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Treasure Studio Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOONBUG ENTERTAINMENT LIMITED and
TREASURE STUDIO INC.,

Plaintiffs

v.

AKWUGFDFO1DDC, AMTIOPS, ANNE
FRANKLIN, AUTBYWQ, BERSAICY US,
BESTPARTY, BICLLCSDD YS, BUAAU,
BUBALUIS, CA POP, CATTIE123,
CECEBRACELST, CHANGLINGLI, CHAOZE,
CHENGDUSAISHUANGYOUJIE,
CHENGDUUYUZHENGGONGGONGSI,
DAFARWON, DERMIBEST, DUAXIN,
DZYHKYMS, FENGUAS, FISHING COWBOY,
FTSHOP-US, GOLDEN FLOWERPOT,
GOMONNING, GROCERY STORE FULL OF
SURPRISES, GROFFRY SPEN,
GUANGZHOU LUQINSHANGMAOYOUXIAN
GONGSIO, HAOSHAOXIONG, HESHIZHU,
HWOZOFAR, JAKE US, JIACHEN
INDUSTRIAL (SHENZHEN) CO. , LTD.,
JILINSHENGGUMINGDIANZISHANGWUYO
UXIANGONGSI, JINPO US, JONENLY,
KAZUA-US, KULOLO, LANMELONS, LAXUA,
LUCKMERRY, MADING HORSE,
MAKE.ANNI, MBVBN, MEIJUNDIAN,
MIMILE111, MOCEJOE, MOON SHOP US,
NUMOSE, NUORUNZHI, ONERBEST,
PSBYTRD, QINOOU, REHALY, SASATEK,

CIVIL ACTION No. 22-cv-5044

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS' EX
PARTE APPLICATION FOR 1) A
TEMPORARY RESTRAINING
ORDER; 2) AN ORDER
RESTRAINING MERCHANT
STOREFRONTS AND
DEFENDANTS' ASSETS WITH THE
FINANCIAL INSTITUTIONS; 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**

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ZIYOKO US and 合肥宽岱商贸有限公司1,

Defendants

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GLOSSARY

Term	Definition
Plaintiffs	Moonbug Entertainment Limited (“Moonbug”) and Treasure Studio Inc. (“Treasure”)
Defendants	akwugfdfo1ddc, Amtiops, Anne Franklin, AUTBYWQ, Bersaicy us, bestparty, Bicllcsdd YS, BUAUA, Bubaluis, CA POP, cattie123, Cecebracelst, changlingli, CHAOZE, chengdusaishuangyoujie, chengduuyuzhengconggongsi, Dafarwon, DERMIBEST, DuaXin, DZYHKYMS, Fenguas, Fishing cowboy, FTSHOP-US, Golden flowerpot, GoMonning, Grocery store full of surprises, Groffry Spen, GuangZhouLuQinShangMaoYouXianGongSio, haoshaoxiong, HESHIZHU, Hwozofar, Jake US, Jiachen Industrial (Shenzhen) Co. , Ltd., JiLinShengGuMingDianZiShangWuYouXianGongSi, Jinpo us, Jonenly, KAZUA-US, KULOLO, Lanmelons, LAXUA, Luckmerry, mading horse, make.anni, MBVBN, meijundian, mimile111, MOCEJOE, moon shop us, NUMOSE, nuoRunZhi, ONERBEST, Psbytrd, QINOOU, REHALY, SASATEK, Shengtangde, shijie149, Shruendi, Summertime-shop, Sunkeelon, THUCI US, Tokyia US Direct, Wajjioe, wenchangshiluojiiongcanbaihuo, Wqfirst, wuhantengmumaoyiyouxiangongsi, XINJIE DIRECT, XISHAPE, Xuehang Trading, xuzhimin77, yazebaby, Yenuoceshang2011, YIMEII, yongguandianzishangwuyouxiangongsi, YUNFEI US, Yusi-us, YUYUANB, zhangliangfudebeimeidianpu, zhi yi shop, zhushanshandebeimeidianpu, Ziyoko US and 合肥宽岱商贸有限公司 ¹
Amazon	Amazon.com, a Seattle, Washington-based, online marketplace and e-commerce platform owned by Amazon.com, Inc., a Delaware corporation, 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, directly to consumers worldwide and specifically to consumers residing in the U.S., including New York
Epstein Drangel	Epstein Drangel LLP, counsel for Plaintiffs
New York Address	224 Madison Ave, Suite 411, New York, NY 10016
Complaint	Plaintiffs’ Complaint
Application	Plaintiffs’ <i>ex parte</i> application for: 1) a temporary

	restraining order; 2) an order restraining Merchant Storefronts (as defined <i>infra</i>) and Defendants’ Assets (as defined <i>infra</i>) with the Financial Institutions (as defined <i>infra</i>); 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
Miller Dec.	Declaration of Robert Miller in Support of Plaintiffs’ Application
Nastasi Dec.	Declaration of Gabriela N. Nastasi in Support of Plaintiffs’ Application
CoComelon Content	A popular streaming media show and YouTube channel featuring 3D animation videos of both traditional nursery rhymes and original children’s songs
CoComelon Applications	<p>88/681,262 for “COCOMELON” for goods in Class 28; 88/681,248 for “COCOMELON” for goods in Class 9; 88/681,253 for “COCOMELON” for goods in</p> <p style="text-align: center;"></p> <p>Class 25; 88/945,840 for “  ” for</p> <p style="text-align: center;"></p> <p>goods in Class 3; 88/681,276 for “  ” for goods in Class 25; 88/681,270 for “</p> <p style="text-align: center;"></p> <p> ” for goods in Class 9; and</p> <p style="text-align: center;"></p> <p>88/681,280 for “  ” for goods in</p>

