

1 Frederic I. Berkley, Esq.
2 Nevada Bar No.: 1798
3 SKLAR WILLIAMS PLLC
4 410 South Rampart Boulevard, Suite 350
5 Las Vegas, Nevada 89145
6 Telephone: (702) 360-6000
7 Facsimile: (702) 360-0000
8 fberkley@sklar-law.com
9 *Attorney for Plaintiffs*

10 UNITED STATES DISTRICT COURT

11 For the

12 DISTRICT OF NEVADA

13 Southern Division

14 Marc C. Gordon and Cynthia Callendar)

15 Gordon, dba Sleep Master,)

16 Plaintiffs,)

17 V.)

18 Ontel Products Corporation, a New Jersey)

19 corporation, dba Sleep 8, Sleep 8 Light-)

20 Eliminating Sleep Mask, www.buysleep8.com)

21 and www.buysleepeight.com; and World Pack)

22 USA, LLC, a Nevada limited liability)

23 company, dba www.worldpackusa.com; and)

24 DOES 1-20,)

25 Defendants.

26
27 //
28

AMENDED COMPLAINT

Civil Action No. 2:14-cv-441

DEMAND FOR JURY TRIAL

1 **AMENDED COMPLAINT FOR PATENT INFRINGEMENT, TRADE DRESS**
2 **INFRINGEMENT AND DILUTION, UNFAIR COMPETITION, UNFAIR AND**
3 **DECEPTIVE TRADE PRACTICES, MISAPPROPRIATION**

4 Plaintiffs above-named allege and complain as follows:

5 **General Allegations**

6 1. Plaintiffs seek redress for Defendants' acts of patent infringement, trade dress
7 infringement and dilution, unfair competition, unfair and deceptive trade practices and
8 misappropriation.

9 2. Plaintiffs are citizens of the State of Nevada, and reside in Las Vegas, Nevada.
10 Plaintiffs are doing business as Sleep Master, Sleep MasterTM, Sleep Master® and Revolutionary
11 Patented Sleep Master Sleep Mask.

12 3. Plaintiffs are the owners of a United States Patent for their Sound Muffling Sleep
13 Mask, United States Patent Number D 465,234 S, issued November 5, 2002, hereafter referred to
14 as the "Patent."

15 4. Plaintiff Marc Gordon is the inventor of the Patent and Plaintiffs, under the Patent
16 design, are, and at all times since the subject Patent was issued have been, the sole manufacturer
17 of the Sleep Master sleep mask, also known as Revolutionary Patented Sleep Master Sleep Mask,
18 Sleep Master® and Sleep MasterTM Sleep Mask, hereafter referred to as the "Sleep Master Sleep
19 Mask," photographs of which is attached hereto and incorporated herein as **Exhibit 1**. The
20 primary photographic brand image of Sleep Master Sleep Mask, used throughout the Internet and
21 its marketing materials, is attached hereto and incorporated herein as **Exhibit 2**.

22 5. Plaintiffs have not assigned, licensed, encumbered, sold or otherwise transferred any
23 right to the Patent, and have always been the sole owners of the Patent.

24 6. On information and belief, Defendant Ontel Products Corporation is a New Jersey
25 corporation doing business as Sleep 8, Sleep 8 Light-Eliminating Sleep Mask,
26 www.buysleep8.com, www.buysleepeight.com, and www.worldpackusa.com, among other
27 DBAs, and is hereafter referred to as "Ontel Products."
28

1 7. On information and belief, Defendant Ontel Products is the manufacturer, importer,
2 distributor and/or retailer of the sleep masks named Sleep 8 and Sleep 8 Light-Eliminating Sleep
3 Mask, among other names, and under any name, all of such masks are the same or substantially
4 identical sleep masks, and are hereafter collectively referred to as the "Sleep 8 Mask," or the
5 "infringing mask," an image thereof, captured from www.buysleep8.com in or about March,
6 2014, is attached hereto and incorporated herein as **Exhibit 3**.

