

FILED

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

OCT 05 2018

CLERK U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

AIRIGAN SOLUTIONS, LLC.,

Plaintiff,

Civil Action No. 18-1330

v.

BUFUJIUGAN, *et al.*,

Defendants.

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**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. STATEMENT OF THE RELEVANT FACTS.....	4
A. AIRIGAN SOLUTIONS' INNOVATIVE NEGG® EGG PEELER.....	4
B. AIRIGAN'S EFFORTS TO POLICE THE COUNTERFEIT PRODUCTS	6
C. THE DEFENDANTS' COUNTERFEIT SALES IRREPARABLY HARM AIRIGAN SOLUTIONS	8
III. ARGUMENT.....	12
A. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS.....	12
1. Defendants are Subject to Personal Jurisdiction Under 42 P.A. Cons. Stat. § 5322	12
2. Exercising Personal Jurisdiction Over Defendants Comports With Due Process	17
B. PLAINTIFF IS ENTITLED TO AN <i>EX PARTE</i> TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION	24
1. Plaintiff Will Suffer Irreparable Harm in the Absence of an Injunction Leaving it with No Adequate Remedy at Law	29
2. Plaintiff is Likely to Prevail on the Merits of its Lanham Act Claims	31
a) Plaintiff's Marks are Strong and Distinctive	35
b) Defendants' Counterfeit Products and Marks are Virtually Identical to the Plaintiff's NEGG® Product and Plaintiff's Marks	36
c) Defendants' Counterfeit Products Directly Compete with the Plaintiff's NEGG® Product and There is No Gap to Bridge	37
d) Actual Confusion Can Be Inferred Between Defendants' Counterfeit Products and the Plaintiff's NEGG® Product.....	38

e)	Defendants Acted in Bad Faith	39
f)	Defendants' Counterfeit Products Are of Inferior Quality	40
g)	The Sophistication of Purchasers	40
3.	Plaintiff is Likely to Prevail on its Patent Infringement Claim	41
4.	Plaintiff is Likely to Prevail on its State Law Claims	41
5.	The Balance of Hardships Favors Plaintiffs	42
6.	Enjoining Defendants from Using the NEGG Marks® Will Serve the Public Interest	43
C.	PLAINTIFF IS ENTITLED TO AN ORDER PREVENTING 1) THE FRAUDULENT TRANSFER OF ASSETS AND 2) FREEZING OF DEFENDANTS' MERCHANT STOREFRONTS	44
1.	Defendants' Assets Must be Frozen	44
2.	Defendants' User Accounts and Merchant Storefronts Must be Frozen	48
D.	PLAINTIFF IS ENTITLED TO AN ORDER AUTHORIZING EXPEDITED DISCOVERY	51
E.	PLAINTIFF'S REQUSET FOR A SECURITY BOND IN THE AMOUNT OF \$5,000 IS ADEQUATE	54
IV.	CONCLUSION	56

TABLE OF AUTHORITIES

Cases

<i>A &H Sportswear, Inc. v. Victoria's Secret Stores, Inc.</i> , 237 F.3d 198, 201-11 (3d Cir. 2000).....	34
<i>A.T. Cross Co. v. Jonathan Bradley Pens, Inc.</i> , 470 F.2d 689, 692 (2d Cir. 1972)	36
<i>AI Mortg. Corp. v. AI Mortg. and Financial Services, LLC</i> , 2006 WL 1437744 (W.D. Pa. 2006)	13
<i>A-1 Mortg. Corp. v. Day One Mortg., LLC</i> , 2007 WL 30317 (W.D. Pa. 2007)	14
<i>Abbott Labs. v. Sandoz, Inc.</i> , 544 F.3d 1341, 1362 (Fed. Cir. 2008)	31
<i>Abercrombie & Fitch Trading Co. v. Abercrombieclassic.com</i> , No. 15-62579-CIV-CMA, 2015 U.S. Dist. LEXIS 179041, at *5 (S.D. Fla. Dec. 11, 2015).....	16
<i>Adidas AG v. 007adidasuk.com</i> , No. 15-61275-CIV-GAYLES, 2015 U.S. Dist. LEXIS 179020, at *8 (S.D. Fla. 2015)	16
<i>Admarketplace, Inc. v. Tee Support, Inc.</i> , No. 13-cv-5635- LGS, 2013 U.S. Dist. LEXIS 129749, at *5 (S.D.N.Y. Sep. 11, 2013).....	52, 53
<i>Advance Magazine Publr. Inc. v. Vogue Int'l</i> , 123 F. Supp. 2d 790, 795 (D.N.J. 2000).....	34
<i>Advanced Portfolio Technologies, Inc. v. Advanced Portfolio Technologies Ltd.</i> , 1994 U.S. Dist. LEXIS 18457, at *7 (S.D.N.Y. Dec. 28, 1994).....	52
<i>Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.</i> , 751 F.3d 796, 803 (7th Cir. 2010).....	16
<i>Allstar Marketing Group, LLC v. 158, et al.</i> , No. 18-cv-4101-GHW, Dkt. 22 (S.D.N.Y. May 17, 2018).....	11
<i>Animale Grp. Inc. v. Sunny's Perfume Inc.</i> , 256 F. App'x 707, 709 (5th Cir. 2007).....	45
<i>Apple Corps Ltd. v. 3W Store</i> , No. 18-CV-60656 (S.D. Fla. March 27, 2018).....	2
<i>Asahi Metal Indus. Co., Ltd. v. Superior Court of California</i> , 480 U.S. 102, 109, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).....	18
<i>AT&T Co. v. Winback and Conserve Program, Inc.</i> , 42 F.3d 1421, 1427 (3d Cir. 1994)	28, 38
<i>AW Licensing, LLC v. Bao</i> , No. 15-cv-1373, 2015 U.S. Dist. LEXIS 177101, at *3 (S.D.N.Y. Apr. 1, 2015).....	11, 49
<i>Ayyash v. Bank Al-Madina</i> , 233 F.R.D. 325, 326 (S.D.N.Y. 2005).....	52

<i>Balenciaga Am., Inc. v. Dollinger</i> , No. 10-cv-2912-LTS, 2010 U.S. Dist. LEXIS 107733, at *22 (S.D.N.Y. Oct. 8, 2010).....	45
<i>Belstaff Grp. SA v. Doe</i> , No. 15-cv-2242-PKC/MHD, 2015 U.S. Dist. LEXIS 178124, at *2 (S.D.N.Y. June 18, 2015)	11
<i>Bernard v. Commerce Drug Co.</i> , 774 F. Supp. 103 (E.D.N.Y. 1991)	35
<i>Best Van Lines, Inc. v. Walker</i> , 490 F.3d 239, 243 (2d Cir. 2007).....	16, 17
<i>Bill Blass, Ltd. v. SAZ Corp.</i> , 751 F.2d 152, 224 U.S.P.Q. (BNA) 753 (3d Cir. 1984)	30
<i>Boschetto v. Hansing</i> , 539 F.3d 1011, 1019 (9th Cir. 2008)	15
<i>Broad. Music, Inc. v. Prana Hosp., Inc.</i> , 158 F. Supp. 3d 184, 196 (S.D.N.Y. 2016).....	42
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462, 475 (U.S. 1985)	17, 19
<i>Cadbury Beverages Inc. v. Cott Corp.</i> , 73 F.3d 474, 480 (2d Cir. 1996).....	37
<i>Calder v. Jones</i> , 465 U.S. 783, 788 (1984)	17
<i>Carteret Sav. Bank, F.A. v. Shushan</i> , 954 F.2d 141 (3d Cir. 1992)	17
<i>Chambers v. Nasco, Inc.</i> , 501 U.S. 32, 44 (1991)	25
<i>Chanel Inc. v. Yang</i> , No. C-12-04428-PJH (DMR), 2013 U.S. Dist. LEXIS 151104, at *5-6 (N.D. Cal. Aug. 13, 2013)	8
<i>Chanel, Inc. v. 2012leboyhandbag.com</i> , No. 15-61986-CIV-WJZ, 2015 U.S. Dist. LEXIS 177989, at *3 (S.D. Fla. Oct. 13, 2015).....	16
<i>Chanel, Inc. v. Chanelstore.com</i> , No. 15-61156-CIV- CMA, 2015 U.S. Dist. LEXIS 179101, at *5 (S.D. Fla. August 31, 2015).....	16
<i>Chanel, Inc. v. Conklin Fashions, Inc.</i> , No. 3:15-cv-893-MAD/DEP, 2015 U.S. Dist. LEXIS 109886, at *10-13 (N.D.N.Y. Aug. 14, 2015).....	11
<i>Chanel, Inc. v. Powell</i> , No. C/A 2:08-0404-PMD-BM, 2009 U.S. Dist. LEXIS 127709, at *7 (D.S.C. 2009).....	8
<i>Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.</i> , 269 F.3d 270, 294–95 (3d Cir. 2001)	34
<i>Chloe v. Designersimports.com USA, Inc.</i> , No. 07-cv-1791 -CS/GAY, 2009 U.S. Dist. LEXIS 42351, at *2 (S.D.N.Y. Apr. 29, 2009).....	11
<i>Clean Ocean Action v. York</i> , 57 F.3d 328, 331 (3d Cir. 1995)	28, 32

