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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	Response to Board Order/Inquiry
Filer's Name	Jessica C. Bromall
Filer's e-mail	trademarkdocket@jmbm.com
Signature	/jessica c. bromall/
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Attachments	Response to Board's Order date June 11, 2008.pdf (5 pages)(193267 bytes) Exhibit A.pdf (17 pages)(429327 bytes) Exhibit B.pdf (21 pages)(598574 bytes) Exhibit C.pdf (9 pages)(180722 bytes) Exhibit D.pdf (17 pages)(448861 bytes) Exhibit E.pdf (111 pages)(3447374 bytes) Exhibit E #112.pdf (1 page)(19636 bytes) Exhibit F.pdf (26 pages)(230821 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 and BLUE SLIDE DESIGN

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

RESPONSE TO BOARD'S ORDER DATED JUNE 11, 2008

In its Order dated June 11, 2008, the Board directed petitioner AW Computer Holdings LLC to provide: 1) a copy of the pleadings, notice of appeal, and statement of the current status of Civil Action No. CV06-1382 RSWL (CWx); 2) a copy of the pleadings and statement of the current status of Civil Action No. CV08-01281 PSG (Ex)¹; and 3) a brief explanation of the relationship between the foregoing civil actions. Petitioner hereby submits its response.

1. **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)**

On or about October 11, 2007, the jury in the above-referenced action (the "First Action") rendered a verdict in favor of respondent Wham-O, Inc. ("Respondent") and against SLB.

¹ Petitioner notes that this case was, at some point, transferred to the judge who handled the Case No. CV06-1382 RSWL (CWx) and that the case number was changed to reflect this transfer to CV06-1382 RSWL (CWx).

Thereafter, on or about December 5, 2007, judgment was entered in the First Action in favor of Respondent and against SLB.

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. The appeal in this matter is currently pending. The parties have received a briefing schedule, but have not yet received a hearing date. The opening brief is currently scheduled to be filed on or before August 18, 2008.

Attached hereto as Exhibit A is a copy of the Complaint filed by SLB. Attached hereto as Exhibit B is a copy of Respondent's Answer to the Complaint and Counterclaim and attached hereto as Exhibit C is a copy of SLB's response to Respondent's Counterclaim. Attached hereto as Exhibit D is a copy of the Notice of Appeal filed by Petitioner and SLB.

2. **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 operative pleading in the above-referenced civil action (the "Second Action") is the Second Amended Complaint filed by Respondent on April 21, 2008 (the "SAC"), against Manley Toys, Ltd., Izzy Holdings, LLC, Aquawood, LLC, AW Computer Holdings, LLC, Brian Dubinsky, Samson Chan, Lisa Liu, Wal-Mart Stores, Inc., Target Corp., Toys "R" Us, Inc., and KMART Corporation.

AW Computer Holdings, LLC ("Petitioner") has not yet filed its Answer to the SAC in the Second Action. However, only one cause of action in the SAC - the seventh cause of action - is alleged against Petitioner and, on or about May 16, 2008, Petitioner, together with defendant Aquawood, LLC, filed a Motion to Dismiss the Seventh Claim for Relief in the Second Amended Complaint Based Upon (A) Lack of Subject Matter Jurisdiction Under Rule 12(b)(1) and (B) The Failure to State a Claim Upon Which Relief Can be Granted Under Rule 12(b)(6),

and to Strike Portions of the Prayer Under Rule 12(f). Motions to dismiss the SAC have also been filed by defendants Chan and Liu, defendant Dubinsky, and defendant Izzy Holdings, LLC.

Defendants Manley Toys, Ltd., Toys "R" Us, Inc., Target Corp., and KMART Corporation, have each filed their Answer to the SAC, as well as Counterclaim(s) against Wham-O, Inc. KMART Corporation has also filed a Cross-Claim against Manley Toys, Ltd. Manley Toys, Ltd. has also filed a First Amended Counterclaim against Respondent. Respondent has filed its answer to the counterclaim filed by Toys "R" Us, Inc., but has not yet filed an answer or other document in response to the other counterclaims.

Additionally, Manley Toys, Ltd. has filed a Motion for Preliminary Injunction against Wham-O, Inc. and Target Corp. has also filed a Motion for Summary Judgment to Dismiss the SAC against Target Corp.

Manley Toys, Ltd.'s Motion for Preliminary Injunction, as well as each of the above-referenced motions to dismiss, are currently set to be heard on July 1, 2008.

The Board has requested copies of the pleadings in the Second Action. Accordingly, Petitioner attaches hereto, as Exhibit E, the SAC filed by Respondent. Additionally, although not technically a pleading, Petitioner attaches hereto as Exhibit F, Petitioner's Motion to Dismiss the SAC.

Because so many of the pleadings and other documents filed in this matter were filed by entities and individuals who are not involved in the matter currently pending before the Board, Applicant has not submitted copies of any other pleadings or documents filed by those parties. Should the Board determine that it would like copies of any or all of those pleadings and documents, Petitioner will obtain copies thereof and provide them to the Board.

3. Relationship Between the Civil Actions

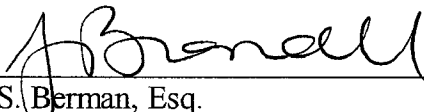
As noted above, judgment was entered against SLB in the First Action. Respondent was also awarded attorneys' fees in the First Action. Wham-O alleges generally in the Second Action that certain defendants therein, including Petitioner, are alter egos of and/or successors in interest to SLB and seeks to impose on them the judgment against SLB on that basis. Wham-O has also brought claims against certain defendants, not including Petitioner, for, among other things, infringement and dilution of the Yellow Slide Design and Yellow and Blue Slide Design.

4. Additional Cases

The Board also asked Petitioner to identify any other proceedings to which Respondent and Petitioner are parties or which involve the marks at issue in the instant cancellation proceeding. Respondent has amended its complaint in Alameda County Superior Court Case No. RG 07329828, Wham-O, Inc. v. Sefchick, et al, to name Petitioner as a party, but as of today's date, has not yet served Petitioner with a copy of the summons and complaint. Petitioner is unaware of any proceedings, other than those previously identified, to which both Petitioner and Respondent are parties or which involve any of the registrations at issue in the instant proceeding.

Respectfully submitted,

Dated: June 26, 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

ELECTRONIC FILING CERTIFICATE

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being submitted electronically through the Electronic System for Trademark Trials and Appeal ("ESTTA") on the date shown below:

Date: 6/26/06

J Bromall
Jessica C Bromall

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: 6/26/06

J Bromall
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

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

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 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

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 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
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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
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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
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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
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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 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 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.

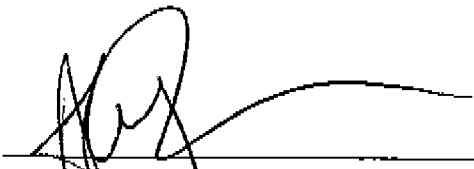
21 5. For an award to SLB of its costs and attorneys' fees incurred in this
22 action as provided by law;

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.
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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.

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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.
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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
 22 Counterclaimant,
 23 v.
 24 SLB TOYS USA, INC., doing business as
 TOYQUEST,
 25 Counterdefendant.
 26
 27
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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

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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.

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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

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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.

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.

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**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.

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**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

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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.

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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:

13

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

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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

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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

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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.

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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

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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

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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

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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.

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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

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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;

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- 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 HOWARD
 17 RICE
 18 NEMEROVSKI
 19 CANADY
 20 FALK
 21 & RABKIN

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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

ORIGINAL

1 Alex M. Weingarten (Bar No. 204410)
 aw@lagerweingarten.com
 2 Jefferson K. Logan (Bar No. 136962)
 jlogan@lagerweingarten.com
 3 LAGER WEINGARTEN LLP
 The Water Garden
 4 1601 Cloverfield Blvd., Second Floor, South Tower
 Santa Monica, California 90404
 5 Tel. (310) 471-8773
 Fax (310) 388-0464

FILED
 MAY 19 11 39 25
 U.S. DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

~~Attorneys for Defendants and Counterclaimants~~

7 SLB TOYS USA, INC., TOY QUEST LLC, WAL-MART STORES, INC.
 8 HAMMACHER, SCHLEMMER & CO., and CSK AUTO, INC.

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

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

14 Plaintiff,

15 v.

