

ESTTA Tracking number: **ESTTA236843**

Filing date: **09/15/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92049264
Party	Plaintiff AW Computer Holdings LLC
Correspondence Address	Rod S. Berman Jeffer Mangels Butler & Marmaro LLP 1900 Avenue of the Stars, Seventh Floor Los Angeles, CA 90067 UNITED STATES trademarkdocket@jmbm.com
Submission	Other Motions/Papers
Filer's Name	Jessica C. Bromall
Filer's e-mail	trademarkdocket@jmbm.com
Signature	/jessica c. bromall/
Date	09/15/2008
Attachments	Motion for Reconsideration.pdf ( 9 pages )(100987 bytes ) Exhibit A.pdf ( 18 pages )(430323 bytes ) Exhibit B.pdf ( 22 pages )(599304 bytes ) Exhibit C.pdf ( 7 pages )(2719314 bytes ) Exhibit D.pdf ( 3 pages )(67835 bytes ) Exhibit E.pdf ( 8 pages )(253624 bytes ) Exhibit F.pdf ( 113 pages )(3498229 bytes ) Exhibit G.pdf ( 10 pages )(20547 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

AW COMPUTER HOLDINGS LLC,

Petitioner,

v.

WHAM-O, INC.,

Respondent.

Cancellation No. 92/049,264

Reg. Nos. 761,883; 1,432,069; and 2,924,744

Marks: SLIP 'N SLIDE; YELLOW SLIDE  
DESIGN, and YELLOW/BLUE SLIDE  
DESIGN

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**MOTION FOR RECONSIDERATION OF BOARD'S ORDER**  
**SUSPENDING PROCEEDINGS OR, IN THE ALTERNATIVE,**  
**MOTION TO RESUME PROCEEDINGS**

**I. INTRODUCTION**

Pursuant to Trademark Rules 2.117(a) and 2.127, Petitioner AW Computer Holdings, LLC ("Petitioner") hereby moves the Board to reconsider its Order dated August 14, 2008, suspending proceedings in the instant matter pending disposition of two civil actions. In the alternative, Petitioner moves the Board for an order to resume proceedings in the instant matter, at least with respect to U.S. Reg. No. 761,883 for SLIP 'N SLIDE (the SLIP 'N SLIDE Registration").

Petitioner is a company that is in the process of entering the water toy industry, primarily as a marketer, seller, and distributor of slip 'n slides. In the instant cancellation proceeding, Petitioner seeks cancellation of three unrelated registrations - the SLIP 'N SLIDE Registration,

on the grounds that the term "slip 'n slide" is generic, as well as two other registrations involving unrelated marks - each on distinct and independent grounds. Two of these registrations are involved in currently pending civil actions. The SLIP 'N SLIDE Registration, however, is in no way involved in or affected by any civil action currently pending between the parties.

On August 14, 2008, the Board issued an Order (the "Suspension Order") suspending proceedings in this cancellation action - with respect to *all three* registrations - pending final disposition of the identified civil actions. As a result of the Board's Suspension Order, Petitioner is precluded from pursuing cancellation of Respondent's registration for the generic term "slip 'n slide" until after final disposition of two civil actions that neither involve, nor have any bearing on, the SLIP 'N SLIDE Registration. This result is improper under Trademark Rule 2.1117(a), contrary to the strong public interest in speedy cancellation of registrations for generic terms, and manifestly unfair.

Accordingly, Petitioner respectfully requests that the Board reconsider its Suspension Order, at least with respect to the SLIP 'N SLIDE Registration, and issue an order resuming proceedings with respect to the SLIP 'N SLIDE Registration.

## **II. FACTUAL BACKGROUND**

### **A. The Registrations at Issue**

In this action, Petitioner seeks cancellation of three independent trademark registrations owned by Respondent, each on distinct and independent grounds, as follows:

- U.S. Reg. No. 761,883 for SLIP 'N SLIDE (the SLIP 'N SLIDE Registration") on grounds that the term "slip 'n slide" is generic;
- U.S. Reg. No. 1,432,069 for the YELLOW SLIDE Design (the "YELLOW SLIDE Registration") on the grounds of fraud on the Trademark Office, as well as functionality; and

- U.S. Reg. No. 2,924,744 for the YELLOW/BLUE SLIDE Design (the "YELLOW/BLUE Registration") on the grounds that the "mark" is merely ornamental and/or descriptive and has not acquired secondary meaning.

Petitioner could have filed three separate cancellation proceedings, one for each registration. In the interest of judicial economy, however, Petitioner filed only one proceeding in which it stated the separate and independent grounds for cancellation of each of the three registrations.

**B. The Civil Actions**

On August 14, 2008, the Board issued its Suspension Order suspending proceedings in the Cancellation Action pending resolution of the following civil actions:

- SLB Toys USA, Inc. v. Wham-O, Inc., et al., United States District Court for the Central District of California, Civil Action No. CV06-1382 RSWL (CWx), currently on appeal to the United States Court of Appeals for the Ninth Circuit (the "First Action"); and
- Wham-O, Inc. v. AW Computer Holdings LLC, et al., United States District Court for the Central District of California, Civil Action No. CV08-01281 RSWL (CWx) (the "Second Action").<sup>1</sup>

The SLIP 'N SLIDE Registration is not at issue or involved in either of the foregoing proceedings.

**1. The First Action**

In the First Action, Respondent alleged that SLB Toys USA, Inc. ("SLB") infringed its rights in both the YELLOW SLIDE Design mark and the YELLOW/BLUE SLIDE Design mark. See SLB's Complaint in the First Action and Respondent's Answer and Counterclaims in the First Action, attached hereto as Exhibits A and B, respectively. In turn, SLB alleged that the

---

<sup>1</sup> The First Action and the Second Action are collectively referred to herein as the "Civil Actions."

YELLOW SLIDE Registration had been abandoned and should be cancelled. See id. On or about October 11, 2007, the jury in the First Action rendered a verdict finding that, *inter alia*, that Respondent had not abandoned the YELLOW SLIDE Design mark, that SLB had infringed the YELLOW SLIDE Design mark, and that Petitioner had not infringed the YELLOW/BLUE SLIDE Design mark. See Special Verdict Form from the First Action, attached hereto as Exhibit C. Thereafter, a judgment in the amount of \$6,000,000 was entered in favor of Respondent and against SLB. See Judgment in the First Action, attached hereto as Exhibit D.

In or around November of 2007, Petitioner acquired from SLB certain assets, as well as the appellate rights in the First Action, and on March 5, 2008, Petitioner and SLB filed a Notice of Appeal of the judgment and orders entered in the First Action. See Notice of Appeal filed in First Action, attached hereto as Exhibit E. The appeal in this matter is currently pending.

The First Action, including the appeal, does not involve any allegations regarding, claims of infringement of, or requests for cancellation of the SLIP 'N SLIDE Registration. In fact, the First Action has no bearing whatsoever on the SLIP 'N SLIDE Registration.

## **2. The Second Action**

In the Second Action, Respondent alleged that Petitioner, among others, is the alter ego and/or successor in interest to SLB, and seeks to impose the judgment entered against SLB in the First Action against Petitioner on that basis. See Respondent's Second Amended and Supplemental Complaint in the Second Action, attached hereto as Exhibit F. In the Second Action, Respondent also alleges against certain defendants, not including Petitioner, have infringed its rights in the YELLOW SLIDE Design mark and the YELLOW/BLUE SLIDE Design mark. See id. Petitioner, who was named in only one cause of action in the Second Action, has now been dismissed from that proceeding. See Order re Motion to Dismiss, attached hereto as Exhibit G.

The Second Action does not involve any allegations regarding, claims of infringement of, or requests for cancellation of the SLIP 'N SLIDE Registration. In fact, the Second Action has no bearing whatsoever on the SLIP 'N SLIDE Registration.

**C. The Board's Suspension Order**

In its Suspension Order, the Board states that after reviewing the pleadings and other relevant documents from the Civil Actions, the Civil Actions "involve the same parties and issues in common with the instant cancellation proceeding." See Suspension Order, at 3. Based thereon, the Board concludes that the Civil Action may "have a bearing on the Board proceeding" and, pursuant to Trademark Rule 2.117(a), ordered all proceedings herein suspended pending final disposition of the Civil Actions. See id. at 4.

**III. ARGUMENT**

The Suspension Order is improper under Trademark Rule 2.1117(a), contrary to the strong public interest in speedy cancellation of registrations for generic terms, and manifestly unfair. Accordingly, Petitioner request that the Board issue an order to resume proceedings with respect to the SLIP 'N SLIDE Registration.

**A. Trademark Rule 2.117(a) Does Not Support Suspension of Proceedings on the SLIP 'N SLIDE Registration**

The Trademark Rules provide that suspension of proceedings is appropriate where the "parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case." Trademark Rule 2.117(a).

As noted above, the instant proceeding involves petitions to cancel three separate registrations on three independent grounds: the YELLOW SLIDE Registration for fraud on the Trademark Office and functionality, the YELLOW/BLUE Registration because it is merely ornamental and/or descriptive, and the SLIP 'N SLIDE Registration because it is generic. Only

the First Action involves the same parties as the instant cancellation proceeding. Similarly, only the First Action involves the YELLOW/BLUE Registration. Petitioner does not dispute that the First Action involves both the YELLOW SLIDE Registration and the YELLOW/BLUE Registration. Petitioner allows that it is conceivable that the Civil Actions could have a bearing on the outcome of the petitions to cancel the YELLOW SLIDE Registration and the YELLOW/BLUE Registration.

Neither of the Civil Actions, however, can have any bearing on the petition to cancel the SLIP 'N SLIDE Registration. A review of the relevant documents from the Civil Actions demonstrates that the SLIP 'N SLIDE Registration is simply not involved in either Civil Action. Further, the petition to cancel the SLIP 'N SLIDE Registration does not share any "issues in common" with either of the Civil Actions - both of which involve allegations of infringement of different marks, neither of which puts at issue the term "slip 'n slide" or any variation or component thereof.

Because the Civil Actions identified by the Board can have no bearing on the petition to cancel the SLIP 'N SLIDE Registration, suspension of the proceedings herein with respect to the SLIP 'N SLIDE Registration is not warranted by Trademark Rule 2.117(a).

**B. Suspension of Proceedings on the SLIP 'N SLIDE Registration is Contrary to the Strong Public Policy Favoring Speedy Cancellation of Registrations for Generic Terms**

The public has a strong interest in cancelling registrations of generic terms. See, e.g., Kaiser Aluminum & Chemical Corporation v. American Meter Company, 153 U.S.P.Q. 419, 420-21 (T.T.A.B. 1967); Southwire Company v. Kaiser Aluminum & Chemical Corporation, 196 U.S.P.Q. 566, 573 (T.T.A.B. 1977) (it is in the "public interest to . . . cancel those registrations where the registered marks have, since the time of registration, become terms of art or common description."). To allow registrations for generic terms to continue to exist on the

register "would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are." See CBS Pub. Corp. v. St. Regis Publications, Inc., 531 F.2d 11, 13 (2d Cir. 1975). The foregoing succinctly describes the situation Petitioner faces.

Respondent is the owner of a registration for the generic term "slip 'n slide." Petitioner, also in the toy industry and in the process of becoming a distributor of "slip 'n slides," is precluded by Respondent's registration of "slip 'n slide" from describing its proposed goods as what they are. Instead, if Petitioner wants to describe and market its "slip 'n slide" products, it must employ an "elaborate and possibly confusing paraphrase" to do so, e.g. flexible plastic water slides for recreational use. See Door Systems, Inc. v. Pro-Line Door Systems, Inc., 83 F.3d 169, 171 (7th Cir. 1996). Using this description is both confusing and inefficient, and as a result, as long as Respondent owns the SLIP 'N SLIDE Registration, it has an unfair competitive advantage over Petitioner, as well as other competitors. See id.

Although neither of the Civil Actions have any bearing on the petition to cancel the SLIP 'N SLIDE Registration, the Board's Suspension Order delays the determination of whether that registration should be cancelled for genericness until the unrelated Civil Actions are resolved. Final disposition of the Civil Actions could take years. In which case, by its Suspension Order, the Board could be extending protection for a generic mark by years.

This result is contrary to the public interest in favor of speedy cancellation of registrations for generic marks. Proceedings on the SLIP 'N SLIDE Registration should proceed.

**C. The Board's Order is Unfair**

As noted above, Petitioner could have filed three separate cancellation proceedings, one for each registration it sought to cancel. Petitioner, however, mindful of judicial economy, brought all of its petitions to cancel in a single proceeding. Petitioner is now being punished for this decision.



The only reason that proceedings on the petition to cancel the SLIP 'N SLIDE Registration have been suspended is because the Civil Actions share issues in common with the petitions to cancel the YELLOW SLIDE Registration and the YELLOW/BLUE Registration. Had Petitioner simply filed its petition to cancel the SLIP 'N SLIDE Registration as a separate action, proceedings on that action would not have been suspended because, as noted above, no civil action currently pending between the parties has any bearing on the petition to cancel the SLIP 'N SLIDE Registration.

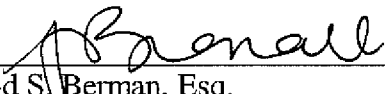
Additionally, the marks that are the subject of each of the three registrations involved are different and the grounds for cancellation are different for each registration. As a result, there are no issues in common between the petition to cancel the SLIP 'N SLIDE Registration and the petitions to cancel the YELLOW SLIDE Registration and the YELLOW/BLUE Registration. Therefore, no inefficiency or duplication of effort, on the part of either the Board or the parties, will result if the petition to cancel the SLIP 'N SLIDE Registration is allowed to proceed.

#### **IV. CONCLUSION**

For all the foregoing reasons, Petitioner respectfully requests that the Board reconsider its Suspension Order, or in the alternative, that the Board issue an order to resume proceedings in the instant matter with respect to the SLIP 'N SLIDE Registration.

Respectfully submitted,

Dated: September 15, 2008


By:   
Rod S. Berman, Esq.  
Brian W. Kasell, Esq.  
Jessica C. Bromall, Esq.  
JEFFER MANGELS BUTLER & MARMARO, LLP  
1900 Avenue of the Stars, Seventh Floor  
Los Angeles, California 90067  
(310) 203-8080  
Attorneys for Petitioner AW COMPUTER  
HOLDINGS LLC

**CERTIFICATE OF SERVICE**

I hereby certify that one (1) copy of this document is being deposited with the United States Postal Service as First Class Mail, postage affixed, in an envelope addressed to:

Beth M. Goldman  
Heller Ehrman LLP  
333 Bush Street  
San Francisco CA 94104-2878

Date: September 15, 2008

  
\_\_\_\_\_  
Jessica C. Bromall

Jeffer, Mangels, Butler & Marmaro LLP  
1900 Avenue of the Stars, Seventh Floor  
Los Angeles, CA 90067  
Phone: (310) 203-8080  
Fax: (310) 203-0567  
www.jmbm.com

# EXHIBIT A

ORIGINAL

1 Alex M. Weingarten (Bar No. 204410)  
 2 LAGER WEINGARTEN LLP  
 3 The Water Garden  
 4 1601 Cloverfield Blvd., Second Floor, South Tower  
 5 Santa Monica, California 90404  
 Telephone: (310) 471-8773  
 Facsimile: (310) 496-0422  
 aw@lagerweingarten.com

2006 MAR -5 PM 12:13  
 U.S. DISTRICT COURT  
 CENTRAL DISTRICT OF CALIF.  
 LOS ANGELES

FILED

6 Attorneys for Plaintiff  
 7 SLB TOYS USA, INC.

8 UNITED STATES DISTRICT COURT  
 9 CENTRAL DISTRICT OF CALIFORNIA

10 CV06-1382 RSWL (CW) X  
 Case No.

11 SLB TOYS USA, INC., a New York  
 Corporation,

12 Plaintiff,

13 v.

14 WHAM-O, INC., a Delaware  
 15 corporation, CORNERSTONE  
 16 OVERSEAS INVESTMENTS LTD., a  
 17 Hong Kong entity; CHARTERHOUSE  
 GROUP, INC. a Delaware corporation;  
 TRAXI, LLC, a New York entity; and  
 DOES 1-10, inclusive,

18 Defendants.

COMPLAINT FOR

1. Trademark Infringement (Section 43(a) of Lanham Act);
2. Trade Dress Infringement (Section 43(a) of Lanham Act);
3. Trademark Infringement under Common Law;
4. Breach of Confidential and Fiduciary Relationship;
5. Unfair Competition;
6. Declaratory Relief

DOCKETED ON CM  
 MAR 13 2006  
 BY [Signature] 014

20 Plaintiff SLB Toys, Inc. ("SLB") alleges as follows:

21 **JURISDICTION AND VENUE**

22 1. This is a civil action arising under the United States Trademark Act of  
 23 1946, as amended, 15 U.S.C. §§ 1051, *et seq.* (the "Lanham Act"), for infringement in  
 24 violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and for related  
 25 rights under the statutory or common law of the State of California.

26 2. This Court has subject matter jurisdiction of this action pursuant to 15  
 27 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, 2201, and 2202, as it involves claims  
 28

IS  
 den  
 26  
 Form 27  
 28

1 arising under the Lanham Act. This Court has supplemental subject matter  
2 jurisdiction over all other claims pursuant to 28 U.S.C. § 1367, because they are so  
3 related that they form part of the same case or controversy.

4 3. This Court has personal jurisdiction over the Defendants in that they are  
5 doing business in the State of California and are committing the acts hereinafter  
6 alleged in this State.

7 4. Venue in this Court is proper pursuant to 28 U.S.C. § 1391, in that the  
8 parties are located in or transact their affairs in this district and because a substantial  
9 part of the events or omissions giving rise to the claims occurred in this district.

#### 10 PARTIES

11 5. Plaintiff SLB is a corporation organized and existing under the laws of  
12 the State of New York, with its principal place of business located in Los Angeles  
13 County, California. SLB does business as Toy Quest, a toy company which promotes,  
14 advertises and sells toys to retailers throughout the United States.

15 6. SLB is informed and believes and based thereon alleges that defendant  
16 Wham-O, Inc. ("Wham-O") is a Delaware corporation, with its principal place of  
17 business located in Emeryville, California. Wham-O is a toy company which  
18 promotes, advertises and sells products that compete with the products and services of  
19 SLB.

20 7. SLB is informed and believes and based thereon alleges that defendant  
21 Cornerstone Overseas Investments Ltd. ("Cornerstone") is a Hong Kong entity which  
22 has at all relevant times conducted business in California. Cornerstone recently  
23 purchased Wham-O from defendant Charterhouse Group, Inc. and, on information and  
24 belief, provides manufacturing facilities and other services or assistance to Wham-O  
25 in connection with the manufacture and distribution of its toys.

26 8. SLB is informed and believes and based thereon alleges that defendant  
27 Charterhouse Group, Inc. ("Charterhouse") is a Delaware corporation, with its  
28

1 principal place of business located in New York, which has at all relevant times  
2 conducted business in California. Charterhouse is a private investment group or  
3 equity fund which recently sold its interest in Wham-O to Cornerstone in or about  
4 January of 2006.

5 9. SLB is informed and believes and based thereon alleges that defendant  
6 Traxi, LLC ("Traxi") is a New York entity, with its principal place of business located  
7 in New York, which has at all relevant times conducted business in California. Traxi  
8 promotes itself as a special situation advisory or consulting firm and represented  
9 Wham-O and Charterhouse in connection with the sale of Wham-O and related  
10 negotiations.

11 10. SLB is unaware of the names and true capacities of defendants, whether  
12 individual, corporate or otherwise, named herein as DOES 1 through 10, inclusive,  
13 and therefore sues them by their fictitious names. SLB will seek leave to amend this  
14 complaint when their true names and capacities are ascertained. SLB is informed and  
15 believes, and based thereon alleges that said defendants and DOES 1 through 10,  
16 inclusive, are in some manner responsible for the wrongs alleged herein, and that at all  
17 times referenced each was the agent and servant of the other defendants and was  
18 acting within the course and scope of said agency and employment.

### 19 GENERAL ALLEGATIONS

20 11. SLB is an innovative and dynamic toy company located in Los Angeles  
21 County, California with product lines in multiple categories including preschool,  
22 plush, plastic, wood, inflatables, water and pool toys, battery-operated, radio control,  
23 plug and play, musical instruments, and youth electronics. SLB has over thirty years  
24 of experience in the toy industry and has achieved considerable success including top  
25 selling toy products such as Tekno The Robotic Dog (awarded Toy of the Year). SLB  
26 has been honored with awards such as Vendor of the Year by Toys 'R Us and has  
27 earned the right to include its products with McDonald's Happy Meals. SLB has  
28

1 fostered an excellent reputation among its peers and customers and relies on this  
2 reputation in its business.

3 12. SLB currently markets a line of popular water slide toys that are known  
4 as the *Banzai Falls* water slides. These water slide toys include the *Banzai Falls*  
5 *Quick Set Water Slide*, the *Banzai Falls In-Ground Pool Slide*, the *Banzai Falls Mega*  
6 *Racer*, and the *Banzai Falls Criss Cross* (collectively the *Banzai Falls Water Slides*).  
7 True and correct photographs of the *Banzai Falls Quick Set Water Slide*, the *Banzai*  
8 *Falls In-Ground Pool Slide*, the *Banzai Falls Mega Racer*, and the *Banzai Falls Criss*  
9 *Cross* are attached hereto as Exhibits A, B, C and D, respectively, and are  
10 incorporated herein by this reference.

11 13. In or about March 2003, SLB began marketing *Banzai Falls Quick Set*  
12 *Water Slide* to the toy trade. The product, which was designed and developed by and  
13 is an original creation of SLB, is a puncture proof, rapidly inflating water slide that  
14 children (and adults for that matter) can use in their own back yards. A blower motor,  
15 included with the product, keeps the inflatable water slide continuously inflated and  
16 the water comes from an average garden hose. The material used also allows the slide  
17 to be used dry.

18 14. Retailers such as Toys 'R Us and Wal-Mart were immediately interested  
19 in the *Banzai Falls Quick Set Water Slide* and SLB began production in earnest  
20 shortly after its initial presentation. Shipment of the *Banzai Falls Quick Set Water*  
21 *Slide* to the United States from production facilities in China began in or around  
22 December 2003 for sale in the 2004 Summer season. The *Banzai Falls Quick Set*  
23 *Water Slide* was an instant success and quickly became a popular toy product  
24 receiving an award as one of the top ten toys for 2004.

25 15. SLB continued to market and sell the *Banzai Falls Quick Set Water Slide*  
26 in 2005, and it has been nominated for Toy of the Year for 2006. In addition, in 2005,  
27 SLB undertook to build upon the success of the *Banzai Falls Quick Set Water Slide*

1 and extend the product line to include the *Banzai Falls In-Ground Pool Slide*, the  
2 *Banzai Falls Mega Racer*, and the *Banzai Falls Criss Cross*. The *Banzai Falls In-*  
3 *Ground Pool Slide* was released at the beginning of 2005 for the 2005 Summer  
4 season, and the *Banzai Falls Mega Racer* and the *Banzai Falls Criss Cross* were  
5 released at the end of 2005 in preparation for the 2006 Summer season. These slides,  
6 like the *Banzai Falls Quick Set Water Slide*, also share the fanciful and ornamental  
7 design of the *Banzai Falls* arch over the top of the slide in which a vertical stitching or  
8 seam pattern is used to create the appearance of multiple vertical tubes comprising the  
9 arch (the "*Banzai Falls Arch Mark*"). See Exhibits A through D hereto. All of these  
10 slides also share the fanciful and ornamental design of the *Banzai Falls* side panels in  
11 which the stitching or seam pattern is used to create the appearance of three horizontal  
12 tubes that run along side the slide, with two top tubes of equal size and a bottom tube  
13 that is thicker, and a center triangle shape beneath the arch with the top of the triangle  
14 squared off with horizontal line and a logo in the center of the triangle (the "*Banzai*  
15 *Falls Side Panel Mark*"). *Ibid.*

16 16. The *Banzai Falls Quick Set Water Slide*, *Banzai Falls In-Ground Pool*  
17 *Slide*, the *Banzai Falls Mega Racer*, and *Banzai Falls Criss Cross* additionally share  
18 the unique features comprising a common, non-functional trade dress which include  
19 the silhouette, shape, profile, size, configuration and dimension, as well as placement  
20 of elements such as the *Banzai Falls Arch Mark* and the *Banzai Falls Side Panel Mark*  
21 (collectively the "*SLB Trade Dress*"). Other elements comprising the *SLB Trade*  
22 *Dress* include:

- 23 (a) Climbing wall in the back to reach top of slide with the look of  
24 horizontal tubes created by two seams;
- 25 (b) Arch over the top of the slide with the *Banzai Falls Arch Mark* and  
26 containing the water nozzle for spraying onto the slide;
- 27 (c) Steep slide starts under the arch;



1 (d) Side of slide with the *Banzai Falls* Side Panel Mark that is  
2 primarily blue in color;

3 (e) Orientation of water spray from top of the arch;

4 (f) Waterbags attached to the slide under the triangle; and

5 (g) Yellow blower motor and tube for inflating the slide.

6 In addition, the *Banzai Falls Quick Set Water Slide*, the *Banzai Falls Mega Racer* and  
7 the *Banzai Falls Criss Cross* each include a splash pool for landing at the end of the  
8 slide with a horizontal seam depicting horizontal tubes above the floor of the pool and  
9 an indentation in the top two rails on side of splash pool for exit about halfway  
10 forward in splash pool. Also, the color of the vertical slide for each of the *Banzai*  
11 *Falls In-Ground Pool Slide* and the *Banzai Falls Criss Cross* is yellow.

12 17. SLB has spent millions of dollars promoting its *Banzai Falls Water*  
13 *Slides*, primarily through production and airing of advertising for the *Banzai Falls*  
14 *Quick Set Water Slide* on network television featuring the unique features forming the  
15 *Banzai Falls* Arch Mark, the *Banzai Falls* Side Panel Mark and the SLB Trade Dress  
16 for its *Banzai Falls Water Slides*. SLB has developed a reputation as the leader in the  
17 toy industry for inflatable water slides through such advertising and the success its  
18 sales of the *Banzai Falls Water Slides*. The *Banzai Falls* Arch Mark and the *Banzai*  
19 *Falls* Side Panel Mark are inherently distinctive and are further associated through  
20 such advertising and the success of SLB's sales of the *Banzai Falls Water Slides* with  
21 a particular source, particularly SLB. Likewise, the SLB Trade Dress is also  
22 inherently distinctive and further is associated and has acquired secondary meaning  
23 through such advertising and the success of SLB's sales of the *Banzai Falls Water*  
24 *Slides* with a particular source, particularly SLB.

25 18. Meanwhile, in or about October 2005, SLB entered into confidential  
26 discussions with Charterhouse, Traxi and Wham-O in connection with a possible  
27 merger or acquisition by SLB involving Wham-O. Charterhouse was looking to sell

1 all or a substantial part of its interest in Wham-O, and Traxi was advising  
2 Charterhouse and Wham-O in connection with a potential sale of Wham-O. As part of  
3 those discussions, SLB disclosed in confidence its product line for 2006 to  
4 Charterhouse and Traxi, both of which were also acting on behalf of Wham-O, and the  
5 information so disclosed in confidence included SLB's plans for release of the *Banzai*  
6 *Falls Criss Cross* as the next generation or extension of its *Banzai Falls Water Slides*  
7 for the 2006 season. Charterhouse, Traxi and Wham-O, and each of them, knew and  
8 understood that SLB had disclosed this information to them in confidence, that the  
9 information was not to be used for any reason other than for the purpose of evaluating  
10 a potential merger or acquisition of Wham-O by SLB and that they could not use this  
11 information for any other purpose, including for the purpose of creating, producing or  
12 selling a competing product or otherwise for use in competition with SLB.

13 19. On or about January 19, 2006, Wham-O announced that Cornerstone had  
14 acquired the company from Charterhouse. As a result of the transaction, according to  
15 the press release, Wham-O's management, vendors and customers will benefit from  
16 Cornerstone's size, financial stability and operational assistance, including the  
17 production, manufacture or distribution of Wham-O products through Cornerstone's  
18 facilities in China or elsewhere. The press release also confirmed that Wham-O had  
19 been advised in the transaction by Traxi.

20 20. In late February 2006, SLB received a letter from Wham-O's legal  
21 counsel purporting to accuse SLB of infringing upon Wham-O's trademarks with  
22 respect to its water toy products. Through correspondence with Wham-O's legal  
23 counsel, SLB learned that Wham-O had undertaken to release its own version of the  
24 *Banzai Falls Criss Cross* in 2006, a virtual knock-off which Wham-O calls the *Super*  
25 *Splash Tunnel Slide*. A true and correct copy of the Wham-O *Super Splash Tunnel*  
26 *Slide*, as depicted in communications received from its counsel, is attached hereto as  
27 Exhibit E and is incorporated herein by this reference.

1           21. Incredibly, in its letter, Wham-O's legal counsel claimed that SLB had  
2 misappropriated Wham-O's design for the *Super Splash Tunnel Slide*. To the  
3 contrary, however, it is apparent, at least to anyone with knowledge of the underlying  
4 facts, that Wham-O made its assertion as a preemptive strike in an attempt to conceal  
5 that the fact that Wham-O, Charterhouse, Traxi and now Cornerstone, have engaged in  
6 an unlawful conspiracy in which they purposefully conspired with each other and gave  
7 substantial assistance and encouragement to one another to wrongfully violate the  
8 confidence in which SLB had disclosed its plans for the *Banzai Falls Criss Cross* and  
9 to unlawfully and unfairly compete with SLB in connection with the production and  
10 release of the Wham-O *Super Splash Tunnel Slide*. Among other things, in addition to  
11 the flagrant breach of confidence, the Wham-O *Super Splash Tunnel Slide* wrongfully  
12 uses and infringes upon the *Banzai Falls Arch Mark* and the *Banzai Falls Side Panel*  
13 *Mark*, and each of them, as well as the SLB Trade Dress. Compare Exhibits A-D and  
14 Exhibit E. The Wham-O *Super Splash Tunnel Slide* uses virtually the same stitching  
15 pattern comprising the *Banzai Falls Arch Mark* and the *Banzai Falls Side Panel Mark*,  
16 and the appearance and dimensions the Wham-O *Super Splash Tunnel Slide* are  
17 virtually the same in all material respects to the SLB Trade Dress, including height,  
18 length and slope of the slide, size of splash pool, orientation of water spray, use of  
19 yellow blower motor and hose, blue coloring of side panels, and use and location of  
20 water bags. *Ibid.*

21           22. Wham-O and its co-conspirators and/or aiders and abettors, including  
22 Charterhouse, Traxi and Cornerstone, purposefully conspired with each other and/or  
23 gave substantial assistance and encouragement to one another to wrongfully produce,  
24 market and sell Wham-O *Super Splash Tunnel Slide*, and to deceive consumers as to  
25 its purported association with SLB and to trade off its goodwill from the success of its  
26 *Banzai Falls Water Slides*, all for the purpose of profiting or enriching themselves at  
27 the expense of SLB. Among other things, while Wham-O and Cornerstone gain or  
28

1 stand to gain from the illegal and illicit profits resulting from sales of the Wham-O  
2 *Super Splash Tunnel Slide*, Charterhouse and Traxi profit or stand to profit from their  
3 realization of the sale of Wham-O and use of its release of "new" products like the  
4 Wham-O *Super Splash Tunnel Slide* to facilitate the sale of the company.

5  
6 **FIRST CLAIM FOR RELIEF**  
7 **(TRADEMARK INFRINGEMENT IN VIOLATION OF SECTION 43(a) OF**  
8 **THE LANHAM ACT)**

9 23. SLB repeats and realleges the allegations in paragraphs 1 through 22 as  
10 though set forth fully herein.

11 24. Defendants are wrongfully using and/or aiding and abetting or  
12 contributing to the use of the *Banzai Falls Arch Mark* and the *Banzai Falls Side Panel*  
13 *Mark*, and each of them, in connection with, without limitation, the manufacture,  
14 importation, sale, offering for sale, distribution and/or dissemination of the Wham-O  
15 *Super Splash Tunnel Slide*, in order to capitalize on the good name, notoriety,  
16 reputation and goodwill of SLB with respect to its *Banzai Falls Water Slides*.

17 25. Defendants' acts as alleged above are unlawful and constitute  
18 infringement and/or aiding and abetting or contributory infringement by, among other  
19 things, creating and/or permitting or assisting others to misrepresent the nature,  
20 characteristics, qualities, or origin of Defendants' goods, services, activities or  
21 information and/or to unlawfully compete in a manner which is likely to cause  
22 confusion, or cause mistake, or deceive customers as to the affiliation, connection, or  
23 association between Defendants and SLB, or as to the origin, sponsorship, or approval  
24 by SLB of Defendants' goods, services and/or activities, in violation of the Lanham  
25 Act, 15 U.S.C. §1125(a).

