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

DOGGIE DENTAL INC., *et al.*, Plaintiffs, v. MAX_BUY, *et al.*, Defendants.	Civil Action No. 19-746 **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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

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I. INTRODUCTION

Plaintiffs Doggie Dental Inc. ("Doggie Dental") and Peter Dertsakyan ("Dertsakyan") (collectively, "Plaintiffs") submit this memorandum of law in support of their *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) an order authorizing expedited discovery against above-referenced Defendants (hereinafter collectively referred to as "Defendants" or individually as "Defendant"), eBay Inc., and Paypal, Inc. ("Application").[1]

Defendants are knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling knock-off versions of Plaintiffs' BRISTLY™ dog toothbrush (the "Infringing Product") which closely mimic the appearance of Plaintiffs' genuine product throughout the United States, including within the Commonwealth of Pennsylvania and this district, by operating fully interactive, commercial Internet based e-commerce stores established

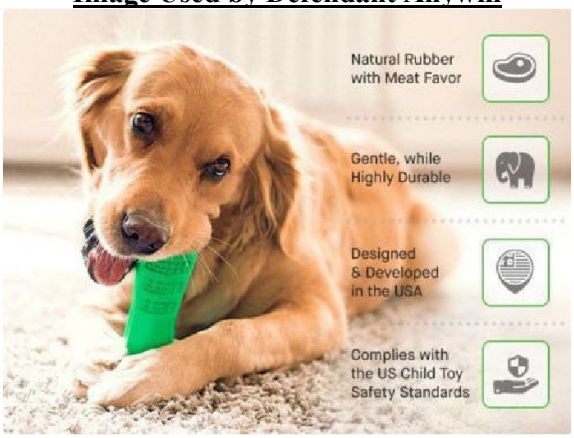
[1] Plaintiffs acknowledge they are seeking multiple forms of relief. Plaintiffs will promptly provide supplemental briefing or oral argument on any issue should the Court request it.

via third-party marketplaces accessible in Pennsylvania operating using the seller identities identified on Schedule "A" to the Complaint (the "Seller IDs"). Specifically, Plaintiffs have obtained evidence clearly demonstrating that (a) Defendants have infringed upon Plaintiffs' common law trade dress rights; (b) Defendants have infringed upon Plaintiffs' federally registered copyrights; (c) Defendants have used Plaintiffs' copyrighted photographs and/or common law BRISTLY trademark while marketing their knock-off products in a willful attempt to pass them off as genuine BRISTLY™ products; and (d) Defendants accomplish their infringing sales through the use of, at least, the Internet based e-commerce stores operated via at least the eBay Inc. ("eBay") Internet marketplace platform. Based on this evidence, Plaintiffs' Complaint alleges claims for federal unfair competition in violation of Section 43(a) of the Trademark Act of 1946, as amended; copyright infringement of Plaintiffs' federally registered copyrights in violation of the Copyright Act of 1976; common law unfair competition; and common law trademark infringement pursuant to 15 U.S.C. § 1125(a), 17 U.S.C. §§ 101 *et seq*., and The All Writs Act, 28 U.S.C. § 1651(a).

Defendants' sale, distribution, and advertising of the Infringing Product are highly likely to cause consumers to believe that Defendants are offering genuine BRISTLY™ dog toothbrushes when in fact they are not. To illustrate, below are several examples which vividly show that the Infringing Product itself and the manner in which it is marketed is designed to confuse and mislead consumers into believing that they are purchasing Plaintiffs' BRISTLY™ Product or that the Infringing Product is otherwise approved by or sourced from Plaintiffs:

Plaintiffs' Copyrighted Image

Image Used by Defendant Anywill



Plaintiffs' Copyrighted Image

Image Used by Defendant Extechnico

Plaintiffs' Copyrighted Image

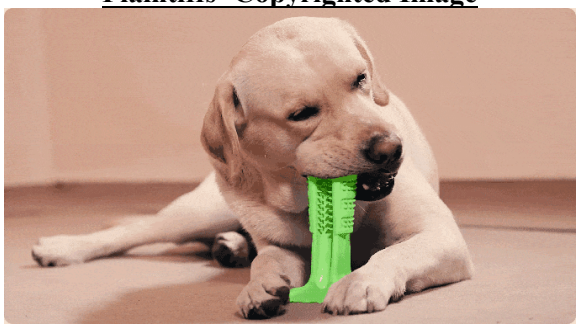


Image Used by Defendant Yu Xingchen

See Declaration of Peter Dertsakyan (the "*Dertsakyan Dec*.") at ¶ 21.

Defendants' actions have resulted in actual confusion in the marketplace between Defendants' Infringing Product and genuine BRISTLY™ dog toothbrushes. *Id.* at ¶ 21.

Numerous purchasers of Defendants' Infringing Product have contacted Plaintiffs to complain about the performance of the Infringing Product believing same to be a genuine BRISTLY™ dog toothbrush. *Id.* Examples of such complaints include "my dog destroyed your teeth cleaning thing in 10 seconds" and "I was so worried my dog may have eaten parts of it that I had to check him over at the vet." *Id.* Such complaints and negative comments are not just made directly to Plaintiffs, but are also posted by buyers of the Infringing Products on various websites and social media sites for all the world to see. *Id.*

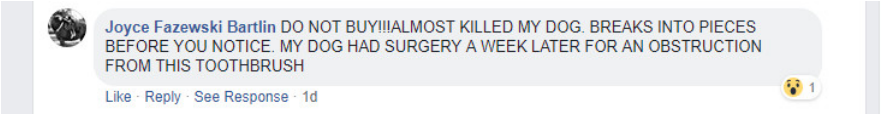
Defendants' Infringing Products are substantially inferior to the genuine product. Plaintiffs' genuine BRISTLY™ dog toothbrush is made of natural rubber. *Id.* at ¶ 23. Defendants' Infringing Products are made with silicone or other materials. As poorly designed and manufactured products, Defendants' Infringing Products create serious risk of harm to animals and threaten to destroy the reputation of high quality that Plaintiffs' BRISTLY™ products have earned. *Id.*

A graphic illustration of the significant danger that BRISTLY™ knock offs present to animals was brought to the Plaintiffs' attention by a pet owner who believed that Doggie Dental sold a faulty and defective product when in actuality the pet owner purchased a knock off masquerading as an authentic BRISTLY™ dog toothbrush. The dog had chewed apart the fake product, swallowed a portion, and underwent corrective surgery to remove the piece. The pet owner provided the photographs below.

Bristly Knock Off Chewed by Dog

Injured Dog After Surgery

The pet owner wanted Doggie Dental to pay for the damages caused by the fake product. Additionally, the pet owner has previously publicized this post on Doggie Dental's publicly available Facebook page:



This pet owner's experience and posting highlight both the actual confusion between the knock offs and the genuine BRISTLY™ dog toothbrush and the immediate and irreparable injury being incurred by the Plaintiffs. *Id.* at ¶ 24.

Internet based e-commerce stores like the Defendants herein are estimated to receive tens of millions of visits per year and to generate over $135 billion in annual online sales. *Declaration of Stanley D. Ference III* (the "*Ference Dec*.") at ¶ 3. According to an intellectual property rights seizures statistics reports issued by Homeland Security, the manufacturer's suggested retail price (MSRP) of goods seized by the U.S. government since 2012 annually exceeds $1.0 billion. *Id.* at ¶ 4. Internet based e-commerce stores like the Defendants herein are also estimated to contribute to tens of thousands of lost jobs for legitimate businesses and broader economic damages such as lost tax revenue every year. *Id.* at ¶ 5.

