BLECHER & COLLINS, P.C.
Maxwell M. Blecher (State Bar No. 26202)
mblecher@blechercollins.com
Courtney A. Palko (State Bar No. 233622)
cpalko@blechercollins.com
515 South Figueroa Street, Suite 1750
Los Angeles, California 90071
Telephone: (213) 622-4222
Facsimile: (213) 622-1656

Attorneys for Plaintiff
MGA ENTERTAINMENT, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MGA ENTERTAINMENT, INC., Plaintiff, vs. MATTEL, INC. and ROBERT A. ECKERT, Defendants.	CASE NO. CV 11-01063 DOC (RNBx) **FIRST AMENDED COMPLAINT FOR DAMAGES FOR VIOLATION OF SHERMAN ACT (15 U.S.C. § 2)** (DEMAND FOR JURY TRIAL)

Plaintiff MGA Entertainment, Inc. ("MGA") files this First Amended Complaint ("Complaint") against Defendants Mattel, Inc. ("Mattel") and its CEO Robert A. Eckert to secure damages from those Defendants based on their violation of Section 2 of the Sherman Act (15 U.S.C. § 2), and alleges as follows:

I.

STATEMENT OF THE CASE

1. The gravamen of MGA's Complaint is the 7-year ruthless pursuit of vexatious litigation, with which the fashion doll powerhouse Mattel has aggressively used as an anticompetitive weapon by continuing unabated to oppress its smaller competitor MGA, to which Mattel was starting to lose market share. The extent of the baselessness was judicially sanctioned on July 22, 2010 in the Ninth Circuit's

stinging rebuke, which stayed all equitable orders within four hours of oral argument and then in its decision, vacated all the equitable relief under an abuse of discretion standard, and empowered this Court to vacate the entire damage award, which it promptly did. At retrial this year, Mattel did not succeed on a single claim and was awarded zero damages. To date, Mattel has spent 7 years and $400 million dollars to "litigate MGA to death" – pursuing "overbroad remedies stunning in scope" and pursuing claims it knew were statute-barred – and has nearly destroyed MGA in the process. The Ninth Circuit's ruling and the subsequent jury verdict and judgment in MGA's favor form the basis of a viable antitrust claim grounded on baseless anticompetitive litigation.

II.

PARTIES

2. Plaintiff MGA is a California corporation organized and existing under the laws of the State of California, with its principal place of business in Van Nuys, California.

3. Defendant Mattel is a Delaware corporation with its principal place of business in El Segundo, California.

4. Defendant Robert Eckert, a resident of this judicial district, currently serves as Chairman of the Board and Chief Executive Officer of Mattel, and has since May 2000.

III.

JURISDICTION AND VENUE

5. This Complaint is filed and these proceedings are instituted against Mattel and Mr. Eckert under Section 2 of the Sherman Antitrust Act (15 U.S.C. § 2), and Sections 4 and 16 of the Clayton Antitrust Act (15 U.S.C. §§ 15, 26, respectively) to recover damages from Mattel and Mr. Eckert for injuries to the business and property of MGA. This Court has original jurisdiction over the federal antitrust claims pursuant to 28 U.S.C. § 1337.

6. Defendant Mattel maintains headquarters, transacts business, maintains factories, and sells products to major customers located within the Central District of California.

7. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws was carried on in part within this district, and some of the unlawful acts described herein were conceived, performed, or made effective within this district. Venue is proper in this district pursuant to 15 U.S.C. § 15(a) and 28 U.S.C. § 1391.

IV.

APPLICABILITY OF *RES JUDICATA* AND RULES GOVERNING COMPULSORY COUNTERCLAIMS

8. The Court has jurisdiction over this case as a stand-alone Complaint, and the case is not barred by *res judicata* or the rules governing compulsory counterclaims. An antitrust suit which attacks an underlying lawsuit as anticompetitive and sham cannot be *res judicata* or a compulsory counterclaim at least until the outcome of the underlying suit is determined. The Supreme Court has made clear: "A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 n.5 (1993). In *PRE*, the Supreme Court expressly invoked the tort of malicious prosecution as an analog to an anticompetitive litigation claim such as alleged in MGA's Complaint. *See id.* at 62 & n.7. A requirement of malicious prosecution claims is proof that the underlying lawsuit was successfully terminated. Had MGA lost the retrial, it would be impossible for MGA to prove the underlying lawsuit was a sham. Therefore, the antitrust claim was not ripe and was premature until MGA secured a favorable verdict and judgment in the underlying suit.

9. The Supreme Court and Ninth Circuit have ruled that an antitrust case attacking litigation as anticompetitive and sham is not a compulsory counterclaim. In

Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 671, 64 S. Ct. 268, 274 (1944), the Supreme Court plainly stated that the antitrust claim is a "claim for damages" that is a "separate statutory cause of action" which is not compulsory:

> The fact that [the antitrust claim] might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment *res judicata* as respects it. The case is then governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is *res judicata* not as to issues which might have been tendered but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' (internal citations omitted).

10. The Supreme Court, acting as a court of equity, voiced concern about "placing its imprimatur on a scheme that involves a misuse of the patent privilege and a violation of the antitrust laws. It would aid in the consummation of a conspiracy to expand a patent beyond its legitimate scope." *Mercoid*, 320 U.S. at 670. *Mercoid*'s rationale applies with equal force to Mattel's misuse of the copyright privilege.

