

1 Unless enjoined, the proliferation of the unlicensed use of the Gibson Trademarks will
2 irreparably harm GIBSON by: (1) undermining Gibson's substantial investment in the Gibson
3 Trademarks; (2) eliminating Gibson's control over distribution of its federally registered trademarks;
4 (3) harming Gibson's reputation with third party licensees; and diminishing the sales of future
5 products displaying the Gibson Trademarks by Gibson and its authorize retailers (Declaration of
6 Henry Juskiewicz at ¶ 28).

8 Gibson has invested millions of dollars developing, promoting and advertising goods that bear
9 the Gibson Trademarks. In the absence of injunctive relief, Defendants will continue to profit from
10 the sales of the illegal goods while Gibson will be harmed by the continued distribution of these
11 counterfeit items to the public. The lack of injunctive relief will therefore result in the loss of
12 goodwill to the public and licensees encourage infringers to increase operations, and discourage anti-
13 piracy enforcement – all of which is great and irreparable harm. In contrast, Defendants will only
14 suffer the loss of the revenue from the sales of illicit
15 Unauthorized Products utilizing the Gibson Trademarks. But that is the risk Defendants assumed
16 when they decided to participate actively in an illegal business activity. The law is clear that the
17 economic harm that befalls a pirate is not cognizable in the balance of hardships (Cadence Design
18 Systems, Inc. v. Avant! Corp., 125 F.3d 824, 829 (9th Cir. 1997) (profit lost from enjoined sales of
19 infringing goods not cognizable harm); Triad Sys Corp. v. Southeastern Express Co., 64 F. 3d 1330,
20 1338 (9th Cir. 1995) (“Where the only hardship that the defendants will suffer is lost profits from an
21 activity which has been shown likely to be infringing, such an argument in defense merits little
22 equitable consideration.”) Moreover, the Defendants retail businesses appear to involve the supply of
23 many types of products, of which the items bearing the Gibson Trademarks are but a few. They will,
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1 presumably, continue to supply these other products, despite the granting of any injunctive relief
2 preventing the sale and distribution of the Unauthorized Products. Because of the irreparable harm to
3 Gibson and because the balance of hardships tips strongly in favor of Gibson, Gibson is entitled to a
4 temporary restraining order and preliminary injunction.

5
6 Additionally, Plaintiff is willing to post a bond to protect Defendants' interest pending the
7 outcome of this litigation, although Plaintiff strongly believes that the bond should be minimal based
8 on the merits of its case and the strong likelihood it will prevail.

9 Fed. R. Civ. P. 65 (c) provides that a bond be posted "in an amount that the court considers
10 proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined
11 or restrained." A bond "may not be required, or may be minimal, when the harm to the enjoined party
12 is slight or where the movant has demonstrated a likelihood of success" (Ticketmaster L.L.C. v.
13 RMG Technologies, Inc., 507 F. Supp. 2d 1096, 1116 (C.D. Cal. 2007); *see also* Connecticut Gen.
14 Life Ins. Co. v. New Images of Beverly Hills, 321 F. 3d 878, 882 (9th Cir. 2003) ("bond amount may
15 be zero if there is no evidence the party will suffer damages from the injunction."). Here, there is
16 little prospect that any of Defendants' legitimate interests would be impinged by an order requiring
17 them to cease distribution of the goods bearing the Gibson Trademarks. However, if the Court
18 requires that a bond be posted, GIBSON submits that the bond should not exceed \$10,000 since that
19 amount is more than sufficient to account for the unlikely possibility that Defendants would be
20 "wrongly enjoined or restrained," from selling these plainly illegal devices (Fed. R. Civ. P. 65 (c);
21 *see, e.g.,* Iconix, Inc. v. Tokuda, 457 F. Supp. 2d 969, 1002 (N.D. Cal. 2006) (setting bond at \$10,000
22 for preliminary injunction in copyright infringement action); Microsoft Corp. v. Very Competitive
23 Computer Products Corp., 671 F. Supp. 1250, 1252 (N.D. Cal. 1987) (setting bond at \$10,000 for
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1 preliminary injunction in copyright infringement action); Nintendo of America, Inc. v. Computer &
2 Entertainment, Inc., 1996 U.S. Dist. LEXIS 20975, *15, 1996 WL 511619, *6 (W.D. Wa. 1996)
3 (setting bond at \$10,000 for preliminary injunction in copyright and trademark infringement action).

