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FILED
LOS ANGELES SUPERIOR COURT

Case assigned to *D-72* NOV 26 2007

Judge Ruth Ann Kwan JOHN A. CLARKE, CLERK
BY MARY GARCIA, DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

8 C 381262

11 THE FRED RAPPOPORT COMPANY, a
12 California corporation,

13 Plaintiff,

14 vs.

15 ELMO SHROPSHIRE, INDIVIDUALLY AND
16 DOING BUSINESS AS ELMO
17 PUBLISHING and DOES 1 through 50,
18 inclusive,

19 Defendants.

CASE NO.:

COMPLAINT FOR:

- (1) INTENTIONAL INTERFERENCE WITH CONTRACT;
- (2) BREACH OF CONTRACT; AND
- (3) DECLARATORY RELIEF

20 Plaintiff The Fred Rappoport Company, a California corporation, alleges as follows:

INTRODUCTION AND SUMMARY OF THE COMPLAINT

24 1. This litigation represents the third time that the Plaintiff and Defendant
25 Shropshire have been involved in litigation over Plaintiff's rights to the song "Grandma Got
26 Run Over By A Reindeer" (the "Song"). In 1996, Plaintiff and Shropshire entered into a
27 Dramatic Rights Agreement that gave Plaintiff the right to use the Song in connection with

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1 the creation of audio/visual programs based on the Song and in connection with the
2 exploitation and merchandising of the programs. Following litigation over the
3 interpretation of the Dramatic Rights Agreement, Shropshire sued Plaintiff in Federal
4 Court claiming, among other things, that Plaintiff was improperly using the Song. That
5 litigation was resolved by a Settlement and Mutual General Release Agreement entered
6 into by the parties in 2004 (the "Settlement Agreement"). Although Plaintiff believes that
7 all disputes concerning its use of the Song were resolved by the Settlement Agreement,
8 Shropshire has ignored the express terms of the Settlement Agreement and improperly
9 interfered with Plaintiff's merchandising efforts of an animated program (the "Program")
10 based on the Song. As set forth in detail below, even though the Settlement Agreement
11 expressly provides that Plaintiff has the right, in perpetuity and in all media, to use the
12 Song in connection with the exploitation, marketing and merchandising of products
13 directly related to certain characters and logos it originated or rendered in connection with
14 the Program, Defendants have breached their obligations and interfered with Plaintiff's
15 legitimate merchandising and exploitation efforts.

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17 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

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19 **Identification Of The Parties**

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21 2. Plaintiff, The Fred Rappoport Company ("Plaintiff"), is a corporation
22 organized and existing under the laws of the State of California with its principal place of
23 business in Los Angeles County, California.

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25 3. Plaintiff is informed and believes, and based on such information and belief
26 alleges, that Elmo Shropshire ("Shropshire") is an individual residing in Marin County,
27 California. At all relevant times, Shropshire did business as Elmo Publishing.

1 Pursuant to the Dramatic Rights Agreement, Plaintiff obtained an option to acquire the
2 sole and exclusive rights to create, produce and license an animated motion picture or
3 pictures based on the Song (the "Program" or the "Programs") and to exploit and
4 merchandise the Programs and the Song. A true and correct copy of the Dramatic Rights
5 Agreement is attached hereto as Exhibit "1" and incorporated herein by this reference.
6

7 8. Pursuant to the express terms of the Dramatic Rights Agreement, Plaintiff
8 was granted "the exclusive dramatic rights and synchronization license" to the Song for
9 the purpose of creating the Programs. In addition, Plaintiff obtained, among other things,
10 the right to merchandise: (i) material from the Song and the Programs, including
11 merchandise based upon characters mentioned in the Song and artistically rendered by
12 Plaintiff for use in the Programs; (ii) characters created entirely by Plaintiff; (iii) the logo of
13 the Programs; and (iv) the title of the Song (collectively, "Program Specific Merchandise").
14 In this regard, the Dramatic Rights Agreement provides, at paragraph 7, that: "Publishers
15 [which includes Shropshire] will share in the Net Profit amounts retained by [Plaintiff] from
16 merchandising. [Plaintiff] will have the exclusive right to merchandise material from the
17 Programs." Plaintiff also obtained the right to use the Song in such merchandise.
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19 9. Plaintiff timely exercised its option under the Dramatic Rights Agreement by
20 paying the necessary option consideration to the publishers. Plaintiff timely performed all
21 of its obligations under the Dramatic Rights Agreement and is not in breach of the
22 Dramatic Rights Agreement.
23

