IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| PIKE BRANDS LLC,<br>Plaintiff,<br><br>v.<br><br>TEEGEM, *et al*.,<br><br>Defendants. | Civil Action No.<br><br>**FILED UNDER SEAL** |

**MEMORANDUM OF LAW IN SUPPORT OF *EX PARTE* APPLICATION FOR: 1) TEMPORARY RESTRAINING ORDER; 2) AN ORDER RESTRAINING ASSETS AND MERCHANT STOREFRONTS; 3) AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE; AND 4) AN ORDER AUTHORIZING EXPEDITED DISCOVERY**

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| PIKE BRANDS LLC,<br>Plaintiff,<br><br>v.<br><br>TEEGEM, *et al*.,<br><br>Defendants. | Civil Action No.<br><br>**FILED UNDER SEAL** |

## I. INTRODUCTION

Plaintiff, Pike Brands LLC, submits this memorandum of law in support of its *ex parte* application for: 1) a temporary restraining order; 2) an order restraining assets and Merchant Storefronts (as defined *infra);* 3) an order to show cause why a preliminary injunction should not issue; and 4) an order authorizing expedited discovery against above-referenced Defendants (hereinafter collectively referred to as "Defendants" or individually as "Defendant"), and the third parties, Amazon Services, LLC d/b/a Amazon.com, and Amazon Payments, Inc. d/b/a Amazon Pay (collectively "Amazon"), eBay, Inc. d/b/a ebay.com, Alibaba.com US LLC d/b/a Alibaba.com and Aliexpress.com, PayPal Inc. d/b/a paypal.com, Context Logic Inc. d/b/a wish.com (Third Party Service Providers) ("Application").

Defendants are knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling patent infringing versions of Plaintiff's Grabease and Nooli brand baby utensils ("Infringing Products") which infringe at least at least one of Plaintiff's Patents throughout the United States, including within the Commonwealth of Pennsylvania and this district, by operating fully interactive, commercial Internet based e-commerce stores established

via third-party marketplaces accessible in Pennsylvania operating using the seller identities identified on Schedule "A" to the Complaint (the "Seller IDs").

Specifically, Plaintiff has obtained evidence clearly demonstrating that (a) all of Defendants have willfully infringed on at least one of Plaintiff's Patents (as defined below) by offering for sale, selling, and distributing knock-off versions of Plaintiff's Products and (b) Defendants accomplish their infringing sales through the use of, at least, the Internet based e-commerce stores operated via at least one of the electronic storefronts on Amazon.com, eBay.com, Aliexpress.com, and wish.com Internet marketplace platforms. Based on this evidence, Plaintiff's Complaint alleges claims for patent infringement pursuant to 35 U.S.C. § 271 and infringement of Plaintiff's rights in its trade dress, in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Shown below are photos of Plaintiff's Product and example products offered for sale by the Defendants and which are the subject of this lawsuit:

***Plaintiff's Baby Utensils***

**Defendant chaelmody's Infringing Listing**

**Defendant TeeGem's Infringing Listing**

**Defendant Infant Self's Infringing Listing**

*See Declaration of Nate Jelovich* (the "*Jelovich Dec.*") at ¶17.

As a result of the Defendants' conduct as set forth herein, consumers may come to attribute the inferior qualities of the Defendants' baby utensils to the Plaintiff's baby utensils, to

Plaintiff's detriment. As poorly designed and manufactured products, the flimsiness of the product may disappoint a customer who may give the product a bad review. *Id. at ¶ 18.*

Internet based e-commerce stores like the Defendants herein are estimated to receive tens of millions of visits per year and to generate over $135 billion in annual online sales. *Declaration of Stanley D. Ference III* (the "*Ference Dec*.") at ¶ 3. According to an intellectual property rights seizures statistics reports issued by Homeland Security, the manufacturer's suggested retail price (MSRP) of goods seized by the U.S. government since 2012 annually exceeds $1.0 billion. *Id.* at ¶ 4. Internet based e-commerce stores like the Defendants herein are also estimated to contribute to tens of thousands of lost jobs for legitimate businesses and broader economic damages such as lost tax revenue every year. *Id.* at ¶ 5.

Defendants' unlawful activities have deprived and continue to deprive Plaintiff of their rights to fair competition and to control their intellectual property and patents. By their activities, Defendants are defrauding Plaintiff and the consuming public for Defendants' benefit. Defendants should not be permitted to continue their unlawful activities, which are causing Plaintiff ongoing irreparable harm. Accordingly, Plaintiff is seeking entry of a temporary restraining order prohibiting Defendants' further infringement of one or more of the Plaintiff's Patents and restraining Defendants from unfairly competing by using trade dress.

Moreover, Plaintiff has obtained evidence that Defendants use money transfer and/or retention/processing services with financial institutions such as Amazon, Alipay, Paypal, and Context Logic, Inc. *See Declaration of Dee Odell* (the "*Odell Dec*.") ¶¶ 1 - 2, filed herewith. Plaintiff seeks to restrain Defendants' assets. In light of the inherently deceptive nature of the counterfeiting and knock-off business, Plaintiff has good reason to believe Defendants will hide or transfer their ill-gotten assets beyond the jurisdiction of this Court unless they are restrained.

In Pennsylvania, a pre-judgment restraint of existing assets is appropriate where a plaintiff asserts a claim for money damages.[1] *Walter v. Stacey*, 837 A.2d 1205 (Pa. Super. 2003) (injunction entered restraining assets in action seeking damages for a wrongful death); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (3d Cir. 1990) (affirming injunction entered restraining assets in class action lawsuit). To prevent the depletion of ill-gotten gains of the Defendants and the ability to at least partially satisfy a judgment, Plaintiff seeks an *ex parte* order restraining Defendants' assets, including specifically, funds transmitted through the Financial Institutions. This Court has also previously granted the relief sought herein in actions involving claims for trademark counterfeiting and patent infringement. *Doggie Dental Inc. v. Go Well,* No. 19-cv-1282 (W.D. Pa. Oct. 11, 2019) (Hornak, J.) (sellers on amazon.com); *Doggie Dental Inc. v. Worthbuyer,* No. 19-cv-1283 (W.D. Pa. Oct. 11, 2019) (Hornak, J.) (sellers on ebay.com); *Doggie Dental Inc. v. Max_Buy,* No. 19-cv-746 (W.D. Pa. June 27, 2019) (Hornak, J.) (sellers on ebay.com); *Doggie Dental Inc. v. Anywill,* No. 19-cv-682 (W.D. Pa. June 13, 2019) (Hornak, J.) (sellers on amazon.com); *Airigan Solutions, LLC v. Abagail*, No. 19-cv-503 (May 28, 2019) (Fischer, J.) (sellers on amazon.com); *Airigan Solutions, LLC v. Babymove*, No. 19-cv-166 (W.D. Pa. Feb. 14, 2019) (Fischer, J.) (sellers on amazon.com); *Airigan Solutions, LLC v. Artifacts_Selling*, No. 18-cv-1462 (W.D. Pa. Oct. 31, 2018) (Fischer, J.) (sellers on ebay.com and aliexpress.com).

[1] Fed. R. Civ. P. 64 provides "every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."

## II. STATEMENT OF FACTS

### A. Plaintiff's Innovative Grabease and Nooli Baby Utensils

1. PIKE BRANDS LLC, a Delaware limited liability with a registered address of 113 Cherry Street, PMB 89249, Seattle, Washington 98104-2205, and the 100% owner of the combined assets and intellectual property comprising the business of the Grabease and Nooli baby utensils at issue in this case. *Jelovich Dec*., ¶ 2. The Plaintiff's innovative Grabease and Nooli brand baby utensils (pictured below) were created with a baby in mind. All of the combined features did not exist until these utensils were brought to market. The idea was to promote a baby's safe and independent feeding. Thus, the utensils are of a size and shape that is perfect for the baby's grip. They help strengthen the baby's fingers by promoting grip while facilitating hand-to-mouth feeding motion. The combination of the short handle and the built-in choke protection barrier prevent the baby from putting the utensil too far into its mouth. The utensils are recommended by Occupational Therapists because they help the baby develop fine and gross motor skills, getting them ready to color, draw, and write in the months to come. *Jelovich Dec*., ¶ 5.

Plaintiff's Product has been featured in videos, articles, or podcasts by numerous media outlets, including *Buzzfeed, Fox News,* and *Parenting Magazine*. *Jelovich Dec*., ¶ 6.

Plaintiff's Products are sold under the brand names Grabease and Nooli baby utensils, and are widely advertised and promoted by Plaintiff, its authorized distributors, and unrelated third parties via the Internet. *Jelovich Dec*., ¶ 7. Over the past several years, visibility on the Internet, particularly via Internet search engines such as Google, Yahoo!, and Bing have become increasing important to Plaintiff's overall marketing. *Id.* During the relevant times, Plaintiff and

its predecessors have sold its baby utensils through Amazon.com and other online and retail outlets enjoying great commercial success for their baby utensils. *Id.*

Thus, Plaintiff and its authorized distributors expend significant monetary resources on Internet marketing, including search engine optimization ("SEO") strategies. *Jelovich Dec*., ¶ 8. Other costs include print catalog ads, tradeshows, and handing out free samples. *Id.* Those strategies allow Plaintiff and its authorized retailers to fairly and legitimately educate consumers about the value associated with Plaintiff's brand and the goods sold thereunder. *Id.* Similarly, Defendants' individual seller's stores are indexed on search engines and compete directly with Plaintiff for space in the search results. *Id.*

**B. Plaintiff's Products are Protected by Design Patents**

Plaintiff has taken numerous steps to protect Plaintiff's Products. The innovative features of Plaintiff's Products are protected by numerous design patents as set forth below and more fully described in Complaint **Exhibits 2A - 2D** which are true and correct copies of each of the Plaintiff's Patents. ("Plaintiff's Patents"):

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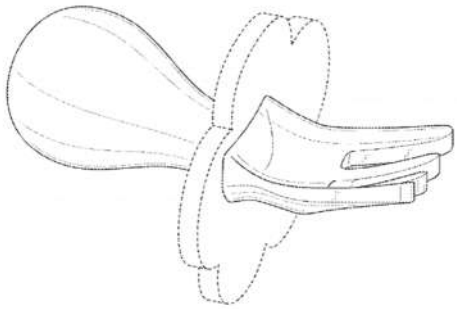
|---|---|---|
| U.S. Design Patent No. RE48,520 for TODDLER FORK (the "'520 Patent") | TODDLER FORK |  |

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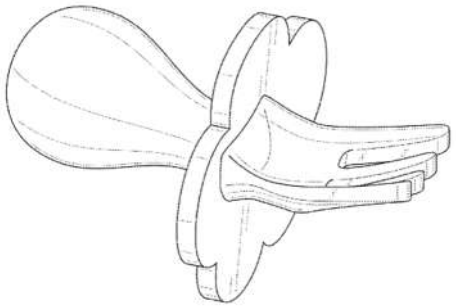
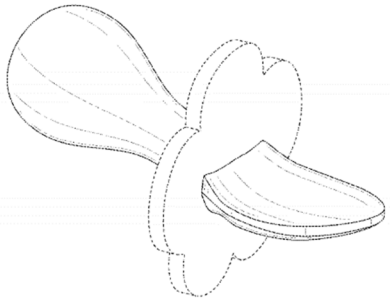
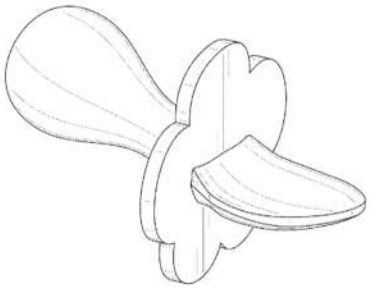
|---|---|---|
| U.S. Design Patent No. RE48,743 for TODDLER FORK (the "'743 Patent") | TODDLER FORK |  |
| U.S. Design Patent No. RE48,531 for TODDLER SPOON (the "'531 Patent") | TODDLER SPOON |  |
| U.S. Design Patent No. 799,280 for TODDLER SPOON (the "'280 Patent") | TODDLER SPOON |  |

Although the '531 Patent is a reissue of the '280 Patent, the '280 Patent has not been surrendered because there remains a pending application for reissue of the '280 Patent. Further, the claims of the '743 Patent are substantially similar to those of the original Design Patent D799,910 ("the '910 Patent"). Each of the Plaintiff's Patents covers the unique, novel, and non-obvious ornamental design and appearance of Pike Brands' baby utensils. *Jelovich Dec*. at ¶ 12.

