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18 CV 10524

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SPIN MASTER LTD. and SPIN MASTER, INC.,

Plaintiffs

v.

13385184960@163.COM, 18888236883@163.COM, ALTAY, ANGELCITYER, BAMBOO001, CAOPING, CONGCONG2, DANDANXIAOWU, DAYINGJIA1256, DIAMOND BOUTIQUE, DIY GEM SHOP, DREAMSHIPS, DUMBLEDOR SHOP, EFASHIONER, EVERY DAY THERE WILL BE A NEW SUN, FASHIONABLE AND SPORT STORE, FASHIONDOFU, FELLA, FHIJHCF, FULLUSSET, GIFTSHOP2017, GIVE YOUR DREAM, GLOBAL_DAWN, GLOBAL-SPIRIT, GODCUP, GREEN FASHION, GUANGDONGHUATAI, GUIGIUDEDIAN, HAPPYSTORE99, HUASHAOSHOT, HUAXIAWAIMAOSHANG, ISHOP, ISYISY, IVANICABABYSHOP, JAHURTO, JASONSTORE1, JL&PREFECT, JUZIEJIA,

CIVIL ACTION No.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' 1) *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER; 2) ORDER RESTRAINING ASSETS AND MERCHANT STOREFRONTS; 3) AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE; 4) ORDER AUTHORIZING BIFURCATED AND ALTERNATIVE SERVICE AND 5) ORDER AUTHORIZING EXPEDITED DISCOVERY

FILED UNDER SEAL

KAIXUANXIAORENJIA, KEEP GOING, KRISTINECOTTRELL, LANXIHUANGLONGDONG, LIANJIAXIAODIAN, LOSTIU8, MAGIC CURRY, MAISYSTORE001, MAOMAO1608@163.COM, MIKEQYQ, MOMTUTUS, MR. P, MR.ZXX, MRY_STORE, NEWMERCHANTFASHION, NVC, PANDORA LOVE, QIQIYANYAN, QOMXZHK, RENDERINGYOU, SHENZHENYIWEIKEJIYOUXIANGONGSI, SHENZHEN YINFA TECHNOLOGY LTD, SHOW YOU NOW, SHU PANPAN WU SHOUSHOU, SIERMAOYIYOUXIANGONGSI, SMALL Y CLOTHES STORE, SMALLSMALLWORLD, THREEQIAOWAY, TIANCONG135, TOMIK18816764436, UTOPIA1973, UTOPIA2017, VALUABLE, YEHUDIEYE, WANGJUHUA11365, WENDY E-COMMERCE, WULI0014, WXXWW, XINYUDIYIYI, XYRSTOREKL, YIWU BLUE SKY, XIONGDISTORE, XUANXUAN636187, XZH, YANGMINGXIONGDI, YANGLIU248, YEKAIQIANG, YEQIRONG, YIHUIANDYIHUI, YOUR FASHION JEWELRY, YOUYOUSHANXI, YOYOBESS, YQUAN, YUXITAO, YY6752SDD, ZHANGDONGYUE, ZHANGXIAXIAZHANG, ZHENPINHUI and ZHENZHEN-FASHION,

Defendants

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GLOSSERY

Term	Definition
Plaintiffs or "Spin Master"	Spin Master Ltd. and Spin Master, Inc.
Defendants	13385184960@163.com, 18888236883@163.com, Altay, angelcityer, bamboo001, caoping, congcong2, dandanxiaowu, dayingjia1256, Diamond boutique, DIY Gem shop, Dreamships, Dumbledor shop, Efashioner, Every day there will be a new sun, fashionable and sport store, fashiondofu, Fella, fhijhcf, Fullusset, giftshop2017, give your dream, global_dawn, global-spirit, Godcup, Green Fashion, guangdonghuatai, guigiudedian, happystore99, Huashaoshot, Huaxiawaimaoshang, ISHOP, ISYISY, ivanicababyshop, Jahurto, Jasonstore1, JL&prefect, juziEjia, kaixuanxiaorenjia, Keep going, kristinecottrell, Lanxihuanglongdong, lianjiaxiaodian, Lostiu8, magic Curry, maisystore001, maomao1608@163.com, Mikeqyq, MOMTUTUS, Mr. P, Mr.Zxx, MRY_Store, NewMerchantFashion, NVC, Pandora love, qiqiyanyan, Qomxzhk, Renderingyou, Shenzhenyiweikejiyouxiangongsi, Shenzhen Yinfa Technology LTD, Show You Now, Shu panpan wu shoushou, siermaoyiyouxiangongsi, Small Y Clothes Store, smallsmallworld, Threeqiaoway, tiancong135, Tomik18816764436, Utopia1973, Utopia2017, Valuable, yehudieye, wangjuhua11365, wendy E-commerce, wuli0014, wxxww, Xinyudiyiyi, xyrstorekl, yiwu blue sky, xiongdistore, xuanxuan636187, XZH, Yangmingxiongdi, yangliu248, yekaiqiang, yeqirong, YiHuiandYiHui, YOUR FASHION JEWELRY, youyoushanxi, YOYOBESS, Yquan, Yuxitao, YY6752SDD, Zhangdongyue, zhangxiaxiazhang, Zhenpinhui and zhenzhen-fashion
Complaint	Plaintiffs' Complaint filed on November 13, 2018
Application	Plaintiffs' *Ex Parte* Application for: 1) a temporary restraining order; 2) an order restraining assets and Merchant Storefronts (as defined *infra*); 3) an order to show cause why a preliminary injunction should not issue; 4) an order authorizing bifurcated and alternative service and 5) an order authorizing expedited discovery filed on November 13, 2018
Arnaiz Dec.	Declaration of Jessica Arnaiz in Support of Plaintiffs' Application
Harrs Dec.	Declaration of Chris Harrs in Support of Plaintiffs' Application
Wolgang Dec.	Declaration of Spencer Wolgang in Support of Plaintiffs' Application
Twisty Petz Mark	U.S. Trademark Registration No. 5,514,561 for "TWISTY PETZ" for a variety of goods in Class 28

Twisty Petz Work	U.S. Copyright Reg. VA 1-305-408, covering the Twisty Petz Packaging Artwork & Collectors' Guides
Counterfeit Products or Infringing Products	Products bearing or used in connection with the Twisty Petz Mark and/or Twisty Petz Work, and/or products in packaging and/or containing labels bearing the Twisty Petz Mark and/or Twisty Petz Work, and/or bearing or used in connection with marks and/or artwork that are confusingly or substantially similar to the Twisty Petz Mark and/or Twisty Petz Work and/or products that are identical or confusingly or substantially similar to the Twisty Petz Products
User Accounts	Any and all websites, any and all accounts with online marketplace platforms such as Wish.com, as well as any and all as yet undiscovered accounts with additional online marketplace platforms held by or associated with Defendants, their respective officers, employees, agents, servants and all other persons in active concert with any of them
Merchant Storefronts	Any and all User Accounts through which Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with any of them operate storefronts to manufacture, import, export, advertise, market, promote, distribute, display, 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
Defendants' Assets	All money, securities or other property or assets of Defendants (whether said assets are located in the U.S. or abroad)
Defendants' Financial Accounts	Financial accounts associated with or utilized by any Defendants or any Defendants' User Accounts or Merchant Storefront(s) (whether said account is located in the U.S. or abroad)
Financial Institutions	Any banks, financial institutions, credit card companies and payment processing agencies, such as ContextLogic, PayPal Inc. ("PayPal"), Payoneer Inc. ("Payoneer"), 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 Defendants
Third Party Service Providers	Online marketplace platforms, including, without limitation, those owned and operated, directly or indirectly, by ContextLogic, such as Wish, as well as any and all as yet undiscovered online marketplace platforms and/or entities through which 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 Counterfeit Products which are hereinafter identified as a result of any order entered in this action, or otherwise

I. INTRODUCTION

Pursuant to and in accordance with the Federal Rules of Civil Procedure, Plaintiffs submit this memorandum of law in support of their *ex parte* Application in light of Defendants' intentional and willful offering for sale and/or sales of Counterfeit Products. Courts often grant *ex parte* applications for relief in similar matters[1] and Plaintiffs respectfully request that the Court grant this Application.