24 10. In connection with the dramatic rights Plaintiff obtained to the Song, Plaintiff
25 created an animated film based on the Song. The animated film was completed in or
26 around May 2000. The Program has been broadcast annually on television stations
27 worldwide since 2000. The Program has also been released on home video and is
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1 available for purchase in retail stores and on the Internet. Finally, the Program scheduled
2 for broadcast approximately twelve times in December 2007 on the CW network and the
3 Cartoon Network.

4
5 **The First Action**

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7 11. In or around 1999, a dispute arose between Plaintiff, Shropshire and others
8 concerning Plaintiff's right to merchandise the Song. Plaintiff filed an action in the Los
9 Angeles Superior Court (Case No. BC 218 036) ("the "First Action") seeking, among other
10 things, declaratory relief as to its merchandising rights.

11
12 12. Following the entry of Judgment in the First Action, all of the parties
13 appealed. On February 6, 2003, the Court of Appeal of the State of California, Second
14 Appellate District, Division Five, filed its decision in the First Action (the "Decision"). While
15 the Decision found that Plaintiff did not have the exclusive right to merchandise the Song,
16 it held that Plaintiff did have the right to merchandise the Song in connection with Program
17 Specific Merchandise.

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19 13. The Decision provides, in pertinent part, as follows:

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21 13.1. "Rappoport contends the contract unambiguously gives it the
22 exclusive right to merchandise material from the program, which includes the song
23 and its characters, and therefore, Rappoport has the exclusive right to
24 merchandise the song. The Publishers contend the contract does not give
25 Rappoport the exclusive right to merchandise the song. We agree with the
26 Publishers that the contract is unambiguous and does not provide Rappoport the
27 exclusive right to merchandise the song."

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13.2 "Paragraph 3 does not provide Rappoport with the exclusive right to merchandise the song; it provides Rappoport with the exclusive right to dramatize the song and prohibits the Publishers from licensing other products that dramatize the song by using the plot or characters as part of the license."

13.3 "Paragraph 7 provides Rappoport with 'the exclusive right to merchandise material from the Programs.' It does not additionally expressly provide Rappoport the exclusive right to merchandise the song or material from the song. The common sense interpretation of this provision is that Rappoport has the exclusive right to license products based on material created for and originating in the programs, but not the song or material originating in the song. Rappoport's exclusive merchandising right would include characters created solely by Rappoport, as well as Rappoport's depictions of the characters from the song."

13.4 "Under this commonsense interpretation of the agreement, Rappoport did not have the exclusive right to license the song for a generic reindeer toy."

13.5 "It is clear that the Publishers did not give Rappoport the right to control all merchandising of the song. The agreement prevents the Publishers from licensing the song for other products dramatizing the song and merchandising material created for Rappoport's program. However, the agreement does not prevent the Publishers from licensing the song for use with generic merchandise that might compete with Rappoport's program-specific merchandise."

A copy of the Decision is attached hereto as Exhibit "2" and incorporated herein by this reference.

1 The Second Action

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14. On May 23, 2003, Shropshire filed a Complaint for Punitive Damages, Compensatory Damages and Injunctive Relief against Plaintiff in the United States District Court for the Northern District of California, San Francisco Division, Case No. C 03 2454 JCS (the "Second Action").

15. In the Second Action, Shropshire alleged, among other things, that Plaintiff breached the Dramatic Rights Agreement by failing timely to deliver or broadcast the Program. With respect to merchandising rights, Shropshire alleged as follows:

"42. The limited rights granted to [Plaintiff] by [Shropshire] in the DRAMATIC RIGHTS AGREEMENT included the merchandising rights to characters created for the PROGRAM but did not include the exclusive merchandising rights to characters based on the SUBJECT SONG."

"43. [Shropshire] never granted [Plaintiff] exclusive merchandising rights for characters from SUBJECT SONG."

