

Jason M. Drangel (JD 7204)
jdrangel@ipcounselors.com
Ashly E. Sands (AS 7715)
asands@ipcounselors.com
Danielle S. Futterman (DY 4228)
dfutterman@ipcounselors.com
Gabriela N. Nastasi
gnastasi@ipcounselors.com
Melissa J. Levine
mlevine@ipcounselors.com
Jodi-Ann McLane (*pro hac vice* forthcoming)
jmclane@ipcounselors.com
EPSTEIN DRANGEL LLP
60 East 42nd Street, Suite 1250
New York, NY 10165
Telephone: (212) 292-5390
Facsimile: (212) 292-5391
Attorneys for Plaintiffs
Hyper Ice, Inc. and Hyperice IP Subco, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HYPER ICE, INC. and HYPERICE IP SUBCO, LLC,

Plaintiffs

v.

E HUNG TAT INTERNATIONAL GROUG CO.,
LIMITED d/b/a JQX-US and JINYUN LIGE
TECHNOLOGY CO., LTD. d/b/a
JINYUNLIGEKEJI,

Defendants

CIVIL ACTION NO.

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

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GLOSSARY

Term	Definition
Plaintiffs or Hyperice Defendants	Hyper Ice, Inc. and Hyperice IP Subco, LLC
Amazon	E Hung Tat International Group Co., Limited d/b/a Jqx-US and Jinyun Lige Technology Co., Ltd. d/b/a Jinyunligekeji
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	244 Madison Ave, Suite 411, New York, New York 10016
Complaint	Plaintiffs' Complaint
Application	Plaintiffs' <i>ex parte</i> Application for: 1) a temporary restraining order; 2) an order restraining Defendants' User Accounts (as defined <i>infra</i>), Defendants' 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
Arnold Dec.	Declaration of Brian Arnold in Support of Plaintiffs' Application
Levine Dec.	Declaration of Melissa J. Levine in Support of Plaintiffs' Application
Hyperice Products	Plaintiffs' Hypervolt line of battery-powered percussive massage devices, including the Hypervolt Go 2, Hypervolt 2 and Hypervolt 2 Pro which are covered by one or more claims in the Hyperice Patents (defined <i>infra</i>)
Hyperice Website	https://www.hyperice.com/
Hyperice Amazon Storefront	https://www.amazon.com/stores/Hyperice/page/D1C8E117-0D44-41F0-9B14-E5AE1F4EDD4C
Hyperice Patents	U.S. Patent No. 11,857,482 (“482 Patent”), entitled “Massage Device Having Variable Stroke Length” and U.S. Patent No. 12,213,933 (“933 Patent”), entitled “Massage Device with a Releasable Connection for a Massaging Head”
Infringing Products	Products which infringe one or more of the claims of the Hyperice Patents under the brand name “JQX”
Infringing Listings	Defendants' listings for Infringing Products
User Accounts	Any and all websites owned and/or operated by Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with Defendants, advertise, promote, offer for sale and/or sell Infringing Products held and/or operated by Defendants, 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 Defendants
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 Defendants operate storefronts to manufacture, import, export, advertise, market, promote, distribute, display, make, use, offer for sale, sell and/or otherwise deal in Infringing Products, which are held by or associated with Defendants, their respective officers, employees, agents, servants and all persons in active concert or participation with Defendants including, without limitation, the Merchant Storefronts located at https://www.amazon.com/sp?ie=UTF8&seller=A2F5I30TBCP8PT and https://www.amazon.com/sp?ie=UTF8&seller=AZH1R74KMWHA5
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 Defendants or Defendants' User Accounts or Merchant Storefronts (whether said account is located in the U.S. or abroad)
Financial Institutions	PayPal Inc. ("PayPal"), Payoneer Inc. ("Payoneer"), Amazon payment services (e.g., Amazon Pay) and PingPong Global Solutions, Inc. ("PingPong")
Third Party Service Providers	Any third party providing services in connection with Defendants' User Accounts, including online marketplace platforms, including, without limitation, 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 Defendants manufacture, import, export, advertise, market, promote, distribute, make, use, offer for sale, sell and/or otherwise deal in Infringing 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 making, using, offering for sale, selling and/or importing in the United States for subsequent sale or use, unauthorized and unlicensed Infringing Products to unknowing consumers through their Merchant Storefronts on Amazon.¹ Courts grant *ex parte* applications for relief in similar matters² and Plaintiffs request that the Court grant their Application.

Amazon is an online marketplace and e-commerce platform that allows manufacturers, wholesalers, and other third-party merchants, like Defendants, to advertise, distribute, offer for sale, sell and ship their retail products originating from China³ directly to consumers worldwide and specifically to consumers residing in the U.S., including New York. (Levine Dec., ¶ 3). Defendants are located in China and/or Hong Kong but, upon information and belief, conduct their business in the U.S. and other countries by means of their Merchant Storefronts on Amazon, as well as potentially yet undiscovered additional online marketplace platforms. (Levine Dec., ¶¶ 13, 19, 24). Through their Merchant Storefronts on Amazon, Defendants offer for sale and/or sell Infringing Products, and target, market, distribute and ship such products to customers located in the U.S., including New York. (Levine Dec., ¶¶ 13-15). Third-party merchants, like Defendants, often use evasive tactics like aliases, false addresses and other incomplete identification

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

² 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).