Wish.com is a San Francisco, California-based, online marketplace and e-commerce platform owned by ContextLogic, Inc., a Delaware corporation ("ContextLogic"), that allows manufacturers and other third-party merchants, like Defendants, to advertise, distribute, offer for sale, sell and ship their retail products, which, upon information and belief, primarily originate from China,[2] directly to consumers worldwide and specifically to consumers residing in the U.S., including New York (hereinafter, "Wish"). *See* Wolgang Dec., ¶ 3. Defendants are individuals and/or businesses, who, upon information and belief, are located in China but conduct business in the United States and other countries by means of their respective User Accounts and on their Merchant Storefronts on Wish, as well as any and all as yet undiscovered online marketplace platforms. *See* Arnaiz Dec., ¶¶ 4, 6, Harrs Dec., ¶¶ 21-22 and Wolgang Dec., ¶ 3. Through their Merchant Storefronts, Defendants offer for sale and/or sell consumer products, including Counterfeit Products, and market, distribute and ship such products to consumers throughout the

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[1] *See In re Vuitton et Fils, S.A.*, 606 F.2d 1 (2d Cir. 1979) (holding that *ex parte* temporary restraining orders are indispensable to the commencement of an action when they are the sole method of preserving a state of affairs in which the court can provide effective final relief); *see also, e.g.*, *JLM Couture, Inc. v. Aimibridal, et al.*, No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018); *Ideavillage Products Corp. v. Dongguan Opete Yoga Wear Manufacturer Co., Ltd., et al.*, No. 17-cv-9099 (JMF), Dkt. 19 (S.D.N.Y. Nov. 27, 2017); *Gucci America, Inc., et al v. Alibaba Group Holding LTD, et al*, No. 1:15-cv-03784 (PKC) (S.D.N.Y. June 23, 2015); *AW Licensing, LLC v. Bao*, No. 15- CV-1373, 2015 U.S. Dist. LEXIS 177101, at *2-3 (S.D.N.Y. Apr. 1, 2015); *Klipsch Grp., Inc. v. Big Box Store Ltd.*, No. 1:12-cv-06283 (VSB), 2012 U.S. Dist. LEXIS 153137, at *3-4 (S.D.N.Y. Oct. 24, 2012).

[2] *See* Armando Roggio, *Ecommerce Lessons from the Wish Shopping App*, PRACTICALECOMMERCE (Jan. 7, 2015), available at https://www.practicalecommerce.com/Ecommerce-Lessons-from-the-Wish-Shopping-App.

world, including New York. *See* Arnaiz Dec., ¶¶ 6-7, 10-11, Ex. A; Harrs Dec., ¶ 21 and Wolgang Dec., ¶ 3. Third-party merchants operating Merchant Storefronts on Wish, like Defendants, as well as other online marketplace platforms, often use evasive tactics such as aliases, false addresses and other incomplete identification information to conceal their identities and avoid detection. *See* Wolgang Dec., ¶ 13. In fact, Defendants' User Accounts and Merchant Storefronts are either devoid of any or contain incomplete information regarding Defendants' true identities, locations and contact information, making it virtually impossible for Plaintiffs to obtain independently. *See id.*, ¶¶ 25-26.

Without Plaintiffs' authorization or consent, Defendants were and/or currently are manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products to consumers located in the U.S., including New York, through their Merchant Storefronts. *See* Arnaiz Dec., ¶¶ 4-6, Ex. A; Harrs Dec., ¶¶ 23-24 and Wolgang Dec., ¶¶ 16-20, Ex. A. Defendants' aforementioned actions have caused and will continue to cause – should the requested relief be denied – irreparable harm to Plaintiffs' goodwill and reputation as well as to the unassuming consumers who will continue to believe that Defendants' inferior and potentially dangerous Counterfeit Products are authorized, sponsored, approved, endorsed and/or licensed by Plaintiffs, when, in fact, they are not. *See* Harrs Dec., ¶ 28.

Plaintiffs' request for *ex parte* relief is particularly necessary because if Defendants receive notice of this Lawsuit, it is highly likely that they will transfer, conceal and/or destroy 1) the Counterfeit Products, 2) the means of making or obtaining such Counterfeit Products, 3) business records and 4) any and all other evidence relating to their infringing activities. *See* Wolgang Dec., ¶ 13. Moreover, they will likely hide or dispose of Defendants' Assets. *See id.* In light of the foregoing, and considering that it typically takes noticed Financial Institutions and/or Third Party

Service Providers a minimum of five (5) days to locate, attach and freeze Defendants' Assets and/or Defendants' Financial Accounts, Plaintiffs respectfully request that the Court order bifurcated service specifically allowing enough time for the Financial Institutions and/or Third Party Service Providers to comply with the TRO before ordering service on Defendants.

II. STATEMENT OF RELEVANT FACTS

The facts are contained in the factual declarations of Chris Harrs and Jessica Arnaiz and the attorney summarizing declaration of Spencer Wolgang, plus accompanying exhibits. *See* Harrs Dec., Arnaiz Dec., Wolgang Dec. and Exhibits A-D to the Complaint. In the interest of brevity, any factual discussion is contained in the legal analysis below.[3]

III. ARGUMENT

A. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS

Determining personal jurisdiction over a foreign defendant in a federal question case requires a two-step inquiry. First, courts must look to the law of the forum state to determine whether personal jurisdiction will lie. *See Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 168 (2d Cir. 2013) (citing *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007)). Second, if jurisdiction lies, the court then considers whether the district court's exercise of personal jurisdiction over a foreign defendant comports with due process protections established under the United States Constitution. *See id.*; *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). As alleged herein, Defendants' unlawful counterfeiting and infringing activities subject

[3] Although Plaintiffs acknowledge that they seek multiple forms of relief, in the interest of brevity and with respect for the Individual Rules and Practices in Civil Cases of each District Judge in the Southern District of New York, Plaintiffs respectfully submit this twenty-five (25) page memorandum of law in support of their Application. Plaintiffs will promptly provide supplemental briefing and/or oral argument on any issue should the Court request it.

them to long-arm jurisdiction in New York under N.Y. C.P.L.R. §§ 302(a)(1).[4] Furthermore, New York's exercise of jurisdiction over Defendants thereunder comports with due process.

