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The Honorable \_\_\_\_\_

07-CV-00373-CMP

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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CASCADE FRESH, INC., a Washington Corporation,

CV 07-0373 JUR  
Civil Action No.

Plaintiff,

COMPLAINT FOR TRADEMARK  
INFRINGEMENT, UNFAIR  
COMPETITION AND UNFAIR  
BUSINESS PRACTICES

v.

LIFEWAY FOODS, INC, an Illinois Corporation,

DEMAND FOR JURY TRIAL

Defendant.

Plaintiff Cascade Fresh, Inc. by and through its undersigned attorneys, avers and states as follows for its Complaint:

STATEMENT OF THE CASE

1. This is an action asserting claims for trademark infringement, unfair competition and unfair business practices under the federal Lanham Act, the common law and the laws of the State of Washington.

PARTIES

2. Plaintiff Cascade Fresh, Inc. ("Cascade Fresh") is a Washington corporation, with a principal place of business at 1280 NW Elford Drive, Seattle, Washington 98177.

1 3. On information and belief, Defendant Lifeway Foods, Inc. ("Lifeway") is an  
2 Illinois corporation having a place of business at 6431 W. Oakton Street, Morton Grove, Illinois  
3 60053-2727.

4 **JURISDICTION AND VENUE**

5  
6 4. This action is brought under the Lanham Act (15 U.S.C. Section 1051 *et seq.*) and  
7 the common law and statutory law of the State of Washington.

8 5. This Court has subject matter jurisdiction pursuant to 15 U.S.C. Section 1121, 28  
9 U.S.C. Sections 1331, 1338, 2201, as well as 28 U.S.C. Section 1367(a), which provides for  
10 supplemental jurisdiction over related state-law claims.

11 6. Venue in this Court is proper in this district pursuant to 28 U.S.C. Section 1391(a),  
12 in that, on information and belief, a substantial part of the events or omissions giving rise to the  
13 claims at issue herein occurred within this judicial district, and a substantial part of the injury to  
14 the property and rights of Plaintiff Cascade Fresh that is the subject of these claims occurred in  
15 this district, namely, harm to Cascade Fresh has occurred through Defendant Lifeway's past and  
16 continued infringement of Plaintiff's trademark GO WITH THE FLOW in this judicial district  
17 (and across the United States), along with threats of litigation sent from Defendant to Plaintiff in  
18 this district regarding Plaintiff's use of the trademark. By misappropriating Plaintiff's GO WITH  
19 THE FLOW trademark, Defendant assumed the risk that injuring Plaintiff in Seattle, Washington,  
20 and Washington generally, would subject Defendant to personal jurisdiction within this Court.  
21 Defendant's knowledge of its infringing activity comes from a variety of sources, including  
22 demand letters sent by Plaintiff to Defendant. Defendant also sent its own demand letters to  
23 Plaintiff's primary place of business in this judicial district, threatening suit over use of the GO  
24 WITH THE FLOW trademark, causing a reasonable apprehension of suit by Plaintiff. As a result  
25 of Defendant's knowledge of Plaintiff's senior use of the GO WITH THE FLOW trademark and  
26 Plaintiff's priority to the mark, and Defendant's threats of suit, Defendant could reasonably have  
27 expected to be sued in the city and state of Plaintiff's primary place of business, namely within the

1 jurisdiction of this Court, especially since a substantial portion of Defendant's infringing activity  
2 occurred in Washington State. Moreover, Defendant is subject to personal jurisdiction in this  
3 judicial district from its substantial and continuous contacts within this district and Washington  
4 State generally.

5 **PLAINTIFF CASCADE FRESH AND ITS RIGHTS**

6 7. Plaintiff Cascade Fresh is a family-owned corporation providing a unique line of  
7 health food products across the United States, including all-natural yogurts, and a specialty brand  
8 of smoothies called Cascaders™, sold under the trademark GO WITH THE FLOW, packaged in a  
9 convenient bottle for on-the-go consumption.

