

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NOTICE OF OPPOSITION

In the Matter of Application No. 78/168,235
Mark: Pointing Clown Graphic
Application Filed: September 26, 2002
Application Classes: 35 & 39
Published in the Official Gazette at TM 170
On December 9, 2003



04-05-2004
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

SONY COMPUTER ENTERTAINMENT
AMERICA INC.,

Opposition No.

Opposer,

v.

FROSTY TREATS, INC.,

Applicant.

TO THE COMMISSIONER OF PATENTS AND TRADEMARKS:

SONY COMPUTER ENTERTAINMENT AMERICA INC. (hereinafter
“Opposer”), a Delaware corporation with its principal place of business at 919 East
Hillsdale Blvd., Foster City, CA 94404, believes that it will be damaged by the
registration of the alleged design mark of a pointing clown (hereinafter “Pointing Clown
Graphic”) shown in Application No.78/168,235 for the identified services in International
Classes 35 and 39 whose central focus is the distribution of “frozen foods, ice cream and
confections”, and Opposer hereby opposes same.

1. Opposer believes that registration is improper for four reasons: (i) The Board should determine that Applicant's true "mark" is the composite which appears on the specimen of use that Applicant submitted with the application, i.e., the Pointing Clown Graphic and the child safety message to which the clown is pointing ("SAFETY CLOWN SAYS...CROSS TO THE REAR"), and the Board should find that the composite functions merely as a child safety message and does not function as a mark to identify and distinguish Applicant's services; (ii) In the event the Board determines that Applicant's "mark" is the Pointing Clown Graphic by itself, the Board should find that the alleged mark is inherently non-distinctive when applied to goods and services related to "frozen foods, ice cream and confections", and lacks acquired distinctiveness; (iii) Furthermore, the Board should find that the alleged mark as shown on the drawing page of the application (Pointing Clown Graphic by itself) is a mutilation or incomplete representation of the mark actually being used on the specimen of record (Pointing Clown Graphic and child safety message); and (iv) Finally, the Board should find that the specimen of record is improper for the services recited in International 39.

2. Opposer and its predecessors (hereinafter collectively "Opposer") have for many years marketed and sold in the United States a wide range of video game and video game hardware products under the world famous PLAYSTATION and PLAYSTATION 2 marks including, but not limited to, the PLAYSTATION and PS ONE video game consoles and the PLAYSTATION 2 computer entertainment system (hereinafter collectively "the PLAYSTATION systems"). Additionally, Opposer has for many years

published, marketed and sold in the United States its own video games for the PLAYSTATION systems in the United States under various game marks, and has licensed the right to others to publish, market and sell in the United States their own video games for the PLAYSTATION systems.

3. Since at least as early as November 1995, Opposer has published, marketed and sold in interstate commerce in the United States six distinct video games under the trademarks TWISTED METAL, TWISTED METAL: BLACK and TWISTED METAL: SMALL BRAWL which utilize various images of clowns in connection with vehicles including, but not limited to, vehicles associated with ice cream. Opposer is not engaged in the same or similar business as Applicant.

4. On September 26, 2002, Applicant filed U.S. Application No. 78/168,235 for its Pointing Clown Graphic in International Class 35 for "wholesale distribution of frozen foods, ice cream and confections" and in International Class 39 for the "leasing of commercial vehicles" for the distribution of the same goods. The September 26, 2002 filing date for the application comes nineteen years and seven months after the February 1983 date of first use alleged in the application. Upon information and belief, the only explanation for Applicant's belated discovery of its alleged mark was its desire to manufacture additional claims in a federal court action discussed below that it was intending to bring against Opposer.

5. In the body of the application, Applicant stated: "(t)he mark consists of the head of a clown.". No claim was made for the clown's safety message. With the

application, Applicant submitted a drawing page displaying its alleged mark as shown below:



6. Also, with the application, Applicant submitted a specimen of its use of its alleged mark (hereinafter "specimen of record") as shown below:



The specimen reveals a composite of a clown pointing to the child safety message "SAFETY CLOWN SAYS...CROSS TO THE REAR" with an arrow pointing to the rear of Applicant's vehicle. The overall impression created by the specimen of record is that of a clown directing children to move toward the back of Applicant's vehicle before attempting to cross the street. In the later-filed federal court action discussed below, Applicant would change its claim of rights to include a child safety message substantially similar to that which appears on this specimen of record.

7. In the application, Applicant requested registration of its Pointing Clown Graphic on the basis of Section 2(f) of the U.S. Trademark Act claiming that the mark "has become distinctive of the goods/services through Applicant's substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement." By seeking registration through a claim of acquired distinctiveness, Applicant has acknowledged that the use of its Pointing Clown Graphic in connection with the sale of services related to "frozen foods, ice cream and confections" is inherently non-distinctive¹ and cannot be registered as a service mark without proof that it has acquired distinctiveness.

8. On the same day Applicant filed the application for the Pointing Clown Graphic it also filed an application for a companion mark "Frosty Treats" (U.S. Application No. 78/168,231). As evidenced by the printout from the database of the U.S.

¹ This application was published for opposition without a 2(f) limitation. The application history provides no explanation why Applicant was allowed to withdraw this limitation and thereby expand its claim of right by the Examining Attorney. Opposer submits that the Examining Attorney's decision on this issue was an error.

Patent and Trademark Office attached as Exhibit A hereto, the Examining Attorney approved Applicant's companion application for publication on March 20, 2003.²

9. One day later, on March 21, 2003, Applicant and its related companies filed a state court complaint against Opposer in the Circuit Court of Jackson County Missouri for trademark infringement involving Applicant's alleged "Frosty Treats" mark and a reinvented clown graphic that is discussed below. The stamped cover page showing the March 21, 2003 filing date is attached as Exhibit B hereto. In the state court complaint, Applicant asserted among other things, that Opposer's use of a clown character in its video games was an infringing use of the reinvented clown graphic discussed below.

10. The state lawsuit was subsequently removed to federal district court in Kansas City, Missouri where it is currently pending (Frosty Treats, Inc., et al., v. Sony Computer Entertainment America Inc., et al., No. 03-0378-CV-W-SOW, W.D. Mo.). Attached as Exhibit C hereto is Opposer's first amended complaint in the federal court action (hereinafter "federal complaint"). In Paragraph 14 of the federal complaint (Exhibit C), Opposer asserted rights in the "SAFETY CLOWN trademark as shown in Exhibit A" which is shown below:

² This application is the subject of Opposition No. 91157867 filed by Opposer which was instituted by the Board on September 26, 2003.



The claim of rights represented by this exhibit includes both the Pointing Clown and the child safety message "SAFETY CLOWN SAYS: WATCH CARS-CROSS AT REAR." This child safety message includes the additional warning "WATCH CARS" which was not present in the specimen of record submitted with the application. In Paragraph 2 of the federal complaint (Exhibit C), Applicant identified this composite shown above as its "SAFETY CLOWN logo mark."

