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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

GORGE DESIGN GROUP, LLC, *et al.*,

Plaintiffs,

v.

ACCESSMALL, *et al.*,

Defendants.

Civil Action No. 19-1454

Jury Trial Requested

FILED UNDER SEAL

**DECLARATION OF KIRBY ERDELY
IN SUPPORT OF PLAINTIFFS' *EX PARTE* APPLICATION
FOR ENTRY OF A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I, KIRBY ERDELY, do hereby declare:

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

2. I am a named Plaintiff, and the President and owner of Co-Plaintiff, Gorge Design Group, LLC ("Gorge"), a limited liability company organized and existing under the laws of the State of Washington.

3. I make this declaration in support of Plaintiffs' *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction against Defendants, the Individuals, Partnerships, and Unincorporated Associations identified on **Schedule "A"** to the Complaint.

4. The Defendants use the interactive commercial Internet websites and Internet based e-commerce stores (“Online Marketplace Platforms” or “OMPs”) using the seller identities and store names set forth on **Schedule “A”** to the Complaint.

5. My father-in-law, David J. Brown, invented the Orange Screw ground anchor (the “Ultimate Ground Anchor”) and I am the owner of the patent related thereto; Gorge Design Group, LLC, and I own all the intellectual property related thereto. We are a family-owned business and the named Plaintiffs in this lawsuit.

6. I developed my father-in law’s invention and brought it to market, and now, with Gorge Design, sell the unique and revolutionary product under the common law trademark Ultimate Ground Anchor (“Plaintiffs’ Mark”) that is the most effective ground anchor ever made (“Plaintiffs’ Product”). The Plaintiffs’ Product is made of 100% recycled materials and manufactured in the U.S.A. The Plaintiffs’ Product will secure pets; anchor RV awnings; hold tarps over boats, ATVs and firewood; as well as ensure tents and sunshades stay put. We identified the need for this product and created the market for this product.

7. In 2005, my family developed the idea behind Plaintiffs’ Product.

8. By August of 2015, a crowdfunding campaign was launched on kickstarter.com. In less than one month, the campaign was fully funded and at the end of the campaign, it was 214% funded from 641 backers in nearly 20 countries.

9. The current version of Plaintiffs’ Product is sold through the orangescrew.com website, and the amazon.com and eBay Internet marketplaces by Gorge Design Group, LLC d/b/a Orange Screw; and various retail stores across the United States.

10. Plaintiffs' Product has been featured in videos, articles, or podcasts by numerous media outlets, including NBC (<https://www.kgw.com/article/money/washington-based-company-dealing-with-counterfeit/283-c0e3d0a8-9ce4-483c-a8d6-886fca7923a0>); NPR (https://edge2.pod.npr.org/anon.npr-mp3/npr/hibt/2019/06/20190607_hibt_hybt_-_orange_screw_for_seamus_-_061019.mp3/20190607_hibt_hybt_-_orange_screw_for_seamus_-_061019.mp3_3b65203266d0646bdd82770ddadcecb6_4423741.mp3?orgId=1&d=260&p=510313&story=730695224&t=podcast&e=730695224&siteplayer=true&size=4161660&awCollectionId=510313&awEpisodeId=730695224&dl=1&hash_redirect=1&x-total-bytes=4423741&x-ais-classified=download&listeningSessionID=0CD_382_301_98a5c26012621d891e7c46c58c5cbbf1ae572ff6); NBC's The Today Show (<https://www.youtube.com/watch?v=5FuTdEn6bYs&feature=youtu.be>); and the Gear Junkie (<https://gearjunkie.com/threaded-tent-stake-anchor>).

11. Genuine goods bearing Plaintiffs' Mark and using Plaintiffs' Works (as defined below) are widely legitimately advertised and promoted by Plaintiffs, their authorized distributors, and unrelated third parties via the Internet. Over the past several years, visibility on the Internet, particularly via Internet search engines such as Google, Yahoo!, and Bing has become increasingly important to Plaintiffs' overall marketing.

