

AQUAPAW LLC,

Plaintiff,

v.

ALLNICE, *et al.*,

Defendants.

Civil Action No. 20-1954

FILED UNDER SEAL

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

Plaintiff hereby moves this Court on an *ex parte* basis, for an order to extend the temporary restraining order, continue the show cause hearing, and modify the briefing schedule.

In support thereof, Plaintiff submits the following:

I. INTRODUCTION

Plaintiff is suing Defendants for patent infringement. Defendants are knowingly and intentionally promoting, advertising, distributing, offering for sale, and selling knock-off products within this district and throughout the United States by operating e-commerce stores established via the Internet marketplace website amazon.com, eBay.com, aliexpress.com, and wish.com, under the seller identification names identified on Schedule “A” to the Complaint (the “Seller IDs”).

On December 17, 2020, this Court entered a Sealed Order (“Order”) granting 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 the Defendants, Third Party Service Providers and Financial

Institutions. The Order was served on all the Third Party Service Providers and Financial Institutions on the same day it was entered except upon PayPal. (*Malkin Dec.*,¹ ¶ 4). The Order set a date of on or before December 23, 2020, for Defendants' papers in opposition to be served. Additionally, the Order set a Show Cause Hearing on Plaintiff's Application for December 30, 2020. The timing of the hearing and service of the Summons, Complaint, and the *Ex Parte* Application were predicated upon all of the Third Party Service Providers and Financial Institutions acting within five (5) days of receipt of the Order. As discussed below, not all of the Financial Institutions have complied with the Order. Thus, Plaintiff is requesting a modification of the briefing schedule and the Show Cause Hearing date.

II. STATEMENT OF FACTS

The Order provides that upon receipt of notice of this Order, each Third Party Service Provider and Financial Institution shall locate, attach and freeze Defendants' Assets. The Order provides that Financial Institution is to notify Plaintiff's counsel when the asset freeze is completed. Once the Asset Freeze is completed, Plaintiff's counsel is to serve the Defendants. (See *Malkin Dec.*, ¶¶ 7 -10).

In this way, the Plaintiff's are assured that Defendants are not able to avoid the Court's Order by receiving advanced notice of the suspension before the asset freeze. (*Malkin Dec.*, ¶ 8). Plaintiff's counsel has promptly served all of the third parties (*Malkin Dec.*, ¶ 4). As of today (December 28, 2020), a not all of the third parties have complied with the asset freeze order nor

¹ *Malkin Dec.* refers to the December 28, 2020 Declaration of Brian Samuel Malkin submitted herewith.

provided to Plaintiff's counsel the contact information needed to accomplish alternative service upon the Defendants. (*Malkin Dec.*, ¶¶ 5, 7 - 10).

III. ARGUMENT

It is appropriate to extend the Temporary Restraining Order, continue the Show Cause Hearing, adjust the date for serving any papers in opposition, and provide Plaintiff with additional time to serve Defendants given has not complied with the five (5) day time limit given in the Order. Good cause exists for doing so because, *inter alia*, should Plaintiff be forced to serve Defendants prior to attachment of Defendants' Financial Accounts, Defendants are likely to move such assets. (*Malkin Dec.*, ¶ 9).

Preserving the careful sequencing of asset freeze, suspension of accounts, and finally service is provided for in the Order. Specifically, as stated in the Order "the Court allows enough time for Plaintiff to serve the Financial Institutions and the Third Party Service Providers with this Order and for the Financial Institutions and/or the Third Party Service Providers to comply with the Paragraph I(A)(7) of this Order before requiring service on Defendants since if 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 the knock-offs or other goods infringing the Plaintiff's copyright registrations. See *id.*

Good Cause Exists for Extending the Temporary Restraining Order

Federal Rule of Civil Procedure 65(b) provides that a Temporary Restraining Order "order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a

longer extension.” Thus, the Temporary Restraining Order will expire unless extended by the Court.

It is not atypical to extend a Temporary Restraining Order in cases like the present case. Indeed, in *Doggie Dental v. Anwyll, et al*, 19-cv-682, this Court extended the Temporary Restraining Order to permit Plaintiff’s more time to serve the Defendants. (See ECF No. 24) (Order entered June 18, 2019).

In other similar cases, Courts have extended Temporary Restraining Orders. For example, in *Talavera Hair Prods., Inc. v. Taizhou Yunsung Electrical Appliance Co., Ltd. a business entity and The Individuals, P’ships & Unicorporated Assns. Identified on Exhibit “1”*, No. 18-CV-823 (S.D. Cal. May 22, 2018) (ECF No. 16) 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 the Court rules on Plaintiff’s Motion for Preliminary Injunction.” In *Apple Corps Ltd. v. 3W Store*, No. 18-CV-60656 (S.D. Fla. April 12, 2018) (ECF No. 28), 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 (S.D.N.Y Feb. 5, 2018) (ECF No. 4), 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 (S.D.N.Y. May 24, 2018) (ECF No. 7). Likewise,

In *William Mark Corporation v I&cc*, No. 18-CV-3889 (S.D.N.Y. May 23, 2018) (ECF No. 19), 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 all of the third parties not yet complied with the Order, have not provided confirmation of the asset freeze, and has not provided the contact information to Plaintiff's counsel so that service may be accomplished on Defendants, good cause exists to extend the Temporary Restraining Order in this case. Likewise, the briefing schedule which provides opposition papers be filed on or before December 23, 2020 should be extended. Finally, the show cause hearing scheduled for December 30, 2020 should be re-scheduled to a later date. Based upon past experience with third parties timing for compliance with restraint orders, it would be prudent to extend the dates by two (2) weeks, at least. (*Malkin Dec.*, ¶ 11).

IV. CONCLUSION

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

A Proposed Order granting this motion is submitted herewith.

Respectfully submitted,

Dated: December 28, 2020

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