

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

GORGE DESIGN GROUP, LLC, *et al.*,

Plaintiffs,

v.

ACCESSMALL, *et al.*,

Defendants.

Civil Action No. 19-1454

(Judge Stickman)

**[PROPOSED] FINAL DEFAULT JUDGMENT AND PERMANENT INJUNCTION**

This matter comes before the Court upon Motion by Plaintiffs for entry of a default judgment and permanent injunction against the Defendants identified on Schedule “A” hereto (hereinafter referred to as “Defaulting Defendants”) for Defaulting Defendants’ unfair competition, patent infringement and related state and common law claims arising out of Defaulting Defendants’ infringing use of Plaintiffs’ trade dress, common law trademark, and patented products in their manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying offering for sale and/or selling and/or sale of Infringing Products.<sup>1</sup>

The Court, having considered the Plaintiffs’ Motion for Default Judgment and Permanent

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<sup>1</sup> As alleged in Plaintiffs’ Complaint, “. . .the Defendants identified in **Schedule “A”** of the Complaint, were and/are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and or/selling products that have infringed upon Plaintiffs’ common law trade dress rights (“Plaintiffs’ Works”). Defendants have used Plaintiffs’ photographs and/or common law ULTIMATE GROUND ANCHOR™ trademark (“Plaintiffs’ Mark”) and/or Defendants have infringed on at least one claim of U.S. Patent No. 7,309,198 (“Plaintiffs’ Patent”) while marketing their knock-off products in a willful attempt to pass them off as genuine products; and Defendants accomplish their infringing sales through the use of, at least, the Internet based e-commerce stores operated via at least the Third Party Service Provider marketplace platform. (“Infringing Product(s)”).

Injunction, the Declaration of Brian Samuel Malkin in support of thereof, the Certificates of Service of the Summons and Complaint, the Entries of Default by the Clerk of Courts, and upon all other pleadings and papers on file in this Action, it is hereby ORDERED as follows (hereinafter, "Order"):

**I. Defaulting Defendants' Liability**

Judgment is granted in favor of Plaintiffs on all claims asserted against Defendants in the Complaint.

**II. Damage Awards**

IT IS FURTHER ORDERED that because it serves the compensatory and punitive purpose of the Lanham Act's prohibitions on willful infringement and because Plaintiffs have sufficiently set forth the basis for the disgorgement of profits for unfair competition requested in their supporting papers, the Court finds that such awards are reasonable and Plaintiffs are awarded damages of \$2,000,000.00 against each of the Defaulting Defendants.

**III. Permanent Injunction**

A. IT IS HEREBY ORDERED that each Defaulting Defendant, its officers, directors, employees, agents, subsidiaries, distributors, and all persons in active concert or participation with any Defaulting Defendant having notice of this Default Judgment Order shall be permanently restrained and enjoined from:

- (1) manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale, selling and/or otherwise dealing in Infringing Products, using Plaintiffs trade dress, Plaintiffs' Mark , or Plaintiffs' Works, in connection with the distribution, marketing, advertising, offering for sale, or sale of any products; and (b)

shipping, delivering, holding for sale, transferring or otherwise moving, storing, distributing, returning, or otherwise disposing of, in any manner products which use Plaintiffs' trade dress, Plaintiff's Mark, Plaintiffs' Works, or infringe upon at least one claim of Plaintiffs' Patent;

- (2) directly or indirectly infringing in any manner any of the Plaintiff's trade dress, trademarks, or works, patent, or engaging in any unfair competition against the Plaintiffs;
- (3) using any reproduction, counterfeit, copy, or colorable imitation of Plaintiffs' trade dress, Plaintiffs' Marks, Plaintiffs' Works, or other rights including, without limitation, the Plaintiff's trade dress, Plaintiffs' Mark, and the Plaintiffs' Works to identify any goods or services not authorized by Plaintiffs;
- (4) using any of Plaintiffs' trade dress, trademarks, copyrights, patent, or other rights including, without limitation, the Plaintiffs' trade dress, the Plaintiffs' Mark, and the Plaintiffs' Works, or any other trade dress, marks, photographs, or artwork that are confusing or substantially similar to the Plaintiffs' trade dress, Plaintiffs' Mark, and Plaintiffs' Works on or in connection with the manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale, selling and/or otherwise dealing in the Infringing Products;
- (5) using any false designation of origin or false description, or engaging in any action which is likely to cause confusion, cause mistake and/or to deceive members of the trade and/or the public as to the affiliation, connection or association of any product manufactured, imported, exported, advertised, marketed, promoted, distributed, displayed, offered for sale or sold by Defaulting Defendants with Plaintiffs, and/or as to the origin, sponsorship or approval of any product manufactured, imported, exported, advertised, marketed,