<i>Coalition for Parity, Inc. v. Sebelius</i> , 709 F.Supp.2d 6 (D.D.C. 2010).....	28
<i>D’Jamoos v. Pilatus Aircraft</i> , 566 F.3d 94, 102 (3d Cir. 2009).....	12
<i>Dama S.P.A. v. Doe</i> , 2015 U.S. Dist. LEXIS 178076, at *4-6 (S.D.N.Y. June 12, 2015).....	47
<i>DatatechEnters. LLC v. FFMagnatLtd.</i> , No. 12-cv-04500-CRB, 2012 U.S. Dist. LEXIS 131711, at *12 (N.D. Cal. Sept. 14, 2012)	46
<i>Doctor’s Assocs., Inc. v. Stuart</i> , 85 F.3d 975, 985 (2d Cir. 1996)	55
<i>eBay, Inc. v. MercExchange, LLC</i> , 547 U.S. 388, 393 (2006); <i>Salinger</i> , 607 F.3d at 80)	30
<i>El Greco Leather Prods. Co. v. Shoe World, Inc.</i> , 806 F.2d 392, 395 (2d Cir. 1986)	28, 30
<i>EnviroCare Techs, LLC v. Simanovsky</i> , No. 11-CV-3458, 2012 U.S. Dist. LEXIS 78088, at *10 (E.D.N.Y. June 4, 2012)	15
<i>Federal Express Corp. v. Federal Espresso, Inc.</i> , 201 F.3d 168, 173 (2d Cir. 2000).....	28
<i>Fisons Horticulture, Inc. v. Vigoro Indus., Inc.</i> , 30 F.3d 466, 472 (3d Cir.1994).....	32, 35
<i>Ford Motor Co. v. Summit Motor Prods. Inc.</i> , 930 F.2d 277, 291 (3d Cir.), <i>cert. denied</i> , 502 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 324 (1991).....	32
<i>Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.</i> , 111 F.3d 993, 1004-1005 (2d Cir. 1997).....	36
<i>Gentex Corp. v. Abbott</i> , 978 F. Supp. 2d 391, 398 (M. D. Pa. 2013).....	21
<i>George Basch Co., Inc. v. Blue Coral, Inc.</i> , 968 F.2d 1532, 1537 (2d Cir. 1992)	45
<i>Gourmet Video, Inc. v. Alpha Blue Archives, Inc.</i> , 2008 WL 4755350, *3 (D.N.J. Oct.29, 2008)	21
<i>Grand Entm’t Group, Ltd., v. Star Media Sales, Inc.</i> , 988 F.2d 476, 483 (3rd Cir.1993).....	23
<i>Grecia v. McDonald’s Corp.</i> , 2018 U.S. App. LEXIS 5903, at *7-8 (Fed. Cir. Mar. 6, 2018)	41
<i>Groupe SEB USA v. Euro-Pro Operating LLC</i> , 774 F.3d 192 (3d Cir.. 2014)	30, 40
<i>Gucci Am. v. Bank of China</i> , 768 F.3d 122, 131-132 (2d Cir. 2014)	47
<i>Gucci Am., Inc. v. Duty Free Apparel, Ltd.</i> , 286 F. Supp. 2d 284, 287 (S.D.N.Y. 2003).....	33
<i>Gucci Am., Inc. v. Gucc- Outlet.com</i> , No. 15-62165-CIV-DPG, 2015 U.S. Dist. LEXIS 181483, at *3-4 (S.D. Fla. Nov. 9, 2015)	16
<i>Gucci Am., Inc. v. Tyrrell-Miller</i> , 678 F. Supp. 2d 117, 119 (S.D.N.Y. 2008).....	8

<i>Gucci Am., Inc. v. Weixing Li</i> , 768 F.3d 122, 126 (2d Cir. 2014).....	48
<i>Gucci America, Inc. v. Action Activewear, Inc.</i> , 759 F. Supp. 1060, 1065 (S.D.N.Y. 1991).....	39
<i>Gucci America, Inc., et al v. Alibaba Group Holding LTD, et al</i> , No. 1:15-cv-03784-PKC (S.D.N.Y. June 23, 2015)	11
<i>Hall v. Johnson</i> , 599 F.Supp.2d 1, 6 n. 2 (D.D.C. 2009)	28
<i>Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.</i> , 240 U.S. 251, 259 (1916)	47
<i>Helicopteros Nacionales de Colombia, S.A. v. Hall</i> , 466 U.S. at 414 (1984).....	17
<i>HICKIES, Inc. v. Shop1668638 Store, et al.</i> , No. 17-cv-9101-ER, Dkt. 14 (S.D.N.Y. Dec. 6, 2017).....	11
<i>Hoxworth v. Blinder, Robinson & Co., Inc.</i> , 903 F.2d 186, 210 n. 31 (3d Cir.1990)	54
<i>Ideavillage Products Corp. v. Aarhus, et al.</i> , No. 18-cv-2739- JGK, Dkt. 22 (S.D.N.Y. March 28, 2018).....	11
<i>Ideavillage Products Corp. v. abc789456, et al.</i> , No. 18- cv-2962-NRB, Dkt. 11 (S.D.N.Y. April 11, 2018).....	11
<i>Ideavillage Products Corp. v. Bling Boutique Store, et al.</i> , No. 16-cv-09039-KMW, Dkt. 9 (S.D.N.Y. Nov. 21, 2016).....	11
<i>Ideavillage Products Corp. v. Dongguan Opete Yoga Wear Manufacturer Co., Ltd., et al.</i> , No. 17-cv-9099-JMF, Dkt. 19 (S.D.N.Y. Nov. 27, 2017).....	11
<i>Ideavillage Products Corp. v. Dongguan Shipai Loofah Sponge Commodity Factory, et al.</i> , No. 18-cv-901-PGG, Dkt. 20 (S.D.N.Y. Feb. 1, 2018).....	11
<i>Ideavillage Products Corp. v. Shenzhen City Poly Hui Foreign Trade Co., Ltd., et al.</i> , No. 17-cv- 8704-JGK. (S.D.N.Y. May 24, 2017).....	11
<i>Illinois v. Hemi Group LLC</i> , 622 F.3d 754, 756 (7th Cir. 2010).....	16
<i>IMO Industries, Inc. v. Kiekert AG</i> , 155 F.3d 254 (3rd Cir.1998)	12
<i>Instant Air Freight Co. v. C.F. Air Freight, Inc.</i> , 882 F.2d 797, 804 (3d Cir.1989)	54
<i>Intenze Products, Inc. v. 1586, et al.</i> , No. 18-cv-4611-RWS (S.D.N.Y. May 24, 2018)	11
<i>Interlink Int’l Fin. Servs., Inc. v. Block</i> , 145 F. Supp. 2d 312, 314 (S.D.N.Y. 2001)	55
<i>International Kennel Club v. Mighty Star, Inc.</i> , 846 F.2d at 1092 n. 8	43
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)	18

<i>Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.</i> , 146 F.3d 66, 71-72 (2d Cir. 1998).....	45
<i>Iron Maiden Holdings Ltd. v. The P'ships & Unicorporated Assns. Identified on Schedule "A"</i> , No. 18-CV-522 (N.D. Ill. Jan. 23, 2018).....	2, 50
<i>Jiffy Lube Int'l, Inc.</i> , 968 F.2d 371, 378 (3d Cir.1992)	29
<i>JLM Couture, Inc. v. Aimibridal, et al.</i> , No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018)	11
<i>Johnson v. Couturier</i> , 572 F.3d 1067, 1085 (9th Cir. 2009)	46
<i>Klipsch Grp., Inc. v. Big Box Store Ltd.</i> , No. 1:12-cv-06283-VSB, 2012 U.S. Dist. LEXIS 153137, at *3-4 (S.D.N.Y. Oct. 24, 2012).....	11
<i>Kraft Gen. Foods, Inc. v. Allied Old English, Inc.</i> , 831 F. Supp. 123, 132 (S.D.N.Y. 1993)	39
<i>L'At hen e, Inc. v. EarthSpring LLC</i> , 570 F.Supp. 588, 593–94 (D. Del. 2008).....	21
<i>Le Book Publ'g, Inc. v. Black Book Photography, Inc.</i> , 418 F. Supp. 2d 305, 312 (S.D.N.Y. 2005)	34
<i>Levi Strauss & Co. v. Sunrise Int'l Trading Inc.</i> , 51 F.3d 982, 987 (11th Cir. 1995).....	45, 47
<i>Link v. Wabush R. R.</i> , 370 U.S. 626, 630 – 31 (1962).....	24
<i>Local 1814, Int'l Longshoremen's Ass'n v. N.Y. Shipping Ass'n, Inc.</i> , 965 F.2d 1224, 1228 (2d Cir. 1992).....	28
<i>Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.</i> , 799 F.2d 867, 871 (2d Cir. 1986)	35
<i>Lorillard Tobacco Co. v. Applewood Party Store, Inc.</i> , 2006 WL 2925288.....	13
<i>Lorillard Tobacco Co. v. Jamelis Grocery, Inc.</i> , 378 F.Supp.2d 448, 455 (S.D.N.Y. 2005).....	33
<i>Louis Vuitton Malletier and Oakley, Inc. v. Veit</i> , 211 F.Supp.2d 567, 580–81 (E.D.Pa.2002).....	33
<i>Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.</i> , 426 F.3d 532, 537 (2d Cir. 2005)	28
<i>Louis Vuitton Malletier, S.A. v. 2015shoplvhandbag.com</i> , No. 15-62531-CIV-BLOOM, 2015 U.S. Dist. LEXIS 181477, at *11 (S.D. Fla. Dec. 18, 2015).....	16
<i>Louis Vuitton Malletier, S.A. v. Mosseri</i> , 736 F.3d 1339, 1356-58 (11th Cir. 2013)	16
<i>Malcom v. Esposito</i> , 63 Va. Cir. 440, 446 (Cir. Ct. 2003)	15
<i>Malibu Media, LLC v. Doe</i> , 2015 U.S. Dist. LEXIS 87751, at *2-3 (S.D.N.Y. July 6, 2015)	52

<i>Malibu Media, LLC v. Doe</i> , 2016 U.S. Dist. LEXIS 64656, at *4 (S.D.N.Y. May 16, 2016).....	52
<i>Malletier v. 2015louisvuittons.com</i> , No. 15-61973-CIV-BB, 2015 U.S. Dist. LEXIS 181452, at *11 (S.D. Fla. Sep. 29, 2015)	16
<i>Malletier v. 2016bagsilouisvuitton.com</i> , No. 16-61554-CIV- DPG, 2016 U.S. Dist. LEXIS 93072, at *3 (S.D. Fla. July 18, 2016).....	8
<i>Mateson Chemical Corp. v. Vernon</i> , 2000 WL 680020, at *5 n. 7 (E.D.Pa. May 9, 2000).....	34
<i>McGee v. Int’l Life Ins. Co.</i> , 355 U.S. 220, 223, 78 S.Ct. 199, 2 L. Ed. 2d 223 (1957).....	22
<i>Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc.</i> , 983 F.2d 551, 556 (3d Cir. 1993).....	19
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O’Connor</i> , 194 F.R.D. 618, 624 (N.D. Ill. 2000)	52
<i>Microsoft Corp. v. Jun Yan</i> , 2010 U.S. Dist. LEXIS 14934 (Dist. Conn. Feb. 18, 2010).....	47
<i>Milk Studios, LLC v. Samsung Elecs. Co.</i> , 2015 U.S. Dist. LEXIS 38710, at *4-5 (S.D.N.Y. Mar. 25, 2015).....	52
<i>Milliken v. Meyer</i> , 311 U.S. 457 (1940)	17
<i>Mint, Inc. v. Iddi Amad</i> , No. 10-cv-9395-SAS, 2011 U.S. Dist. LEXIS 49813, at *9 , n.23 (S.D.N.Y. May 9, 2011)	31, 42
<i>Monster Energy Co. v. Chen Wensheng</i> , 136 F. Supp. 3d 897, 906 (N.D. Ill. 2015).....	16
<i>Moose Toys Pty LTD et al. v. Guangzhou Junwei Trading Company d/b/a Backgroundshop et al.</i> , No. 17-cv-2561-LAK, Dkt. 12 (S.D.N.Y. May 11, 2017)	11
<i>Moose Toys Pty Ltd. et al., v. 963, et al.</i> , No. 18-cv-2187-VEC, Dkt. 16 (S.D.N.Y. April 2, 2018)	11
<i>Moose Toys Pty, Ltd. v. Thriftway Hylan Blvd. Drug Corp.</i> , No. 15- cv-4483-DLI/MDG, 2015 U.S. Dist. LEXIS 105912, at *8 (E.D.N.Y. Aug. 6, 2015).....	26
<i>Mycoskie v.2016tomsshoessaleoutlet.us</i> , No. 16-61523- CIV -GAYLES, 2016 U.S. Dist. LEXIS 95963, at *4 (S.D. Fla. July 22, 2016).....	16
<i>N. Face Apparel Corp. v. Fujian Sharing Imp. & Exp. Ltd. Co.</i> , No. 1:10- cv-1630-AKH, 2011 U.S. Dist. LEXIS 158807 (S.D.N.Y. June 24, 2011)	11
<i>N.Y. State Soc’y of CPA’s v. Eric Louis Assocs.</i> , 79 F. Supp. 2d 331, 340 (S.D.N.Y. 1999)	39
<i>National Football League v. Chen Cheng, et al.</i> , No. 11-Civ-00344 (S.D.N.Y. January 19, 2011)	45