³ See Juozas Kaziukenas, *Chinese Sellers Are Building Brands on Amazon*, MARKETPLACE PULSE (Dec. 6, 2018), <https://www.marketplacepulse.com/articles/chinese-sellers-are-building-brands-on-amazon>.

information to conceal their identities and avoid detection. (Levine Dec., ¶ 10).

Without Plaintiffs' authorization or consent, Defendants were and are manufacturing, making, using, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Infringing Products to consumers located in the U.S., including New York, through their Merchant Storefronts on Amazon. (Levine Dec., ¶¶ 13-17). Defendants' aforementioned actions have caused and will continue to cause irreparable harm to Plaintiffs' goodwill and reputation. (Arnold Dec., ¶¶ 15-16).

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 Infringing Products, 2) the means of making or obtaining such Infringing Products, 3) business records, and 4) any and all other evidence relating to their infringing activities. (Levine Dec., ¶¶ 10, 12). 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 declaration of Brian G. Arnold and the summarizing attorney declaration of Melissa J. Levine, plus accompanying exhibits. *See also*, Complaint, Exs. A-E. In the interest of brevity, any factual discussion is contained in the legal analysis below.

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. *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 infringing activities subject 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. Defendants Are Subject to Personal Jurisdiction Under N.Y. C.P.L.R. § 302(a)(1)

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*,

⁴ Plaintiffs respectfully submit that 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). However, this alternative analysis is omitted for brevity. Plaintiffs will provide supplemental briefing and/or oral argument on any issue upon the Court’s request.

Inc., 490 F.3d at 246-247) (internal quotation marks 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) (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 on Amazon, and allows for customers all over the world to communicate with Defendants and view and purchase Infringing Products, as demonstrated by Epstein Drangel’s purchase of Infringing Products from Defendants. *See Levine Dec.*, ¶ 16, Ex A; *see also Chloe*, 616 F.3d at 170.

Recently, in *American Girl, LLC v. Zembrka*, the Second Circuit exercised jurisdiction over a defendant that “purposefully availed itself of the privilege of conducting activities within New York and, thus, transacted business” by “accept[ing] orders with New York shipping addresses, sen[ding] confirmatory emails with New York shipping addresses containing commitments to ship to those New York addresses, and accept[ing] payments from a customer with a New York

address.” *Am. Girl, LLC v. Zembrka*, 118 F.4th 271 (2d Cir. 2024). Despite the fact that the defendant cancelled the orders and refunded the customer, the Second Circuit held that the transaction itself was enough to satisfy Section 302(a)(1), ruling that “Section 302(a)(1) doesn’t require a completed sale. It only requires a transaction.” *Id.* 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).⁵

In *EnviroCare Techs.*, the court held 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.” 2012 U.S. Dist. LEXIS 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 an infringing 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 [infringing products] for sale to New York consumers.” *Chloe*, 616 F.3d 158, 170.

In some circumstances, courts in the Second 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

⁵ 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); *Allstar Marketing Group, LLC v. Learns babyshop, et al.*, 19-cv-4211-KPF (S.D.N.Y. May 9, 2019).

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 (“Generally, an interactive website supports a finding of personal jurisdiction over the defendant.”).

Here, Defendants operate interactive Merchant Storefronts on Amazon, allowing New York consumers to make inquiries to and communicate with Defendants, purchase Infringing Products, by and through Defendants’ Infringing Listings, and upon completion of a sale, ship goods to New York. The fact that Defendants have chosen to open their User Accounts for the purpose of selling Infringing Products through their Merchant Storefronts 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)).

Epstein Drangel has confirmed via its test purchases made from Defendants’ Merchant Storefronts that Defendants do, in fact, ship to New York. Epstein Drangel completed checkout pages for orders of Infringing Products from Defendants’ Merchant Storefronts and provided the New York Address as the shipping address, and Epstein Drangel received the Infringing Products from Defendants at the New York Address. (Levine Dec., ¶ 20, Ex. A).

Nevertheless, whether a defendant physically shipped Infringing 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, Am. Girl, LLC*, 118 F.4th 271 (“Neither *Chloe* nor any of our other cases should be read as indicating that shipment is required to demonstrate a business transaction for § 302(a)(1) purposes.”); *see also, e.g., 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' Infringing Products via their Merchant Storefronts. (Arnold Dec., ¶¶ 9-10; Levine Dec., ¶ 13). Epstein Drangel purchased Infringing Products from Defendants' Merchant Storefronts by providing the New York Address as the shipping address.⁶ (Levine Dec., ¶ 16, Ex. A). Thus, Defendants' sophisticated commercial operations, specifically including its offering for sale and/or selling of Infringing Products through their highly interactive Merchant Storefronts on Amazon, Epstein Drangel's purchase of Infringing Products, along with Defendants' own representations on their Merchant Storefronts that they ship Infringing 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.⁷ *Id.*

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

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 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).

