

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

BROADWAY PINE BRANDS LLC,  
Plaintiff,

v.

AMTOY STORE, *et al.*,

Defendants.

Civil Action No.

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

BROADWAY PINE BRANDS LLC,  
Plaintiff,

v.

AMTOY STORE, *et al.*,

Defendants.

Civil Action No.

**FILED UNDER SEAL**

**I. INTRODUCTION**

Plaintiff, Broadway Pine 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 SLIDEAWAY® Toy Bin (the “Infringing Product”) which infringe at least one claim of U.S. Patent No. 11,154,128 (“Plaintiff’s Patent” or “the ‘128 patent”) 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”). Plaintiff filed a Complaint for patent infringement against each of the Defendants. Specifically, Plaintiff has obtained evidence clearly demonstrating that Defendants have willfully infringed one or more of the claims of Plaintiff’s Patent by offering for sale, selling, and distributing knock-off versions of Plaintiff’s Product. 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, Alibaba.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.<sup>1</sup> 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 PRODUCT**



See Declaration of Nate Jelovich (the “Jelovich Dec.”) at ¶11.

<sup>1</sup> Counts II and III of the Complaint allege Federal Trademark Infringement and Counterfeiting and Common Law Trademark Infringement, respectively.

**INFRINGEMENT LISTING OF DEFENDANT AMTOY**



**INFRINGEMENT LISTING OF DEFENDANT MILIN STORE**



**INFRINGEMENT LISTING OF DEFENDANT SHOPPING899**



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

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 its rights to fair competition. 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 at least one claim of Plaintiff’s Patent and restraining certain other Defendants from unfairly competing by using Plaintiff’s Mark.

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.<sup>2</sup> *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 seek 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. Abigail*, 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).

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<sup>2</sup> 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 SLIDEAWAY® Toy Bin**

1. BROADWAY PINE BRANDS LLC, a Delaware limited liability with a registered address of 113 Cherry Street, POB 89249, Seattle, Washington 98104-2205, and the 100% owner of the combined assets of Adam Hinkle, Dana Sue Hinkle, and Hinkle Direct, LLC d/b/a CreativeQT, the original owners and creators that developed and marketed the product at issue in this case. *Jelovich Dec.*, ¶ 2. Borne from the minds of the loving parents of 5 children, the Plaintiff's patented product solved the challenging problem of cleaning up small toys that a creative child has spread out to explore and play with on the floor. The toys are stored in a decorative storage bin that has a play mat integrated into it. The toys are spilled from the storage bin onto the integrated play mat and do not escape from the system. The mat is large enough for the child to spread all their toys out but still fits neatly into the storage bin with the toys on it. To clean up, the draw string handles are pulled to gather the mat with the toys back into the storage bin. The lid of the bin is then closed and the decorative storage bin, holding the play mat, and all the toys, may be placed in the room as desired. *Jelovich Dec.*, ¶ 5. Today, the product is sold by Plaintiff under the brand name SLIDEAWAY® toy bin ("Plaintiff's Product") *Jelovich Dec.*, ¶ 5.

Plaintiff's Product has been featured in videos, articles, or podcasts by numerous media outlets, including: *The New York Times*, *Good Housekeeping*, ABC's *Good Morning America*, NBC's *Today Show*, and *Scary Mommy*. *Jelovich Dec.*, ¶ 6.

Plaintiff's Product is sold under the brand name SLIDEAWAY® Toy Bin, and is widely legitimately 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.* Plaintiff's Product has been highly reviewed by consumers and has received the prestigious Gold Award for the 2020 Mom's Choice Awards. *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, tradeshow, 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 Product is Protected by a Patent and a Federally Registered Trademark**

Plaintiff has taken numerous steps to protect Plaintiff's Product. The innovative features of Plaintiff's Product are the subject of U.S. Patent No. 11,154,128 entitled "storage container with an integrated mat". Plaintiff is the sole owner of U.S. Patent 11,154,128, and has not licensed the patent to any individual or entity. A copy of the patent is attached as Complaint **Exhibit 2** ("Plaintiff's Patent"). The Defendants had actual notice of the publication of this patent. The claims as published were the subject of a first office action allowance. Thus, the allowed claims and the published claims were identical. Defendants' infringement began as early as November 21, 2019 (the publication date).