26 26. Defendants' conduct has caused and, if not enjoined, will continue to  
27 cause irreparable harm to one or more of the *Banzai Falls Arch Mark* and the *Banzai*  
28 *Falls Side Panel Mark*, as well as to SLB's good name, reputation and goodwill, in a

1 manner that cannot be calculated or compensated in money damages. SLB has no  
2 adequate remedy at law.

3 27. As a result of the foregoing, SLB has been injured, and Defendants have  
4 received and/or, if not enjoined, will receive illicit profits and wrongful gains.

5 28. Defendants' conduct is willful, deliberate and malicious, so as to entitle  
6 SLB to treble or exemplary damages in an amount according to proof at trial.

7 **SECOND CLAIM FOR RELIEF**  
8 **(TRADE DRESS INFRINGEMENT IN VIOLATION OF SECTION 43(a) OF**  
9 **THE LANHAM ACT)**

10 29. SLB repeats and realleges the allegations in paragraphs 1 through 28 as  
11 though set forth fully herein.

12 30. Defendants have adopted and continue to make use of a non-functional  
13 trade dress on the Wham-O *Super Splash Tunnel Slide* that is confusingly similar to  
14 the SLB Trade Dress.

15 31. Defendants' acts as alleged above constitute infringement and/or aiding  
16 and abetting or contributory infringement of the SLB Trade Dress and are likely to  
17 cause confusion, or cause mistake, or deceive customers as to the affiliation,  
18 connection, or association between Defendants and SLB, or as to the origin,  
19 sponsorship, or approval by SLB of Defendants' goods, services and/or activities, in  
20 violation of the Lanham Act, 15 U.S.C. §1125(a).

21 32. By reason of Defendants' acts as alleged herein, SLB has suffered, is  
22 suffering, and will continue to suffer irreparable harm and, unless Defendants are  
23 restrained from continuing their wrongful acts, the harm to SLB will increase. SLB  
24 has no adequate remedy at law.

25 33. As a result of the foregoing, SLB has been injured, and Defendants have  
26 received and/or, if not enjoined, will receive illicit profits and wrongful gains.

1           34. Defendants' conduct is willful, deliberate and malicious, so as to entitle  
2 SLB to treble or exemplary damages in an amount according to proof at trial.

3   **THIRD CLAIM FOR RELIEF**  
4   **(COMMON LAW TRADEMARK INFRINGEMENT)**

5           35. SLB repeats and realleges the allegations in paragraphs 1 through 34 t as  
6 though set forth fully herein.

7           36. The aforesaid acts of Defendants constitute infringement and/or aiding  
8 and abetting or contributory infringement under common law of one or more of the  
9 *Banzai Falls Arch Mark* and the *Banzai Falls Side Panel Mark*.

10          37. By reason of Defendants' acts as alleged herein, SLB has suffered, is  
11 suffering, and will continue to suffer irreparable harm and, unless Defendants are  
12 restrained from continuing their wrongful acts, the harm to SLB will increase. SLB  
13 has no adequate remedy at law.

14          38. As a result of the foregoing, SLB has been injured, and Defendants have  
15 received and/or, if not enjoined, will receive illicit profits and wrongful gains.

16          39. Defendants' conduct as alleged herein is willful, deliberate and  
17 malicious, and constitutes fraud, oppression or malice, so as to entitle SLB to  
18 exemplary damages in an amount according to proof at trial.

19   **FOURTH CLAIM FOR RELIEF**  
20   **(BREACH OF CONFIDENTIAL AND FIDUCIARY RELATIONSHIP)**

21          40. SLB repeats and realleges the allegations in paragraphs 1 through 39 as  
22 though set forth fully herein.

23          41. At all relevant times herein, there was a mutual understanding between  
24 SLB, on the one hand, and Wham-O, Charterhouse and Traxi, on the other, that the  
25 information disclosed in confidence to them, including SLB's disclosure of its plans  
26 for release the *Banzai Falls Criss Cross*, was to be used solely for purposes of  
27

1 evaluating a potential merger or acquisition of Wham-O by SLB, and SLB reposed  
2 trust and confidence in Wham-O, Charterhouse and Traxi that they would not use such  
3 information for any other purpose. Accordingly, a confidential or fiduciary  
4 relationship existed between SLB, on the one hand, and Wham-O, Charterhouse and  
5 Traxi, on the other, that they would not use information disclosed in confidence to  
6 them, including SLB's disclosure of its plans for release the *Banzai Falls Criss Cross*,  
7 for any purpose other than to evaluate a potential merger or acquisition of Wham-O by  
8 SLB.

9 42. Wham-O, Charterhouse and Traxi, and each of them, wrongfully  
10 breached and conspired with each other to breach their respective confidential and  
11 fiduciary obligations to SLB by, among other things, using information disclosed to  
12 them in confidence, including SLB's disclosure of its plans for release the *Banzai*  
13 *Falls Criss Cross*, for purposes of producing, assisting, aiding and abetting or  
14 facilitating in the production of the *Wham-O Super Splash Tunnel Slide* for sale in  
15 competition with SLB. Cornerstone knew that SLB had disclosed such information to  
16 Wham-O, Charterhouse and Traxi in confidence, and of their respective confidential  
17 and fiduciary obligations restricting the use of such information, and wrongfully  
18 joined in the conspiracy and aided and abetted Wham-O in the manufacture and  
19 exploitation of *Wham-O Super Splash Tunnel Slide* in violation of Wham-O's  
20 confidential and fiduciary obligations to SLB and to substantially assist Wham-O in  
21 unlawful and unfair competition with SLB.

22 43. By reason of Defendants' acts as alleged herein, the SLB has suffered, is  
23 suffering, and will continue to suffer irreparable harm and, unless Defendants are  
24 restrained from continuing their wrongful acts, the harm to SLB will increase. SLB  
25 has no adequate remedy at law.

26 44. As a result of the foregoing, SLB has been injured, and Defendants have  
27 received and/or, if not enjoined, will receive illicit profits and wrongful gains.

1 45. Defendants' conduct as alleged herein is willful, deliberate and  
2 malicious, and constitutes fraud, oppression or malice, so as to entitle SLB to  
3 exemplary damages in an amount according to proof at trial.

4 **FIFTH CLAIM FOR RELIEF**  
5 **(COMMON LAW UNFAIR COMPETITION)**

6 46. SLB repeats and realleges the allegations in paragraphs 1 through 45 as  
7 though set forth fully herein.

8 47. Defendants by virtue of their acts as alleged above, have willfully,  
9 knowingly, maliciously and intentionally engaged in acts of unfair competition under  
10 the common law of the State of California, including, without limitation, palming off,  
11 and/or attempting to palm off, and/or enabling others to palm off Wham-O *Super*  
12 *Splash Tunnel Slide* as a product made by, sponsored by, or authorized by SLB and  
13 breaching, conspiring to breach and aiding and abetting in the breach of confidential  
14 and fiduciary obligations to SLB in using the information that it had disclosed in  
15 confidence, including SLB's disclosure of its plans for release the *Banzai Falls Criss*  
16 *Cross*, for purposes other than of evaluating a potential merger or acquisition of  
17 Wham-O by SLB.

18 48. Defendants' conduct has caused and, if not enjoined, will continue to  
19 cause irreparable harm to SLB in a manner that cannot be calculated or compensated  
20 in money damages. SLB has no adequate remedy at law.

21 49. As a result of the foregoing, SLB has been injured, and Defendants have  
22 received or, if not enjoined, will receive illicit profits and wrongful gains.

23 50. Defendants' conduct as alleged herein is willful, deliberate and  
24 malicious, , and constitutes fraud, oppression or malice, so as to entitle SLB to  
25 exemplary damages in an amount according to proof at trial.  
26  
27



**SIXTH CLAIM FOR RELIEF**

**(Declaratory Relief)**

1  
2  
3 51. SLB repeats and re-alleges the allegations in paragraphs 1 through 50 as  
4 though fully set forth herein.

5 52. In late February 2006, SLB received a letter from Wham-O's counsel  
6 demanding that SLB immediately cease the marketing, sales and distribution of its  
7 water slide products, including the *Banzai Falls Water Slides*, based on Wham-O's  
8 claim to exclusive use the colors yellow and blue for all water toy products. SLB  
9 disputes Wham-O's contentions and contends that SLB may continue marketing,  
10 selling and distributing its water slide products, including the *Banzai Falls Water*  
11 *Slides*, to the public as they are currently marketed, sold and distributed to the public.

12 53. There is a currently an actual and justiciable controversy between SLB  
13 and Wham-O as to whether Wham-O's alleged trademarks on the colors yellow and  
14 blue with water toys preclude SLB from marketing, selling and distributing its water  
15 slide products, including the *Banzai Falls Water Slides*, as they are currently  
16 marketed, sold and distributed to the public.

17 54. A declaratory judgment in this controversy will settle the dispute between  
18 SLB and Wham-O thereby eliminating the necessity of further legal action on this  
19 matter by both parties.

20 55. A declaratory judgment is necessary at this time to preserve SLB's rights  
21 with regard to the marketing, sale and distribution of its water slide products,  
22 including the *Banzai Falls Water Slides*.

**PRAYER FOR RELIEF**

23  
24 WHEREFORE, plaintiff SLB requests the following judgment against  
25 Defendants:

26 1. For preliminary and permanent injunctive relief providing, among other  
27 things, that Defendants, their officers, agents, servants, employees, attorneys, parent,  
28

1 subsidiary and affiliated companies and all persons acting for, with, by, through, under  
2 or in concert with them, and each of them, be enjoined and restrained from using in  
3 any manner any of the SLB marks and trade dress, or any marks or trade dress likely  
4 to cause confusion therewith, or mistake or deception, in connection with the  
5 importation, sale, manufacture, distribution, advertising or promotion of their  
6 products, including, but not limited to, Wham-O *Super Splash Tunnel Slide*, and from  
7 otherwise engaging in any activity constituting an infringement of SLB's trademarks  
8 or trade dress or violation of the confidential and fiduciary obligations owed to SLB  
9 based on the information disclosed in confidence by SLB regarding its business and  
10 products;

11 2. That Defendants be required to account and pay over to SLB all profits  
12 realized by Defendants by reason of their unlawful acts alleged herein, as well as  
13 compensatory damages according to proof at trial, and that such amounts be trebled as  
14 provided by law;

15 3. For exemplary damages against Defendants, and each of them, according  
16 to proof at trial and as provided by law;

17 4. For a declaration that SLB's products do not violate any trademarks or  
18 rights claimed by Wham-O and that SLB may continue marketing, selling and  
19 distributing its water slide products, including the *Banzai Falls Water Slides*, to the  
20 public as they are currently marketed, sold and distributed to the public.

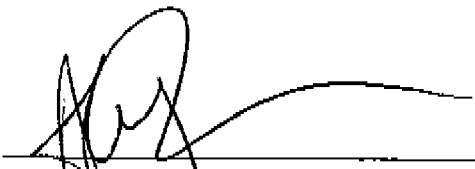
21 5. For an award to SLB of its costs and attorneys' fees incurred in this  
22 action as provided by law;

23 6. For interest, including prejudgment interest, as provided by law; and  
24  
25  
26  
27  
28

1           7. For such other and further relief as the Court deems just, equitable, and  
2 proper.

3 Dated: March 6, 2006

LAGER WEINGARTEN LLP

4  
5  
6 By:   
7 Alex M. Weingarten  
8 Attorneys for Plaintiff  
9 SLB Toys USA, Inc.

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**DEMAND FOR JURY TRIAL**

Plaintiff SLB TOYS USA, INC. hereby demands trial of this action by jury.

Dated: March 6, 2006

LAGER WEINGARTEN LLP

By:



Alex M. Weingarten

Attorneys for Plaintiff SLB Toys, Inc.

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

# EXHIBIT B

1 JEFFREY E. FAUCETTE (NO. 193066)  
 Email: jfaucette@howardrice.com  
 2 SARAH J. GIVAN (NO. 238301)  
 Email: sgivan@howardrice.com  
 3 HOWARD RICE NEMEROVSKI CANADY  
 FALK & RABKIN  
 4 A Professional Corporation  
 Three Embarcadero Center, 7th Floor  
 5 San Francisco, California 94111-4024  
 Telephone: 415/434-1600  
 6 Facsimile: 415/217-5910  
 7 Attorneys for Defendant and Counterclaimant  
 WHAM-O, INC.  
 8

FILED  
 CLERK U.S. DISTRICT COURT  
 MAY - 1 2006  
 CENTRAL DISTRICT OF CALIFORNIA  
 BY [Signature]

RECEIVED  
 BUT NOT FILED  
 MAY - 1 2006  
 CLERK, U.S. DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA  
 SOUTHERN DIVISION  
 DEPUTY

9 UNITED STATES DISTRICT COURT  
 10 CENTRAL DISTRICT OF CALIFORNIA  
 11

12 SLB TOYS USA, INC., a New York  
 corporation,  
 13  
 14 Plaintiff,

No. CV06-1382 RSWL  
 Action Filed: March 7, 2006  
 JURY TRIAL DEMANDED

15 v.  
 16 WHAM-O, INC., a Delaware corporation,  
 CORNERSTONE INVESTMENTS LTD., a  
 17 Hong Kong entity; CHARTERHOUSE  
 GROUP, INC. a Delaware corporation;  
 18 TRAXI, LLC, a New York entity; and DOES  
 1-10, inclusive,  
 19 Defendants.

DEFENDANT WHAM-O, INC.'S  
 ANSWER AND COUNTERCLAIMS  
 FOR TRADEMARK INFRINGEMENT,  
 TRADEMARK DILUTION AND  
 UNFAIR COMPETITION

20 WHAM-O, INC.,  
 21 Counterclaimant,  
 22 v.  
 23 SLB TOYS USA, INC., doing business as  
 24 TOYQUEST,  
 25 Counterdefendant.  
 26  
 27  
 28

DOCKETED ON CM  
 MAY 18 2006  
 [Signature]

8

HOWARD  
 RICE  
 NEMEROVSKI  
 CANADY  
 FALK  
 & RABKIN

1 Defendant and Counterclaimant Wham-O, Inc. ("Wham-O") hereby answers the  
2 Complaint against it by Plaintiff SLB Toys, Inc., doing business as Toyquest, ("SLB"), as  
3 follows:  
4

5 **JURISDICTION AND VENUE**

6 1. Paragraph 1 states a legal conclusion to which no response is required. To the  
7 extent a response is required, Wham-O admits the allegations of Paragraph 1.

8 2. Paragraph 2 states a legal conclusion to which no response is required. To the  
9 extent a response is required, Wham-O admits that this Court has subject matter jurisdiction  
10 of this action as it pertains to SLB's claims under Section 43(a) of the Lanham Act and as to  
11 SLB's claim for Declaratory Relief. Except as specifically admitted, Wham-O denies the  
12 remaining factual allegations of Paragraph 2.

13 3. Paragraph 3 states a legal conclusion to which no response is required. To the  
14 extent a response is required, Wham-O admits that its principal place of business is in the  
15 State of California. Except as specifically admitted, Wham-O denies the remaining factual  
16 allegations of Paragraph 3.

17 4. Paragraph 4 states a legal conclusion to which no response is required. To the  
18 extent a response is required, Wham-O denies that it is located in this district or that a  
19 substantial portion of the events or omissions alleged in the Complaint occurred in this  
20 district.  
21

22 **PARTIES**

23 5. Wham-O lacks knowledge and information sufficient to form a belief as to the  
24 allegations contained in Paragraph 5 and on that basis denies them.

25 6. Wham-O admits that it is a Delaware corporation with its principal place of  
26 business located in Emeryville, California. Wham-O admits that it promotes, advertises and  
27 sells toys, some of which compete with products sold by SLB. Except as specifically  
28 admitted, Wham-O denies the remaining factual allegations of Paragraph 6.

ANSWER AND COUNTERCLAIMS FOR TRADEMARK INFRINGEMENT

HOWARD  
RICE  
NEMERLOVSKI  
CANADY  
TRALK  
& RABKIN

1 7. Wham-O admits that Defendant Cornerstone Overseas Investments, Ltd.  
 2 ("Cornerstone") purchased an equity interest in Wham-O. Wham-O lacks knowledge and  
 3 information sufficient to form a belief as to the remaining allegations contained in  
 4 Paragraph 7 and on that basis denies them.

5 8. Wham-O admits that Charterhouse Group, Inc. ("Charterhouse") sold its interest  
 6 in Wham-O to Cornerstone in or about January 2006. Wham-O lacks knowledge and  
 7 information sufficient to form a belief as to the remaining allegations contained in  
 8 Paragraph 8 and on that basis denies them.

9 9. Wham-O admits that Traxi, LLC ("Traxi") represented Wham-O in connection  
 10 with the sale of Charterhouse's equity interest in Wham-O and related negotiations. Wham-  
 11 O lacks knowledge and information sufficient to form a belief as to the remaining allegations  
 12 contained in Paragraph 9 and on that basis denies them.

13 10. Wham-O lacks knowledge and information sufficient to form a belief as to the  
 14 allegations contained in Paragraph 10 and on that basis denies them.

HOWARD  
 RICE  
 NEMEROVSKI  
 CANADY  
 FALK  
 & RABKIN

15  
 16 **GENERAL ALLEGATIONS**

17 11. Wham-O lacks knowledge and information sufficient to form a belief as to the  
 18 allegations contained in Paragraph 11 and on that basis denies them.

19 12. Wham-O admits that SLB is marketing and selling water slide toy products that  
 20 infringe and dilute Wham-O's trademark and trade dress rights. The water slide toys that  
 21 Wham-O is currently aware of that infringe and dilute Wham-O's trademarks include the  
 22 "Banzai Falls Speed Slide," the "Banzai Falls In-Ground Pool Slide," the "Banzai Falls  
 23 Mega Racer" and the "Banzai Falls Criss Cross." Wham-O lacks knowledge and  
 24 information sufficient to form a belief as to the remaining allegations contained in  
 25 Paragraph 12 and on that basis denies them.

26 13. Wham-O lacks knowledge and information sufficient to form a belief as to the  
 27 allegations contained in Paragraph 13 and on that basis denies them.

28 14. Wham-O lacks knowledge and information sufficient to form a belief as to the



1 allegations contained in Paragraph 14 and on that basis denies them.

2 15. Wham-O admits that SLB is marketing and selling water slide toy products that  
3 infringe and dilute Wham-O's trademark and trade dress rights. The water slide toys that  
4 Wham-O is currently aware of that infringe and dilute Wham-O's trademarks include the  
5 "Banzai Falls Speed Slide," the "Banzai Falls In-Ground Pool Slide," the "Banzai Falls  
6 Mega Racer" and the "Banzai Falls Criss Cross." Wham-O lacks knowledge and  
7 information sufficient to form a belief as to the remaining allegations contained in  
8 Paragraph 15 and on that basis denies them.

9 16. Wham-O admits that SLB is marketing and selling water slide toy products that  
10 infringe and dilute Wham-O's trademark and trade dress rights. The water slide toys that  
11 Wham-O is currently aware of that infringe and dilute Wham-O's trademarks include the  
12 "Banzai Falls Speed Slide," the "Banzai Falls In-Ground Pool Slide," the "Banzai Falls  
13 Mega Racer" and the "Banzai Falls Criss Cross." Wham-O lacks knowledge and  
14 information sufficient to form a belief as to the remaining allegations contained in  
15 Paragraph 16 and on that basis denies them.

16 17. Wham-O lacks knowledge and information sufficient to form a belief as to the  
17 allegations contained in Paragraph 17 and on that basis denies them.

18 18. Wham-O admits that in or about October 2005, SLB entered into discussions  
19 with Charterhouse, Traxi and Wham-O in connection with the possible sale of  
20 Charterhouse's equity interest in Wham-O. Wham-O further admits that prior to the  
21 provision of confidential information to SLB, SLB executed a confidentiality agreement  
22 whereby SLB agreed to certain restrictions on SLB's use of certain information disclosed to  
23 SLB by Wham-O and/or Traxi. Wham-O further admits that Traxi was advising Wham-O in  
24 connection with the sale of Charterhouse's equity interest in Wham-O. Except as  
25 specifically admitted, Wham-O denies the remaining factual allegations of Paragraph 18.

26 19. Wham-O admits that it issued a press release on January 19, 2006, and that the  
27 press release announced that an affiliate of Comerstone had acquired Wham-O from the  
28 private equity fund which had previously owned it. Wham-O admits that the press release

HOWARD  
RICE  
NEMERLOVSKI  
CANADY  
PAUK  
& RABKIN

1 also described many benefits to Wham-O and its vendors and customers from the acquisition  
 2 by Cornerstone and that Wham-O had been advised in the transaction by Traxi. Except as  
 3 specifically admitted, Wham-O denies the remaining factual allegations of Paragraph 19.

4 20. Wham-O admits that counsel for Wham-O sent a letter to SLB's counsel in late  
 5 February 2006, a true and correct copy of which is attached hereto as Exhibit 1. Wham-O  
 6 further admits that, in later email correspondence between counsel for Wham-O and counsel  
 7 for SLB, the image of a Wham-O product included in Exhibit E was sent to counsel for SLB.  
 8 Except as specifically admitted, Wham-O denies the remaining factual allegations of  
 9 Paragraph 20.

10 21. Wham-O admits that SLB's Banzai Falls Criss Cross slide product shares many  
 11 elements common to the Wham-O Super Splash Tunnel slide product because SLB  
 12 improperly and illegally misappropriated these elements from Wham-O's product. Except  
 13 as specifically admitted, Wham-O denies the remaining factual allegations of Paragraph 21.

14 22. Wham-O admits that it receives revenues from the sales of its products. Wham-O  
 15 further admits that Cornerstone owns an equity interest in Wham-O. Except as specifically  
 16 admitted, Wham-O denies the remaining factual allegations of Paragraph 22.

HOWARD  
 RICE  
 NEMENOVSKI  
 CANADY  
 FALK  
 & LADKIN

17  
 18 **FIRST CLAIM FOR RELIEF**  
 19 **(TRADEMARK INFRINGEMENT IN VIOLATION OF**  
 20 **SECTION 43(A) FO THE LANHAM ACT)**

21 23. Wham-O repeats its responses to Paragraphs 1-22 of the Complaint as if set forth  
 22 at length herein.

23 24. Denied.

24 25. Paragraph 25 states legal conclusions to which no response is required. To the  
 25 extent a response is required, Wham-O denies the allegations of Paragraph 25.

26 26. Denied.

27 27. Denied.

28 28. Denied.

**SECOND CLAIM FOR RELIEF  
(TRADE DRESS INFRINGEMENT IN VIOLATION OF  
SECTION 43(A) FO THE LANHAM ACT)**

29. Wham-O repeats its responses to Paragraphs 1-28 of the Complaint as if set forth at length herein.

30. Wham-O admits that SLB's Banzai Falls Criss Cross slide product shares many elements common to the Wham-O Super Splash Tunnel slide product because SLB improperly and illegally misappropriated these elements from Wham-O's product, that SLB adopted and continues to use these common elements in order to cause confusion among customers as to the source or sponsor of SLB's product and that SLB is guilty of unfair competition and false designation of origin pursuant to Section 43(a) of the Lanham Act. Except as specifically admitted, Wham-O denies the remaining factual allegations of Paragraph 30.

31. Paragraph 31 states legal conclusions to which no response is required. To the extent a response is required, Wham-O denies the allegations of Paragraph 31.

32. Denied.

33. Denied.

34. Denied.

**THIRD CLAIM FOR RELIEF  
(COMMON LAW TRADEMARK INFRINGEMENT)**

35. Wham-O repeats its responses to Paragraphs 1-34 of the Complaint as if set forth at length herein.

36. Paragraph 36 states legal conclusions to which no response is required. To the extent a response is required, Wham-O denies the allegations of Paragraph 36.

37. Denied.

38. Denied.

39. Denied.

HOWARD  
RICE  
NEMECLOSKI  
CANADY  
BAIK  
B RABKIN

**FOURTH CLAIM FOR RELIEF  
(BREACH OF CONFIDENTIAL AND FIDUCIARY  
RELATIONSHIP)**

40. Wham-O repeats its responses to Paragraphs 1-39 of the Complaint as if set forth at length herein.

41. Wham-O admits that in or about October 2005, SLB entered into discussions with Charterhouse, Traxi and Wham-O in connection with the possible sale of Charterhouse's equity interest in Wham-O. Wham-O further admits that prior to the provision of confidential information to SLB, SLB executed a confidentiality agreement whereby SLB agreed to certain restrictions on SLB's use of certain information disclosed to SLB by Wham-O and/or Traxi. Wham-O further admits that Traxi was advising Wham-O in connection with the sale of Charterhouse's equity interest in Wham-O. Except as specifically admitted, Wham-O denies the remaining factual allegations of Paragraph 41.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

**FIFTH CLAIM FOR RELIEF  
(COMMON LAW UNFAIR COMPETITION)**

46. Wham-O repeats its responses to Paragraphs 1-45 of the Complaint as if set forth at length herein.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

**SIXTH CLAIM FOR RELIEF  
(DECLARATORY RELIEF)**

51. Wham-O repeats its responses to Paragraphs 1-50 of the Complaint as if set forth

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
PALK  
& STARKIN

MAY-01-06 10:48AM FROM-HOWARD.RICE,ET AL. (415)217-5910

+14152175910

T-641 P. 09

F-308

1 at length herein.

2 52. Wham-O admits that counsel for Wham-O sent a letter to SLB's counsel in late  
3 February 2006, a true and correct copy of which is attached hereto as Exhibit 1. Wham-O  
4 lacks knowledge and information sufficient to form a belief as to the remaining allegations  
5 contained in Paragraph 52 and on that basis denies them.

6 53. Wham-O admits that there is currently an actual and justifiable controversy  
7 between SLB and Wham-O as a result of SLB's infringement and dilution of Wham-O's  
8 trademarks and trade dress. Except as specifically admitted, Wham-O denies the remaining  
9 factual allegations of Paragraph 53.

10 54. Wham-O lacks knowledge and information sufficient to form a belief as to the  
11 allegations contained in Paragraph 54 and on that basis denies them.

12 55. Denied.

13  
14 **AFFIRMATIVE DEFENSES**

15 Wham-O sets forth its separate and affirmative defenses to the Complaint below,  
16 without conceding that the burden of proof rests with Wham-O with respect to these issues.  
17 Wham-O reserves the right to assert such other separate and affirmative defenses as  
18 continuing investigation and discovery may disclose.

- 19 1. SLB's claims fail to state claims upon which relief may be granted.  
20 2. SLB's claims for relief are barred, in whole or in part, by the doctrine of implied  
21 and/or express waiver.  
22 3. SLB's claims for relief are barred, in whole or in part, by the doctrine of estoppel  
23 and/or acquiescence.  
24 4. SLB's claims for relief are barred, in whole or in part, by the doctrine of unclean  
25 hands.  
26 5. SLB's claims for relief are barred, in whole or in part, by the doctrine of laches.  
27 6. SLB's claims for relief are barred, in whole or in part, by the doctrine of implied  
28 consent.

HOWARD  
RICE  
NEMERLOVSKI  
CANADY  
JALK  
& RABKIN  
Attorneys at Law

1 7. SLB has suffered no damages or economic harm as a result of the matters alleged  
2 in the Complaint.

3 8. SLB is not entitled to recover the alleged damages, if any, because they are  
4 uncertain, contingent, and speculative.

5 9. SLB has failed to limit and mitigate its damages, if in fact any damages have  
6 been or will be sustained.

7

8 **COUNTERCLAIM OF WHAM-O, INC. FOR TRADEMARK**  
9 **INFRINGEMENT, TRADEMARK DILUTION AND UNFAIR**  
10 **COMPETITION**

11 Defendant Counterclaimant Wham-O, Inc. (hereafter "Wham-O") by and for its  
12 complaint against Plaintiff and Counterdefendant SLB Toys, Inc., doing business as  
13 Toyquest (hereafter "Counterdefendant" or "SLB") alleges as follows:

14 **INTRODUCTION**

15 1. This action is brought to restrain SLB from continuing its deliberate scheme to  
16 infringe and dilute Wham-O's trademarks and trade dress associated with water slide toys.  
17 Prior to engaging in this activity, SLB had notice of Wham-O's trademark and trade dress  
18 rights, and SLB knowingly infringed these rights. Wham-O's has federal trademark  
19 registrations for color marks for the color yellow on flexible plastic water slides and the  
20 colors yellow and blue on flexible plastic water slides with bumpers. Wham-O and its  
21 predecessors have marketed water slide toys using these marks for decades since their  
22 introduction in 1961, and this line of toys is beloved (and famous) among several  
23 generations. SLB has taken several deliberate steps to infringe and dilute Wham-O's  
24 trademarks and trade dress including, without limitation, (1) selling a competing water slide  
25 toy in packaging that copies and infringes Wham-O's distinctive trade dress and infringes  
26 Wham-O's color marks by depicting a yellow slide with a blue bumper (despite the fact that  
27 the toy itself is actually orange and blue) and (2) introducing a line of several water slide  
28 toys with yellow slides and blue bumpers. SLB's marketing and sales of these products and

HOWARD  
RICE  
MEMEROVSKI  
CANADY  
FALK  
& MARRIN

1 use of this packaging is causing immediate and irreparable injury to Wham-O. Wham-O  
2 hereby seeks to enjoin SLB's infringement and dilution of its marks and trade dress and to  
3 recover the damages caused by SLB's unlawful actions.

4  
5 **THE PARTIES**

6 2. Counterclaimant Wham-O, Inc. is a corporation organized and existing under the  
7 laws of the State of Delaware and has a principal place of business at 5903 Christie Avenue,  
8 Emeryville, California 94608.

9 3. Upon information and belief, Counterdefendant SLB Toys USA, Inc., doing  
10 business as Toyquest, is a corporation organized and existing under the laws of the State of  
11 New York with its principal place of business at 2228 Barry Avenue, Los Angeles,  
12 California 90064.

13  
14 **NATURE OF THE CASE**

15 4. This is an action for infringement of a registered trademark in violation of  
16 Section 32(1) of the Lanham Act, 15 U.S.C. §1114(1); for unfair competition in violation of  
17 Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a); for dilution in violation of Section  
18 43(c) of the Lanham Act, 15 U.S.C. §1125(c).

19  
20 **JURISDICTION AND VENUE**

21 5. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C.  
22 §1121 and 28 U.S.C. §§1331 and 1338. Venue is proper within this district under the  
23 provisions of 28 U.S.C. §1391(b) and (c).

24  
25 **WHAM-O'S WATER SLIDE MARKS AND TRADE DRESS**

26 6. For many years and long prior to SLB's acts complained of herein, Wham-O and  
27 its predecessors in interest have continuously engaged in the business of manufacturing and  
28 marketing in interstate commerce toys called "water slides" sold under the trademark SLIP

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
PAUK  
& RABKIN

MAY-01-06 10:48AM FROM-HOWARD.RICE.ET AL. (415) 217-5910

#14152175910

T-641 P.12/52 F-308

1 'N SLIDE. The water slide portion of Wham-O's SLIP 'N SLIDE water slide toys is  
 2 colored yellow, and that color has long served to identify and distinguish Wham-O's water  
 3 slides from those of others. The bumper portion of Wham-O's water slide toys is typically  
 4 colored blue, and that color has also served to identify and distinguish Wham-O's water  
 5 slides from those of other manufacturers.

6 7. A color mark for a water slide of the color yellow was duly registered as a  
 7 trademark in the United States Patent and Trademark Office on March 10, 1987 and  
 8 Wham-O is the owner of Reg. No. 1,432,069 for that mark. A copy of a printout from the  
 9 USPTO database reflecting this registration is attached as Exhibit 2. Registration No.  
 10 1,432,069 was assigned to Wham-O in 1997. As a result of lengthy use and compliance  
 11 with statutory requirements, this mark has attained incontestable status. That mark is  
 12 referred to herein as the YELLOW WATER SLIDE mark.

13 8. A color mark for a water slide of the color yellow with the color blue on bumpers  
 14 at the end of the slide was duly registered as a trademark in the United States Patent and  
 15 Trademark Office on February 8, 2005 and Wham-O is the owner of Reg. No. 2,924,744 for  
 16 that mark. A copy of a printout from the USPTO database reflecting this registration is  
 17 attached as Exhibit 3. That mark is referred to herein as the YELLOW/BLUE WATER  
 18 SLIDE mark.

19 9. The YELLOW WATER SLIDE mark and the YELLOW/BLUE WATER SLIDE  
 20 mark are referred to herein collectively as the WHAM-O COLOR MARKS.