"63. On February 6, 2003 the Court of Appeal of the State of California, Second Appellate District, Division 5 in Case No. B155513, reversed the trial court and held that [Plaintiff] does not have exclusive merchandising rights to the SUBJECT SONG."

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1 A true and correct copy of the Complaint in the Second Action is attached hereto as
2 Exhibit "3" and is incorporated herein by this reference.

3
4 16. In order to resolve all of the issues between the parties, including Plaintiff's
5 right to use the Song in connection with its Program Specific Merchandise, in March 2004,
6 Plaintiff and Shropshire entered into a Settlement and Mutual General Release
7 Agreement (the "Settlement Agreement"). Among other things, pursuant to the
8 Settlement Agreement, Shropshire assigned to Plaintiff all of his right, title and interest in
9 and to the Dramatic Rights Agreement. Shropshire also expressly confirmed Plaintiff's
10 right to use the Song in connection with its Program Specific Merchandising. Paragraphs
11 1 and 2 of the Settlement Agreement provide as follows:

12
13 **"1. Assignment of Rights Under the Dramatic Rights**
14 **Agreement.** Concurrently with the execution of this Settlement
15 Agreement, Shropshire will execute the assignment attached
16 hereto as Exhibit "1" (the "Assignment"), assigning to [Plaintiff]
17 all of his rights under the Dramatic Rights Agreement,
18 **including the right the use the Song in everything that is**
19 **permitted under the Dramatic Rights Agreement.** Nothing
20 contained in this Settlement Agreement or in the Assignment
21 constitutes an assignment, transfer or other grant of any other
22 rights owned by Shropshire to the Song, whether as a
23 publisher, artist or otherwise, other than those rights
24 encompassed by the Dramatic Rights Agreement. Nothing
25 contained in this Agreement obligates [Plaintiff] to assume or
26 otherwise be responsible for any obligations of Shropshire."
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"2. Rights To Use The Song. Shropshire confirms that [Plaintiff] has the right to use the Song, for no additional compensation or payment (other than the sharing of fees, royalties and profit participation expressly set forth in paragraphs 6, 7, 8 and 9 of the Dramatic Rights Agreement), on a non-exclusive basis, in connection with the creation, production, development, distribution, promotion, advertising, broadcasting, exploitation, marketing, and merchandising of the Program, in all media, in perpetuity. The right to use the Song does not include the right to use Shropshire's recordings of the Song without obtaining a license from Shropshire. Notwithstanding the foregoing, Shropshire and Trigg may license the song for use in other generic merchandise, such as generic reindeer toys, that might compete with [Plaintiff's] Program specific merchandise. Shropshire and Trigg may not license the Song for use in Program-specific merchandise." [Emphasis added].

A true and correct copy of the Settlement Agreement is attached hereto as Exhibit "4" and is incorporated herein by this reference.

Plaintiff's Merchandising Efforts

17. Based on the rights it obtained under the Dramatic Rights Agreement (as interpreted by the Decision) and the Settlement Agreement, Plaintiff has entered into an agreement with Gemmy Industries Corporation to market various Program Specific

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1 Merchandise, including a toy truck that bears the Program's logo and character designs
2 taken from the Program. The truck moves and the characters sing the Song.

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4 18. Based on the rights it obtained under the Dramatic Rights Agreement (as
5 interpreted by the Decision) and the Settlement Agreement, Plaintiff has entered into an
6 agreement with Sandbox LLC, d/b/a San Francisco Music Box, to market various Program
7 Specific Merchandise, including: (i) a snow/water globe that uses the character designs
8 from the Program enacting Santa on a sleigh about to hit Grandma. The snow/water
9 globe plays the Song; (ii) a cookie jar that also depicts characters from the Program that
10 plays the Song when the lid is lifted; and (iii) bobble head dolls depicting the characters
11 from the Program that play the Song.

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13 **Defendants' Interference With Plaintiff's Merchandising Efforts**

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15 19. On November 6 and November 7, 2007, Gerald B. Weiner, Esq., on behalf
16 of Shropshire, wrote letters to Gemmy Industries Corporation and Sandbox LLC accusing
17 them of violating Shropshire's copyright in the Song based on their production and
18 distribution of the Program Specific Merchandise they licensed from Plaintiff and
19 demanding that they cease and desist from manufacturing, selling or distributing all
20 merchandise that "embodies" the Song. True and correct copies of these two letters are
21 attached hereto, respectively, as Exhibits "5" and "6."