11. "*Mercoid* leaves open the possibility of raising antitrust claims as permissive counterclaims in an infringement action, or in a separate and subsequent action." *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 536 (9th Cir. 1995). In *Hydranautics*, the Ninth Circuit held that an antitrust claim alleging that the underlying litigation itself constituted the antitrust violation was **not** a compulsory counterclaim in that litigation. "It was permissible for Hydranautics to delay suing FilmTec for predatory patent litigation ***until it had succeeded in defeating the infringement case***." *Id.* (emphasis added).

12. As the Supreme Court did in *PRE, Hydranautics* draws its vitality from

an express analogy to malicious prosecution, which "cannot be asserted as a counterclaim to the original suit which furnishes the predicate." *Id.* at 537. As in a malicious prosecution claim, an antitrust claim in which the underlying suit furnishes the predicate does not ripen unless and until there is a favorable outcome, and therefore it is premature to require that it be filed as a compulsory counterclaim in the underlying suit:

> The antitrust claim attacks the patent infringement lawsuit itself as the wrong which furnishes the basis for antitrust damages. This is somewhat analogous to a civil claim for malicious prosecution. It is usually held that a malicious prosecution claim cannot be asserted as a counterclaim to the original suit which furnishes its predicate. 1 Harper, James & Gray, The Law of Torts § 4.8 (2d ed. 1986). *Mercoid* is consistent with this approach, and we see no reason to distinguish *Mercoid* from the case at bar.

Id. at 536-37.

13. Scholarly analysis establishes that both *Mercoid* and *Hydranautics* make practical sense and are supported by strong policy, economy, and efficiency justifications. Such a rule prevents the automatic, reflexive filing of potentially frivolous antitrust compulsory counterclaims, allows sufficient time and due diligence to form a viable legal and factual basis to prove objective baselessness, and weeds out the non-meritorious claims. *See* Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, IP and Antitrust, Antitrust Allegations as Compulsory Counterclaims in Enforcement Litigation §11.3b6 (2005) ("there are strong policy arguments against treating an anticompetitive litigation claim in particular as a compulsory counterclaim").

14. The Fifth and First Circuits are in agreement. *Tank Insulation Int'l, Inc. Insultherm, Inc.*, 104 F.3d 83, 87-88 (5th Cir. 1997) ("the [*Mercoid*] Court plainly held that the antitrust counterclaim was permissive—controlled by rule 13(b)—and

therefore, not barred in the second action"); *Fowler v. Sponge Products Corp.*, 246 F.2d 223, 227 (1st Cir. 1957) ("The Supreme Court has clearly stated that a counterclaim for treble damages [under the antitrust laws] is permissive in nature . . ."); *Longwood Manufacturing Corp. v. Wheelabrator Clean Water Systems, Inc.*, 954 F. Supp. 17, 17-19 (D. Me. 1996).

15. *Mead Data Central, Inc. v. West Publishing Co.*, 679 F. Supp. 1455 (S.D. Ohio 1987) extended *Mercoid* outside the realm of patent infringement to antitrust claims based on copyright infringement. In *Mead*, the court determined that the antitrust claim was not a compulsory counterclaim to the prior copyright infringement action. *Id.* at 1461-62 ("Antitrust law plays no part in the Minnesota copyright action.").

16. This Complaint is entirely proper under general and traditional Rule 13 considerations. To determine whether a counterclaim was compulsory in a prior action, courts consider whether "the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987). Courts apply a flexible "logical relationship" test in making this determination. *United States v. Iron Mountain Mines, Inc.*, 952 F. Supp. 673, 678 n.9 (E.D. Cal. 1996) ("In the Ninth Circuit, the test under [Rule] 13(a) is the 'logical relationship' test.") (citing *Hydranautics*, 70 F.3d at 536); *Grumman Sys. Support Corp. v. Data Gen. Corp.*, 125 F.R.D. 160, 162 (N.D. Cal. 1988) ("The test is a 'flexible' one taking into account all of the circumstances in light of the purposes of Rule 13(a)."). "Among the factors courts consider in determining whether the test is met is whether 'the facts substantially overlap, [and whether] the collateral estoppel effect of . . . the first action would preclude [the claims from being brought in a later action.]'" *Competitive Technologies v. Fujitsu Ltd.*, 286 F. Supp. 2d 1118, 1135-36 (N.D. Cal. 2003) (quoting *Pochiro*, 827 F.2d at 1251).

17. Because this Complaint is based on Mattel's sham abusive tactics in the

underlying litigation, and did not mature into a viable claim until an advanced stage of the prior litigation (at least July 22, 2010), judicial economy and fairness support the filing of this permissive claim as a separate, standalone Complaint. *See, e.g.*, *Jarrow Formulas, Inc. v. Int'l Nutrition Co.*, 175 F. Supp. 2d 296, 308-09 (D. Conn. 2001) (antitrust action not compulsory as it involves distinct factual issues and facts that arose after filing of prior action); *Gasswint v. Clapper*, 17 F.R.D. 309, 313 (W.D. Mo. 1955) ("[a] claim for treble damages under the Sherman Act is separate and distinct from any transaction that is involved in an infringement suit, and, being so, it is a permissible counterclaim, by classification under Rule 13(b), which is not lost if not asserted in the infringement action, even if then subsisting"); Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, *IP and Antitrust*, *Antitrust Allegations as Compulsory Counterclaims in Enforcement Litigation* §5.5 n.16 (2005) ("when no arguable factual or legal basis existed for the counterclaim until after the original pleading deadlines have expired, courts should allow late filing of the counterclaim"); Teague I. Donahey, *Antitrust Counterclaims in Patent Infringement Litigation: Clarifying the Supreme Court's Enigmatic* Mercoid *Decision*, 39 IDEA J. L. & Tech. 225 (1999) (arguing for analysis under logical relationship test and predicting many will be properly treated as permissive).