21 10. The SLIP 'N SLIDE yellow water slide toy was first introduced at least as early  
 22 as 1961, was promoted and sold for decades by Wham-O's predecessors, and the goodwill  
 23 associated with such promotion and sales was duly assigned to Wham-O with the  
 24 registrations. Wham-O first began using the product in May 1998, and first used the product  
 25 in interstate commerce in December 1998.

26 11. Upon its acquisition of the marks and associated goodwill, Wham-O engaged in a  
 27 substantial investment to completely redesign and test the product. This re-design included,  
 28 among other things, the addition of a blue scalloped bumper to one end of the SLIP 'N

HOWARD  
 RICE  
 NEMELOVSKI  
 CANADY  
 FALK  
 & KAPKIN



1 SLIDE yellow water slide toy product. The bumper was designed to prevent injury by safely  
 2 stopping the forward movement of a child sliding across the surface of the toy. As a result  
 3 of its substantial investment in re-design and testing of the toy, Wham-O obtained the  
 4 approval of the Consumer Products Safety Commission for its SLIP 'N SLIDE yellow water  
 5 slide toy.

6 12. Wham-O has widely promoted the redesigned SLIP 'N SLIDE yellow water slide  
 7 toy since December 1998, including significant expenditures on marketing efforts, including  
 8 television advertising. The product has been sold by all of the nation's largest discount  
 9 retailers, including, among others, Wal-Mart® and Target®. It is regularly one of the top  
 10 five ranked toys according to The MPD Group, Inc., the leading toy monitoring and market  
 11 research firm. Over more than four decades of use, and in the last five years of promotion  
 12 and sales by Wham-O, the WHAM-O COLOR MARKS have acquired strong commercial  
 13 significance. Indeed, Wham-O's market research reveals unanimous unaided awareness of  
 14 the yellow water slide as a SLIP 'N SLIDE toy.

HOWARD  
 RICE  
 NEMETOVSKI  
 CANADY  
 PAIK  
 B.R. ADKIN

15 13. In addition to the WHAM-O COLOR MARKS, Wham-O has also developed and  
 16 established distinctive trade dress in the design and configuration of its water slide toy  
 17 packaging. Examples of this trade dress are attached as Exhibit 4. As demonstrated in  
 18 Exhibit 4, Wham-O's trade dress makes prominent use of color pictures of water slide toys  
 19 bearing the WHAM-O COLOR MARKS. The trade dress also contains numerous common  
 20 graphic design elements. Taken together, these elements form the WHAM-O WATER  
 21 SLIDE TRADE DRESS. This trade dress is distinctive, it has become well and favorably  
 22 known throughout the United States and it has achieved secondary meaning. The purchasing  
 23 public has come to the WHAM-O WATER SLIDE TRADE DRESS with water slide toys  
 24 from Wham-O.

25 14. In sum, Wham-O's toy water slides are well and favorably known by the  
 26 purchasing public under the WHAM-O COLOR MARKS and the WHAM-O WATER  
 27 SLIDE TRADE DRESS; indeed, the SLIP 'N SLIDE YELLOW WATER SLIDE toy has  
 28 become an iconic child's toy, a symbol of summer fun in hot weather, and is famous to

1 children and adults (particularly those who played with it in their childhood) alike.

2 15. Wham-O has provided notice that the WHAM-O COLOR MARKS are federally-  
3 registered by displaying the letter R enclosed within a circle, thus ~~©~~ In addition, on  
4 information and belief, SLB had actual notice that the WHAM-O COLOR MARKS were  
5 federally-registered.

### 6 7 COUNTERDEFENDANT'S INFRINGING ACTIVITIES

8 16. SLB manufactures and markets rival water slide toys. In March 2005, Wham-O  
9 learned that SLB had manufactured and sold a water slide toy in packaging that infringed  
10 both the WHAM-O COLOR MARKS and the WHAM-O WATER SLIDE TRADE DRESS.  
11 SLB's packaging depicted a yellow water slide with a blue bumper, thereby infringing the  
12 WHAM-O COLOR MARKS and the WHAM-O WATER SLIDE TRADE DRESS. This  
13 packaging also misled customers because the actual water slide inside was orange rather  
14 than yellow. A color copy of this packaging from 2005 is attached as Exhibit 5.

15 17. Shortly after learning of this infringement, Wham-O notified SLB and demanded  
16 that SLB cease and desist. A copy of Wham-O's letter to SLB is attached as Exhibit 6.

17 18. In response to this letter, counsel for SLB communicated with counsel for Wham-  
18 O. During these communications, counsel for SLB represented that SLB had sold all of its  
19 inventory in the infringing packaging and that it would not use the infringing packaging in  
20 the future.

21 19. In February 2006, Wham-O learned that SLB is marketing and selling water slide  
22 toys in packaging identical to that in Exhibit 5 (except that the UPC code information  
23 contained 2006 date coding information).

24 20. Additionally, in February 2006, Wham-O learned that SLB is marketing and  
25 selling new water slide toy products that infringe and dilute the WHAM-O COLOR  
26 MARKS and infringe the WHAM-O WATER SLIDE TRADE DRESS. The water slide  
27 toys that Wham-O is currently aware of that infringe and dilute Wham-O's trademarks  
28 include the "Banzai Falls Speed Slide," the "Banzai Falls In-Ground Pool Slide," the

1 "Banzai Falls Mega Racer" and the "Banzai Falls Criss Cross." Color copies of the  
2 packaging of these products are attached as Exhibit 7.

3 21. After learning of SLB's renewed and expanded infringement, Wham-O sent a  
4 new cease and desist letter. A copy of this letter is attached as Exhibit 1. SLB has refused to  
5 stop its infringing actions.

6 22. SLB's use of the colors yellow and blue in connection with the manufacture,  
7 advertisement, distribution and sale of water slides damages the value of Wham-O's rights in  
8 the WHAM-O COLOR MARKS and is likely to injure the business reputation of Wham-O.

9 23. Wham-O is informed and believes that SLB is knowledgeable regarding the fame  
10 and strength of the WHAM-O COLOR MARKS among the consumers of water slide toys.

11 24. Wham-O is informed and believes that SLB has used the color yellow on the  
12 slide portion of its slides and the color blue on the bumper portions with the intent to benefit  
13 from Wham-O's goodwill and reputation in the water slide toy market, to deceive the public  
14 as to the source or origin of SLB's goods, and to profit from the demand created for goods  
15 identified by the WHAM-O COLOR MARKS.

16 25. Wham-O is informed and believes that SLB has also used numerous elements of  
17 the WHAM-O WATER SLIDE TRADE DRESS with the intent to benefit from Wham-O's  
18 goodwill and reputation in the water slide toy market, to deceive the public as to the source  
19 or origin of SLB's goods, and to profit from the demand created for goods identified by the  
20 WHAM-O WATER SLIDE TRADE DRESS.

21 26. As a direct result of SLB's infringing activities, Wham-O will be irreparably  
22 injured by the confusion likely to occur, by the damage to the value of Wham-O's rights in  
23 the WHAM-O COLOR MARKS and the WHAM-O WATER SLIDE TRADE DRESS, and  
24 by the likely injury to the business reputation of Wham-O. SLB's continued use of the  
25 colors yellow and blue on water slides and infringing packaging will materially and  
26 negatively affect the business, reputation and goodwill of Wham-O.

27 27. In sum, SLB's marketing, advertising, sale and promoting the sale of its water  
28 slides colored yellow and blue and in its infringing packaging will create a likelihood that a

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
PAUK  
& RABKIN

1 false and unfair association will be made between the water slides of SLB and those of  
 2 Wham-O because the purchasing public is likely to believe that SLB's water slides are  
 3 connected with, produced or sponsored by Wham-O.

4  
 5  
 6 FIRST CLAIM FOR RELIEF

7 (Infringement of Registered Mark)

8 (15 U.S.C. §1114)

9 28. The allegations of paragraphs 1 through 27 are incorporated herein by reference.

10 29. Wham-O's registered WHAM-O COLOR MARKS have acquired secondary  
 11 meaning. Purchasers associate the WHAM-O COLOR MARKS only with WHAM-O's  
 12 water slide toy products. This is a result of extensive advertising and sales throughout the  
 13 United States of goods bearing the WHAM-O COLOR MARKS.

14 30. SLB, by using the colors yellow and/or yellow and blue in connection with the  
 15 advertisement, distribution and sale of competing water slides, has used and intends to  
 16 continue to use, in commerce an imitation of the WHAM-O COLOR MARKS in connection  
 17 with the advertisement, distribution and sale of competing water slides in a manner that is  
 18 likely to cause confusion, mistake or deception.

19 31. By committing the acts alleged herein, SLB has intentionally, knowingly and  
 20 willfully infringed the registered WHAM-O COLOR MARKS, and SLB continues to do so.

21 32. Because of SLB's infringement, Wham-O has been irreparably harmed. Wham-  
 22 O will continue to suffer irreparable harm unless SLB is preliminarily and permanently  
 23 restrained from infringing the WHAM-O COLOR MARKS.

24 33. Wham-O is entitled to recover all profits heretofore realized by SLB during its  
 25 infringement of the WHAM-O COLOR MARKS, as well as Wham-O's costs in this action  
 26 pursuant to 15 U.S.C. Section 1117(a).

27 34. SLB's actions have been willful, malicious and fraudulent with knowledge of the  
 28 likelihood of confusion and deception and with intent to confuse and deceive, as alleged

HOWARD  
 RICE  
 NEMERKOVSKI  
 CANADY  
 FALK  
 & RABKIN  
 Attorneys at Law

1 above. Therefore, Wham-O is entitled to recover three times the amount of SLB's profits  
2 plus Wham-O's reasonable attorneys' fees pursuant to 15 U.S.C. Section 1117(b).

3  
4  
5 SECOND CLAIM FOR RELIEF

6 (Unfair Competition and False Designation of Origin)

7 (15 U.S.C. §1125(a))

8 35. The allegations of paragraphs 1 through 34 are incorporated herein by reference.

9 36. As stated above, Wham-O, for many years and long prior to the acts of SLB  
10 herein complained of, has marketed its yellow water slide with a blue bumper configuration  
11 at the downstream end, the bumper configuration being inflatable to present an end region  
12 and having two side portions extending partially upstream. The yellow waterslide with the  
13 blue end portion has been and continues to be pictured on Wham-O's package, on the front  
14 and in smaller panels on all four sides of the package. Wham-O has promoted the color  
15 yellow, with the blue end portion, by conspicuously presenting the water slide extending  
16 diagonally across the top of the package and showing a boy riding toward the end, with his  
17 arms outstretched. Wham-O's yellow water slide and its yellow water slide with a blue end  
18 portion have come to be well and favorably known by the purchasing public. Additionally,  
19 Wham-O's distinctive WATER SLIDE TRADE DRESS has come to be well and favorably  
20 known by the purchasing public and has come to indicate to the purchasing public that  
21 Wham-O is the source of goods packaged in this trade dress.

22 37. SLB has copied Wham-O's color yellow for a water slide and the blue end, and  
23 SLB has copied the WHAM-O WATER SLIDE TRADE DRESS. As a result, SLB's  
24 marketing of its water slide is likely to deceive and cause confusion to the purchasing public  
25 and to induce them to believe that SLB or its water slides are in some manner related to,  
26 approved by or sponsored by Wham-O. SLB has intentionally engaged in conduct that  
27 constitutes a false designation of origin, a false or misleading description of fact, and a false  
28 or misleading representation of fact tending wrongfully and falsely to describe or represent a

HOWARD  
RICE  
NEMENOVSKI  
CANADY  
TALK  
& RABKIN

MAY-01-06 10:50AM FROM-HOWARD, RICE, ET AL. (415) 217-5910

+14152175910

T-641 P. 18/52

F-308

1 connection or affiliation between Wham-O's goods and SLB's goods in violation of 15  
 2 U.S.C. Section 1125(a). Wham-O believes that customers are likely to be confused by  
 3 SLB's use of such false designations of origin, and false descriptions or representations  
 4 regarding Wham-O's goods and SLB's goods.

5 38. By committing the acts alleged herein, SLB has intentionally, knowingly and  
 6 willfully infringed the Wham-O's marks and trade dress, and SLB continues to do so.

7 39. Because of SLB's infringement, Wham-O has been irreparably harmed. Wham-  
 8 O will continue to suffer irreparable harm unless SLB is preliminarily and permanently  
 9 restrained from infringing the WHAM-O COLOR MARKS and the WHAM-O WATER  
 10 SLIDE TRADE DRESS.

11 40. Wham-O is entitled to recover all profits heretofore realized by SLB during its  
 12 infringement of the WHAM-O COLOR MARKS and the WHAM-O WATER SLIDE  
 13 TRADE DRESS, as well as Wham-O's costs in this action pursuant to 15 U.S.C. Section  
 14 1117(a).

15 41. SLB's actions have been willful, malicious and fraudulent with knowledge of the  
 16 likelihood of confusion and deception and with intent to confuse and deceive, as alleged  
 17 above. Therefore, Wham-O is entitled to recover three times the amount of SLB's profits  
 18 plus Wham-O's reasonable attorneys' fees pursuant to 15 U.S.C. Section 1117(b).

19  
 20 THIRD CLAIM FOR RELIEF

21 (Trademark Dilution)

22 (15 U.S.C. §1125(c))

23 42. The allegations of paragraphs 1 through 41 are incorporated herein by reference.

24 43. Given their more than four decades of use and the enormous popularity of the  
 25 toy, the WHAM-O COLOR MARKS are famous among children and adults alike. The  
 26 colors serve no function in a water slide toy.

27 44. SLB has made unauthorized use of the marks in their products, and continue to  
 28 do so despite demand to cease doing so.

HOWARD  
 RICE  
 NEMENOVSKI  
 CANADY  
 FALK  
 & RABKIN

MAY-01-06 10:50AM FROM-HOWARD, RICE, ET AL. (415) 217-5910

#14192175910

T-641 P. 19/52

F-308

1 45. Such unauthorized use of the marks has and will actually dilute the  
2 distinctiveness of the WHAM-O COLOR MARKS.

3 46. By reason of these acts, Wham-O has suffered and is suffering actual, permanent  
4 and irreparable injury, the extent of which is presently not known, and Wham-O will suffer  
5 continuing damage and irreparable injury unless SLB is preliminarily and permanently  
6 enjoined from the use of the marks.

7  
8 **PRAYER FOR RELIEF**

9 WHEREFORE, Wham-O prays that this Court entered judgment in its favor on each  
10 and every claim for relief set forth above and award it relief including, but not limited to, the  
11 following.

12 1. That SLB be adjudged to have willfully and deliberately advertised, distributed  
13 and sold goods infringing the registered WHAM-O COLOR MARKS, in violation of federal  
14 law;

15 2. That all water slides, documents, advertising, packaging and any other materials  
16 infringing the WHAM-O COLOR MARKS in the possession, custody or control of SLB be  
17 seized;

18 3. That SLB be adjudged to have willfully and deliberately infringed the registered  
19 WHAM-O COLOR MARKS, in violation of federal law;

20 4. That SLB be adjudged to have competed unfairly with Wham-O by its infringing  
21 use of the colors yellow and blue and/or by its infringing use of Wham-O's trade dress on  
22 competing water slides, in violation of federal law;

23 5. That SLB and its officers, agents, owners, employees, confederates, attorneys and  
24 any persons in active concert or participation with them be temporarily, preliminarily and  
25 permanently enjoined and restrained from:

26 a. Using the colors yellow and/or yellow and blue on water slide products, or  
27 any other mark including any reproduction, copy or colorable imitation of said mark, in  
28 connection with the advertising, manufacturing, offering for sale, distribution or sale of

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
BALK  
& RABKIN

1 water slides or any other goods that are not authorized by Wham-O;

2 b. Using the colors yellow and/or yellow and blue on water slide products, or  
3 any other mark including any reproduction, copy or colorable imitation of said mark in any  
4 manner likely to cause others to believe that any of SLB's goods are made by, distributed by,  
5 associated or connected with Wham-O's goods;

6 c. Using as packaging for any water slide toy product packaging that is  
7 confusingly similar to the WHAM-O WATER SLIDE TRADE DRESS;

8 d. Committing any other acts calculated to cause actual or potential purchasers  
9 to believe that Wham-O is the source or sponsor of SLB's goods; and

10 e. Assisting, aiding or abetting any supplier, distributor or any other person or  
11 business entity in engaging in or performing any of the activities referred to in the above  
12 subparagraphs a through d;

13 6. That SLB be ordered to deliver to Wham-O all materials that infringe and/or  
14 dilute Wham-O's marks and/or trade dress;

15 7. That SLB be ordered to advise Wham-O of the identity of all customers,  
16 suppliers, distributors and manufacturers of SLB's water slides using the color yellow or  
17 yellow and blue;

18 8. That SLB be ordered to advise all customers, suppliers, distributors and  
19 manufacturers that SLB's water slides using the color yellow and/or the colors yellow and  
20 blue were not manufactured, licensed, authorized or distributed by Wham-O, and that any  
21 such water slides sold or distributed by SLB may be returned to SLB in any condition for a  
22 full refund, and that SLB shall make such refund and maintain all records relating to such  
23 recall notices and refunds;

24 9. For an award of all profits heretofore realized by SLB during its use of the  
25 infringing marks pursuant to 15 U.S.C. Section 1117;

26 10. For an award of three times the amount of SLB's profits and Wham-O's  
27 reasonable attorneys' fees pursuant to 15 U.S.C. Section 1117(b);

28 11. For an award of compensatory damages;

HOWARD  
RICE  
NEMENOVSKI  
CANADY  
FALK  
& RABKIN



MAY-01-06 10:50AM FROM-HOWARD.RICE,ET AL. (415)217-5910 +14152175910 T-641 P.21/52 F-308

- 1 12. For an award of punitive damages;
- 2 13. For an award of costs; and
- 3 14. For all other relief the Court deems just and proper.

5 DATED: May 1, 2006.

6 Respectfully,

7 JEFFREY E. FAUCETTE  
 8 SARAH J. GIVAN  
 9 HOWARD RICE NEMEROVSKI CANADY  
 10 FALK & RABKIN  
 11 A Professional Corporation

12 By: \_\_\_\_\_

13 JEFFREY E. FAUCETTE

14 Attorneys for Defendant and Counterclaimant  
15 WHAM-O, INC.

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

HOWARD RICE  
 NEMEROVSKI  
 CANADY  
 FALK  
 & RABKIN

MAY-01-06 10:51AM FROM-HOWARD.RICE.ET AL. (415) 217-5910 +14152175910 T-641 P.22/52 F-300

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


JURY TRIAL DEMANDED

Pursuant to Rule 38(a) of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury of all issues properly triable of right by a jury.

DATED: May 1, 2006.

Respectfully,

JEFFREY E. FAUCETTE  
SARAH J. GIVAN  
HOWARD RICE NEMEROVSKI CANADY  
FALK & RABKIN  
A Professional Corporation

By:   
JEFFREY E. FAUCETTE

Attorneys for Defendant and Counterclaimant  
WHAM-O, INC.

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
FALK  
& RABKIN

# EXHIBIT C

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

Priority \_\_\_\_\_  
Send  \_\_\_\_\_  
Enter \_\_\_\_\_  
Closed \_\_\_\_\_  
JS-5/JS-6 \_\_\_\_\_  
JS-2/JS-3 \_\_\_\_\_  
Scan Only \_\_\_\_\_

FILED  
CLERK U.S. DISTRICT COURT  
OCT 11 2008  
CENTRAL DISTRICT OF CALIFORNIA  
BY [Signature] DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

SLB TOYS USA, INC., a New York corporation  
Plaintiff / Counter-Defendant,  
v.  
WHAM-O, INC., a Delaware corporation  
Defendant / Counter-Claimant.

No: 2:06-CV-01382 RSWL (CWx)

VERDICT FORM WITH  
SPECIAL  
INTERROGATORIES

The Honorable Ronald S.W. Lew

///  
///  
///  
///  
///  
///  
///  
///

DOCKETED ON CM  
OCT 11 2008  
BY [Signature] 022  
435

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

WE, THE JURY, FIND:

CLAIM 1--INFRINGEMENT OF YELLOW WATER SLIDE

TRADEMARK

On the claim of Wham-O against SLB for infringement of the trademark (registered as U.S. Trademark Reg. No. 1,432,069 or unregistered) for the color YELLOW on the sliding surface of water slide toys, we, the jury, find in favor of (check one):

Wham-O:

SLB:

If you found for Wham-O on claim 1, do you find that SLB infringed the trademark willfully?

Yes:

No:

CLAIM 2--INFRINGEMENT OF YELLOW/BLUE WATER SLIDE

TRADEMARK

On the claim of Wham-O against SLB for infringement of the trademark registered in the United States (U.S. Trademark Reg. No. 2,924,744), we, the jury, find in favor of (check one):

Wham-O:

SLB:

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

If you found in favor of Wham-O on claim 2, do you find that SLB infringed the trademark willfully?

Yes: \_\_\_

No: \_\_\_

CLAIM 3--FALSE ADVERTISING

On the claim of Wham-O against SLB for unfair competition through false advertising, we, the jury, find in favor of (check one):

Wham-O:

SLB: \_\_\_

If you found in favor of Wham-O on claim 3, do you find that SLB intended to deceive or otherwise acted in bad faith?

Yes:

No: \_\_\_

CLAIM 4--DILUTION

On the claim of Wham-O against SLB for dilution of the trademark (registered or unregistered) for the color YELLOW on the sliding surface of water slide toys, we, the jury, find in favor of (check one):

Wham-O:

SLB: \_\_\_

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

If you found in favor of Wham-O on claim 4, do you find that SLB diluted the YELLOW trademark willfully?

Yes:

No:

DAMAGES--ALL CLAIMS

Note: Complete the following paragraph only if you find in favor of the Wham-O on at least one of the claims.

We, the jury, assess damages for the Wham-O in the sum of \$ 3.60 M

\$ 3,600,000

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

ADVISORY VERDICT

The Court requests advice from the jury with regard to the following matters.

SLB'S CLAIM FOR CANCELLATION

Do you find that SLB has established by clear and convincing evidence that Wham-O abandoned its YELLOW WATER SLIDE trademark registration (U.S. Trademark Reg. No. 1,432,069)?

Yes: \_\_\_\_\_  
No:

WHAM-O'S REQUEST FOR ENHANCED DAMAGES

Note: Complete the following paragraphs only if you find in favor of Wham-O and find willfulness or bad faith on at least one of the claims.

Do you find that enhanced damages should be awarded against SLB in order to fully compensate Wham-O and/or to make SLB's infringement unprofitable?

Yes:   
No: \_\_\_\_\_



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

If your answer was Yes, please recommend an amount of enhanced damages to the Court in a sum no more than three times the damages you have already assessed. The enhanced amount may not be so great as to constitute a penalty.

We, the jury, recommend enhanced damages for Wham-O in the sum of \$ 2.4M  
\$ 2,400,000

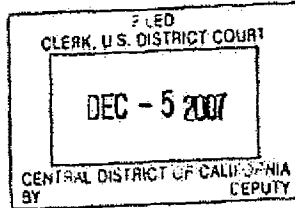
PLEASE SIGN AND DATE THIS FORM AND RETURN IT TO THE COURT

Dated: 11 Oct 07

Signed: Name Redacted by Court for service  
(by Jury Foreperson) on parties

# EXHIBIT D

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



Priority  
Send   
Enter   
Closed   
JS-5/JS-6   
JS-2/JS-3   
Scan Only

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

SLB TOYS USA, INC.,  
Plaintiff,  
v.  
WHAM-O INC., et al.  
Defendant.

CV 06-1382 RSWL (CWx)

**JUDGMENT**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED

1. SLB'S CLAIMS FOR DECLARATORY RELIEF

Plaintiff SLB Toys USA, Inc.'s claims for declaratory relief are hereby dismissed with prejudice; Defendant Wham-O's United States Trademark Registration No. 1,432,069 is good and valid in law.

1 2. WHAM-O'S COUNTERCLAIMS

2 Counter-claimant Wham-O is hereby awarded final  
3 judgment on its counterclaims against SLB in the sum of  
4 \$6,000,000 (six million dollars), plus its costs of suit as  
5 the prevailing party in this action.

6 3. PERMANENT INJUNCTION

7 IT IS ORDERED THAT SLB and each of its officers,  
8 agents, servants and employees, and all those persons in  
9 active concert or participation with them are hereby forever  
10 enjoined from using the color yellow on the sliding surface  
11 of water slide toys, or packaging or advertising depicting  
12 the same, or any mark similar thereto or likely to cause  
13 confusion therewith, in the sale, offering for sale,  
14 distribution or advertising of water slide toys at any  
15 locality in the United States.

16

17

RONALD S.W. LEW

18

\_\_\_\_\_  
RONALD S.W. LEW  
Senior U.S. District Judge

19

DATED: December 4, 2007

20

21

22

23

24

25

26

# EXHIBIT E

1 JOSHUA R. FURMAN (Bar No. 225461)  
Joshua@furman.com  
2 9663 Santa Monica Boulevard, No. 721  
Beverly Hills, California 90210  
3 Telephone: (310) 809-3016  
Facsimile: (310) 861-0449  
4

5 Attorneys for Plaintiff and Nominal Appellant SLB  
TOYS USA, INC.

6 JEFFER, MANGELS, BUTLER & MARMARO LLP  
ROD S. BERMAN (Bar No. 105444)  
7 RBerman@jmbm.com  
MATTHEW D. HINKS (Bar No. 200750)  
8 MHinks@jmbm.com  
1900 Avenue of the Stars, Seventh Floor  
9 Los Angeles, California 90067-4308  
Telephone: (310) 203-8080  
10 Facsimile: (310) 203-0567

11 Attorneys for Appellant and Real Party In Interest AW  
COMPUTER HOLDINGS LLC  
12

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15

16 SLB TOYS USA, INC., a New York  
corporation,

17  
18 Plaintiff and Nominal  
Appellant,

19 - and -

20 AW COMPUTER HOLDINGS LLC, a  
California limited liability company,

21  
22 Appellant and Real Party In  
Interest,

23 v.

24 WHAM-O, INC., a Delaware  
corporation, and DOES 1-10, inclusive,

25  
26 Defendants and Appellees.  
27  
28

CASE NO. CV 06-1382 RSWL (CWx)

**NOTICE OF APPEAL TO THE  
UNITED STATES COURT OF  
APPEALS FOR THE NINTH  
CIRCUIT**


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

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL:  
PLEASE TAKE NOTICE THAT SLB TOYS USA, INC. ("SLB"), the Plaintiff and Nominal Appellant herein, and AW COMPUTER HOLDINGS, LLC ("AW"), the Appellant and Real Party In Interest herein, appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment of the District Court, filed in this case on December 5, 2007, and entered on December 9, 2007 (a true and correct copy of which is attached hereto as Exhibit A) together with all interlocutory orders, rulings and other decisions that give rise to that judgment, including but not limited to: the District Court's Order denying SLB's Motion for Sanctions and Motion for Summary Judgment, or in the alternative, Partial Summary Judgment filed on August 8, 2007 and entered on August 10, 2007; the District Court's Orders on SLB's Motions in Limine to Preclude Introduction of Expert Testimony of Francesca Benevento, and to Preclude Evidence and Argument Regarding the "Soak 'N Splash" Name, and Wham-O's Motions in Limine to Exclude Evidence and Argument Regarding Alleged Copying of SLB Product Design by Wham-O, to Exclude Evidence of Discovery Disputes, and to Exclude Evidence and Argument Regarding SLB's Affirmative Defenses, filed on October 1, 2007 and entered on October 2, 2007; the District Court's Order denying SLB's Motion for Judgment as a Matter of Law reflected in the minutes filed on October 9, 2007 and entered on October 11, 2007; the District Court's Order denying SLB's renewed Motion for Judgment as a Matter of Law reflected in the minutes filed and entered on October 11, 2007; the District Court's Order Granting Permanent Injunction filed on December 5, 2007 and entered on December 9, 2007; the District Court's Order denying SLB's Motions for Judgment as a Matter of Law, for New Trial, and to Amend Judgment filed and entered on February 26, 2008; the District Court's Order granting Wham-O's Motion for Attorney Fees filed and entered on February 26, 2008; and all evidentiary rulings of the District Court.

1 Pursuant to Ninth Circuit Rule No. 3-2 and FRAP 12(b), SLB's and AW's  
2 Representation Statement is attached hereto.

3 AW is the owner of SLB's appellate rights in connection with the above-  
4 captioned matter as a result of a General Assignment and Asset Purchase Agreement.  
5 SLB and AW will promptly bring a Motion for Substitution of Parties pursuant to  
6 Federal Rule of Appellate Procedure 43.

7  
8 DATED: March 5, 2008 JOSHUA R. FURMAN

9  
10 By:   
11 JOSHUA R. FURMAN  
12 Attorney for Plaintiff and Nominal Appellant SLB  
13 TOYS USA, INC.

14 DATED: March 5, 2008 JEFFER, MANGELS, BUTLER & MARMARO LLP  
15 ROD S. BERMAN  
16 MATTHEW D. HINKS

17 By:   
18 MATTHEW D. HINKS  
19 Attorneys for Appellant and Real Party In Interest  
20 AW COMPUTER HOLDINGS LLC  
21  
22  
23  
24  
25  
26  
27  
28

JMBM  
Jeffer Mangels  
Butler & Marmaro LLP



EXHIBIT "A"

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

FILED  
CLERK, U.S. DISTRICT COURT  
DEC - 5 2007  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

Priority  
Send   
Enter   
Closed   
JS-5 JS-6   
JS-2/JS-3   
Scan Only

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SLB TOYS USA, INC.,  
Plaintiff,  
v.  
WHAM-O INC., et al.  
Defendant.

CV 06-1382 RSWL (CWx)

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED

1. SLB'S CLAIMS FOR DECLARATORY RELIEF

Plaintiff SLB Toys USA, Inc.'s claims for declaratory relief are hereby dismissed with prejudice; Defendant Wham-O's United States Trademark Registration No. 1,432,069 is good and valid in law.

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

2. WHAM-O'S COUNTERCLAIMS

Counter-claimant Wham-O is hereby awarded final judgment on its counterclaims against SLB in the sum of \$6,000,000 (six million dollars), plus its costs of suit as the prevailing party in this action.

3. PERMANENT INJUNCTION

IT IS ORDERED THAT SLB and each of its officers, agents, servants and employees, and all those persons in active concert or participation with them are hereby forever enjoined from using the color yellow on the sliding surface of water slide toys, or packaging or advertising depicting the same, or any mark similar thereto or likely to cause confusion therewith, in the sale, offering for sale, distribution or advertising of water slide toys at any locality in the United States.

RONALD S.W. LEW  
\_\_\_\_\_  
RONALD S.W. LEW  
Senior U.S. District Judge

DATED: December 4, 2007

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES**

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7<sup>th</sup> Floor, Los Angeles, California 90067.

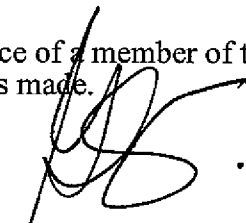
On March 6, 2008 I served the document(s) described as **NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

Annette L. Hurst, Esq. <b>HELLER EHRMAN LLP</b> 333 Bush Street San Francisco, California 94014	John C. Ulin, Esq. Peter E. Gratzinger <b>HELLER EHRMAN LLP</b> 333 South Hope Street, 39th Floor Los Angeles, California 90071
--	---

- (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (BY FAX) At \_\_\_\_\_, I transmitted, pursuant to Rule 2.306, the above-described document by facsimile machine (which complied with Rule 2003(3)), to the above-listed fax number(s). The transmission originated from facsimile phone number (310) 203-0567 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.
- (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
- (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on March 6, 2008 at Los Angeles, California.

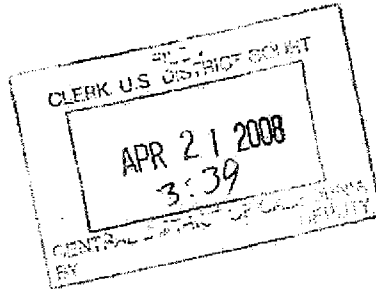
- (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

  
\_\_\_\_\_  
GWENDOLYN SANTINI

# EXHIBIT F

COPY

1 ANNETTE L. HURST (Bar No. 148738)  
 Annette.Hurst@hellerehrman.com  
 2 ELISABETH R. BROWN (Bar No. 234879)  
 Elisabeth.Brown@hellerehrman.com  
 3 HELLER EHRMAN LLP  
 4 333 Bush Street  
 San Francisco, CA 94104  
 5 Telephone: +1 (415) 772-6000  
 Facsimile: +1 (415) 772-6268  
 6



7 JOHN C. ULIN (Bar No. 165524)  
 John.Ulin@hellerehrman.com  
 8 ANNA R. ZUSMAN (Bar No. 232753)  
 Anna.Zusman@hellerehrman.com  
 9 333 South Hope Street, 39th Floor  
 Los Angeles, CA 90071  
 10 Telephone: +1 (213) 689-0200  
 Facsimile: +1 (213) 614-1868  
 11

12 Attorneys for Plaintiff  
 WHAM-O, INC.

13 UNITED STATES DISTRICT COURT  
 14 CENTRAL DISTRICT OF CALIFORNIA

15 WHAM-O, INC., a Delaware corporation,  
 16  
 Plaintiff,  
 17

18 v.