Defendants' unlawful activities have deprived and continue to deprive Plaintiffs of their rights to fair competition. By their activities, Defendants are defrauding Plaintiffs and the consuming public for Defendants' benefit. Defendants should not be permitted to continue their unlawful activities, which are causing Plaintiffs ongoing irreparable harm. Accordingly, Plaintiffs are seeking entry of a temporary restraining order prohibiting Defendants' further wrongful unfair competition and infringement of Plaintiffs' federally registered copyrights.

Moreover, Plaintiffs have obtained evidence that Defendants use money transfer and/or retention/processing services with financial institutions such as PayPal, Inc. ("PayPal"). *See Declaration of Mary Laplante* (the "*Laplante Dec*.") ¶¶ 1 - 2, filed herewith.) Plaintiffs seek to restrain the illegal profits generated by each Defendant. In light of the inherently deceptive nature of the counterfeiting and knock-off business, Plaintiffs have good reason to believe Defendants will hide or transfer their ill-gotten assets beyond the jurisdiction of this Court unless they are restrained. Both the Lanham Act and Copyright Act allow Plaintiffs to recover the illegal profits gained through Defendants' distribution and sale of knock-off and infringing goods. *See* 15 U.S.C. § 1117(a) and 17 U.S.C. § 504(b). Furthermore, in Pennsylvania, a pre-judgment restraint of existing assets is appropriate where a plaintiff is asserts a claim for money damages.[2] *Walter v. Stacey*, 837 A.2d 1205 (Pa. Super. 2003) (injunction entered restraining assets in action seeking damages for a wrongful death); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (3d Cir. 1990) (affirming injunction entered restraining assets in class action lawsuit). To preserve the disgorgement remedy and the ability to at least partially satisfy a judgment, Plaintiffs seek an *ex parte* order restraining Defendants' assets, including specifically, funds transmitted through PayPal.

[2] Fed. R. Civ. P. 64 provides "every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."

This Court has previously granted the relief sought herein in actions involving counterfeiting of federally registered trademarks and claims under Section 43(a) of the Lanham Act. *Airigan Solutions, LLC v. Babymove*, No. 19-cv-166 (W.D. Pa. Feb. 14, 2019) (Fischer, J.) (sellers on amazon.com); *Airigan Solutions, LLC v. Artifacts_Selling*, No. 18-cv-1462 (W.D. Pa. Oct. 31, 2018) (Fischer, J.) (sellers on ebay.com and aliexpress.com). Other courts have granted the relief sought herein in actions involving claims under Section 43(a) of the Lanham Act and copyright infringement – the claims asserted in the present case. *Millennium IP, Inc. v. The Partnerships and Unincorporated Associat*ions *Identified on Schedule "A"*, No. 18-cv-3778 (N.D. Ill. June 6, 2018) (nearly 400 defendants, including sellers on amazon.com and ebay.com); *Nu Image, Inc. v. The Partnerships and Unincorporated Associat*ions *Identified on Schedule "A"*, No. 17-cv-2918 (N.D. Ill. May 12, 2017) (over 200 defendants, including sellers on amazon.com and ebay.com). Furthermore, other courts have granted the relief sought herein whether the defendants are located outside of the United States or based in the United States. *Cartier International A.G. v. Replicapaneraiwatches.cn,* No. 17-cv-62401 (S.D. Fla. Jan. 2, 2018) (mix of U.S. and foreign defendants) and *Juul Labs, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 18-cv-1382 (E.D. Va. Nov. 16, 2018) (all U.S. defendants). Copies of the temporary restraining orders issued in these cases are included in Plaintiff's *Request for Judicial Notice* submitted herewith.

II. STATEMENT OF FACTS

A. Plaintiffs' Innovative BRISTLY™ Dog Toothbrush

Dertsakyan is the inventor of the BRISTLY™ dog toothbrush and the owner of intellectual property related thereto; Doggie Dental is the exclusive licensee of such intellectual property. *See Dertsakyan Dec*., ¶ 5. Plaintiffs developed and sell a unique and revolutionary

product under the common law trademark BRISTLY ("Bristly Mark") that safely and easily permits dogs to brush their own teeth removing plaque and tarter ("BRISTLY™ Product"). *Id.* at ¶ 6 Plaintiffs identified the need for this product and created the market for this product. *Id.*

In 2016 Dertsakyan developed the idea behind the BRISTLY™ dog toothbrush. *Id.* at ¶ 7. June 2017 saw the launch of the BRISTLY™ dog toothbrush for beta testing. *Id.* Over 50,000 dog owners experienced effortless daily tooth brushing of their dogs with BRISTLY™. *Id.* In early 2018, development and testing of a new version of the BRISTLY™ dog toothbrush occurred. *Id.* In June 2018 a crowdfunding campaign was launched on kickstarter.com. *Id.* at ¶ 8. In less than two months, $466,000 was raised with the assistance of nearly 11,000 backers and reached its funding goal in one day; the campaign was featured on the homepage of kickstarter.com as one of its successful campaigns. *Id.* The crowdfunding campaign was continued on indiegogo.com where an additional $534,000 was raised with the assistance of over 5,000 additional backers. *Id.* The crowdfunding campaign for the BRISTLY™ dog toothbrush is the campaign with the highest number of backers and the highest amount raised of any pet campaigns. *Id.*

The new version of the BRISTLY™ dog toothbrush went on sale in October 2018. Plaintiffs' BRISTLY™ dog toothbrush is sold through the bristly.com website; the amazon.com Internet marketplace by the official seller – Brandish; and various retail stores across the United States. Authentic BRISTLY™ dog toothbrushes are not sold on eBay by authorized sellers.

Plaintiffs' Bristly Product has been featured in videos or articles by numerous media outlets, including MSN (https://www.msn.com/en-sg/lifestyle/lifestylegeneral/a-new-chew-toy-will-help-your-dog-brush-its-own-teeth/ar-AAA8pvh) , Pet Lover Geek (https://www.facebook.com/petlovergeek/videos/613996128985404), Askmen

(https://www.askmen.com/entertainment/guy_gear/best-new-kickstarters-for-june-28-2018.html), Interesting Engineering (https://interestingengineering.com/this-chew-stick-for-dogs-helps-them-achieve-good-oral-health), Awesome Stuff 365 (https://awesomestuff365.com/bristly-toothbrush-for-dogs/), star2.com (https://www.star2.com/living/2018/07/28/toothbrushing-stick-dogs-clean-teeth/), Dude (http://www.dudeiwantthat.com/household/pets/bristly-toothbrush-for-dogs.asp), Gaget flow (https://thegadgetflow.com/blog/bristly-is-the-chew-toy-that-cleans-your-dogs-teeth/ and https://thegadgetflow.com/portfolio/dog-tooth-brushing-stick/), The Gadgeteer (https://the-gadgeteer.com/2018/07/20/micro-veggie-growing-tray-tiny-edc-pen-a-toothbrush-for-dogs-and-more-notable-crowdfunding-campaigns/), Steemit (https://steemit.com/steemhunt/@adarshagni/bristly-chew-stick-for-dogs), New Atlas (https://newatlas.com/bristly-dog-toothbrush/55401/), TheThings.com (https://www.thethings.com/chew-toy-helps-dogs-brush-teeth), slashpets (https://www.slashpets.com/bristly-toothbrush/), Cool Business Ideas (https://www.coolbusinessideas.com/archives/toothbrush-for-your-doggy/), Cool Hunting (https://coolhunting.com/design/bristly-dog-toothbrush/), MNN (https://www.mnn.com/family/pets/stories/answer-dog-toothbrushing-struggle), Gismo Review (https://www.gismoreview.com/bristly-the-toothbrush-for-dog/), Product Watch (https://productwatch.co/hate-brushing-your-dogs-teeth-meet-bristly-and-forget-your-troubles/), Mental Floss (http://mentalfloss.com/article/551054/new-chew-toy-will-help-your-dog-brush-its-own-teeth), and Trend Hunter (https://www.trendhunter.com/trends/bristly). *Id.* at ¶ 10.

