

CAUSE NO. 10-16052

iGPS COMPANY LLC,

Plaintiff,

v.

NATIONAL WOODEN PALLET &
CONTAINER ASSOCIATION and
BRUCE N. SCHOLNICK

Defendants.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

192ND JUDICIAL DISTRICT

FILED
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SARY FITZSIMMONS
DISTRICT CLERK
DALLAS CO., TEXAS
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PLAINTIFF'S FIRST AMENDED PETITION

Plaintiff iGPS Company LLC ("iGPS") files this its First Amended Petition against Defendant National Wooden Pallet & Container Association ("NWPCA") and Bruce N. Scholnick, President and CEO of the NWPCA, (collectively, "NWPCA") as follows:

NATURE OF ACTION

1. iGPS brings this action against NWPCA, an industry trade association that refers to itself as "a consultant" that "advocates" for its members with regard to the *wooden* pallet industry, in response to NWPCA's malicious smear campaign to spread false and deceptive statements about iGPS's competing *plastic* pallets. This intentional disparagement and defamation, done solely to harm iGPS in the marketplace and thereby advance the economic interests of its wooden pallet industry members, has proximately caused and continues to proximately cause significant damages to iGPS.

2. iGPS entered the pallet rental marketplace in 2007, offering a revolutionary lightweight, discretely traceable, 100% recyclable plastic pallet as an alternative to platforms made of wood. In approximately four years of operation, its pallet has become the platform of choice for leading companies in North America, shifting the paradigm of the pallet pooling industry and threatening the continued viability of the traditional wooden pallet. Indeed, iGPS's

plastic pallet represents the first significant innovation in the pallet pooling industry in more than sixty years.

3. To protect the economic interests of the wooden pallet industry, the NWPCA, funded by its wooden pallet member companies, has conspired to tortiously attempt to drive iGPS out of business. As part of its plan, it has published a so-called "press release" containing intentionally false, misleading and defamatory statements singularly calculated to create the completely false impression that iGPS's pallets were the possible cause of an alleged contamination of butter in certain Texas stores.

4. Unable to challenge iGPS' superior plastic platform fairly and competitively, the NWPCA has resorted to false and misleading statements and unfair competition designed solely to frighten away the public and injure or destroy iGPS's prospective business relationships.

5. NWPCA's conduct has caused confusion among iGPS's customers and has significantly damaged iGPS's reputation, good will, and future profits (among other damages). Accordingly, iGPS here seeks judgment against NWPCA for its unlawful conduct.

DISCOVERY CONTROL PLAN

6. Pursuant to Texas Rule of Civil Procedure 190.4, Plaintiff intends to conduct discovery in this matter under a Level 3 Discovery Control Plan.

JURISDICTION, VENUE, AND SERVICE

7. This Court has jurisdiction over this dispute as the amount in controversy falls within the jurisdictional limits of this Court.

8. This Court has jurisdiction over Defendants as they have committed torts in and/or directed to Texas and its citizens and businesses. Defendants have intentionally infiltrated Texas and Texas commerce as part of their smear campaign to distort the qualities of the iGPS

plastic pallet, which are transported throughout Texas every day. Moreover, this Court has general jurisdiction over Defendants as they regularly conduct business in Texas.

9. Defendant NWPCA may be served by (a) personally serving Defendant NWPCA or one of its officers, (b) serving it by mail at its home and principal office and/or (c) serving the Texas Secretary of State because it has engaged in business in Texas as a matter of law (including actions which give rise to claims in this suit) but does not maintain a regular place of business in Texas or a designated agent for service of process in Texas. Defendant Scholnick may be served by (a) personally serving him, (b) serving him by mail at his mailing address and/or (c) serving the Texas Secretary of State because he has engaged in business in Texas as a matter of law (including actions which give rise to claims in this suit) but does not maintain a regular place of business in Texas or a designated agent for service of process in Texas.

