

08-2367-CD  
New York Tours vs Giuseppe's Finer Food

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**FILED**  
DEC 09 2008  
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William A. Shaw  
Prothonotary/Clerk of Courts  
2 ckt TO  
CD  
ATTY

Plaintiff,

V.

No. 08-2367 -CD

## COMPLAINT

Counsel of Record for  
this party:

8

NADDEO & LEWIS, LLC.  
207 E. Market Street  
P.O. Box 552  
Clearfield, PA 16830  
(814) 765-1601

Dated: December 9, 2008

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

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No. 08-

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**NOTICE**

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator  
Clearfield County Courthouse  
Market and Second Streets  
Clearfield, PA 16830

(814) 765-2641, ext. 5982

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

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No. 08-

-CD

**COMPLAINT**

NOW COMES the Plaintiff, New York Tours R US, LLC,  
t/d/b/a Ginger Boost, and by its attorney, Trudy G. Lumadue,  
Esquire, sets forth the following:

1. That Plaintiff, New York Tours R US, LLC, t/d/b/a Ginger Boost (hereinafter "Ginger Boost"), is a New York limited liability company with a principal place of business located 601 South 12<sup>th</sup> Street, New Hyde Park, New York 11040.

2. That the Defendant, Giuseppe's Finer Foods, Inc. (hereinafter "Giuseppe's"), is a Pennsylvania corporation with a principal place of business located at 2592 Oklahoma-Salem Road, DuBois, Pennsylvania 15801.

3. At all times referred to herein, Giuseppe's was engaged in the processing and packaging of food products for shipment to

retailers and held itself out as having expertise in the bottling of food and beverages.

4. Ginger Boost is engaged in the development and sale of a nutritional beverage product known as "Ginger Boost."

5. Ginger Boost offers two varieties of the nutritional beverage product.

6. On or about July 3, 2008, Ginger Boost contracted with Giuseppe's to brew, process, manufacture and package its beverage product in two varieties.

7. The contract between the parties was reduced to the form of a purchase order generated by Ginger Boost and submitted to Giuseppe's as the parties had agreed. The particulars were that Giuseppe's agreed to process, manufacture, package and load for shipment a batch of 3,200 cases of the Ginger Boost beverage product in two flavors for the cost of \$8,800.00 which was required to be prepaid to Giuseppe's. A true and correct copy of Purchase Order is attached hereto as Exhibit "A."

8. The agreement was such that Giuseppe's would perform all the necessary services, provide facilities and required equipment and staff to process, mix, code, label, pack and ship Ginger Boost's product batch.

9. Ginger Boost was to supply all ingredients, recipe, bottles and labels.

10. On or about August 14, 2008, a pilot run conducted by Giuseppe's of the processing and production of the Ginger Boost products was successful.

11. On or about August 21, 2008, Giuseppe's undertook to process, manufacture and package the batch of 3,200 cases of Ginger Boost product at its plant in DuBois, Pennsylvania.

12. In the processing and manufacturing of the Ginger Boost product lengthy breakdowns occurred at the Giuseppe facility which required delays in the production of the Ginger Boost product.

13. Failures at the Giuseppe facility including but not limited to the inability and/or failure to regulate the temperature of the product as required to produce it to specification and failure to flash pasteurize occurred during the production of the Ginger Boost product.

14. Due to the delays and failures of the Giuseppe facility, staff, equipment and processes utilized or not utilized as described in Paragraphs 12 and 13 hereof the Ginger Boost product manufactured by Giuseppe's is not fit for sale or consumption.

15. Multiple resulting negative effects to the Ginger Boost product occurred as a result of the ill-processing and manufacturing by Giuseppe's, they include, but are not limited

to:

- A. Ginger Boost product is changed in its taste and flavor profile in that it is no longer palatable or fit for sale;
- B. Ginger Boost product is changed in its taste and flavor profile in that the flavor varieties are not distinguishable;
- C. Ginger Boost color specification as conducted by Giuseppe's is not met and the product color is significantly changed in that it is darkened and cloudy;
- D. bottles were not capped properly;
- E. bottles were not filled to the appropriate level and there is inconsistency in the level to which the bottles were filled.

16. As a result of the events described in Paragraphs 12 - 14 and the resulting ill-effects to the product produced, Giuseppe's has failed to perform as contracted by the parties and said failure is material.

17. As a result of the material breach and failure as described herein by Giuseppe's, Ginger Boost was required to remove product from the shelves of distributors and did not have product available to distributors as promised to them.

18. The Plaintiff at all times prior to the events as described at Paragraph 17 has been a business of good name, credit and reputation, having a credible and good business and professional reputation and rapport established with distributors and the market.

19. As a result of the material breach as described herein by Giuseppe's, Ginger Boost suffered delay in its business marketing and production and lost the benefit of its prior efforts of product marketing.

20. As a result of the material breach as described herein by Giuseppe's, Ginger Boost has suffered harm and loss as follows:

<u>Item Description</u>	<u>Amount</u>
Product ingredients	\$ 12,191.39
Bottles	\$ 10,083.37
Caps	\$ 1,664.38
Labels	\$ 1,958.64
Co-Packing Fee Paid to Giuseppe	\$ 8,800.00
Travel expenses	\$ 465.67
Costs Incurred to Replace Co-packer	\$ presently unliquidated
Storage Costs of Bad Product	\$ continuing
Lost Profits	\$ 38,400.00
Reputation harm	\$ unliquidated



By Trudy G. Lumadue  
Trudy G. Lumadue  
Attorney for Plaintiff

V E R I F I C A T I O N

I, Sheniza Abdul, verify that I am a member of New York Tours R Us, LLC t/d/b/a Ginger Boost and that I am authorized to execute this verification and further that the statements made in the foregoing Complaint are true and correct upon my personal knowledge or information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

Ginger Boost

By:

