MANAGEMENT, LLC,**

14 a Nevada Limited Liability Company,

15 and

16 **TIPTON SPIRITS, LLC,** d/b/a Desirée  
Vodka Company, LLC.,

17 an Indiana Limited Liability Company,

18 **Defendants.**

Case No.

**COMPLAINT**

**FEDERAL TRADEMARK INFRINGEMENT  
AND RESTITUTION BASED ON UNJUST  
ENRICHMENT**

19  
20 Plaintiff The Wine Group LLC (“TWG”) for its Complaint against Defendants Levitation  
21 Management, LLC (“Levitation”) and Tipton Spirits, LLC (“Tipton”)(collectively “Defendants”)  
22 alleges on information and belief:

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**JURISDICTION AND VENUE**

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2 1. This is an action seeking injunctive relief for federal trademark infringement under the  
3 Lanham Act, 15 U.S.C. §§ 1051 *et seq.* and restitution based on unjust enrichment.

4 2. This Court has subject matter jurisdiction over the federal claims pursuant to 28  
5 U.S.C. §§ 1331, 1338(a) and 15 U.S.C. § 1121, and has subject matter jurisdiction over the state law  
6 claims under 28 U.S.C. §§ 1338 (b) and 1332, and the doctrine of supplemental jurisdiction under 28  
7 U.S.C. § 1337. Acts giving rise to the claims asserted herein have been expressly aimed at, have  
8 occurred in, and will continue to occur in California and this District.

9 2. Venue properly lies within this District pursuant to 28 U.S.C. §1391 and in this Court  
10 because Plaintiff's principal place of business is in San Joaquin County.

11 **PARTIES**

12 3. TWG is a Delaware limited liability company with its principal place of business in  
13 Tracy, California. Its products are sold, advertised and distributed throughout the United States and  
14 this District. The injury described herein has occurred and will continue to occur in this District.

15 4. Levitation is a Nevada limited liability company with its registered office in Las  
16 Vegas, Nevada. It is a marketing consulting agency that owns the DESIRÉE trademark, the other  
17 trademarks at issue herein, and the domain name desireevodka.com.

18 5. Tipton is an Indiana limited liability company with its registered office in Brazil,  
19 Indiana. Tipton is responsible for the sales and marketing of the goods at issue herein.

20 6. Although they are separate corporations, Defendants have common shareholders,  
21 officers, and/or principals and at all times herein have acted in concert with each other. The CEO of  
22 Tipton and the President of Levitation are the same person, Jerry Knight. He is a former new  
23 products development executive with the world's largest alcohol beverage company, Diageo, which  
24 is one of TWG's principal competitors.

**BACKGROUND**

1  
2 7. TWG is a producer, importer and marketer of wine, vodka and other alcohol beverages  
3 in California and is the owner of some of the leading alcohol beverage brands in the United States. It  
4 is one of the largest wine producers in the world. One of the guiding principles of the company is to  
5 create, promote and build strong brands.

6 8. In 2007, after over a year of product and packaging development, TWG launched a  
7 brand of wine called CUPCAKE. The CUPCAKE brand is designed for and directed toward  
8 consumers of the Millennial generation, i.e., consumers born between 1970 – 1989. The CUPCAKE  
9 name was selected because consumer research showed that Millennials responded very favorably to  
10 products and brand names with a “personal rewards” theme, and that “cupcakes” are remembered  
11 fondly by Millennials as special childhood treats. The branding concept was to craft a lush, rich  
12 premium wine at a modest price point that would evoke among Millennial consumers the same  
13 feeling of rewarding themselves with special treats that they associate with cupcakes. This coincided  
14 with a resurgence of specialty and other bakeries that were making and selling cupcakes and other  
15 specialty baked treats.

16 9. At the time, TWG’s branding strategy was viewed as unconventional because wines  
17 and other alcohol beverages historically were not named after baked goods. Nonetheless, TWG  
18 believed in the concept and invested in it, promoting CUPCAKE wines heavily in all forms of media,  
19 including on the internet, paid advertising, traditional National television advertising, sweepstakes,  
20 National public relations, social media, in-store displays, traditional print media, and through  
21 sponsorships and other joint promotions. There was a significant business risk to TWG’s branding  
22 strategy.

