UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PRIME TIME TOYS LLC, PRIME TIME TOYS LTD. and EASEBON SERVICES LTD.
Petitioner,

v.

SPIN MASTER, INC.,
Patent Owner.

Case IPR2023-01339
Patent 8,640,683

PATENT OWNER'S MOTION TO SEAL

In conjunction with its filing of the Patent Owner's Response and per the authorization in the Scheduling Order, Paper 15 at 2-3, Patent Owner files this Motion to Seal and moves for entry of the agreed and jointly proposed Protective Order, which is provided as EX2200. Per the Board's Order, Paper 15 at 3, a "marked-up comparison of the proposed and default protective orders showing the differences between the two" is provided in EX2201.

I. THERE IS GOOD CAUSE TO ENTER THE AGREED AND JOINTLY PROPOSED PROTECTIVE ORDER

The parties have agreed on and jointly propose a protective order (EX2200) that makes modest modifications to the Board's default protective order for good cause. In this IPR, the parties both intend to re-file and rely on confidential materials that have already been filed under seal in a parallel proceeding before the International Trade Commission ("ITC"). The modifications to the proposed protective order are to ensure that the "Confidential Business Information" ("CBI") filed in the ITC proceeding, including third-party confidential information as laid out below, receives comparable and compatible protection in this IPR.

More specifically, as the proposed protective order states, Petitioner and Patent Owner "are participants in an investigation before the United States International Trade Commission titled: "In the matter of certain soft projectile launching devices, components thereof, ammunition and products containing same.

(U.S.I.T.C. 337-TA-1325) (the 'ITC Case')." EX2201 at 1. The proposed protective order further explains that "the Parties have provided certain documents ('CBI Material') in the ITC Case subject to a protective order entered into the ITC Case and which are marked with the label 'CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER MATERIAL' and which they wish to introduce the Parties' CBI Material into this IPR as confidential information that is subject to this protective order in this IPR." EX2201 at 1. As shown in the marked-up comparison (EX2201 at 2, ¶2), the primary modification is to ensure CBI materials (which were produced on an "outside counsel only" basis in the ITC Case) that are re-filed in the IPR retain the same "outside counsel" confidentiality level and are not shared with in-house counsel or employees.

Apart from avoiding incompatibility with the ITC protective order, there is further good cause for such continued protection because Petitioner and Patent Owner are active competitors, and materials relating to finances, business plans, and strategy (as noted below) are especially sensitive and permeate these documents. As noted below, and especially in the case of third parties, production was made and testimony was given in deposition during the ITC Case on the understanding that the information would not be shared with the parties or their employees.

The proposed protective order further explains that third party confidential information used in the ITC Case may be relied upon in the IPR as well, so long as

the proffering party first obtains permission from such third party "to introduce said CBI Material into this IPR as confidential information subject to this protective order." EX2201 at 2. There is good cause for the proposed modification, as it ensures that the treatment of each third party's confidential information referenced in this IPR will be consistent with the treatment of that confidential information in the ITC Case, in line with third party expectations under which production was made. EX2201 at 4-5.

There is further good cause for these modifications because these modifications are made in the same spirit as expressed in the PTAB Consolidated Trial Practice Guide ("TPG"), which states that "[w]hen a proceeding before the Board involves the same parties and subject matter as a parallel district court proceeding, parties may propose that a protective order entered by the district court be adopted by the Board … especially if certain provisions commonly found in district court protective orders that are unnecessary or inappropriate in proceedings before the Board are removed before submitting the proposed protective order to the Board." TPG at 116. Here, rather than starting with the ITC Protective Order as a base (with its inapplicable provisions) the parties have modified the PTAB's more appropriate default order to ensure that CBI material protected in the ITC Case remains protected here.

II. THERE IS GOOD CAUSE TO SEAL THE "CBI" EXHIBITS SUBMITTED WITH THE PATENT OWNER'S RESPONSE

This IPR has more exhibits than the usual case and Patent Owner has worked to rely on and use as much public information as possible. The vast majority of exhibits in the proceeding are public, but this IPR also presents the unusual situation where multiple parties have already provided confidential information in a proceeding before the ITC governed by a protective order. Patent Owner seeks to re-file a limited set of the "Confidential Business Information" of Petitioner, Patent Owner, and third parties as follows.

