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18 CV 10524

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPIN MASTER LTD. and SPIN MASTER, INC.,

Plaintiffs

v.

13385184960@163.COM, 18888236883@163.COM, ALTAY, ANGELCITYER, BAMBOO001, CAOPING, CONGCONG2, DANDANXIAOWU, DAYINGJIA1256, DIAMOND BOUTIQUE, DIY GEM SHOP, DREAMSHIPS, DUMBLEDOR SHOP, EFASHIONER, EVERY DAY THERE WILL BE A NEW SUN, FASHIONABLE AND SPORT STORE, FASHIONDOFU, FELLA, FHIJHCF, FULLUSSET, GIFTSHOP2017, GIVE YOUR DREAM, GLOBAL_DAWN, GLOBAL-SPIRIT, GODCUP, GREEN FASHION, GUANGDONGHUATAI, GUIGIUDEDIAN, HAPPYSTORE99, HUASHAOSHOT, HUAXIAWAIMAOSHANG, ISHOP, ISYISY, IVANICABABYSHOP, JAHURTO, JASONSTORE1, JL&PREFECT, JUZIEJIA, KAIXUANXIAORENJIA, KEEP GOING, KRISTINECOTTRELL,

CIVIL ACTION No.

DECLARATION OF CHRIS HARRS AND ACCOMPANYING EXHIBITS IN SUPPORT OF PLAINTIFFS' *EX PARTE* APPLICATION FOR: 1) TEMPORARY RESTRAINING ORDER; 2) AN ORDER RESTRAINING ASSETS AND MERCHANT STOREFRONTS; 3) AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE; 4) ORDER AUTHORIZING BIFURCATED AND ALTERNATIVE SERVICE AND 5) ORDER AUTHORIZING EXPEDITED DISCOVERY

FILED UNDER SEAL

LANXIHUANGLONGDONG, LIANJIAXIAODIAN, LOSTIU8, MAGIC CURRY, MAISYSTORE001, MAOMAO1608@163.COM, MIKEQYQ, MOMTUTUS, MR. P, MR.ZXX, MRY_STORE, NEWMERCHANTFASHION, NVC, PANDORA LOVE, QIQIYANYAN, QOMXZHK, RENDERINGYOU, SHENZHENYIWEIKEJIYOUXIANGONGSI, SHENZHEN YINFA TECHNOLOGY LTD, SHOW YOU NOW, SHU PANPAN WU SHOUSHOU, SIERMAOYIYOUXIANGONGSI, SMALL Y CLOTHES STORE, SMALLSMALLWORLD, THREEQIAOWAY, TIANCONG135, TOMIK18816764436, UTOPIA1973, UTOPIA2017, VALUABLE, YEHUDIEYE, WANGJUHUA11365, WENDY E-COMMERCE, WULI0014, WXXWW, XINYUDIYIYI, XYRSTOREKL, YIWU BLUE SKY, XIONGDISTORE, XUANXUAN636187, XZH, YANGMINGXIONGDI, YANGLIU248, YEKAIQIANG, YEQIRONG, YIHUIANDYIHUI, YOUR FASHION JEWELRY, YOUYOUSHANXI, YOYOBESS, YQUAN, YUXITAO, YY6752SDD, ZHANGDONGYUE, ZHANGXIAXIAZHANG, ZHENPINHUI and ZHENZHEN-FASHION,

Defendants

CONFIDENTIAL/FILED UNDER SEAL
NOT TO BE OPENED EXCEPT BY ORDER OF THE COURT

DECLARATION OF CHRISTOPHER HARRS[1]

I, Christopher Harrs, hereby declare as follows:

1. I am over eighteen (18) years of age. I have never been convicted of a felony or any criminal offense involving moral turpitude, and I am fully competent to testify to the matters stated herein. I have personal knowledge of every statement made in this Declaration and such statements are true and correct.

2. I am the Executive Vice-President, General Counsel, and Corporate Secretary for Spin Master Ltd., a Canadian corporation, which wholly owns Spin Master, Inc., the exclusive licensee of Spin Master Ltd. in the United States (hereinafter collectively referred to as "Spin Master" or "Plaintiffs"). I make and submit this affirmation in connection with Spin Master's *ex parte* application for: 1) a temporary restraining order; 2) an order restraining assets and Merchant Storefronts; 3) an order to show cause why a preliminary injunction should not issue; 4) an order authorizing bifurcated and alternative service; and 5) an order authorizing expedited discovery against the above-captioned Defendants (hereinafter collectively referred to as "Defendants"), Third Party Service Providers and Financial Institutions, in light of Defendants' intentional and willful offerings for sale and/or sales of Counterfeit Products (as defined *infra*) ("Application").

