**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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| Lifeway Foods, Inc.<br><br>Plaintiff,<br><br>v.<br><br>Edward Smolyansky and Ludmila Smolyansky, d/b/a Pure Culture Organics, Inc.,<br><br>Defendants. | ) | Case No. 1:24-cv-02601<br><br>Judge Jorge L. Alonso<br>Magistrate Judge Jeffrey T. Gilbert |

**DEFENDANTS EDWARD SMOLYANSKY AND LUDMILA SMOLYANSKY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR PROTECTIVE ORDER BARRING DEFENDANTS' RULE 30(b)(6) SUBPOENAS TO PLAINTIFF'S CUSTOMERS**

## I. Introduction

This is a trade secrets case. Lifeway alleges Defendants have copied their "secret" kefir formula. Because Defendants know that Lifeway makes kefir for third-party competitors and shares its formula and processes with them—*i.e.*, the formula is ***not*** a trade secret—Defendants seek short depositions of less than one hour of four of those competitors to discover their knowledge of the purported trade secret kefir formula and whether they take any steps to ensure its secrecy. Defendants anticipate this third-party testimony will defeat Lifeway's claims.

To try to prevent these depositions, Lifeway filed its emergency motion for a protective order and provided a sworn declaration claiming that "All Lifeway provides to its White Label Customers is a list of ingredients and nutritional information—all information consumers can obtain from the product label." (ECF No. 18-1, Decl. of Jason Burdeen, ¶ 9.) This is absolutely false. Great detail, including the formulas, are provided to these White Label Customers. Although defendants are not typically required to accept as true statements by plaintiff even if they have no basis to otherwise challenge them, here Defendants know this statement by Lifeway and supporting declarations are

untrue. This makes these depositions of these third parties even more necessary in order to obtain the truth in this case. Moreover, the supporting declaration under oath on which the motion is based only further proves the unfounded nature of this entire lawsuit filed against Defendants—to put it mildly.

## II. Procedural History and Critical Nature of These Depositions

### A. The Parties

Lucy and her husband, Michael, founded Lifeway in Chicago in the 1980s. (ECF No. 15-1, Declaration of Edward Smolyansky ("April 3 Decl.") at ¶ 2.) When Michael passed away in 2002, their daughter Julie became the CEO and their son Edward became the COO. (*Id.* ¶ 3.) Edward separated from Lifeway in January 2022. (Exhibit 1, Declaration of Edward Smolyansky ("April 11 Decl.") at ¶ 2.) As part of his separation agreement, Edward agreed to a non-compete clause precluding him from owning or working for a competing kefir company for a period of 18 months. (*Id.*)

### B. Lifeway's Other Claims Against Defendants It Just Abandoned to Avoid Trial

Edward and Lucy Smolyansky are also the largest shareholders of Lifeway. (ECF No. 15-1, April 3 Decl. ¶ 6.) In July 2022, they agreed to a "proxy standstill agreement" whereby they agreed to refrain from exercising certain shareholder rights in return for Lifeway hiring an investment banker and exploring a sale of the company, as well as agreeing to nominate Lucy to Lifeway's Board of Directors. (*See id.* ¶ 7.) After executing the agreement, however, Julie made clear she would never agree to sell the company and forgo the millions she and her husband, Jason Burdeen, are collectively paid by Lifeway every year. Lifeway never engaged in an exploration of a sale and, in breach of the proxy settlement agreement and Illinois law, claimed to terminate Lucy as a director based on a vote of the directors. Julie then caused Lifeway to sue Edward and Lucy for allegedly breaching the proxy settlement agreement. (*See id.* ¶ 8; ECF No. 15-1 at Group Ex. 1.) Shortly before filing this action, Lifeway lost its motion for preliminary injunction in that Cook County Chancery Case and then, with trial on the merits approaching, filed a notice of dismissal in February 2024 on the two equitable claims

to avoid an adverse verdict. (*See id.*) However, it has chosen to continue to prosecute its remaining claims for alleged damages in the amount of approximately $180,000, and is seeking as recovery from Defendants the fees it is paying to three national law firms to advise Lifeway and prosecute that case.