10 8. As early as April 2004, Plaintiff selected the GO WITH THE FLOW trademark for  
11 use on its packaging of the Cascaders product line.

12 9. As early as January 1, 2005, an outside company generated branded product labels  
13 with the GO WITH THE FLOW trademark for Plaintiff.

14 10. As early as 2005, Plaintiff publicly shared product mockups and point of sale  
15 materials bearing the GO WITH THE FLOW mark with many outside third parties, including a  
16 labeling company, a packaging company, a copywriter, an editor, and a culture company.

17 11. On July 22 and 23, 2005, Plaintiff sampled and offered for sale GO WITH THE  
18 FLOW branded product at the Kehe natural foods trade show in Chicago, Illinois.

19 12. As early as May 19, 2006, Plaintiff was selling and shipping product bearing the  
20 GO WITH THE FLOW trademark to distributors that serviced the entire United States.

21 13. Plaintiff has also spent considerable resources in advertising, marketing and  
22 promoting its GO WITH THE FLOW branded products across the United States and in  
23 Washington State.

24 14. As a result of Plaintiff's extensive use, promotion, and sales, its GO WITH THE  
25 FLOW mark has become known to and recognized by relevant consumers as identifying quality  
26  
27

1 health food products, namely its Cascaders smoothies. The GO WITH THE FLOW mark and the  
2 goodwill associated therewith are valuable assets of Plaintiff.

3 **DEFENDANT AND ITS ACTIVITIES**

4  
5 15. Defendant Lifeway also operates in the health food industry, selling products that  
6 compete with Plaintiff's products. For example, Defendant sells a yogurt-like portable dairy  
7 beverage called Kefir.

8 16. As part of Defendant's advertising and promotions, Defendant is using GO WITH  
9 THE FLOW as a slogan as part of its Lifeway house brand. Defendant's various advertising  
10 efforts having the GO WITH THE FLOW mark include a billboard and vans previously used in  
11 the Illinois area, magazine advertisements, and its website [www.lifeway.net](http://www.lifeway.net).

12 17. Upon information and belief, Defendant is yet to use the GO WITH THE FLOW  
13 mark on its products, and its use of the mark has been limited to advertisements.

14 18. Defendant's products are sold to the same consumers and through the same  
15 channels of trade as Plaintiff's products. For example, Defendant's goods are promoted and  
16 offered for sale at the same trade shows as Plaintiff's goods.

17 19. Defendant's products are available for sale in this judicial district and elsewhere.  
18 Defendant's web site at [www.lifeway.net](http://www.lifeway.net) lists at least five major chain retail outlets in Washington  
19 State where Lifeway products are sold, including Costco, Safeway, Whole Foods, Wild Oats, and  
20 King Soopers.

21 20. Defendant's advertising efforts are not sufficient to establish trademark use of the  
22 mark for priority concerns, but its promotion of the GO WITH THE FLOW mark as part of its  
23 house brand on advertisements is likely to cause confusion among the purchasing public. For  
24 example, on March 8-10, 2007, at the EXPO West natural foods trade show in Anaheim,  
25 California, Defendant publicly displayed a large banner having its Lifeway mark and GO WITH  
26 THE FLOW. Plaintiff also attended the March EXPO West trade show, publicly displaying and  
27

1 offering for sale its GO WITH THE FLOW marked products. This promotional activity by  
2 Defendant was likely to cause confusion among those attending the EXPO West trade show  
3 because, even though Defendant did not have GO WITH THE FLOW marked product, the  
4 simultaneous presence of Defendant at the trade show with Plaintiff having GO WITH THE  
5 FLOW marked goods would lead an observer or consumer to likely believe that there was a  
6 connection or association between Plaintiff and Defendant, when there is not.

7  
8 21. Plaintiff's trademark use of the GO WITH THE FLOW mark predates Defendant,  
9 as Plaintiff was the first to select the mark, Plaintiff was the first to place the mark on printed  
10 materials and packaging proofs, Plaintiff is the only party to publicly share marked products, and  
11 Plaintiff is the only party to distribute sample branded product or to offer marked product for sale  
12 in Washington State and across the United States.

