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6 Attorneys for Plaintiffs

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 YOWIE NORTH AMERICA, INC., and
HENRY M. WHETSTONE, JR.,

12 Plaintiffs,

13 v.

14 CANDY TREASURE, LLC; and
15 KEVIN GASS,

16 Defendants.

Case No. 3:13-cv-01906-BEN-JMA
AMENDED COMPLAINT FOR
PATENT INFRINGEMENT

JURY DEMANDED

17
18 Plaintiffs YOWIE NORTH AMERICA, INC. and HENRY M. WHETSTONE,
19 JR., for their Complaint against Defendants CANDY TREASURE, LLC and KEVIN
20 GASS alleges and states as follows:

21 **THE PARTIES**

22 1. Plaintiff YOWIE NORTH AMERICA, INC. is a corporation organized
23 and existing under the laws of the State of Florida with its principal place of business
24 located at 431 Roberts Road, Subiaco, Tempo Offices, Unit B9, Perth, Western
25 Australia, 6008 AU.

26 2. Plaintiff HENRY M. WHETSTONE, JR. (“Whetstone”) is an individual
27 residing in Saint Augustine, Florida.
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1 Treasure Floorstands (for SKU/UPC 852923002506). Defendants cultivated these
2 relationships with multiple national retailers for the express purpose of creating
3 distribution channels for the distribution and sale of their Choco Treasure chocolate
4 surprises throughout the United States, including California as the state with the
5 largest GDP in the nation. Defendants knew that in doing so, they were deriving
6 significant revenues from sale of their accused goods in California as the terminal end
7 point of their goods.

8 9. Defendants' minimum contacts with the forum are such that the exercise
9 of jurisdiction with respect to the claims herein comports with traditional notions of
10 fair play and substantial justice.

11 10. Venue is proper in this judicial district under 28 U.S.C. sections 1391(b)
12 and (c) and 1400(b) because a substantial part of the events or omissions giving rise
13 to the claims occurred in the district and the defendants reside in this district by virtue
14 of being subject to personal jurisdiction in this judicial district by, among others, their
15 repeatedly availment and direction of their activity toward this district, and engaging
16 in acts of infringement in this judicial district.

17 **FIRST CLAIM FOR RELIEF**

18 **INFRINGEMENT OF U.S. PATENT NO. 5,925,391**

19 11. Yowie realleges all allegations in this Complaint as if stated herein.

20 12. On January 14, 1997, United States Patent Number 5,925,391 ('391
21 Patent) entitled "Edible and Nonedible Product," was duly and legally issued to
22 Whetstone. Whetstone is the owner and Yowie is the exclusive licensee to all rights
23 and interests in the '391 Patent in the United States. A true and correct copy of this
24 Patent is attached hereto as **Exhibit 1** and incorporated herein by reference.

25 13. Defendants have directly and indirectly infringed and continue to
26 infringe (literally and under the doctrine of equivalents) the '391 Patent by making,
27 using, selling, offering for sale, importing, and/or actively inducing others to use (for
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1 example, end users of their products by providing instructions and/or manuals)
2 chocolate surprises with toys inside covered by one or more claims of the '391
3 Patent, and are thus liable for patent infringement pursuant to 35 U.S.C. § 271. This
4 includes the practice by Defendants via the Candy Treasure's Choco Treasure of
5 claim 1 of the '391 Patent.

6 14. Defendants' infringement of the '391 Patent has caused and continues to
7 cause damage to Yowie in an amount to be determined at trial.

8 15. Defendants' infringement of the '391 Patent has caused and will
9 continue to cause immediate and irreparable harm to Yowie for which there is no
10 adequate remedy at law, unless this Court enjoins and restrains such activities.

11 16. On Defendants' website, Defendants describe Yowie's product by
12 saying: "We love these products! That's why we set out to make a similar version for
13 America."

14 17. Yowie is informed and believes and, on that bases alleges, that
15 Defendants knew of the '391 Patent and that Defendants' infringement of the '391
16 Patent was willful and deliberate, entitling Yowie to enhanced damages pursuant to
17 35 U.S.C. § 284, and costs incurred prosecuting this action. For example,
18 Defendants' website identifies Yowie as another supplier of candy products including
19 chocolate surprises and purports to engage in a comparison and Defendants had prior
20 discussion with the inventor of the '391 Patent concerning this patent.

21 **SECOND CLAIM FOR RELIEF**

22 **INFRINGEMENT OF U.S. PATENT NO. 6,099,872**

23 18. Yowie realleges all allegations in this Complaint as if stated herein.

24 19. On March 24, 1998, United States Patent Number 6,099,872 ('872
25 Patent) entitled "Edible and Non-Edible Product," was duly and legally issued to
26 Whetstone. Whetstone is the owner and Yowie is the exclusive licensee to all rights
27 and interests in the '872 Patent in the United States. A true and correct copy of this
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1 Patent is attached hereto as **Exhibit 2** and incorporated herein by reference.

2 20. Defendants have directly and indirectly infringed and continue to
3 infringe (literally and under the doctrine of equivalents) the '872 Patent by making,
4 using, selling, offering for sale, importing, and/or actively inducing others to use (for
5 example, end users of their products by providing instructions and/or manuals)
6 chocolate surprises with toys inside covered by one or more claims of the '872
7 Patent, and are thus liable for patent infringement pursuant to 35 U.S.C. § 271. This
8 includes the practice by Defendants via the Candy Treasure's Choco Treasure of
9 claim 1 of the '872 Patent.