Genuine goods bearing the Bristly Mark and Bristly Trade Dress are widely legitimately advertised and promoted by Plaintiffs, their authorized distributors, and unrelated third parties

via the Internet. *Id.* at ¶ 11. Over the past several years, visibility on the Internet, particularly via Internet search engines such as Google, Yahoo!, and Bing has become increasing important to Plaintiffs' overall marketing. *Id.* Thus, Plaintiffs and their authorized distributors expend significant monetary resources on Internet marketing, including search engine optimization ("SEO") strategies. *Id.* at ¶ 12. Those strategies allow Plaintiffs and their authorized retailers to fairly and legitimately educate consumers about the value associated with Plaintiffs' brand and the goods sold thereunder. *Id.* Similarly, Defendants' individual seller stores are indexed on search engines and compete directly with Plaintiffs for space in the search results. *Id.*

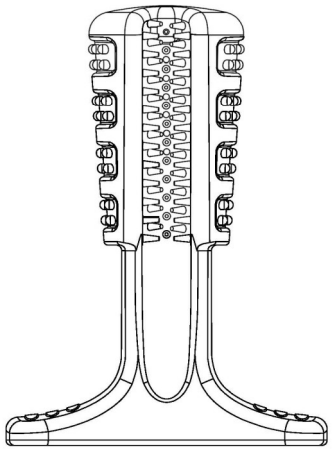
B. Plaintiffs' Rights

Plaintiffs have taken numerous steps to protect the BRISTLY™ dog toothbrush. *Id.* at ¶ 13. Dertsakyan is the owner of U.S. copyright registration VA 2-122-455 directed to various photographs related to the BRISTLY™ dog toothbrush (the "Bristly Works"). *Id.* A copy of Dertsakyan's copyright registration certificate, together with copies of the deposit materials, is attached to the Complaint as **Exhibit 1**. *Id.* Dertsakyan is also the owner of unregistered copyrights related to the BRISTLY™ dog toothbrush. *Id.*

In addition to his common law trademark rights in BRISTLY, Dertsakyan is also the owner of various pending trademark applications, including U.S. Application Serial No. 88/177,120 for BRISTLY on the Principal Register for goods which include "non-edible dental chews for pets;" examination of this application has concluded and the application was recently published for opposition by the U.S. Patent and Trademark Office. *Id.* at ¶ 14. A copy of the Notice of Publication dated March 6, 2019, is attached to the Complaint as **Exhibit 2**. *Id.* The opposition period closed on April 25, 2019, without any oppositions being filed and it is anticipated the trademark registration certificate will be issued in 2019. *Id.* The Bristly Mark is

inherently distinctive, as recognized by the U.S. Patent and Trademark Office in stating the Bristly Mark "appears to be entitled to registration" on the Principal Register. *Id.*

Dertsakyan is also the owner of various design patent applications directed to the BRISTLY™ dog toothbrush, including an issued European Registered Community Design (005818606-0001), a pending U.S. design patent application, and a pending Chinese design patent application. *Id.* at ¶ 15. A copy of Dertsakyan's Registered Community Design is attached to the Complaint as **Exhibit 3**. All of the design patent applications have common figures, and one of the figures is set forth below:



Id. at ¶ 15.

Dertsakyan is also the owner of U.S. Patent Application No. 15/472,206 for "Pet chew toy for dental self-cleaning by domestic pets," which was filed March 28, 2017, and is currently pending. *Id.* at ¶ 16. A copy of Plaintiffs' U.S. Patent Application Publication No. 2018/0295811 is attached to the Complaint as **Exhibit 4**. *Id.* This utility patent application is currently undergoing examination at the U.S. Patent Office. *Id.*

BRISTLY™ Products have a unique and distinctive trade dress, which is characterized by the ornamental features shown and described in Plaintiffs' design patent applications and

variations thereof (the "BRISTLY™ Trade Dress"). *Id.* at ¶ 17. The arrangement and combination of these features are arbitrary, non-functional, and fanciful and constitute legally protectable trade dress. The BRISTLY™ Trade Dress has acquired secondary meaning identifying Plaintiffs as the source of products bearing it. *Id.* This secondary meaning was acquired prior to use of the BRISTLY™ Trade Dress by Defendants. *Id.*

Plaintiffs' Bristly Mark and Bristly Trade Dress have been used in interstate commerce to identify and distinguish Plaintiffs' goods. *Id.* at ¶ 18. Plaintiffs' Bristly Mark and Bristly Trade Dress have been used by Plaintiffs prior in time to Defendants' use of this mark and trade dress. *Id.* The Bristly Mark and Bristly Trade Dress has never been assigned or licensed to any of the Defendants in this matter. *Id.* The Bristly Mark and Bristly Trade Dress is a symbol of Plaintiffs' quality, reputation, and goodwill and have never been abandoned. *Id.*

C. Plaintiffs' Efforts to Police the Defendants' Conduct

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. *See Cline Dec*., ¶ 2. These interactive commercial Internet websites provide on-line Merchant Storefronts (as defined *infra*) that allow the Defendants to maintain their anonymity while advertising, offering for sale, and selling Infringing Products into the United States and into Pennsylvania. The Internet marketplaces used by these Defendants include eBay.com. *See Laplante Dec.,* ¶ 2 and Composite Exhibit 1 attached thereto.

Plaintiffs have been forced to police the various Internet marketplaces to identify and seek takedowns of unlawful listings for the Infringing Products since allowing the unlawful listings to continue is causing damage to Plaintiffs' reputation and bottom line. *Dertsakyan Dec.,* at ¶ 19. Some Defendants sell their fake BRISTLY™ dog toothbrushes at a fraction of the

controlled retail price, going as low as $3.00 or $4.00. *Id.* Because of the software provided by the various Internet marketplaces, the lowest priced items are sorted to the top and/or promoted by the software and then purchased by the consumers. *Id.* The genuine BRISTLY™ dog toothbrush is ignored. *Id.* Plaintiffs have had varied success in identifying and requesting takedowns of the various unlawful listings and as soon as one is taken down another unlawful listing replaces it. *Id.*

Another major problem with the Internet marketplaces is that there is a direct and convenient connection between various Chinese and other unidentified manufactures to the Infringing Products. *Id.* In essence, a counterfeiter in Vietnam or Russia, for example, may order a crate of Infringing Products from a Chinese manufacturer, have them drop shipped to a fulfillment center in the United States, and then sell the Infringing Products to a US consumer through a Third Party Service Provider. *Id.* The ease of this system encourages knock-offs to flourish. *Id.*

