

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

OSPREY LLC,

Plaintiff,

v.

ALFIE PET, *et al.*,

Defendants.

Civil Action No.

Jury Trial Requested

FILED UNDER SEAL

**DECLARATION OF RICHARD MASON
IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION
FOR ENTRY OF A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I, **RICHARD MASON**, do hereby declare:

1. I am over eighteen (18) years of age. I have never been convicted of a felony or any criminal offense involving moral turpitude, and I am fully competent to testify to the matters stated herein. I have personal knowledge of every statement made in this Declaration and such statements are true and correct.

2. I am the President and owner of OSPREY LLC, a limited liability company organized and existing under the laws of the State of Maryland, having its principal place of business at 1431 Hoppa Road, Crownsville, MD 21032.

3. I make this declaration in support of Plaintiff's *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction against Defendants, the Individuals, Partnerships, and Unincorporated Associations identified on **Schedule "A"** to the Complaint.

4. The Defendants use the interactive commercial Internet websites and Internet based e-commerce stores (“Online Marketplace Platforms” or “OMPs”) using the seller identities and store names set forth on **Schedule “A”** to the Complaint.

5. I invented the FrogLog[®] back in 2004 when good friends of mine called me up very upset that they were finding many dead frogs in the skimmer of their pool. During one morning, my friends found a total of 53 frogs and toads in their pool. I spoke with other friends with swimming pools who also said frogs were regularly found in their pools. In addition to frogs, there was the occasional mole, mouse, baby bird, opossum, turtle, salamander, squirrel, bat, chipmunk, and more. As a wildlife biologist, I wanted to prevent these needless deaths if possible. I set to work and researched the problem, but there was nothing very effective on the market. I knew that the animal’s natural instinct was to swim all around the edge of the water looking for a way to get out. My thought was that if, while instinctively swimming along the edge of the pool, the frogs could somehow find and climb across a bridge from the pool to the land, they would be able to escape to their safety, before tiring and getting sucked into the pool skimmer.

6. Using foam, fabric, and needle and thread, I build a few prototypes and put them into service. I tested my invention by setting up cone traps at the end of the bridge. Over a 23-day period, a total of 50 frogs were rescued from the pool. In the early years of developing the FrogLog, I spent several thousand hours catching varies species of wildlife, placing them in the pool and observing how they react and use or not use multiple different prototypes of the product. This took place over countless hours and many different prototypes. Developing the prototypes also took many, many hours and required a financial commitment. I made modifications and continued testing and gave out more prototypes and continued to test from

2004 to 2005. To my delight, reports from the fields were very positive and my invention was actually saving frogs, toads, small insects (like crickets) and small animals too. In 2005, I founded Osprey LLC and started selling my product under the brand FrogLog® (“Plaintiff’s Product”).

7. Plaintiff’s Product has been featured in videos, articles, or podcasts by numerous media outlets, including:

- The Dodo: Video: <https://www.thedodo.com/videos/simple-invention-saves-animals>
- The Dodo: Story: <https://www.thedodo.com/in-the-wild/animals-saved-froglog>
- CBS News (WJZ in Baltimore): <http://baltimore.cbslocal.com/2017/09/04/pool-frog-log/>
- The Osgood Files:
http://images.tritondigitalcms.com/6616/sites/1341/2017/09/07050421/osgood_09072017_925.mp3
- Good Housekeeping:
<http://www.goodhousekeeping.com/home/gardening/news/a44802/froglog-escape-ramp/>
- Business Insider: <http://www.businessinsider.com/ramp-stop-animals-drowning-swimming-pools-froglog-frog-lizard-ducks-2017-6>
- Interesting Engineering: <https://interestingengineering.com/froglog-tiny-little-inflatable-ramp-saves-animals-from-drowning-in-pools>
- The holiDog Times: <http://www.holidogtimes.com/this-amazing-invention-saves-animals-from-drowning-in-the-simplest-way/#gs.kSaHw8o>
- Care2: <http://www.care2.com/causes/how-we-can-protect-wildlife-from-swimming-pools.html>
- The Humane Gardener: <http://www.humanegardener.com/wildlife-and-swimming-pools/>
- Oh!my mag: http://www.ohmymag.com/grenouille/pour-sauver-toutes-les-petites-betes-de-la-noyade-en-piscine-cet-homme-a-trouve-la-solution-miracle_art110801.html