Further, Plaintiff sells its toy storage bin under the registered SLIDEAWAY® trademark U.S. Reg. No. 5994698 for "fabric sided toy storage container in the nature of a toy box or toy chest having an integrated play mat" in class 20. A copy of the trademark registration certificate

and status and ownership record from the United States Patent and Trademark Office is attached as Complaint **Exhibit 3** (“Plaintiff’s Mark”). *Jelovich*, ¶ 9.

The Plaintiff’s Product is an innovative integrated toy storage container and play mat combination that permits the user to pour small toys from the container onto the play mat. By pulling the storage bin handles the play mat retracts back into the storage bin with all the toys. The storage bin lid is closed and the bin and toy clean-up is complete. The Plaintiff’s Product, pictured below: retails for \$49.99 *Id.*



*Jelovich Dec.* at ¶17.

The unique and patented features of Plaintiff’s Product, 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 Product. *Jelovich Dec.*, ¶ 11. Screenshots of Plaintiff’s Website and Amazon Store 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, Alibaba.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 Product 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 Product is 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 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.*

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 ¶ 16. 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.*

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 Product 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 Patent, 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<sup>3</sup>, 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 claim of the Plaintiff’s Patent. *Id.* and Composite Exhibit 1, and *Jelovich Dec.*, ¶¶ 23 – 25.<sup>4</sup>

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.

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<sup>3</sup> If shipped and received, the products were examined physically to confirm that they are infringing and knock-offs and not genuine.

<sup>4</sup> 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 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).

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.<sup>5</sup> Accordingly, Plaintiff respectfully

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<sup>5</sup> 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); *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 parte 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).

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.

### **III. ARGUMENT**

#### **A. This Court Has Personal Jurisdiction Over 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 (3d Cir. 1987)). This determination entails a two-step inquiry. First, the court 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 (3d 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); *AI Mortg. Corp. v. AI 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.<sup>6</sup> Thus, Defendants’

sophisticated commercial operations, specifically including their offering for sale and/or selling

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<sup>6</sup> *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. 2016tomshoessaleoutlet.us*, No. 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. Chanelstore.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

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 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

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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).

tortious, actions expressly aimed at California, they must have reasonably anticipated being hailed 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 claim of the Plaintiff’s Patent, 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.<sup>7</sup>

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 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.

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<sup>7</sup> *See, supra* fn. 2 (collecting cases granted *ex parte* temporary restraining order in situations where harm to Plaintiff far outweighed harm to defendants.).

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

Defendants' infringing activities must be stopped immediately in order to prevent any further harm to Plaintiff. Not only does Plaintiff stand to suffer lost profits as a result of Defendants' competing substandard Infringing Products, but it destroys the inherent value of Plaintiff's brand, it impairs Plaintiff's reputation for providing quality products, and it negatively affects Plaintiff's relationships with its current customers and its ability to attract new customers.

The Plaintiff will suffer irreparable harm through the continued infringement of the Plaintiff's Patent by Defendants. 35 U.S.C. § 154(a)(1) 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 Labs.*, 849 F.2d 1446, 1456-57 (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 Co. v. Ireco Chems.*, 773 F.2d 1230, 1233 (Fed. Cir. 1985)).

The Federal Circuit held a refusal by the plaintiff to license his invention was evidence of an intention to obtain market exclusivity. *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1345 (Fed. Cir. 2013). "[Exclusivity] is an intangible asset that is part of a company's reputation, and here, [Plaintiff's] exclusive right to make, use, and sell the patented inventions is under attack by [Defendant's] infringement." *Id.* In this case, Plaintiff has not licensed its invention to third parties, and Defendants' sales and advertising of Infringing Products is attacking Plaintiff's right to market exclusivity (*Jelovich Dec.* at ¶ 12).

