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EX PARTE APPLICATION OF PLAINTIFF GIBSON GUITAR CORP. FOR A TEMPORARY  
RESTRANDING ORDER AND AN ORDER TO SHOW CAUSE RE: PRELIMINARY  
INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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1 Respectfully submitted,

2 DATED: November \_\_\_, 2010 BATES & BATES, LLC

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## I. INTRODUCTION

Plaintiff Gibson Guitar Corp. (hereinafter “Gibson”) is engaged in the business of developing, manufacturing and selling musical instruments, including guitars, basses and mandolins under the famous Gibson® trademark for over a century. Gibson guitars are sold worldwide. Gibson’s instruments have gained worldwide recognition and reputation, winning awards for their design (Declaration of Henry Juszkievicz at ¶’s 18, 19, 20, and 21).

Gibson is the sole and exclusive owner of the following registered United States trademarks:

(1) The Les Paul Body Shape Design®, U.S. Trademark Reg. No. 1782606 (hereinafter “Les Paul Body Shape Design® Trademark”) (See Declaration of Henry Juszkievicz at ¶ 5; Declaration of Bruce Mitchell at ¶ 5(a), and accompanying exhibit “A”); (2) The Les Paul Peg-Head Design®, U.S. Trademark Reg. No. 1020485 (hereinafter “Les Paul Peg-Head® Trademark”) (See Declaration of Henry Juszkievicz at ¶ 65; Declaration of Bruce Mitchell at ¶ 5(b), and accompanying exhibit “B”); The Bell Shaped Truss Rod Cover Design®, U.S. Trademark Reg. No. 1022637 (hereinafter “the Bell Cover Design® Trademark”) (See Declaration of Henry Juszkievicz at ¶ 5; Declaration of Bruce Mitchell at ¶ 5(c), and accompanying exhibit “C”); The Flying V Body Shape Design Body Shape Design®, U.S. Trademark Reg. No. 2051790 (hereinafter “Flying V Body Shape Design® Trademark” (See Declaration of Henry Juszkievicz at ¶ 8; Declaration of Bruce Mitchell at ¶ 5(d), and accompanying exhibit “D”); The Explorer Body Shape Design®, U.S. Trademark Reg. No. 2053805 (hereinafter “Explorer Design® Trademark”) (See Declaration of Henry Juszkievicz at ¶ 5; Declaration of Bruce Mitchell at ¶ 5(e), and accompanying exhibit “E”); (6) The Kramer Peg-Head Design®, U.S. Trademark Reg. No. 1567052 (hereinafter “Kramer Peg-Head® Trademark”) (See Declaration of Henry Juszkievicz at ¶ 10; Declaration of Bruce Mitchell at ¶ 5(f), and accompanying

1 exhibit "F"); (7) The SG Body Design®, U.S. Trademark Reg. No. 2215791 (hereinafter "SG Body  
 2 Design® Trademark") (See Declaration of Henry Juszkiewicz at ¶ 11; Declaration of Bruce Mitchell  
 3 at ¶ 5(g), and accompanying exhibit "G"); (8) The word mark "LES PAUL"® Trademark, U.S.  
 4 Trademark Reg. No. 1539282 (hereinafter the "LES PAUL® Trademark) (See Declaration of Henry  
 5 Juszkiewicz at ¶ 13; Declaration of Bruce Mitchell at ¶ 5(h) , and accompanying exhibit "H"); (9)  
 6 The word mark "FLYING V"® Trademark, U.S. Trademark Reg. 1216644 (hereinafter the  
 7 "FLYING V® Trademark) (See Declaration of Henry Juszkiewicz at ¶ 12; Declaration of Bruce  
 8 Mitchell at ¶ 5(i) , and accompanying exhibit "I"); (10) The word mark "EXPLORER"® Trademark,  
 9 U.S. Trademark Reg. 2641548 (hereinafter the "EXPLORER® Trademark) (See Declaration of  
 10 Henry Juszkiewicz at ¶ 15; Declaration of Bruce Mitchell at ¶ 5(j) , and accompanying exhibit "J");  
 11 (11) The word mark "S-G"® Trademark, U.S. Trademark Reg. 1045872 (hereinafter the  
 12 "EXPLORER® Trademark) (See Declaration of Henry Juszkiewicz at ¶ 14; Declaration of Bruce  
 13 Mitchell at ¶ 5(k) , and accompanying exhibit "K"); (12) The word mark "GIBSON"® Trademark,  
 14 U.S. Trademark Reg. 1545311 (hereinafter the GIBSON® Trademark) (See Declaration of Henry  
 15 Juszkiewicz at ¶ 16; Declaration of Bruce Mitchell at ¶ 5(l), and accompanying exhibit "L")  
 16 (collectively "Gibson Trademarks").