benefits and protections of its laws.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (U.S. 1985); *Best Van Lines, Inc.*, 490 F.3d at 243; *see also* Levine Dec., ¶¶ 14-16, Ex. A.⁸ 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 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). Courts, including this Court, have granted injunctive relief for patent infringement in similar cases. *See, e.g., 3 Bees & Me Inc. v. Besportble*, 20-cv-5150 (LJL), 2020 U.S. Dist. LEXIS 137940 (S.D.N.Y. July 30, 2020); *Airigan Solutions, LLC v. Yiwu Lanhomes Jewelry Co.*, 18-cv-6132-GHW, 2018 U.S. Dist. LEXIS 237933 (S.D.N.Y. Aug. 7, 2018); *Chrome Cherry, Ltd. v. P’ships & Unincorporated Ass’ns Identified on Schedule “A”*, 21-cv-05491, 2021 U.S. Dist. LEXIS 252339 (N.D. Ill. Oct. 20, 2021).

An *ex parte* temporary restraining order is particularly warranted in cases, such as the

⁸ In *Am. Girl*, the Second Circuit held that exercising jurisdiction over the defendant comported with due process as the defendant, “ran the risk of being haled into court by offering for sale allegedly counterfeit items for which New York customers could order and pay.” *Am. Girl, LLC*, 118 F.4th 271. After balancing the interests at hand, the Court concluded that “New York has an exceptionally strong interest in protecting consumers and businesses in this state from the flow of counterfeit goods from abroad,” which “trumps the potential inconvenience of requiring foreigners to litigate in the courts of this State.” *Id.*

instant one, involving offshore infringers who are engaging in unlawful and harmful activities over the Internet to avoid revealing their actual locations and identities. (Levine Dec., ¶¶ 10-12). Defendants, who, upon information and belief, are located in China and/or Hong Kong, and operates their business exclusively over the Internet, knowingly and willfully offer for sale and/or sell Infringing Products through their Merchant Storefronts on Amazon. (Arnold Dec., ¶¶ 10-12, Ex. C; Levine Dec., ¶¶ 13, 19, 24, Ex. A). The covert nature of Defendants and their infringing 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 Hyperice Patents, 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 Infringing Products. (Arnold Dec., ¶¶ 15-16).

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

1. Plaintiffs are Likely to Prevail on Their Patent Act Claims

Likelihood of success on the merits of patent infringement claims requires a showing that the patent is being infringed and that it would survive any challenge to validity. *See Titan Tire*

Corp. v. Case New Holland, Inc., 566 F.3d 1372, 1376 (Fed. Cir. 2009). The United States Patent Act provides that “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.” 35 U.S.C. § 271(a). Here, Hyperice IP Subco, LLC is a wholly owned subsidiary of Hyper Ice, Inc. and the assignee of the Hyperice Patents. (Arnold Dec., ¶ 3). Hyper Ice, Inc. is an exclusive licensee that has been granted the express, irrevocable right to, *inter alia*, sublicense, enforce and defend the Hyperice Patents. *Id.* “Each issued patent carries with it a presumption of validity under 35 U.S.C. § 282.” *Tinnus Enters., LLC v. Telebrands Corp.*, 846 F.3d 1190, 1205 (Fed. Cir. 2017). Plaintiffs have submitted extensive evidence, as attached to Exhibit C to the Arnold Dec. that Defendants are making, using, offering for sale, importing and/or selling Infringing Products that infringe one or more claims of the Hyperice Patents. Finally, Defendants are not authorized by Hyperice or any of their authorized sellers to offer for sale and/or sell products that are covered by the claims of the Hyperice Patents. (Arnold Decl., ¶ 12). Moreover, the presumption of validity attached to all issued patents controls and establishes a likelihood that the Hyperice Patents will survive invalidity challenges.

In sum, the detailed claim charts showing Defendants’ infringement of every element of the Hyperice Patents, along with the presumption of validity of the Hyperice Patents meet the required showing that Plaintiffs have a high likelihood of succeeding on the merits of their patent infringement claim.

3. Plaintiffs Will Suffer Irreparable Harm in the Absence of Injunctive Relief

While irreparable harm is not presumed in the context of patent infringement, 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, Infringing Products that have eroded their market share, Defendants’ illicit activities destroy the

inherent value of the Hyperice Products, impair Plaintiffs' reputation and goodwill associated therewith, and negatively affect Plaintiffs' relationships with their current customers as well as their ability to attract new customers. (Arnold Dec., ¶¶ 15-16).

“[T]o satisfy the irreparable harm factor in a patent infringement suit, a patentee must establish both of the following requirements: 1) that absent an injunction, it will suffer irreparable harm, and 2) that a sufficiently strong causal nexus relates the alleged harm to the alleged infringement.” *Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1374 (Fed. Cir. 2012). In determining whether a plaintiff has been irreparably harmed, courts consider “loss of market share, brand name recognition, reputation as an innovator, and goodwill”. *Inventio AG v. Otis Elevator Co.*, 06-cv-5377 (CM), 2011 U.S. Dist. LEXIS 87215, at *2 (S.D.N.Y. Aug. 4, 2011); *see also Presidio Components, Inc. v. Am. Technical Ceramics Corp.*, 702 F.3d 1351, 1363 (Fed. Cir. 2012) (“Direct competition in the same market is certainly one factor suggesting strongly the potential for irreparable harm without enforcement of the right to exclude.”)