JURY TRIAL DEMAND

10. Plaintiff hereby demands a trial by jury and will pay the jury fee contemporaneously with the filing of this suit.

BACKGROUND

11. iGPS was formed in March 2006 and has been in the pallet pooling business since 2007. Pallet pooling is a system whereby manufacturers, distributors and retailers rent – rather than own – their shipping pallets. Under a pooled pallet system, the customer notifies the pallet pooler of a required number of pallets and the pallet pooler delivers pallets to the customer's facility, usually in truckload quantities. The customer then palletizes its product onto the pallet and ships it across its distribution network. Once the pallets have been emptied at a retail outlet, the distributor relocates the pallets to a distribution center. Pallets are accumulated at the distribution center and then returned to the pallet pooler for inspection and reissue.

12. Every year, many billions of dollars worth of goods in the United States—from

computer parts to groceries—are transported in unitized loads on pallets. Pallets are an essential component of any large retailer’s product distribution and critical to the stream of commerce in the United States. Without every day access to pallets, distribution in America essentially comes to a stop.

iGPS Introduces A Plastic Pallet To Compete with Traditional Wood Pallets

13. Traditionally, pallets were made of wood. iGPS, seeking to improve upon a number of inefficiencies and environmental shortcomings associated with wooden pallets, worked with a plastic manufacturer to develop a revolutionary new plastic pallet. iGPS’s plastic pallets are lighter, stronger, safer, Greener (*i.e.*, better for the environment), and more hygienic than traditional wooden pallets.

14. iGPS’s plastic pallets offer numerous advantages over traditional wood pallets. For example, they are far more hygienic than wood pallets, do not absorb liquids like wood pallets, and, unlike wood pallets, are impervious to insect infestation and contamination. In fact, consumer reports have demonstrated that it can be dangerous to ship many food products on wood pallets for fear that the food will become infested with insects, bacteria and other dangerous organisms.¹ iGPS pallets are far more durable than traditional wood pallets. A typical wood pallet begins to splinter, break apart, have protruding nails, and otherwise is damaged after two to three uses. It needs constant repair and typically spends most of its useful life damaged in one way or another. A typical iGPS pallet, on the other hand, is effectively impervious to damage and retains a “like-new” condition for its entire useful life, which is predicted to run somewhere between 60 and 120 uses.

¹ See, e.g., “Potentially harmful bugs found in shipments at Seattle port,” [King5.com](http://www.king5.com/news/local/Potentially-harmful-bugs-found-in-shipments-at-Seattle-port-90790264.html), April 13, 2010. (available at <http://www.king5.com/news/local/Potentially-harmful-bugs-found-in-shipments-at-Seattle-port-90790264.html>).

15. iGPS's introduction of a better, safer and greener product into the marketplace stands to revolutionize the shipping industry. For example, replacing all wood pallets in the United States with plastic pallets would remove 9.25 billion pounds of non-value-added weight from the nation's supply chain.

16. iGPS ships pallets to customers located in the vast majority of states, including the state of Texas. iGPS's prospective customers are located in every state in the United States.

NWPCA's Role As The Attack Dog For The Wooden Pallet Industry

17. NWPCA is a trade association representing the wood pallet industry that provides consulting services for and advocates governmental authorities on behalf of the wooden pallet industry.

18. iGPS's introduction of trackable and traceable environmentally-friendly plastic pallets into the marketplace has shifted the paradigm of the pallet pooling industry and threatened the continued viability of the traditional wooden pallet.

19. For years, the wood pallet industry operated virtually without any competitors. Since the arrival of iGPS, however, the wood pallet industry has for the first time, faced legitimate competition in the form of a far better and safer product. Instead of lobbying legislators and regulators on legitimate issues, upon information and belief, the NWPCA has met this competition by spreading false and misleading statements about iGPS's plastic pallets. For example, in August 2009, NWPCA issued a press release in which it stated that the flame retardant in iGPS's pallets was "bound to leach into the products they carry" and that the United States Food and Drug Administration should test iGPS pallets to see how much [flame retardant]

dust is getting onto our food.”² NWPCA has embarked on its unlawful campaign in order to squelch competition and protect the revenue and market share of its benefactors—participants in the wooden pallet industry.