11. Thus, the representation made by Applicant in its federal court filing stands in direct contradiction to the representation it had previously made to the U.S. Patent and Trademark Office that its "mark" was merely the depiction of "the head of a clown" without any reference to the child safety messages "SAFETY CLOWN SAYS...CROSS TO THE REAR" and "SAFETY CLOWN SAYS: WATCH CARS-CROSS AT REAR".

12. There is no evidence in the record of this application that Applicant ever informed the Examining Attorney of the federal court action or of the shift in its ownership claim from simply “the head of a clown” to the composite of the Pointing Clown Graphic and the child safety messages “SAFETY CLOWN SAYS...CROSS TO THE REAR” and “SAFETY CLOWN SAYS: WATCH CARS-CROSS AT REAR”. Because of Applicant’s contradictory representations, it is critical to the interests of justice that the Board review the full record and determine for itself the proper identification of Applicant’s alleged mark.

13. Opposer has denied infringement in the federal action, denied the existence of a likelihood of confusion and has sought a declaration that Applicant’s alleged mark is invalid and unenforceable. Upon information and belief, Applicant’s sole reason for filing the subject application was to improperly manufacture a new but non-meritorious federal cause of action for inclusion in the lawsuit. The inclusion of such a cause of action so lacking in merit will drive up the cost and inconvenience of the litigation.

Count One: Applicant’s Alleged Mark Does Not Function as a Mark to Identify and Distinguish Applicant’s Services

14. Applicant’s “mark” is the composite of the pointing clown and the child safety message to which the clown is pointing. The overall impression created by this composite is that of a “safety clown” directing children to move to the back of Applicant’s vehicle before crossing the street (“CROSS TO THE REAR”). Consumers are accustomed to seeing “safety clowns” providing safety messages in various forms.

They would understand Applicant's composite in this context, as a safety message only, and not as an identification of the source of particular services.

15. Based on the above, the Board should determine that Applicant's true "mark", i.e., the composite discussed above, functions merely to provide a child safety message and does not function as a mark to identify and distinguish Applicant's services. Therefore, the opposition should be dismissed.

Count Two: Applicant's Alleged Mark Is Inherently Non-Distinctive and Lacks Acquired Distinctiveness

16. In the event the Board determines that Applicant's "mark" is the Pointing Clown Graphic by itself, Opposer submits that the use of a clown graphic is such a common form of ornamentation for goods and services related to "frozen foods, ice cream and confections" that Applicant's mark is inherently non-distinctive and lacks acquired distinctiveness. The use of a clown graphic is a common form of ornamentation for the sale of goods and services related to "frozen foods, ice cream and confections." Therefore, such graphic devices are extremely weak as indications of the source of origin for particular goods and services. Because of this weakness, substantial proof is required to support a claim of acquired distinctiveness, if such a claim can be made at all.

17. Applicant's evidence of acquired distinctiveness consists solely of the declaration made in the application of "substantially exclusive" use for at least five years. There is no evidence of purchaser recognition of the Pointing Clown Graphic as Applicant's exclusive mark for the recited services and the goods related thereto. Nor is

there any evidence of the amount and types of advertising Applicant has used to generate such recognition.

18. In view of the extremely common nature of Applicant's alleged mark, Applicant's proposed proof of acquired distinctiveness should be rejected as insufficient. The application should be denied registration on the grounds that the Pointing Clown Graphic is an inherently non-distinctive identifier of Applicant's services whose central focus is "frozen foods, ice cream and confections", and the graphic lacks acquired distinctiveness.

Count Three: The Mark Shown in the Drawing Is A Mutilation of the Mark as Shown On the Specimen

19. The mark that appears on the drawing page of the application is the Pointing Clown Graphic by itself. In contrast, the mark on the specimen of record is the composite of the Pointing Clown Graphic and the child safety message to which the clown is pointing: "SAFETY CLOWN SAYS...CROSS TO THE REAR." The pointing clown and the child safety message to which the clown is pointing create a single, unified impression, if any, in the minds of consumers. The pointing clown by itself cannot create a separate impression apart from the message. Therefore, Applicant's attempt on the drawing page to sever the clown from his message is a mutilation or incomplete representation of Applicant's mark as shown on the specimen of record.

20. Based on the above, the current specimen should be rejected and Applicant should be required to provide new specimens which are consistent with the alleged mark as it appears on the drawing page, and which were in use in commerce at

least as early as September 26, 2002, the filing date of the application. If Applicant fails to do so, the application should be refused.

Count Four: Applicant has Submitted an Improper Specimen of Use for the Recited Services in International Class 39

21. With regard to the recited services in International Class 39, namely, the “leasing of commercial vehicles”, Applicant has failed to submit an adequate specimen in support of such services. According to 37 C.F.R. § 2.56 (b)(2), “(a) service mark specimen must show the mark as actually used in the sale or advertising of the services,” in this instance, the sale to the drivers/lessees of leasing services or the advertising to the drivers/lessees of such services. As a specimen of use for the recited services in this class, Applicant has submitted a photograph of the Pointing Clown Graphic as it is alleged to appear on a vehicle from which Applicant’s “frozen foods, ice cream and confections” are distributed to the public.

22. The specimen of record does not evidence that commercial leasing services are available for potential drivers/lessees nor does it provide any information with regard to how a potential driver/lessee viewing the specimen might go about leasing a commercial vehicle. In fact, there is no mention of leasing at all. As a result of this improper submission, Applicant has failed to meet the specimen requirements of 37 C.F.R. § 2.56(b)(2). The application with regard to International Class 39 is void for failure to submit an acceptable specimen, resulting in the abandonment of the application for this class.

23. Opposer has a present and future right to use of a clown character in association with a vehicle in its video games. Opposer is likely to be damaged by the registration of Applicant's Pointing Clown Graphic because the registration of this merely functional and non-distinctive graphic will tend to prejudice Opposer by increasing the expense and inconvenience of defending non-meritorious claims. Furthermore, Opposer has a real interest in this proceeding as its outcome will directly affect the scope and duration of the pending litigation with Applicant. In the litigation, Applicant seeks to enjoin sales of Opposer's existing products because of Opposer's use in its existing products of its clown character.

24. Applicant seeks registration only for use in the pending litigation against Opposer. While Applicant cannot prove infringement in the litigation, the added expense and inconvenience from the addition of a new claim will harm Opposer. Opposer will obviously be harmed in the unlikely, and ultimately erroneous, event that Applicant is able to obtain an injunction against Opposer's existing products on the basis of a federal registration in the Pointing Clown Graphic. Applicant's filing of the aforementioned lawsuit as soon as its companion application was approved for publication reveals its true intent to claim rights far beyond the scope of wholesale distribution and commercial leasing and instead claim exclusivity in a clown graphic for all uses related to "frozen foods, ice cream and confections". Not only would the registration of this merely functional and non-distinctive graphic damage Opposer, it would also be a source of damage and injury to the trade in which Applicant is engaged who use and understand a clown graphic as a common form of ornamentation for the sale of goods and services related to "frozen foods, ice cream and confections". Said trade would be required to

abandon such ornamental use and substantially modify its marketing, advertising and communications or face additional lawsuits by Applicant, all to the great expense and detriment of the trade and the public.