13 22. Defendant is yet to mark any of its products with the GO WITH THE FLOW  
14 mark. To date, Defendant's efforts have been limited to advertisements having the house brand  
15 LIFEWAY next to the slogan GO WITH THE FLOW.

16 23. In comparison to Defendant who has not established trademark use sufficient for  
17 priority, especially in light of Defendant's failure to mark its product with the GO WITH THE  
18 FLOW mark, Plaintiff is the senior user with priority to the trademark GO WITH THE FLOW in  
19 Washington State, and across the United States, from at least Plaintiff's senior trademark use on  
20 GO WITH THE FLOW marked product that were sold, offered for sale, and moved in interstate  
21 commerce by Plaintiff.  
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1 **FIRST COUNT**

2 **FEDERAL FALSE DESIGNATION OF ORIGIN**  
3 **AND UNFAIR COMPETITION UNDER 15 U.S.C. SECTION 1125**  
4

5 24. Plaintiff alleges and incorporates by reference the allegations of Paragraphs 1  
6 through 23 of the Complaint as though fully set forth herein.

7 25. Plaintiff's GO WITH THE FLOW mark and trade name are designations of origin  
8 that identify Plaintiff as the exclusive source of its goods, and distinguish Plaintiff's goods from  
9 the goods of others in the marketplace, including its drinkable dairy products.

10 26. Defendant's use of the GO WITH THE FLOW mark is likely to cause confusion  
11 and mistake. Such use includes Defendant's advertisements, including at trade shows attended by  
12 Plaintiff, where Defendant's advertisements reach overlapping consumers and are likely to  
13 deceive or confuse others into believing that Defendant's advertisements using the GO WITH  
14 THE FLOW mark are sponsored by, approved by, or affiliated with Plaintiff.

15 27. Defendant's use of the GO WITH THE FLOW mark constitutes false designation  
16 of origin, false or misleading description, and/or false or misleading representation. Defendant's  
17 use of Plaintiff's GO WITH THE FLOW mark and trade name (or confusingly similar variations  
18 thereof) is likely to cause confusion or mistake or to deceive others as to the affiliation,  
19 connection, or association of Defendant with Plaintiff and vice versa. It is also likely to cause  
20 confusion, mistake, or deception as to the origin, sponsorship, or approval with regards to  
21 Plaintiff's marked products and Defendant's advertisements having the mark.

22 28. Such false designation, description, and/or representation constitute unfair  
23 competition and are an infringement of Plaintiff's rights in its GO WITH THE FLOW mark and  
24 trade name in violation of Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a).

25 29. Despite actual and/or constructive knowledge of Plaintiff's rights, Defendant is  
26 continuing its acts of infringement.  
27

1           30. Plaintiff has been, and will continue to be, damaged by Defendant's past and  
2 continuing false description, false representation, false designation of origin, and other acts of  
3 unfair competition in a manner and amount that cannot be fully measured or compensated in  
4 economic terms. Defendant's actions have damaged, and will continue to damage, Plaintiff's  
5 market, reputation, and goodwill, and may discourage current and potential customers from  
6 dealing with Plaintiff. Such irreparable harm will continue unless Defendant's acts are restrained  
7 and/or enjoined.

8           31. Plaintiff has been damaged by Defendant's actions in an amount to be proven at  
9 trial.

10                               **SECOND COUNT**

11                               **COMMON LAW TRADE NAME AND TRADEMARK INFRINGEMENT**

12           32. Plaintiff realleges and incorporates by reference the allegations set forth in  
13 paragraphs 1 through 31 of the Complaint.

14           33. Defendant's use of the GO WITH THE FLOW mark is likely to cause confusion  
15 and mistake. Such use of Plaintiff's trademark and trade name by Defendant is likely to deceive  
16 or confuse others into believing that Defendant's activities using the GO WITH THE FLOW mark  
17 are sponsored by, approved by, or affiliated with Plaintiff, which they are not.

