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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IDEAVILLAGE PRODUCTS CORP.

*Plaintiff*

v.

29SHYANS2012, 29V-DAILYFU, 500-MILES,  
AIEASYGO, ALIDECAL, ALWAYSBEST\_UK,  
AMAZSHOPP, AMERICAMAZING,  
APPLEINTHEBOX, AZO-SHOP,  
BATTERYPOWERMALL, BC\_EMPORIUM, BE-  
MAKEUP-2016, BEST4DEALS2013,  
BETTYMARKET-TRADE2017,  
BUYHERE4DEALS, CAR-DVD-GPS, CAR-  
MULTIMEDIA-MANUFACTURER, COMMON-  
NEEDS\_989, CRANKLAHRAS, CUTE\*KIKI,  
DAILIDEAL86, DBONSALE,  
DELUXEBEAUTYDEALS, DIGIBABYBOY,  
DK888STORE2012, DVDGPS-  
MANUFACTURER, EHOME-MALLTRADE-  
ZONE, ELMAGICO2018,  
EMERALD.EMPIRE.SHOP, ENOUGHCLOUDS,  
EVERYSALE4U4, FASHIONSELLER9002,  
FASHIONTECHOD, IXCRACKED,  
FOR.BEAUTY, FOREVERDEALS106,

**CIVIL ACTION No.  
18-cv-6266 (AT)**

**AMENDED AFFIDAVIT OF  
BRIENNE SCULLY IN SUPPORT  
OF PLAINTIFF'S APPLICATION  
FOR AN ORDER TO SHOW  
CAUSE WHY DEFAULT  
JUDGMENT AND A PERMANENT  
INJUNCTION SHOULD NOT BE  
ENTERED AGAINST  
DEFAULTING DEFENDANTS**

FUUJ6695, GREATDEAL335, HAELO-0,  
HAPPYENDING1920, HARRYNILSON,  
HAZEINAS7, HEZHIHUA2017,  
HOMEFASHIONCHOICE, HONGXIANG6,  
HUIWAN2016, IMIKIMISHOP, INOLITE2016,  
JINGCHENGFACTORY, JINLE-ZHAN,  
JORDEN-SHOP2018, JUST-PERFECT-1840,  
KEVINFANG128, KINGMOST1115, KING-  
SELLING, KJ-STORE, KOLORRAINBOW,  
LEMON-BEST2012, LIAOJIANGANG145-2,  
LILLY\_BETTER, LIUYU\_1, LOYALTY2017,  
LUCKJEWELRYSTORE, LUCKY-WORLD15,  
MARKSHOPDEALS, MATAN3333, MEDLIFE-  
STORE, METIKTECHNOLOGY,  
MIXMIXMIXMIX, MYVENUSSHOP77,  
NALANTRADE, NINADAVIS98, ORIGHTHERE,  
PAPA-BABY, PRO-DEAL\_5680, PUPU888,  
ROY\_CAR, SAWA-STORE2018,  
SEYCHELLES\_US02, SHUANGFENGSHIYE,  
SMARTOPLED, SPEAR-8487, STORE-  
REPLICAS, SUPERSUPER7, TIKTAK.SHOP,  
TIMBE.OUTLET, TREEDEAL, UNISTORE2014,  
UWORLDBUYING, VIDALI\_6, VOGUETECH,  
WONDER4SHOPPING, WUQIN18,  
WUZHIANGL19950, WWHOP, XD-SMARTSHOP,  
YAJIE1956, YOUR\_BEST\_SELECTION,  
YSTORE4U, ZENGNIAN547-8, ZHANGQS-1 and  
ZXH1975,

*Defendants*

**AMENDED AFFIDAVIT OF BRIEANNE SCULLY**

I, Brieanne Scully, hereby affirm as follows:

1. I am an associate at Epstein Drangel LLP (“Epstein Drangel”), located at 60 East 42<sup>nd</sup> Street, Suite 2520, New York, New York 10165.
2. 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.
3. I have personal knowledge of every statement made in this Amended Affidavit and such statements are true and correct.
4. I represent Plaintiff Ideavillage Products Corp. (“Ideavillage” or “Plaintiff”) in the above-referenced action (“Action”) against the above-captioned defendants (hereinafter collectively referred to as “Defendants” or individually as “Defendant”).
5. I make and submit this Amended Affidavit in connection with Plaintiff’s application for an Order to Show Cause why a Default Judgment and Permanent Injunction should not be entered (hereinafter “Order to Show Cause”) against the following ninety-six (96) Defendants: 29shyans2012, 29v-dailyfu, 500-miles, aieasygo, alidecal, alwaysbest\_uk, Amazshopp, americamazing, appleinthebox, azo-shop, batterypowermall, bc\_emporium, be-makeup-2016, best4deals2013, buyhere4deals, car-multimedia-manufacturer, common-needs\_989, cranklahras, cute\*kiki, dailideal86, dbonsale, digibabyboy, dk888store2012, ehome-malltrade-zone, elmagico2018, emerald.empire.shop, everysale4u4, fashionseller9002, fashiontechod, for.beauty, foreverdeals106, fuuj6695, greatdeal335, haelo-0, happyending1920, harrynilson, hazeinas7, hezhihua2017, homefashionchoice, hongxiang6, huiwan2016, Imikimishop, inolite2016, jingchengfactory, jinle-zhan, jorden-shop2018, just-perfect-1840, kevinfang128, kingmost1115, king-selling, kj-store, kolorrainbow, lemon-best2012, liaojiangang145-2, lilly\_better, liuyu\_1,

loyalty2017, luckjewelrystore, lucky-world15, markshopdeals, matan3333, medlife-store, metiktechnology, mixmixmixmix, myvenusshop77, nalantrade, ninadavis98, orighthere, papababy, pro-deal\_5680, pupu888, roy\_car, sawa-store2018, shuangfengshiye, smartoped, spear-8487, store-replicas, supersuper7, tiktak.shop, timbe.outlet, treedeal, unistore2014, uworldbuying, vidali\_6, vogueotech, wonder4shopping, wuqin18, wuzhiang19950, wwshop, xd-smartshop, yajie1956, your\_best\_selection, ystore4u, zengnian547-8, zhangqs-1 and zxh1975 (collectively, hereinafter referred to as “Defaulting Defendants”).

6. Attached hereto as **Exhibit A** is a true and correct copy of the Certificate of Service regarding service of the Summons and Complaint on Defendants, including Defaulting Defendants.

7. Attached hereto as **Exhibit B** are true and correct copies of the registered email delivery and messaging receipts of service of the Summons and Complaint on Defendants, including Defaulting Defendants.

8. Attached hereto as **Exhibit C** is a true and correct copy of the Certificate of Service regarding service of the Preliminary Injunction Order (“PI Order”) on Defendants, including Defaulting Defendants.

9. Attached hereto as **Exhibit D** are true and correct copies of the registered email delivery and messaging receipts of service of the PI Order on Defendants, including Defaulting Defendants.

10. Attached hereto as **Exhibit E** is a [Proposed] Order to Show Cause Why a Default Judgment and Permanent Injunction Should Not Issue Against Defaulting Defendants.

11. Attached hereto as **Exhibit F** is a true and correct copy of the Certificate of Default from the Clerk of the Court.

12. Attached hereto as **Exhibit G** is a true and correct chart detailing each and every Defaulting Defendants’ 1) number of sales of Counterfeit Products on eBay as identified in eBay’s

discovery responses and 2) a brief discussion of Defaulting Defendants' wrongful use of the Touch Marks and Touch Works.

13. Attached hereto as **Exhibit H** is a true and correct copy of the Complaint.

**INTRODUCTION AND BACKGROUND**<sup>1</sup>

14. Without Plaintiff's authorization, Defaulting Defendants were offering for sale and/or selling products bearing and/or using the Touch Marks (as defined *infra*) and/or marks that are confusingly similar to, identical to and constitute a counterfeiting and/or infringement of the Touch Marks and/or displaying and/or incorporating one or more of the Touch Works (as defined *infra*) and/or works that are substantially similar to, identical to and constitute infringement of one or more of the Touch Works (referred to herein as "Counterfeit Products" or "Infringing Products") to consumers located in the U.S., including to consumers in New York, by means of their accounts held by or associated with Defaulting Defendants, their respective officers, employees, agents, servants and all other persons in active concert with any of them ("User Accounts") or User Accounts through which Defaulting Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them manufacture, import, export, advertise, market, promote, distribute, offer for sale, sell and/or otherwise deal in products, including Counterfeit 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 including, without limitation, those owned and operated, directly or indirectly, by eBay (as defined *infra*) and the Financial Institutions (as defined *infra*) ("Merchant Storefronts") on eBay.com.