19 MANLEY TOYS, LTD., a Hong Kong corporation,  
 20 IZZY HOLDINGS, LLC, a California limited  
 liability company, AQUAWOOD, LLC, a California  
 21 limited liability company, A.W. COMPUTER  
 HOLDINGS, LLC, a California limited liability  
 22 company, BRIAN DUBINSKY, SAMSON CHAN,  
 LISA LIU, WAL-MART STORES, INC., a  
 23 Delaware corporation, TARGET CORP., a  
 Minnesota corporation, TOYS 'R' US, INC., a  
 24 Delaware corporation, and KMART  
 CORPORATION, a Michigan corporation,  
 25  
 Defendants.  
 26

Case No.: CV08-01281 RSWL (CWx)

**SECOND AMENDED AND  
 SUPPLEMENTAL COMPLAINT FOR  
 JUDGMENT DEBTOR'S INTEREST  
 IN DEBT TO SATISFY MONEY  
 JUDGMENT, TRADEMARK  
 INFRINGEMENT, FALSE  
 DESIGNATION OF ORIGIN,  
 TRADEMARK DILUTION AND  
 UNFAIR COMPETITION**

**DEMAND FOR JURY TRIAL**

1 Plaintiff Wham-O, Inc. (“WHAM-O”) by and for its complaint against  
2 Defendants Manley Toys, Ltd. (“Manley” or “Manley Toys”), Aquawood, LLC,  
3 A.W. Computer Holdings, LLC, Izzy Holdings, LLC, Brian Dubinsky, Samson  
4 Chan, Lisa Liu, WAL-MART STORES, INC. a Delaware corporation (“Wal-Mart”),  
5 TARGET CORPORATION, a Minnesota Corporation (“Target”), TOYS ‘R’ US,  
6 INC., a Delaware corporation (“TRU”), and KMART CORPORATION, a Michigan  
7 corporation (“Kmart”) alleges as follows:

### 8 INTRODUCTION

9 1. On October 11, 2007 a jury in the District Court for the Central District of  
10 California awarded WHAM-O a \$6 million verdict against SLB Toys USA, Inc.  
11 doing business as Toyquest (“SLB”) for willful trademark infringement, willful  
12 trademark dilution, and willful false advertising in connection with SLB’s  
13 unauthorized use of WHAM-O’s registered trademark in the color yellow for water  
14 slide toys, Reg. No. 1,432,069 (“YELLOW WATER SLIDE Mark”). Following the  
15 verdict, but before the Court entered judgment, SLB initiated an elaborate scheme  
16 designed to evade judgment and deprive WHAM-O of its award, purporting to divest  
17 itself of all of its assets and liabilities through an unsupervised, unregulated  
18 Assignment for Benefit of Creditors under state law. On or about December 9, 2007,  
19 this Court entered its judgment and permanent injunction against SLB, restraining  
20 SLB and all those acting in concert with it from further infringement of WHAM-O’s  
21 YELLOW WATER SLIDE Mark. WHAM-O thereafter served that judgment and  
22 permanent injunction upon Manley Toys, Chan, Liu and Dubinsky personally.  
23 Although Dubinsky initially evaded service of the judgment and permanent  
24 injunction, WHAM-O is informed and believes and thereupon alleges that, even  
25 during the period of evasion, Dubinsky had actual knowledge of the terms thereof, as  
26 retailers reported to WHAM-O that Dubinsky falsely assured them that they need not  
27 comply with that permanent injunction.

28 2. In fact, Aquawood, Dubinsky, Chan, Liu and Manley have flagrantly

1 disregarded the terms of this Court's injunction by continuing to market, sell and  
2 distribute to retailers unauthorized slides bearing the YELLOW WATER SLIDE  
3 Mark as well as advertising in the form of product packaging on numerous products  
4 bearing depictions of unauthorized slides bearing the YELLOW WATER SLIDE  
5 Mark.

6 3. Both from the evidence given at the October trial in the prior action and  
7 from evidence that has emerged as a result of the ABC, it is apparent that SLB was  
8 nothing more than an undercapitalized shell corporation that failed to follow even the  
9 most basic corporate formalities and that Dubinsky, Chan, Liu, Manley and Izzy  
10 Holdings, LLC ("Izzy" or "Izzy Holdings") are its alter egos. SLB was simply the  
11 United States division of the overall enterprise known as Manley Toyquest, run by  
12 Chan, Liu and Dubinsky. Izzy holds real property for the enterprise in the United  
13 States, and owns the property at the locations where SLB conducted its principal  
14 place of business. Izzy is owned by Chan and Dubinsky, and also has failed to  
15 observe corporate formalities. In fact, there was no lease between SLB and Izzy, and  
16 SLB paid many of the property-related expenses that Izzy, as the landlord, would  
17 otherwise have been expected to pay.

18 4. Additionally, Dubinsky, Chan and Liu have started a new enterprise in the  
19 United States that simply replaces SLB's former operations, retaining the same  
20 employees, assets and business, and operating at the same location still owned by  
21 Chan and Dubinsky through Izzy, such enterprise being conducted in the names of  
22 AW Computer Holdings LLC ("AW") and Aquawood LLC ("Aquawood").  
23 Aquawood, controlled by Dubinsky and acting on behalf of Manley, Dubinsky, Chan  
24 and Liu, has continued to market and sell infringing products and packaging.

25 5. WHAM-O thus hereby brings further Lanham Act and other trademark  
26 claims against Defendants Manley, Aquawood, Dubinsky, Chan and Liu for their  
27 ongoing willful trademark infringement, trademark dilution, and false advertising in  
28 violation of the Lanham Act and California law. WHAM-O further seeks an order, to



1 the extent not adjudicated in the Color Case, that the true owners behind SLB—Brian  
2 Dubinsky, Samson Chan, Lisa Liu, Manley and Izzy—be held liable for the judgment  
3 as SLB’s alter egos, and that AW/Aquawood be held liable as its successor. They are  
4 the true judgment debtors as well as SLB.

5 6. WHAM-O also provided Defendants Wal-Mart, TRU, Target and Kmart  
6 with copies of the permanent injunction, and requested that they cease selling the  
7 products that violate the injunction and otherwise infringe WHAM-O’s YELLOW  
8 WATER SLIDE Mark. Wal-Mart has been a responsible corporate entity in  
9 connection with WHAM-O’s trademarks since being provided notice of the judgment  
10 and permanent injunction. It promptly complied upon receiving notice of the  
11 permanent injunction, pulling infringing products from its shelves and is agreeing to  
12 use the trademark only pursuant to a license. Kmart has pledged that it will either  
13 return the infringing products and packaging or use the trademark only pursuant to a  
14 license. Target is engaged in ongoing license discussions with Wham-O that Wham-  
15 O believes will shortly conclude with a license. TRU, however, has refused to stop  
16 selling infringing products and packaging and has refused to take a license.  
17 Moreover, this is not the first time that TRU has sold infringing products.  
18 Accordingly, TRU is sued herein for willful trademark infringement.

19 7. WHAM-O also files this creditor’s suit against Defendants Wal-Mart,  
20 Target, TRU, and Kmart pursuant to California Code of Civil Procedure Section  
21 708.210. WHAM-O is informed and believes and thereupon states that Wal-Mart,  
22 Target, TRU, and Kmart hold several million dollars in funds that are payable to the  
23 true judgment debtor, Manley.

24 **THE PARTIES**

25 8. Plaintiff Wham-O, Inc. is a corporation organized and existing under the  
26 laws of the State of Delaware and has a principal place of business at 5903 Christie  
27 Avenue, Emeryville, California 94608.

28 9. Upon information and belief, Defendant Manley Toys, Ltd. is a

1 corporation organized and existing under the laws of Hong Kong, with its principal  
2 place of business in Hong Kong at 818 Cheung Sha Wan Road and its principal place  
3 of business in the United States at 2228-2229 Barry Avenue, Los Angeles,  
4 California. Manley regularly conducts business in this District and elsewhere  
5 throughout the United States through the operations of judgment debtor SLB dba  
6 Toyquest and its successor Aquawood LLC dba Toyquest. Manley has entered into  
7 contracts with United States retailers that provide for the shipment of infringing and  
8 contemptuous product into this District and elsewhere throughout the United States,  
9 and Manley has also delivered such product to retailers in Hong Kong with the  
10 knowledge and intent that such infringing and contemptuous product be placed on  
11 retail store shelves and sold to consumers throughout this District and elsewhere in  
12 the United States.

13 10. Upon information and belief, Defendant Izzy Holdings, LLC is a limited  
14 liability company organized and existing under the laws of the State of California  
15 owned by Brian Dubinsky and Samson Chan, and has a principal place of business at  
16 2228-2229 Barry Avenue, Los Angeles, California.

17 11. Upon information and belief, Defendant Aquawood, LLC is a limited  
18 liability company organized and existing under the laws of the State of California and  
19 has a principal place of business at 2228-2229 Barry Avenue, Los Angeles,  
20 California.

21 12. Upon information and belief, Defendant AW Computer Holdings, LLC is  
22 a limited liability company organized and existing under the laws of the State of  
23 California and has a principal place of business at 2228-2229 Barry Avenue, Los  
24 Angeles, California.

25 13. Upon information and belief, Brian Dubinsky is a resident of California,  
26 residing at 521 S. Bentley Ave., Los Angeles, CA 90049 and regularly conducts  
27 business in this District, with his principal place of business at 2228-2229 Barry  
28 Avenue, Los Angeles, California.

1 14. Upon information and belief Samson Chan is a resident of Hong Kong,  
2 residing at Flat B, 11/F, Sunpeace Court, 136-142 Boundary Street, Kowloon, Hong  
3 Kong, and regularly conducts business within this District. Chan's business card  
4 states that his offices in the United States are located at 2228 Barry Avenue, Los  
5 Angeles, California. Throughout the period of infringement alleged by this  
6 Complaint, Chan was the Chief Executive Officer of SLB, the judgment debtor.

7 15. Upon information and belief, Lisa Liu is a resident of Hong Kong,  
8 residing at Flat F, 5/F, The Astrid Tower 2, 180 Argyle Street, Kowloon, Hong Kong,  
9 and regularly conducts business within this District. Liu is the Managing Director of  
10 Manley, and throughout the period of infringement alleged by this Complaint  
11 claimed to be the sole Director of SLB, the judgment debtor. Throughout the period  
12 of infringement alleged by this Complaint, Liu owned 50% or more of SLB, the  
13 judgment debtor, whose principal place of business was located in this District at  
14 2228 Barry Avenue, Los Angeles, California. Liu also personally signed and sent  
15 royalty statements into this District on behalf of SLB and Manley reporting and  
16 attesting to a licensor, Six Flags, the accuracy of the sales of the infringing product.

17 16. Upon information and belief, Defendant Wal-Mart Stores, Inc. is a  
18 corporation organized and existing under the laws of the State of Delaware with its  
19 principal place of business at 702 SW 8th Street, Bentonville, Arkansas 72716. Wal-  
20 Mart conducts regular and systematic business throughout this District.

21 17. Upon information and belief, Defendant Target Corporation is a  
22 corporation organized and existing under the laws of the State of Minnesota with its  
23 principal place of business at 1000 Nicollet Mall TPN-0945, Minneapolis, Minnesota  
24 55403. Target conducts regular and systematic business throughout this District.

25 18. Upon information and belief, Defendant Toys 'R' Us, Inc. is a corporation  
26 organized and existing under the laws of the State of Delaware with its principal  
27 place of business at One Geoffrey Way, Wayne, New Jersey 07470. Toys 'R' Us  
28 conducts regular and systematic business throughout this District.

1 19. Upon information and belief, Defendant Kmart Corporation is a  
2 corporation organized and existing under the laws of the State of Michigan with its  
3 principal place of business at 3333 Beverly Road, Hoffman Estates, Illinois, 60179.  
4 Kmart conducts regular and systematic business throughout this District.

5  
6 **NATURE OF THE CASE**

7 20. This is an action for: (i) judgment debtor's interest in debt to satisfy  
8 money judgment pursuant to Cal. Civ. Proc. Code 708.210 *et seq.*; (ii) infringement  
9 of a registered trademark in violation of Section 32(1) of the Lanham Act, 15 U.S.C.  
10 § 1114; (iii) false advertising in violation of Section 43(a) of the Lanham Act, 15  
11 U.S.C. § 1125(a); (iv) trademark dilution in violation of Section 43(c) of the Lanham  
12 Act, 15 U.S.C. § 1125(c); (v) unfair competition in violation of the common law of  
13 the State of California; (vi) contributory and vicarious trademark infringement in  
14 violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114; (vii) contributory  
15 and vicarious false advertising in violation of Section 43(a) of the Lanham Act, 15  
16 U.S.C. § 1125(a); and (viii) contributory and vicarious trademark dilution in violation  
17 of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

18 **JURISDICTION AND VENUE**

19 21. This Court has subject matter jurisdiction over the federal law claims  
20 pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1131, 1138 and has subject matter  
21 jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Venue is proper  
22 within this district under the provisions of 28 U.S.C. § 1391.

23 22. General personal jurisdiction is proper over each of the retailer defendants  
24 (Wal-Mart, Target, TRU, and Kmart) based upon their regular and systematic  
25 conduct of business within this District. General personal jurisdiction is proper over  
26 Dubinsky, Aquawood, AW, Manley and Izzy based upon their regular and systematic  
27 business activity, residence, and/or ownership of property within this District.  
28 Specific personal jurisdiction also is proper over Manley, Aquawood, AW, Izzy,

1 Dubinsky, Chan, Samson and Liu based upon their contacts with the forum giving  
2 rise to the claims as alleged in detail herein.

3 **BACKGROUND FACTS COMMON TO ALL CLAIMS**

4 **A. WHAM-O's Trademarks**

5 23. WHAM-O and its predecessors have long engaged in the business of  
6 manufacturing and marketing in interstate commerce toys called "water slides" sold  
7 under the SLIP 'N SLIDE trademark. SLIP 'N SLIDE is a registered trademark of  
8 WHAM-O, U.S. Reg. No. 761,883, attached hereto as Exhibit 1.

9 24. Since the introduction to the public of the SLIP 'N SLIDE water slide toy  
10 in 1961, the sliding surface of one or more versions of WHAM-O's SLIP 'N SLIDE  
11 water slide toy has continuously been colored yellow, and that color has long served  
12 to identify and distinguish WHAM-O's water slide toys from those of others.

13 WHAM-O and its predecessors have sold millions of yellow water slides under the  
14 SLIP 'N SLIDE trademark, and WHAM-O has consistently promoted the YELLOW  
15 mark on its packaging, creating a direct consumer association between the SLIP 'N  
16 SLIDE word mark and the YELLOW color mark.

17 25. WHAM-O has widely promoted the SLIP 'N SLIDE YELLOW WATER  
18 SLIDE toy, including significant expenditures on marketing efforts, including  
19 television advertising. The product has been sold by all of the nation's largest  
20 discount toy retailers, including Wal-Mart, Target, TRU, and Kmart. Over more than  
21 four decades of use, promotion and sales, the YELLOW WATER SLIDE Mark has  
22 become famous. In 2003, the fame of the SLIP 'N SLIDE YELLOW WATER  
23 SLIDE toy was further recognized when it was included as an iconic toy of youth in  
24 the Paramount film, *Dickie Roberts: Former Child Star*.

25 26. A registration for the color yellow on water slide toys duly issued from the  
26 United States Patent and Trademark Office on March 10, 1987, and WHAM-O is the  
27 owner of Reg. No. 1,432,069 for that mark. A copy of the registration for the  
28 YELLOW WATER SLIDE Mark is attached as Exhibit 2. As a result of lengthy use

1 and compliance with statutory requirements, this registration has attained  
2 incontestable status. The goodwill associated with the SLIP 'N SLIDE and  
3 YELLOW WATER SLIDE trademarks, and the registrations therefore, were duly  
4 assigned to WHAM-O in 1997.

5 27. In sum, WHAM-O's water slide toys using the YELLOW WATER  
6 SLIDE Mark are well and favorably known by the purchasing public. They have  
7 become iconic toys, a symbol of summer fun, and famous to children and adults  
8 alike.

9 **B. The Underlying Lawsuit**

10 28. In March 2005, WHAM-O learned that SLB had manufactured,  
11 distributed, marketed, advertised, sold, and offered for sale water slide toys in  
12 packaging that infringed the YELLOW WATER SLIDE Mark. Shortly after learning  
13 of this infringement, WHAM-O notified SLB of its infringement and demanded that  
14 SLB cease and desist. In response, counsel for SLB represented to WHAM-O's  
15 counsel that SLB had sold all of its inventory in the infringing packaging and that it  
16 would not use the infringing packaging in the future. Almost a year later, in February  
17 2006, WHAM-O learned that SLB was again manufacturing, distributing,  
18 advertising, marketing, selling, and offering for sale water slide toys in packaging  
19 identical to the infringing packaging SLB promised to stop using. In addition, SLB  
20 was marketing and selling new water slide toy products that infringed and diluted  
21 WHAM-O's YELLOW WATER SLIDE Mark. After learning of SLB's renewed  
22 and expanded infringement, WHAM-O sent a new cease and desist letter. SLB  
23 refused to stop its infringing actions, and instead brought an action for, *inter alia*,  
24 trademark infringement and declaratory relief in the Central District of California, to  
25 which WHAM-O counterclaimed for, *inter alia*, willful infringement, willful  
26 dilution, intentional false advertising, and unfair competition. SLB's frivolous  
27 claims were all subsequently dismissed, without compensation to SLB.

28 29. Beginning on October 2, 2007, WHAM-O tried its counterclaims against

1 SLB for trademark infringement, trademark dilution, false advertising and unfair  
2 competition to a jury for six days (hereinafter, “the Color case”) and SLB tried its  
3 claim for invalidity of WHAM-O’s YELLOW WATER SLIDE Mark. WHAM-O  
4 obtained a jury verdict against SLB for willful infringement, willful dilution, and  
5 willful false advertising under the Lanham Act, and the jury specifically rejected  
6 SLB’s invalidity defense. With respect to infringement, the jury found that SLB  
7 acted “intentionally, knowing it was an infringement, or with an aura of deliberate  
8 indifference or willful blindness to Wham-O’s rights, or used the trademark for the  
9 purpose of trading upon Wham-O’s reputation.” With respect to dilution, the jury  
10 found that SLB “intended to trade on Wham-O’s reputation or to cause dilution of the  
11 famous mark.” Finally, with respect to false advertising, the jury found that SLB  
12 made “a false statement with the intention to deceive the consuming public, or  
13 otherwise acted in bad faith in conducting false advertising, then the false advertising  
14 was willful.” Attached hereto as Exhibit 3 is the jury’s verdict in the Color case.

15 30. The jury awarded WHAM-O damages of \$3.6 million and recommended  
16 an enhanced damages award of \$2.4 million because of SLB’s willful conduct. The  
17 Court accepted the jury’s enhanced damages award and entered judgment  
18 adjudicating the YELLOW WATER SLIDE Mark valid, willfully infringed and  
19 intentionally diluted, awarding \$6 million plus costs, and granting a permanent  
20 injunction. A true and correct copy of that Judgment, entered on December 9, 2007,  
21 is attached hereto as Exhibit 4. Accordingly, the YELLOW WATER SLIDE Mark  
22 has been adjudged and decreed both valid and famous by this Court. In addition, on  
23 February 26, 2008, the Court deemed the case to be “exceptional” within the meaning  
24 of the Lanham Act because of the willful and deliberate conduct of SLB and granted  
25 WHAM-O’s motion for attorneys’ fees, awarding WHAM-O an additional  
26 \$1,768,882.24. A true and correct copy of the Order awarding attorneys’ fees,  
27 entered on February 26, 2008, is attached hereto as Exhibit 8.

28

1           **C.    ABC Process, Alter Ego & Successor Liability**

2           31. During the trial of the Color case, testimony was given by Dubinsky and  
3 statements were made by SLB's attorneys to the jury that suggested an alter ego  
4 relationship with Manley. Shortly after the trial, WHAM-O took deposition  
5 testimony from Dubinsky in another action by WHAM-O against SLB pending in  
6 this District, Case No. 06-6508 RSWL (CWx) (the "Wave Rider case"), and  
7 Dubinsky's testimony in that deposition further suggested that Dubinsky, Manley and  
8 Izzy were alter egos of SLB.

9           32. After the jury verdict and the deposition in the Wave Rider case, but  
10 before the Court entered judgment, SLB initiated a fraudulent transaction designed to  
11 deprive WHAM-O of the benefits of its judgment and to avoid the effects of the  
12 permanent injunction. Sometime in mid-October, SLB's President, Brian Dubinsky,  
13 and SLB's in-house counsel, Joshua Furman, met with attorney Ron Bender of the  
14 firm Levene Neale Bender Rankin & Brill. During the course of that meeting,  
15 Bender contacted attorney Byron Moldo of the firm Moldo Davidson Fraioli Seror &  
16 Sestanovich LLP to ascertain whether Moldo would be willing to serve as an  
17 Assignee of SLB in a process pursuant to state law called an Assignment for Benefit  
18 of Creditors ("ABC"), whereby SLB would divest itself of its assets and cease to  
19 operate as a going concern. Mr. Moldo agreed with Mr. Bender that he would meet  
20 with the representatives of SLB to discuss the ABC process, and Moldo, Dubinsky  
21 and Furman met the same afternoon.

22           33. Unlike bankruptcy or a receivership, the ABC process is unsupervised by  
23 a court. SLB concealed its intention to enter into the ABC process from WHAM-O  
24 and from this Court in two pending actions (the Color case and Wave Rider case) as  
25 well as concealing the process from the Court in Alameda County, where a third  
26 action by WHAM-O for misappropriation of trade secrets is pending and a  
27 preliminary injunction *prohibiting the transfer of evidence and requiring the*  
28 *preservation of evidence* has been entered. A true and correct copy of the Alameda



1 Court's order is attached hereto as Exhibit 5.

2 34. At the initial meeting with Moldo, Dubinsky and Furman explored not  
3 only the divestiture of assets and liabilities, but also proposed that Dubinsky would  
4 re-purchase all, or substantially all, of SLB's assets simultaneously with the ABC  
5 transaction. During this initial meeting and at all times thereafter until the General  
6 Assignment was executed, Furman and Dubinsky concealed from Moldo the  
7 pendency of the Alameda County Superior Court action and concealed from him the  
8 existence of the preliminary injunction in that action. After the initial meeting  
9 between Dubinsky, Furman and Moldo, Bender informed Moldo (to his surprise) that  
10 Bender would be representing not SLB, but the purchaser of the assets in dual  
11 transactions.

12 35. The irregular and fraudulent nature of these dual transactions was then  
13 borne out in a further series of events. Dubinsky breached his fiduciary duty to SLB  
14 by negotiating the commercial terms of *both* sides of the transaction—both the  
15 Assignment by SLB and the Asset Purchase Agreement on behalf of purported  
16 purchaser AW. Bender and his colleague, Monica Kim, improperly acted on both  
17 sides of the overall transaction, negotiating the terms of the Asset Purchase, insisting  
18 that the General Assignment by SLB was contingent upon Moldo's advance  
19 agreement to the terms of the Asset Purchase Agreement, and then offering edits to  
20 both sets of transaction documents. Eventually, on November 19, 2007, various  
21 parties executed a General Assignment, and an Asset Purchase Agreement. A true  
22 and correct copy of the General Assignment with exhibits is attached as Exhibit 6. A  
23 true and correct copy of the Asset Purchase Agreement with exhibits is attached as  
24 Exhibit 7. Whatever the name and form of the purchaser entity, Dubinsky and the  
25 other participants in the Manley Toyquest enterprise were the real parties in interest  
26 on both sides of the transaction whereby they attempted to divest SLB of its  
27 liabilities, and the WHAM-O judgment in particular, and continue the business under  
28 a different name using SLB's assets, employees, contracts and property.

1 36. Moldo thus purportedly became SLB's Assignee. Under the Asset  
2 Purchase Agreement, AW purported to purchase not only all of the tangible assets of  
3 SLB, and to assume all of the contracts necessary for Dubinsky to continue operating  
4 his business without disruption (such as utilities at the very same Barry Avenue  
5 building and health insurance for the employees), but AW also purported—in a  
6 theretofore unheard of transaction to Moldo who has been practicing in this area for  
7 25 years—to purchase the “appellate rights” to the judgment in the Color case *while*  
8 *not assuming the liability for the underlying judgment.*

9 37. This “appellate rights purchase” transaction on its face violated California  
10 Civil Code Section 3521, which provides that “he who takes the benefit must bear the  
11 burden.” Since purchasing this purported assignment of appellate rights, AW, acting  
12 through Dubinsky, instructed attorney Furman to file various pleadings in the name  
13 of SLB (rather than AW) which were not authorized by Assignee Moldo. Furman  
14 filed such pleadings at Dubinsky's instruction, including without limitation, a motion  
15 for new trial, opposition to motion for attorneys's fees, application to quash  
16 subpoena, and various letters to the Court submitted in connection with these papers.  
17 By taking these actions pursuant to the assignment of appellate rights, AW has  
18 sought to obtain the benefit of that assignment which is avoidance of the judgment.  
19 As such, by operation of law, AW also assumed the liability of the underlying  
20 judgment associated therewith and has become a judgment debtor. Cal. Civ. Code  
21 §3521; *see Fanning v. Yoland Prods.*, 150 Cal.App.2d 444, 448 (Cal. Ct. App. 1957).  
22 AW and Aquawood also are successors and judgment debtors because they are a  
23 mere continuation of SLB dba Toyquest, and because of the fraudulent ABC  
24 transaction.

25 38. Both before and after the General Assignment, Moldo requested various  
26 documents from SLB. SLB was unable to produce any corporate minute book or any  
27 evidence whatsoever of any meeting or action by the Board of Directors of SLB.  
28 SLB provided Moldo no insurance policy covering liability arising from its toy

1 design or distribution operations. SLB claimed to have no financial computer. SLB  
2 provided no documentary evidence of the ownership of the stock of the corporation.  
3 SLB provided no corporate filings of any kind to Moldo prior to the Assignment.  
4 SLB refused to provide a list of its employees, necessitating Moldo to approach ADP  
5 in order to provide W-2s and 1099s for 2007. SLB's failure to provide information  
6 in response to Moldo's requests made it readily apparent that SLB had failed to  
7 observe the most basic corporate formalities. SLB held no board meetings and kept  
8 no corporate minutes or written resolutions of corporate action.

9 39. It also became apparent that SLB was woefully undercapitalized.  
10 Dubinsky testified at trial in the Color case that Toyquest was the seventh largest toy  
11 company in the world, but the financials provided by SLB to Moldo demonstrate that  
12 SLB did not maintain sufficient unencumbered capital to meet its recurring and/or  
13 prospective liabilities, and instead relied on monthly infusions of cash from Manley  
14 to meet its on-going obligations, including payroll and royalty payments. These  
15 capital infusions came in the form of regular payments internally denominated as  
16 "commissions." Notably, despite Manley's continued use of toy designs created in  
17 whole or in part by SLB, Manley ceased making these regular commission payments  
18 to SLB shortly before the ABC transaction and has since made no such payments to  
19 its Assignee.

20 40. Upon information and belief, there are no documents evidencing any  
21 issuance of stock by SLB or that the shareholders made any initial or subsequent  
22 capital contribution.

23 41. As part of his duties as SLB's Assignee for the benefit of SLB's creditors,  
24 Moldo has endeavored to discover the extent and value of SLB's intangible assets,  
25 including any intellectual property owned by SLB, such as the Toyquest trade name  
26 and any toy designs or packaging designs created by SLB and its employees prior to  
27 the ABC. After the assignment, Moldo directed his field agent, Tony Shokrai, to  
28 obtain copies of the hard drives from the computers used by SLB and its employees,

1 which he believed contained important corporate records, as well as perhaps the only  
2 documentary evidence of the intellectual property owned by SLB. Dubinsky,  
3 however, refused to permit Shokrai any access to the computers, their hard drives, or  
4 the contents thereof. Nonetheless, these computers were transferred to AW through  
5 the Asset Purchase Agreement, and the contents of those computers are currently in  
6 use by Aquawood at the 2228-2229 Barry Avenue address.

7 42. Aquawood, and SLB dba Toyquest before it, is nothing more than a  
8 common enterprise engaged in by Defendants Dubinsky, Chan, and Liu acting  
9 through a variety of entities, including Manley, SLB, Izzy, Aquawood and AW  
10 Computer Holdings. Dubinsky, Chan and Liu were in true control and ownership of  
11 SLB and its assets at all times relevant to the infringement in the Color case, and are  
12 presently in true control of Aquawood and AW. Indeed, Dubinsky is identified as the  
13 agent for service of process for both Aquawood and AW.

14 43. One purpose of this common enterprise was to trade on WHAM-O's  
15 goodwill by manufacturing, selling, distributing, marketing, and offering for sale  
16 water slide toys that infringed WHAM-O's YELLOW WATER SLIDE Mark. SLB's  
17 attorney in the Color case admitted in opening argument that "SLB and Manley work  
18 hand in hand. Manley makes the products. SLB assists in the design. They market,  
19 and they are a sales agent for Manley."

20 44. The overlapping connections between Manley and SLB are extensive.  
21 According to SLB's 2006 tax returns signed by Dubinsky under penalty of perjury  
22 and filed on or about September 12, 2007, the shareholders of SLB are Lisa Liu and  
23 Alan Chan (son of Samson Chan), each purportedly owning 50% of the stock in SLB.  
24 (In contrast, the Consent of Stockholders signed by Liu in connection with the  
25 General Assignment just two months later claimed that she was the sole stockholder.)  
26 In 2003, Lisa Liu was identified in the New York state corporate filings as the Chief  
27 Financial Officer and a director for SLB. At Manley, Lisa Liu serves in the role as  
28 the Managing Director for the company. Alan Chan, putative co-owner of SLB, is

1 the son of Samson Chan, founder, owner and CEO of Defendant Manley. Samson  
2 Chan also held himself out at various times as the Chief Executive Officer and  
3 corporate secretary of SLB. The address listed for Samson Chan and Lisa Liu on  
4 SLB's corporate filings is the business address for Manley in Hong Kong. In 2005,  
5 Dubinsky signed documents purporting to be the President of Manley, while at the  
6 same time serving as the President of SLB. In Hong Kong, Manley's offices bear the  
7 Toyquest name.

8 45. In addition, SLB has held itself out to the world to be part and parcel with  
9 Manley. Both SLB and Manley do business as Toyquest, even though SLB owns the  
10 Toyquest trademark in the United States and has not formally authorized Manley to  
11 operate under the trade name. SLB does business under several names, including  
12 Manley, Manley Toys, Manley Toys USA, Manley Toys USA, Ltd., Manley  
13 Toyquest, Toyquest, and Toyquest a division of Manley Toys. At trial in the Color  
14 case, Dubinsky testified that his company was the seventh largest toy company in the  
15 world, testimony that could only have been truthful if SLB and Manley are one and  
16 the same. SLB's website at [www.toyquest.com](http://www.toyquest.com) listed a Hong Kong address—the  
17 same as Manley's address.

18 46. SLB's disregard for the corporate form spills over to its licensing  
19 arrangements with third parties. SLB entered a licensing arrangement with Six Flags  
20 Theme Parks, Inc. ("Six Flags"), which permitted SLB, and only SLB, to use certain  
21 Six Flag's trademarks in connection with the sale of SLB's products. The rights  
22 conveyed under the licensing agreement were non-transferable. SLB, however,  
23 concedes that it neither manufactured nor sold any products bearing the Six Flags  
24 trademarks. Instead, Defendant Manley exercised SLB's non-transferable rights,  
25 manufactured and sold the products bearing Six Flags' trademarks, prepared the  
26 royalty statements on SLB's behalf, and funneled the money to allow SLB to pay the  
27 royalties to Six Flags. WHAM-O is informed and believes and thereupon states that  
28 SLB acted in the same fashion with respect to numerous other intellectual property

1 licensors, including Lund & Company, Blue Man Group, Disney, Warner Bros. and  
2 others. SLB has served as nothing more than a pass-through company for Manley.

3 47. Similarly, Izzy has served as nothing more than a real estate holding entity  
4 for Dubinsky and Chan for the benefit of SLB and Manley. Izzy has been unable to  
5 produce any written lease between it and SLB as a tenant, and SLB's books and  
6 records appear to indicate that SLB paid for garbage disposal, property insurance on  
7 the building structure and premises at 2228-2229 Barry Avenue, taxes, water and  
8 sewage, and other expenses commonly borne by the landlord. Izzy apparently  
9 charged SLB no rent for its use of the premises.