Here, as outlined in the claim charts, Defendants' Infringing Products clearly and unambiguously infringe each and every element of at least one claim of the Hyperice Patents and Defendants have been profiting from the sale of Infringing Products. (Levine Dec., ¶ 17, Ex. B). Further, the Infringing Products sold by Defendants and the Hyperice Products are interchangeable in that they are both percussive massage guns that include the same reciprocating structure with quick-connect massage heads. *Id.* As a result, irreparable harm to Hyperice in the nature of price erosion, loss of customer goodwill (*e.g.*, due to quality and pricing), and loss of business opportunities results in permanent, irreparable harm. *Id.* *See Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). “Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.” citing *Abbott*

Labs. v. Sandoz, Inc., 544 F.3d 1341, 1362 (Fed.Cir. 2008); *Sanofi–Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1382–83 (Fed. Cir. 2006).

Defendants have sold substandard Infringing Products that compete head-to-head for sales on Amazon with Hyperice. Absent injunctive relief, Plaintiffs will unquestionably suffer irreparable harm as Defendants’ intentional and willful misconduct has resulted in lost profits to Hyperice and has damaged the inherent value of the Hyperice Patents, impaired Hyperice’s standing as an innovator and the brand’s reputation for providing trendsetting, quality products as well as the goodwill associated therewith, thereby negatively affecting Hyperice’s relationships with current and potential customers (including both retail customers and end consumers) and eroding Hyperice’s market share by copying the Hyperice Products and making, using, offering for sale, selling or importing goods that infringe the Hyperice Patent. (Arnold Dec., ¶¶ 15-16). Moreover, Defendants’ infringing activities also damage brand confidence, which can result in a loss of future sales and market share to Hyperice and take away Hyperice’s ability to control the nature and quality of the Infringing Products thus weakening Hyperice’s brand recognition and reputation. *Id.* ¶ 28. In addition, the inferior quality of the Infringing Products has and will result in increased skepticism in consumers presented with genuine Hyperice Products undermining Hyperice’s reputation and goodwill. *Id.* Finally, Hyperice Products are sold on various e-commerce websites thus Defendants’ Infringing Products, also offered on, at minimum, Amazon, directly compete with the genuine Hyperice Products. Thus, this factor weighs heavily in Plaintiffs’ favor.

4. 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 their Hyperice Products, and to their reputation as a result of Defendants’ willful and knowing sales of

substandard Infringing Products. 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 its Hyperice Products, and to their reputation as a result of Defendants' willful and knowing sales of substandard Infringing Products. (Arnold Dec., ¶¶ 15-16).

Any harm to Defendants would only be the loss of Defendants' ability to continue to offer its Infringing Products for sale, or, in other words, the loss of the benefit of being allowed to continue to unfairly profit from its 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). A patent's exclusionary right—designed to protect against these harms—is a "fundamental tenet of patent law." *Edwards Lifesciences AG v. CoreValve, Inc.*, 699 F.3d 1305, 1314 (Fed. Cir. 2012).

5. Enjoining Defendants from Infringing the Hyperice Patents Will Serve the Public Interest

An injunction in these circumstances is in the public interest because it incentivizes inventors and innovators to continue developing new products and patenting inventions without the fear of an inability to enforce those patents or stop infringers. Public policy favors protection of rights secured by valid patents. *See Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 647 (Fed. Cir. 2015) ("[T]he public interest nearly always weighs in favor of protecting property rights in the absence of countervailing factors, especially when the patentee practices his inventions."). Here, the public has an interest in being able to rely on the high quality of the Hyperice Products and to protect and incentivize companies like Hyperice to continue innovating. Since Defendants

have willfully and knowingly inserted substandard Infringing Products into the marketplace, the public would benefit from a temporary restraining order and preliminary injunction halting any further sale and distribution of Infringing Products.

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

1. Defendants' Assets Must be Frozen

Considering the nature of Defendants' infringing business, and Plaintiffs' showing that they have a high likelihood of succeeding on the merits of their claims, 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 Animale Grp. Inc. v. Sunny's Perfume Inc.*, 256 F. App'x 707, 709 (5th Cir. 2007); *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995); *Reebok Int'l Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 559 (9th Cir. 1992).

Under 35 U.S.C.S. § 284, courts shall award a claimant damages that are adequate to compensate for patent infringement. 35 U.S.C.S. § 284. Under the statute, "damages adequate to compensate" means "full compensation for 'any damages' [the patent owner] suffered as a result of the infringement." *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983). The statutory measure of damages is the difference between the patent owner's pecuniary condition after the infringement, and what its condition would have been if the infringement had not occurred. *Mentor Graphics v. EVE-USA*, 851 F.3d 1275, 1284 (Fed. Cir. 2017). This Court, and others, have also found it necessary and appropriate to restrain defendants' assets in the context of design patent infringement cases in similar cases. *See, e.g., Airigan Solutions, LLC v. Yiwu*

Lanhome Jewelry Co., 18-cv-6132 (GHW), 2018 U.S. Dist. LEXIS 237993 (S.D.N.Y. Aug. 7, 2018); *Chrome Cherry, Ltd.*, 2021 U.S. Dist. LEXIS 252339; *Wearable Shoe Tree, LLC v. Individuals*, 1:23-cv-24461-PCH-EGT, 2023 U.S. Dist. LEXIS 234582 (S.D. Fl. Dec. 4, 2023).