15. In blatant disregard of the procedures of this Court, Defaulting Defendants knowingly

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<sup>1</sup> Where a defined term is referenced herein and not defined herein, the defined term should be understood as it is defined in the Complaint or Application.

and willfully failed to answer or otherwise move in response to the Complaint, despite valid and effective service of process. Defaulting Defendants' default has deprived Plaintiff of the ability to prove a specific amount of actual damages. Accordingly, Plaintiff relies on the statutory damages provisions contained in the Lanham Act, including the provisions for a heightened measure of statutory damages for willful infringement.

16. Plaintiff respectfully submits that entry of default judgment against Defaulting Defendants is appropriate and seeks the following relief against Defaulting Defendants: 1) the entry of a final judgment and permanent injunction by default in order to prevent Defaulting Defendants from infringing Plaintiff's intellectual property rights in the future; 2) individual statutory damages awards pursuant to 15 U.S.C. § 1117(c), plus post-judgment interest calculated pursuant to the statutory rate, as follows:

- a. an award of \$50,000.00 in statutory damages against the following sixty-two (62) Defaulting Defendants, totaling \$3,100,000.00: 500-miles, alwaysbest\_uk, amazshopp, americamazing, azo-shop, batterypowermall, bc\_emporium, common-needs\_989, cranklahras, cute\*kiki, dbonsale, elmagico2018, everysale4u4, for.beauty, foreverdeals106, greatdeal335, haelo-0, harrynilson, hazeinas7, hezhihua2017, homefashionchoice, imikimishop, inolite2016, jingchengfactory, jinle-zhan, jorden-shop2018, just-perfect-1840, kingmost1115, kj-store, kolorrainbow, liaojiangang145-2, liuyu\_1, loyalty2017, markshopdeals, matan3333, medlife-store, metiktechnology, mixmixmixmix, myvenusshop77, nalantrade, ninadavis98, pro-deal\_5680, pupu888, roy\_car, sawa-store2018, spear-8487, store-replicas, supersuper7, tiktak.shop, timbe.outlet, treedeal, unistore2014, vidali\_6, vogueotech, wonder4shopping, wuqin18, wuzhiang19950, yajjie1956, ystore4u, zengnian547-8, zhangqs-1 and zxh1975;

- b. an award of \$75,000.00 in statutory damages against the following seventeen (17) Defaulting Defendants, totaling \$1,275,000.00: 29shyans2012, aieasygo, alidecal, best4deals2013, car-multimedia-manufacturer, dailideal86, digibabyboy, dk888store2012, ehome-malltrade-zone, emerald.empire.shop, hongxiang6, huiwan2016, kevinfang128, lilly\_better, luckjewelrystore, papa-baby and shuangfengshiye;
  - c. an award of \$150,000.00 in statutory damages against the following seven (7) Defaulting Defendants, totaling \$1,050,000.00: appleinthebox, fashiontechod, fuuj6695, happyending1920, king-selling, uworldbuying and xd-smartshop;
  - d. an award of \$300,000.00 in statutory damages against the following six (6) Defaulting Defendants, totaling \$1,800,000.00: 29v-dailyfu, be-makeup-2016, buyhere4deals, fashionseller9002, lucky-world15 and smartopled;
  - e. an award of \$500,000.00 in statutory damages against the following two (2) Defaulting Defendants, totaling \$1,000,000.00: lemon-best2012 and wwshop;
  - f. an award of \$750,000.00 in statutory damages against the following one (1) Defaulting Defendant, totaling \$750,000.00: your\_best\_selection;
  - g. an award of \$1,000,000.00 in statutory damages against the following one (1) Defaulting Defendant, totaling \$1,000,000.00: orighthere;
- 3) a post-judgment asset restraining order and 4) an order authorizing the release and transfer of Defaulting Defendants' Frozen Assets (as defined *infra*) to satisfy the damages awarded to Plaintiff.<sup>2</sup>

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<sup>2</sup> Through this Order to Show Cause, in addition to permanent injunctive relief, Plaintiff only seeks damages for its First and Second Causes of Action (Trademark Counterfeiting and Infringement), however, does not waive its Fourth Cause of Action (Copyright Infringement). Plaintiff does not seek monetary relief in connection with the remaining causes of action plead in the Complaint.

**I. PROCEDURAL HISTORY**

17. On July 11, 2018, Plaintiff filed this Action against Defendants, including Defaulting Defendants, for trademark infringement and counterfeiting of Plaintiff's federally registered trademarks, copyright infringement of Plaintiff's federally registered copyrights, false designation of origin and unfair competition, and related state and common law claims and moved *ex parte* against Defendants, including Defaulting Defendants, for: 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; 4) an order authorizing alternative service and 5) an order authorizing expedited discovery (the "Application"). *See* Dkts. 7-17.

18. On July 11, 2018, the Court entered an Order granting Plaintiff's Application (the "TRO"). *See* Dkt. 19.

19. The TRO required Defendants to attend an order to show cause hearing on July 25, 2018 to show cause why a preliminary injunction should not issue ("Show Cause Hearing").

20. The TRO also specifically ordered that service shall be made on Defendants and deemed effective as to all Defendants by the following means: 1) delivery of: (i) PDF copies of the TRO together with the Summons and Complaint, or (ii) a link to a secure website (including Dropbox.com, NutStore.com, a large mail link created through RPost.com or via website publication through a specific page dedicated to this Action accessible through ipcounselors.com) where each Defendant will be able to download PDF copies of the TRO together with the Summons and Complaint, and all papers filed in support of Plaintiff's Application seeking the TRO to Defendants' e-mail addresses to be determined after having been identified by eBay pursuant to Paragraph V(C) of the TRO. *See* Dkt. 19.

21. Accordingly, on July 17, 2018, pursuant to the TRO, Plaintiff served each and every Defendant with PDF copies of the TRO together with the Summons and the Complaint and all



papers filed in support of Plaintiff's Application seeking the TRO, and provided a link to a secure website where each Defendant would be able to download PDF copies of the TRO together with the Summons and Complaint, and all papers filed in Support of Plaintiff's Application seeking the TRO, by email using RPost's registered email system. *See* Dkt. 20.

22. Thus, Defendants' deadline to Answer or move otherwise was no later than August 7, 2018. *See* Dkts. 20 and 25.

23. Pursuant to the TRO, on July 25, 2018, the Court held a Show Cause Hearing, at which no Defendants appeared.

24. On July 30, 2018, the Court entered a Preliminary Injunction Order ("PI Order") against all Defendants mirroring the terms of the TRO and extending through the pendency of the Action. *See* Dkt. 6.

25. On August 6, 2018, Plaintiff served Defendants with the PI Order in accordance with its terms. *See* Dkt. 27.

26. At the Show Cause Hearing, the Court set a deadline of September 24, 2018 for Plaintiff to move for default judgment against all Defendants who have not yet appeared.

27. On September 11, 2018, Plaintiff filed a Request for Entry of Default. *See* Dkt. 24.

28. On September 12, 2018, the Clerk of the Court entered a Certificate of Default as to the Defendants listed in Plaintiff's Request for Entry of Default, including the Defaulting Defendants. *See* Dkt. 25 and Ex. F.

29. As of the date of this Amended Affidavit, Defaulting Defendants have not filed an answer with the Court, otherwise responded to the Complaint or formally appeared in this Action.

## II. STATEMENT OF FACTS

### A. Plaintiff and Its Well-Known Touch Products

30. Plaintiff is a leading developer, producer, marketer, and distributor of quality, innovative consumer products. Plaintiff promotes and sells its products through national direct response television advertising commonly called “As Seen On TV” (“ASOTV”). Plaintiff also promotes and sells its ASOTV products at the retail level at well-known mass retail outlets, including, without limitation: Wal-Mart, Target Stores, Bed Bath & Beyond, Toys R Us, Rite-Aid, CVS and Walgreens; through catalog companies; online, through its own website and its retail customers’ websites; as well as through a network of international distributors, among other channels of trade. *See* Complaint, ¶ 6.

31. Plaintiff is among the most well-known, well-respected sources of many of the most popular and most successful ASOTV products sold in the U.S. *See id.*, ¶ 7.

32. One of Plaintiff’s most popular and successful product brands is a line of personal hair removal tools, marketed and sold under Ideavillage’s distinct Touch brand, namely, FINISHING TOUCH, MICROTOUCH, FINISHING TOUCH FLAWLESS, YES! BY FINISHING TOUCH and MICROTOUCH TOUGH BLADE, among others (“Touch Products”). *See id.*, ¶ 8.

33. The Touch Products have achieved great success since their initial introduction. *See id.*, ¶ 9.

34. While Plaintiff has gained significant common law trademark and other rights in the Touch Products through its use, advertising and promotion of the same, Plaintiff has also sought to protect its valuable rights by filing for and obtaining federal trademark registrations. *See id.*, ¶ 10.