As discussed below, for each class of information, (i) the information sought to be sealed has not been publicly disclosed to Patent Owner's knowledge and is truly confidential, and (ii) the revelation of the confidential business information would result in harm from public disclosure, including commercial harm. Moreover, (iii) there exists a genuine need in this IPR for Patent Owner to rely on the specific information sought to be sealed because the information is relevant to questions of validity, including objective indicia of non-obviousness for the patent-in-suit. And, (iv) Patent Owner has provided a redacted copy of the exhibits under its control wherever possible, such that, on balance, the interest in maintaining the confidentiality of the remaining information outweighs the public interest in having a completely open record. As noted below, the CBI largely consists of confidential

testimony, sensitive financial information, and private design and development details.

1. Third Party CBI Exhibits

There is good cause to seal the third party CBI at issue in this IPR, including prior deposition testimony, confidential business records, and financial projections submitted in the ITC Case. Patent Owner has sought and obtained permission from each respective third party—namely, Maya Group (the original assignee of the patents, and creator of the Xploderz patent-practicing products), Splat-R-Ball LLC, and Daisy Inc.—to file in this IPR exhibits containing their CBI, subject to the proposed IPR protective order that maintains full confidentiality of the exhibits. Each of these exhibits was previously produced in the ITC Case on an "Outside Counsel Only" basis, is branded as "Confidential Business Information," and is simultaneously governed by the ITC protective order. Further, in each instance below, the revelation of this non-public business information would result in harm from public disclosure, including through commercial harm in a competitive industry where Petitioner, Patent Owner, and third parties are direct competitors. The items to be sealed are:

- **EX2072** (CX-0173C) is a third party Splat-R-Ball financial presentation containing confidential financial sales history, confidential projections, confidential financial details including EBITDA margin information, and other

statements regarding business plans and projections. It was originally produced in the ITC Case branded as their "Confidential Business Information."

- **EX2073** (CX-1631C) is the confidential deposition transcript of third party Thomas Roeder, Chief Financial Officer and Corporate Designee of third party Splat-R-Ball, obtained during the ITC Case and addressing the internal workings of Splat-R-Ball and their products. EX2073 at 13:7-14:1. The exhibit is branded "Confidential Business Information Subject to Protective Order" by third party Splat-R-Ball, and third party Thomas Roeder provided his testimony in the ITC Case subject to that confidentiality designation.
- **EX2074** (CX-0573C) is a highly confidential spreadsheet containing Splat-R-Ball's sales information designated "Confidential Business Information" by third party Splat-R-Ball.
- **EX2075** (CX-0176C) is an email regarding the relative strength of Splat-R-Ball's product offering. It contains confidential business information and is branded "Confidential Business Information" by third party Splat-R-Ball.
- **EX2077** (CX-1635C) is the confidential deposition transcript of third party Keith Higginbotham, President and CEO of third party Splat-R-Ball, obtained during the ITC Case and addressing the internal workings of Splat-R-Ball and their products. EX2077 at 8:12-10:18. The exhibit is branded "Confidential Business Information Subject to Protective Order" by third party Splat-R-Ball,

and third-party Keith Higginbotham provided his testimony in the ITC Case subject to that confidentiality designation.

- **EX2079** (CX-1633C) is the confidential deposition transcript of third party Kyle Whiteis, Director of New Product Development and Corporate Designee of third party Splat-R-Ball, obtained during the ITC Case and addressing the internal workings of Splat-R-Ball and their products. EX2079 at 10:2-12:10. The exhibit is branded "Confidential Business Information Pursuant to the ITC Protective Order" by third party Splat-R-Ball, and third-party Kyle Whiteis provided his testimony in the ITC Case subject to that confidentiality designation.
- **EX2032** (CX-1634C) is the confidential deposition transcript of third party Maya Group by its owner, Oded Ben-Ezer, obtained during the ITC Case and addressing confidential information about the XPloderz line of patent-practicing blasters, including confidential detailed sales information relating to confidential strategy. It is branded "Confidential Business Information" by third party Maya Group, and third party Mr. Ben-Ezer provided his testimony in the ITC Case subject to that confidentiality designation.
- **EX2068** (CX-0165C) is a highly confidential spreadsheet containing Maya Group's product sales information and was produced in the ITC Case by third party Maya Group subject to a "Confidential Business Information" designation.