Sheniza Abdul

Sheniza Abdul  
Plaintiff

Dated: Nov 18, 2008

# PURCHASE ORDER

**Ginger Boost**<sup>TM</sup>

P.O. # 1  
DATE: JULY 3, 2008

601 So. 12 Street, New Hyde Park, NY 11040  
Phone 516.488.7035  
sheniza@gingerboost.com

**VENDOR** GIUSEPPE'S  
2592 Oklahoma - Salem Road  
PO BOX 687  
Dubois, PA 15801  
Telephone: 814 375 0516  
Customer ID

**SHIP TO** [Name]  
[Company Name]  
[Street Address]  
[City, ST ZIP Code]  
[Phone]  
Customer ID [ABC12345]

SHIPPING METHOD	SHIPPING TERMS	DELIVERY DATE	PAYMENT TERMS
	Giuseppe's agree to hold finished product for 7 days following production, after 14 days warehouse fees will be applied monthly, at the cost of \$0.25/case per month		Net 10

QTY	ITEM #	DESCRIPTION	JOB	UNIT PRICE	LINE TOTAL
1600 cases	Mango Flavor	See Below	Co-packing	\$2.75	\$4,400.00
1600 cases	Orange Flavor	See Below	Co-packing	\$2.75	\$4,400.00

Co-packing fees shall include the following: pallets, filtered water, pallet stretch wrap, tray, shrink wrap, glue, code dating ink, all receiving, storage and handling of raw materials, and packaging supplies, processing and shipping of finished goods (not inclusive of any freight charges). The beverage will be produced by flash pasteurization and hot fill as per formulation provided by *Ginger Boost*<sup>TM</sup>. We would like to be part of your early August, 2008 production run.

**SUBTOTAL** \$8,800

**SALES TAX**

**TOTAL**

1. Enter this order in accordance with the prices, terms, delivery method, and specifications listed above.
2. Please notify us immediately if you are unable to ship as specified.
3. Send all correspondence to:  
601 So. 12 Street, New Hyde Park, NY 11040  
Phone 516.488.7035  
sheniza@gingerboost.com

Authorized by: Sheniza Abdul

Date 7/3/08

Exhibit "A"

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA

NEW YORK TOURS R US, LLC,  
t/d/b/a GINGER BOOST, a New York  
limited liability company,

Plaintiffs,

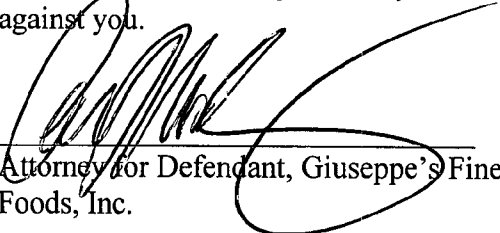
v.

GIUSEPPE'S FINER FOODS, INC., a  
Pennsylvania corporation,

Defendant.

To: Plaintiff, NEW YORK TOURS R US,  
LLC, t/d/b/a GINGER BOOST

You are hereby notified to file a written  
response to the enclosed New Matter and  
Counterclaim within twenty (20) days from  
service hereof or a judgment may be entered  
against you.

  
Attorney for Defendant, Giuseppe's Finer  
Foods, Inc.

CIVIL DIVISION

No. 2008-2367-CD

**DEFENDANTS' ANSWER, NEW  
MATTER AND COUNTERCLAIM**

Filed on behalf of Defendant, Giuseppe's Finer  
Foods, Inc.

Counsel of Record:

Gregory H. Teufel, Esq.  
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Christopher E. Mohnhey, Esq.  
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DuBois, PA 15801  
(814) 375-1044  
(814) 375-1088 (facsimile)  
[cem:esq@verizon.net](mailto:cem:esq@verizon.net)

**A JURY TRIAL IS DEMANDED**

**FILED**

JAN 12 2009

0/9:50/10

William A. Shaw  
Prothonotary/Clerk of Courts

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ATTN @

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,  
PENNSYLVANIA**

NEW YORK TOURS R US, LLC,  
t/d/b/a GINGER BOOST, a New York  
limited liability company,

CIVIL DIVISION

No. 2008-2367-CD

Plaintiffs,

v.

**DEFENDANTS' ANSWER, NEW  
MATTER AND COUNTERCLAIM**

GIUSEPPE'S FINER FOODS, INC., a  
Pennsylvania corporation,

Defendant.

**ANSWER, NEW MATTER AND COUNTERCLAIM**

AND NOW comes the Defendant, Giuseppe's Finer Foods, Inc. ("Giuseppe's"), by and through its undersigned counsel, and files the following Answer, New Matter and Counterclaim to the Complaint of Plaintiff.

**Answer**

1. Admitted.

2. Admitted.

3. Admitted in part and denied in part. It is admitted that Giuseppe's is engaged in the processing and packaging of food products for shipment to not only retailers, but also wholesalers and food services, both in the United States and export markets, and holds itself out as having expertise in the packaging of food and beverages. By way of further response, Giuseppe's currently packages certain condiment products, including mayonnaise and sandwich spreads, salad dressings, pasta sauces, salsas, ketchups, and barbecue sauces, as well as certain other tea and beverage products.

4. Admitted in part and denied in part. It is admitted that Ginger Boost is engaged in the development and sale of two varieties of beverage products called "Ginger Boost." After reasonable investigation, Giuseppe's is without information sufficient to form a belief as to whether those products are "nutritional."

5. Admitted in part and denied in part. The answer to paragraph 4 above is incorporated by reference as if fully set forth herein.

6. Admitted in part and denied in part. Upon information and belief, the actual Purchase Order sent was dated and sent to Giuseppe's by Ginger Boost on July 7, 2008, and not on July 3, 2008.

