

FILED

FEB 14 2019

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,

Civil Action No. 19-166

v.

BABYMOVE, *et al.*,

Defendants.

FILED UNDER SEAL

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

I, Brian Samuel Malkin, hereby declare as follows:

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

2. I am one of the attorneys working for Ference & Associates LLC ("the Ference Firm" or "Plaintiff's Counsel"), legal counsel for Plaintiff, Airigan Solutions, LLC ("Airigan" or "Plaintiff"). I make this declaration in support of Plaintiff's *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction against Defendants, the Individuals, Partnerships, and Unincorporated Associations identified on **Schedule "A"** to the Complaint.

Plaintiff's Counsel's Investigation of Counterfeit Products

3. I am employed as a Principal Attorney by the Ference Firm. Plaintiff hired the Ference Firm to investigate and police manufacturers, wholesalers and/or third-party merchants offering for sale and/or selling products bearing and/or using counterfeits of Plaintiff's trademark, trade dress, and patent ("Infringing and Counterfeit Products")¹ on through their User Accounts² on their Merchant Storefronts³, including at least, wish.com.

4. The Plaintiff trained me and Stanley D. Ference III on how to identify Counterfeit products.

5. Through our investigation, we identified Defendants as offering for sale and/or selling Counterfeit Products through their respective Merchant Storefronts on wish.com. (also referred to as "Third Party Platform(s)")

6. Prior to the filing of the lawsuit, we investigated the Defendants who were/are offering for sale and/or selling Counterfeit Products. During this investigation, it was confirmed that through their respective User Accounts and Merchant Storefronts, the Defendants were offering worldwide shipping, and that there was no indication the offered Counterfeit Product in

¹ As alleged in Plaintiff's Complaint, ". . . 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").

² As defined in the Application, a "User Account" is As defined in the Complaint, a "User Account" is any and all accounts with online marketplace platforms, as well as any and all as yet undiscovered accounts with additional online marketplace platforms held by or associated with Defendants, their respective officers, employees, agents, servants and all other persons in active concert with any of them.

³ 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.

the identified Infringing Listing would not be shipped to Pennsylvania. Further, we confirmed that each Defendant's Infringing Listing was in English and that U.S. Dollars were accepted for payment. Finally, we purchased and received at least one product from each of the Defendants and confirmed that the product was counterfeit.

7. True and correct copies of the Infringing Listings are attached as Composite Exhibit 1 to the Declaration of Jennifer Lineberry.

8. In performing my research and doing my work for the Plaintiff, I quickly learned that the problem of counterfeiting is pervasive and seemingly unstoppable.⁴ The technology that drives the OMPs has outpaced the current laws in the United States. Though each OMP purports to assist in curtailing and taking down copyright, trademark, and copyright infringing materials, this actually results in a form of frustrating "Whack-A-Mole" where no sooner than you get one counterfeit and/or infringing product listing down, another one simply pops up on the same or a different OMP under a new made up name.

9. 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. Plaintiff filed federal lawsuits in the Western District of Pennsylvania at *Airigan Solutions, LLC v. Bufujiugan*, Civil Action No. 18-cv-1330-NBF (Amended Temporary Restraining Order entered on October 16, 2018); *Airigan Solutions, LLC v. Artifacts_Selling*,

⁴ See, e.g., <https://medium.com/sealnetwork/70-of-counterfeit-products-are-sold-online-c6eafe07083>, medium.com, "70% of Counterfeit Products are Sold Online", Posted March 17, 2018 ("consumers spend about half a trillion dollars annually on counterfeit products"), <https://medium.com/sealnetwork/70-of-counterfeit-products-are-sold-online-c6eafe07083>, Face the Nation, "Popular Goods Sold through Amazon, Walmart and Others are Counterfeits: Government Report", Posted February 26, 2018 (indicating that Federal Investigators documented that Amazon, Walmart, eBay, and other on-line Marketplaces were selling counterfeit goods), <https://www.engadget.com/2018/05/31/fulfilled-by-amazon-counterfeit-fake/>, engadget.com, "Amazon Needs to Get a Handle On its Counterfeit Problem", Posted May 31, 2018 (criticizing on-line marketplace practices that encourage the proliferation of counterfeiting).

Civil Action No. 18-cv-1462-NBF (Temporary Restraining Order entered on November 2, 2018). This has resulted in some success. However, predictably, new counterfeiters selling into Allegheny County Pennsylvania are damaging and causing irreparable harm to Plaintiff.

10. Upon information and belief, Defendants, have cooperated, communicated their plans with one another, shared information, and coordinated their efforts, all in order to create an illegal marketplace operating in parallel to the legitimate marketplace of Plaintiff's and the legally authorized resellers of Plaintiff's genuine goods. Defendants are concurrently targeting their counterfeiting and infringing activities toward consumers and causing harm in Allegheny County Pennsylvania. Defendants are aware of Plaintiff, its genuine NEGG[®] egg peeler product, and are aware that their illegal counterfeiting and infringing actions alleged herein are likely to cause injury to Plaintiff in the U.S., in Pennsylvania and in this judicial district specifically, as Plaintiff conducts substantial business in Pennsylvania.