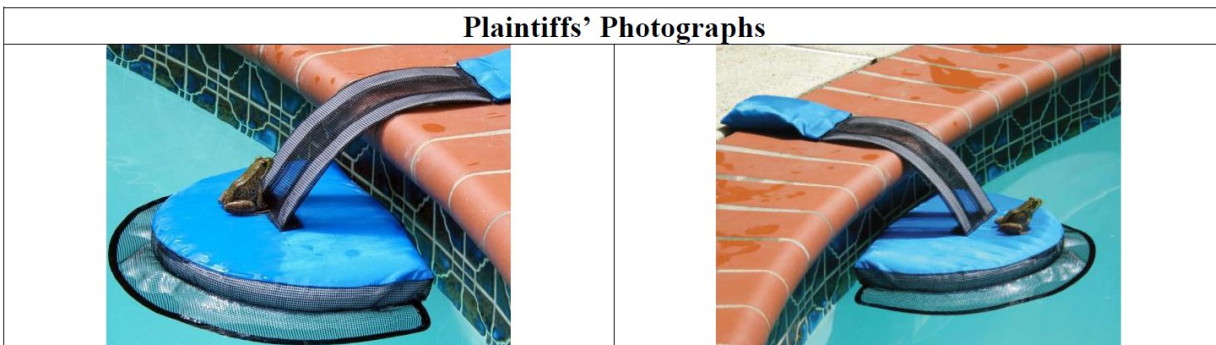
8. Genuine goods bearing at least one of Plaintiff’s Mark, Trade Dress, or Works (as defined below), are widely legitimately advertised and promoted by Plaintiff, its authorized distributors, and unrelated third parties via the Internet. Over the past several years, visibility on the Internet, particularly via Internet search engines such as Google, Yahoo!, and Bing has become increasingly important to Plaintiff’s overall marketing.

9. Thus, Plaintiff and its authorized distributors expend significant monetary resources on Internet marketing, including search engine optimization (“SEO”) strategies. Other costs include print catalog ads, tradeshow, and handing out free samples. 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. Similarly, Defendants’ individual seller’s stores are indexed on search engines and compete directly with Plaintiff for space in the search results.

10. Plaintiff developed and sells its animal rescue device under the registered FrogLog® trademark U.S. Reg. No. 5,390,968 for “Non-metal floating container comprised of a fabric pouch containing an inflated bladder and sandbag, placed on the edge of a swimming pool for small animals to escape using the ramp attached to the floating device” in class 20. (“Plaintiff’s Mark”) A copy of the registration certificate is attached to the Complaint as **Exhibit 3**.

11. The Plaintiff’s Product is designed to permit small animals and insects to rescue themselves from being trapped in a pool. The Plaintiff’s Product is royal blue, manufactured of high quality materials, made of pool chemical safe materials, and comprises a floating platform in a distinct half-moon shape (“Island”) using an inflatable bladder for floating on the water; the Island is connected to a rectangular animal rescue bridge (“Bridge”) connected to a square weighted pouch to keep the device in place on the pool deck (“Dock”). The Plaintiff’s Product includes distinct and non-functional design aspects, including its shape, color, and configuration. Plaintiff identified the need for this product and created the market for this product. Below are images of one of Plaintiff’s Products as photographed in use in my friends’ pool (with red brick lip and brown Mediterranean tile liner). The Plaintiff’s Product retails for \$19.95:

Plaintiffs' Photographs



12. The combined distinct features of the device and the Plaintiff's Mark all comprise trade dress so that consumers are certain that Plaintiff is the source of the FrogLog[®]. Plaintiff is also the owner of various published photographs, videos, artwork, creative text and product instructions appearing on its web site froglog.us. ("Plaintiff's Works"). Screen shots of the Plaintiff's Mark, Plaintiff's Trade Dress, and Plaintiff's Works are shown in Complaint **Exhibit 2**.

13. The unique features of Plaintiff's Product, Plaintiff's Mark and Plaintiff's Works, 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.

14. Plaintiff's Mark and Plaintiff's Trade Dress has been used in interstate commerce to identify and distinguish Plaintiff's goods. Plaintiff's Mark and Trade Dress have been used by Plaintiff prior in time to Defendants' use of this mark and trade dress. Plaintiff's Mark and Trade Dress have never been assigned or licensed to any of the Defendants in this matter. The Plaintiff's Mark and Trade Dress are symbols of Plaintiff's quality, reputation, and goodwill and have never been abandoned.

15. Due to the success of Plaintiff's Product, Plaintiff has become the target of multiple infringers seeking to profit off the goodwill and reputation and fame enjoyed by Plaintiff's Mark, Trade Dress, Works and Plaintiff's Product. Defendants have flooded the market with cheap imitations and caused Plaintiff's sales and profit to plummet.