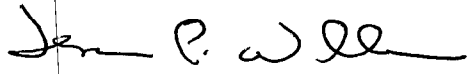
WHEREFORE, Opposer prays that Application No. 78/168,235 for Applicant's alleged mark in International classes 35 and 39 be denied and refused registration as incapable of functioning as a mark or being inherently non-distinctive as a mark and lacking acquired distinctiveness. In the alternative, Applicant should be ordered to provide new specimens showing the mark as it appears on the drawing page of the application which were in use in commerce at least as early as September 26, 2002, the filing date of the application. Finally, the application with regard to International Class 39 is void for failure to submit an adequate specimen, resulting in the abandonment of the application for this class.

Please recognize as attorneys for Opposer, Riley R. Russell, Vice President, Legal and Business Affairs, Jennifer Y. Liu and James P. Williams, Directors of Legal & Business Affairs, Sony Computer Entertainment America Inc., a wholly-owned subsidiary of Sony Computer Entertainment Inc., 919 East Hillsdale Boulevard, Foster City, California, 94404. All are members of the Bar of the State of California. Please address all communications to James P. Williams at Sony Computer Entertainment America Inc.

Please deduct the amount of \$600 and any other necessary fees for this two-class opposition from Deposit Account 193196 in the name of Sony Interactive Entertainment Inc.

Dated: Foster City, California
April 5, 2004

By:



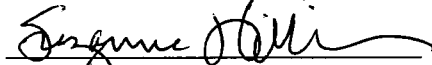
Riley R. Russell
Jennifer Y. Liu
James P. Williams

Attorneys for Opposer
Sony Computer Entertainment America Inc.

CERTIFICATE OF MAILING

"Express Mail" mailing label number EL884936648US

I hereby certify that this NOTICE OF OPPOSITION is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service in an envelope addressed to the Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514, on April 5, 2004


Suzanne Williams



Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2004-03-29 19:10:59 ET

Serial Number: 78168231

Registration Number: (NOT AVAILABLE)

Mark (words only): FROSTY TREATS

Standard Character claim: No

Current Status: An opposition is now pending at the Trademark Trial and Appeal Board.

Date of Status: 2003-09-26

Filing Date: 2002-09-26

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 116

Attorney Assigned:
CARROLL DORITT Employee Location

Current Location: 657 -Pre-Publication Final Review

Date In Location: 2003-07-08

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Frosty Treats, Inc.

Address:

Frosty Treats, Inc.
620 East Linwood Boulevard
Kansas City, MO 641091718
United States

Legal Entity Type: Corporation

State or Country of Incorporation: Missouri

Phone Number: 816-931-9969

GOODS AND/OR SERVICES

wholesale distributorships featuring frozen foods, ice cream, and confections

International Class: 035**First Use Date:** 1991-03-00**First Use in Commerce Date:** 1991-03-00**Basis:** 1(a)

Leasing of commercial vehicles

International Class: 039**First Use Date:** 1991-03-00**First Use in Commerce Date:** 1991-03-00**Basis:** 1(a)

ADDITIONAL INFORMATION

(NOT AVAILABLE)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

2003-09-26 - Opposition instituted for Proceeding

2003-06-05 - Extension of time to oppose - Filed

2003-05-13 - Published for opposition

2003-04-23 - Notice of publication

2003-03-20 - Approved for Pub - Principal Register (Initial exam)

2003-03-06 - Examiners amendment e-mailed

2003-03-05 - Case file assigned to examining attorney

CONTACT INFORMATION

Correspondent (Owner)

David R. Barnard (Attorney of record)

DAVID R. BARNARD

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2345 GRAND AVE., SUITE 2500

KANSAS CITY, MO 64108-2618

Phone Number: 816-292-2000

Fax Number: 816-292-2001

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE, MISSOURI

FROSTY TREATS, INC., FROSTY
TREATS OF LOUISVILLE, INC.,
FROSTY TREATS WHOLESALE,
INC. AND FROSTY TREATS OF
ATLANTA, INC.,

Plaintiffs,

v.

SONY COMPUTER
ENTERTAINMENT AMERICA, INC.,
SONY CORPORATION, AND
GEORGE GOEHRING, CAROL
GOEHRING AND SCOTT GOEHRING
D/B/A GAME X CHANGE,

Defendants.

03CV207329

BDS

Case No. _____

Division **DIVISION**
17

Service Instructions:

Sony Computer Entertainment
America, Inc., Registered Agent
in California is: Corporation Service
Company, 2730 Gateway Oaks Drive,
Suite 100, Sacramento, CA 95833

George Goehring
2010 Wayhaven Drive
West Plains, MO 65775

Carol Goehring
2010 Wayhaven Drive
West Plains, MO 65775

Scott B. Goehring
4409 Noland Road, Apt. C
Independence, MO 64055

PETITION

Plaintiffs Frosty Treats, Inc., Frosty Treats of Louisville, Inc., Frosty Treats Wholesale,
Inc. and Frosty Treats of Atlanta, Inc. (collectively, "Plaintiffs" or "Frosty Treats") state the

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FROSTY TREATS, INC., FROSTY
TREATS OF LOUISVILLE, INC.,
FROSTY TREATS WHOLESALE,
INC. AND FROSTY TREATS OF
ATLANTA, INC.,

Plaintiffs,

v.

SONY COMPUTER
ENTERTAINMENT AMERICA, INC.,
SONY CORPORATION, AND
GEORGE GOEHRING, CAROL
GOEHRING AND SCOTT GOEHRING
D/B/A GAME X CHANGE,

Defendants.

Case No. 03-0378-CV-W-SOW

FIRST AMENDED COMPLAINT

Plaintiffs Frosty Treats, Inc., Frosty Treats of Louisville, Inc., Frosty Treats Wholesale, Inc. and Frosty Treats of Atlanta, Inc. (collectively, "Plaintiffs" or "Frosty Treats") state the following for their Petition against defendants Sony Computer Entertainment America, Inc., Sony Corporation (collectively, "Sony Defendants") and George Goehring, Carol Goehring and Scott Goehring d/b/a Game X Change (collectively, "Game X Change Defendants"):

1. This is an action at law and in equity for trademark infringement and dilution, injury to business reputation, unfair competition, business defamation, and deceptive trade practices arising under the Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.* (1994) ("Lanham Act"); the anti-dilution laws of the several states, including the Missouri Anti-Dilution Statute, Mo. Rev. Stat. § 417.061; the fair business practices and unfair and deceptive trade practices act

of the several states; the common law; and the misappropriation of Plaintiffs' name and logo and the unauthorized publicity of Plaintiffs' name and logo.

2. Defendants are offering for sale and selling a series of video games, including Twisted Metal, Twisted Metal II, Twisted Metal III, Twisted Metal IV, Twisted Metal Black and Twisted Metal Small Brawl (collectively "Twisted Metal games"), that are confusingly similar imitations of Plaintiffs' FROSTY TREATS mark, SAFETY CLOWN logo mark and SAFETY CLOWN trade dress. Defendants' video games are not manufactured by Plaintiffs, nor has Defendants' use of Plaintiffs' name and logo been authorized by Plaintiffs in any way. Defendants are not connected with or affiliated with Plaintiffs in any way. Defendants' merchandise is likely to cause confusion and to deceive consumers and the public regarding its source, dilutes and tarnishes the distinctive quality of Plaintiffs' marks and trade dress, and defames and disparages Plaintiffs' business.