Plaintiff is the sole owner of these patents and has not licensed the patent to any individual or entity. The Defendants had actual notice of the publication of this patent. *Id.*

The Plaintiff's Products are designed to permit babies to safely feed themselves. The Plaintiffs' Products retail for between $8.99 and $13.95:


*Jelovich Dec.* at ¶ 10.

The unique and patented features of Plaintiff's Products, their trade dress, including the distinct photographs, the design, the instructions, the packaging, and the unique presentation of the product, all comprise Plaintiff's valuable intellectual property ("IP") and all have become distinct in consumer's minds such that consumers associate all of this IP with Plaintiff's Products. *Jelovich Dec*., ¶ 11. Screenshots of Plaintiff's Websites and Amazon Stores are attached as Complaint **Exhibit 1.**

**C. Plaintiff's Efforts to Enforce Its Rights and Police the Defendants' Conduct**

The Defendants use the interactive commercial Internet websites and Internet based e-commerce stores using the Seller IDs set forth on "**Schedule A**" to the Complaint. *See Odell Dec*., ¶ 2. These interactive commercial Internet websites provide on-line Merchant Storefronts

(as defined *infra*) that allow the Defendants to maintain their anonymity while advertising, offering for sale, and selling Infringing Products into the United States and into Pennsylvania. The Internet marketplaces used by these Defendants include Amazon.com, eBay.com, Aliexpress.com, and wish.com. *See Odell Dec.,* ¶ 2 and **Composite Exhibit 1** attached thereto.

Plaintiff has been forced to police the various Internet marketplaces to identify and seek takedowns of unlawful listings for the Infringing Products since allowing the unlawful listings to continue is causing damage to Plaintiff's reputation and bottom line. *Jelovich Dec.,* at ¶ 14. Some Defendants sell the Infringing Products at a fraction of the controlled retail price. *Id.* Because of the software provided by the various Internet marketplaces, the lowest priced items are sorted to the top and/or promoted by the software and then purchased by the consumers. *Id.* The Plaintiff's genuine Products are ignored. *Id*. Plaintiff has had varied success in identifying and requesting takedowns of the various unlawful listings and as soon as one is taken down another unlawful listing replaces it. *Id.*

Another major problem with the Internet marketplaces is that there is a direct and convenient connection between various Chinese[2] and other unidentified manufactures to the Infringing Products. *Id.* In essence, a counterfeiter in Vietnam or Russia, for example, may order a crate of Infringing Products from a Chinese manufacturer, have them drop shipped to a fulfillment center in the United States, and then sell the Infringing Products to a US consumer through a Third-Party Service Provider. *Id.* The ease of this system encourages counterfeits to flourish. *Id.*

[2] Prior to filing this lawsuit, Plaintiff viewed a public seller profile that is published by each Defendant' Amazon.com storefront that purports to identify the name and address of the Defendant. Solely based upon their representation on their Amazon.com storefronts, the following defendants have identified themselves as US-based and are not at this time alleged to be foreign sellers: BLESSING BABY, CHUBBY ZEBRA and PANDAEAR.

For these reasons, Plaintiff retained the legal counsel of Ference & Associates LLC ("the Ference firm") to perform the policing of various Internet marketplaces. *Id*. at ¶ 15. During the process, the Ference firm identified many Chinese manufacturers operating on Marketplace Storefronts hosted by the Internet marketplaces. *See Id.* These manufacturers were supplying many of the other identified Defendants with Infringing Products flooding the Internet marketplaces and damaging Plaintiff's business. This damage to Plaintiff's business will continue unless Plaintiff receives the sought-after restraining order and injunctive relief. *Id.*

**D. The Defendants' Wrongful Conduct Infringing Plaintiff's Rights**

Defendants do not have, nor have they ever had, the right or authority to infringe upon or otherwise use Plaintiff's IP for any purpose. *Jelovich Dec.*, ¶¶ 20 - 23. Despite their known lack of authority, however, Defendants are promoting, selling, offering for sale and distributing goods Infringing Products without Plaintiff's authorization. *Id*.

Defendants' sale, distribution, and advertising of the Infringing Products are highly likely to cause consumers to believe that Defendants are offering genuine versions of Plaintiff's Products when in fact they are not. The Defendants' conduct as set forth herein is all the more egregious when measured against competing baby utensils made and sold by other manufacturers on Amazon. A survey of the trade dress used by other manufacturers shows the multiple baby utensil designs available to other companies such as the Defendants. The similarity of the Defendants' baby utensils to the Plaintiff's baby utensils is all the more striking when viewed in light of this range of available options.

***Other baby utensils.***

*Jelovich Dec.*, ¶ 16.

As part of Plaintiff's counsel's ongoing investigation regarding the sale of Infringing Products, Plaintiff's counsel investigated the promotion and sale of Infringing Products by Defendants and obtained available payment account data for receipt of funds by Defendants for the sale of infringing versions of Plaintiff's Products through the Seller IDs. *Odell Dec.*, ¶ 2. Through visual inspection of Defendants' listings for Infringing Products, it was confirmed that each Defendant is selling knock-offs infringing upon at least one claim of the Plaintiff's Patents, without authorization, which are, in fact, not genuine products. *Id.* The checkout pages or order forms for the Infringing Products confirm that each Defendant was and/or is still currently offering for sale and/or selling Infringing Products through their respective Merchant Storefronts and User Accounts and that each Defendant provides shipping and/or has actually shipped Infringing Products to the United States[3], including to customers located in Pennsylvania. At checkout, a shipping address located in the Pittsburgh area ("the Pennsylvania Address") in the Western District of Pennsylvania verified that each Defendant provides shipping to the Pennsylvania Address. *Id.* Jelovich inspected the detailed web listings describing the Infringing Products Defendants are offering for sale through the Internet based e-commerce stores operating under each of their respective Seller IDs, and determined the products were not genuine versions of Plaintiff's Products and infringed at least one of the Plaintiff's Patents. *Id.* and Composite Exhibit 1, and *Jelovich Dec.,* ¶¶ 23 – 25.[4]

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[3] If shipped and received, the products were examined physically to confirm that they are infringing and knock-offs and not genuine.

[4] See *e.g., Gucci Am., Inc. v. Tyrrell-Miller,* 678 F. Supp. 2d 117, 119 (S.D.N.Y. 2008) (Plaintiff's Intellectual Property Manager found that the products offered for sale on the Defendant's websites were non-genuine counterfeit products, based on a visual inspection of Defendant's websites); *Malletier v. 2016bagsilouisvuitton.com,* No. 16-61554-CIV- DPG, 2016 U.S. Dist. LEXIS 93072, at *3 (S.D. Fla. July 18, 2016) (Plaintiff's representative reviewed the items bearing the Louis Vuitton Marks offered for sale through Defendant's Internet websites and determined the products to be non-genuine, unauthorized versions of the

Defendants' goods are being promoted, advertised, offered for sale, and sold by Defendants to consumers within this district and throughout the United States. Defendants are making substantial sums of money by preying upon members of the general public, many of whom have no knowledge Defendants are defrauding them. Ultimately, Defendants' Internet activities infringe upon Plaintiff's intellectual property rights. The Seller IDs, and associated payment accounts, are a substantial part of the means by which Defendants further their scheme and cause harm to Plaintiff.

In light of the covert nature of Defendants' apparent offshore and infringing activities and the importance of creating economic disincentives for such infringing activities, courts have recognized these concerns and routinely grant *ex parte* applications for relief in cases asserting violations of intellectual property rights on the Internet.[5] Accordingly, Plaintiff respectfully

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Plaintiff's products.); *Chanel Inc. v. Yang,* No. C-12-04428-PJH (DMR), 2013 U.S. Dist. LEXIS 151104, at *5-6 (N.D. Cal. Aug. 13, 2013) (Plaintiff's Director of Legal Administration reviewed the various Chanel-branded products offered for sale by Defendants on each of the websites operating under the subject domain names, and determined that the products were non-genuine Chanel products); *Chanel, Inc. v. Powell,* No. C/A 2:08-0404-PMD-BM, 2009 U.S. Dist. LEXIS 127709, at *7 (D.S.C. 2009) (Plaintiff's representative personally reviewed the printouts reflecting the various Chanel brand products offered for sale by the Defendant through its website, and concluded that those products were non-genuine Chanel products).

[5] *See, e.g., Doggie Dental Inc. v. Go Well, No. 19-cv-1282 (W.D. Pa. Oct. 11, 2019) (Hornak, J.) (sellers on amazon.com); Doggie Dental Inc. v. Worthbuyer, No. 19-cv-1283 (W.D. Pa. Oct. 11, 2019) (Hornak, J.) (sellers on ebay.com); Doggie Dental Inc. v. Max_Buy, No. 19-cv-746 (W.D. Pa. June 27, 2019) (Hornak, J.) (sellers on ebay.com); Doggie Dental Inc. v. Anywill, No. 19-cv-682 (W.D. Pa. June 13, 2019) (Hornak, J.) (sellers on amazon.com); Airigan Solutions, LLC v. Abagail, No. 19-cv-503 (May 28, 2019) (Fischer, J.) (sellers on amazon.com); Airigan Solutions, LLC v. Babymove, No. 19-cv-166 (W.D. Pa. Feb. 14, 2019) (Fischer, J.) (sellers on amazon.com); Airigan Solutions, LLC v. Artifacts_Selling, No. 18-cv-1462 (W.D. Pa. Oct. 31, 2018) (Fischer, J.) (sellers on ebay.com and aliexpress.com). See also Intenze Products, Inc. v. 1586, et al.,* No. 18-cv-4611-RWS (S.D.N.Y. May 24, 2018)*; Allstar Marketing Group, LLC v. 158, et al.,* No. 18-cv-4101-GHW, Dkt. 22 (S.D.N.Y. May 17, 2018)*; William Mark Corporation v. 1&cc, et al.,* No. 18-cv-3889-RA, Dkt. 18 (S.D.N.Y. May 2, 2018)*; WOW Virtual Reality, Inc. v. Bienbest, et al.,* No. 18-cv-3305-VEC, Dkt. 9 (S.D.N.Y. April 16, 2018)*; Ideavillage Products Corp. v. abc789456, et al*., No. 18- cv-2962-NRB, Dkt. 11 (S.D.N.Y. April 11, 2018)*; Ideavillage Products Corp. v. Aarhus, et al.,* No. 18-cv-2739- JGK, Dkt. 22 (S.D.N.Y. March 28, 2018)*; Moose Toys Pty Ltd. et al., v. 963, et al*., No. 18-cv-2187-VEC, Dkt. 16 (S.D.N.Y. April 2, 2018)*; Off-White, LLC v. A445995685, et al.,* No. 18-cv-2009-LGS, Dkt. 5 (S.D.N.Y. March 27, 2018)*; Spin Master Ltd. and Spin Master, Inc. v. 158, et al.,* No. 18-cv-1774-PAE, Dkt. 18 (Feb. 27, 2018)*; JLM Couture, Inc. v. Aimibridal, et al.,* No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018)*; Spin Master Ltd. and Spin Master, Inc. v. Alisy, et al.,* No. 18-cv-543-PGG, Dkt. 16 (S.D.N.Y. Jan. 22, 2018)*; WowWee Group Limited, et al. v. Meirly, et al.,* No. 18-cv-706-AJN, Dkt. 11 (S.D.N.Y. Jan. 26, 2018)*; Ideavillage Products Corp. v. Dongguan Shipai Loofah Sponge Commodity Factory, et al.,* No. 18-cv-901-PGG, Dkt. 20 (S.D.N.Y. Feb. 1, 2018)*;*

requests that this Court grant its *ex parte* Application for the following: 1) a temporary restraining order; 2) an order restraining assets and Merchant Storefronts; 3) an order to show cause why a preliminary injunction should not issue; and 4) an order authorizing expedited discovery against Defendants, the Third Party Service Providers and Financial Institutions.[6]

## III. ARGUMENT

### A. This Court Has Personal Jurisdiction Over the Defendants

Federal courts "may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state." *D'Jamoos v. Pilatus Aircraft, 566 F.3d 94, 102 (3d Cir. 2009)* (quoting *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F. 2d 434, 436 (3rd Cir. 1987)). This determination entails a two-step inquiry. First, the court