<i>Nemours & Co. v. Yoshida International, Inc.</i> , 393 F. Supp. 502, 514 (E.D.N.Y. 1975).....	39
<i>New West Corp. v. NYM Co. of California, Inc.</i> , 595 F.2d 1194, 1201 (9th Cir. 1979)	34
<i>North Face Apparel Corp. v. TC Fashions, Inc.</i> , No. 05-cv-9083-RMB, 2006 U.S. Dist LEXIS 14226, at *10 (S.D.N.Y. Mar. 30, 2006)	46
<i>NYPHoldings v. New York Post Pub. Inc.</i> , 63 F. Supp. 3d 328, 341 (S.D.N.Y. 2014)	30
<i>Off-White, LLC v. A445995685, et al.</i> , No. 18-cv-2009-LGS, Dkt. 5 (S.D.N.Y. March 27, 2018)	11
<i>Oldfield v. Pueblo De Bahia Lora, S.A.</i> , 558 F.3d 1210, 1219-1224 (11th Cir. 2011)	16
<i>One Alarm Monitoring, Inc. v. Exec. Prot. One Sec. Serv., LLC</i> , 553 F. Supp. 2d 201, 206 (E.D.N.Y. 2008)	38
<i>Ontel Products Corp. v. Airbrushpainting Makeup Store a/k/a Airbrushespainting, et al.</i> , No. 17-cv-871-KBF, Dkt. 20 (S.D.N.Y. Feb. 6, 2017)	11, 55
<i>Opticians Ass'n of Am. v. Indep. Opticians of Am.</i> , 920 F.2d 187, 196 (3d Cir.1990)	29, 38
<i>Otokoyama Co. Ltd v. Wine of Japan Import, Inc.</i> , 175 F.3d 266, 270 (2d Cir. 1999).....	32
<i>Pappan Enters., Inc. v. Hardee's Food Sys., Inc.</i> , 143 F.3d 800, 805 (3d Cir.1998).....	29
<i>Pennzoil Prods. Co. v. Colelli & Assocs., Inc.</i> , 149 F.3d 197, 207 (3rd Cir.1998).....	23
<i>Pfizer, Inc. v. Y2K Shipping & Trading, Inc.</i> , 00-cv-5304-SJ, 2004 U.S. Dist. LEXIS 10426, at *15-16 (E.D.N.Y. March 26, 2004).....	38
<i>Philip Morris USA Inc. v. 5 Bros. Grocery Corp.</i> , No. 13-cv-2451- DLI/SMG, 2014 U.S. Dist. LEXIS 112274 (E.D.N.Y. Aug. 5, 2014)	42
<i>Playboy Enter., Inc. v. Universal Tel-A-Talk, Inc.</i> , 1998 WL 767440, *7 (E.D.Pa., Nov. 3, 1998)	33
<i>Polymer Technology Corp. v. Mimran</i> , 975 F.2d 58, 62 (2d Cir. 1992).....	40
<i>Polymer Techs., Inc. v. Bridwell</i> , 103 F.3d 970, 975-76 (Fed. Cir. 1996).....	31
<i>Poole v. Sasson</i> , 122 F. Supp. 2d 556 (E. D. Pa. 2000).....	18
<i>Pretty Girl, Inc. v. Pretty Girl Fashions, Inc.</i> , 778 F. Supp. 2d 261, 268-269 (E.D.N.Y. 2011) ..	40
<i>Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n</i> , 819 F. 2d 434, 436 (3rd Cir. 1987).....	12
<i>Purdue Pharma L.P. v. Boehringer Ingelheim GmbH</i> , 237 F.3d 1359, 1368 (Fed. Cir. 2001)	31

<i>Rado Watch Co. v. ABC, Co.</i> , 92-cv-3657-PKL, 1992 U.S. Dist. LEXIS 8356, at *11 (S.D.N.Y. June 8, 1992).....	36
<i>Reebok Int'l Ltd. v. Marnatech Enters., Inc.</i> , 970 F.2d 552, 559 (9th Cir. 1992).....	45
<i>Remick v. Manfredy</i> , 238 F.3d 248, 255 (3rd Cir.2001).....	18
<i>Renner v. Lanard Toys Limited</i> , 33 F.3d 277, 279 (3d Cir.1994)	18
<i>Richemont N. Am., Inc. v. Linda Lin Huang</i> , No. 12-cv-4443-KBF, 2013 U.S. Dist. LEXIS 136790, at *14-16 n.15 (S.D.N.Y. Sep. 24, 2013)	34
<i>Rovio Entertainment Ltd. and Rovio Animation OY v. Angel Baby Factory d/b/a Angelbaby_factory et al.</i> , No. 17-cv-1840-KPF, Dkt. 11 (S.D.N.Y. March 27, 2017).....	11, 55
<i>Rovio Entertainment Ltd. and Rovio Animation OY v. Best Baby and Kid Store, et al.</i> , No. 17-cv-4884-KPF, Dkt. 6 (S.D.N.Y. June 28, 2017).....	55
<i>S & R Corp. v. Jiffy Lube Int'l, Inc.</i> , 968 F.2d 371, 378 (3d Cir.1992)	30
<i>Salinger v. Colting</i> , 607 F.3d 68, 82 (2d Cir. 2010).....	29
<i>Scott Paper Co. v. Scott's Liquid Gold, Inc.</i> , 589 F.2d 1225, 1229 (3d Cir. 1978).....	32
<i>SEC v. Caledonian Bank Ltd.</i> , 317 F.R.D. 358 (S.D.N.Y. 2016).....	48
Seventh Circuit, in <i>Illinois v. Hemi Group LLC</i>	16
<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i> , 309 U.S. 390, 399 (1940).....	47
<i>Showtech Merchndising, Inc. v. Various John Doe, et al</i> , 2:12-cv-1270 (W.D. PA September 6, 2012).....	55
<i>Sin, Inc. v. Does 1-176</i> , 279 F.R.D. 239, 241 (S.D.N.Y. 2012)	52
<i>SK & F, Co. v. Premo Pharmaceutical Laboratories</i> , 625 F.2d 1055, 1057 (3d Cir.1980)	43
<i>Skrodzki v. Marcello</i> , 810 F. Supp. 2d 501, 512-13 (E.D.N.Y. 2011)	15
<i>Spin Master Ltd. and Spin Master, Inc. v. 158, et al.</i> , No. 18-cv-1774-PAE, Dkt. 18 (Feb. 27, 2018).....	11
<i>Spin Master Ltd. and Spin Master, Inc. v. Alisy, et al.</i> , No. 18-cv-543-PGG, Dkt. 16 (S.D.N.Y. Jan. 22, 2018).....	11
<i>Square D Co. v. Scott Elec. Co.</i> , No. 06-459, 2008 WL 4462298, at *3 (W.D. PA September 30, 2008)	20
<i>Star Indus. v. Bacardi & Co.</i> , 412 F.3d 373, 387 (2d Cir. 2005)	38

Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 115 (2d Cir. 2009).....38

Sterling Commercial Credit-Michigan, LLC v. Phoenix Industries I, LLC, 762 F.Supp.2d 8 (D.D.C. 2011)28

Stern v. Cosby, 246 F.R.D. 453, 457 (S.D.N.Y. 2007).....52

Stix Prods., Inc. v. United Merchants &Mfrs., Inc., 295 F. Supp. 479, 488 (S.D.N.Y. 1968).....35

Talavera Hair Prods., Inc. v. Taizhou Yunsung Electrical Appliance Co., Ltd. a business entity and The Individuals, P’ships & Unicorporated Assns. Identified on Exhibit “1”, No. 18-CV-0923-BAS-JLB (S.D. Cal. April 30, 2018)2

The North Face Apparel Corp. and PRL USA Holdings, Inc. v. Fujian Sharing, et al., Civil Action No. 10-Civ-1630 (AKH) (S.D.N.Y. March 2, 2010).....45

Thompson Medical Co., v. Pfizer Inc., 753 F.2d 208, 216 (2d Cir. 1985)35

Tiffany (NJ) LLC v. Forbse, No. 11-cv-4976-NRB, 2012 U.S. Dist. LEXIS 72148, at *34 (S.D.N.Y. May 23, 2012)45

Time Warner Entertainment Co., L.P. v. Does, 876 F. Supp. 407, 410-11 (E.D.N.Y. 1994).....26

Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C., 212 F.3d 157, 169 (3d Cir.2000).....29

Tinnus Enters., LLC v. Telebrands Corp., 846 F.3d 1190, 1205 (Fed. Cir. 2017).....41

Tory Burch LLC v. Yong Sheng Intl Trade Co., Ltd., No. 10-Civ-9336 (S.D.N.Y. December 17, 2010).....11, 45

Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3rd Cir.2003).....19

TRE Services, Inc. v. U.S. Bellows, Inc., 2012 WL 2872830, *4–5 (W.D.Pa. July 12, 2012).....21

True Religion Apparel, Inc. et al. v. Xiaokang Lee et al., No. 1:11-cv-08242-HB (S.D.N.Y. Nov. 15, 2011).....11

U.S. Polo Ass’n, Inc. v. PRL USA Holdings, Inc., 800 F.Supp.2d 515, 540 (S.D.N.Y. 2011)30

