

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>THOSE CHARACTERS FROM</b>	)	<b>CASE NO.: 1:02CV 875</b>
<b>CLEVELAND, INC.</b>	)	
<b>One American Road</b>	)	<b>JUDGE: WELLS</b>
<b>Cleveland, Ohio 44144</b>	)	
	)	
<b>PLAINTIFF,</b>	)	
	)	<b>SECOND AMENDED COMPLAINT FOR</b>
<b>v.</b>	)	<b>MONEY DAMAGES, INJUNCTIVE</b>
	)	<b><u>RELIEF, AND ACCOUNTING</u></b>
<b>TOYMAX, INC.</b>	)	
<b>c/o Steven Lebensfeld</b>	)	<b>( JURY DEMAND ENDORSED</b>
	)	<b>HEREON)</b>
<b>Chairman and CEO</b>	)	
<b>125 East Bethpage Road</b>	)	
<b>Plainview, New York 11803</b>	)	
	)	
<b>AND</b>	)	
	)	
<b>MONOGRAM INTERNATIONAL, INC.</b>	)	
<b>c/o Sanford B. Frank</b>	)	
<b>Secretary</b>	)	
<b>125 East Bethpage Road</b>	)	
<b>Plainview, New York 11803</b>	)	
	)	
<b>AND</b>	)	
	)	
<b>GO FLY A KITE, INC.</b>	)	
<b>c/o Sanford B. Frank</b>	)	
<b>Secretary</b>	)	
<b>125 East Bethpage Road</b>	)	
<b>Plainview, New York 11803</b>	)	
	)	
<b>AND</b>	)	
	)	

**FUNNOODLE, INC.** )  
c/o Sanford B. Frank )  
Secretary )  
125 East Bethpage Road ) )  
Plainview, New York 11803 )  
 )  
 )  
**AND** )  
 )  
 )  
**JAKKS PACIFIC, INC.** )  
c/o Jack Friedman )  
Process Agent )  
22761 Pacific Coast Highway )  
Suite 226 )  
Malibu, California 90265 )  
 )  
 )  
**DEFENDANTS.** )

Plaintiff, Those Characters From Cleveland, Inc. ("TCFC"), for its Second Amended Complaint against Defendants, Toymax, Inc. ("Toymax"), Monogram International, Inc. ("Monogram"), Go Fly a Kite, Inc. ("GFK"), Funnoodle, Inc. ("Funnoodle"), and Jakks Pacific, Inc. ("Jakks") (collectively, "Defendants"), herein states as follows:

**PARTIES**

1. TCFC is an Ohio Corporation authorized to do business and doing business in the State of Ohio, with its principal place of business located in Cleveland, Ohio.
2. Toymax is a New York corporation, with its principal place of business located at 125 East Bethpage Road, Plainview, New York 11803.
3. Monogram is a Delaware corporation, with its principal place of business located at 66 Old Mill Road, Ghent, New York 12075.
4. On information and belief, GFK is a Delaware corporation, with its principal place of business located at 125 East Bethpage Road, Plainview, New York 11803.

5. Funnoodle is a Delaware corporation, with its principal place of business located at 125 East Bethpage Road, Plainview, New York 11803.

6. Jakks is a Delaware corporation with its principal place of business located at 22761 Pacific Coast Highway, Suite 226, Malibu, California 90265.

### **JURISDICTION AND VENUE**

7. Jurisdiction is founded upon U.S.C. § 1331 (Federal Question – Lanham Act), 28 U.S.C. § 1338 (Patent Claims), 28 U.S.C. § 1332 (Diversity of Citizenship), and 28 U.S.C. § 1367 (Pendant Jurisdiction).

8. Venue is proper in the Northern District of Ohio, Eastern Division, pursuant to 28 U.S.C. § 1391, because a substantial part of the events giving rise to the claims occurred in whole or in part in this District and/or the property that is the subject of this action is situated in this District, and/or pursuant to 28 U.S.C. § 1400.

9. This Court has personal jurisdiction over the Defendants pursuant to, and by virtue of, without limitation, the provisions of Ohio Revised Code § 2307.382, including subsections (A)(1), (2), (4), and/or (6) thereof.

### **ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

10. On or about August 1, 2000, TCFC, as licensor, and Toymax, Monogram, GFK, and Funnoodle, collectively as licensees (hereinafter, collectively, the "Licensee Defendants"), executed and entered into a Merchandise License Agreement with respect to the property known as "Popples", which is more particularly described in said Merchandise License Agreement (hereinafter referred to as the "Popples License Agreement"). A copy of the Popples License Agreement, although hereby referenced as Exhibit A hereto and

incorporated herein by reference, is not attached to this Complaint due to its confidential nature. A true and correct copy of the Popples License Agreement was filed under seal on July 8, 2002, Document No. 21 of the Docket, pursuant to the Court's Order of July 3, 2002, and the same constitutes Exhibit A to this Second Amended Complaint.

