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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.

**DECLARATION OF MELISSA J.
LEVINE AND ACCOMPANYING
EXHIBITS IN SUPPORT OF
PLAINTIFFS' *EX PARTE*
APPLICATION FOR: 1)
TEMPORARY RESTRAINING
ORDER; 2) AN ORDER
RESTRAINING DEFENDANTS'
USER ACCOUNTS, MERCHANT
STOREFRONTS AND 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

**CONFIDENTIAL/FILED UNDER SEAL
NOT TO BE OPENED EXCEPT BY ORDER OF THE COURT**

DECLARATION OF MELISSA J. LEVINE¹

I, Melissa J. Levine, hereby declare as follows:

1. I am an attorney with the law firm of Epstein Drangel LLP, located at 60 East 42nd Street, Suite 1250, New York, New York 10165 and represent Plaintiffs Hyper Ice, Inc. and Hyperice IP Subco, LLC in the above-referenced action. I make and submit this declaration in connection with Plaintiffs' *ex parte* application for the following: 1) a temporary restraining order; 2) an 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) an order authorizing bifurcated and alternative service and 5) an order authorizing expedited discovery against the Defendants in light of Defendants' intentional and willful offerings for sale and/or sales of Infringing Products.
2. Epstein Drangel represents Plaintiffs in intellectual property matters and has reviewed test purchases of Defendants' Infringing Products, Defendants' Merchant Storefronts and Infringing Listings and has confirmed that Defendants offer for sale and sell, without authorization, products that infringe the Hyperice Patents.
3. Based on my research, Amazon is a Seattle, Washington-based global online marketplace and e-commerce platform owned by Amazon.com, Inc., a Delaware corporation,² 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

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

² *FAQs*, Amazon.com, Inc., <https://ir.aboutamazon.com/corporate-governance/documents-and-charters/certificate-of-incorporation/default.aspx> (last visited Apr. 25, 2025).

belief, primarily originate from China, directly to consumers worldwide and specifically to consumers residing in the U.S., including New York.

4. Amazon is recognized as one of the leaders of the worldwide e-commerce and digital retail market and the company's net sales were \$169.9 billion in the fourth quarter of 2023.³ Sales to the U.S. make up a significant percentage of the business done on Amazon.⁴ As of February 3, 2025, Amazon had a market capital of \$2.48 trillion, making it the fifth most valuable company in the U.S.⁵
5. Many of the third-party merchants that have User Accounts with and operate Merchant Storefronts on Amazon, like Defendants, are located in China and have recently accounted for nearly half of all businesses on Amazon.⁶
6. In Q1 of 2024, third party merchants generated \$34.6 billion, accounting for 61% of Amazon's sales.⁷ In Q2 of 2024, third party merchants generated \$36.2 billion, growing approximately 13% on a year-over-year basis.⁸
7. Amazon aggressively uses the Internet and television to market itself and the products offered for sale and/or sold by its third-party merchant users to potential consumers, particularly in the U.S. In 2023 alone, Amazon spent \$44.4 billion on marketing, up from

³ *Amazon's Record Earnings in 2023 Propelled by Strong Fourth-Quarter Results*, MSN (Mar. 8, 2024), www.msn.com/en-us/money/companies/amazon-s-record-earnings-in-2023-propelled-by-strong-fourth-quarter-results/ar-BB1ijMBv

⁴ See Amazon.com, Inc., Quarterly Results Q4 Earnings (Form 10-K) (Feb. 1, 2024).

⁵ STOCK ANALYSIS (last visited Apr. 25, 2025), <https://stockanalysis.com/stocks/amzn/market-cap/>.

⁶ John Herrman, *The Junkification of Amazon Why does it feel like the company is making itself worse?*, NEW YORK MAGAZINE (Jan. 30, 2023), <https://nymag.com/intelligencer/2023/01/why-does-it-feel-like-amazon-is-making-itself-worse.html>.

⁷ Daniela Coppola, *Quarterly value of Amazon third-party seller services 2017-2024*, STATISTA (May 7, 2024), <https://www.statista.com/statistics/1240236/amazon-third-party-seller-services-value/#:~:text=Amazon%27s%20net%20sales%20generated%20through%20its%20third-party%20seller,fees%20and%20other%20services%20related%20to%20third-party%20sellers>, Daniela Coppola, *Share of paid units sold by third-party sellers on Amazon platform from 2nd quarter 2007 to 1st quarter 2024*, STATISTA (Jul. 11, 2024), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/>.

⁸ *Id.*

\$42.3 billion the previous year.⁹

8. As reflected in the federal lawsuits filed against third-party merchants offering for sale and selling infringing and/or counterfeit products on Amazon,¹⁰ and as recently addressed in news reports, an astronomical number of counterfeit and infringing products are offered for sale and sold on Amazon at a rampant rate.¹¹
9. Despite the fact that Amazon has a system in place to report intellectual property infringement,¹² sellers of infringing products frequently re-post their listings for such products on their respective Merchant Storefronts on Amazon once taken down or open new User Accounts and/or Merchant Storefronts on Amazon under different seller names and post the same and/or similar listings for counterfeit and/or infringing products.
10. Given our experience in policing against infringement on Amazon and other similarly-situated online marketplaces, sellers operating User Accounts and Merchant Storefronts, like Defendants, often use evasive tactics, such as aliases, false addresses and other incomplete identification information to conceal their identities and avoid detection. These tactics commonly are used to attempt to circumvent restraining orders and other remedies issued with prior notice, by disappearing or claiming ignorance of their responsibilities

⁹Daniela Coppola, *Worldwide Amazon marketing expenditure 2010-2023*, STATISTA (Feb. 8, 2024), <https://www.statista.com/statistics/506535/amazon-marketing-spending/#:~:text=In%20the%20fiscal%20year%202023%2C%20Amazon%E2%80%99s%20marketing%20spending,42.3%20billion%20U.S.%20dollars%20in%20the%20previous%20year.>

¹⁰ See, e.g., *Apple Inc. v. Mobile Star LLC*, No. C17-1120 RAJ (W.D. Cal. Aug. 4, 2017) and *Daimler AG v. Amazon.com, Inc.*, 16-cv-00518-RSM (W.D. Wash. Mar. 11, 2019).

¹¹ Brittney Myers, *Some Shoppers Are Fleeing Amazon Because of Counterfeit Goods*, THE ASCENT (Jan. 17, 2023), <https://www.fool.com/the-ascent/personal-finance/articles/some-shoppers-are-fleeing-amazon-because-of-counterfeit-goods/>; see Brendan Case, *Amazon, Third-Party Sellers Spur Fake Goods, Group Says*, BLOOMBERG (Oct. 13, 2021), <https://www.bloomberg.com/news/articles/2021-10-13/amazon-third-party-sellers-spur-counterfeit-boom-group-says#xj4y7vzkg>.

¹² See Amazon.com, Inc., Counterfeit Crimes Unit, (last visited Apr. 25, 2025), [https://brandservices.amazon.com/counterfeitcrimesunit#:~:text=Amazon%20Counterfeit%20Crimes%20Unit%20\(CCU,actors%20and%20hold%20them%20accountable.](https://brandservices.amazon.com/counterfeitcrimesunit#:~:text=Amazon%20Counterfeit%20Crimes%20Unit%20(CCU,actors%20and%20hold%20them%20accountable.)

while simultaneously destroying any evidence of their infringing actions and draining their financial accounts.