18. Here, this conclusion is reinforced because, on August 2, 2010, this Court ordered all claims to be tried starting January 11, 2011, with the express statement that no continuance would be allowed (Dkt. 8434).

19. For the reasons set forth below, trial of this complex antitrust case could not reasonably have been accomplished within that short span:

a. wholly apart from the *res judicata*/compulsory counterclaim questions, a case which alleges "sham" litigation issues under *Noerr* will produce a motion to dismiss;

b. no discovery has been conducted on the litany of antitrust issues including:

i. definition of relevant product and geographic markets;

ii. Mattel's share of that market, an issue often addressed by issuing subpoenas to industry participants, forcing disclosure of their sales data and related information, which often requires judicial resolution of objections, frequently in distant forums where the recipients of the subpoena reside;

iii. whether there are entry/expansion barriers sufficient to satisfy the standards established by case law;

iv. the search for and retention of expert witnesses on both liability and damage issues;

v. the time needed by experts to absorb the subjects and data on which they will testify;

vi. the writing of expert reports and the taking of expert depositions;

vii. whether Mattel's seeking and achieving the constructive trust remedy was the proximate cause of injury to MGA;

viii. whether Mattel's seeking and achieving the constructive trust remedy was a monopolizing act in violation of Section 2 of the Sherman Act;

ix. whether Mattel's seeking and achieving the constructive trust remedy satisfies the requirement of "antitrust injury" established by case law;

x. whether MGA sustained quantifiable damage as a result of the constructive trust remedy; and

c. law and motion activity related to discovery matters, summary judgment filings, and other disputed issues.

There is no possibility that these tasks could have been conducted and prepared professionally by either side in the period from August 16, 2010 to January 11, 2011. In short, the addition of the antitrust case at any time after it was "born" by reason of the Ninth Circuit's July 22, 2010 decision was completely impracticable.

According to the Institute for the Advancement of the American Legal System,

Civil Case Processing in the Federal District Courts: A 21st Century Analysis, Appendix E, at 99 (2009), *available at* http://www.du.edu/legalinstitute/pubs/PACER%20FINAL%201-21-09.pdf, the average time from filing to disposition of a federal antitrust case is 531.7 days or almost 18 months exactly. This number includes cases terminated early by motions to dismiss or summary judgment or settlement. This statistic confirms the impracticability of doing a complex case such as this in less than five months. Even if filed, the antitrust claim would almost surely have resulted in a severance and stay to permit the underlying case to move forward through trial to verdict. That would have placed Mattel in exactly the same posture as now exists. Accordingly, Mattel suffers absolutely no prejudice by reason of the later filing.

20. *Res judicata* does not bar this Complaint. *Res judicata* is an affirmative defense, and the burden is on Mattel to prove all of its elements. *See* Fed. R. Civ. P. 8(c); *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 n.4 (9th Cir. 1988) (abrogated on other grounds). In the Ninth Circuit, the factors to consider are: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982) (citing *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980)). The last of these criteria is the most important. *Id.* No single criterion can decide every *res judicata* question; identity of causes of action "cannot be determined precisely by mechanistic application of a simple test." *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir. 1979).

21. ***First***, the rights or interests established in the prior judgment would not be destroyed or impaired by prosecution of this Complaint. MGA has not sued or been compensated for injury due to Mattel's abusive litigation tactics used as an

anticompetitive weapon in order to restore and maintain its monopoly power. MGA has not sought recovery for Mattel's violation of the Sherman Act through anticompetitive litigation, or been previously compensated for loss of its going concern value. MGA has been compensated for an entirely distinct injury (26 categories of trade secret misappropriation) due to Mattel sneaking into showrooms and stealing trade secrets and rushing copycat products to market. The nature of the conduct is different, the type of injury is different, the time period is different, and the fact and amount of damages are different.

22. On the other hand, if MGA is not allowed to bring this antitrust suit, Mattel will have succeeded in its goal of abusing litigation to destroy a legitimate threat to its monopoly, depleting the going concern value, resources, and reputation of its smaller competitor MGA, and Mattel will be judicially immunized from the consequences of taking advantage of the courts and judicial resources to avoid competing on the merits, and will be rewarded for harming competition. MGA has been irreparably harmed by abusive litigation spanning 7 years to date, expending countless resources, and will never be able to recover its prior market position or undo the damage Mattel caused to the value of MGA's company, brands, goodwill, and reputation. Accordingly, this present Complaint does not threaten to and will not undermine the existing judgment in the underlying case. There is absolutely no danger of double recovery because the invasion of rights, the nature of the actual injury, and the evidentiary basis of the claims are entirely different.