16 WHAM-O, INC., a Delaware
 17 corporation, CORNERSTONE
 OVERSEAS INVESTMENTS LTD., a
 18 Hong Kong entity; CHARTERHOUSE
 GROUP, INC. a Delaware corporation;
 19 TRAXI, LLC, a New York Limited
 Liability Company; and DOES 1-10,
 20 inclusive,

21 Defendants.

Case No. CV 06-1382 RSWL

**PLAINTIFF AND
 COUNTERCLAIM DEFENDANT
 SLB TOYS USA, INC.'S ANSWER
 TO WHAM-O'S COUNTERCLAIMS**

22 AND RELATED COUNTERCLAIMS.
 23

MAY 26 2008
 BY *[Signature]*

11

1 Plaintiff and Counterclaim Defendant SLB Toys, Inc. ("SLB") hereby answers
2 the Counterclaims of Defendant and Counterclaimant WHAM-O, INC. ("Wham-O")
3 as follows:

4 1. SLB denies the allegations of paragraph 1.

5 2. SLB is without knowledge or information sufficient to form a belief as to
6 the truth of the allegations of paragraph 2.

7 3. SLB admits the allegations of paragraph 3.

8 4. Paragraph 4 states a legal conclusion to which no response is required.
9 To the extent that a response is required, SLB denies the allegations of paragraph 4.

10 5. Paragraph 5 states a legal conclusion to which no response is required.
11 To the extent that a response is required, SLB denies the allegations of paragraph 5.

12 6. SLB is without knowledge or information sufficient to form a belief as to
13 the truth of the allegations of paragraph 6.

14 7. SLB is without knowledge or information sufficient to form a belief as to
15 the truth of the allegations of paragraph 7.

16 8. SLB is without knowledge or information sufficient to form a belief as to
17 the truth of the allegations of paragraph 8.

18 9. SLB is without knowledge or information sufficient to form a belief as to
19 the truth of the allegations of paragraph 9.

20 10. SLB is without knowledge or information sufficient to form a belief as to
21 the truth of the allegations of paragraph 10.

22 11. SLB is without knowledge or information sufficient to form a belief as to
23 the truth of the allegations of paragraph 11.

24 12. SLB is without knowledge or information sufficient to form a belief as to
25 the truth of the allegations of paragraph 12.

26 13. SLB denies that Wham-O has developed and established a distinctive
27 trade dress in the design and configuration of its water slide toy packaging and/or that

1 any purported trade dress is distinctive, has become well and favorably known
2 throughout the United States and has achieved secondary meaning. SLB is otherwise
3 without knowledge or information sufficient to form a belief as to the truth of the
4 allegations of paragraph 13.

5 14. SLB is without knowledge or information sufficient to form a belief as to
6 the truth of the allegations of paragraph 14.

7 15. SLB is without knowledge or information sufficient to form a belief as to
8 the truth of the allegations of paragraph 15.

9 16. SLB denies the allegations of paragraph 16.

10 17. SLB admits that Wham-O sent SLB a letter, a copy of which is attached
11 as Exhibit 6 to Wham-O's counterclaims. SLB otherwise denies the allegations of
12 paragraph 17.

13 18. SLB denies the allegations of paragraph 18.

14 19. SLB denies the allegations of paragraph 19.

15 20. SLB denies the allegations of paragraph 20.

16 21. SLB admits that Wham-O sent a letter to counsel for SLB, a true and
17 correct copy of which is attached to Wham-O's complaint as Exhibit 1. SLB
18 otherwise denies the allegations of paragraph 21.

19 22. SLB denies the allegations of paragraph 22.

20 23. SLB is without knowledge or information sufficient to form a belief as to
21 the truth of the allegations of paragraph 23.

22 24. SLB denies the allegations of paragraph 24.

23 25. SLB denies the allegations of paragraph 25.

24 26. SLB denies the allegations of paragraph 26.

25 27. SLB denies the allegations of paragraph 27.

26 28. SLB incorporates by reference herein its responses to paragraphs 1-27.

27 29. SLB denies the allegations of paragraph 29.

- 1 30. SLB denies the allegations of paragraph 30.
2 31. SLB denies the allegations of paragraph 31.
3 32. SLB denies the allegations of paragraph 32.
4 33. SLB denies the allegations of paragraph 33.
5 34. SLB denies the allegations of paragraph 34.
6 35. SLB incorporates by reference herein its responses to paragraphs 1-34.
7 36. SLB denies the allegations of paragraph 36.
8 37. SLB denies the allegations of paragraph 37.
9 38. SLB denies the allegations of paragraph 38.
10 39. SLB denies the allegations of paragraph 39.
11 40. SLB denies the allegations of paragraph 40.
12 41. SLB denies the allegations of paragraph 41.
13 42. SLB incorporates by reference herein its responses to paragraphs 1-41.
14 43. SLB denies the allegations of paragraph 43.
15 44. SLB denies the allegations of paragraph 44.
16 45. SLB denies the allegations of paragraph 45.
17 46. SLB denies the allegations of paragraph 46.

18 **AFFIRMATIVE DEFENSES**

19 For its affirmative defenses to the Counterclaims, SLB alleges:

20 **FIRST AFFIRMATIVE DEFENSE**

21 **(Failure to State a Claim)**

- 22 1. The Counterclaims fail to state a claim upon which relief can be granted.

23 **SECOND AFFIRMATIVE DEFENSE**

24 **(Estoppel)**

- 25 2. The purported claims for relief in the Counterclaims are barred by the
26 doctrine of estoppel.

1 Counterclaims, in whole or in part, because SLB's conduct was justified or privileged.

2 **FIFTEENTH AFFIRMATIVE DEFENSE**

3 **(Adequate Remedy At Law)**

4 15. Wham-O is barred from recovering for declaratory and injunctive relief
5 on the allegations of the Counterclaims because Wham-O has an adequate remedy at
6 law.

7 **SIXTEENTH AFFIRMATIVE DEFENSE**

8 **(Speculative Damages)**

9 16. Wham-O is not entitled to recover the alleged damages, if any, because
10 they are uncertain, contingent and speculative.


11 WHEREFORE, SLB demands judgment against Wham-O as follows:

12 A. Dismissing the Counterclaims with prejudice;

13 B. Granting such other and further relief as this Court deems just and
14 proper, including awarding SLB the costs, interest and attorneys fees incurred by it in
15 the defense of this action.

16 Dated: May 19, 2006

17 LAGER WEINGARTEN LLP
18 Alex M. Weingarten
19 Jefferson K. Logan

20 By: 
21 Alex M. Weingarten
22 Attorneys for Plaintiff and Counterclaim
23 Defendant SLB TOYS USA, INC.

PROOF OF SERVICE

1

2 STATE OF CALIFORNIA)

3 COUNTY OF LOS ANGELES) Ss

4 I am a resident of the State of California, over the age of eighteen years, and not a party to the

5 within action. My business address is Lager Weingarten LLP, 1601 Cloverfield Blvd., Second Floor,

6 South Tower, Santa Monica, California 90404. On May 19, 2006, I served the within documents:

7 **PLAINTIFF AND COUNTERCLAIM DEFENDANT SLB TOYS USA, INC.'S**

8 **ANSWER TO WHAM-O'S COUNTERCLAIMS**

- 9 I sent such document from facsimile machine (310) 388-0464 on May 19, 2006. I certify that
- 10 said transmission was completed and that all pages were received and that a report was
- 11 generated by facsimile machine (310) 388-0464 which confirms said transmission and receipt.
- 12 The transmission was reported as complete and without error. I, thereafter, mailed a copy to the
- 13 interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelope(s)
- 14 addressed to the parties listed below.
- 15 by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid,
- 16 in the United States mail at Los Angeles, addressed as set forth below.
- 17 by personally delivering the document(s) listed above to the person(s) at the address(es) set
- 18 forth below.
- 19 by placing the document(s) listed above, together with an unsigned copy of this declaration, in a
- 20 sealed Federal Express envelope with postage paid on account and deposited with Federal
- 21 Express at Los Angeles, California, addressed as set forth below.
- 22 by transmitting the document(s) listed above, electronically, via the e-mail addresses set forth
- 23 below.