*WowWee Group Limited, et al. v. A249345157, et al,* No. 17-cv-9358-VEC, Dkt. 18 (S.D.N.Y. Dec. 11, 2017)*; HICKIES, Inc. v. Shop1668638 Store, et al.,* No. 17-cv-9101-ER, Dkt. 14 (S.D.N.Y. Dec. 6, 2017)*; Ideavillage Products Corp. v. Dongguan Opete Yoga Wear Manufacturer Co., Ltd., et al.,* No. 17-cv-9099-JMF, Dkt. 19 (S.D.N.Y. Nov. 27, 2017); *Ideavillage Products Corp. v. Shenzhen City Poly Hui Foreign Trade Co., Ltd., et al.,* No. 17-cv-8704-JGK. .(S.D.N.Y. May 24, 2017)*; Moose Toys Pty LTD et al. v. Guangzhou Junwei Trading Company d/b/a Backgroundshop et al.,* No. 17-cv-2561-LAK, Dkt. 12 (S.D.N.Y. May 11, 2017)*; Rovio Entertainment Ltd. and Rovio Animation OY v. Angel Baby Factory d/b/a Angelbabyfactory et al.,* No. 17- cv-1840-KPF, Dkt. 11 (S.D.N.Y. March 27, 2017); *Ontel Products Corporation v. Airbrushpainting Makeup Store a/k/a Airbrushespainting et al.,* No. 17-cv-871-KBF, Dkt. 20 (S.D.N.Y. Feb. 6, 2017)*; Ideavillage Products Corp. v. Bling Boutique Store, et al*., No. 16-cv-09039-KMW, Dkt. 9 (S.D.N.Y. Nov. 21, 2016); *Gucci America, Inc., et al v. Alibaba Group Holding LTD, et al,* No. 1:15-cv-03784-PKC (S.D.N.Y. June 23, 2015) (unpublished); *Chanel, Inc. v. Conklin Fashions, Inc*., No. 3:15-cv-893-MAD/DEP, 2015 U.S. Dist. LEXIS 109886, at *10-13 (N.D.N.Y. Aug. 14, 2015)*; Belstaff Grp. SA v. Doe, No. 15-cv-2242-PKC/MHD*, 2015 U.S. Dist. LEXIS 178124, at *2 (S.D.N.Y. June 18, 2015); *AW Licensing, LLC v. Bao*, No. 15-cv-1373, 2015 U.S. Dist. LEXIS 177101, at *2-3 (S.D.N.Y. Apr. 1, 2015)*; Klipsch Grp., Inc. v. Big Box Store Ltd.,* No. 1:12-cv-06283-VSB, 2012 U.S. Dist. LEXIS 153137, at *3-4 (S.D.N.Y. Oct. 24, 2012); *True Religion Apparel, Inc. et al. v. Xiaokang Lee et al*., No. 1:11-cv-08242-HB (S.D.N.Y. Nov. 15, 2011) (unpublished)*; N. Face Apparel Corp. v. Fujian Sharing Imp. & Exp. Ltd. Co*., No. 1:10- cv-1630-AKH, 2011 U.S. Dist. LEXIS 158807 (S.D.N.Y. June 24, 2011); *Tory Burch, LLC v. Yong Sheng Int'l Trade Co., Ltd*., No. 1:10-cv-09336-DAB, (S.D.N.Y. Jan. 4, 2011) (unpublished); *Chloe v. Designersimports.com USA, Inc*., No. 07-cv-1791 -CS/GAY, 2009 U.S. Dist. LEXIS 42351, at *2 (S.D.N.Y. Apr. 29, 2009); *see also In re Vuitton et Fils, S.A*., 606 F.2d 1 (2d Cir. 1979) (holding that *ex par*te temporary restraining orders are indispensable to the commencement of an action when they are the sole method of preserving a state of affairs in which the court can provide effective final relief).

[6] Since the Defendants BLESSING BABY, CHUBBY ZEBRA, and PANDAEAR are currently believed to be US Sellers, and presumably the risk of thwarting this Court's orders by moving assets outside of the jurisdiction of this Court is not present, the Plaintiff is not seeking a pre-judgment restraining order on the financials assets of these sellers, however Plaintiff is seeking to have these Defendants' infringing listings restrained so they can no longer offer the infringing listings.

must determine whether the long-arm statute of the forum allows courts of that state to exercise jurisdiction over the defendant. Fed. R. Civ. P. 4 (e) (1). Second, if the forum state allows jurisdiction, the court must determine whether exercising personal jurisdiction over the defendant in a given case is consistent with the Due Process Clause of the U.S. Constitution. *See IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3rd Cir.1998). As alleged herein, Defendants' unlawful, infringing activities subject them to long-arm jurisdiction in Pennsylvania under 42 P. A. Cons. Stat. § 5322. Furthermore, Pennsylvania's exercise of jurisdiction over Defendants thereunder comports with due process.

**1. Defendants are Subject to Personal Jurisdiction under 42 P. A. C. S. A. § 5322**

Pennsylvania authorizes personal jurisdiction over the Defendant pursuant to 42 Pa. Cons. Stat § 5322 (a) which provides in pertinent part: "A tribunal of this Commonwealth may exercise personal jurisdiction over a person ... as to a cause of action or other matter arising from such person: (1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business for the purpose of this paragraph: (ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit…(3) Causing harm or tortious injury by an act or omission in this Commonwealth. (4) Causing harm or tortious injury by an act or omission outside this Commonwealth. . .(10) Committing any violation within the jurisdiction of the Commonwealth of any statute, home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit."

Courts have regularly conferred personal jurisdiction on a given defendant based on that defendant's operation of a fully interactive website through which consumers can access the site from anywhere and purchase products, as is the case with Defendants' User Accounts and

Merchant Storefronts, and allow for customers all over the world (including within Allegheny County, Pennsylvania) to view and purchase products, including Infringing Products, as demonstrated by the websites themselves and Plaintiff's purchase of Infringing Products. *See Odell Dec.,* ¶ 2 and Composite Exhibit 1, and *Jelovich Dec.,* ¶ 25 - 28. *See n. 4, infra.* (collecting cases in which operating interactive web sites was deemed sufficient to confer personal jurisdiction upon the Court).

Here, by advertising, offering for sale, selling, distributing and shipping retail products directly to consumers across the world, including consumers located throughout the U.S. and specifically in Pennsylvania, Defendants have committed tortious acts, as alleged herein, outside of Pennsylvania, thus directly giving rise to the claims asserted in the instant action. *See Odell Dec.,* ¶ 2 and Composite Exhibit 1; *see also Lorillard Tobacco Co. v. Applewood Party Store, Inc.,* 2006 WL 2925288 (E.D. Mich. 2006) (defendant's local sale of counterfeit "Newport" cigarettes had an economic effect on interstate commerce)*; A1 Mortg. Corp. v. A1 Mortg. and Financial Services, LLC,* 2006 WL 1437744 (W.D. Pa. 2006) (while plaintiff's provision of services was "predominantly intrastate" in character, its mark was eligible for protection since, even absent an interstate sale, its advertising crossed state lines and, therefore, had entered interstate commerce), see later opinion, *A-1 Mortg. Corp. v. Day One Mortg., LLC,* 2007 WL 30317 (W.D. Pa. 2007) (court awarded permanent injunctive relief in its award of summary judgment to plaintiff).

Here, the injury clearly occurred within Pennsylvania, as Defendants' Infringing Listings, resulted in consumers throughout the U.S., and specifically in Pennsylvania, purchasing Infringing Products. *See Odell Dec.,* ¶ 2 and Composite Exhibit 1. As a direct result of Defendants' counterfeiting and infringing actions, Plaintiff has suffered harm in Pennsylvania

through lost sales in Pennsylvania and lost Pennsylvania consumers. *See Jelovich Dec.,* ¶¶ 26 - 28.

Accordingly, this Court has personal jurisdiction over Defendants who have intentionally availed themselves of the opportunity to do business in Pennsylvania, and specifically in Allegheny County, Pennsylvania, through their fully interactive web sites, as well as yet undiscovered online marketplaces, to offer for sale and/or sell Infringing Products. The identified Defendants merely use fanciful and made up store names or seller ids without complete addresses, contact information, phones numbers and the like). *See Ference Dec.,* ¶¶ 6 - 7; Defendants used and continue to advertise, market, promote, offer for sale, sell, distribute and/or import Infringing Products to Pennsylvania customers and/or potential customers, including in Allegheny County, Pennsylvania. *See Jelovich Dec.* ¶¶ 26 - 28.

Here, the fact that Defendants have chosen to open their respective User Accounts for the purpose of selling Infringing Products through their Merchant Storefronts, as well as any and all as yet undiscovered online marketplace platforms, alone supports a finding that Defendants have intentionally used these marketplace platforms, "as a means for establishing regular business with a remote forum." *EnviroCare Techs, LLC v. Simanovsky, No. 11-CV-3458, 2012* U.S. Dist.. *LEXIS 78088, at *10 (E.D.N.Y. June 4, 2012)* (quoting *Boschetto v. Hansing,* 539 F.3d 1011, 1019 (9th Cir. 2008); *see also Lifeguard Licensing Corp.,* 2016 U.S. Dist.. LEXIS 89149, at *8 and *EnviroCare Techs., LLC,* 2012 U.S. Dist.. LEXIS 78088, at *10. Courts have indeed found that "commercial sellers" on "well-known, national . . . website[s]" are in fact subject to personal jurisdiction, as these Defendants "must have been able to foresee the possibility of being hauled into court [in the present jurisdiction]." *Malcom v. Esposito,* 63 Va. Cir. 440, 446 (Cir. Ct. 2003); *see also EnviroCare Techs., LLC,* 2012 U.S. Dist.. LEXIS 78088, at *12.

Whether a Defendant physically shipped Infringing Products into Pennsylvania is not determinative of whether personal jurisdiction exists, as courts in this Circuit examine a given defendant's online interactions with consumers in considering whether a particular defendant has transacted business in the forum state. *See Odell Dec.* ¶ 2. *See Zippo Mfg. Co.,* 952 F. Supp. at 1119; *Rolex Watch, U.S.A., Inc. v. Pharel*, 09 CV 4810 (RRM) (ALC), 2011 U.S. Dist. LEXIS 32249, at 6 (E.D.N.Y. Mar. 11, 2011) (finding personal jurisdiction over defendant, a resident of South Carolina, because he transacted business in New York by monitoring and responding to inquiries for counterfeit watches through websites accessible in New York). Plaintiff and Plaintiff's counsel have viewed Defendant's Infringing Products via their online User Accounts and Merchant Storefronts and have physically examined any products that were received from the Defendants. *See Odell Dec.*, ¶ 2 and *Jelovich Dec.* ¶¶ 23 - 28.[7] Thus, Defendants'

[7] *See Skrodzki v. Marcello,* 810 F. Supp. 2d 501, 512-13 (E.D.N.Y. 2011), and that, "[t]he offering for sale of even one copy of an allegedly infringing item, even if no sale results, is sufficient to give personal jurisdiction over the alleged infringer under N.Y. CPLR § 302. *Cartier v. Seah LLC,* 598 F. Supp. 2d 422, 425 (S.D.N.Y. 2009). Moreover, under Second Circuit case law, when analyzing personal jurisdiction in the Internet context, "traditional statutory and constitutional principles remain the touchstone of the inquiry," and while a website's interactivity, "may be useful" for analyzing personal jurisdiction 'insofar as it helps to decide whether the defendant 'transacts any business' in New York,'" ... "it does not amount to a separate framework for analyzing internet-based jurisdiction." *Best Van Lines, Inc.,* 490 F.3d at 252 (quoting *Best Van Lines, Inc. v. Walker,* No. 03- Civ. 6585 (GEL), 2004 U.S. Dist. LEXIS 7830, at *9 (S.D.N.Y. May 4, 2004)) (citing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.,* 952 F. Supp. 1119 (W.D. Pa. 1997)). Sister circuits similarly rely on the traditional principles guiding the personal jurisdiction analysis when analyzing the same in the Internet context, namely the Eleventh Circuit (see, *e.g., Oldfield v. Pueblo De Bahia Lora, S.A.,* 558 F.3d 1210, 1219-1224 (11th Cir. 2011) (criticizing the over-reliance on the sliding scale of interactivity analysis and instead applying a traditional personal jurisdiction analysis in an Internet case where the website was fully interactive); *see also Louis Vuitton Malletier, S.A. v. Mosseri,* 736 F.3d 1339, 1356-58 (11th Cir. 2013) (applying the traditional purposeful availment test in a case where defendant's fully interactive website was accessible in Florida, and was selling and distributing infringing goods through his website to Florida consumers), and the Seventh Circuit (see, e.g., *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.,* 751 F.3d 796, 803 (7th Cir. 2010) (addressing the impact of a defendant's online activities upon the personal jurisdiction analysis and reiterating that, as with offline activities, the Court must focus upon the deliberate actions of the defendant within the State)), are instructive in considering whether the exercise of jurisdiction over Defendants in the instant action is appropriate under similar, if not identical facts. For example, courts in the Eleventh Circuit have routinely granted temporary restraining orders, preliminary injunctions and default judgments in online counterfeiting cases where no purchases of the counterfeit/infringing products were made, but the Plaintiff alleged and confirmed that each of the foreign defendants operated fully interactive commercial websites through which they advertised, promoted, offered for sale, and sold products bearing what the plaintiff determined to be counterfeit and infringing trademarks into the U.S., and in interstate commerce, in violation of the plaintiff's rights. *See, e.g., Malletier,* 2016 U.S. Dist. LEXIS 93072, at *3; *Mycoskie v. 2016tomsshoessaleoutlet.us,* No.

sophisticated commercial operations, specifically including their offering for sale and/or selling of Infringing Products through their highly interactive User Accounts and Merchant Storefronts, along with Defendants' own representations on their Merchant Storefronts that they ship Infringing Products to the U.S., including to Pennsylvania addresses, unequivocally establishes that Defendants conduct business within this District and the claims in this suit arise from Defendants' business dealings and transactions with consumers in Pennsylvania. *See Zippo Mfg. Co. v. Zippo DOT Com*, 952 F. Supp. 1119 (W.D. Pa. 1997).

