

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

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

v.

BELVIA, *et al.*,

Defendants.

Civil Action No. 20-cv-284

Judge Schwab

FILED UNDER SEAL

**DECLARATION OF STANLEY D. FERENCE III
IN SUPPORT OF PLAINTIFF'S *EX PARTE* MOTION FOR AN ORDER
TO EXTEND TEMPORARY RESTRAINING ORDER, CONTINUE HEARING,
MODIFY BRIEFING SCHEDULE, AND REDUCE BOND**

I, Stanley D. Ference III, hereby declare as follows:

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

2. I am one of the attorneys working for Ference & Associates LLC ("the Ference Firm" or "Plaintiff's Counsel"), legal counsel for Plaintiff. I make this declaration in support of Plaintiff's *Ex Parte* Motion for an Order to Extend the Temporary Restraining Order, Continue the Hearing, and Modify the Briefing Schedule.

3. On February 26, 2020, this Court entered a Sealed Order ("Order") (doc. no. 11) granting 1) a temporary restraining order and 2) an order restraining assets and Merchant Storefronts against all of the Defendants, Amazon.com, Inc., and its related companies and

affiliates, including Amazon Services, LLC, and Amazon Payments, Inc. (collectively “Amazon”). The Order sets the bond amount at \$250,000.

4. I have been working with the broker used to obtain the bond in the previous cases brought in this District by Airigan Solutions. Bonds in previous cases were issued as soon as the same day as the court order with the bond amount was provided to the broker. In the present case, the court order with the \$250,000 bond amount was provided to the broker the same day the order issued, February 26, 2020. I was advised given the size of the bond, additional underwriting would be involved.

5. On February 27, 2020, I was advised by the broker the underwriters were requesting additional financial information from Airigan Solutions, including audited financial statements. I have confirmed that Airigan Solutions does not currently have audited financial statements. The broker is continuing to attempt to qualify Airigan Solutions for the issuance of a \$250,000 bond.

6. Over the past several years, I have reviewed the dockets of over five hundred (500) online counterfeiting lawsuits filed by various brand owners since 2017. It is very rare for any defendant in such a lawsuit to appear, and the lawsuits conclude through the default judgment process. The largest bond amount that has been required in the lawsuits I have reviewed is \$25,000. I have not seen any lawsuit in which a claim was made against the bond. Rather, the default judgment order discharges the bond.

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7. Exhibit 1 hereto is a true and correct copy of the transcript of the preliminary injunction hearing in *Arigian Solutions, LLC v. Abigail*, No. 19-cv-503 (W.D. Pa. July 5, 2019) (Fischer, J.).

Executed this 27th day of February 2020, at Pittsburgh, Pennsylvania.

/s/ Stanley D. Ference III
Stanley D. Ference III

EXHIBIT 1

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

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

vs.

Civil Action No. 19-503

ABAGAIL, et al.,

Defendant.

Transcript of Proceedings held on Friday, July 5, 2019,
in the United States District Court, 700 Grant Street,
Pittsburgh, PA 15219, before Honorable Nora Barry Fischer,
United States District Judge.

APPEARANCES:

For the Plaintiff: Ference & Associates, LLC
by Stanley D. Ference, III, Esq., and
Brian S. Malkin, Esq.

For the Defendants: (Not present)

Court Reporter: Noreen A. Re, RMR, CRR
700 Grant Street
Suite 5300
Pittsburgh, PA 15219

Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription.

P R O C E E D I N G S

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3 THE COURT: This is the time and place for
4 proceedings in the matter styled Airigan Solutions, LLC,
5 Plaintiff, versus Abigail, et al., Defendants, Civil Action
6 No. 19-cv-503. Present on behalf of the Plaintiff are both
7 counsel, Stanley Ference and Brian Malkin. Both of whom are
8 appearing here in person.

9 Now, we had initially scheduled this matter to start
10 at 11:30 in the morning. It's now about 11:16. Counsel are
11 here and ready to proceed. And, to that end, I would note no
12 one else has appeared on behalf of any party to this matter.
13 In fact, no one has appeared on behalf of the Defendants.