SEE ATTACHED SERVICE LIST

24 I am readily familiar with the firm's practice of collection and processing correspondence for

25 mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with

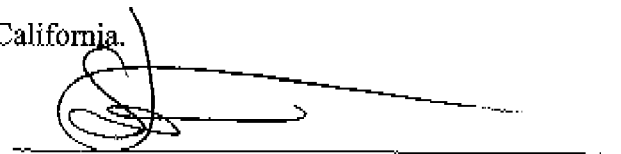
26 postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party

27 served, service is presumed invalid if postal cancellation date or postage meter date is more than on day

28 after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 19, 2006, at Los Angeles, California.



Sonny Randhawa

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Jeffrey E. Faucette, Esq. HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN Three Embarcadero Center Seventh Floor San Francisco, California 94111-4024 Phone: (415) 434-1600 Fax: (415) 217-5910	TRAXI, L.L.C. 1 North Broadway White Plains, New York, 10601
CHARTERHOUSE GROUP, INC. 1585 Broadway New York, 10022-4299	

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**

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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.

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

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

DATED: March 4, 2008 JOSHUA R. FURMAN

By: 
JOSHUA R. FURMAN
Attorney for Plaintiff and Nominal Appellant SLB TOYS USA, INC.

DATED: March 4, 2008 JEFFER, MANGELS, BUTLER & MARMARO LLP
ROD S. BERMAN
MATTHEW D. HINKS

By: _____
MATTHEW D. HINKS
Attorneys for Appellant and Real Party In Interest
AW COMPUTER HOLDINGS LLC

JMBM
Jeffer Mangels
Butler & Marmaro LLP

JMBM
Jeffer Mangels
Butler & Marmarou LLP

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
7 JEFFER, MANGELS, BUTLER & MARMARO LLP
ROD S. BERMAN (Bar No. 105444)
RBerman@jmbm.com
8 MATTHEW D. HINKS (Bar No. 200750)
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.

CASE NO. CV 06-1382 RSWL (CWx)

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


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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
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JMBM | Jeffer Mangels
Butler & Marmaro LLP

EXHIBIT "A"

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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.

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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, 7th Floor, Los Angeles, California 90067.

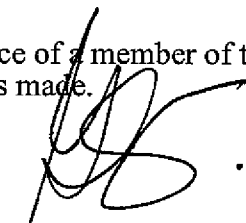
On March 6, 2008 I served the document(s) described as **NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

Annette L. Hurst, Esq. HELLER EHRMAN LLP 333 Bush Street San Francisco, California 94014	John C. Ulin, Esq. Peter E. Gratzinger HELLER EHRMAN LLP 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

1 JOSHUA R. FURMAN (Bar No. 225461)
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2 9663 Santa Monica Boulevard, No. 721
Beverly Hills, California 90210
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14 CENTRAL DISTRICT OF CALIFORNIA
15

16 SLB TOYS USA, INC., a New York
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20 AW COMPUTER HOLDINGS LLC, a
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24 WHAM-O, INC., a Delaware
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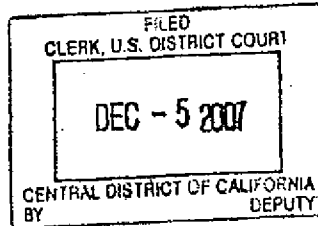
CASE NO. CV 06-1382 RSWL (CWx)

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

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL:
2 PLEASE TAKE NOTICE THAT SLB TOYS USA, INC. ("SLB"), the
3 Plaintiff and Nominal Appellant herein, and AW COMPUTER HOLDINGS, LLC
4 ("AW"), the Appellant and Real Party In Interest herein, appeal to the United States
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9 limited to: the District Court's Order denying SLB's Motion for Sanctions and
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13 Benevento, and to Preclude Evidence and Argument Regarding the "Soak 'N Splash"
14 Name, and Wham-O's Motions in Limine to Exclude Evidence and Argument
15 Regarding Alleged Copying of SLB Product Design by Wham-O, to Exclude
16 Evidence of Discovery Disputes, and to Exclude Evidence and Argument Regarding
17 SLB's Affirmative Defenses, filed on October 1, 2007 and entered on October 2,
18 2007; the District Court's Order denying SLB's Motion for Judgment as a Matter of
19 Law reflected in the minutes filed on October 9, 2007 and entered on October 11,
20 2007; the District Court's Order denying SLB's renewed Motion for Judgment as a
21 Matter of Law reflected in the minutes filed and entered on October 11, 2007; the
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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)

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IT IS HEREBY ORDERED, ADJUDGED, AND DECREED

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RONALD S.W. LEW

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Senior U.S. District Judge

DATED: December 4, 2007

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STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES

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

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GWENDOLYN SANTINI

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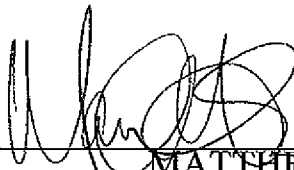
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DATED: March __, 2008 JOSHUA R. FURMAN

By: _____
JOSHUA R. FURMAN
Attorney for Plaintiff and Nominal Appellant SLB
TOYS USA, INC.

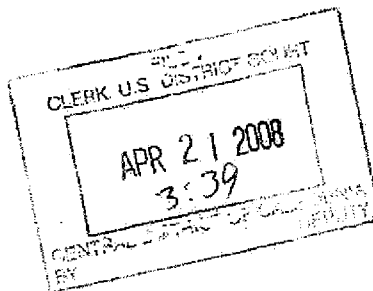
DATED: March 5, 2008 JEFFER, MANGELS, BUTLER & MARMARO LLP
ROD S. BERMAN
MATTHEW D. HINKS

By:  _____
MATTHEW D. HINKS
Attorneys for Appellant and Real Party In Interest
AW COMPUTER HOLDINGS LLC

JMBM
Jeffer Mangels
Butler & Marmaro LLP

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
 6 Facsimile: +1 (415) 772-6268



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
 11 Facsimile: +1 (213) 614-1868

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
 17 Plaintiff,

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
 26 Defendants.

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 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.

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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.

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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
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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.
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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;

EXHIBIT 1

United States Patent Office

761,883
Registered Dec. 24, 1963

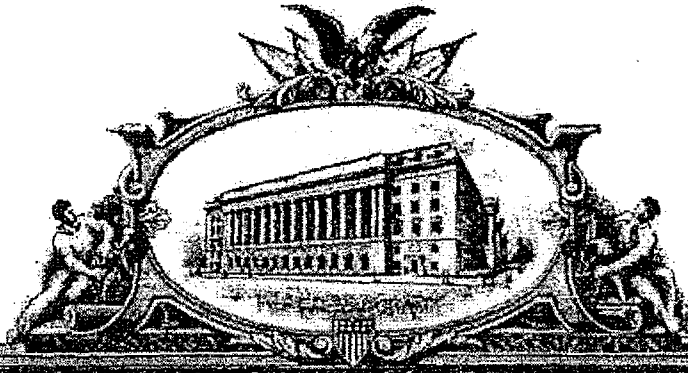
PRINCIPAL REGISTER Trademark

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

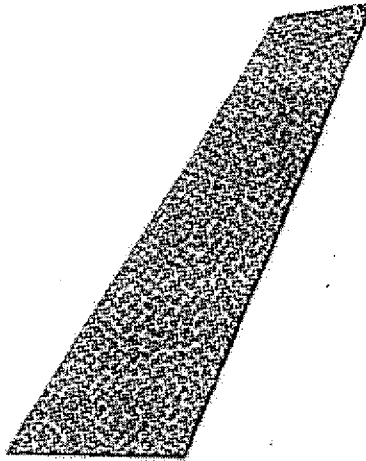


Int. Cl.: 28

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

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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

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DOCKETED ON CM
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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:

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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:

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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

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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:

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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.