promoted, distributed, displayed, offered for sale or sold by Defaulting Defendants and Defaulting Defendants' commercial activities by Plaintiffs;

- (6) secreting, concealing, destroying, altering, selling off, transferring or otherwise disposing of and/or dealing with any computer files, data, business records, documents or any other records or evidence relating to their User Accounts,<sup>2</sup> Merchant Storefronts<sup>3</sup> or any money, securities or other property or assets of Defendants (hereinafter collectively referred to as "Defendants' Assets"); and
- (7) effecting assignments or transfers, forming new entities or associations, or creating and/or utilizing any other platform, User Account, Merchant Storefront or any other means of importation, exportation, advertising, marketing, promotion, distribution, and/or display for the purposes of circumventing or otherwise avoiding the prohibitions set forth in this Order.

B. IT IS FURTHER ORDERED that, pursuant to 15 U.S.C. § 1118 and 17 U.S.C. § 502 (a), the Defaulting Defendants must deliver up for destruction to Plaintiffs any and all Infringing Products and any and all packaging, labels, tags, advertising and promotional materials and any other materials in the possession, custody or control of the Defaulting Defendants that infringe any of Plaintiffs' trade dress, trademarks, copyrights, or patents, or other rights including, without limitation, the Plaintiffs' trade dress, Plaintiffs' Mark and/or the Plaintiffs'

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<sup>2</sup> "User Accounts" are any and all accounts with the online marketplace platforms Aliexpress.com, ebay.com, and wish.com, 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.

<sup>3</sup> "Merchant Storefronts" are 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 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.

Works, or bear any marks, photographs, and/or artwork that are confusingly similar or substantially similar to the Plaintiffs' trade dress, Plaintiffs' Mark and/or the Plaintiffs' Works.

C. IT IS FURTHER ORDERED that Third Party Service Providers<sup>4</sup> and Financial Institutions<sup>5</sup> are permanently enjoined and restrained from:

secreting, concealing, transferring, disposing of, withdrawing, encumbering or paying Defaulting Defendants' Assets from or to financial accounts associated with or utilized by any Defaulting Defendant or any Defaulting Defendant's User Accounts or Merchant Storefronts (whether said account is located in the U.S. or abroad) ("Defaulting Defendants' Financial Accounts").

D. IT IS FURTHER ORDERED that the Third Party Service Providers and Financial Institutions shall be permanently restrained and enjoined from engaging in any of the following acts or omissions:

providing services to Defaulting Defendants, Defaulting Defendants' User Accounts and Defaulting Defendants' Merchant Storefronts, including, without limitation, continued operation of Defaulting Defendants' User Accounts and Merchant Storefronts which are connected in any way in the distribution, marketing, advertising, offering for sale, or sale of any products; and (b) shipping, delivering, holding for sale, transferring or otherwise moving, storing, distributing, returning, or otherwise disposing of, in any manner

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<sup>4</sup> Third Party Service Providers are any third-party providing services in connection with any Defaulting Defendant and/or any Defaulting Defendant's Merchant Storefront, including, without limitation, Internet Service Providers, back-end service providers, web designers, sponsored search engine providers, sponsored ad-words providers, sponsored shopping providers, merchant account providers, third-party processors and other payment processing services, shippers, domain name registrars and domain name registries.

<sup>5</sup> Financial Institutions are any banks, financial institutions, credit card companies and payment processing agencies, such as Amazon Payments Inc. d/b/a Pay.amazon.com, and other companies or agencies that engage in the processing or transfer of money and/or real or personal property of any Defaulting Defendant.

products which use Plaintiffs' trade dress, trademark, copyrights, and patents.