11. Further, based upon my research, and upon information and belief, foreign sellers rarely, if ever, provide registered business names or trade names, contact names, complete addresses or any other true and correct contact information on their Merchant Storefronts. As a result, Defendants' correspondence is limited to messaging through its User Accounts and communications otherwise transmitted over the Internet.
12. The aforementioned elusive tactics, as well as disappearing, destroying evidence of infringing activities and draining of financial accounts, are commonly used by sellers to attempt to circumvent, among other remedies, restraining orders issued with prior notice.
13. Epstein Drangel investigated and researched manufacturers, wholesalers and/or third-party merchants offering Infringing Products for sale through their Merchant Storefronts on Amazon. Through this process, Epstein Drangel identified Defendants' Merchant Storefronts which sell Infringing Products. True and correct screenshots of Defendants' Infringing Listings on Amazon are included in **Exhibit A** attached hereto and incorporated herein by reference.
14. Through visual inspection of the Defendants' Merchant Storefronts, we also confirmed that Defendants accept payment for products in U.S. dollars.
15. Through visual inspection of the Infringing Listings, we also verified that Defendants offer shipping to the U.S. and confirmed that Defendants offer for sale and sell Infringing Products, and that Defendants target, market, distribute and ship such products to customers located in the U.S., including New York.
16. Epstein Drangel purchased Infringing Products via Defendants' Merchant Storefronts

through an Amazon account associated with the New York Address, provided the New York Address as the shipping address, paid in U.S. dollars and received the Infringing Products from Defendants at the New York Address. True and correct copies of the checkout pages and order confirmations showing the New York Address as the shipping address are included in **Exhibit A**.

17. Once Plaintiffs received the Infringing Products purchased via Defendants' Infringing Listings, Plaintiffs compared the Infringing Products to the claims of the Hyperice Patents. Plaintiffs reviewed and prepared the claim charts identifying the infringing elements as shown in **Exhibit B** and incorporated herein by reference. Through this inspection and comparison, Plaintiffs were able to confirm with certainty that the Infringing Products offered for sale by Defendants via the Infringing Listings do, in fact, infringe the Hyperice Patents. Plaintiffs were also able to confirm that the Infringing Products and the Hyperice Products are interchangeable in that they are percussive massagers having the same claimed elements including, for example, the reciprocating piston, drive mechanism and quick-connect system for attaching and removing massage heads.
18. Upon information and belief, Defendants share a common owner or are otherwise related as they both sell JQX branded Infringing Products.
19. Epstein Drangel located Defendants' addresses, Building 1, 6th Floor, No. 12 Tongchuan Road, Haotang Village, Zhiying Town, Yongkang City, Jinhua City, Zhejiang Province, China and Jinyun County, Lishui City, Zhejiang Province, Room 201, 2nd Floor, Building 2, No. 1, Hong Road, Xinbi Street, Lishui City, Zhejiang Province 321403 China which were displayed on Defendants' Merchant Storefronts on Amazon.
20. Epstein Drangel sent the list of Defendants' addresses, as displayed on Defendants'

Merchant Storefronts, to Epstein Drangel's Beijing office for further investigation, and that office performed the steps set forth below to attempt to confirm the accuracy of the addresses displayed on Defendants' Merchant Storefronts.

21. First, Epstein Drangel's Beijing office used baidu.com, which is one of the most popular search engines in China, to attempt to locate and/or confirm the accuracy of Defendants' addresses.
22. Next, Epstein Drangel's Beijing office conducted a search with Defendants' Merchant Storefront names on a Chinese company registration website, QiChaCha, i.e. qcc.com. Epstein Drangel's Beijing office confirmed that this website is reliable as all of the information displayed on this website is sourced from official websites such as the National Enterprise Credit Information Publicity System, China Copyright Protection Center, China National Intellectual Property Administration, China Judicial Documents Website and other official websites.
23. Finally, Epstein Drangel's Beijing office conducted a further search on the National Enterprise Credit Information Publicity System (<https://www.gsxt.gov.cn/index.html>), which is the most reliable source for providing company registration information. The organizer of this website is the China National Market Supervision and Administration.
24. Epstein Drangel's Beijing office determined that the address displayed on Defendants' Merchant Storefront for E Hung Tat International Group Co., Limited is false and/or outdated since the company is registered as a Hong Kong entity and located a different registered address associated with Defendant, Flat 1512, 15/F, Lucky Centre, No.165-171 Wan Chai Road, Wan Chai Hong Kong ("Hong Kong Address").
25. For this reason and the reasons discussed earlier, the true identity, location and contact

information of Defendants, as well as the location of the Infringing Products that Defendants are offering for sale and/or selling, are unclear and virtually impossible for Plaintiffs to obtain independently.


26. Given the uncertainty that remains as to the accuracy of the Defendants' addresses, in our experience, service by a combination of Federal Express at the Hong Kong Address and email is the most effective way to notify the Defendants of the lawsuit. This is especially the case as Defendants are merchants on an online platform and must have a good and accurate email address in order to operate their online business. Plainly, it would be virtually impossible for Defendants to operate their Merchant Storefronts and not check and utilize their email account frequently.
27. As part of Plaintiffs' Application, they seek alternative service, and upon entry of an order by the Court granting Plaintiffs' requested relief, Plaintiffs will serve such order on Amazon. It is my understanding and expectation that Amazon will provide Plaintiffs' counsel with Defendants' true and accurate email address(es).
28. It is my understanding that the e-mail address(es) to be provided by Amazon will be true and accurate as, based on my experience and understanding, Amazon provides Plaintiffs' counsel with the e-mail address that Defendants use to log in to their User Accounts on Amazon, to operate their Merchant Storefronts, communicate with customers, complete transactions and receive funds.
29. Epstein Drangel has used RMail's online services and confirms that its services include verifying valid proof of authorship, content and delivery of an email as well as the official time and date an email was sent and received.
30. Moreover, the Chinese Ministry of Commerce published an article regarding Epstein

Drangel's involvement in litigation regarding the sale of Chinese counterfeits on e-commerce platforms.¹³

31. In our experience, a small group of attorneys represent defendants in anti-counterfeiting lawsuits similar to the case at hand, and we have been informed by said defense counsel that they closely monitor the PACER docket, looking for potential new cases and clients.
32. Likewise, we recently discovered our law firm was impersonated by various defendants in similar lawsuits who falsified court orders as a way to get their respective frozen accounts released by the platform.
33. A true and correct copy of the transcript from the July 14, 2022 hearing in *FoxMind Canada Enterprises Ltd. v. Abctec, et al.*, No. 21-cv-5146(KPF) (S.D.N.Y. Jul. 14, 2022) is attached hereto as **Exhibit C**.
34. Neither I, nor anyone at Hyperice, to the best of my knowledge, have publicized this Application or Plaintiffs' intent to seek entry of a temporary restraining order against the Defendants to any third party.

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

Executed on this 1st day of May, 2025 in New York, New York.

By: 
Melissa J. Levine

¹³ See Ministry of Commerce of the People's Republic of China, Tips for avoiding the risk of PayPal accounts that are blocked as a result of infringement (Nov. 2017), available at <http://shangwutousu.mofcom.gov.cn/article/resume/af/201711/20171102664964.shtml>.