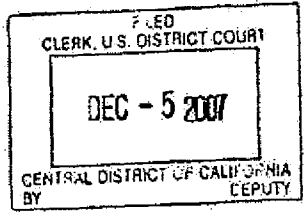
We, the jury, recommend enhanced damages for Wham-O in the sum of \$ 2.4M
\$ 2,400,000

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

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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.

Case 2:06-cv-01382 RSWL-CW Document 476 Filed 12/05/2007 Page 2 of 2

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.

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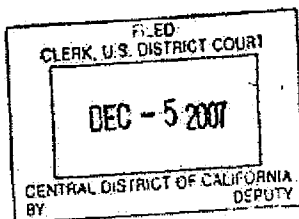
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RONALD S.W. LEW

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

DATED: December 4, 2007

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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 ///

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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

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

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DATED: December 3, 2007

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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;

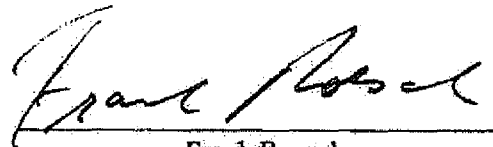
(c) retaining possession of any Proprietary Information;

(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, 20th 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, 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 19th 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.

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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 19th 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

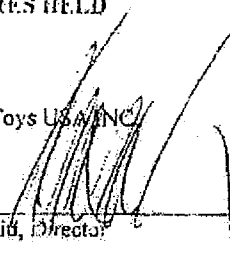
SHARES HELD

Lisa Liu

100%

SLB Toys USA INC

By:



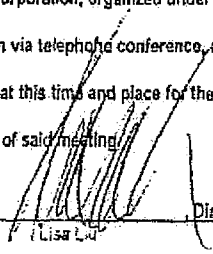
Lisa Liu, Director

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.

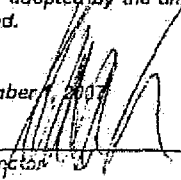
Dated November 1, 2007

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 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, 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, 21st Floor
Los Angeles, CA 90067
Tel.: 310-551-3100
Fax: 310-551-0238
Email: 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

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.

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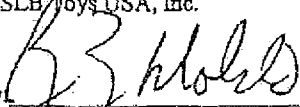
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By: 
Byron Z. Moldo

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.

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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 19th DAY OF NOVEMBER, 2007:

BYRON Z. MOLDO, ASSIGNEE

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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

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

By: Brian Dubinsky
Brian Dubinsky, President

ACCEPTED THIS 19th 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:

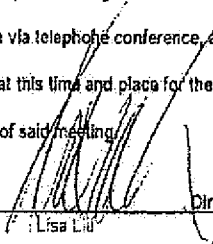
Lisa Liu, Director

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 (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.

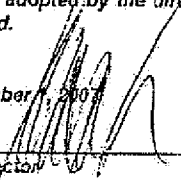
Dated November 1, 2007

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

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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

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1 BETH ANN R. YOUNG (SBN 143945)
bry@lnbrb.com
2 HOLLY ROARK (SBN 234638)
hr@lnbrb.com
3 LEVENE, NEALE, BENDER, RANKIN & BRILL L.L.P.
10250 Constellation Blvd., Suite 1700
4 Los Angeles, CA 90067
Telephone: (310) 229-1234
5 Facsimile: (310) 229-1244

6 ROD S. BERMAN (SBN 105444)
RXB@jmbm.com
7 MATTHEW D. HINKS (SBN 200750)
MH2@jmbm.com
8 JEFFER, MANGELS, BUTLER & MARMARO, L.L.P.
1900 Avenue of the Stars, 7th Floor
9 Los Angeles, California 90067
Telephone: (310) 203-8080
10 Facsimile: (310) 203-0567

11 Attorneys for Defendants Aquawood, LLC,
and AW Computer Holdings, LLC
12

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

15 WHAM-O, INC. a Delaware corporation,) Case No. 2:08-cv-01281-RSWL-CW
16)
17 Plaintiff,)
18 v.)
19 MANLEY TOYS, LTD., a Hong Kong corporation; IZZY)
HOLDINGS, LLC, a California)
20 limited liability company;)
AQUAWOOD, LLC, a)
21 California limited liability)
company; AW COMPUTER)
22 HOLDINGS, LLC, a California)
limited liability company,)
23 BRIAN DUBINSKY,)
SAMSON CHAN, LISA LIU,)
24 WAL-MART STORES, INC., a)
Delaware corporation;)
25 TARGET CORP., a Minnesota)
corporation, TOYS 'R' US,)
26 INC., a Delaware corporation,)
and KMART CORPORATION,)
27 a Michigan corporation,)
28 Defendants.)
NOTICE OF MOTION AND MOTION OF
DEFENDANTS AQUAWOOD, LLC AND
AW COMPUTER HOLDINGS, LLC TO
DISMISS THE SEVENTH CLAIM FOR
RELIEF IN THE SECOND AMENDED
COMPLAINT BASED UPON (A) LACK
OF SUBJECT MATTER JURISDICTION
UNDER RULE 12(b)(1) AND (B) THE
FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED
UNDER RULE 12(b)(6), AND TO STRIKE
PORTIONS OF THE PRAYER UNDER
RULE 12(F); MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION OF HOLLY ROARK IN
SUPPORT THEREOF
The Honorable Ronald S.W. Lew, presiding
Date: June 18, 2008
Time: 9:00 a.m.
Place: Courtroom "21"
312 N. Spring Street
Los Angeles, California 90012
Action filed: February 25, 2008

1 **TO THE HONORABLE RONALD S.W. LEW, UNITED STATES**
2 **DISTRICT JUDGE AND TO ALL INTERESTED PARTIES:**

3 **PLEASE TAKE NOTICE** that on June 18, 2008, at 9:00 a.m. in
4 Courtroom 21, of the above entitled Court located at 312 N. Spring Street, Los
5 Angeles, California 90012, Defendants Aquawood, LLC (“Aquawood”) and
6 AW Computer Holdings, LLC (“AW”) will move the Court for an Order
7 Dismissing the Seventh Claim for Relief and the prayer for successor liability as
8 to AW and Aquawood, pursuant to Rules 12(b)(1), 12(b)(6), and 12(f) of the
9 Federal Rules of Civil Procedure, on the following grounds:

10 The Second Amended Complaint (“SAC”) filed by Plaintiff Wham-O,
11 Inc. (“Wham-O”) as to AW and Aquawood lacks subject matter jurisdiction
12 since as to the Seventh Claim for Relief (founded exclusively upon California
13 Code of Civil Procedure §708.210) there is no federal question, and no basis for
14 supplemental jurisdiction; and Wham-O is not entitled to declaratory relief
15 absent traditional subject matter jurisdiction which does not exist here.

16 As set forth in the Memorandum of Points and Authorities annexed
17 hereto, the Seventh Claim for Relief in the SAC as to AW and Aquawood is
18 factually insupportable and deficient as a matter of law and should be dismissed.

19 **PLEASE TAKE FURTHER NOTICE** that pursuant to Local Rule 7-9,
20 if any party wishes to oppose this Motion, it shall do so in writing not less than
21 fourteen (14) days prior to the date of the hearing.

22 The Motion is based upon this Notice, the attached Memorandum of
23 Points and Authorities, the attached Declaration of Holly Roark, and all
24 documents in the Court’s file herein, and on such arguments as may be
25 presented at or before the hearing on this Motion.


26 This Motion is made following the meeting and conference of counsel
27 pursuant to Local Rule 7-3, which timely took place, but did not result in a
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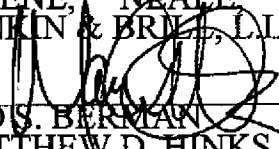
1 resolution of the issues presented in the Motion. See Declaration of Holly Roark
2 submitted herewith.

3 **WHEREFORE**, Aquawood and AW respectfully request that the Court
4 enter an order (i) dismissing as to AW and Aquawood the Seventh Claim for
5 Relief in the SAC, as well as striking the prayer for "successor liability"
6 although not pled in the form of a claim for relief; and (ii) granting such other
7 and further relief as is just and proper under the circumstances.