19 Plaintiff has recently learned that defendants WOWWEE USA, INC. (hereinafter  
 20 "WowWee"), WAL-MART STORES, INC. (hereinafter "WAL-MART"), AMAZON.COM, INC.  
 21 (hereinafter "AMAZON"), BIG LOTS STORES, INC. (hereinafter "BIG LOTS"), KMART  
 22 CORPORATION (hereinafter "KMART"), TARGET CORPORATION (hereinafter "TARGET"),  
 23 TOYS "R" US-DELAWARE, INC. (hereinafter "TOYS "R" US"), WALGREEN CO. (hereinafter  
 24 "WALGREENS"), BROOKSTONE COMPANY, INC. (hereinafter "BROOKSTONE"), BEST BUY  
 25 (hereinafter "BEST BUY"), and T.J. MAXX (hereinafter "T.J. MAXX") (hereinafter  
 26 "Retailers").

1 CO. INC. (hereinafter "BEST BUY"), TOYWIZ, INC. (hereinafter "TOYWIZ") and HSN, INC.  
 2 (hereinafter "HSN") (collectively "Defendants") are selling musical play instruments worldwide,  
 3 including the United States, that infringe upon the Gibson Trademarks ("Unauthorized Products").  
 4 Defendant WowWee is the manufacturer and distributor of the play instruments and the remaining  
 5 defendants (the "Retail Defendants") offer those items for sale either online, in physical locations, or  
 6 both. The Unauthorized Products are being advertised by WowWee on its websites  
 7 ([www.paperjamz.com](http://www.paperjamz.com), [www.paperjamzstore.com](http://www.paperjamzstore.com), [www.wow-wee-paper-jamz-guitar.com](http://www.wow-wee-paper-jamz-guitar.com),  
 8 [www.paperjamz.com](http://www.paperjamz.com), [www.paperjamzstore.com](http://www.paperjamzstore.com), [www.wow-wee-paper-jamz-guitar.com](http://www.wow-wee-paper-jamz-guitar.com),  
 9 [www.wowwee.com](http://www.wowwee.com), among others) as either Guitar Style 1/Country 1 (attached as Exhibit "M" to the  
 10 Declaration of Bruce Mitchell), Guitar Style 4/Rock 4 (attached as Exhibit "N" to the Declaration of  
 11 Bruce Mitchell), Guitar Style 5/Rock 5 (attached as Exhibit "O" to the Declaration of Bruce  
 12 Mitchell), and Guitar Style 6/Rock 6 (attached as Exhibit "P" to the Declaration of Bruce Mitchell).  
 13 These Unauthorized Products are identical to the Gibson Trademarks and clearly infringe on the  
 14 Gibson Trademarks (See Exhibits "Q," "R," "S," and "T" to the Declaration of Bruce Mitchell).  
 15

16 On the [www.paperjamz.com](http://www.paperjamz.com) website, WowWee indicates that Defendants AMAZON, BEST  
 17 BUY, BIG LOTS, BROOKSTONE, KMAR, TARGET, TOYS "R" US, WALGREENS AND  
 18 WAL-MART has locations where the public can purchase the Unauthorized Products (See Exhibit  
 19 "U" to the Declaration of Bruce Mitchell. Indeed, a review of the Defendants websites indicates that  
 20 the Unauthorized Products are widely available on-line (See Exhibits "V", "W", "X", "Y", "Z",  
 21 "AA", "BB", and "CC" to the Declaration of Bruce Mitchell). Each of those entities conducts  
 22 business within this district.  
 23

1 A review of the websites of the remaining defendants, EBAY, TOYWIZ and HSN, indicates  
2 that the Unauthorized Products are available on-line to the public within this district, as well (See  
3 Exhibits "DD", "EE", and "FF" to the Declaration of Bruce Mitchell).

4 Thus, Plaintiff Gibson is seeking emergency relief via this application for a temporary  
5 restraining order and request for preliminary injunction to stop the infringing activities as soon as  
6 possible.