Accordingly, injunctive relief is an appropriate remedy for patent infringement. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (“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.”).

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 the genuine SLIDEAWAY® Toy Bin. *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 Plaintiff's high-quality product, causing long term price erosion that is difficult to calculate. *See Apnea Scis. Corp. v. Konzept 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, Plaintiff would be able to advertise its goods to the public and create strong relationships with its 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 Plaintiff's 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, 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”); *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 Claim**

Plaintiff has established a likelihood of success on its cause of action for patent infringement. “Section 271(a) of the Patent Act defines direct infringement as ‘whoever without authority makes, uses, offers to sell, or sells any patented invention, within the U.S. or imports into the U.S. any patented invention during the term of the patent therefor, infringes the patent.’

35 U.S.C. § 271(a).” *Grecia v. McDonald’s Corp.*, 2018 U.S. App. LEXIS 5903, at \*7-8 (Fed. Cir. Mar. 6, 2018).

In this case, Plaintiff is the lawful owner of the Plaintiff’s Patent. 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 at least claim 1 of the ‘728 patent. *Odell Dec.*, **Composite Exhibit 1**; *Jelovich Dec.*, ¶¶ 23 - 25; **Exhibits 3 and 4** to the Complaint. To show infringement, Plaintiff submits a detailed infringement claim chart for Plaintiff’s Patent that set forth the text of the patent claim compared with images of the infringing products. **Exhibits 3 and 4** to the Complaint. Thus, Plaintiff has shown it is likely to prevail on its patent infringement claims. The Plaintiff’s Product is 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 Plaintiff is Likely to Prevail on its Trademark Claim against Defendant Nos. 1-36, 38-44, 46, 51, 57-61, and 63-72**

In order to establish a likelihood of success on trademark counterfeiting and infringement claims, a plaintiff must show: (1) that its marks are valid and entitled to protection, and (2) that defendants’ use of Plaintiff’s Mark is likely to cause confusion. In order for a party to prevail on a claim of trademark or service mark infringement under Section 1114 and the common law, the party must establish that (1) the mark is valid and legally protectable, (2) the mark is owned by the plaintiff and (3) use of the same mark by the defendant is likely to create confusion among

the relevant consumers. *See, e.g., Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995); *Otokoyama Co. Ltd v. Wine of Japan Import, Inc.*, 175 F.3d 266, 270 (2d Cir. 1999). *See also Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 472 (3d Cir.1994); *Ford Motor Co. v. Summit Motor Prods. Inc.*, 930 F.2d 277, 291 (3d Cir.), *cert. denied*, 502 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 324 (1991).

As a preliminary matter, the U.S. Trademark Registration certificate submitted in conjunction with this application provide *prima facie* evidence of both the validity of Plaintiff's Mark, as well as Plaintiff's ownership of the same. *See* Complaint, **Exhibit 3**; *see also* 15 U.S.C. § 1057(b). ("A certificate of registration of a mark upon the principal register...shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner's ownership of the mark....").

In the Third Circuit, likelihood of confusion is assessed by the so-called *Lapp* factors first enunciated in *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3d Cir. 1978). Here, each of the ten, non-exhaustive factors used to analyze whether there is likelihood of confusion favor Plaintiff: (1) the strength of Plaintiff's Marks; (2) the degree of similarity between the Plaintiff's Marks and Defendants' marks; (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase; (4) the length of time the defendant has used the mark without evidence of actual confusion; (5) the intent of the defendant in adopting the mark; (6) actual confusion; (7) the similarity of the channels of trade; (8) the extent to which the targets of the parties' sales efforts are similar; (9) the relationship of the goods in the minds of consumers; and (10) other factors suggesting that consumers might expect the trademark owner to manufacture both products, or manufacture a product in the defendant's market.