8 Dated: May 16, 2008

AQUAWOOD, LLC, AND AW
COMPUTER HOLDINGS, LLC

9
10 By: 
11 BETH ANN R. YOUNG
12 HOLLY ROARK
13 LEVENE, NEALE, BENDER,
14 RANKIN & BRILL, L.L.P.;


15 RODS. BERMAN
16 MATTHEW D. HINKS,
17 JEFFER, MANGELS, BUTLER &
18 MARMARO, L.L.P.:

19 Attorneys for Defendants
20 AQUAWOOD, LLC, AND AW
21 COMPUTER HOLDINGS, LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **SUMMARY OF ARGUMENT**

4 The SAC represents Plaintiff's third unsuccessful attempt to allege a
5 federal claim for relief against AW and Aquawood to satisfy a money judgment.
6 Indeed, there is no question that the Seventh Claim for Relief (which is the only
7 claim alleged against AW) is founded exclusively upon state law. Although the
8 SAC, unlike its predecessor pleadings, now attempts to state a federal claim
9 against Aquawood unrelated to satisfying the money judgment, the Seventh
10 Claim for Relief against Aquawood is still a state law claim for which there is
11 no subject matter jurisdiction and for which no relief can be granted in this
12 federal court. Accordingly, the Seventh Claim for Relief against AW and
13 Aquawood, should be dismissed pursuant to FRCP 12(b)(1) and 12(b)(6), and
14 the prayer for a finding of successor liability should be stricken under FRCP
15 12(f).

16 What is readily evident from the face of the SAC is that there are no
17 federal claims for relief alleged against AW, and thus there is no subject matter
18 jurisdiction. Indeed, there is no supplemental jurisdiction for the state law claim
19 because it is not so related to the other federal claims against other defendants or
20 even the newly alleged federal claims against Aquawood as to form a single
21 "case or controversy." Accordingly, dismissal of the Seventh Claim for Relief
22 as to both AW and Aquawood under FRCP 12(b)(1) is warranted.

23 Finally, even assuming arguendo that Wham-O could get past the blatant
24 subject matter jurisdiction defects, the SAC also fails to state any claim upon
25 which relief can be granted under both California Code of Civil Procedure
26 ("CCP") section 708.210, *et seq.*, or for successor liability because Wham-O has
27 not (and cannot) meet a crucial element of those claims, namely, that either
28

1 Aquawood or AW is in possession of property belonging to SLB Toys USA,
2 Inc., a New York corporation ("SLB"). As set forth more fully in the
3 Discussion, this is not a factual determination, but an indisputable legal one.
4 Accordingly, dismissal of these claims under FRCP 12(b)(6) is proper.

5 **II.**

6 **STATEMENT OF RELEVANT FACTS**

7 In a separate action, SLB filed a lawsuit against Wham-O for, *inter alia*,
8 trademark infringement, in connection with the use of yellow coloring in the
9 production of water slides.¹ In response, Wham-O countersued SLB, claiming,
10 among other things, willful infringement by SLB in connection with the same
11 use of the yellow coloring in the production of water slides. That case went to
12 trial and a judgment was entered in favor of Wham-O against SLB, although that
13 judgment is presently on appeal (the "Judgment").

14 Through the SAC, initially filed on or about February 25, 2008, Wham-O
15 seeks to impose liability upon AW and Aquawood based upon quintessential
16 state law claims for putative successor liability for the Judgment against SLB.²
17 In this regard, the SAC is no different than the First Amended Complaint
18 ("FAC") filed by Wham-O, and suffers from the same defects outlined in AW's
19 and Aquawood's first Motion to Dismiss filed in response to the FAC. In
20 response to the Motion, Wham-O requested that the parties stipulate to permit
21 Wham-O to file its SAC, which was supposed to cure these (and other) blatant
22 pleading defects. Remarkably, none of these defects noted herein were
23 corrected, thus necessitating this renewed Motion to Dismiss.

24
25
26 ¹ SLB Toys USA, Inc. v. Wham-O, Inc., et al., Case No. 2:06-cv-01382-RSWL-CW,
27 filed on March 6, 2006, in the Central District of California.

28 ² AW acquired certain assets of SLB pursuant to that Asset Purchase Agreement
("APA") dated November 19, 2007. Thereafter, Aquawood leased from AW certain assets
which AW acquired through the APA.

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III.

DISCUSSION

A. The District Court Lacks Subject Matter Jurisdiction Over the State Law Claims Against Both AW and Aquawood.

In order for this Court to maintain subject matter jurisdiction, there must be either (1) complete diversity of the parties, or (2) a federal question. (28 U.S.C. §§ 1331, 1332; See also, Lincoln Property Co. v. Roche, 546 U.S. 81, 82 [126 S.Ct. 606, 163 L.Ed.2d 415] (2005)(complete diversity required for subject matter jurisdiction); Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 678 [126 S.Ct. 2121, 165 L.Ed.2d 131] (2006)(federal question required for subject matter jurisdiction.) Wham-O has pleaded subject matter jurisdiction under 1331 (federal question), 1338 (actions relating to trademarks), and 1367 (supplemental). Wham-O does not allege diversity jurisdiction (which would fail in any event), and there is no federal question as to AW and Aquawood with regard to the Seventh Claim for Relief. Therefore, the SAC should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

(1) Wham-O, Aquawood, and AW Are All Citizens of California.

Although not alleged in the SAC, to be clear, there is no basis for this Court to exercise subject matter jurisdiction based upon diversity. Wham-O is a corporation organized and existing under the laws of the State of Delaware, but has its principal place of business in California. (SAC, ¶ 8). Aquawood is a limited liability company organized and existing under the laws of the State of California. (See SAC, ¶ 11.) Similarly, AW is a limited liability company organized and existing under the laws of the State of California. (See SAC, ¶ 12.) Given these facts, diversity is absent. 28 U.S.C. § 1332.

On the face of the SAC it is clear that subject matter jurisdiction does not lie because Wham-O, Aquawood, and AW are all citizens of California. Thus, it is readily evident that the District Court does not have subject matter jurisdiction

1 based on diversity since there is no diversity between the parties. (Lincoln
2 Property Co., 546 U.S. at 82. See, Gould Elecs. Inc. v. United States, 220 F.3d
3 169 [51 ERC 1014, 31 Env'tl. L Rep. 20,001] (3d Cir. 2000); and Wolfe v.
4 Strankman, 392 F.3d 358, 362 (9th Cir. 2004)(Rule 12(b)(1) motion may be
5 treated as either a facial or factual challenge to the court's subject matter
6 jurisdiction).

7 **(2) Subject Matter Jurisdiction Does Not Exist Under Either 28**
8 **U.S.C. Section 1331, Or Section 1338.**

9 As stated supra, the SAC alleges only the Seventh Claim for Relief
10 against AW based upon CCP section 708.210, and indirectly, a claim for
11 successor liability, although questionably only in the prayer for relief. Absent a
12 federal question, no subject matter jurisdiction exists. Empire Healthchoice
13 Assur., Inc., 547 U.S. at 678. Thus, Wham-O has stated no federal claim for
14 relief in the SAC against AW. With regard to Aquawood, although Plaintiff
15 alleges several federal claims for relief against Aquawood for the first time, that
16 does not automatically confer subject matter jurisdiction over the alleged state
17 law claim set forth in the Seventh Claim for Relief. (Wisconsin Dept. of
18 Corrections v. Schacht, 524 U.S. 381, 387 (1998) (Federal court must find basis
19 for supplemental jurisdiction over the state law claims. Supplemental
20 jurisdiction allows federal courts to hear and decide state-law claims along with
21 federal-law claims when they “are so related to claims in the action within such
22 original jurisdiction that they form part of the same case or controversy,” citing
23 28 U.S.C. § 1367(a).) See discussion infra.

24 28 U.S.C. § 1331 provides:

25 Sec. 1331. Federal question

26 The district courts shall have original jurisdiction of all
27 civil actions arising under the Constitution, laws, or
28 treaties of the United States.