**2. Exercising Personal Jurisdiction Over Defendants Comports With Due Process**

The assertion of personal jurisdiction over Defendants also comports with the Due Process Clause of the U.S. Constitution, as Defendants have "certain minimum contacts ... such that maintenance of th[is] suit does not offend 'traditional notions of fair play and substantial

16-61523- CIV-GAYLES, 2016 U.S. Dist. LEXIS 95963, at *4 (S.D. Fla. July 22, 2016); *Adidas AG v. 007adidasuk.com,* No. 15-61275-CIV-GAYLES, 2015 U.S. Dist. LEXIS 179020, at *8 (S.D. Fla. 2015); *Louis Vuitton Malletier, S.A. v. 2015shoplvhandbag.com,* No. 15-62531-CIV-BLOOM, 2015 U.S. Dist. LEXIS 181477, at *11 (S.D. Fla. Dec. 18, 2015); *Abercrombie & Fitch Trading Co. v. Abercrombieclassic.com,* No. 15-62579-CIV-CMA, 2015 U.S. Dist. LEXIS 179041, at *5 (S.D. Fla. Dec. 11, 2015); *Gucci Am., Inc. v. Gucc-Outlet.com,* No. 15-62165-CIV-DPG, 2015 U.S. Dist. LEXIS 181483, at *3-4 (S.D. Fla. Nov. 9, 2015); *Chanel, Inc. v. 2012leboyhandbag.com,* No. 15-61986-CIV-WJZ, 2015 U.S. Dist. LEXIS 177989, at *3 (S.D. Fla. Oct. 13, 2015); *Abercrombie & Fitch Trading Co. v. Abercrombieandfitchdk.com,* No. 15-62068-CIV-BB, 2015 U.S. Dist. LEXIS 179117, at *5 (S.D. Fla. Oct. 7, 2015); *Malletier v. 2015louisvuittons.com,* No. 15-61973-CIV-BB, 2015 U.S. Dist. LEXIS 181452, at *11 (S.D. Fla. Sep. 29, 2015); *Chanel, Inc. v. Chanelsstore.com,* No. 15-61156-CIV- CMA, 2015 U.S. Dist. LEXIS 179101, at *5 (S.D. Fla. August 31, 2015). Similarly, the Seventh Circuit, in *Illinois v. Hemi Group LLC,* held that it had personal jurisdiction over the foreign defendants because they operated a nationwide business model where they intentionally created and operated several commercial, interactive websites to offer products for sale and allow online orders from Illinois residents, specifically noting that the "[defendants] maintained commercial websites through which customers could purchase cigarettes, calculate their shipping charges using their zip codes, and create accounts," and as a result, the "[defendants] stood ready and willing to do business with Illinois residents." *Illinois v. Hemi Group LLC,* 622 F.3d 754, 756 (7th Cir. 2010); *see also Monster Energy Co. v. Chen Wensheng,* 136 F. Supp. 3d 897, 906 (N.D. Ill. 2015) (holding that defendants had "expressly aimed" their actions at the state, making specific personal jurisdiction proper even without a sale made to an Illinois resident, because in addition to intentionally creating and operating commercial, fully interactive AliExpress.com Internet stores through which consumers can purchase counterfeit Monster Energy Products, the defendants had affirmatively selected a shipping option to ship counterfeit products to the U.S., including to Illinois residents, and the Plaintiff's exhibits showed that the named defendants had specifically offered to sell particular counterfeit products to individuals with Illinois shipping addresses and provided Amazon Pay account number for the buyer to make the payment for the item, and as a result, the defendants expressly elected to do business with the residents of all fifty states, including Illinois).

justice.'" *Calder v. Jones,* 465 U.S. 783, 788 (1984) (quoting *Milliken v. Meyer,* 311 U.S. 457 (1940)).

This Court may exercise personal jurisdiction when the plaintiff can establish that the cause of action at issue arose from the defendant's activities within the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. at 414 (1984). The plaintiff initially bears the burden of proving a *prima facie* case, by a preponderance of the evidence, that the defendant's contacts with the forum state meet the "minimum contacts" test. *Carteret Sav. Bank, F.A. v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992). *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (U.S. 1985); *see Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 243 (2d. Cir. 2007) ("In the language of minimum contacts, when the defendants committed 'their intentional, and allegedly tortious, actions expressly aimed at California, they must have reasonably anticipated being hauled into court there.'") (internal quotations omitted); Here, the Defendants intentionally directed their activity towards the Pennsylvania market, thereby purposefully availing themselves of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *See Jelovich Dec*. ¶ 28. *See Odell Dec*. ¶ 2 and Composite Exhibit 1. Thus, the Plaintiff has made out a *prima facie* case, by a preponderance of the evidence that Defendants' contacts with the Pennsylvania meet the "minimum contacts" test.

Pennsylvania's long-arm statute provides that jurisdiction may be exercised "to the fullest extent allowed under the Constitution of the U.S. and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the U.S.." 42 Pa. C. S. A. § 5322(b) (1981). Thus, because Pennsylvania's long-arm statute is coextensive with the dictates of the U.S. Constitution, the traditional two-step analysis is collapsed into a single inquiry: "whether the exercise of personal jurisdiction would conform with the Due Process Clause."

*Poole v. Sasson,* 122 F. Supp. 2d 556, 558 (E. D. Pa. 2000); *see also Renner v. Lanard Toys Limited,* 33 F.3d 277, 279 (3d Cir. 1994) ("[T]his court's inquiry is solely whether the exercise of personal jurisdiction over the defendant would be constitutional."). Due process requires that the defendant have "minimum contacts" with the forum state. *Remick v. Manfredy,* 238 F.3d 248, 255 (3d Cir. 2001) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). "Minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Remick,* 238 F.3d at 255 (quoting *Asahi Metal Indus. Co., Ltd. v. Superior Court of California,* 480 U.S. 102, 109, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)).

Here, each of the Defendants has used an interactive web site for offering for sale and selling Infringing Products. This Court has personal jurisdiction over each Defendant based upon internet-based sales activity into the US and this judicial district. The seminal opinion in this regard is *Zippo Mfg. Co*, 952 F. Supp. at 1119. In *Zippo,* this court established a "sliding scale" analytical framework for internet-based personal jurisdiction cases based upon the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site." 952 F. Supp. at 1124. The court explained:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by

> interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

*Id*.

The Third Circuit endorsed this general framework in *Toys "R" Us, Inc. v. Step Two, S.A.,* 318 F.3d 446 (3rd Cir. 2003), but clarified that the plaintiff must also provide evidence of "the intentional nature of the defendant's conduct vis-a-vis the forum state." *Id.* at 452. In other words, "there must be some evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other related contacts." *Id.* at 454. *See also Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc.*, 983 F.2d 551, 556 (3d Cir. 1993) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985))

In the wake of *Zippo* and *Toys "R" Us,* most courts have concluded that a defendant that intentionally conducts business transactions over an interactive website with customers in the forum state has purposefully directed itself of the laws of that forum. In *Square D,* for example, the defendant's website contained links providing "a [telephone] number and e-mail address for the purpose of placing an order," information concerning product warranties, and a link that permitted a potential purchaser to "submit a form specifying the manufacturer, catalog number, and quantity of the product to be purchased, as well as the purchaser's company name, phone, fax and e-mail." *Square D Co. v. Scott Elec. Co.,* No. 06-459, 2008 WL 4462298, at *3 (W.D. Pa. Sept. 30, 2008). There was also a space on the form for additional "comments" concerning a proposed transaction. *Id.* Although a customer could not directly order products using only the website, customers could "commence the ordering process" by "provid[ing] much of the same type of information that would be required for an order (e.g., manufacturer, quantity, catalog

number, contact information)." *Id.* at *8, Indeed, the court noted that the website had produced "twenty-four (24) Pennsylvania customers and a total of $10,238.25 in sales" for the defendant. *Id.* at *9. Although this amount represented "less than 1%" of the defendant's total sales, the Court concluded that it was sufficient to establish personal jurisdiction in the state of Pennsylvania. *Id.* As explained by the court:

> The website was more than a mere advertisement; rather, it was an interactive site that allowed customers to take the first step in an ordering process that could be completed with one phone call or e-mail. By knowingly selling and shipping a product that is at issue in this litigation to a customer [in] Pennsylvania, the Moving Defendants purposefully availed themselves of the laws and privileges of this forum. *Id.* at *11.

*Willyoung v. Colorado Custom Hardware, Inc.* is similarly instructive. *Willyoung v. Colorado Custom Hardware, Inc.,* 2009 WL 3183061 (W. D. Pa. Sept. 30, 2009). In *Willyoung,* the website at issue allowed visitors to "request a catalog by supplying certain information according to the website prompts, contact the company directly by e-mail, subscribe to [defendant's] on-line newsletter, and search, view, and select products for on-line purchase via a 'shopping cart.' " *Id* . at *12. Over a two-year period, Pennsylvania customers had utilized the website to place 211 orders amounting to $41,566.05 in sales. *Id.* Based on the foregoing, the court concluded that the defendant had purposefully availed itself of the privilege of conducting business in the state of Pennsylvania by "intentionally and repeatedly engag[ing] in internet-based sales of its products to Pennsylvania residents via its website." *Id.* at *13. Other courts have frequently reached the same conclusion. *See also Gentex Corp. v. Abbott,* 978 F. Supp. 2d 391, 398 (M.D. Pa. 2013) (finding personal jurisdiction where non-resident defendant's interactive website was used by Pennsylvania residents to place at least 17 orders over a three-year period); *TRE Services, Inc. v. U .S. Bellows, Inc.,* 2012 WL 2872830, *4–5 (W.D. Pa. July 12, 2012) (finding personal jurisdiction based on defendant's commercially interactive website

that accepted orders from Pennsylvania); *Gourmet Video, Inc. v. Alpha Blue Archives, Inc.,* 2008 WL 4755350, *3 (D.N.J. Oct. 29, 2008) ("Personal jurisdiction is properly exercised over a defendant using the Internet to conduct business in the forum state."); *L'Athene, Inc. v. EarthSpring LLC,* 570 F. Supp. 588, 593–94 (D. Del. 2008) (defendants purposely availed themselves of doing business in state of Delaware where they operated a website accessible in Delaware, received orders and payments from customers in Delaware, and shipped their products to Delaware). Thus, the Defendants in this case have all offered interactive web sites for viewing, ordering, and paying for the Counterfeit Goods and have purposefully availed themselves of the opportunity to conduct business with Pennsylvania citizens with their respective Merchant Storefronts.

Further there is sufficient evidence to establish the type of "intentional interaction with the forum state" required by the Third Circuit for the exercise of personal jurisdiction. *See Toys "R" Us,* 318 F.3d at 451–52 (requiring evidence that the defendant has "intentionally interact[ed] with the forum state). *See, e.g., Square D.,* 2008 WL 4462298 at *9 n. 10 (concluding that an amount equal to less than 1% of overall sales was sufficient to establish minimum contacts); *Zippo,* 952 F.Supp. at 1127 (exercising personal jurisdiction despite that only 2% of the defendant's customers were Pennsylvania residents); *L'Athene,* 570 F. Supp. 2d at 593–94 (exercising personal jurisdiction despite that sales to the forum state constituted less than 1% of defendants' total annual sales based on units sold). As noted in *Zippo,* "[t]he Supreme Court has made clear that even a single contact can be sufficient." *Zippo,* 952 F. Supp. at 1127 (citing *McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 223, 78 S.Ct. 199, 2 L. Ed. 2d 223 (1957)); *see also Square D.,* 2008 WL 4462298 at *9 n. 10 (noting that, while an argument based on a minute number of overall sales might be "valid in the context of general jurisdiction, in the context of

specific jurisdiction it is evidence that supports Plaintiff's argument that the Moving Defendants purposefully availed themselves of the laws and privileges of Pennsylvania by selling and shipping products to residents of the Commonwealth.").