To establish federal trademark counterfeiting, the record must show that (1) the defendants infringed a registered trademark in violation of the Lanham Act, 15 U.S.C. § 1114(1)(a), and (2) intentionally used the trademark knowing it was counterfeit or was [sic] willfully blind to such use.” *Louis Vuitton Malletier and Oakley, Inc. v. Veit*, 211 F. Supp. 2d 567, 580–81 (E.D. Pa. 2002) (citing *Playboy Enter., Inc. v. Universal Tel–A–Talk, Inc.*, 1998 WL 767440, \*7 (E.D.Pa., Nov. 3, 1998)).

Moreover, courts repeatedly hold that, "where counterfeit marks are involved, it is not necessary to perform the step-by-step examination of each factor because counterfeit marks are inherently confusing." *Lorillard Tobacco Co. v. Jamelis Grocery, Inc.*, 378 F. Supp. 2d 448, 455 (S.D.N.Y. 2005); *see also Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003). A counterfeit mark is defined in the Lanham Act as a "spurious mark which is identical with, or substantially indistinguishable from, a registered mark" on the Principal Register of the U.S. Patent and Trademark Office, used by an unauthorized producer. *See* 15 U.S.C. §§ 1116(d) and 1127. Plaintiff has established that: (1) the marks used by Defendants on the Infringing Websites to sell their Counterfeit Products are identical to or substantially indistinguishable from Plaintiff's Marks which Plaintiff is using in commerce on its genuine products; and (2) Defendants' use of Plaintiff's Marks to sell their Counterfeit Products is not authorized by Plaintiff. Consumers are, in fact, being deceived by purchasing what they believe are genuine products from these Infringing Websites, only to learn when the goods arrive that they have purchased lower-quality Counterfeit Products. As such, Plaintiff has demonstrated that consumers are likely to be confused as to the source of Defendants' Counterfeit Products and that consumers are actually being confused by Defendants' sale of Counterfeit Products on the Infringing Websites.

Finally, because Plaintiff has shown that it is likely to prevail on its trademark counterfeiting and trademark infringement claims, Plaintiff has also shown that it will likely prevail on its claims for false designation of origin, passing off and unfair competition.

Trademark infringement claims under § 32(1) of the Lanham Act, 15 U.S.C. § 1114(1), and federal unfair competition claims under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), are considered under the same standard. The analysis of common law trademark infringement is governed by the same standards as federal trademark infringement. *Mateson Chemical Corp. v. Vernon*, 2000 WL 680020, at \*5 n. 7 (E.D. Pa. May 9, 2000). *See also Advance Magazine Publs. Inc. v. Vogue Int'l*, 123 F. Supp. 2d 790, 795 (D.N.J. 2000) (citing *A &H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 201-11 (3d Cir. 2000)). Like other courts, the Third Circuit Court of Appeals recognizes that such behavior violates § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)—even, for example, where the objectionable conduct is the defendant's passing off that lures potential customers away from the plaintiff but where the customers recognize the passing off before actually transacting business with the defendant. *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 294–95 (3d Cir. 2001). This particular type of passing off, which creates what is known as “initial interest confusion,” is prohibited by the Lanham Act because without such protection, “an infringer could use an established mark to create confusion as to a product's source thereby receiving a ‘free ride on the goodwill’ of the established mark.” *Id. See Richemont N. Am., Inc. v. Linda Lin Huang*, No. 12-cv-4443-KBF, 2013 U.S. Dist. LEXIS 136790, at \*14-16 n.15 (S.D.N.Y. Sep. 24, 2013) (quoting *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979)); *Le Book Publ'g, Inc. v. Black Book Photography, Inc.*, 418 F. Supp. 2d 305, 312 (S.D.N.Y. 2005) (quoting *New West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979)) (“[W]hether we call the violation infringement, unfair competition or false designation or origin, the test is identical.”).