18           34. Defendant's acts, as above alleged, constitute infringement of Plaintiff's trademark  
19 and trade name rights in violation of the common law.

20           35. *Despite actual and/or constructive knowledge of Plaintiff's rights, Defendant is*  
21 *continuing its acts of infringement.*

22           36. Plaintiff has been and continues to be damaged in a manner that cannot be fully  
23 measured or compensated in economic terms and for which there is no adequate remedy at law.  
24 The past and continuing actions of Defendant has damaged and will continue to damage Plaintiff's  
25 market, reputation, and goodwill.  
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1           3.       That Defendant, and its affiliates, officers, agents, servants, employees, attorneys,  
2 and all other persons in active concert or participation with any of them, be preliminarily and  
3 permanently enjoined and restrained from all manufacture, purchase, promotion, sale, and use of  
4 any products, packaging, advertising, labels, or other sales or shipping material that infringe  
5 Plaintiff's GO WITH THE FLOW mark, including retail web sites such as www.lifeway.net, and  
6 products, packaging, advertising, labels, or other sales or shipping material having the GO WITH  
7 THE FLOW mark or any other confusingly similar mark.

8           4.       That Defendant, and its affiliates, officers, agents, servants, employees, attorneys,  
9 and all other persons in active concert or participation with any of them, be ordered to deliver to  
10 all products, packaging, advertising, labels, or other sales or shipping material in their possession  
11 or control to Plaintiff that infringe Plaintiff's GO WITH THE FLOW mark, including products,  
12 packaging, advertising, labels, or other sales or shipping material having the GO WITH THE  
13 FLOW mark or any other confusingly similar mark.

14           5.       That Defendant, and its affiliates, officers, agents, servants, employees, attorneys,  
15 and all other persons in active concert or participation with any of them, be ordered to withdraw  
16 and/or cancel all trademark, service mark, or any other type of trademark application filed in the  
17 United States and elsewhere for the GO WITH THE FLOW mark or any other confusingly similar  
18 mark.

19           6.       That Defendant be directed to file with this Court and serve on Plaintiff within  
20 thirty (30) days after the service of an injunction a report in writing, under oath, setting forth in  
21 detail the manner and form in which Defendant and its affiliates, officers, agents, servants,  
22 employees, attorneys, and all other persons in active concert or participation with any of them  
23 have complied with the injunction.

24           7.       That Defendant be required to pay Plaintiff such damages as Plaintiff has  
25 sustained, or will sustain, in consequence of Defendant's false description and representation, false  
26 designation of origin, unfair competition and trademark infringement, and to account for all gains,  
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1 profits, and advantages derived by Defendant that are attributable to such unlawful acts, as  
2 provided by 15 U.S.C. Section 1117.

3 8. That Defendant be ordered to pay to Plaintiff such damages as Plaintiff has  
4 sustained in consequence of Defendant's unfair business practices and unfair competition, together  
5 with Plaintiff's costs of suit, as provided by R.C.W. Section 19.86.090.

6 9. That Plaintiff be declared the senior user with priority to the GO WITH THE  
7 FLOW mark in Washington State and across the United States with respect to Defendant.

8 10. That Defendant be ordered to pay to Plaintiff prejudgment and postjudgment  
9 interest on all sums allowed by law.

10 11. That Defendant be ordered to pay to Plaintiff its costs incurred in this action.

11 12. That Plaintiff have such other and further relief as this Court may deem just and  
12 proper.

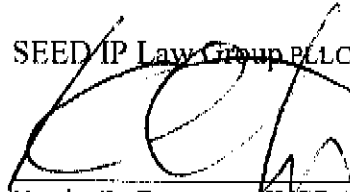
13 **DEMAND FOR JURY TRIAL**

14 Plaintiff demands a trial by jury as to all issues so triable.

15 DATED this 12<sup>th</sup> day of March, 2007, at Seattle, Washington.

16  
17 Respectfully submitted,

18 SEED IP Law Group PLLC

19  
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