Since the Defendants have purposefully availed themselves of the opportunity to conduct business with Pennsylvania citizens through their interactive websites, the Court must next consider whether this litigation "arise[s] out of and relate[s] to" those sales. *D'Jamoos,* 566 F.3d at 102. Here, the lawsuit directly arises out of the Defendants' respective sales of Infringing Products to Pennsylvania residents through their interactive websites. *See, e.g., Willyoung,* 2009 WL 3183061 at *13 ("The second part of our jurisdictional inquiry is also easily satisfied because this litigation arises out of and relates to BGM's use of its web site to conduct internet-based sales of its merchandise to Pennsylvania residents.") (internal quotation marks omitted); *Square D.,* 2008 WL 4462298 at *11 (finding the relatedness requirement satisfied where "at least one" of the products sold to a Pennsylvania resident by the defendant was from the allegedly infringing line of products at issue in the litigation). All of the Infringing Products which are the subject of this lawsuit were sold into Pennsylvania. Therefore, the "arise[s] out of and relate[s] to" test is easily met here.

Finally, the Court must consider whether the exercise of jurisdiction would otherwise comport with "traditional notions of fair play and substantial justice." *O'Connor v Sandy Lane Hotel Co., Ltd,* 496 F.3d 312, 316 (3rd Cir. 2007)(quoting *Int'l Shoe,* 326 U.S. at 316). Because the existence of minimum contacts makes jurisdiction presumptively constitutional, the defendant at step three of the specific-jurisdiction-inquiry process "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id* . (quoting *Burger King,* 471 U.S. at 477). The burden upon the defendant at this stage of the

inquiry is considerable. *See Pennzoil Prods. Co. v. Colelli & Assocs., Inc.,* 149 F.3d 197, 207 (3rd Cir. 1998) (noting that if minimum contacts are present, then jurisdiction will be unreasonable only in "rare cases"); *Grand Entm't Group, Ltd., v. Star Media Sales, Inc.,* 988 F.2d 476, 483 (3rd Cir.1993) ("The burden on a defendant who wishes to show an absence of fairness or lack of substantial justice is heavy."). As the Third Circuit has observed:

> The Supreme Court has identified several factors that courts should consider when balancing jurisdictional reasonableness. Among them are the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate [and international] judicial system's interest in obtaining the most efficient resolution of controversies, and [t]he procedural and substantive interests of other nations.

*O'Connor,* 496 F.3d at 324 (internal quotations omitted).

Here, the Plaintiff's interest in obtaining convenient and effective relief in the forum of its choice and Pennsylvania's interest in protecting its citizens from the sale of infringing goods within its borders are factors that weigh heavily in finding personal jurisdiction of the Defendants. *See Square D*, 2008 WL 4462298 at *12 (concluding that jurisdiction should be exercised in Pennsylvania "because the counterfeit goods in question potentially pose a danger to the public and were sold to residents of this Commonwealth."); *Zippo,* 952 F.Supp. at 1127 (noting Pennsylvania's strong interest in resolving trademark infringement claims implicating its citizens and giving "due regard to the Plaintiff's choice to seek relief in Pennsylvania"). As the court noted in *Zippo,* "[i]f [the defendant] had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple—it could have chosen not to sell its [products] to Pennsylvania residents." *Id* . at 1126–27.

Accordingly, Plaintiff respectfully submits that this Court has personal jurisdiction over Defendants in this action.

**B. Plaintiff Is Entitled To An *Ex Parte* Temporary Restraining Order And A Preliminary Injunction**

The Patent Act authorizes courts to issue injunctive relief "in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 35 U.S.C. § 283. An *ex parte* order is essential in this case to prevent immediate and irreparable injury to Plaintiff. Rule 65(b) of the Federal Rules of Civil Procedure provides, in pertinent part, that a temporary restraining order may be granted without written or oral notice to the opposing party or that party's counsel where "it clearly appears from the specific facts shown by affidavit . . . that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." Fed. R. Civ. P. 65(b). Further, this court has inherent power to grant an *ex parte* restraining order. *See Link v. Wabush R. R.*, 370 U.S. 626, 630 – 31 (1962) ("Inherent powers are governed by the 'control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases.'(citation omitted)"). Indeed, the Supreme Court has indicated that federal courts have broad inherent powers to accomplish justice. *See Chambers v. Nasco, Inc*., 501 U.S. 32, 44 (1991).

Defendants herein fraudulently promote, advertise, sell, and offer for sale goods that infringe on at least one of the Plaintiff's Patents, via their fully interactive, commercial Internet e-commerce stores using the Seller IDs. By their actions, Defendants are passing off Infringing Products as a genuine version of Plaintiff's Products and creating a false association in the minds of consumers between Defendants and Plaintiff. The entry of a temporary restraining order would serve to immediately stop Defendants from benefiting from their wrongful use of Plaintiff's intellectual property at issue and preserve the status quo until such time as a hearing can be held. *See Dell Inc. v. BelgiumDomains, LLC*, Case No. 07-22674 2007 WL 6862341, at

*2 (S.D Fla. Nov. 21, 2007) (finding *ex parte* relief more compelling where Defendants' scheme "is in electronic form and subject to quick, easy, untraceable destruction by Defendants.")

Absent a temporary restraining order without notice, Defendants can and, based upon Plaintiff's counsel's past experience, will significantly alter the status quo before the Court can determine the parties' respective rights. In particular, the Seller IDs at issue are under the Defendants' complete control. Thus, Defendants have the ability to modify e-commerce store data and content, redirect consumer traffic to other seller identification names, change payment accounts, and transfer assets. *Ference Dec.*, ¶ 6. Such modifications can happen in a short period of time after Defendants are provided with notice of this action. *Id.* Defendants can also easily electronically transfer and secret the funds sought to be restrained if they obtain advance notice of Plaintiff's Application for a Temporary Restraining Order and thereby thwart the Court's ability to grant meaningful relief and can completely erase the status quo. *Id*. As Defendants engage in illegal infringing activities, Plaintiff has no reason to believe Defendants will make their assets available for recovery pursuant to an account of profits or will adhere to the authority of this Court any more than they have adhered to the Patent Act.

"Courts in other circuits dealing with foreign on-line counterfeiters have not hesitated to exercise [their] authority [to grant an *ex parte* order] in infringement cases in which there is a danger the defendants will destroy, conceal, or transfer counterfeit goods." *Moose Toys Pty, Ltd. v. Thriftway Hylan Blvd. Drug Corp.,* No. 15- cv-4483-DLI/MDG, 2015 U.S. Dist.. LEXIS 105912, at *8 (E.D.N.Y. Aug. 6, 2015). Moreover, federal courts have long recognized that civil actions against counterfeiters - whose very business is built around the deliberate misappropriation of rights and property belonging to others - present special challenges that justify proceeding on an *ex parte* basis. *See Columbia Pictures Indus., Inc. v. Jasso*, 927 F.

Supp. 1075, 1077 (N.D. Ill. 1996) (observing that "proceedings against those who deliberately traffic in infringing merchandise are often useless if notice is given to the infringers"); *Time Warner Entertainment Co., L.P.* v. *Does*, 876 F. Supp. 407, 410-11 (E.D.N.Y. 1994).

This Court should prevent an injustice from occurring by issuing an *ex parte* temporary restraining order which precludes Defendants from continuing to display their infringing content via the Internet e-commerce stores or modifying or deleting any related content or data. Only such an order will prevent ongoing irreparable harm and maintain the status quo. The immediate and irreparable harm to Plaintiff's business in denying its Application for an *ex parte* temporary restraining order, greatly outweighs the harm to Defendants' interests in continuing to offer for sale and sell Infringing Products. Many courts have granted an *ex parte* temporary restraining order in situations where the harm to Plaintiff far outweighed the harm to defendants.[8]

The Third Circuit holds that a district court must evaluate the following four factors in deciding whether preliminary injunctive relief is appropriately entered: (1) the extent to which the moving party will suffer irreparable harm without injunctive relief; (2) the likelihood that the moving party will succeed on the merits; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest. *AT&T Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994). As shown below, Plaintiff readily meet the criteria for obtaining a temporary restraining order and preliminary injunction. The "standards which govern consideration of an application for a temporary restraining order are the same standards as those which govern a preliminary injunction." *Local 1814, Int'l*

[8] *See, supra* fn. 2 (collecting cases granted *ex parte* temporary restraining order in situations where harm to Plaintiff far outweighed harm to defendants.).

*Longshoremen's Ass'n v. N.Y. Shipping Ass'n, Inc.,* 965 F.2d 1224, 1228 (2d Cir. 1992). *See also Hall v. Johnson*, 599 F.Supp.2d 1, 6 n. 2 (D.D.C. 2009); *accord Sterling Commercial Credit-Michigan, LLC v. Phoenix Industries I, LLC*, 762 F.Supp.2d 8 (D.D.C. 2011); *Coalition for Parity, Inc. v. Sebelius*, 709 F.Supp.2d 6 (D.D.C. 2010). As detailed below, Plaintiff has met the standard for a preliminary injunction, and accordingly, a temporary restraining order should also issue against Defendants.

**1. Plaintiff Will Suffer Irreparable Harm in The Absence of an Injunction Leaving Them With No Adequate Remedy at Law**

Pike Brands also stands to suffer irreparable harm through the Defendants infringement of at least one of Plaintiff's Patents. 35 U.S.C. § 154(a)(a) provides "[e]very patent shall contain ... a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States..." "It is well-settled that, because the principal value of a patent is its statutory right to exclude, the nature of the patent grant weighs against holding that monetary damages will always suffice to make the patentee whole." *Hybritech Inc. v. Abbott Laboratories*, 849 F.2d 1446, 1456-1457 (Fed. Cir. 1988). "If monetary relief were the sole relief afforded by the patent statute then injunctions would be unnecessary and infringers could become compulsory licensees for as long as the litigation lasts." *Id*. at 1457 (quoting *Atlas Powder*, 773 F.2d at 1233, 227 USPQ at 292). Accordingly, injunctive relief is an appropriate remedy for patent infringement. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (U.S. 2006) (stating: "We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards."); *see also Telebrands*

*Direct Response Corp. v. Ovation Commc'ns, Inc.*, 802 F. Supp. 1169, 1178-79 (D.N.J. 1992) (granting preliminary injunction on design patent infringement claim).

As discussed previously, Pike Brands has lost and will continue to lose its hard-earned market share, which supports a finding of irreparable harm. *Abbott Laboratories v. Sandoz, Inc*., 544 F.3d 1341, 1361-62 (Fed. Cir. 2008) (citing: *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed.Cir.2001); *Bio-Technology Gen. Corp. v. Genentech, Inc*., 80 F.3d 1553, 1566 (Fed.Cir.1996); *Polymer Technologies, Inc. v. Bridwell*, 103 F.3d 970, 975-76 (Fed.Cir.1996)). In this case, Plaintiff Pike Brands has already begun to lose market share and almost certainly will suffer great and unpredictable harm should Defendants continue their infringing activity. (Jelovich Dec. ¶ 58).

Harm to a patent holder's goodwill also supports issuance of a preliminary injunction *AstraZeneca LP v. Apotex Corp*.,633 F.3d 1042, 1063 (Fed. Cir. 2010); *see also Reebok Int'l Ltd. v. J. Baker, Inc*., 32 F.3d 1552, 1558 (Fed. Cir. 1994) ("Harm to reputation resulting from confusion between an inferior accused product and a patentee's superior product is a type of harm that is often not fully compensable by money because the damages caused are speculative and difficult to measure"). Here, there is ample evidence that the Defendants' infringing conduct will irreparably harm the goodwill that Pike Brands has built up through the use of the patented baby utensils in connection with Pike Brands' Grabease and Nooli brands.

Unless the Defendants are enjoined, the Plaintiff will lose their hard-earned market share, which further supports a finding of irreparable harm. *Abbott Labs. v. Sandoz, Inc*., 544 F.3d 1341, 1361-62 (Fed. Cir. 2008) (citing *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001)); *Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1566 (Fed. Cir. 1996); *Polymer Techs., Inc. v. Bridwell,* 103 F.3d 970, 975-76 (Fed. Cir. 1996)). In

this case, the Plaintiff almost certainly will suffer great and unpredictable harm should Defendants continue their infringing activity.