7 Personal jurisdiction over each of these Defendants is proper because among other things they  
8 have sold and distributed the Unauthorized Products in the Central District of California both in their  
9 physical locations as well as through their websites (See Brunner v. Bawcom, U.S. Dist. LEXIS  
10 96341, 2010 WL 3724436, \*4 (D.Mont., Sept. 15, 2010) (holding that the defendant's single sale of  
11 199, 2 L.Ed.2d 223 (1957)). Finally, each of the Defendants operate an online retail business from a  
12 highly-interactive website (See Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F.Supp.2d  
13 1142, 1150-51 (D.Or. 2000) (personal jurisdiction was proper when defendant's website had  
14 interactive features and one sale to an Oregon resident was made via the website); *see also* Park Inns  
15 International v. Pacific Plaza Hotels, Inc., 5 F.Supp.2d 762, 764 (D.Ariz. 1998) (personal jurisdiction  
16 proper Arizona residents and travel agents used defendant's website to make on-line hotel  
17 reservations).

18 Although Gibson sent cease and desist letters to the Defendants, none of the Defendants have  
19 ceased selling the Unauthorized Products. Based on the foregoing, Plaintiff will suffer irreparable  
20 harm if the Defendants are not enjoined from selling the Unauthorized Products.

1 harm if the Defendants are not immediately enjoined from manufacturing, marketing or selling the  
2 Unauthorized Products.

3 **II. STATEMENT OF FACTS**

4 **A. Plaintiff Exclusively Owns the Gibson Trademarks**

5 Plaintiff owns uncontested US trademark registrations for the Gibson Trademarks and has  
6 used the Gibson Trademarks in connection with musical instruments for over 50 years and in the case of  
7 the GIBSON® Trademark it was first used in commerce in the late 1800s (See Exhibit L to Bruce  
8 Mitchell ).

9 **B. The Gibson Trademarks Enjoy Worldwide Fame**

10 Gibson's instruments and, in turn, Gibson Trademarks have achieved a high level of fame  
11 both domestically and abroad. Several of the most well-known national and international musicians  
12 use Gibson's products which utilize the Gibson's Trademarks, including but not limited to: Keith  
13 Richards of the Rolling Stones; Elvis Presley; Jan Akkerman; Billy Joe Armstrong of GreenDay;  
14 Martin Barre of Jethro Tull; Jeff Beck of the Yardbirds; Dave Davies of the Kinks; Buck Dharma of  
15 the Blue Oyster Cult; The Edge of U2; Ace Frehley of Kiss; Steve Howe of Yes and Asia; Mick  
16 Jones of Foreigner; Lenny Kravitz; Bob Marley; Ted Nugent; Joe Perry of Aerosmith; Duane Allman  
17 of the Allman Brother Band; John Lennon of the Beatles; Angus Young of AC/DC; James Hetfield of  
18 Metallica; Jimmy Page of Led Zeppelin; Eddie Van Halen; Johnny Winter; Neil Young; Slash; and  
19 Eric Clapton. (Declaration of Henry Juszkevich at ¶ 19).

20 Pictures of Gibson products in famous musical performances date back well over 50 years (*Id.*  
21 at ¶ 19). Many of those musicians have been elected to the Rock and Roll Hall of Fame, of which  
22 Gibson is a proud sponsor (*Id.*). Additionally, Gibson has been covered in the press, both in the  
23

1 United States and elsewhere, demonstrating as a testament to the fame and good will associated with  
2 all the Gibson Trademarks. (Declaration of Henry Juszkiewicz at ¶ 20).

3 As a result of the high quality of the Gibson's instruments and the extensive sales, licensing  
4 and marketing, advertising and promotion of these instruments under the Gibson Trademarks, the  
5 Gibson Trademarks have become famous trademarks that are widely and favorably known by  
6 consumers in the United States and elsewhere as designating high quality and dependable products  
7 originating exclusively from Gibson and its related companies (Declaration of Henry Juszkiewicz at ¶  
8 21).

9

10 **C. Defendant's Illegal Activities**

11 Defendant WowWee has improperly commenced the business of manufacturing, selling and  
12 marketing various Unauthorized Products that utilize the famous marks of Gibson, specifically the  
13 Gibson Trademarks. The remaining Defendants represent retailers who sell the Unauthorized  
14 Products that display the Gibson Trademarks to the unassuming public.