	Class 28
CoComelon Registrations	<p>U.S. Trademark Registration Nos.: 6,375,368 for “COCOMELON” for goods in Class 16; 5,830,142 for “COCOMELON” for goods in Classes 9 and 41; 6,421,553 for “COCOMELON” for goods in Class 28; 6,521,784 for “COCOMELON” for goods in Class 25;</p>  <p>5,918,526 for “CoComelon” for goods in Classes 9</p>  <p>and 41; and 6,563,758 for “ CoComelon ” for goods in Class 25</p>
CoComelon Marks	The marks covered by the CoComelon Registrations and CoComelon Applications
CoComelon Works	U.S. Copyright Registration Nos.: VAu 1-379-978 covering JJ; VAu 1-322-038 covering Unpublished Family Characters 2017; VAu 1-319-613 covering Animal Characters 2017 and VAu 1-374-077 covering CoComelon Logo
CoComelon Products	A variety of consumer products including toys, apparel, backpacks and other gear
Counterfeit Products	Products bearing or used in connection with the CoComelon Marks and/or CoComelon Works, and/or products in packaging and/or containing labels and/or hang tags bearing the CoComelon Marks and/or CoComelon Works, and/or bearing or used in connection with marks and/or artwork that are confusingly or substantially similar to the CoComelon Marks and/or CoComelon Works and/or products that are identical or confusingly or substantially similar to the CoComelon Products
Infringing Listings	Defendants’ listings for Counterfeit Products
User Accounts	Any and all websites and any and all accounts with online marketplace platforms such as Amazon, 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 persons in active concert or participation 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 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	Any and all money, securities or other property or assets of Defendants (whether said assets are located in the U.S. or abroad)
Defendants' Financial Accounts	Any and all financial accounts associated with or utilized by any Defendants or any Defendants' User Accounts or Merchant Storefront(s) (whether said accounts are located in the U.S. or abroad)
Financial Institutions	Any banks, financial institutions, credit card companies and payment processing agencies, such as 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 Amazon, 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.¹

Amazon is an online marketplace platform that allows manufacturers, wholesalers and other third-party merchants, like Defendants, to advertise, offer for sale, sell, distribute and ship their wholesale and retail products originating from China directly to consumers across the world and specifically to consumers residing in the U.S., including New York. (Nastasi Dec., ¶ 3). Defendants are individuals and/or businesses, who, upon information and belief, are located in China but conduct business in the U.S. and other countries by means of their respective User Accounts and Merchant Storefronts. (Miller Dec., ¶¶ 21-22; Nastasi Dec., ¶¶ 16-17, Ex. A). Defendants offer for sale and/or sell consumer products, including Counterfeit Products, and market, distribute and ship such products to consumers throughout the world, including New York. (Miller Dec., ¶ 20; Nastasi Dec., ¶ 17, Ex. A). Third-party merchants, like Defendants, often use evasive tactics like aliases, false addresses and other incomplete identification information to conceal their identities and avoid detection. (Nastasi Dec., ¶¶ 11-14). In fact, many of 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. (Nastasi Dec., ¶¶ 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

¹ Where a defined term is referenced herein but not defined, it should be understood as it is defined in the Glossary.

New York, through their Merchant Storefronts. (Miller Dec., ¶¶ 21-22; Nastasi Dec., ¶¶ 3, 16-17, Ex. A). Defendants' aforementioned actions have caused and will continue to cause 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. (Miller Dec., ¶ 23). 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, the means of making or obtaining such Counterfeit Products, business records and any and all other evidence relating to their infringing activities. (Nastasi Dec., ¶ 14. Moreover, they will likely hide or dispose of Defendants' Assets. *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 Robert Miller and attorney declaration of Gabriela N. Nastasi, plus accompanying exhibits. *See* Miller Dec.; Nastasi Dec.; Complaint, Exs. A-D. In the interest of brevity, any factual discussion is contained in the legal analysis below.²

III. ARGUMENT

A. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS

Determining personal jurisdiction over a foreign defendant in a federal question case

² Although Plaintiffs acknowledges 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 submits this 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.

requires a two-step inquiry. First, courts must look to the law of the forum state to determine whether personal jurisdiction will lie. *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 U.S. 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 them to long-arm jurisdiction in New York under N.Y. C.P.L.R. § 302(a)(1).³ New York’s exercise of jurisdiction over Defendants thereunder comports with due process.