For these reasons, Plaintiffs retained the legal counsel of Ference & Associates LLC ("the Ference firm") to perform the policing of various Internet marketplaces. *Id*. at ¶ 20. During the process, the Ference firm identified many Chinese manufacturers operating on Marketplace Storefronts hosted by the Internet marketplaces. *See id.* These manufacturers were supplying many of the other identified Defendants with infringing products flooding the Internet marketplaces and damaging Plaintiffs' business. This damage to Plaintiffs' business will continue unless Plaintiffs receive the sought after restraining order and injunctive relief. *Id.*

D. The Defendants' Wrongful Conduct

Defendants do not have, nor have they ever had, the right or authority to use Plaintiffs' BRISTLY Trade Dress, BRISTLY Mark, and/or BRISTLY Works for any purpose. *Dertsakyan*

Dec., ¶ 25. Despite their known lack of authority, however, Defendants are promoting and otherwise advertising, distributing, selling and/or offering for sale, through their respective Seller IDs knock-off versions of Plaintiffs' BRISTLY™ dog toothbrush which closely mimic the appearance of Plaintiffs' genuine product; infringing upon Plaintiffs' federally registered copyrights; and using Plaintiffs' copyrighted photographs and/or common law BRISTLY trademark while marketing their knock-off products in a willful attempt to pass them off as genuine BRISTLY™ products, all without Plaintiffs' authorization. *Id.* at ¶¶ 27– 29.

Given Defendants' copying and use of Plaintiffs' BRISTLY Trade Dress, BRISTLY Marks, and/or BRISTLY Works, the Infringing Products are indistinguishable to consumers, both at the point of sale and post-sale. *Id.* at ¶ 26. By using Plaintiffs' intellectual property, Defendants have created a false association between their Infringing Products, their Internet e-commerce stores, and Plaintiffs. *Id.* Such false association is in violation of 15 US.C. § 1125(a) and is causing and will continue to cause Plaintiffs' irreparable harm and damage. *Id.*

As part of Plaintiffs' counsel's ongoing investigation regarding the sale of Infringing Products, Plaintiffs' counsel investigated the promotion and sale of Infringing Products by Defendants and obtained available payment account data for receipt of funds by Defendants for the sale of knock-off versions of Plaintiffs' genuine BRISTLY™ products through the Seller IDs. *Cline Dec.*, ¶ 2. Through visual inspection of Defendants' listings for Infringing Products, it was confirmed that each Defendant is featuring, displaying, and/or using the BRISTLY Trade Dress, BRISTLY Mark, and/or BRISTLY Works without authorization and that the products that each Defendant is offering for sale, using virtually identical copies of Plaintiff's BRISTLY Trade Dress, BRISTLY Mark, and/or BRISTLY Works are, in fact, not genuine products. *Id.* The checkout pages or order forms for the Infringing Products confirm that each Defendant was

and/or is still currently offering for sale and/or selling Infringing Products through their respective Merchant Storefronts and User Accounts and that each Defendant provides shipping and/or has actually shipped Infringing products to the United States, including to customers located in Pennsylvania. At checkout, a shipping address located in the Pittsburgh area ("the Pennsylvania Address") in the Western District of Pennsylvania verified that each Defendant provides shipping to the Pennsylvania Address. *Id.* Plaintiff Dertsakyan inspected the detailed web listings describing the Infringing Products Defendants are offering for sale through the Internet based e-commerce stores operating under each of their respective Seller IDs, and determined the products were not genuine versions of Plaintiff's BRISTLY Products. *Id.* and Composite Exhibit 1*,* and *Dertsakyan Dec.,* ¶¶ 27 – 29.[3]

Section 43(a) of the Lanham Act prohibits the use "in commerce [of] any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which – (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." 15 U.S.C. § 1125(a). A comparison of Plaintiffs' trade dress to the products of Defendants and a comparison of

[3] 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. 2016bagsilouisvuitton.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).

Plaintiffs' copyrighted images and common law BRISTLY trademark to the advertising and offering for sale of Defendants' products reveals the obvious knock-off and infringing nature of Defendants' activities. Defendants' goods are being promoted, advertised, offered for sale, and sold by Defendants to consumers within this district and throughout the United States. Defendants are making substantial sums of money by preying upon members of the general public, many of whom have no knowledge Defendants are defrauding them. Defendants are also falsely representing to consumers that their goods are genuine, authentic, endorsed, and authorized by Plaintiffs. Ultimately, Defendants' Internet activities infringe upon Plaintiffs' intellectual property rights. The Seller IDs, and associated payment accounts, are a substantial part of the means by which Defendants further their scheme and cause harm to Plaintiffs.

In light of the covert nature of Defendants' offshore and infringing activities and the importance of creating economic disincentives for such infringing activities, courts have recognized these concerns and routinely grant *ex parte* applications for relief in cases asserting Section 43(a) violations and copyright infringement on the Internet.[4] Accordingly, Plaintiffs

[4] *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-

respectfully request that this Court grant their *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; and 4) an order authorizing expedited discovery against Defendants, the Third Party Service Provider and Financial Institutions.

III. 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 (3rd 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 (3rd Cir.1998). As alleged herein, Defendants'

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).

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. C.S.A. § 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, and allow for customers all over the world (including within Allegheny County, Pennsylvania) to view and purchase products, including Infringing Products, as demonstrated by the websites themselves and Plaintiff's purchase of Infringing Products. *See Cline Dec.,* ¶ 2 and Composite Exhibit 1, and *Dertsakyan Dec.,* ¶ 27 - 29. *See n. 4, 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 Cline 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)*; A1 Mortg. Corp. v. A1 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, resulted in consumers throughout the U.S., and specifically in Pennsylvania, purchasing Infringing Products. *See Cline 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 Dertsakyan Dec.,* ¶¶ 29 - 32.

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, as well as yet undiscovered online marketplaces, to offer for sale and/or sell Infringing Products. The identified Defendants merely use fanciful and made up store names or seller ids without complete addresses, contact information, phones numbers and the like). *See Ference Dec.,* ¶¶ 6 - 7; Defendants used and continue to advertise, market, promote, offer for sale, sell, distribute and/or import Infringing Products to Pennsylvania customers and/or potential customers, including in Allegheny County, Pennsylvania. *See Dertsakyan Dec.* ¶¶ 27 - 32.

Here, the fact that Defendants have chosen to open their respective User Accounts for the purpose of selling Infringing Products through their Merchant Storefronts, as well as any and all as yet undiscovered online marketplace platforms, alone supports a finding that Defendants have intentionally used these marketplace platforms, "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.

Whether a Defendant physically shipped Infringing 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 Cline Dec.* ¶ 2. *See Zippo Mfg. Co.,* 952 F. Supp. at

1119; *Rolex Watch, U.S.A., Inc. v. Pharel*, 09 CV 4810 (RRM) (ALC), 2011 U.S. Dist. LEXIS 32249, at 6 (E.D.N.Y. Mar. 11, 2011) (finding personal jurisdiction over defendant, a resident of South Carolina, because he transacted business in New York by monitoring and responding to inquiries for counterfeit watches through websites accessible in New York). Plaintiff and Plaintiff's counsel have viewed Defendant's Infringing Products via their online User Accounts and Merchant Storefronts. *See Cline Dec.*, ¶ 2 and *Dertsakyan Dec.* ¶¶ 27 - 29.[5] Thus,

[5] *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 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. Gucc-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. Chanelsstore.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

Defendants' sophisticated commercial operations, specifically including their offering for sale and/or selling of Infringing Products through their highly interactive User Accounts and Merchant Storefronts, along with Defendants' own representations on their Merchant Storefronts that they ship Infringing 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. <u>Exercising Personal Jurisdiction Over Defendants Comports With Due Process</u>

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

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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).