JURISDICTION AND VENUE

3. This Court has personal jurisdiction over Defendants because they have distributed or sold infringing merchandise within this State, have engaged in acts or omissions within this State causing injury, have engaged in acts or omissions outside of this State causing injury within this State, have manufactured or distributed products used or consumed within this State in the ordinary course of trade, or have otherwise made or established contacts with this State sufficient to permit the exercise of personal jurisdiction. This Court is the proper venue because defendants George Goehring and Carol Goehring do business in this county, and because defendant Scott B. Goehring resides and does business in this county, and because part of the events and actions of the Sony defendants and the Goehring defendants giving rise to Plaintiffs' claims occurred in this county.

THE PARTIES

4. Plaintiff Frosty Treats, Inc. is a Missouri corporation with its principal place of business at 620 East Linwood, Kansas City, Jackson County, Missouri 64109, and it has offices located in St. Louis, Missouri; Ferguson, Missouri; Kansas City, Missouri; Omaha, Nebraska; and Memphis, Tennessee.

5. Plaintiff Frosty Treats of Louisville Inc. is a Missouri corporation having its principal place of business at 620 East Linwood, Kansas City, Jackson County, Missouri 64109, and it has offices in Louisville, Kentucky; Lexington, Kentucky; and Evansville, Indiana.

6. Plaintiff Frosty Treats Wholesale Inc. is a Missouri corporation with its principal place of business at 620 East Linwood, Kansas City, Jackson County, Missouri 64109, and it has offices located in New Orleans, Louisiana.

7. Plaintiff Frosty Treats of Atlanta, Inc. is a Missouri corporation with its principal place of business located at 620 East Linwood, Kansas City, Jackson County, Missouri 64109, and it has offices located in Atlanta, Georgia.

8. Defendant Sony Computer Entertainment America, Inc. is a Delaware corporation having its office and principal place of business in Foster City, California. This defendant's registered agent for service of process is Corporation Service Company, 2730 Gateway Oaks Drive, Suite 100, Sacramento, California 95833.

9. Defendant Sony Corporation is a Japanese corporation having its office and principal place of business at 7-35, Kitashinagawa 6-chome, Shinagawa-ku, Tokyo, 141-0001, Japan.

10. Defendant George Goehring d/b/a Game X Change, with offices at 4474 S. Noland Road, Independence, Missouri and 516 S.E. Hwy 291, Lee's Summit, Missouri, resides at 2010 Wayhaven Drive, West Plains, Missouri 65775.

11. Defendant Carol Goehring d/b/a Game X Change, with offices at 4474 S. Noland Road, Independence, Missouri and 516 S.E. Hwy 291, Lee's Summit, Missouri, resides at 2010 Wayhaven Drive, West Plains, Missouri 65775.

12. Defendant Scott B. Goehring d/b/a Game X Change, with offices at 4474 S. Noland Road, Independence, Missouri and 516 S.E. Hwy 291, Lee's Summit, Missouri, resides at 4409 Noland Road, Apt. C, Independence, Missouri 64055.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

13. Frosty Treats is currently, and for years has been, the single largest lessor of custom built ice cream trucks and wholesale distributor of ice cream products in conjunction with ice cream truck street vending in the United States.

14. Approximately 30 years ago, Frosty Treats' corporate predecessor began placing a clown head logo on the side of its ice cream trucks and using it as a trademark. On or around 1983, Frosty Treats' corporate predecessor changed the clown design to the current "SAFETY CLOWN" trademark as shown in Exhibit A. In conjunction with its use of the SAFETY CLOWN mark, Frosty Treats' corporate predecessor began using the trademark to specifically promote itself as the most safety conscious ice cream truck company in the United States.

15. In 1991, Plaintiff Frosty Treats, Inc. purchased substantially all of the assets of its corporate predecessor, including the SAFETY CLOWN mark and associated goodwill.

16. In addition, in 1991, Plaintiff Frosty Treats, Inc. began using the FROSTY TREATS wordmark as shown in Exhibit B in U.S. commerce in conjunction with its ice cream truck leasing and wholesale ice cream distribution business.

17. Frosty Treats' corporate predecessor continuously used the SAFETY CLOWN mark from approximately 1983 up to 1991. Plaintiff Frosty Treats, Inc. has continuously used both the SAFETY CLOWN and FROSTY TREATS marks in conjunction with its business from

1991 to the current date. Both are prominently displayed on Frosty Treats' ice cream trucks and constitute Plaintiffs' "COMBINED TRADE DRESS."

18. Plaintiffs' FROSTY TREATS mark is well known and famous. Plaintiffs have used this mark in connection with their advertising activities, community awareness events, and to promote their image.

19. Plaintiffs' SAFETY CLOWN mark and COMBINED TRADE DRESS are well known and famous. Plaintiffs have used both in connection with their advertising activities, community awareness events, and to promote their image.

20. The FROSTY TREATS mark is not functional, and the public recognizes and understands that the FROSTY TREATS mark distinguishes and identifies Plaintiffs' goods and services.

21. The SAFETY CLOWN mark and COMBINED TRADE DRESS are not functional, and the public recognizes and understands that both distinguish and identify Plaintiffs' goods and services.

22. For over a decade, the Plaintiffs have extensively and continuously used and promoted the FROSTY TREATS and SAFETY CLOWN marks and COMBINED TRADE DRESS in connection with their business. In recent years, annual sales of products sold have exceeded millions of dollars within the United States. Further, because of the nature of their business, Plaintiffs' ice cream trucks display the FROSTY TREATS and SAFETY CLOWN marks and COMBINED TRADE DRESS throughout neighborhoods to millions of Americans every year. Accordingly, both the FROSTY TREATS and SAFETY CLOWN marks and COMBINED TRADE DRESS have achieved national fame and tremendous recognition.

23. The fame and popularity of the FROSTY TREATS and SAFETY CLOWN marks and COMBINED TRADE DRESS is also evident from numerous newspaper articles that have appeared throughout the country.

24. On or about October 21, 2002, Plaintiffs registered their FROSTY TREATS and SAFETY CLOWN marks with the Missouri state trademark authorities.

25. As a result of Plaintiffs' extensive use and promotion of their FROSTY TREATS and SAFETY CLOWN trademarks and COMBINED TRADE DRESS, Plaintiffs have built up and now own valuable goodwill that is symbolized by these marks and trade dress. The purchasing public has come to associate the FROSTY TREATS and SAFETY CLOWN marks and COMBINED TRADE DRESS with Plaintiffs. Plaintiffs' marks and COMBINED TRADE DRESS are distinctive and non-functional and have achieved significant secondary meaning.