7 8. On information and belief, Defendant Ontel Products is marketing and selling the
8 infringing Sleep 8 Mask, to the general public, on the Internet and other media and locations, in
9 interstate commerce, individually or in concert with Defendant World Pack USA, LLC on the
10 websites www.buysleep8.com, www.buysleepeight.com, and www.worldpackusa.com among
11 other locations, and is generally advertising its sale of the Sleep 8 Mask generally on the Internet
12 and other media.

13 9. On information and belief, Defendant World Pack USA, LLC is a Nevada limited
14 liability company and is doing business as Sleep 8, Sleep 8 Light-Eliminating Sleep Mask,
15 www.buysleep8.com, www.buysleepeight.com, and www.worldpackusa.com, among other
16 DBAs, and is hereafter referred to as "World Pack USA."

17 10. On information and belief, Defendant World Pack USA is the manufacturer, importer
18 into the United States, distributor and/or retailer of the Sleep 8 Mask.

19 11. On information and belief, Defendant World Pack USA is marketing and selling the
20 infringing Sleep 8 Mask, to the general public, on the Internet and other media and locations, in
21 interstate commerce, individually or in concert with Defendant Ontel Products, on the websites
22 www.buysleep8.com, www.buysleepeight.com, and www.worldpackusa.com, among other
23 locations, and is generally advertising its sale of the Sleep 8 Mask on the Internet and other
24 media.

25 12. The true names and capacities of Defendants sued herein as DOES 1 through 20,
26 inclusive, are unknown to Plaintiffs at this time. Plaintiffs are informed and believe and, on that
27 basis allege, that each of the Defendants named as a DOE defendant was an agent, servant, co-
28 owner, and/or employee of each of the other named Defendants and, at all times herein, acted

1 within the course and scope of their agency and/or employment with the authority, express
2 direction, knowledge and consent of the named Defendants. Plaintiffs will amend this
3 Complaint when the identities of the DOE Defendants become known.

4 13. Plaintiffs are informed and believe, and on that basis allege, that at all times relevant
5 each of the Defendants, whether DOE Defendants or otherwise, acted within a common plan and
6 contributed to the injuries suffered by Plaintiffs as hereinafter alleged. All such Defendants were
7 the agents and/or employees of the remaining Defendants and at all times acted within the course
8 and scope of that agency relationship and with the knowledge, consent and ratification of the
9 remaining Defendants.

10 **Jurisdiction and Venue**

11 14. Jurisdiction is appropriate in this Court under the Act of June 25, 1948, 62 Stat. 869,
12 U.S.C., Title 28, Section 1338(a), as hereinafter more fully appears.

13 15. This Court further has subject matter jurisdiction under 28 U.S.C. § 1331 because
14 these claims arise under federal law and involve the violation of federal statutes.

15 16. This Court has subject matter jurisdiction under section 39 of the Lanham Act, 15
16 U.S.C. § 1121, and under 28 U.S.C. §§ 1331 and 1338. This Court has jurisdiction over
17 Plaintiffs' related state and common law claims pursuant to 28 U.S.C. §§ 1338 and 1367. The
18 amount in controversy exceeds \$75,000, exclusive of interest and costs.

19 17. This Court has personal jurisdiction over the Defendants because each Defendant,
20 either individually or as part of an agreement, has: (a) offered, sold, advertised, and provided on-
21 line services to people residing in Nevada via its websites, and is conducting electronic
22 commerce with residents of Nevada and this District; (b) maintains and has maintained
23 continuous and systematic contacts with Nevada and this District over a period of time; (c)
24 purposefully availed itself of the benefits of doing business in Nevada and this District; (d) and
25 has a warehousing, distribution or customer service operation in Nevada and this District.
26 Accordingly, Defendants, and each of them maintain minimum contacts with Nevada and this
27 District that are more than sufficient to subject the Defendants to service of process in
28 compliance with due process of law.