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

Under § 302(a)(1), two requirements 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 quotation marks omitted). The second prong of § 302(a)(1) requires an “articulable

³ Alternatively, Defendants are also subject to jurisdiction under § 302(a)(3). *See Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 470 (S.D.N.Y. 2008). This alternative analysis is omitted for brevity.

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) (citations omitted) (internal citations omitted) (internal quotation marks 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 state. *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’ Merchant Storefronts, and allow for customers all over the world to communicate with Defendants, view and purchase products, including Counterfeit Products, as demonstrated by the checkout pages and purchase of Counterfeit Products completed by Epstein Drangel. (Nastasi Dec., ¶¶ 16-17, 22-23, Ex. A; *see also Chloe*, 616 F.3d at 170).

This Circuit has 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). Jurisdiction is proper “for internet sellers who use an internet storefront like Amazon,” when the Internet sellers are “commercial vendors who use it ‘as a means for establishing regular business with a remote forum.’” *Id.* at *8. In *Lifeguard Licensing Corp.*, Judge Schofield held that a “website that does more than provide information about a product and allows customers to purchase goods online, is a ‘highly interactive website,’ which may provide a basis for personal jurisdiction under CPLR § 302(a).” *Id.* at *7. (citing *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 170 (2d Cir. 2010) and *Grand v. Schwartz*, No. 15 Civ. 8779, 2016 U.S. Dist. LEXIS 61606 at *3 (S.D.N.Y. May 1, 2016) (holding that interactive commercial websites provides support for jurisdiction pursuant to CPLR § 302(a)(1))). Moreover, “[r]egularly offering and selling goods via an online marketplace such as Amazon.com can provide a basis for personal jurisdiction under CPLR § 302(a), even though Defendants do not control their Amazon.com ‘storefront’ or its interactivity to the same extent that they control their own highly interactive website.” *Id.* at *8. If a defendant

wishes to operate an interactive website accessible in New York, there is no inequity in subjecting [that defendant] to personal jurisdiction here. If [a defendant] does not want its website to subject it to personal jurisdiction here, it is free to set up a passive website that does not enable [that defendant] to transact business in New York.

Thomas Publ’g Co. v. Indus. Quick Search, 237 F. Supp. 2d 489, 492 (S.D.N.Y. 2002).⁴

In *EnviroCare Techs.*, the court held “if a website is interactive and allows a buyer in New York to submit an order online, courts typically find that the website operator is ‘transacting business’ in New York and is therefore subject to the court’s jurisdiction.” 2012 U.S. Dist. LEXIS

⁴ This Court has repeatedly found personal jurisdiction over defendants based in China who are operating Merchant Storefronts on online marketplace platforms, such as Alibaba, AliExpress, Wish and eBay. *See, e.g., Allstar Marketing Group, LLC v. activate2011store, et al.*, 19-cv-4204-KPF (S.D.N.Y. May 9, 2019); *Allstar Marketing Group, LLC v. Alice Wonder Household (Shanghai) Co., Ltd.*, 19-cv-4208-KPF (S.D.N.Y. May 9, 2019); *Allstar Marketing Group, LLC v. 545756338, et al.*, 19-cv-4209-KPF (S.D.N.Y. May 9, 2019).

78088 at *9 (citing *Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000) (“Generally, an interactive website supports a finding of personal jurisdiction over the defendant.”)) Similarly, in *Chloe*, the Second Circuit found that while the single act of shipping a counterfeit product might be sufficient to subject him to the jurisdiction of a New York court, it did not need to delve into such an inquiry as the defendant “operated a highly interactive website offering [counterfeit products] for sale to New York consumers.” *Chloe*, 616 F.3d 158, 170.

Courts in this Circuit have found that “[t]he offering for sale of even one copy of an allegedly infringing item, even if no sale results, is sufficient to give personal jurisdiction over the alleged infringer under N.Y. CPLR § 302(a), subd. 1, 2 and 3.” *Cartier v. Seah LLC*, 598 F. Supp. 2d 422, 425 (S.D.N.Y. 2009). In *McGraw-Hill Global Educ. Holdings LLC v. Khan*, 323 F. Supp. 3d 488 (S.D.N.Y. 2018), this Court found personal jurisdiction where the defendant’s website was “interactive” and allowed a buyer to submit an order online. *McGraw-Hill* cited to *Audiovox Corp v. S. China Enter., Inc.*, 2012 U.S. Dist. LEXIS 104656 at *3 (S.D.N.Y. Jul. 26, 2012) for the proposition that “if a website is interactive and allows a buyer in New York to submit an order online, courts typically find that the website operator is ‘transacting business’ in New York and is therefore subject to the court’s jurisdiction.” See also *Hsin Ten Enter.*, 138 F. Supp. 2d 449, 456.

Here, Defendants operate interactive Merchant Storefronts, allowing New York consumers to inquire and communicate with Defendants, purchase goods, including Counterfeit Products, by and through Defendants’ listings, and upon completion of a sale, ship goods to New York. The fact that Defendants have chosen to open their respective User Accounts for the purpose of selling Counterfeit Products alone supports a finding that Defendants have intentionally used Amazon “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, because Defendants are offering for sale and/or selling Counterfeit Products 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 Amazon, such that they are subject to jurisdiction. *Id.* at *10.

