

FILED

OCT 16 2018

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

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

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

v.

BUFUJIUGAN, *et al.*,

Defendants.

Civil Action No. 18-1330

(Judge Fischer)

FILED UNDER SEAL

PLAINTIFF'S *EX PARTE* MOTION TO AMEND TEMPORARY RESTRAINING ORDER; ORDER RESTRAINING ASSETS AND MERCHANT STOREFRONTS; ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE; AND ORDER AUTHORIZING EXPEDITED DISCOVERY

Plaintiff, Airigan Solutions, LLC (“Airigan” or “Plaintiff”), hereby moves this Court on an *ex parte* basis to amend the previously issued *ex parte* Temporary Restraining Order to include the Defendants, the Individuals, Partnerships, and Unincorporated Associations identified on **Amended Schedule “A”** hereto (collectively “Defendants”)¹ and which are included in the Amended Complaint that is being contemporaneously filed herewith. In support thereof, Airigan submits the following:

I. INTRODUCTION

This is an action for trademark counterfeiting and infringement, false designation of origin, common law unfair competition, common law trademark infringement, and patent

¹ Airigan is contemporaneously filing an Amended Complaint that is substantively identical to the original Complaint except that the **Amended Schedule “A”** thereto includes newly added Defendants. Airigan is also contemporaneously moving to amend the original Order permitting alternate service to permit alternate service on the newly added Defendants. Airigan hereby incorporates by reference its Application for TRO and Motion for Alternative Service, together with supporting declarations and exhibits.

infringement. Defendants are knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling goods bearing counterfeits of Airigan's registered trademark within this district and throughout the United States by operating e-commerce stores established via the Internet marketplace website, Amazon.com ("Amazon"), under their respective seller identification names (the "Seller IDs").

On October 5, 2018, Plaintiff filed its Complaint together with its *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction (the "Application for TRO") as to the original Defendants. On October 9, 2018, the Court entered an Order granting an *Ex Parte* Temporary Restraining Order and setting a hearing on the Preliminary Injunction for November 26, 2018 at 9:00 a.m.

Airigan is filing herewith an Amended Complaint that names additional Defendants and by this Motion seeks to amend the October 9, 2018, Temporary Restraining Order to: 1) include the newly added Defendants who are also knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling goods bearing counterfeits of Airigan's registered trademark within this district and throughout the United States by operating e-commerce stores established via the Amazon Internet marketplace website; 2) add an additional Amazon Standard Identification Number (ASIN) under which one of the originally named Defendants (E-ADF) is selling counterfeit product; and 3) require Amazon to place Airigan into Amazon's gating program and restrain Amazon from processing payments from sellers not authorized by Airigan for products sold under the ASINs controlled by Airigan.

II. ARGUMENT

The papers submitted by Airigan on October 9, 2018, – in particular, the *Memorandum of Law* – set forth the governing law with respect to the issuance of a Temporary Restraining Order

for counterfeit products. In the present Motion, Airigan incorporates the previously filed papers by reference, and will limit the present Motion to showing the newly added Defendants are subject to the personal jurisdiction of the court, are selling counterfeit product, and it is appropriate to amend the previously entered Temporary Restraining Order.

The new Defendants are comprised of two groups of defendants. First, four (4) newly added Defendants (Kelly Babbitt, NO9ESHOP, Nanther, and Right Tools) are selling counterfeit product using ASINs controlled by Plaintiff. Second, fourteen (14) newly added defendants (advancedshop, BJack-LiuA, BossUS, Intercall, InterDeals, Jiaowoliudehua, Kelly Babbit, Labu Store, Maideer, Ojljjhdfdi, Pingdi, SpideR, UniGalaxy, and yuazzhugao) are selling counterfeit product through various other ASINs.

A. The Newly Added Defendants are Subject to Personal Jurisdiction

Airigan has in its possession counterfeit product that has been shipped into this District from a number of the newly added Defendants. All of the newly added defendants, however, operate a fully interactive website directed to residents of the Commonwealth of Pennsylvania, and will ship product to the Commonwealth of Pennsylvania. Furthermore, all of the newly added Defendants collect Pennsylvania sales tax. *See* October 15, 2018, Declaration of Margaret B. Tyler (“*Tyler Dec.*”), ¶ 14, and October 15, 2018, Declaration of Jennifer Lineberry (“*Lineberry Dec.*”), ¶ 2 and *Composite Exhibit 2* thereto. *Composite Exhibit 2* includes, for each newly added Defendant, documentation showing their willingness to ship counterfeit product into Pennsylvania and, for a number of the newly added Defendants, documentation showing counterfeit product was actually shipped into Pennsylvania.