10 21. Defendants' infringement of the '872 Patent has caused and continues to
11 cause damage to Yowie in an amount to be determined at trial.

12 22. Defendants' infringement of the '872 Patent has caused and will
13 continue to cause immediate and irreparable harm to Yowie for which there is no
14 adequate remedy at law, unless this Court enjoins and restrains such activities.

15 23. On Defendants' website, Defendants describe Plaintiff's product by
16 saying: "We love these products! That's why we set out to make a similar version for
17 America."

18 24. Yowie is informed and believes and, on that bases alleges, that
19 Defendants knew of the '872 Patent and that their infringement of the '872 Patent is
20 willful and deliberate, entitling Yowie to enhanced damages pursuant to 35 U.S.C. §
21 284, and costs incurred prosecuting this action. For example, Defendants' website
22 identifies Yowie as another supplier of candy products including chocolate surprises
23 and purports to engage in a comparison and Defendants had prior discussion with the
24 inventor of the '872 Patent concerning this Patent. Defendants also cited the '872
25 Patent in its prosecution of its own patent application, which was cited multiple times
26 by the Examining Attorney in rejecting such application.

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THIRD CLAIM FOR RELIEF

FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT

25. Yowie realleges all allegations in this Complaint as if stated herein.

26. Defendants have made false statements or representations in connection with the Choco Treasure.

27. For example, Defendants advertise the following false claims:

- a. “Choco Treasure is the only surprise chocolate in the world recognized as safe for children of all ages.” Yowie’s candy products are also safe for children of all ages, making this claim literally false.
- b. “Our patented capsule design ensures we are in compliance with the FDA 1938 Federal Food, Drug, and Cosmetic Act.” This statement is likely to be read as stating that Defendants have obtained a patent on the capsules. They have not, and indeed their patent application has been rejected by the USPTO numerous times based on the ’872 Patent.
- c. “Choco Treasure is the only surprise chocolate that is legal for sale in the USA, as it meets or exceeds both The USA Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC) rules for child safety.” Yowie’s candy products are also legal for sale in the USA, making this claim literally false.
- d. “Choco Treasure is the only surprise egg approved by the FDA and the CPSC.” At the least, the CPSC does not “approve” products and on information and belief did not “approve” the Choco Treasure, and thus this statement is literally false. On information and belief, Defendants have made other similar and/or additional false statements.

28. These statements are false and/or imply falsity to a consumer, and are material to consumers. These statements are likely to deceive consumers, and on information and belief are actually confusing consumers. Consumers who read these

1 claims are likely to believe that Choco Treasure is the only legal such candy product
2 that they may buy in the United States, that it has been expressly approved by the
3 CPSC and thus they can feel particularly comfortable about the purchase, and that
4 there are no other in the world that are both safe for all ages and/or legal in the United
5 States.

6 29. These statements are likely to cause injury to Yowie. Yowie's candy
7 products are not illegal or unfit for children of certain ages. Yet Defendants'
8 advertising has the effect of convincing consumers that they are, and that consumers
9 can only purchase such candy products that are legal in the United States and/or safe
10 for children of all ages from Defendants (not Yowie). Those who believe
11 Defendants' statements are likely to conclude that Yowie's candy products are illegal
12 and unsafe for certain children, thereby tarnishing and damaging Yowie's goodwill
13 and reputation, and interfering with Yowie's ability to market and sell its candy
14 products. Additionally, by suggesting certain U.S. agencies "approve" products when
15 they in fact do not, this impinges upon Yowie's ability to effectively compete in the
16 marketplace since it cannot make a similar claim (to do so would be false).

17 30. As a result, Yowie is entitled to compensatory damages in an amount to
18 be determined at trial. Yowie is also entitled to an award of Defendants' profits
19 attributable to the false statements.

20 31. Yowie is further entitled to temporary, preliminary and permanent
21 injunctive relief barring further false statements by Defendants. Yowie's remedy at
22 law is inadequate to compensate for the damage caused by these false assertions.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Yowie prays for relief as follows:

25 1. For judgment entered in favor of Yowie that one or more claims of the
26 '391 Patent and/or the '872 Patent are infringed by Defendants;

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CERTIFICATE OF SERVICE

I am employed in the County of San Diego, my business address is Mintz Levin Cohn Ferris Glovsky and Popeo PC, 3580 Carmel Mountain Road, Suite 300, San Diego, CA 92130. I am over the age of 18 and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for personal delivery, for mailing with United States Postal Service, for facsimile, and for overnight delivery by Federal Express, Express Mail, or other overnight service.

On October 4, 2013, I caused a copy of the following document:

AMENDED COMPLAINT FOR PATENT INFRINGEMENT

to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

Robert P. Greenspoon, Esq. Attorneys for Defendants
Flachsbart & Greenspoon, LLC
333 N. Michigan Ave., 27th Floor Phone: (312) 551-9500
Chicago, IL 60601 Email: rpg@fg-law.com

FEDERAL EXPRESS: Such correspondence was deposited on the same day in the ordinary course of business with a facility regularly maintained by Federal Express.

EMAIL: I caused the documents to be sent to the persons at the email address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury that the above is true and correct. Executed on October 4, 2013, at San Diego, California. I further declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made.

Kelly E. Jenckes

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