**C. Launch of Pure Culture Organics**

In March 2024, Edward and Lucy unveiled Pure Culture Organics, which is a brand new kefir concept unlike anything else in the market: no added fillers, no dyes, and collagen formulations. (Ex. 1, April 11 Decl. ¶ 3.) As Lifeway sells approximately 90% of the kefir in the United States either under its own brand or manufactured for other companies, all using the same Lifeway formulation, nearly all kefir sold in the United States tastes the exact same with the uniquely tart Lifeway flavor. (*Id.*) The point of Pure Culture Organics was to sell a different tasting kefir. In response to this announcement, Lifeway filed this lawsuit and Motion for Entry of a Temporary Restraining Order and Preliminary Injunction ("Motion for TRO") requesting the Court order Pure Culture Organics to be shut down for allegedly copying and using Lifeway's formulation. (*See* ECF No. 4 at ¶ 8.) The basis for the allegation of copying the formula is a text message that Lifeway has never attached to its pleadings and a press release for Pure Culture Organics that Lifeway partially quoted but also omits from its pleadings, as it does not say or mean what Lifeway argues. (*See* ECF No. 5, Mem. in Support of Mot. for TRO and Prelim. Inj. at 4; ECF No. 15, Opp. to Mot. for TRO and Prelim. Inj. at 11-12.)

As set forth in Defendants' Response in Opposition to Plaintiff's Motion for TRO and detailed supporting affidavit, Defendants rebutted those allegations and disclosed that their formula uses different kefir cultures, from a different laboratory, using a different ratio of milk to kefir, and different ingredients. (*See* ECF No. 15, Opp. to Mot. for TRO and Prelim. Inj. at 1, 4-5.) Additionally, a primary challenge to Lifeway's claim in its Complaint of secrecy and exclusivity is that many of Lifeway's biggest kefir competitors on grocery shelves are actually manufactured by Lifeway and sold by those competitors under their own labeling. (*Id.* at 1, 4.) Defendants believe this fact is so significant

to their defense that they emboldened it in the introduction on page 1 of their Response in Opposition to the Motion for TRO. (*Id.* at 1.)

## III. The Narrow Third-Party Discovery Requests at Issue

Lifeway has filed under seal the identities of the four Lifeway competitors that sell kefir manufactured by Lifeway that Defendants intended to issue subpoenas to seeking only a one hour Rule 30(b)(6) deposition with no document requests. (ECF No. 18-1, Decl. of Jason Burdeen, ¶ 3.) Defendants disagree that the identity of these companies is actually secret information warranting filing under seal. It is widely known in the industry that Lifeway is the kefir manufacturer for these brands, certain of these relationships are publicly disclosed by Lifeway in its public SEC filings, Lifeway's unique facility code is stamped on every bottle made at Lifeway's facility, and Lifeway's own Memorandum in Support of its Motion for TRO identifies certain of these customers. (Ex. 1, April 11 Decl. ¶ 10; ECF No. 5.) Lifeway's inaccurate allegations of secrecy over these relationships is representative of its underlying claim of confidentiality around its "trade secret formula" (that Pure Culture Organics does not use).

Defendants intend to depose corporate representative for each of these four companies for less than an hour each, simply to ask whether Lifeway's alleged "trade secret formula" and production process is shared with them (contrary to Lifeway's sworn declaration, the answer is yes), and what steps, if any, those third parties undertake to ensure the confidentiality of that alleged trade secret. (*See* Ex. 1, April 11 Decl. ¶ 17.) If the goal were to "harass" Lifeway's customers as asserted in the Motion, Defendants would seek all of the documents they would be entitled to given the trade secret and Lanham Act claims alleged in Lifeway's complaint; *i.e.*, documents from each of these four companies, as well as documents from Lifeway's biggest customers about the alleged "loss of sales" and "loss of customers" that Lifeway alleges Pure Culture Organics has ***already*** caused. (*See* ECF No. 1, Complaint at ¶ 62.)

