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FoxMind Canada Enterprises Ltd.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FOXMIND CANADA ENTERPRISES LTD.,

Plaintiff

v.

APROAT, AVBVCV-DIRECT, AWINNERDIRECT,
BRWVOLIX TOYS MALL, BUYSBDD US,
CHONGYANGXIANWENNIANSANGMAO,
DRAVILLOY, EVERYDAY GOOD HEALTH,
HAITAISHIDIANZI, HIGHYUE, HOME CLEAN
CARE, KM-BM, KUISANG CO.LTD, LLESSOO US,
OPEHUO TOY STORE, SHANWOWW, SIDAN,
SOONEEDEAR,
TONGSHANXIANBAOXIANGDIANZISHANGWUY
OUXIANGONGSI, ZAICHI STORE,
ZHANGRUIZHEN, ZHIYONG, 义乌市焰缙日用百货
有限公司 a/k/a YIWU YANJIN DAILY
NECESSITIES CO., LTD. AND 别弄, 不然弄你店
a/k/a DON'T DO IT, OR YOUR STORE WILL BE
RUINED,

Defendants

CIVIL ACTION NO.

**DECLARATION OF DAVID
CAPON AND
ACCOMPANYING EXHIBITS IN
SUPPORT OF PLAINTIFF'S *EX
PARTE* APPLICATION FOR: 1)
TEMPORARY RESTRAINING
ORDER; 2) AN ORDER
RESTRAINING MERCHANT
STOREFRONTS AND
DEFENDANTS' ASSETS WITH
THE FINANCIAL INSTITUTIONS;
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

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

DECLARATION OF DAVID CAPON¹

I, David Capon, 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 President of FoxMind Canada Enterprises Ltd. ("FoxMind"), a corporation organized and existing under the laws of Canada. I make and submit this affirmation in connection with FoxMind's ex parte application for: 1) a temporary restraining order; 2) an order restraining Merchant Storefronts and Defendants' Assets with the Financial Institutions; 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 in light of Defendants' intentional and willful counterfeiting and infringement of FoxMind's Pop It Mark (defined *infra*).
3. FoxMind is a leading distributor of toys and games that offer mind stimulating fun while developing reasoning skills, spatial logic and other skills associated with science, technology, engineering, and math (STEM) ("FoxMind Products") under its brands, including, but not limited to: Match Madness, Architecto, Figure It and Kulami ("FoxMind Brands").
4. FoxMind Products are sold worldwide through major U.S. retailers, quality toy stores and e-commerce sites, including, but not limited to: Target, Staples, Barnes and Noble, Amazon and

¹ Where a defined term is referenced herein but not defined, it should be understood as it is defined in the Glossary in Plaintiff's Complaint or Memorandum of Law.

many others.

5. One of FoxMind's most popular and successful brands is Pop It, a soothing tactile toy and smart bubble popping game designed to stimulate children's senses and develop logic and reasoning skills ("Pop It Products"). Images of sample Pop It Products are attached hereto as **Exhibit A** and incorporated herein by reference.
6. Pop It's popularity has soared in recent years due to over 2.5 billion people watching videos of people using Pop It Products on TikTok and other social media channels.²
7. Pop It Products typically retail for between \$7.99-12.99.
8. While FoxMind has gained significant common law trademark and other rights in its Pop It Products through use, advertising, and promotion, FoxMind has also protected its valuable trademark rights to the Pop It Products by filing for and obtaining a federal trademark registration.
9. For example, FoxMind is the owner of the following U.S. Trademark Registration No. 6,183,005 for "POP IT!" for goods in Class 28 (hereinafter referred to as "Pop It Mark"). A true and correct copy of the registration certificate for the Pop It Mark is attached hereto as **Exhibit B** and incorporated herein by reference.
10. The Pop It Mark is currently in use in commerce in connection with the Pop It Products. The Pop It Mark was first used in commerce on or before August 6, 2019.
11. The success of the Pop It Products is due in part to FoxMind's marketing and promotional efforts. These efforts include advertising and promotion FoxMind's website, retailer websites

² Maressa Brown, *What Are Pop Its?*, PARENTS (June 24, 2023), <https://www.parents.com/fun/toys/kid-toys/what-are-pop-it-fidget-toys-and-why-are-they-so-popular-right-now/>; Lauren Cansick, *POP IT! Pop Its: What are They, and How do I Buy Them*, THE U.S. SUN (May 25, 2022), <https://www.the-sun.com/sun-selects/5365747/where-to-buy-pop-its/>; *Why are Pop Its So Popular*, BBC NEWSROUND (May 7, 2021), <https://www.bbc.co.uk/newsround/56979264>.

and internet-based advertising and placement of the Pop It Products at dozens of authorized major retail outlets, both domestically and abroad, including New York.