16. Plaintiff has been forced to police the various Internet marketplaces to identify and seek takedowns of unlawful listings for the Infringing Products¹ since allowing the unlawful listings to continue is causing damage to Plaintiff's reputation and bottom line. Some Defendants sell their FrogLog[®] knock-offs at a fraction of the controlled retail price. 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. Plaintiff's Product is thus ignored. 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. 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. 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. The ease of this system encourages knock-offs to flourish.

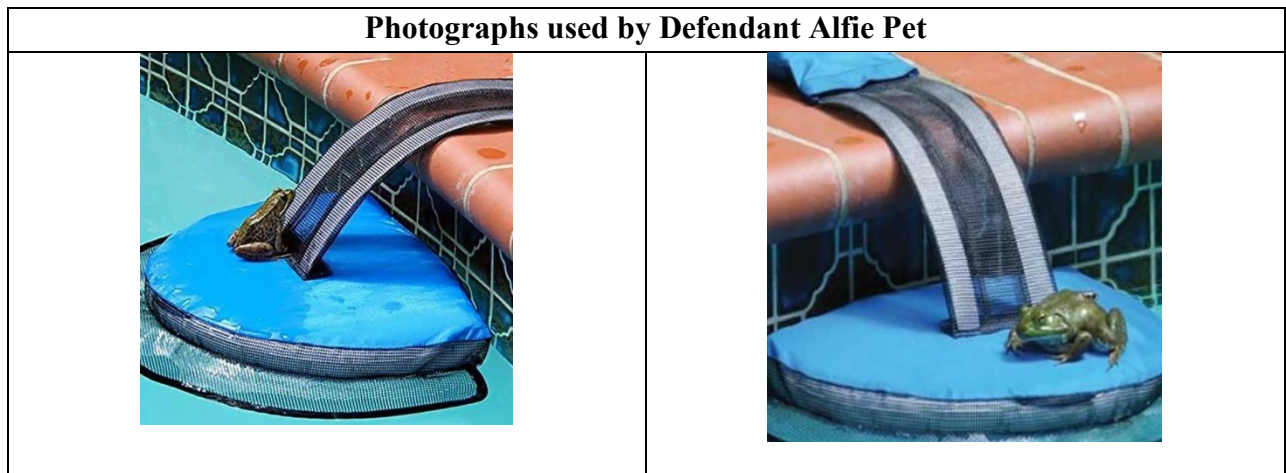
17. For these reasons, Plaintiff retained the legal counsel of Ference & Associates LLC ("the Ference firm") to perform the policing of various Internet marketplaces. During the

¹ As set forth in the Complaint, Defendants have offered for sale, sold, and distributed infringing and knock-off versions of Plaintiff's Product which closely mimic the appearance of Plaintiff's product and uses at least one of Plaintiff's Mark, Trade Dress, or Works, and otherwise, counterfeit and/or infringe, and unfairly compete with Plaintiff's Product (the "Infringing Product").

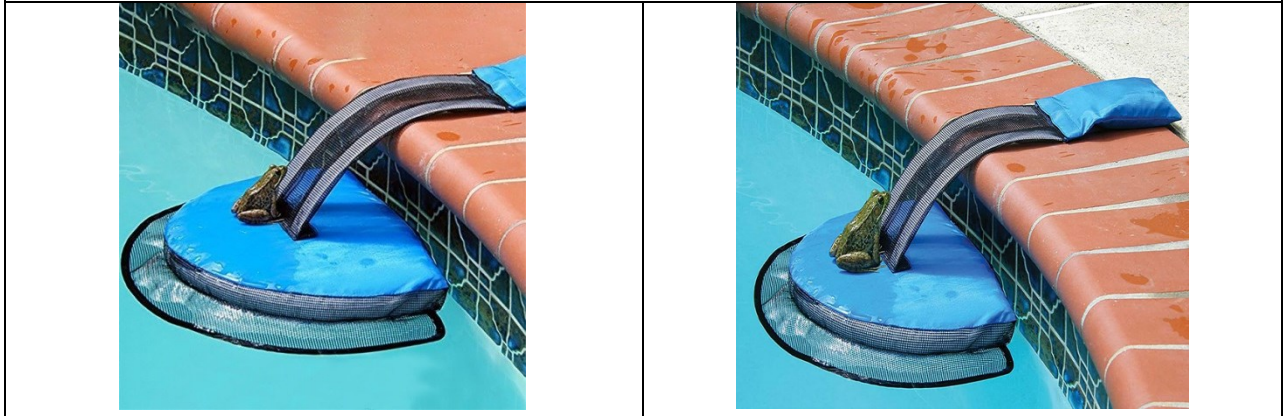
process, the Ference firm identified many Chinese manufacturers operating on Marketplace Storefronts hosted by the Internet marketplaces. These manufacturers were supplying many of the other identified Defendants with infringing products flooding the Internet marketplaces and damaging Plaintiff's business. This damage to Plaintiff's business will continue unless Plaintiff receives the sought after restraining order and injunctive relief.