1. <u>Defendants are Subject to Personal Jurisdiction Under N.Y. C.P.L.R. § 302(a)(1)</u>

Under § 302(a)(1), there are two requirements that must be met to establish personal jurisdiction: "(1) [t]he defendant must have transacted business within the state; and (2) the claim asserted must arise from that business activity." *Licci*, 732 F.3d at 168 (quoting *Solé Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006)). In applying the test for the "transacts business" prong of § 302(a)(1), "New York decisions ... tend to conflate the long-arm statutory and constitutional analyses by focusing on the constitutional standard," ergo, "a defendant need not be physically present in New York to transact business there within the meaning of [this first prong]," so long as the defendant has engaged in "purposeful activity," for example, "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Chloe v. Queen Bee of Beverly Hills*, LLC, 616 F.3d 158, 169-71 (2d Cir. 2010) (quoting *Best Van Lines, Inc.*, 490 F.3d at 246-247) (internal quotations omitted). The second prong of § 302(a)(1) requires an "articulable nexus or substantial relationship between the business transaction and the claim asserted," however, "a causal relationship between the business transaction and the claim asserted" is not required. *Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 93 (S.D.N.Y. 2015) (internal citations and quotations omitted). Rather, it is sufficient that "the latter is not completely unmoored from the former." *Id.*

In determining whether a party has "transacted business," New York courts must look at the totality of the circumstances concerning the party's interactions with, and activities within, the

[4] Plaintiffs respectfully submit that Defendants are also subject to jurisdiction under § 302(a)(3), however, this alternative analysis is omitted for brevity. *See Energy Brands Inc.*, 571 F. Supp. at 470.

state. *See Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000). Whether the exercise of personal jurisdiction is permissible in the context of Internet activity is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* Courts in this Circuit have regularly conferred personal jurisdiction on a given defendant based on that defendant's operation of a fully interactive website through which consumers can access the site from anywhere and purchase products, as is the case with Defendants' User Accounts and Merchant Storefronts, and allow for customers all over the world to communicate with Defendants and view and purchase products, including Counterfeit Products, as demonstrated by the order forms and checkout pages completed by NAL for and Epstein Drangel's purchase of Counterfeit Products. *See* Arnaiz Dec., ¶¶ 8-10, Ex. A and Wolgang Dec., ¶ 23, *Ex.* B; *see also Chloé*, 616 F.3d at 170.

Courts in this Circuit have also exercised jurisdiction over defendants under § 302(a)(1) where such defendants regularly offer for sale and sell goods through online marketplaces, "even though Defendants do not control their [] 'storefront' or its interactivity to the same extent that they control their own highly interactive website." *Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co., LLC*, No. 15 Civ. 8459 (LGS), 2016 U.S. Dist. LEXIS 89149 *7 (S.D.N.Y. July 8, 2016) (quoting *EnviroCare Techs., LLC v. Simanovsky*, No. 11-CV-3458(JS)(ETB),2012 U.S. Dist. LEXIS 78088 *8 (E.D.N.Y. June 4, 2012).[5] Jurisdiction is proper "for internet sellers who use an internet storefront like Amazon," – or in this case, Wish – when the Internet sellers are "commercial vendors who use it 'as a means for establishing regular business with a remote forum.'" *Id.* at *8.

[5] *See also* Footnote 1.

Here, the fact that Defendants have chosen to open their respective User Accounts for the purpose of selling Counterfeit Products through their Merchant Storefronts on Wish as well as any and all as yet undiscovered online marketplace platforms alone supports a finding that Defendants have intentionally used Wish "as a means for establishing regular business with a remote forum." *EnviroCare Techs., LLC*, 2012 U.S. Dist. LEXIS 78088 at *10 (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008)). Moreover, the fact that Defendants are offering the Counterfeit Products through their Merchant Storefronts usually in wholesale quantities and always at significantly below-market prices coupled with the fact that most of their User Accounts reflect multiple sales to consumers across the world, including repeat sales to consumers in the U.S., confirms that Defendants are sophisticated sellers operating commercial businesses through Wish.com, such that they are subject to jurisdiction. *See id.* at *10.

It is highly likely that Defendants have shipped Counterfeit Products to consumers in New York based on the following: 1) NAL completed an order form or checkout page for an order of Counterfeit Products from each and every Defendant through an account associated with a New York Address and/or provided a New York Address as the shipping address and 2) Epstein Drangel purchased five (5) Counterfeit Products. *See* Arnaiz Dec., ¶¶ 8-10, Ex. A and Wolgang Dec., ¶ 23, *Ex.* B.

Nevertheless, whether a defendant physically shipped Counterfeit Products into New York is not determinative of whether personal jurisdiction exists, as courts in this Circuit examine a given defendant's online interactions with consumers in considering whether a particular defendant has transacted business in the forum state under § 302(a)(1). *See Rolex Watch, U.S.A., Inc. v. Pharel*, 2011 U.S. Dist. LEXIS 32249, at * 6 (E.D.N.Y. Mar. 11, 2011). Plaintiffs, Plaintiffs' counsel and NAL have viewed Defendants' Counterfeit Products via their online User

Accounts and Merchant Storefronts (*see* Arnaiz Dec., ¶ 7; Harrs Dec., ¶ 23 and Wolgang Dec., ¶ 19). NAL completed order forms or checkout pages for Counterfeit Products by providing a New York Address as the shipping address and Epstein Drangel purchased five (5) Counterfeit Products.[6] *See* Arnaiz Dec., ¶¶ 8-10, Ex. A and Wolgang Dec., ¶ 23, *Ex.* B. Thus, Defendants' sophisticated commercial operations, specifically including their offering for sale and/or selling of Counterfeit Products through their highly interactive User Accounts and Merchant Storefronts on Wish, NAL's completion of order forms and/or checkout pages for and Epstein Drangel's purchase of Counterfeit Products, along with Defendants' own representations on their Merchant Storefronts that they ship Counterfeit Products to the U.S., including the New York Address, unequivocally establishes that Defendants conduct business within this District and the claims in this suit arise from Defendants' business dealings and transactions with consumers in New York.[7] *See id.*

2. <u>Exercising Personal Jurisdiction Over Defendants Comports with Due Process</u>

Asserting personal jurisdiction over Defendants also comports with the Due Process Clause of the U.S. Constitution, as Defendants have "certain minimum contacts ... such that maintenance of th[is] suit does not offend 'traditional notions of fair play and substantial justice.'" *Calder v. Jones*, 465 U.S. 783, 788 (1984) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)). Defendants 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

[6] Under case law of the Second Circuit, when analyzing personal jurisdiction in the Internet context, "traditional statutory and constitutional principles remain the touchstone of the inquiry", and while a website's interactivity, "may be useful" for analyzing personal jurisdiction 'insofar as it helps to decide whether the defendant 'transacts any business' in New York,'" ... "it does not amount to a separate framework for analyzing internet-based jurisdiction." *Best Van Lines, Inc.*, 490 F.3d at 252 (quoting *Best Van Lines, Inc. v. Walker*, No. 03 Civ. 6585 (GEL), 2004 U.S. Dist. LEXIS 7830, at *9 (S.D.N.Y. May 4, 2004) (internal citation omitted)).