35. For example, Plaintiff is the owner of U.S. Trademark Registration No. 4,422,095 for the wordmark “FINISHING TOUCH” for goods in Class 8, U.S. Trademark Reg. No. 4,693,272

for the wordmark “YES! BY FINISHING TOUCH” for goods in Class 8, U.S. Trademark Registration No. 5,318,698 for the wordmark “FLAWLESS” for goods in Class 8, U.S. Trademark Registration No. 5,391,994 for the wordmark “FLAWLESS” for goods in Class 8, U.S. Trademark Registration No. 5,325,690 for the wordmark “FINISHING TOUCH FLAWLESS” for goods in Class 8, U.S. Trademark Registration No. 2,884,308 for the wordmark “MICROTOUCH” for goods in Class 8, U.S. Trademark Registration No. 4,183,150 for the wordmark “MICROTOUCH MAX” for goods in Class 8, U.S. Trademark Registration No. 4,937,115 for the wordmark “MICROTOUCH ONE” for goods in Class 8, U.S. Trademark Registration No. 4,582,646 for the wordmark “MICROTOUCH SWITCHBLADE” for goods in Class 8 and U.S. Trademark Registration No. 4,749,480 for the wordmark “TOUGHBLADE” for goods in Class 8 (hereinafter collectively referred to as the “Touch Marks”). *See id.*, ¶ 11.

36. Also, Plaintiff has protected its valuable rights by filing and obtaining U.S. copyright registrations in and relating to the Touch Products. For example, Plaintiff is the owner of U.S. Copyright Reg. PA 2-055-361, covering the Finishing Touch Flawless Commercial, U.S. Copyright Reg. VA 2-082-167, covering the Finishing Touch Flawless Website, U.S. Copyright Reg. VA 1-898-348, covering the Yes! by Finishing Touch Website, U.S. Copyright Reg. VA 1-892-726, covering the Microtouch One Packaging and Instructions, U.S. Copyright Reg. VA 2-000-168, covering the MicroTouch One Website, U.S. Copyright Reg. VA 2-000-181, covering the MicroTouch One Packaging Artwork, U.S. Copyright VAu 1-142-294, Microtouch Switchblade Packaging and Instructions and U.S. Copyright Reg. VA 1-945-485, covering the MicroTouch Tough Blade Packaging (collectively, the “Touch Works”). *See id.*, ¶ 14.

37. The success of the Touch Products is due in part to Plaintiff’s marketing and promotional efforts. These efforts include advertising and promotion through television, Plaintiff’s Websites, retailer websites and other internet-based advertising, print, participation in

trade shows, among other efforts domestically and abroad. *See id.*, ¶ 18.

38. Plaintiff's success is also due to its use of the highest quality materials and processes in making the Touch Products. *See id.*, ¶ 19.

39. Additionally, Plaintiff owes a substantial amount of the success of the Touch Products to its consumers, and word of mouth buzz that its consumers have generated. *See id.*, ¶ 20.

40. As a result of Plaintiff's efforts, the quality of Plaintiff's products, and the word-of-mouth buzz generated by its consumers, the Touch Marks, Touch Works and Touch Products have become prominently placed in the minds of the public. Members of the public have become familiar with Plaintiff's Touch Marks, Touch Works and Touch Products, and have come to associate them exclusively with Plaintiff. Plaintiff has acquired a valuable reputation and goodwill among the public as a result of such association. *See id.*, ¶ 21.

**B. eBay and Defaulting Defendants' User Accounts**

41. eBay.com is an online marketplace and e-commerce platform that allows manufacturers and other third-party merchants, like Defendants, to advertise, distribute, offer for sale and/or sell in what it characterizes as either auction-style or fixed-price formats and ship their retail products originating from China, among other locations, directly to consumers worldwide and specifically those residing in the U.S., including New York (hereinafter, "eBay"). *See id.*, ¶ 23.

42. As recently addressed in news reports, and as reflected in the federal lawsuits filed against third-party merchants offering for sale and selling infringing and/or counterfeit products on eBay, an astronomical number of counterfeit and infringing products are offered for sale and sold on eBay at a rampant rate. *See id.*, ¶ 26.

43. Despite the fact that the eBay has a system in place to report intellectual property infringement, sellers of counterfeit and/or infringing products frequently re-post their listings for

such products on their respective Merchant Storefronts on eBay once taken down or open a new User Account and/or Merchant Storefront on eBay under different seller names and post the same and/or similar listings for counterfeit and/or infringing products. *See* Declaration of Spencer Wolfgang (Dkt. 16) (“Wolfgang Dec.”), ¶ 11.

44. Sellers operating Merchant Storefronts on eBay, like Defaulting Defendants, often use evasive tactics, such as aliases, false addresses and other incomplete identification information, to conceal their identities and avoid detection. Since eBay prohibits sellers from displaying their contact information, including, but not limited to, emails and phone numbers, sellers, like Defendants, use eBay as a means for selling infringing and/or counterfeit products with almost total anonymity. *See id.*, ¶¶ 11-13.

**C. Defaulting Defendants’ Unlawful and Infringing Conduct**

45. Plaintiff retained investigators, New Alchemy Limited (“NAL”), to investigate and research manufacturers, wholesalers, retailers and/or other merchants offering for sale and/or selling Counterfeit Products on eBay. *See* Complaint, ¶ 30; *See also* Declaration of Jessica Arnaiz (Docket Entry No. 15) (“Arnaiz Dec.”), ¶ 4.

46. NAL identified Defaulting Defendants during its investigation as offering for sale and/or selling Counterfeit Products, specified a shipping address located in in New York (the “New York Address”) and verified that each Defaulting Defendant provides shipping to the New York Address. *See* Complaint, ¶ 34; Arnaiz Dec., ¶ 6-8.

47. NAL confirmed that each Defaulting Defendant was and/or is still currently offering for sale and/or selling Counterfeit Products through their respective Merchant Storefronts and User Accounts and that each Defendant provides shipping and/or has actually shipped Counterfeit Products to the U.S., including to customers located in New York. *See id.*, ¶ 35; Arnaiz Dec., ¶ 10.

48. Through visual inspection of Defaulting Defendants' listings for Counterfeit Products ("Infringing Listings"), Plaintiff or Plaintiff's counsel also confirmed that the products that each Defaulting Defendant offered for sale using virtually identical copies of the Touch Marks and/or Touch Works were, in fact, Counterfeit Products, and therefore each and every Defaulting Defendant has infringed the Touch Works and/or one or more of the Touch Marks. *See id.*, ¶ 31; Wolfgang Dec., ¶ 16.

49. Neither Plaintiff or its authorized agents have ever authorized or consented to Defaulting Defendants' use of the Touch Marks and/or Touch Works, or to Defaulting Defendants' offering for sale or sale of the Touch Products. *See* Complaint, ¶ 32; Declaration of LoriAnn Lombardo (Dkt. 14) ("Lombardo Dec."), ¶ 23.

**D. Defaulting Defendants' Defaults and Plaintiff's Lack of Discovery**

50. Although Plaintiff properly effected service of the Summons and Complaint and all other documents supporting its Application on Defaulting Defendants in accordance with the TRO, Defaulting Defendants' failure to answer the Complaint or otherwise appear has deprived Plaintiff of the ability to confirm whether or not Defaulting Defendants have ceased manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products in accordance with the TRO and PI Order. *See* Dkt. 25.

51. Due to Defaulting Defendants' defaults, Plaintiff was unable to engage in any discovery with Defaulting Defendants regarding the scope of their sales, profits and costs, among other discoverable issues.

52. To date, the only discovery Plaintiff was able to obtain regarding Defaulting Defendants' sales, profits and costs was produced by eBay. Based on the discovery produced by eBay, Defaulting Defendants collectively sold a minimum of 23,887 Counterfeit Products on eBay alone. *See* Ex. G.

53. eBay's discovery production relates exclusively to Defaulting Defendants' User Accounts and Merchant Storefronts on eBay. In other words, the discovery produced by eBay is far from comprehensive insofar as it does not cover Defaulting Defendants' offering for sale and/or sale of Counterfeit Products on other e-commerce platforms in addition to eBay. *See id.*

54. In Plaintiff's counsel's experience, it is usual and customary for counterfeiters, such as Defaulting Defendants, to sell across multiple e-commerce platforms. *See Wolfgang Dec.*, ¶ 11.

55. It is thus probable that Defaulting Defendants are utilizing other e-commerce platforms to circumvent the TRO and PI Order in order to continue to engage in counterfeiting and infringing activities, specifically the sale and/or offering for sale of Counterfeit Products.