DEFENDANTS' UNLAWFUL ACTIVITIES

26. Sony Defendants are designing, manufacturing, distributing, offering for sale and selling goods that bear a confusingly similar imitation of Plaintiffs' FROSTY TREATS mark and SAFETY CLOWN mark and COMBINED TRADE DRESS, including the magazine advertisement, a true and correct copy of which is attached as Exhibit C.

27. On or about November 1, 1995, Sony Defendants began making and selling the first installment of the Twisted Metal game series.

28. The first version of Twisted Metal ("Twisted Metal I") is a violent, demolition-derby type game in which a variety of vehicles attempt to destroy each other using machine guns, rockets, fire, bombs, and other weapons. In addition, buildings and homes can be destroyed, and innocent pedestrians and even pets can be murdered in the middle of the street.

29. In the Twisted Metal I game, one of the vehicles that can be driven is an ice cream truck.

30. In the Twisted Metal I game, the driver of the ice cream truck is a "sadistic clown" named "Sweet Tooth".

31. On information and belief, at the time the Twisted Metal I game first was distributed in U.S. commerce, no ice cream truck company except Frosty Treats and its corporate predecessors had used a clown in conjunction with ice cream trucks.

32. On or about November 1, 1996, Sony Defendants began selling the second installment of the Twisted Metal game series ("Twisted Metal II").

33. Like Twisted Metal I, Twisted Metal II is a violent video game involving vehicles using an arsenal of weapons to attack other vehicles, destroy property, and murder innocent pedestrians and pets.

34. Like the Twisted Metal I game, Twisted Metal II also features an ice cream truck driven by the clown "Sweet Tooth."

35. On or about November 1, 1998, Sony Defendants released the third installment of the Twisted Metal game series ("Twisted Metal III").

36. On or about November 1, 1999, Sony Defendants began selling the fourth installment of the Twisted Metal game series ("Twisted Metal IV").

37. Like the earlier versions of the Twisted Metal game, both Twisted Metal III and Twisted Metal IV are violent video games and both incorporate an ice cream truck driven by the Sweet Tooth clown character. Again, Sweet Tooth uses an ice cream truck equipped with destructive weapons to attack other vehicles, destroy property and murder innocent pedestrians and pets.

38. On or about June 19, 2001, Sony Defendants released the fifth version of the Twisted Metal game series. This fifth installment of the Twisted Metal video game series is

known as "Twisted Metal Black", and is designed for Sony Defendants' Playstation 2 video game console.

39. Twisted Metal Black has a more sophisticated visual look and detailed story line than any of the previous Twisted Metal video games. In Twisted Metal Black, all the drivers of the various vehicles are former inmates of an insane asylum. During extended story clips during the game, each character tells why they were incarcerated in the insane asylum. A central character, Calisto, offers each of the characters a chance to be free of the insane asylum if they will battle each other.

40. Sweet Tooth the clown reappears in the Twisted Metal Black video game.

41. In the Twisted Metal Black story line associated with Sweet Tooth, Sweet Tooth is presented as a serial killer who drives an ice cream truck. Sweet Tooth uses the appeal of the ice cream truck to lure children into the truck and then slaughters them. In the storyline, newspaper headlines detail Sweet Tooth's massacre of over 20 victims. As the story line continues, graphic images are presented of Sweet Tooth the clown being electrocuted in an electric chair, escaping from the chair, being beaten by police officers and then escaping. In the audio portion of the Sweet Tooth story line, we learn that Sweet Tooth murdered all of the police officers who attempted to keep him from escaping from his execution.

42. In the last chapter of the Sweet Tooth story line, Calisto presents Sweet Tooth a medicine, consisting of a preacher's blood, that will quell the hell fire that burns on top of his head. Sweet Tooth is told, however, that if he ever murders again, the hell fire will return. Instead of drinking the preacher's blood potion, Sweet Tooth the clown destroys the potion and murders the Calisto character. In the video segment, an image is shown with Calisto screaming as Sweet Tooth the clown slits his throat, blood splattering across the room.

43. In the Twisted Metal Black game, Sweet Tooth's ice cream truck is known as the "Tasty Treats" ice cream truck.

44. Each of the various characters appearing in Twisted Metal Black has their own story line. All of the characters are murderers, in addition to each story line containing a variety of other disgusting and unsavory themes and characters such as assassination, cannibalism, a mad homicidal preacher, parricide, torture and child mutilation.

45. On or about November 27, 2001, Sony Defendants released the sixth installment of the Twisted Metal video game series ("Twisted Metal Small Brawl").

46. Like the earlier installments of the Twisted Metal video game series, Twisted Metal Small Brawl is a violent video game in which an arsenal of weapons is used to attack other vehicles and destroy property.

47. In Twisted Metal Small Brawl, the Sweet Tooth character is present, again driving an ice cream truck.

48. In both the Twisted Metal Small Brawl game itself, the associated game manual, and Sony Defendants' advertising, Sweet Tooth's ice cream truck is described by Sony Defendants as the **"Frosty Treats Ice Cream Truck."**

49. Because consumers of the Twisted Metal video game series are familiar with previous incarnations of the game, Twisted Metal Small Brawl's use of Plaintiffs' FROSTY TREATS mark in conjunction with Sweet Tooth the Clown is immediately associated with all of the acts of violence, homicide, child murder, and mayhem in the previous Twisted Metal games.

50. Game X Change Defendants are selling the Twisted Metal video game series from their 4474 S. Noland Road, Independence, Missouri location, including Twisted Metal Black.

51. In addition to the game itself, Sony Defendants have used Plaintiffs' marks on an ice cream truck in advertising materials associated with the game in national media publications.

52. The Twisted Metal video game series offered for sale and sold by Defendants is not manufactured by Plaintiffs, nor are the Defendants associated or connected with Plaintiffs, or licensed, authorized, sponsored, endorsed or approved by Plaintiffs in any way.

53. Plaintiffs used the FROSTY TREATS mark, SAFETY CLOWN mark and COMBINED TRADE DRESS extensively and continuously before Defendants began using the confusingly similar imitations of Plaintiffs' marks and trade dress in the Twisted Metal video game series.

54. The goods sold by Defendants are directed at the same demographic group as Plaintiffs' end consumer, i.e., children and their parents.

55. Defendants' use and/or sale of confusingly similar imitations of Plaintiffs' FROSTY TREATS mark, SAFETY CLOWN mark and COMBINED TRADE DRESS are likely to deceive, confuse and mislead prospective purchasers into believing that Defendants' Twisted Metal games are authorized by, sponsored by, or in some manner associated with Plaintiffs, which they are not. The likelihood of confusion, mistake and deception engendered by Defendants' misappropriation of Plaintiffs' marks and trade dress are causing irreparable harm to the goodwill symbolized by the FROSTY TREATS mark, SAFETY CLOWN mark and COMBINED TRADE DRESS and the reputation for quality and safety consciousness that they embody.

56. On information and belief, Sony Defendants knowingly, willfully, intentionally and maliciously adopted and used confusingly similar imitations of Plaintiffs' FROSTY TREATS trademark, SAFETY CLOWN mark and COMBINED TRADE DRESS.