[7] Plaintiff respectfully submits that the Court has jurisdiction pursuant to Fed. R. Civ. P. 4(k)(2), which "provides for jurisdiction over a defendant if a claim arises under federal law, if the defendant is not subject to jurisdiction of the courts of general jurisdiction of any state, and if the exercise of jurisdiction is consistent with the Constitution and laws of the United States." *Lechner v. Marco-Domo Intnationales Interieur GmbH*, No. 03 Civ. 5664 (JGK), 2005 U.S. Dist. LEXIS 4022, *8 (S.D.N.Y. Mar. 10, 2005).

benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (U.S. 1985); *see Best Van Lines, Inc.*, 490 F.3d at 243; *see also* Arnaiz Dec., ¶¶ 8-10, Ex. A and Wolgang Dec., ¶ 23, Ex. B. Moreover, "as a practical matter, the Due Process Clause permits the exercise of jurisdiction in a broader range of circumstances of N.Y. C.P.L.R. § 302, and a foreign defendant meeting the standards of § 302 will satisfy the due process standard." *Energy Brands Inc.*, 571 F. Supp. 2d at 469. Accordingly, Plaintiffs respectfully submit that this Court has personal jurisdiction over Defendants in this action.

B. PLAINTIFFS ARE ENTITLED TO AN *EX PARTE* TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Here, an *ex parte* order is essential to prevent immediate and irreparable injury to Plaintiffs. A temporary restraining order may be granted without written or oral notice to the opposing party or that party's counsel where "it clearly appears from the specific facts shown by affidavit . . . that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." Fed. R. Civ. P. 65(b). Section 34 of the Lanham Act expressly authorizes this Court to issue *ex parte* restraining orders "with respect to a violation [of the Act] that consists of using a counterfeit mark in connection with the sale, offering for sale, or distribution of goods." 15 U.S.C. § 1116(d)(1)(a).[8]

Once a violation of the Lanham Act is demonstrated, the issuance of an *ex parte* order is appropriate upon showing that: (i) the plaintiff will provide adequate security; (ii) any order other than an *ex parte* order is not adequate to achieve the purposes of 15 U.S.C. § 1114; (iii) the plaintiff has not publicized the requested *ex parte* order; (iv) the plaintiff is likely to succeed on showing

[8] Congress' purpose for enacting such *ex parte* remedies was to ensure that courts were able to effectively exercise their jurisdiction in counterfeiting cases and to prevent counterfeiters given prior notice from disappearing or quickly disposing of infringing inventory or records relating to their counterfeiting and illegal actions. *See* Senate-House Joint Explanatory Statement on trademark Counterfeiting Legislation, 130 Cong. Rec. H12076, at 12080 (Oct. 10, 1984).

that defendants are using counterfeit marks; (v) an immediate and irreparable injury will occur if such *ex parte* order is not granted; (vi) the materials to be seized will be located at the place identified in the application; (vii) the harm to the plaintiff in denying the application outweighs the harm to defendants in granting the order and (viii) if prior notice was given, defendants would destroy, move, hide or otherwise make such matter inaccessible to the court. *See* 15 U.S.C. § 1116(d)(4)(B). As discussed below, Plaintiffs meet each of the relevant criteria for the issuance of an *ex parte* temporary restraining order under the Lanham Act.[9]

An *ex parte* temporary restraining order is particularly warranted in cases, such as the instant one, involving offshore counterfeiters who conceal their identities and engage in unlawful and harmful activities over the Internet to avoid revealing their actual locations and identities. *See* Wolgang Dec., ¶¶ 11-15, 24-25. Defendants, who, upon information and belief, are located in China and operate their businesses exclusively over the Internet, knowingly and willfully offer for sale and/or sell Counterfeit Products through their User Accounts and on their Merchant Storefronts on Wish. *See* Arnaiz Dec., ¶¶ 4-7, Ex. A; Harrs Dec., ¶ 22 and Wolgang Dec., ¶ 19-20. The covert nature of Defendants and their counterfeiting activities make any order other than an *ex parte* temporary restraining order an exercise in futility. The immediate and irreparable harm to Plaintiffs' business and reputation, as well as to the goodwill associated with the Twisty Petz Mark and Twisty Petz Work, in denying their Application for an *ex parte* temporary restraining order greatly outweighs the harm to Defendants' interests in continuing to offer for sale and sell Counterfeit Products. *See* Harrs Dec., ¶ 28.

In order "[t]o obtain a preliminary injunction, a plaintiff must establish: '(1) the likelihood

[9] Plaintiffs have expressed their willingness to provide security in conjunction with the *ex parte* relief they seek. *See* [Proposed] Order, filed herewith. Plaintiffs have certified that they have not publicized this Application. *See* Harrs Dec., ¶ 30. Also, since Defendants' location and the location of the Counterfeit Products are unclear, Plaintiffs are not requesting a seizure order in this Application. *See* Wolgang Dec., ¶¶ 24-25.

of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly' in its favor.'"*Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 537 (2d Cir. 2005) (quoting *Federal Express Corp. v. Federal Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir. 2000)). The "standards which govern consideration of an application for a temporary restraining order... are the same standards as those which govern a preliminary injunction." *Local 1814, Int'l Longshoremen's Ass'n v. N.Y. Shipping Ass'n. Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992). As detailed below, Plaintiffs meet the standard for a preliminary injunction and the Court should enter a temporary restraining order against Defendants.

1. **Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction Leaving Plaintiffs with No Adequate Remedy at Law**

Defendants' infringing activities must be stopped immediately to prevent any further harm to Plaintiffs. Not only do Plaintiffs stand to suffer lost profits as a result of Defendants' competing, substandard Counterfeit Products, Defendants' illicit activities destroy the inherent value of the Twisty Petz Mark, impair Plaintiffs' reputation, dilute Plaintiffs' brands and goodwill and negatively affect Plaintiffs' relationships with their current customers as well as their ability to attract new customers. *See* Harrs Dec., ¶ 28. While courts may no longer presume irreparable harm upon a finding of infringement, "[i]rreparable harm exists in a trademark case when the party seeking the injunction shows that it will lose control over the reputation of its trademark . . . because loss of control over one's reputation is neither 'calculable nor precisely compensable.'" *U.S. Polo Ass'n, Inc. v. PRL USA Holdings, Inc.*, 800 F.Supp.2d 515, 540 (S.D.N.Y. 2011). Further, a plaintiff may still demonstrate that "on the facts of the case, the failure to issue an injunction would actually cause irreparable harm." *Salinger v. Colting*, 607 F.3d 68,

82 (2d Cir. 2010) (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 393).