56. Consequently, it is extremely likely that the number of sales of Counterfeit Products made by Defaulting Defendants greatly exceeds the numbers identified in eBay's discovery responses.

### **III. THIS COURT HAS PERSONAL JURISDICTION OVER DEFAULTING DEFENDANTS**

57. For the reasons presented in Plaintiff's Application Section III(A)(1) (*see* Dkt. 13) and accepted by this Court in the entrance of the TRO and PI Order (*see* Dkts.6 and 19), this Court has personal jurisdiction under § 302(a)(1) of the N.Y. C.P.L.R., as Defaulting Defendants have transacted business within the State of New York and the claims in this Action arose from such business transactions. *See Arnaiz Dec.*, ¶¶ 4-11 and *Lombardo Dec.*, ¶ 21; *see also Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. 2013) (citing *Solé Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006)).

58. Defaulting Defendants' sophisticated commercial operations, including, but not limited to, the offering for sale and/or selling of Counterfeit Products through their highly interactive User Accounts on eBay, which generate millions of dollars in illicit revenues from consumers all over

the world, and NAL's completion of order forms and/or checkout pages along with Defaulting Defendants' own admissions that they do in fact ship Counterfeit Products to the New York Address, unequivocally establishes that Defaulting Defendants conduct business in this judicial district and the claims in this suit arise from Defaulting Defendants' business dealings and transactions with consumers in New York. *See* Arnaiz Dec., ¶¶ 4-11.

59. Additionally, as a direct result of Defaulting Defendants' infringing and counterfeiting actions, Plaintiff suffered harm in New York through lost sales in New York and lost New York consumers. *See* Arnaiz Dec., ¶¶ 4-11 and Lombardo Dec., ¶ 27.

60. Further, as detailed in Plaintiff's Application Section III(A)(2), this Court also has personal jurisdiction under § 302(a)(3) of the N.Y.C.P.L.R., as Defaulting Defendants have committed a tortious act outside of New York that caused injury in New York that the Defaulting Defendants expected or should have reasonably expected to have consequences and derived substantial revenue from international commerce. *See* Arnaiz Dec., ¶¶ 4-11 and Lombardo Dec., ¶ 21; *see also Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458 (S.D.N.Y. 2008).

61. Plaintiff advertises, markets, promotes, distributes, displays, offers for sale and sells the Touch Products in New York. *See* Lombardo Dec., ¶ 13. Defaulting Defendants' commercial operations through eBay resulted in consumers through the U.S., and specifically in New York, purchasing Counterfeit Products. *See* Arnaiz Dec., ¶ 4-11; Ex. A and Wolfgang Dec., ¶ 21, Ex. B.

62. Given that NAL completed order forms or checkout pages for Counterfeit Products that provide the New York Address as the shipping address, and that counsel for Plaintiff purchased Counterfeit Products from a sampling of Defaulting Defendants, Defaulting Defendants should have expected their infringing actions to have consequences in New York. *See* Arnaiz Dec., ¶¶ 4-11, Ex. A and Wolfgang Dec., ¶ 21, Ex. B.

63. Moreover, the assertion of personal jurisdiction over Defaulting Defendants comports



with the Due Process Clause of the U.S. Constitution, given that Defaulting Defendants have intentionally directed activity towards the New York market, thereby purposefully availing themselves of “the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (U.S. 1985); *see* Arnaiz Dec., ¶¶ 4-18 Ex. A.

**IV. PLAINTIFF IS ENTITLED TO A FINAL JUDGMENT BY DEFAULT AGAINST DEFAULTING DEFENDANTS**

64. Federal Rule of Civil Procedure 55(b) provides for a court-ordered default judgment following the entry of default by the court clerk under Rule 55(a).

65. Plaintiff has complied with Federal Rule of Civil Procedure 55(a). *See* Dkt. 25 and Ex. F.

66. Defaulting Defendants, in defaulting, inherently conceded the well-pleaded allegations of Plaintiff’s Complaint, since, upon the entry of default, the factual allegations of the complaint, except those relating to the amount of damages, are taken as true. *See, e.g., Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 69 (2d Cir. 1971); *see also Greyhound Exhibit Group, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992) *cert. denied*, 113 S.Ct. 1049 (1993).

67. Ultimately, however, the entry of a default judgment is entrusted to the sound discretion of the district court. *See Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir. 1993).

68. Therefore, Plaintiff respectfully requests that the Court enter default judgment against each and every Defaulting Defendant.

**V. PLAINTIFF IS ENTITLED TO A PERMANENT INJUNCTION**

69. A district court has authority under both the Lanham Act and the Copyright Act to grant injunctive relief to prevent further violations of Plaintiff’s trademark and copyrights. *See* 15 U.S.C. § 1116; 17 U.S.C. § 502.

70. A district court has the authority to grant a permanent injunction on a motion for default judgment. *See Harris v. Fairweather*, 11-cv-2152 (PKC) (AJP), 2012 U.S. Dist. LEXIS 128409, 38-39 (S.D.N.Y. Sep. 10, 2012).

71. A permanent injunction may be granted where the plaintiff demonstrates that it has succeeded on the merits that: “(1) plaintiff is likely to suffer irreparable injury in the absence of an injunction; (2) remedies at law, such as monetary damages, are inadequate to compensate the plaintiff for that injury; (3) the balance of hardships tips in plaintiff’s favor; and (4) the public interest would not be disserved by the issuance of a[n]. . . injunction.” *Laboratorios Rivas, SRL v. Ugly & Beauty, Inc.*, 11-cv-5980 (RA) (JLC), 2013 U.S. Dist. LEXIS 161188, \*39 (S.D.N.Y. Nov. 12, 2013) citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 390 (2006) (applying *eBay* in context of trademark and trade dress infringement); *see also Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (extending the *eBay* standard to copyright injunctions).

72. In intellectual property actions, permanent injunctions are normally granted when there is “a threat of continuing violations.” *Steele v. Bell*, 11-cv-9343 (RA) (RLE), 2014 U.S. Dist. LEXIS 44976 (S.D.N.Y. Mar. 3, 2014).

73. Though eBay has complied with the TRO and PI Order insofar as freezing the identified User Accounts and Merchant Storefronts owned by Defaulting Defendants, which has prevented further sales of Counterfeit Products on eBay during the pendency of this Action, there remains a serious possibility that Defaulting Defendants will continue to infringe Plaintiff’s intellectual property rights should such restraints be lifted. *See Allee v. Medrano*, 416 U.S. 802, 810-11 (1974) (“It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants would be free to return to (their) old ways.” (quotation marks omitted)).

74. Plaintiff therefore respectfully requests that the Court permanently enjoin Defaulting

Defendants from any further counterfeiting and/or infringement of Plaintiff's Touch Marks and Touch Works.

**A. Plaintiff Has Succeeded on the Merits of its Claims**

75. Plaintiff has both alleged in its Complaint and presented specific evidence that Defaulting Defendants have infringed at least one of the Touch Marks and one or more of the Touch Works by, *inter alia*, willfully and knowingly manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products, thereby causing irreparable injury to Plaintiff. *See* Complaint, ¶¶ 36-38, Ex. C to the Complaint.

76. Thus, since Defaulting Defendants' default constitutes an admission of liability, Plaintiff has successfully established its claims for trademark infringement and counterfeiting and copyright infringement. *See, e.g., Guishan, Inc. v. Faith Ice, Inc.*, 08-cv-2407 (DLI) (RML), 2010 U.S. Dist. LEXIS 26830, \*3-4 (E.D.N.Y. Mar. 22, 2010).

**1. *Plaintiff has Succeeded on its Claims for Trademark Counterfeiting and Trademark Infringement***

77. In order to prevail on a trademark infringement claim, "a plaintiff must establish that (1) it has a valid mark that is entitled to protection under the Lanham Act; and that (2) the defendant used the mark, (3) in commerce, (4) in connection with the sale or advertising of goods or services, (5) without the plaintiff's consent" and (6) "that defendant's use of the mark is likely to cause confusion as to the affiliation, connection, or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of the defendant's goods, services, or commercial activities by plaintiff." *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F3d 400, 406-407 (2d Cir 2005) (internal quotations omitted).

*a. Plaintiff's Touch Marks are Valid*

78. The Touch Marks are currently in use in commerce in connection with the Touch Products. *See* Complaint, ¶ 12, Ex. A.

79. The U.S. Trademark Registration certificates for the Touch Marks provides *prima facie* evidence of both the validity of the Touch Marks, as well as Plaintiff's ownership of the same. *See* 15 U.S.C. § 1057(b); Complaint, ¶ 11, Ex. A.