2. Party CBI Exhibits

There is good cause to seal the parties' CBI including confidential business records. Each of these exhibits was produced in the ITC Case on an "Outside Counsel Only" basis, is branded as "Confidential Business Information," and is simultaneously governed by the ITC protective order. Further, the revelation of this non-public and highly sensitive business information would result in harm from public disclosure, including through commercial harm in a competitive industry where Petitioner and Patent Owner are direct competitors, and where there are other players in the market. For example, if given access to the parties' CBI, the parties' competitors could assess information about market positions and devise strategies to compete unfairly, focus on different product development, or learn internal business information (e.g., financial information, sales results, and strategy) that could be used against the parties to cause competitive harm. The items to be sealed are:

- **EX2043** (CX-0531C) is a highly confidential spreadsheet containing Hasbro's detailed sales information for Nerf products. It is designated "Confidential Business Information" in the ITC Case and subject to the ITC's protective order and contains extremely sensitive financial information that would cause commercial harm if it were made public.

- **EX2115** (RX-0120C) is the confidential deposition transcript of Dan Bairos, Director of Global Brand Finance, obtained during the ITC Case and addressing Hasbro's confidential financial documents and sales information. EX2115 at 17:12-16. The exhibit discusses sensitive financial information that would cause commercial harm if it were made public. The exhibit is branded "Contains Confidential Business Information," and Mr. Bairos provided his testimony in the ITC Case subject to that confidentiality designation.
- **EX2070** (CX-1635C) is the confidential deposition transcript of John Tomulonis, Senior Director of Brand Strategy and Marketing, obtained during the ITC Case and addressing the confidential internal workings of Hasbro and its products, including confidential strategy direction and reasoning, that would cause competitive harm if made public. EX2070 at 34:19-21. The exhibit is branded "Confidential Business Information Under the ITC Protective Order," and Mr. Tomulonis provided his testimony in the ITC Case subject to that confidentiality designation.
- **EX2069** (CX-1639C) is the confidential deposition transcript of Francis Chia, CEO of Petitioner Prime Time Toys Ltd., obtained during the ITC Case and addressing the business and financial internals of their company and products. EX2069 at 25:12-20.

- **EX2081** (CX-0112C) and **EX2082** (CX-0110C) are confidential internal emails of Prime Time Toys, Ltd. regarding internal business operations, product planning, product pricing, and future toy directions.

3. Papers and Declarations That Discuss CBI Subject to the ITC Protective Order

There is also good cause to seal papers in this IPR and expert materials from the ITC Case that discuss CBI subject to the ITC protective order, including the exhibits appearing in the above-discussed categories.

- **Paper 19 (POR)** is the Patent Owner's Response that discusses the confidential exhibits and confidential information laid out above in Sections II.1 and II.2. Patent Owner has submitted a public redacted version of the Patent Owner Response that redacts the confidential material.
- **EX2015** is the declaration of Patent Owner's expert Dr. Barry Kudrowitz. Dr. Kudrowitz discusses the confidential exhibits and confidential information laid out above in Sections II.1 and II.2. Patent Owner has submitted a public redacted version of EX2015 that redacts the confidential material.
- **EX2046** is an expert report prepared by a witness in the ITC Case who gave testimony at trial on the confidential record discussing the confidential exhibits and confidential information laid out above in Sections II.1 and II.2. The document is labeled "Contains Confidential Information Subject to Protective

Order." Patent Owner has submitted a public redacted version of EX2046 that redacts the confidential material.

- **EX2084** (CDX-0005C) is a slide from Patent Owner's expert, Dr. Barry Kudrowitz, in the ITC Case that quotes a portion of the confidential transcript of Petitioner's CEO, Francis Chia, EX2069 (CX-1639C).

III. CERTIFICATION OF NON-PUBLICATION

The undersigned counsel certifies that the information sought to be sealed by this Motion has not, to their knowledge, been published or otherwise made public.

IV. CONCLUSION

For these reasons, Patent Owner respectfully requests entry of the agreed jointly proposed protective order and the sealing of the exhibits identified above (Exhibits 2070, 2072, 2073, 2074, 2075, 2077, 2079, 2032, 2068, 2043, 2115, 2077, 2069, 2081, 2082, 2015, 2046, 2084) and Paper 19.

Respectfully submitted,

Date: December 6, 2024

/Kenneth Wayne Darby Jr./

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e)(4), the undersigned certifies that on December 6, 2024, a complete and entire copy of this Motion to Seal was provided via email, to the Petitioner by serving the email correspondence addresses of record as follows:

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