23 10. TWG’s risk and investment in the CUPCAKE concept and brand were rewarded with  
24 broad consumer acceptance and substantial sales. CUPCAKE was the fastest \$8.00+ wine brand to

1 sell one million nine liter cases annually. In 2009 and 2010 it was recognized by Impact magazine as  
2 a “Hot Brand” of the year. In 2010 it was IRI’s #1 “momentum brand” of the year. And by 2011  
3 CUPCAKE sauvignon blanc was the #1 selling sauvignon blanc in 750 ml bottles in the United  
4 States. The CUPCAKE concept and brand were an unparalleled success.

5 11. The CUPCAKE label features a stylized depiction of a cupcake at the top of the label.  
6 Cupcake imagery is frequently used by TWG in promotional materials for the brand. The  
7 CUPCAKE package is illustrated below:



19 12. In 2010, TWG added a red wine called RED VELVET to its CUPCAKE portfolio.  
20 This wine is a proprietary blend of Zinfandel, Merlot and Cabernet Sauvignon. It has also been very  
21 successful with consumers. The RED VELVET package is illustrated below:

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11 13. The unparalleled success of the CUPCAKE brand and concept is well-known in the  
12 alcohol beverage business. While some competitors of TWG have emulated the concept by labeling  
13 their products with brand names that evoke a “personal rewards” theme, none of these products has  
14 been as successful as CUPCAKE.

15 14. CUPCAKE wines have also been successful with wine writers. They have won over  
16 150 awards and medals in wine competitions across the United States. Numerous positive reviews  
17 have appeared in general circulation print media, trade media, on blogs and on social networking  
18 sites.

19 15. TWG applied to register CUPCAKE as a trademark for wine on October 5, 2007. The  
20 trademark was registered as United States Registration No. 3,776,660 on April 20, 2010.

21 16. In 2010, TWG decided to leverage the tremendous success of the CUPCAKE wine  
22 brand by creating a CUPCAKE vodka. Like CUPCAKE wine, CUPCAKE vodka is designed to  
23 appeal to Millennials. Like CUPCAKE’s RED VELVET wine, CUPCAKE vodka has three unique,  
24 proprietary sub-brands: DEVIL’S FOOD, FROSTING and CHIFFON. Each of these is designed to

1 leverage and reinforce the “personal rewards” theme of the CUPCAKE brand. CUPCAKE vodka  
2 was launched in April 2011 and has been enormously successful.

3 17. The label for CUPCAKE vodka also prominently features the word mark CUPCAKE  
4 and a stylized depiction of a cupcake at the top of the label. Cupcake imagery is frequently used by  
5 TWG in promotional materials for the brand as illustrated below:



14 18. TWG applied to register CUPCAKE as a trademark for spirits on May 21, 2010. The  
15 trademark was registered as United States Registration No. 3,979,678 on June 14, 2011.

16 19. Defendants are in the business of developing and marketing alcohol beverages. They  
17 observed and understood the success with Millennials of brands with a “personal rewards” theme.  
18 They knew that TWG was a California company located in this District and engaged in the  
19 production, marketing and sales of CUPCAKE and RED VELVET wines. In early 2010, Defendants  
20 decided that a “personal rewards” themed vodka might resonate with consumers and they decided to  
21 emulate the CUPCAKE concept by creating a DESIRÉE brand of vodka. A “Desirée” is a vodka-  
22 based cocktail popular with Millennials made from crème de cassis and vodka. The term is French for  
23 “desired,” which reinforces the “personal rewards” theme.

