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**

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

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

I. INTRODUCTION

Airigan is suing Defendants for trademark counterfeiting and infringement, false designation of origin, common law unfair competition, common law trademark infringement, and patent infringement. Defendants are knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling goods bearing counterfeits of Airigan's registered trademark within this district and throughout the United States by operating e-commerce stores established via the Internet marketplace website, Amazon.com ("Amazon"), under their seller identification names identified on Schedule "A" to the Complaint (the "Seller IDs"). It is

unlikely any Defendant will appear, and thus, the case will end with entry of a default judgment. *See Bose Corp. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-7467 (N.D. Ill. Feb. 19, 2020) (Dkt. No. 46) (Durkin, J.) ("Probably none of the Defendants will ever make an appearance in this case and the default judgment process will determine the case's outcome in its entirety."). Of the more than five-hundred (500) online counterfeiting cases with which the undersigned counsel is familiar, each one started with a temporary restraining order, then a preliminary injunction, and ended with a default judgment. (*Ference Dec.*,[1] ¶ 6) A copy of a transcript from the preliminary injunction hearing in a prior case brought by Airigan Solutions is attached to the *Ference Dec.* at Ex. 1.

On February 26, 2020, this Court entered a sealed Order ("TRO 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"). Additionally, the TRO Order set a hearing on Plaintiff's Application for March 4, 2020, at 11:30 a.m., and required a bond in the amount of $250,000.

On February 26, 2020, this Court also entered a sealed Scheduling Order of Court ("Scheduling Order") (Doc. No. 10), which, among other things, requires Plaintiff to provide notice of this action to all Defendants, including copies of all Orders and pleadings, "[o]n or before February 27, 2020, at 4:00 PM." Both the TRO Order and Scheduling Order also require any papers in opposition to be served by March 2, 2020, at Noon.

[1] *Ference Dec.* refers to the February 27, 2020, Declaration of Stanley D. Ference III submitted herewith.

In order for the asset restraint to be effective, Amazon needs to confirm the restraint prior to Defendants having notice of the lawsuit. The TRO Order was served on Amazon the same day it was entered. (*Malkin Dec*.,[2] ¶ 4) Amazon has advised they will be able to restrain Defendants' assets within five (5) business days, that is, no later than March 4, 2020, and provide the contact information used to provide alternative service by e-mail. (*Malkin Dec.*, ¶ 5-10) If Defendants have notice of the lawsuit prior to Amazon implementing the restraint, Defendants will likely transfer their funds outside the jurisdiction of Court. (*Id.*)

Given the time Amazon needs to restrain the Defendants' assets, Plaintiffs are now moving to extend the temporary restraining order, continue the hearing, modify the briefing schedule. This would be the first extension of the temporary restraining order. Plaintiff is also requesting a reduction in the bond amount.

II. ARGUMENT

It is appropriate to extend the temporary restraining order, continue the hearing, adjust the date for serving any papers in opposition, provide Plaintiff with additional time to provide notice of this action to Defendants given Amazon has not yet complied with the TRO Order. Good cause exists for the requested extension because, *inter alia*, should Plaintiff be forced to serve Defendants prior to attachment of Defendants' Financial Accounts, Defendants are likely to move such assets. *(Malkin Dec*., ¶¶ 5 - 8)

The TRO Order contemplates a sequencing of asset freeze, suspension of accounts, and finally service upon Defendants. Specifically, the TRO Order provides "the Court allows enough time for Plaintiff to serve the Financial Institutions and the Third Party Service Providers

[2] *Malkin Dec.* refers to the February 27, 2020, Declaration of Brian Samuel Malkin submitted herewith.

with this Order and for the Financial Institutions and/or the Third Party Service Providers to comply with this Order before requiring service on Defendants" since "[i]f Defendants are given notice of the Application, they are likely to secret, conceal, transfer or otherwise dispose of their ill-gotten proceeds from their sales of Counterfeit Products or other goods infringing the NEGG Marks and at least Claim 1 of the '211 patent." *TRO Order* (Doc. No. 11) at pages 4 - 5, ¶ 8. The TRO Order also notes "[i]t typically takes Financial Institutions a minimum of five (5) days to locate, attach and freeze Defendants' Assets … and/or Defendant's Financial Accounts." (*Id*.)

A. Good Cause Exists for Extending the Temporary Restraining Order

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

It is not atypical to extend a temporary restraining order in online counterfeiting cases like the present case. Indeed, in the three most recent online counterfeiting cases involving Amazon sellers brought in this Court the temporary restraining order was extended at least once to permit additional time for Amazon to restrain the defendants' assets before requiring Plaintiff to serve the defendants. *Doggie Dental, Inc. v. Ahui*, No. 19-cv-1627 (Hornack, C.J.) (filed Dec. 17, 2019; TRO extended twice); *Gorge Design Group, LLC v. Accessmall*, No. 19-cv-1454 (Stickman, J.) (filed Nov. 7, 2019; TRO extended once); and *Rapid Slicer, LLC v. Art-House,* 19-cv-411 (Horan, J.) (filed Apr. 11, 2019; TRO extended once).