7. Admitted in part and denied in part. It is admitted that Exhibit A is a true and correct copy of a purchase order, but it is not a true and correct copy of the final purchase order sent to Giuseppe's by Ginger Boost on July 7, 2008. On the contrary, the purchase order attached to the Complaint as Exhibit A appears to be an earlier dated version of the same purchase order. It is denied that the contract between the parties was reduced to the form of a purchase order generated by Ginger Boost and submitted to Giuseppe's as the parties had agreed. It is further denied that the particulars were that Giuseppe's agreed to process, manufacture, package and load for shipment a batch of 3,200 cases of the Ginger Boost beverage product in two flavors for the cost of \$8,800.00 which was required to be prepaid to Giuseppe's. On the contrary, the Purchase Order speaks for itself and does not accurately state all of the particulars to which the parties had agreed. For example, the payment terms were not "Net 10," but rather, prepayment was required, as indicated in paragraph 7 of the Complaint.

8. Admitted in part and denied in part. It is admitted that the agreement was such that Giuseppe's would provide facilities and required equipment and staff to process, mix, code,

label, and pack Ginger Boost's product batch. It is denied that the agreement was such that Giuseppe's would "perform all the necessary services" and ship Ginger Boost's product batch. On the contrary, it is not clear what is meant by "perform all the necessary services" and Giuseppe's never promised to "perform all the necessary services." In addition, freight charges were not included and Giuseppe's was not obligated to arrange the shipping.

9. Admitted in part and denied in part. It is denied that Ginger boost was to supply all of the ingredients. On the contrary, Giuseppe's supplied some of the ingredients, such as water.

10. Admitted.

11. Admitted.

12. Denied. It is denied that, in the processing and manufacturing of the Ginger Boost product lengthy breakdowns occurred at the Giuseppe's facility which required delays in the production of the Ginger Boost product. On the contrary, delays occurred due to problems with the capper, but the breakdowns are not properly characterized as "lengthy."

13. Denied. It is denied that failures at the Giuseppe's facility, including but not limited to the inability and/or failure to regulate the temperature of the product as required to produce it to specification and failure to flash pasteurize, occurred during the production of the Ginger Boost products. On the contrary, there was no specification provided and the product was flash pasteurized. There are two steps in the heating process (1) pasteurization, and (2) hot fill. Flash pasteurization is simply pasteurization — active heating above the required kill temperature — for a short time, typically 30 seconds. This is in fact what occurred during the production of the Ginger Boost beverages. The Ginger Boost products were heated to 190 degrees Fahrenheit for 30 seconds. The next step, also specified on the Purchase Order, "hot

fill,” extends the time that the beverage stays hot. The bottle needs to be filled at a high enough temperature to sterilize it and ensure that the contents are not contaminated before it is sealed. After pasteurization, the Ginger Boost product was filled at about 180 degrees Fahrenheit and the temperature of the bottle stayed above 175 degrees Fahrenheit for at least two minutes before it was cooled. This is required by the United States Food and Drug Administration to ensure that the finished product is shelf-stable. In Giuseppe’s system, this means that the beverage can be hot for ten minutes or longer.

14. Denied. It is denied that, due to delays and failures of Giuseppe’s facility, staff, equipment and processes utilized or not utilized as described in Paragraphs 12 and 13 of the Complaint, the Ginger Boost product manufactured by Giuseppe’s is not fit for sale or consumption. On the contrary, the products manufactured for Ginger Boost by Giuseppe’s were fit for sale and consumption. The answers to paragraphs 12 and 13 above are incorporated by reference as if fully set forth herein.

15. Denied. It is denied that multiple resulting negative effects to the Ginger Boost product occurred as a result of ill-processing and manufacturing by Giuseppe’s, including that:

- a. Ginger Boost product is changed in its taste and flavor profile in that it is no longer palatable or fit for sale;
- b. Ginger Boost product is changed in its taste and flavor profile in that the flavor varieties are not distinguishable;
- c. Ginger Boost color specification as conducted by Giuseppe’s is not met and the product color is significantly changed in that it is darkened and cloudy;
- d. Bottles were not capped properly;



- e. Bottles were not filled to the appropriate level and there is inconsistency in the level to which the bottles were filled.

On the contrary, there was no ill-processing and no ill-manufacturing by Giuseppe's and no negative effects to the Ginger Boost product resulting from any such issues, and

- a. The Ginger Boost product produced by Giuseppe's was not "changed" in its taste and flavor profile and it was palatable and fit for sale. There was never any agreed taste and flavor profile against which the produced product could even be compared.
- b. The Ginger Boost product produced by Giuseppe's was not "changed" in its taste and flavor profile and the flavor varieties produced by Giuseppe's are distinguishable.
- c. There was no color specification conducted by Giuseppe's or provided to Giuseppe's. The Ginger Boost product produced by Giuseppe's was not darker or cloudier than should have been expected and there was no specification provided in regard to darkness or cloudiness. Ginger Boost did not allow the professional formulator, which formulator Ginger Boost had separately hired prior to contracting with Giuseppe's, to complete stability testing for the products, which would have shown the same darkening of the color that is evident in the products produced for Ginger Boost by Giuseppe's.
- d. Every production run of 3,200 cases can be expected to have a certain percentage of bottles not capped properly. The rate of improper capping on the bottles produced by Giuseppe's for Ginger Boost was well below

industry standards and any bottles found not properly capped were removed from production.

- e. Every bottle filled was weighed to confirm proper filling. Any bottles found not filled to the appropriate level were removed from production. As in any production run there was some minimal variation in fill levels, however all of the bottles packed for shipment to Ginger Boost met the minimum fill level requirement for 16 fluid oz.

16. Denied. It is denied that the events described in paragraphs 12-14 occurred as the Complaint described or that there were resulting ill effects. On the contrary, the answers to paragraphs 12-14 above are incorporated by reference as if fully set forth herein. The averment that Giuseppe's failed to perform as contracted or that such alleged failure is material are legal conclusions to which no response is required. To the extent a response may be required, said averments are denied. On the contrary, Giuseppe's performed as contracted and did not materially breach the contract in any way.