EXHIBIT A

DEFENDANT JQX-US

Defendant's Infringing Listing



Roll over image to zoom in

JQX Massage Gun Deep Tissue, Handheld Electric Body Muscle Massage Gun, High Percussion Vibration Back Neck Massager for Athletes with 30 Speed Levels & 9 Heads, Gifts for Men and Women (Black)

[Visit the JQX Store](#)

4.5 ★★★★★ (504) | Search this page

100+ bought in past month

-50% \$19⁹⁹ (\$19.99 / Count)

Typical price: \$39.99 

FREE Returns 

Exclusive Prime price

Pay \$19.99 **\$0.00**; get a **\$125 Amazon Gift Card** upon approval for the Amazon Business Prime Card. Terms apply. [Learn more](#)

Color: **Black**



Use for

Body

Power Source

Battery Powered

Material

Metal

\$19⁹⁹ (\$19.99 / Count)

FREE Returns ▼

FREE delivery **Tuesday, April 22**
for Prime members. Order
within **8 hrs 40 mins**.

📍 Deliver to Hans - New York 10016

In Stock

Quantity: 1

Add to Cart

[Buy Now](#)

Ships from Amazon

Sold by JQX-US

Returns 30-day
refund/replacement

Customer Amazon

service

▼ See more

Add to List



Defendant's Merchant Storefront

Amazon.com

https://www.amazon.com/s?me=A2F5I30TBCP8PT&marketplaceID=ATVPDKIKX0DER

amazon prime

Deliver to Hans New York 10016

JQX-US

Search Amazon

Q

EN

Hello, Jason Account & Lists

Returns & Orders

Cart


AllRufusAmazon HaulSame-Day DeliveryMedical CareSaksAmazon BasicsGroceriesShop By InterestAmazon HomePharmacyHandmadeHousehold, Health & Baby CareBest Sellers

1 result

Sort by: Featured

Results

Check each product page for other buying options.



30 99

SPARK BUSINESS

JQX Massage Gun Deep Tissue, Handheld Electric Body Muscle Massage Gun, High Percussion Vibration Back Neck Massager for Athletes with 30 Speed Levels & 9 Heads,...

4.5 (509)

100+ bought in past month

Save 50%

\$19⁹⁹ (\$19.99/Count)

Typical price: \$39.99

Exclusive Prime price


prime Two-Day

FREE delivery Thu, May 1

Add to cart

Need help?

Visit the help section or contact us




Cotsoco 20-Speed Deep Tissue Massage Gun

4.3 (7,790)

\$19⁹⁸ prime

Sponsored

Capital One Business




"The cash back reward is simple."

Real Capital One Cardholder
July 9, 2024

66°F Sunny

Search



10:15 AM
4/29/2025

5

Checkout Page for Counterfeit Products from Defendant

Place your order

FREE pickup available nearby 

Order total: \$21.76

Use a gift card, voucher, or promo code

FREE



[Add gift options](#)

By placing your order, you agree to Amazon's [privacy notice](#) and [conditions of use](#).

Order Confirmation for Counterfeit Products from Defendant

Order Details

https://www.amazon.com/gp/your-account/order-details?ie=UTF8&orderID=112-2938305-6166632&ref=ppx_yo2ov_dt_b_fed_veo

This site has coupons!

amazon prime

Deliver to Hans
New York 10016

All Search Amazon

EN Hello, jason
Account & Lists

Returns & Orders

Cart

All Rufus Amazon Haul Same-Day Delivery Medical Care Alexa+ Amazon Basics Groceries Shop By Interest Amazon Home Pharmacy Handmade Household, Health & Baby Care Best Sellers

Your Account > Your Orders > Order Details

Order Details

Order placed April 16, 2025 Order # 112-2938305-6166632

View invoice

Shipping Address

Hans Diamond
244 MADISON AVE STE 411
NEW YORK, NY 10016-2817
United States

Change

Payment method

AMEX ending in 5002

Order Summary

Item(s) Subtotal:

\$19.99

Shipping & Handling:

\$0.00

Total before tax:

\$19.99

Estimated tax to be collected:

\$1.77

Grand Total:

\$21.76

Arriving Tuesday

JQX Massage Gun Deep Tissue, Handheld Electric Body Muscle Massage Gun, High Percussion Vibration Back Neck Massager for Athletes with 30 Speed Levels & 9 Heads, Gifts for Men and Women (Black)

Sold by: JQX-US

\$19.99

Buy it again

Track package

Cancel items

Ask Product Question

Write a product review

Change Payment Method

Recommended for you based on JQX Massage Gun Deep Tissue, Handheld Electric Bod...

Page 1 of 12

Finance headline
Hong Kong susp...

Search

3:20 PM
4/16/2025

9

DEFENDANT jinyunligekeji

Defendant's Infringing Listing

Defendant's Merchant Storefront

Amazon.com

https://www.amazon.com/s?me=AZH1R74KMWHA5&marketplaceID=ATVPDKIKX0DER

EN

Hello, jason
Account & Lists

Returns
& Orders

Cart

amazon prime

Deliver to Hans
New York 10016

jinyunligekeji

Search Amazon

Q

All

Rufus

Amazon Haul

Same-Day Delivery

Medical Care

Alexa+

Amazon Basics

Groceries

Shop By Interest

Amazon Home

Pharmacy

Handmade

Household, Health & Baby Care

Best Sellers

Results 3 results

Sort by Featured

Check each product page for other buying options.

Previously viewed

JQX Massage Gun, Deep Tissue Massager Gun for Pain Relief, Percussion Muscle Massage Gun for Athletes, Handheld Electric Back Massager with 30 Speed Levels & 9 Massage...

4.6 (194)

300+ bought in past month

\$35⁹⁹ (\$35.99/Count)

prime One-Day

FREE delivery Tomorrow, Apr 17

Add to cart

JQX Massage Gun Deep Tissue, High Percussion Back Neck Massager for Athletes, Handheld Muscle Massager Gun with 30 Speed Levels 9 Replacable Heads, Gift for Men...

4.0 (24)

100+ bought in past month

\$29⁹⁹ (\$29.99/Count) List: \$39.99

FREE delivery Tue, Apr 22 for Prime members

Add to cart

JQX Hand Massager with Heat and Compression, Cordless Electric Hand Massager, 3 Levels Pressure for Finger, Gifts for Women, Men(Grey)

3.9 (33)

\$49⁹⁹ (\$49.99/Count)

prime One-Day

FREE delivery Tomorrow, Apr 17

Add to cart

49°F
Windy

Search

3:22 PM
4/16/2025

Checkout Page for Counterfeit Products from Defendant

Place your order

FREE pickup available nearby 

Use a gift card, voucher, or promo code

If you order in the next 3 hours and 58 minutes [Details](#)



FREE

FREE

Lower carbon option ▾

By placing your order, you agree to Amazon's [privacy notice](#) and [conditions of use](#).