12. Thus, Plaintiffs and their authorized distributors expend significant monetary resources on Internet marketing, including search engine optimization ("SEO") strategies. 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. Similarly, Defendants' individual sellers stores are indexed on search engines and compete directly with Plaintiffs for space in the search results.

13. Plaintiffs are the owners of various published photographs, videos, artwork, creative text and product instructions appearing on kickstarter.com and orangescrew.com. (“Plaintiffs’ Works”), which are shown in Complaint **Exhibit 1** and Complaint **Exhibit 2**, respectively.

14. Additionally, Plaintiffs have taken numerous steps to protect Plaintiffs’ Product. For instance, I am the owner of U.S. Patent No. 7309198 for “Re-useable threaded tie downs” (“Plaintiffs’ Patent”) (describing Plaintiffs’ Product and its use.) A copy of the assignment record and the issued patent is attached as Complaint **Exhibit 3**.

15. The patented features of Plaintiffs’ Product, common law trademark for the Ultimate Ground Anchor, the distinct photographs, the design, the instructions, the packaging, and the unique presentation of the product, all comprise Gorge’s valuable intellectual property (“IP”) and all have become distinct in consumer’s minds such that consumers associates all of this IP with Gorge’s genuine Ultimate Ground Anchor Product.

16. Gorge only manufactures its genuine Ultimate Ground Anchor Product in the United States and closely controls the quality of the product. Thus, if a product that purports to be an Ultimate Ground Anchor Product is manufactured in China or overseas, it is a counterfeit.

17. Likewise a ground anchor that through visual inspection and analysis infringes on one or more of the claims in the U.S. patent owned by the Plaintiffs but is offered for sale as new on an Online Marketplace at below market price, it is also a counterfeit.

18. Plaintiffs’ Mark has been used in interstate commerce to identify and distinguish Plaintiffs’ goods. Plaintiffs’ Mark has been used by Plaintiffs prior in time to Defendants’ use of this mark. Plaintiffs’ Mark has never been assigned or licensed to any of the Defendants in this

matter. The Plaintiffs' Mark is a symbol of Plaintiffs' quality, reputation, and goodwill and has never been abandoned.

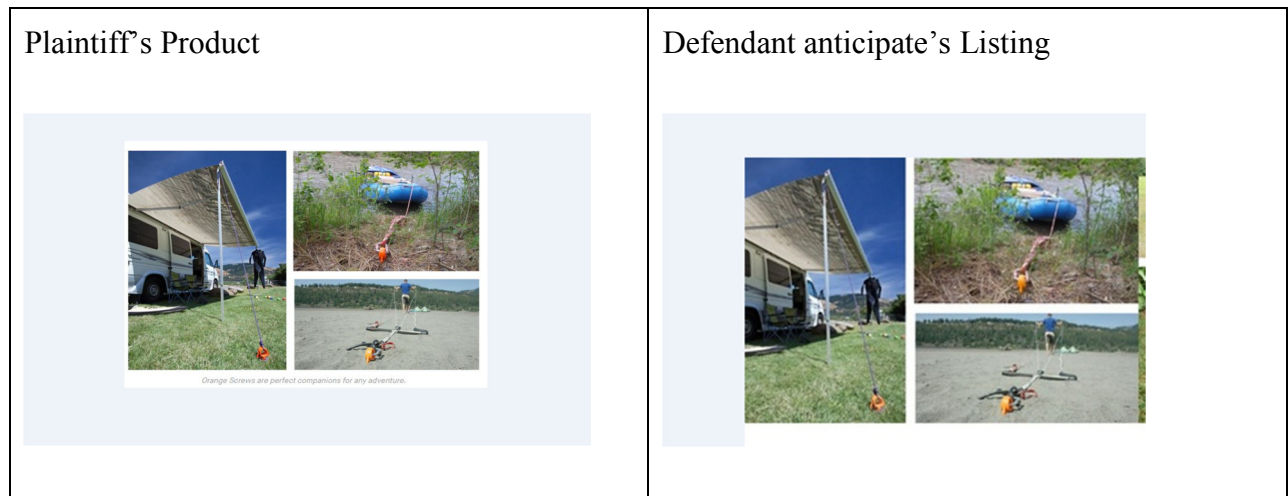
19. Due to the success of Plaintiffs' Product, Plaintiffs have become the target of multiple counterfeiters seeking to profit off the goodwill and reputation and fame enjoyed by Plaintiffs' Mark and Plaintiffs' Product. Plaintiffs have been forced to police the various Internet marketplaces to identify and seek takedowns of unlawful listings for the Infringing Products¹ since allowing the unlawful listings to continue is causing damage to Plaintiffs' reputation and bottom line. Some Defendants sell their fake Ultimate Ground Anchor Product at a fraction of the controlled retail price, going as low as \$3.00 or \$4.00. 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. Plaintiffs' Product is thus ignored. 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. 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. 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. The ease of this system encourages knock-offs to flourish.