23. ***Second***, substantially the same evidence as was introduced in the underlying action could not be used to prove a Sherman Act violation. *See Western Sys. v. Ulloa*, 958 F.2d 864, 871-872 (9th Cir. 1992); *Int'l Union of Operating Eng'r-Employers Constr. Indus. Pension v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993). In fact, significantly new and distinct evidence is required to prove an antitrust claim, including detailed market analysis and expert economist opinions:

a. defining the relevant product market;

i. forensic economist expert discovery, depositions, and reports about whether fashion dolls constitute a separate product market sufficient to satisfy the antitrust definition, or whether, as Mattel contends, fashion dolls falls within a larger market of toys;

ii. analysis of other products and whether they are reasonably interchangeable to constitute reasonable substitutes;

iii. whether Bratz and Barbie compete in the same market, are co-extensive in that market, or whether, as Mattel contends, Bratz dolls are in a separate market appealing to older girls;

b. defining the relevant geographic market;

i. whether the United States is a proper geographic market, or whether, as Mattel contends, the market is global;

c. whether substantial barriers to entry/expansion exist;

d. Mattel's market share;

e. other competitors' market share and entrance to/exit from the market;

f. whether Mattel has monopoly power;

g. the nature and extent of Mattel's anticompetitive conduct;

h. whether there was harm to competition generally, as opposed to harm to a competitor MGA;

i. direct and proximate causation;

j. going concern value of MGA and quantifying the detrimental impact of Mattel's anticompetitive litigation conduct on MGA;

k. fact and amount of damages to MGA arising from Mattel's anticompetitive conduct (issues of causation, analysis of external factors);

l. *Noerr-Pennington* two-part "sham" analysis:

i. Objective prong:

(a) whether Mattel's lawsuit against MGA was

objectively baseless because Mattel knew it was statute-barred;

(b) whether Mattel induced the Court to commit legal error and sought erroneous jury instructions by disregarding applicable law and facts;

(c) whether Mattel's seeking equitable relief in the form of a constructive trust and injunction was objectively baseless.

ii. Subjective Prong: whether Mattel acted in bad faith to achieve an anticompetitive objective.

None of this evidence has been presented or decided in the underlying case.

24. ***Third***, the two suits involve infringement of different rights. The Sherman Act is a federal statute with a highly specialized body of law and elements, and which deals specifically with promoting a competitive marketplace and proscribing harm to competition, violation of which entitles the antitrust plaintiff to statutory treble damages. This Complaint is based on Mattel's abuse of the litigation process to destroy its competitor and the biggest threat to its market dominance, and thus restore and maintain its monopoly power. Nowhere in the prior suit was Mattel found to violate the Sherman Act by attempting to monopolize the fashion doll market by engaging in abusive sham litigation. The underlying suit was based in copyright regarding ownership of Bratz and trade secret misappropriation relating to Mattel's pattern and practice of engaging in widespread theft of MGA's trade secrets. MGA sought and was compensated for lost profits. MGA has not sought or been compensation for the loss of its going concern value. The invasion of rights, the nature of the actual injury, and evidentiary basis of the claims are entirely different.

25. ***Fourth***, the Complaint arises out of a different transactional nucleus of facts than the underlying suit. The facts comprising the antitrust suit that were not at issue in the underlying suit include: analysis of the relevant product and geographic market in which MGA and Mattel compete; whether Mattel enjoys monopoly power

in the fashion doll market in the U.S.; the harm that Mattel's anticompetitive litigation causes to competition generally; and the damage to MGA in the form of loss of going concern value caused by Mattel. MGA's antitrust claim involves analysis of: (1) relevant product and geographic market; (2) reasonable substitutes; (3) existence of Mattel's monopoly power; (4) barriers to entry; (5) Mattel's monopolizing conduct; (6) Mattel's alleged procompetitive business justifications; (7) injury to competition; and (8) damages resulting to MGA from the antitrust violation. No one of these was or could legitimately have been litigated in the recently concluded trial. *See, e.g., Abramson v. University of Hawaii*, 594 F.2d 202, 207 (9th Cir. 1979) (the present case "did not have the requisite coincidence of issues to have required that appellant litigate the entire claim in the prior suit").

26. Moreover, this Complaint relies on continuing conduct and developments throughout the pendency of the trial, jury verdict, judgment, and post-trial motions in the underlying case. Substantial new evidence supporting MGA's antitrust Complaint occurred after the filing and throughout the pendency of the underlying suit. Most notably, that Mattel pursued a case for 7 years and $400 million dollars and lost on every count and is still appealing the judgment!

27. Applying either the "same transactional nucleus" or "logical relationship" test will not change the fact that this Complaint arises from new conduct subsequent to the existing case, presents entirely different factual and legal questions, and would have needlessly complicated, confused, delayed, and burdened the existing trial, if indeed it can be assumed for sake of discussion that it could have been readied for trial between July 22, 2010 (when it first became judicially sanctioned) and the court-ordered trial date of January 11, 2011. As a permissive counterclaim, the antitrust claim did not have to be filed in the underlying litigation which forms the predicate for this Complaint. The antitrust claim did not have an arguable factual and legal basis until a very advanced stage of the underlying proceedings, and did not fully ripen until MGA secured a favorable judgment in

August 2011.