This Circuit recognizes that irreparable harm sufficient to warrant a preliminary injunction exists where defendant injected counterfeit versions of a plaintiff's products into the market. *See CJ Prods. LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 145 (E.D.N.Y. 2011). Here, Defendants have sold substandard Counterfeit Products that look remarkably similar, if not identical, to the Twisty Petz Products and which embody, bear and/or incorporate the Twisty Petz Mark and/or Twisty Petz Work and/or identical or confusingly and/or substantially similar marks and/or works, thereby resulting in lost sales and impairing Plaintiffs' reputation that they have achieved through the expenditure of considerable time and effort. *See Mitchell Grp. USA LLC v. Udeh*, No. 14-cv-5745, 2015 U.S. Dist. LEXIS 18801 at *8 (E.D.N.Y. Feb. 17, 2015) (internal citations omitted); Harrs Dec., ¶¶ 23, 28 and Wolgang Dec., ¶ 19.

Moreover, Defendants' counterfeiting and infringing activities deny Plaintiffs of their fundamental right to control the quality of the goods sold under the Twisty Petz Mark. *See Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 243 (2d Cir. 2009). Defendants are offering their substandard Counterfeit Products in wholesale quantities and at significantly below-market prices with which Plaintiffs cannot compete given the high-quality materials and construction necessary to manufacture the Twisty Petz Products. *See* Harrs Dec., ¶ 26 and Wolgang Dec., ¶ 21; *see also Zino Davidoff SA*, 71 F.3d 244

Also, because Defendants' substandard Counterfeit Products are virtually indistinguishable from the Twisty Petz Products, not only could any injury to consumers that results from use of Defendants' substandard Counterfeit Products be attributed to Plaintiffs, thereby causing irreparable harm to Plaintiffs in the form of unquantifiable lost sales, loss of goodwill and loss of control of their reputation with authorized licensees, retailers and consumers, but Plaintiffs would

also potentially be exposed to legal liability for any such injury to consumers, which is of incredible importance given the Twisty Petz Products are directed towards children. *See* Harrs Dec., ¶ 27 and Wolgang Dec., ¶¶ 19, 21. Thus, this factor weighs heavily in Plaintiffs' favor.

2. <u>Plaintiffs are Likely to Prevail on the Merits of Their Lanham Act Claims</u>

In order to establish a likelihood of success on trademark counterfeiting and infringement claims, a plaintiff must show: (1) that its marks are valid and entitled to protection, and (2) that defendants' use of plaintiff's marks is likely to cause confusion. *See Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

First, the U.S. Trademark Registration certificate submitted in conjunction with this Application provide *prima facie* evidence of both the validity of the Twisty Petz Mark as well as Plaintiffs' ownership of the same. *See* Harrs Dec., ¶¶ 10-11, Ex. B; 15 U.S.C. § 1057(b).

Second, a proper likelihood of confusion inquiry generally involves an analysis of the factors set forth in *Polaroid Corp. v. Polarad Elecs. Corp.* 287 F.2d 492, 495 (2d Cir. 1961). 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). 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.* at 383 (internal citations omitted). Regardless, even if a *Polaroid* analysis were necessary, a straightforward application of the test clearly demonstrates that a likelihood of confusion exists in this case.

Finally, because Plaintiffs have shown that they are likely to prevail on their trademark counterfeiting and trademark infringement claims, they have also shown that they likely will

prevail on their claims for false designation of origin, passing off and unfair competition. *See Richemont N. Am., Inc. v. Linda Lin Huang*, No. 12 Civ. 4443 (KBF), 2013 U.S. Dist. LEXIS 136790, at *14-16 n.15 (S.D.N.Y. Sep. 24, 2013).

a) *The Twisty Petz Mark is Strong and Distinctive*

In determining the strength of a mark, courts look to: "(1) inherent strength, resulting from the mark's degree of inherent distinctiveness, usually measured on the ladder ranging from unprotectable generic marks to arbitrary, fanciful marks that enjoy the broadest protection, and (2) acquired strength, reflecting the degree of consumer recognition the mark has achieved." *Tcpip Holding Co. v. Haar Communs. Inc.*, 244 F.3d 88, 100 (2d Cir. 2001). The Twisty Petz Mark are suggestive as applied to the goods with which they are associated, and have acquired distinctiveness from being prominently used in connection with the Twisty Petz Products, which have achieved worldwide recognition and fame. *See* Harrs Dec., ¶¶ 10-11, Ex. B. Additionally, Plaintiffs' federal trademark registration for the Twisty Petz Mark further demonstrates the strength of the same. *See id.*; *see also Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986). Likewise, the Twisty Petz Mark is suggestive as applied to the goods with which it is associated, as it "require[s] imagination, thought and perception to reach a conclusion as to the nature of the goods," and thus, the Twisty Petz Mark is inherently distinctive and is thereby entitled to trademark protection "without proof of secondary meaning." *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968). Thus, this factor weighs in Plaintiffs' favor.

b) *Defendants' Counterfeit Products and Marks are Virtually Identical to the Twisty Petz Products and Twisty Petz Mark*

Defendants have applied identical copies of the Twisty Petz Mark to their substandard, Counterfeit Products and/or used identical copies of the Twisty Petz Mark in marketing and promoting their substandard, Counterfeit Products on Defendants' User Accounts and Merchant

Storefronts. *See* Arnaiz Dec., ¶¶ 6-7, Ex. A; Harrs Dec., ¶ 22 and Wolgang Dec., ¶¶ 16, 19. Defendants' Counterfeit Products are clearly designed to look as much like the Twisty Petz Products as possible, without the quality and workmanship. *See* Harrs Dec., ¶ 23; Wolgang Dec., ¶¶ 16, 19; *see also Rado Watch Co. v. ABC, Co.*, No. 92 Civ. 3657 (PKL),1992 U.S. Dist. LEXIS 8356, *11 (S.D.N.Y. 1992). Only minor differences exist between the Counterfeit Products and the Twisty Petz Products, which have no bearing on a finding of likelihood of confusion. *See* Arnaiz Dec., ¶¶ 6-7, Ex. A; Harrs Dec., ¶ 23 and Wolgang Dec., ¶¶ 16, 19; *see also Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 1004-1005 (2d Cir. 1997). Further, courts do "not look with much favor on the businessman who, out of the wealth of words available, chooses as a trademark one which comes as close as he dares to a well-known mark on the identical product." *A. T. Cross Co. v. Jonathan Bradley Pens, Inc.*, 470 F.2d 689, 692 (2d Cir. 1972).

c) *Defendants' Counterfeit Products Directly Compete with the Twisty Petz Products and There is No Gap to Bridge*

In considering the proximity of the products in the market, the concern is "competitive proximity," meaning "whether and to what extent the two products compete with each other." *Cadbury Beverages Inc. v. Cott Corp.*, 73 F.3d 474, 480 (2d Cir. 1996). In assessing the proximity of the parties' products, courts "look to the nature of the products themselves and the structure of the relevant market. Among the considerations germane to the structure of the market are the class of customers to whom the goods are sold, the manner in which the products are advertised, and the channels through which the goods are sold." *Id.* (citations and internal quotations omitted). "[T]he closer the secondary user's goods are to those the consumer has seen marketed under the prior user's band, the more likely that the consumer will mistakenly assume a common source." *Virgin Enterprises v. Nawab*, 335 F.3d 141, 150 (2d Cir. 2003). In this case, the class of

customers for both the Counterfeit Products and the Twisty Petz Products are the same retail consumers, so this factor weighs in favor of Plaintiffs.