United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 142 (3d. Cir. 1981)37

Virgin Enterprises v. Nawab, 335 F.3d 141, 150 (2d Cir. 2003)37, 40

Warner Bros. Entm’t Inc. v. Doe, No. 14-cv-3492- KPF, 2014 U.S. Dist. LEXIS 190098 (S.D.N.Y. May 29, 2014)45, 47

William Mark Corporation v. I&cc, et al., No. 18-cv-3889-RA, Dkt. 18 (S.D.N.Y. May 2, 2018)11

<i>Willyoung v. Colorado Custom Hardware, Inc.</i> , 2009 WL 3183061 (W. D. Pa. Sept.30, 2009)	20
<i>Windsurfing Intern, Inc. v. AMF, Inc.</i> , 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986)	42
<i>Wishnatzki & Nathel, Inc. v. H.P. Island-Wide, Inc.</i> , No. 00-cv-8051-JSM, 2000 U.S. Dist. LEXIS 15664, at *4 (S.D.N.Y. 2000)	45
<i>WOW Virtual Reality, Inc. v. Bienbest, et al.</i> , No. 18-cv-3305-VEC, Dkt. 9 (S.D.N.Y. April 16, 2018)	11
<i>Wow-Virtual Reality, Inc. v. 740452063 et al.</i> , No. 18-cv-3618, Dkt. 18 (S.D.N.Y. April 25, 2018)	55
<i>WowWee Group Limited, et al. v. A249345157, et al.</i> , No. 17-cv-9358-VEC, Dkt. 18 (S.D.N.Y. Dec. 11, 2017)	11
<i>WowWee Group Limited, et al. v. Meirly, et al.</i> , No. 18-cv-706-AJN, Dkt. 11 (S.D.N.Y. Jan. 26, 2018)	11
<i>Zino Davidoff SA v. CVS Corp.</i> , 571 F.3d 238, 243 (2d Cir. 2009)	30
<i>Zippo Mfg. Co. v. Zippo DOT Com</i> , 952 F.Supp. 1119 (W.D.Pa.1997)	16, 17, 22
Statutes	
§ 32(1) of the Lanham Act	34
§ 43(a) of the Lanham Act	34
130 Cong. Rec. H12076, at 12080 (Oct. 10, 1984)	25
15 U.S.C. § 1057(b)	32
15 U.S.C. § 1114(1)	34
15 U.S.C. § 1114(1)(a), and (2)	33
15 U.S.C. § 1114; (iii)	25
15 U.S.C. § 1116 (d) (1) (a)	25
15 U.S.C. § 1117(a)	44, 46, 47
15 U.S.C. § 1125(a)	34
15 U.S.C. §§ 1116(d) and 1127	33
15 U.S.C.A. §§ 1114, 1125(a)(1)(A)	35

35 U.S.C. § 271(a).....	41
35 U.S.C. § 282	41
42 P. A. Cons. Stat. § 5322.....	12
42 Pa. C. S. A. § 5322(b) (1981)	18
Fed. R. Civ. P. 26(d)(1)	52
Fed. R. Civ. P. 30(b), 34(b)	51
Fed. R. Civ. P. 4 (e) (1)	12
Fed. R. Civ. P. 65(a)	55
Fed. R. Civ. P. 65(b).....	24
Fed. R. Civ. P. 65(d)(2)(C).....	53
Fed.R.Civ.P. 4(f)(3).....	50
Fed.R.Civ.P. 65(c)	54

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

AIRIGAN SOLUTIONS, LLC.,

Plaintiff,

v.

BUFUJIUGAN, *et al.*,

Defendants.

Civil Action No.

FILED UNDER SEAL

I. INTRODUCTION

Presently, pursuant to and in accordance with the Federal Rules of Civil Procedure, Plaintiff Airigan Solutions, LLC (“Airigan” or “Plaintiff”) 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) and an order authorizing expedited discovery against above-referenced Defendants (hereinafter collectively referred to as “Defendants” or individually as “Defendant”), Amazon Services, LLC d/b/a Amazon.com, and Amazon Payments, Inc. d/b/a Amazon Pay (collectively “Amazon”) in light of Defendants’ intentional and willful offering for sale and/or sales of Counterfeit and/or Patent Infringing Products (“Application”).

Counterfeiting is a pervasive and as yet unstoppable problem throughout the world. *See Declaration of Brian Samuel Malkin (“Malkin Dec.”)*, ¶ 9. Counterfeiting through interactive web sites damages legitimate businesses and presents unique legal issues both procedurally and substantively. Federal Courts around the country have addressed the legal issues posed by the

counterfeiting in various ways, but have regularly granted *ex parte* temporary restraining orders freezing the counterfeiters assets and on-line accounts to prevent the counterfeiters from secreting the assets and obviating the federal courts' orders. *See, e.g. Plaintiff's Request for Judicial Notice.*

The approach taken in the present case -- having the defendants listed as the merchants using the online marketplace platforms -- is the approach that has been approved by Courts in similar cases. *See Talavera Hair Prods., Inc. v. Taizhou Yunsung Electrical Appliance Co., Ltd. a business entity and The Individuals, P'ships & Unincorporated Assns. Identified on Exhibit "1",* No. 18-CV-0923-BAS-JLB (S.D. Cal. April 30, 2018); *Apple Corps Ltd. v. 3W Store*, No. 18-CV-60656 (S.D. Fla. March 27, 2018); *Iron Maiden Holdings Ltd. v. The P'ships & Unincorporated Assns. Identified on Schedule "A",* No. 18-CV-522 (N.D. Ill. Jan. 23, 2018); *Ideavillage Products Corp. v. Dongguan Shipai Loofah Sponge Commodity Factory d/b/a Bathing Store*, No. 18-cv-901 (S.D.N.Y. Feb. 1, 2018) (a copy of the Temporary Restraining Order in each of these cases is included at Exhibits 1 - 4 in *Plaintiff's Request for Judicial Notice* submitted herewith.)

In effort to curtail and stop earlier on-line counterfeiters, Plaintiff filed a federal lawsuit in New York and obtained an *ex parte* temporary restraining order against other various counterfeiters. *See Airigan Solutions, LLC v. Yiwu Lanhome Jewelry Co., LTD., 18-cv-6132-GWH, (S.D.N.Y. 2018).* (Temporary Restraining Order entered on July 19, 2018). This has resulted in some success. However, predictably, new counterfeiters selling into Allegheny County Pennsylvania are damaging and causing irreparable harm to Plaintiff. *Malkin Dec.* ¶ 9

In the U.S., counterfeiters have found a convenient way through various on-line stores to both retail and wholesale their substandard copies of genuine products. *See Declaration of*

Margaret B. Tyler (“*Tyler Dec.*”), ¶¶ 18 - 20. Worse yet, these on-line stores (or “On-Line Marketplaces” or “OMPs”) provide easy anonymity for the purveyors of the counterfeit products, assist them in obtaining the counterfeits, provide the logistics for fulfillment of orders, and allow them to reap the financial rewards also anonymously. *See id.* Until the law changes in the U.S., businesses selling their genuine products will continue to be deprived of their profits and sales by these counterfeiters who are able to flood the on-line marketplaces with cheaply manufactured counterfeit or infringing products (“Infringing Listings”) favored by consumers because they are sold so far below the retail prices of the genuine products. *See Malkin Dec.*, ¶¶ 11 - 12. As detailed below, the Plaintiff in this case has fallen victim to these deceptive and unscrupulous counterfeiters, essentially at risk of losing all of its business unless a legal remedy is obtained. *See Tyler Dec.* ¶¶ 25 - 28.

Plaintiff, Airigan Solutions, LLC, developed the genuine NEGG[®] egg peeler, an innovative product for quickly peeling the shell off of hard boiled eggs. *See Tyler Dec.*, ¶6. The product is patented and the mark NEGG[®] is a registered trademark. *See Tyler Dec.*, ¶¶7 - 8. The product is exclusively manufactured in the U.S. and is only sold on a few Airigan controlled on-line stores and their own web page. *See Tyler Dec.*, ¶¶ 13 - 15. It has received acclaim and acquired distinctiveness amongst consumers, its hand-picked re-sellers, and retail outlets. *See Tyler Dec.*, ¶¶ 9 -14. Some months after Airigan began selling its product, counterfeit versions began to show up on Amazon.com, and both retail and wholesale orders from Airigan plummeted as did profit and its reputation for quality products. *See Tyler Dec.*, ¶¶ 17 - 18. After becoming frustrated and failing to alleviate the sales and profit erosion while playing “Whack-a-Mole” with various counterfeit product listings that were taken down upon request and then

popped up again under a new made up name for the seller or on-line store, Airigan retained legal counsel. *See Tyler Dec.*, ¶¶ 18 - 19. *See Malkin Dec.* ¶ 9.

II. STATEMENT OF THE RELEVANT FACTS

A. Airigan Solutions' Innovative NEGG[®] Egg Peeler

Plaintiff Airigan was founded in 2015 and is in the business of producing, marketing and selling the patented NEGG[®] brand egg peeler, which was launched in 2015. *See Tyler Dec.*, ¶ 5. The NEGG[®] egg peeler (Fig. 1, below) is designed so that by placing a standard chicken egg inside with a capful of water, tightly fastening the opposing lids, and shaking the egg peeler, the shell is punctured and cracked so that it simply peels off in one continuous motion (“Plaintiff’s NEGG[®] Product”) (Fig. 2, below). *See Tyler Dec.*, ¶ 6:

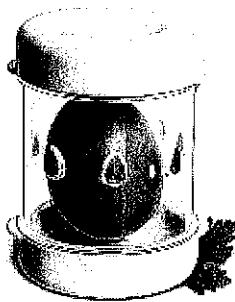


Fig. 1

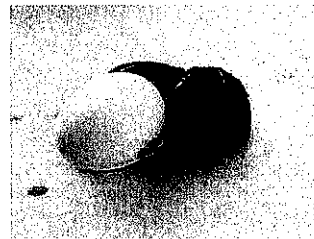


Fig. 2

The distinctive photograph of the NEGG[®] egg peeler found on all of the packaging and on-line sales materials was posed with parsley leaves underneath the right facing side of the egg peeler.

