

EX PARTE APPLICATION

1
2 Pursuant to Fed. R. Civ.P. 65, Local Rules 7-19 and 65-1 and Judge R. Gary Klauser, plaintiff
3 Gibson Guitar Corp. ("Gibson"), by its undersigned attorneys, hereby applies to the Court, ex parte,
4 for a Temporary Restraining Order and an Order to Show Cause re: Preliminary injunction to enjoin
5 the Defendants from further acts of trademark infringement in violation of 15 USC 1114 and 1125.
6

7 This application ("Application") is made on the grounds that:

8 1. Gibson is the sole owner of the distinctive Les Paul Body Shape Design®, U.S.
9 Trademark Reg. No. 1782606 (hereinafter "Les Paul Body Shape Design® Trademark"). This
10 Trademark was issued by the U.S. Patent and Trademark Office on July 20, 1993, and has been
11 continuously and exclusively used in commerce by Gibson since 1952.
12

13 2. Gibson is the sole owner of the distinctive The Les Paul Peg-Head Design®, U.S.
14 Trademark Reg. No. 1020485 (hereinafter "Les Paul Peg-Head® Trademark"). This Trademark was
15 issued by the U.S. Patent and Trademark Office on September 16, 1975, and has been continuously
16 and exclusively used in commerce by Gibson since 1922.
17

18 3. Gibson is the sole owner of the distinctive The Bell Shaped Truss Rod Cover
19 Design®, U.S. Trademark Reg. No. 1022637 (hereinafter "the Bell Cover Design® Trademark").
20 This Trademark was issued by the U.S. Patent and Trademark Office on October 14, 1975, and has
21 been continuously and exclusively used in commerce by Gibson since 1922.
22

23 4. Gibson is the sole owner of the distinctive The Flying V Body Shape Design Body
24 Shape Design®, U.S. Trademark Reg. No. 2051790 (hereinafter "Flying V Body Shape Design®
25 Trademark"). This Trademark was issued by the U.S. Patent and Trademark Office on April 15,
26 1997, and has been continuously and exclusively used in commerce by Gibson since 1958.
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28 EX PARTE APPLICATION OF PLAINTIFF GIBSON GUITAR CORP. FOR A TEMPORARY
RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE RE: PRELIMINARY
INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

1 5. Gibson is the sole owner of the distinctive The Explorer Body Shape Design®, U.S.
2 Trademark Reg. No. 2053805 (hereinafter “Explorer Design® Trademark”). This Trademark was
3 issued by the U.S. Patent and Trademark Office on April 22, 1997, and has been continuously and
4 exclusively used in commerce by Gibson since 1958.

5 6. Gibson is the sole owner of the distinctive The Kramer Peg-Head Design®, U.S.
6 Trademark Reg. No. 1567052 (hereinafter “Kramer Peg-Head® Trademark”). This Trademark was
7 issued by the U.S. Patent and Trademark Office on November 21, 1999, and has been continuously
8 and exclusively used in commerce by Gibson since 1958.

9 7. Gibson is the sole owner of the distinctive The SG Body Design®, U.S. Trademark
10 Reg. No. 2215791 (hereinafter “SG Body Design® Trademark”). This Trademark was issued by the
11 U.S. Patent and Trademark Office on January 5, 1999, and has been continuously and exclusively
12 used in commerce by Gibson since 1961.

13 8. Gibson is the sole owner of the distinctive word mark FLYING V®, U.S. Trademark
14 Reg. No. 1216644 (hereinafter “FLYING V® Trademark”). This Trademark was issued by the U.S.
15 Patent and Trademark Office on November 16, 1982, and has been continuously and exclusively used
16 in commerce by Gibson since 1958.

17 9. Gibson is the sole owner of the distinctive word mark LES PAUL®, U.S. Trademark
18 Reg. No. 1539282 (hereinafter “LES PAUL® Trademark”). This Trademark was issued by the U.S.
19 Patent and Trademark Office on May 16, 1989, and has been continuously and exclusively used in
20 commerce by Gibson since 1952.