18. Defendants' sale, distribution, and advertising of the Infringing Product are highly likely to cause consumers to believe that Defendants are offering genuine versions of Plaintiff's Products when in fact they are not.

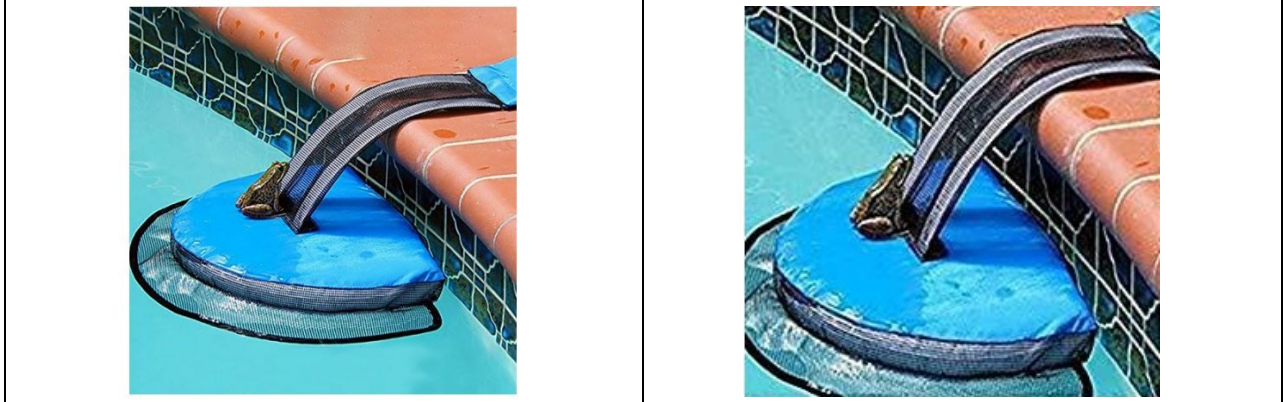
19. To illustrate, below are several examples which vividly show that the Infringing Product itself and the manner in which it is marketed is designed to confuse and mislead consumers into believing that they are purchasing Plaintiff's Product or that the Infringing Product is otherwise approved by or sourced from Plaintiff:



Photographs used by Defendant Good Impression Store



Photographs used by Defendant Sunt498



Additional photograph comparisons of Plaintiff's Product and the Infringing Products appear in **Exhibit 1** attached to the Complaint.

20. Defendants' actions have resulted in actual confusion in the marketplace between Defendants' Infringing Product and the genuine version of Plaintiff's Products. Numerous purchasers of Defendants' Infringing Product have written emails and reviews to complain about the quality of the Infringing Product believing same to be a genuine version of Plaintiff's Product. Below is an example complaint:

"Aloha. I wanted to reach out about the Frog Log I received today. I am not one to go on social media and write bad reviews, so I

wanted to let you know directly. This is the second time I have purchased your product.My first one was amazing!!!...I have to say, I am super disappointed with it. It is very obvious that it is a different manufacturer. The blue fabric is much thinner and not as sturdy. The inflatable is as thin as a beach ball....there is no pouch to put the sand into the end, and there are not even directions or any materials to promote your company. It all came smashed into a cheap baggie. Even the side supports were wrapped around....I just thought you should know that the change in the product is really disappointing.”

“Hello, We've used Frog Logs for years and love them. I needed to replace the 6 we have and ordered them on ebay. I just wanted to let you know that knockoffs are being sold on ebay with the Frog Logo on the listing and the name "Frog Log" in the listing. Maybe this isn't news to you, but I wanted to let you know. Now we have 6 pieces of junk and will probably still have to pay for the real deal - REAL Frog Logs.”

Such complaints and negative comments are likely not just made directly to Plaintiff, but are also posted by buyers of the Infringing Products on various websites and social media sites for all the world to see.