12. FoxMind's success is also due to its use of the highest quality materials and processes in making Pop It Products.
13. FoxMind does not sell, and no other party is authorized to sell, Pop It Products directly from China into the U.S. market.
14. Additionally, FoxMind owes a substantial amount of the success of the Pop It Products to its consumers, and word-of-mouth buzz that its consumers have generated.
15. FoxMind's efforts, the quality of its Pop It Products, its marketing, promotion and distribution efforts, and the word-of-mouth buzz generated by its consumers have caused the Pop It Mark to be prominently placed in the minds of the public. Members of the public and retailers have become familiar with FoxMind's Pop It Mark and Pop It Products and have come to associate them exclusively with FoxMind.
16. As a result of such associations, the Pop It Mark has acquired a valuable reputation and goodwill among the public.
17. FoxMind has gone through great lengths to protect its interests in the Pop It Mark. No one other than FoxMind and its distributors are authorized to manufacture, import, export, advertise, offer for sale, or sell any goods utilizing the Pop It Mark.
18. Due to the success and reputation of FoxMind, its FoxMind Products and its Pop It Mark, FoxMind, its FoxMind Products and Pop It Mark have become targets for unscrupulous individuals and entities that wish to capitalize on the goodwill and reputation that FoxMind has amassed in its FoxMind Products and the Pop It Mark.
19. As part of these efforts, FoxMind authorized Epstein Drangel to investigate and research

manufacturers, wholesalers and/or third-party merchants offering for sale and/or selling Counterfeit Products on online marketplace Amazon and Walmart Marketplace, which allow manufacturers and third-party merchants, like Defendants, to advertise, distribute, offer for sale, sell and ship their retail products, originating primarily from China, directly to consumers worldwide and specifically to consumers residing in the U.S., including New York.

20. Through Epstein Drangel's investigative and enforcement efforts, FoxMind 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 Counterfeit Products to U.S. consumers, including those located in New York, through Defendants' User Accounts and Merchant Storefronts on Amazon and/or Walmart Marketplace.
21. Through visual inspection of Defendants' Infringing Listings, we confirmed that each Defendant displays the Pop It Mark in the Infringing Listings without authorization, and that the products that each Defendant offers for sale using and featuring virtually an identical copy of the Pop It Mark are, in fact, Counterfeit Products.
22. FoxMind's inspection of the Infringing Listings revealed, among other things, improper packaging, incorrect labeling, wrong coloring and below market pricing.
23. We have confirmed that Defendants are not, and have never been, authorized distributors or licensees of the Pop It Mark. FoxMind never consented to Defendants' use of the Pop It Mark, nor has FoxMind consented to Defendants' use of any identical or confusingly similar marks.
24. One of the principal reasons FoxMind instituted an active anti-counterfeiting enforcement program is to protect its consumers from purchasing counterfeit and/or infringing products that wrongly bear FoxMind's name and may be unsafe or of poor quality, which is of

particular importance given that FoxMind Products' primary consumer base is children.

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

26. FoxMind has trained its counsel, Epstein Drangel, on how to identify products infringing the Pop It Mark. Epstein Drangel is available to identify additional differences between the Counterfeit Products and authentic Pop It Products upon request of the Court. FoxMind keeps its procedures to determine the authenticity of its Pop It Products confidential to streamline and ensure accuracy of the identification process for FoxMind and its anti-counterfeiting team.

27. Neither I, nor anyone else at FoxMind, to the best of my knowledge, have publicized this Application or FoxMind'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 1st day of July, 2025 in Montreal.

By:

David Capon

EXHIBIT A





EXHIBIT B

United States of America

United States Patent and Trademark Office

POP IT!

Reg. No. 6,183,005

Registered Oct. 27, 2020

Int. Cl.: 28

Trademark

Principal Register

FOXMIND CANADA ENTERPRISES LTD. (CANADA CORPORATION)
Unit 1104
5530 St. Patrick
Montreal, Quebec, CANADA H4E1A8

CLASS 28: Manipulative games, namely, bubble popping games

FIRST USE 8-6-2019; IN COMMERCE 8-6-2019

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

SER. NO. 88-613,618, FILED 09-11-2019



Andrei Iancu

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>.