80. As such, there is no dispute that Plaintiff has valid and exclusive rights in and to the Touch Marks.

*b. Defaulting Defendants Used the Touch Marks in Commerce in Connection with the Sale or Advertising of Counterfeit Products without Plaintiff's Authorization*

81. Each and every Defaulting Defendant used at least one of the Touch Marks on or in connection with the offering for sale and/or sale of Counterfeit Products without authorization, and therefore it is indisputable that Defaulting Defendants have used the Touch Marks in commerce in connection with the sale or advertising of Counterfeit Products. *See* Complaint, ¶ 48, Ex. C to the Complaint.

*c. Defaulting Defendants' Unauthorized Use of the Touch Marks is Likely to Cause Consumer Confusion*

82. In determining whether a likelihood of confusion exists, courts in the Second Circuit generally conduct an analysis of the factors set forth in *Polaroid Corp. v. Polarad Elecs. Corp.*: 1) the strength of the plaintiff's mark; 2) the similarity between the two marks; 3) the competitive proximity of the parties' products in the marketplace; 4) the likelihood that the senior user will bridge the gap, if any, between the products; 5) evidence of actual confusion; 6) the defendant's bad faith; 7) the quality of the defendant's product and 8) the sophistication of the relevant consumer group. 287 F.2d 492, 495 (2d Cir. 1961).

83. Yet, “where counterfeit marks are involved, it is not necessary to conduct the step-by-step examination of each *Polaroid* factor because counterfeit marks are inherently confusing.” *Fendi Adele S.R.L. v. Filene's Basement, Inc.*, 696 F. Supp. 2d 368, 383 (S.D.N.Y. 2010) (internal citations omitted).

84. Instead, “[t]he court need only determine the more fundamental question of whether there are items to be confused in the first place – that is, whether the items at issue...are, in fact, counterfeit and whether [d]efendants sold those items, or offered those items for sale.” *Id.* (internal citations omitted).

85. “Sellers bear strict liability for violations of the Lanham Act.” *Id.* (internal citations omitted).

86. Through visual inspection of Defaulting Defendants’ Infringing Listings, Plaintiff confirmed that each and every Defaulting Defendant was using a counterfeit copy of one or more of the Touch Marks on or in connection with the offering for sale and/or sale of Counterfeit Products. Hence, Defaulting Defendants’ use of counterfeit copies of Plaintiff’s Touch Marks is irrefutably likely to cause consumer confusion. *See* Arnaiz Dec., ¶ 7; Lombardo Dec., ¶ 22 and Wolfgang Dec., ¶ 16.

87. Regardless, even if a *Polaroid* analysis were necessary, a straightforward application of the test clearly demonstrates that a likelihood of confusion exists in this Action, and therefore, there is no dispute that Defaulting Defendants have infringed the Touch Marks. *See* Application, III(B)(2)(a)-(g).

## **2. Plaintiff has Succeeded on its Claim for Copyright Infringement**

88. Under 17 U.S.C. § 501(a), in order to show likelihood of success on the merits for a copyright infringement claim, “(1) ownership of a valid copyright, and (2) copying of constituent

elements of the work that are original.” *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011) (quoting *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 361 (1991)).

*a. Plaintiff Owns Valid Copyrights in the Touch Works*

89. With respect to ownership, “[a] certificate of registration from the United States Register of Copyrights constitutes prima facie evidence of the valid ownership of a copyright.” *Mint, Inc. v. Iddi Amad*, 10-cv-9395 (SAS), 2011 U.S. Dist. LEXIS 49813, at \*6 (S.D.N.Y. May 9, 2011); *see also* 17 U.S.C. § 410(c).

90. Therefore, Plaintiff’s certificates of registrations for the Touch Works are *prima facie* evidence of the validity of the copyrights contained therein. *See* Complaint, ¶ 14, Ex. B to the Complaint.

*b. Defaulting Defendants Infringed One or More of Plaintiff’s Touch Works*

91. To establish infringement, “the copyright owner must demonstrate that (1) the defendant has actually copied the plaintiff’s work; and (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectable elements of plaintiff’s [work].” *Yurman Design, Inc. v. PAJ Inc.*, 262 F.3d 101, 110 (2d Cir. 2001).

92. “Actual copying must be shown, either by direct or indirect evidence.” *P&G v. Colgate-Palmolive Co.*, 199 F.3d 74, 77 (2d Cir. 1999) (internal citations omitted).

93. “Indirect copying may be shown by demonstrating that the defendant had access to the copyrighted work and that the similarities between the works are probative of copying.” *P&G v. Colgate-Palmolive Co.*, 199 F.3d 74, 77 (2d Cir. 1999) (internal citations omitted).

94. “Generally, an allegedly infringing work is considered substantially similar to a copyrighted work if the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” *Mint, Inc.*, 2011 U.S. Dist. LEXIS 49813, at \*7 n.16 (quoting *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001)).

95. A side-by-side comparison of Plaintiff's Touch Works to Defaulting Defendants' works illustrates that each and every Defaulting Defendant has copied one or more of the Touch Works by reproducing and/or displaying substantially similar, if not identical, imitations of such works in connection with the offering for sale and/or sale of Counterfeit Products. *See* Wolfgang Dec., ¶¶ 16-17 and Ex. A.

96. In addition to proving the "substantial similarity" prong, the fact that Defaulting Defendants' imitations of the Touch Works are virtually indistinguishable, coupled with Plaintiff's significant and widespread advertising efforts and the notoriety of the Touch Products and Touch Works, also shows that Defaulting Defendants had "access" to Plaintiff's Touch Works. *See* Complaint, ¶¶ 29-33 and Wolfgang Dec., ¶ 17.

97. Accordingly, there is no question that each and every Defaulting Defendant infringed one or more of the Touch Works, and as a result, Plaintiff has succeeded on the merits of its copyright claim.

**B. Plaintiff is Likely to Suffer Irreparable Injury in the Absence of an Injunction**

98. Following the Second Circuit's adoption of the *eBay* standard for injunctive relief in actions alleging copyright infringement, as well as the extension of that standard to actions alleging trademark infringement, the Court may no longer presume irreparable harm upon a finding of infringement. *See Salinger*, 607 F.3d at 82 (applying *eBay* in a copyright case); *Laboratorios Rivas*, 2013 U.S. Dist. LEXIS 161188 (applying *eBay* in the context of trademark infringement).

99. Nevertheless, the Second Circuit also acknowledged that "as an empirical matter," it may "well be the case" that "most copyright plaintiffs who have shown a likelihood of success on the merits" will be "irreparably harmed absent preliminary injunctive relief." *Salinger*, 607 F.3d at 82.

100. “Harm might be irremediable, or irreparable, for many reasons, including that a loss is difficult to replace or difficult to measure, or that it is a loss that one should not be expected to suffer.” *EMI April Music Inc. v. 4MM Games, LLC*, 12-cv-2080 (DLC) (JLC), 2014 U.S. Dist. LEXIS 11448 at 81 (S.D.N.Y. Jan. 13, 2014) (quoting *Salinger*, 607 F.3d at 80 (citing *eBay*, 547 U.S. at 391)).

101. In post-*Salinger* cases arising under the Lanham Act, this Circuit’s district courts have issued a permanent injunction when an intellectual property rights holder has shown a potential loss of goodwill and control over its trade dress and/or trademark(s). *See, e.g., Artemide Inc. v. Spero Elec. Corp.*, 09-cv-1110 (DRH) (ARL), 2010 U.S. Dist. LEXIS 136870 (E.D.N.Y. Nov. 23, 2010) (finding irreparable harm where likelihood of confusion as to source and likelihood of injury to reputation were shown).

102. Not only has Plaintiff suffered lost profits as a result of Defaulting Defendants’ competing, substandard Counterfeit Products, but Defaulting Defendants’ actions have caused irreparable harm to Plaintiff’s goodwill and reputation, as well as to the goodwill and reputation associated with its Touch Marks, Touch Works and Touch Products. *See Lombardo Dec.*, ¶ 27.

**C. Monetary Damages are not an Adequate Remedy at Law**

103. A showing that there is no adequate remedy at law “is satisfied where the record contains no assurance against defendant's continued violation” of plaintiff’s rights. *Montblanc-Simplo GmbH v. Colibri Corp.*, 692 F. Supp. 2d 245, 259 (E.D.N.Y. 2010).

104. Where a default is entered, “[a] court may infer from a defendant's default that it is willing to, or may continue its infringement.” *Pearson Educ., Inc. v. Vergara*, 09-cv-6832 (JGK)(KNF), 2010 U.S. Dist. LEXIS 101597, at 4 (S.D.N.Y. Sept. 27, 2010) (internal citations omitted), adopted by, Order at Dkt. No. 21 (S.D.N.Y. May 11, 2011).