NWPCA’S FALSE AND MISLEADING STATEMENTS

20. As part of its unlawful campaign to harm iGPS, NWPCA has published false and misleading statements about iGPS. On December 8, 2010, NWPCA issued a press release entitled “Plastic Pallets Should be Investigated in Butter Contamination Scandal” (the “Release”), attached as Exhibit A. In the Release, NWPCA purports to describe a study conducted by the University of Texas School of Public Health in which high levels of a chemical in the family of chemicals known as polybrominated diphenyl ethers (“PBDEs”) were found in butter purchased from grocery stores in Dallas, Texas.

21. The Release does not (and cannot) state that iGPS’s plastic pallets were the cause of the purported butter contamination. In fact, the Release does not even state (nor can it) that the butter was shipped on an iGPS pallet. Unburdened by these facts, NWPCA nonetheless states in the Release that iGPS’s plastic pallets should be investigated as the “root source” of the butter contamination. Indeed, NWPCA has not retracted the Release even though the author of the study publicly stated that the “source of the contaminants was traced to the wrapper” and that the high level of chemicals found was likely “due to an electrical incident.”³

22. The purpose of the Release is evident from its face. The Release is designed to use an alleged food contamination that is entirely unrelated to iGPS as an opportunity to deceive

² See, e.g., “Wood Pallet Industry Supports FDA Review,” *Smart Brief*, August 12, 2009 (available at <http://www.smartbrief.com/news/aaaa/industryPR-detail.jsp?id=AD69269B-63A1-4AD3-8FF0-8520ADC7AF11>).

³ See “I Can’t Believe It’s Not Butter (Because It’s So Flame Retardant),” *Food In The News*, December 13, 2010 (available at <http://www.delish.com/food/recalls-reviews/butter-contaminated-with-fire-retardant?GT1=47001>), attached hereto as Exhibit B.

and mislead the public. Despite evidence that iGPS pallets were not in any way connected to the food source, the stores or otherwise, in the Release NWPCA nonetheless gives the overall impression that iGPS pallets are unsafe and may have been involved in the alleged contamination. Perhaps most egregiously, by identifying several of iGPS's food industry customers in the Release, NWPCA is purposely targeting iGPS' largest customers to inflict the greatest harm possible to iGPS. By suggesting to the world that iGPS' customers are using a pallet linked to contaminated butter, the Release has tapped in to a food company's greatest fear: food contamination. Even the appearance of being involved in a food contamination scandal could do severe damage to a food company's reputation and profits, thereby causing the company to terminate its business with (or even file suit against) iGPS.

23. In addition to the overall misleading nature of the Release, the NWPCA, among other things, makes a number of specific false statements designed exclusively to mislead consumers and frighten customers from using iGPS's superior products.

24. First, at the time of NWPCA's malicious statements, none of iGPS's customers shipped butter on iGPS pallets. NWPCA misleadingly attempts to communicate in the Release that butter is shipped on iGPS's pallets by calling for an investigation of iGPS's pallets and further by claiming that iGPS's pallets are used "almost exclusively by the food industry."

25. Second, NWPCA states in the Release that "each of [iGPS's] pallets contain 3.4 lbs of decabromodiphenyl ether." This is a false statement.

26. Third, NWPCA states in the Release that iGPS uses or will use "102 million pounds" of decabromodiphenyl ether ("Deca") over five years. This is wildly inaccurate and is a false statement.

27. Fourth, NWPCA states in the Release that annually, "iGPS would be using

between 20 and 40 percent of the EPA estimated total of [Deca].” This is a false statement.

28. Fifth, NWPCA states in the Release that “plastic pallets are one of the largest users of [Deca].” This is an intentionally misleading statement.

29. Sixth, NWPCA’s President, Bruce Scholnick, misleadingly states in the Release that “further testing of food that is transported on [iGPS’s pallets]” should be conducted. Mr. Scholnick, without any basis in fact, outrageously attempts to communicate in the Release that there is somehow a serious risk that food transported on iGPS’s pallets would become contaminated.

30. Finally, Mr. Scholnick misleadingly states in the Release that “households around the country are baking butter-laden cookies and cakes” and then rhetorically asks “Are families eating flame-retardant cupcakes?” Mr. Scholnick, in a clear attempt to create panic among the public and food manufacturers, falsely implies that iGPS’s pallets were the cause of the alleged butter contamination.