1 18. Venue is proper in this District pursuant to 28 U.S.C. §1391 (a), (b)(2) and (c),
2 because at all times relevant hereto, a substantial part of the events or omissions giving rise to
3 Plaintiffs' claims occurred in this District, including but not limited to: (a) Defendants transacted
4 business, were found, or acted through subsidiaries or agents present in this District, engaged in
5 advertising in this District, and solicited sales of their infringing Sleep 8 Mask in this District; (b)
6 a substantial part of Plaintiffs claims occurred in this District; and (c) Defendants are subject to
7 the personal jurisdiction of this District as set forth above as of the commencement of this action.

8 **FIRST CLAIM FOR RELIEF – PATENT INFRINGEMENT**

9 19. Plaintiffs repeat and re-allege paragraphs 1 through 19 of this Complaint, and
10 incorporate same as though fully set forth herein.

11 20. Plaintiffs own and have owned the Patent throughout the period of Defendants'
12 infringing acts. Pursuant to the exclusive rights granted by the Patent, Plaintiffs have been
13 manufacturing, marketing, and selling the Sleep Master Sleep Mask sound muffling sleep mask
14 since 2001 in interstate and international commerce.

15 21. Defendants have infringed and are infringing the Patent by making, selling, and
16 using the Sleep 8 Mask that embodies the Patent, and the Defendants will wrongfully and
17 unlawfully continue to do so unless enjoined by this Court.

18 22. Plaintiffs have complied with the statutory requirement of placing a notice of the
19 Patent and its U.S. patent number on sewn-in tags and product packaging, continuously since the
20 patent was issued, on the Sleep Master Sleep Mask.

21 23. On information and belief, Defendants' infringement on Plaintiffs' Patent has
22 caused, and continues to cause, damages to Plaintiffs, and has deprived Plaintiffs of sales and
23 loss of profits and loss of royalties in an amount in excess of \$75,000.00, subject to proof at time
24 of trial.

25 24. Defendants, and each of them, have been unjustly enriched by retaining proceeds
26 from the sales of the infringing Sleep 8 Masks.

27 //

28 //

1 31. Sleep Master Sleep Mask is a famous sleep mask featuring a distinctive design, color
2 and appearance that identifies to consumers that the origin of the product lies with the Plaintiffs.

3 32. Since introducing the Sleep Master Sleep Mask, over many years, Plaintiffs have
4 spent thousands of hours of work and thousands dollars promoting the product and its
5 appearance. As a result of Plaintiffs' continuous and exclusive use of the Sleep Master Sleep
6 Mask trade dress in connection with its product, the Sleep Master Sleep Mask trade dress enjoys
7 wide public acceptance and association with Plaintiffs, has enjoyed extensive media coverage,
8 recognition and accolades, positive customer reviews and testimonials, and is well known and
9 favorably recognized to consumers worldwide as an indicator of the origin of Sleep Master Sleep
10 Mask.

11 33. Defendants have appropriated the Sleep Master Sleep Mask' distinctive design and
12 the Sleep Master Sleep Mask trade dress without Plaintiff's permission and without
13 compensation to Plaintiffs.

14 34. As a result of Plaintiffs' extensive use and promotion of its Sleep Master Sleep Mask
15 trade dress, Plaintiffs have built up and now own valuable goodwill that is symbolized by the
16 Sleep Master Sleep Mask trade dress. The purchasing public has come to associate the Sleep
17 Master Sleep Mask trade dress with Plaintiffs. The Sleep Master sleep mask trade dress elements
18 are distinctive, non-functional and have achieved significant secondary meaning.

19 35. The blue color element of the Sleep Master sleep mask, among other of its non-
20 functional inherently distinctive design elements, has come to distinguish Sleep Master Sleep
21 Mask from other sleep masks on the market.

22 36. Defendants have caused to be manufactured, imported, distributed, sold, and offered
23 for sale, the Sleep 8 Mask in interstate commerce. Defendants' Sleep 8 Mask is a confusingly
24 similar imitation of Plaintiffs' Sleep Master Sleep Mask trade dress in design, color, and
25 appearance.

26 37. The Sleep 8 Mask manufactured, distributed, offered for sale, and sold by
27 Defendants is not manufactured by Plaintiffs, nor are Defendants associated or connected with
28 Plaintiffs, or licensed, authorized, sponsored, endorsed, or approved by Plaintiffs in any way.