105. Here, as discussed above, Defaulting Defendants' failure to respond or otherwise appear in this Action supports the conclusion that Defaulting Defendants have no intention of ceasing their infringement and counterfeiting of the Touch Marks and Touch Works in the future.

106. Additionally, Plaintiff has shown that there is a significant possibility that Defaulting Defendants will continue to infringe Plaintiff's intellectual property by opening new User Accounts and/or Merchant Storefronts under the same or different names on eBay, or elsewhere, and will continue to offer for sale and sell Counterfeit Products. *See* Wolfgang Dec., ¶ 12.

107. Moreover, Plaintiff has been deprived of any and all information regarding Defaulting Defendants' sales and thus, cannot adequately prove Defaulting Defendants' profits.

108. Therefore, given the threat of future infringement, Plaintiff cannot be compensated with monetary relief alone and an injunction is necessary to fully redress the irreparable injury that Plaintiff has suffered due to Defaulting Defendants' illegal and infringing actions. *See Hounddog Prods., L.L.C. v. Empire Film Group, Inc.*, 826 F. Supp. 2d 619, 633 (S.D.N.Y. 2011).

**D. The Balance of Hardships Favors Plaintiff**

109. Foremost, Defaulting Defendants have "not identified any hardships for this court to consider" in light of their defaults. *Pearson Educ.*, 2010 U.S. Dist. LEXIS 101597, at \*13; *see also Hounddog Prods.*, 826 F. Supp. 2d at 633.

110. Even without identification of any hardships by Defaulting Defendants, given that Defaulting Defendants have willfully and knowingly sold substandard imitations of Plaintiff's Touch Products, thus reaping the benefits of the popularity and fame of the Touch Marks and Touch Works with little to no cost to Defaulting Defendants, it is clear that the irreparable harm suffered by Plaintiff would far outweigh any harm suffered by Defaulting Defendants. *See* Complaint, ¶¶ 29-34, Ex. C.

111. Plaintiff has been irreparably harmed and will continue to be irreparably harmed by the insertion of Defaulting Defendants' substandard Counterfeit Products into the stream of commerce, resulting in lost profits and goodwill.

112. Moreover, "[i]t is axiomatic that an infringer . . . cannot complain about the loss of ability to offer its infringing product." *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012) (internal citation omitted).

113. Defaulting Defendants' conduct, coupled with their failure to participate in this Action or produce any evidence to the Court that they have and/or intend to cease their infringing activities, demonstrates that the balance of hardships clearly favors the entry of a permanent injunction against Defaulting Defendants.

**E. The Public Interest Would be Served by the Issuance of a Permanent Injunction**

114. Consumers would be served by the issuance of a permanent injunction because "[t]he public has an interest in not being deceived." *NY City Triathlon, LLC v NYC Triathlon Club, Inc.*, 704 F Supp 2d 305, 344 (SDNY 2010) (granting motion to enjoin defendant from any further violations of trademark); *see also Montblanc-Simplo GMBH*, 692 F. Supp. 2d at 259 ("the public interest would not be disserved by a permanent injunction, as there is greater public benefit in securing the integrity' of plaintiffs' trade dress than in permitting defendant to infringe those interests and cause consumer confusion.").

115. Here, the public has an interest in being able to rely on the high quality of Plaintiff's Touch Products bearing the Touch Marks and featuring and/or incorporating the Touch Works, particularly since the Touch Products are intended for young children, and poor-quality Counterfeit Products pose and can cause significant health and safety risks to such a vulnerable audience. *See Lombardo Dec.*, ¶ 26.

116. Again, since Defaulting Defendants have willfully and knowingly inserted substandard Counterfeit Products into the marketplace, the public would stand to gain from a permanent injunction. *See* Application III(B)(6).

117. For the reasons stated above, Plaintiff respectfully submits that Defaulting Defendants should be permanently enjoined from infringing upon the Touch Marks and Touch Works or otherwise impairing Plaintiff's reputation and the goodwill associated therewith.

#### **VI. DEFAULTING DEFENDANTS ACTED WILLFULLY**

118. The standard for willfulness "is simply whether the defendant had knowledge that its conduct represented infringement or perhaps recklessly disregarded the possibility." *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993).

119. Such knowledge may be actual or constructive and may be inferred from defendant's conduct rather than proven directly. *N.A.S. Import Corp. v. Alentino, Ltd.*, 968 F.2d 250, 252 (2d Cir. 1992).

120. Defaulting Defendants' willfulness is apparent given that the Counterfeit Products contain marks and/or artwork that are identical to one or more of the Touch Marks and Touch Works. *See* Arnaiz Dec., ¶ 7; Lombardo Dec., ¶ 25 and Wolfgang Dec., ¶ 18; *see also* *Coach, Inc. v. Melendez*, 10-cv-6178 (BSJ) (HBP), 2011 U.S. Dist. LEXIS 116842, at 5 (S.D.N.Y. Sep. 2, 2011) ("Because the marks used by defendants on their products are virtually identical to the Coach Registered Trademarks, the conclusion is inescapable that defendants' infringement and counterfeiting is intentional.").

121. Additionally, the undisputed evidence shows that none of the Counterfeit Products sold by Defaulting Defendants were purchased from Plaintiff. *See* Lombardo Dec., ¶ 23; *see also* *Bambu Sales, Inc. v. Ozak Trading, Inc.*, 58 F.3d 849, 854 (2d Cir. 1995) (defendants found to have acted willfully due in part to their failure to take any measures to verify the authenticity of

the infringing product); *Gucci Am., Inc., v. Duty Free Apparel, Ltd.*, 315 F. Supp. 2d 511, 521 (S.D.N.Y. April 23, 2004) (quoting *Gucci America, Inc. v. Daffy's Inc.*, 354 F.3d 228, 245 (3d Cir. 2003) (“Selling products acquired outside the customary chain of retail distribution and without the usual authenticating documentation’ is a ‘high risk business.’”).

122. Further, infringement is deemed willful “[b]y virtue of the default[.]” *Tiffany (NJ) Inc. v. Luban*, 282 F. Supp. 2d 123, 124 (S.D.N.Y. 2003); *see also, e.g., Chloe v. Zarafshan*, 06-cv-3140, 2009 U.S. Dist. LEXIS 84255, at \*7 (S.D.N.Y. Sept. 15, 2009) (“Willfulness maybe established by a party's default because an innocent party would presumably have made an effort to defend itself.”); *Malletier v. Carduci Leather Fashions, Inc.*, 648 F. Supp. 2d 501, 504 (S.D.N.Y. 2009) (“Here, by virtue of its default, [defendant] has admitted [plaintiff]'s allegation that it acted knowingly and intentionally or with reckless disregard or willful blindness to [plaintiff]'s rights.”); *Rodgers v. Anderson*, 04-cv-1149 (RJH) (AJP), 2005 U.S. Dist. LEXIS 7054, at \*2 (S.D.N.Y. Apr. 26, 2005) (“In this case, defendants have defaulted and by virtue of their default, are deemed to be willful infringers.”).

123. Since no Defaulting Defendants answered or otherwise formally appeared in this Action, Defaulting Defendants are in default and their infringement is thereby deemed willful. *See id.*

## **VII. PLAINTIFF IS ENTITLED TO HEIGHTENED STATUTORY DAMAGES UNDER THE LANHAM ACT**

124. Plaintiff respectfully elects to seek statutory damages solely under the Lanham Act, but does not waive its claims made under the Copyright Act.

125. The Lanham Act provides that, at any time before final judgment is rendered, a trademark owner may elect to recover an award of statutory damages, rather than actual damages, for the use of a counterfeit mark in connection with goods or services in the amount of: 1) “not

less than \$1,000 or more than \$200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just,” or 2) if the use of the counterfeit mark is found to be willful, up to “\$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.” 15 U.S.C. § 1117(c).

126. Congress enacted the statutory damages remedy in trademark counterfeiting cases because evidence of a counterfeiter’s profits in such cases is almost impossible to ascertain since “records are frequently nonexistent, inadequate, or deceptively kept.” *See Gucci Am., Inc.*, 315 F Supp 2d at 520; *see also Coach, Inc.*, 2014 U.S. Dist. LEXIS 79005, at \*41-42 (“Section 1117(c) of the Lanham Act was created to give victims of trademark infringement and unfair competition an avenue for recovering damages when a defendant hides, alters, or destroys business records.”).

127. Defaulting Defendants’ propensities to conceal their identities, disappear and destroy or hide any evidence or records of their counterfeiting and infringing actions, and that to date, no Defaulting Defendants have appeared, answered or otherwise responded to the Complaint, Plaintiff cannot ascertain Defaulting Defendants’ actual profits, which is exactly the type of circumstances that Congress envisioned in its enactment of Section 1117(c). *See Wolfgang Dec.*, ¶ 36.