Airigan is the owner of U.S. Patent No. 9,968,211 for “PERSONAL EGG PEELER,” which is directed to the NEGG[®] brand egg peeler. *See Tyler Dec.*, ¶ 7. Airigan is the owner of U.S. Trademark Registration No. 5,142,630 for NEGG for “manually operated device used for peeling eggs.” *See Tyler Dec.*, ¶ 7. A true and correct copy of the trademark registration

certificate is attached to the Complaint as “Exhibit 1” The NEGG[®] trademark, the logo (pictured below), and packaging have acquired distinctiveness among consumers:



A true and correct copy of the packaging, on which the above logo appears, is attached to the Complaint as “Exhibit 2,” and includes a copy of the NEGG[®] product insert. *See Tyler Dec.*, ¶ 9. Hereinafter, the NEGG[®] trademark, the NEGG[®] logo, and the trade dress for the NEGG[®] are collectively referred to as the “Negg Marks” or “Plaintiff’s Marks”). The NEGG[®] brand egg peeler and the Negg Marks have become well-known amongst consumers and retailers and have and continue to receive widespread publicity. The NEGG[®] brand egg peeler has been featured on national television in The Today Show and the Home Shopping Network. *See Tyler Dec.*, ¶ 10.

The NEGG[®] brand egg peeler typically retails for between \$16.00 and \$18.00. *See Tyler Dec.*, ¶ 11. The product has been successful though sales have suffered drastically in the past several months due to the infringing and counterfeit products offered for sale and sold by the Defendants. *See Tyler Dec.*, ¶ 12. The NEGG[®] brand egg peeler is sold through its own Merchant Storefront on Amazon.com, through its website at www.peelaneegg.com and by a few authorized re-sellers entitled to purchase wholesale and then sell the product at retail. Several of the authorized re-sellers are located in Pennsylvania, including Allegheny County. *See Tyler Dec.*, ¶ 13.

The patented features of the NEGG[®] brand egg peeler, the registered trademark of NEGG[®], the distinct photographs, the distinct NEGG[®] logo and design, the instructions, the

trade dress, and the unique presentation of the product, all comprise Airigan's valuable intellectual property ("IP") and all have become distinct in consumer's minds such that consumers associates all of this IP with Airigan's genuine NEGG® egg peeler. *See Tyler Dec.*, ¶14. Since the product is only manufactured by Airigan in the U.S., if a product that purports to be a NEGG® brand egg peeler is manufactured in China or overseas it is a counterfeit. *See Tyler Dec.*, ¶¶ 15. 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 as new on an Amazon.com at below market price is also a counterfeit. *See Tyler Dec.*, ¶ 16.

Due to the success of Airigan and its NEGG® brand egg peeler, they have become the target of multiple counterfeiters seeking to profit off the goodwill and reputation and fame enjoyed by Airigan and its NEGG® brand egg peeler. *See Tyler Dec.*, ¶ 17. The counterfeiting activities have driven sales and prices down. Indeed, wholesale orders from Airigan's re-sellers have precipitously dropped over the last six months due the pervasive activities of the counterfeiters. *See Tyler Dec.*, ¶ 19.

B. Airigan's Efforts to Police the Counterfeit Products

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. These interactive commercial Internet websites provide on-line Merchant Storefronts (as defined *infra*) that allow the Defendants to maintain their anonymity ("OMPs") while selling counterfeit goods into the U.S. and into Pennsylvania. The OMPs used by these Defendants include Amazon.com. *See Malkin Dec.* ¶¶ 5 – 6. *See Declaration of Jennifer Lineberry ("Lineberry Dec.")* ¶ 2 and Composite Exhibit 1 attached thereto.

Airigan has been forced to police the various OMPs to identify and seek takedowns of the counterfeit products since allowing them to continue is causing damage to Airigan's reputation and bottom line. Some of these counterfeiters sell their fake egg peelers at a fraction of the controlled retail price, going as low as \$3.00 or \$4.00. Because of the software provided by the various OMPs, the lowest priced items are sorted to the top and/or promoted by the software and then purchased by the consumers and the genuine NEGG[®] egg peeler is ignored. *See Tyler Dec.*, ¶ 19. Airigan has had varied success in identifying and requesting takedowns of the various counterfeit listings and as soon as one is taken down another counterfeit is listed to replace it. *See Id.*

Another major problem with the OMPs is that there is a direct and convenient connection between various Chinese and other unidentified manufactures to the counterfeiters. In essence, a counterfeiter in Vietnam or Russia, for example, may order a crate of counterfeit products from a Chinese manufacturer, have them drop shipped to a fulfillment center in the US, for example, Amazon fulfillment (so called "FBA" by Amazon), and then sell the counterfeit product to a US consumer through the Amazon OMP. The ease of this system encourages counterfeiting to flourish. *See Tyler Dec.*, ¶20.

For these reasons, Airigan retained the legal counsel of Ference & Associates LLC ("the Ference firm") to perform the policing of various OMPs. *See Tyler Dec.* ¶ 21. During the process, the Ference firm identified many Chinese manufacturers operating through Amazon. *See id.* These identified Defendants were supplying many of the other identified Defendants with counterfeit products flooding the OMPs and damaging Airigan's business. This damage to Airigan's business will continue unless Airigan receives the sought after restraining order and injunctive relief. *See Tyler Dec.*, ¶¶ 25 - 28.

C. The Defendants' Counterfeit Sales Irreparably Harm Airigan Solutions

Without Airigan's authorization or consent, the Defendants identified in Schedule "A" of the Complaint, were and/are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and or/selling patent infringing and counterfeit products with Airigan's NEGG[®] trademark and/or logo and using marking, packaging and trade dress that are confusingly similar and/or identical to those of Airigan ("Infringing Products" or "Counterfeit Products") to U.S. consumers, including those consumers in Pennsylvania, through their Merchant Storefronts. *See Malkin Dec.*, ¶¶ 5 - 6, 11, *Lineberry Dec.* ¶2 and Composite Exhibit 1, and *Tyler Dec.*, ¶¶ 22-24.¹

None of the identified Defendants are authorized re-sellers of genuine NEGG[®] brand egg peelers. Moreover, none of the identified Defendants are authorized to manufacture, import, export, advertise, offer for sale or sell any NEGG[®] branded egg peelers or any egg peelers that purport to be NEGG[®] egg peelers or any egg peelers that are counterfeits of the NEGG[®] brand egg peelers. Further, Airigan never consented or granted permission to any of the identified Defendants to use Airigan's artwork, photographs, or any of Airigan's other IP. *Tyler Dec.*, ¶¶ 23.

¹ 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. 2016bagslouisvuitton.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).

Comparison of the the genuine NEGG[®] egg peeler to the counterfeits reveals that the counterfeits, their packaging and presentation are cheaply produced poor copies of Airigan's IP. They clearly indicate that they were manufactured in China. Yet, the writing on the packaging is in English. So, they were intentionally manufactured and packaged to be shipped to English speaking countries, like the US. Predictably, Airigan has received multiple consumer complaints from purchasers actually confused that the substandard, faulty, and leaking counterfeit products were those of Airigan when they were not. *See Tyler Dec.* ¶24.

Defendants' actions have caused and will continue to cause, in the event the requested relief is not granted, irreparable harm to Airigan'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 counterfeit or infringing products are produced, authorized, approved, endorsed or licensed by Airigan, when they are not. *See id.* Defendants' intentional and illegal conduct, including selling inferior counterfeit egg peelers using Airigan's various IP into the U.S. and the Commonwealth of Pennsylvania has likely caused lost profits to Airigan and damaged the inherent value of Airigan's business and NEGG[®] brand, by diluting the brand and goodwill, damaging Airigan's reputation for providing high quality fully functioning egg peelers, and interfering with Airigan's relationships with its customers and authorized resellers, as well as impeding Airigan's ability to attract new customers and business. *See Tyler Dec.* ¶ 26. All of the injuries and damages described above are taking place in the U.S., including in the Commonwealth of Pennsylvania. *See Tyler Dec.*, ¶ 27.

In addition to trying to stop the injuries and damages caused to Airigan's business, Airigan also is seeking in this lawsuit to protect consumers from being exposed to and purchasing the substandard, faulty, and leaking counterfeits or infringing products that wrongly

indicate their origin as being from Airigan or wrongly bear Airigan's NEGG[®] trademark or are a poor and cheaply made imitation of the patented NEGG[®] egg peeler. *See Tyler Dec.*, ¶ 28.

Airigan's request for *ex parte* relief is particularly necessary since, upon information and belief, many of the Defendants are most likely located in China and other overseas locations and conduct business entirely over the Internet. Consequently, should Defendants receive notice of the claims and allegations against them prior to the issuance of the relief sought in the instant Application, it is highly likely that they will transfer, conceal and/or destroy the inventory of the Counterfeit Products in their possession and their means of making or obtaining such Counterfeit Products, along with all business records and any and all other evidence relating to their counterfeiting activities, as well as hide or dispose of all of Defendants' Assets to which Airigan may be entitled. *See Declaration of Stanley D. Ference III ("Ference Dec.")*, ¶¶ 15 -16.

Considering that sellers on Amazon and other Online Marketplaces, like Defendants, usually conceal their identities, such sellers often circumvent temporary restraining orders issued with prior notice by disappearing, destroying any evidence of their counterfeiting and infringing actions, and/or draining their financial accounts. *See id.* In light of the foregoing, and considering that it typically takes Financial Institutions and/or Third Party Service Providers a minimum of five (5) days to locate, attach and freeze Defendants' Assets and/or Defendants' Financial Accounts (as defined *infra*), Airigan respectfully requests that the Court order bifurcated service. Specifically, Airigan asks that the Court provide enough time for the Financial Institutions and/or the Third Party Service Provider to freeze Defendants' Assets, Defendants' User Accounts, Defendants' Merchant Storefronts and Financial Accounts before ordering service on Defendants.

In light of the covert nature of Defendants' offshore counterfeiting and infringing activities and the importance of creating economic disincentives for such counterfeiting and infringing activities, courts have recognized these concerns and routinely grant *ex parte* applications for relief in similar instances of infringement on the Internet.² Accordingly, Airigan respectfully 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; 4) an order authorizing alternative

² See, e.g., *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).

service and 5) an order authorizing expedited discovery against Defendants, the Third Party Service Provider and Financial Institutions.

II. 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, counterfeiting and 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.Cons. Stat. § 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, on Amazon.com, and allow for customers all over the world (including
within Allegheny County, Pennsylvania) to view and purchase products, including Counterfeit
Products, as demonstrated by the websites themselves and Plaintiff’s purchase of Counterfeit
Products. *See Lineberry Dec.* ¶ 2 and Composite Exhibit 1, and *Ference Dec.* ¶ 14. *See n. 3, 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*
Lineberry 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 on Amazon.com resulted in consumers throughout the U.S., and specifically in Pennsylvania, purchasing Counterfeit Products. See *Lineberry 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 *Tyler Dec.*, ¶ 26 - ¶ 27.