Order Confirmation for Counterfeit Products from Defendant

Amazon.com: JQX Massage Gun, x

Order Details

https://www.amazon.com/gp/your-account/order-details?ie=UTF8&orderID=112-3383910-6463407&ref=ppx_yo2ov_dt_b_fed_veo

amazon prime

Deliver to Hans
New York 10016

All Search Amazon

Q

EN

Hello, jason
Account & Lists

Returns
& Orders

0 Cart

All Rufus Amazon Haul Same-Day Delivery Medical Care Alexa+ Amazon Basics Groceries Shop By Interest Amazon Home Pharmacy Handmade Household, Health & Baby Care Best Sellers

Your Account > Your Orders > Order Details

Order Details

Order placed April 16, 2025 | Order # 112-3383910-6463407

View invoice

Shipping Address

Hans Diamond
244 MADISON AVE STE 411
NEW YORK, NY 10016-2817
United States

Change


Payment method

AMEX ending in 5002

Order Summary

Item(s) Subtotal:	\$35.99
Shipping & Handling:	\$0.00
Your Coupon Savings:	-\$5.00
Total before tax:	\$30.99
Estimated tax to be collected:	\$2.75
Grand Total:	\$33.74

Arriving tomorrow by 10 PM



JQX Massage Gun, Deep Tissue Massager Gun for Pain Relief, Percussion Muscle Massage Gun for Athelets, Handheld Electric Back Massager with 30 Speed Levels & 9 Massage Heads
Sold by: jinyunligekeji
\$35.99

Buy it again

Track package

Cancel items





Ask Product Question

Write a product review

Change Payment Method

Top picks for you

Page 1 of 9



Temps to jump
Saturday

Search



3:16 PM
4/16/2025

Received Products



convenient
delivery

2.5 Lbs 04/21 DJR3

Hans Diamond
244 MADISON AVE STE 411
10016 - 2817 NEW YORK, NY United
States



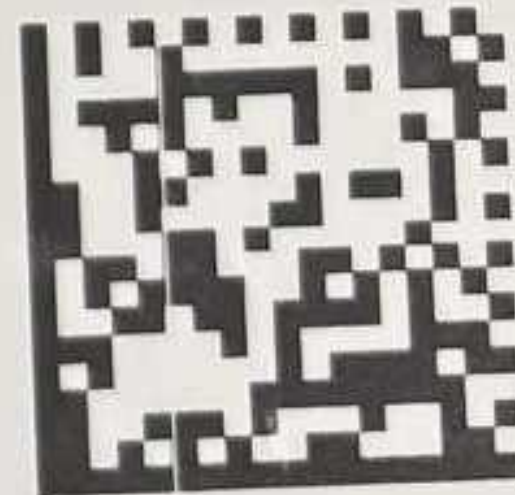
TBA320748126887



DJR3

CYCLE 1

HQ9PL
4012



BhFqH09PL
1 / 4012



NT5
001

EWR8
DJR3

LGA5
B010

video streaming
movies and tv shows






OLSKY[®]

MASSAGE GUN USER'S MANUAL



M68-7



Guarantee Card

 **6 month replacement or full refund**

Any problems, please email us. Our customer service team will be ready for you any time.

 **E-mail: ww77vv@163.com**
 **WhatsApp: +86 18128827084**

Thank you for buying our products!

Major Anterior

Deltoid

Pectoralis major

Brachioradialis

Glenohumeral joint

Rectus femoris

Iliotibial band

Gastrocnemius

Extensor hallucis

Extensor digitorum



WARNING: If suffocation, keep this bag and its contents away from children. Do not use in cribs, beds, carriages, or strollers. Keep away from nose and mouth. Do not use near flammable materials. Avertissement: Si asphyxie, gardez ce sac et son contenu loin des enfants. Ne pas utiliser dans les berceaux, lits, poussettes ou berceaux. Gardez à l'écart du nez et de la bouche. Ne pas utiliser près de matériaux inflammables.

DESIGNED IN USA ASSEMBLED IN CHINA



Li-ion



DC IN : 5V
2A
2500mAh

MODEL: M68-7

2.6 Lbs

04/17

DJR3

Hans Diamond
244 MADISON AVE STE 411
10016 - 2817 NEW YORK, NY United
States



TBA320744671019



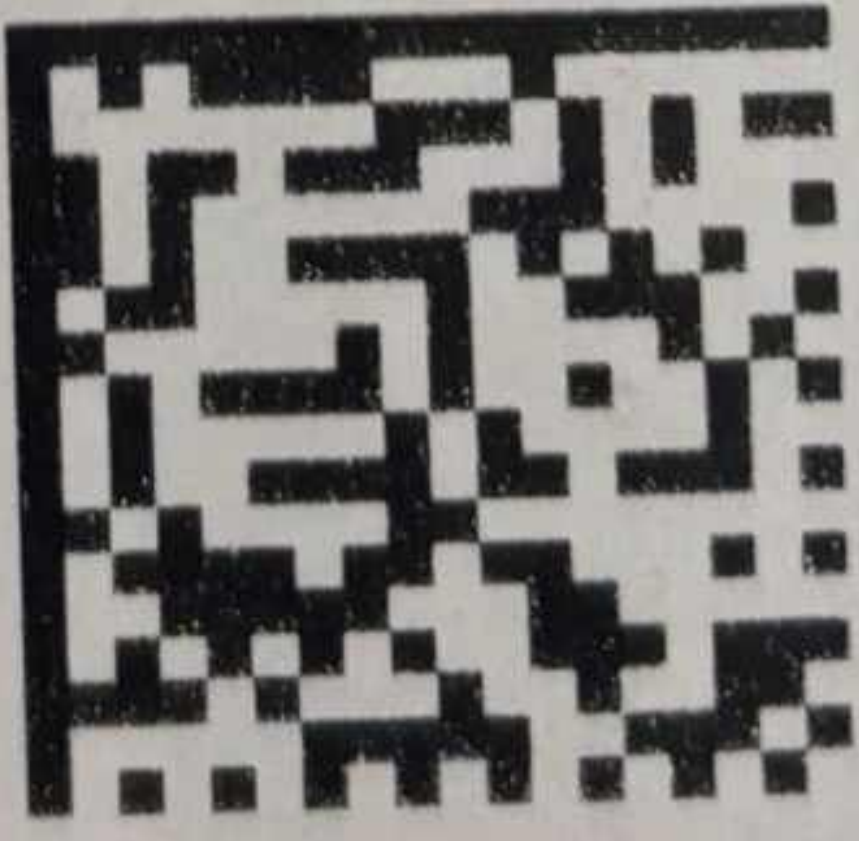
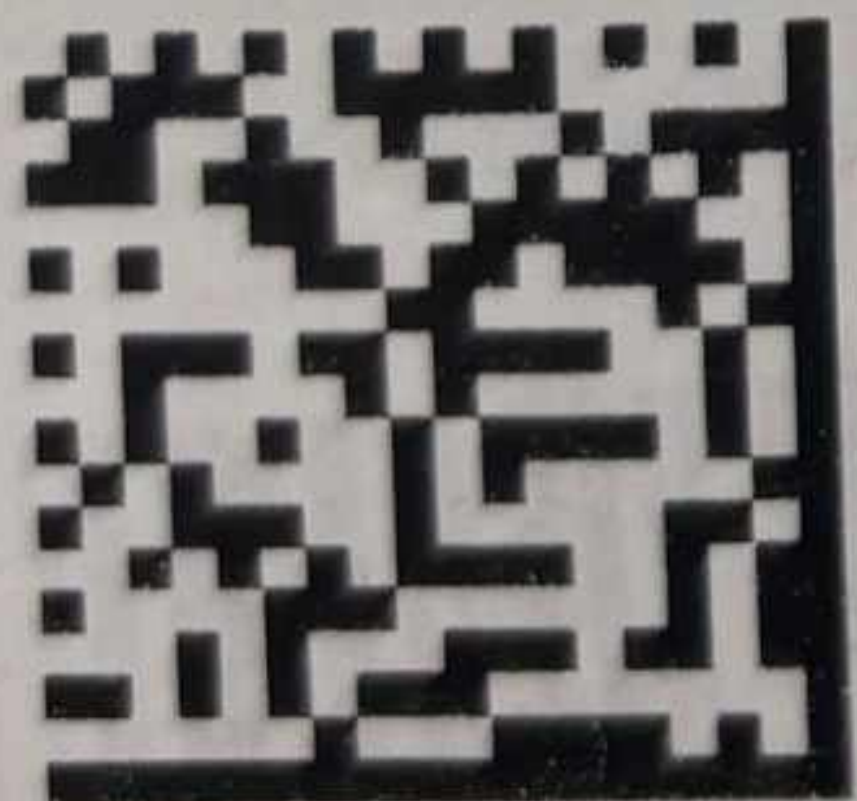
DJR3

CYCLE 1

M 13.3
DRIVE
AT
TBA320744671019

B7PJ8lhIL

1 / 3042



B7PJ8lhIL

1 / 3042

BDL4
& JR3

spSH13QI6I3



X004E0CQUF

JQX Massage Gun, Deep Ti...ght and Portable - Black
New



SCAN THE QR CODE



TO GET 2-YEAR EXTENDED WARRANTY

If you're not satisfied with our product or have any suggestions, please reach out to us directly

E-mail: jqsxservice@163.com

Whatsapp: [+86 13281307932](https://wa.me/8613281307932)

We really appreciate your support!