20. For these reasons, Plaintiffs retained the legal counsel of Ference & Associates LLC ("the Ference firm") to perform the policing of various Internet marketplaces. During the process, the

¹ As set forth in the Complaint, Defendants have offered for sale, sold, and distributed infringing and knock-off versions of Plaintiffs' Product which closely mimic the appearance of Plaintiffs' product and infringe upon Plaintiffs' Mark and at least one of the claims in its registered U.S. Patent, use Plaintiffs' Works, and otherwise unfairly compete with Plaintiffs' Product (the "Infringing Product").

Ference firm identified many Chinese manufacturers operating on Marketplace Storefronts hosted by the Internet marketplaces. 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.

21. Defendants' sale, distribution, and advertising of the Infringing Product are highly likely to cause consumers to believe that Defendants are offering genuine versions of Plaintiffs' Products 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' Product or that the Infringing Product is otherwise approved by or sourced from Plaintiffs:



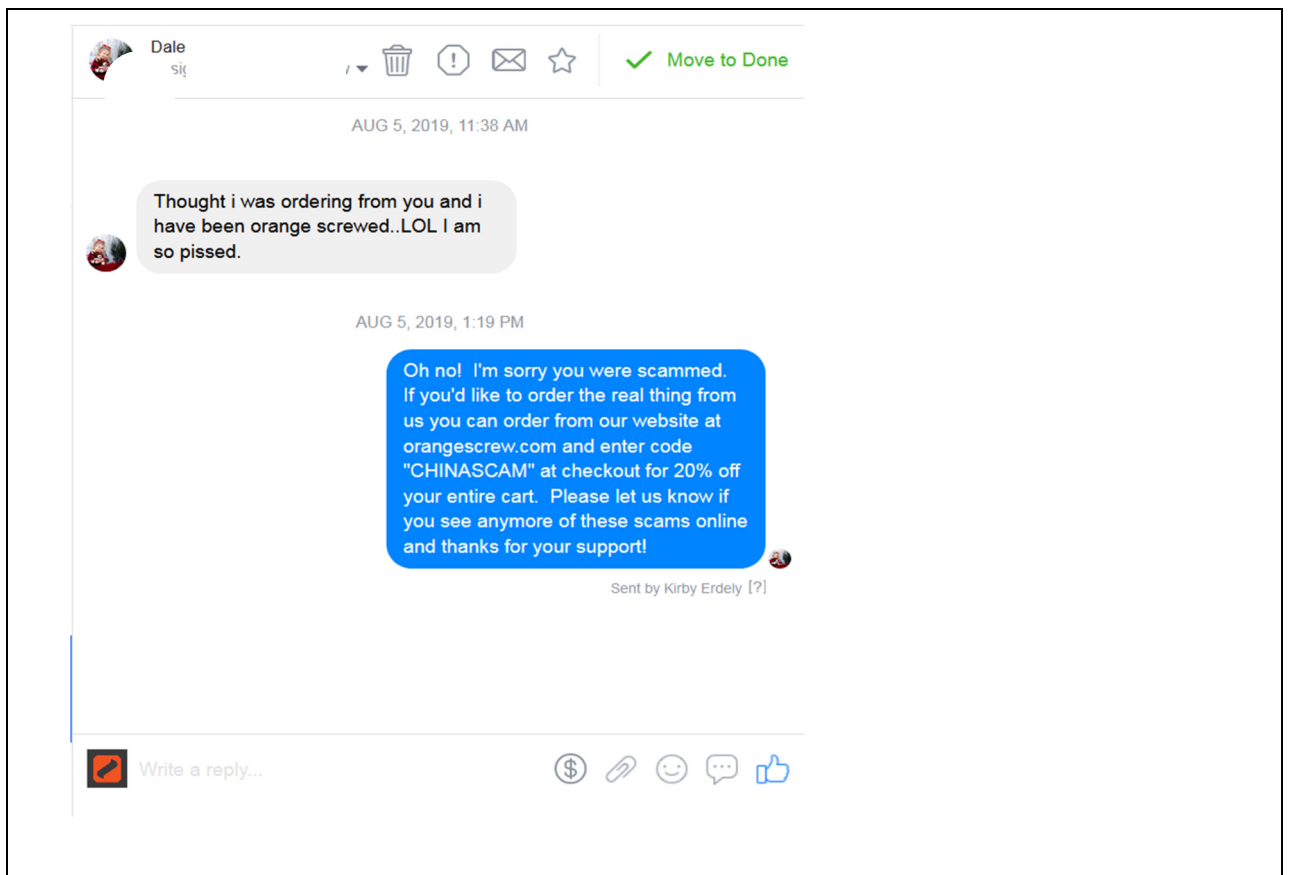
| | |
|---|---|
| <p>Plaintiff's Product</p>  <p><small>Orange Screws are safe and reliable animal tethers for all your pets- large and small.</small></p> | <p>Defendant uyuanludbi's Listing</p>  |
| <p>Plaintiff's Product</p>  | <p>Defendant City spray Store's Listing</p>  |