17. Denied. It is denied that Ginger Boost was required to remove product from shelves of distributors and did not have product available to distributors as promised to them as a result of any material breach or failure by Giuseppe's. On the contrary, there was no material breach or failure and Ginger Boost only took delivery of twenty-four cases of products. Thus no distribution of products to distributors could have occurred. In addition, there was product available, but Ginger Boost improperly refused to take delivery of it. Indeed, Ginger Boost accepted the products produced as acceptable and only complained weeks later about color change as the product darkened over time, as is normal for products of this type. Upon

information and belief, Ginger Boost is belatedly attempting to assert false purported product defects as a basis for attempting to get the money back that was paid to Giuseppe's.

18. Denied. Upon information and belief, it is denied that Plaintiff at all times prior to the events described in paragraph 17 of the Complaint has been a business of good name, credit and reputation, having a credible and good business and professional reputation and rapport established with distributors and the market. On the contrary, the events described in paragraph 17 of the Complaint never occurred, and Ginger Boost is a new company with new products and has not established any kind of good name, credit, credibility, reputation, or rapport with any distributors or with any market.

19. Denied. It is denied that, as a result of any material breach by Giuseppe's, Ginger Boost suffered delay in its business marketing and production and lost the benefit of its prior efforts of product marketing. On the contrary, no material breach by Giuseppe's occurred, and any delay in marketing was solely caused by Ginger Boost's improper refusal to take delivery of the products, which products Giuseppe's had timely produced within the time frame contemplated by the contract.

20. Denied. It is denied that Ginger Boost suffered the alleged harms and losses stated at paragraph 20 of the Complaint as a result of any material breach by Giuseppe's. On the contrary, Giuseppe's did not materially breach the contract. After reasonable investigation, Giuseppe's lacks information sufficient to form a belief as to whether the costs stated are accurate as to how much Ginger Boost spent on Product Ingredients, Bottles, Caps, Labels, or travel expenses. Therefore, said cost averments are denied. The Co-Packing Fee Paid to Giuseppe's was \$8,800.00 as stated. After reasonable investigation, Giuseppe's lacks information sufficient to form a belief as to whether Ginger Boost could have made \$38,400.00

in profits in selling the products it contracted to buy from Giuseppe's. Therefore, said alleged lost profit amount is denied, and Giuseppe's also denies that any profits were lost as a result of anything Giuseppe's did or did not do. As for "reputation harm," the answer to paragraph 19 above is incorporated herein as if fully set forth at length.

WHEREFORE, Defendant denies that Plaintiff is entitled to any of the relief demanded in its Complaint and respectfully requests that the Court enter judgment in Defendant's favor and against Plaintiff, dismissing Plaintiff's Complaint in its entirety and with prejudice, and awarding Defendant its costs and other such and further relief as the Court deems proper.

#### **NEW MATTER**

By way of further Answer to Plaintiff's Complaint, Giuseppe's incorporates by reference the preceding paragraphs as if the same were set forth at length herein, and Giuseppe's sets forth the following separate New Matter:

1. Ginger Boost fails, in whole or in part, to state a claim upon which relief can be granted.
2. Ginger Boost is barred or limited, in whole or in part, by Ginger Boost's failure to give proper notice, and by the doctrines of laches, estoppel and/or waiver.
3. Ginger Boost's claims are or may be barred or limited by the provisions of the agreement between Giuseppe's and Ginger Boost.
4. Ginger Boost's claims are barred or limited, in whole or in part, by its failure to mitigate its alleged damages.
5. Ginger Boost's damages, if any, are offset by Giuseppe's Counterclaim, which is incorporated by reference as if fully set forth herein.

6. No action nor omission by Giuseppe's was the proximate cause or contributing cause of any alleged injury, loss or damage to Ginger Boost and, thus, Ginger Boost's claims should be dismissed because there is no causal connection between the events alleged in the Complaint and any damages that Ginger Boost has allegedly suffered.

7. Ginger Boost's claims are barred or limited, in whole or in part, by its breach and/or repudiation of the Agreement.

8. Ginger Boost's claims are barred or limited, in whole or in part, by the statute of frauds.

9. Any alleged damages or injuries that Ginger Boost incurred were caused by persons or entities other than Giuseppe's, over whom Giuseppe's had no control or right of control.

10. Giuseppe's acted without fault in all of its conduct relating to Ginger Boost.

11. Giuseppe's did not breach any duties to Ginger Boost.

12. Sheniza Abdul, President of Ginger Boost, was present at Giuseppe's during manufacture and personally inspected, tasted, and accepted the finished products at issue, taking twenty-four cases with her, and discussed shipping arrangements. Ginger Boost accepted the goods produced by Giuseppe's, did not have any proper basis to revoke acceptance, and did not give notice of revocation of acceptance within a reasonable time thereafter.

WHEREFORE, Defendant denies that Plaintiff is entitled to any of the relief demanded in its Complaint and respectfully requests that the Court enter judgment in Defendant's favor and against Plaintiff, dismissing Plaintiff's Complaint in its entirety and with prejudice, and awarding Defendant its costs and such other and further relief as the Court deems proper.

### **JURY DEMAND**

Giuseppe's hereby demands a trial by jury on all claims asserted in Plaintiff's Complaint and in Giuseppe's Counterclaim.

### **COUNTERCLAIM**

1. The averments of the Answer and New Matter set forth above are incorporated by reference as if fully set forth herein.

### **Parties**

2. Counterclaim-Plaintiff Giuseppe's is a corporation organized under the laws of Pennsylvania and maintains its principle place of business at 2592 Oklahoma-Salem Road, Dubois, Pennsylvania, 15801.

3. Counterclaim Defendant New York Tours R US, LLC t/d/b/a Ginger Boost ("Ginger Boost") is a limited liability company organized under the laws of New York. Ginger Boost has its principal place of business at 601 South 12<sup>th</sup> St., New Hyde Park, New York 11040.