4 Based thereon, Plaintiff respectfully contends that the balance of equities tips in its favor and
5 favors the issuance of injunctive relief and that a bond, if necessary, be minimal.

7 **E. An Injunction Is In The Public Interest**

8 In the trademark context, courts often define the public interest as the right of the public not to
9 be deceived or confused (Moroccanoil, Inc. v. Moroccan Gold, LLC, 590 F. Supp.2d 1271, 1282
10 (C.D. Cal. 2008) (quoting Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 198 (3d.
11 Cir. 1990)). Courts also recognize that the public interest favors injunctive relief in trademark
12 infringement cases (*See, e.g.*, Promatek Industries, Ltd. v. Equitrac Corp., 300 F. 3d 808, 813 (7th
13 Cir. 2002).

14 On the other hand, no public benefit results from Defendants' activities. Public policy
15 certainly does not support trademark infringement as a means to facilitate trademark counterfeiting.
16 If the Court finds a likelihood of confusion between marks, it may also find that the public interest
17 weighs in favor of granting injunctive relief (Maxim Integrated Products, Inc. v. Richard Quintana,
18 et al., 654 F.Supp.2d 1024, 1036 (N.D. Cal.2009). In this case, not only is there a likelihood of
19 confusion; rather, there has been at least one example of "actual" confusion by one of Plaintiff's own
20 customers. Thus, injunctive relief is warranted.

23 **V. CONCLUSION**

24 Pursuant to the factors set forth by the U.S. Supreme Court in Winter, 129 S.Ct. at 375-376,
25 Plaintiff has established 1) that it is likely to succeed on the merits; 2) that it is likely to suffer
26


1 irreparable harm in the absence of preliminary relief; 3) that the balance of equities tip in its favor;
2 and 4) that an injunction is in the public interest.

3 A Temporary Restraining Order and a Preliminary Injunction will ensure protection of
4 Plaintiff from further infringement of its Registered Trademarks as well as the public's right to
5 distinguish between competing sources of goods and services. Accordingly, Plaintiff respectfully
6 requests that the court enjoin Defendants' infringement in the form of the order proposed and filed
7 concurrently herewith.
8

9 Respectfully submitted,

10 DATED: November 19, 2010

BATES & BATES, LLC

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13 ANDREA E. BATES
14 MICHAEL A. BOSWELL
15 Attorneys for PLAINTIFF
16 GIBSON GUITAR CORP
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Exhibit 4

1 ANDREA E. BATES, ESQ, SBN 192491
Abates@Bates-Bates.com
2 MICHAEL A. BOSWELL, ESQ. SBN 198994
MBoswell@Bates-Bates.com
3 BATES & BATES, LLC
4 964 DeKalb Avenue, Suite 101
Atlanta, Georgia 30307
5 Phone (866)701-0404 and (562) 360-2097
6 Fax (404)963-6231

7 Attorneys for
Plaintiff
8 GIBSON GUITAR CORP.,

9
10 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 GIBSON GUITAR CORP., a Delaware
12 corporation,

13 Plaintiff,

14 vs.