Further, where, as here, Defendants are offering for sale and selling products that are virtually identical in kind, but not in quality to the Twisty Petz Products, bearing counterfeit and/or infringing marks in the same class of goods under which Plaintiffs sell their Twisty Petz Products, they are already in competitive proximity and there is no "gap" to bridge. *See* Arnaiz Dec., ¶¶ 6-7, Ex. A; Harrs Dec., ¶ 23 and Wolgang Dec., ¶¶ 16, 19; *see also Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 115 (2d Cir. 2009).

d) *Actual Confusion Can Be Inferred Between Defendants' Counterfeit Products and the Twisty Petz Products*

Seeing as Defendants are offering for sale and/or selling counterfeit versions of the Twisty Petz Products under the Twisty Petz Mark, or a confusingly similar mark, actual confusion can be inferred. *See* Arnaiz Dec., ¶¶ 6-7, Ex. A; Harrs Dec., ¶ 22 and Wolgang Dec., ¶¶ 16, 19. Plaintiffs, however, do not need to prove actual confusion, only a likelihood of confusion to obtain equitable relief. *See Prot. One Alarm Monitoring, Inc. v. Exec. Prot. One Sec. Serv., LLC*, 553 F. Supp. 2d 201, 206 (E.D.N.Y. 2008).

e) *Defendants Acted in Bad Faith*

Given that Defendants' choice of marks, which are virtually identical to the Twisty Petz Mark and used in connection with the offering for sale and/or sale of virtually identical products, it can be presumed that Defendants intended to trade off of the goodwill and reputation of Plaintiffs, their Twisty Petz Products and Twisty Petz Mark. *See* Arnaiz Dec., ¶ 6, Ex. A; Harrs Dec., ¶¶ 22 - 23 and Wolgang Dec., ¶¶ 16, 19-20, Ex. A.; *see also Kraft Gen. Foods, Inc. v. Allied Old English, Inc.*, 831 F. Supp. 123, 132 (S.D.N.Y. 1993). If Defendants' counterfeiting and infringing actions are found to be willful, "likelihood of confusion will be presumed as a matter of law." *N.Y. State Soc'y of CPA's v. Eric Louis Assocs.*, 79 F. Supp. 2d 331, 340 (S.D.N.Y. 1999).

f) *Defendants' Counterfeit Products Are of Inferior Quality*

The Twisty Petz Products are manufactured with high quality materials. *See* Harrs Dec., ¶ 15. Plaintiffs have neither authorized Defendants' use of the Twisty Petz Mark or confusingly similar marks in connection with the Counterfeit Products, nor approved or tested Defendants' Counterfeit Products being offered for sale and/or sold under or in connection with the Twisty Petz Mark and/or confusingly similar marks. *See* Harrs Dec., ¶ 24. Hence, Defendants have encroached on Plaintiffs' right to control the quality of the goods manufactured and sold under their Twisty Petz Mark. *See Polymer Technology Corp. v. Mimran*, 975 F.2d 58, 62 (2d Cir. 1992). In light of the above, this factor further supports a finding of likelihood of confusion.

g) *The Sophistication of Purchasers*

"Where the purchasers of a products are highly trained professionals, they know the market and are less likely than untrained consumers to be misled or confused by the similarity of different marks." *Virgin Enters. Ltd. v. Nawab*,335 F.3d 141, 151 (2d Cir. 2003). In contrast, ordinary "retail customers," (*i.e.*, the consumers of Plaintiffs' and Defendants' products), "are not expected to exercise the same degree of care as professional buyers, who are expected to have greater powers of discrimination." *Pretty Girl, Inc. v. Pretty Girl Fashions, Inc.*, 778 F. Supp. 2d 261, 268-269 (E.D.N.Y. 2011) (internal citations omitted). Thus, this factor favors Plaintiffs' likelihood of success on the merits.

3. <u>Plaintiffs are Likely to Prevail on Their Copyright Act Claims</u>

Under 17 U.S.C. § 501(a), in order to show likelihood of success on the merits of a copyright infringement claim, a given plaintiff must demonstrate: "(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)). As detailed below, Defendants have infringed upon the Twisty Petz Work.

a) Plaintiffs own a Valid Copyright in the Twisty Petz Work

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.*, 2011 U.S. Dist. LEXIS 49813, at *6; *see also* 17 U.S.C. § 410(c). Thus, Plaintiffs' certificate of registration for the Twisty Petz Work is *prima facie* evidence of the validity of the copyright and the facts stated in such registration. *See* Harrs Dec., ¶ 13, *Ex.* C.

b) Defendants Infringed the Twisty Petz Work

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 protectible [sic] elements of plaintiff's [work]." *Yurman Design, Inc. v. PAJ Inc.*, 262 F.3d 101, 110 (2d Cir. 2001).

A plaintiff may demonstrate actual copying "either by direct or indirect evidence." *P&G v. Colgate-Palmolive Co.*, 199 F.3d 74, 77 (2d Cir. 1999) (internal citations omitted). "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." *Id.*

A representative sample of side-by-side comparisons of Plaintiffs' Twisty Petz Work to Defendants' Infringing Products and/or Defendants' Infringing Listings illustrates that Defendants are copying one or more of the Twisty Petz Work by reproducing and/or displaying substantially similar, if not identical, imitations of the Twisty Petz Work either embodied in the Infringing Products themselves and/or in connection with the offering for sale and/or sale of Infringing Products. *See* Arnaiz Dec., ¶¶ 6-7, Ex. A; Harrs Dec., ¶ 22; and Wolgang Dec., ¶¶ 19-20, *Ex.* A. Defendants have taken the original and well-known elements of the Twisty Petz Work – comprised of the packaging of the Twisty Petz Products, the characters themselves and associated artwork – and used the same and/or elements thereof in Defendants' Infringing Listings for their Infringing

Products. *See* Wolgang Dec., ¶¶ 19-20, *Ex.* A. Defendants' imitations of the Twisty Petz Work are virtually indistinguishable therefrom, which, coupled with Plaintiffs' significant and widespread advertising efforts, show that Defendants unquestionably had "access" to the Twisty Petz Work. *See id.*; *Mint, Inc. v. Iddi Amad*, 2011 U.S. Dist. LEXIS 49813, at *7 (S.D.N.Y. May 9, 2011); and *Stora v. Don't Ask Why Outfitters*, 2016 U.S. Dist. LEXIS 170172, at *12 (E.D.N.Y. Dec. 7, 2016). Plaintiffs have demonstrated, at a minimum, "evidence of a reasonable possibility of access" through their widespread use of their Twisty Petz Work as well as the extensive advertising and widespread distribution of the Twisty Petz Products. *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988). This demonstrates that Plaintiffs' assertion of Defendants' access to the Twisty Petz Work is more than mere speculation.

Further, Defendants' infringing use of the Twisty Petz Work is clearly more than *de minimis*. Defendants have taken entire and/or core elements of the Twisty Petz Work and have used these, or nearly identical replicas thereof, in connection with the advertising, marketing, distributing, offering for sale and/or sale of the Infringing Products. In many instances, Defendants have directly copied one or more of the individual components of the Twisty Petz Work and have used such elements together in Defendants' Infringing Listings. *See Wolgang Dec.*, ¶¶ 19-20, *Ex.* A, and *Arnaiz Dec.*, *Ex.* A. Thus, Plaintiffs have established substantial similarity between the Twisty Petz Work and Defendants' imitations, and that Defendants copied the same. *See Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003). Plaintiffs respectfully submit that they are likely to succeed on the merits of their copyright claims.