1 38. Plaintiffs used the Sleep Master Sleep Mask trade dress extensively and continuously
2 before Defendants began using a confusingly similar imitation.

3 39. The Sleep 8 Mask sold by Defendants is similar to and competes with Plaintiffs'
4 Sleep Master Sleep Mask, and the parties' products are sold through overlapping channels of
5 trade.

6 40. Defendants' use of a confusingly similar imitation of Plaintiffs' Sleep Master Sleep
7 Mask trade dress is likely to deceive, confuse, and mislead prospective purchasers and purchasers
8 into believing that the Sleep 8 Mask sold by Defendants is manufactured by, authorized by, or in
9 some manner associated with Plaintiffs, which it is not. The likelihood of confusion, mistake,
10 and deception engendered by Defendants' misappropriation of Plaintiffs' Sleep Master Sleep
11 Mask trade dress is causing irreparable harm to the goodwill symbolized by the Sleep Master
12 Sleep Mask trade dress and the reputation for quality that Plaintiffs' Sleep Master Sleep Mask
13 trade dress embodies.

14 41. Defendants' activities are likely to cause confusion before, during, and after the time
15 of purchase because purchasers, prospective purchasers, and others viewing Defendants' Sleep 8
16 Mask at the point of sale or on a wearer are likely -- due to Defendants' use of a confusingly
17 similar imitation of the Sleep Master Sleep Mask trade dress -- to mistakenly attribute the
18 product to Plaintiffs. This is particularly damaging with respect to those persons who perceive a
19 defect or lack of quality in Defendants' product and attribute it to Plaintiffs' Sleep Master Sleep
20 Mask. This is also particularly damaging to the uniqueness and valuable reputation of the Sleep
21 Master Sleep Mask brand and Plaintiffs' ability to control the public perception of its brand. By
22 causing such a likelihood of confusion, mistake, and deception, Defendants are inflicting
23 irreparable harm to the Plaintiffs' Sleep Master Sleep Mask business and the goodwill
24 symbolized by the Sleep Master Sleep Mask trade dress and the reputation for quality that it
25 embodies.

26 42. Upon information and belief, Defendants continue to manufacture or import, use,
27 distribute and sell the Sleep 8 Mask, a confusingly similar imitation of Plaintiffs' Sleep Master
28 Sleep Mask trade dress that is directly competitive with the Sleep Master Sleep Mask.

1 Defendants began selling this imitation well after Plaintiffs had established protectable rights in
2 Sleep Master Sleep Mask and its Sleep Master Sleep Mask trade dress.

3 43. On information and belief Defendants adopted advertising language, photographs
4 pictures and style intended to confuse consumers about the origin of the Sleep 8 Mask, by
5 imitating and copying the language, photographs, pictures and style of Plaintiff's advertising of
6 Sleep Master Sleep Mask.

7 44. On information and belief, Defendants knowingly, willfully, intentionally, and
8 maliciously adopted and used a confusingly similar imitation of Plaintiffs' Sleep Master Sleep
9 Mask and Sleep Master Sleep Mask trade dress.

10 45. Plaintiffs' Sleep Master Sleep Mask trade dress has acquired secondary meaning.
11 Defendants' use of a knockoff duplicate and confusingly similar imitation of Plaintiffs' Sleep
12 Master Sleep Mask trade dress has caused and is likely to cause confusion, deception, and
13 mistake by creating the false and misleading impression that Defendants' Sleep 8 Mask is
14 manufactured or distributed by Plaintiffs, or are affiliated, connected, or associated with
15 Plaintiffs, or have the sponsorship, endorsement, or approval of Plaintiffs.

16 46. Defendants have made false representations, false descriptions, and false
17 designations of the origin of its Sleep 8 Mask in violation of 15 U.S.C. § 1125(a), and
18 Defendants' activities have caused and, unless enjoined by this Court, will continue to cause a
19 likelihood of confusion and deception of members of the trade and public and, additionally,
20 injury to Plaintiffs' goodwill and reputation as symbolized by the Sleep Master Sleep Mask trade
21 dress, for which Plaintiffs have no adequate remedy at law.