21. As poorly designed and manufactured products, Defendants’ Infringing Products create serious risk since they are intended to help rescue small animals and insects and a failure may result in death to intended rescued creatures. Likewise, improper or missing instructions pose a further risk that the product will not be used safely for its intended purpose. Many if not all of the Infringing Products have not been properly labeled with warnings and proper usage.

22. The Infringing Products threaten to destroy the reputation of high quality that Plaintiff’s Products have earned.

23. Defendants do not have, nor have they ever had, the right or authority to use Plaintiff’s Mark, Trade Dress, or Works, for any purpose. 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 wrongful unfair competition and infringement of Plaintiff's Mark, Trade Dress, or Works.

24. Given Defendants' copying and use of Plaintiff's Mark, and/or Trade Dress, and/or Plaintiff's Works, the Infringing Products are indistinguishable to consumers, both at the point of sale and post-sale. By using Plaintiff's intellectual property, Defendants have created a false association between their Infringing Products, their Internet e-commerce stores, and Plaintiff. Such false association is in violation of 15 U. S. C. § 1125(a), constitutes unfair competition, infringes on Plaintiff's Mark, and is causing and will continue to cause Plaintiff's irreparable harm and damage.

25. The infringements of Plaintiff's Works deprive Plaintiff of the ability to control the creative content protected by the copyright, it devalues the Plaintiff's FrogLog[®] animal rescue device brand by associating it with inferior quality goods, and it undermines the value of the Plaintiff's IP by creating the impression that infringement may be undertaken with impunity which threatens Plaintiff's ability to attract investors and markets for the Plaintiff's Products.

26. I have reviewed **Composite Exhibit 1** and the pictured web listings and upon my information and belief, the Defendants identified in **Schedule "A"** of the Complaint, were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and or/selling non genuine, patent infringing versions of Plaintiff's Product and copying and using Plaintiff's Mark, and/or Trade Dress, and/or Plaintiff's Works, or using substantially similar copies of Plaintiff's Works, with the non-genuine, copies of

Plaintiff's Product directed to U.S. consumers, including those consumers in Pennsylvania, through their e-commerce stores.

27. None of the identified Defendants are authorized re-sellers of genuine version of Plaintiff's Product. Moreover, none of the identified Defendants are authorized to manufacture, import, export, advertise, offer for sale or sell Plaintiff's Products. Further, Plaintiff never consented or granted permission to any of the identified Defendants to use Plaintiff's Mark, Trade Dress, or Works.

28. I have confirmed that all of the identified products pictured in **Composite Exhibit 1** are infringements of Plaintiff's Product and upon information and belief, the Defendants set forth in **Schedule "A" of the Complaint** were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling patent infringing and unfairly competing products with the Plaintiff's Mark, an/or Trade Dress and/or using Plaintiff's Works, or substantially similar copies of Plaintiff's Works, to sell to U.S. consumers, including those consumers in Pennsylvania, through their Online Marketplace Storefronts. Through visual inspection of Defendants' listings for Infringing Products, it was confirmed that each Defendant is featuring, displaying, and/or using at least one of Plaintiff's Mark, Trade Dress, and/or Works without authorization and that the products that each Defendant is offering infringing versions of the Plaintiff's Product. 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, 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. I 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. Each product that was ordered and received was physically examined to confirm that it was not genuine.

29. Defendants' actions have caused and will continue to cause, in the event the requested relief is not granted, irreparable harm to Plaintiff's goodwill and reputation as well as to the unassuming consumers who will continue to believe that the Defendants cheaply produced, inferior, and typically faulty infringing products and knock-offs are produced, authorized, approved, endorsed or licensed by Plaintiff, when they are not.

30. Defendants' intentional and illegal conduct, including offering for sale and selling inferior infringing and knock-offs into the U.S. and the Commonwealth of Pennsylvania has caused lost profits to Plaintiff and damaged the inherent value of Plaintiff's business and the Plaintiff's Mark, and, by diluting the brand and goodwill, damaging Plaintiff's reputation for providing high quality products, and interfering with Plaintiff's relationships with its customers and authorized resellers, as well as impeding Plaintiff's ability to attract new customers and business.

31. All of the injuries and damages described above are taking place in the United States, including in Pittsburgh, Allegheny County, Pennsylvania.

32. In addition to trying to stop the injuries and damages caused to Plaintiff's business, Plaintiff is also seeking in this lawsuit to protect consumers from being exposed to and purchasing the substandard, faulty, and potentially dangerous knock-offs and infringing products