It is highly likely that Defendants have shipped Counterfeit Products to consumers in New York based on the following: 1) Epstein Drangel completed a checkout page for an order of Counterfeit Products from every Defendant through an account associated with the New York Address, 2) Epstein Drangel purchased Counterfeit Products from a representative sampling of Defendants to New York, 3) and all Defendants accept payment in U.S. dollars. (Nastasi Dec., ¶¶ 16-17, 19, 22-24, Ex. A).

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). *Rolex Watch, U.S.A., Inc. v. Pharel*, 2011 U.S. Dist. LEXIS 32249, at * 6 (E.D.N.Y. Mar. 11, 2011). Plaintiffs and Epstein Drangel have viewed Defendants' Counterfeit Products via their Merchant Storefronts. (Miller Dec., ¶ 22; Nastasi Dec., ¶¶ 16-17, Ex. A). Epstein Drangel then completed checkout pages for Counterfeit Products by providing the New York Address as the shipping address.⁵ (Nastasi Dec., ¶¶ 23-24, Ex. A). Further, Epstein Drangel purchased Counterfeit Products from a representative

⁵ 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)).

sampling of Defendants into New York. *Id.* 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 Amazon, Epstein Drangel’s completion of checkout pages with the New York Address, 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 New York, 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.⁶

2. Exercising Personal Jurisdiction Over Defendants Comports with Due Process

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 benefits and protections of its laws.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (U.S. 1985). *see also Best Van Lines, Inc.*, 490 F.3d at 243. (Nastasi Dec., ¶¶ 22-23, Ex. A). 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. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 469 (S.D.N.Y. 2008). Accordingly, Plaintiffs respectfully submits that this Court

⁶ (Nastasi Dec., ¶¶ 16-17, 22-23, Ex. A). Plaintiffs respectfully submit 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 Internationales Interieur GmbH*, No. 03 Civ. 5664 (JGK), 2005 U.S. Dist. LEXIS 4022, *8 (S.D.N.Y. Mar. 10, 2005).

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).⁷

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 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. 15 U.S.C. § 1116(d)(4)(B). As discussed below, Plaintiffs meets each of the relevant criteria for the issuance

⁷ 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).

of an *ex parte* temporary restraining order under the Lanham Act.⁸

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. (Nastasi Dec., ¶¶ 11-14, 25-26). 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 via their Merchant Storefronts. (Miller Dec., ¶¶ 20-21; Nastasi Dec., ¶¶ 3, 16-17). 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 CoComelon Works and CoComelon Marks, in denying their Application greatly outweighs the harm to Defendants' interests in continuing to offer for sale and sell Counterfeit Products. (Miller Dec., ¶ 25).

“To obtain a preliminary injunction, a plaintiff must establish: ‘(1) the likelihood 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.*

⁸ 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. (Miller Dec., ¶ 27). Also, since Defendants' location and the location of the Counterfeit Products are unclear, Plaintiffs are not requesting a seizure order in this Application. (Nastasi Dec., ¶¶ 11-14).

Shipping Ass'n, Inc., 965 F.2d 1224, 1228 (2d Cir. 1992). Plaintiffs meets the standard for a preliminary injunction and the Court should enter a temporary restraining order.

3. Plaintiffs are Likely to Prevail on the Merits of Their Lanham Act Claims

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 Plaintiffs' marks is likely to cause confusion. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010). First, the U.S. Trademark Registration certificates submitted in conjunction with this Application provide *prima facie* evidence of both the validity of the CoComelon Marks as well as Plaintiffs' ownership of the same. 15 U.S.C. § 1057(b). (Miller Dec., ¶ 10, Ex. 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 demonstrates that 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. *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).

4. Plaintiffs are Likely to Prevail on Their Copyright Act Claims

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 CoComelon Works.

a) Plaintiffs owns Valid Copyrights in the CoComelon Works

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*, No. 10 Civ. 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). Thus, Plaintiffs’ certificates of registration for the CoComelon Works are *prima facie* evidence of the validity of the copyrights and the facts stated in such registrations. (Miller Dec., ¶ 13, Ex. C).

b) Defendants Infringed the CoComelon Works

To establish infringement, “the copyright owner must demonstrate that: (1) the defendant has actually copied the Plaintiffs’ work; and (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible [sic] elements of Plaintiffs’ [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 CoComelon Works to Defendants’ Counterfeit Products illustrates that Defendants are copying one or more of the CoComelon Works by reproducing and/or displaying substantially similar, if not identical, imitations of the

