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ORIGINAL FILED
08 JAN -9 PM 2:35
JAMES M. WILKINS
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 **NUTS FOR CANDY, A Sole Proprietorship,**)
14 individually and on behalf of all others similarly)
15 situated,)
16 Plaintiff,)
17 vs.)
18 **GANZ, INC., a Canadian Company, and**)
19 **GANZ U.S.A. LLC,**)
20 Defendants.)

CV 08 2873
Case No. _____

CLASS ACTION COMPLAINT
COMPLAINT FOR VIOLATIONS
OF SECTION 1 OF THE SHERMAN
ACT (15 U.S.C. § 1)

JURY TRIAL DEMANDED

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1 **INTRODUCTION**

2 1. Plaintiff, NUTS FOR CANDY, a sole proprietorship (collectively referred to
3 herein as “NFC” or “Plaintiff”) on behalf of all others similarly situated, brings this action for
4 treble damages and injunctive relief under the Sherman Antitrust Act and the Clayton Antitrust
5 Act against Defendants GANZ, INC. and GANZ U.S.A., LLC (collectively referred to herein as
6 “Ganz”). Plaintiff complains and alleges on information and belief except to those paragraphs
7 applicable to the named Plaintiff, which are based on personal knowledge, as follows:

8 **NATURE OF THE ACTION**

9 2. This action arises from the illegal acts of the Defendants in conditioning the sale
10 of the Webkinz toy (the “tying” product”) to retailers on a minimum purchase of \$1,000 of
11 products from Ganz’s “core line” (the “tied Ganz products”). The core line consists of Ganz
12 products unrelated to Webkinz, including lip gloss, magnets, and stuffed and rubber animals.

13 3. Webkinz is a toy and an online game at the same time. Webkinz is a highly
14 popular line of plush stuffed animals. Each Webkinz costs between \$10 and \$15 and comes with
15 a code that allows the user to unlock a Web site that offers online games and other activities
16 (www.webkinz.com). The main attraction of the Webkinz Web site is the games. Once on the
17 Webkinz site, the user takes care of a virtual pet by earning points from playing games. The user
18 cashes in their points to buy food, houses, and other items for their virtual pet.

19 4. Ganz sells Webkinz primarily through small retailers and gift shops. If the retailer
20 does not have an account with Ganz, it must first order a minimum of \$1,000 from Ganz’s “core
21 line” before it can become eligible to order Webkinz. After placing the minimum order for the
22 tied Ganz products, the retailer can then submit an application to Ganz to order Webkinz. Ganz
23 does not guarantee approval of the retailer’s application. Through this co-ordering requirement,
24 the ability to purchase of Webkinz is conditioned on first purchasing at least \$1,000 of the tied
25 Ganz products. Ganz does not permit the retailer to return any of the tied Ganz products that it
26 does not sell.

27 5. In addition to this co-ordering requirement, Ganz has a Loyalty Program for
28 Webkinz retailers that gives priority shipping for ordering more than specified levels of core

1 products (non-Webkinz products) within a twelve month period. Also, the greater the dollar
2 value of core products ordered, the greater the maximum number of pieces the retailer can order
3 of each Webkinz style.

4 6. Ganz possesses sufficient power in the relevant product market to force Plaintiff
5 and members of the Class into this tying arrangement. Ganz also possesses sufficient power in
6 the relevant product market to appreciably restrain competition in the market where the tied Ganz
7 products compete.

8 7. Defendants' actions have caused monetary injury to Plaintiff and members of the
9 Class by forcing them to order the tied Ganz products before being qualified to order Webkinz.
10 Defendants' actions have also allowed them to reap wrongful profits.

11 8. Plaintiff brings this action on behalf of all persons and entities in the United States
12 who established an account with Ganz during the period from July 1, 2006 through the present
13 (the "Class Period") and who ordered Webkinz from Ganz on the condition that they also order
14 products from Ganz's "core line" of products.

15 **JURISDICTION AND VENUE**

16 9. Plaintiff brings this action to obtain injunctive relief and to recover treble damages
17 and the costs of this suit, including reasonable attorneys' fees, against Defendants for the injuries
18 sustained by Plaintiff and the members of the Class as a result of violations of Section 1 of the
19 Sherman Act, 15 U.S.C. § 1.

20 10. This Court has jurisdiction over the subject matter of this dispute under the
21 provisions of Sections 1331, 1337 and 2201 of Title 28 of the United States Code, and Sections 4
22 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

23 11. This Court has jurisdiction over this dispute pursuant to the Class Action Fairness
24 Act, 28 U.S.C. § 1332(d), in that Plaintiff and Defendant are citizens of different states and the
25 matter in controversy exceeds \$5,000,000.00, exclusive of interest and costs, and the suit is
26 brought as a class action.