### **Factual Background**

4. On or about July 7, 2008, Giuseppe's and Ginger Boost entered into an agreement ("the Agreement"), documented, *inter alia*, by a Purchase Order issued by Ginger Boost to Giuseppe's on that date. A true and correct copy of said Purchase Order, with handwriting added after the receipt of same, is attached hereto as Exhibit A.

5. Pursuant to the agreement, Giuseppe's agreed to produce for Ginger Boost 1,600 cases of the Mango Flavor Ginger Boost product and 1,600 cases of the Orange Flavor Ginger Boost product ("the Products").

6. No specification was provided for the Products.

7. On or about August 21, 2008, Giuseppe's properly produced the Products in accordance with the Agreement and in accordance with the time frame contemplated thereby.

8. Sheniza Abdul, President of Ginger Boost, personally inspected, tasted, and accepted the finished Products, taking twenty-four cases with her, and discussed shipping arrangements.

9. Several weeks later, on or about September 9, 2008, Ms. Abdul called Giuseppe's complaining that the Products were no longer palatable and alleging spoilage such that it could no longer be consumed. She further complained that a few bottles were not capped tightly and complained of different levels of liquid in the bottles.

10. Giuseppe's tested three samples of the Mango Ginger flavor and six samples of the Orange Ginger flavor from the pallets in its warehouse. The samples were collected on September 10, 2008 and spread across the entire production period from August 21, 2008 based on their time dates. APC stands for aerobic plate count, which is a standard indicator of the level of bacteria in a food product. Coliform is a test of bacteria like E. Coli, which are associated with sanitation. Y&M stands for yeast and mold. These are the standard tests done in the food industry. CFU stands for colony forming unit. All of the samples scored <10cfu, which means that they were below the detection level of the tests. This is essentially the same as zero. Giuseppe's also did these tests after production on August 21, 2008, which is Giuseppe's standard procedure, and they also scored <10cfu -- perfectly clean. There was no microbiological spoilage of the products produced for Ginger Boost.

11. Every production run of 3,200 cases can be expected to have a certain percentage of bottles not capped properly. The rate of improper capping on the bottles produced by

Giuseppe's for Ginger Boost was well below industry standards and any bottles found not properly capped were removed from production.

12. Every bottle filled was weighed to confirm proper filling. Any bottles found not filled to the appropriate level were removed from production. As in any production run, there was some minimal variation in fill levels, however all of the bottles packed for shipment to Ginger Boost met the minimum fill level requirement for 16 fluid oz.

13. Thus, weeks after accepting the produced products, Ginger Boost began asserting false excuses for refusing to take delivery of the Products and for seeking a refund of Ginger Boost's costs in producing the Products.

14. The Agreement provided, as noted in the Purchase Order, that Giuseppe's would hold the finished Products for 7 days following production, and after 14 days warehouse fees would be applied monthly, at the cost of \$0.25 per case per month.

15. Because Ginger Boost improperly refused to accept delivery of the Products, Ginger Boost has incurred storage charges of \$617.00 per month for September, October, November, and December, and will continue to incur storage charges until the Products are either delivered or disposed.

16. Giuseppe's invoiced Ginger Boost for storage costs, but Ginger Boost has failed and refused to pay such invoices.

17. Giuseppe's has demanded that Ginger Boost take delivery of the Products but Ginger Boost has failed and refused to take delivery of the Products and insists it will never take delivery.

18. As a result, Giuseppe's has no choice but to dispose of the Products to avoid the ongoing burden and expense of storing the Products.



### COUNT I – BREACH OF CONTRACT

19. Paragraphs 1 through 18 of this Counterclaim are incorporated by reference as if fully set forth herein.

20. The Agreement was a valid, binding, enforceable contract, as Ginger Boost has admitted in paragraphs 7-9 of its Complaint.

21. Giuseppe's performed all of its obligations under the Agreement.

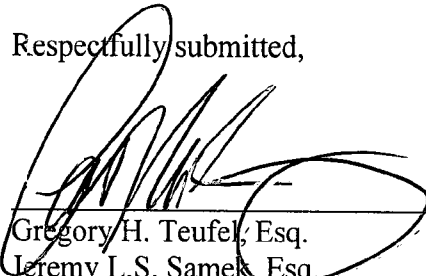
22. Ginger Boost's actions and omissions as described herein constitute breach of the Agreement.

23. As a result of Ginger Boost's breach of the Agreement, Giuseppe's has incurred damages of \$2,468.00 to date, and will continue to incur additional storage charges and/or disposal costs.

WHEREFORE, Giuseppe's respectfully requests that the Court enter judgment in its favor and against Ginger Boost, awarding Giuseppe's damages, plus interest, costs, and such other and further relief as the Court deems proper.

Dated: 1/12/09

Respectfully submitted,



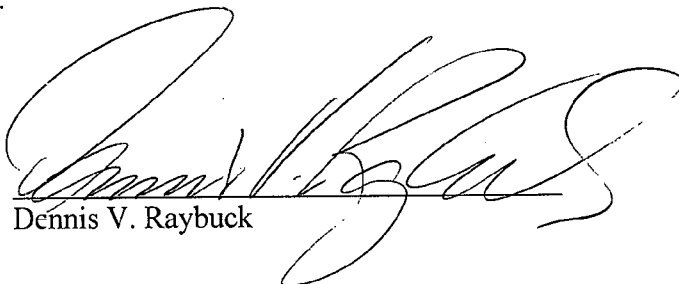
\_\_\_\_\_  
Gregory H. Teufel, Esq.  
Jeremy L.S. Samek, Esq.  
Christopher E. Mohny, Esq.  
*Attorneys for Defendant,  
Giuseppe's Finer Foods, Inc.*

**VERIFICATION**

I, Dennis V. Raybuck, am President of Defendant Giuseppe's Finer Foods, Inc. and am authorized to make this verification on behalf of said Defendant. I hereby verify that the factual allegations set forth in the foregoing Answer and New Matter are true and correct to the best of my personal knowledge, information, and belief.

