

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

FILED

MAY 02 2019

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

v.

ABAGAIL, *et al.*,

Defendants.

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

Civil Action No. 19-503

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 on, *inter alia*, Amazon.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 Amazon.com.

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 the identified Infringing Listing would not be shipped to Pennsylvania. Further, we confirmed

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 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.

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.

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 Amazon.com Infringing Listings are attached as Composite Exhibit 1 to the Declaration of Amy Cline.

8. In reviewing each of the Amazon.com Defendants' User Accounts and Merchant Storefronts, I confirmed that an Amazon.com messaging system is available for communicating directly through the Amazon Merchant Storefront name to whoever is selling through the Merchant Storefront. The Amazon.com messaging system offers messages and attachments to be transmitted to whoever is selling through the Merchant Storefront.

9. 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.

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).

10. In effort to curtail and stop earlier on-line counterfeiters, Plaintiff filed federal lawsuits in Pennsylvania and obtained an *ex parte* temporary restraining order against other various counterfeiters. See *Airigan Solutions, LLC v. Babymove, et al.*, Case No. 19-cv-166-NBF (W.D. Pa., filed February 14, 2019), *Airigan Solutions, LLC v. Bufuijugan, et al.*, Case No. 18-cv-1330-NBF (W.D. Pa., filed October 5, 2018); *Airigan Solutions, LLC v. Artifacts_Selling*, Case No. 18-cv-1462-NBF (W.D. Pa., filed October 31, 2018). This has resulted in some success. However, predictably, new counterfeiters selling into Allegheny County Pennsylvania are damaging and causing irreparable harm to Plaintiff.

11. 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.

12. Upon information and belief, Defendants are employing and benefiting from substantially similar, paid advertising and marketing and Amazon selling strategies in order to make their Merchant Storefronts selling illegal goods appear more relevant and attractive to the Amazon.com search result software 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 Amazon.com search results and reducing the visibility of the Plaintiff's Amazon.com 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

13. 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 Amazon.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 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 Amazon's efforts to curtail counterfeiting.

14. Based upon my personal experience and my review of lawsuits filed by other brand owners, I have learned that the Defendants selling on Amazon.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 Amazon.com and other OMPs, 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.

15. Based upon my personal experiences, I have formed a belief that the majority of the Defendants, likely reside and/or operate in foreign jurisdictions with lax trademark and patent enforcement.⁵

⁵ The Defendant operating the e-AuctionMaven store appears to be a U.S.-based entity based upon information and belief. Accordingly, Plaintiff hereby notifies the Court that this Defendant does not appear to be Chinese or foreign-owned and nothing in the Application for Ex Parte Relief or this Complaint is intended to suggest otherwise.

Method of Service upon Defendants

16. Because the Defendants do not provide email addresses on their respective Merchant Storefronts, Plaintiff's counsel would make a discovery request to Amazon seeking the email addresses associated with each of the respective Defendant's User Accounts and Merchant Storefronts. For each of the email addresses provided for each Defendant, Plaintiff's counsel would provide service upon that Defendant. For those Defendants for whom an email address was not provided, Plaintiff's counsel would use the respective messaging apps, where available, to accomplish service.

Identity and Method of Service upon Parties to be Enjoined

17. Based upon my own research and a review of pleadings (including declarations) in multiple past actions by other brand owners, as described above, Amazon Pay is the name of a payment processing service owned and operated by Amazon Payments, Inc., a Delaware Corporation with a registered address of Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware 19808 and with a business address of 410 Terry Avenue North, Seattle, Washington 98109-5210.

18. Amazon Payments, Inc. is a foreign registered corporation in the Commonwealth of Pennsylvania with a registered address of c/o Corporation Services Company, Dauphin County, Pennsylvania and business address of 15600 NE 8th Street, Ste B1 #975 Bellevue, Washington 98008. According to Amazon Pay's website at <https://pay.amazon.com/us/help/82972> (last accessed on October 4, 2018), it is a Pennsylvania licensed money transmitter under Pennsylvania's Transmitting Money Act (License #17489). As such, this Court has jurisdiction over Amazon Payments, Inc.

19. Based upon my own research and a review of pleadings (including declarations) in multiple past actions by other brand owners, as described above, Amazon.com is an online marketplace and e-commerce platform that is owned and operated by Amazon.com, Inc. and its affiliate, Amazon Services LLC, a Nevada Corporation, with a registered address of Corporation Service Company, is a foreign registered corporation in the Commonwealth of Pennsylvania with a registered address of c/o Corporation Services Company, Dauphin County and 300 Deschutes Way, SW, Suite 304, Tumwater, WA 98501, ATTN: Legal Department. As such, the Court has jurisdiction over Amazon Services LLC.

20. Upon information and belief, the Defendants (Schedule 'A'), use Amazon.com to operate their respective User Accounts and Merchant Storefronts noted individually in each row for each Defendant.

21. Based upon my own research, a review of pleadings (including declarations) in multiple past actions by other brand owners and my past communications with Amazon Services LLC d/b/a Amazon.com ("Amazon"), my review of the terms and conditions in seller agreements, including definitions of the "Contracting Parties" for the seller agreements, for Amazon, I reasonably believe it may be served at the noted contact information, by the following delivery method, and further reasonably believe that upon service, Amazon will comply with a temporary restraining order ("Order") if one is issued by this Court:

Third Party Service Provider	Platform	Delivery Method, Contact and Address
Amazon Services LLC	Amazon. com	Delivery of a true and correct copy of this Order via Federal Express to Amazon.com, Inc., Corporation Service Company, 300 Deschutes Way, SW, Suite 304, Tumwater, WA 98501, ATTN: Legal Department.

22. Based upon a review of pleadings (including declarations) in multiple past actions by other brand owners, I reasonably believe that Amazon Payments, Inc. provides payment services for Amazon, which payment services were/are utilized by the Defendants, and Amazon Payments, Inc. may be served at the noted contact information, by the following delivery method, and further reasonably believe that the same will comply with a temporary restraining order if one is issued by this Court:

Financial Institution	Platform	Delivery Method, Contact and Address
Amazon Payments, Inc.	Pay.amazon.com	Delivery of a true and correct copy of this Order via Federal Express to Amazon.com, Inc., Corporation Service Company, 300 Deschutes Way, SW, Suite 304, Tumwater, WA 98501, ATTN: Legal Department.

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 2nd day of May, 2019, at Pittsburgh, Pennsylvania.

/s/ Brian Samuel Malkin
 Brian Samuel Malkin