11. Upon information and belief, Defendants are employing and benefiting from substantially similar, paid advertising and marketing and selling strategies in order to make their Merchant Storefronts selling illegal goods appear more relevant and attractive in the Third Party Platform(s) search results across an array of search words, including but not limited to "NEGG", "EGG PEELER", and "EGG CRACKER", and "BOILED EGG PEELER"). By their actions, Defendants are causing concurrent and indivisible harm to Plaintiff and the consuming public by (i) depriving Plaintiff of its right to fairly compete for space within the Third Party Platform(s) search results and reducing the visibility of the Plaintiff's genuine NEGG[®] egg peeler products and/or diluting and driving down the retail market price for NEGG[®] egg peelers; (ii) causing an overall degradation of the value of the goodwill associated with Plaintiff's marks and goods, and

(iii) increasing Plaintiff's overall cost to market their goods and educate consumers about their brands.

Anonymity of Merchant Storefronts and User Accounts

12. In my experience policing the Plaintiff's products, and based upon my review of lawsuits filed by other brand owners, despite the presence of on-line systems for reporting intellectual property infringement to various third party service providers, like wish.com, sellers of counterfeit and/or infringing products, particularly those sellers whose product listings are removed, merely change the description or photograph and then re-post the listing for the products on their respective Merchant Storefront or modify or create a new User Account and/or Merchant Storefront and proceed to sell the same product again. Also, taking the listing down, does not prevent a previous buyer of counterfeit products from contacting a Defendant using the messaging system through the Merchant Storefront provided by the Third Party Service Provider(s) and requesting the counterfeit product again. Therefore, takedown of the entire Merchant Storefront is appropriate. I also have noted that in Amazon.com's terms of service ("If you sell or supply inauthentic products, we may immediately suspend or terminate your Amazon selling account (and any related accounts) and destroy any inauthentic products in our fulfillment centers at your expense"). Although well meaning, these policies lend themselves 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. Accordingly, without court intervention, as requested in this case, the counterfeiting and damage caused by counterfeiting will continue unabated even with various Third Party Service Provider(s) efforts to curtail counterfeiting.

13. Based upon my personal experience and my review of lawsuits filed by other brand owners, I have learned that the Defendants selling on Third Party Platforms like wish.com have structured their businesses so that the sole means for customers to purchase Defendants' Counterfeit Products is by placing an order over the internet. While selling on on-line marketplace platforms (i.e., wish.com), they do not display their registered business name or trade name, contact name, complete address or any other contact information. These Defendants use their respective Merchant Storefronts and User Accounts to anonymously sell their Infringing or Counterfeit Products. Likewise, these Defendants typically use shipping services like EMS and DHL and ePacket. These shipping services provide minimal tracking and/or use incomplete or made up return addresses to further secret their identities.

14. Based upon my personal experiences, I have formed a belief that the majority of the Defendants, likely reside and/or operate in foreign jurisdictions.

Identity and Method of Service upon Parties to be Enjoined

15. Based upon my own research, experience, and communications with various Parties to be enjoined, the paragraphs below set forth my information and belief about the identity of each, service addresses, and willingness to accept service, submit to jurisdiction of this court, and comply with court any orders.

16. Based upon my own research and a review of pleadings (including declarations) in multiple past actions by other brand owners, as described above, Wish.com is based in San Francisco, California. It is an online marketplace and e-commerce platform owned by Context Logic, Inc., a Delaware corporation with a registered address of Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware 19808. Context Logic, Inc.'s legal counsel, Dwight Lueck of Barnes & Thornburg LLP has agreed to receive papers and submit to the

jurisdiction of this Court for the purpose of restraining orders for brand owner lawsuits filed on our client's behalf.

17. PayPal, Inc. is foreign registered corporation in the Commonwealth of Pennsylvania with a registered address of "c/o CT Corporation System Dauphin" which indicates "c/o C T Corporation System, 600 North 2nd Street, Suite 401, Harrisburg, Pennsylvania 17101." According to PayPal's website at https://www.paypalobjects.com/webstatic/en_US/licenses/PA_license.pdf (last accessed on February 8, 2019), it is a licensed money transmitter under Pennsylvania's Transmitting Money Act (License #0043). As such, this Court has jurisdiction over PayPal, Inc.

18. I reasonably believe that each of the Parties to be enjoined may be served at the noted contact information, by the following delivery method, and further reasonably believe that upon service, each will comply with a temporary restraining order ("Order") if one is issued by this Court:

Third Party	Platform	Delivery Method, Contact and Address
Context Logic, Inc.	Wish.com	Delivery of: (1) a PDF copy of this Order, or (2) a link to a website where ContextLogic, Inc. to ContextLogic's counsel, Dwight Lueck, at Dwight.Lueck@btlaw.com
PayPal, Inc.	PayPal.com	Delivery of a true and correct copy this Order to PayPal, Inc. via electronic mail to Adam Fritz, Executive Escalations, PayPal at EEOMALegalSpecialist@paypal.com .

I declare under the penalty of perjury laws of the United States of America that to the best of my knowledge the foregoing is true and correct.

Executed this 14th day of February, 2019, at Pittsburgh, Pennsylvania.

/s/ Brian Samuel Malkin

Brian Samuel Malkin