## IV. Lifeway's Motion is Based on Previously Rebutted Allegations and a Fraud on The Court by Mr. Burdeen.

### A. The Motion Alleges "Facts" That Are Either Inaccurate or Were Already Disproven.

In its Motion, Lifeway double downs on the same misleading and inaccurate allegations it made in support of its Motion for TRO. In particular, Lifeway states that Edward admitting to stealing the formula and issued a press release touting Pure Culture Organic's affiliation with Lifeway and use of Lifeway's formula. (ECF No. 18, Mot. at 2-3.) As set forth in Defendants' Response in Opposition to the Motion for TRO—which actually attached the press release conspicuously missing from Lifeway's Motion for TRO—the press release said no such thing. (ECF No. 15, Opp. to Mot. for TRO and Prelim. Inj. at 7, 12; ECF No. 15-1 at Ex. 4 (press release).) And contrary to Mr. Burdeen's Declaration (ECF No. 18-1, Burdeen Decl. at ¶¶ 6-7), Edward certainly did not text Mr. Burdeen that he stole the "secret formula to heat and cool th[e] ingredients…" or any other Lifeway secrets.

### B. The Declaration on Which Lifeway Bases Its Motion Is a Fraud on the Court.

The entire premise of the Motion is Lifeway's submission to the Court is that "Lifeway does not tell its White Label Customers anything about its formula or its manufacturing processes." (ECF No. 18, Mot. at 6). Indeed, in his sworn declaration, Mr. Burdeen states that that "All Lifeway provides to its White Label Customers is a list of ingredients and nutritional information—all information consumers can obtain from the product label." (ECF No. 18-1, Burdeen Decl. ¶ 9.) This is false. As set forth in Edward's Declaration, these third parties receive great detail about the product and the process to make it. (Ex. 1, April 11 Decl. ¶ 14.) Contrary to Mr. Burdeen's Declaration, the formula is absolutely provided to its White Label customers. (*Id.*)

It is notable that it is Mr. Burdeen that submitted the Declaration with this false statement. For the reasons set forth in Edward's Declaration attached hereto, Mr. Burdeen, who lives in Los Angeles with Julie (*id.* at ¶ 7), has never worked in Lifeway's offices (*id.* at ¶ 8), has never worked in a

bottling plant at Lifeway (*id.* at ¶ 9), and has no knowledge of how Lifeway makes kefir or what it provides to customers (*id.* at ¶¶ 10, 12). His role at Lifeway is to assist Julie in the disputes between she and her family.

The fact that Lifeway has made such a serious misrepresentation[1] to the Court only confirms that Defendants cannot rely on statements by or productions of documents from Lifeway and must subpoena third parties. If Lifeway wants to maintain that its Motion and supporting declaration are not based on a serious misrepresentation to the Court, it should provide a declaration from Fallon Morgan (VP Operations at Lifeway) that Mr. Burdeen's statements in paragraphs 6 and 9 of his Declaration are accurate. Ms. Morgan is the employee at Lifeway in charge of manufacturing and formula procedures.

## V. Lifeway's Motion is Based on Inapposite Case Law, and under Governing Law Defendants Are Entitled to Far Broader Discover Than They Seek.

The sparse authority cited in Plaintiff's Motion does not support its requested relief, as not only do the cited cases not address trade secret claims, but they also find that discovery into a party's customers is appropriate when properly tailored. For example, Lifeway relies on *digEcor, Inc. v. e.Digital Corp.,* 2008 WL 4335539, *5 (D. Utah Sept. 16, 2008), in which the court ***allowed*** subpoenas of the plaintiff's customers, subject to minor modifications to the phrasing of certain document requests and the temporal scope, to obtain discovery into the scope of plaintiff's intellectual property rights. *Id.* at *4-5. Moreover, *digEcor* underscores why a party like Lifeway cannot preclude third-party discovery through its own (questionable) assertions, explaining that even though plaintiff "provides declarations and deposition testimony to convince the court that no inquiry is needed[,] [i]t is simply not possible for the court to decide the non-existence of an issue to defeat discovery at this stage, when there is some factual support for the discovery." *Id.* at *2. So too here, Lifeway should not be permitted to cut

[1] To be clear, Defendants understand that Lifeway's lawyers believed what Mr. Burdeen told them, as lawyers are entitled to rely on their clients, and the target of this accusation is *solely* the Declarant.

off Defendants' discovery into efforts to keep its formulas secret—a central element of its trade secret claim—by insisting that the Court and Defendants accept its own say-so on the issue.