28. Furthermore, this case is being heard by the same judge as a related action. The Court is intimately familiar with the facts, evidentiary findings, and rulings of the prior case.[1] The present case is suitably positioned for the Court to manage to best serve judicial economy and efficiency considerations. *See, e.g., Hydranautics*, 70 F.3d at 536 ("In many cases even if the antitrust counterclaim were asserted by counterclaim, the court would sever the issues and resolve the infringement case first."). Courts have broad discretion to "dissect complicated trial into manageable sections." *Alarm Device Manufacturing Co. v. Alarm Products Int'l, Inc.*, 60 F.R.D. 199, 201 (E.D.N.Y. 1973).

29. A number of reasons warrant a separate trial for this antitrust case: (1) it involves different factual, evidentiary, and legal issues, documentary proof, and witnesses; (2) consideration of all the claims at a single trial is unduly burdensome on the Court and jury; (3) antitrust involves a highly specialized and complex body of law, intensive fact and expert discovery requirements, and frequently protracted trials; (4) separate counsel have been retained by MGA to try the antitrust claim, and a separate trial serves to economize counsel's time. *See id.* at 202; *Henan Oil Tools, Inc. v. Engineering Enterprises, Inc.*, 262 F. Supp. 629, 630-32 (S.D. Tex. 1966). Fairness, judicial economy, convenience, and practical considerations favor a severance of the claims. Accordingly, the Complaint is properly brought as a separate, stand-alone case.

V.

FACTUAL BACKGROUND

30. MGA will establish that Mattel, under the direction and authorization of Mr. Eckert, specifically intended to eliminate MGA as a competitor in the fashion doll market, long dominated and controlled by Mattel's Barbie, so that Mattel could reacquire and maintain a monopoly in the fashion doll market in the United States.

[1] *See* 11-1063 Dkt. 11 at 16:2-3 ("The Court is well-versed in the history of the litigation between MGA and Mattel. . .").

31. MGA brings this action to stop Mattel's unlawful anticompetitive conduct, which continues without interruption today, and to recover the extensive damage that Mattel's illicit behavior has caused, and continues to cause, MGA. As the Ninth Circuit concluded: "America thrives on competition; Barbie, the all-American girl, will too." *Mattel*, 616 F.3d at 918.

32. Mattel is the world's largest toy company and it owes its immense success chiefly to a single product: Barbie. Since her debut in 1959, Barbie has been the fuel for Mattel's growth and success, turning Mattel into an international powerhouse. By the late 1990s, Mattel's annual sales of the doll and related products approached or topped $1.8 billion and Mattel stock reached a record high of approximately $45 per share. At that time, the average American girl had eight Barbie dolls, and Barbie was the world's best-selling toy. Mattel had relied on Barbie to provide one-third (1/3) of its revenue and fifty percent (50%) of its profit. According to the research firm NPD Group, which measures toy industry market share, Mattel's share was over 90% of the fashion doll market.

33. *Then came the competition* – MGA's Bratz.

34. Bratz challenged Barbie's half-century domination of the fashion-doll market like nothing ever before had been able to do.

35. MGA is a privately held company located in the San Fernando Valley that began in 1979 as a small consumer electronics business. In 1987, the company made its first foray into the toy business when it secured rights to market handheld LCD games featuring licensed Nintendo® characters. Building on that small success, the company began marketing products for popular licensed properties such as the "Power Rangers,"® "Hello Kitty,"® and even Barbie, Uno and Othello from Mattel.

36. In June 2001, this little-known but successful company was propelled into the limelight after its daring release of an innovative line of Bratz fashion dolls, a collection of multi-ethnic fashion dolls that sport a fresh new urban and

contemporary look and style. Within only a few years, Bratz devastated Barbie's dominance of the fashion doll market and acquired a market share equal to or in excess of Barbie, which caused panic within Mattel and resulted in a strategy to "Kill Bratz."

37. Mattel has not taken kindly to the challenge presented by MGA. Either unable or unwilling to compete against Bratz fairly and on a level playing field, Mattel has instead taken a far more aggressive and expeditious approach, resorting to unfair and anticompetitive business practices, including the pursuit of baseless litigation remedies in bad faith. Wielding its substantial clout and influence in the toy industry, Mattel has tried to muscle MGA out of business.

38. MGA unveiled a preliminary sample of the Bratz doll at the Hong Kong Toy Fair in January 2001, while continuing to finalize the product throughout that spring. At that toy fair, which Mattel attended, MGA invited Mattel to look at and consider distributing Bratz in Latin America. Mattel declined. Finished Bratz products were first shipped in May 2001, and MGA introduced the line to consumers in June 2001.

39. Unlike Barbie dolls, the Bratz line of dolls and branded products sported a hip, multi-ethnic urban look that appealed to contemporary teenage and preteen girls.

40. At approximately 9.5 to 10 inches tall, Bratz dolls were intentionally shorter than Barbie dolls and looked like no other, with disproportionately large heads; big, dramatic eyes and lips; small, thin bodies; oversized feet (to emphasize shoe fashion and to stand on their own, unlike Barbie, which requires a stand); and sporting current, cutting-edge fashions.