15 WOWWEE USA, INC., a California
16 corporation; WAL-MART STORES, INC., a
17 Delaware corporation; AMAZON.COM, INC.,
18 a Delaware corporation; BIG LOTS STORES,
19 INC., an Ohio corporation; K MART
CORPORATION, a Michigan corporation;
20 TARGET CORPORATION, a Minnesota
corporation; TOYS "R" US-DELAWARE,
21 INC., a Delaware corporation; WALGREEN
CO., an Illinois corporation; BROOKSTONE
22 COMPANY, INC., a New Hampshire
corporation; BEST BUY CO. INC., a
23 Minnesota corporation; EBAY INC., a
Delaware corporation, TOYWIZ, INC., a New
24 York corporation, HSN, Inc. a Delaware
corporation, and DOES 1 through 100,

25 Defendants,
26
27

) Case No. CV10-8884 RGK (RZx)

)
) DECLARATION OF ANDREA E. BATES IN
) SUPPORT OF PLAINTIFF'S EX PARTE
) APPLICATION FOR A TEMPORARY
) RESTRAINING ORDER AND ORDER TO
) SHOW CAUSE RE: PRELIMINARY
) INJUNCTION

) LOCAL RULES 7-19, 7-19.1

) Date:

) Time:

) Dept.: 805

) Judge: Judge R. Gary Klausner

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3 **DECLARATION OF ANDREA E. BATES**

4 I, Andrea E. Bates, declare as follows:
5

6 1. Unless otherwise stated as based upon information and belief, the facts set forth
7 in this declaration are personally known to me and I have first knowledge of these facts. If
8 called upon to testify during court of this action, I could, and I would competently testify
9 thereto under oath. I am over 18 and a party to this action.
10

11 2. I am an attorney licensed to practice law before the courts in the State of California
12 and the federal Central District of California. I am a partner in the law firm of Bates & Bates, LLC,
13 which is counsel of record for Plaintiff GIBSON GUITAR CORP. (hereinafter "GIBSON"), a
14 Delaware corporation.
15

16 3. Pursuant to the Standing Order For Newly Cases Assigned To Judge R. Gary
17 Klausner, ¶9 (Ex Parte Applications), Plaintiff has begun to electronically serve all the Defendants
18 via facsimile the Application and Notice of the Ex Parte Application For A Temporary Restraining
19 Order And An Order To Show Cause Re: Preliminary Injunction to the Defendants, and Proposed
20 Order, including notifying Defendants that an opposition shall be filed no later than 3 p.m. on the first
21 business day following service. Because of the number of the Defendants, and the size of the
22 accompanying papers, the service has not yet been completed as of the time this declaration is filed
23 with the court, but is being completed simultaneously therewith.
24

25 4. For those Defendants listed below that I am aware to have counsel, I have also faxed
26 them in addition to the respective companies registered agents for process with the Application and
27

1 Notice of the Ex Parte Application For A Temporary Restraining Order And An Order To Show
2 Cause Re: Preliminary Injunction to the Defendants, and Proposed Order:

3 **WOWWEE USA, INC.**

4 Counsel: Kim Landsman, Patterson Belknap
5 1133 Ave. of the Americas,
6 NY, NY 10036
7 Fax: 212-336-2985
8 Phone: 212-336-2980.

9 Address: 5963 La Place Court, Suite 207
10 Carlsbad, CA 92008

11 Registered Agent: National Registered Agents, Inc.
12 2875 Michelle Drive, Suite 100
13 Irvine, CA 92606
14 Phone: 800-562-6439
15 Fax: 800-562-6504

16 **WAL-MART STORES, INC.**

17 Counsel: Rosalyn Mitchell (in house)
18 Fax: 479-277-5991

19 Address: 702 SW 8th Street
20 Bentonville, AR 72716

21 Registered Agent: The Corporation Trust Company
22 Corporation Trust Center
23 1209 Orange Street
24 Wilmington, DE 19801
25 Phone: 302-658-7581
26 Fax: 302-655-5049

27 **AMAZON.COM, INC.**

28 Counsel: Not known at this moment

Address: 410 Terry Avenue North
Seattle, WA 98109-5210

Registered Agent: Corporation Service Company

1 2711 Centerville Road, Suite 400
2 Wilmington, DE 19808
3 Phone: 800-927-9800
4 Fax: 302-636-5454