CoComelon Works either embodied in the Counterfeit Products themselves and/or in connection with the offering for sale and/or sale of Counterfeit Products. (Miller Dec., ¶¶ 21-22; and Nastasi Dec., ¶¶ 16-17, Ex. B). Defendants have taken the original and well-known elements of the CoComelon Works and used the same and/or elements thereof in the Infringing Listings. (Nastasi Dec., ¶¶ 16-17, Exs. A, B). Defendants' imitations of the CoComelon Works are virtually indistinguishable therefrom, which, coupled with Plaintiffs' significant and widespread advertising efforts, show that Defendants unquestionably had "access" to the CoComelon Works. *See id.*; *Mint, Inc.*, 2011 U.S. Dist. LEXIS 49813, at *7; *Stora v. Don't Ask Why Outfitters*, 2016 U.S. Dist. LEXIS 170172, at *12 (E.D.N.Y. Dec. 7, 2016). Plaintiffs demonstrated, at a minimum, "evidence of a reasonable possibility of access" through their widespread use of the CoComelon Works as well as extensive advertising and widespread distribution of the CoComelon Products. *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988). This demonstrates that Plaintiffs' assertion of Defendants' access to the CoComelon Works is more than mere speculation.

Further, Defendants' infringing use of the CoComelon Works is clearly more than *de minimis*. Defendants have taken entire and/or core elements of the CoComelon Works and have used these, or nearly identical replicas thereof, in connection with the advertising, marketing, distributing, offering for sale and/or sale of the Counterfeit Products. In many instances, Defendants have directly copied one or more of the individual components of the CoComelon Works and have used such elements together in the Infringing Listings. (Nastasi Dec., ¶¶ 16-17, Exs. A, B). Thus, Plaintiffs have established substantial similarity between the CoComelon Works 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). Accordingly, Plaintiffs respectfully submits that they are likely to succeed on the merits of their copyright claims.

5. Plaintiffs are Likely to Prevail on Their State Law Claims

Since Plaintiffs have shown a likelihood of success on their Lanham Act claims, Plaintiffs have also shown a likelihood of success on their New York unfair competition and unjust enrichment claims. *N. Am. Olive Oil Ass'n v. Kangadis Food Inc.*, 962 F. Supp. 2d 514, 521 (S.D.N.Y. 2013).

6. Plaintiffs are Entitled to a Presumption of Irreparable Harm

Plaintiffs are entitled to a rebuttable presumption of irreparable harm as they are likely to succeed on the merits of their Lanham Act claims. On December 27, 2020, the Trademark Modernization Act of 2020 (codified as part of the Consolidated Appropriations Act, 2021, Pub. L. 116-260) was signed into law. The Act, *inter alia*, amended the text of 15 U.S.C. § 1116(a) codified a rebuttable presumption of irreparable harm which, now reads in relevant part:

A plaintiff seeking any such injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection in the case of a motion for a permanent injunction or upon a finding of likelihood of success on the merits for a violation identified in this subsection in the case of a motion for a preliminary injunction or temporary restraining order.

See City of N.Y. v. Lopez, No. 21 CV 7862 (JPO), 2021 U.S. Dist. LEXIS 243449 (S.D.N.Y. Dec. 21, 2021). Thus, since Plaintiffs have established that they are likely to succeed on the merits of their claims under 15 U.S.C. § 1125(a), Plaintiffs are entitled to a presumption of irreparable harm.

7. The Balance of Hardships Favors Plaintiffs

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 CoComelon Works and CoComelon Marks and to their reputation as a result of Defendants' willful and knowing sales of substandard imitations of the CoComelon Products. (Miller Dec., ¶ 25). 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).

8. Enjoining Defendants from Using the CoComelon Works and CoComelon Marks Will Serve the Public Interest

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 CoComelon Products bearing and/or sold in connection with the CoComelon Works and/or CoComelon Marks. (Miller Dec., ¶ 25; Nastasi Dec., ¶¶ 16-17, Exs. A, B). 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. (Nastasi Dec., ¶¶ 16-17, Ex. A).

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

9. 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 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).⁹

District courts have "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. The onus is on "the party seeking relief [from such asset freeze] to 'present documentary proof'" that its profits are not 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 Plaintiffs' 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 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 copyrighted infringement and/or those arising under the Lanham Act, it has been established in this Circuit, as well as others, that courts have the authority to issue a prejudgment asset restraint injunction in favor of plaintiffs seeking an accounting and/or another equitable remedy. *Warner Bros. Entm't Inc. v. Doe*, No. 14-CV-3492 (KPF), 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,

⁹ *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).

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, 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. (Miller Dec., ¶ 25; *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).¹⁰ Therefore, Plaintiffs respectfully submit that this Court should exercise its inherent equitable power and freeze Defendants' Assets and Financial Accounts for the purpose of preserving Defendants' funds and ensuring that a meaningful accounting of their profits can be made.¹¹

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

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. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 126 (2d Cir. 2014).

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

Both China and the U.S. are signatories to the Hague Convention ("Hague"); however, where, as is the case with 8 Defendants here,¹² such Defendants display incomplete addresses on their Merchant Storefronts to shield their true identities, the Hague does not apply. *See Advanced*

¹⁰ *See also supra* fn. 2.

¹¹ Upon the entering of an asset freeze, Plaintiffs also requests 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.