10 48. Upon information and belief, Dubinsky, acting on behalf of Defendant  
11 Manley and the entire Toyquest enterprise, directed and controlled the litigation in  
12 the Color case. Moreover, as the sole Director of SLB, Liu —also the Managing  
13 Director of Manley—had the statutory right and power to manage the affairs of SLB.  
14 As a result of Liu's power and authority over SLB and her position with Manley as  
15 Managing Director, Manley also had *de facto* control over the litigation. Upon  
16 information and belief, Dubinsky communicated with Chan and/or Liu concerning  
17 material events in the Color case. As noted above, this was not the first time  
18 Dubinsky acted on behalf of Manley. In addition to other events described herein  
19 where Dubinsky has acted in the name of Manley, in 2005, Dubinsky and Samson  
20 Chan jointly visited WHAM-O to discuss a possible acquisition of WHAM-O by  
21 Manley. Dubinsky introduced Chan as his partner. Dubinsky signed a proposed  
22 letter of intent for the acquisition of WHAM-O giving his title President of *Manley*.

23 49. There is a common identity of interest between Manley and SLB dba  
24 Toyquest. They have common ownership, directors and officers. SLB has been held  
25 out to the public as a "division of Manley" and has used various versions of the name  
26 Manley as its corporate name. Manley uses Toyquest as part of its trade name. SLB  
27 has served as a mere conduit for transactions for the benefit of Manley. Manley has  
28 manufactured, or contracted for the manufacture, of the infringing product and

1 packaging designed and sold by SLB. Based on the facts set forth herein, it is  
2 apparent that maintaining the corporate fiction of a separate existence for SLB, Izzy  
3 or Manley, particularly where SLB has engaged in a fraudulent transaction to avoid  
4 WHAM-O's judgment, leads to an inequitable result. Manley, Dubinsky, Chan, Liu  
5 and Izzy are the judgment debtors in the Color case.

6 50. Additionally, based on the facts set forth herein it is apparent that AW and  
7 Aquawood are mere continuations of SLB, and the product of fraud by SLB in  
8 connection with the General Assignment, and in all events are true judgment debtors  
9 under Civil Code Section 3521 by virtue of their assumption and exercise of the  
10 appellate rights to the judgment in the Color case under the Asset Purchase  
11 Agreement.

12 **D. Wal-Mart's, Target's, TRU's, and Kmart's Accounts Payable to the**  
13 **Judgment Debtor(s)**

14 51. Upon information and belief, Wal-Mart, Target, TRU, and Kmart  
15 currently have an accounts payable balance due to Manley in an amount of several  
16 million dollars.

17 52. Upon information and belief, Wal-Mart's, Target's, TRU's, and Kmart's  
18 outstanding balances payable to Manley are for inventory purchased from Manley  
19 bearing the Toyquest and BANZAI trademarks, owned in the United States by SLB,  
20 and for products and packages designed by employees of SLB and sold by employees  
21 and agents of SLB to retailers, all activities occurring prior to the General  
22 Assignment to Moldo. These products are continuing to exploit intellectual property  
23 assets owned by SLB without consent and without compensation to SLB. The  
24 payable balances at Wal-Mart, Target, TRU, Kmart due to Manley therefore include  
25 sums owed to the judgment debtor in the Color case, SLB dba Toyquest.  
26 Accordingly, those sums are subject to lien and execution pursuant to California  
27 Code of Civil Procedure Section 708.210 *et seq.*

28 53. Additionally, because Manley is an alter ego of SLB and therefore also a

1 true judgment debtor in the Color case, the sums payable held by Wal-Mart, Target,  
2 TRU, and Kmart for the benefit of Manley are subject to execution by WHAM-O in  
3 connection with its judgment, and are subject to lien and execution pursuant to  
4 California Code of Civil Procedure Section 708.210 *et seq.* See *Fleet Credit Corp. v.*  
5 *TML Bus Sales, Inc.*, 65 F.3d 119 (9th Cir. 1995) (affirming district court's  
6 adjudication of alter ego issues in context of creditor's suit and permitting judgment  
7 creditor to recover judgment from third party that held money of judgment debtor's  
8 alter ego).

9 54. Finally, to the extent any sums held by the retailers for Manley may be  
10 owing to Aquawood, and Aquawood is also a judgment debtor based upon its  
11 successor liability, such sums are subject to lien and execution pursuant to Section  
12 708.210 *et seq.*

13 **E. Past and Continuing Infringement, Dilution, and False Advertising**  
14 **by Manley Toys, Aquawood, TRU, Chan, Dubinsky and Liu**

15 55. Acting in concert with SLB, and now with SLB's successor Aquawood,  
16 Defendant Manley Toys designs, manufactures, promotes, advertises, distributes,  
17 markets, sells, and offers for sale water-related toys, including products and  
18 packaging that infringe WHAM-O's YELLOW WATER SLIDE Mark. In particular,  
19 Manley manufactured and delivered to retailers for sale in the United States the  
20 infringing products and packages that were the subject of the judgment in the Color  
21 case. Chan, Dubinsky and Liu authorized, directed, and participated in and  
22 controlled the design, manufacture, distribution and sale of those infringing products  
23 and packages.

24 56. As joint tortfeasors with SLB, Manley, Dubinsky, Chan and Liu are liable  
25 for the identical conduct for which SLB was found liable in the Color case, including  
26 willful trademark infringement, willful false advertising, and willful trademark  
27 dilution.

28 57. Moreover, Defendant Manley Toys, at the direction and authorization of



1 Dubinsky, Chan, and Liu, and with assistance from Aquawood, *continues* to use the  
2 YELLOW WATER SLIDE Mark in connection with the manufacture and sale of  
3 water slides with actual knowledge of and in contempt of this Court's permanent  
4 injunction order and in violation of the Lanham Act. For example, Dubinsky, now  
5 acting as an agent for Aquawood, has urged retailers to continue to sell Manley  
6 products in misleading packaging that depicts a water slide toy that infringes and  
7 dilutes WHAM-O'S YELLOW WATER SLIDE Mark, despite this Court's  
8 permanent injunction in the Color case enjoining the continued use of this very same  
9 packaging. Manley, Dubinsky, Chan, and Liu know their actions violate WHAM-  
10 O's trademark rights and this Court's order and, nonetheless, they continue to profit  
11 from their violation of these rights. This continued unauthorized, flagrant and  
12 unlawful use of WHAM-O's mark damages the value of WHAM-O's rights in the  
13 YELLOW WATER SLIDE Mark, costs Wham-O sales, further injures the business  
14 reputation of WHAM-O, and allows Manley and Aquawood to profit from their  
15 illegal conduct.

16 58. Similarly, Defendant TRU is acting in willful disregard of WHAM-O's  
17 rights. WHAM-O gave Defendant TRU, along with the other retailers, notice of the  
18 judgment and permanent injunction entered in the Color case. Despite its knowledge  
19 of the permanent injunction and the Court's adjudication of the validity of Wham-O's  
20 YELLOW WATER SLIDE Mark, TRU sets itself apart from the other retailers by  
21 refusing to stop its infringement.

22 59. As a direct result of the willfully infringing activities of Defendants  
23 Manley, Aquawood, TRU, Dubinsky, Chan, and Liu, WHAM-O has been and  
24 continues to be irreparably injured by the confusion likely to occur, by the damage to  
25 the value of WHAM-O's rights in the YELLOW WATER SLIDE Mark, and by the  
26 likely injury to its business, reputation, and goodwill.

27  
28

1 **FIRST CLAIM FOR RELIEF**

2 (Infringement of Registered Trademarks in Violation of Section 32 of the Lanham  
3 Act, 15 U.S.C. § 1114 as to Defendants Manley, Aquawood, and TRU)

4 60. Paragraphs 1 through 59 are hereby incorporated by reference.

5 61. WHAM-O alleges that Defendants Manley, Aquawood, and TRU have  
6 infringed, and continue to infringe, WHAM-O's YELLOW WATER SLIDE Mark in  
7 violation of the Lanham Act.

8 62. The YELLOW WATER SLIDE Mark is famous and has acquired  
9 secondary meaning. Purchasers associate the YELLOW WATER SLIDE Mark only  
10 with WHAM-O's water slide toy products. This association is a result of extensive  
11 advertising and sales throughout the United States of goods bearing the YELLOW  
12 WATER SLIDE Mark.

13 63. As a joint tortfeasor with SLB for the willful trademark infringement that  
14 resulted in the nearly \$8 million judgment in the Color case, Defendant Manley  
15 infringed the YELLOW WATER SLIDE Mark through the manufacture, marketing,  
16 advertising, promotion, distribution, offers to sell and sales in commerce of its  
17 competing goods utilizing an imitation of the YELLOW WATER SLIDE Mark in a  
18 manner that was likely to cause confusion, mistake or deception. Consequently,  
19 Manley is jointly and severally liable along with SLB for the full amount of the  
20 nearly \$8 million judgment and WHAM-O is entitled to collect this judgment from  
21 Manley.

22 64. In defiance of the Court's permanent injunction in the Color case,  
23 Defendant Manley continues to profit from its infringement of the YELLOW  
24 WATER SLIDE Mark through the continued manufacture, marketing, advertising,  
25 promotion, distribution, offers to sell and sales in commerce of competing goods  
26 utilizing an imitation of the YELLOW WATER SLIDE Mark in a manner that is  
27 likely to cause confusion, mistake or deception.

28

1           65. Defendant Aquawood is a mere continuation of SLB, as the result of a  
2 fraudulent transaction. Through its agent, Brian Dubinsky, Aquawood has urged  
3 retailers to continue selling Manley's products with yellow water slides and other  
4 products in packaging depicting yellow water slide toys that infringe WHAM-O's  
5 YELLOW WATER SLIDE Mark, despite this Court's permanent injunction in the  
6 Color case enjoining the sale of these same trademark infringing products.

7           66. Defendant TRU advertises, markets, sells and offers for sale Manley  
8 products and product packaging that infringe WHAM-O's YELLOW WATER  
9 SLIDE Mark, despite the Court's permanent injunction and WHAM-O's repeated  
10 demands for TRU to cease and desist.

11           67. The activities of Defendants Manley, Aquawood, and TRU described  
12 above constitute infringement of WHAM-O's rights in its federally registered  
13 YELLOW WATER SLIDE Mark under 15 U.S.C. § 1114.

14           68. By committing the acts alleged herein, Defendants Manley, Aquawood,  
15 and TRU have intentionally, knowingly and willfully infringed the registered  
16 YELLOW WATER SLIDE Mark, and Defendants Manley, Aquawood, and TRU  
17 continue to do so.

18           69. Defendants Manley, Aquawood, and TRU are presently in contempt of  
19 this Court's permanent injunction in the Color case by continuing to engage in the  
20 marketing and sale of infringing goods. Unless held in contempt and immediately  
21 restrained and enjoined, they will continue to do so. WHAM-O's remedy at law is  
22 not adequate to compensate it for the harm inflicted and threatened by the use of  
23 confusingly similar marks by Defendants Manley, Aquawood, and TRU in  
24 connection with their goods and services.

25           70. WHAM-O has been further damaged by TRU's willful and deliberate  
26 infringement and the continued willful and deliberate infringement of Defendants  
27 Manley, Aquawood, and TRU in an amount to be proved at trial. WHAM-O is  
28 entitled to recover all profits realized by Defendants Manley and Aquawood as a

1 result of their ongoing infringement, and all profits realized by TRU as a result of its  
2 infringement of the YELLOW WATER SLIDE Mark, as well as WHAM-O's costs  
3 in this action pursuant to 15 U.S.C. § 1117(a).

4 71. The actions of Defendants Manley, Aquawood, and TRU have been  
5 willful, malicious and fraudulent with knowledge of the likelihood of confusion and  
6 deception and with intent to confuse and deceive, as alleged above. Therefore,  
7 WHAM-O is entitled to recover three times the amount of the profits of Defendants  
8 Manley, Aquawood, and TRU as a result of their trademark infringement, plus  
9 WHAM-O's reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1117(a) & (b).

10 **SECOND CLAIM FOR RELIEF**

11 (Trademark Dilution in Violation of Section 43(C) of the Lanham Act,  
12 15 U.S.C. § 1125(C) as to Defendants Manley, Aquawood, and TRU)

13 72. Paragraphs 1 through 71 are hereby incorporated by reference.

14 73. WHAM-O alleges that Defendants Manley, Aquawood, and TRU diluted,  
15 and continue to dilute, WHAM-O's YELLOW WATER SLIDE Mark in violation of  
16 the Lanham Act.

17 74. Given more than four decades of use and the enormous popularity of  
18 WHAM-O's water slide toys, the YELLOW WATER SLIDE Mark is famous among  
19 children and adults alike. The color serves no function in a water slide toy. Indeed, a  
20 federal court has already deemed the YELLOW WATER SLIDE Mark to be valid  
21 and good in law, and a jury held the mark to be famous by its willful dilution  
22 determination.

23 75. As a joint tortfeasor with SLB for the willful trademark dilution that  
24 resulted in the nearly \$8 million judgment in the Color case, Defendant Manley made  
25 unauthorized use of the YELLOW WATER SLIDE Mark in products it sold or  
26 offered for sale. Such unauthorized use of the mark has diluted the distinctiveness of  
27 the YELLOW WATER SLIDE Mark. Consequently, Manley is jointly and severally  
28 liable along with SLB for the full amount of the nearly \$8 million judgment and

1 WHAM-O is entitled to collect this judgment from Manley.

2 76. In defiance of the Court's permanent injunction in the Color case,  
3 Defendant Manley continues to profit from its dilution of the YELLOW WATER  
4 SLIDE Mark through the manufacture, marketing, advertising, promotion,  
5 distribution, offers to sell and sales in commerce of competing goods utilizing an  
6 imitation of the YELLOW WATER SLIDE Mark in a manner that is likely to cause  
7 confusion, mistake or deception and erode WHAM-O's goodwill in the YELLOW  
8 WATER SLIDE mark.

9 77. Defendant Aquawood is a mere continuation of SLB, as the result of a  
10 fraudulent transaction. Through its agent, Brian Dubinsky, Aquawood has urged  
11 retailers to continue selling Manley's products in packaging depicting yellow water  
12 slide toys that dilute WHAM-O's YELLOW WATER SLIDE Mark, despite this  
13 Court's permanent injunction in the Color case enjoining the sale of these same  
14 trademark diluting products.

15 78. Defendant TRU advertises, markets, sells and offers for sale Manley  
16 products in packaging depicting water slide toys that dilute WHAM-O's YELLOW  
17 WATER SLIDE Mark, despite the Court's permanent injunction and WHAM-O's  
18 repeated demands that TRU cease and desist such practices.

19 79. Defendants Manley, Aquawood, and TRU are presently in contempt of  
20 this Court's permanent injunction in the Color case by continuing to engage in the  
21 marketing and sale of diluting goods and causing WHAM-O to suffer actual,  
22 permanent, and irreparable injury. Unless held in contempt and immediately  
23 restrained and enjoined, they will continue to do so. WHAM-O's remedy at law is  
24 not adequate to compensate it for the harm inflicted and threatened by the use of the  
25 diluting marks by Defendants Manley, Aquawood, and TRU in connection with their  
26 goods and services.

27 80. WHAM-O is entitled to recover all further profits realized by Defendants  
28 Manley and Aquawood during their continued dilution of the YELLOW WATER

1 SLIDE Mark since the judgment in the Color case, and all profits realized by TRU  
2 during its dilution of the YELLOW WATER SLIDE Mark, as well as WHAM-O's  
3 costs in this action pursuant to 15 U.S.C. § 1117(a).

4 81. The actions of Defendants Manley, Aquawood, and TRU have been  
5 willful, malicious and fraudulent with knowledge of the likelihood of confusion and  
6 deception and with intent to confuse and deceive, as alleged above. Therefore,  
7 WHAM-O is entitled to recover three times the amount of profits realized by  
8 Defendants Manley, Aquawood, and TRU as a result of their trademark dilution, plus  
9 WHAM-O's reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1117(a) & 1117(b).

10 **THIRD CLAIM FOR RELIEF**

11 (False Advertising in Violation of section 43(a)(1)(b) of the Lanham Act as to  
12 Defendants Manley, Aquawood, and TRU)

13 82. Paragraphs 1 through 81 are hereby incorporated by reference.

14 83. WHAM-O alleges that Manley, Aquawood, and TRU intentionally  
15 engaged in, and continue to engage in, false advertising in violation of the Lanham  
16 Act.

17 84. As a joint tortfeasor with SLB for the willful false advertising that resulted  
18 in the nearly \$8 million judgment in the Color case, Defendant Manley's use of  
19 misleading packaging in connection with the sale, or offering for sale, of its water  
20 slide toys constituted false advertising in violation of section 43(a)(1)(B) of the  
21 Lanham Act. The horizontal sliding surface of Defendant Manley Toys's water slide  
22 toys is orange, but the packaging depicts a yellow horizontal sliding surface.  
23 Defendant Manley's false representation in connection with the sale, or offering for  
24 sale, of its water slide toys has caused confusion with the YELLOW WATER SLIDE  
25 Mark and caused injury to WHAM-O. Consequently, Manley is jointly and severally  
26 liable along with SLB for the full amount of the nearly \$8 million judgment and  
27 WHAM-O is entitled to collect this judgment from Manley.

28 85. In defiance of the Court's permanent injunction in the Color case,

1 Defendant Manley continues to use misleading packaging which depicts a yellow  
2 horizontal sliding surface on water slide toys in connection with the promotion,  
3 marketing, sale, or offering for sale, of its products and water slide toys.

4 86. Defendant Aquawood is a mere continuation of SLB, as the result of a  
5 fraudulent transaction. Through its agent, Brian Dubinsky, Aquawood has urged  
6 retailers to continue selling Manley's products in misleading packaging that  
7 constitutes false advertising in violation of section 43(a)(1)(B), despite this Court's  
8 permanent injunction in the Color case enjoining the use of this very same misleading  
9 packaging.

10 87. Defendant TRU advertises, markets, sells and offers for sale Manley  
11 products in misleading packaging depicting water slide toys that infringe WHAM-  
12 O's YELLOW WATER SLIDE Mark, and continues to do so despite the Court's  
13 permanent injunction and WHAM-O's repeated demands that TRU cease and desist  
14 such false advertising.

15 88. Defendants Manley, Aquawood, and TRU are presently in contempt of  
16 this Court's permanent injunction in the Color case by engaging in the misleading  
17 marketing, advertising, and promotion of its water slide toys. Unless held in  
18 contempt and immediately restrained and enjoined, they will continue to do so.  
19 WHAM-O's remedy at law is not adequate to compensate it for the harm inflicted  
20 and threatened by the false representations of Defendants Manley, Aquawood, and  
21 TRU in connection with the sale, or offering for sale, of their goods and services.

22 89. WHAM-O has been further damaged by the false advertising of  
23 Defendants Manley, Aquawood, and TRU in an amount to be proved at trial.  
24 WHAM-O is entitled to recover lost profits due to diverted sales because of the false  
25 advertising, loss of good will, the cost of corrective advertising, and all further profits  
26 realized by Defendants Manley and Aquawood during their continued false  
27 advertising since the judgment in the Color case, and all profits realized by TRU  
28 during its false advertising.

1 90. The actions of Defendants Manley, Aquawood, and TRU have been  
2 willful, malicious and fraudulent with knowledge of the likelihood of confusion and  
3 deception and with intent to confuse and deceive, as alleged above. Therefore,  
4 WHAM-O is entitled to recover three times the amount of profits realized by  
5 Defendants Manley, Aquawood, and TRU as a result of their false advertising, plus  
6 WHAM-O's reasonable attorneys' fees.

7 **FOURTH CLAIM FOR RELIEF**

8 (Contributory and Vicarious Infringement for Infringement in Violation of Section 32  
9 of the Lanham Act, 15 U.S.C. § 1114 as to Defendants Dubinsky, Chan, and Liu)

10 91. Paragraphs 1 through 90 are hereby incorporated by reference.

11 92. WHAM-O alleges that Defendants Dubinsky, Chan, and Liu are each  
12 personally liable, jointly and severally, for Manley's, SLB's, and Aquawood's  
13 infringement of WHAM-O's YELLOW WATER SLIDE Mark, including the \$6  
14 million judgment plus attorneys' fees awarded WHAM-O in the Color case.

15 93. As corporate officers and directors who authorized and directed the  
16 infringing activities of SLB, Aquawood and Manley, Defendants Dubinsky, Chan,  
17 and Liu are personally and vicariously liable for SLB's, Manley's, and Aquawood's  
18 infringing conduct. *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814,  
19 823 (9th Cir. 1996). Dubinsky authorized and directed the infringing activities of  
20 SLB and Aquawood as their president. Upon information and belief, Dubinsky  
21 directed the creation of the infringing packaging, which consisted of a photograph  
22 taken in his sister's backyard and featured his nephew. His personal involvement in  
23 the infringement of WHAM-O's YELLOW WATER SLIDE Mark continues to this  
24 day, as he continues to personally and falsely assure retailers that they need not  
25 comply with that permanent injunction entered in the Color case, intentionally  
26 inducing the retailers to infringe WHAM-O's YELLOW WATER SLIDE Mark. His  
27 conduct has encouraged retailers to continue distributing, selling, and offering for  
28



1 sale infringing slides designed by SLB and manufactured, distributed and sold by  
2 Manley and Aquawood.

3 94. As Chairman and CEO of Manley, and owner of almost 95% of Manley's  
4 stock, as well as CEO and corporate secretary of SLB at the time the Color case was  
5 filed, Chan has authorized and directed SLB's and Manley's infringing conduct.  
6 Upon information and belief, Chan was familiar with WHAM-O's intellectual  
7 property generally and the YELLOW WATER SLIDE MARK specifically at least as  
8 of 2005 when he personally met with WHAM-O's CEO to discuss Manley's possible  
9 acquisition of WHAM-O. Furthermore, despite the judgment and permanent  
10 injunction entered in the Color case, which WHAM-O personally served on Chan, he  
11 continues to authorize and direct his company's manufacture, distribution,  
12 advertisement, marketing, sale, and offering for sale of water slide toys that infringe  
13 WHAM-O's YELLOW WATER SLIDE Mark.

14 95. As a primary, if not sole, owner and sole director of SLB, and the  
15 managing director of Manley, Lisa Liu has authorized and directed SLB's and  
16 Manley's infringing conduct. Dubinsky reported to Liu, and Liu had responsibility at  
17 Manley for the infringing products and prepared the royalty statements for the  
18 infringing products due to Six Flags. Despite the judgment and permanent injunction  
19 entered in the Color case, which WHAM-O personally served on Liu, she continues  
20 to authorize and direct Manley's manufacture, distribution, advertisement, marketing,  
21 sale, and offer to sell water slide toys that infringe WHAM-O's YELLOW WATER  
22 SLIDE Mark.

23 96. By authorizing and directing Manley's, SLB's, and Aquawood's actions  
24 alleged above, Defendants Dubinsky, Chan, and Liu have intentionally, knowingly  
25 and willfully infringed the registered YELLOW WATER SLIDE Mark, and induced  
26 others to infringe the YELLOW WATER SLIDE Mark and they continue to do so.

27 97. As joint tortfeasors with SLB for the willful infringement that resulted in  
28 the judgment in the Color case, Defendants Dubinsky, Chan, and Liu are each jointly

1 and severally liable along with SLB for the full amount of the nearly \$8 million  
2 judgment and WHAM-O is entitled to collect this judgment from them.

3 98. In defiance of this Court's permanent injunction in the Color case,  
4 Defendants Dubinsky, Chan, and Liu presently have authorized and are directing  
5 Manley and Aquawood in the marketing and sale of infringing goods. Unless held in  
6 contempt and immediately restrained and enjoined, they will continue to do so.  
7 WHAM-O's remedy at law is not adequate to compensate it for the harm inflicted  
8 and threatened by Defendants Dubinsky's, Chan's, and Liu's use of confusingly  
9 similar marks in connection with Manley's and Aquawood's goods and services.

10 99. WHAM-O has been further damaged by Defendants Dubinsky's, Chan's,  
11 and Liu's for their continued willful and deliberate infringement of the YELLOW  
12 WATER SLIDE Mark in an amount to be proved at trial, . WHAM-O is entitled to  
13 recover all additional profits realized by Defendants Manley Toys and Aquawood for  
14 their continued infringement of the YELLOW WATER SLIDE Mark since the  
15 judgment in the Color case, as well as WHAM-O's costs in this action pursuant to 15  
16 U.S.C. § 1117(a).

17 100. Defendants Dubinsky's, Chan's, and Liu's actions have been willful,  
18 malicious and fraudulent with knowledge of the likelihood of confusion and  
19 deception and with intent to confuse and deceive, as alleged above. Therefore,  
20 WHAM-O is entitled to recover three times the amount of any additional profits  
21 realized from their infringement of the YELLOW WATER SLIDE MARK plus  
22 WHAM-O's reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1117(a) & (b).

23 **FIFTH CLAIM FOR RELIEF**

24 (Contributory and Vicarious Trademark Dilution in Violation of Section 43(C) of the  
25 Lanham Act, 15 U.S.C. § 1125(C) as to Defendants Dubinsky, Chan, and Liu)

26 101. Paragraphs 1 through 100 are hereby incorporated by reference.  
27  
28

1 102. WHAM-O alleges that Defendants Dubinsky, Chan, and Liu are  
2 personally liable for Manley's, SLB's and Aquawood's willful trademark dilution of  
3 WHAM-O's famous YELLOW WATER SLIDE Mark.

4 103. As corporate officers and directors who authorized and directed the  
5 trademark diluting activities of SLB, Aquawood, and Manley, Defendants Dubinsky,  
6 Chan, and Liu are personally and vicariously liable for SLB's, Manley's, and  
7 Aquawood's infringing conduct. *Committee for Idaho's High Desert, Inc. v. Yost*, 92  
8 F.3d 814, 823 (9th Cir. 1996). Dubinsky authorized and directed the trademark  
9 diluting activities of SLB and Aquawood as their president. Upon information and  
10 belief, Dubinsky directed the creation of the trademark diluting packaging, which  
11 consisted of a photograph taken in his sister's backyard and which featured his  
12 nephew. His personal involvement in the dilution of WHAM-O's YELLOW  
13 WATER SLIDE Mark continues to this day, as he continues to personally assure  
14 retailers that they can ignore the judgment and permanent injunction entered in the  
15 Color case, which adjudged the YELLOW WATER SLIDE Mark to be famous. His  
16 conduct has encouraged retailers to continue distributing, selling, and offering for  
17 sale slides designed by SLB and manufactured, distributed and sold by Manley and  
18 Aquawood that dilute WHAM-O's YELLOW WATER SLIDE Mark, intentionally  
19 inducing the retailers to dilute WHAM-O's YELLOW WATER SLIDE Mark.

20 104. As Chairman and CEO of Manley, and owner of almost 95% of Manley's  
21 stock, as well as CEO and corporate secretary of SLB at the time the Color case was  
22 filed, Chan has authorized and directed SLB's and Manley's trademark diluting  
23 conduct, as alleged above. Upon information and belief, Chan was familiar with  
24 WHAM-O's intellectual property generally and the YELLOW WATER SLIDE Mark  
25 at least as of 2005 when he personally met with WHAM-O's CEO to discuss  
26 Manley's possible acquisition of WHAM-O. Furthermore, WHAM-O personally  
27 served Chan with the judgment and permanent injunction from the Color case, which  
28 found the YELLOW WATER SLIDE Mark to be famous, and yet he continues to

1 authorize and direct his company's continued manufacture, distribution,  
2 advertisement, marketing, selling, and offering for sale water slide toys that dilute  
3 WHAM-O's YELLOW WATER SLIDE Mark.

4 105. As a primary, if not sole owner, and sole director of SLB, and the  
5 managing director of Manley, Lisa Liu has authorized and directed SLB's and  
6 Manley's trademark diluting conduct, as alleged above. Dubinsky reported to Liu,  
7 and Liu had responsibility at Manley for the trademark diluting products and  
8 prepared the royalty statements for the trademark diluting products due to Six Flags.  
9 WHAM-O personally served Liu with the judgment and permanent injunction from  
10 the Color case, and yet she continues to authorize and direct Manley's manufacture,  
11 distribution, advertisement, marketing, sale, and offer to sell water slide toys that  
12 infringe WHAM-O's YELLOW WATER SLIDE Mark.

13 106. Given more than four decades of use and the enormous popularity of  
14 WHAM-O's water slide toys, the YELLOW WATER SLIDE Mark is famous among  
15 children and adults alike. The color serves no function in a water slide toy. Indeed,  
16 this Court already adjudged the YELLOW WATER SLIDE Mark to be valid and  
17 good in law, and the jury in the Color case held the mark to be famous.

18 107. Defendants Dubinsky, Chan, and Liu have directed and authorized SLB,  
19 Aquawood, and Manley to make unauthorized use of the YELLOW WATER SLIDE  
20 Mark in their products, and continue to do so despite the permanent injunction and  
21 judgment in the Color case.

22 108. Such unauthorized use of the mark has and will actually dilute the  
23 distinctiveness of the YELLOW WATER SLIDE Mark.

24 109. As joint tortfeasors with SLB for the willful trademark dilution that  
25 resulted in the judgment in the Color case, Defendants Dubinsky, Chan, and Liu are  
26 each jointly and severally liable along with SLB for the full amount of the nearly \$8  
27 million judgment and WHAM-O is entitled to collect this judgment from them.

28 110. In defiance of this Court's permanent injunction in the Color case,

1 Defendants Dubinsky, Chan, and Liu presently have authorized and are directing  
2 Manley and Aquawood in the marketing and sale of diluting goods. Unless held in  
3 contempt and immediately restrained and enjoined, they will continue to do so.  
4 WHAM-O's remedy at law is not adequate to compensate it for the harm inflicted  
5 and threatened by Defendants Dubinsky's, Chan's, and Liu's use of trademark  
6 diluting marks in connection with their goods and services.

7 111. WHAM-O has been further damaged by the actions of Defendants  
8 Dubinsky, Chan and Liu, and is entitled to recover, jointly and severally, from  
9 Defendants Dubinsky, Chan, and Liu, all further profits realized by Defendants  
10 Manley and Aquawood during their continued dilution of the YELLOW WATER  
11 SLIDE Mark since the judgment in the Color case, as well as WHAM-O's costs in  
12 this action pursuant to 15 U.S.C. § 1117(a).

13 112. Defendants Dubinsky's, Chan's, and Liu's actions have been willful,  
14 malicious and fraudulent with knowledge of the likelihood of confusion and  
15 deception and with intent to confuse and deceive, as alleged above. Therefore,  
16 WHAM-O is entitled to recover three times the amount of Defendant Manley's  
17 profits plus WHAM-O's reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1117(a)  
18 & 1117(b) and the enhanced damages award from the Color case.

19 **SIXTH CLAIM FOR RELIEF**

20 (Contributory and Vicarious False Advertising in Violation of section 43(a)(1)(b) of  
21 the Lanham Act as to Defendants Dubinsky, Chan and Liu)

22 113. Paragraphs 1 through 112 are hereby incorporated by reference.

23 114. WHAM-O alleges that Defendants Dubinsky, Chan and Liu are personally  
24 and vicariously liable for the intentional false advertising engaged in by Manley and  
25 Aquawood in violation of the Lanham Act.

26 115. As corporate officers and directors who authorized and directed the false  
27 advertising by SLB, Aquawood, and Manley, Defendants Dubinsky, Chan, and Liu  
28 are personally and vicariously liable for SLB's, Aquawood's, and Manley's

1 intentional false advertising. *Committee for Idah's High Desert, Inc. v. Yost*, 92 F.3d  
2 814, 823 (9th Cir. 1996). Dubinsky authorized and directed the false advertising by  
3 SLB and Aquawood as their president. Upon information and belief, Dubinsky  
4 directed the creation of the misleading packaging, which consisted of a photograph  
5 taken in his sister's backyard and which featured his nephew. His personal  
6 involvement in the false advertising continues to this day, as he continues to  
7 personally assure retailers that they can ignore the judgment and permanent  
8 injunction entered in the Color case. His conduct has encouraged retailers to  
9 continue distributing, selling, and offering for misleading and false packaging for  
10 water slides designed by SLB and manufactured, distributed and sold by Manley and  
11 Aquawood, intentionally inducing the retailers to engage in false advertising to the  
12 derogation of WHAM-O's YELLOW WATER SLIDE Mark.