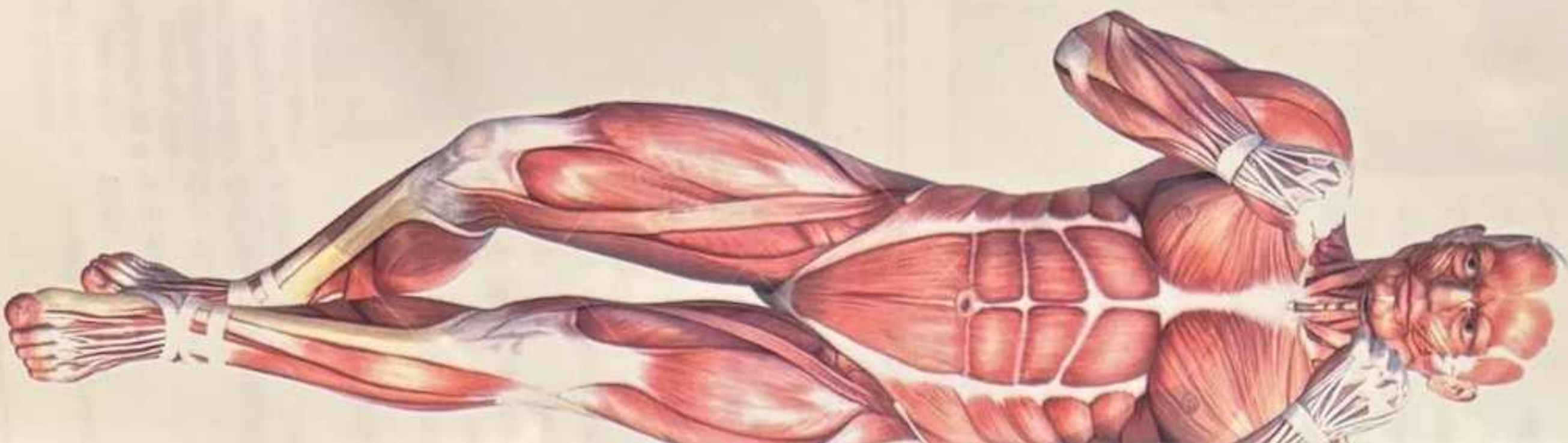
Send us your order number to join our VIP membership.
We would like to offer you 10% off coupons for your next purchase.



Please Scan the QR Code for an
Extended 2-Year Warranty

Thank you for buying our products!

Trigg

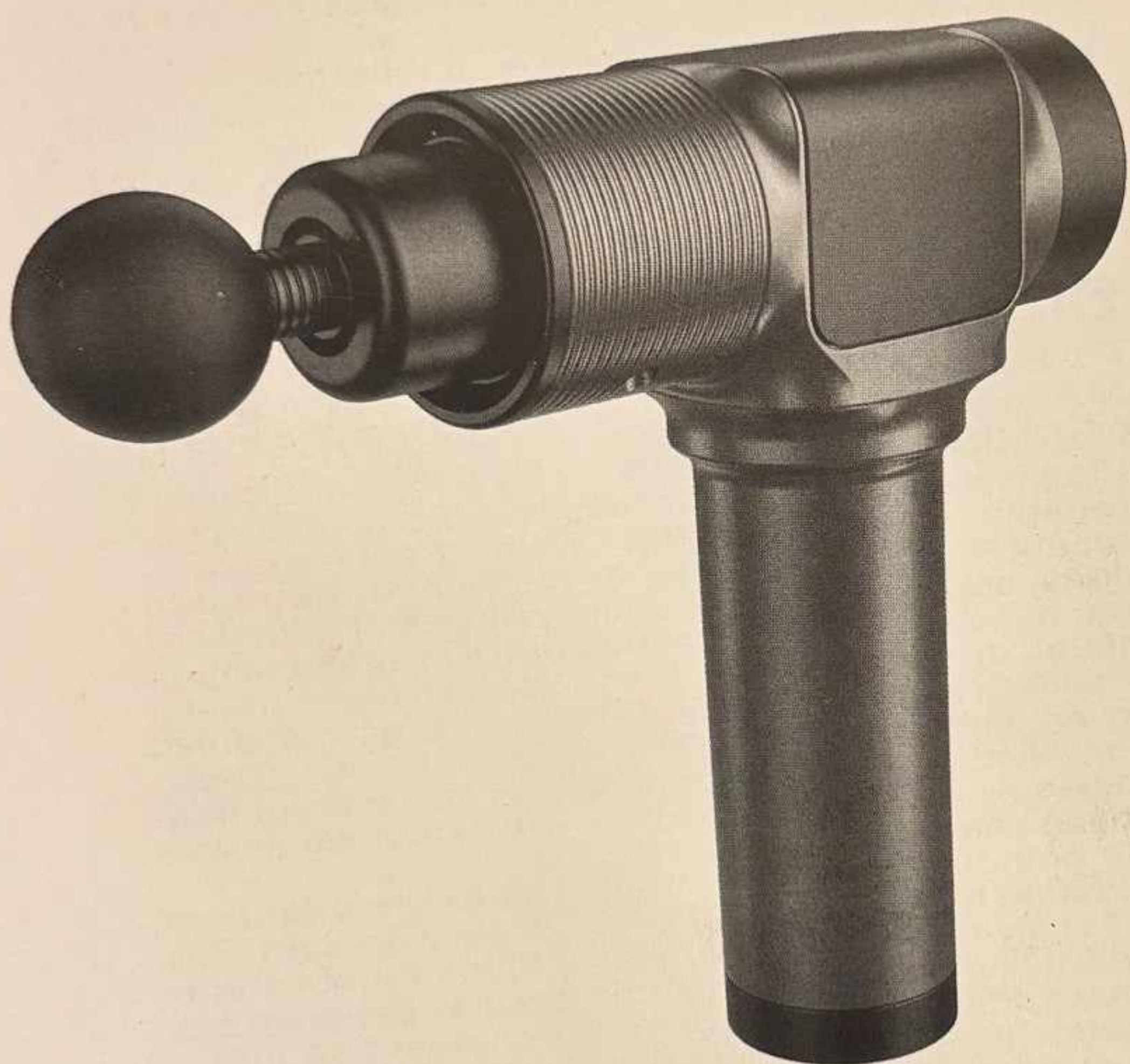




INPUT:   DC IN
AC 100V-240V 7.4V
50/60Hz  0.7A
MADE IN CHINA  2500MAH
CEFC   
Read instructions carefully before using
MODEL:X1
ON  OFF

MASSAGE GUN USER'S MANUAL

X1



Thank you for buying our products!