41. Indeed, the classic Barbie look was nowhere to be seen in these dolls; they would never be confused with Barbie.

42. Featuring and embodying the slogan "The Girls With a Passion for Fashion!," Bratz dolls revitalized, transformed, and expanded the fashion doll

market.

43. The Bratz line – with its unique and distinctive look – is well recognized and has been critically acclaimed and praised by consumers, retailers, and toy industry analysts alike. In 2001, the Bratz line won the Toy Industry Association ("TIA") People's Choice Toy of the Year Award, the Family Fun Toy of the Year Award, and Toy Wishes Hot Pick Award. In 2002, the Bratz line again won the TIA People's Choice Toy of the Year Award and the Family Fun Toy of the Year Award. The licensing industry's official arm, LIMA (Licensing Industry Merchandisers' Association), awarded MGA's Bratz the best character license of the year, as well as the overall best licensed property of the year for 2003. MGA's Bratz also earned the coveted TIA "Property of the Year" and "Girl Toy of the Year" for 2003, as well as the Family Fun Toy of the Year Award. MSNBC named Bratz the "Hottest Toy of the Year," and both MGA and Bratz received numerous other accolades in 2004, including the Supplier Performance Award by Retail Category (the "SPARC" award) in the Girls' Toys category sponsored by the business publication DSN Retailing Today/Apparel Merchandising.

44. Although merely a tiny fraction of Mattel's size, MGA – with Bratz – was able to chip away at Mattel's stranglehold on the fashion doll market, gaining shelf space and market share as Barbie sales remained flat or, at times, declined. The competition that MGA and Bratz posed to Mattel was unexpected and not welcomed by Mattel.

45. Mattel was not poised to respond to Bratz with a new, creative product of its own. Indeed, it had been antithetical to Mattel's corporate culture and mentality for Mattel to even conceive that a product might vie for shelf space with Barbie, let alone be available for sale to consumers mere months after first being shown to retailers. Mattel had to take a more cutthroat and expeditious route, favoring barnstorming over brainstorming.

46. Instead of fairly competing on the merits of product, Mattel waged war

against MGA with the prosecution of overreaching litigation seeking baseless remedies in bad faith – all with one goal in mind – to banish MGA from the market.

VI.

MATTEL'S CONTINUING PURSUIT OF ANTICOMPETITIVE LITIGATION

47. Since 1959, Barbie had been, by a wide margin, the dominant fashion doll in the world, enjoying overwhelming market share and shattering all potential competition. Barbie has been the main reason for Mattel's immense success and growth, accounting for nearly $2 billion in annual sales by the late 1990s, about one-third of Mattel's total sales and nearly 50% of Mattel's profit. In fact, in the opening statement at trial in the Mattel litigation, Mattel's attorney, John B. Quinn, Esq., told the jury: "Until Bratz, there was only one fashion doll in the market and that was Barbie."

A. Mattel's Continuing "Litigate MGA to Death" Objective and Strategy

48. The 2001 entry of Bratz by MGA into the market challenged Barbie's half-century domination of the fashion doll market. As the Ninth Circuit recently noted in reversing the equitable relief granted to Mattel against MGA:

> Barbie was the unrivaled queen of the fashion-doll market throughout the latter half of the 20th Century. But 2001 saw the introduction of Bratz . . . and Bratz became an overnight success. Mattel, which produces Barbie, didn't relish the competition.

Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 907 (9th Cir. 2010) ("the Mattel litigation").

49. By the end of 2003 and early 2004, the reality of Mattel's inability to compete had set in. In the face of stiff competition from MGA's new line of Bratz fashion dolls, and according to Mattel's own internal documents, its executives were in a full-blown panic, concluding that "the House is on Fire," a document distributed to the Mattel Board of Directors to secure their consent to initiate the litigation

against Carter Bryant. Mattel documents also recorded that the "Brand [Barbie] is in Crisis." These concerns were based on the fact that Barbie's market share had plummeted at a "chilling rate" while the Bratz share was skyrocketing. As Mattel's senior executives lamented in early 2004: "we have been out-thought and out-executed." Having been, by its own admission, "out-thought and out-executed" in the market by MGA, and with Barbie losing market share "at a chilling rate" to Bratz, Mattel – under the direction and authorization of Mr. Eckert – developed and deployed a strategy to "Kill Bratz" through a multi-front assault by whatever means necessary. Mattel implemented its strategy by conducting "attacks" through the use of tactics which included the self-titled "Operation Cast Doubt on Bratz," "Defcon 1 Alert," and "Litigate MGA to Death."

50. As MGA proved in the underlying litigation, Mattel's collective "Kill Bratz" strategy – ordered and authorized by Mr. Eckert – consisted, in part, of anticompetitive practices such as infiltrating confidential competitor showrooms, accessing industry events with false identification, and representing sham toy retailers made up by Mattel in order to get an illicit preview of new Bratz products before they hit the market so that Mattel could imitate or copy them. Indeed, the jury found that Mattel acted willfully and maliciously in misappropriating 26 categories of MGA trade secrets, and MGA secured a judgment for $85 million in compensatory damages, $85 million in punitive damages, and $2.172 million in attorneys' fees and costs for this conduct.

51. Merely imitating Bratz and oppressing MGA's competitive efforts were not enough for Mattel to stem the tide. Therefore, Mattel turned to the courts for relief. According to Mattel's own employees, "[t]here [were] competitive issues such as Bratz that were forcing the decline of Barbie. . . . [O]ne of the strategies for trying to defeat Bratz was to litigate [MGA] to death."