4 **BIG LOTS STORES, INC.**

5 Counsel: Not known at this moment
6 Address: 300 Phillipi Road
7 PO Box 28512
8 Columbus, OH 43228-5311
9 Registered Agent: CSC-Lawyers Incorporating Service
10 50 W. Broad Street, Suite 1800
11 Columbus, OH 43215
12 Phone: 800-927-9800
13 Fax: 302-636-5454

12 **KMART CORPORATION**

13 Counsel: Not known at this moment
14 Address: 3333 Beverly Road
15 Hoffman Estates, IL 60179
16 Phone: 847-286-2500
17 Fax: 847-286-5500
18 Registered Agent: The Corporation Company
19 30600 Telegraph Road, Suite 2345
20 Bingham Farms, MI 48025

20 **TARGET CORPORATION**

21 Counsel: Michael S. Kroll,
22 Phone: 612-696-2249
23 Fax: 612-696-3399
24 Michael.kroll@target.com.

25 It is unknown whether he is acting as counsel for this litigation.

26 Address: 1000 Nicollet Mall
27 Minneapolis, MN 55403

1 Phone: 612-304-6073
2 Fax: 612-696-5400

3 Registered Agent: No Agent on File With Secretary of State

4 **TOYS”R”US DELAWARE, INC**

5 Counsel: Not known at this moment

6 Address: One Geoffrey Way
7 Wayne, NJ 07470-2030

8 Registered Agent: The Prentice-Hall Corporation System, Inc.
9 2711 Centerville Road, Suite 400
10 Wilmington, DE 19808
11 Phone: 302-636-5440
12 Fax: 302-636-5454

11 **WALGREEN CO.**

12 Counsel: Not known at this moment

13 Address: 200 Wilmot Road
14 Deerfield, Il 60015

15 Registered Agent: Illinois Corporation Service Company
16 801 Adlai Stevenson Drive
17 Springfield, IL 62703
18 Phone: 888-690-2882
19 Fax: 302-636-5454

19 **BROOKSTONE COMPANY, INC.**

20 Counsel: Not known at this moment

21 Address: One Innovation Way
22 Merrimack, NH 03054

23 Registered Agent: Thomas P. Manson, Esq.
24 1000 Elm Street, 20FI
25 Manchester, NH 03101
26 Phone: 603-621-7100
27 Fax: 603-621-7111

27 **BEST BUY CO., INC.**

1 Counsel: Not known at this moment

2
3 Address: 7601 Penn Avenue South
Richfield, MN 55423

4 Registered Agent: C T Corporation System Inc.
5 100 South 5th Street, Suite 1075
6 Minneapolis, MN 55402
7 Phone: 612-333-4315
Fax: 612-333-2524

8 **EBAY INC.**

9 Counsel: Not known at this moment

10 Address: 2145 Hamilton Avenue
11 San Jose, CA 95125

12 Registered Agent: National Registered Agents, Inc.
13 160 Greentree Drive, Suite 101
14 Dover, DE 19904
15 Phone: 302-674-4089
Fax: 302-674-5266

16 **TOYWIZ, INC.**

17 Counsel: Not known at this moment

18 Address: 363 Spook Rock Rd. Building K
19 Suffern, NY 10901

20 Registered Agent: Barr, Post & Associates
21 664 Chestnut Ridge Road
Spring Valley, NY 10977
22 Phone: 845-352-4080
Fax: 845-352-6777

23 **HSN, INC.**

24 Counsel: Not known at this moment

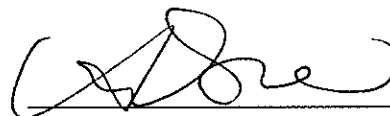
25 Address: 1 HSN Drive
26 St. Petersburg, FL 33729

27
28

1 Registered Agent: National Registered Agents, Inc.
2 160 Greentree Drive, Suite 101
3 Dover, DE 19904
4 Phone: 302-674-4089
5 Fax: 302-674-5266

6 I declare under penalty of perjury under the laws of the United States of America, the States
7 of Georgia and California that the foregoing is true and correct.

