Deck et al v. Spartz, Inc.			Doc. 1
1	GLENN W. PETERSON, ESQ. (SBN 126173)		
2	MILLSTONE PETERSON & WATTS, LLP		
	Attorneys at Law 2267 Lava Ridge Court, Suite 210		
3	Roseville, CA 95661		
4	Telephone No: (916) 780-8222		
5	Fax No: (916) 780-8775		
6	Attorneys for Plaintiff		
	Adorian Deck; Marylou Deck, as Legal Guardian of Adorian Deck		
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8	UNITED STATES DISTRICT COURT		
9	EASTERN DISTRICT OF CALIFORNIA		
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)	
11	ADORIAN DECK; MARYLOU DECK, as	Case No.	
12	Legal Guardian of ADORIAN DECK, a minor	COMPLAINT FOR LANHAM ACT	
13	Plaintiffs,	VIOLATIONS, RESCISSION OF WRITTEN CONTRACT AND RELATED	
14	vs.	CLAIMS	
	SPARTZ, INC., A Delaware Corporation; and	,)	
15	DOES 1 through 10, inclusive,) JURY DEMAND	
16	Defendants.) JURY DEMAND	
17))	
18	Plaintiffs, Adorian Deck and Marylou Deck, as Legal Guardian of Adorian Deck by and		
19	through their undersigned counsel, hereby file this Complaint with Jury Demand against the above		-
20	named Defendants, and Does 1 through 10, inclusive, and complain and allege as follows:		
21	JURISDICTION AND VENUE		
22	1. This is an action for trademark infringement and false designation of origin/false		e
23	advertising under the Lanham Act, 15 U.S.C. §1125, and pendent claims under state law. This Court		:t
24	has subject matter jurisdiction over the matters complained of under 28 U.S.C. §1331, §1338(a) and		d
25	§1367. Additionally, diversity jurisdiction also exists pursuant to 28 U.S.C. § 1332(a)(1), since this		s
26	action involves citizens of different states and Plaintiff's claims for relief herein exceed the sum or		
27	value of \$75,000.		
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- 2. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(a), (b) and (c), as one or more Defendants have committed acts of infringement and unfair competition in this judicial district, and a substantial part of the events or omissions giving rise to the claims occurred, or a substantial part of property that is the subject of the action is situated in this district.
- 3. Plaintiff further alleges on information and belief that the Defendants, acting in collusion/conspiracy with one another and under the common direction and control of Emerson Spartz, make sales, solicit sales or engage in related business activities in Northern California, and serve its markets with products or services that infringe Plaintiff's rights as hereinafter alleged.

PARTIES

- 4. Plaintiff, Adorian Deck, resides in Nevada County, California. He was born on May 22, 1993 and, therefore, will not reach the age of majority under California law until May 22, 2011. This action is, therefore, brought by his mother as legal guardian, who will be supplanted as the representative plaintiff when Adorian reaches adult age next month.
- 5. Upon information and belief, Defendant Spartz, Inc. is a Delaware corporation with its principal business office in LaPorte, Indiana. Plaintiff further alleges upon information and belief that Spartz, Inc. acts in close concert with other business associations, form unknown, that are completely controlled by Emerson Spartz and possibly his spouse and perhaps other partners/accomplices (hereinafter "Defendants").
- 6. Defendants Does 1 through 10, inclusive, are sued under these fictitious names because Plaintiff is presently ignorant of their true names and capacities. Plaintiff will seek to amend this Complaint to set forth their true names and capacities when ascertained. Plaintiff is informed and believes, and on that basis alleges that each of these fictitiously-named defendants is responsible in some manner for the occurrences herein alleged in that Plaintiff's damages as herein alleged were proximately caused by such defendants. Allegations herein applicable to one or more named defendant or categorically "Defendants" are also applicable to and shall include Does 1 through 10, inclusive, unless specifically averred otherwise.

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7. In doing the acts herein alleged, unless otherwise stated, each of the defendants, including those fictitiously-named, acted as the alter ego, agent, representative or co-conspirator of each of the others, and in so doing, was acting within the course and scope of such agency, representation or conspiracy. Alternatively, each of the defendants is vicariously liable for the other defendants' misconduct herein alleged by ratification and acceptance of benefits from same.