Lifeway's remaining authorities are also inapposite. In *Murata Manufacturing Co., Ltd. v. Bel Fuse Inc.,* 2004 WL 1194740 (N.D. Ill. May 26, 2004), the court addressed third-party subpoenas in a patent infringement dispute, focusing on the role of such discovery in adjudicating defendant's "obviousness" affirmative defense and plaintiff's ability to show "commercial success" and "long-felt need" for the product through customer testimony. *See id.* at *6 ("Particularly significant is the fact that Murata is unable to cite a single case in which testimony from a customer of the alleged infringer was used to show commercial success or long-felt need."). These issues and legal doctrines have no import to the instant case. Similarly, in *Joy Technologies, Inc. v. Flakt, Inc.,* 772 F. Supp. 842, 845, 849 (D. Del. 1991), another patent infringement case, the court quashed subpoenas to third parties because the requested information was available from the defendant, but noted that third-party discovery would be appropriate if the plaintiff "can demonstrate that is has a specific need for evidence available only from third party customers of [defendant]." Lifeway has made no such argument here, and the information Defendants seek clearly could not be obtained from Lifeway itself.

Under applicable case law, not only are Defendants entitled to the very narrow discovery they seek—short depositions with no document productions—but would be on firm ground to seek far more. For example, in *Wright Medical Technology, Inc. v. Orthopedic Systems, Inc.*, 2007 WL 9760389, at *4 (E.D. Wis. Mar. 28, 2007), which actually addresses third-party discovery in the context of a trade secret claim, the court denied a motion for a protective order on a subpoena that sought documents from a third party alleged to have access to plaintiff's trade secret information, ***even though*** the third party had already complied with a prior document subpoena and presented witnesses for deposition. The court rejected the argument that disclosure of the requested information "could harm its competitive standing," instead ordering production because the requested information was directly

relevant to the issue of "whether any of [plaintiff]'s confidential or trade secret information was disclosed to" the third party. *Id.*; *see also GlobalTranz Enterprises Inc. v. Shippers Choice Glob. LLC*, 2017 WL 8231364, at *2 (D. Ariz. Sept. 22, 2017) (denying plaintiff's motion for protective regarding subpoenas to plaintiff's customers in trade secrets case, finding that requested information was relevant to how the trade secrets were used); *Revolutionary Software, Inc. v. Eclipsys Corp.*, 2007 WL 1655564, at *2 (N.D. Cal. June 7, 2007) (rejecting generic assertion that discovery from customers could harm party's business relationships and explaining that "any information a customer does produce to Plaintiff is by definition likely *not* a trade secret, because such production would raise a strong inference that Defendant had not taken reasonable steps to ensure the information was kept secret.").

## CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion and grant such other relief as this Court deems just and appropriate.

Dated: April 11, 2024

Respectfully submitted,

LUDMILA SMOLYANSKY AND EDWARD SMOLYANSKY

By: */s/ Nicholas H. Callahan*
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**CERTIFICATE OF SERVICE**

I, Nicholas Callahan, hereby certify that on this 11th day of April, 2024, I caused a copy of the foregoing **Defendants Edward Smolyansky and Ludmila Smolyansky's Response in Opposition to Plaintiff Lifeway Foods, Inc.'s Emergency Motion for Protective Order Barring Defendants' Rule 30(b)(6) Subpoenas to Plaintiff's Customers** to be served via e-filing on all counsel of record.

*/s/ Nicholas H. Callahan*

# Exhibit 1

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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| Lifeway Foods, Inc.<br><br>Plaintiff,<br><br>v.<br><br>Edward Smolyansky and Ludmila Smolyansky, d/b/a Pure Culture Organics, Inc.,<br><br>Defendants. | ) | Case No. 1:24-cv-02601<br><br>Judge Jorge L. Alonso<br>Magistrate Judge Jeffrey T. Gilbert |

**DECLARATION OF EDWARD SMOLYANSKY**

I, Edward Smolyansky, declare under oath that I have personal knowledge of the facts and opinions set forth below, and, if called to testify as a witness in this matter, would testify to the following:

1. I am over the age of twenty-one (21) years, of sound mind, and I suffer no legal disability to incapacitate me from making this declaration.