An asset freeze in the instant matter is unquestionably warranted because Defendants, who are foreign individuals and/or entities based in China and/or Hong Kong, are manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, making, using, offering for sale and/or selling Infringing Products to U.S. consumers solely via the Internet, and accepting payment for such Infringing 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 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* Arnold Dec., ¶¶ 15-16; Levine Dec., ¶¶ 10, 12; *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). 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.⁹

2. 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 Infringing Products by Defendants on Defendants' Merchant Storefronts. *Airigan Solutions, LLC*, 2018 U.S. Dist. LEXIS 237993; *Chrome Cherry, Ltd.*, 2021 U.S. Dist. LEXIS 252339; *Belstaff Group SA v. Doe*, 15-CV-

⁹ 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.

2242 (PKC)(MHD), 2015 WL 1085250, at *2-3 (S.D.N.Y. June 18, 2015) (in a counterfeiting case, this Court restrained, *inter alia*, the defendants' websites, Internet advertising and social media accounts); *Lindsey Adelman Studio, LLC v. Zora Lighting Co.*, 19-cv-4715 (NRB), 2019 U.S. Dist. LEXIS 225454 (S.D.N.Y. June 18, 2019) (preliminary injunction order restraining, *inter alia*, the defendants' websites, advertising via social media platforms and directing removal of any content posted by the defendants which would violate the preliminary injunction order).

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

Plaintiffs respectfully request that this Court issue an order granting them permission to serve Defendants via the following combination of methods: 1) registered electronic mail, 2) website publication, and 3) Federal Express ("FedEx"). 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. (Levine Dec., ¶ 29). Along with service via email, Plaintiffs respectfully request that the Court, in its discretion, permit service via website publication.¹⁰

Plaintiffs submit that their requested methods of alternative service are warranted herein based, not only in statutory authority, but also the practical facts and circumstances surrounding this case. Foreign infringers, like Defendants, have been known to use aliases, false addresses and other incomplete identification information to shield their true identities, and in fact, Defendants display an address located in China on their JQX-US Merchant Storefront, however, Epstein Drangel's Beijing office located an address associated with this Defendant in Hong Kong. It is,

¹⁴ 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).

however, imperative for online merchants like Defendants to have a current and operational e-mail address to operate its User Accounts, Merchant Storefronts, and conduct their business. (Levine Dec., ¶ 26).

1. The Exigent Circumstances Present Here Justify Alternative Service

Plaintiffs respectfully submit that the exigencies present here justify service via alternative means. First, the plain language of Article 15 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague”) states, “[n]otwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.” Hague, Art. 15; *see also Genus Lifesciences Inc. v. Tapaysa Eng’g Works Pvt. Ltd.*, No. 20-CV-3865, 2021 U.S. Dist. LEXIS 76291, at *9 (E.D. Pa. Mar. 10, 2021). Second, the Advisory Committee notes to Fed. R. Civ. P. 4 specifically contemplate Rule 4(f)(3)’s use as an alternative to compliance with the Hague.¹¹ The 1993 Advisory Committee Notes to Fed. R. Civ. P. 4 state, in relevant part, the following:

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.

¹¹ Plaintiffs respectfully submit that the Court’s conclusion in *Smart Study Co. v. Acuteye-Us*, No. 21 Civ. 5860 (GHW), 2022 WL 2872297 (S.D.N.Y. July 21, 2022) (hereinafter “*Smart Study*”), that “the Court need not determine whether the request was truly urgent because it does not matter. There is no exigent circumstances exception in Rule 4(f)(3)” (*Smart Study*, 2022 WL 2872297 at *27) is directly belied by the 1993 Advisory Committee noted to Fed. R. Civ. P. 4. Additionally, Plaintiffs submit that the Court’s conclusion in *Smart Study*’s finding service by email on Chinese defendants does not comply with Fed. R. Civ. P. 4 or the Hague Convention is so broad as to prevent an American plaintiff from being able to sue and effectively serve a Chinese defendant in numerous circumstances, particularly Chinese defendants like the counterfeiters in this case, having the motivation and propensity to conceal their identities and locations and/or display false information regarding their identities and whereabouts.

Fed. R. Civ. P. 4, Advisory Committee Notes, 1993 amendments.¹² In line with the Advisory Committee Notes, Judge Failla found the same exigencies present here counseled in favor of alternative service in *FoxMind Canada Enterprises Ltd. v. Abctec, et al.*, No. 21-cv-5146(KPF) (S.D.N.Y. Jul. 14, 2022). *See* Levine Dec., Ex. C at 21:11-22:10.