I understand that this verification is made subject to the penalties of 18 Pa.Cons.Stat. § 4904 relating to unsworn falsification to authorities.

Dated: 1/12/09

  
Dennis V. Raybuck

# PURCHASE ORDER

**Ginger Boost™**

601 So. 12 Street, New Hyde Park, NY 11040  
Phone 516.488.7035  
sheniza@gingerboost.com

P.O. # 1  
DATE: JULY 7, 2008

# 952

**VENDOR** GIUSEPPE'S  
2592 Oklahoma • Salem Road  
PO BOX 687  
Dubois, PA 15801  
Telephone: 814 375 0516  
Customer ID

**SHIP TO** [Name]  
[Company Name]  
[Street Address]  
[City, ST ZIP Code]  
[Phone]  
Customer ID [ABC12345]

SHIPPING METHOD	SHIPPING TERMS	DELIVERY DATE	PAYMENT TERMS
	Giuseppe's agree to hold finished product for 7 days following production, after 14 days warehouse fees will be applied monthly, at the cost of \$0.25/case per month		Net 10

QTY	ITEM #	DESCRIPTION	JOB	UNIT PRICE	LINE TOTAL
1,329 <del>1600</del> cases	Mango Flavor	See Below	Co-packing	\$2.75	\$4,400.00
1,170 <del>1600</del> cases	Orange Flavor	See Below	Co-packing	\$2.75	\$4,400.00

Co-packing fees shall include the following: pallets, filtered water, pallet stretch wrap, tray, shrink wrap, glue, code dating ink, all receiving, storage and handling of raw materials, and packaging supplies, processing and shipping of finished goods (not inclusive of any freight charges). The beverage will be produced by flash pasteurization and hot fill as per formulation provided by *Ginger Boost™*. We would like to be part of your early August, 2008 production run.

SUBTOTAL	\$8,800
SALES TAX	
TOTAL	

1. Enter this order in accordance with the prices, terms, delivery method, and specifications listed above.
2. Please notify us immediately if you are unable to ship as specified.
3. Send all correspondence to:  
601 So. 12 Street, New Hyde Park, NY 11040  
Phone 516.488.7035  
sheniza@gingerboost.com

Produced 8-21-08

Authorized by: Sheniza Abdul

Date 7/3/08

EXHIBIT "A"

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a true and correct copy of the foregoing  
ANSWER, NEW MATTER AND COUNTERCLAIM was served on the following counsel of  
record by hand-delivery this 12<sup>th</sup> day of January, 2009:

James A. Naddeo, Esq.  
Trudy G. Lumadue, Esq.  
Naddeo & Lewis, LLC  
207 E. Market Street  
P.O. Box 552  
Clearfield, PA 16830

A handwritten signature in black ink, appearing to read "Trudy Lumadue", is written over a horizontal line.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

No. 08-2367-CD

Type of Pleading:

**REPLY TO NEW MATTER AND  
ANSWER TO COUNTERCLAIM**

Filed on behalf of:  
Plaintiffs

Counsel of Record for  
this party:

Trudy G. Lumadue, Esq.  
Pa I.D. 202049

&

James A. Naddeo, Esq.  
Pa I.D. 06820

NADDEO & LEWIS, LLC.  
207 E. Market Street  
P.O. Box 552  
Clearfield, PA 16830  
(814) 765-1601

Dated: February 3, 2009

**FILED**  
01/10:47  
FEB 03 2009

2cc  
Atty Lumadue  
(610)

5  
William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BCOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

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No. 08-2367-CD

**REPLY TO NEW MATTER AND ANSWER TO COUNTERCLAIM**

NOW COMES the Plaintiff, New York Tours R US, LLC,  
t/d/b/a Ginger Boost, and by its attorney, Trudy G. Lumadue,  
Esquire, sets forth the following in reply to the new matter and  
in answer to the counterclaim filed by Defendant:

**REPLY TO NEW MATTER**

1.<sup>1</sup> States a conclusion of law to which no answer is  
required. To the extent an answer may be required said averment  
is denied.

2. States conclusions of law to which no answer is  
required. To the extent an answer may be required said averment  
is denied. In further answer thereto on or about September 8,  
2008, Plaintiff discovered the defects complained of with the

---

<sup>1</sup> Plaintiff notes that Defendant failed to Paragraph its New Matter continuing  
the numbers consecutively after the Complaint. Plaintiff is answering the  
New Matter as improperly numbered by Defendant.

product and that the same was not maintaining itself as produced and was not fit for consumption or sell as intended by Plaintiff. The following day, on September 9, 2008, Plaintiff notified Defendant in writing and verbally of the complaints and that the product was being rejected for the same.

3. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

4. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

5. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

6. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

7. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

8. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied. On the contrary, the parties had an agreement in

writing as required by the statute of frauds. The same has been  
pled in this action.

9. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied. In further answer thereto, no third party (parties) had control over the production of the product which caused the damages to Plaintiff. Rather Defendant and/or Defendant's agents had complete control of the production of the product and the circumstances which caused the damages to Plaintiff.

10. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

11. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

12. Admitted in part, denied in part. It is admitted that Sheniza Abdul was present at the facility of Defendant at the time of production. In further answer thereto, Ms. Abdul did not witness the actual production of the product by Defendant. It is admitted that Ms. Abdul tasted three samples of the product throughout the course of production. However, Ms. Abdul had/has no information as to how said samples were prepared or from where the same were retrieved. The samples were brought to Ms. Abdul and she did not witness the actual production of the



same. It is admitted that 24 cases were initially accepted and taken with Plaintiff from the production site. In further answer thereto, the defects in the product were latent at this time. In further answer thereto, Plaintiff gave notice immediately when it became aware of the defects in the product and Plaintiff incorporates its answer to Paragraph 2 as if said Paragraph was set forth at length herein. That Plaintiff did not have a proper basis for revoking acceptance states a conclusion of law to which no answer is required. To the extent an answer may be required said conclusion is denied.