14 My staff -- that's Mr. Kravetz, Mr. Galovich and the
15 remainder of my clerks and interns -- have also told me no one
16 has made any contact with our chambers about this matter.
17 Meanwhile, this hearing has been duly scheduled on the Court's
18 CM ECF system. It also appears on the Court's website. And
19 it's also posted on the halls of the courthouse, as I have now
20 been told, twice.

21 Since we're the only game in town, there could be no
22 line trying to get up here from the security station on the
23 first floor; and so that would not be the reason for any kind
24 of a delay in appearing here today.

25 By way of background, on May 2, 2019, the Plaintiff

1 filed a complaint against a number of sellers on Amazon
2 alleging that they had sold knock-off versions of its Negg.
3 Negg is N-E-G-G. The Negg is an egg peeler, and they were
4 being sold through amazon.com and using Amazon payments.

5 Now, this case is related to a number of other
6 complaints filed at Civil Actions No. 18-1330, 18-1462 and
7 19-166, all of which are brought against sellers on Amazon,
8 eBay, aliexpress.com, Pay Pal and wish.com. On the same day
9 this Court issued a temporary restraining order authorizing
10 expedited discovery and ordered the Defendants to show cause
11 why a preliminary injunction should not issue in this case,
12 and I set this matter for hearing.

13 On May 28, 2019, the Plaintiff filed an amended
14 complaint adding additional Defendants to this lawsuit. The
15 Court then issued an amended temporary restraining order and
16 amended orders authorizing expedited discovery and to show
17 cause why a preliminary injunction should not issue in this
18 case.

19 I initially set this matter for hearing on June 10th,
20 but at the request of Plaintiff granted a continuance until
21 today's date. And, hence, the matter is scheduled for today.

22 Now, the Plaintiff's attorney has represented that
23 they have served all of the Defendants pursuant to the Court's
24 order for alternative service. Plaintiffs subsequently
25 submitted a proposed preliminary injunction order, along with

1 a declaration by the inventor, Margaret Tyler, and a number of
2 exhibits, all of which the Court has had the opportunity to
3 review and consider in advance of today's proceedings.

4 Once again, no representative and no counsel have
5 entered appearances for any of the Defendants as of this time,
6 nor has anyone appeared here in open court, despite the
7 Court's scheduling of this hearing.

8 Now, at this time I ask Mr. Ference and Mr. Malkin
9 whether you intend to put on any additional evidence at this
10 time, either by witness or by document.

11 MR. FERENCE: No, Your Honor. We rely on our papers.

12 THE COURT: To that end, as the Court has indicated,
13 the Court has carefully reviewed the papers in this case
14 including the most recent amended complaint; and, in addition,
15 the Court has had the benefit of the proposed preliminary
16 injunction order and, most importantly, the declaration of
17 Margaret B. Tyler.

18 Ms. Tyler identifies herself as the president and one
19 of the co-founders of Plaintiff, Airigan Solutions. And, to
20 that end, she provides the Court with background as to how
21 Amazon sells, that particularly products are assigned specific
22 codes. And, to that end, relative to her company's invention;
23 namely, seven of the assigned code numbers called Amazon
24 Standard Identification Numbers were considered to be variants
25 of B01M9TX -- 1 or I -- ZSIAN. And, to that end, apparently,

1 she and members of her company have tried numerous times to
2 have Amazon relink, but they have been unsuccessful in this
3 regard.

4 And, as she advises the Court, not all of the sellers
5 under the ASINs controlled by Airigan are, in fact, authorized
6 sellers. And even though Amazon's been requested to do so, it
7 has continued to permit unauthorized sellers to list under
8 Airigan-controlled ASINs, and it has not promptly removed
9 unauthorized dealers.

10 And, to that end, she actually provides a number of
11 printouts as exhibits; and they demonstrate what appears on
12 the Amazon site. And that, in the Court's estimation, is
13 consistent with what she tells me by way of declaration.