3. Plaintiffs are part of a large, multinational toy and entertainment company started in 1994 that designs and sells innovative children's lifestyle products and toys ("Spin Master Product(s)") under their own well-known brands, including Twisty Petz, Flutterbye Fairy,

[1] Where a defined term is referenced herein and not defined herein, the defined term should be understood as it was defined in the Complaint or Application.

Bunchems and Hatchimals, as well as under their licensed properties, such as Paw Patrol and Air Hogs.

4. Plaintiffs sell their Spin Master Products throughout the U.S. and the world through major retailers, quality toy stores, department stores and online marketplaces, including, but not limited to, Walmart, Toys R Us, Target, Kohl's and Amazon.com.

5. In addition, Plaintiffs sell their Spin Master Products directly through Plaintiffs' website, available at www.shop.spinmaster.com, as well as through their websites dedicated to the individual Spin Master Products.

6. One of Plaintiffs' most recent and successful Spin Master Products is Twisty Petz, which are bejeweled pets that transform into sparkly bracelets, necklaces or backpack accessories with a few simple twists ("Twisty Petz Products"). There are over 70 types of Twisty Petz to collect, ranging from Leona Lion to Pearly Puppy to Zaggy Zebra and more. Images of Spin Master's Twisty Petz Products are attached hereto as **Exhibit A** and incorporated herein by reference.

7. Twisty Petz has been named one of the "hottest toys for 2018" by the *New York Post* and was included in *Amazon's 2018 Holiday Toy List.*[2] The Twisty Petz Products are predicated to sellout and become impossible to find due to its popularity.[3]

8. The Twisty Petz Products retail from $5.99 (individual) to $14.99 (set of three).

9. While Spin Master has gained significant common law trademark and other rights in their Twisty Petz Products through their extensive use, advertising and promotion, Spin Master

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[2] Melanie Notkin, *These are the hottest toys for 2018* (April 5, 2018), NEW YORK POST, https://nypost.com/2018/04/05/these-are-the-hottest-toys-for-2018/; Remi Rosmarin, *Amazon predicts these will be the 100 hottest toys every kid wants this holiday season* (October 13, 2018), BUSINESS INSIDER, https://www.businessinsider.com/amazon-best-toys-games-holidays-christmas-2018-9.

[3] PR.COM, TOP 10 HOT HOLIDAY 2018 GIFTS THAT WILL BECOME IMPOSSIBLE TO FIND (October 1, 2018), http://www.lethalchickengames.com/blog/top-10-hot-holiday-2018-gifts-that-will-become-impossible-to-find.

has also protected their valuable rights by filing for and obtaining a federal trademark registration.

10. Spin Master is the owner of U.S. Trademark Registration No. 5,514,561 for "TWISTY PETZ" for a variety of goods in Class 28 ("Twisty Petz Mark"). A true and correct copy of the registration certificate for the Twisty Petz Mark is attached hereto as **Exhibit B** and incorporated herein by reference.

11. The Twisty Petz Mark is currently in use in commerce in connection with the Twisty Petz Products. The constructive date of first use based on Plaintiffs' federal trademark registration for their Twisty Petz Mark is at least as early as February 17, 2018.

12. In addition, Spin Master owns both registered and unregistered copyrights in and related to the Twisty Petz Products.

13. Spin Master has protected their valuable rights by filing and obtaining a U.S. copyright registration in and relating to the characters and packaging of the Twisty Petz Products. For example, Spin Master is the owner of U.S. Copyright Registration No. VA 1-305-408, covering the Twisty Petz Packaging Artwork & Collectors' Guides, as well as numerous common law copyrights ("Twisty Petz Work"). A true and correct copy of the registration certificate for the Twisty Petz Work is attached hereto as **Exhibit C** and incorporated herein by reference.