27

28

1 17. Ganz transacts business in the Northern District of California. The company's
2 Area Sales Representatives and Northern California Regional Manager also visit stores
3 throughout the district to sell Webkinz and the tied Ganz products.

4 C. Agency

5 18. At all times relevant to this complaint, Defendants, and each of them, were acting
6 as the agents or joint venturers of each other, and were acting within the course and scope of their
7 agency with the full knowledge, consent, permission, authorization, and ratification, either
8 express or implied, of each of the other Defendants in performing the acts alleged in this
9 complaint.

10 CLASS ALLEGATIONS

11 19. Plaintiff brings this action on its own behalf and as a class action pursuant to
12 Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the following Class:

13 All persons and entities in the United States who established an account with
14 Ganz during the period from July 1, 2006 through the present and ordered
15 Webkinz from Defendant on the condition that they also order products from
16 Ganz's "core line" of products.

17 20. Because such information is in the exclusive control of Defendants, Plaintiff does
18 not know the exact number of Class members. However, Plaintiff believes that Class members
19 number at least in the hundreds and are sufficiently numerous and geographically dispersed
20 throughout the United States so that joinder of all Class members is impracticable.

21 21. There are questions of law and fact common to the Class. They include:

- 22 (a) The definition of the relevant product market for Webkinz;
- 23 (b) Whether Ganz implemented an unlawful and illegal tying arrangement that
24 conditioned retailers' ability to purchase Webkinz on their purchase of a
25 specified, minimum dollar amount of the tied Ganz products in the United
26 States in violation of Section 1 of the Sherman Act;
- 27 (c) Whether plaintiff and the other members of the Class were injured by
28 reason of Ganz's unlawful conduct; and

1 (d) The appropriate measure of damages sustained by Plaintiff and other Class
2 members.

3 22. Plaintiff's claims are typical of the claims of the Class members. Plaintiff will
4 fairly and adequately protect the interests of the Class. Plaintiff purchased Webkinz from the
5 Defendants on the condition that it also purchase a specified, minimum dollar amount of the tied
6 Ganz products, and Plaintiff's interests are coincident with and not antagonistic to those of other
7 members of the Class.

8 23. The questions of law and fact common to the members of the Class predominate
9 over any questions affecting only individual members.

10 24. A class action is superior to other methods for the fair and efficient adjudication
11 of this controversy. Treatment as a class action will permit a large number of similarly situated
12 persons to adjudicate their common claims in a single forum simultaneously, efficiently, and
13 without the duplication of effort and expense that numerous individual actions would engender.

14 25. Class treatment will also permit the adjudication of relatively small claims by
15 many Class members who otherwise could not afford to litigate an antitrust claim such as is
16 asserted in this complaint. This class action presents no difficulties in management that would
17 preclude maintenance as a class action. Finally, the Class is readily definable and is one for
18 which records of the names and addresses of the members of the Class exist in the files of
19 Defendants.

20 26. Plaintiff and the Class have retained counsel experienced in complex class action
21 litigation. Counsel for the Class will vigorously assert the claims of the Class members.

22 **TRADE AND COMMERCE**

23 27. During the entire Class Period, Defendants sold Webkinz and the tied Ganz
24 products in the United States in interstate commerce, and the violations of law asserted herein
25 have occurred in interstate commerce.

26 28. Defendant's unlawful conduct described herein affected a substantial amount of
27 United States interstate commerce in both the relevant market and the market in which the tied
28 Ganz products compete.

1 **GANZ USED ITS DOMINANT POSITION IN THE MARKET FOR TOYS COMBINED**
2 **WITH ONLINE GAMING TO FORCE THE ILLEGAL TYING ARRANGEMENT**
3 **UPON RETAILERS**

4 A. **Consistent With The Reasonable Interchangeability Standard, The Relevant**
5 **Product Market Is Toys Combined With Online Gaming**

6 29. The Supreme Court, in *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962),
7 held that “the ‘outer boundaries’ of a product market are determined by the **reasonable**
8 **interchangeability of use** or the cross-elasticity of demand between the product itself and
9 substitutes for it.”