1 As a matter of law, the claims under CCP section 708.210, and for
2 successor liability are not claims for relief arising under the Constitution, federal
3 laws, or treaties of the United States. Neither are they trademark claims under
4 28 U.S.C. § 1338. Therefore, this Court has no subject matter jurisdiction based
5 upon a federal question.

6 **B. Supplemental Jurisdiction Under 28 U.S.C. Section 1367 Does Not**
7 **Apply Since the State Law Claims Are Not So Related to the Federal**
8 **Claims as to Form Part of the Same Case or Controversy.**

9 Wham-O erroneously alleges that this Court has supplemental jurisdiction
10 over the CCP § 708.210 claims against all Defendants (SAC, ¶¶ 123 - 133), and
11 over the successor liability claims against AW and Aquawood (SAC, Prayer, ¶
12 1.) See also SAC, ¶ 21. However, Wham-O has failed to meet its burden under
13 28 U.S.C. section 1367 to establish how either the collection action under CCP §
14 708.210 or the successor liability claims are so related to the new federal claims
15 asserted against Aquawood in this action such that they “form part of the same
16 case or controversy under Article III of the United States Constitution.” It is
17 axiomatic that where there is no other claim for relief asserted against AW, this
18 cannot be correct as a matter of law.

19 To this end, 28 U.S.C. § 1367 specifically provides that:

20 Sec. 1367. Supplemental jurisdiction

21 (a) Except as provided in subsections (b) and (c) or as
22 expressly provided otherwise by Federal statute, in any
23 civil action of which the district courts have original
24 jurisdiction, the district courts shall have supplemental
25 jurisdiction over all other claims that are **so related to**
26 **claims in the action within such original**
27 **jurisdiction that they form part of the same case or**
28

1 **controversy under Article III of the United States**
2 **Constitution** (Emphasis added.)

3 (c) The district courts may decline to exercise
4 supplemental jurisdiction over a claim under
5 subsection (a) if –

6 (1) the claim raises a novel or complex issue of State
7 law,

8 (2) the claim substantially predominates over the claim
9 or claims over which the district court has original
10 jurisdiction,

11 (3) the district court has dismissed all claims over
12 which it has original jurisdiction, or

13 (4) in exceptional circumstances, there are other
14 compelling reasons for declining jurisdiction.

15
16 In the SAC, Plaintiff attempts to assert several federal claims against
17 Aquawood (although none were previously alleged against Aquawood in either
18 the initial Complaint or the FAC), including, but not limited to trademark
19 infringement. Notably, there are no factual allegations that would explain how
20 the collection action relative to the Judgment in a different case or the successor
21 liability claims are so related to these arguably new federal claims that they form
22 part of the “same case or controversy.” Clearly, whether some Defendants are
23 infringing or diluting Wham-O’s mark has nothing to do with whether Wham-O
24 can satisfy the Judgment through a creditor’s suit against Aquawood and AW, or
25 whether Aquawood and AW are successors to SLB. There is no nexus between
26 the nature of these distinct claims.

27 Moreover, there are compelling reasons to decline to exercise
28 supplemental jurisdiction over the state law-based claims. First, the creditor’s

1 suit under CCP § 708.210 can only be construed to raise a “novel or complex
2 issue of State law,” since it is based entirely upon a California state statute.
3 Second, there can be no finding other than that the state-law based claim
4 substantially predominates over the federal claims, because (1) as to AW, there
5 are no federal claims alleged, and (2) as to Aquawood, the federal claims against
6 it appear to be pretextual, simply to obtain federal jurisdiction. (The Supreme
7 Court has held that “a suit may sometimes be dismissed for want of jurisdiction
8 where the alleged claim under the Constitution or federal statutes clearly appears
9 to be immaterial and made solely for the purpose of obtaining jurisdiction or
10 where such a claim is wholly insubstantial and frivolous.” Molski v. Mandarin
11 Touch Restaurant, 359 F.Supp.2d 924, 936 (C.D.Cal. 2005), citing Bell v. Hood,
12 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946).) Finally, the
13 appropriate vehicle to seek a finding of successor liability upon AW or
14 Aquawood for the Judgment against SLB would be to file a motion to amend the
15 Judgment. (Odnil Music Ltd. v. Katharsis LLC, 2007 WL 3308857, *10
16 (E.D.Cal. 2007) (judgment amended to add successor and alter ego entities).)

17 **C. The SAC Should Be Dismissed Because Wham-O Has Failed to State**
18 **A Claim Upon Which Relief Can Be Granted.**

19 **(1) No Relief Can Be Granted Under CCP § 708.210.**

20 Assuming *arguendo* that the CCP § 708.210 claim is somehow proper in
21 federal court, which it is not, then in any event, Wham-O has not pleaded, and
22 cannot plead that either AW or Aquawood meet the requirements set forth in
23 CCP § 708.210. The statute explicitly requires that any third party being sued
24 for recovery of property in satisfaction of a judgment against the judgment
25 debtor must be (1) in “possession or control” of (2) “property in which the
26 judgment debtor has an interest or is indebted to the judgment debtor.” (CCP §
27 708.210.) Here, although in paragraph 132 of the SAC Wham-O attempts to
28 plead that AW and Aquawood are in possession SLB’s property, a valid cause of

1 action cannot be stated as a matter of law because through the APA, AW
2 purchased the certain of SLB's property. Simply buying assets does not create
3 successor liability, and eliminates the judgment debtor's continuing interest in
4 the property which is the subject of the APA. (Acheson v. Falstaff Brewing
5 Corp., 523 F.2d 1327, 1329-30 (9th Cir. 1975) (Under the law of California and
6 most other jurisdictions, where one company sells or otherwise transfers all its
7 assets to another company, the latter is not liable for the debts and liabilities of
8 the transferor, except where: (1) the purchaser expressly or impliedly agrees to
9 assume such debts; (2) the transaction amounts to a consolidation or merger of
10 the seller and purchaser; (3) the purchasing corporation is merely a continuation
11 of the selling corporation; or (4) the transaction is entered into fraudulently in
12 order to escape liability for such debts.)

13 Wham-O does not allege that the APA should be set aside, nor does
14 Wham-O allege that the APA reflects a fraudulent transfer. Therefore, without
15 an initial determination that the assets now held by AW belong to SLB rather
16 than AW, AW is the legal owner of the assets it purchased from the assignee.
17 (See, e.g., Simons v. Hill Street Fireproof Bldg. Co., 69 Cal.App. 129, 134
18 (1924) (Title to personal property, sold or exchanged, passes to the buyer
19 whenever the parties agree upon a present transfer, and the thing itself is
20 identified).

21 Similarly, Aquawood is simply the lessee of the assets which lawfully
22 belong to AW and therefore are not in "possession" of SLB's property as a
23 matter of law, since title already passed to AW. Simons, 69 Cal.App. at 134.
24 Thus, there is no claim under CCP § 708.210 for which relief can be granted
25 because, as a matter of law, a critical element of that cause of action simply
26 cannot be met. Therefore, the Seventh Claim for Relief should be dismissed
27 under FRCP 12(b)(6).

28

1 **(2) No Relief Can Be Granted With Regard to Successor Liability.**

2 It is entirely unclear whether a claim can even be stated in the prayer for
3 relief, where there is no corresponding claim for relief seeking to impose the
4 liability sought in the prayer for relief. (Weber v. Superior Court of Yolo
5 County, 26 Cal.2d 144, 148 (1945) (Prayer for relief does not necessarily
6 establish the character of an action.) Moreover, with regard to successor
7 liability, no claim has been stated for which relief can be granted for at least four
8 reasons: (1) there is no subject matter jurisdiction over that claim as set forth
9 supra; (2) CCP § 708.210 is not the proper vehicle to impose successor liability
10 upon AW or Aquawood for the Judgment against SLB (see supra – appropriate
11 remedy is to file motion to amend SLB Judgment); (3) the SAC does not allege
12 facts to satisfy the elements of successor liability; and (4) Wham-O is not
13 entitled to declaratory relief absent jurisdiction.