22 47. Defendants' actions demonstrate an intentional, willful, and malicious intent to trade
23 on the goodwill associated with Plaintiffs' Sleep Master Sleep Mask trade dress to the great and
24 irreparable injury of Plaintiffs.

25 48. Defendants' conduct has caused, and is likely to continue causing, substantial injury
26 to the public and to Plaintiffs, and Plaintiffs are entitled to injunctive relief and to recover
27 Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable
28 attorneys' fees pursuant to 15 U.S.C. §§ 1125(a), 1116 and 1117.

1 49. Plaintiffs have extensively and continuously promoted and used the Sleep Master
2 Sleep Mask trade dress both in the United States and throughout the world, and the Sleep Master
3 Sleep Mask trade dress has thereby become a famous and well-known indicator of the origin of
4 Plaintiffs' Sleep Master Sleep Mask.

5 50. Defendants are making commercial use in commerce of Sleep Master Sleep Mask
6 trade dress that dilutes and is likely to dilute the distinctiveness of Plaintiffs' Sleep Master Sleep
7 Mask trade dress by eroding the public's exclusive identification of this famous trade dress with
8 Plaintiffs, tarnishing and degrading the positive associations and prestigious connotations of the
9 trade dress, and otherwise lessening the capacity of the trade dress to identify and distinguish
10 Sleep Master Sleep Mask.

11 51. Defendants' actions demonstrate an intentional, willful, and malicious intent to trade
12 on the goodwill associated with Plaintiffs' Sleep Master Sleep Mask trade dress or to cause
13 dilution of the Sleep Master Sleep Mask trade dress, to the great and irreparable injury of
14 Plaintiffs.

15 52. Defendants have caused and will continue to cause irreparable injury to Plaintiffs'
16 goodwill and business reputation, and dilution of the distinctiveness and value of Plaintiffs'
17 famous and distinctive Sleep Master Sleep Mask trade dress in violation of 15 U.S.C. § 1125(c),
18 and Plaintiffs therefore are entitled to injunctive relief and to Defendants' profits, actual
19 damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15
20 U.S.C. §§ 1125(c), 1116 and 1117.

21 53. As a result of Defendants' acts, Plaintiffs have been damaged in an amount not as yet
22 determined or ascertainable. At a minimum, however, Plaintiffs are entitled to injunctive relief,
23 to an accounting of Defendants' profits, to damages, and to costs. Further, in light of the
24 deliberately fraudulent and malicious use of a confusingly similar imitation of Plaintiffs' famous
25 and distinctive Sleep Master Sleep Mask trade dress, and the need to deter Defendants from
26 similar conduct in the future, Plaintiffs additionally are entitled to punitive damages.

27 //

28 //

54. Defendants conduct constitutes unfair and deceptive acts or practices in the course of a business, trade, or commerce in violation of the unfair and deceptive trade practices statutes of the United States, and of several states, including but not limited to, the State of Nevada.

THIRD CLAIM FOR RELIEF – UNFAIR AND DECEPTIVE TRADE PRACTICES

55. Plaintiffs repeat and re-allege paragraphs 1 through 54 of this Complaint, and incorporate same as though fully set forth herein.

56. Defendants have been passing off their goods as those of Plaintiffs causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval of Defendant's goods, causing a likelihood of confusion as to Defendants' affiliation, connection, or association with another, and otherwise damaging the public. Defendants' conduct constitutes unfair and deceptive acts or practices in the course of business, trade, or commerce in violation of the unfair and deceptive practices in common law and statutes of several states.

FOURTH CLAIM FOR RELIEF-- MISAPPROPRIATION

57. Plaintiffs repeat and re-allege paragraphs 1 through 56 of this Complaint, and incorporate same as though fully set forth herein.

58. Defendants have appropriated the Sleep Master Sleep Mask design, color, and appearance without the permission of and without compensating Plaintiffs causing injury to Plaintiffs, in violation of the common law and statutes of several states.