Please Scan the QR Code for an
Extended 2-Year Warranty

Trigger Point


TO GET 2-YEAR
If you're not satisfied
suggestions, please
E-mail: support@triggerpoint.com
Whatsapp: <https://www.whatsapp.com/channel/00253333333333333333>
We really appreciate your feedback.
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SCAN

EXHIBIT B

Claim Chart – U.S. Patent No. 11,857,482 – JQX (ASIN B0CGN8SYDQ)

U.S. Patent No. 11,857,482	JQX (ASIN B0CGN8SYDQ)
1. A percussive massager comprising:	<p>The accused product is a percussive massager:</p> <p>JQX Massage Gun Deep Tissue, Handheld Electric Body Muscle Massage Gun, High Percussion Vibration Back Neck Massager for Athletes with 30 Speed Levels & 9 Heads, Gifts for Men and Women (Black)</p> <p>Visit the JQX Store</p> <p>4.5 ★★★★★ (505) Search this page</p> <p>100+ bought in past month</p> 

The accused product has a housing:

a housing;



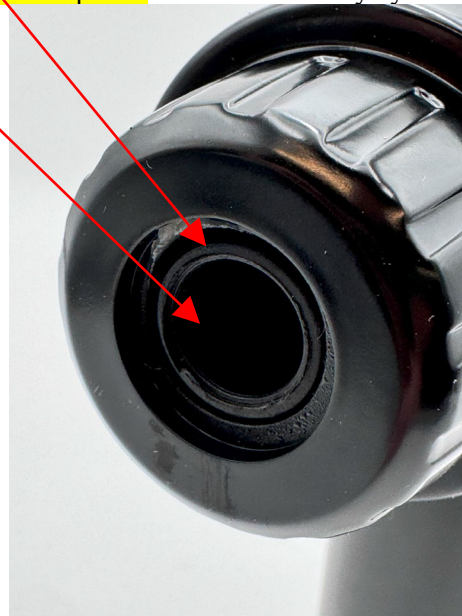
The piston has a proximal end and a distal end.

The proximal end of the piston is operatively connected to the drive mechanism (as shown in the cavity below):

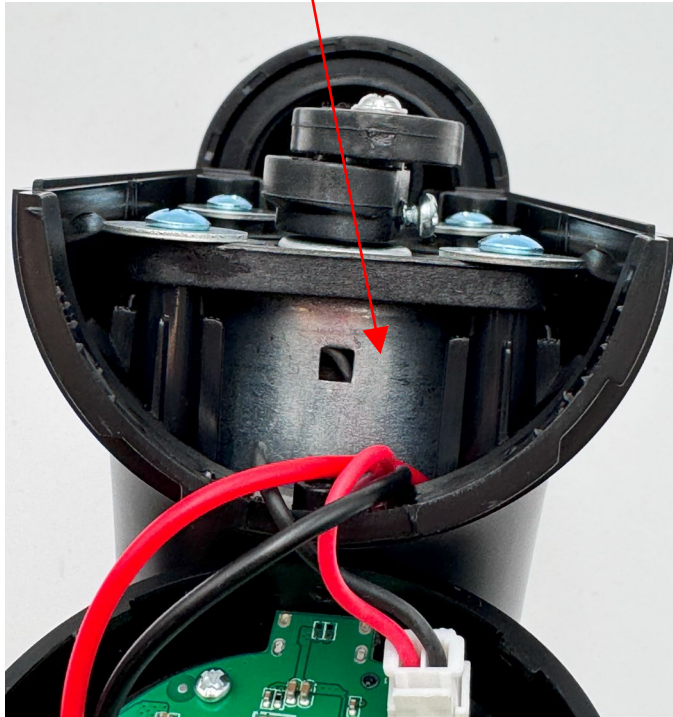


a piston having a proximal end and a distal end, the distal end of the piston having a substantially cylindrical bore;

The distal end of the piston has a substantially cylindrical bore:



The accused product has a motor at least partially within the housing:



a motor at least partially within the housing and operatively connected to the proximal end of the piston,

and is operatively connected to the proximal end of the piston,



wherein the motor is configured to cause the piston to reciprocate at a first speed;

In the accused product, the motor is configured to cause the piston to reciprocate at a first speed.



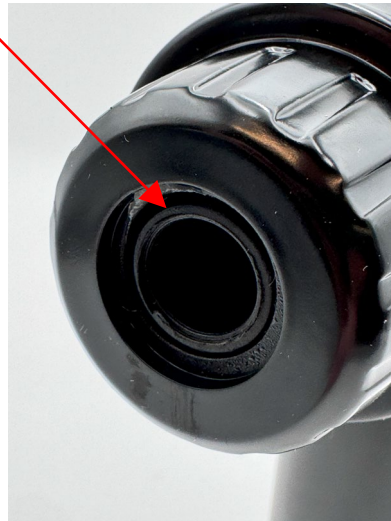
The accused product has a drive mechanism that is operatively connected to the piston. Thus, the drive mechanism controls a predetermined stroke length of the piston. The drive mechanism includes a crank pin and a flywheel powered by the motor.



a drive mechanism that controls a predetermined stroke length of the piston; and



The accused product has a quick-connect system comprising the distal end of the piston and a first massaging head.



a quick-connect system comprising the distal end of the piston and a first massaging head,




wherein the quick-connect system is configured to secure the first massaging head to the percussive massager by a proximal end of the massaging head being slid into the bore while the piston reciprocates the predetermined stroke length at the first speed.

The quick-connect system of the accused product is configured to secure the first massaging head to the percussive massager by a proximal end of the massaging head being slid into the bore while the piston reciprocates the predetermined stroke length at the first speed.

[Click to see Video](#)

Note: To the extent the Court is unable to open the link in the video, Plaintiffs will provide the Court with an alternative method to access the video at the Court's request.

Claim Chart – U.S. Patent No. 11,857,482 – JQX (ASIN B0DGGKTJR5)

U.S. Patent No. 11,857,482	JQX (ASIN B0DGGKTJR5)
<p>1. A percussive massager comprising:</p>	<p>The accused product is a percussive massager:</p> <p>JQX Massage Gun, Deep Tissue Massager Gun for Pain Relief, Percussion Muscle Massage Gun for Athletes, Handheld Electric Back Massager with 30 Speed Levels & 9 Massage Heads</p> <p>Visit the JQX Store</p> <p>4.6 ★★★★★ (194) Search this page</p> <p>300+ bought in past month</p> 

a housing;

The accused product has a housing:



The piston has a proximal end and a distal end.