31. When the above false and misleading statements are taken as a whole, it is patently clear that NWPCA intended to create confusion and disruption among the public and iGPS’s customers and prospective customers about whether iGPS’s plastic pallets are safe to transport food. Moreover, NWPCA did so, upon information and belief, without conducting any meaningful investigation to determine the veracity of the charge. Instead, NWPCA publicly, and in a manner calculated for maximum distribution, reported to the world that iGPS’s plastic pallets contaminated food.

32. Upon information and belief, NWPCA’s unlawful dissemination of the false and misleading statements described herein has proximately resulted in damage to iGPS in the form of, among other things, harm to its reputation and good-will, the loss of future revenue, and the

loss of prospective customers.

NWPCA's Conduct Caused Customer Confusion and Has Damaged iGPS

33. iGPS has devoted a substantial amount of time and capital into developing and marketing its plastic pallet, which is a significant technological advance to its customers' supply chains. iGPS's market share is small in comparison to wooden pallet companies (which constitute the largest component of the pallet pooling industry), making it particularly susceptible to the unlawful, anti-competitive tactics employed by NWPCA (upon information and belief, at the behest of the wooden pallet industry). As described in detail above, NWPCA's misconduct has irreparably harmed iGPS by, among other things, causing harm to iGPS's reputation, lost future business, harm to good will, and the cost of defending against a defamatory Release.

COUNT ONE
UNFAIR COMPETITION

34. iGPS incorporates by reference paragraphs 1 through 33 above herein.

35. NWPCA, through their above-described misfeasant scheme, which is contrary to honest practice in industrial or commercial matters, constitutes unfair competition and is therefore tortious and actionable.

36. NWPCA intentionally disseminated information for the sole purpose of purveying misleading manipulation and distortion as a perverse means of achieving pecuniary gain through the disruption of iGPS's business and relationships as well as the marketplace.

37. Such unfair competition has proximately caused iGPS damages for which it is entitled to recovery herein.

COUNT TWO
BUSINESS DISPARAGEMENT

38. iGPS incorporates by reference paragraphs 1 through 37 above herein.

39. NWPCA, without privilege, has intentionally and maliciously disseminated disparaging and defamatory information about iGPS for the sole purpose of inflicting pecuniary damage upon iGPS and to harm iGPS's business reputation.

40. Such disparaging and defamatory statements have proximately caused iGPS damages for which it is entitled to recovery herein.

COUNT THREE
DEFAMATION

41. iGPS incorporates by reference paragraphs 1 through 40 above herein.

42. NWPCA, through the publication of defamatory false and misleading statements as described above, has defamed iGPS and continues to do so, causing actual harm to iGPS's business reputation.

43. NWPCA made material defamatory statements that identify iGPS.

44. NWPCA's defamatory statements were published with actual malice, and with knowledge that the statements were false and misleading.

45. NWPCA's defamatory statements were negligently published.

46. NWPCA's defamatory statements caused and continue to cause actual reputational harm to iGPS.

COUNT FOUR
TEMPORARY AND PERMANENT INJUNCTION

47. iGPS incorporates by reference paragraphs 1 through 46 above herein.

48. As stated above, if NWPCA is not stopped from its course and pattern, iGPS will be left irretrievably damaged with no adequate remedy at law.

49. iGPS therefore requests this Court grant and enter a Temporary Injunction (followed by a Permanent Injunction) prohibiting NWPCA, directly or indirectly, through itself

or participation or involvement with others, from (a) engaging in conduct calculated to coerce iGPS's customers to cease doing business with iGPS or discourage iGPS's prospective customers from engaging in business with iGPS, (b) disseminating anywhere in the United States the false and deceptive statements described in this Complaint, and any other false and deceptive statements substantially similar thereto, and (c) making any false statement or claim, including any claim that iGPS's plastic pallets are unsafe (including but not limited to any false statement that iGPS's plastic pallets contain unsafe levels of Deca or have caused any contamination of any food product.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff iGPS respectfully requests that NWPCA be cited to appear and answer and that this Court enter a temporary injunction (as described above) and judgment for iGPS for all of its direct, actual, indirect, consequential, and punitive damages, as well as for interest, costs, attorneys' fees and expenses, and enter a permanent injunction as described above, and provide iGPS all other relief to which iGPS may be entitled at law or in equity.