59. Plaintiffs have retained legal counsel to prosecute this matter and will incur attorney fees in an amount subject to proof at the time of trial.

WHEREFORE, Plaintiffs pray as follows:

1. For general damages in an amount of at least \$75,000.00, according to proof at trial;
2. For a preliminary injunction restraining and enjoining Defendants, their agents, servants, employees, attorneys, and all other persons in active concert or participation with them from infringing on Plaintiffs' Patent;
3. That a permanent injunction be granted perpetually restraining Defendants and all those in privity with them from further infringement of Plaintiffs' Patent;

1 4. That Defendants be ordered to account to Plaintiffs for Defendants' profits and all
2 other unjust enrichment resulting from Defendants Patent infringement;

3 5. For a preliminary injunction restraining and enjoining Defendants, their agents,
4 servants, employees, attorneys, and all other persons in active concert or participation with them
5 from infringing on Plaintiffs' trade dress, and from engaging in trade dress dilution and unfair
6 competition; from passing off the Sleep 8 Mask as the Sleep Master Sleep Mask; from use of the
7 Sleep Master Sleep Mask design, color and appearance;

8 6. That a permanent injunction be granted perpetually restraining Defendants and all
9 those in privity with them from further infringement of Plaintiffs' trade dress, and from engaging
10 in any further acts of trade dress dilution and unfair competition; from passing off the Sleep 8
11 Mask as the Sleep Master Sleep Mask; from use of the Sleep Master Sleep Mask design, color
12 and appearance;

13 7. That Defendants be ordered to account to Plaintiffs for Defendants' profits and all
14 other unjust enrichment resulting from Defendants' Patent infringement, trade dress
15 infringement, from Defendants' acts in engaging in trade dress dilution and unfair competition,
16 from passing off the Sleep 8 Mask as the Sleep Master Sleep Mask, misappropriation of the
17 Sleep Master Sleep Mask design, color and appearance;

18 8. Based on Defendants' knowing and intentional use of a confusingly similar imitation
19 of Plaintiffs' Trade Dress, that the damages award be trebled and the award of Defendants'
20 profits be enhanced as provided for by 15 U.S.C. § 1117(a);

21 9. Based on Defendants' willful and deliberate infringement and dilution of Plaintiffs'
22 trade dress, for their willful and deliberate acts of unfair competition, and to deter such conduct
23 in the future, Plaintiffs be awarded punitive damages;

24 10. For reasonable attorney fees;

25 11. For statutory interest from the date this Complaint is filed according to law;

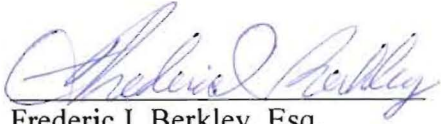
26 12. For costs of suit; and

27 13. For such other and further relief as the Court deems just and proper.
28

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all issues of fact and on all matters allowable to a trial by jury.

Date: March 25, 2014



Frederic I. Berkley, Esq.