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1           20. Like TWG's CUPCAKE brand of wine and vodka, Defendants' DESIRÉE vodka also  
2 has several sub-brands. But rather than assuming the business and financial risk of creating their own  
3 proprietary sub-brands, Defendants decided to free-ride on the goodwill of TWG's CUPCAKE and  
4 RED VELVET trademarks by appropriating them as their own. On one vodka, Defendants use the  
5 trademark CUPCAKE and a large depiction of a cupcake, and on the other Defendants use the  
6 trademark RED VELVET and a large depiction of a slice of a layer cake. Their packaging is  
7 illustrated below:



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20           21. Defendants began selling their DESIRÉE CUPCAKE and RED VELVET vodkas in  
21 April 2011 and have aggressively marketed and promoted these products on-line to consumers in  
22 California and throughout the United States. They are in the process of rolling out CUPCAKE and  
23 RED VELVET vodka and seeking distributors on a national basis, including in California. The  
24 Defendants' DESIRÉE vodka competes directly with TWG's CUPCAKE vodka.

1           22.     One of the ways that Defendants promote their CUPCAKE and RED VELVET  
2 vodkas is by using the services of the social networking site known as Facebook located in Palo Alto,  
3 California. Defendants have created their own advertising page for the brands which provides a  
4 platform for marketing communications directly with and from consumers. Defendants' Facebook  
5 page may be "friended" by anyone, and it includes "friends" from California and this District. The  
6 Facebook page links to the web site [www.desireevodka.com](http://www.desireevodka.com) on which consumers are invited to  
7 contact Defendant Tipton to receive additional information about Defendants' vodka.

8           23.     TWG learned of Defendants' intended use of the CUPCAKE and RED VELVET  
9 trademarks in February 2011, shortly after Defendants' bottler applied for and received Certificates  
10 of Label Approval for Defendants' vodka. TWG promptly contacted Defendants, reminded them of  
11 TWG's trademark rights to the CUPCAKE and RED VELVET trademarks for wine, told them of the  
12 pending application to register CUPCAKE for spirits, told them that it planned to launch its own  
13 CUPCAKE brand of vodka which would compete directly with theirs, explained why there was a  
14 likelihood of consumer confusion, and asked them to change the labels. This would have been a  
15 simple thing for Defendants to do because their vodka had not been launched.

16           24.     Instead of respecting TWG's trademark rights by changing the labels prior to the  
17 launch, Defendants doubled down on their scheme. They refused to change their labels. Defendants  
18 defiantly claimed that the terms "cupcake" and "red velvet" are "known flavor(s) in the baking  
19 industry" and, therefore, Defendants asserted an absolute right to use TWG's valuable trademarks on  
20 and in connection with vodkas that are claimed to have a "cupcake" or "red velvet" flavor.

21           25.     There is no "cupcake" flavor. A cupcake is a form of baked good that is made in  
22 many different flavors (e.g. chocolate, vanilla, strawberry). There is also no "red velvet" vodka  
23 flavor. "Velvet" is an inedible fabric. In the context of both wine and vodka, these are coined terms  
24 used to evoke and reinforce the "personal rewards" imagery of the overall branding concept.

1           26. Defendants' claim that TWG's valuable trademarks are merely known flavor names is  
2 inconsistent with their use of these terms, both on their labels and in their promotional materials.  
3 Defendants consistently refer to their products as CUPCAKE, RED VELVET, DESIRÉE CUPCAKE  
4 or DESIRÉE RED VELVET. Consumers also refer to Defendants' products in this manner. The  
5 Metatags on Defendants' web site include CUPCAKE VODKA and RED VELVET VODKA, which  
6 ensure that references to Defendants' vodka will appear whenever a consumer searches for TWG's  
7 wine or vodka.

8           27. Defendants' claim that TWG's valuable trademarks are merely flavor names is a sham  
9 designed to mask their deliberate and intentional targeting of TWG's business, its brands and their  
10 goodwill. Defendants were on statutory and actual notice of TWG's CUPCAKE and RED VELVET  
11 trademarks before they began using them, and even though they had time to change the labels before  
12 their launch, they refused to do so. Defendants deliberately targeted TWG and its valuable  
13 trademarks by appropriating two of them with full knowledge that the terms are not known flavor  
14 names, that TWG owns the trademark rights to these terms for wine and spirits, and that they are of  
15 great value to TWG because they have a tremendous amount of consumer goodwill attached to them.  
16 Defendants are specifically targeting TWG with the intention of destroying the ability of TWG's  
17 valuable trademarks to function as indicators of a single source of the goods so that Defendants can  
18 free-ride on the brand recognition, goodwill, investment and success of TWG's brands. Defendants  
19 willfully, deliberately and knowingly adopted and used TWG's trademarks for the purpose of  
20 promoting their new DESIRÉE vodka, attracting new customers and building their brand in direct  
21 competition with TWG in a manner that, if successful, will destroy the CUPCAKE and RED  
22 VELVET trademarks. The whole point of Defendants' conduct is to confuse consumers into thinking  
23 that there are two sources of CUPCAKE and RED VELVET wine or vodka, when up until the launch