22
23 20. On November 15, 2007, counsel for Plaintiff wrote to Weiner advising him
24 that based on the Settlement Agreement, the Dramatic Rights Agreement and the
25 Decision, Plaintiff had the right to use the Song in Program Specific Merchandise in
26 connection with the exploitation and merchandising of the Program and that the
27 merchandise that is being distributed by Gemmy Industries and Sandbox LLC is Program

1 specific, in that each item being sold contains characters, designs, logos and other
2 materials developed by Plaintiff that were utilized in the Program. A true and correct copy
3 of Plaintiff's counsel's letter is attached hereto as Exhibit "7" and is incorporated herein by
4 this reference.

5
6 21. Amazingly, on November 16, 2007, Weiner responded to Plaintiff's counsel
7 claiming that he had never been made aware of the Settlement Agreement by Shropshire:
8 "It is my understanding that the Settlement and Mutual General Release Agreement you
9 refer to was never agree (sic) to or signed by my client. If you have a fully executed copy
10 please let me see it immediately. A true and correct copy of Weiner's letter is attached
11 hereto as Exhibit "8" and is incorporated herein by this reference.

12
13 22. On November 18, 2007, Plaintiff's counsel sent Weiner a signed copy of the
14 Settlement Agreement. However, even after receiving the Settlement Agreement,
15 Shropshire refused to retract his letters to Gemmy Industries Corporation and Sandbox
16 LLC. Shropshire continues to demand that those companies cease and desist from
17 manufacturing, selling or distributing Plaintiff's Program Specific Merchandise.

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19 **FIRST CAUSE OF ACTION**

20 **(By Plaintiff Against Shropshire and Does 1 to 50**

21 **For Tortious Interference with Contract)**

22
23 23. Plaintiff realleges and incorporates by this reference as if set forth in full in
24 this Cause of Action, the allegations of Paragraphs 1 through 22, inclusive, of this
25 Complaint.

26
27 24. By interfering with Plaintiff's contractual relationships with Gemmy Industries

1 Corporation and Sandbox LLC, Defendants have caused Plaintiff damage in an amount
2 presently unknown to It but believed to be in excess of \$1,000,000.

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4 25. The acts of Defendants were willful and malicious. Not only did the
5 Settlement Agreement clearly grant Plaintiff the right to use the Song in connection with
6 the exploitation and merchandising of Program Specific Merchandise, Defendants
7 intentionally failed to inform counsel that the Settlement Agreement had been executed by
8 Shropshire and was binding upon him. Moreover, even after Shropshire's counsel was
9 made aware of the Settlement Agreement, in an attempt to cover up their wrongful
10 actions, Defendants refused to withdraw the request that Plaintiff's licensees cease and
11 desist from manufacturing, selling or distributing Plaintiff's Program Specific Merchandise.

12
13 26. Defendants' actions violate Business and Professions Code section 17200
14 et seq.

15
16 27. Unless restrained, Defendants will continue to disrupt other contracts and
17 business relationships that Plaintiff has entered into or may enter into in the future,
18 causing great and irreparable injury to Plaintiff, for which damages would not afford
19 adequate or complete relief, e.g. they would not compensate for the injury to Plaintiff's
20 business reputation and goodwill.

21
22 **SECOND CAUSE OF ACTION**

23 **(By Plaintiff Against Shropshire**

24 **For Breach of Contract)**

25
26 28. Plaintiff realleges and incorporates by this reference as if set forth in full in
27 this Cause of Action, the allegations of Paragraphs 1 through 22, inclusive, of this

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1 Complaint.

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3 29. Shropshire's actions constitute a breach of the Settlement Agreement.

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5 30. As the proximate result of Shropshire's breach of the Settlement Agreement,
6 Plaintiff has been damaged in an amount currently unknown to it, but believed to be in
7 excess of \$1,000,000.

8

9 31. The Settlement Agreement requires five payments of \$50,000 each to
10 Shropshire, the last of which is due on or before the first day of April 2008. As a result of
11 Shropshire's breach of the Settlement Agreement, Plaintiff should be relieved from
12 making any further payments and should be entitled to a refund of all payments made.