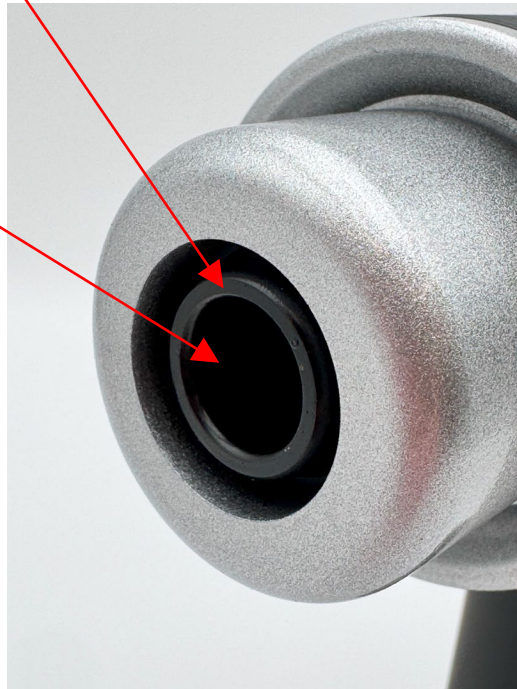
The proximal end of the piston is operatively connected to the drive mechanism (as shown in the cavity below):

drive mechanism

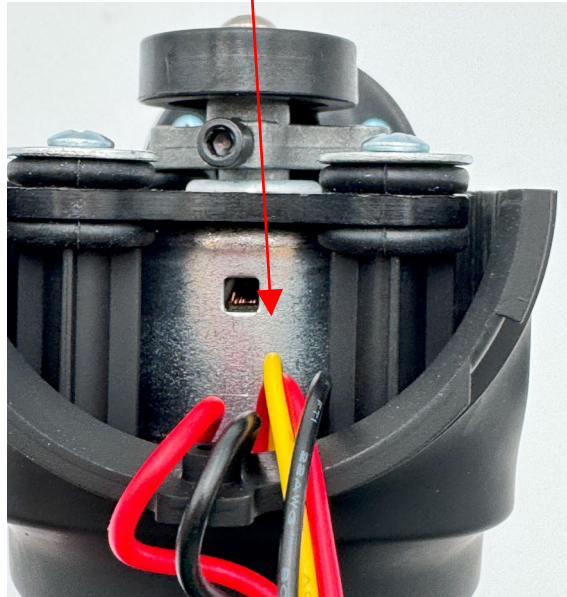


a piston having a proximal end and a distal end, the distal end of the piston having a substantially cylindrical bore;

The distal end of the piston has a substantially cylindrical bore:



The accused product has a motor at least partially within the housing:



a motor at least partially within the housing and operatively connected to the proximal end of the piston,

and is operatively connected to the proximal end of the piston,



wherein the motor is configured to cause the piston to reciprocate at a first speed;

In the accused product, the motor is configured to cause the piston to reciprocate at a first speed.

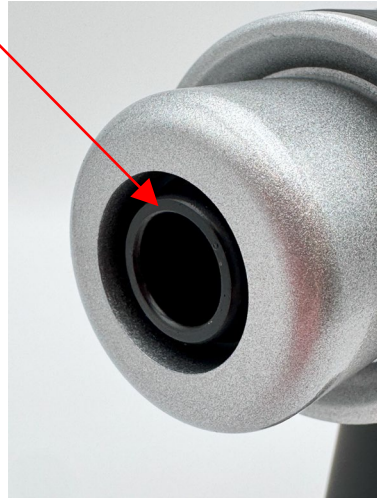


The accused product has a drive mechanism that is operatively connected to the piston. Thus, the drive mechanism controls a predetermined stroke length of the piston. The drive mechanism includes a crank pin and a flywheel powered by the motor.

a drive mechanism that controls a predetermined stroke length of the piston; and



The accused product has a quick-connect system comprising the distal end of the piston and a first massaging head.



a quick-connect system comprising the distal end of the piston and a first massaging head,




wherein the quick-connect system is configured to secure the first massaging head to the percussive massager by a proximal end of the massaging head being slid into the bore while the piston reciprocates the predetermined stroke length at the first speed.

The quick-connect system of the accused product is configured to secure the first massaging head to the percussive massager by a proximal end of the massaging head being slid into the bore while the piston reciprocates the predetermined stroke length at the first speed.

[*Click to see Video*](#)

Note: To the extent the Court is unable to open the link in the video, Plaintiffs will provide the Court with an alternative method to access the video at the Court's request.

Claim Chart – U.S. Patent No. 12,213,933 – JQX (ASIN B0CGN8SYDQ)

U.S. Patent No. 12,213,933	JQX (ASIN B0CGN8SYDQ)
1. A percussive massager comprising:	<p>The accused product is a percussive massager:</p> <p>JQX Massage Gun Deep Tissue, Handheld Electric Body Muscle Massage Gun, High Percussion Vibration Back Neck Massager for Athletes with 30 Speed Levels & 9 Heads, Gifts for Men and Women (Black)</p> <p>Visit the JQX Store 4.5 ★★★★★ (505) Search this page 100+ bought in past month</p> 

The accused product has a housing:



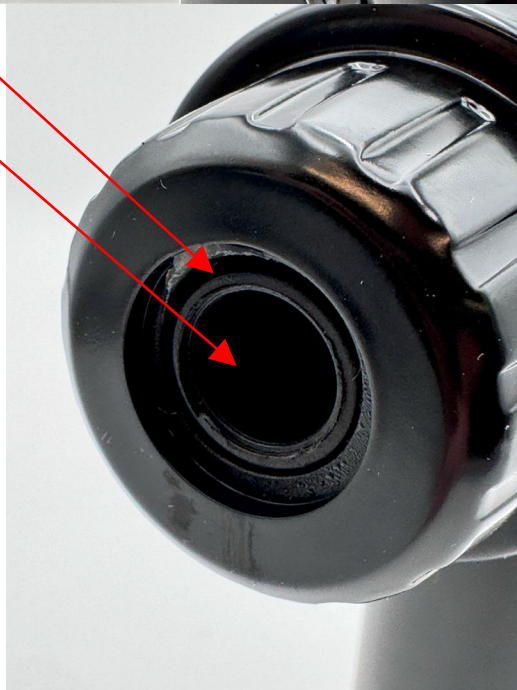
a housing;

The accused product has a piston with a proximal end and a distal end. The proximal end of the piston is operatively connected to the drive mechanism as shown below. The distal end of the piston has a bore.