As discussed in Plaintiff’s *Memorandum of Law* submitted on October 5, 2018, (pgs. 12-24), it is not necessary for a defendant to actually ship counterfeit product into Pennsylvania to

be subject to personal jurisdiction in Pennsylvania. A defendant is subject to personal jurisdiction in a state where the defendant offers counterfeit product for sale through an interactive website. Therefore, this Court has personal jurisdiction over the newly added Defendants.

B. The Newly Added Defendants are Selling Counterfeit Product

The new Defendants are also selling Counterfeit and Infringing Products² through Accounts³ and Merchant Storefronts⁴ on Amazon.com. *See* October 15, 2018 Declaration of Margaret B. Tyler (“*Tyler Dec.*”), ¶¶ 14 - 18; October 15 Declaration of Jennifer Lineberry (“*Lineberry Dec.*”), ¶ 2 and *Composite Exhibit 2* thereto; and October 15, 2018 Declaration of Stanley D. Ference III (“*Ference Dec.*”), ¶ 4. It is not necessary for Airigan to obtain and physically review a sample of product from each newly added Defendant to make a determination that Defendants are selling counterfeit and infringing product.

Airigan submitted a *Request for Judicial Notice* on October 5, 2018, which included copies of Temporary Restraining Orders entered in various actions. One of the Temporary

² As alleged in Plaintiff’s Amended Complaint, “. . .the Defendants identified in **Amended 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”).

³ As defined in the Application, a “User Account” is, as defined in the Complaint, 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.

⁴ As defined in the Application, a “Merchant Storefront” is 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.

Restraining Orders included was from *Ideavillage Products Corp. v. Dongguan Shipai Loofah Sponge Commodity Factory d/b/a Bathing Store*, No. 18-cv-901 (S.D.N.Y. Feb. 2, 2018) (Exhibit 4 to the *Request for Judicial Notice*). In *Ideavillage*, the Temporary Restraining Order was issued against nearly 25 defendants even though no counterfeit product was actually delivered into New York State or physically reviewed by the plaintiff. *Ideavillage* showed – as Airigan has shown here – that each defendant ships counterfeit product into the state and a determination of infringement was made through visual inspection of the Defendants’ listings for counterfeit products.

As in the *Ideavillage* case, for those newly added Defendants for which Airigan has not reviewed actual product, Airigan is able to confirm with certainty through visual inspection of the newly added Defendants’ listings on Amazon the counterfeit products offered for sale by each newly added Defendant in its listing are, in fact, infringing, particularly given the low prices at which the newly added Defendants are offering counterfeit products. As reflected in the copies of each newly added Defendants’ listings attached to *Composite Exhibit 2*, the newly added Defendants’ counterfeit products are virtually indistinguishable from Airigan’s genuine NEGG® brand egg peeler. Therefore, Airigan has shown that the newly added Defendants are offering for sale and/or selling counterfeit product.

C. It is Proper to Amend the Temporary Restraining Order

A temporary restraining order may be modified if the proposed changes are equitable in light of subsequent changes in the facts or law, or for any other good reason. *See Thornbrook Int'l, Inc. v. Rivercross Foundation*, 2003 WL 22289853, * 2, No. No. 03 C 1113 (N.D. Ill., Oct. 6, 2003) (citing *Movie Systems, Inc. v MAD Minneapolis Auto Distributors*, 717 F. 2d 427, 430 (8th Cir. 1983); *Canal Authority v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974)). In

counterfeiting cases such as the present case, temporary restraining orders have been amended to include additional defendants. *See Gaffigan v. Does 1-10 d/b/a tiffjewelrystore.com, et al.*, 2010 WL 2925091, No. 09-61206 (S.D. Fl., July 22, 2010) (order adopting Magistrate’s report and recommendation to grant motion to amend temporary restraining order to include additional defendant domain names).