128. In making a determination of statutory damages awards under Section 1117(c) of the Lanham Act, courts have adopted the following factors used for determining statutory damages under Section 504(c) of the Copyright Act: “(1) the expenses saved and the profits reaped; (2) the revenues lost by the plaintiff; (3) the value of the copyright [or trademark]; (4) the deterrent effect on others besides the defendant; (5) whether the defendant’s conduct was innocent or willful; (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant.” *Gucci Am., Inc.*, 315 F. Supp. 2d at 511 (quoting *Fitzgerald Publishing Co., Inc. v. Baylor Publishing*

*Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986)); *see also Louis Vuitton Malletier v. Carducci Leather Fashions, Inc.*, 648 F. Supp. 2d 501, 504 (S.D.N.Y. 2009) (“In the absence of any guidelines for determining the appropriate award in a case involving willful trademark violations, courts often have looked for guidance to the better developed case law under the Copyright Act, 17 U.S.C. § 504(c), which permits an award of statutory damages for willful copyright infringement.”).

129. With respect to the first, second and sixth factors, Defaulting Defendants’ propensities to secrete evidence pertaining to sales and profits – along with their failure to appear, answer or otherwise respond to the Complaint or comply with the expedited discovery ordered in the TRO and PI Order – have made it impossible to determine Defaulting Defendants’ profits, quantify any expenses that Defaulting Defendants may have saved by infringing Plaintiff’s Touch Marks or Touch Works, or assess any revenues lost by Plaintiff as a result of Defaulting Defendants’ infringing and counterfeiting activities. *See* Wolfgang Dec., ¶ 11.

130. Thus, these three factors support a higher statutory damage award for Plaintiff. *See AW Licensing, LLC v. Bao*, No. 15- CV-1373, Dkt. 64 (S.D.N.Y. Aug. 2, 2016) (unpublished) (“[C]ourts have supported an inference of a broad scope of operations in cases dealing specifically with websites that ship and sell to a wide geographic range,” like Defaulting Defendants’ User Accounts and Merchant Storefronts in this Action).

131. Plaintiff has established that its Touch Products have achieved worldwide recognition and success as a result of its efforts in building up and developing consumer recognition, awareness and goodwill in its Touch Products, Touch Marks and Touch Works, as well as the quality of the Touch Products, Plaintiff’s promotions, the extensive press and media coverage and the word-of-mouth buzz. *See* Complaint, ¶¶ 17-21 and Lombardo Dec., ¶¶ 15-19.

132. Accordingly, Plaintiff has amassed enormous value in the Touch Marks and Touch Works, and the Touch Marks identify Plaintiff as the exclusive source of the Touch Products to

which they are applied. *See Bumble & Bumble, LLC*, 2016 U.S. Dist. LEXIS 19329, at \*13; *see also Laboratorios Rivas, SRL*, 2013 U.S. Dist. LEXIS 161188, at \*32; *Allstar Mktg. Grp., LLC v. Media Brands Co.*, 775 F. Supp. 2d 613, 623 (S.D.N.Y. 2010) (quoting *Polo Ralph Lauren v. 3M Trading Co.*, 97 Civ. 4824 (JSM), 1999 U.S. Dist. LEXIS 6251, at \*6 (S.D.N.Y. Apr. 19, 1999) (“we infer from the well-known reputations of most or all of the trademarks and the sea of advertising that presses them on the consciousness of the buying public that they are indeed valuable.”).

133. Therefore, the third factor – the value of the Touch Marks – also weighs in favor of an increased statutory damages award for Plaintiff.

134. The remaining factors further support significant statutory damages awards against Defaulting Defendants.

135. Particularly where, such as here, Defaulting Defendants have acted willfully, “a statutory award should incorporate not only a compensatory, but also a punitive component to discourage further wrongdoing by the defendants and others.” *Malletier*, 648 F. Supp. 2d at 504; *see also Allstar Mktg. Grp., LLC*, 775 F. Supp. 2d at 613.

136. Consequently, in light of Defaulting Defendants’ knowing and intentional offering for sale and/or sale of Counterfeit Products bearing trademarks that are identical or confusingly similar to Plaintiff’s Touch Marks and/or artwork that is identical or substantially similar to Plaintiff’s Touch Works, Plaintiff seeks statutory damages awards against each and every Defaulting Defendant.<sup>3</sup>

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<sup>3</sup> Plaintiff respectfully submits that it is entitled to post-judgment interest calculated pursuant to the statutory rate. “Interest shall be allowed on any money judgment in a civil case recovered in a district court.” 28 U.S.C. § 1961(a).

137. For the reasons detailed in Section 2(D) *supra*, Plaintiff was deprived of the ability to prove a specific amount of actual damages and instead have been left with no choice but to seek an award of statutory damages.

138. Plaintiff's respectful requests for statutory damages are based upon a combined analysis of the following: 1) the discovery provided by eBay which shows the number of sales of Counterfeit Products made by each Defaulting Defendant on eBay and 2) each Defaulting Defendants' wrongful use of the Touch Marks and Touch Works. *See* Ex G.

139. Given that the Lanham Act provides for statutory damages of up to "\$2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just" (15 U.S.C. § 1117(c)), Plaintiff respectfully seeks statutory damages awards as follows:

- a. an award of \$50,000.00 in statutory damages against the following sixty-two (62) Defaulting Defendants, totaling \$3,100,000.00: 500-miles, alwaysbest\_uk, amazshopp, americamazing, azo-shop, batterypowermall, bc\_emporium, common-needs\_989, cranklahras, cute\*kiki, dbonsale, elmagico2018, everysale4u4, for.beauty, foreverdeals106, greatdeal335, haelo-0, harrynilson, hazeinas7, hezhihua2017, homefashionchoice, imikimishop, inolite2016, jingchengfactory, jinle-zhan, jorden-shop2018, just-perfect-1840, kingmost1115, kj-store, kolorrainbow, liaojiangang145-2, liuyu\_1, loyalty2017, markshopdeals, matan3333, medlife-store, metiktechnology, mixmixmixmix, myvenusshop77, nalantrade, ninadavis98, pro-deal\_5680, pupu888, roy\_car, sawa-store2018, spear-8487, store-replicas, supersuper7, tiktak.shop, timbe.outlet, treedeal, unistore2014, vidali\_6, voguetech, wonder4shopping, wuqin18, wuzhiang19950, yajie1956, ystore4u, zengnian547-8, zhangqs-1 and zxh1975;



- b. an award of \$75,000.00 in statutory damages against the following seventeen (17) Defaulting Defendants, totaling \$1,275,000.00: 29shyans2012, aieasygo, alidecal, best4deals2013, car-multimedia-manufacturer, dailideal86, digibabyboy, dk888store2012, ehome-malltrade-zone, emerald.empire.shop, hongxiang6, huiwan2016, kevinfang128, lilly\_better, luckjewelrystore, papa-baby and shuangfengshiye;
- c. an award of \$150,000.00 in statutory damages against the following seven (7) Defaulting Defendants, totaling \$1,050,000.00: appleinthebox, fashiontechod, fuuj6695, happyending1920, king-selling, uworldbuying and xd-smartshop;
- d. an award of \$300,000.00 in statutory damages against the following six (6) Defaulting Defendants, totaling \$1,800,000.00: 29v-dailyfu, be-makeup-2016, buyhere4deals, fashionseller9002, lucky-world15 and smartopled;
- e. an award of \$500,000.00 in statutory damages against the following two (2) Defaulting Defendants, totaling \$1,000,000.00: lemon-best2012 and wwshop;
- f. an award of \$750,000.00 in statutory damages against the following one (1) Defaulting Defendant, totaling \$750,000.00: your\_best\_selection;
- g. an award of \$1,000,000.00 in statutory damages against the following one (1) Defaulting Defendant, totaling \$1,000,000.00: orighthere. *See Ex. G.*

140. Generally, “[t]he lack of information about any of the defendants' sales and profits, and the suspect nature of any information that was provided, make statutory damages particularly appropriate for this case.” *Nike, Inc. v. Top Brand Co.*, 2006 U.S. Dist. LEXIS 76543, at \*6 (S.D.N.Y. Feb. 27, 2006).

141. Plaintiff respectfully submits that its tiered requests for statutory damages based upon the currently-known number of sales of Counterfeit Products by Defaulting Defendants are appropriate.

142. Plaintiff reiterates that the number of sales of Counterfeit Products made by Defaulting Defendants as identified in eBay's discovery responses are the lowest possible number of sales. In other words, it is likely that Defaulting Defendants' sales of Counterfeit Products are significantly higher than what has been identified through the limited discovery Plaintiff was able to obtain. *See* Ex. G.