¹² Out of the 82 Defendants in this action, 8 Defendants display incomplete addresses (only identifying their city, country and/or zip code) (Nastasi Dec., at ¶ 25).

Access Content Sys. Licensing Adm'r, LLC v. Shen, No. 14 Civ. 1112 (VSB), 2018 U.S. Dist. LEXIS 169603, at *7 (S.D.N.Y. Sep. 30, 2018). As for the remaining Defendants, to the extent that the addresses displayed on their Merchant Storefronts are complete and accurate, which Plaintiffs have been unable to confirm with any certainty, even if the Hague applies, Plaintiffs respectfully submit that the Hague allows for such Defendants to be served via registered electronic mail with confirmation of delivery by Rmail, and website publication either pursuant to Fed. R. Civ. P. 4(f)(2)(A) or Fed. R. Civ. P. 4(f)(3).

“Article 2 of the Hague mandates that each contracting country ‘designate a Central Authority which [] undertake[s] to receive requests for service’ from other countries party to the agreement,” *Vega v. Hastens Beds, Inc.*, 339 F.R.D. 210 (S.D.N.Y. 2021) (quoting Hague, 20 U.S.T. 361, Art. 2.)). “Submitting a request to a central authority is not, however, the only method of service approved by the Convention. For example... ***Article 19 clarifies that the Convention does not preempt any internal laws of its signatories that permit service from abroad via methods not otherwise allowed by the Convention.***” *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508 (2017) (emphasis added); *see also Vega v. Hastens Beds, Inc.*, 339 F.R.D. 210, 216 (S.D.N.Y. 2021). (“The Hague Service Convention provides alternate methods of service, in addition to the Central Authority—*e.g.*, “service through consular channels”, “service by mail if the receiving [foreign] state does not object” and “service pursuant to the internal laws of the [foreign] state.”) (internal citations omitted).

Pursuant to Fed. R. Civ. P. 4(f)(2)(A), service may occur at a place not within any judicial district of the U.S. “if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice . . . as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction.” Fed. R. Civ. P.

4(f)(2)(A). “While this precise issue has not been explicitly ruled on by any other court in the Second Circuit, courts have appeared to implicitly accept that Rule 4(f)(2)(A) allows for service through any method...permitted by the recipient country.” *Dev. Specialists, Inc. v. Li (In re Coudert Bros. LLP)*, No. 16-CV-8237 (KMK), 2017 U.S. Dist. LEXIS 71435, at *34-35 (S.D.N.Y. May 9, 2017); *see also Appel v. Hayut*, No. 20 Civ. 6265 (JPC), 2020 U.S. Dist. LEXIS 229322, 2020 WL 7211212, at *1 (S.D.N.Y. Dec. 7, 2020) (“Rule 4(f)(2)(A) on its face appears to allow, without limitation, service by mail if the recipient country so allows.”).

Pursuant to Article 87 of Civil Procedure Law of the People’s Republic of China (“PRC Article 87”), “[s]ubject to the consent of the person on which a procedural document is to be served, the document may be served by way of facsimile, **electronic mail** or any other means through which the receipt of the document may be acknowledged, with the exception of judgments, rulings and mediation statements...” (emphasis added). *See Hangzhou Chic Intelligent Tech. Co. v. P’ships & Unincorporated Ass’n Identified on Schedule A*, No. 20 C 4806, 2021 U.S. Dist. LEXIS 64064, at *11 (N.D. Ill. Apr. 1, 2021). Further, the Online Litigation Rules of the People’s Court, adopted at the 1838th meeting of the judicial committee of the Supreme People’s Court on May 18, 2021 and effective August 1, 2021, are instructive in light of their provisions relating to service via electronic means, including Article 31, which confirms when service via e-mail is considered effected, and Article 32, which allows for the Court to serve through SMS, instant messaging tools, prompts on the litigation platform.¹³ Accordingly, Chinese law specifically authorizes service by e-mail (among other electronic means), particularly where, as here, Defendants expressly consented to service by electronic means by agreeing to certain terms and conditions necessary to create their User Accounts, use Amazon’s services, and sell on Amazon.

¹³ *See also, How to Understand the Rules of Electronic Service in Online Litigation*, Written by The Supreme People’s Court Judge, P.R. China. (Nastasi Dec., ¶ 30, Ex. C).

Amazon’s Conditions of Use specifically require that a user consent “to receive communications from us [Amazon] electronically, such as e-mails, texts, mobile push notices, or notices and messages on this site or through the other Amazon Services, such as our [Amazon’s] Message Center” and that the user agree “that all agreements, notices, disclosures, and other communications that we [Amazon] provide[s] to you electronically satisfy any legal requirement that such communications be in writing”. *Conditions of Use*, Amazon.com, <https://sellercentral.amazon.com/gp/help/external/201824360> (last visited Feb. 3, 2022).¹⁴

Moreover, U.S. Courts have also found that since China allows its own courts to “order service of Chinese process by email on defendants outside China, it cannot credibly object to U.S. courts ordering the same on defendants located in China”. *See, e.g., Hangzhou Chic*, No. 20 C 4806, 2021 U.S. Dist. LEXIS 64064, at *11-*12; *see also Chanel, Inc. v. Handbagstore*, No. 20-CV-62121-RUIZ/STRAUSS, 2021 U.S. Dist. LEXIS 122842, at *25-30 (S.D. Fla. June 30, 2021).

