

FERENCE & ASSOCIATES LLC

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

18 CV 6132

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AIRIGAN SOLUTIONS, LLC,

Plaintiff,

Civil Action No.

v.

YIWU LANHOME JEWELRY CO., LTD.,
NINGBO GLORY IMP & EXP CO., LIMITED,
NINGBO JIANGBEI JIAMIN COMMODITY
CO., LTD., JIANGSHAN TOPME IMPORT &
EXPORT CO., LTD., NINGHAI HONGHAO
PLASTIC CO., LTD., NINGBO ONTIME
IMP. & EXP. CO., LTD., NINGBO HAISHU
GREENWELL COMMODITY INDUSTRIAL
CO., LTD., HEFEI FENGZHISHENG TRADE
CO., LTD., and THE INDIVIDUALS,
PARTNERSHIPS AND UNINCORPORATED
ASSOCIATIONS IDENTIFIED ON
SCHEDULE "A",

Defendants.
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Jury Trial Requested

FILED UNDER SEAL

**DECLARATION OF BRIAN SAMUEL MALKIN AND ACCOMPANYING EXHIBITS
IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION FOR: 1) A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION; 2) AN ORDER
RESTRAINING ASSETS AND MERCHANT STOREFRONTS; 3) AN ORDER TO
SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE; 4) AN
ORDER AUTHORIZING ALTERNATIVE SERVICE BY ELECTRONIC MEANS; AND
5) AN ORDER AUTHORIZING EXPEDITED DISCOVERY**

I, BRIAN SAMUEL MALKIN, do hereby declare:

1. I am one of the attorneys working for Ference & Associates LLC, (Ference) legal counsel for Plaintiff, Airigan Solutions, LLC (“Airigan Solutions”). 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.

2. All the Defendants use the interactive commercial Internet websites and Internet based e-commerce stores (“Online Marketplace Platforms”, hereafter “OMPs”) using the seller identities and store names, store fronts, and URLs set forth on **Schedule “A”** to the Complaint. Upon information and belief, some of the Defendants are Chinese Manufactures who maintain a presence on Alibaba.com. All of the Defendants are unknown Individuals, Partnerships, and Unincorporated Associations operating under various made up names (“Marketplace Defendants”). With Plaintiff’s assistance, I familiarized myself with the genuine NEGG® brand egg peeler, Plaintiff’s U.S. Patent and U.S. Trademark Registration, the copyrighted materials, and the various trade dress materials involved in the advertising, marketing, and sale of it (“Negg IP”).

3. The Plaintiff in the lawsuit is the owner of the genuine patented NEGG® brand egg peeler as fully described in the Declaration of Margaret B. Tyler.

4. The NEGG® brand egg peeler is sold through its own merchant store fronts on Amazon.com and eBay.com, through its website at www.peelanegg.com and by

a few authorized re-sellers entitled to purchase wholesale and then sell the product at retail.

5. Plaintiff only manufactures the genuine NEGG® brand egg peeler in the United States and closely controls the quality of the product. Thus, if a product that purports to be a NEGG® brand egg peeler is manufactured in China or overseas it is a counterfeit. Likewise an egg peeler that through visual inspection and analysis infringes on one or more of the claims in the U.S. patent owned by the Plaintiff but offered for sale on an OMP at below market price it is also a counterfeit.¹

6. In performing my research and doing my work for the Plaintiff, I quickly learned that the problem of counterfeiting is pervasive and seemingly unstoppable.² The technology that drives the OMPs has outpaced the current laws in the United States. Though each OMP purports to assist in curtailing and taking down copyright, trademark, and copyright infringing materials, this actually results in a form of frustrating “Whack-A-Mole” where no sooner than you get one counterfeit and/or infringing product listing down, another one simply pops up on the same or a different OMP under a new made up name. *See id.*

¹ Hereinafter, “Counterfeit Products” are defined as any egg peeler product that infringes Plaintiff’s IP and is sold under Plaintiff’s NEGG® trademark without Plaintiff’s consent or license.

² See, e.g., <https://medium.com/sealnetwork/70-of-counterfeit-products-are-sold-online-c6eafe07083>, medium.com, “70% of Counterfeit Products are Sold Online”, Posted March 17, 2018 (“consumers spend about half a trillion dollars annually on counterfeit products”), <https://medium.com/sealnetwork/70-of-counterfeit-products-are-sold-online-c6eafe07083>, Face the Nation, “Popular Goods Sold through Amazon, Walmart and Others are Counterfeits: Government Report”, Posted February 26, 2018 (indicating that Federal Investigators documented that Amazon, Walmart, eBay, and other on-line Marketplaces were selling counterfeit goods), <https://www.engadget.com/2018/05/31/fulfilled-by-amazon-counterfeit-fake/>, engadget.com, “Amazon Needs to Get a Handle On its Counterfeit Problem”, Posted May 31, 2018 (criticizing on-line marketplace practices that encourage the proliferation of counterfeiting).

