

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

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

v.

ABAGAIL, *et al.*,

Defendants.

Civil Action No. 19-cv-503

Judge Fischer

FILED UNDER SEAL

**PLAINTIFF'S *EX PARTE* MOTION FOR AN ORDER
TO EXTEND THE TEMPORARY RESTRAINING ORDER, CONTINUE THE SHOW
CAUSE HEARING, AND MODIFY THE BRIEFING SCHEDULE**

Plaintiff, Airigan Solutions, LLC (“Airigan”), hereby moves this Court on an *ex parte* basis, for an order to extend the temporary restraining order, continue the show cause hearing, and modify the briefing schedule. In support thereof, Plaintiff submits the following:

I. INTRODUCTION

Airigan is suing Defendants for trademark counterfeiting and infringement, false designation of origin, common law unfair competition, common law trademark infringement, and patent 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 seller identification names identified on Schedule “A” hereto (the “Seller IDs”)

On May 2, 2019, this Court entered a Sealed Order (“Order”) (ECF No. 10) granting 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) an order authorizing expedited discovery against all of the Defendants identified on the attached **Schedule “A”**, Amazon Services LLC d/b/a Amazon.com and Amazon Payments, Inc. d/b/a Pay.amazon.com (“Amazon Pay”). (collectively, “Amazon”). The TRO was served on Amazon the same day it was entered. (*Malkin Dec.*¹, ¶ 4). The Order set a date of before May 7, 2019, for Defendants’ papers in opposition to be served. Additionally, the Order set a Show Cause Hearing on Plaintiff’s Application for this Friday, May 10, 2019, at 1:30 pm. The timing of the hearing and service of the Summons, Complaint, and the *Ex Parte* Application were predicated upon Amazon acting within five (5) days of receipt of the Order. As discussed below, Amazon has not yet complied with the Order. Thus, Plaintiff is requesting a modification of the briefing schedule and the Show Cause Hearing date.

¹ Refers to the May8, 2019 Declaration of Brian Samuel Malkin.

II. STATEMENT OF FACTS

Section I (A) of the Order provides that upon receipt of notice of this Order, Amazon shall locate, attach and freeze Defendants' Assets. The Order provides that Amazon is to notify Plaintiff's counsel when the asset freeze is completed. Once the Asset Freeze is completed, Plaintiff's counsel is to serve the Defendants. (*Malkin Dec.*, ¶ 6).

In this way, the Plaintiff is assured that Defendants are not able to avoid the Court's Order by receiving advanced notice of the suspension before the asset freeze. (*Malkin Dec.*, ¶¶ 7 -8). Plaintiff's counsel has promptly served Amazon as of May 2, 2019. (*Malkin Dec.*, ¶ 4). As of May 8, 2019, Amazon has not confirmed compliance with the Order. (*Malkin Dec.*, ¶ 5). Amazon has not yet complied with the asset freeze order nor provided to Plaintiff's counsel the contact information needed to accomplish alternative service upon the Defendants. (*Malkin Dec.*, ¶¶ 5, 8 - 9).

III. ARGUMENT

It is appropriate to extend the Temporary Restraining Order, continue the Show Cause Hearing, adjust the date for serving any papers in opposition, and provide Plaintiff with additional time to serve Defendants given has not complied with the five (5) day time limit given in the Order. Good cause exists for doing so because, *inter alia*, should Plaintiff be forced to serve Defendants prior to attachment of Defendants' Financial Accounts, Defendants are likely to move such assets. (*Malkin Dec.*, ¶¶ 7 - 8).

Preserving the careful sequencing of asset freeze, suspension of accounts, and finally service is provided for in the Order. Specifically, as stated in the Order "the Court allows enough time for Plaintiff to serve the Financial Institutions and the Third Party Service Providers with

this Order and for the Financial Institutions and/or the Third Party Service Providers to comply with the Paragraph I of this Order before requiring service on Defendants” since “[i]f Defendants are given notice of the Application, they are likely to secret, conceal, transfer or otherwise dispose of their ill-gotten proceeds from their sales of Counterfeit Products or other goods infringing the NEGG Marks and at least Claim 1 of the ‘211 patent.” *Order* (May 2, 2019) at pages 4 - 5, paragraph 8.

Good Cause Exists for Extending the Temporary Restraining Order

Federal Rule of Civil Procedure 65(b) provides that a Temporary Restraining Order “order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension.” Thus, the Temporary Restraining Order will expire unless extended by the Court.

It is not atypical to extend a Temporary Restraining Order in cases like the present case. Indeed, in *Rapid Slicer, LLC v. Buyspry, et al*, 19-cv-249, the Court extended the Temporary Restraining Order to permit Plaintiff more time to serve the Defendants. (See ECF No. 23)(Order entered March 26, 2019).

In other similar counterfeiting cases, Courts have extended Temporary Restraining Orders. For example, in *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-823 (S.D. Cal.) the Court continued the hearing on the Preliminary Injunction for **two (2) weeks**, moved the time for Defendants to file papers in opposition, and extended the Temporary Restraining Order “until further Order of Court.” In *Apple Corps Ltd. v. 3W Store*, No. 18-CV-60656 (S.D. Fla.), a Magistrate Judge held a hearing on the Preliminary

Injunction and issued a report and recommendation. The Court issued an Order that the Temporary Restraining Order “is hereby extended and shall remain in effect until this Court rules on the Report and Recommendation issued by Magistrate Judge Patrick M. Hunt.” It is not unusual in the Southern District of New York for such adjustments in briefing because of delays in Third Party Service Provider’s responses. For example, in the case of *WowWee Group Limited, et. al. v. Meirly, et. al.*, Civil Case. No. 18-cv-706 (AJN) (S.D.N.Y), the original briefing schedule was modified based upon Plaintiff’s representation that they could not serve the Defendants within the original TRO schedule; *See also Allstar Marketing Group, LLC v. 158, et. al.*, Civil Case No. 18-cv-4101-GHW)S.D.N.Y). Likewise, In *William Mark Corporation v I&cc*, No. 18-CV-3889 (S.D.N.Y.) (Abrams, J.), a Temporary Restraining Order was entered on May 2, 2018, and the Show Cause Hearing was scheduled for June 1, 2018. On May 14, 2018, the Temporary Restraining Order was extended until June 1, 2018.

Given that Amazon has not yet complied with the Order, has not provided confirmation of the asset freeze, and has not provided the contact information to Plaintiff’s counsel so that service may be accomplished on Defendants, good cause exists to extend the Temporary Restraining Order in this case. Likewise, the briefing schedule which provides opposition papers be filed before May 7, 2019 should be extended. Finally, the show cause hearing scheduled for May 10, 2019 should be re-scheduled to a later date. Based upon past experience with Amazon’s timing for compliance with restraint orders, it would be prudent to extend the dates by 21 days if possible. (*Malkin Dec.*, ¶ 10).

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully submits good cause exists for extending the Temporary Restraining Order, continuing the Show Cause Hearing, and modifying the schedule by an additional 21 days.

A Proposed Order granting this motion is submitted herewith.

Respectfully submitted,

Dated: May 8, 2019

/s/ Brian Samuel Malkin

Stanley D. Ference III
Pa. ID No. 59899
courts@ferencelaw.com

Brian Samuel Malkin
Pa. ID No. 70448
bmalkin@ferencelaw.com

FERENCE & ASSOCIATES LLC
409 Broad Street
Pittsburgh, Pennsylvania 15143
(412) 741-8400 – Telephone
(412) 741-9292 – Facsimile

Attorneys for Plaintiff
Airigan Solutions, LLC