Defendants are offering their substandard Infringing Products, often in wholesale quantities, at significantly below market prices with which Plaintiff cannot compete given the high-quality materials and construction necessary to manufacture their genuine products. *See Jelovich Dec.,* ¶ 14 and *Mint, Inc. v. Iddi Amad*, No. 10-cv-9395-SAS, 2011 U.S. Dist.. LEXIS 49813, at *9 , n.23 (S.D.N.Y. May 9, 2011) ("the loss of pricing power resulting from the sale of inexpensive 'knock-offs' is, by its very nature, irreparable") (citing *Abbott Labs. v. Sandoz, Inc.,* 544 F.3d 1341, 1362 (Fed. Cir. 2008) (citing *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH,* 237 F.3d 1359, 1368 (Fed. Cir. 2001) (likelihood of price erosion and loss of market position are evidence of irreparable harm); *Polymer Techs., Inc. v. Bridwell,* 103 F.3d 970, 975-76 (Fed. Cir. 1996) (loss of market opportunities cannot be quantified or adequately compensated and is evidence of irreparable harm).

When consumers become accustomed to seeing advertised prices significantly lower online, they will be reluctant to pay more money for Plaintiffs' high-quality product, causing long term price erosion that is difficult to calculate. *See Apnea Scis. Corp. v. Koncept Innovators, Inc.*, 2016 U.S. Dist. LEXIS 188988, at *13 (C.D. Cal. Nov. 7, 2016).

Another consideration supporting a finding of irreparable harm is that this is a new market. Without Defendants' infringement, Plaintiffs would be able to advertise their goods to the public and create strong relationships with their customers. The flood of Defendants' Infringing Products into the market is harmful because consumers may assume all similar products are of a poor quality, including Plaintiffs' Products. *Power Survey, LLC v. Premier Util. Servs., LLC*, 61 F. Supp. 3d 477, 487 (D.N.J. 2014).

Harm to a patent holder's goodwill also supports issuance of a preliminary injunction. *AstraZeneca LP v. Apotex Corp.,* 633 F.3d 1042, 1063 (Fed. Cir. 2010); *see also Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994) ("Harm to reputation resulting from confusion between an inferior accused product and a patentee's superior product is a type of harm that is often not fully compensable by money because the damages caused are speculative and difficult to measure."). Here, there is ample evidence (*See Jelovich Dec.,* ¶¶ 18–29) that Defendants' infringing conduct will irreparably harm the goodwill and reputation of the Plaintiff.

Finally, because Defendants are individuals and business who, upon information and belief, likely reside in the foreign jurisdictions with no U.S. presence[9], any monetary judgment is likely uncollectable. *See Robert Bosch, LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011) (reversing denial of permanent injunction where the likely availability of monetary damages was in question, citing *O2 Mirco INt'l Ltd. v. Beyond Innovation Tech. Co.*, No. 2:04-cv-0032, 2007 WL 869576, at *2 (E.D. Tex. Mar. 21, 2007) where "'all three defendants are foreign corporation and that there is little assurance that [plaintiff] could collect money damages'"). Furthermore, other district court have found that money damages were insufficient in similar cases involving foreign infringers. *E.g., Aevoe Corp. v. AE Tech Co., Ltd.*, No. 2:12-cv-0053, 2012 WL 760692, at *5 (D. Nev. Mar. 7, 2012) ("[A] finding of irreparable harm was not clearly erroneous because it also found that since AE Tech is a foreign corporation, money damages would be insufficient."); *Otter Prods. V. Anke Group Indus. Ltd.*, 2:13-cv-00029, 2013 WL 5910882, at *2 (D. Nev. Jan. 8, 2013) ("because Anke has no presence in the United States, it may be difficult or impossible to Otterbox to enforce a monetary judgment against Anke");

[9] With the exception of the self-identified U.S. Sellers, BLESSING BABY, CHUBBY ZEBRA, and PANDAEAR.

*Bushnell, Inc. v. Brunton Co.*, 673 F.Supp.2d. 1241, 1263 (D. Kan. 2009) (granting preliminary injunction; "the prospect of collecting money damages from a foreign defendant with few to no assets in the United States tips in favor of a finding of irreparable harm"); *Nike , Inc. v. Fuijian Bestwinn Industry Co., Ltd.*, 166 F.Supp.3d 1177, 1179 (D. Nev. 2016) ("[B]ecause Bestwinnhas no presence in the United States, it may be difficult or impossible for NIKE to recover a money judgment against Bestwinn").

For the reasons stated above, Plaintiff will suffer immediate and irreparable injury, loss, or damage if an *ex parte* Temporary Restraining Order is not issued in accordance with Federal Rule of Civil Procedure 65(b)(1).

**2. Plaintiff is Likely to Prevail on its Patent Infringement Claims[10]**

A design patent contains a single claim. 37 C.F.R. § 1.153. "Whether a design patent is infringed is determined by first construing the claim to the design … and then comparing it to the design of the accused device." *OddzOn Prods., Inc. v. Just Toys, Inc*., 122 F. 3d 1396, 1404-05 (Fed. Cir. 1997) (citation omitted). The Federal Circuit has established that the sole test for design patent infringement is the ordinary observer test. *Egyptian Goddess, Inc. v. Swisa, Inc*., 543 F.3d 665, 678 (Fed. Cir. 2008). The ordinary observer test originated in *Gorham v. White*, 81 U.S. 511 (U.S. 1872), where the Supreme Court held "if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other." *Id.* at 528. Thus, to show infringement under the ordinary observer test, a plaintiff must demonstrate that "an ordinary

[10] Two of the Defendants, SODEE and TONGXING US were selling devices that only infringed on the '280 (Count IV of the *Complaint*) and the '531 Patent (Count III of the *Complaint*), thus they are not accused of infringing all of the Plaintiff's Patents.

observer, familiar with the prior art designs, would be deceived into believing that the accused product is the same as the patented design." *Crocs Inc. v. ITC et al*., 598 F.3d 1294, 1303 (Fed. Cir. 2010) (citing *Egyptian Goddess*, 543 F.3d at 681). Ordinary observers are those having "ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give." *Gorham*, 81 U.S. at 528. "[T]he test of infringement must be the effect produced upon the eye of a prospective purchaser who for the first time sees the two articles and is pleased to the point of buying." *Sanson Hosiery Mills, Inc. v. Warren Knitting Mills, Inc.*, 202 F.2d 395, 398 n.2 (3d Cir. 1953) (quoting *Standard Match Corporation v. Bell Machine Co.*, 7 Cir., 1936, 83 F.2d 365, 367).

The case of *Hoop v. Hoop*, 279 F.3d 1004 (Fed. Cir. 2002) is illustrative of how a design can be determined to be "substantially the same," *Gorham*, 81 U.S. at 528, in the design patent context. In *Hoop*, the Federal Circuit upheld a preliminary injunction issuing on a claim of design patent infringement. At issue in *Hoop* were two competing designs (see *Illustration 1*) where, because the designs of FIG. 1 and 2 (first design) were substantially similar to FIG. 3 (second design), a preliminary injunction was affirmed. *Hoop*, 279 F.3d at 1008.

Figure 1 Figure 2 Figure 3

In *Hoop*, noting that "…the two eagles have the same proportions, body size, orientation, three rows of feathers, head and beak shape, and eye placement", the Federal Circuit concluded

that "…the trial court could permissibly conclude at the preliminary injunction stage that the second design was likely to be found to be merely a more refined version of the first." *Hoop*, 279 F.3d at 1006.

**a. Construing the Claim**

With respect to construing the claimed design, "[a]s the Supreme Court has recognized, a design is better represented by an illustration 'than it could be by any description and a description would probably not be intelligible without the illustration.'" *Egyptian Goddess*, 543 F.3d at 679 (quoting *Dobson v. Dornan*, 118 U.S. 10, 14 (1886). There is no need for the district court "to provide a detailed verbal description of the claimed design, as is typically done in the case of utility patents." *Egyptian Goddess*, 543 F.3d at 679 (citing *Contessa Food Prods., Inc*. 282 F.3d at 1377 (approving district court's construction of the asserted claim as meaning "a tray of a certain design, as shown in Figures 1-3")); *see also Crocs Inc*., 598 F.3d at 1302 ("This court has cautioned, and continues to caution, trial courts about excessive reliance on a detailed verbal description in a design infringement case.") (citation omitted). For this reason, a detailed verbal claim construction is not required and may actually be misleading; instead, a claim construction based on the figures may be used.

Each of the '520, '743, '531, and '280 Patents covers a baby utensil of the general shape and character as represented by Illustrations in Complaint ¶ 7, which reproduce an exemplar of the various figures from each of these patents. These figures illustrate the overall visual effect of the ornamental design of each of Plaintiff's Patents.

The ordinary observer is presumed to be familiar with the prior art; thus, "when the claimed and accused designs are not plainly dissimilar, resolution of the question whether the ordinary observer would consider the two designs to be substantially the same will benefit from a

comparison of the claimed and accused designs with the prior art…" *Egyptian Goddess*, 543 F.3d at 678. Accordingly, a comparison with the prior art may be informative because "…differences between the claimed and accused designs that might not be noticeable in the abstract can become significant to the hypothetical ordinary observer who is conversant with the prior art." *Id*.

In considering the prior art, however, it is important to consider the design as a whole, as "the deception that arises is a result of the similarities in overall design, not of similarities in ornamental features in isolation." *Crocs Inc.*, 598 F.3d at 1303 (citation and internal quotation marks omitted). Thus, "[t]he ordinary observer test applies to the patented design in its entirety, as it is claimed. Id (citation omitted). Furthermore, while a comparison of the claimed and accused designs with the prior art may benefit the ordinary observer analysis, it is the accused infringer, not the patentee, that bears the burden of pointing out prior art that it considers pertinent to the comparison between the claimed and accused designs (although the patentee is free to make such comparisons). *Egyptian Goddess*, 543 F.3d at 678-79.

In the instant case, the differences between the design claimed by the ''520, '743, '531, and '280 Patents and the prior art, as aptly represented by the references cited by the United States Patent and Trademark Office ("USPTO"), are significant. The representative references cited by the USPTO establishes that no prior design, or combination of designs, create the overall visual effect of the ornamental design of the '520, '743, '531, and '280 Patents.

Claims of a design patent are also to be construed with the understanding that "[w]here a design contains both functional and non-functional elements, the scope of the claim must be construed in order to identify the non-functional aspects of the design as shown in the patent." *Richardson v. Stanley Works, Inc*., 597 F.3d 1288, 1293 (2010) (quoting *OddzOn Prods*., 122 F.

3d at 1405) (internal quotation remarks removed). "If … a design contains both functional and ornamental features, the patentee must show that the perceived similarity is based on the ornamental features of the design. The patentee 'must establish that an ordinary person would be deceived by reason of the common features in the claimed and accused designs which are ornamental.'" *OddzOn Prods*., 122 F. 3d at 1405 (quoting *Read Corp. v. Portec, Inc*., 970 F.2d 816, 825 (Fed. Cir. 1992)). Thus, a district court properly factors out the functional aspects of a design as part of its claim construction. *Id.*

Many designs or design elements perform some function; however, so long as a design choice has been applied to the design or design element in question, the design or design element is not dictated by function and the ornamental nature of the design or design element should be given patentable weight. *L.A. Gear, Inc. v. Thom McAn Shoe Co*., 988 F.2d 1117, 1123 (Fed. Cir. 1993) ("When there are several ways to achieve the function of an article of manufacture, the design of the article is more likely to serve a primarily ornamental purpose."). Here, as with many designs, it may be alleged that the design claimed in the '520, '743, '531, and '280 Patents contains some functional elements. However, even if there are some functional elements, the ''520, '743, '531, and '280 Patent design claims are to be construed as encompassing the ornamental design applied to such elements. *Richardson*, 597 F.3d at 1294 (citing *L.A. Gear*, 988 F.2d at 1123 ("The elements of the design may indeed serve a utilitarian purpose, but it is the ornamental aspect that is the basis of the design patent").

Thus, although a baby utensil or any similar article of manufacture may include some functional elements, such as elements to enclose a liquid, the ornamental design applied in the design is properly considered part of the design claimed.

Here, the designs of the many other manufacturers show the multiple baby utensil designs available to other companies such as the Defendants for accomplishing any functionality that may be allegedly associated with the design of the ‘‘520, ‘743, ‘531, and ‘280 Patents. (Jelovich Decl. ¶¶ 34 and 35). Such ornamentation is not functional and thus is properly included in the construed design claim. Accordingly, it cannot be concluded that any of the elements of the ‘‘520, ‘743, ‘531, and ‘280 Patent design are “’dictated by’ the use or purpose of the article”, *L.A. Gear*, 988 F.2d at 1123, and thus functionality should not significantly impact the claim construction of the ‘‘520, ‘743, ‘531, and ‘280 Patents.