Several federal district courts have likewise held that alternative service is appropriate where, as here, a plaintiff demonstrates exigent circumstances justifying the urgent injunctive relief sought herein, making a quick and effective means of service necessary to prevent further irreparable harm to Plaintiff. *See e.g., Equipav S.A. Pavimentação, Engenharia e Comercia Ltda. v. Bertin*, No. 22-CV-04594 (PGG), 2022 WL 2758417, at *5 (S.D.N.Y. July 14, 2022) (“As to whether this Court’s intervention is necessary, courts in this District have found that lengthy delays in service under the Hague Convention are sufficient to show that alternative service under Rule 4(f)(3) is warranted.” (citing cases)); *Asia Cube Energy Holdings, LTD v. Inno Energy Tech Co.*, No. 20-cv-6203 (AJN), 2020 U.S. Dist. LEXIS 148012, at *10 (S.D.N.Y. Aug. 17, 2020) (“[Plaintiff’s] pursuit of emergency relief bears on the question of whether judicial approval of alternative means of service is warranted”); *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); *Aircraft Engine Lease Finance, Inc. v. Plus Ultra Lineas Aereas, S.A.*, 21 Civ. 1758, 2021 WL 6621578, at *1 (S.D.N.Y. Apr. 23, 2021) (“[B]ecause service through the Hague Convention would unnecessarily delay this case, the Court finds that intervention is necessary.”); *In re GLG Life Tech Corp. Sec. Litig.*, 287 F.R.D. 262, 266 (S.D.N.Y. 2012) (“Courts

¹² The Supreme Court in *Water Splash*, noted that where an ambiguity in a treaty exists, “[t]hree extratextual sources are especially helpful...the Convention’s drafting history, the views of the Executive, and the views of other signatories.” *Water Splash*, 137 S. Ct. at 1511.

have frequently cited delays in service under the Hague Convention as supporting an order of alternative service under Rule 4(f)(3).”). Similarly, in *NBA*, the court held “[a] speedy method of service...was justified to ensure, among other reasons, that the funds gained by the allegedly infringing conduct would be recoverable.” *NBA Props. v. P’ships & Unincorporated Ass’ns*, 549 F. Supp. 3d 790, 797 (N.D. Ill. 2021), citing *Strabala*, 318 F.R.D. at 114, quoting 4B FED. PROC. & PROC. CIV. § 1134 (4th ed.).

In *Moonbug Entertainment Ltd., et al. v. 012 Stickers Store, et al.*, No. 22-cv-2394 (JMF), a nearly identical case, the Court granted plaintiffs’ request for alternative service for purposes of the temporary restraining order and preliminary injunction order, despite plaintiffs locating seemingly accurate addresses for some defendants as Plaintiffs did here. At a hearing on plaintiffs’ default judgment motion, the Court stated the following on the record:

...Article 15 of the Hague Convention itself provides that a judge, “may order in case of urgency any provisional or protective measures.” On the basis of those provisions, that is, Article One and Article 15 of the Convention, I’m inclined to think that I was on solid ground exercising my discretion under Rule 4(f)(3) of the Federal Rules of Civil Procedure to authorize service by email for purposes of entering the TRO and the preliminary injunction, since both would qualify as provisional or protective measures; and, in any event, the Hague Convention wouldn’t apply to the extent that, despite reasonable diligence, the physical address of a defendant was unknown.

...

At a minimum, I’m inclined to proceed with caution at least and until the Second Circuit resolves the issue, exercise my discretion under Rule 4(f)(3). And it is a question of my discretion to say that service of the summons and complaint for purposes of entering a default judgment, as opposed to entry of provisional or protective measures, must be done consistent with the Hague Convention.

Moonbug, Dkt. 43 at 5:18 – 6:3; 6:14 – 6:21. Thereafter, the Court entered a Memorandum Opinion and Order directing plaintiffs to serve defendants through the Hague which stated:

...there is good reason to permit a plaintiff who satisfies the standards for a preliminary injunction, including by showing irreparable harm, to obtain preliminary relief without going through the laborious Hague Convention process;

there is no good reason to do the same at the default judgment stage when, as here, the plaintiff already has the protection of a preliminary injunction.”

Moonbug, Dkt. 46. Further, following *Smart Study Co. v. Acuteye-Us, et al.*, No. 21 Civ. 5860 (GHW), 2022 WL 2872297 (S.D.N.Y. July 21, 2022)¹³ Judge Woods ordered alternative service for the temporary restraining order and preliminary injunction order as to all defendants where Epstein Drangel performed the same due diligence efforts as described in the Levine Dec. and located seemingly accurate addresses for many defendants. *Telebrands Corp. v. Adward runbaifan, et al.*, No. 23-cv-1063 (GHW) Dkts. 5, 18. Accordingly, for the same reasons the Court granted alternative service in *Moonbug*, Plaintiffs respectfully request that the Court authorize alternative service for the temporary restraining order and preliminary injunction order.

a) Service via FedEx is Permissible

Plaintiffs acknowledge that both the U.S. and Hong Kong are signatories to the Hague Convention. “[I]n cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise applicable law.” *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513 (2017). Both conditions are met here. First, Article 10 of the Hague Convention allows for service of process through alternative means such as postal channels. *See* Hague Convention on Service Abroad of Judicial and Extrajudicial Documents art. 10 (“Provided the State of destination does not object, the present Convention shall not interfere with – (a) the freedom to send judicial documents, by postal channels, directly to persons abroad...”). Hong Kong does not oppose Article 10(A)¹⁴, thus, it does not object to service of judicial documents by postal channels. *In re Coudert Bros. LLP*, 2017 U.S. Dist. LEXIS 71435, at *12 (S.D.N.Y. May

¹³ Smart Study has filed an appeal of Judge Woods’ decision before the Second Circuit and filed its opening brief.