***a) Plaintiff's Mark is Strong and Distinctive***

In determining the strength of a mark, the Third Circuit has repeatedly applied a two-prong test of “(1) the distinctiveness or conceptual strength of the mark; and (2) the commercial strength or marketplace recognition of the mark.” *A & H Sportswear*, 237 F.3d at 221 (quotations omitted); *see also Fisons Horticulture, Inc. v. Vigoro Industries*, 30 F.3d 466, 478-79 (3d Cir. 1994). Lanham Trade–Mark Act, §§ 32, 43(a)(1)(A), 15 U.S.C.A. §§ 1114, 1125(a)(1)(A). The Plaintiff’s Mark are distinct as applied to the goods with which they are associated and as used in connection with Plaintiff’s Product, which has achieved recognition and fame. *See Jelovich Dec.*, ¶¶ 9 - 14. Additionally, Plaintiff’s federal trademark registration for Plaintiff’s Mark further demonstrate the strength of the same. *See id.* *See also Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986) (“[R]egistered trademarks are presumed to be distinctive and should be afforded the utmost protection”). Likewise, the Plaintiff’s Mark are suggestive as applied to the goods with which it is associated, as each “requires imagination, thought and perception to reach a conclusion as to the nature of the goods,” and thus, the Plaintiff’s Mark are inherently distinctive and is thereby entitled to trademark protection “without proof of secondary meaning.” *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968); *see also Thompson Medical Co., v. Pfizer Inc.*, 753 F.2d 208, 216 (2d Cir. 1985); *Bernard v. Commerce Drug Co.*, 774 F. Supp. 103 (E.D.N.Y. 1991) (applying the aforementioned standards in the context of an unregistered trademark). Thus, this factor weighs in Plaintiff’s favor since Plaintiff owns an inherently distinct trademark registered on the principal register of the U.S. Patent and Trademark Office.

***b) Defendants ' Counterfeit Products and Marks are Virtually Identical to Plaintiff's Product and Plaintiff's Mark***

Defendants have applied identical copies of the Plaintiff's Mark to their substandard, Counterfeit Products and/or used identical copies of the Plaintiff's Mark in marketing and promoting their substandard, Counterfeit Products at Defendants' User Accounts and Merchant Storefronts; as such, this factor weighs in favor of Plaintiff. Defendants' Counterfeit Products are clearly designed to look as much like the Plaintiff's Products as possible, without the quality and workmanship of the Plaintiff's Products. *See id.*; *see also Rado Watch Co. v. ABC, Co.*, 92-cv-3657-PKL, 1992 U.S. Dist.. LEXIS 8356, at \*11 (S.D.N.Y. June 8, 1992) (finding that the similarity of the marks weighed heavily in plaintiff's favor where it is "exceedingly difficult" to distinguish between authentic and infringing goods, "even in a side- by-side comparison"). Only minor differences exist between the Counterfeit Products and the Plaintiff's Products, which have no bearing on a finding of likelihood of confusion. *See id.*; *see also Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 1004-1005 (2d Cir. 1997) (holding that the test for confusion is "whether they create the same general overall impression such that a consumer who has seen" the authentic product would, when seeing the infringing product, be confused). Further, courts do "not look with much favor on the businessman who, out of the wealth of words available, chooses as a trademark one which comes as close as he dares to a well-known mark on the identical product." *A.T. Cross Co. v. Jonathan Bradley Pens, Inc.*, 470 F.2d 689, 692 (2d Cir. 1972).

***c) Defendants' Counterfeit Products Directly Compete with the Plaintiff's Product and There is No Gap to Bridge***

In considering the proximity of the products in the market, the concern is “competitive proximity,” meaning “whether and to what extent the two products compete with each other.” *Cadbury Beverages Inc. v. Cott Corp.*, 73 F.3d 474, 480 (2d Cir. 1996). In assessing the proximity of the parties' products, courts “look to the nature of the products themselves and the structure of the relevant market. Among the considerations germane to the structure of the market are the class of customers to whom the goods are sold, the manner in which the products are advertised, and the channels through which the goods are sold.” *Id.* (citations and internal quotations omitted). “[T]he closer the secondary user's goods are to those the consumer has seen marketed under the prior user's band, the more likely that the consumer will mistakenly assume a common source.” *Virgin Enterprises v. Nawab*, 335 F.3d 141, 150 (2d Cir. 2003). In this case, the class of customers for both the Counterfeit Products and the Plaintiff's Products are the same retail consumers, so this factor weighs in favor of Plaintiff.