13 116.As Chairman and CEO of Manley, and owner of almost 95% of Manley's  
14 stock, as well as CEO and corporate secretary of SLB at the time the Color case was  
15 filed, Chan has authorized and directed SLB's and Manley's false advertising, as  
16 alleged above. Upon information and belief, Chan was familiar with WHAM-O's  
17 intellectual property generally and the YELLOW WATER SLIDE Mark at least as of  
18 2005 when he personally met with WHAM-O's CEO to discuss Manley's possible  
19 acquisition of WHAM-O. Furthermore, WHAM-O personally served Chan with the  
20 judgment and permanent injunction from the Color case, which found SLB's  
21 packaging misleading and false, and yet he continues to authorize and direct his  
22 company's false and misleading advertising.

23 117.As a primary, if not sole, owner and the sole director of SLB, and the  
24 managing director of Manley, Lisa Liu has authorized and directed SLB's and  
25 Manley's false advertising, as alleged above. Dubinsky reported to Liu, and Liu had  
26 responsibility at Manley for the products that were falsely advertised and prepared  
27 the royalty statements for those products due to Six Flags. WHAM-O personally  
28 served Liu with the judgment and permanent injunction from the Color case, and yet

1 she continues to authorize and direct Manley's false and misleading advertising.

2 118. Defendants Dubinsky's, Chan's, and Liu's direction and authorization of  
3 false and misleading advertising by SLB, Manley Toys, and Aquawood, in  
4 connection with the sale, or offering for sale, of its water slide toys constitute false  
5 advertising in violation of section 43(a)(1)(B) of the Lanham Act. The horizontal  
6 sliding surface of SLB's and Defendant Manley's water slide toys is orange, but the  
7 packaging depicts a yellow horizontal sliding surface. This false representation in  
8 connection with the sale, or offering for sale, of its water slide toys has caused, or is  
9 likely to cause, confusion with the YELLOW WATER SLIDE Mark and cause injury  
10 to WHAM-O.

11 119. As joint tortfeasors with SLB for the willful false advertising that resulted  
12 in the judgment in the Color case, Defendants Dubinsky, Chan, and Liu are jointly  
13 and severally liable along with SLB for the full amount of the nearly \$8 million  
14 judgment and WHAM-O is entitled to collect this judgment from them.

15 120. In defiance of this Court's permanent injunction in the Color case,  
16 Defendants Dubinsky, Chan, and Liu continue to direct and authorize Manley and  
17 Aquawood to engage in the misleading marketing, advertising, and promotion of its  
18 water slide toys. Unless held in contempt and immediately restrained and enjoined,  
19 they will continue to do so. WHAM-O's remedy at law is not adequate to  
20 compensate it for the harm inflicted and threatened by Defendants false  
21 representations in connection with the sale, or offering for sale, of its goods and  
22 services.

23 121. WHAM-O has been further damaged by Defendants' continued false  
24 advertising in an amount to be proved at trial. WHAM-O is entitled to recover any  
25 additional lost profits due to diverted sales because of the continued false advertising,  
26 loss of good will, the cost of corrective advertising, and all profits further realized by  
27 Defendants Manley and Aquawood during their false advertising since the judgment  
28 in the Color case..

1 122. Defendants Dubinsky's, Chan's, and Liu's actions have been willful,  
2 malicious and fraudulent with knowledge of the likelihood of confusion and  
3 deception and with intent to confuse and deceive, as alleged above. Therefore,  
4 WHAM-O is entitled to recover three times the amount of the profits realized by  
5 Defendants Manley and Aquawood, plus WHAM-O's reasonable attorneys' fees.

6 **SEVENTH CLAIM FOR RELIEF**

7 (Judgment Debtor's Interest in Property or Debt to Satisfy Money Judgment Pursuant  
8 to Cal. Civ. Proc. Code § 708.210 et seq. as to all Defendants)

9 123. Paragraphs 1 through 122 are hereby incorporated by reference.

10 124. On or about December 9, 2007, the District Court for the Central District  
11 of California entered a \$6 million money judgment against SLB in favor of WHAM-  
12 O in Case No. CV06-1382 RSWL (CWx) in the United States District Court for the  
13 Central District of California.

14 125. On or about February 26, 2008, the District Court for the Central District  
15 of California granted WHAM-O's motion for attorneys' fees, awarding an additional  
16 \$1,768,882.24 to WHAM-O in Case No. CV06-1382 RSWL (CWx).

17 126. WHAM-O's judgment in Case No. CV06-1382 has not been satisfied, and  
18 SLB has sought to evade that judgment by initiating the unsupervised and fraudulent  
19 ABC process.

20 127. In light of the unity and identity of interest between SLB, Defendants  
21 Manley, Dubinsky, Chan, and Liu, the severe undercapitalization of SLB, SLB's  
22 complete disregard of corporate formalities, and the inequitable result that will arise  
23 if SLB is permitted to maintain its corporate fiction, Defendants Manley, Dubinsky,  
24 Chan and Liu are the alter egos of SLB and are judgment debtors each fully liable on  
25 the \$6 million judgment entered against SLB, in addition to the \$1,768,882.24 in  
26 attorney's fees awarded to WHAM-O by the Court. It is proper, under long-standing  
27 California law, to treat SLB's alter egos as the true judgment debtors, because "[t]hat  
28 a court may at any time amend its judgment so that the latter will properly designate



1 the real defendants is not open to question.” *Mirabito v. San Francisco Dairy Co.*, 8  
2 Cal.App.2d 54, 57 (1935); *see also Thomson v. L. C. Roney & Co.*, 112 Cal.App.2d  
3 420, 425 (1952) (amendment to judgment to add alter ego is “simply an amendment  
4 whose purpose is to designate the real name of the judgment debtor”).

5 128. In light of the unity of interest between Izzy Holdings and its alter egos,  
6 Dubinsky and Chan, on the one hand, and SLB and SLB’s alter egos, including  
7 Dubinsky and Chan, on the other hand, and the fact that Izzy Holdings is but one of  
8 several shell entities in the overall Manley Toyquest enterprise, Izzy Holdings is  
9 SLB’s alter ego and, under long-standing California law, it is proper to treat Izzy  
10 Holdings as a true judgment debtor.

11 129. Defendants AW and Aquawood are mere continuations of SLB, created  
12 for the sole purpose of enabling SLB to evade the nearly \$8 million judgment, while  
13 allowing SLB to continue its operations under a new name. Consequently, it is  
14 proper under California law to treat AW and Aquawood as true judgment debtors.

15 130. Plaintiff is informed and believes and on such information and belief  
16 alleges that Defendants Wal-Mart, Target, TRU, and Kmart are indebted to the  
17 judgment debtor Manley in the sum of several million dollars, which can be properly  
18 garnished to satisfy WHAM-O’s judgment because such property is owed by  
19 Manley, in part or in full, to SLB, and/or because such property is owned by alter ego  
20 judgment debtor Manley.

21 131. Defendant Manley has compensated SLB for its toy designs and other  
22 services through the payment of near monthly commissions. Manley continues to  
23 market, distribute, sell, and offer for sale products using SLB’s toy designs. Despite  
24 its continued use of SLB’s toy designs, Manley has ceased making the commission  
25 payments to SLB. Consequently, Manley is indebted to SLB in a sum to be  
26 determined at trial, which can be subject to lien and properly garnished to satisfy  
27 WHAM-O’s judgment because such property is owed by Manley in full to SLB.

28

1 132. As mere continuations of SLB, resulting from a fraudulent transaction,  
2 AW and Aquawood are in possession of SLB's property, which can properly be  
3 subject to lien and garnished to satisfy WHAM-O's judgment.

4 133. As SLB's alter egos, the property of Izzy Holdings, Dubinsky, Chan, Liu,  
5 and Manley, can be used to satisfy WHAM-O's judgment, and, consequently can  
6 properly be garnished and subject to lien.

7 **EIGHTH CLAIM FOR RELIEF**

8 (Unfair Competition in Violation of California Common Law as to Defendants  
9 Manley, Aquawood, TRU, Dubinsky, Chan, and Liu)

10 134. Paragraphs 1 through 133 are hereby incorporated by reference.

11 135. WHAM-O alleges that Defendants Manley, Aquawood, TRU, Dubinsky,  
12 Chan, and Liu have engaged in, and continue to engage in, unfair competition in  
13 violation of California common law.

14 136. The conduct of Defendants Manley, Aquawood, TRU, Dubinsky, Chan,  
15 and Liu as alleged above, constitutes unfair competition under California State  
16 common law. The acts of Defendants Manley, Aquawood, TRU, Dubinsky, Chan,  
17 and Liu have resulted in the "passing off" of their products as those of WHAM-O, or  
18 as somehow related or associated with, or sponsored or endorsed by WHAM-O.

19 137. In further violation of California unfair competition common law,  
20 Defendant TRU has refused to do business with Plaintiff WHAM-O as a result of  
21 WHAM-O'S enforcement of its intellectual property rights.

22 138. By reason of these acts, WHAM-O has suffered and is suffering actual,  
23 permanent and irreparable injury, the extent of which is presently not known, and  
24 WHAM-O will suffer continuing damage and irreparable injury unless Defendants  
25 Manley, Aquawood, TRU, Dubinsky, Chan, and Liu are preliminarily and  
26 permanently enjoined from the use of the marks.

27 139. The actions of Defendants Manley, Aquawood, TRU, Dubinsky, Chan,  
28 and Liu entitle WHAM-O to general and specific damages for all of such

1 Defendants' profits derived from their past unlawful conduct to the full extent  
2 provided for by the common law of the State of California.

3 140. The actions of Defendants Manley, Aquawood, and TRU have been  
4 willful, malicious and fraudulent with knowledge of the likelihood of confusion and  
5 deception and with intent to confuse and deceive, as alleged above. Therefore,  
6 WHAM-O is entitled to recover punitive damages under California Civil Code  
7 § 3294.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, WHAM-O prays for entry of judgment in its favor and against  
10 Defendants as follows:

- 11 1. For a declaration that Defendants Manley Toys, Aquawood, AW, Izzy,  
12 Dubinsky, Chan and Liu are liable for the Color case judgment because (1)  
13 Defendants Manley Toys, Dubinsky, Chan, and Liu are jointly and  
14 severally liable as SLB's joint tortfeasors; (2) Defendants Manley Toys,  
15 Izzy, Dubinsky, Chan, and Liu are liable as SLB's alter egos; and/or (3)  
16 Defendants Aquawood and AW are liable as SLB's successors;
- 17 2. For an award to WHAM-O of all profits received by Defendants Manley  
18 Toys, Aquawood, and TRU as a result of the continued infringement,  
19 dilution and false advertising of Defendants Manley Toys, Aquawood,  
20 Dubinsky, Chan, and Liu and the infringement, dilution and false  
21 advertising of TRU;
- 22 3. For an award of all damages sustained by WHAM-O by reason of the acts  
23 of continued infringement, dilution, and false advertising of Defendants  
24 Manley Toys, Aquawood, Dubinsky, Chan, and Liu, and the acts of  
25 infringement, dilution, and false advertising by TRU pursuant to 15 U.S.C.  
26 § 1117;
- 27 4. For an order that Defendants Manley Toys, Dubinsky, Chan, Liu,  
28 Aquawood, and TRU are in contempt of the Court's permanent injunction

1 in the Color case, or, alternatively for entry of preliminary and permanent  
2 injunctive relief restraining and enjoining Defendants Manley Toys,  
3 Aquawood, TRU, Dubinsky, Chan, and Liu and all of their agents,  
4 successors, and assigns, and all persons in active concert or participation  
5 with any of them, from using the color yellow in connection with the  
6 distribution, sale or offering for sale of water slide toys, or any other mark,  
7 alone or in combination with other words or symbols, that is confusingly  
8 similar to WHAM-O's YELLOW WATER SLIDE Mark, or which is likely  
9 to cause confusion or mistake or to deceive, including any use on  
10 Defendants' websites and on the Internet;

- 11 5. For an order requiring Defendant Manley Toys, Aquawood, and TRU to  
12 deliver to WHAM-O all articles that infringe or dilute the YELLOW  
13 WATER SLIDE Mark, pursuant to 15 U.S.C. § 1118;
- 14 6. For an order requiring Defendants Manley Toys, Aquawood, and TRU to  
15 advise WHAM-O of the identity of all customers, suppliers, distributors and  
16 manufacturers of Defendant's water slides using the color yellow and  
17 requiring Defendants Manley Toys Aquawood, and TRU to advise all  
18 customers, suppliers, distributors and manufacturers that: (a) their water  
19 slides using the color yellow were not manufactured, licensed, distributed  
20 or authorized by WHAM-O; (b) any sales of such waterslides infringes the  
21 YELLOW WATER SLIDE Mark; and (c) any such infringing water slides  
22 sold or distributed by Defendants Manley Toys, Aquawood, or TRU may  
23 be returned to Defendants Manley Toys, Aquawood, or TRU in any  
24 condition for a full refund, and Defendants Manley Toys, Aquawood, or  
25 TRU shall make such refund and maintain all records relating to such recall  
26 notices and refunds;
- 27 7. For a declaration that the conduct of Defendants' Manley, Aquawood,  
28 TRU, Dubinsky, Chan, and Liu was willful;

- 1 8. For an award of three times the amount of profits awarded herein pursuant
- 2 to 15 U.S.C. § 1117(a);
- 3 9. For a declaration that this is an exceptional case and an award of reasonable
- 4 attorneys' fees against Defendants Manley Toys, Aquawood, TRU,
- 5 Dubinsky, Chan, and Liu pursuant to 15. U.S.C. § 1117(a);
- 6 10. For an award of compensatory damages, punitive damages, and costs
- 7 against Defendants Manley Toys, Aquawood, TRU, Dubinsky, Chan, and
- 8 Liu;
- 9 11. For a judgment that each Defendant is either (1) indebted to SLB, SLB's
- 10 alter egos, or SLB's successors, or (2) in possession of property belonging
- 11 to SLB, SLB's alter egos or SLB's successors, and that such debt or
- 12 property shall be applied to payment of the money judgment against SLB
- 13 Toys in Case No. CV 06-1382 RSWL (CWx) in favor of WHAM-O; and
- 14 12. For an award of such other and further relief as the Court shall deem just
- 15 and proper.

16 DATED: April 11, 2008

Respectfully submitted,

HELLER EHRMAN LLP

21 By           /s/ John C. Ulin            
JOHN C. ULIN

23 Attorneys for Plaintiff  
24 WHAM-O, INC.

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

**DEMAND FOR JURY TRIAL**

Plaintiff WHAM-O, Inc. hereby demands a jury trial on all claims herein that are properly triable to a jury.

DATED: April 11, 2008

Respectfully submitted,

HELLER EHRMAN LLP

By                                 /s/ John C. Ulin                                  
JOHN C. ULIN

Attorneys for Plaintiff  
WHAM-O, INC.

**EXHIBIT 1**

# United States Patent Office

761,883  
Registered Dec. 24, 1963

## PRINCIPAL REGISTER Trademark

Ser. No. 118,388, filed Apr. 21, 1961

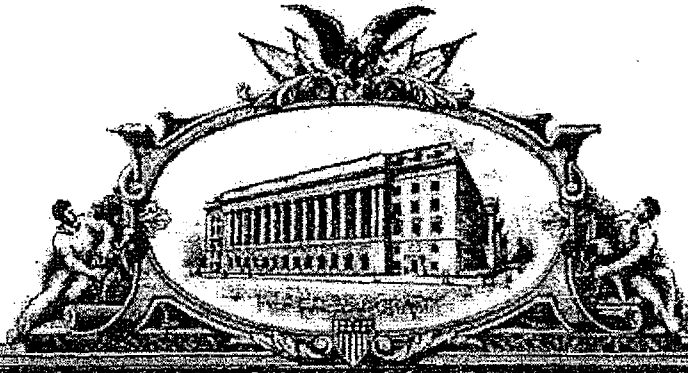
### SLIP 'N SLIDE

Wham-O Manufacturing Company (California corporation)  
835 E. El Monte St.  
San Gabriel, Calif.

For: FLEXIBLE PLASTIC WATER SLIDE, in  
CLASS 22.  
First use Apr. 13, 1961; in commerce Apr. 13, 1961.  
No claim of exclusive right is made to the use of  
"Slide."







781600

**THE UNITED STATES OF AMERICA**

**TO ALL TO WHOM THESE PRESENTS SHALL COME:  
UNITED STATES DEPARTMENT OF COMMERCE**

United States Patent and Trademark Office

September 21, 2005

THE ATTACHED U.S. TRADEMARK REGISTRATION 1,432,069 IS  
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND  
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN  
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES  
PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF 20 YEARS FROM *March 10, 1987*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*WHAM-O- INC.*

*A DELAWARE CORPORATION*

By Authority of the  
Under Secretary of Commerce for Intellectual Property  
and Director of the United States Patent and Trademark Office

*W. Montgomery*  
W. MONTGOMERY  
Certifying Officer

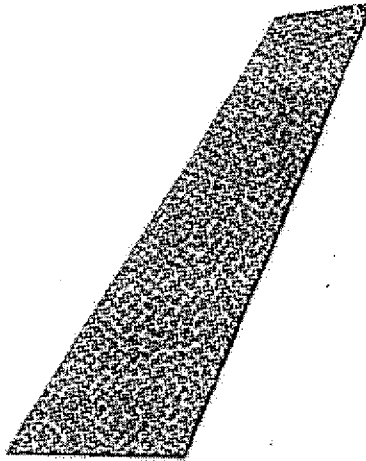


Int. Cl.: 28

Prior U.S. Cl.: 22

**United States Patent and Trademark Office** Reg. No. 1,432,069  
Registered Mar. 10, 1987

**TRADEMARK  
PRINCIPAL REGISTER**



KRANSCO MANUFACTURING, INC. (CALI-  
FORNIA CORPORATION)  
160 PACIFIC AVENUE  
SAN FRANCISCO, CA 941884866

FOR: WATER SLIDE TOYS, IN CLASS 28  
(U.S. CL. 22).

FIRST USE 0-0-1960; IN COMMERCE  
0-0-1960.

THE MARK IS LINED FOR THE COLOR  
YELLOW.

THE MARK CONSISTS OF THE SINGLE  
COLOR YELLOW APPLIED TO THE ENTIRE  
SURFACE OF THE GOODS.

SEC. 2(F).

SER. NO. 574,701, FILED 12-23-1985.

JAMES WALSH, EXAMINING ATTORNEY



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

Priority \_\_\_\_\_  
Send  \_\_\_\_\_  
Enter \_\_\_\_\_  
Closed \_\_\_\_\_  
JS-5/JS-6 \_\_\_\_\_  
JS-2/JS-3 \_\_\_\_\_  
Scan Only \_\_\_\_\_

FILED  
CLERK U.S. DISTRICT COURT  
OCT 11 2008  
CENTRAL DISTRICT OF CALIFORNIA  
BY [Signature] DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

SLB TOYS USA, INC., a New York corporation  
Plaintiff / Counter-Defendant,  
v.  
WHAM-O, INC., a Delaware corporation  
Defendant / Counter-Claimant.

No: 2:06-CV-01382 RSWL (CWx)

**VERDICT FORM WITH  
SPECIAL  
INTERROGATORIES**

The Honorable Ronald S.W. Lew

///  
///  
///  
///  
///  
///  
///  
///

DOCKETED ON CM  
OCT 11 2008  
BY [Signature] 022  
1455

1 WE, THE JURY, FIND:  
2

3 CLAIM 1--INFRINGEMENT OF YELLOW WATER SLIDE

4 TRADEMARK

5 On the claim of Wham-O against SLB for infringement  
6 of the trademark (registered as U.S. Trademark Reg. No.  
7 1,432,069 or unregistered) for the color YELLOW on the  
8 sliding surface of water slide toys, we, the jury, find  
9 in favor of (check one):

10 Wham-O:

11 SLB:

12  
13 If you found for Wham-O on claim 1, do you find  
14 that SLB infringed the trademark willfully?

15 Yes:

16 No:

17  
18 CLAIM 2--INFRINGEMENT OF YELLOW/BLUE WATER SLIDE

19 TRADEMARK

20 On the claim of Wham-O against SLB for infringement  
21 of the trademark registered in the United States (U.S.  
22 Trademark Reg. No. 2,924,744), we, the jury, find in  
23 favor of (check one):

24 Wham-O:

25 SLB:

26  
27  
28

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

If you found in favor of Wham-O on claim 2, do you find that SLB infringed the trademark willfully?

Yes: \_\_\_

No: \_\_\_

CLAIM 3--FALSE ADVERTISING

On the claim of Wham-O against SLB for unfair competition through false advertising, we, the jury, find in favor of (check one):

Wham-O:

SLB: \_\_\_

If you found in favor of Wham-O on claim 3, do you find that SLB intended to deceive or otherwise acted in bad faith?

Yes:

No: \_\_\_

CLAIM 4--DILUTION

On the claim of Wham-O against SLB for dilution of the trademark (registered or unregistered) for the color YELLOW on the sliding surface of water slide toys, we, the jury, find in favor of (check one):

Wham-O:

SLB: \_\_\_

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

If you found in favor of Wham-O on claim 4, do you find that SLB diluted the YELLOW trademark willfully?

Yes:   
No:

DAMAGES--ALL CLAIMS

Note: Complete the following paragraph only if you find in favor of the Wham-O on at least one of the claims.

We, the jury, assess damages for the Wham-O in the sum of \$ 3.60M  
\$ 3,600,000



1 ADVISORY VERDICT

2 The Court requests advice from the jury with regard  
3 to the following matters.  
4

5  
6 SLB'S CLAIM FOR CANCELLATION

7 Do you find that SLB has established by clear and  
8 convincing evidence that Wham-O abandoned its YELLOW  
9 WATER SLIDE trademark registration (U.S. Trademark Reg.  
10 No. 1,432,069)?  
11

12 Yes:

13 No:

14  
15  
16 WHAM-O'S REQUEST FOR ENHANCED DAMAGES

17 Note: Complete the following paragraphs only if you  
18 find in favor of Wham-O and find willfulness or bad  
19 faith on at least one of the claims.  
20

21 Do you find that enhanced damages should be awarded  
22 against SLB in order to fully compensate Wham-O and/or  
23 to make SLB's infringement unprofitable?  
24

25 Yes:

26 No:

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

If your answer was Yes, please recommend an amount of enhanced damages to the Court in a sum no more than three times the damages you have already assessed. The enhanced amount may not be so great as to constitute a penalty.

We, the jury, recommend enhanced damages for Wham-O in the sum of \$ 2.4M  
\$ 2,400,000

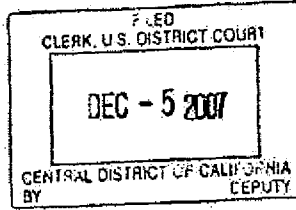
PLEASE SIGN AND DATE THIS FORM AND RETURN IT TO THE COURT

Dated: 11 Oct 07

Signed: Name Redacted by Court for service  
(by Jury Foreperson) on parties



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



Priority \_\_\_\_\_  
Send   Z    
Enter   Z    
Closed \_\_\_\_\_  
JS-5   Z    
JS-2/JS-3 \_\_\_\_\_  
Scan Only \_\_\_\_\_

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SLB TOYS USA, INC.,  
Plaintiff,  
v.  
WHAM-O INC., et al.  
Defendant.

CV 06-1382 RSWL (CWx)

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED

1. SLB'S CLAIMS FOR DECLARATORY RELIEF

Plaintiff SLB Toys USA, Inc.'s claims for declaratory relief are hereby dismissed with prejudice; Defendant Wham-O's United States Trademark Registration No. 1,432,069 is good and valid in law.

1 2. WHAM-O'S COUNTERCLAIMS

2 Counter-claimant Wham-O is hereby awarded final  
3 judgment on its counterclaims against SLB in the sum of  
4 \$6,000,000 (six million dollars), plus its costs of suit as  
5 the prevailing party in this action.

6 3. PERMANENT INJUNCTION

7 IT IS ORDERED THAT SLB and each of its officers,  
8 agents, servants and employees, and all those persons in  
9 active concert or participation with them are hereby forever  
10 enjoined from using the color yellow on the sliding surface  
11 of water slide toys, or packaging or advertising depicting  
12 the same, or any mark similar thereto or likely to cause  
13 confusion therewith, in the sale, offering for sale,  
14 distribution or advertising of water slide toys at any  
15 locality in the United States.

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

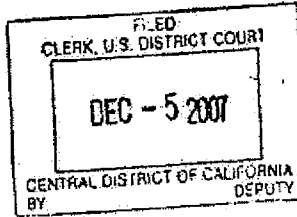
RONALD S.W. LEW  

---

RONALD S.W. LEW  
Senior U.S. District Judge

DATED: December 4, 2007

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



Priority \_\_\_\_\_  
Send   
Enter   
Closed \_\_\_\_\_  
JS-5/JS-6 \_\_\_\_\_  
IS-2/IS-3 \_\_\_\_\_  
Scan Only \_\_\_\_\_

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SLB TOYS USA, INC., )

Plaintiff, )

v. )

WHAM-O INC., et al. )

Defendant. )

CV 06-1382 (RSWL) (CWx)

ORDER GRANTING  
PERMANENT INJUNCTION

Currently before this Court is Wham-O, Inc.'s Motion for Permanent Injunction. Having considered all papers and arguments, **THE COURT NOW FINDS AND RULES AS FOLLOWS:**

Wham-O, Inc. has shown that it will suffer irreparable injury, there is inadequate remedy at law, the balance of hardship tilts in its favor, and the public interest would

1 not be disserved by a permanent injunction.

2 Accordingly, the Court **GRANTS** the Motion for Permanent  
3 Injunction as detailed below.

4 IT IS ORDERED THAT SLB and each of its officers,  
5 agents, servants and employees, and all those persons in  
6 active concert or participation with them are hereby forever  
7 enjoined from using the color yellow on the sliding surface  
8 of water slide toys, or packaging or advertising depicting  
9 the same, or any mark similar thereto or likely to cause  
10 confusion therewith, in the sale, offering for sale,  
11 distribution or advertising of water slide toys at any  
12 locality in the United States. See Plough, Inc. v. Kreis  
13 Laboratories, 314 F.2d 635, 639 (9th Cir. 1963) ("[The  
14 infringer] must 'be required to keep a safe distance away  
15 from the margin line.'").

16 However, the Court denies Wham-O's request to order  
17 destruction of articles because such an order is  
18 unnecessarily harsh and burdensome for the Court to oversee,  
19 especially in light of the fact that the jury did not find  
20 any specific product design to be infringing. Further, the  
21 Court denies SLB's request for a sell-off period as  
22 inappropriate in this case.

23 ///

24 ///

25 ///

26 ///

Case 2:06-cv-01382-RSWL-CW Document 475 Filed 12/05/2007 Page 3 of 3

1           Moreover, the Court denies Wham-O's request to order  
2 compliance reporting as inappropriate and unnecessary in  
3 this case.

4

5 **IT IS SO ORDERED.**

6

RONALD S.W. LEW

7

---

RONALD S.W. LEW  
Senior U.S. District Judge

8

DATED: December 3, 2007

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26







**FILED**  
ALAMEDA COUNTY

JUL 19 2007

CLERK OF THE SUPERIOR COURT

By Vicki Daybell JS

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

WHAM-O, INC.,

Plaintiff,

vs.

EILEEN SEFCHICK; BRIAN  
DUBINSKY; SLB TOYS USA, INC.;  
MANLEY TOYQUEST, LLC, and DOES  
1 through 100, inclusive,

Defendants.

No. RG07-329828

ORDER GRANTING PRELIMINARY  
INJUNCTION

The Motion of Plaintiff Wham-O, Inc. ("Plaintiff") for Preliminary Injunction came on regularly for hearing on June 29, 2007, in Department 31 of this Court, Judge Frank Roesch presiding. Plaintiff appeared by Annette L. Hurst, Stephen C. Tedesco and Rod M. Fliegel. Defendant SLB Toys USA, Inc. ("SLB"), on its own behalf and on behalf of the entity sued (perhaps erroneously) as Manley Toyquest, LLC ("Manley"), appeared by Joshua R. Furman. Defendant Eileen Sefchick ("Sefchick") appeared by Jeffrey Abrams. Defendant Brian Dubinsky ("Dubinsky") appeared by Alex Weingarten.

The Court has considered all of the papers filed on behalf of the parties, and the arguments of counsel at the hearing, and good cause appearing, HEREBY GRANTS the motion for preliminary injunction.

In deciding whether to issue a preliminary injunction, a court must weigh two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits; and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction. The Court's determination is guided by a mix of the potential merit and interim harm factors. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-78.) The scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits. (*Id.*) A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. (*Id.*)

Based on a consideration of the above factors and all the material before it on the present Order to Show Cause, the Court finds that Plaintiff has made a sufficient showing for extending the injunctive relief set forth in the Temporary Restraining Order issued by the Court on June 8, 2007, as modified by the Court in this Order, through the time of trial in this action.

Accordingly, IT IS HEREBY ORDERED that Defendants SLB, Manley, Sefchick and Dubinsky, and all persons acting in concert or participating with them, are

(1) ordered to return immediately to Plaintiff all materials, writings (as defined in California Evidence Code section 250), documents, computer files and/or databases

(whether stored on CD-Rom or in other computer-based or digital form) containing information of Plaintiff covered by the Proprietary Information and Inventions Agreement signed by Sefchick on or about October 14, 2004, or protected as "trade secret" information under California law, including any and all originals, copies, transcriptions, extracts, and any materials of any form that consist of, contain, incorporate, or otherwise refer to or disclose such information;

(2) enjoined and/or restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly, any and all of the following acts:

(a) misappropriating, disclosing to any third parties or making use of any "Proprietary Information" of Plaintiff, defined as information that is either covered by the Proprietary Information and Inventions Agreement signed by Sefchick on or about October 14, 2004, or protected as "trade secret" information under California law, except for information acquired through publicly available sources wholly independent of Sefchick;

(b) engaging in solicitation activities, sales calls or other contacts using Proprietary Information for the purpose of marketing, soliciting or selling competing products;

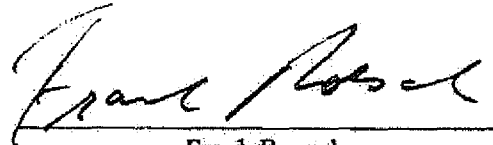
(c) retaining possession of any Proprietary Information;

(d) interfering with the advantageous business relationships between Plaintiff and its customers in any manner through use of Proprietary Information; or

(e) concealing, transferring, deleting, altering, editing or modifying any computer files, databases, documents or other information obtained from Plaintiff, or destroying any information relevant to this lawsuit.

IT IS FURTHER ORDERED that Plaintiff shall furnish a bond in connection with this preliminary injunction pursuant to Code of Civil Procedure § 529 in the sum of \$10,000.00 on or before five (5) days after the date of the Clerk's certificate of mailing of this Order (plus five additional days for service by mail pursuant to Code of Civil Procedure § 1013).

Dated 7/19/07



Frank Roesch  
Judge of the Superior Court

**CLERK'S DECLARATION OF MAILING**

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER GRANTING PRELIMINARY INJUNCTION to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

Stephen C. Tedesco, Esq.  
Rod M. Fliegel, Esq.  
LITTLER MENDELSON, APC  
650 California Street, 20<sup>th</sup> Floor  
San Francisco, CA 94108-2693

Annette L. Hurst, Esq.  
HELLER EHRMAN  
333 Bush Street  
San Francisco, CA 94104

Joshua R. Furman, Esq.  
2228 Barry Avenue  
Los Angeles, CA 90064

Jeffrey I. Abrams, Esq.  
WOLF, RIFKIN, SHAPIRO & SCHULMAN, LLP  
11400 West Olympic Blvd., Ninth Floor  
Los Angeles, CA 90064-1557

Alex M. Weingarten, Esq.  
LAGER WEINGARTEN, LLP  
1800 Century Park East, Suite 600  
Los Angeles, CA 90067

I declare under penalty of perjury that the same is true and correct.  
Executed on July 20, 2007.

By: Vicki Daybell  
Vicki Daybell, Deputy Clerk  
Department 31



GENERAL ASSIGNMENT

THIS ASSIGNMENT made this 19th day of November, 2007, by SLB Toys USA, INC., a New York corporation, having its principal place of business at 2229 Barry Avenue, Los Angeles, California (hereinafter referred to as "Assignor"), to BYRON Z. MOLDO (hereinafter referred to as "Assignee").