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 Dertsakyan Dec*. ¶ 29. *See Cline 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 (3d 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 infringing 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. Sept. 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'Athene, 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 Infringing 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 Infringing 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 v Sandy Lane Hotel Co., Ltd,* 496 F.3d 312, 316 (3rd Cir. 2007)(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).

Defendants herein fraudulently promote, advertise, sell, and offer for sale goods infringing Plaintiffs' BRISTLY Trade Dress, BRISTLY Marks, and/or BRISTLY Works via their fully interactive, commercial Internet e-commerce stores using the Seller IDs. Specifically, Defendants wrongfully use infringements of Plaintiffs' BRISTLY Trade Dress, BRISTLY Marks, and/or BRISTLY Works to increase traffic to their illegal operations. By their actions, Defendants are passing off Defendants' Infringing Products as Plaintiff's genuine BRISTLY Products and creating a false association in the minds of consumers between Defendants and Plaintiffs. The entry of a temporary restraining order would serve to immediately stop Defendants from benefiting from their wrongful use of Plaintiffs' intellectual property at issue and preserve the status quo until such time as a hearing can be held. *See Dell Inc. v. BelgiumDomains, LLC*, Case No. 07-22674 2007 WL 6862341, at *2 (S.D Fla. Nov. 21, 2007) (finding *ex parte* relief more compelling where Defendants' scheme "is in electronic form and subject to quick, easy, untraceable destruction by Defendants.")

Absent a temporary restraining order without notice, Defendants can and, based upon Plaintiffs' counsel's past experience, will significantly alter the status quo before the Court can determine the parties' respective rights. In particular, the Seller IDs at issue are under the Defendants' complete control. Thus, Defendants have the ability to modify e-commerce store data and content, redirect consumer traffic to other seller identification names, change payment accounts, and transfer assets. *Ference Dec.*, ¶ 6. Such modifications can happen in a short period of time after Defendants are provided with notice of this action. *Id.* Defendants can also easily electronically transfer and secret the funds sought to be restrained if they obtain advance notice of Plaintiff's Application for a Temporary Restraining Order and thereby thwart the Court's ability to grant meaningful relief and can completely erase the status quo. *Id*. As Defendants engage in illegal infringing activities, Plaintiffs have no reason to believe Defendants will make their assets available for recovery pursuant to an account of profits or will adhere to the authority of this Court any more than they have adhered to the Lanham Act and the Copyright Act.

"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 Columbia Pictures Indus., Inc. v. Jasso*, 927 F. Supp. 1075, 1077 (N.D. Ill. 1996) (observing that "proceedings against those who deliberately

traffic in infringing merchandise are often useless if notice is given to the infringers"); *Time Warner Entertainment Co., L.P.* v. *Does*, 876 F. Supp. 407, 410-11 (E.D.N.Y. 1994).

This Court should prevent an injustice from occurring by issuing an *ex* parte temporary restraining order which precludes Defendants from continuing to display their infringing content via the Internet e-commerce stores or modifying or deleting any related content or data. Only such an order will prevent ongoing irreparable harm and maintain the status quo. 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 Infringing Products. Many courts have granted an *ex parte* temporary restraining order in situations where the harm to plaintiffs far outweighed the harm to defendants.[6]

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. *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

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

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

1. Plaintiffs Will Suffer Irreparable Harm in The Absence of an Injunction Leaving Them 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 Infringing 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 Dertsakyan Dec.,* ¶¶ 29 - 31. 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 NYPHoldings 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' 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 Infringing 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 genuine BRISTLY™ products. *See Dertsakyan Dec.,* ¶¶ 19 - 23 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)).

The harms caused by the copyright infringement of the BRISTLY Works is equally insidious. The infringements deprive Plaintiffs of the ability to control the creative content protected by the copyright, it devalues the BRISTLY brand by associating it with inferior quality goods, and it undermines the value of the copyright by creating the impression that infringement may be

undertaken with impunity which threatens Plaintiffs' ability to attract investors and markets for the BRISTLY Products. *See Dertsakyan Dec.,* ¶ 26. These are recognized irreparable harms for which monetary compensation is inadequate. *See MGM Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1219 (C.D. Cal. 2007) ("In sum, Plaintiffs' have offered two independently sufficient grounds for a finding of irreparable harm. Plaintiffs will suffer irreparable harm because of StreamCast's likely inability to pay for the past and/or future infringements that it has induced. Additionally, StreamCast's inducement has and will continue to irreparably harm Plaintiffs' ability to enforce its exclusive rights*."); Warner Bros. Entm't, Inc. v. WTV Sys.,* 824 F. Supp. 2d 1003, 1013-14 (C.D. Cal. 2011) (recognizing that the perception of the ability to infringe copyright protected work undermines the ability to develop and conduct business).

Also, because Defendants' substandard Infringing Products are virtually indistinguishable from Plaintiffs' genuine BRISTLY™ products, not only could any injury to an animal that results from such animal's use of Defendants' substandard Infringing Products be attributed to Plaintiffs *(See Dertsakyan Dec.*, ¶ 24), thereby causing irreparable harm to Plaintiffs in the form of unquantifiable lost sales, loss of goodwill and loss of control of its reputation with authorized licensees, retailers and consumers, but Plaintiffs potentially could be exposed to legal liability for any such injury to animals, which is of particular importance given the nature of the genuine BRISTLY™ products. *Id. at* ¶ 33. Thus, this factor weighs heavily in Plaintiffs' favor.

2. <u>Plaintiffs Are Likely to Prevail on The Merits of Their Lanham Act Claims</u>

To prevail on a false designation of origin claim[7] pursuant to 15 U.S.C. § 1125(a) of the Lanham Act, a plaintiff must show: (1) that defendants used a false designation of origin; (2) that

[7] Plaintiffs' Complaint also asserts Section 43(a) of the Lanham Act has been violated by Defendants' use of Plaintiffs' BRISTLY Trade Dress. Although Plaintiffs' Complaint asserts this as a basis for liability, it is not being used as a basis for seeking a Temporary Restraining Order or Preliminary Injunction.

the use of the false designation of origin occurred in interstate commerce in connection with goods or services; (3) that the false designation is likely to cause confusion, mistake or deception as to the origin, sponsorship or approval of Plaintiffs' goods by another person; and (4) that Plaintiffs have been or are likely to be damaged as a result. *See AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1428 (3d Cir. 1994). False designation of origin claims often take one of two forms: "passing off" claims and "reverse passing off" claims. The Supreme Court distinguished the two claims as follows: "Passing off (or palming off, as it is sometimes called) occurs when a producer misrepresents his own goods or services as someone else's. Reverse passing off, as its name implies, is the opposite: The producer misrepresents someone else's goods or services as his own." *Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23, 28 n. 1 (2003) (citations omitted).