WHEREFORE, Plaintiff, Ginger Boost, demands judgment against Defendant, Giuseppe's, and in its favor in an amount in excess of \$25,000.00 (Twenty-five thousand) dollars with costs and interest thereon from August 22, 2008 forward.

#### **ANSWER TO COUNTERCLAIM**

##### **FACTUAL BACKGROUND**

1.<sup>2</sup> Plaintiff incorporates by reference the averments of its Complaint and the averments of its reply to new matter as if all of the same were set forth at length herein.

2. Admitted.

3. Admitted.

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<sup>2</sup> Plaintiff notes that Defendant failed to Paragraph its Counterclaim continuing the numbers consecutively after the New Matter. Plaintiff is answering the Counterclaim as improperly numbered by Defendant.

4. Denied as stated. The agreement was entered into on or about July 3, 2008 which is the date when said Purchase Order was sent to Defendant by email. In further answer thereto, the document's date field is a coded and/or programmed field which generates the current date thereon each time the document is opened or printed.

5. No answer is required. The agreement speaks for itself.

6. Denied. To the contrary, on or after June 20, 2008, Plaintiff provided Batch Order Instructions in writing to Defendant. Further details were provided in correspondences between Plaintiff and Defendant and during discussions between the parties. The Purchase Order references the instructions provided. The instructions were utilized by Defendant to generate a "Stove-Top" formula. The instructions were subsequently utilized by Defendant to conduct a pilot run.

7. Denied. To the contrary, on or about September 8, 2008, Plaintiff discovered that the product was not maintaining itself as produced and as required by specification. Therefore, on August 21, 2008, there were latent defects in the product as produced. Defendant was immediately notified of said defects upon Plaintiff's discovery of the same and at the time of discovery the product was rejected by Plaintiff as defective and as not fit for consumption or sell as intended by Plaintiff.

8. Denied as stated. To the contrary, Plaintiff incorporates its answer at Paragraph 12 of its Reply to New Matter and Paragraph 7 of its Answer to Counterclaim.

9. It is admitted that September 9, 2008 is the date that Defendant was notified that the product was being rejected as it was defective and was not fit for consumption or sell as the product did not maintain itself to specification post-production.

10. Denied. After reasonable investigation Plaintiff is without knowledge or information sufficient to form a belief as to the truth of said averment.

11. Denied. After reasonable investigation Plaintiff is without knowledge or information sufficient to form a belief as to the truth of said averment. In further answer thereto, Defendant admitted in writing to Plaintiff that spillage was excessive during the production of Plaintiff's product and due to such Defendant offered a refund to Plaintiff for the same.

12. That every bottle was weighed to confirm proper filling is denied. After reasonable investigation Plaintiff is without knowledge or information sufficient to form a belief as to the truth of said averment. It is denied that any bottles found not filled to the appropriate level (after weighing) were removed from production. To the contrary, there were bottles produced that were not filled to the appropriate level that were not

removed and Plaintiff notified Defendant of the same. In further answer thereto, it is denied that all bottles met the minimum fill level.

13. Denied. To the contrary Plaintiff incorporates Paragraph 7 of its Answer to Counterclaim as if set forth at length herein.

14. No answer is required. Plaintiff requests the agreement which is in writing speak for itself.

15. States conclusions of law to which no answers are required. To the extent an answer may be required said averment is denied. In further answer thereto, Plaintiff incorporates Paragraph 7 of its Answer to Counterclaim as if set forth at length herein. It is denied that the storage charges are \$617.00 per month. After reasonable investigation Plaintiff is without knowledge or information sufficient to form a belief as to the truth of said averment. Plaintiff admits that Plaintiff would owe only the appropriate storage costs of the product up to and including September 8, 2008.

16. Admitted that Plaintiff has not paid the storage costs as invoiced by Defendant. In further answer thereto, Plaintiff incorporates its answer to Paragraph 15 of this Answer to Counterclaim. Furthermore, Plaintiff is exercising the right to offset its damages.

17. Admitted. In further answer thereto, Plaintiff has rightfully rejected the product due to the fact that the product is defective and was not made or maintaining itself to specification.

18. Denied as stated. The parties by agreement determined an acceptable amount of the product to be retained for the purposes of litigation and agreed that the remainder could be destroyed because it is defective.

COUNT I - BREACH OF CONTRACT

19. Paragraphs 1 through 18 of Plaintiff's Answer to Counterclaim are incorporated herein by reference as if set forth at length herein.

20. Admitted. In further answer thereto, the contract date is July 3, 2008 not July 7, 2008 as explained by Plaintiff in Paragraph 4 of this Answer to Counterclaim which Plaintiff incorporates by reference herein.

21. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

22. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment is denied.

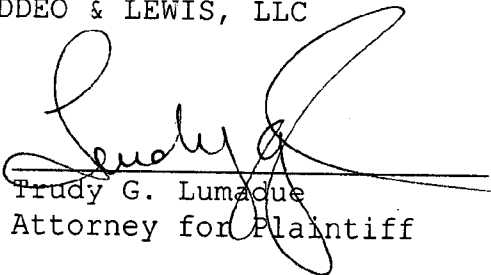
23. States a conclusion of law to which no answer is required. To the extent an answer may be required said averment

is denied. In further answer thereto, the costs incurred were due to Defendant's breach of the contract in its failure to produce the product as agreed which caused defects in the product and caused Plaintiff to rightfully reject the same.

WHEREFORE, Plaintiff, Ginger Boost, respectfully requests judgment against Defendant, Giuseppe's, and in its favor in an amount in excess of \$25,000.00 (Twenty-five thousand) dollars with costs and interest thereon from August 22, 2008 forward.