Accordingly, because the most natural reading of Rule 4(f)(2)(A), on its face and in context, is that service may be effected by any means prescribed by the law of the recipient country, and because the law of China permits service via e-mail and other electronic means, Plaintiffs submit that service on Defendants via registered electronic mail with confirmation of delivery by Rmail, and website publication is appropriate and affective under the Hague and Rule 4(f)(2)(A).

Alternatively, Plaintiffs may serve Defendants pursuant to Fed. R. Civ. P. 4(f)(3). It is left to the Court's discretion whether to authorize service “by other means” under Rule 4(f)(3), and exhaustion of service methods under Rule 4(f)(1) or (f)(2) is not a prerequisite for service under 4(f)(3). *See Elsevier, Inc. v. Siew Yee Chew*, 287 F. Supp. 3d 374, 377 (S.D.N.Y. 2018); *see also*

¹⁴ Amazon explicitly limits sellers’ communications with customers to communications via electronic means, including via email and the buyer-seller messaging portal. *See Communication Guidelines*, Amazon.com, https://sellercentral.amazon.com/gp/help/external/G1701?language=en_US&ref=efph_G1701_cont_521 (last visited Feb. 3, 2022).

Sulzer Mixpac AG v. Medenstar Indus. Co., 312 F.R.D. 329, 330 (S.D.N.Y. 2015) (“[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.”). Fed. R. Civ. P. 4(f)(3) 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).

As a preliminary matter, the alternative service requested by Plaintiffs herein (i.e., service by electronic means), is not prohibited by any international agreement. Despite China’s objection to service by postal channels under Article 10, this Court, along with many others, have held that such objection does not include service by email and further, that service by email is not prohibited by any international agreement. *See, e.g. Sulzer*, 312 F.R.D. at 332; *Anova Applied Elecs., Inc. v. Hong King Grp., Ltd.*, 334 F.R.D. 465, 471 (D. Mass. 2020); *The Neck Hammock, Inc v. Danezen.com*, 2020 U.S. Dist. LEXIS 202808, at *4 (D. Utah Oct. 29, 2020).¹⁵ In fact, as discussed *supra*, service by electronic means has been *specifically authorized* by PRC Article 87 and the Online Litigation Rules of the People’s Court, and has also been consented to by all Defendants through their agreements with Third Party Service Providers.

Further, since third-party merchants on Amazon, like Defendants, have been known to use aliases, false addresses and other incomplete identification information to shield their true identities and Plaintiffs confirmed that 8 Defendants herein display incomplete physical addresses

¹⁵ In *Luxottica Grp. S.p.A. v. P’ships, et al.*, 391 F. Supp. 3d 816 (N.D. Ill. 2019) the court disagreed with this Court’s holding in *Sulzer*, finding China’s objection to service via postal channels is an objection to service by email, relying on *Water Splash*, 197 L. Ed. 2d 826. Yet, on a motion for reconsideration, the *Luxottica* court conceded that the Supreme Court did not “conclusively settle the precise questions” because neither *Water Splash* nor *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) involved Rule 4(f)(3) or e-mail service. *Luxottica Grp. S.p.A. v. P’ships, et al.*, 18 Civ. 2188, 2019 U.S. Dist. LEXIS 93466, at *3 (N.D. Ill. June 4, 2019); *see also In re Bibox Grp. Holdings Sec. Litig.*, No. 20cv2807(DLC), 2020 U.S. Dist. LEXIS 142802, at *5 (S.D.N.Y. Aug. 10, 2020) (“Service by email or social media are not among those listed in Article 10. Courts have understood objections to the alternative channels of service in Article 10 to be limited to the methods specifically enumerated therein.”)

on their Merchant Storefronts, and Plaintiffs are unable to confirm with certainty that the addresses displayed by the remaining Defendants are true, complete and correct, this is exactly the circumstance where the courts should exercise, as they previously have,¹⁶ the authority to grant alternative methods of service pursuant to Fed. R. Civ. P. 4(f)(3). *Id.*

Alternative service is particularly appropriate where, as here, Plaintiffs have demonstrated exigent circumstances justifying the urgent injunctive relief sought herein, making a quick and effective means of service necessary to prevent further irreparable harm to Plaintiffs.¹⁷ *See e.g., Strabala v. Zhang*, 318 F.R.D. 81, 114 (N.D. Ill. 2016) (“Court-directed service pursuant to Rule 4(f)(3) is appropriate when, for example, ‘there is a need for speed that cannot be met by following the Hague Convention methods. . . .’”) (internal quotation omitted). Accordingly, service by the Hague is not the means most reasonably calculated to timely apprise Defendants of the TRO and this lawsuit, since, as this Court has noted, “the length of time required for service under the Hague Convention, approximately six to eight months...may unnecessarily delay [a] case.” *In re GLG Life Tech Corp. Sec. Litig.*, 287 F.R.D. 262, 266 (S.D.N.Y. 2012) (internal citations omitted); *see also Tevra Brands LLC v. Bayer Healthcare LLC*, No. 19 Civ. 4312, 2020 U.S. Dist. LEXIS 109919, at *5 (N.D. Cal. June 23, 2020) (delays to service via the Hague “may arise due to COVID-19 pandemic [thus] permitting renewal of alternative service motion.”). In *Microsoft*

¹⁶ *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 (S.D.N.Y. Mar. 7, 2013).