COUNT I

(State Trademark Infringement, Dilution And Injury To Business Reputation)

57. Plaintiffs' repeat and incorporate by reference the allegations contained in paragraphs 1 - 56.

58. Plaintiffs have extensively and continuously promoted and used the FROSTY TREATS trademark and SAFETY CLOWN trademark, and their COMBINED TRADE DRESS in the United States and the marks and trade dress have become distinctive, famous and well-known symbols of Plaintiffs' goods and services.

59. Defendants' unauthorized use of Plaintiffs' trademarks and trade dress and confusingly similar imitations infringes and dilutes the distinctiveness of Plaintiffs' trademarks and trade dress by eroding the public's exclusive identification of these famous marks and trade dress with Plaintiffs, and tarnishing and degrading the positive associations and prestigious connotations of the mark and trade dress.

60. Defendants are causing and will continue to cause irreparable injury to Plaintiffs' goodwill and business reputation, and dilution of the distinctiveness and value of Plaintiffs' famous and distinctive trademarks and trade dress in violation of the Missouri Anti-Dilution Act, Mo. Rev. Stat. § 417.061(1)(1990 & Supp. 1998).

61. Plaintiffs are entitled to injunctive relief, damages, costs, and reasonable attorneys fees.

COUNT II

(Common Law Trademark Infringement, Dilution And Unfair Competition)

62. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1 - 62.

63. Defendants' acts constitute common law trademark infringement and unfair competition and have created and will continue to create a likelihood of confusion to the

irreparable injury of Plaintiffs as well as irreparable dilution of an injury to Plaintiffs' marks unless restrained by this Court. Plaintiffs have no adequate remedy at law for this injury.

64. On information and belief, Sony Defendants acted with full knowledge of Plaintiffs' use of, and statutory and common law rights to, the FROSTY TREATS mark, the SAFETY CLOWN mark, and COMBINED TRADE DRESS and without regard to the likelihood of confusion of the public or likelihood of dilution created by Sony Defendants' activities.

65. Sony Defendants' actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Plaintiffs' marks and trade dress to the great and irreparable injury of Plaintiffs.

66. As a result of Defendants' acts, Plaintiffs have been damaged in an amount not as yet determined or ascertainable. At a minimum, however, Plaintiffs are entitled to injunctive relief, to an accounting of Defendants' profits, to damages, and to costs. In light of the deliberately fraudulent and malicious use of confusingly similar imitations of Plaintiffs' trademarks and trade dress, and the need to deter Sony Defendants from similar conduct, Plaintiffs additionally are entitled to punitive damages.

COUNT III (Defamation)

67. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1-67.

68. On information and belief, Sony Defendants were fully aware that Plaintiffs, who collectively are engaged in the largest ice cream truck vending business of its type in the United States, were the only ice cream truck vending business to use a clown mark and trade dress with their goods and services.

69. On information and belief, Sony Defendants were fully aware of Plaintiffs' FROSTY TREATS mark, SAFETY CLOWN mark and COMBINED TRADE DRESS.

70. On information and belief, Sony Defendants' activities as described herein were willfully and maliciously aimed at conveying the message that Plaintiffs' business practices are unsafe, drivers associated with its business are unsavory criminals, and to otherwise intentionally and specifically damage Plaintiffs' goodwill and reputation amongst the public, and the public's trust of Plaintiffs' business.

71. These previously-described defamatory acts of Sony Defendants have willfully and intentionally damaged Plaintiffs in an amount not as yet determined or ascertainable. At a minimum, however, Plaintiffs are entitled to injunctive relief, to an accounting of Sony Defendants' profits, to damages, and to costs. In light of the deliberately defamatory and malicious conduct by Sony Defendants, and the need to deter Sony Defendants from similar conduct, Plaintiffs are additionally entitled to punitive damages.

COUNT IV
(Injurious Falsehood)

72. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1- 72.

73. On information and belief, Sony Defendants were fully aware that Plaintiffs, who collectively are engaged in the largest ice cream truck vending business of its type in the United States, are dependant upon the public's perception of the safety of Plaintiffs' drivers, ice cream trucks, and products.

74. On information and belief, Sony Defendants' activities as described herein were willfully and maliciously aimed at conveying the message that Plaintiffs' business practices are unsafe, drivers associated with its business are unsavory criminals, and to otherwise intentionally and specifically damage Plaintiffs' goodwill and reputation amongst the public, and the public's

trust of Plaintiffs' business. Alternatively, Sony Defendants should have recognized that their activities described herein would have the alleged effect upon Plaintiffs' reputation and business, but recklessly proceeded with said activity.

75. On information and belief, Sony Defendants were cognizant that its activities as described herein contained statements that falsely conveyed the message that Plaintiffs' business practices are unsafe, drivers associated with its business are unsavory criminals, and to otherwise intentionally and specifically damage Plaintiffs' goodwill and reputation amongst the public, and the public's trust of Plaintiffs' business.

76. These previously described acts of injurious falsehood of Sony Defendants have willfully and intentionally damaged Plaintiffs in an amount not as yet determined or ascertainable. At a minimum, however, Plaintiffs are entitled to injunctive relief, to an accounting of Sony Defendants' profits, to damages, and to costs. In light of the deliberately malicious conduct by Sony Defendants, and the need to deter Sony Defendants from similar conduct, Plaintiffs are additionally entitled to punitive damages.

COUNT V
(Prima Facie Tort)

77. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1-77.

78. Alternatively, Defendants' acts as described herein constituted otherwise lawful acts.

79. Sony Defendants' activities as described herein were willfully and maliciously aimed at injuring Plaintiffs by conveying the message that Plaintiffs' business practices are unsafe, drivers associated with its business are unsavory criminals, and to otherwise intentionally and specifically damage Plaintiffs' goodwill and reputation amongst the public, and the public's trust of Plaintiffs' business.

80. Sony Defendants' activities as described herein have willfully and intentionally damaged Plaintiffs by negatively impacting Plaintiffs' goodwill and reputation amongst the public and the public's trust of Plaintiffs' business.

81. Sony Defendants lack justification for their activities as described herein.

82. These previously described acts of prima facie tort of Sony Defendants have willfully and intentionally damaged Plaintiffs in an amount not as yet determined or ascertainable. At a minimum, however, Plaintiffs are entitled to injunctive relief, to an accounting of Sony Defendants' profits, to damages, and to costs. In light of the deliberately malicious conduct by Sony Defendants, and the need to deter Sony Defendants from similar conduct, Plaintiffs are additionally entitled to punitive damages.

COUNT VI
(Wrongful Appropriation)

83. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1-82.

84. Plaintiffs did not at any time consent to Defendants' use of the name Frosty Treats or the Safety Clown image.

85. Defendants have used and continue to use the name of Frosty Treats and the Safety Clown image without Plaintiffs' consent.

86. Defendants have derived advantages and made substantial profits from the unauthorized and wrongful use of the name of Frosty Treats and the Safety Clown image.

87. The unauthorized and wrongful use of the name of Frosty Treats and the Safety Clown image has damaged and will continue to damage Plaintiffs' image and good reputation.

88. Plaintiffs' good will and good reputation have been and will continue to be damaged by Defendants' wrongful use of the name of Frosty Treats and the Safety Clown image.

