

## UNITED STATES DISTRICT COURT

for the  
District of Colorado

United States of America )

v. )

Jason Eric Kay )

Defendant )

Case No. 10-MJ-01002-KMT

## CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date of 01/04/2010 in the county of Boulder in the \_\_\_\_\_ District ofColorado, the defendant violated 21U. S. C. § 331(a); 21 U.S.C. § 331(k); and 18 U.S.C. § 1365(b)

, an offense described as follows:

Title 21 United States Code, § 331(a): The introduction or delivery for introduction into interstate commerce of any food that is adulterated or misbranded.

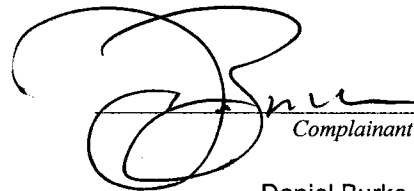
Title 21 United States Code, § 331(k): The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

Title 18, United States Code, §1365(b): With intent to cause serious injury to the business of any person, tainting a consumer product or rendering materially false or misleading the labeling of, or container for, a consumer product which affects interstate or foreign commerce.

This criminal complaint is based on these facts:

See Attached Affidavit.

Continued on the attached sheet.



Complainant's signature

Daniel Burke, Special Agent

Printed name and title

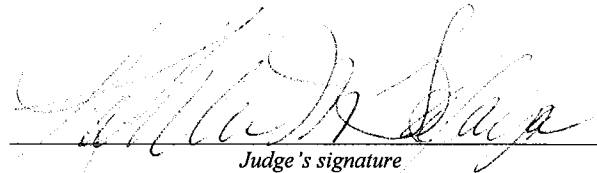
Sworn to before me and signed in my presence.

Date:

1-12-2010

City and state:

Boulder, CO



Judge's signature

KATHLEEN M. TAFOYA

United States Magistrate Judge

## **AFFIDAVIT OF SPECIAL AGENT DANIEL BURKE**

1. I, Special Agent Daniel Burke, being of lawful age and duly sworn upon my oath, depose and state as follows:

### **I. INTRODUCTION**

2. I am currently employed as a Special Agent with the United States Food and Drug Administration, Office of Criminal Investigations (hereafter "FDA-OCI"). I have been a Special Agent with FDA-OCI since October 2005. Previously, I supervised criminal investigations as a Supervisory Special Agent with U.S. Immigration and Customs Enforcement and was a Customs Special Agent for seven years. Prior to being a Customs Agent, I was a Special Agent with the Criminal Investigation Division of the Internal Revenue Service. Throughout my career, I have attended basic and continuing training on federal law and criminal investigative techniques and I am also certified as a Seized Computer Evidence Recovery Specialist. As a Special Agent with FDA-OCI, I am responsible for conducting criminal investigations involving violations of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 et seq., and other applicable violations of Title 18 of the United States Code, such as the Federal Anti-Tampering Act codified under Title 18, United States Code, § 1365.

3. The information contained in this affidavit is based upon information personally known to me as an agent working on this investigation, my previous investigative experience, and information and observations conveyed to me by other investigators and witnesses and involved in this case.

4. This affidavit is submitted in support of a criminal complaint detailing probable cause to believe that **JASON ERIC KAY** has violated the law by:

a. The introduction or delivery for introduction into interstate commerce of any food that is adulterated or misbranded in violation of Title 21 United States Code, § 331(a).

b. The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded in violation of Title 21 United States Code, § 331(k).

c. With intent to cause serious injury to the business of any person, tainting a consumer product or rendering materially false or misleading the labeling of, or container for, a consumer product which affects interstate or foreign commerce in violation of Title 18, United States Code, § 1365(b).

## II. STATEMENT OF PROBABLE CAUSE

5. On January 8, 2010, I received a case referral pursuant to a complaint from PepsiCo North America. The company informed the FDA that it had received multiple complaints from the public involving the relabeling/tampering of 1 quart Tropical-Mango Flavored Gatorade bottles with unauthorized labels depicting in part, a photograph of professional golfer Tiger Woods and his wife Elin Woods on one side and the word "unfaithful" on the other. PepsiCo North America, through its wholly owned subsidiary, The Gatorade Company, is the manufacturer of Gatorade sports drink. Company representatives have advised me that the company never authorized the labeling of their product in this manner. The company further advised that the bar code on the label was fully functional and none of the bottles appeared to have been opened. PepsiCo personnel noted that each bottle appeared to be individually numbered, for example one bottle recovered by company representatives was numbered 56/100. As of the date of this criminal complaint, I have been advised by PepsiCo that approximately 10 bottles were removed by personnel at Safeway and King Soopers stores in Erie, Boulder, Broomfield and Longmont, Colorado.