#### **IV. Follow-Up Requests**

IT IS FURTHER ORDERED, as sufficient cause has been shown, that, upon Plaintiff's request, within no later than five(5) calendar days of Plaintiff's request:

(1) The Third Party Service Provider(s) are each ordered to suspend any ASIN listing, item number, eBay item number, wish item number identified product that Plaintiffs assert is counterfeit, and/or infringes on Plaintiffs' copyright, and/or unfairly competes, and/or infringes at least one claim of the Plaintiffs' Patent, and is identified as originating outside of the United States (i.e. any seller is prevented from listing for sale under the identified item number);

(3) The Third Party Service Provider(s) are ordered to suspend any item number/product listing that was associated with a product already identified by prior Order of this Court in the present lawsuit to be Counterfeit, Infringing, or unfairly competing, as designated in the Amended Schedule A third column under "**Item Number(s)**" (i.e. any seller is prevented from listing for sale under the identified item number);

(4) however, the Seller controlling such listings shall not be subject to financial account restraint.

#### **V. Post-Judgment Asset Transfer and Asset Freeze Order**

A. IT IS FURTHER ORDERED that in accordance with Rule 64 of the Federal Rules of Civil Procedure, 15 U.S.C. § 1116(a), and this Court's inherent equitable powers to issue remedies ancillary to its authority to provide final relief, and given the difficulties Plaintiffs would have enforcing this Order, Defaulting Defendants' Assets from Defaulting Defendants' Financial Accounts that were and/or are attached and frozen or restrained

pursuant to the Temporary Restraining Order and/or Preliminary Injunction Order, or which are attached and frozen or restrained pursuant to any future order entered by the Court in this Action (collectively, “Defaulting Defendants’ Frozen Assets” and “Defaulting Defendants’ Frozen Accounts”), are, to the extent that a given Defaulting Defendant’s Frozen Assets equal the Defaulting Defendants’ Individual Damages Award, hereby released and transferred to Plaintiffs as full satisfaction of the Defaulting Defendants’ Individual Damages Award for that Defaulting Defendant. Those Defaulting Defendant’s Frozen Assets shall be transferred to Plaintiffs by Financial Institution(s) through Plaintiffs’ counsel within twenty (20) business days following service of this Default Judgment Order. Upon receipt by Plaintiffs’ counsel of such Defaulting Defendant’s Frozen Assets in full satisfaction of the Defaulting Defendants’ Individual Damages Award, the Financial Institution(s) holding that Defaulting Defendant’s Frozen Assets and Defaulting Defendants’ Frozen Accounts may unfreeze that Defaulting Defendant’s Frozen Assets and Defaulting Defendant’s Frozen Accounts. To the extent that a Defaulting Defendant’s Frozen Assets are less than the Defaulting Defendants’ Individual Damages Award, that Defaulting Defendant’s Frozen Assets are hereby released and transferred to Plaintiffs as partial satisfaction of the Defaulting Defendants’ Individual Damages Award for that Defaulting Defendant and those Defaulting Defendant’s Frozen Assets shall be transferred to Plaintiffs, by the Financial Institution(s), through Plaintiffs’ counsel forthwith.

B. IT IS FURTHER ORDERED that in accordance with Rule 64 of the Federal Rules of Civil Procedure and this Court’s inherent equitable powers to issue remedies ancillary to its authority to provide final relief, and given the difficulties Plaintiffs would have enforcing this Order, the Court also hereby grants Plaintiffs’ request for a post-judgment restraining order continuing the attachment of each Defaulting Defendant’s Frozen Assets until

Plaintiffs have recovered the full payment of the Defaulting Defendants' Individual Damages Award owed to it by that Defaulting Defendant under this Order, or until further order of this Court.