14 A successor corporation has legal responsibility for a predecessor
15 corporation's debts and liabilities **only if**: (1) the successor corporation expressly
16 or impliedly agreed to assume the liabilities of the predecessor corporation; (2)
17 the alleged transactions between the two companies amounted to a consolidation
18 or merger of the corporations; (3) the successor corporation is a mere
19 continuation or reincarnation of the predecessor corporation; or (4) clear and
20 convincing evidence shows that the transfer of assets from the predecessor
21 corporation to the successor corporation was for the fraudulent purpose of
22 escaping debt liability. Fisher v. Allis-Chalmers Corp. Product Liability Trust,
23 95 Cal.App.4th 1182, 1188 (2002).

24 Here, the SAC does not allege that (1) Aquawood and AW agreed to
25 assume the liabilities of SLB; or (2) that transactions between the two
26 companies amounted to a consolidation or merger of the corporations. The SAC
27 attempts to allege that AW and Aquawood are “mere continuations” of SLB
28 (SAC, ¶ 132), however, it provides no factual allegations to support such a

1 conclusion. Indeed, there are no such facts in existence since (1) AW does not
2 do any business whatsoever, other than as a lessor, and (2) Aquawood is not
3 involved in any of the activities for which the Judgment against SLB was
4 imposed.

5 Finally, although the SAC alleges that the Assignment for the Benefit of
6 Creditors ("ABC") was "fraudulent" (SAC, ¶ 37), there are no facts in the SAC
7 to support such a legal conclusion. An Assignment for the Benefit of Creditors
8 is a statutorily legal means to resolve issues relating to debt without resorting to
9 bankruptcy. See California Code of Civil Procedure § 493.010. SLB did
10 nothing more than exercise its rights under § 493.010, and as a matter of law, the
11 SAC fails to allege facts that would indicate otherwise. Therefore, the claim for
12 successor liability necessarily fails, and should be dismissed against Aquawood
13 and AW.

14 Additionally, as a matter of law, Wham-O is not entitled to a declaration
15 that Aquawood and AW are successors of SLB. The Declaratory Judgment Act,
16 found at 28 U.S.C. §§ 2201-2202, sets forth the authority for federal courts to
17 provide declaratory relief; however, such a remedy cannot be created **absent**
18 **jurisdiction**, and as set forth supra, there is no subject matter jurisdiction over
19 the state law-based claims against AW and Aquawood. See Schilling v. Rogers,
20 363 U.S. 666, 677 [80 S.Ct. 1288, 4 L.Ed.2d 1478] (1960)(commenting that the
21 Declaratory Judgment Act is not an independent source of federal jurisdiction).
22 Therefore the claim for successor liability necessarily fails.

23 28 U.S.C. § 2201 provides the following:

24 Sec. 2201. Creation of remedy

25 (a) In a case of actual controversy **within its**
26 **jurisdiction** . . . any court of the United States, upon
27 the filing of an appropriate pleading, may declare the
28 rights and other legal relations of any interested party

1 seeking such declaration, whether or not further relief
2 is or could be sought. Any such declaration shall have
3 the force and effect of a final judgment or decree and
4 shall be reviewable as such. (Emphasis added.)

5 The Declaratory Judgment Act does not expand the court's jurisdiction; this
6 provision only provides a declaratory remedy in cases properly brought in
7 federal court. Schilling, 363 U.S. at 677.

8 As can be seen from the plain language of this statute, although federal
9 courts can fashion remedies for declaratory relief, they cannot do so absent
10 jurisdiction. Id. Here, as outlined above, Wham-O has not established an
11 independent basis for the district court's subject matter jurisdiction over the
12 either the § 708.210 claim or the successor liability claim (e.g. diversity of
13 citizenship, federal question, or supplemental jurisdiction). Accordingly,
14 Wham-O is not entitled to a declaratory remedy against Aquawood and AW in
15 federal court. Schilling, 363 U.S. at 677. See also Skelly Oil Co. v. Phillips
16 Petroleum Co., 339 U.S. 667, 671 [70 S.Ct. 876, 94 L.Ed. 1194]
17 (1950)(jurisdiction requirements not altered by the Declaratory Judgment Act).

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IV.

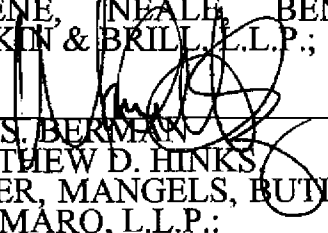
CONCLUSION

WHEREFORE, Aquawood and AW respectfully request that the Court enter an order (i) dismissing the Seventh Claim for Relief in the SAC entirely as to AW and Aquawood; (ii) dismissing the state law-based claims for successor liability against both AW and Aquawood; and (iii) granting such other and further relief as is just and proper under the circumstances.

Dated: May 16, 2008

AQUAWOOD, LLC, AND AW
COMPUTER HOLDINGS, LLC

By: 
BETH ANN R. YOUNG
HOLLY ROARK
LEVENE, NEALE, BENDER,
RANKIN & BRILL, L.L.P.;


ROD S. BERMAN
MATTHEW D. HINKS
JEFFER, MANGELS, BUTLER &
MARMARO, L.L.P.:

Attorneys for Defendants
AQUAWOOD, LLC, AND AW
COMPUTER HOLDINGS, LLC

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DECLARATION OF HOLLY ROARK

I, Holly Roark declare as follows:

1. I am an associate of the law firm Levene, Neale, Bender, Rankin & Brill L.L.P., counsel for defendants Aquawood, LLC (“Aquawood”), and AW Computer Holdings, LLC (“AW”). I have personal knowledge of the facts stated herein and if called upon as a witness I would testify competently as to the following:

2. On Tuesday May 6, 2008, in order to resolve a potential Motion to Dismiss and to comply with Local Rule 7-3, I faxed and mailed a “meet and confer” letter to Annette Hurst, Elizabeth Brown, John Ulin, and Anna Zusman, at Heller Ehrman LLP, counsel of record for plaintiff Wham-O, Inc. (“Wham-O”). The letter sets forth Aquawood’s and AW’s legal positions and indicates that dismissal of AW completely, and of the state law claims against both AW and Aquawood, would be appropriate for (1) lack of subject matter jurisdiction, and (2) for failure to state claims upon which relief can be granted. Attached hereto as Exhibit “1” and incorporated herein by this reference is a true copy of that letter.

3. On May 8, 2008, I emailed counsel for Wham-O requesting a response to our meet and confer letter, and attached a copy of the same to the email. Attached hereto as Exhibit “2” and incorporated herein by this reference is a true copy of that email.

4. On Friday, May 9, 2008, at about 3:57 p.m. I received a voicemail from Anna Zusman indicating that counsel for Wham-O believes that AW and Aquawood have made a good faith attempt to meet and confer, but that Wham-O does not intend to dismiss AW or any claims against AW or Aquawood, and that counsel for Wham-O looks forward to AW’s and Aquawood’s Motion to Dismiss.

L N B R & B

LEVENE, NEALE, BENDER, RANKIN & BRILL L.L.P.

LAW OFFICES

May 6, 2008

Via Facsimile and Mail

Heller Ehrman LLP
Annette L. Hurst, Esq.
Elizabeth R. Brown, Esq.
333 Bush St.
San Francisco, CA 94104
Facsimile: (415) 772-6268

Heller Ehrman LLP
John C. Ulin, Esq.
Anna R. Zusman, Esq.
333 South Hope Street, 39th floor
Los Angeles, CA 90071
Facsimile: (213) 614-1868

Re: Wham-O, Inc. v. Manley Toys, Ltd., et al.

Dear Ms. Hurst, Ms. Brown, Mr. Ulin, and Ms. Zusman,

As you know, we are counsel to AW Computer Holdings, LLC ("AW") and Aquawood, LLC ("Aquawood"). This letter will serve to initiate the meet and confer process pursuant to Local Rule 7-3 regarding our response to Wham-O's Second Amended Complaint ("SAC"). Despite the federal claims now alleged against Aquawood, the SAC still does not cure many of the defects of the First Amended Complaint, and therefore, Aquawood and AW intend to file a motion to dismiss the SAC.