13

14 32. Unless restrained, Shropshire will continue to breach his agreements with
15 Plaintiff causing great and irreparable injury to Plaintiff, for which damages would not
16 afford adequate or complete relief, e.g. they would not compensate for the injury to
17 Plaintiff's business reputation and goodwill.

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19 **THIRD CAUSE OF ACTION**

20 **(By Plaintiff Against Shropshire and Does 1 through 50**

21 **For Declaratory Relief)**

22

23 33. Plaintiff realleges and incorporates by this reference as if set forth in full in
24 this Cause of Action, the allegations of Paragraphs 1 through 22, inclusive, of this
25 Complaint.

26

27 34. Actual controversies have arisen and now exist between Plaintiff, on the one

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1 hand, and the Defendants, on the other, concerning Plaintiff's right to use the Song in
2 Program Specific Merchandise that is used to exploit and merchandise the Program. In
3 this regard, Plaintiff contends that, as a result of the Dramatic Rights Agreement, the
4 Decision, and the Settlement Agreement, it has obtained the sole and exclusive right to
5 merchandise the Program through the use of Program Specific Merchandise and to use
6 the Song as part of its merchandising efforts.

7
8 35. Plaintiff further contends that it has no obligation to make any further
9 payments under the Settlement Agreement and that it is entitled to a refund of all of the
10 payments made. Plaintiff, as and when the final Settlement Agreement payment is due —
11 on or before April 1, 2008 — will take steps to deposit such payment into the Court to
12 preserve its rights under the Settlement Agreement.

13
14 36. Plaintiff is informed and believes, and based on such information and belief
15 alleges, that the Defendants contend that Plaintiff may not use the Song in connection
16 with its Program Specific Merchandise and that Shropshire has not breached the
17 Settlement Agreement.

18
19 37. Plaintiff desires a judicial determination of the respective rights and
20 obligations of the parties with respect to the use of the Song in Program Specific
21 Merchandise and with respect to Plaintiff's obligations under the Settlement Agreement.
22 A judicial determination in accordance with Plaintiff's contentions is necessary and
23 appropriate at this time under the circumstances in order to avoid future additional
24 litigation over the respective rights and obligations of Plaintiff and the Defendants. No
25 other adequate remedy exists by which the rights and obligations of the parties may be
26 determined.

1 38. In accordance with Section 1062 of the California Code of Civil Procedure,
2 nothing contained herein constitutes a waiver of Plaintiff's right to seek additional relief
3 against the Defendants, including additional monetary relief, based upon the same facts
4 and the holding of the Court in this action.

5
6 PRAYER FOR RELIEF

7
8 WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of
9 them, as follows:

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11 1. Pursuant to the First Cause of Action against the Defendants, and each of
12 them, for compensatory damages in an amount in excess of \$1,000,000.

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14 2. Pursuant to the First Cause of Action against the Defendants, and each of
15 them, for punitive and exemplary damages in an amount to be determined by the Court at
16 least equal to \$1,000,000.

17
18 3. Pursuant to the Second Cause of Action against Shropshire for
19 compensatory damages in an amount in excess of \$1,000,000.

20
21 4. Pursuant to the Third Cause of Action against Defendants, and each of
22 them, for a declaration in accordance with Plaintiff's contentions as set forth in Paragraphs
23 34 and 35 of this Complaint;

24
25 5. Pursuant to the First, Second and Third Causes of Action, that this Court
26 issue a temporary restraining order, a preliminary injunction and a permanent injunction
27 restraining the Defendants, and each of them, and their respective agents, attorneys,

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1 representatives, assigns, and all those acting in concert with them, from: (i) taking any
2 steps to diminish or otherwise interfere with Plaintiff's sole and exclusive merchandising
3 rights under the Settlement Agreement relating to the use of the Song in Program Specific
4 Merchandise; and (ii) taking any actions in violation of their obligations under the Dramatic
5 Rights Agreement and the Settlement Agreement.

6
7 6. For costs of suit incurred herein, including, to the extent applicable,
8 reasonable attorney's fees; and

9
10 7. For such other and further relief as the Court deems just and proper.

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12 DATED: November 26, 2007

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15 By: _____

Richard C. Leonard
Attorneys for Plaintiff

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