15 Further, defendant WowWee has gone so far as to market its Unauthorized Products utilizing  
16 the protected word marks of Gibson, namely, "GIBSON®," "LES PAUL®," "FLYING V®,"  
17 "EXPLORER®," and "S-G®" (Declaration of Bruce Mitchell at ¶ 14). Gibson is the exclusive owner  
18 of each of these respective trademarks, and it has not granted permission for any of the Defendants to  
19 utilize these marks in conjunction with their Unauthorized Products (Declaration of Henry  
20 Juszkiewicz at ¶ 24).

21 WowWee has, itself, indicated that the Unauthorized Product which is identical to the  
22 registered Gibson designs are "styled after the famous Gibson Les Paul" (Declaration of Bruce  
23 Mitchell at ¶ 15 , and attached Exhibit GG ); or the "famous Gibson Explorer" (Declaration of Bruce  
24

1 Mitchell at ¶ 15, and attached Exhibit HH ); or the “famous Gibson SG” (Declaration of Bruce  
 2 Mitchell at ¶ 15 , and attached Exhibit II ); or the “famous Gibson Flying V Guitar” (Declaration of  
 3 Bruce Mitchell at ¶ 15 , and attached Exhibit JJ ). Indeed, WowWee goes as far as to say the  
 4 following on its website, “The designs of each Paper Jamz guitar are similar to a classic that is highly  
 5 sought after. For example, the Rock Style 6 guitar in Series 1 of Paper Jamz is **made to resemble a**  
 6 **Gibson SG** while the Rock Style 1is made to look like the **famous Gibson Les Paul**. You can  
 7 choose from your favorite styles of guitar, with the styles ranging from the classic Fender Stratocaster  
 8 the “**Gibson Flying V Design**” (emphasis added) (Declaration of Bruce Mitchell at ¶ 15, and  
 9 attached Exhibit NN ).

10  
 11 Defendant WowWee has even made the following bold statement in their advertising  
 12 “WowWee Paper Jamz Guitar is molded **just like the genuine matter, allowing you to play on a**  
 13 **Gibson Flying V** or a Fender Strat without experiencing to dispense hundreds of dollars” (emphasis  
 14 added) (Declaration of Bruce Mitchell at ¶ 16 , and attached Exhibit KK ). The ad goes on to state  
 15 that three of its musical play instruments, Rock 4, 5, and 6, are in the “Flying V style,” “the Explorer  
 16 Style,” and “the SG style.” (Declaration of Bruce Mitchell at ¶ 17, and attached Exhibit KK ). This  
 17 egregious and blatant use of the Gibson Trademarks, without the consent or license from Gibson is  
 18 unconscionable.  
 19

20  
 21 In Gibson’s experience, once irreparable damage to a trademark has been caused, it is nearly  
 22 impossible for the company to recover its goodwill (Declaration of Henry Juszkiewicz at ¶ 28).

23  
 24 In the fall, Gibson contacted WowWee about its infringing activities (Declaration of Bruce  
 25 Mitchell at ¶ 8). However, despite communications between the parties and the demands by Gibson  
 26 that WowWee cease and desist its infringing activities and the manufacture and sale of counterfeit

1 parts, WowWee continued to do so. As a result, Gibson sent cease and desist letters to the remaining  
 2 Defendants on November 15 and 16, 2010. To date, only five of the Defendants have contacted  
 3 Gibson. One, Macys.com, Inc., appears to not be participating in the infringing activities, and thus  
 4 has not been named a party to this action. The remaining four, WAL-MART, TOYWIZ, TARGET  
 5 and Boscov (not a party to this action) indicated that they would look into the matter, but they have  
 6 failed to cease and desist their infringing activities and they along with the other retail defendants  
 7 continue to mislead the public in their offerings of counterfeit goods.

8

9 **D. Defendant EBay's Contributory Infringement of the Gibson Trademarks**

10 EBay supports on its site numerous examples of the infringement of the Gibson Trademarks  
 11 (Declaration of Bruce Mitchell at ¶ 13(i)). Accordingly, counsel for Gibson also sent EBay a cease  
 12 and desist letter, but to date there has been no response.

13 The standard for analyzing contributory liability claims was set forth by the Supreme Court in  
 14 the case of Inwood Laboratories Inc. v. Ives Laboratories, Inc. (456 U.S. 844, 853-854 (1982)). In  
 15 Inwood Laboratories, the Supreme Court re-affirmed the basic principle that “liability for trademark  
 16 infringement can extend beyond those who actually mislabel goods with the mark of another” (*Id.* at  
 17 853). Thus, “[e]ven if a manufacturer does not directly control others in the chain of distribution, it  
 18 can be held responsible for their infringing activities under certain circumstances” (*Id.* at 853-854).