¹⁴ *See*, <https://www.hcch.net/en/states/authorities/details3/?aid=393> (last visited Apr. 25, 2025).

10, 2017) (“Hong Kong has not objected to Article 10(a), nor do the service rules in Hong Kong prohibit service via mail...Accordingly, Rule 4(f)(2)(C)(ii) could serve as the basis for service via mail in this circumstance.”).

This Court has held that service of a summons and complaint to a defendants’ business address in Hong Kong via FedEx with a “direct signature required” comports with Fed. R. Civ. P. 4(h)(2) and Fed. R. Civ. P. 4(f)(2)(C)(ii) (an individual may be served in a foreign country “if there is no internationally agreed means, or if an international agreement allows but does not specify other means,” by “using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt”). *See, Ckr Law Llp v. Anderson Invs. Int’l*, 525 F. Supp. 3d 518 (S.D.N.Y. 2021) (authorizing service via FedEx on a Hong Kong petitioner at its registered office); *Evriholder Prods. LLC v. Simply LBS Co.*, No. 17-CV-4329, 2020 U.S. Dist. LEXIS 71936, at *3 (S.D.N.Y. Apr. 21, 2020) (finding service proper where Clerk of Court sent summons and complaint to defendant’s business in Hong Kong via FedEx); *see also Polargrid LLC v. Videsh Sanchar Nigam Ltd.*, 2006 U.S. Dist. LEXIS 17531, at *2 (S.D.N.Y. Apr. 7, 2006) (service via FedEx complies with Fed. R. Civ. P. 4(f)(2)(C)(ii)’s “mail” requirement).

b) *Service by Electronic Means is Not Prohibited by the Hague*

Fed. R. Civ. P. 4(f)(3) enables a court to grant alternative 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 WL 361739, at *7 (S.D.N.Y. Feb. 8, 2009) citing Fed. R. Civ. P. 4(f)(3). Despite the Court’s contrary holding in *Smart Study*, the alternative service requested by Plaintiffs herein is not prohibited by any international agreement. As detailed below, this was confirmed by *Advanced Access Content Sys. Licensing Adm’r, LLC v. Shen*, No. 14-cv-1112 (VSB), 2018 U.S. Dist. LEXIS 169603 (S.D.N.Y. Sep. 30, 2018). Moreover, while *Smart Study* suggests that the holding in *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1505

(2017) “indicated” that the only permissible methods of service are those “specified” in the Hague, many courts have opined that, “the Convention neither authorizes nor prohibits service by email—it is entirely silent on the issue.” *NBA Props. v. P'ships & Unincorporated Ass'ns*, 549 F. Supp. 3d 790, 797 (N.D. Ill. 2021) (citing *MacLean—Fogg Co. v. Ningbo Fastlink Equip. Co.*, No. 08 CV 2593, 2008 WL 5100414, at *2 (N.D. Ill. Dec. 1, 2008); *Sulzer Mixpac*, 312 F.R.D. at 331; *Ouyeinc Ltd. v. Alucy*, No. 20 C 3490, 2021 WL 2633317, at *3 (N.D. Ill. June 25, 2021)).

c) China's Objection to Article 10(a) is Not an Objection to Email Service

Despite China's objection to service by postal channels under Article 10, China's governing bodies (i.e. the National People's Congress and its Standing Committee) have not made any interpretations regarding whether the reservation to Article 10(a) includes email and this Court, along with many others, has held that such objection does not include service by email¹⁵ and further, that service by email is not prohibited by any international agreement.¹⁶ *See, e.g. Equipav S.A.*, 2022 U.S. Dist. LEXIS 124987, at *5 (finding that the Hague does not prohibit service via e-mail despite the fact that Brazil has objected to Article 10 of the Hague regarding service by mail); *ShelterZoom Corp. v. Goroshevsky*, 19-cv-10162 (AJN), 2020 WL 4252722, at *2 (S.D.N.Y. July 23, 2020) (“[N]umerous courts have held that service by email does not violate any international agreement, even when a country objects to Article 10 of the Hague Convention[.]” (quotation marks and citation omitted)); *Grp. One Ltd. v. GTE GmbH*, 523 F. Supp.

¹⁵ U.S. Courts have 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 Hangzhou Chic Intelligent Tech. Co. v. P'ships & Unincorporated Ass'n Identified on Schedule A*, No. 20 C 4806, 2021 WL 1222783, at *11-12 (N.D. Ill. Apr. 1, 2021) (“Chinese law permits its courts to order service by email on a party outside of China, in part because email permits the person to be served to ‘acknowledge’ receipt.” *See id.* at 8 (p. 47, Article 267) (“A people’s court may serve procedural documents on a party without a domicile within the People’s Republic of China in the following ways: . . . Service by . . . e-mail and any other means through which the receipt of the document may be acknowledged.”); *see also Chanel, Inc. v. Handbagstore*, No. 20-CV-62121-RUIZ/STRAUSS, 2021 WL 3060329, at *25-30 (S.D. Fla. June 30, 2021); *see also Smart Study*, Dkt. 98 at ¶ 11.