10 30. Applying this standard to the Webkinz product line, two characteristics define
11 products within the relevant market. First, the consumer purchases a toy. Second, the toy
12 contains a secret code or password that allows the purchaser to access online games and other
13 activities. Purchase of the toy is required for online access. Examples include Littlest Pet Shop
14 VIPs (www.hasbro.com/littlestpetshop) and Shining Stars (www.shiningstars.com).

15 31. From these product characteristics, three definitions of the relevant product
16 market in the United States are most plausible: (1) plush lines combined with online gaming; (2)
17 toys combined with online gaming; and (3) virtual worlds that can be enjoyed without the initial
18 purchase of a physical item. The second definition – toys combined with online gaming – is the
19 most appropriate definition for the relevant product market.

20 32. While the two first definitions are similar, the second is broader in scope. Yet,
21 there is no principled reason to restrict the product market to plushes combined with online
22 gaming, as opposed to toys combined with online gaming. Examples of non-plush toys
23 combined with online gaming that possess the two defining characteristics of products within the
24 relevant market include: (1) Mattel’s U.B. Funkeys features various vinyl characters that the
25 purchaser uses to unlock different online gaming zones and social networking
26 (www.ubfunkeys.com), and (2) the Be-Bratz doll (not a plush) and necklace allow the purchaser
27 to log on to the toy’s Web site (www.be-bratz.com), which offers games and social networking.

28 33. These products – toys combined with online gaming – possess the same two
essential characteristics as plushes combined with online gaming. Excluding the non-plush toys

1 combined with online gaming from the market does not square with the reasonable
2 interchangeability standard. The second market definition is therefore preferable.

3 34. Defining the relevant market product as virtual worlds, including those that do not
4 include a toy accessory, results in an overbroad market definition. Virtual worlds have been
5 defined as “Sites and applications that provide users with an online environment for interaction
6 and socialization, typically through customizable avatars. Virtual worlds may include games but
7 are not games themselves. Often, virtual worlds have economies and their own currency.”

8 (eMarketer, *Kids and Teens Online: Virtual Worlds Open New Universe*, September 2007, pg. 3).

9 35. The virtual worlds market includes not only toys combined with online gaming,
10 but also online ventures such as Club Penguin owned by Disney (www.clubpenguin.com),
11 Stardoll (www.stardoll.com), and Neopets (www.neopets.com) that do not require the purchase
12 of a toy or any other item (e.g., trading cards) to gain online access. These latter sites often offer
13 monthly membership fees and/or premium memberships and fees to gain access to special
14 features.

15 36. Virtual worlds that do not require the purchase of a toy or other item for online
16 access are not reasonably interchangeable with toys combined with online gaming.
17 Conceptualizing the relevant product market as the former yields an overinclusive set of products
18 that are not reasonably interchangeable in terms of function. The critical distinction between the
19 two product markets is the physical aspect of the toy that allows the user to enjoy the product
20 independent of doing anything online. One can sleep and play with a Webkinz or Shining Star,
21 but it is impossible to enjoy Club Penguin without going to the website. Anita Frazier, analyst
22 with the market research company NPD Group, explains the importance of the physical and
23 online combination: “We’ve found that most kids are actively playing both the online version ...
24 and with the physical toy.”

25 37. Defining the market as toys combined with online gaming produces a set of
26 products that are reasonably interchangeable, while defining the market as virtual worlds does
27 not. Because there are non-plush toys that are reasonably interchangeable with Webkinz, the
28

1 most appropriate definition of the relevant product market is the following: the United States
2 market for toys combined with online gaming.

3 **B. Webkinz Possesses A Dominant Share Of The Relevant Product Market**

4 38. The available evidence suggests that Webkinz enjoys a dominant position in the
5 United States for toys combined with online gaming. First, Webkinz enjoys great popularity.
6 Introduced in 2005, Webkinz was an early entrant into the market. In 2007, girls six to eleven
7 rated Webkinz as the “coolest” toy brand, while boys of the same age rated Webkinz as the third
8 coolest toy brand. With girls, Webkinz ranked above Bratz, Barbie, and Littlest Pet Shop. Girls
9 ranked Webkinz as their favorite brand, beating out heavyweights such as High School Musical,
10 Hannah Montana, and Abercrombie & Fitch. (Playthings, *Toys Still Tops With Kids – Barely;*
11 *Kids share coolest brands heading into the holidays*, January 1, 2008, pg. 2).