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1 of Defendants' vodka there had been only one, and to compete unfairly with TWG by destroying its  
2 trademarks and causing great harm, injury, and damage to TWG and its valuable brands in the  
3 process.

4 28. Defendants committed these infringing acts knowing that TWG resides in this District  
5 and would suffer any injuries from Defendants' conduct in this District.

6 **CLAIM ONE**

7 **(Federal Trademark Infringement)**

8 29. The allegations of Paragraphs 1-28 of this Complaint are hereby incorporated by  
9 reference.

10 30. TWG was the first to file trademark applications for CUPCAKE for both wine and  
11 spirits. Its rights relate back to the filing date of the applications, both of which precede Defendant's  
12 date of first use of the mark. TWG was also the first to use the CUPCAKE and RED VELVET  
13 trademarks. TWG's marks have priority over Defendants'.

14 31. Defendants began using the CUPCAKE and RED VELVET trademarks in the  
15 promotion and sale of vodka without authorization from TWG. The trademarks are identical to  
16 TWG's registered and common law trademarks. The goods are both alcohol beverages, and identical  
17 in the case of vodka. In the normal course of trade the goods would be sold and promoted to the  
18 same consumers in the same channels of trade. Consumers seeking TWG's wines and vodka will  
19 initially be interested in Defendants' vodka because it uses TWG's well-known trademarks, and  
20 consumers who see Defendants' vodka will believe it originates with, is licensed by or is otherwise  
21 associated or affiliated with TWG. Such unauthorized use of the TWG marks by Defendants creates  
22 a likelihood of confusion with TWG's trademarks and constitutes an infringement of TWG's  
23 trademarks under 15 U.S.C. §§ 1114 *et seq.*

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1 32. TWG has been and will be injured by Defendants' use and promotion of the  
2 CUPCAKE and RED VELVET trademarks. The use of identical marks on identical and similar  
3 goods will undermine if not destroy the goodwill in TWG's trademarks and cause damage and injury  
4 to TWG. It will harm TWG's business reputation and goodwill and decrease its business and profits.

5 33. Defendants' infringing conduct is willful, intentional and in bad faith. Defendants  
6 were aware of TWG's prior rights and had an opportunity to change their labels prior to the launch of  
7 the infringing products. Notwithstanding this knowledge and opportunity, Defendants made a  
8 conscious decision to proceed with their scheme to destroy and free ride on TWG's trademark rights.

9 WHEREFORE, TWG prays for relief as set forth below.

10 **CLAIM TWO**

11 **(Restitution Based On Unjust Enrichment)**

12 34. TWG realleges and incorporates by reference the allegations of paragraphs 1-33.

13 35. As a result of Defendants' conduct, they have been unjustly enriched at the expense of  
14 TWG and the law thereby implies a contract by which the Defendants must pay to TWG  
15 the amount by which, in equity and good conscience, Defendants have been unjustly enriched at the  
16 expense of TWG.

17 **WHEREFORE**, TWG seeks judgment against the Defendants as follows:

- 18 1. An injunction against Defendants enjoining any further infringement of TWG's  
19 trademarks in the United States;
- 20 2. An award in the amount by which Defendants have been unjustly enriched;
- 21 3. Costs of suit, including TWG's reasonable attorneys' fees; and
- 22 4. Such further relief as this Court deems just.

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**LAW OFFICE OF PAUL W. REIDL**

Dated: June 24, 2011

By: /s/ Paul W. Reidl

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