21 10. Gibson is the sole owner of the distinctive word mark S-G®, U.S. Trademark Reg.
22 No. 1045872 (hereinafter “S-G® Trademark”). This Trademark was issued by the U.S. Patent and
23

1 Trademark Office on August 10, 1976, and has been continuously and exclusively used in commerce
2 by Gibson since 1975.

3 11. Gibson is the sole owner of the distinctive word mark EXPLORER®, U.S. Trademark
4 Reg. No. 2641548 (hereinafter “EXPLORER® Trademark”). This Trademark was issued by the U.S.
5 Patent and Trademark Office on October 29, 2002, and has been continuously and exclusively used in
6 commerce by Gibson since 1958.

7
8 12. Gibson is the sole owner of the distinctive word mark GIBSON®, U.S. Trademark
9 Reg. No. 1545311 (hereinafter “GIBSON® Trademark”). This Trademark was issued by the U.S.
10 Patent and Trademark Office on June 27, 1989, and has been continuously and exclusively used in
11 commerce by Gibson since 1890.

12 13. Defendants offer for sale and sell products using the Les Paul Body Shape Design®
13 Trademark, the Les Paul Peg-Head® Trademark, the Bell Cover Design® Trademark, the Flying V
14 Body Shape Design® Trademark, the Explorer Body Shape Design® Trademark, the Kramer Peg-
15 Head® Trademark, the SG Body Design® Trademark, the LES PAUL® Trademark, the FLYING
16 V® Trademark, the EXPLORER® Trademark, the GIBSON® Trademark and the S-G® Trademark
17 (“Defendants’ Unauthorized Products”)
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19 14. Notwithstanding the lack of authorization from Gibson and the fact that said
20 Defendants’ Unauthorized Products otherwise are not authorized to be sold utilizing the Gibson
21 Trademarks, Defendants have made repeated unauthorized use of the Trademark in connection with
22 said Unauthorized Products, with the intent to mislead and confuse consumers into believing that said
23 Defendants’ Unauthorized Products are made directly by Gibson pursuant to Gibson's strict quality
24 control standards or that said Defendants’ Unauthorized Products are otherwise authorized or
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1 licensed by Gibson and with the intent of misappropriating, for their own benefit, the tremendous
2 goodwill built up by Gibson in the Gibson Trademarks.

3 15. Defendant WowWee is advertising the FLYING V® Trademark along with the
4 Unauthorized Product bearing the Flying V Body Shape Design® Trademark, the LES PAUL®
5 Trademark along with the Unauthorized Product bearing the Les Paul Body Shape Design®
6 Trademark, the Les Paul Peg-Head® Trademark the S-G® Trademark along with the Unauthorized
7 Product bearing the SG Body Design® Trademark, and the EXPLORER Trademark along with the
8 Unauthorized Explorer Body Shape Design® and the GIBSON® Trademark with the Unauthorized
9 Products on the www.paperjamz.com and www.paperjamzstore.com websites.

10
11 16. The aforementioned misuse of the Gibson Trademarks by Defendants was done by
12 Defendants with the intent of deceiving or misleading customers into mistakenly believing that said
13 Defendants' Unauthorized Products were authorized Gibson products originating from Gibson or its
14 related companies and otherwise misappropriating the goodwill built up by Gibson in the Gibson
15 Trademarks and otherwise attracting and misdirecting consumers looking for genuine or authorized
16 Gibson goods to Defendants' websites.

17
18 17. The misuse of the Gibson Trademarks by Defendants was intended to cause, has
19 caused and is likely to continue to cause consumer confusion, mistake or deception including the
20 misleading of consumers into mistakenly believing that the Defendants' Unauthorized Products are
21 made directly by Gibson pursuant to Gibson's strict quality control standards or Gibson has
22 authorized or licensed the use by Defendants of the Trademark for those products.
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27 EX PARTE APPLICATION OF PLAINTIFF GIBSON GUITAR CORP. FOR A TEMPORARY
28 RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE RE: PRELIMINARY
INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

1 18. The aforementioned misuse of the Trademark by Defendants is damaging to the
2 reputation and goodwill of the Gibson and the Gibson Trademarks and any continued use will cause
3 irreparable harm to Gibson.