WITNESSETH: That whereas Assignor is indebted to various persons and is desirous of providing for the payment of same, so far as is in its power, by an assignment of all of its property for that purpose:

NOW, THEREFORE, Assignor, for valuable consideration, receipt of which is hereby acknowledged, does hereby make the following General Assignment for the benefit of Assignor's creditors to Byron Z. Moldo, as Assignee, under the following terms and conditions:

1. Assignor does hereby grant, bargain, sell, assign, convey, and transfer to Assignee, his successors and assigns, in trust for the ultimate benefit of Assignor's creditors generally, all of the property and assets of the Assignor of every kind and nature and wheresoever situated (collectively, the "Assets"), whether in possession, reversion, remainder, or expectancy, both real and personal, and any interest or equity therein; included therein are all merchandise, furniture, fixtures, machinery, equipment, raw materials, merchandise or work in process, book accounts, books, accounts receivable, cash on hand, all causes of action (personal or otherwise), insurance policies, patents, trademarks, trade names, copyrights, trade secrets, intellectual property, any and all right, title, license, and/or interest of Assignor in advertising, including White and Yellow Page telephone listings, any and all right, title, license or other interest in Assignor's telephone, fax, or other numbers listed in any advertisement by which business is solicited, any and all rights and goodwill in the name "SLB Toys USA, INC.", Assignor's complete computer system, and all other property of every kind and nature owned by Assignor, and without limiting the generality of the foregoing, including all of the assets pertaining to that certain business known as SLB Toys USA, INC., located at 2229 Barry Avenue, Los Angeles, California 90064. Assignor shall use reasonable efforts to have the insurance policies endorsed over to the Assignee.

2. This Assignment constitutes a grant deed of all real property owned by the Assignor, if any, whether or not said real property is specifically described herein.

3. Leases and leasehold interests in real estate are included in this assignment.

4. Assignor agrees to deliver to Assignee all books of account and records, to execute and deliver all additional necessary documents immediately upon request by Assignee, and to endorse all indicia of ownership where required by Assignee, in order to complete the transfer of all assets to Assignee as intended by this Assignment, including, but not limited to, all of Assignor's real and personal property and/or Assignor's interest therein, including mortgages, deeds of trust, motor vehicles, patent rights, trademarks,



trade names, copyrights, trade secrets and intellectual property. Assignee is hereby authorized to execute all endorsements and demands requiring Assignor's signature, in the name of Assignor. Assignor further authorizes Assignee to apply for any deposits, refunds (including specifically among all others, claims for refund of taxes paid) or claims wherever necessary in the name of Assignor. Assignee is authorized to direct all Assignor's United States mail to be delivered to Assignee, and Assignee is expressly authorized and directed to open said mail as agent of Assignor, and to do any thing or act which the Assignee in his sole and arbitrary discretion deems necessary or advisable to effectuate the purpose of this Assignment.

5. Assignor and Assignee agree to the following:

a. This instrument transfers legal title and possession to Assignee of all of the above-described assets and Assignee, in his own discretion, may direct whether to continue all, or part, of the business operations, or to liquidate said assets.

b. Assignee, at his discretion, may sell and dispose of said assets upon such terms and conditions as he may see fit, at public or private sale. Assignee shall not be personally liable in any manner, and Assignee's obligations shall be in a representative capacity only in his capacity as Assignee for the benefit of creditors. Assignee shall administer this estate to the best of his ability, but it is expressly understood that he, his agents and/or employees shall be liable only for the reasonable care and diligence in said administration, and he shall not be liable for any act or thing, or any omission to act, done by him, his agents or employees in good faith in connection therewith.

c. From the proceeds of the sale, collections, operations or other source, Assignee shall pay himself and retain as Assignee all of his charges and expenses, together with his own remuneration and fee, which remuneration and fee shall not exceed the sum of fifteen thousand dollars (\$15,000.00), plus ten percent (10%) of the amount of the proceeds received and handled by the Assignee from sales, collections, operations or other sources. Assignee may also pay from such proceeds reasonable remuneration to his agents, attorneys and accountants, and may pay a reasonable fee to Assignor's attorney. All of the aforementioned amounts are to be determined at Assignee's sole direction, determination and judgment.

d. Assignee may compromise claims, assume or reject Assignor's executory contracts, and discharge at his option any liens on said assets and indebtedness which under law are entitled to priority of payment. Assignee shall have the power to borrow money, hypothecate and pledge the assets, and to do all matters and things that said Assignor could have done prior to this Assignment. Any act or thing done by the Assignee hereunder shall bind the assignment estate and the Assignee only in his capacity as Assignee for the benefit of creditors. Assignee shall have the right to sue and defend suits as the successor of the Assignor, and the Assignee is hereby given the right and power to institute and prosecute legal proceedings in the name of the Assignor, the same as if the Assignor itself had instituted and prosecuted such proceedings or actions.

e. Assignor agrees (to the extent assignable by law) to make any and all claims for refund of taxes which may be due from the Internal Revenue Service or other taxing agencies for tax refunds, or otherwise, and to forthwith upon receipt of such refunds pay them over to the Assignee, and hereby empowers Assignee to make all claims for refunds which may be made by Assignor.

f. After paying all costs and expenses of administration and all fees and all allowed priority claims, Assignee shall distribute to all unsecured creditors, *pro rata*, any remaining net proceeds of this assignment estate. Said payments are to be made until all assets are exhausted, or these creditors are paid or settled, in full. Thereafter, the surplus of moneys and property, if any, shall be transferred or conveyed to the Assignor. If any undistributed dividends to creditors or any reserve funds shall remain unclaimed for a period of ninety (90) days after issuance of a final dividend check by the Assignee, then the same shall become the property of this Assignee and used to supplement his fees for services rendered in administering this Assignment.

g. It is agreed and understood that this transaction is a common law assignment for the benefit of Assignor's creditors, and is not a statutory assignment. This Agreement shall be governed by the provisions of section 493.010, *et seq.*, of the California Code of Civil Procedure.

SLB Toys USA, INC.,  
a New York corporation, Assignor

By: \_\_\_\_\_  
Brian Dubinsky, President

ACCEPTED THIS 19<sup>th</sup> DAY OF NOVEMBER, 2007:

\_\_\_\_\_  
BYRON Z. MOLDO, ASSIGNEE

e. Assignor agrees (to the extent assignable by law) to make any and all claims for refund of taxes which may be due from the Internal Revenue Service or other taxing agencies for tax refunds, or otherwise, and to forthwith upon receipt of such refunds pay them over to the Assignee, and hereby empowers Assignee to make all claims for refunds which may be made by Assignor.

f. After paying all costs and expenses of administration and all fees and all allowed priority claims, Assignee shall distribute to all unsecured creditors, *pro rata*, any remaining net proceeds of this assignment estate. Said payments are to be made until all assets are exhausted, or these creditors are paid or settled, in full. Thereafter, the surplus of moneys and property, if any, shall be transferred or conveyed to the Assignor. If any undistributed dividends to creditors or any reserve funds shall remain unclaimed for a period of ninety (90) days after issuance of a final dividend check by the Assignee, then the same shall become the property of this Assignee and used to supplement his fees for services rendered in administering this Assignment.

g. It is agreed and understood that this transaction is a common law assignment for the benefit of Assignor's creditors, and is not a statutory assignment. This Agreement shall be governed by the provisions of section 493.010, *et seq.*, of the California Code of Civil Procedure.

SLB Toys USA, INC.,  
a New York corporation, Assignor

By: \_\_\_\_\_  
Brian Dubinsky, President

ACCEPTED THIS \_\_\_\_\_ DAY OF NOVEMBER, 2007:

  
\_\_\_\_\_  
BYRON Z. MOLDO, ASSIGNEE

11/22/07 MON 22:00 FAX 719 577 5361 BROADMOOR HOTEL

0067014

e. Assignor agrees (to the extent assignable by law) to make any and all claims for refund of taxes which may be due from the Internal Revenue Service or other taxing agencies for tax refunds, or otherwise, and to forthwith upon receipt of such refunds pay them over to the Assignee, and hereby empowers Assignee to make all claims for refunds which may be made by Assignor.

f. After paying all costs and expenses of administration and all fees and all allowed priority claims, Assignee shall distribute to all unsecured creditors, *pro rata*, any remaining net proceeds of this assignment estate. Said payments are to be made until all assets are exhausted, or these creditors are paid or settled, in full. Thereafter, the surplus of moneys and property, if any, shall be transferred or conveyed to the Assignor. If any undistributed dividends to creditors or any reserve funds shall remain unclaimed for a period of ninety (90) days after issuance of a final dividend check by the Assignee, then the same shall become the property of this Assignee and used to supplement his fees for services rendered in administering this Assignment.

g. It is agreed and understood that this transaction is a common law assignment for the benefit of Assignor's creditors, and is not a statutory assignment. This Agreement shall be governed by the provisions of section 493.010, *et seq.*, of the California Code of Civil Procedure.

SLB Toys USA, INC.,  
a New York corporation, Assignor

By: Brian Dubinsky  
Brian Dubinsky, President

ACCEPTED THIS 19<sup>th</sup> DAY OF NOVEMBER, 2007:

BYRON Z. MOLDO, ASSIGNEE

CONSENT TO ASSIGNMENT BY STOCKHOLDERS AND  
BOARD OF DIRECTORS

We, the undersigned, being owners and holders of 100% of the shares of stock, being more than 50% of the subscribed and issued stock, and the Board of Directors of SLB Toys USA Inc a New York corporation, do hereby give our consent to the within assignment and transfer of the property of said corporation.

NAME

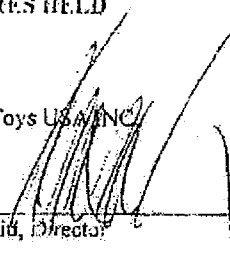
SHARES HELD

Lisa Liu

100%

SLB Toys USA INC

By:

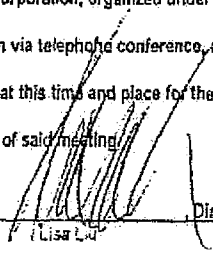
  
\_\_\_\_\_  
Lisa Liu, Director

**CONSENT OF DIRECTORS TO HOLD MEETING**

*Los Angeles, California*

*November 12th, 2007*

I, Lisa Liu, being the sole director of SLB Toys USA, Inc. a corporation, organized under the laws of the State of New York, assembled this day at the office of the Corporation via telephone conference, at Los Angeles California, do hereby consent that a meeting of said directors be held at this time and place for the transaction of such business as may come before the meeting, and waive any notice of said meeting.

  
\_\_\_\_\_  
Lisa Liu, Director

## MINUTES OF THE MEETING

Los Angeles, California, November 1st, 2007

At a meeting of the directors of SLB Toys USA Inc., a New York Corporation, held at the office of the Corporation via telephone conference at its place of business, 2228 Barry Avenue, Los Angeles California 90064, at 6:56 o'clock pm, the following directors were present:

Lisa Liu

\_\_\_\_\_  
\_\_\_\_\_

Absent:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The President announced that the purpose of the meeting was to consider the financial condition of the company and the advisability of making a general assignment for the benefit of creditors.

On motion by Lisa Liu, seconded by Lisa Liu the following resolution was adopted, to-wit:

**BE IT RESOLVED:**

That Brian Dubinsky, President of this Corporation be, and is, hereby authorized and directed by the directors of this Corporation, in meeting assembled, to make an assignment of all assets of the Corporation to Byron Z. Moldo, for the pro rata benefit of all creditors of this corporation, and that Brian Dubinsky be, and he is hereby authorized and directed to execute said assignment containing such provisions as may be agreed upon between him and Byron Z. Moldo, (Assignee), and he is also authorized and directed to execute and deliver to Byron Z. Moldo, as Assignee, such other deeds, assignments, and agreements as may be necessary to carry this resolution into effect.

**BE IT FURTHER RESOLVED:**

That said Assignee for the benefit of creditors be, and is hereby, authorized to execute and file and prosecute on behalf of this corporation all claims for refund or abatement of all excess taxes heretofore or hereafter assessed against or collected from this corporation and any one officer of this corporation be, and it is, hereby authorized and directed to make, execute and deliver in favor of such person as may be designated by the assignee for the benefit of creditors, a power of attorney on the regular printed form thereof used by the United States Treasury Department so as to authorize said attorney-in-fact to process any tax claims for it on behalf of this Corporation.

There being no further business to come before the directors, the meeting is adjourned subject to the call of the President or Vice-President.

I, Lisa Liu, Director of SLB Toys USA Inc., a New York Corporation, do hereby certify that the foregoing is a true and correct copy of the minutes of the meeting of directors held in Los Angeles, California, at the place and hour stated and that the resolution

*contained in said minutes was adopted by the directors at said meeting and the same has not been modified or rescinded.*

*Dated November 1, 2007*

---

*Lisa Liu, Director*

CORPORATE  
SEAL



*in Los Angeles, California, at the place and hour stated and that the resolution contained in said minutes was adopted by the directors at said meeting and the same has not been modified or rescinded.*

Dated November 20, 2007

\_\_\_\_\_  
Lisa Liu, Director

CORPORATE  
SEAL

**EXHIBIT B**

ToyQuest  
 2228 Barry Ave.  
 Los Angeles, CA

Assets Inventory


Electronics and Computers

NO	Description	Qty.
2A	Dell Desktop Optiplex, Dimension, Precision	16
3S	Flat monitors graphics, 15,17,19,22,24,32 inch	23
4S	Apple G5 Desktop (upgraded) graphic	8
5A	Apple IMAC Desktop (upgraded) graphic	2
6A	Apple Server network with (7) raids and accessory	1
7A	Apple networking equipment	2
8A	Dell server power edge 2900	1
9A	Routers, HDB (24P) patch panel, sonic wall	6
10A	Belkin Power Conditioners	2
11A	ONKYO sound system, DVD, cdrw, speakers	1
12A	Scanners, Epson, Fujitsu	8
	Dell server power edge 1400	1
	Copier	1
	Printers, photo, inkjet	8
126	Printers, laser, (Canon, Epson)	10
127	Canon Fax	1
	HP Plotter Electro Static 500PS	1
	Nikon Camera	1
	External Hard Drive Maxtor	3
	Polycom Speaker phone	2
128	Sony 50" TV	1
129	Panasonic Flat TV	1
9	Panasonic Phone System high bird digital	1

ToyQuest  
2228 Barry Ave.  
Los Angeles, CA

Assets Inventory

Office Furniture

2	Office desks and return. Book shelves, file cabinet	8
3	Ping Pong Table	1
4	Basket Ball Hoop	1
5	Office High back chairs	28
6	Couches (canvas) and love seat	3
7	Coffee table	2
8	Conference Table and 10 chairs and side table	1
9	Bean bag chairs	11
	Kitchen equipment; refrigerator, coffeemaker,	
10	microwave, table and chairs	
11	Couches corner unit and coffee table	
		
13	Assorted toys and display	

Bills to Purchase

Phones: Account #011790110281693004 (Verizon)  
Cellular – Account #493020121 (T-Mobile) and #828388772 (AT&T)  
Account #995718753 (AT&T)

COVAD Isl – Account #590373

UPS – Account #E13A05

Pacific Alarm System account– Customer #16793

Blue Cross account– Group #285554

Kansas Communications phone acct– Account #001 0803 506807604

Excel phone– Account #12000006608

DWP – Account #4480769402229000000101 & 4480769402229000000901

Time Warner cable– Account #8448200190791573

Sirius music – Account #1200567211

Tivo – Account #0011032676

Gas Company – Account #03738969041

American Express – Primary Account #378207594142007

Bentonville phone – Account #60103-147286

discover.com account

Case No. CV 06-1382 RSWL (CWx) - SLB v. Wham-O, Inc. – **only the appellate rights**

So. Cal. Disposal trash – Account #2206

**EXHIBIT 7**

## ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this "*Agreement*"), dated as of November 19, 2007 (the "*Effective Date*"), is made by and between BYRON Z. MOLDO ("*Seller*"), in his capacity as assignee for the benefit of creditors of SLB Toys, USA, Inc., and AW COMPUTER HOLDINGS LLC, a California limited liability company ("*Buyer*").

### RECITALS

A. By resolution of the board of directors (the "*Board*") of SLB Toys USA, Inc. ("*Assignor*"), as memorialized in duly executed minutes, and with consent by written action of the majority of Assignor's shareholders entitled to vote, Assignor transferred ownership of all of its right, title and interest in and to its tangible and intangible assets (the "*Assets*") to Seller, and in so doing also designated Seller to act, pursuant to California law, as the assignee for the benefit of creditors of Assignor. A true and correct copy of the General Assignment Agreement, dated as of November 19, 2007, between Assignor and Seller, as assignee, memorializing such assignment is attached hereto as Exhibit A (the "*General Assignment*"). Prior to the General Assignment, Assignor was engaged in the business of designing toy and related products (the "*Business*").

B. Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, certain of the Assets, on the terms and conditions set forth in this Agreement. After the occurrence of the Closing contemplated under this Agreement, Seller will undertake the winding down of Assignor, which shall include, but not be limited to, the distribution of net funds, after payment of fees and costs associated with the liquidation and winding down, to Assignor's creditors.

### AGREEMENT

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants hereinafter set forth, Buyer and Seller hereby agree as follows:

#### 1. PURCHASE AND SALE OF CERTAIN ASSETS.

1.1 Agreement to Sell and Purchase Assets. Subject to the terms and conditions of this Agreement, and in reliance on the representations, warranties and covenants set forth in this Agreement, Seller agrees to and will sell, assign, transfer and convey to Buyer at the Closing (as defined in Section 2.2 below), and Buyer agrees to and will purchase and acquire from Seller at the Closing, all of Seller's right, title and interest in and to all of the Assets described in Section 1.2 below.

1.2 Acquired Assets Defined. Seller shall, at the Closing, sell, assign, transfer, convey and deliver to Buyer, and Buyer shall purchase from the Seller, at the Closing, as-is, where-is, all right, title and interest in and to the following Assets (collectively, the "*Acquired Assets*"): .

- (i) all tangible personal property, including, without limitation, all equipment and furniture set forth on Exhibit B annexed hereto;
- (ii) the rights of Assignor and Seller in and to the pending appeal in that certain litigation entitled SLB v. Wham-O, Case No. CV 06-1382 RSWL (CWx); and
- (iii) those written contracts, agreements, invoices, of indebtedness, or other contractual arrangements which are set forth on Exhibit B annexed hereto (the "*Assumed Contracts*").

Except for the Acquired Assets described above in Section 1.2(i), (ii) and (iii) which are being transferred to Buyer hereunder, Seller shall retain all of its right, title and interest in, to and under all remaining Assets (collectively, the "*Excluded Assets*"), which shall include:

- (i) all cash as of the Closing;
- (ii) all written and oral contracts, agreements, leases, subleases, licenses, purchase orders, invoices, instruments of indebtedness, or other contractual arrangements that are not Assumed Contracts ("*Excluded Contracts*"); and
- (iii) all rights of the Seller under this Agreement.

**1.3 Asset Transfer; Passage of Title; Delivery.**

(a) Title Passage. At the Closing, title to all of the Acquired Assets shall pass to Buyer, and Seller shall execute assignments, conveyances, bills of sale, or such other instruments of conveyance as Buyer may reasonably request to effect or evidence the transfers contemplated hereby.

**2. PURCHASE PRICE; PAYMENTS.**

**2.1 Purchase Price.** At the Closing and effective as of the Closing, and in consideration of the sale, transfer, conveyance and assignment of all the Acquired Assets to Buyer, Buyer shall (i) pay by cashier's check the sum of Fifty Five Thousand Dollars (\$55,000); and (ii) assume the liabilities, debts and obligations associated with the Assumed Contracts ("*Purchase Price*").

**2.2 Closing.** The consummation of the purchase and sale of the Acquired Assets contemplated hereby (the "*Closing*") shall take place by not later than November 19, 2007, *provided that* the parties may mutually agree to extend the date of the Closing. Upon termination, neither party will have any further rights or obligations hereunder, except that Sections 3 and 11 shall survive such termination.



**3. OBLIGATIONS NOT ASSUMED.**

**3.1 Liabilities and Obligations Not Assumed.** Other than those liabilities, debts or obligations of Seller or Assignor associated with the Assumed Contracts which serves and constitutes a material component of the Purchase Price given for the Acquired Assets, Buyer shall not assume or become obligated in any way to pay any liabilities, debts or obligations of Seller or of Assignor whatsoever, including, but not limited to, any liabilities or obligations now or hereafter arising from Assignor's business activities that took place prior to the Closing or any liabilities arising out of or connected to the liquidation and winding down of Assignor's business.

**3.2 No Obligations to Third Parties.** The execution and delivery of this Agreement shall not be deemed to confer any rights upon any person or entity other than the parties hereto, or make any person or entity a third party beneficiary of this Agreement, or to obligate either party to any person or entity other than the parties to this Agreement. There shall be no successor liability of any kind arising from the transaction contemplated herein.

**4. REPRESENTATIONS AND WARRANTIES OF BUYER.**

Buyer hereby represents and warrants to Seller as follows:

**4.1 Due Organization.** Buyer is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of California. Buyer has all necessary power and authority to enter into this Agreement and all other documents that Buyer is required to execute and deliver hereunder, and holds or will timely hold all permits, licenses, orders and approvals of all federal, state and local governmental or regulatory bodies necessary and required therefore.

**4.2 Power and Authority; No Default.** Buyer has all requisite power and authority to enter into and deliver this Agreement and to perform its obligations hereunder. The signing, delivery and performance by Buyer of this Agreement, and the consummation of all the transactions contemplated hereby, have been duly and validly authorized by Buyer. This Agreement, when signed and delivered by Buyer, will be duly and validly executed and delivered and will be the valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms, subject to the laws relating to bankruptcy, insolvency and relief of debtors, and rules and laws governing specific performance, injunctions, relief and other equitable remedies.

**4.3 Authorization for this Agreement.** No authorization, approval, consent of, or filing with any governmental body, department, bureau, agency, public board, authority or other third party is required for the consummation by Buyer of the transactions contemplated by this Agreement.

**4.4 Litigation.** As of Closing, there is no litigation, suit, action, arbitration, inquiry, investigation or proceeding pending or, to the knowledge of Buyer, threatened, before any court,

agency or other governmental body against Buyer (or any corporation or entity affiliated with Buyer) which seeks to enjoin or prohibit or otherwise prevent the transactions contemplated hereby.

**5. REPRESENTATIONS AND WARRANTIES OF SELLER.**

Seller represents and warrants to Buyer as follows:

**5.1 Power and Authority; No Default Upon Transfer.** As assignee for the benefit of creditors of Assignor, Seller has all requisite power and authority to enter into and deliver this Agreement and to perform its obligations hereunder and under the General Assignment. The signing, delivery and performance by Seller of this Agreement, and the consummation of all the transactions contemplated hereby, have been duly and validly authorized by Seller. To the best of Seller's knowledge, the General Assignment was duly authorized by Assignor's Board, with the consent of the majority of Assignor's shareholders entitled to vote with respect thereto, and is a valid agreement binding on Assignor and Seller. This Agreement, when signed and delivered by Seller, will be duly and validly executed and delivered and will be the valid and binding obligation of Seller, enforceable against Seller, as Assignee, in accordance with its terms as governed by applicable law, regulations and rules.

**5.2 Title.** The sale of the Acquired Assets is on an as-is, where-is basis, with no representations or warranties on the part of Seller.

**5.3 Assignee.** All rights of Seller with regard to the ownership and possession of the Assets are rights held as Assignee pursuant to the General Assignment made by Assignor. Pursuant to the General Assignment, Assignor has transferred all of Assignor's right, title and interest in and to the Assets to Seller.

**6. COVENANTS OF SELLER.**

Seller covenants and agrees with Buyer as follows:

**6.1 Taxes and any Other Charges Related to the Sale.** Seller agrees to pay all sales, transfer, use or other taxes, duties, claims or charges, if any, imposed on and/or related to the sale of the Acquired Assets to Buyer under this Agreement by any tax authority or other governmental agency.

**6.2 Further Assurances.** From and after the Closing, Seller shall cooperate with Buyer and promptly sign and deliver to Buyer any and such additional documents, instruments, endorsements and related information and take actions as Buyer may reasonably request for the purpose of effecting the transfer of Seller's and/or Assignor's title to the Acquired Assets to Buyer, and/or carrying out the provisions of this Agreement. Buyer shall compensate Seller for any reasonable, documented disbursements in connection with this Section 6.2 and time incurred in connection with providing assistance under this Section 6.2 in connection with any enforcement or other infringement action regarding the Acquired Assets; *provided that* Seller

shall have furnished Buyer an advance, written estimate of the fees and costs for such assistance and Buyer shall have agreed in writing to pay such fees and costs.

6.3 Survival of Covenants. Each of the covenants set forth in this Section 6 and in Section 11 shall survive the Closing.

7. CONDITIONS TO CLOSING.

7.1 Conditions to Buyer's Obligations. The obligations of Buyer hereunder shall be subject to the satisfaction and fulfillment of each of the following conditions, except as Buyer may expressly waive any of the same in writing:

(a) Accuracy of Representations and Warranties on Closing. The representations and warranties made herein by Seller shall be true and correct in all material respects, and not misleading in any material respect, on and as of the date given, and on and as of the Closing with the same force and effect as though such representations and warranties were made on and as of the Closing.

(b) Compliance. As of the Closing, Seller shall have complied in all material respects with, and shall have fully performed, in all material respects, all conditions, covenants and obligations of this Agreement imposed on Seller and required to be performed or complied with by Seller at, or prior to, the Closing.

(c) Delivery of Closing Documents. Seller shall have delivered, and Buyer shall have received, all of the documents deemed by the Buyer to be necessary to consummate the transaction contemplated hereby, which shall include, without limitation, a bill of sale.

7.2 Conditions to Seller's Obligations. The obligations of Seller hereunder shall be subject to the satisfaction and fulfillment of each of the following conditions, except as Seller may expressly waive the same in writing:

(a) Accuracy of Representations and Warranties on Closing. The representations and warranties made herein by Buyer shall be true and correct in all material respects, and not misleading in any material respect, on and as of the date given, and on and as of the Closing with the same force and effect as though such representations and warranties were made on and as of the Closing.

(b) Compliance. Buyer shall have complied in all material respects with, and shall have fully performed, the terms, conditions, covenants and obligations of this Agreement imposed thereon to be performed or complied with by Buyer at, or prior to, the Closing.

(c) Payment. Buyer shall have transmitted by wire transfer and Seller shall have received payment of the Purchase Price.

**8. CLOSING OBLIGATIONS.**

**8.1 Buyer's Closing Obligations.** At the Closing, Buyer shall deliver to Seller payment of Fifty Five Thousand Dollars (\$55,000) by cashier's check or as otherwise instructed by Seller, and a signature to this Agreement.

**8.2 Seller's Closing Obligations.** At the Closing, Seller shall deliver to Buyer a signature to this Agreement, and executed bill of sale, assignment agreements and other agreements and documents which Buyer deems necessary to consummate the transaction contemplated hereunder.

**9. SURVIVAL OF WARRANTIES.**

All representations and warranties made by Seller or Buyer herein, or in any certificate, schedule or exhibit delivered pursuant hereto, shall survive for a period of one (1) year after the Closing.

**10. TERMINATION.**

**10.1 Termination.** This Agreement may be terminated and the transactions contemplated herein may be abandoned, by written notice given to the other party hereto, at any time prior to the Closing:

(a) by mutual written consent of Seller and Buyer;

(b) by Buyer if Seller alters, amends or breaches any of the covenants, is in breach of any material covenant, representation, or warranty, or if it appears that a condition is impossible (other than through the failure of Buyer to comply with its obligations under this Agreement) to satisfy and Buyer has not waived such condition in writing on or before the Closing Date;

(c) by Seller if Buyer alters, amends or breaches any of the covenants, is in breach of any material covenant, representation or warranty or if it appears that a condition is impossible (other than through the failure of Seller to comply with their obligations under this Agreement) to satisfy and Seller has not waived such condition in writing on or before the Closing Date;

(d) if the Closing shall not have occurred on or before November 19, 2007, unless the Closing is extended by mutual agreement of the parties.

**11. MISCELLANEOUS.**

**11.1 Expenses.** Each of the parties hereto shall bear its own expenses (including without limitation attorneys' fees) in connection with the negotiation and consummation of the transaction contemplated hereby.

**11.2 Notices.** Any notice required or permitted to be given under this Agreement shall be in writing and shall be personally or sent by certified or registered United States mail, postage prepaid, or sent by nationally recognized overnight express courier and addressed as follows:

(a) If to Seller:

Byron Z. Moldo  
Moldo Davidson Fraioli Seror Sestanovich LLP  
2029 Century Park East, 21<sup>st</sup> Floor  
Los Angeles, CA 90067  
Tel.: 310-551-3100  
Fax: 310-551-0238  
Email: [bmoldo@mdfslaw.com](mailto:bmoldo@mdfslaw.com)

(b) If to Buyer:

AW Computer Holdings LLC  
2229 Barry Ave.  
Los Angeles, CA 90064  
Tel: 310-594-7292  
Fax: 310-594-7292  
Attention: Sui Sui Mak

With a copy to:

Ron Bender, Esq.  
Levene, Neale, Bender, Rankin & Brill L.L.P.  
10250 Constellation Blvd., Suite 1700  
Los Angeles, CA 90067  
Tel: 310-229-1234  
Fax: 310-229-1244  
Email: [rb@lnbrb.com](mailto:rb@lnbrb.com)

**11.3 Entire Agreement.** This Asset Purchase Agreement, the Exhibits hereto (which are incorporated herein by reference) and any agreements to be executed and delivered in connection herewith, together constitute the entire agreement and understanding between the parties and there are no agreements or commitments with respect to the transactions contemplated herein except as set forth in this Agreement. This Agreement supersedes any prior offer, agreement or understanding between the parties with respect to the transactions contemplated hereby.

**11.4 Amendment; Waiver.** Any term or provision of this Agreement may be amended only by a writing signed by Seller and Buyer. The observance of any term or provision of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a writing signed by the party to be bound by such waiver.

No waiver by a party of any breach of this Agreement will be deemed to constitute a waiver of any other breach or any succeeding breach.

**11.5 No Third Party Beneficiaries.** Nothing expressed or implied in this Agreement is intended, or shall be construed, to confer upon or to give any person, firm or corporation, other than the parties hereto, any rights or remedies under or by reason of this Agreement.

**11.6 Execution in Counterparts.** For the convenience of the parties, this Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

**11.7 Benefit and Burden.** This Agreement shall be binding upon, shall inure to the benefit of, and be enforceable by and against, the parties hereto and their respective successors and permitted assigns.

**11.8 Governing Law.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of California (excluding application of any choice of law doctrines that would make applicable the law of any other state or jurisdiction) and, where appropriate, applicable federal law.

**11.9 Severability.** If any provision of this Agreement is for any reason and to any extent deemed to be invalid or unenforceable, then such provision shall not be voided but rather shall be enforced to the maximum extent then permissible under then applicable law and so as to reasonably effect the intent of the parties hereto, and the remainder of this Agreement will remain in full force and effect.

**11.10 Attorneys' Fees.** Should a suit or arbitration be brought to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees to be fixed in amount by the Court or the Arbitrator(s) (including without limitation costs, expenses and fees on any appeal). The prevailing party will be entitled to recover its costs of suit or arbitration, as applicable, regardless of whether such suit or arbitration proceeds to a final judgment or award.

IN WITNESS WHEREOF, Buyer and Seller executed and delivered this Asset Purchase Agreement by their duly authorized representatives as of the date referenced above.

**SELLER:**  
BYRON Z. MOLDO, in his capacity  
as Assignee for the benefit of creditors  
of SLB Toys USA, Inc.

**BUYER:**  
AW COMPUTER HOLDINGS LLC

By: \_\_\_\_\_  
Byron Z. Moldo

By: \_\_\_\_\_  
Sui Sui Mak, President of  
AW Computer Holdings, LLC

No waiver by a party of any breach of this Agreement will be deemed to constitute a waiver of any other breach or any succeeding breach.

11.5 **No Third Party Beneficiaries.** Nothing expressed or implied in this Agreement is intended, or shall be construed, to confer upon or to give any person, firm or corporation, other than the parties hereto, any rights or remedies under or by reason of this Agreement.

11.6 **Execution in Counterparts.** For the convenience of the parties, this Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

11.7 **Benefit and Burden.** This Agreement shall be binding upon, shall inure to the benefit of, and be enforceable by and against, the parties hereto and their respective successors and permitted assigns.


11.8 **Governing Law.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of California (excluding application of any choice of law doctrines that would make applicable the law of any other state or jurisdiction) and, where appropriate, applicable federal law.

11.9 **Severability.** If any provision of this Agreement is for any reason and to any extent deemed to be invalid or unenforceable, then such provision shall not be voided but rather shall be enforced to the maximum extent then permissible under then applicable law and so as to reasonably effect the intent of the parties hereto, and the remainder of this Agreement will remain in full force and effect.

11.10 **Attorneys' Fees.** Should a suit or arbitration be brought to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees to be fixed in amount by the Court or the Arbitrator(s) (including without limitation costs, expenses and fees on any appeal). The prevailing party will be entitled to recover its costs of suit or arbitration, as applicable, regardless of whether such suit or arbitration proceeds to a final judgment or award.