Accordingly, an appropriate claim construction in this case is simply the figures for the design for the ‘‘520, ‘743, ‘531, and ‘280 Patents, with the understanding that the prior art does not give the overall visual effect as seen in these figures, and further with the understanding that any functional elements should be discounted in claim construction.

As such, the ordinary observer test is to be applied to the design for the baby utensils as illustrated in the figures for the design for the ‘‘520, ‘743, ‘531, and ‘280 Patents. *Crocs Inc*., 598 F.3d at 1303 (“The administrative judge and the Commission needed to apply the ordinary observer test to ‘the design shown in Figures 1-7’”).

**b. Comparison of the Patented Designs with the Accused Products**

“The comparison step of the infringement analysis requires the fact-finder to determine whether the patented design as a whole is substantially similar in appearance to the accused design. The patented and accused designs do not have to be identical in order for design patent infringement to be found.” *OddzOn Prods*., 122 F.3d at 1405. “The proper comparison requires a side-by-side view” of the patent design and the accused product. *Crocs Inc*., 598 F.3d at 1304. The accused products in this case are the Defendants’ baby utensils. Example views of the

Defendants' baby utensils, with corresponding example figures from the Plaintiff's Patents are generally set forth in Complaint **Composite Exhibit 1** and the *Jelovich Dec*. As is readily apparent from a side-by-side comparison, the Defendants' baby utensils include the same design features, distinguishable from the prior art and not to be discounted due to functionality, as the design claimed in the figures for the Plaintiff's Patents. As the side-by-side comparison demonstrates, the Defendants' baby utensils have a deceptively similar if not identical overall visual effect that deceives purchasers and easily satisfies the ordinary observer test.

The accused products provide a strikingly similar overall visual effect that is essentially indistinguishable from the claimed design to the ordinary observer, even when the prior art is taken into consideration and functional elements, if any, are filtered out of the analysis. Here, the design covered by the Plaintiff's Patents "departs conspicuously from the prior art," and the accused product parrots these ornamental features; thus, "the accused design is naturally more likely to be regarded as deceptively similar to the claimed design, and thus infringing." *Egyptian Goddess*, 543 F.3d at 677.

In contrast to the stark differences between the design claimed by the Plaintiff's Patents and the references cited by the USPTO, the differences, if any, between the design claimed in the Plaintiffs Patents and the accused product are so minor as to escape the attention of the ordinary observer, particularly given that the ordinary observer only gives "such attention as a purchaser usually gives." *Gorham*, 81 U.S. at 528. The overall effect of minute differences, if any, is negligible and does not change the overall visual effect or the deception of the ordinary observer.

Moreover, to the extent that any of the elements of the design claimed in the Plaintiff's Patents should be discounted on the basis that they are functional, these elements do not contribute to the overall visual effect of the patented design. Essentially all of the features,

including the overall visual effect of the patented design of the Plaintiff's Patents are nonfunctional. In addition to the myriad of other design choices manufacturer have available to them to make baby utensils, the non-functionality of the design of the Plaintiff's Patents is also evidenced by the many alternative design choices available for achieving the "functions" – insofar as there are any relevant to the analysis – associated with a baby utensil

Thus, any arguably functional element, even if discounted, would not change the ordinary observer analysis inasmuch as an ordinary observer would still be deceived into thinking the accused product designs are the same as the Plaintiff's Patents designs because these elements, if any, do not contribute significantly to the overall visual effect of the design as a whole.

Moreover, a comparison of the commercial embodiment of the design claimed in the Plaintiff's Patents and the Defendants' baby utensils provides further support that the designs are confusingly similar under the ordinary observer test. *See L.A. Gear*, 988 F.2d at 1125-26 ("When the patented design and the design of the article sold by the patentee are substantially the same, it is not error to compare the patentee's and the accused articles directly … indeed, such comparison may facilitate application of the *Gorham* criterion of whether an ordinary purchaser would be deceived into thinking that one were the other.") (internal citation omitted).

Accordingly, an ordinary observer, familiar with the prior art, and discounting any functional elements, would be deceived into believing the design of the accused product is the same as the design claimed by the ''520, '743, '531, and '280 Patents. It follows that Plaintiff is also likely to prove infringement at trial, and as such, injunctive relief is warranted here. *See e.g., Hoop*, 279 F.3d at 1008 ("We will affirm [a preliminary injunction under the patent laws] unless we find it to be an abuse of discretion upon an error of law, or a serious misjudgment of the evidence.").

**c. Plaintiff is likely to Prevail on Design Patent Validity at Trial**

Pike Brands must also show that it "will likely withstand challenges, if any, to the validity of the patent." *Titan Tire Corp*., 566 F.3d at 1376. "In assessing whether the patentee is entitled to the injunction, the court views the matter in light of the burdens and presumptions that will inhere at trial." *Id.* "At trial … an issued patent comes with a statutory presumption of validity under 35 U.S.C. § 282. Because of this presumption, an alleged infringer who raises invalidity as an affirmative defense has the ultimate burden of persuasion to prove invalidity by clear and convincing evidence, as well as the initial burden of going forward with evidence to support its invalidity allegation." *Id.* (internal citations omitted) (emphasis in original).

"Before trial … these burdens and presumptions [are] tailored to fit the preliminary injunction context." *Id*. at 1377 (emphasis in original). "Thus, if a patentee moves for a preliminary injunction and the alleged infringer does not challenge validity, the very existence of the patent with its concomitant presumption of validity satisfies the patentee's burden of showing a likelihood of success on the validity issue." *Id.* at 1377. If Defendants come forward with evidence of invalidity, Plaintiffs are entitled to respond. *Id.*

In addition to the presumption of validity, the prosecution of the ''520, '743, '531, and '280 Patents before the USPTO supports the validity of the ''520, '743, '531, and '280 Patents because the ''520, '743, '531, and '280 Patents issued from the USPTO after having a large number of references cited against them, none of which were close to the design of the ''520, '743, '531, and '280 Patents. Other considerations also evidence the novelty of the design covered by the ''520, '743, '531, and '280 Patents. For example, the design as applied in a commercial embodiment (Pike Brands Grabease and Nooli Baby Utensils) have enjoyed great commercial success. (Jelovich Dec. ¶6).

The clear differences between the claimed design and the prior art, as discussed in the context of claim construction, also support a conclusion that the ‘‘520, ‘743, ‘531, and ‘280 Patents are valid. Moreover, and as discussed in the context of claim construction, any elements that may be alleged as functional are clearly inconsequential to the overall visual effect, which also supports a conclusion that the ‘‘520, ‘743, ‘531, and ‘280 Patents are valid. Accordingly, the Plaintiff, not the Defendants, is likely to prevail on the validity of the ‘‘520, ‘743, ‘531, and ‘280 Patents at trial.

In this case, Plaintiff is the lawful owner of the Plaintiff's Patents. Plaintiff has submitted extensive documentation showing that Defendants make, use, offer for sale, sell, and/or import in the United States for subsequent sale or use products that infringe directly on at least one of Plaintiffs Patents. *Odell Dec.*, **Composite Exhibit 1**; *Jelovich Dec.*, ¶¶ 23 – 25. In reviewing the photographs and listings of the Defendants products in Exhibit 1 and comparing them to the Plaintiffs design patents, it is demonstrated that the Defendants' products infringe on at least one of the Plaintiff's Patents. Thus, Plaintiff has shown it is likely to prevail on its patent infringement claims. The Plaintiff's Products are marked in accordance with the Patent Act.

As to validity, "[e]ach issued patent carries with it a presumption of validity under 35 U.S.C. § 282." *Tinnus Enters., LLC v. Telebrands Corp.*, 846 F.3d 1190, 1205 (Fed. Cir. 2017). "This presumption is sufficient to establish a likelihood of success on the validity issue, absent a challenge by the accused infringer." *Id.*

**3. The Balance of Hardships Favors the Plaintiff**

The balance of hardships unquestionably and overwhelmingly favors Plaintiff in this case. Here, as described above, Plaintiff has suffered, and will continue to suffer, irreparable harm to their business, the value, goodwill and reputation built up in and associated with the

Plaintiff's Products and to their reputation as a result of Defendants' willful and knowing sales of Infringing Products. *See Jelovich Dec.,* ¶¶ 21- 28. In contrast, any harm to Defendants would only be the loss of Defendants' ability to continue to offer their Infringing Products for sale, or, in other words, the loss of the benefit of being allowed to continue to unfairly profit from their illegal and infringing activities. "Indeed, to the extent defendants 'elect[] to build a business on products found to infringe[,] [they] cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." *Windsurfing Intern, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986); *Broad. Music, Inc. v. Prana Hosp.,* Inc., 158 F. Supp. 3d 184, 196 (S.D.N.Y. 2016) (quoting *Mint, Inc. v. Amad,* 2011 U.S. Dist.. LEXIS 49813, at *3 (S.D.N.Y. 2011) (internal quotation marks and citation omitted)); *see also Mitchell Group USA LLC*, No. 14-cv-5745-DLI/JO, 2014 U.S. Dist.. LEXIS 143001, at *6-7 (E.D.N.Y Feb. 17, 2014) (citing *Philip Morris USA Inc. v. 5 Bros. Grocery Corp.,* No. 13-cv-2451- DLI/SMG, 2014 U.S. Dist.. LEXIS 112274 (E.D.N.Y. Aug. 5, 2014) ("Absent an injunction, there will be further erosion of plaintiff's goodwill and reputation. Defendants, on the other hand, will be called upon to do no more than refrain from what they have no right to do in the first place.")).

**4. The Relief Sought Serves the Public Interest**

As Plaintiff has demonstrated, Defendants have been profiting from the sale of Infringing Products. Thus, the balance of equities tips decisively in Plaintiff's favor. The public is currently under the false impression that Plaintiff has granted a license or permission to Defendants with respect to the Plaintiff's Patents. In this case, the injury to the public is significant, and the injunctive relief that Plaintiff seeks is specifically intended to remedy that injury be dispelling the public confusion created by Defendants' actions. Since Defendants have willfully and knowingly inserted knock-off Infringing Products into the marketplace, the public

would benefit from a temporary restraining order and preliminary injunction halting any further sale and distribution of Defendants' Infringing Products. *See Jelovich Dec.,* ¶¶ 23 - 29. As such, equity requires that Defendants be ordered to cease their unlawful conduct.

### C. Plaintiff is Entitled to an Order Preventing 1) The Fraudulent Transfer of Assets and 2) Freezing of Defendants' Merchant Storefronts

#### 1. Defendants' User Accounts and Merchant Storefronts Must be Frozen to Prevent Defendants From Thwarting this Court's Orders[11]

A temporary restraining order which, in part, restrains and enjoins the Third Party Service Provider(s), as well as any and all as yet undiscovered online marketplace platforms, from providing services to Defendants' User Accounts and Merchant Storefronts is warranted and necessary because the continued offering for sale and/or sale of the Infringing Products by Defendants on their Merchant Storefronts through their User Accounts will result in immediate and irreparable injury to Plaintiff, as described above. *See Gucci Am., Inc. v. Weixing Li,* 768 F.3d 122, 126 (2d Cir. 2014) (Hon. Richard J. Sullivan entered a temporary restraining order, which, in part, enjoined the sale of counterfeit goods on the Internet) and *AW Licensing, LLC v. Bao,* No. 15-cv-1373, 2015 U.S. Dist.. LEXIS 177101, at *3 (S.D.N.Y. Apr. 1, 2015) (Hon. Katherine B. Forrest entered a temporary restraining order which was subsequently converted into a preliminary injunction, which, in part, disabled the defendants' websites, which were their means of distributing, offering for sale and selling Infringing Products.).[12]

[11] While Plaintiff is seeking the takedown of any infringing listings, Plaintiff is not currently seeking a restraining order on the financial accounts of the purported US Sellers, namely, BLESSING BABY, CHUBBY ZEBRA and PANDAEAR.

[12] See also *supra fn. 3*

**2. There is Good Reason for the Court to Freeze Defendants' User Accounts**

One reason why courts have ordered this relief is the ease with which a Merchant Storefront may be set up. For example, a defendant who knowingly sells Infringing Products will likely try and set up another Merchant Storefront to keep selling when the current Merchant Storefront stops working. *See Ference Dec.*, ¶ 6. This brings into play a balancing of the hardship to Defendants against the hardship to Plaintiff if the relief is not granted. In the present case, the hardship to Plaintiff outweighs any hardship to Defendants. The proposed Order does not block any of the enjoined Defendants from setting up another Merchant Storefront to sell non-Infringing Products. The proposed Order merely blocks any goodwill associated with the Merchant Storefront which sold Infringing Products; the Defendants are free to set up a new Merchant Storefront that does not sell Infringing Products.