14 And she points out something that I think we all well
15 know, that Amazon now accounts for over 50 percent of
16 E-commerce sales. Meanwhile, what's happening here is that
17 these products that Amazon is selling allegedly as Neggs are,
18 indeed, not Neggs, but they're being produced primarily in
19 China.

20 She further tells me at Paragraph 10, no sellers
21 based in China are authorized resellers of the Negg egg
22 peeler; and no product originating in China is a genuine Negg
23 egg peeler, despite what these postings on Amazon might say.

24 She also says -- and this is kind of interesting, as
25 these cases are developed -- that Airigan ran targeted

1 advertising. And what's happening, basically, is this
2 advertising that her company is running is, in effect, inuring
3 to the benefit of these counterfeiters and Amazon. And, as we
4 all know, people are always looking for a bargain; and they're
5 trying to find the lowest available price. These counterfeit
6 Negg egg peelers are priced anywhere between \$7.49 and \$10.
7 Whereas, the genuine Negg egg peeler is sold for \$17.95.

8 And so the more her company tries to advertise, in
9 effect, it's not necessarily benefiting her company, Airigan,
10 but it's benefiting these counterfeiters and, indeed, Amazon.

11 So having considered all of that, and certainly
12 having considered what I've learned through the rest of this
13 litigation and related cases, it would appear that the
14 Plaintiff's position is well-taken in this case seeking a
15 preliminary injunction order.

16 But having said that, Mr. Ference and Mr. Malkin, do
17 you have any argument you would like to present at this time?

18 MR. FERENCE: Nothing other than what was in our
19 paperwork, Your Honor, although we would be happy to answer
20 any questions you may have.

21 THE COURT: Okay. No. I think that you've been very
22 self-explanatory. And, as I've said in other hearings we've
23 had in these cases each and every time, I think you and
24 Mr. Malkin have risen to the challenge providing well-done
25 documents including briefing as well as declarations and

1 exhibits. It makes the judge's job very easy.

2 So having considered the Plaintiff's complaint, the
3 amended complaint, the motion for temporary restraining order
4 and supporting evidence, having considered the position of the
5 Plaintiff and, again, no one having appeared on behalf of the
6 Defendants, having considered the proposed order and certainly
7 the declaration of Ms. Tyler and the attachments, as the Court
8 just reviewed, and also having considered what I've learned in
9 the related matters at Civil Actions No. 18-1330, 18-1462 and
10 19-166, the Court will enter the preliminary injunction order
11 in the form as presented by the Plaintiff. I also order that
12 the \$5,000 bond, which had been previously posted, shall
13 remain in place.

14 I further order that Amazon shall comply within five
15 calendar days. Now, to that end, at this time I have been
16 provided with the preliminary injunction order; and I'll sign
17 off on same here in open court, having all of you read these
18 in anticipation of today's proceeding.

19 (Pause.)

20 THE COURT: Once again, I would note that we still
21 have not seen anyone appearing on behalf of the Defendants,
22 nor has my chambers been contacted by anyone on behalf of the
23 Defendants.

24 So the Court has entered both of these orders on this
25 5th day of July 2019. And I've timed it at 11:30, as we're

1 just about at the 11:30 mark. Now, before I conclude, do
2 either counsel wish a copy of today's proceedings by way of
3 transcript?

4 MR. FERENCE: No, Your Honor.

5 THE COURT: Okay. If at some point that becomes
6 important, of course, you'll get in touch with our chambers;
7 and we'll order preparation. Is there any other matter for
8 the Court's attention?

9 MR. FERENCE: No, Your Honor.

10 MR. MALKIN: No, Your Honor.

11 THE COURT: Relative to this case, do you anticipate
12 any other related filings that might appear?

13 MR. FERENCE: It all depends on what's in the
14 marketplace, Your Honor.

15 THE COURT: Okay. All right. Has there been any
16 reaction, by the way, to the other lawyers that have been
17 entered?