6. Further, the company advised that an e-mail address was added to the unauthorized label: jek29@yahoo.com.

7. On January 11, 2010, PepsiCo informed me that one of their sales representatives had initiated an e-mail exchange with jek29@yahoo.com on or about January 7, 2010 asking where she could purchase additional Gatorade bottles. In a reply email dated on or about January 8, 2010, the sender identified as "jason kay jekay29@yahoo.com" wrote:

*"Hey thanks for the support. I re-merchandise them. I about to put out 40 more today through out Denver. Next week im going to put some on ebay. Let me know when your in denver and i will drop u one."*

8. In another reply email dated on or about January 9, 2010, the sender again identified as "jason kay jekay29@yahoo.com" wrote:

*"There are many bottles at each store in Denver are King Soopers and Safeway and Target. Cherry Creek and Capital Hill. I will sell you 6 bottle for \$12.00. You should buy a few for your friend in Denver. I had two other people ask for them as well. Thanks for your support. 303.709.6763"*

9. On January 11, 2010, investigators with PepsiCo informed me that the company had received an e-mail on January 10, 2010 from jek29@yahoo.com which stated, in part, as follows:

*"I represent the artist doing the "UNFAITHFUL" pop art label in the Greater Denver Area. He's been buying the 1 QT Tropical Mango, replacing the label with his art label and then re-merchandising them in stores here for less than a week. In this short time several people have contacted me and the story has even made the local news. We're creating quite a buzz! People are making contact trying to buy directly from the artist but he is not interested in selling directly to individual collector.*

*This entire production is performance art at its finest!*

*The artist's personal aim is to get his work out into the public in a unique way and hopefully get people thinking and talking. The artist is interested in continuing to generate this buzz anonymously. Gatorade can participate unofficially (while denying this connection) by providing support to the artist for travel and per diem in various cities. Your product will sell and generate even more demand for Gatorade. Two days are needed in each target city. Cities may be chosen by Gatorade to boost sales. This is the cheapest marketing campaign you could ever participate in. It is good for Gatorade and good for art.*

*As an example, the artist will wear a Gatorade t-shirt and act like a Gatorade employee. He will exchange 24 of his labeled bottles for 24 on the store's shelf. He will relabel those and do it again at the next store.*

*I assure you that the contents of each bottle remain safe and sealed and ready for consumption (or collecting) by the final consumer.*

*Contact me via this email address or call 303-709-6763.*

*Thank you for your time,*

*Jason Kay*

10. Colorado Department of Motor Vehicles records identify a driver's license belonging to JASON ERIC KAY, DOB 07/10/1971. Boulder County property records indicate JASON KAY as the owner of 460 Morgan Rd., Longmont, CO. State of Colorado employment records indicate that KAY filed for unemployment benefits in December, 2009. The telephone number associated with KAY's unemployment application is 303-709-6763.

11. On January 11, 2010 at approximately 3:18 PM, I contacted KAY at his residence 460 Morgan Rd., Longmont, Colorado. KAY resembled the photograph provided by the Colorado Department of Motor Vehicles. I presented my credentials and identified myself as a Special Agent of the Food and Drug Administration asked KAY if he would be willing to answer questions

regarding the re-labeling of the Gatorade bottles. KAY subsequently invited me into his home and agreed to a voluntary interview.

12. KAY informed me that he was responsible for changing the labels on the Gatorade bottles and replacing the bottles on store shelves. He said he did it because he considered it "pop art" and added that he is an artist comparing this type of art to Andy Warhol. He told me that he wanted to "get people talking about how stupid the whole thing with Tiger Woods is." He said he felt "it [the issue of Tiger Wood's alleged infidelity to his wife Elin] is his [Tiger Wood's] personal business" and added that this act would get people talking about why Gatorade dropped their Tiger Woods ad campaign. He said he felt that the company should be happy because he was providing them with "positive press."

13. KAY said that he acted alone and described how he created the labels. KAY advised that he purchased the 1 quart Gatorade bottles, removed the labels and affixed the "Tiger Woods" label he created by using a photocopier and clear adhesive at Kinko's. He described this method as "old-school" and supplied me with a one page piece of paper he retrieved from a file folder with two of the labels depicting professional golfer Tiger Woods and his wife Elin Woods on one side and the word "unfaithful" on the other. KAY said that he placed most of the products on store shelves on Friday, January 8, 2010 and advised that he replaced the bottles at Target, King Soopers, Walgreens and Rite Aide stores in and around Denver and Longmont. He said that he individually numbered each bottle and had distributed less than 100. Kay provided me with a tally sheet entitled "Gatorade Run" which was number 1 through 100. The numbers 1, 11-64, 66, 71-74, 76, 81-84, 91-93 were marked off with a black pen. This tally sheet indicates that KAY distributed approximately 67 bottles.

14. KAY said that he did not tamper with the contents or open any of the Gatorade bottles.

15. KAY subsequently retrieved one of the bottles and gave it to me. I noted that the bottle is a 1 quart tropical-mango flavored Gatorade bottle with a label depicting professional golfer Tiger Woods and his wife Elin Woods on one side and the word "unfaithful" on the other. Further, the label contained the e-mail address [jekay29@yahoo.com](mailto:jekay29@yahoo.com). I asked KAY what his e-mail address was and he said "the one that is on the bottle, [jek29@yahoo.com](mailto:jek29@yahoo.com)." The bottle was marked with a black pen "59/100" along with a letter K inside a circle. KAY said he individually numbered each bottle and identified the letter K inside a circle as his signature. KAY also provided a receipt from a FedEx-Kinko's located at 980B Ken Pratt Blvd., Longmont, CO dated January 7, 2010 showing a purchase of \$6. On the back of the receipt, KAY had noted a definition of "pop art."