IN WITNESS WHEREOF, Buyer and Seller executed and delivered this Asset Purchase Agreement by their duly authorized representatives as of the date referenced above.

**SELLER:**  
BYRON Z. MOLDO, in his capacity  
as Assignee for the benefit of creditors  
of SLB Toys USA, Inc.

By:   
Byron Z. Moldo

**BUYER:**  
AW COMPUTER HOLDINGS LLC

By: \_\_\_\_\_  
Sui Sui Mak, President of  
AW Computer Holdings, LLC

11/19/2007 MON 22:02 FAX 719 577 5861 BROADMOOR HOTEL

014/014

No waiver by a party of any breach of this Agreement will be deemed to constitute a waiver of any other breach or any succeeding breach.

**11.5 No Third Party Beneficiaries.** Nothing expressed or implied in this Agreement is intended, or shall be construed, to confer upon or to give any person, firm or corporation, other than the parties hereto, any rights or remedies under or by reason of this Agreement.

**11.6 Execution in Counterparts.** For the convenience of the parties, this Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

**11.7 Benefit and Burden.** This Agreement shall be binding upon, shall inure to the benefit of, and be enforceable by and against, the parties hereto and their respective successors and permitted assigns.

**11.8 Governing Law.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of California (excluding application of any choice of law doctrines that would make applicable the law of any other state or jurisdiction) and, where appropriate, applicable federal law.

**11.9 Severability.** If any provision of this Agreement is for any reason and to any extent deemed to be invalid or unenforceable, then such provision shall not be voided but rather shall be enforced to the maximum extent then permissible under then applicable law and so as to reasonably effect the intent of the parties hereto, and the remainder of this Agreement will remain in full force and effect.

**11.10 Attorneys' Fees.** Should a suit or arbitration be brought to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees to be fixed in amount by the Court or the Arbitrator(s) (including without limitation costs, expenses and fees on any appeal). The prevailing party will be entitled to recover its costs of suit or arbitration, as applicable, regardless of whether such suit or arbitration proceeds to a final judgment or award.

IN WITNESS WHEREOF, Buyer and Seller executed and delivered this Asset Purchase Agreement by their duly authorized representatives as of the date referenced above.

**SELLER:**  
BYRON Z. MOLDO, in his capacity  
as Assignee for the benefit of creditors  
of SLB Toys USA, Inc.

**BUYER:**  
AW COMPUTER HOLDINGS LLC

By: \_\_\_\_\_  
Byron Z. Moldo

By:  \_\_\_\_\_  
Sui Sui Mak, President of  
AW Computer Holdings, LLC



EXHIBIT A

General Assignment

[To be attached.]

GENERAL ASSIGNMENT

THIS ASSIGNMENT made this 19th day of November, 2007, by SLB Toys USA, INC., a New York corporation, having its principal place of business at 2229 Barry Avenue, Los Angeles, California (hereinafter referred to as "Assignor"), to BYRON Z. MOLDO (hereinafter referred to as "Assignee").

WITNESSETH: That whereas Assignor is indebted to various persons and is desirous of providing for the payment of same, so far as is in its power, by an assignment of all of its property for that purpose:

NOW, THEREFORE, Assignor, for valuable consideration, receipt of which is hereby acknowledged, does hereby make the following General Assignment for the benefit of Assignor's creditors to Byron Z. Moldo, as Assignee, under the following terms and conditions:

1. Assignor does hereby grant, bargain, sell, assign, convey, and transfer to Assignee, his successors and assigns, in trust for the ultimate benefit of Assignor's creditors generally, all of the property and assets of the Assignor of every kind and nature and wheresoever situated (collectively, the "Assets"), whether in possession, reversion, remainder, or expectancy, both real and personal, and any interest or equity therein; included therein are all merchandise, furniture, fixtures, machinery, equipment, raw materials, merchandise or work in process, book accounts, books, accounts receivable, cash on hand, all causes of action (personal or otherwise), insurance policies, patents, trademarks, trade names, copyrights, trade secrets, intellectual property, any and all right, title, license, and/or interest of Assignor in advertising, including White and Yellow Page telephone listings, any and all right, title, license or other interest in Assignor's telephone, fax, or other numbers listed in any advertisement by which business is solicited, any and all rights and goodwill in the name "SLB Toys USA, INC.", Assignor's complete computer system, and all other property of every kind and nature owned by Assignor, and without limiting the generality of the foregoing, including all of the assets pertaining to that certain business known as SLB Toys USA, INC., located at 2229 Barry Avenue, Los Angeles, California 90064. Assignor shall use reasonable efforts to have the insurance policies endorsed over to the Assignee.

2. This Assignment constitutes a grant deed of all real property owned by the Assignor, if any, whether or not said real property is specifically described herein.

3. Leases and leasehold interests in real estate are included in this assignment.

4. Assignor agrees to deliver to Assignee all books of account and records, to execute and deliver all additional necessary documents immediately upon request by Assignee, and to endorse all indicia of ownership where required by Assignee, in order to complete the transfer of all assets to Assignee as intended by this Assignment, including, but not limited to, all of Assignor's real and personal property and/or Assignor's interest therein, including mortgages, deeds of trust, motor vehicles, patent rights, trademarks,

trade names, copyrights, trade secrets and intellectual property. Assignee is hereby authorized to execute all endorsements and demands requiring Assignor's signature, in the name of Assignor. Assignor further authorizes Assignee to apply for any deposits, refunds (including specifically among all others, claims for refund of taxes paid) or claims wherever necessary in the name of Assignor. Assignee is authorized to direct all Assignor's United States mail to be delivered to Assignee, and Assignee is expressly authorized and directed to open said mail as agent of Assignor, and to do any thing or act which the Assignee in his sole and arbitrary discretion deems necessary or advisable to effectuate the purpose of this Assignment.

5. Assignor and Assignee agree to the following:

a. This instrument transfers legal title and possession to Assignee of all of the above-described assets and Assignee, in his own discretion, may direct whether to continue all, or part, of the business operations, or to liquidate said assets.

b. Assignee, at his discretion, may sell and dispose of said assets upon such terms and conditions as he may see fit, at public or private sale. Assignee shall not be personally liable in any manner, and Assignee's obligations shall be in a representative capacity only in his capacity as Assignee for the benefit of creditors. Assignee shall administer this estate to the best of his ability, but it is expressly understood that he, his agents and/or employees shall be liable only for the reasonable care and diligence in said administration, and he shall not be liable for any act or thing, or any omission to act, done by him, his agents or employees in good faith in connection therewith.

c. From the proceeds of the sale, collections, operations or other source, Assignee shall pay himself and retain as Assignee all of his charges and expenses, together with his own remuneration and fee, which remuneration and fee shall not exceed the sum of fifteen thousand dollars (\$15,000.00), plus ten percent (10%) of the amount of the proceeds received and handled by the Assignee from sales, collections, operations or other sources. Assignee may also pay from such proceeds reasonable remuneration to his agents, attorneys and accountants, and may pay a reasonable fee to Assignor's attorney. All of the aforementioned amounts are to be determined at Assignee's sole direction, determination and judgment.

d. Assignee may compromise claims, assume or reject Assignor's executory contracts, and discharge at his option any liens on said assets and indebtedness which under law are entitled to priority of payment. Assignee shall have the power to borrow money, hypothecate and pledge the assets, and to do all matters and things that said Assignor could have done prior to this Assignment. Any act or thing done by the Assignee hereunder shall bind the assignment estate and the Assignee only in his capacity as Assignee for the benefit of creditors. Assignee shall have the right to sue and defend suits as the successor of the Assignor, and the Assignee is hereby given the right and power to institute and prosecute legal proceedings in the name of the Assignor, the same as if the Assignor itself had instituted and prosecuted such proceedings or actions.

e. Assignor agrees (to the extent assignable by law) to make any and all claims for refund of taxes which may be due from the Internal Revenue Service or other taxing agencies for tax refunds, or otherwise, and to forthwith upon receipt of such refunds pay them over to the Assignee, and hereby empowers Assignee to make all claims for refunds which may be made by Assignor.

f. After paying all costs and expenses of administration and all fees and all allowed priority claims, Assignee shall distribute to all unsecured creditors, *pro rata*, any remaining net proceeds of this assignment estate. Said payments are to be made until all assets are exhausted, or these creditors are paid or settled, in full. Thereafter, the surplus of moneys and property, if any, shall be transferred or conveyed to the Assignor. If any undistributed dividends to creditors or any reserve funds shall remain unclaimed for a period of ninety (90) days after issuance of a final dividend check by the Assignee, then the same shall become the property of this Assignee and used to supplement his fees for services rendered in administering this Assignment.

g. It is agreed and understood that this transaction is a common law assignment for the benefit of Assignor's creditors, and is not a statutory assignment. This Agreement shall be governed by the provisions of section 493.010, *et seq.*, of the California Code of Civil Procedure.

SLB Toys USA, INC.,  
a New York corporation, Assignor

By: \_\_\_\_\_  
Brian Dubinsky, President

ACCEPTED THIS 19<sup>th</sup> DAY OF NOVEMBER, 2007:

\_\_\_\_\_  
BYRON Z. MOLDO, ASSIGNEE

e. Assignor agrees (to the extent assignable by law) to make any and all claims for refund of taxes which may be due from the Internal Revenue Service or other taxing agencies for tax refunds, or otherwise, and to forthwith upon receipt of such refunds pay them over to the Assignee, and hereby empowers Assignee to make all claims for refunds which may be made by Assignor.

f. After paying all costs and expenses of administration and all fees and all allowed priority claims, Assignee shall distribute to all unsecured creditors, *pro rata*, any remaining net proceeds of this assignment estate. Said payments are to be made until all assets are exhausted, or these creditors are paid or settled, in full. Thereafter, the surplus of moneys and property, if any, shall be transferred or conveyed to the Assignor. If any undistributed dividends to creditors or any reserve funds shall remain unclaimed for a period of ninety (90) days after issuance of a final dividend check by the Assignee, then the same shall become the property of this Assignee and used to supplement his fees for services rendered in administering this Assignment.

g. It is agreed and understood that this transaction is a common law assignment for the benefit of Assignor's creditors, and is not a statutory assignment. This Agreement shall be governed by the provisions of section 493.010, *et seq.*, of the California Code of Civil Procedure.

SLB Toys USA, INC.,  
a New York corporation, Assignor

By: \_\_\_\_\_  
Brian Dubinsky, President

ACCEPTED THIS \_\_\_\_ DAY OF NOVEMBER, 2007:

  
\_\_\_\_\_  
BYRON Z. MOLDO, ASSIGNEE

11/19/2007 MON 22:00 FAX 719 577 5361 BROADMOOR HOTEL

006/014

e. Assignor agrees (to the extent assignable by law) to make any and all claims for refund of taxes which may be due from the Internal Revenue Service or other taxing agencies for tax refunds, or otherwise, and to forthwith upon receipt of such refunds pay them over to the Assignee, and hereby empowers Assignee to make all claims for refunds which may be made by Assignor.

f. After paying all costs and expenses of administration and all fees and all allowed priority claims, Assignee shall distribute to all unsecured creditors, *pro rata*, any remaining net proceeds of this assignment estate. Said payments are to be made until all assets are exhausted, or these creditors are paid or settled, in full. Thereafter, the surplus of moneys and property, if any, shall be transferred or conveyed to the Assignor. If any undistributed dividends to creditors or any reserve funds shall remain unclaimed for a period of ninety (90) days after issuance of a final dividend check by the Assignee, then the same shall become the property of this Assignee and used to supplement his fees for services rendered in administering this Assignment.

g. It is agreed and understood that this transaction is a common law assignment for the benefit of Assignor's creditors, and is not a statutory assignment. This Agreement shall be governed by the provisions of section 493.010, *et seq.*, of the California Code of Civil Procedure.

SLB Toys USA, INC.,  
a New York corporation, Assignor

By: Brian Dubinsky  
Brian Dubinsky, President

ACCEPTED THIS 19<sup>th</sup> DAY OF NOVEMBER, 2007:

\_\_\_\_\_  
BYRON Z. MOLDO, ASSIGNEE

CONSENT TO ASSIGNMENT BY STOCKHOLDERS AND  
BOARD OF DIRECTORS

We, the undersigned, being owners and holders of 100% of the shares of stock, being more than 50% of the subscribed and issued stock, and the Board of Directors of SLB Toys USA Inc a New York corporation, do hereby give our consent to the within assignment and transfer of the property of said corporation.

NAME

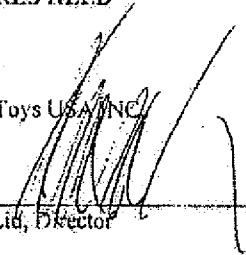
SHARES HELD

Lisa Liu

100%

SLB Toys USA INC

By:

  
Lisa Liu, Director

**CONSENT OF DIRECTORS TO HOLD MEETING**

*Los Angeles, California*

*November 12th, 2007*

I, Lisa Liu, being the sole director of SLB Toys USA, Inc. a corporation, organized under the laws of the State of New York, assembled this day at the office of the Corporation via telephone conference, at Los Angeles California, do hereby consent that a meeting of said directors be held at this time and place for the transaction of such business as may come before the meeting, and waive any notice of said meeting.

Director

Lisa Liu



## MINUTES OF THE MEETING

Los Angeles, California, November 1st, 2007

At a meeting of the directors of SLB Toys USA Inc., a New York Corporation, held at the office of the Corporation, via telephone conference at its place of business, 2228 Barry Avenue, Los Angeles, California 90064, at 6 (six) o'clock pm, the following directors were present:

Lisa Liu

\_\_\_\_\_  
\_\_\_\_\_

**Absent:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The President announced that the purpose of the meeting was to consider the financial condition of the company and the advisability of making a general assignment for the benefit of creditors.

On motion by Lisa Liu, seconded by Lisa Liu the following resolution was adopted, to-wit:

**BE IT RESOLVED:**

That Brian Dubinsky, President of this Corporation be, and is, hereby authorized and directed by the directors of this Corporation, in meeting assembled, to make an assignment of all assets of the Corporation to Byron Z. Moldo, for the pro rata benefit of all creditors of this corporation, and that Brian Dubinsky be, and he is hereby authorized and directed to execute said assignment containing such provisions as may be agreed upon between him and Byron Z. Moldo, (Assignee), and he is also authorized and directed to execute and deliver to Byron Z. Moldo, as Assignee, such other deeds, assignments, and agreements as may be necessary to carry this resolution into effect.

**BE IT FURTHER RESOLVED:**

That said Assignee for the benefit of creditors be, and is hereby, authorized to execute and file and prosecute on behalf of this corporation all claims for refund or abatement of all excess taxes heretofore or hereafter assessed against or collected from this corporation and any one officer of this corporation be, and it is, hereby authorized and directed to make, execute and deliver in favor of such person as may be designated by the assignee for the benefit of creditors, a power of attorney on the regular printed form thereof used by the United States Treasury Department so as to authorize said attorney-in-fact to process any tax claims for it on behalf of this Corporation.

There being no further business to come before the directors, the meeting is adjourned subject to the call of the President or Vice-President.

I, Lisa Liu, Director of SLB Toys USA Inc., a New York Corporation, do hereby certify that the foregoing is a true and correct copy of the minutes of the meeting of directors held in Los Angeles, California, at the place and hour stated and that the resolution

*contained in said minutes was adopted by the directors at said meeting and the same has not been modified or rescinded.*

*Dated November 1, 2007*

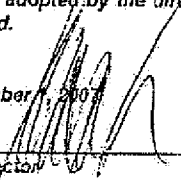
---

*Lisa Liu, Director*

CORPORATE  
SEAL

*in Los Angeles, California, at the place and hour stated and that the resolution contained in said minutes was adopted by the directors at said meeting and the same has not been modified or rescinded.*

Dated November 1, 2007

  
\_\_\_\_\_  
Lisa Liu, Director

CORPORATE  
SEAL

**EXHIBIT B**

ToyQuest  
2228 Barry Ave.  
Los Angeles, CA

**Assets Inventory**

Electronics and Computers

NO	Description	Qty.
2A	Dell Desktop Optiplex, Dimension, Precision	16
3S	Flat monitors graphics, 15,17,19,22,24,32 inch	23
4S	Apple G5 Desktop (upgraded) graphic	8
5A	Apple iMAC Desktop (upgraded) graphic	2
6A	Apple Server network with (7) raids and accessory	1
7A	Apple networking equipment	2
8A	Dell server power edge 2900	1
9A	Routers, HOB (24P) patch panel, sonic wall	6
10A	Belkin Power Conditioners	2
11A	ONKYO sound system, DVD, cdrw, speakers	1
12A	Scanners, Epson, Fujitsu	8
	Dell server power edge 1400	1
	Copier	1
	Printers, photo, inkjet	3
126	Printers, laser, (Canon, Epson)	10
127	Canon Fax	1
	HP Plotter Electro Static 500PS	1
	Nikon Camera	1
	External Hard Drive Maxtor	3
	Polycom Speaker phone	2
128	Sony 50" TV	1
129	Panasonic Flat TV	1
9	Panasonic Phone System high bird digital	1

ToyQuest  
2228 Barry Ave.  
Los Angeles, CA

Assets Inventory

Office Furniture

2	Office desks and return. Book shelves, file cabinet	8
3	Ping Pong Table	1
4	Basket Ball Hoop	1
5	Office High back chairs	28
6	Couches (canvas) and love seat	3
7	Coffee table	2
8	Conference Table and 10 chairs and side table	1
9	Bean bag chairs	11
	Kitchen equipment: refrigerator, coffeemaker,	
10	microwave, table and chairs	
11	Couches corner unit and coffee table	
13	Assorted toys and display	

Bills to Purchase

Phones: Account #011790110281693004 (Verizon)  
Cellular – Account #493020121 (T-Mobile) and #828388772 (AT&T)  
Account #995718753 (AT&T)

COVAD Jsi – Account #590373

UPS – Account #E13A05

Pacific Alarm System account– Customer #16793

Blue Cross account– Group #285554

Kansas Communications phone acct– Account #001 0803 506807604

Excel phone– Account #12000006608

DWP – Account #4480769402229000000101 & 4480769402229000000901

Time Warner cable– Account #8448200190791573

Sirius music – Account #1200567211

Tivo – Account #0011032676

Gas Company – Account #03738969041

American Express – Primary Account #378207594142007

Bentonville phone – Account #60103-147286

discover.com account

Case No. CV 06-1382 RSWL (CWx) - SLB v. Wham-O, Inc. – **only the appellate rights**

So. Cal. Disposal trash – Account #2206





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

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SLB TOYS USA, INC., )  
Plaintiff, )  
v. )  
WHAM-O INC., et al. )  
Defendant. )

CV 06-1382 RSWL (CWx)

ORDER

Currently before this Court are (1) Plaintiff and Counterclaim Defendant SLB Toys USA, Inc.'s Motion and Post-Judgment Motion for Judgment as a Matter of Law or, in the alternative, for New Trial or to Amend the Judgment; and (2) Defendant and Counterclaimant Wham-O, Inc.'s Motion for Attorneys' Fees. Having considered all papers and

1 arguments, **THE COURT NOW FINDS AND RULES AS FOLLOWS:**

2

3 As a preliminary matter, the Court **overrules** as moot  
4 SLB's Objections to Exhibit A of Declaration of Gratzinger  
5 because the Court did not rely on Exhibit A.

6

7 Moreover, the Court **overrules** SLB's Objections to  
8 Attorneys' Fees and Costs Amount because these objections  
9 are not evidentiary objections, but merely arguments as to  
10 why certain items of requested attorneys' fees are  
11 unreasonable.

12

13 The Court:

- 14 - **DENIES** SLB's Motion for Judgment as a Matter of Law  
15 because sufficient evidence supports jury's findings;  
16 - **DENIES** SLB's Motion for New Trial because the verdict  
17 was not contrary to the clear weight of the evidence or  
18 based upon false or perjurious evidence, and there was  
19 no miscarriage of justice; and  
20 - **DENIES** SLB's Motion to Amend Judgment because the Court  
21 was not presented with newly discovered evidence, the  
22 Court did not commit clear error, and there was no  
23 intervening change in controlling law.

24

25 In addition, the Court **GRANTS** Wham-O's Motion for  
26 Attorneys' Fees because this case is "exceptional." The

1 case is exceptional because SLB's conduct was willful and  
2 deliberate.

3

4 SLB deliberately and willfully infringed and diluted  
5 Wham-O's famous trademark by using the YELLOW mark on SLB's  
6 slide products and packaging, even after it received  
7 multiple cease and desist letters.

8

9 In addition, SLB deliberately and willfully made false  
10 representation to the consuming public by putting a picture  
11 of a yellow water slide on packaging boxes that actually  
12 contained orange water slide products.

13

14 Wham-O seeks attorneys' fees in the amount of  
15 \$1,648,195 and expenses in the amount of \$125,437.74, for a  
16 total award of \$1,773,632.74.

17

18 In addition to awarding attorneys' fees for work done  
19 in pursuing Wham-O's claims under the YELLOW mark, the Court  
20 awards attorneys' fees for work done regarding SLB's  
21 declaratory judgment claims regarding noninfringement and  
22 invalidity of Wham-O's trademarks because the theories  
23 underlying the declaratory relief claims are also  
24 affirmative defenses to Wham-O's claims against SLB.  
25 Accordingly, the work done in defense of SLB's declaratory  
26 relief claims and work done in pursuit of Wham-O's trademark

1 claims are exactly the same work. Therefore, apportionment  
2 is not appropriate.

3  
4 Moreover, the Court awards attorneys' fees for work  
5 done in pursuing the unsuccessful claim under the  
6 YELLOW/BLUE mark because the claim under the YELLOW/BLUE  
7 mark was asserted to remedy the same course of conduct that  
8 brought about Wham-O's claims under the YELLOW mark. Also,  
9 the discovery, legal research, and motion practice related  
10 to the YELLOW/BLUE mark are related and inseparable to the  
11 work done for the claims under the YELLOW mark. Therefore,  
12 apportionment is not appropriate.

13  
14 However, the following items from the Howard Rice  
15 Billing should not be awarded because they do not represent  
16 work related to Wham-O's Lanham Act claims:

17  
18 6/6/06 J. Faucette entry (50%) \$1935.50  
19 6/6/06 S. Givan entry \$25  
20 6/7/06 J. Faucette entry \$1215  
21 6/8/06 J. Faucette entry \$1575  
22  
23 Total: \$4,750.50

24  
25 All other items billed are reasonable.  
26

1 In conclusion, the Court awards \$1,643,444.50 in  
2 attorneys' fees and \$125,437.74 in expenses, for a total of  
3 \$1,768,882.24.

4

5 IT IS SO ORDERED.

6



7

---

RONALD S.W. LEW  
Senior U.S. District Judge

8

DATED: February 26, 2008

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

# EXHIBIT G

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

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Wham-O, Inc.,	)	CV 08-1281 RSWL (CWx)
	)	
Plaintiff,	)	ORDER
	)	
v.	)	
	)	
Manley Toys, Ltd., et	)	
al.	)	
	)	
Defendants.	)	
_____	)	

Currently before this Court are:

1. Motion of Defendant Samson Chan and Lisa Liu to Dismiss Plaintiff's Second Amended Complaint for (1) Lack of Subject Matter Jurisdiction and (2) Failure to State a Claim Upon Which Relief Can be Granted or, Alternatively, Motion to Strike and Motion for a More Definite Statement;
2. Motion of Defendant Aquawood, LLC and AW Computer Holdings, LLC, to Dismiss the Seventh Claim for Relief in the Second Amended Complaint Based Upon

1 (A) Lack of Subject Matter Jurisdiction Under Rule  
2 12(b)(1) and (B) Failure to State a Claim Upon  
3 Which Relief Can be Granted Under Rule 12(b)(6),  
4 and to Strike Portions of the Prayer Under Rule  
5 12(f);

6 3. Defendant Dubinsky's Motion to Dismiss Plaintiff's  
7 Second Amended Complaint for (1) Failure to State a  
8 Claim and (2) Lack of Subject Matter Jurisdiction,  
9 or in the Alternative, Motion to Stay;

10 4. Defendant Izzy Holdings, LLC's Motion to Dismiss  
11 Plaintiff's Second Amended Complaint for (1) Lack  
12 of Subject Matter Jurisdiction and (2) for Failure  
13 to State a Claim; and

14 5. Defendant Manley's Motion for Preliminary  
15 Injunction.

16 Having considered all papers and arguments, THE COURT  
17 NOW FINDS AND RULES AS FOLLOWS:

18  
19 The Court DISMISSES the Seventh Claim for Relief as  
20 to all Defendants because the Court lacks subject  
21 matter jurisdiction over the Claim. There is no  
22 federal question jurisdiction over the Seventh Claim  
23 for Relief asserted pursuant to California law.

24 Moreover, there is no diversity jurisdiction over the  
25 Claim because there is a lack of complete diversity.  
26

27 Furthermore, there is no supplemental jurisdiction  
28 over the Seventh Claim for Relief for the following



1 reasons.

2

3 The Seventh Claim for Relief does not share a  
4 common nucleus of operative fact with the other claims  
5 in this action because the Seventh Claim for Relief is  
6 based on a different legal theory and underlying facts,  
7 and is asserted against additional defendants than  
8 other claims.

9

10 The Seventh Claim for Relief is asserted pursuant  
11 to Cal. Code Civ. Proc. § 708.210 et seq. to collect on  
12 money judgment entered in the case of CV 06-1382-RSWL  
13 ("Color Case") in this Court. The Seventh Claim for  
14 Relief involves allegations of lien, alter ego, and  
15 successor liability. The resolution of this Claim  
16 involves establishing debts owed by retailers to the  
17 judgment debtor, examining transactions between various  
18 entities and individuals, and determining relationships  
19 between various entities and individuals.

20

21 On the other hand, other claims in this action are  
22 for violation of the Lanham Act and state unfair  
23 competition law. The resolution of these claims  
24 involves examining the trademark at issue, various  
25 accused products, and other marketing and sales related  
26 conduct of defendants.

27

28 Moreover, the Seventh Claim for Relief is the only

1 claim asserted against five of the eleven total  
2 defendants in this case. In other words, almost half  
3 of the defendants involved in the Seventh Claim for  
4 Relief are not accused of violation of the Lanham Act  
5 or unfair competition law.

6  
7 In conclusion, one would not ordinarily expect to  
8 try the Seventh Claim for Relief--to collect on a  
9 judgment in a different case--with the Lanham Act and  
10 unfair competition claims in one judicial proceeding  
11 because they involve different set of facts and legal  
12 theories.

13  
14 Therefore, common nucleus of operative fact does  
15 not exist, and the Court lacks supplemental  
16 jurisdiction over the Seventh Claim for Relief.

17  
18 In the alternative, assuming supplemental  
19 jurisdiction exists, the Court declines to exercise  
20 supplemental jurisdiction over the Seventh Claim for  
21 Relief because this is an exceptional circumstance and  
22 compelling reasons exist.

23  
24 Compelling reasons exist to decline supplemental  
25 jurisdiction over the Seventh Claim in consideration of  
26 judicial economy, convenience, and fairness.

27  
28 Because the Seventh Claim for Relief involves

1 different facts and legal theories as discussed above,  
2 judicial economy would not be served by litigating the  
3 Claim in this action.

4  
5       Moreover, judicial economy would be served by  
6 declining jurisdiction over the Seventh Claim because  
7 the assertion of the Seventh Claim has created  
8 procedural disputes that would not otherwise exist.  
9 Plaintiff Wham-O is conducting post-judgment discovery  
10 in the Color Case in preparation for filing motions to  
11 enforce and execute on the Color Case judgment. Among  
12 other things, parties dispute as to who should be  
13 notified of the post-judgment discovery, who may  
14 participate in the post-judgment discovery, and how the  
15 evidence obtained in the Color Case may be used in this  
16 action. Therefore, judicial economy would be served by  
17 declining jurisdiction over the Seventh Claim.

18  
19       Furthermore, as discussed above, the Seventh Claim  
20 for Relief is the only claim asserted against five of  
21 the eleven defendants in this action. Therefore,  
22 convenience and fairness to parties favor declining  
23 jurisdiction over this Claim so that enforcement of  
24 rights can proceed in a more appropriate case or forum.

25  
26       In addition, this is an exceptional circumstance  
27 because resolution of the Seventh Claim would largely  
28 involve unnecessary duplication of efforts. A large

1 part of the Seventh Claim depends on the Court finding  
2 that various entities are alter egos or successors of  
3 SLB Toys USA Inc.<sup>1</sup> However, Plaintiff is doing  
4 post-judgment discovery in the Color Case, and has  
5 stated its intention to file a motion to amend judgment  
6 to add judgment debtors in the Color Case before this  
7 Court. Such a motion to amend judgment in the Color  
8 Case before this Court would involve resolution of the  
9 issues of alter ego and successor liability.

10  
11 Accordingly, to the extent that Plaintiff wants to  
12 pursue collection of a judgment in a different case  
13 (i.e. the Color Case), there are more effective and  
14 efficient mechanisms for doing so pursuant to the  
15 Federal Rules.

16  
17 In conclusion, assuming that supplemental  
18 jurisdiction exists, the Court declines to exercise  
19 jurisdiction over the Seventh Claim for Relief because  
20 this is an exceptional case, and compelling reasons  
21 exist in consideration of judicial economy,  
22 convenience, and fairness.

23  
24 1. Per the Motion of Chan and Liu, the Court:  
25 - GRANTS the motion to dismiss the Seventh Claim for  
26 Relief for lack of subject matter jurisdiction for  
27

---

28 <sup>1</sup> SLB Toys USA Inc. is the judgment debtor in the Color  
Case.

1 the reasons stated above;

2 - DENIES the motion to dismiss for failure to state a  
3 claim upon which relief can be granted;

4 - DENIES the motion for a more definite statement;  
5 and

6 - DENIES the motion to strike because prejudice has  
7 not been shown.

8  
9 2. Per the Motion of Aquawood and AW, the Court:

10 - GRANTS the motion to dismiss the Seventh Claim for  
11 Relief for lack of subject matter jurisdiction for  
12 the reasons stated above;

13 - DENIES the motion to strike because prejudice has  
14 not been shown; and

15 - DENIES as moot the motion to dismiss the Seventh  
16 Claim for Relief for failure to state a claim upon  
17 which relief can be granted.

18  
19 3. Per Dubinsky's Motion, the Court:

20 - GRANTS the motion to dismiss the Seventh Claim for  
21 Relief for lack of subject matter jurisdiction for  
22 the reasons stated above;

23 - DENIES the motion to dismiss as to other claims for  
24 relief; and

25 - DENIES the motion to stay because there is  
26 substantial doubt as to whether the state  
27 proceeding will resolve the federal action  
28 involving additional or different parties, legal

1 theories, and factual issues.

2  
3 4. Per Izzy's Motion, the Court:

- 4 - GRANTS the motion to dismiss the Seventh Claim for  
5 Relief for lack of subject matter jurisdiction for  
6 the reasons stated above; and  
7 - DENIES as moot the motion to dismiss for failure to  
8 state a claim.

9  
10 5. Per Manley's Motion for Preliminary Injunction, the  
11 Court:

- 12 - SUSTAINS Manley Toys, Ltd.'s Objections to Wham-O,  
13 Inc.'s [Proposed] Findings and Conclusions of Law  
14 Re Denial of Manley Toys, Ltd.'s Motion for  
15 Preliminary Injunction because Plaintiff has not  
16 followed proper procedure in requesting a court  
17 order;  
18 - OVERRULES Manley Toys, Ltd.'s Objection to Wham-O,  
19 Inc.'s Notice of Reliance on Specified Materials in  
20 Opposition to Manley Toys, Ltd.'s Motion for  
21 Preliminary injunction;  
22 - DENIES as moot Manley's Motion to Strike All  
23 References to Evidence Not Provided to the Parties  
24 and the Court because the Court did not rely on  
25 such evidence;  
26 - DENIES as moot Plaintiff's Request for Judicial  
27 Notice because the Court did not rely on the  
28 documents submitted for judicial notice; and

1 - DENIES Manley's Motion for Preliminary Injunction  
2 because Manley has not sufficiently shown  
3 irreparable injury and likelihood of success on the  
4 merits. Manley has not sufficiently shown  
5 irreparable harm because the purported harm could  
6 have been avoided through its own conduct, and  
7 there are legal remedies available to compensate  
8 Manley for its purported harm. Moreover, Manley  
9 has not sufficiently shown likelihood of success on  
10 the merits because Manley has not sufficiently  
11 shown that Wham-O's conduct was legally wrongful.  
12

13 IT IS SO ORDERED.

14 / s /

15 \_\_\_\_\_  
16 HONORABLE RONALD S.W. LEW  
17 Senior U.S. District Judge

18 DATED: July 18, 2008  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28