11. On or about July 25, 2001, TCFC, as licensor, and the Licensee Defendants, collectively as licensees, executed and entered into a Merchandise License Agreement with respect to the property known as "My Pet Monster", which is more particularly described in said Merchandise License Agreement (hereinafter referred to as the "My Pet Monster License Agreement"). A copy of the My Pet Monster License Agreement, although hereby referenced as Exhibit B hereto and incorporated herein by reference, is not attached to this Complaint due to its confidential nature. A true and correct copy of the My Pet Monster License Agreement was filed under seal on July 8, 2002, Document No. 21 of the Docket, pursuant to the Court's Order of July 3, 2002, and the same constitutes Exhibit B to this Second Amended Complaint.

12. Pursuant to the terms of the Popples License Agreement and the My Pet Monster License Agreement (collectively the "License Agreements"), the Licensee Defendants were granted the exclusive right, while the License Agreements were in effect, to manufacture, use, sell, and market under the TCFC applicable trademarks using TCFC's proprietary know-how, including, but not limited to, the right to use the technology and design characteristics set forth in the Patents (as hereinafter defined in Paragraph 39 below) (collectively, the "Licensed Rights"), and to sell licensed articles based upon the Popples and

My Pet Monster designs (collectively, the "Products"), and the Licensee Defendants were required to pay to TCFC certain royalties based upon net sales from the Products.

13. In addition, pursuant to the License Agreements, the Licensee Defendants were required to pay certain guaranteed amounts for purposes thereof and as reflected in the License Agreements.

14. In addition, pursuant to the License Agreements, the Licensee Defendants were required to bear a portion of certain expenses associated with protecting/maintaining TCFC's rights with respect to the Products.

15. The License Agreements contained certain restrictions entitling TCFC to terminate the License Agreements immediately and in its sole discretion in the event of any material change in the management, ownership or controlling interest of any of the Licensee Defendants, their parents or subsidiaries.

16. On or about February 27, 2002, TCFC received notice from the Licensee Defendants that the parent company of the Licensee Defendants, or certain of the Licensee Defendants, would be acquired by Jakks pursuant to a certain stock purchase agreement.

17. On information and belief, the acquisition of the parent company of the Licensee Defendants, or certain of them, has been completed, and Jakks is now the owner of the stock and/or assets of the parent company of Licensee Defendants, or certain of the Licensee Defendants.

18. The acquisition by Jakks of the parent company of Licensee Defendants, or certain of the Licensee Defendants, was undertaken without the prior consent of TCFC, and

was undertaken in violation of the provisions of the License Agreements, and in particular paragraph 20 thereof.

19. On April 16, 2002 and April 22, 2002, respectively, TCFC duly gave written notice to the Licensee Defendants pursuant to paragraph 20 of the License Agreements that the License Agreements, including Licensed Rights, would be terminated effective immediately; that all amounts required to be paid pursuant to the License Agreements as shared expenses and guaranteed amounts would be required to be paid immediately; and that Licensee Defendants would be required immediately to cease all manufacture and sale of the Products. True and correct copies of the April 16, 2002 and April 22, 2002 letters sent on behalf of TCFC are attached hereto collectively as Exhibit C and incorporated herein by reference.

20. The License Agreements expressly provide that upon termination, any and all ownership of the Licensed Rights and/or rights with respect to the Products granted under the License Agreements would revert immediately back to TCFC.

21. On information and belief, the Licensee Defendants and/or Jakks are continuing to exercise the Licensed Rights and/or to manufacture, market, promote, and/or sell the Products in violation of the License Agreements and in violation of TCFC's rights as owner.

22. As a result of Defendants' continued willful and unlawful conduct, TCFC has suffered, and is continuing to suffer, damages in an amount in excess of \$75,000.00 and which are currently unknown but to be proven at trial.

23. Unless injunctive relief is granted, TCFC will be irreparably injured as a result of Defendants' continued unlawful conduct.

**FIRST CLAIM FOR RELIEF**  
**(Lanham Act)**

24. TCFC incorporates by this reference Paragraphs 1-23 above as if fully restated herein.

25. In connection with their continued unlawful use of the Licensed Rights for the Products, on information and belief, Defendants have introduced, and continue to introduce, into interstate commerce false and misleading statements of fact concerning the Licensed Rights and/or the Products.

26. Defendants' continued manufacture, marketing, promotion, sale and/or other unlawful use of the Licensed Rights and/or Products includes and constitutes material and deceptive information that is, and continues to be, introduced into interstate commerce.