2. I separated from Lifeway in January 2022. As part of my separation agreement, I agreed to a non-competition clause precluding me from owning or working for a competing kefir company for 18 months.

3. In March 2024, my mom and I unveiled Pure Culture Organics, a brand new kefir concept unlike anything else in the market: no added fillers, no dyes, and collagen formulations. As Lifeway sells approximately 90% of the kefir in the United States either under its own brand or manufactured for other companies, all using the same Lifeway formulation, nearly all kefir sold in the United States tastes the exact same with the uniquely tart Lifeway taste.

4. I know Jason Burdeen very well. At one point he was my best friend and he married my sister, Julie Smolyansky, the CEO of Lifeway.

5. For many years, although Jason Burdeen was on the books as an employee of Lifeway, no one else at Lifeway other than Julie, my mom, me, the CFO and HR knew Jason Burdeen was an employee. Mr. Burdeen's primary role related to managing the family's expense account. He performed this role exclusively from his and Julie's home.

6. It was not until the disputes between my mom, me, and my sister started and the Company began pushing us out, that Mr. Burdeen received the title of "Chief of Staff" to Julie, and other employees at Lifeway were then informed he was now an employee.

7. Mr. Burdeen and Julie live and work out of their home in Los Angeles, California.

8. During all the years I worked at Lifeway, I do not recall a *single time* when Mr. Burdeen did any Lifeway-related work at Lifeway's office or plants.

9. Mr. Burdeen has never worked in the Lifeway manufacturing facilities in Illinois, Wisconsin, or Pennsylvania.

10. During all the years that Mr. Burdeen was an employee of Lifeway in name only, I do not recall ever speaking to Mr. Burdeen about the procedures for the production of kefir. As my closest friend at the time, though, I spoke to Mr. Burdeen very often.

11. Mr. Burdeen's professional background is in his family jewelry business.

12. I do not believe Mr. Burdeen has any knowledge of how Lifeway makes kefir or what information about Lifeway's formulation is communicated to third parties.

13. I have spent thousands of days working at Lifeway's Illinois and Wisconsin facilities and interacting with Lifeway employees.

14. In Paragraph 9 of his Declaration, Mr. Burdeen states that "All Lifeway provides to its White Label Customers is a list of ingredients and nutritional information—all information consumers can obtain from the product label." I believe this is a false statement and that Lifeway

provides to its White Label Customers great detail about the formula of kefir that these customers will be selling as their own.

15. The most significant of these customers is extensively involved in the production of its kefir made by Lifeway, and is involved in audits of Lifeway's formula and process and the sources and chain of custody of its ingredients. In particular, this customer required Lifeway to complete a Product Specification Information form that required detailed information about the product formulations and ratios, including specifying the amount of each ingredient and sub-ingredient by quantity (*e.g.*, grams or ounces per serving) and by percent of the total weight of the recipe.

16. Regarding the four companies that Defendants seek to depose, it is widely known in the industry that Lifeway is the kefir manufacturer for these brands, certain of these relationships are publicly disclosed by Lifeway in its public SEC filings, Lifeway's unique facility code is stamped on every bottle made at Lifeway's facility, and Lifeway's Memorandum of Law in Support of its Motion for Entry of a Temporary Restraining Order and Preliminary Injunction identifies certain of these customers.

17. Defendants do not desire to serve these subpoenas for testimony for any reason other than we believe the testimony will defeat Lifeway's claim. I'm certain the companies will testify that Lifeway provides to them more than the same information that "consumers can obtain from the product label" as sworn in Mr. Burdeen's declaration.

18. I do not have any reason to believe that if these major companies receive a subpoena that would potentially cost "Lifeway tens of millions of dollars" as Lifeway alleges. In fact, I believe Lifeway knows that is untrue.

19. I certify that the statements set forth in this instrument are true and correct to the

best of my knowledge.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Dated: April 11, 2024

DocuSigned by:
Edward Smolyansky
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Edward Smolyansky