8 Executed on November 19, 2010 at Atlanta, Georgia.



11
12
13 Andrea E. Bates, Esq.
14 Declarant

1 ANDREA E. BATES, ESQ, SBN 192491
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2 MICHAEL A. BOSWELL, ESQ. SBN 198994
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4 964 DeKalb Avenue, Suite 101
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5 Phone (866)701-0404 and (562) 360-2097
6 Fax (404)963-6231

7 Attorneys for
Plaintiff
8 GIBSON GUITAR CORP.,

9
10 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 GIBSON GUITAR CORP., a Delaware) Case No. CV10-8884 RGK (RZx)
12 corporation,)
13) DECLARATION OF BRUCE MITCHELL IN
Plaintiff,) SUPPORT OF PLAINTIFF'S EX PARTE
14 vs.) APPLICATION FOR A TEMPORARY
15) RESTRAINING ORDER AND ORDER TO
WOWWEE USA, INC., a California) SHOW CAUSE RE: PRELIMINARY
16 corporation; WAL-MART STORES, INC., a) INJUNCTION
17 Delaware corporation; AMAZON.COM, INC.,)
a Delaware corporation; BIG LOTS STORES,) LOCAL RULES 7-19, 7-19.1
18 INC., an Ohio corporation; K MART
CORPORATION, a Michigan corporation;)
19 TARGET CORPORATION, a Minnesota) Date:
corporation; TOYS "R" US-DELAWARE,) Time:
20 INC., a Delaware corporation; WALGREEN)
CO., an Illinois corporation; BROOKSTONE) Dept.: 805
21 COMPANY, INC., a New Hampshire)
corporation; BEST BUY CO. INC., a) Judge: Judge R. Gary Klausner
22 Minnesota corporation; EBAY INC., a)
23 Delaware corporation, TOYWIZ, INC., a New)
York corporation, HSN, Inc. a Delaware)
24 corporation, and DOES 1 through 100,)
25)
26 Defendants,)

1 (c) The Bell Shaped Truss Rod Cover Design®, U.S. Trademark Reg. No. 1022637
2 (hereinafter “the Bell Cover Design® Trademark”) (a true copy of the Trademark Registration is
3 attached hereto as Exhibit “C”);

4 (d) The Flying V Body Shape Design Body Shape Design®, U.S. Trademark Reg. No.
5 2051790 (hereinafter “Flying V Body Shape Design® Trademark”) (a true copy of the Trademark
6 Registration is attached hereto as Exhibit “D”);

7 (e) The Explorer Body Shape Design®, U.S. Trademark Reg. No. 2053805 (hereinafter
8 “Explorer Design® Trademark”) (a true copy of the Trademark Registration is attached hereto as
9 Exhibit “E”);

10 (f) The Kramer Peg-Head Design®, U.S. Trademark Reg. No. 1567052 (hereinafter
11 “Kramer Peg-Head® Trademark”) (a true copy of the Trademark Registration is attached hereto as
12 Exhibit “F”);

13 (g) The SG Body Design®, U.S. Trademark Reg. No. 2215791 (hereinafter “SG Body
14 Design® Trademark”) (a true copy of the Trademark Registration is attached hereto as Exhibit “G”);

15 (h) The word mark “LES PAUL”® Trademark, U.S. Trademark Reg. No. 1539282
16 (hereinafter the “LES PAUL® Trademark) (a true copy of the Trademark Registration is attached
17 hereto as Exhibit “H”);

18 (i) The word mark “FLYING V”® Trademark, U.S. Trademark Reg. 1216644
19 (hereinafter the “FLYING V® Trademark) (a true copy of the Trademark Registration is attached
20 hereto as Exhibit “I”);