22. Defendants' actions have resulted in actual confusion in the marketplace between Defendants' Infringing Product and the genuine version of Plaintiffs' Products. Numerous purchasers of Defendants' Infringing Product have contacted Plaintiffs to complain about the performance of the Infringing Product believing same to be a genuine version of Plaintiffs' Product.

23. Defendants' Infringing Products are substantially inferior to the genuine product. As poorly designed and manufactured products, Defendants' Infringing Products create serious risk of harm to animals that may break or pull out the inferior ground stake and run away from their intended safe ground. Likewise, the inferior products may fail allowing expensive items such as canoes, kayaks, and the like to escape safe mooring and be damaged or lost. Finally, the failure

of the inferior ground stake may result in tents or tarps coming undone thus exposing users or items to sun or inclement weather, and the damage caused by such. The Infringing Products threaten to destroy the reputation of high quality that Plaintiffs' Products have earned.

24. The poorly designed and manufactured products masquerading as Plaintiff's Product have caused consumers to be confused as to the origin or the Infringing Products. Thus, consumers have believed that they ordered a genuine version of Plaintiffs' Product only to be disappointed when the fake arrived in their hands. One such consumer contacted me and the communication below is a screenshot of the actual confusion that occurred. (The seller of the knock off is not a current defendant in this lawsuit because the product was not sold into this judicial district.)



The consumer's experience highlights both the actual confusion between the Infringing Product and Plaintiff's Product and the immediate and irreparable harm being incurred by Plaintiffs.

25. Defendants do not have, nor have they ever had, the right or authority to use Plaintiffs' Mark and/or Plaintiffs' Works for any purpose. 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' patent.

26. Given Defendants' copying and use of Plaintiffs' Mark and/or Plaintiffs' Works, the Infringing Products are indistinguishable to consumers, both at the point of sale and post-sale. By using Plaintiffs' intellectual property, Defendants have created a false association between their Infringing Products, their Internet e-commerce stores, and Plaintiffs. Such false association is in violation of 15 U.S.C. § 1125(a), constitutes unfair competition, and is causing and will continue to cause Plaintiffs' irreparable harm and damage. The infringements of Plaintiffs' Works deprive Plaintiffs of the ability to control the creative content protected by the copyright, it devalues the Plaintiffs' Ultimate Ground Anchor brand by associating it with inferior quality goods, and it undermines the value of the copyright and patent by creating the impression that infringement may be undertaken with impunity which threatens Plaintiffs' ability to attract investors and markets for the Plaintiffs' Products.