Respectfully submitted,

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EXHIBIT A

Plastic Pallets Should be Investigated in Butter Contamination Scandal

Alexandria, VA – A study conducted by the University of Texas (UT) School of Public Health showed high levels of polybrominated diphenyl ether (PBDE) flame retardants in butter samples purchased from five grocery stores in the city of Dallas. Investigators suggest the incident represents the worst documented case of PBDE contamination in food ever reported in the U.S.

The leading company supplying plastic pallets to companies transporting and storing food, Intelligent Global Pooling Systems (iGPS), commissioned a life cycle analysis that revealed each of its pallets contain 3.4 lbs of decabromodiphenyl ether (decaBDE), one of several chemicals classified as PBDEs. While UT researchers speculated on possible causes of contamination such as the butter's paper wrapper, given the high levels of PBDE used in the plastic pallets, they should be examined as the root source of transfer to the food.

The U.S. Department of Environmental Protection Agency (EPA) has estimated that between 50—100 million pounds of decaBDE was manufactured or imported in the U.S. in 2005. In 2008, iGPS announced an agreement with the plastic pallet manufacturer Schoeller Arca Systems that it would be producing up to 30 million pallets in the next five years – that's 102 million pounds of decaBDE. At annual averages, IGPS would be using between 20 and 40 percent of the EPA estimated total amount of this chemical.

Clearly plastic pallets are one of the largest users of decaBDE.

This is likely why just last week the EPA issued a news release saying it would conduct a *Design for the Environment* assessment on the flame retardant decaBDE in products such as "textiles, plastic pallets, and electronics."

"In 2009, our organization distributed a number of news releases and white papers quoting highly credible environmental groups and federal agencies on the risks associated with decaBDE which is contained in large quantities in iGPS plastic pallets," said Bruce Scholnick, President/CEO of the National Wooden Pallet and Container Association. "We warned of the potential for those chemicals leaching into food, but iGPS convinced the food industry that their chemicals are 'encapsulated' and can't be transferred to the food. We hope that this most recent evidence of decaBDE-food contamination will serve as a wake-up call to the food industry."

iGPS plastic pallets are used almost exclusively by the food industry. The company lists household names like Quaker, Tropicana, Gatorade, Dole, Imperial Sugar, Mars, Pilgrims Pride, Campbell Soup, General Mills and, Kraft among their pallet customers.

"Pallets are treated roughly in warehouse and material handling conditions," said Scholnick. "They are scraped across floors, gouged by forklifts and dropped from the back of trucks onto loading docks. Plastic pallets end up with fine layers of dust, likely containing decaBDE. Those pallets are then piled with produce, dairy and manufactured food products."

DecaBDE is also showing up in our water. In April 2009, the National Oceanic and Atmospheric Administration (NOAA) released a report documenting that flame retardants are now in all U.S. coastal waters and the Great Lakes in increasing concentrations. John H. Dunnigan, NOAA assistant administrator of the National Ocean Service said: "Scientific evidence strongly documents that these contaminants impact the food web and action is needed to reduce the threats posed to aquatic resources and human health."

"I'm not saying that plastic pallets are the source of the chemical contaminants in the butter, but I am encouraging further testing of food that is transported on these pallets," said Scholnick. "This time of year households around the country are baking butter-laden cookies and cakes. Are families eating flame retardant-filled cupcakes? We should know."

“Regardless of how this chemical got into the butter – whether from plastic pallets or butter wrappers – decaBDE has no place in the food supply chain. A zero tolerance policy should be the goal of every food producer in this country.”

Wood pallets are a natural byproduct using wood that is strong and durable, but unusable by furniture and home builders for cosmetic purposes. More than 1.2 billion wood pallets are in service each day in the United States. When these wood pallets can no longer be repaired to a standard that ensures protection of the goods being shipped and safety of workers handling the load, the pallets are reprocessed into new products such as biofuel, landscape mulch, animal bedding, woodstove pellets. The nails from ground pallet chips are removed through a variety of collection technologies and sold as scrap metal to be used again – from cradle to grave wood pallets are the sustainable choice for those in the supply chain who are concerned about preserving our environment by using natural renewable resource products like wood.