21 (j) The word mark “EXPLORER”® Trademark, U.S. Trademark Reg. 2641548
22 (hereinafter the “EXPLORER® Trademark) (a true copy of the Trademark Registration is attached
23 hereto as Exhibit “J”);

1 (k) The word mark “S-G”® Trademark, U.S. Trademark Reg. 1045872 (hereinafter the
2 “EXPLORER® Trademark) (a true copy of the Trademark Registration is attached hereto as Exhibit
3 “K”);

4 (l) The word mark “GIBSON”® Trademark, U.S. Trademark Reg. 1545311 (hereinafter
5 the GIBSON® Trademark) (a true copy of the Trademark Registration is attached hereto as Exhibit
6 “L”);

7
8 6. Gibson recently became aware of the fact that Defendant WOWWEE USA, INC.
9 (“WOWWEE”) was involved in the business of manufacturing and marketing products, including
10 guitars, known as Paper Jamz.

11 7. Certain Paper Jamz guitars have caused great alarm at Gibson, because of the fact that
12 these unauthorized guitars are identical to the Gibson registered trademarks, namely, Les Paul Peg-
13 Head® Trademark, the Bell Cover Design® Trademark, the Les Paul Peg-Head® Trademark, the
14 Flying V Body Shape Design® Trademark, the Explorer Body Shape Design® Trademark, the
15 Kramer Peg-Head® Trademark, and the SG Body Design® Trademarks. Furthermore they are used
16 in conjunction with the GIBSON® Trademark, FLYING V® Trademark, EXPLORER® Trademark,
17 LES PAUL® Trademark and S-G® Trademark.
18

19
20 8. On October 15, 2010, Gibson contacted Defendant WOWWEE via a cease and desist
21 letter, alerting them to Gibson’s rights as well as Gibson’s concerns.

22 9. That letter resulted in several conversations between Gibson and counsel for
23 WOWWEE in an effort to resolve the current situation, short of litigation. However, those
24 discussions did not result in any settlement, forcing Gibson to institute this lawsuit to protect its
25 valuable, goodwill and trademark rights.
26

1 10. Gibson has reviewed the websites of defendant WOWWEE's namely
2 www.paperjamz.com, www.paperjamzstore.com, www.wow-wee-paper-jamz-guitar.com,
3 www.wowwee.com, among others, and discovered that WOWWEE is offering the counterfeit items
4 as either Guitar Style 1/Country 1 (attached as Exhibit "M" to this Declaration), Guitar Style 4/Rock
5 4 (attached as Exhibit "N" to this Declaration), Guitar Style 5/Rock 5 (attached as Exhibit "O" to this
6 Declaration), and Guitar Style 6/Rock 6 (attached as Exhibit "P" to this Declaration).

8 11. Further investigation Gibson found that the items being offered for sale through the
9 WOWWEE websites and through the Defendant retailers, are identical to the Gibson Trademarks and
10 used for the same protected goods (guitars), thereby clearly infringed upon the Gibson Trademarks
11 (See Exhibits Q, R, S and T attached to this Declaration).

12 12. During Gibson's investigation of the matter on the WOWWEE website, it was
13 discovered that there are numerous retailers who carry Paper Jamz guitars (a copy of the screen shot
14 obtained showing the retailers being utilized by WOWWEE is attached hereto as Exhibit U), these
15 retailers have a physical presence in this district and/or upon information and belief engage in the
16 marketing, and sale of the Paper Jamz products bearing the Gibson Trademarks in this district.

17 13. Gibson visited the websites of the following Defendant retailers and discovered that
18 each was offering the counterfeit items displaying the Gibson Trademarks of which screen shots of
19 some of the offending are provided:
20

- 21 a. WAL-MART (Exhibit V to this Declaration);
- 22 b. AMAZON.COM (Exhibit W to this Declaration);
- 23 c. KMART (Exhibit X to this Declaration);
- 24 d. TARGET (Exhibit Y to this Declaration);
- 25 e. TOYS "R" US (Exhibit Z to this Declaration);