Although the above sets out the general rule, in cases involving use of a plaintiff's photographs and common law trademarks, courts do not go through a detailed analysis of these four factors. Rather, the focus is on whether a defendant has used plaintiff's photographs to advertise defendant's own products; if the defendant has, Section 43(a) has been violated and an injunction issues. Similarly, when considering infringement of a common law trademark, the focus is on whether use of the same mark is by the defendant is likely to create confusion; if there is a likelihood of confusion, an injunction issues. Plaintiffs are likely to prevail on the merits of their passing off claim as the evidence shows Defendants have misrepresented the Infringing Products as Plaintiffs' genuine BRISTLY™ products by using Plaintiffs' copyrighted photographs and/or common law BRISTLY trademark while marketing their knock-off products, and Defendants' actions have created actual confusion between Defendants' knock-offs and Plaintiffs' genuine BRISTLY Products.

a. Defendants' Use of Plaintiffs' Photographs

The Lanham Act, including Section 43(a), was enacted in 1946. The very first case to consider whether a defendant's use of a plaintiff's photograph in defendant's advertising was a Section 43(a) violation was *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.,* 214 F.2d 649 (3d Cir. 1954). The Third Circuit reversed a district court's grant of a defendant's motion to dismiss for failure to state a claim, summarizing the case as follows:

> Plaintiff, a manufacturer, and defendant, a retailer, are both members of the dress industry, selling dresses in commerce. Each is incorporated in Pennsylvania. Alleging a fraudulent and injurious use of a picture of plaintiff's dress in defendant's advertising, the plaintiff brought this action under the Lanham trade-Mark Act of 1946 for damages an injunctive relief. …
>
> * * * *
>
> On its face Section 43(a) seems rather clearly to cover the present claim. It provides in relevant part that "Any person who shall * * * use in connection with any goods * * * any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods * * * to enter into commerce, * * * shall be liable to a civil action by any person * * * who believes that he is or is likely to be damaged by the use of any such false description or representation." Section 39 gives federal district courts jurisdiction of causes arising under this statute regardless of the amount in controversy or the citizenship of the litigants.
>
> The present complaint alleges that plaintiff created and alone sold to the retail trade throughout the country a certain distinctively styled dress. To advertise this dress plaintiff published pictures of it, together with its price, $17.95, in advertisements in leading newspapers and in some two million individual mailing pieces distributed through retailers. In this way the picture and price of this dress became associated in the minds of many readers and identified as plaintiff's $17.95 dress.
>
> It is further alleged that, at about the same time, defendant was offering for sale through mail order and otherwise in interstate commerce a dress which in fact was much inferior to plaintiff's in quality and notably different in appearance. In this connection defendant published under its name in a magazine of national circulation a display advertisement worded and designed to promote the mail order sale of its dress at a stated price of $6.95, but showing as the most prominent feature of the advertisement an actual photographic reproduction of plaintiff's dress, thus fraudulently represented as the article defendant was selling

> for $6.95. Plaintiff alleges that this misrepresentation caused some trade to be diverted from plaintiff to defendant and caused other trade to be lost by plaintiff as a result of the mistaken impression conveyed to those familiar with the advertising of both parties that plaintiff was offering for $17.95 a dress worth only $6.95.
>
> **In relation to the language of Section 43(a) this complaint states about as plain a use of a false representation in the description of goods sold in commerce as could be imagined.**

L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 650 (3d Cir. 1954) (emphasis added).

It seems that some things never change.

In a 1967 case – pre-Internet – the plaintiffs created, designed, engineered and sold a novelty signal light. The defendant caused to be copied and manufactured in Hong Kong a "Chinese" copy of plaintiff's novelty signal light. In granting a preliminary injunction, the Court stated:

> This unfair competition is also sufficient to sustain a cause of action cognizable under Section 43(a) of the Lanham Trademark Act, 15 U.S.C.A. § 1125(a). This Section provides, in pertinent part, that:
>
> > "Any person who shall affix * * * or use in connection with any goods or services, or any container * * * for goods, a false designation or origin, or any false description or representation, including any words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action * * * by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."
>
> Plaintiffs and defendant are in competition for the signal light market. Suffice it to say that plaintiffs' light appears to be of a higher quality than defendant's.
>
> The application of Section 43(a) of the Lanham Act to this type of activity has been firmly established. **In a series of cases, the courts have held that defendant may not use a photograph of plaintiff's product to advertise and**

> **sell its own less expensive and inferior product.**[8] Such action is clearly unfair competition within the meaning of the statute and may be enjoined under the proper circumstances.
>
> A preliminary injunction has issued even where a defendant has altered the photograph of a plaintiff's product in order to put defendant's trade name or trademark on the product when, in fact, defendant's product was not identical but inferior, National Dynamics Corp. v. John Surrey, Ltd., (Inc.) 238 F.Supp. 422 (S.D.N.Y. 1963), and when all identifying marks have been removed from plaintiff's pictured product. Zandelin v. Maxwell Bentley Mfg. Co., supra. In the latter case, Judge Van Pelt Bryan stated the rationale for these decisions:
>
> > "This section [Lanham Act § 43(a)] applies where a defendant advertises its inferior and much cheaper product by featuring a photographic reproduction of plaintiff's product, thus creates the impression that his product is precisely the same as plaintiffs' and causes trade to be diverted from plaintiff to himself and other trade to be lost." (197 F.Supp. at 611).

Crossbow, Inc. v. Dan-Dee Imports, Inc., 266 F. Supp. 335, 339-40 (S.D.N.Y. 1967) (emphasis added).

In cases where a defendant has used the plaintiff's photograph in defendant's advertising, courts do not engage in a rigorous factor-by-factor analysis and simply conclude there has been a violation of Section 43(a). *See Bangor Punta Operation v. Universal Marine Co.*, 543 F.2d 1107 (5th Cir. 1976) ("The plaintiff contends that the misappropriation of its advertising material by defendants results in the violation of § 43(a) of the Lanham Act. We agree."); *Ebling & Reuss Co. v. International Collectors Guild, Ltd.*, 462 F. Supp. 716, 720 (E.D. Pa. 1978) (Preliminary Injunction issued where "the advertisements do not depict the cup set actually sold by defendant; rather, they show plaintiff's Taltos set. This, in itself, is a false description or representation, actionable under the Lanham Act."); 1 Federal Unfair Competition: Lanham Act

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[8] *American Optical Co. v. Rayex Corp.*, 266 F. Supp. 342 (S.D.N.Y.1966); *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.),* 261 F. Supp. 238 (S.D.N.Y.1966); *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 266 F. Supp. 755 (S.D.N.Y.1964), *aff'd*, 360 F.2d 1021 (2d Cir. 1966); *National Dynamics Corp. v. John Surrey Ltd.*, 238 F. Supp. 423 (S. D.N.Y.1964); *National Dynamics Corp., v. John Surrey Ltd.*, 238 F. Supp. 422 (S. D.N.Y.1963); *Zandelin v. Maxwell Bentley Mfg., Co.*, 197 F. Supp. 608, 611 (S.D. N.Y.1961); *L'Aiglon Apparel v. Lana Lobell, Inc.*, 214 F.2d 649 (3rd Cir. 1954).

43(a) § 6:12 (Dec. 2018 Update) ("Generally stated, using one product or its facsimile such as a still photograph or motion picture, or otherwise in an advertisement or promotion, while actually delivering another product even though similar in quality or appearance, has been held actionable under Section 43(a)." (citations omitted).)

As demonstrated in **Composite Exhibit 1**, Defendants have used Plaintiffs' copyrighted photographs in Defendants' listings. Such conduct is a clear violation of Section 43(a) of the Lanham Act.

b. Defendants' Use of Plaintiffs' BRISTLY Common Law Trademark

In order for a party to prevail on a claim of common law trademark infringement under Section 43(a),[9] 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., 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). Plaintiffs' evidence submitted herewith satisfies all three requirements.

The first two elements of Plaintiffs' common law trademark infringement claim are easily met. Plaintiffs' unregistered BRISTLY mark is inherently distinctive, as recognized by the U.S.