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 on Amazon.com, as well as yet undiscovered online marketplaces, to offer for sale and/or sell Counterfeit Products. The identified Defendants merely use fanciful and made up store names or seller ids without complete addresses, contact information, phone numbers and the like). See *Malkin Dec.*, ___ and *Ference Dec.*, ¶¶ 13 - 14; Defendants used and continue to use Amazon.com, to advertise, market, promote, offer for sale, sell, distribute and/or import Counterfeit Products to Pennsylvania customers and/or potential customers, including in Allegheny County, Pennsylvania. See *Tyler Dec.* ¶¶ 22 - 26.

Here, the fact that Defendants have chosen to open their respective User Accounts for the purpose of selling Counterfeit Products through their Merchant Storefronts on Amazon.com, as

well as any and all as yet undiscovered online marketplace platforms, alone supports a finding that Defendants have intentionally used Amazon.com, “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.

Plaintiff purchased Counterfeit Products from all the Defendants in this Lawsuit, with all of the Counterfeit Products shipping to a Pennsylvania address. However, whether a defendant physically shipped Counterfeit 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 *Lineberry Dec.* ¶ 2. See *Zippo Mfg. Co.*, 952 F.Supp. at 1119. Plaintiff and Plaintiff’s counsel have viewed Defendant’s Counterfeit Products via their online User Accounts and Merchant Storefronts and purchased and examined the Counterfeit Products. See *Tyler Dec.*, ¶ 24 and *Malkin Dec.* ¶¶ 6 and 7.³ Thus, Defendants’ sophisticated commercial

³ 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

operations, specifically including their offering for sale and/or selling of Counterfeit Products through their highly interactive User Accounts and Merchant Storefronts on Amazon.com, and Plaintiff's counsel's purchase of Counterfeit Products, along with Defendants' own

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 plaintiffs alleged and confirmed that each of the foreign defendants operated fully interactive commercial websites through which they advertised, promoted, offered for sale, and sold products bearing what the plaintiff determined to be counterfeit and infringing trademarks into the U.S., and in interstate commerce, in violation of the plaintiff's rights. See, e.g., *Malletier*, 2016 U.S. Dist. LEXIS 93072, at *3; *Mycoskie v. 2016tomsshoessaleoutlet.us*, No. 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. Gucci-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 counterfeit products to the U.S., including to Illinois residents, and the plaintiffs' exhibits showed that the named defendants had specifically offered to sell particular counterfeit products to individuals with Illinois shipping addresses and provided PayPal 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).

representations on their Merchant Storefronts that they ship Counterfeit 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 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 *Malkin Dec.* ¶ 11. See *Tyler Dec.* ¶¶ 22, 27. See *Lineberry 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 (3rd 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 counterfeit 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 September 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'At hen e, 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 Counterfeit 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 Counterfeit 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*, 496 F.3d at 316 (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

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).

Moreover, Congress specifically acted to provide that Section 34 of the Lanham Act expressly authorizes this Court to issue *ex parte* restraining orders “with respect to a violation [of the Act] that consists of using a counterfeit mark in connection with the sale, offering for sale, or distribution of goods.” 15 U.S.C. § 1116 (d) (1) (a). Congress’ purpose for enacting such *ex parte* remedies was to ensure that courts were able to effectively exercise their jurisdiction in counterfeiting cases and to prevent counterfeiters given prior notice from disappearing or quickly disposing of infringing inventory or records relating to their counterfeiting and illegal actions. *See Senate-House Joint Explanatory Statement on trademark Counterfeiting Legislation*, 130 Cong. Rec. H12076, at 12080 (Oct. 10, 1984).

Once a violation of the Lanham Act is demonstrated, the issuance of an *ex parte* order is appropriate upon showing that: (i) the plaintiff will provide adequate security; (ii) any order other than an *ex parte* order is not adequate to achieve the purposes of 15 U.S.C. § 1114; (iii) the plaintiff has not publicized the requested *ex parte* order; (iv) the plaintiff is likely to succeed on showing that defendants are using counterfeit marks; (v) an immediate and irreparable injury will occur if such *ex parte* order is not granted; (vi) the materials to be seized will be located at the place identified in the application; (vii) the harm to the plaintiff in denying the application outweighs the harm to defendants in granting the order and (viii) if prior notice was given, defendants would destroy, move, hide or otherwise make such matter inaccessible to the court. *See* 15 U.S.C. § 1116 (d)(4)(B). As discussed in this Application, Plaintiff meets each of the

relevant criteria for the issuance of an *ex parte* temporary restraining order under the Lanham Act.⁴ See *Taylor Dec.* and *Malkin Dec.* and *Ference Dec.*

“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 *Time Warner Entertainment Co., L.P. v. Does*, 876 F. Supp. 407, 410-11 (E.D.N.Y. 1994).

An *ex parte* temporary restraining order is particularly warranted in cases, such as the instant one, involving counterfeiters who conceal their identities and engaging in unlawful and harmful counterfeiting activities over the Internet to avoid revealing their actual locations and identities. See *Malkin Dec.*, ¶¶ 13 – 14; *Ference Dec.*, ¶¶ 13. The Defendants, who, upon information and belief, operate their businesses exclusively over the Internet, knowingly and willfully offer for sale and/or sell Counterfeit Products through their User Accounts and on their Merchant Storefronts on Amazon.com. See *Malkin Dec.*, ¶ 2 and ¶ 11; *Tyler Dec.*, ¶ 2 and ¶ 26 - 27, *Ference Dec.*, ¶ 14, *Ex. 1*. See *Lineberry Dec.*, ¶ 2 and Composite Exhibit 1. Given the propensity for third-party merchants on and Amazon.com, as well as other as yet undiscovered online marketplace platforms, to use aliases, false addresses and other incomplete identification

⁴ Plaintiff has expressed its willingness to provide security in conjunction with the *ex parte* relief it seeks. See [Proposed] Order, filed herewith. Plaintiff has certified that it has not publicized this Application. See *Tyler Dec.*, ¶ 30. Also, since Defendants’ location and the location of the Counterfeit Products are unclear, Plaintiff is not requesting a seizure order in this Application. See [Proposed] Order.

information to avoid detection, if Defendants are put on notice of the filing of this Application, it is likely that Defendants will attempt to circumvent the temporary restraining order, by disappearing, destroying any evidence of their counterfeiting activities and draining their financial accounts. *See Ference Dec.*, ¶¶ 13 - 15.

In addition to the fact that Defendants are likely to attempt to hide evidence of their counterfeiting and infringing activities, if Defendants are given notice of this Application prior to providing the Financial Institutions and the Third Party Service Provider with the time necessary to freeze Defendants' Assets and/or Defendants' Financial Accounts (as defined *infra*), it is highly likely that Defendants will move and/or deplete Defendants' Assets and/or Defendants' Financial Accounts before the Financial Institutions and the Third Party Service Provider can comply with the temporary restraining order. *See id.* Further, if provided with prior notice of this Application, Defendants are also likely to simply open new User Accounts or Merchant Storefronts on Amazon.com, as well as any and all yet undiscovered online marketplace platforms, under new or different names and continue to offer for sale and sell Counterfeit Products with little to no consequence. *See id.* In light of the covert nature of Defendants and their unlawful, infringing and counterfeiting activities, an order other than an *ex parte* temporary restraining order would be an exercise in futility. The immediate and irreparable harm to Plaintiff's business and reputation -- as well as to the goodwill associated with Plaintiff's Marks -- 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 Counterfeit Products. *See*

Tyler Dec., ¶ 18, ¶¶ 25 - 27. Many courts have granted an *ex parte* temporary restraining order in situations where the harm to plaintiffs far outweighed the harm to defendants.⁵

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. *See Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995); *AT&T Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994). Courts routinely grant preliminary injunctive relief when a party's trademark rights are threatened by the sale of counterfeit versions of its products based on a trademark holder's inability "to control the quality of the goods manufactured and sold under the holder's trademark." *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986). As shown below, Plaintiffs readily meet the criteria for obtaining a temporary restraining order and preliminary injunction.

Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 537 (2d Cir. 2005) (quoting *Federal Express Corp. v. Federal Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir. 2000)). 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,

⁵ *See, supra* fn. 2 (collecting cases granted *ex parte* temporary restraining order in situations where harm to plaintiffs far outweighed harm to defendants.).

Plaintiff has met the standard for a preliminary injunction, and accordingly, a temporary restraining order should also issue against Defendants.

1. Plaintiff Will Suffer Irreparable Harm in the Absence of an Injunction Leaving 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 Counterfeit Products, but it destroys the inherent value of Plaintiff's Marks, it impairs Plaintiff's reputation for providing quality products, it dilutes Plaintiff's brand and goodwill and it negatively affects Plaintiff's relationships with its current customers and its ability to attract new customers. *See Tyler Dec.*, ¶¶ 25 - 27. While courts may no longer presume irreparable harm upon a finding of infringement, *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010), "[i]rreparable harm exists in a trademark case when the party seeking the injunction shows that it will lose control over the reputation of its trademark . . . because loss of control over one's reputation is neither 'calculable nor precisely compensable.'" *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir.1998). Lack of control over one's mark "creates the potential for damage to ... reputation[, which] constitutes irreparable injury for the purpose of granting a preliminary injunction in a trademark case." *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 196 (3d Cir.1990). Thus, "trademark infringement amounts to irreparable injury as a matter of law." *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 378 (3d Cir.1992); *see also Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.*, 212 F.3d 157, 169 (3d Cir.2000) ("potential damage to ... reputation or goodwill or likely confusion between parties' marks" is irreparable injury). "[O]nce the likelihood of confusion caused by trademark infringement has been established, the inescapable conclusion is that there was also irreparable injury." *Pappan*, 143 F.3d at 805. *See also U.S. Polo*

Ass'n, Inc. v. PRL USA Holdings, Inc., 800 F.Supp.2d 515, 540 (S.D.N.Y. 2011); *see also* *NYP Holdings v. New York Post Pub. Inc.*, 63 F. Supp. 3d 328, 341 (S.D.N.Y. 2014) (“[A]lthough irreparable harm may not be presumed upon a showing of a likelihood of success, irreparable harm exists in a trademark case when the party seeking the injunction shows that it will lose control over the reputation of its trademark . . . Thus, it will often be the case that a party's demonstration of a likelihood of success on a trademark claim will also show a threat of irreparable harm.” (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 393 (2006); *Salinger*, 607 F.3d at 80)). *See: Bill Blass, Ltd. v. SAZ Corp.*, 751 F.2d 152, 224 U.S.P.Q. (BNA) 753 (3d Cir. 1984). (“Harm is irreparable when it cannot be compensated adequately in money damages.”). *See also S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 378 (3d Cir.1992) (Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill.)