Further, where, as here, Defendants are offering for sale and selling products that are virtually identical in kind, but not in quality to the Plaintiff's Products, bearing counterfeit and/or infringing marks in the same class of goods under which Plaintiff sells its products, they are already in competitive proximity and there is no “gap” to bridge. *See Odell Dec.*, ¶ 2 and Composite Exhibit 1. “[T]here is a great likelihood of confusion when an infringer uses the exact trademark....” *U.S. Jaycees v. Philadelphia Jaycees*, 639 F.2d 134, 142 (3d Cir. 1981). Thus, likelihood of confusion is inevitable, when, as in this case, the identical mark is used concurrently by unrelated entities. *See also 2 McCarthy*, § 23:3 (“Cases where a defendant uses an identical mark on competitive goods hardly ever find their way into the appellate reports. Such cases are ‘open and shut’ and do not involve protracted litigation to determine liability for

trademark infringement.”). *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 115 (2d Cir. 2009) (This factor “is irrelevant . . . where . . . the two products are in direct competition with each other.”); *see also Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 387 (2d Cir. 2005) (concluding that “[b]ecause . . . [the] products are already in competitive proximity, there is really no gap to bridge, and this factor is irrelevant to the *Polaroid* analysis”) and *Pfizer, Inc. v. Y2K Shipping & Trading, Inc.*, 00-cv-5304-SJ, 2004 U.S. Dist.. LEXIS 10426, at \*15-16 (E.D.N.Y. March 26, 2004) (citations omitted) (“Where the products are competitive, there is no gap to bridge and the likelihood of confusion is greater.”).

***d) Actual Confusion Can Be Inferred Between Defendants’ Counterfeit Products and the Plaintiff’s Product***

Seeing as Defendants are offering for sale and/or selling counterfeit versions of the Plaintiff’s Product under the Plaintiff’s Mark, or a confusingly similar mark, actual confusion can be inferred. Plaintiff does not need to prove actual confusion, only a likelihood of confusion to obtain equitable relief. *See Opticians Ass'n of America v. Independent Opticians of America Prot.*, 920 F.2d 187, 195 (citations omitted). *See also One Alarm Monitoring, Inc. v. Exec. Prot. One Sec. Serv., LLC*, 553 F. Supp. 2d 201, 206 (E.D.N.Y. 2008) (quoting *Warner Bros., Inc. v. Gay Toys, Inc.*, 658 F.2d 76, 79 (2d Cir. 1981)) (“To obtain an injunction in a trademark case the plaintiff need show ‘only a likelihood of confusion or deception ... in order to obtain equitable relief.’”).

***e) Defendants Acted in Bad Faith***

Given that Defendants' choice of marks, which are virtually identical to the Plaintiff's Mark and used in connection with the offering for sale and/or sale of virtually identical products, it can be presumed that Defendants intended to trade off the goodwill and reputation of Plaintiff, Product and its Mark. *Odell Dec.*, ¶ 2 and Composite Exhibit 1. ; *see also Kraft Gen. Foods, Inc. v. Allied Old English, Inc.*, 831 F. Supp. 123, 132 (S.D.N.Y. 1993) ("When a company appropriates an identical mark that is well known and has acquired a secondary meaning, an inference can be drawn that the company intends to capitalize on the goodwill and reputation of the mark as well as any confusion that might result concerning the common origin of that mark and the senior user's product.").<sup>8</sup> If Defendants' counterfeiting and infringing actions are found to be willful, "likelihood of confusion will be presumed as a matter of law." *N.Y. State Soc'y of CPA's v. Eric Louis Assocs.*, 79 F. Supp. 2d 331, 340 (S.D.N.Y. 1999).