[9] Like other courts, the Third Circuit Court of Appeals also recognize another type of passing off that violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) — 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.*

Patent and Trademark Office as proof of secondary meaning was not required during the trademark application process. Moreover, the BRISTLY Mark is owned by Plaintiff Dertsakyan and Defendants have never had the right or authority to use the BRISTLY Mark. *Dertsakyan Dec*. ¶¶5 and 25.

The Third Circuit uses a ten-factor test, the so-called *Lapp* factors, in determining the third element, likelihood of confusion. *Scott Paper Co. v. Scott's Liquid Gold, Inc.,* 589 F.2d 1225, 1229 (3d Cir. 1978). These factors are: (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. These ten factors are to be weighed and no single factor is dispositive. *Id*.

1. Plaintiffs' BRISTLY Mark is 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 v. Victoria's Secret Stores, Inc.,* 237 F.3d 198, 221 (3d Cir. 2000) (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 Plaintiffs' BRISTLY Mark is distinct as

applied to the goods with which it is associated and as used in connection with Plaintiff's BRISTLY Product, which has achieved recognition and fame. *See Dertsakyan Dec.,* ¶¶ 10 and 18. Likewise, the Plaintiffs' BRISTLY Mark is 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 Plaintiffs' BRISTLY Mark is 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 Plaintiffs' favor since Plaintiffs owns an inherently distinct trademark.

2. Defendants' Infringing Products and Marks are Virtually Identical to Plaintiffs' BRISTLY Product and Plaintiffs' BRISTLY Mark

Defendants have applied identical copies of the Plaintiffs' BRISTLY Mark to their substandard, Infringing Products and/or used identical copies of the Plaintiffs' BRISTLY Mark in marketing and promoting their substandard, Infringing Products at Defendants' User Accounts and Merchant Storefronts; as such, this factor weighs in favor of Plaintiffs. Defendants' Infringing Products are clearly designed to look as much like the Plaintiffs' 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 Infringing Products and the Plaintiffs' 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).

3. *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 Plaintiffs' 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 Plaintiffs' likelihood of success on the merits.

4. Defendants Acted in Bad Faith

Given that Defendants' choice of marks, which is identical to the Plaintiffs' BRISTLY Mark 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 Plaintiffs, their BRISTLY Product and their BRISTLY Mark. *See Dertsakyan Dec.,* ¶¶ 27 – 29 and *Cline 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.").[10] If Defendants' 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).

5. Actual Confusion Can Be Inferred Between Defendants' Infringing Products and the Plaintiffs' BRISTLY Product

Seeing as Defendants are offering for sale and/or selling knock-off versions of the Plaintiffs' BRISTLY Product under the Plaintiffs' BRISTLY Mark, or a confusingly similar mark, actual confusion can be inferred. *See Dertsakyan Dec., ¶¶ 27 – 29* and *Cline Dec. at* ¶ 2 and *Composite Exhibit 1*. Moreover, actual confusion exists in this case. *See Dertsakyan Dec.* ¶ 22. Notwithstanding, Plaintiffs do 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

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[10] *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).

trademark case the plaintiff need show 'only a likelihood of confusion or deception ... in order to obtain equitable relief.'").

6. *Defendants' Infringing Products Are of Inferior Quality*

The Plaintiffs' BRISTLY Product is manufactured with high quality materials, such as natural rubber. *See Dertsakyan Dec.* ¶ 23. Plaintiffs have neither authorized Defendants' use of the BRISTLY Marks or confusingly similar marks in connection with the Infringing Products nor approved or tested Defendants' Infringing Products being offered for sale and/or sold under or in connection with the BRISTLY Marks and/or confusingly similar marks. *See Id. at* ¶¶ 23 - 26. Hence, Defendants have encroached on Plaintiffs' right to control the quality of the goods manufactured and sold under their BRISTLY 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.

7. *Defendants ' Infringing Products Directly Compete with the Plaintiffs' BRISTLY 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, Infringing Products and the Plaintiff's BRISTLY Products are both marketed through the same channel of trade (the Internet), to the same retail consumers, and the retail customers are likely to be confused that the products are the same, so this factor weighs in favor of Plaintiffs.

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 BRISTLY Products, bearing infringing marks in the same class of goods under which Plaintiffs sell their products, they are already in competitive proximity and there is no "gap" to bridge. *See Dertsakyan Dec.,* ¶¶ 26 - 29; *Cline 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.").

3. Plaintiff Are Likely to Prevail on Their Copyright Infringement Claim

Plaintiff has established a likelihood of success on its cause of action for copyright infringement. To prove copyright infringement pursuant to 17 U.S.C. § 501, the plaintiff must demonstrate two elements: (1) ownership of a copyright and (2) copying by the defendant. *Dam Things From Denmark v. Russ Berrie & Co*., 290 F.3d 548, 561 (3d Cir. 2002). Plaintiff is the exclusive owner of U.S. Copyright Reg. No. VA 2-122-455 directed to various photographs related to the BRISTLY™ dog toothbrush. A true and correct copy of which is attached as Complaint **Exhibit 2.** Defendants had actual notice of Plaintiff's exclusive rights in and to the copyrighted work in the BRISTLY Works.

Without permission, Defendants knowingly and intentionally reproduced, copied, and displayed the work in the BRISTLY Works by manufacturing, distributing, displaying, offering for sale and/or selling Infringing Products which bear the work in the BRISTLY Works, or artwork that is, at a minimum, substantially similar to the work in the BRISTLY Works. *See Cline Dec*. Composite Exhibit 1. Therefore, Defendants' display, distribution, and sale of packaging, artwork, photos, text, and instructions directly infringes Plaintiffs' exclusive rights to reproduce, prepare derivative works, distribute and display its copyrighted material under 17 U.S.C. § 106.

4. Plaintiffs Are Likely to Prevail on Their State Law Claims

Because Plaintiffs have shown a likelihood of success on its Lanham Act claims, Plaintiffs respectfully submit that they have also shown a likelihood of success on their unfair competition and common law trademark infringement claims under Pennsylvania Law. *Mateson Chemical Corp. v. Veronon,* 2000 WL 680020, at *5 n.7 (E.D. Pa. May 9, 2000). *See also Advance Magazine Publrs. Inc. v. Vogye Intern.*, 123 F. Supp. 2d 790, 795 (D.N.J. 2000) (citing *A &H Sportswear, Inc.*, 237 F.3d at 201 - 11.)

5. The Balance of Hardships Favors Plaintiffs

The balance of hardships unquestionably and overwhelmingly favors Plaintiffs in this case. Here, as described above, Plaintiffs have suffered, and will continue to suffer, irreparable harm to their business, the value, goodwill and reputation built up in and associated with the Plaintiffs' BRISTLY Marks and to their reputation as a result of Defendants' willful and knowing sales of substandard imitations of the Plaintiffs' BRISTLY Product. *See Dertsakyan Dec.,* ¶¶ 22- 29. In contrast, any harm to Defendants would only be the loss of Defendants' ability to continue to offer their Infringing 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. <u>The Relief Sought Serves the Public Interest</u>

Defendants are directly defrauding the consuming public by palming off the Infringing Products as Plaintiffs' genuine goods. 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 ("[T]he relevant consideration is the consumer's interest in not being deceived.") Here, the public has an interest in being able to rely on the high quality of the Plaintiffs' BRISTLY Products bearing and/or sold in connection with the BRISTLY Mark and BRISTLY Works. Since Defendants have willfully and knowingly inserted substandard Infringing Products into the marketplace, the public would benefit from a temporary restraining order and preliminary injunction halting any further sale and distribution of Defendants' Infringing Products. *See Dertsakyan Dec.,* ¶¶ 25 - 33.