4 Plaintiff request that the Temporary Restraining Order and Preliminary Injunction issue with
5 minimal bond or no bond based on Plaintiff's showing of a string likelihood of success on the merits,
6 and on the anticipated low amount of the enjoined Defendants' possible losses should it later turn out
7 that the injunction should not have been granted (Fed. R. Civ.P. 65).

8 This Application is based on the Complaint filed in this action, the accompanying Notice of
9 Ex Parte Application for a Temporary Restraining Order and an Order to Show Cause Re Preliminary
10 Injunction and Notice of Opposition Procedure, the Memorandum of Points and Authorities, the
11 Declarations of Henry Juskiewicz, Andrea Bates and Bruce Mitchell, all the records and files in this
12 action and such further oral and documentary matters as may be property placed before the court.
13

14 STATEMENT OF OPPOSING COUNSELS POSITION

15 **WOWWEE USA, INC., a California corporation**

16 Prior to filing the complaint against WOWWEE, Plaintiff Gibson engaged in informal
17 settlement discussions with Kim J. Landsman of Patterson Belknap Webb & Tyler LLP, 1133
18 Avenue of the Americas, NY, NY 10036, Direct Tel: 212.336.2980 Direct Fax: 212.336.2985 E-
19 mail: kjlandsman@pbwt.com.
20

21 It is unknown if he has been retained as counsel for this litigation.
22

23 **WAL-MART STORES, INC., a Delaware corporation**

1 Prior to filing the complaint against Wal-Mart, Plaintiff Gibson was contacted by Rosalyn Mitchell,
2 in house counsel for Wal-Mart, indicating that she was looking in to the matter. Her Fax is 479-277-
3 5991.

4 It is unknown if he has been retained as counsel for this litigation.

5 **AMAZON.COM, INC., a Delaware corporation**

6 No known opposing counsel at this time.

7 **BIG LOTS STORES, INC., an Ohio corporation**

8 No known opposing counsel at this time.

9 **KMART CORPORATION, a Michigan corporation**

10 No known opposing counsel at this time.

11 **TARGET CORPORATION, a Minnesota corporation**

12 Prior to filing the complaint against Target, Plaintiff Gibson was contacted by Michael J Kroll, in
13 house counsel for Target, indicating that he was looking in to the matter. His fax is 612-696-3399.

14 It is unknown if he has been retained as counsel for this litigation.

15 **TOYS "R" US-DELAWARE, INC., a Delaware corporation**

16 No known opposing counsel at this time.

17 **WALGREEN CO., an Illinois corporation**

18 No known opposing counsel at this time.

19 **BROOKSTONE COMPANY, INC., a New Hampshire corporation**

20 No known opposing counsel at this time.

21 **BEST BUY CO. INC., a Minnesota corporation**

22 No known opposing counsel at this time.

1 **EBAY INC., a Delaware corporation**

2 No known opposing counsel at this time.

3 **TOYWIZ, INC., a New York corporation**

4 No known opposing counsel at this time.

5 **HSN, Inc. a Delaware corporation, and DOES 1 through 100**

6 No known opposing counsel at this time.

7 **STANDING ORDER**

8 Pursuant to the Standing Order For Assigned Cases ¶ 9 (EX Parte Applications), Plaintiff has
9 served the Defendants via facsimile this Application and Notice of the Ex Parte Application For a
10 Temporary Restraining Order and An Order to Show Cause Re: Preliminary Injunction to the
11 Defendants, including notifying Defendants that an opposition needs to be filed no later 3:00 p.m. on
12 the first business day following such facsimile service.
13

14 **MEMO OF KNOWN COUNSEL/DEFENDANT'S CONTACT INFORMATION**

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16
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1 Respectfully submitted,

2 DATED: November ____, 2010

BATES & BATES, LLC

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ANDREA E. BATES
MICHAEL A. BOSWELL
Attorneys for PLAINTIFF
GIBSON GUITAR CORP.

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