14. The success of the Twisty Petz Products is due in large part to Plaintiffs' marketing, promotion and distribution efforts. These efforts include, but are not limited to, the advertising and promotion of the Twisty Petz Products through Plaintiffs' website entirely dedicated to the Twisty Petz Products, http://www.twistypetz.com, nationwide television advertising campaigns for the Twisty Petz Products, print and internet-based advertising and publicity for the Twisty Petz Products, placement of the Twisty Petz Products at dozens

of authorized major retail outlets, both domestically and abroad and Plaintiffs' participation in trade shows.

15. Spin Master's success is also due to their use of high quality materials and processes in making the Twisty Petz Products.

16. Additionally, Spin Master owes a substantial amount of the success of the Twisty Petz Products to their consumers and word-of-mouth buzz that their consumers have generated.

17. Spin Master's efforts, the quality of Spin Master's Twisty Petz Products, their marketing, promotion and distribution efforts, as well as the word-of-mouth buzz generated by their consumers have made the Twisty Petz Products, Twisty Petz Work and Twisty Petz Mark prominently placed in the minds of the public. Retailers, retail buyers, consumers and members of the public have become familiar with the Twisty Petz Products and associate them exclusively with Spin Master.

18. As a result of such associations, Spin Master and their Twisty Petz Products, the Twisty Petz Work and Twisty Petz Mark have acquired a valuable reputation and goodwill among the public.

19. Spin Master has gone to great lengths to protect their interests in and to the Twisty Petz Products, Twisty Petz Work and Twisty Petz Mark. No one other than Spin Master is authorized to manufacture, import, export, advertise, offer for sale or sell any good utilizing the Twisty Petz Work or Twisty Petz Mark without the express written permission of Spin Master.

20. In light of the success of Spin Master's Twisty Petz Products, Spin Master and their Twisty Petz Products have become targets for unscrupulous individuals and entities wishing to exploit the goodwill, reputation and fame of the Twisty Petz Products, Twisty Petz Work and Twisty Petz Mark, and we routinely investigate and enforce against such activities.

21. As part of these efforts, we authorized Epstein Drangel LLP ("Epstein Drangel") to retain New Alchemy Limited ("NAL"), a company that provides intellectual property infringement research services, to investigate and research manufacturers and/or third-party merchants offering for sale and/or selling Counterfeit Products on online marketplace platforms such as Wish, which allows manufacturers and third-party merchants, like Defendants, to advertise, distribute, offer for sale, sell and ship retail products, originating primarily from China, among other locations, directly to consumers worldwide and specifically to consumers residing in the U.S., including New York (hereinafter, "Wish").
22. Through NAL's investigative and enforcement efforts, Spin Master learned of Defendants' infringing and counterfeiting actions, which vary and include, but are not limited to, manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling infringing Twisty Petz Products bearing the Twisty Petz Work and Twisty Petz Mark, and/or bearing marks and artwork that are confusingly or substantially similar to the Twisty Petz Work and Twisty Petz Mark, and/or are identical or confusingly or substantially similar to the Twisty Petz Products ("Counterfeit Products") to U.S. consumers (including those located in the state of New York) through Defendants' Merchant Storefronts and User Accounts on Wish.
23. Through visual inspection of Defendants' listings for Counterfeit Products ("Infringing Listings"), we confirmed that each Defendant displays the Twisty Petz Work and/or uses the Twisty Petz Mark in the Infringing Listings without authorization, and that the products that each Defendant offers for sale use and feature virtually identical copies of Spin Master's Twisty Petz Work or Twisty Petz Mark are, in fact, Counterfeit Products.
24. We have also confirmed that all Defendants are not, nor have they ever been, authorized distributors or licensees of the Twisty Petz Products. Spin Master never consented to

Defendants' use of Spin Master's Twisty Petz Work or Twisty Petz Mark, nor has Spin Master consented to Defendants' use of any identical or confusingly or substantially similar marks or artwork.

25. We use high quality materials and processes in making the Twisty Petz Products to meet or exceed U.S. requirements and standards.

26. Our inspection of the Infringing Listings revealed, among other things, improper packaging, incorrect labeling, wrong coloring and below-market pricing.

27. One of the principal reasons Spin Master instituted an active anti-infringement enforcement program is to protect its consumers from purchasing counterfeit and/or infringing consumer products that wrongly bear Spin Master's name, and which may be unsafe or of poor quality.