16. KAY advised that he has been contacted via e-mail by several people interested in purchasing more of the Gatorade bottles, however he stated that he has not yet sold any bottles and has not profited off of this scheme.

17. KAY said he emailed representatives of Gatorade only after the story was widely reported in the news. Although he admitted to me he was aware it was against the law, he told me he didn't think his actions would attract so much attention. I explained to KAY that his actions appeared to violate the Federal Anti-Tampering act as well as the Federal Food, Drug, and Cosmetic Act. KAY stated, "I didn't think this was that big of a deal."

18. While inside 460 Morgan Road, Longmont, Colorado, I noticed that KAY had been using a MacBook laptop which was open, turned on, and placed on a table in the front of the residence.

19. My interview of KAY was concluded at approximately 3:48 PM. After departing his residence, I called KAY at 303-709-6763 and confirmed his ownership of this telephone number.

20. As a result of KAY's actions, I am aware that PepsiCo has spent numerous personnel hours dealing with this issue by way of investigation and response to consumer, distributor and media inquiries. In addition, as of January 11, 2010, I retrieved over 100 news articles posted on the Internet reporting about KAY's scheme. Based upon this information, I submit that KAY's actions caused serious injury to The Gatorade Company, a subsidiary of PepsiCo North America, and to the branding, merchandising, fund-raising, and representation of Professional Golfer Tiger Woods and his wife Elin Woods through such companies as IMG Sports & Entertainment, MLB Advanced Media, L.P, and the Tiger Woods Foundation.

### III. CONCLUSION

21. Based on the foregoing facts, on my experience and training, and on information from witnesses involved with this case, I conclude there is probable cause to believe that JASON ERIC KAY committed violations of Title 21 United States Code, §§ 331(a), 331(k) - Relating to the Adulteration and Misbranding of a Food Product and Title 21 United States Code, § 1365(b) - Relating to Tampering with a Consumer Product.

*Signatures on  
page 6* *met*

10-MJ-01002-KMT  
Continued *[Signature]*

*[Signature]*  
\_\_\_\_\_  
DANIEL BURKE, SPECIAL AGENT  
U.S. FOOD AND DRUG ADMINISTRATION  
OFFICE OF CRIMINAL INVESTIGATIONS

Subscribed and sworn to before me this 13<sup>th</sup> day of January, 2010

*[Signature]*  
\_\_\_\_\_  
UNITED STATES MAGISTRATE JUDGE  
DISTRICT OF COLORADO

DEFENDANT: JASON ERIC KAY

DOB:

ADDRESS: Longmont, Colorado

COMPLAINT FILED? \_\_\_\_\_ YES \_\_\_\_\_ NO

IF YES, PROVIDE MAGISTRATE CASE NUMBER: \_\_\_\_\_  
IF NO, PROCEED TO "OFFENSE" SECTION

HAS DEFENDANT BEEN ARRESTED ON COMPLAINT? \_\_\_\_\_ YES \_\_\_\_\_ NO

IF NO, A NEW WARRANT IS REQUIRED

OFFENSE: Count 1: Title 21 United States Code, Section 331(a): The introduction or delivery for introduction into interstate commerce of any food that is adulterated or misbranded.

Count 2: Title 21 United States Code, Section 331(k): The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

Count 3: Title 18, United States Code, Section 1365(b): With intent to cause serious injury to the business of any person, tainting a consumer product or rendering materially false or misleading the labeling of, or container for, a consumer product which affects interstate or foreign commerce.

LOCATION OF OFFENSE (COUNTY/STATE): Boulder County, Colorado

PENALTY: Count 1: NMT 1 year imprisonment, NMT \$100,000 fine, or both; NMT 1 year supervised release; \$100 Special assessment fee.

Count 1: NMT 1 year imprisonment, NMT \$100,000 fine, or both; NMT 1 year supervised release; \$100 Special assessment fee.

Count 3: NMT 3 years imprisonment, NMT \$250,000 fine, or both; NMT 1 year supervised release; \$100 Special assessment fee.



AGENT: Daniel Burke, Special Agent  
U.S. Food and Drug Administration  
Office of Criminal Investigations

AUTHORIZED BY: Jaime Peña  
Assistant U.S. Attorney

ESTIMATED TIME OF TRIAL:

\_\_\_\_\_ five days or less    \_\_\_\_\_ over five days    \_\_\_\_\_ other

THE GOVERNMENT

\_\_\_\_\_ will seek detention in this case    \_\_\_\_\_ will **not** seek detention in this case

The statutory presumption of detention **is** or **is not** applicable to this defendant. **(Circle one)**

OCDETF CASE:    \_\_\_\_\_ Yes      X   No