The only claims against AW are for liability under California Code of Civil Procedure ("CCP") section 708.210, and for successor liability. Once again, there is no subject matter jurisdiction over AW because (1) AW and Wham-O are both citizens of California; (2) there is no federal question between these parties; and (3) supplemental jurisdiction under 28 U.S.C. 1367 does not exist because the attempted collection action under CCP section 708.210 pursuant to the judgment against SLB Toys USA, Inc. dba Toyquest ("SLB") is in no way related to the federal claims asserted in this action such that they "form part of the same case or controversy under Article III of the United States Constitution". See 28 U.S.C. § 1367. Likewise, there is no

10250 CONSTELLATION BOULEVARD, SUITE 1700 LOS ANGELES, CALIFORNIA 90067-6200

TEL: 310.229.1234 FAX: 310.229.1244 WEB: WWW.LNBRB.COM E-MAIL: INFO@LNBRB.COM

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subject matter jurisdiction over the successor liability claims for the same reasons above. Accordingly, the claims against AW cannot stand. Similarly, these state law-based claims cannot stand against Aquawood.

Assuming *arguendo* that the CCP section 708.210 claim is proper in federal court, which it is not, Wham-O has not plead, and cannot plead that either AW or Aquawood meet the requirements set forth in CCP section 708.210. The statute explicitly states that the third party being sued for recovery of property in satisfaction of a judgment against the debtor must be (1) in "possession or control" of (2) "property in which the judgment debtor has an interest or is indebted to the judgment debtor". (CCP § 708.210.) Here, although in paragraph 132 of the SAC Wham-O attempts to plead that AW and Aquawood are in possession of SLB's property, a valid cause of action cannot be stated as a matter of law because there was an assignment and sale of SLB's assets, and neither transaction has been set aside. Moreover, Wham-O does not allege that the transactions have been set aside, nor does Wham-O allege a cause of action for fraudulent transfer, or anywhere in the pleading ask for the assignment and sale to be set aside. Therefore, without an initial determination that the assets belong to SLB rather than to AW, as of the date of the instant pleading AW is the legal owner of the assets it purchased from the assignee. Accordingly, whether the property belongs to SLB or to AW is not a factual inquiry, but a legal one, and the answer has already been determined: AW is the legal owner of the property. Additionally, Aquawood is simply the lessee of the assets which lawfully belong to AW. Thus, there is no claim under CCP section 708.210 for which relief can be granted because, as a matter of law, a critical element of that cause of action simply cannot be met.

Moreover, the allegation of successor liability similarly does not arise under federal law, and furthermore, CCP section 708.210 is not the proper vehicle to impose successor liability upon AW or Aquawood for the judgment against SLB. As set forth above, Wham-O cannot set forth a proper claim under CCP section 708.210 in any event. Thus, Wham-O has stated no causes of action whatsoever in the SAC under which AW can be found liable, and all claims against AW should therefore be dismissed under FRCP 12(b)(6). As well, the claims against Aquawood under CCP section 708.210 and for successor liability should be dismissed.

Due to the foregoing, we again request that Wham-O immediately and completely dismiss AW from this action, and dismiss the CCP section 708.210 and successor liability claims



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against Aquawood. Accordingly, we invite your response to this letter so we can resolve this matter informally, rather than having to file a motion to dismiss. We are available to meet and confer via telephone this week to discuss these issues further.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'Holly Roark', is written in black ink.

HOLLY ROARK, ESQ.

cc: Rod S. Berman, Esq.
Matt Hinks, Esq.
Beth Ann Young, Esq. (i/o)

Holly Roark

From: Holly Roark
Sent: Thursday, May 08, 2008 5:11 PM
To: 'annette.hurst@hellerehrman.com'; 'elisabeth.brown@hellerehrman.com';
'john.uliu@hellerehrman.com'; 'anna.zusman@hellerehrman.com'
Cc: Beth R. Young
Subject: Wham-O - AW/Aquawood



Meet and Confer
Letter.pdf (12...

Counsel,

We previously forwarded to you the attached meet and confer letter on May 6, 2008. Our deadline to meet and confer with you on this matter before we file our motion to dismiss is tomorrow, May 9, 2008. Accordingly, please contact us as soon as possible so that we may attempt to resolve this matter informally. If we do not hear from you by the end of business May 9, 2008, we will proceed to file our motion to dismiss next week.

Thanks,

Holly Roark, Esq.
Levene, Neale, Bender, Rankin & Brill L.L.P.
10250 Constellation Blvd., Suite 1700
Los Angeles, California 90067
Telephone: (310) 229-1234
Facsimile: (310) 229-1244
Direct: (310) 229-3399
Email: hr@lnbrb.com
Website: www.lnbrb.com

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<http://www.lnbrb.com/disclaimers.htm>

PROOF OF SERVICE

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the 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 10250 Constellation Boulevard Suite 1700, Los Angeles, California 90067.

On May 16, 2008, I served the foregoing document described as

NOTICE OF MOTION AND MOTION OF DEFENDANTS AQUAWOOD, LLC AND AW COMPUTER HOLDINGS, LLC TO DISMISS THE SEVENTH CLAIM FOR RELIEF IN THE SECOND AMENDED COMPLAINT BASED UPON (A) LACK OF SUBJECT MATTER JURISDICTION UNDER RULE 12(b)(1) AND (B) THE FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER RULE 12(b)(6), AND TO STRIKE PORTIONS OF THE PRAYER UNDER RULE 12(F); MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF HOLLY ROARK IN SUPPORT THEREOF

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

See Attached Service List:

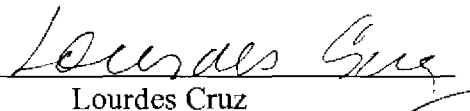
(By Mail) I caused such envelope with postage thereon, fully prepaid to be placed in the United States mail. Executed on May 16, 2008, at Los Angeles, California.

(By E-mail) I caused said document to be sent via email to the office(s) of the addressee(s) so designated on the attached list. Executed on _____, at Los Angeles, California.

(By Federal Express/Overnight Mail) I caused such envelope to be delivered by Federal Express (or Express Mail), next business day delivery to the offices of the addressee. Executed on _____, _____ at Los Angeles, California.

(By Facsimile) I caused said document to be sent via facsimile. Executed on _____, at Los Angeles, California.

(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.


Lourdes Cruz

Counsel for Plaintiff Wham-O, Inc.
Anna R Zusman/John C Ulin
Heller Ehrman LLP
333 South Hope Street, Suite 3900
Los Angeles, CA 90071-3043

Counsel for Defendant Brian Dubinsky
Stephen L Raucher
Reuben Raucher and Blum
1100 Glendon Avenue, 10th Floor
Los Angeles, CA 90024

Defendant
Brian Dubinsky
521 South Bentley Avenue
Los Angeles, CA 90049

Counsel for Plaintiff Wham-O, Inc.
Elisabeth R. Brown/Annette L. Hurst
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104

Defendant
Target Corp.
CT Corporation, Attn: Margaret Wilson
818 West 7th Street, 2nd Floor
Los Angeles, CA 90017

Defendant
Toys "R" Us, Inc.
Authorized Agent: Becky DeGeorge
2730 Gateway Oaks Drive, Suite 100
Sacramento, CA 95833

Defendant
Izzy Holdings, LLC
Authorized Agent: Brian Dubinsky
521 South Bentley Avenue
Los Angeles, CA 90049

Defendant
Kmart Corporation
Authorized Agent: Kristen Oliver
30600 Telegraph Road
Bingham Farms, MI 48025

Defendant
Kmart Corporation
Authorized Agent: Dave Shoovey
3000 West 14th Mile Road
Royal Oak, MI 48068

Counsel for Wal-Mart Stores, Inc.
Michael J. Small/Jeanne M. Gills
Jennifer L. Gregor
FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60610-4764

Counsel for Wal-Mart Stores, Inc.
Lori V. Minassian
FOLEY & LARDNER LLP
555 South Flower, Suite 3500
Los Angeles, California 90071-2411