Blocking the good will associated with the Merchant Storefront helps prevent the situation with the defendants where the Infringing Product listing has been taken down but if someone (e.g., a repeat buyer) contacts a Defendant at the Merchant Storefront using the messaging system provided by the online marketplace asking for the Infringing Product it will be made available by a Defendant. *Id*. The only way to preclude this type of harm to Plaintiff is to freeze the Defendants' Merchant Storefronts.

A freezing of Defendants' Merchant Storefronts also acts to provide immediate notice of the present action to Defendants. Indeed, a number of cases have required that the domain names on which a defendant's storefront operates be turned over to the plaintiff and pointed to a webpage providing notice of the lawsuit against the defendant. *Iron Maiden Holdings Ltd. v. The P'ships & Unicorporated Assns. Identified on Schedule "A"*, No. 18-CV-522 (N.D. Ill. Feb. 1, 2018) ("Plaintiff may provide notice of these proceedings to Defendants, including notice of

the preliminary injunction hearing and service of process pursuant to Fed. R. Civ. P. 4(f)(3), by electronically publishing a link to the Complaint, this Order and other relevant document on a website to which the Defendant Domain Names which are transferred to Plaintiff's control will redirect"). Thus, the freezing of Defendants' Merchant Storefronts is also a manner of ensuring that Defendants receive notice of the present action.

**D. Plaintiff is Entitled to an Order Authorizing Expedited Discovery**

Additionally, Plaintiff respectfully requests that the Court order expedited discovery from Defendants, Financial Institutions and the Third Party Service Providers regarding the scope and extent of Defendants' infringing activities, as well as Defendants' account details and other information relating to Defendants' Financial Accounts, Assets and/or any and all User Accounts and or Financial Accounts with the Third Party Service Providers, including, without limitation any and all websites, any and all accounts with online marketplace platforms, as well as any and all as yet undiscovered accounts with additional online marketplace platforms held by or associated with Defendants, their respective officers, employees, agents, servants and all other persons in active concert with any of them ("User Accounts"), and any and all User Accounts through which Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them operate storefronts to manufacture, import, export, advertise, market, promote, distribute, display, offer for sale, sell and/or otherwise deal in products, including Infringing Products, which are held by or associated with Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them ("Merchant Storefront(s)") including, without limitation, those owned and

operated, directly or indirectly, by the Third Party Service Providers and the Financial Institutions.

District courts have broad power to require early document production and to permit expedited discovery. *See* Fed. R. Civ. P. 30(b), 34(b). Expedited discovery may be granted when the party seeking it demonstrates: (1) irreparable injury; (2) some likelihood of success on the merits; (3) some connection between expedited discovery and the avoidance of irreparable injury; and (4) some evidence that the injury which will result without expedited discovery looms greater than the injury that defendant will suffer if expedited discovery is granted. *See, e.g., Advanced Portfolio Technologies, Inc. v. Advanced Portfolio Technologies Ltd.*, 1994 U.S. Dist.. LEXIS 18457, at *7 (S.D.N.Y. Dec. 28, 1994).

Generally, a party may not seek discovery prior to a Rule 26(f) conference unless authorized by a court order. *See* Fed. R. Civ. P. 26(d)(1). While in the past, Courts have often applied a four-factor test to determine when expedited discovery may be granted,[13] they now apply a more flexible "good cause" test to examine "the discovery request . . . on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding circumstances." *Ayyash v. Bank Al-Madina,* 233 F.R.D. 325, 326 (S.D.N.Y. 2005) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor,* 194 F.R.D. 618, 624 (N.D. 1ll. 2000)).[14] Regardless of which test is applied, Plaintiff has established that it is entitled to the

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[13] ". . . the plaintiff must demonstrate (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted." *Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs., Ltd.,* 1994 U.S. Dist. LEXIS 18457, at *7 (S.D.N.Y. Dec. 28, 1994).

[14] See, *e.g., Malibu Media, LLC v. Doe*, 2016 U.S. Dist. LEXIS 64656, at *4 (S.D.N.Y. May 16, 2016); *Malibu Media, LLC v. Doe,* 2015 U.S. Dist. LEXIS 87751, at *2-3 (S.D.N.Y. July 6, 2015); *Milk Studios, LLC v. Samsung Elecs. Co.,* 2015 U.S. Dist. LEXIS 38710, at *4-5 (S.D.N.Y. Mar. 25, 2015); *Admarketplace, Inc. v. Tee Support, Inc.,* No., 2013 U.S. Dist. LEXIS 129749, at *3-4 (S.D.N.Y. Sept. 11, 2013); *Dig. Sin, Inc. v. Does*

expedited discovery requested. Plaintiff has demonstrated both irreparable injury and its probability of success on the merits above, and taking into account the covert nature of Defendants, their business operations and the fact that they appear to be foreign individuals or companies who have both the incentive and the capability to hide or destroy relevant business records and other discoverable information and documentation upon hearing of this action, Plaintiff respectfully submits that there is good cause for this Court to grant Plaintiff the expedited discovery requested herein because it will prevent further injury to Plaintiff and assist Plaintiff in pursuing its claims against Defendants and in recovering the damages to which it is entitled. *See Ayyash,* 233 F.R.D., at 327.

Despite the likelihood of success of Plaintiff's claims and the injury it has and continues to endure, if this Court were to deny expedited discovery, Plaintiff may lose the opportunity to effectively pursue their claims against Defendants because there are several aspects of Defendants' infringing activities that Plaintiff are not yet able to confirm, including: 1) the true identities of Defendants, 2) the full scope of Defendants' infringing activities, 3) the source or location of Defendants' inventory of Infringing Products and/or 4) where the proceeds from Defendants' infringing activities have gone. *See Admarketplace, Inc. v. Tee Support, Inc.,* No. 13-cv-5635- LGS, 2013 U.S. Dist.. LEXIS 129749, at *5 (S.D.N.Y. Sep. 11, 2013) (finding that a plaintiff "who has a potentially meritorious claim and no ability to enforce it absent expedited discovery, has demonstrated good cause for expedited discovery"). Therefore, only through an order from the Court allowing expedited discovery will Plaintiff be able to fully ascertain the extent of Defendants' infringing activities.

*1-176,* 279 F.R.D. 239, 241 (S.D.N.Y. 2012); and *Stern v. Cosby,* 246 F.R.D. 453, 457 (S.D.N.Y. 2007) (agreeing with the *Ayyash* Court that the more flexible approach is the better approach.).

Plaintiff respectfully requests an *ex parte* Order allowing expedited discovery in order to permit it to discover certain identifying information, including information concerning all of Defendants' Financial Accounts, Assets and User Accounts and their sales of Infringing Products. The discovery requested on an expedited basis in Plaintiff's [Proposed] Order has been limited to include only that which is essential to prevent further irreparable harm. Under Fed. R. Civ. P. 65(d)(2)(C), this Court has the power to bind any third parties who are in active concert with Defendants that are given notice of the Order to provide expedited discovery. Moreover, Financial Institutions and the Third-Party Service Provider have complied with similar requests for expedited discovery in like actions before this Court. *See supra* note 6. Plaintiff respectfully submits that its request should be granted.

**E. Plaintiff's Request for a Security Bond in the Amount of $5,000 is Adequate**

Generally, a bond is a condition of preliminary injunctive relief. Fed. R. Civ. P. 65(c) requires a successful applicant for a preliminary injunction to post a bond, "in such sum as the [district] court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." Thus, the injunction bond "provides a fund to use to compensate incorrectly enjoined defendants." *Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797, 804 (3d Cir. 1989) (quotations omitted).

The injunction bond also serves other functions. "It is generally settled that, with rare exceptions, a [party] wrongfully enjoined has recourse only against the bond." *Id.; see also Hoxworth v. Blinder, Robinson & Co., Inc.,* 903 F.2d 186, 210 n. 31 (3d Cir.1990) (Applicants "derive some protection from the bond requirement, for [enjoined parties] injured by wrongfully issued preliminary injunctions can recover only against the bond itself."). Thus, the bond

generally limits the liability of the applicant and informs the applicant of "the price [it] can expect to pay if the injunction was wrongfully issued." *Instant Air Freight,* 882 F.2d at 805; *see also id.* at 805 n. 9 ("The bond can thus be seen as a contract in which the court and [the applicant] 'agree' to the bond amount as the 'price' of a wrongful injunction.") (quotations omitted).

Plaintiff respectfully submit that in connection with the Court's order pursuant to its inherent equitable power requiring that the Defendants' Assets and Defendants Financial Accounts be frozen by the Financial Institutions, Plaintiff's provision of security in the amount of $5,000 ("Security Bond") is more than sufficient. This Security Bond is equal to an amount that similar Plaintiff has posted in related cases before Courts. *See, e.g. Doggie Dental Inc. v. Go Well, No. 19-cv-1282 (W.D. Pa. Oct. 11, 2019) (Hornak, J.) (Temporary Restraining Order required $5,000 bond); Doggie Dental Inc. v. Worthbuyer, No. 19-cv-1283 (W.D. Pa. Oct. 11, 2019) (Hornak, J.) (Temporary Restraining Order required $5,000 bond); Doggie Dental Inc. v. Max_Buy, No. 19-cv-746 (W.D. Pa. June 27, 2019) (Hornak, J.) (Temporary Restraining Order required $5,000 bond); Doggie Dental Inc. v. Anywill, No. 19-cv-682 (W.D. Pa. June 13, 2019) (Hornak, J.) (Temporary Restraining Order required $5,000 bond); Airigan Solutions, LLC v. Artifacts_Selling, Civil Action No. 18-cv-1462-NBF (Temporary Restraining Order entered on November 2, 2018, $5,000.00 bond required), and Airigan Solutions, LLC v. Babymove, Civil Action No. 19-cv-166-NBF (Temporary Restraining Order entered on February 14, 2019, $5,000.00 bond required), Rapid Slicer, LLC v. Buyspry, Civil Action No. 19-cv-249-MJH (Temporary Restraining Order entered on March 11, 2019, $5,000 bond required), Showtech Merchandising, Inc. v. Various John Doe, et al,* 2:12-cv-1270 (W.D. Pa. Sept. 6, 2012); *See Wow-Virtual Reality, Inc. v. 740452063 et al.*, No. 18-cv-3618, Dkt. 18 (S.D.N.Y. April 25,

2018); *Rovio Entertainment Ltd. and Rovio Animation OY v. Best Baby and Kid Store, et al.,* No. 17-cv- 4884-KPF, Dkt. 6 (S.D.N.Y. June 28, 2017); *Rovio Entertainment Ltd. and Rovio Animation OY v. Angel Baby Factory d/b/a Angelbaby_factory et al.,* No. 17-cv-1840-KPF, Dkt. 11 (S.D.N.Y. March 27, 2017). Moreover, one New York Court has gone as far as to hold that no security bond is necessary in similar circumstances. *See, e.g., Ontel Products Corp. v. Airbrushpainting Makeup Store a/k/a Airbrushespainting, et al.,* No. 17-cv-871-KBF, Dkt. 20 (S.D.N.Y. Feb. 6, 2017).[15]

Plaintiff believes that Defendants would be unable to show a strong likelihood of harm, and even if Defendants were to experience a likelihood of harm, such harm is outweighed by the harm to Plaintiff, as detailed above. For these reasons, Plaintiff respectfully request that the Court, in accordance with Fed. R. Civ. P. 65(a), enter the Security Bond in the amount of $5,000.

## IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully request that its Application be granted *ex parte* and that the Court enter: 1) a temporary restraining order; 2) an order restraining assets and Merchant Storefronts; 3) an order to show cause why a preliminary injunction should not issue; and 4) an order authorizing expedited discovery against Defendants, the Third Party Service Providers and the Financial Institutions, in the form of the [Proposed] Order

[15] The Second Circuit has held that "[d]istrict courts ... are vested with wide discretion in determining the amount of the bond that the moving party must post." *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). Typically, "the amount of the bond posted is the limit that a wrongfully restrained party may recover," but the Court must also balance this against a likelihood of harm the non-movant would be able to show. *Interlink Int'l Fin. Servs,, Inc*. v. *Block*, 145 F. Supp. 2d 312, 314 (S.D.N.Y. 2001); *see also Doctor's Assocs.,* 85 F.3d at 985.

accompanying this Application, and such other relief to which Plaintiff may show they are legally entitled.

Respectfully submitted,

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