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<sup>8</sup> *See also Toys "R" Us, Inc.*, 559 F. Supp. 1189, 1199 (E.D.N.Y. 1983) (citing *E.I. duPont de Nemours & Co. v. Yoshida International, Inc.*, 393 F. Supp. 502, 514 (E.D.N.Y. 1975)) ("On the assumption that a businessman will ordinarily act to his commercial advantage, and that the attraction of an established business' good will to the newcomer's product is such an advantage, the inference to be drawn from imitation is the imitator's own expectation of confusion as to the source of origin of his product. Where, as here, there is little to distinguish the marks themselves and the prior mark is a long-established one of which the newcomer was aware, doubts about intent are resolved against the newcomer, and a reasonable explanation of its choice is essential to establish lack of intent to deceive.") and *Gucci America, Inc. v. Action Activewear, Inc.*, 759 F. Supp. 1060, 1065 (S.D.N.Y. 1991) ("Where the evidence shows or requires the inference that another's name was adopted deliberately with a view to obtain some advantage from the good will, good name, and good trade which another has built up, then the inference of likelihood of confusion is readily drawn, for the very act of the adopter has indicated that he expects confusion and resultant profit.") (internal citation omitted).

***f) Defendants' Counterfeit Products Are of Inferior Quality***

The Plaintiff has neither authorized Defendants' use of the Plaintiff's Mark or confusingly similar marks in connection with the inferior and Counterfeit Products nor approved or tested Defendants' Counterfeit Products being offered for sale and/or sold under or in connection with the Plaintiff's Mark and/or confusingly similar marks. Hence, Defendants have encroached on Plaintiff's right to control the quality of the goods manufactured and sold under Plaintiff's Mark. *See Groupe SEB USA v. Euro-Pro Operating LLC*, 774 F.3d 192 (3d Cir. 2014). *See also Polymer Technology Corp. v. Mimran*, 975 F.2d 58, 62 (2d Cir. 1992) (quoting *El Greco Leather Products Co.*, 806 F.2d at 395) (“One of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder's trademark . . . the actual quality of the goods is irrelevant; it is the control of quality that a trademark holder is entitled to maintain”). In light of the above, this factor further supports a finding of likelihood of confusion.

***g) The Sophistication of Purchasers***

“Where the purchasers of a products are highly trained professionals, they know the market and are less likely than untrained consumers to be misled or confused by the similarity of different marks.” *Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141, 151 (2d Cir. 2003). In contrast, ordinary “retail customers,” (i.e., the consumers of Plaintiff's and Defendants' products), “are not expected to exercise the same degree of care as professional buyers, who are expected to have greater powers of discrimination.” *Pretty Girl, Inc. v. Pretty Girl Fashions, Inc.*, 778 F. Supp. 2d 261, 268-269 (E.D.N.Y. 2011) (citing *Virgin Enterprises*, 335 F.3d at 151) (quoting district court). *See also Fisons*, 30 F.3d at 478–79. Thus, this factor favors Plaintiff's likelihood of success on the merits.

#### **4. The Balance of Hardships Favors 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 its business, the value, goodwill and reputation built up in and associated with the Plaintiff's Products and to its 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.")).

#### **5. 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 Patent. In this case, the injury to the public is significant, and the injunctive relief that Plaintiff seek is specifically intended to remedy that injury by 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**

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.).<sup>9</sup>

## **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

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<sup>9</sup> See also *supra* fn. 3

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 & Unincorporated 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,<sup>10</sup> 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. 11l.

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<sup>10</sup> “. . . 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).

2000)).<sup>11</sup> Regardless of which test is applied, Plaintiff has established that it is entitled to the 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 its 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

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<sup>11</sup> 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 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.).

the Court allowing expedited discovery will Plaintiff be able to fully ascertain the extent of Defendants' infringing activities.

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).<sup>12</sup>

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 requests 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

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<sup>12</sup> 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,

Dated: February 28, 2022

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