GENERAL ALLEGATIONS

- 8. In September 2009, Plaintiff created a Twitter feed [@OMGFacts]. The feed retrieved and republished titillating, sometimes trivial, factual tidbits about such subjects as celebrities, pop culture, world history and commerce. The feed quickly amassed more than 300,000 followers, including many celebrities. It became the 18th most active Twitter trend in 2009, and remained among the top ten trending terms until January 2010.
- 9. At all times since September 27, 2009, Plaintiff has been using "OMG Facts" to denote his distinctive on line products and services, such that "OMG Facts" has become publicly associated exclusively with Plaintiff, and Plaintiff has established protectable common law trademark rights therein. Herein, references to Plaintiff's "OMG Facts" trademark shall be referred to as "Plaintiff's Mark."
- In approximately February 2010, Plaintiff was approached by Emerson Spartz, who 10. sought Plaintiff's permission to commence running a web site and YouTube channel utilizing Plaintiff's Mark. Spartz made a proposal that he and Plaintiff enter a joint venture agreement, the purpose of which would be to share revenues generated by exploitation of Plaintiff's Mark in connection with various on line goods/services, all built around Plaintiff's original OMG Facts Twitter feed and its underlying concept. On the strength of such a joint venture, Plaintiff was prepared to license Plaintiff's Mark for the benefit of the joint venture. On that basis, Plaintiff granted permission for Spartz to build a web site and YouTube channel to operate under Plaintiff's Mark and his OMG Facts concept. After obtaining said permission, Spartz built the web site and YouTube channel through his corporation, defendant Spartz, Inc. However, unbeknown to Plaintiff,

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what Spartz would later present as a joint venture agreement turned out to be nothing more than an artifice of self-dealing.

- On or about April 27, 2010, Plaintiff was induced to sign, and did sign a written 11. contract with defendant Spartz, Inc., entitled "Contractor Agreement" ("Contract"), which Plaintiff understood represented the aforementioned joint venture agreement. However, the Contract is in fact a predatory instrument, quite obviously designed to misappropriate Plaintiff's intellectual property and the fruits of his creative efforts, and pay him little or nothing in return. For example, the Contract purports to retain Plaintiff "to perform certain services to further Internet-related project work in exchange for compensation." The so-called "compensation" was to come from sharing of revenues generated by the OMG Facts YouTube channel. Plaintiff was to receive 30% of those revenues. To date, nearly a year later, Plaintiff has received less than \$100 in compensation from Spartz, and has received no accounting or other disclosure of the revenues associated with the YouTube channel. A true copy of the Contract is attached hereto as Exhibit "A." The Contract expires on April 27, 2011.
- 12. The Contract also provided that Plaintiff receive 100% of revenues from the sale of his T-shirts on the OMG Facts website. What the Contract did not address, however, was the fact that Spartz would have complete control of the OMG Facts website and retain 100% of its revenues, and not be obligated to share or disclose those revenues to Plaintiff.
- 13. Even more disturbing than what the Contract omitted to state, is what it purports to state. For example, in Section 3.B, the Contract purports to state that Plaintiff assigned to Spartz "any copyright in any existing or future works. . . ," including those that he made prior to execution of the Contract, and including those that he thereafter made during its term. Thus, apparently for less than \$100, the Contract purports that Plaintiff conveyed all of his preexisting intellectual property to Spartz, and any corresponding rights Plaintiff had or may now have in OMG Facts. On that basis alone, the Contract is unconscionable and unenforceable under applicable law.
- 14. The Contract further calls for litigation remedies to be pursued exclusively in courts located within the State of Indiana, another provision which is unfairly burdensome upon Plaintiff, ' / /

and intended to be. This provision was designed to discourage, if not economically bar Plaintiff from pursuing his rights against Spartz.

15. Plaintiff recently discovered that Spartz now claims exclusive rights to the service mark "OMG Facts" dating back to February 1, 2010, a claim that is both legally and factually incorrect, but nonetheless injurious to Plaintiff's rights, and further indicative of Spartz's predatory intent.

FIRST CAUSE OF ACTION (Rescission of Contract Under California Law)

16. Plaintiff incorporates by this reference each and every allegation contained in Paragraphs 1 through 15 as if set forth fully herein.

- 17. The Contract, because Plaintiff was a minor when it was executed, is subject to California Family Code section 6710, which permits Plaintiff to now disaffirm it as a matter of law. Plaintiff has opted to disaffirm the Contract, and has earlier provided notice of his intent to disaffirm in writing to Spartz. Plaintiff intends the filing of this action to be further notice of his intent to disaffirm.
- 18. Plaintiff seeks a judicial declaration sufficient to rescind the Contract, and sufficient to restore the benefits received by Spartz and to return Plaintiff to his situation as it existed immediately prior to the making of the Contract. Such restoration includes, without limitation, restoring the revenues received by Spartz during the Contract term and returning to Plaintiff all of the intellectual property that Plaintiff possessed prior to its execution, including all trademarks, copyrights, domain names, and other intellectual properties. It further includes such preliminary and permanent injunctive relief as may be necessary or appropriate to ensure full restoration of Plaintiff's rights and properties.

SECOND CAUSE OF ACTION (False Designation Of Origin, 15 U.S.C. § 1125(a)(1)(A))

19. Plaintiff incorporates by this reference each and every allegation contained in Paragraphs 1 through 15 as if set forth fully herein.