Moreover, Defendants' counterfeiting and infringing activities deny Plaintiff its fundamental right to control the quality of the goods sold under its marks. *See Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 243 (2d Cir. 2009) (affirming district court's grant of preliminary injunction) (quoting *El Greco Leather Products Co. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986, *cert. denied*, 484 U.S. 817 (1987) (“[o]ne 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.”)). Defendants are offering their substandard Counterfeit 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 NEGG[®] egg peeler. *See Tyler Dec.*, ¶¶ 19 - 24; *Malkin Dec.*, ¶¶ 11 - 12 and *Groupe SEB USA v. Euro-Pro Operating LLC*, 774 F.3d 192 (3d Cir. 2014) (holding that

irreparable harm is caused to a trademark owner who cannot control the quality of their products because “a higher incidence of substantial sales of counterfeit goods, which are invariably non-conforming and inferior” would “harm [Plaintiffs’] reputation and diminish the value of its trademark.”); *see also 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)).

Also, because Defendants’ substandard counterfeit or infringing products are virtually indistinguishable from Plaintiff’s NEGG[®] product, not only could any injury to consumers that results from such consumers’ use of Defendants’ substandard Counterfeit Products be attributed to Plaintiff, thereby causing irreparable harm to Plaintiff in the form of unquantifiable lost sales, loss of goodwill and loss of control of its reputation with authorized licensees, retailers and consumers, but Plaintiff potentially could be exposed to legal liability for any such injury to consumers, which is of particular importance given the nature of the NEGG[®] product. *See Tyler Dec.*, ¶ 24. Thus, this factor weighs heavily in Plaintiff’s favor.

2. Plaintiff is Likely to Prevail on the Merits of its Lanham Act Claims

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 marks 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 NEGG[®] mark, as well as Plaintiff's ownership of the same. *See Tyler Dec.*, ¶8, *Ex. 1*; *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 Plaintiffs: (1) the strength of Plaintiffs' Marks; (2) the degree of similarity between the Plaintiffs' 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. Plaintiffs have established that: (1) the marks used by Defendants on the Infringing Websites to sell their Counterfeit Products are identical to or substantially indistinguishable from Plaintiffs' Marks which Plaintiffs are all using in commerce on their genuine products; and (2) Defendants' use of Plaintiffs' Marks to sell their Counterfeit Products is not authorized by Plaintiffs. 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, Plaintiffs have 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 Publr. 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 Marks are 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 Marks are distinct as applied to the goods with which they are associated and as used in connection with Plaintiff's NEGG[®] product, which has achieved recognition and fame. *See Tyler Dec.*, ¶¶ 9 - 14. Additionally, Plaintiff's federal trademark registrations for its NEGG[®] 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 Marks 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 Marks 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 NEGG[®] Product and Plaintiff's Marks*

Defendants have applied identical copies of the Plaintiff's Marks to their substandard, Counterfeit Products and/or used identical copies of the Plaintiff's Marks 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 NEGG® 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 Malkin Dec.*, ¶¶ 10 - 11, Ex. 1; *Tyler Dec.*, ¶ 22 - 24; *Ference Dec.*, ¶¶ 9 - 11; *Lineberry 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 NEGG® Product*

Seeing as Defendants are offering for sale and/or selling counterfeit versions of the Plaintiff's NEGG® Product under the Plaintiff's Marks, or a confusingly similar mark, actual confusion can be inferred. *See Malkin Dec.*, ¶¶ 10 - 11, *Ex. 1*; *Tyler Dec.*, ¶ 22 - 24; *Ference Dec.*, ¶¶ 9 - 11; *Lineberry Dec.*, ¶ 2 and Composite Exhibit 1. Moreover, actual confusion exists in this case. *See Tyler Dec.* ¶ 24. Notwithstanding, 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 Marks 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, its NEGG[®] Product and its Marks. *See Malkin Dec.*, ¶¶ 10 - 11, *Ex. 1*; *Tyler Dec.*, ¶ 22 - 24; *Ference Dec.*, ¶¶ 9 - 11; *Lineberry 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.").⁶ 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).

⁶ *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's NEGG[®] egg peeler is manufactured with high quality materials. *See Tyler Dec.* ¶ 15. Plaintiff has neither authorized Defendants' use of the Plaintiff's Marks or confusingly similar marks in connection with the Counterfeit Products nor approved or tested Defendants' Counterfeit Products being offered for sale and/or sold under or in connection with the Negg Marks and/or confusingly similar marks. *See Tyler Dec.* ¶ 23. Hence, Defendants have encroached on Plaintiff's right to control the quality of the goods manufactured and sold under its Negg Marks. *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.

3. 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).

Plaintiff owns a U.S. patent for its unique NEGG[®] product, U.S. Patent No. 9,968,211 (“the ‘211 patent”). *Tyler Dec.*, ¶ 8. “Each 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.*

To show infringement, Plaintiff submits a detailed infringement claim chart for Plaintiff’s ‘211 patent that set forth the text of the patent claim to compare with annotated images of the infringing products. *Ference Dec.*, Ex. 1. Thus, Plaintiff has shown it is likely to prevail on its patent infringement claims.

4. Plaintiff is Likely to Prevail on its State Law Claims

Because Plaintiff has shown a likelihood of success on its Lanham Act claims, Plaintiff respectfully submits that it has also shown a likelihood of success on its deceptive trade practices, false advertising, unfair competition and unjust enrichment claims under Pennsylvania

Law. *Mateson Chemical Corp.*, 2000 WL 680020, at *5 n. 7. See also *Advance Magazine Publs. Inc.*, 123 F. Supp. 2d at 795 (citing *A &H Sportswear, Inc.*, 237 F.3d at 201-11).

5. 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 Marks and to its reputation as a result of Defendants' willful and knowing sales of substandard imitations of the Plaintiff's NEGG[®] Product. See *Tyler Dec.*, ¶¶ 25 - 29. In contrast, any harm to Defendants would only be the loss of Defendants' ability to continue to offer their Counterfeit 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.")).

6. Enjoining Defendants from Using the NEGG® Mark
Will Serve the Public Interest

The public interest will be served by the issuance of a temporary restraining order and preliminary injunction, as “the public has an interest in not being deceived—in being assured that the mark it associates with a product is not attached to goods of unknown origin and quality.” Public interest can be defined a number of ways, but in a trademark case, it is most often a synonym for the right of the public not to be deceived or confused. 2 *McCarthy*, § 30:21. *See Bill Blass, Ltd. v. Saz Corp.*, 751 F.2d at 156 (there is a public interest in the protection of the trademark and to avoid confusion in the public); *SK & F, Co. v. Premo Pharmaceutical Laboratories*, 625 F.2d 1055, 1057 (3d Cir.1980) (“preventing deception of the public is itself in the public interest”). *See also International Kennel Club v. Mighty Star, Inc.*, 846 F.2d at 1092 n. 8 (the relevant *198 consideration is the consumer's interest in not being deceived). Having already established that there is a likelihood of consumer confusion created by the concurrent use of the Guild marks, it follows that if such use continues, the public interest would be damaged. Conversely, a prohibition upon IOA use of the marks would eliminate that confusion. Here, the public has an interest in being able to rely on the high quality of the Plaintiff's Products bearing and/or sold in connection with the NEGG® Marks. Since Defendants have willfully and knowingly inserted substandard Counterfeit Products into the marketplace, the public would benefit from a temporary restraining order and preliminary injunction halting any further sale and distribution of Defendants' Counterfeit Products. *See Tyler Dec.*, ¶¶ 25 - 29.

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

Considering the nature of Defendants' counterfeiting businesses and Plaintiff showing that it has a high likelihood of succeeding on the merits of all of its claims, Plaintiff will be entitled to an equitable accounting of Defendants' profits from their sales of Counterfeit Products.

Accordingly, Plaintiff's request for an asset freeze order granting Plaintiff information regarding the location of all money, securities or other property or assets of Defendants (whether said assets are located in the U.S. or abroad) ("Defendants' Assets"), the attachment of Defendants' Assets and an injunction preventing the transfer from or to financial accounts associated with or utilized by any Defendants or any Defendants' User Accounts or Merchant Storefront(s) (whether said account is located in the U.S. or abroad) ("Defendants' Financial Accounts") by any banks, financial institutions, credit card companies and payment processing agencies, such as Amazon Services, LLC and Amazon Payments, Inc., and their related companies or agencies that engage in the processing or transfer of money and/or real or personal property of Defendants ("Financial Institutions") and online marketplace platforms, including, without limitation, those owned and operated, directly or indirectly by Amazon, as well as any and all as yet undiscovered online marketplace platforms and/or entities through which Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them manufacture, import, export, advertise, market, promote, distribute, offer for sale, sell and/or otherwise deal in Counterfeit Products which are hereinafter identified as a result of any order entered in this action, or otherwise is both necessary and appropriate, and is within this court's discretion to preserve Plaintiff's right to the relief sought in the Complaint. *See* 15 U.S.C. §

1117(a); see, e.g., *Balenciaga Am., Inc. v. Dollinger*, No. 10-cv-2912-LTS, 2010 U. S. Dist. LEXIS 107733, at *22 (S.D.N.Y. Oct. 8, 2010) (citing *Wishnatzki & Nathel, Inc. v. H.P. Island-Wide, Inc.*, No. 00-cv-8051-JSM, 2000 U.S. Dist.. LEXIS 15664, at *4 (S.D.N.Y. 2000) (“[W]here plaintiffs seek both equitable and legal relief in relation to specific funds, a court retains its equitable power to freeze assets.”); *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger USA, Inc.*, 146 F.3d 66, 71-72 (2d Cir. 1998) (“A district court faced with a Lanham Act violation possesses some degree of discretion in shaping [the] relief according to the principles of equity and the individual circumstances of each case” within the parameters of allowing an accounting for profits); *George Basch Co., Inc. v. Blue Coral, Inc.*, 968 F.2d 1532, 1537 (2d Cir. 1992); *Tiffany (NJ) LLC v. Forbse*, No. 11-cv-4976-NRB, 2012 U.S. Dist.. LEXIS 72148, at *34 (S.D.N.Y. May 23, 2012) and *Warner Bros. Entm’t Inc. v. Doe*, No. 14-cv-3492-KPF, 2014 U.S. Dist.. LEXIS 190098 (S.D.N.Y. May 29, 2014).