C. IT IS FURTHER ORDERED that in accordance with this Court's inherent equitable powers to issue remedies ancillary to its authority to provide final relief, and given the difficulties Plaintiffs would have enforcing this Order:

1. until Plaintiffs have recovered the full payment of the Defaulting Defendants' Individual Damages Award owed to it by any Defaulting Defendant under this Order, in the event that Plaintiffs discover new and/or additional Defaulting Defendants' Assets (whether said assets are located in the U.S. or abroad) and/or Defaulting Defendants' Financial Accounts (whether said account is located in the U.S. or abroad) ("Defaulting Defendants' Additional Assets" and "Defaulting Defendants' Additional Financial Accounts," respectively), Plaintiffs shall have the ongoing authority to serve this Order on any Financial Institutions controlling or otherwise holding such Defaulting Defendants' Additional Assets and/or Defaulting Defendants' Additional Financial Accounts ("Financial Institutions Holding Defaulting Defendants' Additional Assets and/or Financial Accounts");<sup>6</sup>
2. upon notice of this Order, Financial Institutions Holding Defaulting Defendants' Additional Assets and/or Financial Accounts shall immediately locate Defaulting Defendants' Additional Financial Accounts, attach and restrain such Defaulting Defendants' Additional Assets in Defaulting Defendants' Additional Financial

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<sup>6</sup> This Order contemplates that investigation and/or discovery during judgment collection may reveal that Defaulting Defendants may have used other user accounts, operated by other Third Party Service Providers and Financial Institutions other than those named and that any additional discovered Third Party Service Providers and Financial Institutions, once identified and provided with notice, shall be subject to the restraints, asset seizure and turn over in this Order.

Accounts from being secreted, concealed, transferred or disposed of or withdrawn;  
and

3. no later than after twenty (20) business days following the service of this Order on Financial Institutions Holding Defaulting Defendants' Additional Assets and/or Financial Accounts, Financial Institutions Holding Defaulting Defendants' Additional Assets and/or Financial Accounts shall transfer all Defaulting Defendants' Additional Assets to Plaintiffs as partial or full satisfaction of the Defaulting Defendants' Individual Damages Award, unless Defaulting Defendant has filed with this Court and served upon Plaintiffs' counsel a request that such Defaulting Defendants' Additional Assets be exempted from this Order; at the time the funds are transferred, Financial Institutions Holding Defaulting Defendants' Additional Assets and/or Financial Accounts shall provide to Plaintiffs a breakdown reflecting: the (i) total funds restrained in this matter per Defaulting Defendant; (ii) the total chargebacks, refunds, and/or transaction reversals deducted from each Defaulting Defendant's funds, restrained prior to release; and (iii) the total funds transferred per Defaulting Defendant to the Plaintiffs.

#### **VI. Miscellaneous Relief**

- A. Upon Plaintiff's request, the Third Party Service Provider(s) or Financial Institution(s) shall disable and/or cease facilitating access to the Seller IDs, including tombstoning, deleting, and/or suspending identified Item Numbers, ASINs, and any other alias seller identification names being used to offer for sale and/or sell Infringing Products;
- B. The Plaintiff may serve this injunction on any e-mail service provider with a request that the service provider permanently suspend the e-mail addresses which are used by the

Defendants in connection with the Defendants' promotion, offering for sale, and/or sale of Infringing Products and shall notify all known and identified purchasers on the Internet marketplace that they purchased an infringing product;

- C. Upon the Plaintiff's request, any Internet marketplace website operator and/or administrator who is in possession, custody, or control of the Defendants' Infringing Products, including but not limited to Amazon.com, Inc. and its affiliates, Alibaba.com Hong Kong Limited, which operates the AliExpress.com platform, eBay Inc., and Etsy, Inc., shall permanently cease fulfillment of and sequester those goods, and surrender the same to the Plaintiff;
- D. Any failure by Defendants to comply with the terms of this Default Judgment Order shall be deemed contempt of Court, subjecting Defendants to contempt remedies to be determined by the Court, including fines and seizure of property;
- E. Interest from the date of this action was filed shall accrue at the legal rate pursuant to 28 U.S.C § 1961;
- F. The bond posted by Plaintiffs in the amount of \$5,000.00 is hereby ordered released by the Clerk;
- G. Plaintiffs shall serve the Defaulting Defendants with a copy of this Order in accordance with the Alternative Service Order; and

H. This Court shall retain jurisdiction over this matter and the parties in order to construe and enforce this Judgment and permanent injunction.

**SO ORDERED.**

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2022  
Pittsburgh, Pennsylvania

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William S. Stickman IV  
United States District Judge

cc: Stanley D. Ference III, Esq.  
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