In addition to amending the temporary restraining order to address the new ASIN under which original Defendant E-ADF is selling counterfeit product and the newly added Defendants, Airigan is asking to modify the restraint on Amazon Services, Inc. and Amazon Payments, Inc. (“Amazon”) to require Amazon to place Airigan into Amazon’s gating program and enjoin Amazon from processing payments for any seller not authorized by Airigan for product sold under the ASINs controlled by Airigan. (*See* Section I. C. of the proposed *Amended Temporary Restraining Order* submitted herewith; *Tyler Dec.*, ¶ 6.) Airigan has twice asked Amazon to “gate” its ASINs, which would restrict the use of those ASINs to sellers authorized by Airigan, but Amazon has not responded to Airigan’s multiple requests. *Tyler Dec.*, ¶ 12. Such a modification maintains the status quo, and will assist Airigan in minimizing any return to Court should a counterfeiter offer counterfeit product for sale under the ASINs controlled by Airigan in the future.

Eliminating the availability of counterfeit product is particularly important at this time of year given over forty percent (40%) of yearly sales occur in the fourth quarter. Indeed, an advertisement for Airigan’s NEGG[®] brand egg peeler is appearing in the current issue of *Weight Watchers Magazine* (eggs have zero points in the Wight Watchers system). *Tyler Dec.*, ¶ 20. Unless counterfeit product is removed from the market, Arigian’s marketing efforts act to funnel business to the counterfeiters.

III. CONCLUSION

Airigan's motion seeks to amend the temporary restraining order to add additional Amazon Merchant Storefronts by way of Seller IDs and ASIN numbers. Since Plaintiff has already demonstrated good cause for granting the first Application for a temporary restraining order and since the balance of equities continues to weigh in favor of the Plaintiff, it is appropriate for the Court to amend the temporary restraining order to include the new Defendants and further enjoin Amazon.

A proposed Order granting this motion is submitted herewith, together with a proposed Amended Temporary Restraining Order.

Respectfully submitted,

Dated: October 16, 2018

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AMENDED SCHEDULE “A”
DEFENDANTS BY NUMBER AND SELLER ID

Def. No.	Defendant / Seller ID	Amazon Seller ID	Infringing Item’s ASIN
1	bufujiugan	A25PGNY3G3IZJ0	B07FCJ6NLH
2	DiMshop	A1Y5VRHOIHLYBT	B01N235WK4
3	E-ADF	A2366G1DUF6SX2	B07GCMBBK4 B07GCJZ2QW
4	OETT-YO	A1SDI4H10GEEP2	B07FCJ6NLH
5	Phase 1 Marketing	A1HINY1A3NZVNR	B01N235WK4
6	Smart Store !	A2B399SB2E7YE3	B07CGN969R
7	advancedshop	A1WNRDNB1EJOCC	B07DTCN5ZS B07DTCPG1K
8	BJack-LiuA	A1XYEEJLU2VYRW	B07D5WGNX8
9	BossUS	A3UJLGCS6JV6GS	B07H4LNBBF
10	Intercall	AJ6FETZIMC9Y4	B07J68PX75
11	InterDeals	A1BHX9P4XEQYDA	B07CGN969R
12	Jiaowoliudehua	A2NU7SYXC6DICY	B07FCJYFH1
13	Kelly Babbitt	A2X7GCOADAKNPF	B01N7SXX0W B01MT9U0HK B01NATZUY2 B01N235WK4
14	Labu Store	A1EFTOGAHWG4ZS	B07CWDRZ4T
15	Maideer	AC9NN1P2FVMB1	B07CSJPYSN B07JVGN22S
16	NO9ESHOP	A38G93U3TYL81Z	B01N7SXX0W B01MT9U0HK B01NATZUY2

			B01N235WK4
17	Nanther	A2LJN2LH2HMHWQ	B01MT9U0HK
18	Ojljjhfdi	A3A7WP66AL8LMF	B07FCJTFH1
19	Pingdi	ALD9OR5X6E2T3	B07HFDQD35
20	Right Tools	A2T24BDCEDZXXL	B01N235WK4
21	SpideR	A1VD1RPG8A938O	B07J3WL7VR
22	UniGalaxy	A154P2LSGXXCOP	B07D5VXMQM B07D5WDCBX B07D5W33BW B07D5WGNX8
23	Wakstone Commerce	A3QRW4K85D5UTT	B07C7VQ57W B07CGN969R
24	yuanzhugao	A2PZGLW78EBDKW	B07HMTG9TF B07HMHDQRJ