143. Plaintiff has confirmed that each and every Defaulting Defendant wrongfully used at least one of the Touch Marks, in addition to each Defaulting Defendant wrongfully using at least one of the Touch Works. *See* Ex. G. Since "the amount of defendants' likely profits from their infringement, the possibility of deterrence, and the need for redress of wrongful conduct are appropriate factors to consider," Plaintiff respectfully submits that Defaulting Defendants' willful violations of the Lanham Act make its requests for damages appropriate. *Nike, Inc.*, 2006 U.S. Dist. LEXIS 76543 at \*6.

144. "Moreover, this Court has 'wide discretion' in 'setting the amount of statutory damages.'" *Ontel Products Corporation v. Airbrushpainting Makeup Store a/k/a Airbrushpainting et al.*, No. 17-cv-871-KBF, Dkt. 40 (S.D.N.Y. Feb. 6, 2017) citing *Fitzgerald Publ'g Co.*, 807 F.2d at 1116.

### **VIII. AN INQUEST INTO AN AWARD OF DAMAGES IS UNNECESSARY**

145. Plaintiff respectfully submits that its requests for awards of statutory damages do not require the Court to conduct an evidentiary hearing.

146. Courts have awarded damages post-default without an evidentiary hearing based upon affidavits submitted by the plaintiff. *See, e.g., Allstar Marketing Group, LLC v. \_GB*

*Housewear Store, et al.*, 17-cv-7596 (SHS), Dkt. No. 92 (S.D.N.Y. July 9, 2018); *Rovio Entertainment Ltd. and Rovio Animation Oy v. Best Baby and Kid Store, et al.*, 17-cv-4884 (KPF), Dkt. No. 38 (S.D.N.Y. June 28, 2018); *JLM Couture, Inc. v. Aimibridal, et al.*, 18-cv-1565 (JMF), Dkt. No. 49 (S.D.N.Y. June 7, 2018); *Rovio Entertainment Ltd. and Rovio Animation Oy v. Angel Baby Factory d/b/a Angelbaby\_factory, et al.*, 17-cv-1840 (KPF), Dkt. No. 65 (S.D.N.Y. Sept. 13, 2017); *Church & Dwight Co.*, 697 F. Supp. 2d at 295; *Rolex Watch U.S.A. Inc. v. Brown*, 2002 U.S. Dist. LEXIS 10054, \*54, (S.D.N.Y. June 5, 2002); *see also Tamarin v. Adams Caterers*, 13 F.3d 51, 54 (2d Cir. 1993).

**IX. PLAINTIFF IS ENTITLED TO A POST-JUDGMENT ASSET FREEZE, THE TRANSFER OF DEFAULTING DEFENDANTS' FROZEN ASSETS AND POST-JUDGMENT INTEREST ON DEFAULTING DEFENDANTS' FROZEN ASSETS**

147. The post-judgment continuance of the pre-judgment asset restraint previously imposed on the Defaulting Defendants by this Court in the TRO and extended in the PI Order is appropriate pursuant to the law of this Circuit, as a matter of equity and is necessary to preserve Plaintiff's rights to the relief sought in the Complaint (*i.e.*, an equitable accounting).

148. As this Court has acknowledged, the Second Circuit has expressly affirmed the Court's authority to freeze counterfeiters' assets, "in favor of plaintiffs seeking an accounting against allegedly infringing defendants in Lanham Act cases" – whether such assets are located in the United States or abroad, and "impos[ed] on a defendant the obligation to disclose and return profits." *Gucci Am. Inc. v. Bank of China*, 768 F.3d 122, 131 (2d Cir. 2014) (emphasis added); *see* Dkt. 16.

149. Moreover, this Court has repeatedly granted post-judgment asset restraints to aid in the enforcement of a judgment, ensure the availability of relief under the Lanham Act or otherwise and prevent defendants who have defaulted in similar cases from disposing of their assets upon entry of final judgment pursuant to 1) its inherent equitable powers, as well as 2) Section 5222 of

New York's Civil Practice Law and Rules ("CPLR"), as incorporated by Fed. R. Civ. P. 69, particularly where, as here, Defaulting Defendants' complete failure to participate in the Action or comply with discovery made any calculation on Plaintiff's claim for an accounting impossible. *See Tiffany (NJ) LLC v. Forbse*, 11-cv-4976 (NRB), 2015 US Dist. LEXIS 129647, at \*10-11 (S.D.N.Y. Sep. 22, 2015).

150. Most recently, in *Forbse*, the Court ordered a post-judgment asset restraint against defendants who engaged in counterfeiting activities in reliance on both the Court's equitable powers and state law, notwithstanding the Court's award of statutory damages, concluding that, "[t]he asset restraint should remain in place in order to prevent the very harm initially contemplated by the preliminary injunction, just as, analogously, a prejudgment attachment, issued pursuant to New York law and Rule 64 against a defendant seeking to evade enforcement of a possible judgment by secreting property, continues (absent vacatur, modification, or discharge) after the entry of judgment." 2015 US Dist. LEXIS 129647, at \*10-11 (internal citations omitted).

151. Similarly, here, since Plaintiff has demonstrated that Defaulting Defendants are foreign individuals or entities who have engaged in counterfeiting and infringing activities and failed to answer or otherwise formally appear in this Action, or to comply with the expedited discovery ordered in the TRO and PI Order, and are highly likely to dispose of, transfer and/or hide their ill-gotten Defaulting Defendants' Frozen Assets, there remains a significant risk that Defaulting Defendants will dispose of, transfer and/or hide all assets to which Plaintiff may be entitled if Defaulting Defendants' Frozen Assets do not remain frozen post-judgment. *See Arnaiz Dec.*, ¶¶ 6-11 and *Wolfgang Dec.*, ¶¶ 12.

152. This risk is not lessened by entry of judgment, but likely elevated. *See Forbse*, 2015 US Dist. LEXIS 129647, at \*10 ("[T]he need for the injunction is clear: without this relief, defendants would have available a fourteen-day window in which to hide their assets" and "[t]he

risk that they might do so, which in part justified the preliminary injunction, is not lessened by entry of judgment.”).

153. Accordingly, Plaintiff respectfully requests that the post-judgement asset restraint be entered immediately and continue, at the very least, until Plaintiff may enforce and satisfy the final judgment entered by this Court against Defaulting Defendants.

154. Additionally, in accordance with Fed. R. Civ. P. 64, 15 U.S.C. § 1116(a) and this Court’s inherent equitable powers to issue remedies ancillary to its authority to provide final relief, Plaintiff respectfully requests that the Court order that any money, securities or other property or assets of Defaulting Defendants (whether said assets are located in the U.S. or abroad) (“Defaulting Defendants’ Assets”) from any accounts associated with or utilized by any Defaulting Defendant, Defaulting Defendants’ User Account(s) and/or Defaulting Defendant’s Merchant Storefront(s) (whether said account is located in the U.S. or abroad) (“Defaulting Defendants’ Financial Accounts”) that were and/or are attached and frozen or restrained pursuant to the TRO, PI Order or any future order entered by the Court in this Action, including, but not limited to, those Defaulting Defendants’ accounts attached and frozen or restrained by eBay, PayPal Inc. (“PayPal”), Payoneer, Inc. (“Payoneer”) and PingPong Global Solutions, Inc. (“PingPong”) and other companies or agencies that engage in the processing or transfer of money and/or real or personal property of Defaulting Defendants be transferred to Plaintiff as partial or complete satisfaction of the damages awarded to Plaintiff by the Court.

155. This Court has, in similar actions involving counterfeiting defendants, regularly ordered that all monies or assets in any accounts associated with or utilized by the defendants, both previously restrained and newly discovered, be released and transferred to the plaintiff in satisfaction of the damages awarded in the case until plaintiff has recovered the full amount owed.

*See, e.g., AW Licensing, LLC*, 2016 US Dist. LEXIS 101150, at \*19-20.


156. Further, and pursuant to 28 U.S.C. § 1961(a), Plaintiff respectfully requests that until such time as Plaintiff has fully recovered the entire judgment from each Defaulting Defendant, this Court order that post-judgment interest accrue against any remaining balance after the Defaulting Defendants' Frozen Assets are transferred to Plaintiff as part of this judgment.

**X. CONCLUSION**

157. In light of the foregoing, Plaintiff respectfully requests that the Court grant Plaintiff's request for a Default Judgment and Permanent Injunction in its entirety.

I declare under the penalty of perjury under the laws of the United States of America that to the best of my knowledge the foregoing is true and correct.

Executed on this 20<sup>th</sup> day of September 2018 in New York, New York.

By:  \_\_\_\_\_  
Brianne Scully