12 39. Second, although Ganz does not regularly release sales figures, Webkinz sales
13 have been high. Anitz Frazier of NPD Group estimates that Webkinz U.S. revenues were about
14 \$45 million in 2006. That’s before Webkinz’s popularity boomed in early 2007. Ganz claimed
15 that as of May 2007, more than 2 million Webkinz had been sold. One analyst estimates that
16 Webkinz’s sales exceeded \$100 million by late 2007. At Limited Too, a popular mall store with
17 girls, 11% of transactions in the fourth quarter of 2007 involved a Webkinz product. Over 21%
18 of retailers surveyed told Toy Directory Monthly that Webkinz was their best selling item in
19 2007.

20 40. Third, the Webkinz site is one of the most visited web sites aimed at children and
21 teens. Even within the broader market of virtual worlds, in July 2007 the Webkinz site had over
22 5 million unique U.S. visitors – more than any other virtual world. Also as of July 2007,
23 Webkinz had the most unique visitors among U.S. children ages 2 to 11 of any web site. From
24 January to July 2007, the number of unique visitors to Webkinz increased by 175%. In March
25 2008, Webkinz attracted nearly 12 million unique visitors. In fact, other than the Apple iPhone,
26 Webkinz was the fastest rising search term in the United States.

27 41. The web site visitor data strongly suggests Webkinz’s share of unique visitors to
28 online gaming sites combined with a toy is approximately 80%. Visitors to the Webkinz site

1 spend an average of 12 minutes per visit, indicating that the vast majority of visitors are not
2 merely curious visitors, but members.

3 **DEFENDANT'S WRONGFUL CONDUCT AND ANTITRUST VIOLATIONS**

4 42. Beginning by at least July 1, 2006, Ganz instituted a policy whereby persons and
5 entities who did not have an account with Ganz and wanted to order Webkinz had to purchase at
6 least \$1,000 of the tied Ganz products. Ganz enforced this policy on a nationwide basis.

7 43. In addition to the co-ordering requirement, Ganz has a Loyalty Program for
8 Webkinz retailers that gives priority shipping for ordering more than specified levels of core
9 products within a twelve month period. Also, the greater the dollar value of core products
10 ordered, the greater the maximum number of pieces the retailer can order of each Webkinz style.

11 44. During the Class Period, Ganz did not force Class members to sell the tied Ganz
12 products and Webkinz as a package to consumers. Yet, Ganz forced Class members to order the
13 tied Ganz products if they wanted to sell Webkinz, even if they did not want to order the tied
14 Ganz products.

15 45. Ganz's anticompetitive conduct is objectively baseless and subjectively motivated
16 by a desire to restrict competition in the relevant market. The adoption and enforcement of the
17 tying arrangement has had the effect of restricting competition in the relevant product market.

18 46. In order to ensure that they receive genuine Webkinz products, Plaintiff and Class
19 members must order Webkinz direct from Ganz.

20 47. Ganz adopted and implemented these policies and practices to preserve and
21 extend its dominant position in the relevant market. Through these policies and practices, Ganz
22 succeeded in making it more difficult for Plaintiff and Class members to sell products that
23 compete with Webkinz and/or the tied Ganz products by forcing Plaintiff to stock limited retail
24 shelf space with unwanted products, reducing Plaintiff's ability to sell competing products.
25 Ganz's unlawful conduct has had the effect of reducing the level of competition in the relevant
26 market and in the market for the tied Ganz products that would have otherwise prevailed. At the
27 same time, Ganz's conduct has allowed it to maintain and increase its market share in those
28 markets.

1 48. Ganz used its dominant position in the relevant product market to force Plaintiff
2 and Class members to purchase the tied Ganz products. As Ganz's power in the relevant market
3 for Webkinz increased, it began conditioning the sales of Webkinz on the purchase of the tied
4 Ganz products, thereby restraining competition in the market for the tied Ganz products and
5 artificially increasing its revenues and profits from the tied Ganz products.

6 49. Ganz claims that the tying arrangement is necessary to protect customers who
7 already have accounts with Ganz. This explanation is pretextual because the tying arrangement
8 does not tangibly benefit Ganz's existing customers. However, Ganz benefits from increased
9 revenues and profits derived from the tied Ganz products. Further, the tying arrangement does
10 not provide any benefit that is defensible under the federal antitrust laws. Thus, there is no
11 legitimate reason for Defendants to require Plaintiff and Class members to order the tied Ganz
12 products to become eligible to sell Webkinz.

13 **PLAINTIFF AND CLASS MEMBERS SUFFERED ANTITRUST INJURY**
14 **BECAUSE OF DEFENDANTS' CONDUCT**

15 50. Through their unlawful acts, Defendants acted to the detriment of Plaintiff and
16 Class members, resulting in Defendants reaping unlawful revenues and profits from the orders of
17 the tied Ganz products.