7. Upon information and belief, **Schedule “A”** of the Complaint comprises Chinese Manufacturers and other Marketplace Defendants all of whom were advertising, promoting, displaying offering for sale, and selling counterfeit or infringing copies of my client’s genuine NEGG® egg peeler. These individuals were offering their counterfeit or infringing products at well below the usual retail price, and essentially stealing my client’s sales and profits in the process.

8. Most of the OMPs that I policed for the Plaintiff’s product provided a type of a brand protection platform. The various platforms provided by the OMPs appear in various exemplar screen shots attached as exhibits to my Declaration.

9. I daily reviewed the OMPs, identified potential counterfeit and infringing products, used various OMP-provided brand protection platforms to document and report infringement, received and reviewed exemplar products ordered from the various OMP sellers and compiled the list and supporting evidence set forth in **Schedule “A”**.

10. Based upon the hundreds of counterfeit or infringing product listings across the OMPs, the large lead time between ordering and shipping from overseas, and because visual inspection of the listed products and examination of the origin of the manufacturing and/or location of the seller and low prices confirmed they products were counterfeit, Plaintiff, its undersigned counsel, and their agents did not make purchases of each identified product.

11. Plaintiff, its undersigned counsel, and their agents did make some purchases of the products from a representative sampling of the Defendants. True and correct copies of the Ordering information, photographs of the infringing products, packaging, and the like are attached hereto as **Exhibit 1**.

12. Together, these Defendants by either manufacturing and/or selling infringing or counterfeit products resembling Plaintiff's genuine NEGG® egg peeler, have systematically eroded, undermined and stolen Plaintiff's reputation and profits. The sample orders received and analyzed confirmed that the Defendants who sold the items were selling counterfeit products.

13. I have learned from my research that by transacting their business through OMPs, the counterfeiters are able to hide their identities, addresses, emails, and the other identifying factors, while they buy and then sell all types of products which based upon my experience are cheaply manufactured in China and other overseas locations. *See id.*

14. I reported to Alibaba.com some of the Defendants using the Alibaba Intellectual Property Protection Platform and provided by Alibaba.com.

15. **Exhibit 2** includes exemplar screen shots and printouts from on-line listings of the Marketplace Defendants' offering counterfeit products through Alibaba.com and its affiliated web sites, including aliexpress.com.

16. Using the Aliababa.com platform, I filed notices of infringement which were then automatically served by Alibaba.com upon the Marketplace Defendants on Aliababa.com along with a copy of the Plaintiff's U.S. Patent and U.S. Trademark Registration.

17. After filing my notices of infringement, Alibaba.com took down listings of the counterfeit and infringing products. A true and correct copy of the screenshots of the Alibaba.com platform showing the progress of various infringement reports and the

images and descriptions captured by the platform at the time of the infringement notice is attached hereto as **Exhibit 2**.

18. For the remainder of the identified Marketplace Defendants, in order to identify counterfeit products being offered for sale on various OMPs, I visually inspected the OMP listings and used various criteria to confirm that the products being offered for sale were indeed counterfeit. I also reviewed their User Accounts and Merchant Storefronts and confirmed that most these Defendants use nonsensical made up seller names that are not connected with a registered business, business name, company or trading company. Most of these Defendants do not disclose an accurate or complete mailing address or any other useful contact information on their User Accounts or Merchant Storefronts. This means it is unclear and virtually impossible to obtain the actual identities, locations, addresses, contact information, and the location of the counterfeit products being offered for sale and being sold.

19. For each and every listing in **Schedule "A"** of the Complaint, I used one or more of the following criteria in making my determination of infringement and/or counterfeit product selling, along with conferring with the Plaintiff to determine if the OMP seller was an authorized reseller: (a) I determined if the seller's products was properly branded with the U.S. registered NEGG® trademark, (b) I determined if the seller was reporting the manufacturer as Airigan Solutions, LLC, (c) I determined if the seller was reporting that the products were being manufactured in China or overseas instead of in the United States; (d) I analyzed selling price for the product to determine if it was so low as to be indicative of a cheap unauthorized copy; (e) I reviewed the lead time for shipping to determine if it was months and not days because the product had to

be ordered, manufactured, and shipped from overseas into the United States; (f) and I reviewed the photographs in the listing of the products, the displayed instructions, and any pictured packaging, in order to determine if the product was a counterfeit.

20. Amazon is an e-commerce marketplace that allows Defendants to conduct their commercial transactions privately via Amazon's payment processing and retention service, Amazon Payments, Inc. Thus, Defendants' payment information is not publicly available. I have learned from my research that infringers and counterfeiters use unidentified payment accounts to remain anonymous to their customers and to others. I have also learned from my research that Amazon operates a money transmitter for sales made on Amazon and has the ability to identify and restrain the payment accounts associated with each Defendant.

21. The Marketplace Defendants on **Schedule "A"** of the Complaint noted as selling products under ASINs and through amazon.com URLs are the Amazon.com sellers whom I determined were either selling counterfeit or infringing products. These Defendants use the OMP Amazon.com, Inc. ("Amazon") to support and drive consumer traffic to their on-line stores where they sell counterfeit products.