C. PLAINTIFFS ARE ENTITLED TO AN ORDER PREVENTING 1) THE FRAUDULENT TRANSFER OF ASSETS AND 2) FREEZING OF DEFENDANTS' MERCHANT STOREFRONTS

1. Defendants' Assets Must be Frozen

In addition, the Court should enter an order limiting the transfer of Defendants' unlawfully gained asserts. Plaintiffs have demonstrated above that they will likely succeed on the merits of their claims. As such, under both 15 U.S.C. § 1117(a) and 17 U.S.C. § 504(b), Plaintiffs will be entitled to an accounting and payment of the profits earned by Defendants throughout the course of their unlawful scheme. Furthermore, it is unlikely that Defendants possess the funds to satisfy any potential judgment. Due to the deceptive nature of Defendants' business, and Defendants' deliberate violations of both federal trademark and copyright laws, Plaintiffs respectfully request this Court grant additional *ex parte* relief restraining the transfer of all monies held or received by PayPal or other financial institutions for the benefit of any one or more of the Defendants. *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 &N athel, 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 it 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); *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); and *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (1990) (district court has power to issue an injunction in order to protect a future damages remedy; the unsatisfiability of a money judgment can constitute irreparable injury).

This Court has broad authority to grant such an order. The Supreme Court has provided that district courts have the power to grant preliminary injunctions to prevent a defendant from transferring assets in cases where an equitable interest is claimed. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Funds, Inc.*, 527 U.S. 308 (1999). The Third Circuit has additionally ruled that district courts have the power to grant preliminary injunctions to prevent a defendant from transferring assets in order to protect a future damages remedy. *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (1990). Moreover, almost every Circuit has interpreted Rule 65 of the Federal Rules of Civil Procedure to grant authority to restrain assets *pendent elite*. *See Mason Tenders Dist. Council Pension Fund v. Messera*, 1997 WL 223077 (S.D.N.Y. May 7, 1997) (acknowledging that "[a]lmost all of the Circuit Courts have held that Rule 65 is available to freeze assets *pendent lite* under some set of circumstances").

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 an infringer's assets in cases similar to this one, including recently in actions against operators of 'rogue' websites selling infringing 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).

Plaintiffs 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 and Copyright Act, it has been established 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."). Furthermore, in the Third Circuit, the inability of a defendant to satisfy a judgment for legal damages justifies a pre-judgment restraint of existing assets. *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186 (3d Cir. 1990) (concluding the unsatisfiability of a money judgment can constitute irreparable injury).

An asset freeze in the instant matter is unquestionably warranted because Defendants, who appear to be unknown individuals, that are manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Infringing Products to U.S. consumers solely via the Internet, and accepting payment for such Infringing Products in U.S. Dollars through Financial Institutions, thereby causing irreparable harm to Plaintiffs' 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.,* ¶ 6.

Moreover, to provide complete equitable relief, courts have granted such orders without providing notice to the defendants. Specifically, federal courts have held that where advance

notice of an asset restrain is likely to cause a party to alienate the assets sought to be restrained, a temporary restraining order may be issued *ex parte*. *See F.T. Int'l Ltd. v. Mason*, 2000 WL 1514881 *3 (E.D. Pa. 2000) (granting *ex parte* TRO restraining defendants' bank accounts upon finding that advance notice would likely have caused the defendants to secret or alienate funds); *CSC Holdings, Inc. v. Greenleaf Elec., Inc.*, 2000 WL 715601 (N.D. Ill. 2000) (granting *ex parte* TRO enjoining cable television pirates and restraining pirates' assets); *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 Financial Institution 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).[11]

In this case, Defendants' blatant violations of federal trademark and copyright laws warrant an *ex parte* order restraining the transfer of their ill-gotten assets. Moreover, as Defendants' business are conducted anonymously over the Internet, Plaintiffs have additional cause for *ex parte* relief, as Defendants may easily secret or transfer their assets with the Court's or Plaintiffs' knowledge.

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

A temporary restraining order which, in part, restrains and enjoins the Third Party Service Provider(s), as well as any and all as yet undiscovered online marketplace platforms, from providing services to Defendants' User Accounts and Merchant Storefronts is warranted

[11] See also *supra fn. 3*

and necessary because the continued offering for sale and/or sale of the Infringing 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, 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.).[12]

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 Infringing Products will likely try and set up another Merchant Storefront to keep selling when the current Merchant Storefront stops working. *See Ference Dec.*, ¶ 6. 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-Infringing Products. The proposed Order merely blocks any goodwill associated with the Merchant Storefront which sold Infringing Products; the Defendants are free to set up a new Merchant Storefront that does not sell Infringing Products.

Blocking the good will associated with the Merchant Storefront helps prevent the situation with the defendants where the Infringing Product listing has been taken down but if someone (e.g., a repeat buyer) contacts a Defendant at the Merchant Storefront using the

[12] See also *supra fn. 3*

messaging system provided by the online marketplace asking for the Infringing Product it will be made available by a Defendant. *Id*. The only way to preclude this type of harm to Plaintiff is to freeze the Defendants' Merchant Storefronts.

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"). Thus, the freezing of Defendants' Merchant Storefronts is also a manner of ensuring that Defendants receive notice of the present action.

D. PLAINTIFFS ARE 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' 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, 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 Infringing 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 have often applied a four-factor test to determine when expedited discovery may be granted,[13] they now

[13] ". . . 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

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. 1ll. 2000)).[14] Regardless of which test is applied, 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 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.

Despite the likelihood of success of Plaintiffs' claims and the injury it has and continues to endure, if this Court were to deny expedited discovery, Plaintiffs may lose the opportunity to effectively pursue their claims against Defendants because there are several aspects of Defendants' infringing activities that Plaintiffs are not yet able to confirm, including: 1) the true identities of Defendants, 2) the full scope of Defendants' infringing activities, 3) the source or

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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).

[14] 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.).

location of Defendants' inventory of Infringing Products and/or 4) where the proceeds from Defendants' infringing activities have gone. *See 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' infringing activities.

Plaintiffs 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 Infringing Products. The discovery requested on an expedited basis in Plaintiffs' [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. PLAINTIFFS' 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).

Plaintiffs respectfully submit 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 the Financial Institutions, Plaintiffs' 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, e.g. Airigan Solutions, LLC v. Artifacts_Selling, Civil Action No. 18-cv-1462-NBF (*Temporary Restraining Order entered on November 2, 2018, $5,000.00 bond required*), and Airigan Solutions, LLC v. Babymove, Civil Action No. 19-cv-166-NBF (*Temporary Restraining Order entered on February 14, 2019, $5,000.00 bond required), *Rapid Slicer, LLC v. Buyspry, Civil Action No. 19-cv-249-MJH (*Temporary Restraining Order entered on March 11, 2019, $5,000 bond required*), Showtech Merchandising, Inc. v. Various John Doe, et al,* 2:12-cv-1270 (W.D. Pa. Sept. 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).[15]

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

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their 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, the Third Party Service Providers and the Financial Institutions, in the form of the [Proposed] Order

[15] 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.

accompanying this Application, and such other relief to which Plaintiffs may show they are legally entitled.

Respectfully submitted,

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