27. I have reviewed **Composite Exhibit 1** and the pictured web listings and upon my information and belief, the Defendants identified in **Schedule “A”** of the Complaint, were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and or/selling non genuine, patent infringing versions of Plaintiffs’ Product and copying and using Plaintiffs’ Mark, and/or Plaintiffs’ Works with the non-genuine, patent infringing versions of Plaintiff’s Product directed to U.S. consumers, including those consumers in Pennsylvania, through their e-commerce stores.

28. None of the identified Defendants are authorized re-sellers of genuine version of Plaintiffs’ Product. Moreover, none of the identified Defendants are authorized to manufacture, import, export, advertise, offer for sale or sell Plaintiffs’ Products. Further, Plaintiffs never consented or granted permission to any of the identified Defendants to use Plaintiffs’ Mark, Plaintiffs’ Works, or Plaintiffs’ Patent.

29. I have confirmed that all of the identified products pictured in **Composite Exhibit 1** are infringements of Plaintiffs’ Product and upon information and belief, the Defendants set forth in **Schedule “A” of the Complaint** were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling patent infringing and unfairly competing products with the Plaintiffs Mark and/or using Plaintiffs’ Works to sell to U.S. consumers, including those consumers in Pennsylvania, through their Online Marketplace Storefronts. Through visual inspection of Defendants’ listings for Infringing Products, it was confirmed that each Defendant is featuring, displaying, and/or using the Plaintiffs’ Mark, and/or Plaintiffs’ Works without authorization and that the products that each Defendant is offering for sale infringes on at least one of the claims in Plaintiffs’ Patent and are, in fact, not genuine products. 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. I 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 Plaintiffs’ Products.

30. Defendants’ actions have caused and will continue to cause, in the event the requested relief is not granted, irreparable harm to Plaintiffs’ goodwill and reputation as well as to the unassuming consumers who will continue to believe that the Defendants’ cheaply produced, inferior, and typically faulty infringing products and knock-offs are produced, authorized, approved, endorsed or licensed by Plaintiffs, when they are not.

31. Defendants’ intentional and illegal conduct, including offering for sale and selling inferior infringing and knock-offs into the U.S. and the Commonwealth of Pennsylvania has caused lost profits to Plaintiffs and damaged the inherent value of Plaintiffs’ business and the Plaintiffs’ Mark, and, by diluting the brand and goodwill, damaging Plaintiffs’ reputation for providing high quality products, and interfering with Plaintiffs’ relationships with its customers and authorized resellers, as well as impeding Plaintiffs’ ability to attract new customers and business.

32. All of the injuries and damages described above are taking place in the United States, including in Pittsburgh, Allegheny County, Pennsylvania.

33. In addition to trying to stop the injuries and damages caused to Plaintiffs' business, Plaintiffs are also seeking in this lawsuit to protect consumers from being exposed to and purchasing the substandard, faulty, and potentially dangerous knock-offs and infringing products that wrongly indicate their origin as being from Plaintiffs or wrongfully use Plaintiffs' Mark, and/or Works.

34. I have worked with Plaintiffs' legal counsel in this case to assist them in identifying knock-off products and have provided them with various leads in order to find the various outlets for the infringing and knock-off products. If called upon by the Court, Plaintiffs' legal counsel is able to explain additional differences between the genuine version of Plaintiffs' Product and the knock-off products and unfairly competing products offered by the identified Defendants.

35. To be sure that none of the Defendants receive advance notice of the relief and remedies requested in Plaintiffs' Complaint, or the *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction in this case, neither I nor anybody else at Gorge have publicized the filing of this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 7, 2019

White Salmon, Washington

 / Kirby Erdely /
KIRBY ERDELY