89. Defendants' actions are in total disregard of Plaintiffs' rights and Plaintiffs are entitled to punitive damages.

COUNT VII
(Federal Unfair Competition)

90. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1 - 89

91. Defendant's use of confusingly similar imitations of Plaintiffs' FROSTY TREATS and SAFETY CLOWN marks are likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendant's goods are manufactured or distributed by Plaintiffs, or associated with, sponsored by or connected with Plaintiffs, or have the sponsorship, endorsement or approval of Plaintiffs.

92. Defendant has made false representations, false descriptions, and false designations of origin of its goods in violation of 15 U.S.C. § 1125(a), and Defendant's activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public, and, additionally, injury to Plaintiffs' goodwill and reputation as symbolized by the FROSTY TREATS and SAFETY CLOWN marks, for which Plaintiffs have no adequate remedy at law.

93. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Plaintiffs' marks.

94. Defendant's conduct has caused, and is likely to continue causing, substantial injury to the public and to Plaintiffs, and Plaintiffs are entitled to injunctive relief and to recover Defendant's profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(a), 1116 and 1117.

COUNT VIII
(Federal Trademark Dilution)

95. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1 - 94.

96. Plaintiffs have extensively and continuously promoted and used the FROSTY TREATS mark and SAFETY CLOWN mark in the United States and the mark has thereby become a famous and well-known symbol of Plaintiffs' goods and services.

97. Defendant is making commercial use in commerce of marks that dilute and are likely to dilute the distinctiveness of Plaintiffs' FROSTY TREATS mark and SAFETY CLOWN mark by eroding the public's exclusive identification of these famous marks with Plaintiffs, by tarnishing, disparaging and degrading the positive associations and prestigious connotations of the mark, and by otherwise lessening the capacity of the mark to identify and distinguish goods and services.

98. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Plaintiffs' FROSTY TREATS and SAFETY CLOWN marks or to cause dilution of the marks, to the great and irreparable injury of Plaintiffs.

99. Defendant has caused and will continue to cause irreparable injury to Plaintiffs' goodwill and business reputation, and dilution of the distinctiveness and value of Plaintiffs' famous and distinctive FROSTY TREATS and SAFETY CLOWN marks in violation of 15 U.S.C. § 1125(c), and Plaintiffs therefore are entitled to injunctive relief and to Defendant's profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(c), 1116 and 1117.

COUNT IX

(Federal Unfair Competition As To Plaintiffs' Trade Dress)

100. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1 through 99.

101. Plaintiffs use of the FROSTY TREATS trademark, in conjunction with the SAFETY CLOWN mark, including the words, logo, and character known as SAFETY CLOWN,

associated with Plaintiffs' goods and services has been extensively and continuously promoted and used by Plaintiffs as its trade dress in the United States and said COMBINED TRADE DRESS has thereby become a famous and well-known indicator of origin as to Plaintiffs' goods and services.

102. Defendant has made false representations, false descriptions, and false designations of origin of its goods in violation of 15 U.S.C. § 1125(a), and Defendant's activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public and, additionally, injury to Plaintiffs' goodwill and reputation as symbolized by its COMBINED TRADE DRESS, for which Plaintiffs have no adequate remedy at law.

103. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Plaintiffs' trade dress.

104. Defendant's conduct has caused, and is likely to continue to causing, substantial injury to the public and to Plaintiffs, and Plaintiffs are entitled to injunctive relief and to recover Defendant's profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(a), 1116 and 1117.

COUNT X

(Federal Dilution As To Plaintiffs' Trade Dress)

105. Plaintiffs repeat and incorporate by reference the allegations in paragraphs 1 - 104.

106. Plaintiffs have extensively and continuously promoted and used their trade dress, consisting of both the FROSTY TREATS mark and SAFETY CLOWN word mark, logo, design, and character safety clown, as trade dress throughout the United States and said COMBINED

TRADE DRESS has thereby become a famous and well-known indicator of the origin of Plaintiffs' good and services.

107. Defendant is making commercial use in commerce of trade dress that dilutes and is likely to dilute the distinctiveness of Plaintiffs' COMBINED TRADE DRESS by eroding the public's exclusive identification of this famous trade dress with Plaintiffs, by tarnishing and degrading the positive associations and the prestigious connotations of the trade dress, and by otherwise lessening the capacity of the trade dress to identify and distinguish goods and services.

108. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Plaintiffs' COMBINED TRADE DRESS or to cause dilution of Plaintiffs' trade dress.

109. Defendant has caused and will continue to cause irreparable injury to Plaintiffs' goodwill and business reputation, and dilution of the distinctiveness and value of Plaintiffs' famous and distinctive COMBINED TRADE DRESS in violation of 15 U.S.C. § 1125(c), and Plaintiffs are therefore entitled to injunctive relief and to Defendant's profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(c), 1116 and 1117.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that:

1. Defendants and all their agents, officers, employees, representatives, successors, assigns, attorneys and all other persons and entities acting for, with, by, through, or under authority from Defendants, or in concert or participation with Defendants, and each of them, be enjoined permanently, from:

A. Using the FROSTY TREATS mark, SAFETY CLOWN mark, COMBINED TRADE DRESS, or any other copy, reproduction, or colorable imitation or

simulation of Plaintiffs' marks or trade dress all or in connection with Defendants' goods or services;

B. Using any trademark, service mark, name, logo, design, character or source designation of any kind on or in connection with Defendants' goods or services that is a copy, reproduction, colorable imitation, or simulation of or computingly similar to, or in any way similar to the trademarks, service marks, trade dress, names, or logos of Plaintiffs;

C. Using any trademark, service mark, name, logo, design, character, or source designation of any kind on or in connection with Defendants' goods or services that is likely to cause confusion, mistake, deception, or public misunderstanding that such goods or services are produced or provided by Plaintiffs, or are sponsored by, affiliated with, or authorized by or in any way connected or related to Plaintiffs;

D. Using any trademark, service mark, name, logo, design, character, or source designation of any kind on or in connection with Defendants' goods or services that dilutes or is likely to dilute the distinctiveness of the trademarks, service marks, trade dress, names, or logos of Plaintiffs;

E. Using any trademark, service mark, name, logo, design, character, or source designation of any kind on or in connection with Defendants' goods or services that defames or unlawfully disparages Plaintiffs; and

F. Passing off, palming off, or assisting in passing off or palming off, Defendants' goods or services as those of Plaintiffs, or otherwise continuing any and all acts of unfair competition as alleged in this Petition;

2. Sony Defendants be ordered to recall all products bearing the FROSTY TREATS mark, SAFETY CLOWN mark, or COMBINED TRADE DRESS or any other confusingly

similar mark or trade dress, which have been shipped by Sony Defendants or under their authority, to any customer including, but not limited to, any wholesaler, distributor, retailer, consignor, or marketer, and also to deliver to each customer a copy of this Court's Order as it relates to said injunctive relief against Sony Defendants;