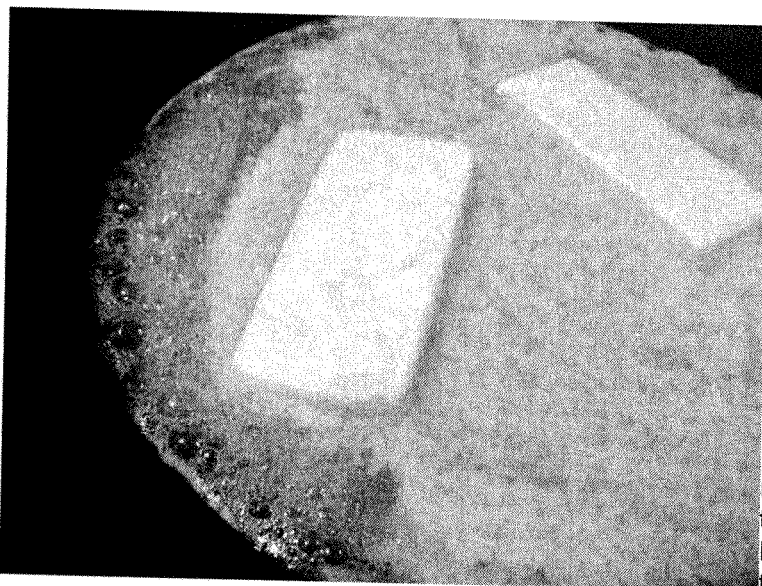
EXHIBIT B



<http://www.delish.com/food/recalls-reviews/butter-contaminated-with-fire-retardant>

I Can't Believe it's Not Butter (because it's also flame-retardant)

BY JUSTINE STERLING



The next time you're looking to fireproof something forget trekking down to the hardware store, instead check the fridge and grab a stick of butter. Researchers have found varied amounts of flame retardant in sticks of butter.

Polybrominated diphenyl ethers, or PBDEs, are a class of chemicals commonly used in furniture and electronic manufacturing as flame-retardants. When digested these chemicals have been known to stop hormone function and increase cancer

risk. "Flame retardants were not made to be eaten," said Arnold Schecter, one of the researchers. "They're made to slow down the smoke in fires. They're not a food component. They don't belong there." Just in case that was unclear. They have also been associated with reproductive, developmental and neurological problems. This is the first documented case of PBDEs being found in food in the US.

U.S. researchers tested a selection of ten kinds of butter sourced from Dallas grocery stores. Nine of the samples showed small amounts of the contaminant, which is consistent with the results of previous studies as PBDEs can enter foods through soil, water and air. But one sample had levels of PBDEs that were 135 times that of the others. The source of the contaminants was traced to the wrapper. Though Schecter will not release the name of the company whose butter contained such high levels of the chemicals, he believes that the issue could be due to an electrical incident. If there was a fire in one of the machines or overheating, the chemicals could have leaked into the paper and then later into the butter.

Currently, there are no federal agencies tracking levels of chemicals like PBDEs in food so there is no way to know how widespread this sort of contamination is. The newly Senate-approved Food Modernization Safety Act would not be able to help as it focuses

on bacteria rather than chemicals. Though it is unlikely that the sample with high levels of PBDEs is the only contaminated stick out there, it is also unlikely that there is a large quantity of the sticks. (If you feel like doing a little detective work to find out the exact brand of butter, Schechter says that the company's headquarters are in the Minneapolis-St. Paul area). These types of chemicals are also nothing new to our systems. "We basically have all of these chemicals in our bodies just from being in an indoor environment and from eating," Schechter said. "You're certainly not going to be able to control that by being careful about what kind of butter you buy." Schechter and the other researchers believe that their research emphasizes the need for a government-regulated program to test foods for contaminants like PBDEs.

How do you feel about these findings? Are you going to switch to Country Crock? Or will you throw caution into the wind and continue to give yourself a little pat of butter?

<http://www.delish.com/food/recalls-reviews/butter-contaminated-with-fire-retardant>