- 20. Because Plaintiff's explicit or implied permission has now been revoked, Defendants no longer have any right to use Plaintiff's Mark, and no longer have the right to operate the website and YouTube channel. By Defendants' continuing unauthorized use, claim of ownership, and/or offers for sale under Plaintiff's Mark, and similar derivations thereof, Defendants have used and will continue to use a false designation of origin that is likely to cause confusion, mistake, or deception as to affiliation, connection, or association of Defendants with Plaintiff and is also likely to cause confusion as to the origin, sponsorship, or approval of Defendants' products, services or commercial activities by Plaintiff, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).
- 21. Because of Defendants' aforementioned conduct, Plaintiff has been irreparably harmed in his business enterprises. Moreover, Plaintiff will continue to suffer irreparable harm unless Defendants are restrained from making false designations of origin, false descriptions, or misrepresentations regarding the Defendants' products and/or services.
- 22. Since Defendants' continuing infringement is willful and intentional, Plaintiff is entitled to recover the actual damages it has sustained, according to proof at trial, and is further entitled to an award of enhanced damages for willful infringement, in addition to an award of costs and attorneys fees pursuant to section 35(a) of the Lanham Act. In addition, Plaintiff is entitled to recover Defendants' profits and reasonable royalties as damages.

THIRD CAUSE OF ACTION (False Advertising, 15 U.S.C. §1125(a)(1)(B))

- 23. Plaintiff hereby incorporates by this reference each and every allegation contained in paragraphs 1 through 22 as if set forth fully herein.
- 24. Plaintiff alleges on information and belief that Defendants have falsely stated and advertised the source/origin of their products and services in a manner intended to pass off their products/services as those of Plaintiff, or to otherwise benefit from deception or mistake among consumers whereby consumers would identify Defendants' products as those manufactured, sold, licensed, or otherwise endorsed by Plaintiff.

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- 25. By engaging in these activities, Defendants have engaged in false advertising under 15 U.S.C. §1125(a)(1)(B) and Defendants' conduct has created deception among consumers and members of the general public as to nature, characteristics, or qualities of their products/services.
- 26. Plaintiff has suffered actual damages as a result of Defendants' false statements in an amount to be proven at trial. Additionally, the harm to Plaintiff arising from Defendants' acts is not fully compensable by money damages. Plaintiff has suffered, and continues to suffer, irreparable harm that has no adequate remedy at law and that will continue unless Defendants' conduct is preliminarily and permanently enjoined.
- 27. Defendants' conduct as described above was willful and intentional. As a result, Plaintiff is further entitled to enhanced damages and an award of costs and attorneys fees under section 35(a) of the Lanham Act. In addition, Plaintiff is entitled to recover Defendants' profits and reasonable royalties as damages.

FOURTH CAUSE OF ACTION

(Unfair Competition, False Advertising; Cal. Bus. & Prof. Code §§ 17200, et seq.)

- 28. Plaintiff hereby incorporates by this reference each and every allegation contained in paragraphs 1 through 25 as if set forth fully herein.
- 29. Defendants' aforementioned conduct is a further violation of California law, namely, California Business and Professions Code section 17500, which provides:

17500. It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein,

or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both that imprisonment and fine.

- 30. By engaging in the foregoing activities, Defendants have engaged in unfair competition as defined by California Bus. & Prof. Code §§17200, et seq. and Defendants' wrongful use of Plaintiff's Mark and violation of the aforementioned laws and regulations represents unfair, deceptive, and misleading advertising in violation of California Bus. & Prof. Code §§17500, et seq.
- 31. Plaintiff has suffered actual injury, including loss of revenue and good will, as a result of Defendants' unfair business practices and acts of unfair competition. Plaintiff has suffered, and continues to suffer, irreparable harm that has no adequate remedy at law and that will continue unless Defendants' conduct is preliminarily and permanently enjoined.

WHEREFORE, Plaintiff prays judgment as follows:

- a. That the Court enter a judgment sufficient to rescind the Contract, and sufficient to restore the benefits received by Spartz and to return Plaintiff to his situation as it existed immediately prior to the making of the Contract. Such restoration includes, without limitation, restoring the revenues received by Spartz during the Contract term and returning to Plaintiff all of the intellectual property that Plaintiff possessed prior to its execution. It further includes such preliminary and permanent injunctive relief as may be necessary or appropriate to ensure full restoration of Plaintiff's rights and properties associated with Plaintiff's Mark;
- b. That the Court enter judgment that Defendants have falsely designated an origin, affiliation or sponsorship by or with Plaintiff's trademarks and trade dress under the Lanham Act, 15 U.S.C. §1125(c);
- c. That the Court enter judgment that Defendants have competed unfairly pursuant to the Lanham Act, 15 U.S.C. §1125(a), and the common law, and be permanently enjoined from continuing such conduct;
- d. That the Court enter judgment that Defendants have competed unfairly under Cal. Bus. & Prof. Code §§17200, et seq. and advertised falsely under §§ 17500,