NADDEO & LEWIS, LLC

By



Trudy G. Lumaque  
Attorney for Plaintiff

V E R I F I C A T I O N

I, Sheniza Abdul, verify that I am a member of New York Tours R Us, LLC t/d/b/a Ginger Boost and that I am authorized to execute this verification and further that the statements made in the foregoing Reply to New Matter and Answer to Counterclaim are true and correct upon my personal knowledge or information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

Ginger Boost

By: Sheniza Abdul  
Sheniza Abdul  
Plaintiff

Dated: 1/19/09

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,  
Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,  
Defendant.

No. 08-2367-CD

CERTIFICATE OF SERVICE

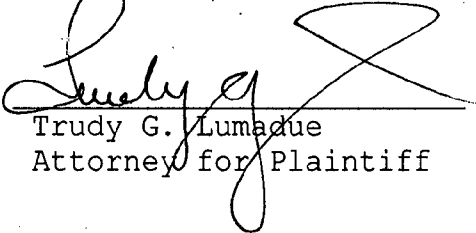
I, Trudy G. Lumadue, Esquire, do hereby certify that a  
certified copy of Reply to New Matter and Answer to Counterclaim  
was served on the following and in the following manner on the 3<sup>rd</sup>  
day of February, 2009:

First-Class Mail, Postage Prepaid

Gregory H. Teufel, Esquire  
Eckert Seamans Cherin & Mellot, LLC  
600 Grant Street  
Pittsburgh, PA 15219

NADDEO & LEWIS, LLC

By:

  
Trudy G. Lumadue  
Attorney for Plaintiff



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

No. 08-2367-CD

Type of Pleading:

**ACCEPTANCE OF SERVICE**

Filed on behalf of:  
Plaintiffs

Counsel of Record for  
this party:

Trudy G. Lumadue, Esq.  
Pa I.D. 202049

&

James A. Naddeo, Esq.  
Pa I.D. 06820

NADDEO & LEWIS, LLC.  
207 E. Market Street  
P.O. Box 552  
Clearfield, PA 16830  
(814) 765-1601

**FILED**

0 3:45 p.m. CK

FEB 09 2009

William A. Shaw  
Prothonotary/Clerk of Courts

(64)

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

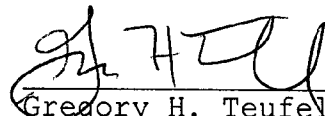
GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

No. 08- -CD

**ACCEPTANCE OF SERVICE**

I, Gregory H. Teufel, Esquire, do hereby accept service  
of Complaint filed in the above-captioned case. This acceptance is  
made on behalf of Defendant, Giuseppe's Finer Foods, Inc.

  
\_\_\_\_\_  
Gregory H. Teufel, Esquire  
Attorney for Defendant

Date: 2/9/06

**FILED**

**FEB 09 2009**

William A. Shaw  
Prothonotary/Clerk of Courts

RECEIVED  
FEB 10 2009  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

No. 08-2367-CD

Type of Pleading:

**PRAECIPE TO SUBSTITUTE  
APPEARANCE**

Filed on behalf of:  
Plaintiffs

Counsel of Record for  
this party:

Trudy G. Lumadue, Esq.  
Pa I.D. 202049

&

James A. Naddeo, Esq.  
Pa I.D. 06820

NADDEO & LEWIS, LLC.  
207 E. Market Street  
P.O. Box 552  
Clearfield, PA 16830  
(814) 765-1601

**FILED**

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Lumadue  
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William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,

Plaintiff,

v.

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,

Defendant.

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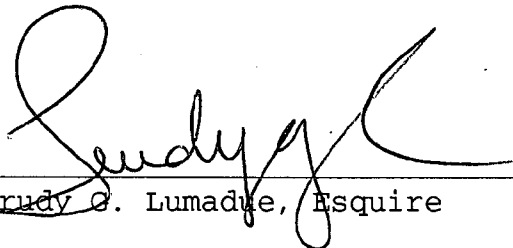
No. 08-2367-CD

**PRAECIPE TO SUBSTITUTE APPEARANCE**

TO THE PROTHONOTARY:

Please withdraw my (Trudy G. Lumadue, Esquire)  
Appearance on behalf of the Plaintiff in the above captioned  
case and substitute the Appearance of James A. Naddeo, Esquire.

Date: 1-5-10

  
Trudy G. Lumadue, Esquire

Date: 1-5-10

  
James A. Naddeo, Esquire

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC,  
t/d/b/a, GINGER BOOST, a  
New York limited liability  
company,  
Plaintiff,

v.

No. 08-2367-CD

GIUSEPPE'S FINER FOODS,  
INC., a Pennsylvania  
corporation,  
Defendant.

CERTIFICATE OF SERVICE

I, Trudy G. Lumadue, Esquire, do hereby certify that a  
certified copy of Praecipe to Substitute Appearance was served on  
the following and in the following manner on the 5<sup>th</sup> day of  
January, 2010:

First-Class Mail, Postage Prepaid

Gregory H. Teufel, Esquire  
Eckert Seamans Cherin & Mellot, LLC  
600 Grant Street  
Pittsburgh, PA 15219

NADDEO & LEWIS, LLC

By: 

Trudy G. Lumadue  
Attorney for Plaintiff

**FILED**

**JAN 05 2010**

William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

NEW YORK TOURS R US, LLC, et al,  
Plaintiffs

vs.

GIUSEPPE'S FINER FOODS, INC.,  
Defendant


\*  
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\*  
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NO. 2008-2367-CD

**ORDER**

NOW, this 2<sup>nd</sup> day of August, 2013, upon the Court's review of the docket and noting no activity for a period of over three years, it is the ORDER of this Court that the case be moved to inactive status. The Prothonotary shall code the case in Full Court as Z-INACTA.

BY THE COURT,

  
FREDRIC J. AMMERMAN  
President Judge

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2  
FILED NoCC  
01/10:33cm  
AUG 06 2013  
William A. Shaw  
Prothonotary/Clerk of Courts  
66