Nevada Bar No.: 1798

SKLAR WILLIAMS PLLC

410 South Rampart Boulevard, Suite 350

Las Vegas, Nevada 89145

Telephone: (702) 360-6000

Facsimile: (702) 360-0000

fberkley@sklar-law.com

Attorney for Plaintiffs

EXHIBIT "1"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28





EXHIBIT "2"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

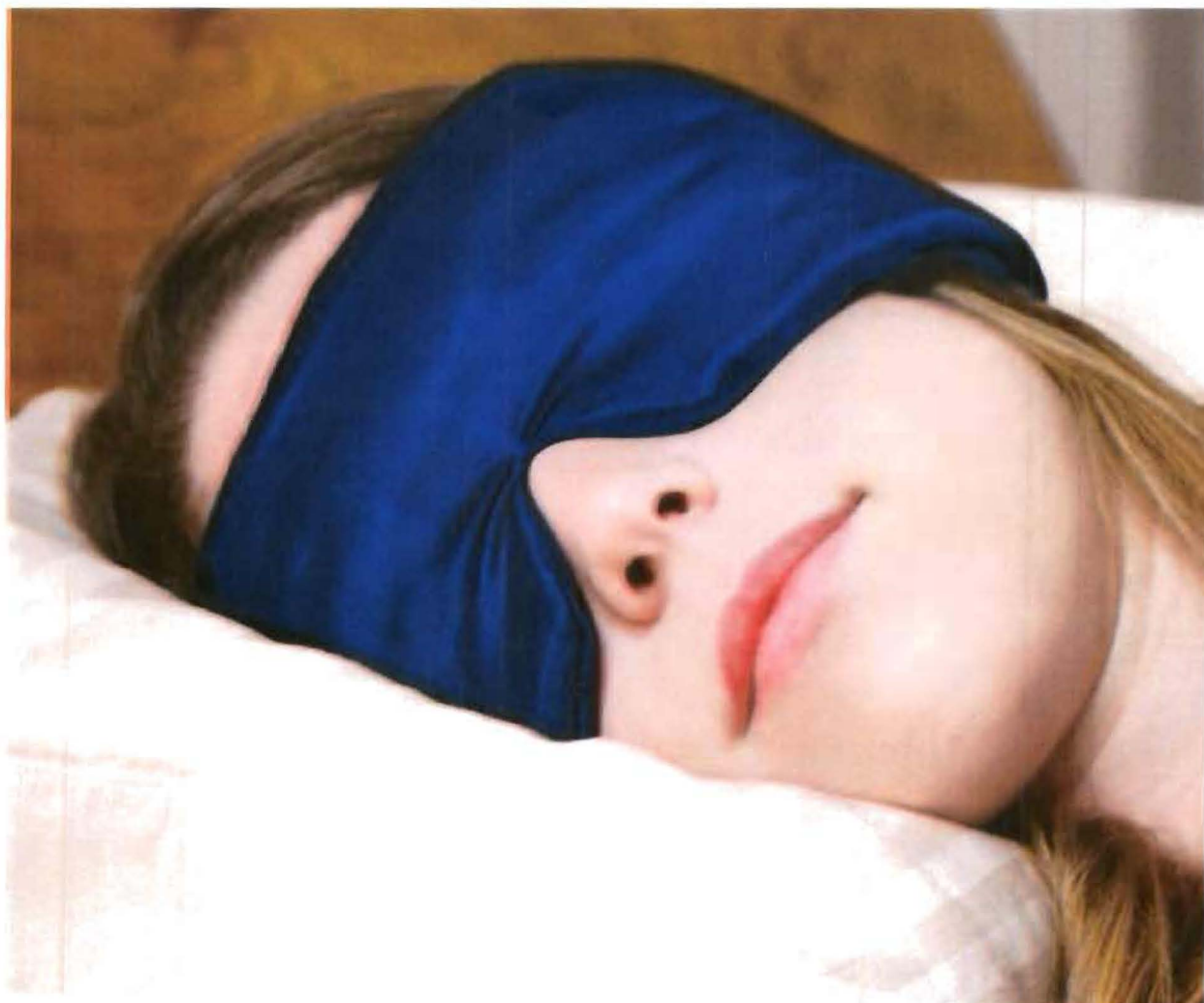


EXHIBIT "3"

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Sleep 8 - Light Ell...
https://www.buysleep8.com/?mid=5123991

Apps Wells Fargo Sig... JuveRest Stuff FedEx Login P... USPS.com - SI... UPS: Tracking In... Google Calendar Gmail FedEx Great Rat... Other bookmarks

Sleep 8
Light-Eliminating Sleep Mask

**Eliminate Light & Block Noise
So You Can Sleep!**

ORDER NOW

The Amazingly Comfortable Sleep Mask That Eliminates 100% of Light AND Blocks Out Ambient Noise!

**MONEY BACK
30 DAYS
GUARANTEE**

**BUY ONE
GET ONE***
*Just pay additional P&H

ONLY \$10 each pair

ORDER NOW

Sleep Like A Baby!

Experience the Sleep 8™ Difference

10:01 AM
3/20/2014