27. As a result of Defendants' willful and continued unlawful conduct, pursuant to 15 U.S.C. § 1125(a) and/or 15 U.S.C. § 1117, TCFC is entitled to injunctive relief and also to recover from Defendants treble damages, costs, and reasonable attorney's fees.

**SECOND CLAIM FOR RELIEF**  
**(Violation of Ohio Deceptive Trade Practices Act)**

28. TCFC incorporates by this reference paragraphs 1-27 above as if fully restated herein.

29. On information and belief Defendants have made, and continue to make, misrepresentations regarding the characteristics, benefits, status, affiliation, connection, standards, and/or quality in respect of the Licensed Rights and/or the Products and, in addition, have advertised and/or implied, and continue to advertise and/or imply that the

Products are properly being manufactured, marketed, promoted, and/or sold pursuant to the License Agreements.

30. Defendants have willfully engaged, and continue to willfully engage, in deceptive trade practices pursuant to Ohio Revised Code § 4165.02 *et seq*, knowing said practices to be deceptive, and Defendants continue to do so.

31. As a result of the foregoing, TCFC is entitled, among other things, to injunctive relief and to recover its damages and reasonable attorney's fees.

**THIRD CLAIM FOR RELIEF**  
**(Breach of Contract)**

32. TCFC incorporates by this reference Paragraph 1-31 above as if fully restated herein.

33. Pursuant to the terms of the License Agreements, TCFC properly and lawfully terminated Defendants' rights to utilize the Products, but on information and belief Defendants have nevertheless continued to manufacture, promote, sell and/or otherwise unlawfully utilize the Licensed Rights and/or Products for their own benefit in violation of TCFC's contractual rights.

34. As a direct and proximate result of Defendants' breach of contract, TCFC is entitled to recover damages from Defendants in an amount that is currently unknown, but to be proven at trial and in excess of \$75,000.00, including, without limitation, the guaranteed amounts and expenses required to be paid pursuant to the License Agreements.

**FOURTH CLAIM FOR RELIEF**  
**(Injunctive Relief)**



35. TCFC incorporates by this reference paragraphs 1-34 above as if fully restated herein.

36. TCFC will be irreparably injured and will have no adequate remedy at law unless the Court enjoins Defendants' continued unlawful conduct in manufacturing, promoting, selling, and/or otherwise utilizing the Licensed Rights and/or Products in violation of the License Agreements and TCFC's rights.

37. TCFC is entitled to preliminary and permanent injunctive relief, enjoining Defendants, their agents, assigns, successors, and those acting in concert with them, from continuing to manufacture, promote, sell, or otherwise utilize the Licensed Rights and/or Products, or any part thereof, or any semblance thereof.

**FIFTH CLAIM FOR RELIEF**  
**(Patent Infringement)**

38. TCFC incorporates by this reference paragraphs 1-37 above as if fully restated herein.

39. On or about September 8, 1987, U.S. Patent No. Des. 291,819, entitled "Toy Stuffed Figure or Similar Article", was duly and legally issued to TCFC, and on or about September 30, 1986, U.S. Patent No. 4,614,505, entitled "Transformable Toy Figure", was duly and legally issued to TCFC (collectively, the "Patents"). TCFC has been and is still the owner of all right, title, and interest in and to the Patents. True and correct copies of the Patents are attached hereto collectively as Exhibit D and incorporated herein by reference.

40. TCFC has fully complied with the requirements of 35 U.S.C. § 287(a) by fixing, or causing to be fixed the word "patent" or the abbreviation "pat", together with Patent Nos.

Des. 291, 819 and 4,614,505, respectively, on all Products manufactured or sold by, or on behalf of, TCFC or any of its licensees, which embody TCFC's patented invention.

41. Defendants have infringed and continue to infringe; have induced and continued to induce others to infringe; and/or have committed and continue to commit acts of contributory infringement of, one or more of the claims of the Patents. The Defendants' infringing activities in the United States and this District include manufacturing, use, sale, and/or offer for sale of certain toy stuffed figures, including the Products, incorporating the characteristics subject to the Patents. Such infringing activities violate 35 U.S.C. § 271. Upon information and belief, such infringement has been, continues to be, willful.

42. As a consequence of the infringing activities of Defendants regarding the Patents as complained of herein, TCFC suffered monetary damages in an amount not yet determined, and TCFC will continue to suffer such damages in the future unless and until Defendants' infringing activities are enjoined by this Court.

**SIXTH CLAIM FOR RELIEF**  
**(Accounting)**

43. TCFC incorporates by this reference paragraphs 1-42 above as if fully restated herein.

44. The License Agreements provide, among other things, that compensation payable to TCFC would be based upon Licensee Defendants' net sales, including any amounts or the value of other consideration received by Licensee Defendants in connection with the sale or other exploitation of the Licensed Rights and/or Products.