Courts have the inherent authority to issue a prejudgment asset restraint when plaintiff’s complaint seeks relief in equity. *Animale Grp. Inc. v. Sunny’s Perfume Inc.*, 256 F. App’x 707, 709 (5th Cir. 2007); *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995); *Reebok Int’l Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 559 (9th Cir. 1992). In the years since *Marnatech*, many federal courts have granted the temporary restraint of a counterfeiter’s assets in cases similar to this one, including recently in actions against operators of ‘rogue’ websites selling counterfeit products to ensure the availability of an equitable accounting. See, e.g., *The North Face Apparel Corp. and PRL USA Holdings, Inc. v. Fujian Sharing, et al.*, Civil Action No. 10-Civ-1630 (AKH) (S.D.N.Y. March 2, 2010); *National Football League v. Chen Cheng, et al.*, No. 11-Civ-00344 (S.D.N.Y. January 19, 2011); *Tory Burch LLC v. Yong Sheng Intl Trade Co., Ltd.*, No. 10-Civ-9336 (S.D.N.Y. December 17, 2010).

In addition, Plaintiff has shown a strong likelihood of succeeding on the merits of its trademark infringement and counterfeiting claim, so according to the Lanham Act 15 U.S.C. § 1117(a)(1), Plaintiff is entitled, “subject to the principles of equity, to recover ... defendant’s profits.” Plaintiff’s Complaint seeks, among other relief, that Defendants account for and pay to Plaintiff all profits realized by Defendants by reason of Defendants’ unlawful acts. Therefore, this Court has the inherent equitable authority to grant Plaintiff’s request for a prejudgment asset freeze to preserve the relief sought by Plaintiff.

Plaintiff may obtain an order restraining Defendants’ Assets by demonstrating a “likelihood of dissipation of the claimed assets, or other inability to recover money damages, if relief is not granted.” *DatatechEnters. LLC v. FFMagnatLtd.*, No. 12-cv-04500-CRB, 2012 U.S. Dist. LEXIS 131711, at *12 (N.D. Cal. Sept. 14, 2012) (citing *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009)). District courts have the “authority to freeze those assets which could [be] used to satisfy an equitable award of profits.” *North Face Apparel Corp. v. TC Fashions, Inc.*, No. 05-cv-9083-RMB, 2006 U.S. Dist. LEXIS 14226, at *10 (S.D.N.Y. Mar. 30, 2006) (internal citation omitted). In doing so, a court “may exempt any particular assets from the freeze on the ground that they [are] not linked to the profits of allegedly illegal activity.” *Id.* at *11. Yet, the onus is on “the party seeking relief [from any such asset freeze] to ‘present documentary proof’” that its profits do not stem from such illegal activity. *Id.*

Under 15 U.S.C. § 1117(a), a plaintiff in an action arising thereunder is entitled to recover a defendant’s profits derived from the counterfeiting and/or infringement and/or plaintiff’s damages. The Supreme Court specifically held that a trademark “infringer is required *in equity to account* for and yield up his gains to the true owner,” and “profits are then allowed as an *equitable* measure of compensation.” *Gucci Am. v. Bank of China*, 768 F.3d 122, 131-132 (2d

Cir. 2014) (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916) (emphasis added) and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940)). Specifically, with respect to claims involving infringement arising under the Lanham Act, it has been established in this Circuit, as well as sister circuits, that district courts have the authority to issue a prejudgment asset restraint injunction in favor of plaintiffs seeking an accounting and/or another equitable remedy against allegedly infringing defendants. *See, e.g., Warner Bros. Entm't Inc. v. Doe*, 2014 U.S. Dist.. LEXIS 190098 (S.D.N.Y. May 29, 2014); *Microsoft Corp. v. Jun Yan*, 2010 U.S. Dist.. LEXIS 14934 (Dist. Conn. Feb. 18, 2010); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982 (11th Cir. 1995) (finding that the district court had the authority to freeze assets that could have been used to satisfy an equitable award of profits pursuant to 15 U.S.C. § 1117) and *Reebok Int'l, Ltd.*, 970 F.2d at 560 (“Because the Lanham Act authorizes the district court to grant Reebok an accounting of Betech's profits as a form of final equitable relief, the district court had the inherent power to freeze Betech's assets in order to ensure the availability of that final relief.”).

An asset freeze in the instant matter is unquestionably warranted because Defendants, who appear to be unknown foreign individuals, that are manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products to U.S. consumers solely via the Internet, and accepting payment for such Counterfeit Products in U.S. Dollars through Financial Institutions, thereby causing irreparable harm to Airigan in the form of lost sales, loss of goodwill and loss of control of its reputation with licensees, retailers and consumers, and can, and most certainly have the incentive to, transfer and hide their ill-gotten funds if their assets are not frozen. *See Ference Dec.*, ¶ 13; *Dama S.P.A. v. Doe*, 2015 U.S. Dist.. LEXIS 178076, at *4-6 (S.D.N.Y. June 12, 2015)

(agreeing that, “Plaintiff’s concerns regarding the likelihood of dissipating assets merit the extraordinary remedy of *ex parte* relief and that there is a strong likelihood that advance notice of the motion would cause Defendants to drain their PayPal accounts, thereby depriving Plaintiff of the remedy it seeks”) and *SEC v. Caledonian Bank Ltd.*, 317 F.R.D. 358 (S.D.N.Y. 2016) (granting plaintiff’s request for an *ex parte* asset freeze based on plaintiff’s assertion that Defendants were foreign entities, and therefore could easily move assets out of bank or brokerage accounts at a moment’s notice).⁷ Therefore, Plaintiff respectfully submits that this Court should exercise its inherent equitable power and freeze Defendants’ Assets and Defendants’ Financial Accounts for the purpose of preserving Defendants’ funds and ensuring that a meaningful accounting of their profits can be made. Upon the entering of an asset freeze, Plaintiff also requests that the Court order Defendants and/or the Financial Institutions and/or the Third Party Service Provider to immediately identify Defendants’ Assets and Defendants’ Financial Accounts and the respective current account or fund balances of the same.

2. Defendants’ User Accounts and Merchant Storefronts Must be Frozen

A temporary restraining order which, in part, restrains and enjoins Amazon.com, 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 Counterfeit 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,

⁷ See also *supra* fn. 2

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 counterfeit products.).⁸

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 Counterfeit Products will likely try and set up another Merchant Storefront to keep selling when the current Merchant Storefront stops working. *See Ference Dec.*, ¶ 13; *See Malkin Dec.*, ¶ 13. 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-Counterfeit Products. The proposed Order merely blocks any goodwill associated with the Merchant Storefront which sold Counterfeit Products; the Defendants are free to set up a new Merchant Storefront that does not sell Counterfeit Products.

Blocking the good will associated with the Merchant Storefront helps prevent the situation with the defendants where the Counterfeit 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 Counterfeit Product it will be made available by a Defendant. *Ference Dec.* ¶ 13, *Malkin Dec.*, ¶ 13. The only way to preclude this type of harm to Plaintiff is to freeze the Defendants' Merchant Storefronts.

The terms of service for a number of the online marketplace platforms prohibit the selling of counterfeit goods. *See Malkin Dec.*, ¶ 13. ("If you sell or supply inauthentic products, we may

⁸ See also *supra* fn. 2

immediately suspend or terminate your Amazon selling account (and any related accounts) and destroy any inauthentic products in our fulfillment centers at your expense.”). While well intentioned, these policies lead to the “whack-a-mole” situation confronting Plaintiff where a seller of Counterfeit Products opens another Merchant Storefront when their original Merchant Storefront is terminated. Furthermore, termination of their accounts because of counterfeiting is something Defendants knew could happen, and having the Court freeze their Merchant Storefront merely accelerates the outcome given the policies of the online marketplaces and requires the Third Party Service Provider to comply with their own policies.

A freezing of Defendants’ Merchant Storefronts also acts to provide immediate notice of the present action to Defendants. Indeed, a number of cases have required that the domain names on which a defendant’s storefront operates be turned over to the plaintiff and pointed to a webpage providing notice of the lawsuit against the defendant. *Iron Maiden Holdings Ltd. v. The P’ships & Unicorporated Assns. Identified on Schedule “A”*, No. 18-CV-522 (N.D. Ill. Feb. 1, 2018) (“Plaintiff may provide notice of these proceedings to Defendants, including notice of the preliminary injunction hearing and service of process pursuant to Fed.R.Civ.P. 4(f)(3), by electronically publishing a link to the Complaint, this Order and other relevant document on a website to which the Defendant Domain Names which are transferred to Plaintiff’s control will redirect”) (§ 13, *Temporary Restraining Order*, copy attached as Exhibit 3 to *Plaintiff’s Request for Judicial Notice*). 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 Provider regarding the scope and extent of Defendants' counterfeiting and 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 Provider, including, without limitation any and all websites, any and all accounts with online marketplace platforms Amazon.com, as well as any and all as yet undiscovered accounts with additional online marketplace platforms held by or associated with Defendants, their respective officers, employees, agents, servants and all other persons in active concert with any of them ("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 Counterfeit 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 Provider 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 in this District have often applied a four-factor test to determine when expedited discovery may be granted,⁹ 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. Ill. 2000)).¹⁰ Regardless of which test is applied, Plaintiff has established that it is entitled to the expedited discovery requested. 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

⁹ “. . . 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).

¹⁰ *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.).

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; *see also Tyler Dec.*, ¶¶ 26 - 29 and *Malkin Dec.*, ¶¶ 13.

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' counterfeiting and infringing activities that Plaintiff is not yet able to confirm, including: 1) the true identities of Defendants, 2) the full scope of Defendants' counterfeiting and infringing activities, 3) the source or location of Defendants' inventory of Counterfeit Products and/or 4) where the proceeds from Defendants' counterfeiting and infringing activities have gone. *See Malkin Dec.*, ¶ 18; *see also Admarketplace, Inc. v. Tee Support, Inc.*, No. 13-cv-5635- LGS, 2013 U.S. Dist.. LEXIS 129749, at *5 (S.D.N.Y. Sep. 11, 2013) (finding that a plaintiff "who has a potentially meritorious claim and no ability to enforce it absent expedited discovery, has demonstrated good cause for expedited discovery"). Therefore, only through an order from the Court allowing expedited discovery will Plaintiff be able to fully ascertain the extent of Defendants' counterfeiting and 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 Counterfeit 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 submits 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 Amazon, 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 plaintiffs have posted in related cases before Courts. *See Showtech Merchandising, Inc. v. Various John Doe, et al*, 2:12-cv-1270 (W.D. PA September 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).¹¹

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 requests that the Court, in accordance with Fed. R. Civ. P. 65(a), enter the Security Bond in the amount of \$5,000.

¹¹ 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.

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, Amazon Payments, Inc. d/b/a Amazon Pay and Amazon Services LLC d/b/a Amazon.com in the form of the [Proposed] Order accompanying this Application, and such other relief to which Airigan may show it is legally entitled.

Respectfully submitted,

Dated: October 5, 2018

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