52. Mattel CEO, Robert Eckert, embraced the "litigate MGA to death" strategy – a whatever it takes process Mattel successfully employed to destroy the

approximate $1 billion net worth of MGA, as well as the "Kill Bratz" and "Operation Cast Doubt on Bratz" battle plan to poison MGA in the marketplace.

53. Carrying out this scorched earth strategy, Mattel filed and ruthlessly pursued claims against MGA, and MGA is informed and believes that Mattel spent over $400 million (and counting) in attorneys' fees in an effort to drain MGA of its ability to compete. Mattel's litigation strategy involved launching thousands of discovery requests, taking needless depositions, and filing hundreds and hundreds of motions. Indeed, by the time of trial in the Mattel litigation, the federal docket had over 3,800 docket entries, making it one of the largest (and certainly most expensive) cases ever litigated. The docket has now swollen to over 10,800 entries as Mattel continues to scorch the earth in this litigation.

54. Despite a stinging rebuke by the Ninth Circuit Court of Appeals, a completely unsuccessful retrial on all its claims, a significant jury verdict and judgment in MGA's favor, Mattel's "litigate MGA to death" strategy continues unabated to this very day, with Mattel continually aggressively pursuing its baseless claims and preventing MGA from competing in the fashion doll market on the merits.

55. This is far from the first time that Mattel has tried litigation instead of competition to protect Barbie's monopolistic perch. Mattel and its counsel Quinn Emanuel have a well-earned reputation for overzealously suing anyone who had the temerity to enter the fashion doll market. Indeed, a California court found it to be "substantially true" that "Mattel aggressively defends against any entries in the fashion doll business and 'anyone who makes an 11 ½ inch fashion doll paints a target on their back.'" *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps*, 2001 WL 1589175, at *9 (Cal. Ct. App. Dec. 13, 2001) (with same counsel representing Mattel).

56. Courts have recognized that Mattel is not only willing to file litigation, but to abuse it, to gain commercial advantage. For example, in *Mattel v. Walking*

Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (with same counsel representing Mattel), the Ninth Circuit sanctioned Mattel $1.6 million for issuing subpoenas that the Court concluded "were served for the purpose of getting the [parties] to exert pressure on the witnesses not to testify," noting that these subpoenas were unfortunately part of a "'pattern . . . [of] oppressive subpoena requests,'" and concluding that the subpoenas served by Quinn Emanuel were "'served for the purpose of annoying and harassment and not really for the purpose of getting information.'" *Id.* at 813-14.

57. As part of its declared war on Bratz and MGA, and through its take no prisoners litigation strategy, Mattel sought and initially secured relief that included the imposition of a constructive trust (and the appointment of a receiver to administer MGA) over virtually all of MGA's trademarks using the words "Bratz" or "Jade." At the time, these assets were worth nearly $1 billion and, as even the district court noted, were comprised almost exclusively of value created by MGA and its CEO Isaac Larian.

B. Ninth Circuit Oral Argument and July 22, 2010 Opinion Eviscerates Original Verdict and Condemns Equitable Relief

58. After the original trial and verdict in Mattel's favor and appellate briefing, at the Ninth Circuit hearing, Judge Wardlaw expressed skepticism as to the fairness of the proceeding and inquired of Mattel's counsel to explain "what did MGA do wrong?":

> Judge Wardlaw: I understand the verdict, I understand what ensued. There were certain jury instructions that were given that almost ensured that would be what ensued, so what I'm trying to figure it out from you is: You say they were wrongfully acquired by MGA?
>
> Mr. Collins: That is correct.
>
> Judge Wardlaw: How did, what did MGA do wrong?
>
> Mr. Collins: MGA interfered . . .

> Judge Wardlaw: Did it know that Bryant – did it have any idea that Bryant had this idea and that it was covered by this invention agreement when it made its deal with Bryant.

Dec. 9, 2009 Ninth Circuit Hearing Tr. at 30:24-31:9; *see also id.* at 19:14-15, 20:16-19.

59. Mattel pursued a result so extreme that **no** objective litigant could have expected it to survive full judicial review.

> The very broad constructive trust the district court imposed must be vacated . . . [because] the value of the trademarks the company eventually acquired for the entire Bratz line was significantly greater because of MGA's own development efforts, marketing and investment. The district court nonetheless transferred MGA's entire Bratz trademark portfolio to Mattel. . .As a result, Mattel acquired the fruit of MGA's hard work. . .

Mattel, 616 F.3d at 910.

60. Mattel pursued a baseless, overreaching remedy despite the applicable law. As the Ninth Circuit stated:

> When the value of the property held in trust increases significantly because of a defendant's efforts, a constructive trust that passes on the profit of the defendant's labor to the plaintiff usually goes too far. . . MGA added tremendous value by turning the idea into products and, eventually, a popular and highly profitable brand. The value added by MGA's hard work and creativity dwarfs the value of the original ideas Bryant brought with him.

Id. at 911.