Courts in other jurisdictions have also extended temporary restraining orders in online counterfeiting cases. For example, in *Talavera Hair Prods., Inc. v. Taizhou Yunsung Electrical Appliance Co., Ltd. a business entity and The Individuals, P'ships & Unicorporated Assns.*

Identified on Exhibit "1", No. 18-CV-823 (S.D. Cal.), the Court continued the hearing on the Preliminary Injunction for **two (2) weeks**, moved the time for Defendants to file papers in opposition, and extended the Temporary Restraining Order "until further Order of Court." In *Apple Corps Ltd. v. 3W Store*, No. 18-CV-60656 (S.D. Fla.), a Magistrate Judge held a hearing on the Preliminary Injunction and issued a report and recommendation. The Court issued an Order that the Temporary Restraining Order "is hereby extended and shall remain in effect until this Court rules on the Report and Recommendation issued by Magistrate Judge Patrick M. Hunt." It is not unusual in the Southern District of New York for such adjustments in briefing because of delays in Third Party Service Provider's responses. For example, in the case of *WowWee Group Limited, et. al. v. Meirly, et. al.*, Civil Case. No. 18-cv-706 (AJN) (S.D.N.Y), the original briefing schedule was modified based upon Plaintiff's representation that they could not serve the Defendants within the original TRO schedule; *see also Allstar Marketing Group, LLC v. 158, et. al.*, Civil Case No. 18-cv-4101-GHW (S.D.N.Y). Likewise, In *William Mark Corporation v 1&cc*, No. 18-CV-3889 (S.D.N.Y.) (Abrams, J.), a temporary restraining order was entered on May 2, 2018, and the Show Cause Hearing was scheduled for June 1, 2018. On May 14, 2018, the Temporary Restraining Order was extended until June 1, 2018.

Given that Amazon has not yet complied with the TRO Order, has not provided confirmation of the asset freeze, and has not provided the contact information to Plaintiff's counsel so that service may be accomplished on Defendants, good cause exists to extend the Temporary Restraining Order in this case. Likewise, the briefing schedule should be extended. Finally, the hearing scheduled for March 4, 2020, should be re-scheduled to a later date. Based upon past experience with Amazon's timing for compliance with restraint orders, it would be prudent to extend the dates by fourteen (14) days. (*Malkin Dec*., ¶ 12)

B. The Bond Should be Reduced from $250,000

The TRO Order required a bond in the amount of $250,000. This is the largest bond amount in an online counterfeiting case, of which Plaintiff's counsel is aware, by a factor of ten (10) and is fifty (50) times larger than bonds required in previous online counterfeiting cases in this District. Plaintiff respectfully requests that the bond amount be reduced to more accurately reflect any potential harm incurred by one of the **five** Defendants in the present case who is wrongfully enjoined.

Plaintiff respectfully submits that Plaintiff's provision of security in the amount of $5,000 is more than sufficient. This suggested bond amount is equal to the amount Plaintiff has posted in previous cases in this Court and is also the bond amount that has been required in other cases in this Court. *See Airigan Solutions, LLC v. Abagail,* No. 19-cv-503 (W.D. Pa.) (Fischer, J.) ($5,000 bond); *Airigan Solutions, LLC v. Babymove.,* No. 19-cv-166 (W.D. Pa.) (Fischer, J.) ($5,000 bond); *Airigan Solutions, LLC v. Artifacts_Selling,* No. 18-cv-1462 (W.D. Pa.) (Fischer, J.) ($5,000 bond); *Airigan Solutions, LLC v. Bufujiugan,* No. 18-cv-1330 (W.D. Pa.) (Fischer, J.) ($5,000 bond); *Doggie Dental, Inc. v. Ahui*, No. 19-cv-1627 (Hornack, C.J.) ($5,000 bond); *Gorge Design Group, LLC v.* Accessmall, No. 19-cv-1454 (Stickman, J.) ($5,000 bond); and *Rapid Slicer, LLC v. Art-House,* 19-cv-411 (Horan, J.) ($5,000 bond).

The suggested $5,000 amount is also similar to what other plaintiffs have posted before various courts. *See Showtech Merchandising, Inc. v. Various John Doe, et al,* 2:12-cv-1270 (W.D. Pa. Sept. 6, 2012); *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).