19 Furthermore, the Court established a two-part test for evaluating contributory liability claims.

20 Specifically, if a manufacturer or distributor intentionally induces another to infringe a trademark, or  
 21 if it continues to supply its product to one whom it knows or has reason to know is engaging in  
 22 trademark infringement, the manufacturer or distributor is contributorily responsible for any harm  
 23 done as a result of the deceit (*Id.* at 854). This two-part test articulated by the Supreme Court in

1 Inwood, has been consistently followed and expounded upon by subsequent courts (See, e.g. Perfect  
 2 10, Inc. v. Visa Int'l Service Ass'n, 494 F.3d 788, 807 (9th Cir. 2007); Lockheed Martin Corp. v.  
 3 Network Solutions, Inc. 194 F.3d 980, 983 (9th Cir. 1999)).

4 A party cannot be willfully blind to claims of trademark infringement. Defendant EBay has  
 5 been notified of the claims of infringement, but to date it has done nothing to attempt to resolve the  
 6 situation, not even so much as a phone call to counsel for Gibson to determine the extent of the  
 7 problem. As can be seen from Exhibit DD to the Declaration of Bruce Mitchell, there are significant  
 8 offerings of counterfeit goods bearing the Gibson Trademarks being trafficked on defendant EBay's  
 9 site, yet it turns a blind eye. Given that it appears the defendant EBay claims to have a robust take  
 10 down procedure for allegedly counterfeit goods (See generally Tiffany v. eBay (2010) 600 F.3d 93),  
 11 it appears that instead of exercising that policy, it instead chooses to act willfully blind to the  
 12 blatantly obvious trademark infringement being conducted within its operations as it relates to the  
 13 Gibson Trademarks which are being infringed by the offending products.

14  
 15 As such, EBay should also be included within the TRO and preliminary injunction.

16  
 17 **III. A TEMPORARY RESTRAINING ORDER IS NECESSARY TO PREVENT**  
 18 **TRADEMARK INFRINGEMENT**

19  
 20 **A. GIBSON Has Satisfied The Standards For Granting A Temporary Restraining**  
 21 **Order And A Preliminary Injunction**

22 The standards in the Ninth Circuit for obtaining a temporary restraining order are identical to  
 23 those for obtaining a preliminary injunction (State of Alaska v. Native Village of Venetie, 856 F.2d  
 24 1384, 1389 (9th Cir. 1988)). Gibson is entitled to preliminary injunctive relief where it shows: (1) a  
 25 likelihood of success on the merits; (2) a likelihood of irreparable harm absent a preliminary

1 injunction; (3) that the balance of equities tips in favor of issuing an injunction; and (4) that an  
 2 injunction is in the public interest (Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374  
 3 (2008); *See also Stormans, Inc. v. Selecky*, Nos. 07-36039, 07-36040, 2009 WL 194550, at 13 (9<sup>th</sup>  
 4 Cir., July 8, 2009). A preliminary injunction is a way to preserve the status quo and prevent  
 5 irreparable loss of rights before judgment (*See, e.g., Textile Unlimited, Inc. v. A. BMH & Co.*, 240 F.  
 6 3d 781, 786 (9th Cir. 2001); Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F. 2d 1415, 1422  
 7 (9th Cir. 1984). Indeed, “public policy favors injunctive relief to remedy the infringement of  
 8 intellectual property rights.” (Yash Raj Films (USA), Inc. v. Sidhu, 2010 U.S. Dist. LEXIS 25988,  
 9 \*17-18, 2010 WL 1032792, \*7 (E.D. Cal. 2010). Courts may also consider whether the granting of a  
 10 preliminary injunction favors the public interest (Sun Microsystems, Inc. v. Microsoft Corp., 21 F.  
 11 Supp. 2d 1109, 1118 (N.D. Cal 1998). Both a temporary restraining order and preliminary injunction  
 12 are clearly proper here.

14

15       **B.     GIBSON has Demonstrated An Indisputable Likelihood of Success On the Merits**

16       **Of Its Federal Trademark Infringement Claims**

17       To be liable for trademark infringement, someone must “(1) use in commerce (2) any word,  
 18 false designation of origin, false or misleading description, or representation of fact, which (3) is  
 19 likely to cause confusion or misrepresents the characteristics of his or another person’s goods or  
 20 services” (Freecycle Network, Inc. v. Oey, 505 F.3d 898, 901 (9th Cir. 2007).