45. The License Agreements further provide that the Licensee Defendants were required within thirty days following the end of each calendar quarter to submit to TCFC a report covering the sales of any licensed articles during the preceding quarter, each report to show (i) by retailer, the number of units sold of each licensed article, (ii) the unit price of each licensed article, (iii) the gross sales for each licensed article, (iv) the deductions taken from gross sales and the reason therefore, and (v) the net sales for each licensed article. The License Agreements further provide that each report must be certified by the Licensee Defendants' Chief Financial Officer or other similar corporate officer.

46. The License Agreements further provide that the Licensee Defendants would keep and maintain complete and accurate records of the transactions underlying the accounting statements to be furnished pursuant to the License Agreements, and would allow representatives of TCFC to review such records at reasonable intervals and to make copies thereof as appropriate.

47. Based upon the relationship of the parties and, in particular, the contractual obligations of the Licensee Defendants pursuant to the License Agreements to make payments based upon the net income of Licensee Defendants, to keep accurate records, and to report detailed accounting information in respect of net sales, and based upon the failure of Defendants to make any payments to TCFC as required pursuant to the terms of the License Agreements, TCFC is entitled to an accounting from Defendants in order to determine the amount of compensation due to TCFC for any and all use by Licensee Defendants of the Licensed Rights and/or Products.

WHEREFORE, Plaintiff, Those Characters from Cleveland, Inc., respectfully requests that the Court enter judgment in its favor, and against Defendants, jointly and severally, as follows:

1. On its First Claim for Relief, that the Court enter judgment in favor of TCFC, and against Defendants, in an amount which is currently unknown but to be proven at trial, and which is believed to be in excess of \$75,000.00, plus interest, together with injunctive relief and such other and further relief to which TCFC may be lawfully entitled; and

2. On its Second Claim for Relief, that the Court enter judgment in favor of TCFC, and against Defendants, in an amount which is currently unknown but to be proven at trial, and which is believed to be in excess of \$75,000.00, plus interest, together with injunctive relief and such other and further relief to which TCFC may be lawfully entitled; and

3. On its Third Claim for Relief, that the Court enter judgment in favor of TCFC, and against Defendants, in an amount which is currently unknown but to be proven at trial, and which is believed to be in excess of \$75,000.00, plus interest, together with such other and further relief to which TCFC may be lawfully entitled; and

4. On its Fourth Claim for Relief, that the Court enjoin Defendants, their officers, agents, servants, employees, attorneys, parents, subsidiaries, affiliates, successors, and all others in active concert or participation with them or acting on their behalf, from continuing to manufacture, market, promote, sell, or otherwise, unlawfully utilize TCFC's rights and/or property defined in the License Agreements, including, without limitation, the Licensed Rights and Products; and

5. On its Fifth Claim for Relief, TCFC prays that the Court enter judgment in favor of TCFC, and against Defendants, jointly and severally, as follows:

- a. That Defendants be declared to have infringed, induced others to infringe, and/or committed acts of contributory infringement with respect to the claims of the Patents;
- b. That Defendants, their officers, agents, servants, employees, attorneys, parents, subsidiaries, affiliates, successors, and all others in active concert or participation with them or acting on their behalf be permanently enjoined from further infringement of the Patents.
- c. That Defendants be ordered to account for and pay to TCFC all damages caused to TCFC by reason of Defendants' infringement of the Patents pursuant to 35 U.S.C. § 284, including any enhanced damages;
- d. That TCFC be granted pre-judgment and post-judgment interest on the damages caused to it by reason of Defendants' infringement of the Patents;
- e. That this be declared an "exceptional case" pursuant to 35 U.S.C. § 285 and that Defendants be ordered to pay TCFC attorney's fees and costs;

6. On its Sixth Claim for Relief, that the Court order Defendants to provide TCFC with an accounting of the amounts owing to TCFC by Defendants pursuant to the License Agreements, such accounting to include all information necessary and relevant for such purposes including, among other things and without limitation, detailed sales and profit information; and

7. That the Court award TCFC its costs and expenses herein, including its reasonable attorney's fees, and such other and further relief to which it may be entitled in law and/or in equity.

**JURY DEMAND**

TCFC hereby demands a trial by jury on all issues so triable.

/s/ Donna M. Flammang

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Attorneys for Plaintiff Those Characters From  
Cleveland, Inc.

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 17, 2002, the foregoing Second Amended Complaint for Money Damages, Injunctive Relief and Accounting with Jury Demand was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Donna M. Flammang

Donna M. Flammang (0013868)

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