4. <u>Plaintiffs are Likely to Prevail on Their State Law Claims</u>

Because Plaintiffs have shown a likelihood of success on their Lanham Act claims, Plaintiffs have also shown a likelihood of success ontheir deceptive trade practices, false advertising, unfair competition and unjust enrichment claims under New York State law. *See N.*

Am. Olive Oil Ass'n v. Kangadis Food Inc., 962 F. Supp. 2d 514, 521 (S.D.N.Y. 2013).

5. <u>The Balance of Hardships Favors Plaintiffs</u>

The balance of hardships unquestionably and overwhelmingly favors Plaintiffs. Here, as described above, Plaintiffs have suffered, and will continue to suffer, irreparable harm to their business, the value, goodwill and reputation built up in and associated with the Twisty Petz Mark and Twisty Petz Work and to its reputation as a result of Defendants' willful and knowing sales of substandard imitations of the Twisty Petz Products. *See* Harrs Dec., ¶ 28. In contrast, any harm to Defendants would only be the loss of Defendants' ability to continue to offer their Counterfeit Products for sale, or, in other words, the loss of the benefit of being allowed to continue to unfairly profit from their illegal and infringing activities. "Indeed, to the extent defendants 'elect[] to build a business on products found to infringe[,] [they] cannot be heard to complain if an injunction against continuing infringement destroys the business so elected." *Broad. Music, Inc. v. Prana Hosp.*, Inc., 158 F. Supp. 3d 184, 196 (S.D.N.Y. 2016) (internal citation omitted).

6. <u>Enjoining Defendants from Using the Twisty Petz Mark and Twisty Petz Work Will Serve the Public Interest</u>

The public interest will be served by the issuance of a temporary restraining order and preliminary injunction, as "the public has an interest in not being deceived—in being assured that the mark it associates with a product is not attached to goods of unknown origin and quality." *N.Y.C. Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 344 (S.D.N.Y. 2010). Here, the public has an interest in being able to rely on the high quality of the Twisty Petz Products bearing and/or sold in connection with the Twisty Petz Mark and Twisty Petz Work. *See* Harrs Dec., ¶ 27. Since Defendants have willfully and knowingly inserted substandard Counterfeit Products into the marketplace, the public would benefit from a temporary restraining order and preliminary injunction halting any further sale and distribution of Defendants' Counterfeit Products. *See* Arnaiz Dec., ¶¶ 6-7, Ex. A and Wolgang Dec., ¶¶ 16, 19.

C. PLAINTIFFS ARE ENTITLED TO AN ORDER PREVENTING 1) THE FRAUDULENT TRANSFER OF ASSETS AND 2) FREEZING DEFENDANTS' MERCHANT STOREFRONTS

1. Defendants' Assets Must be Frozen

Considering the nature of Defendants' counterfeiting businesses, and Plaintiffs' showing that they have a high likelihood of succeeding on the merits of all of their claims, Plaintiffs will be entitled to an equitable accounting of Defendants' profits from their sales of Counterfeit Products. Plaintiffs' request for an asset freeze order granting Plaintiffs information regarding the location of Defendants' Assets, the attachment of Defendants' Assets and an injunction preventing the transfer from or to Defendants' Financial Accounts by the Financial Institutions and Third Party Service Providers is both necessary and appropriate, and is within this Court's discretion to preserve Plaintiffs' right to the relief sought in the Complaint. *See* 15 U.S.C. § 1117(a).[10]

District courts have the "authority to freeze those assets which could [be] used to satisfy an equitable award of profits." *North Face Apparel Corp. v. TC Fashions, Inc.*, 2006 U.S. Dist LEXIS 14226, at *10 (S.D.N.Y. Mar. 30, 2006) (internal citation omitted). In doing so, a court "may exempt any particular assets from the freeze on the ground that they [are] not linked to the profits of allegedly illegal activity." *Id.* at *11. Yet, the onus is on "the party seeking relief [from any such asset freeze] to 'present documentary proof'" that its profits do not stem from such illegal activity. *Id.*

Under 15 U.S.C. § 1117(a) and 17 U.S.C. § 504(b), a plaintiff in an action arising thereunder is entitled to recover a defendant's profits derived from the counterfeiting and/or infringement and/or plaintiff's damages. *See Gucci Am. v. Bank of China*, 768 F.3d 122, 131-132 (2d Cir. 2014) (A copyright and/or trademark "infringer is required in equity to account for and

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[10] *See also, e.g., Balenciaga Am., Inc. v. Dollinger*, No. 10 Civ. 2912 (LTS), 2010 U.S. Dist. LEXIS 107733, at *22 (S.D.N.Y. Oct. 8, 2010).

yield up his gains to the true owner," and "profits are then allowed as an equitable measure of compensation."). Specifically, with respect to claims involving the infringement of federally registered copyrighted works and/or those arising under the Lanham Act, it has been established in this Circuit, as well as sister circuits, that district courts have the authority to issue a prejudgment asset restraint injunction in favor of plaintiffs seeking an accounting and/or another equitable remedy against allegedly infringing defendants. *See Warner Bros. Entm't Inc. v. Doe,* 2014 U.S. Dist. LEXIS 190098 (S.D.N.Y. May 29, 2014).

An asset freeze in the instant matter is unquestionably warranted because Defendants, who are foreign individuals and/or entities based in China, are manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products to U.S. consumers solely via the Internet, and accepting payment for such Counterfeit Products in U.S. Dollars through Financial Institutions, thereby causing irreparable harm to Plaintiffs in the form of lost sales, loss of goodwill and loss of control of their reputation with licensees, retailers and consumers, and can, and most certainly have the incentive to, transfer and hide their ill-gotten funds if their assets are not frozen. *See* Arnaiz Dec., ¶¶ 6-11, Ex. A; Harrs Dec., ¶¶ 27-28; *See* Wolgang Dec., ¶ 13; *see also Dama S.P.A. v. Doe*, No. 15-cv-4528 (VM), 2015 U.S. Dist. LEXIS 178076, at *4-6 (S.D.N.Y. June 12, 2015).[11] Therefore, Plaintiffs respectfully submit that this Court should exercise its inherent equitable power and freeze Defendants' Assets and Defendants' Financial Accounts for the purpose of preserving Defendants' funds and ensuring that a meaningful accounting of their profits can be made.[12]

2. Defendants' User Accounts and Merchant Storefronts Must be Frozen

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[11] *See also* Footnote 1.

[12] Upon the entering of an asset freeze, Plaintiffs also request that the Court Order Defendants and/or the Financial Institutions and/or the Third Party Service Providers to immediately identify Defendants' Assets and Defendants' Financial Accounts and the respective current account or fund balances of the same.