18 MR. FERENCE: No.

19 THE COURT: Just coincidentally, I don't know where I
20 was the last few days. I think I know where I was. I think I
21 was actually at the funeral home. And for whatever reason,
22 somebody I was talking to brought up the fact that he or she
23 purchased things on Amazon. And that particular person was
24 complaining to me about the fact that you don't almost know
25 where these things are coming from. You don't know the

1 country of origin.

2 And this particular person was complaining that they
3 thought Amazon should do a better job before it puts something
4 out in the marketplace as to where these things are coming
5 from and the like. So I thought that was kind of interesting.

6 Coincidentally, on the ride in, I think it was NPR
7 this morning had a story about Amazon and how it's grown from
8 selling books. But it was always Mr. Bezos' idea that it was
9 going to be much more than a book seller. Is that what you
10 heard, too, Mr. Ference?

11 MR. FERENCE: I did not hear that, Your Honor. I
12 thought you were going to say it was the story about a Third
13 Circuit decision that came out on July 3rd involving Amazon.
14 And I have two copies here for you.

15 THE COURT: The one where they were found to be
16 strictly liable as a seller as well?

17 MR. FERENCE: Correct.

18 THE COURT: I did read that. Actually, I passed it
19 on to my daughter, who is a dog lover, because of the
20 underlying facts, how that leash, I guess, snapped back. And
21 the dog owner lost her eye. It's a pretty remarkable factual
22 basis.

23 MR. FERENCE: Well, the Third Circuit decision gives
24 a little bit of background on how Amazon's business operates
25 and how people come to be listed as sellers on Amazon. Given

1 your experience with these cases, I thought reading that
2 portion of the decision might be of interest to you.

3 THE COURT: Well, certainly. I've only read the
4 blurb, if you will, that we get automatically when the opinion
5 came down. Frankly, it's Hornbook law. They're in the chain
6 of sale.

7 MR. FERENCE: This is the first decision that has
8 found Amazon to be a seller for anything that has been sold by
9 a third party on the Amazon website.

10 THE COURT: Interesting.

11 MR. FERENCE: So that's one of the reasons why in
12 these cases we're naming the stores that are selling it
13 instead of Amazon. As previously, everybody -- the courts
14 that have considered it have found Amazon does not take
15 possession or title to the good and, thus, is not a seller and
16 does not have any liability.

17 THE COURT: But Amazon is making some money along the
18 way.

19 MR. FERENCE: Yes, they are.

20 THE COURT: Right. So it sounds to me like a seller.
21 Right?

22 MR. FERENCE: Sounds to us like a seller as well,
23 Your Honor.

24 THE COURT: Well, we'll be happy to take a copy, if
25 you have it. Because I think that my clerks might be

1 interested in reading a full opinion, if they haven't. And I
2 know our intern, Mr. Constantino, would be interested, too.

3 MR. FERENCE: I have two copies for you.

4 THE COURT: Thank you. We appreciate that. It saves
5 us some paper. Both of those are signed, Mr. Kravetz. So the
6 originals of the preliminary injunction orders, having been
7 signed, we're going to be providing them to Mr. Ference and
8 Mr. Malkin. And then we'll be entering our order on the
9 docket. Mr. Kravetz checked that I actually signed.

10 THE DEPUTY CLERK: It's only one line.

11 THE COURT: Is there anything else for the Court's
12 attention? Otherwise, we'll wish you a good weekend. And
13 enjoy the rest of this holiday weekend.

14 MR. FERENCE: Thank you very much, Your Honor. We
15 have nothing else at this time.

16 MR. MALKIN: Thank you, Your Honor.

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18 (Whereupon, the above-captioned matter was
19 concluded.)

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21 C E R T I F I C A T E

22 I, NOREEN A. RE, RMR, CRR, certify that the
23 foregoing is a correct transcript from the record of
24 proceedings in the above-entitled case.

25 s\ Noreen A. Re

NOREEN A. RE, RMR, CRR
Official Court Reporter

July 12, 2019

Date of Certification