¹⁷ The advisory committee notes to Rule 4, in relevant part, state:

The Hague Convention, for example, authorizes special forms of service in cases of urgency if convention methods will not permit service within the time required by the circumstances. Other circumstances that might justify the use of additional methods include the failure of the foreign country's Central Authority to effect service within the six-month period provided by the Convention In such cases, the court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement. Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law.

Fed. R. Civ. P. 4, Advisory Committee Notes, 1993 amendments.

Corp. v. Goldah.Com Network Tech Co., the Court noted that the situation described in Microsoft's motion for, *inter alia*, a temporary restraining order and electronic service of process was "urgent enough to warrant service under Rule 4(f)(3)." 17-cv-02896-LHK, 2017 U.S. Dist. LEXIS 168537, *11-*12 (N.D. Cal. Oct. 11, 2017). Namely because Microsoft, like Plaintiffs, had reason to believe the defendants would "funnel proceeds of their fraud through PayPal to foreign bank accounts held in China...[and] as soon as Defendants learn about the existence of the lawsuit, they will repatriate all of their assets currently held in the U.S. to China to prevent them from being made available to satisfy an award for Microsoft in this case." *Id.* If Plaintiffs serve Defendants via the Hague, Defendants will not receive notice until, at best, months from now, at which time the TRO will have long expired, and Defendants will have the opportunity to continue their counterfeiting operations causing further irreparable harm to Plaintiffs. There is also the likelihood of discovering, after attempting the lengthy process of serving the remaining Defendants through China's Central Authority, that the addresses listed on their Merchant Storefronts were inaccurate.

Plaintiffs therefore respectfully request that this Court issue an order granting it permission to serve Defendants via the following combination of electronic methods: 1) registered electronic mail and 2) website publication. For service by registered electronic mail, Plaintiffs propose using Outlook.com as well as Rmail (www.rmail.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. (Nastasi Dec., ¶ 29). Along with service via email, Plaintiffs respectfully request that the Court, in its discretion, permit service via website publication.

Service on Defendants by electronic means is allowed for by PRC Article 87 and consented to by all Defendants, and thus 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 (1950); *see also Zanghi*, 2020 U.S. Dist. LEXIS 20279, at *6 (judicial approval of service via email is generally supported by facts indicating that the person to be served will likely receive the documents); *Pearson Educ. Inc. v. Doe 1*, 18-CV-7380, 2019 U.S. Dist. LEXIS 210349, at *3 (S.D.N.Y. Dec. 2, 2019) (“Email service has also repeatedly been found by courts to meet the requirements of due process.” (internal citation omitted). This Court held the bar is met where, as here, Defendants engaged in online business and regularly communicated with customers via email. *Mattel, Inc. v. Animefunstore, et al.*, 18 Civ. 8824 (LAP) (Dkt. 81) (S.D.N.Y. May 1, 2020); Nastasi Dec., ¶ 28; *see also Sulzer*, 312 F.R.D. at 332 (service through email was appropriate where the “email address in question is listed prominently on [defendant’s internet homepage...][the defendant] presumably relies at least partially on contact through [its email] to conduct overseas business, and it is reasonable to expect [defendant] to learn of the suit against it through this email address.”). Accordingly, service by e-mail is the most effective means to ensure Defendants are reasonably apprised of this action, as it is more reliable than the unverified physical addresses, if any, posted on Defendants’ Merchant Storefronts. (Nastasi Dec., ¶¶ 13, 27-28).¹⁸

E. PLAINTIFFS ARE ENTITLED TO AN ORDER AUTHORIZING EXPEDITED DISCOVERY

Additionally, Plaintiffs respectfully requests 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,

¹⁸Plaintiffs also respectfully request that the Court issue an order authorizing Plaintiffs to serve the Financial Institutions and Third Party Service Providers with the Court’s order 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.

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. 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,¹⁹ 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; Miller Dec., ¶ 25; Nastasi Dec., ¶¶ 11-14, 25-26.

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. *Rovio Entertainment Ltd. and Rovio Animation OY v. Best Baby and Kid Store, et al.*, No. 17-cv-4884-KPF (S.D.N.Y. June 28, 2017).²⁰

IV. CONCLUSION

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

¹⁹ *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).

²⁰ 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-RJS-JSR (S.D.N.Y. Oct. 4, 2018) (The Hon. Richard J. Sullivan held that no security bond was necessary because “it strikes me almost as fairly arbitrary.”)

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Respectfully submitted,

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