Recognizing the harm to defendants in online counterfeiting cases is small, several Courts have issued temporary restraining orders without requiring any bond or a nominal $1,000 bond. *Moncler S.p.A. v. A191427606*, No. 20-cv-564 (N.D. Ga.) (Brown, J.) (TRO entered Feb. 7, 2020; no bond, 301 defendants); *Skyrocket, LLC v. Comeyun*, No. 19-cv-11623 (S.D.N.Y.) (Gardephe, J.) (TRO entered Dec. 19, 2019; no bond required, 12 defendants); *Volvo Trademark Holding AB v. The Unincorporated Associations Identified in Schedule A*, No. 19-cv-974 (E.D. Va.) (O'Grady, J.) (TRO entered Aug. 9, 2019; no bond, 148 defendants); *Ontel Products Corp. v. Airbrushpainting Makeup Store a/k/a Airbrushespainting,* No. 17-cv-871-KBF, Dkt. 20 (S.D.N.Y. Feb. 6, 2017, no bond required); *Volkswagen Group of America, Inc. v. The Unincorporated Associations Identified in Schedule A*, No. 19-cv-1574 (E.D. Va.) (Trenga, J.) (TRO entered Dec. 20, 2019; $1,000 bond, 83 defendants); and *Off-White LLC v. 0225xiangchun*, No. 19-cv-11626 (S.D.N.Y.) (Failla, J.) (TRO entered Dec. 19, 2019; $1,000 bond, 67 defendants).

The largest bond required in an online counterfeiting case of which the undersigned is aware is $25,000, which is **ten** times less than the bond currently required in the present case, in the Southern District of New York. *Marcelo Burlon s.r.l v. Addidasstore,* No. 19-cv-11333 (S.D.N.Y.) (Broderick, J.) (TRO entered Jan. 7, 2020; $25,000 bond, 154 defendants). The majority of the Judges in the Southern District of New York require either no bonds, or bonds in the amount of $1,000, $5,000, or $10,000, regardless of the number of defendants (typically several hundred).

In both the Southern District of Florida and the Northern District of Illinois, Districts in which nearly one hundred (100) online counterfeiting cases are filed each year, the typical bond amount required – regardless of the number of defendants – is $10,000. *Chanel, Inc. v. 7creplicachanel.com*, No. 20-cv-60309 (S.D. Fla.) (Ruiz, J.) (TRO entered Feb. 19, 2020; $10,000 bond, 41 defendants); *Addidas AG v. Adidas2019sale.com*, No. 20-cv-60085 (S.D. Fla.) (TRO entered Jan. 28, 2020; $10,000 bond, 251 defendants); *Patagonia, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-08048 (N.D. Ill.) (Durkin, J.) (TRO entered Feb. 20, 2020; $10,000 bond, 4 defendants); *Amer Sports Canada, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"*, No. 19-cv-07943 (N.D. Ill.) (Pallmeyer, J.) (TRO entered Dec. 10, 2019; $10,000 bond, 416 defendants).

A $250,000 bond also requires a higher degree of underwriting. Plaintiff has been in contact with its broker, and the bonding company has escalated the underwriting of a $250,000 bond, requesting further information that Plaintiff which will take additional time to gather, which further supports extending the temporary restraining order. (*Ference Dec.,* ¶¶ 4-5) Balancing the hardships, things tip in favor of the Plaintiff. The harm to Defendants is minimal from a wrongful restraint. The restraint does not transfer funds over to Plaintiff, it merely directs Amazon and any other Financial Institutions to hold the Defendants' assets. Undersigned counsel has reviewed over five hundred (500) lawsuits brought by brand owners, without seeing a lawsuit in which a defendant has made a claim against a bond that has been posted. (*Id*.)

Plaintiff is a small company founded in 2015 and sells its exclusively U.S. manufactured, patented, and trademarked NEGG® brand egg peeler as its primary product. The company is owned by Margaret Tyler and her business partner, Sheila Torgan. *See* Declaration of Margaret B. Tyler [Doc. No. 6], ¶¶ 2, 7, 10, and 15. The Defendant counterfeiters are robbing Plaintiff's

small business of its profits, damaging the value of the business, diluting the brand, and eroding its relationships with its customers and re-sellers. *Id*. at ¶¶ 18, 25-26. This is an ongoing battle to keep the Plaintiff's small business from going under because of the sheer numbers of counterfeiters that could overwhelm the Plaintiff's legitimate sales. Thus, the Defendant counterfeiters in this lawsuit and other related lawsuits endanger the very life of Plaintiff's small business without this Court's intervention by court order. To require an extremely large bond rewards the Defendant counterfeiters and makes it difficult for small companies such as Plaintiff to police Defendants' unlawful activity.

Thus, Plaintiff requests that the bond amount be reduced, preferably to $5,000.

III. CONCLUSION

For the reasons set forth above, Plaintiff respectfully submits good cause exists for extending the temporary restraining order, continuing the hearing, modifying the schedule by an additional fourteen (14) days, and reducing the amount of the bond.

A Proposed Order granting this motion is submitted herewith.

Respectfully submitted,

Dated: February 27, 2020

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