21       To prove trademark infringement, Gibson must satisfy two basic elements: (1) a valid  
 22 protectable mark; and (2) a likelihood of confusion, mistake, or deception in Defendants’ use of the  
 23 trademark (15 U.S.C. §1114). GIBSON has done so. It is the owner of the uncontested United  
 24 States trademark registrations for the Gibson Trademarks. Certificates of registration for these marks

1 are *prima facia* evidence of their validity and GIBSON's exclusive rights to use such marks (15  
 2 U.S.C. § 1057 (b)). (Exhibits A-L to the Declaration of Bruce Mitchell)

3 The Ninth Circuit does not apply any particular "test" for likelihood of consumer confusion,  
 4 but has identified a number of factors pertinent to "whether the public is likely to be deceived or  
 5 confused by the similarity of the marks as to source, relationship or sponsorship."<sup>1</sup>

6 The 8-prong Sleekcraft test is a pliant one in which some factors are more important than  
 7 others (Goto.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 (9th Cir. 2000)). In the current  
 8 scenario, however, many of the 8 factors support Plaintiff's request for injunctive relief. Furthermore,  
 9 The Ninth Circuit has adopted these identical eight factors to test whether there is a likelihood of  
 10 confusion for the common-law and federal unfair competition claims (Walter v. Mattel, Inc., 210  
 11 F.3d 1108, 1111 (9th Cir. 2000)).

12 **i. Strength of the Marks**

13 The strength of a trademark is evaluated in terms of its conceptual strength and commercial  
 14 strength (Goto.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1207 (9th Cir. 2000)).

15 The Gibson Trademarks represent the strongest category of trademarks in that they bear no  
 16 logical relationship to the underlying product (i.e., arbitrary marks) and are deemed uncontested  
 17 due to the duration of the registrations.

18  
 19  
 20  
 21 <sup>1</sup> Eclipse Associates Ltd. v. Data General Corp., 894 F. 2d 1114, 1118 (9th Cir. 1990).  
 22 These factors include (1) strength or weakness of the plaintiff's trademark; (2) the degree of  
 23 similarity between defendant's design and the plaintiff's trademark; (3) whether the  
 24 trademarks are used on similar or related goods; (4) the similarities between the marketing  
 25 channels used by the plaintiff and the defendant; (5) any evidence of actual confusion; (6) the  
 26 intent of the defendant; (7) the type of goods and the degree to care likely to be exercised by  
 27 the purchaser; and (8) the likelihood of expansion of product lines. AMF, Inc. v. Sleekcraft  
 28 Boats, 599 F. 2d 341, 348-49 (9th Cir. 1979). Each of these factors is not necessarily  
 relevant to every case, thus the list functions as a guide. Metro Pub., Ltd. v. San Jose  
 Mercury News, 987 F. 2d 637, 640 (9th Cir. 1993).

The strength of Gibson Trademarks is further bolstered by the fact that Gibson is one of the foremost and most well-known providers of guitars, electric guitars, and electric basses in the world, and has been using the GIBSON® Trademark for well over 100 years, more than 50 for the other Gibson Trademarks. The Gibson Trademarks have been used in musical performances by numerous famous musicians, many who are members of the Rock and Roll Hall of fame. (Declaration of Henry Juszkiewicz at ¶ 19). The instruments used with the Gibson Trademarks, represent the pinnacle of stringed musical instruments.

Unlike Gibson, WowWee appears to have only recently incorporated, specifically in 2007. Accordingly this new business, rather than building its own goodwill is attempting to build its company from the hard earned goodwill of Gibson and the Gibson Trademarks..

## ii. Similarity of the Marks

Similarity of the marks is considered a critical question in the likelihood-of-confusion analysis (Goto.com, Inc., 202 F.3d at 1205-1206). The Ninth Circuit in Goto.com has announced a standard that (1) the marks must be considered in their entirety and as they appear in the marketplace; (2) similarity is adjudged in terms of appearance, sound, and meaning; and (3) similarities are weighed more heavily than differences (*Id.* at 1206).

Here, there can be no question that the shape trademarks held by Gibson, the Les Paul Body Shape Design® Trademark, the Les Paul Peg-Head® Trademark, the Bell Cover Design® Trademark, the Flying V Body Shape Design® Trademark, the Explorer Body Shape Design® Trademark, the Kramer Peg-Head® Trademark, and the SG Body Design® Trademark are quite unique. In fact, WowWee has taken note of the goodwill and notoriety of the famous and unique