61. Mattel knew that the remedy it sought went "too far" but Mattel knew it was the surest and most effective way to "Kill Bratz." Accordingly, Mattel purposefully sought this remedy in bad faith knowing no **reasonable** litigant could

expect to ultimately prevail. Indeed, the Ninth Circuit found the very broad constructive trust that Mattel sought was an abuse of discretion. It was, therefore, vacated:

> It is not equitable to transfer this billion dollar brand – the value of which is overwhelmingly the result of MGA's legitimate efforts – because it may have started with two misappropriated names. The district court's imposition of a constructive trust forcing MGA to hand over its sweat equity was an abuse of discretion and must be vacated.

Id.

62. The Ninth Circuit vacated all the equitable relief that Mattel had sought. *Id.* at 918. In fact, the Ninth Circuit concluded that:

> [t]he district court abused its discretion in transferring the entire Bratz trademark portfolio to Mattel. We therefore vacate the constructive trust, UCL injunction and declaratory judgment concerning Mattel's rights to the Bratz trademarks.

Id. at 917.

63. With respect to the copyright injunction that Mattel sought, the Ninth Circuit further found that it was erroneous and not based on "appropriate findings" and the Ninth Circuit "therefore vacate[d] the copyright injunction." *Id.* The Ninth Circuit found the district court "erred in holding that the [inventions] agreement, by its terms, clearly covered ideas." *Id.* at 909-10. The district court further erred in holding that "that the employment agreement clearly assigned works created outside the scope of Bryant's employment." *Id.* at 913.

> The issue should have been submitted to the jury, which could then have been instructed to determine (1) whether Bryant's agreement assigned works created outside the scope of his employment at Mattel, and (2) whether Bryant's creation of the Bratz sketches and sculpt was outside the scope of his employment.

Id. The district court also erred in affording broad protection to sculpts that are only "entitled to thin copyright protection against virtually identical copying" and failing to filter out unprotectable elements of the sculpts and sketches. *Id.* at 915-16. Describing the error as "significant," the Ninth Circuit stated:

> Mattel can't claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing – these are all unprotectable ideas.

Id. at 916.

64. Indeed, the Ninth Circuit stated: "it's likely that a significant portion – if not all – of the jury verdict and damage award should be vacated, and the entire case will probably need to be retried." *Id.* at 918. Thereafter, the district court did, in fact, vacate the judgment and the damage award completely.

C. ***Remand to District Court and January 11, 2011 Retrial Resulted in Complete Reversal in MGA's Favor***

65. After remand, this Court concurred with Judge Wardlaw and the Ninth Circuit's rationale. In this Court's August 2, 2010 Order, the Court observed that Judge Larson's "order imposing the constructive trust was invalid, because it was overbroad and predicated upon verdicts that were reached after improper instruction." 04-9049 Dkt. 8423 at 40:4-11; *see also* 11-1063 Dkt. 29 at 3:8-9 ("equitable relief was impermissibly broad and predicated upon jury verdicts tainted by erroneous instruction"). Judge Larson's order and erroneous instructions were wrongfully solicited by Mattel, knowing they would not withstand appellate scrutiny, for the singular purpose of killing Bratz as a brand.

> Even if a claim for breach of constructive trust is cognizable, and even if Larian/MGA breached the constructive trust imposed after Phase 1, Mattel suffered no injury. The order imposing the constructive trust was invalid, because it was overbroad and predicated upon verdicts that were reached after improper instruction. *See Mattel, Inc. v. MGA*

Entertainment, Inc., No. 09-55673, 2010 WL 2853761 (9th Cir. July 22, 2010). Mattel never had a valid property right to the Bratz intellectual property and suffered no damage as a result of Larian/MGA's alleged breach of the constructive trust imposed after Phase 1.

04-9049 Dkt. 8423 (Aug. 2, 2010 Order on Motion to Dismiss).

66. Indeed, it was Mattel's lawyers who deliberately and wrongfully solicited the improper jury instructions upon which the initial verdict was reached. The inappropriate findings, "significant" legal errors, and erroneous jury instructions which were all induced by Mattel's lawyers required the entire case to be tried again. *See, e.g., Mattel*, 616 F.3d at 917-18; Dec. 9, 2009 Ninth Circuit Hearing Tr. at 30:24-31:3; Dkt. 9021.

67. Mere days after the Ninth Circuit's opinion, on August 2, 2010, this Court issued its "Order Setting Trial Date" (Dkt. 8434), which set the trial for **January 11, 2011**, and in bold all-caps font, the order states: "**THIS DATE WILL NOT BE CONTINUED.**" *Id.*

68. On October 29, 2010, the Court granted MGA's motion for a new trial on all claims and issues, finding that the errors relating to whether the employment agreement covered ideas and work outside the scope of Bryant's employment at Mattel were "central, significant, pervasive, and likely determinative of the outcome of all phase 1 claims. They were also so intertwined with the remaining issues that a miscarriage of justice may occur if they are separately retried." 04-9049 Dkt. 9021; *see also* 11-1063 Dkt. 29 at 3:24 ("indistinct and inseparable claims were all infected by instructional error.").

69. Applying proper legal standards and jury instructions, the jury after retrial agreed with MGA. *See* Dkt. 10518.

D. April 21, 2011 Jury Verdict in MGA's Favor

70. On April 21, 2011, after a rigorous 3-month retrial, the jury returned a verdict for MGA and awarded $88.5 million in damages to MGA, and found zero