28. Defendants' intentional and deceitful misconduct has likely resulted in lost profits to Spin Master and has damaged the inherent value of the Twisty Petz Mark, impaired Spin Master's reputation for providing high-quality products and diluted Spin Master's brands and the goodwill associated therewith, negatively affecting Spin Master's relationships with current customers (including both retail customers as well as end consumers) and its ability to attract new customers.

29. We trained Spin Master's counsel, Epstein Drangel, on how to identify infringing Twisty Petz Products. Epstein Drangel is available to identify additional differences between the Counterfeit Products and the authentic Twisty Petz Products upon request of the Court. Spin Master keeps its procedures to determine the authenticity of its Twisty Petz Products confidential in order to streamline and ensure accuracy of the identification process for Spin Master and its anti-infringement team.

30. Neither I, nor anyone else at Spin Master, to the best of my knowledge, have publicized this

Application or Spin Master's intent to seek entry of a temporary restraining order against Defendants to any third party.

I declare under the penalty of perjury under the laws of the United States of America that to the best of my knowledge the foregoing is true and correct.

Executed on this 7 day of November 2018 in Toronto, Canada.

By: _____
Christopher Harrs

EXHIBIT A

SERIES • SÉRIE 1
Collect them all!
Collectionnez-les tous!
4+ YEARS ANS
Twisty Petz
"BUTTERSCOTCH UNICORN"
"BERRYTALES CHEETAH"
LIMITED EDITION
ÉDITION LIMITÉE
1 HIDDEN INSIDE!
1 CACHÉ À L'INTÉRIEUR!
TWIST INTO A PET!
TRANSFORME-LE EN PETIT ANIMAL!
WARNING:
CHOKING HAZARD – Small parts.
Not for children under 3 years.
ATTENTION !
DANGER D'ÉTOUFFEMENT – Contient de petits éléments.
Ne convient pas aux enfants de moins de 3 ans.
SPIN MASTER

EXHIBIT B

United States of America

United States Patent and Trademark Office

TWISTY PETZ

Reg. No. 5,514,561

Registered Jul. 10, 2018

Int. Cl.: 28

Trademark

Principal Register

David Fuhrer Enterprises LLC (CALIFORNIA LIMITED LIABILITY COMPANY), DBA Funanuf
11862 La Grange Ave
Los Angeles, CALIFORNIA 90025

CLASS 28: Toy jewelry which can transform into a toy figure and then back into toy jewelry

FIRST USE 2-17-2018; IN COMMERCE 2-17-2018

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

No claim is made to the exclusive right to use the following apart from the mark as shown: "PETS"

SER. NO. 87-231,632, FILED 11-09-2016

Director of the United States
Patent and Trademark Office

REQUIREMENTS TO MAINTAIN YOUR FEDERAL TRADEMARK REGISTRATION

WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.

Requirements in the First Ten Years*
What and When to File:

- ***First Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

- ***Second Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.* See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*
What and When to File:

- You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the United States Patent and Trademark Office (USPTO). The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see http://www.wipo.int/madrid/en/.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at http://www.uspto.gov.

NOTE: A courtesy e-mail reminder of USPTO maintenance filing deadlines will be sent to trademark owners/holders who authorize e-mail communication and maintain a current e-mail address with the USPTO. To ensure that e-mail is authorized and your address is current, please use the Trademark Electronic Application System (TEAS) Correspondence Address and Change of Owner Address Forms available at http://www.uspto.gov.

EXHIBIT C

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Acting United States Register of Copyrights and Director

Registration Number

VAu 1-305-408

Effective Date of Registration:
February 13, 2018

Title

Title of Work: Twisty Petz Packaging Artwork & Collectors' Guides

Content Title: Twisty Petz Collectors' Guide

Twisty Petz Single Pack

Twisty Petz 3 Pack

Twisty Petz Baby Collectors' Guide

Twisty Petz Baby 4 Pack

Completion/Publication

Year of Completion: 2017

Author

- **Author:** Spin Master, Inc.
  Author Created: 2-D artwork
  Work made for hire: Yes
  Citizen of: United States

Copyright Claimant

Copyright Claimant: Spin Master Ltd.
121 Bloor Street East, Toronto, Ontario, M4W 3M5

Transfer statement: By written agreement

Rights and Permissions

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Telephone: (212)292-5390