¹⁶ International law, not foreign law, is the relevant law for an analysis under Rule 4(f)(3). *See Restoration Hardware, Inc. v. Lighting Design Wholesalers, Inc.*, 2017 WL 11509784, at *23 (S.D.N.Y. 2020) (noting that “Rule 4(f)(3) does not require a finding that the method of service ordered is permitted under foreign law.”).

3d 323, 343 (E.D.N.Y. 2021) (“Courts in the Second Circuit have generally found that email is not a postal channel and that service by email is authorized if the signatory country has not explicitly objected to service by electronic means.”) (collecting cases); *Doe v. Hyassat*, 342 F.R.D. 53 (S.D.N.Y. 2022) (“Although Austria has objected to Article 10(a) of the Hague Service Convention — which permits service via ‘postal channels’ — such an objection does not extend to service via email.”) (citing *F.T.C. v. Pecon Software Ltd.*, No. 12-cv-7186 (PAE), 2013 U.S. Dist. LEXIS 111375, at *5 (S.D.N.Y. Aug. 7, 2013) (“Numerous courts have held that service by email does not violate any international agreement where the objections of the recipient nation are limited to those means enumerated in Article 10.” (citations omitted)); *Bandyopadhyay v. Defendant I*, No. 22-cv-22907-BLOOM/Otazo-Reyes, 2022 U.S. Dist. LEXIS 212221 (S.D. Fla. Nov. 22, 2022) (noting that “[w]here a signatory nation has objected to the alternative means of service provided by the Hague Convention, that objection is expressly limited to those means and does not represent an objection to other forms of service, such as e-mail or website posting”, and finding service via NFT and posting on a designated website was permissible on Chinese defendants); *see also, 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 WL 6364598, at *4 (D. Utah Oct. 29, 2020); *Smart Study*, Dkt. 98. 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 in reliance on *Water Splash*. 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

WL 2357011, at *3 (N.D. Ill. June 4, 2019); *see also In re Bibox Grp. Holdings Sec. Litig.*, No. 20cv2807(DLC), 2020 WL 4586819, 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.”); *see also Smart Study*, Dkt. 98.

In *Advanced Access*, where the defendant argued that email service violated the laws of China, this Court held “[e]ven if true, the fact that email service does not comport with Chinese law or instructions from the Chinese government under the Hague Convention is inapposite to the Rule 4(f)(3) inquiry, which, requires only that service is not prohibited by international agreement.” 2018 U.S. Dist. LEXIS 169603 at *13; *see also, Rio Props, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002) (“As obvious from its plain language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement,” and “no other limitations are evident from the text.”); *see also Smart Study*, Dkt. 98 at ¶ 11.

a) Service by FedEx and Electronic Means Comports with Due Process

Service on Defendants by electronic means as well as FedEx 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 v. Ritella*, 2020 WL 589409, at *6 (S.D.N.Y. Feb. 5, 2020) (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 I*, 18-CV-7380, 2019 WL 6498305, 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 an online business and regularly communicated with customers via email. *Mattel, Inc. v. Animefunstore, et al.*, No.

18-cv-8824 (LAP) (Dkt. 81) (S.D.N.Y. May 1, 2020); *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.”); *Kaneka Corp.*, 2017 WL 11509784 at *9 (email service appropriate where defendant conducted its business through email.”). Moreover, in *NBA*, the court held that “email was a more reliable method of service...because Defendant’s email address was verified by the sales platform, while their physical addresses were not.” *NBA Props.*, 549 F. Supp. 3d at 797; *see also Restoration Hardware, Inc.*, 2017 WL 11509784, at *23 (finding that in light of the evidence that the defendant was associated with certain electronic email accounts, due process was “easily satisfied”); *see also, Ouyeinc Ltd.*, 2021 WL 2633317, at *3 (“courts have routinely upheld service by email” in infringement actions where online stores’ “business appeared to be conducted entirely through electronic communications”). Accordingly, Plaintiffs submit that email and FedEx service under Rule 4 are the most effective means to ensure Defendants are reasonably apprised of this action.

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’ 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. 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.

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).¹⁸

IV. CONCLUSION

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

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).

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-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,

EPSTEIN DRANGEL LLP

BY: 
Melissa J. Levine
mlevine@ipcounselors.com
Jason M. Drangel (JD 7204)
jdrangel@ipcounselors.com
Ashly E. Sands (AS 7715)
asands@ipcounselors.com
Danielle S. Futterman (DY 4228)
dfutterman@ipcounselors.com
Gabriela N. Nastasi
gnastasi@ipcounselors.com
Melissa J. Levine
mlevine@ipcounselors.com
Jodi-Ann McLane (*pro hac vice*
forthcoming)
jmclane@ipcounselors.com
60 East 42nd Street, Suite 1250
New York, NY 10165
Telephone: (212) 292-5390
Facsimile: (212) 292-5391
Attorneys for Plaintiffs
Hyper Ice, Inc. and Hyperice IP
Subco, LLC