3. Defendants be ordered to deliver up for impoundment and for destruction all Twisted Metal video games, and related materials including, but not limited to, boxes, labels, tags, signs, packages, receptacles, advertising, promotional material, merchandise materials, apparel or other materials in the possession, custody or under the control of Defendants that are found to adopt, to infringe, to dilute, or to defame any of Plaintiffs' trademarks or trade dress or that otherwise unfairly compete with Plaintiffs and their products and services;

4. Sony Defendants be ordered to create, distribute and broadcast corrective advertising sufficient to reasonably educate consumers that Sony Defendants' infringing, diluting and otherwise illegal products are in no way affiliated with, sponsored by or associated with Plaintiffs;

5. Sony Defendants be compelled to account to Plaintiffs for any and all profits derived by Sony Defendants from the sale or distribution of infringing, diluting and/or otherwise unlawful goods as described in this Petition;

6. Plaintiffs be awarded all damages caused by the acts forming the basis of this Petition; and

7. Defendants be required to pay to Plaintiffs the cost of this action and their reasonable attorneys' fees;

8. Based on Defendant's knowing and intentional use of confusingly similar imitations of Plaintiffs' FROSTY TREATS mark, SAFETY CLOWN mark, and COMBINED

TRADE DRESS, the damages award be trebled and the award of Defendant's profits be enhanced as provided for by 15 U.S.C. § 117(a); and

9. Defendant be required to pay to Plaintiffs the cost of this action and their reasonable attorneys' fees pursuant to 15 U.S.C. § 117(a) and the state statutes cited in this Petition;

10. Based on Sony Defendants' willful and deliberate infringement, dilution and defamation of Plaintiffs' marks, trade dress and reputation, and to deter such conduct in the future, Plaintiffs be awarded punitive damages; and

11. Plaintiffs have such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiffs respectfully demand a trial by jury on all claims and issues of so triable.

LATHROP & GAGE L.C.

/s/ R. B. Miller III

R. B. Miller III (24299)

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by U.S. mail, postage prepaid, this 6th day of May, 2003, on the following:

B. Trent Webb
Rob Adams
Eric A. Buresh
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2118

/s/ R. B. Miller III
Attorney for Plaintiffs



FERROSIL

EXHIBIT B

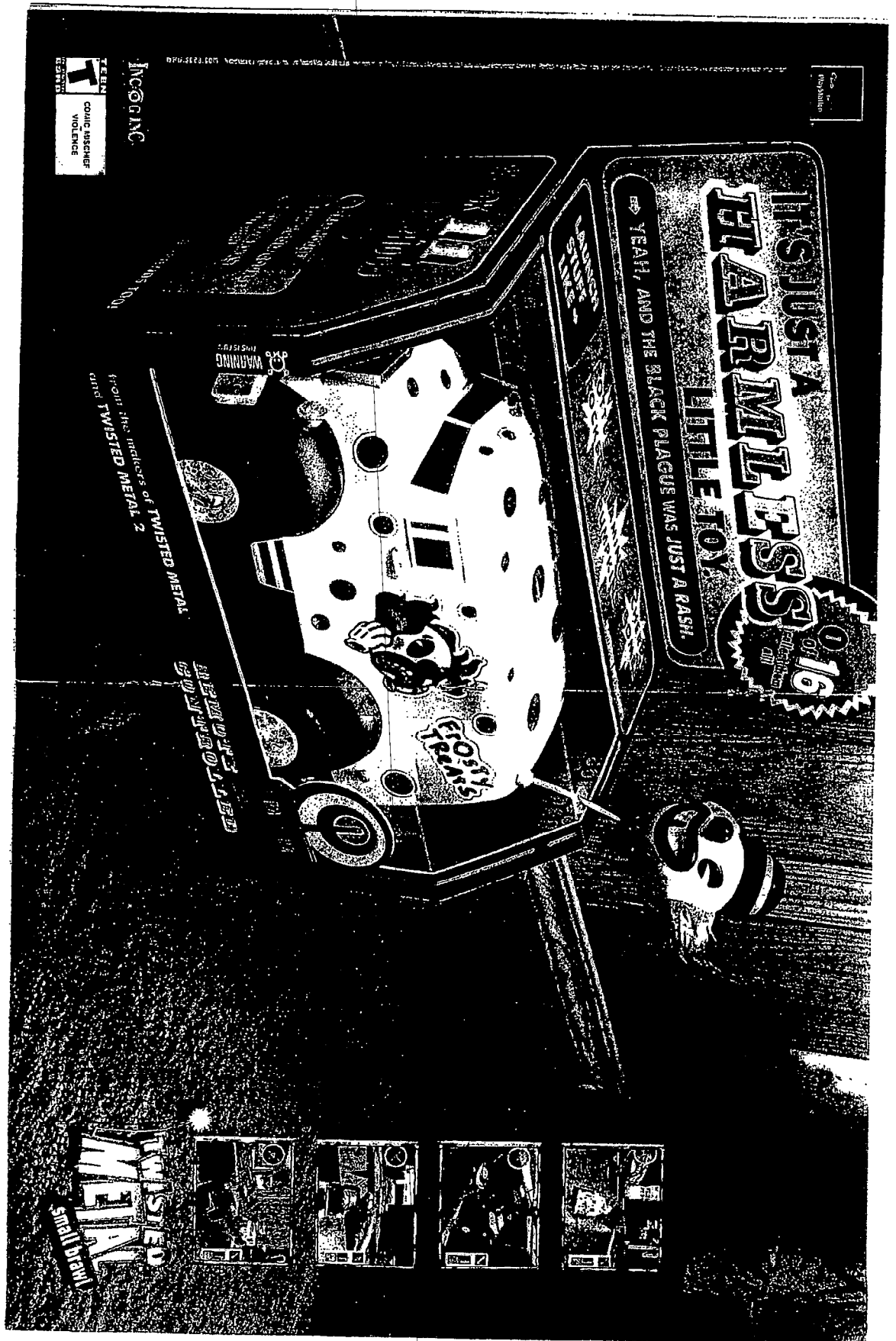


EXHIBIT C

SONY



COMPUTER
ENTERTAINMENT®

Sony Computer Entertainment America Inc.
919 East Hillsdale Blvd., 2nd Floor
Foster City, California 94404-2175
650 655 8000
650 655 8001 Fax

ttab



04-05-2004

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #22

VIA EXPRESS MAIL
#EL884936648 US

April 5, 2004

BOX TTAB FEE
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

RE: Notice Of Opposition To The Registration Of Application
No. 78/168,235 for "POINTING CLOWN GRAPHIC"

Dear Sir/Madam:

Enclosed please find the original and two copies of the Notice of Opposition to the registration of Application No. 78/168,235 for "Pointing Clown Graphic" which is being filed by Opposer Sony Computer Entertainment America Inc. Also enclosed is a return postcard.

Please have \$600.00 and/or any other necessary fees deducted from Deposit Account #19-3196 in the name of Sony Interactive Entertainment Inc.

Please feel free to contact me directly at (650) 655-8137 if you need any further information concerning this mark.

Very truly yours,

James P. Williams
Director, Legal & Business Affairs
Sony Computer Entertainment America Inc.
Enclosure