A temporary restraining order which, in part, restrains the Third Party Service Providers from providing services to Defendants' User Accounts and Merchant Storefronts is warranted and necessary because the continued offering for sale and/or sale of the Counterfeit Products by Defendants on their Merchant Storefronts will result in immediate and irreparable injury to Plaintiffs. *See Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 126 (2d Cir. 2014) and *AW Licensing, LLC v. Bao*, No. 15-CV-1373, 2015 U.S. Dist. LEXIS 177101, at *3 (S.D.N.Y. Apr. 1, 2015).

D. PLAINTIFFS ARE ENTITLED TO AN ORDER AUTHORIZING BIFURCATED AND ALTERNATIVE SERVICE OF PROCESS

Fed. R. Civ. P. (4) governs service on Defendants in the instant matter since, upon information and belief, they are located in China. While Defendants operate sophisticated commercial businesses, they are limited to correspondence by email, messaging through their respective User Accounts and communications otherwise transmitted over the Internet. *See* Arnaiz Dec., ¶¶ 6-11, Ex. A. Plaintiffs therefore respectfully request that this Court issue an order granting it permission to serve each respective Defendant via the following combination of electronic methods: 1) registered electronic mail and 2) website publication.

Plaintiffs may serve international defendants pursuant to Fed. R. Civ. P. 4(f)(3), which enables a court to grant an alternative method of service so long as it: "(1) is not prohibited by international agreement; and (2) comports with constitutional notions of due process." *SEC v. Anticevic*, No. 05 CV 6991 (KMW), 2009 U.S. Dist. LEXIS 11480, at *7 (S.D.N.Y. Feb. 8, 2009). Notably, "[s]ervice under subsection [4(f)] (3) is neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant." *Sulzer Mixpac AG*, 312 F.R.D. 329, 330. Since third-party merchants on Wish, like Defendants, have been known to use aliases, false addresses and other incomplete identification information to shield their true identities and there are, in fact, no physical addresses whatsoever associated with

the majority of Defendants' User Accounts, this is exactly the circumstance where the courts should exercise, as they previously have,[13] the authority to grant alternative methods of service. *See id.* "The decision whether to allow alternative methods of serving process under Rule 4(f)(3) is committed to the sound discretion of the district court." *Id.* [14]

In the instant matter, Plaintiffs propose using Outlook.com as well as RPost (www.rpost.com), an online service that confirms valid proof of authorship, content, and delivery of an email, as well as the official time and date that the email was sent and received. *See* Wolgang Dec., ¶ 26. Along with service via email, Plaintiffs respectfully request that the Court, in its discretion, permit service via website publication.[15]

Ultimately, service on Defendants by various electronic means comports with due process, as it is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 309. None of the Defendants have disclosed their mailing addresses. *See* Wolgang Dec., ¶¶ 24-25. Due to Defendants' purposeful anonymity, service by email, with confirmation of delivery by RPost, and website publication is most likely to provide Defendants with proper notice of this action and Plaintiffs' claims. *See Dama S.P.A.*, 2015 U.S. Dist. LEXIS 178076, at *7. Therefore, Plaintiffs respectfully submit that an order

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[13] *See Dama S.P.A.*, 2015 U.S. Dist. LEXIS 178076, at *6-7; *AW Licensing, LLC*, 2015 U.S. Dist. LEXIS 177101, at *18-19; *FTC v. PCCare247 Inc.*, 2013 U.S. Dist. LEXIS 31969, at *20.

[14] Pursuant to Fed. R. Civ. P (4)(1), service may be effected "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents" ("Hague Convention"). Although China is a signatory to it, the Hauge Convention "shall not apply where the address of the person to be served with the document is not known." *See* Hague Convention, November 15, 1965, Article 1. Moreover, despite China's objection to service by postal channels under Article 10, this Court has held that such objection does not include service by email and further, that service by email is not prohibited by any international agreement. *See Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 332 (S.D.N.Y. 2015).

[15] Publication on a website has been deemed appropriate service under Fed. R. Civ. P (4)(3) "so long as the proposed publication is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *National Association for Stock Car Auto Racing, Inc. v. Does*, 584 F. Supp. 2d 824, 826 W.D.N.C. 2008) (quoting *Mullane*, 339 U.S. at 315-16).

authorizing alternative service benefits all parties and the Court by ensuring that Defendants receive immediate notice of the pendency of this action to move forward expeditiously.[16]

E. PLAINTIFFS ARE ENTITLED TO AN ORDER AUTHORIZING EXPEDITED DISCOVERY

Additionally, Plaintiffs respectfully request that the Court order expedited discovery from Defendants, Financial Institutions and Third Party Service Providers regarding the scope and extent of Defendants' counterfeiting and infringing activities, as well as Defendants' account details and other information relating to Defendants' Financial Accounts, Assets and/or any and all User Accounts and or Financial Accounts with the Third Party Service Providers, including, without limitation any and all websites, any and all User Accounts and any and all Merchant Storefronts, including, without limitation, those owned and operated, directly or indirectly, by the Third Party Service Providers and the Financial Institutions.

Generally, a party may not seek discovery prior to a Rule 26(f) conference unless authorized by a court order. *See* Fed. R. Civ. P. 26(d)(1). In the past, Courts in this District have often applied a four-factor test to determine when expedited discovery may be granted,[17] but now apply a more flexible "good cause" test to examine "the discovery request . . . on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding circumstances." *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005) (internal citation omitted). Regardless of which test, Plaintiffs have established that they are entitled to the expedited discovery requested for good cause shown. *See id.* at 327.

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[16] Plaintiffs also respectfully submit that the Court issue an order authorizing Plaintiffs to serve the Financial Institutions and/or Third Party Service Providers with notice of the Court's order of the Application via electronic means prior to serving Defendants and with enough time for the Financial Institutions and/or Third Party Service Providers to comply with the Court's order to help expedite the process.

[17] *See Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs., Ltd.*, No. 94 Civ. 5620 (JFK), 1994 U.S. Dist. LEXIS 18457, at *7 (S.D.N.Y. Dec. 28, 1994).

F. PLAINTIFFS' REQUEST FOR A SECURITY BOND IN THE AMOUNT OF $5,000 IS ADEQUATE

In determining the amount of the bond that a moving party must post, this Court is "vested with wide discretion." *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). Plaintiffs respectfully submit the provision of security in the amount of $5,000 is sufficient. *See Rovio Entertainment Ltd. and Rovio Animation OY v. Best Baby and Kid Store, et al.*, No. 17-cv-4884-KPF, Dkt. 3 (S.D.N.Y. June 28, 2017).[18]

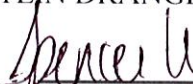
IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their Application be granted *ex parte* in its entirety.

Dated: November 13, 2018

Respectfully submitted,

EPSTEIN DRANGEL LLP

BY: 

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[18] Moreover, this Court has gone as far as to hold that no security bond is necessary in similar circumstances. *See Mattel, Inc. v. 86755, et al.*, No. 18-cv-8825 (JSR), Dkt. 12 (S.D.N.Y. Oct. 4, 2018); *Ontel Products Corp. v. Airbrushpainting Makeup Store a/k/a Airbrushespainting, et al.*, No. 17-cv-871 (KBF), Dkt. 20 (S.D.N.Y. Feb. 6, 2017).

Spin Master Ltd.
and Spin Master, Inc.