22. A true and correct copy of the screen shots of an exemplar of some of the identified defendants OMP store fronts and defendants' offers of counterfeit products and the follow up emails I received upon filing infringement reports with Amazon.com is attached hereto as **Exhibit 3**.

23. Some of the emails in **Exhibit 3** provided invoices and photographs for products and packaging confirming that the counterfeit products were being

manufactured by one or more Chinese manufacturers and sold to the Defendants for sale on one more OMP storefronts.

24. The identified Defendants on **Schedule “A”** indicating bonanza.com listings appear in **Exhibit 4**.

25. A true and correct copy of exemplar product listings, photographs, and infringement reports I made to bonanza.com are attached hereto as **Exhibit 4**.

26. The identified Defendants on **Schedule “A”** of the Complaint indicating dhgate.com listings appear in **Exhibit 5**.

27. A true and correct copy of exemplar products listings and photographs obtained from the identified dhgate.com OMP storefronts is attached hereto as **Exhibit 5**.

28. The identified Defendants on **Schedule “A”** of the Complaint indicating ebay.com sellers appear in **Exhibit 6**.

29. A true and correct copy of exemplar screen shots obtained from the eBay.com storefronts is attached hereto as **Exhibit 6**.

30. The identified Defendant in **Schedule “A”** of the Complaint indicating a Walmart.com listing appears in **Exhibit 7**.

31. A true and correct copy of the screen shots of the infringement report that I made to Walmart.com and the follow-up email(s) I received from the identified Defendant seller are attached hereto as **Exhibit 7**.

32. That same Defendant in **Exhibit 7** was also direct selling the counterfeit products at the website address noted in **Schedule “A”** of the Complaint.

33. I have learned the following information about wish.com from my research. The non-party e-commerce Marketplace platform, wish.com, is operated by ContextLogic Inc. (“ContextLogic”). Merchants like the Defendants operating through the wish.com platform have their payments processed using an aggregate escrow account in the name of WISH. The wish.com platform is not the ultimate merchant but because it accepts and processed payments on behalf of its individual merchants like the Defendants, it is the only party which can tie a particular Seller ID to a reported transaction and thus identify the merchant’s funds held in sub-accounts within the aggregate escrow account. ContextLogic has the ability to and will comply with a temporary restraining order similar to the one sought in the present lawsuit.

34. The identified Defendants on **Schedule “A”** of the Complaint indicating wish.com listings appear in **Exhibit 8**. These Defendants use ContextLogic to support and drive consumers to their on-line stores where they sell counterfeit products.

35. A true and correct copy of screen shots of the infringement reports with product photographs, descriptions and seller store names that I made on the wish.com brand protection platform is attached hereto as **Exhibit 8**.

36. In personally policing and making infringement reports to the various OMPs, I have observed that when faced with infringement reports through the various OMP’s brand protection platforms the accused infringers claim they did not know the product was patented or trademarked, they are justified in selling their counterfeit products, merely rename their stores, change their identification, remove the brand from the counterfeit products, move their product to a different platform, change the product

identification number or ASIN on Amazon, re-list the same product and otherwise attempt to elude efforts to curtail or stop their infringing sales.

37. Thus, I believe that the identified Defendants will use these standard tactics to thwart any restraining orders and other remedies issued with prior notice, by disappearing, moving to another OMP for sales, and generally destroying any evidence of infringement and/or counterfeiting, and emptying their Financial Accounts and hiding or removing any of their Assets³ that might be used to satisfy any judgment for damages incurred by Plaintiff.

38. In order to ensure the efficacy of any restraining order and other remedies entered against the Defendants the undersigned counsel and the law firm have not publicized or discussed the filing of the Plaintiff's Complaint, or the Ex Parte Application For Entry of a Temporary Restraining Order and Preliminary Injunction in this case.

39. I have learned that emails sent through RPOST (www.rpost.com) are confirmed for valid proof of authorship, content, and delivery of the email. RPOST also confirms the official date and time that the email was sent and received. Through my research, I am aware that other plaintiffs have used RPOST in similar actions before this Court to prove service of process on defendants by email.⁴

40. Ference is also prepared to provide notice via website publication if permitted by the Court. Since other than Chinese Manufacturers, very few of the named Defendants have provided actual mailing addresses. Through email service, Ference

³ Herein, "Defendants' Assets" is defined as any property, money, financial interest, or useful or valuable item that might be used to satisfy any judgment related to the Defendants' wrongdoing complained of in this lawsuit.

⁴ See, e.g., *The National Football League v. Mono Lee d/b/a nflinfl.us*, No. 11-cv-8911-PKC (S.D.N.Y. Dec. 7, 2011); and *The National Football League v. Chen Cheng d/b/a nfljerseydiscount.com*, No. 11-cv-09944-WHP (S.D.N.Y. Jan.19, 2011).

would provide the named Defendants with a link to a web page accessible at www.ferencelaw.com that includes all of the relevant pleadings to the lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of July, 2018, at Pittsburgh, Pennsylvania.

A handwritten signature in cursive script that reads "Brian Samuel Malkin". The signature is written in black ink and is positioned above a horizontal line.

Brian Samuel Malkin