18 51. As a direct and proximate result of Ganz's conduct, Plaintiff and the Class
19 members have been injured in their property and business in an amount to be determined
20 according to proof. Plaintiff and Class members have suffered monetary damages from being
21 coerced into purchasing the tied Ganz products as a condition of purchasing Webkinz.
22 Defendants' practice has forced Plaintiff and Class members to pay for and stock items that take
23 up space that could be used for products that compete against Webkinz and/or the tied Ganz
24 products.

25 **VIOLATIONS ALLEGED**

26 (Violation of Sherman Act § 1 and Clayton Act § 3)

27 52. Plaintiff incorporates by reference all the allegations set forth above as if fully set
28 herein.

1 53. Through its co-ordering requirement, Ganz has conditioned the sale of Webkinz
2 (the “tying product”) to the order of the tied Ganz products (the “tied product”). Ganz has sold
3 Webkinz to Plaintiff and Class members on the condition that they also order the tied Ganz
4 products.

5 54. The tying product – Webkinz – is a separate product from the tied product – the
6 tied Ganz products. Demand for the two products can be separated, and to the extent there is any
7 demand for the tied product, there is sufficient demand for each product separately that it is
8 economically efficient to offer the two products separately.

9 55. Ganz has used its economic power in the relevant product market to force Class
10 members to purchase the tied Ganz products in order to sell Webkinz.

11 56. Ganz has sufficient economic power in the United States market for toys
12 combined with online gaming to enable it to restrain trade appreciably in the market where the
13 tied Ganz products compete. Ganz’s tying arrangement has been successful and affects a
14 substantial volume of commerce. Ganz has been able to force Class members to order the tied
15 Ganz products if they want to order Webkinz. If Ganz had not imposed the tying arrangement,
16 many Class members would not have ordered the tied Ganz products, or would have ordered
17 smaller amounts than Ganz forced them to order.

18 57. Ganz has a financial interest in the sale of the tied products so as to increase sales
19 and its share in the market where the tied Ganz products compete.

20 58. Ganz’s tying arrangement has harmed competition and foreclosed a substantial
21 amount of interstate commerce in the market where the tied Ganz products compete.

22 59. Ganz’s tying arrangement has caused monetary injury to Class members.

23 60. Ganz’s tying arrangement involving Webkinz and the tied Ganz products is
24 objectively baseless and subjectively motivated by a desire to restrict competition. This
25 arrangement imposes excessive burdens, and any legitimate business purposes could be
26 accomplished by less restrictive means.

27 61. This tying arrangement constitutes a *per se* violation of Section 1 of the Sherman
28 Act (15 U.S.C. § 1) and Section 3 of the Clayton Act (15 U.S.C. § 14).

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, on behalf of itself and the Class, prays for relief as follows:

3 A. The Court declare and decree that Defendants' acts, conduct and practices are
4 unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 3 of the Clayton Act
5 (15 U.S.C. § 14);

6 B. The Court permanently enjoin Defendants, as well as its officers, agents, servants,
7 employees and attorneys who shall receive actual notice of the Court's injunction, from
8 continued engagement in those acts, forms of conduct and practices found to be illegal, as
9 provided by Section 16 of the Clayton Act (15 U.S.C. § 26; *see also* 15 U.S.C. § 4);

10 C. The Court award Plaintiff and members of the Class threefold their actual antitrust
11 damages sustained as a result of Defendants' antitrust violations, as provided by Section 4 of the
12 Clayton Act (15 U.S.C. § 15);

13 D. The Court award Plaintiff and members of the Class reasonable attorneys' fees
14 and costs as provided by Section 4 of the Clayton Act (15 U.S.C. § 15) and the common fund
15 doctrine;

16 E. The Court award Plaintiff and members of the Class pre-judgment and post-
17 judgment interest as permitted by law; and

18 F. The Court award Plaintiff and members of the Class such other and further relief
19 at law or in equity as the Court may deem just and proper.

20
21 DATED: June 9, 2008

COTCHETT, PITRE & McCARTHY

22
23 By: Steven N. Williams

STEVEN N. WILLIAMS

Counsel for Plaintiff and the Class


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JURY TRIAL DEMAND

Plaintiff, pursuant to Federal Rule of Civil Procedure 38, demands a trial by jury of all issues which are subject to adjudication by a trier of fact.

Dated: June 9, 2008

COTCHETT, PITRE & McCARTHY

By: 
STEVEN N. WILLIAMS
Counsel for Plaintiff and the Class