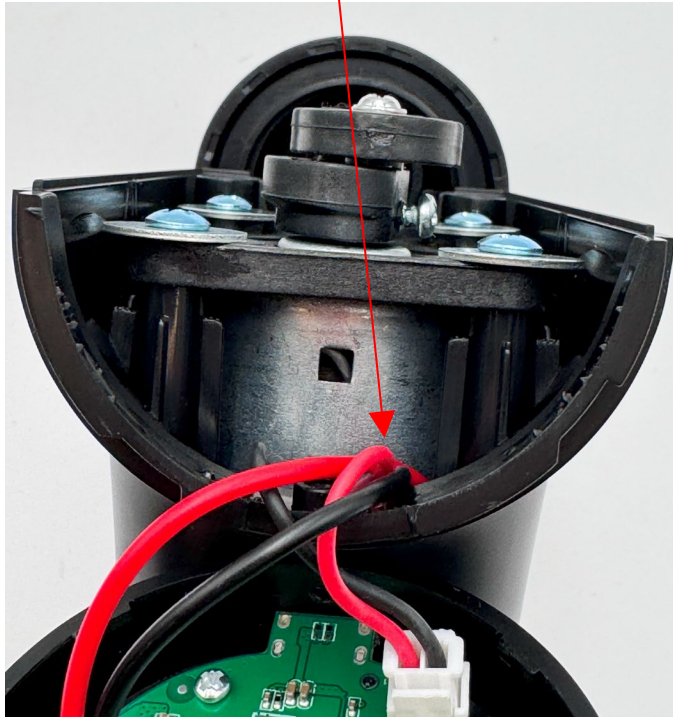


drive mechanism

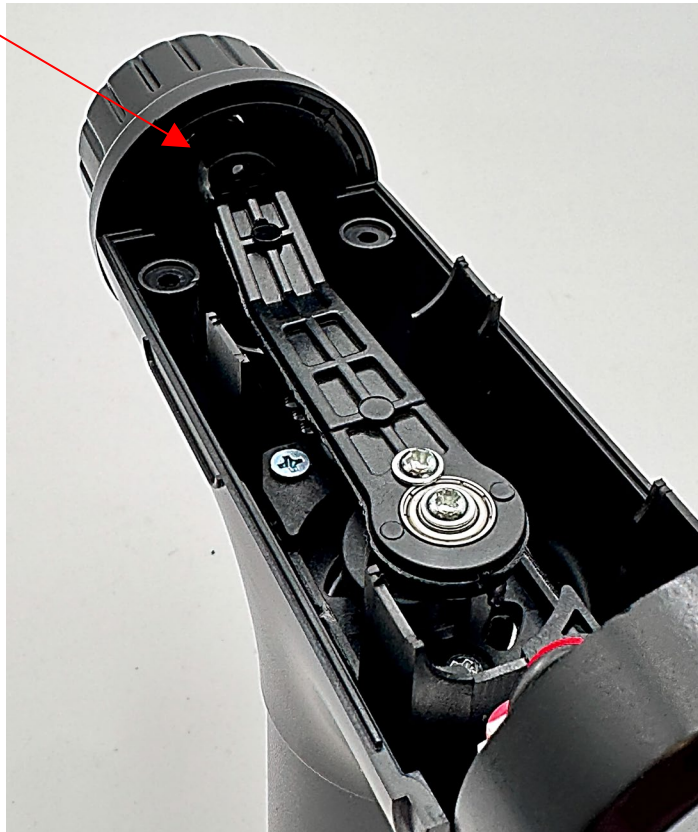
a piston having a proximal end and a distal end, the distal end of the piston having a bore,



The accused product has a **motor** operatively connected to the proximal end of the piston:



a motor operatively connected to the **proximal end of the piston,**



wherein the motor is configured to cause the piston to reciprocate at a first speed;

In the accused product, the motor is configured to cause the piston to reciprocate at a first speed.



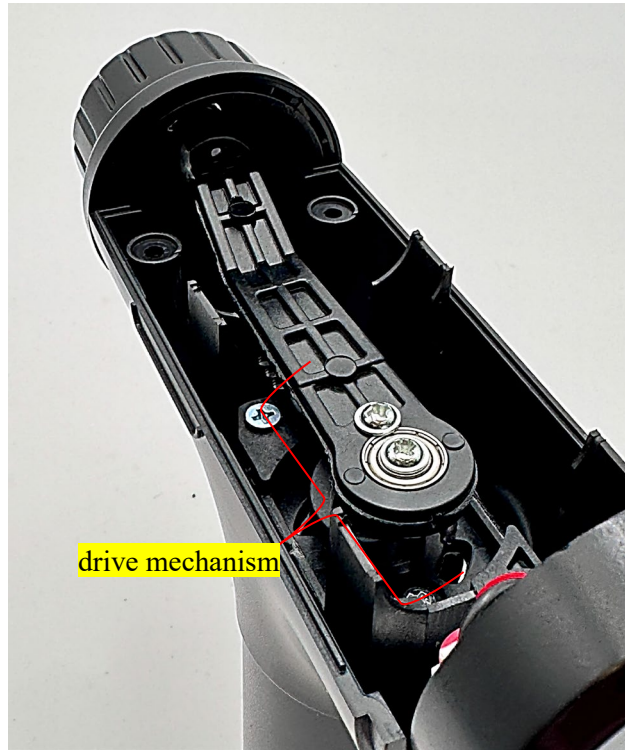
The accused product has a drive mechanism that is operatively connected to the piston. Thus, the drive mechanism determines a predetermined stroke length of the piston. The drive mechanism includes a crank pin and a flywheel powered by the motor.

piston

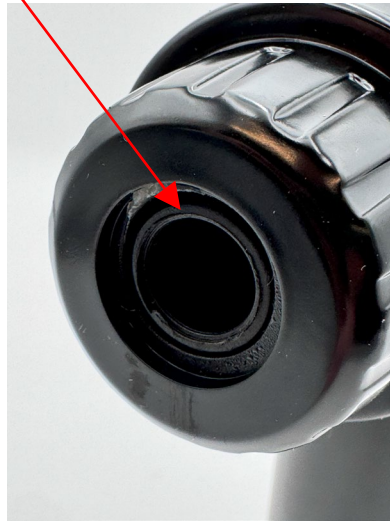


a drive mechanism that determines a predetermined stroke length of the piston; and

drive mechanism



The accused product has a quick-connect system comprising the distal end of the piston and a first massaging head:



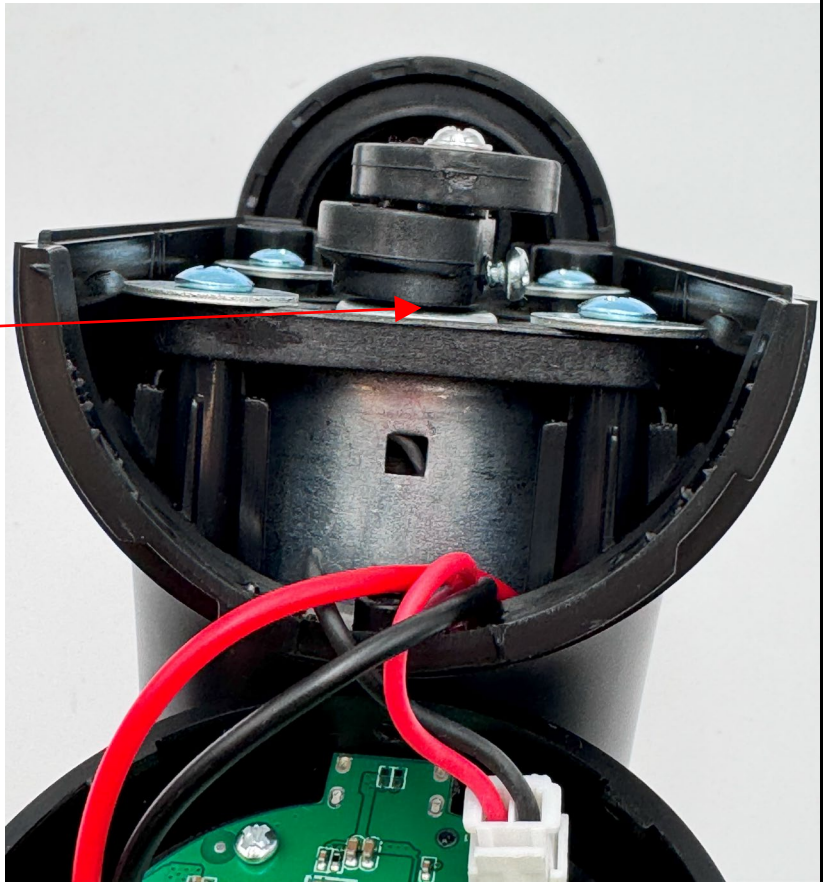
a quick-connect system comprising the distal end of the piston and a first massaging head,



<p>wherein the quick-connect system allows a proximal end of the first massaging head to be inserted into or removed from the bore while the piston reciprocates the predetermined stroke length at the first speed,</p>	<p>The quick-connect system of the accused product allows a proximal end of the first massaging head to be inserted into or removed from the bore while the piston reciprocates the predetermined stroke length at the first speed.</p> <p>Click to see Video</p> <p>Note: To the extent the Court is unable to open the link in the for the video, Plaintiffs will provide the Court with an alternative method to access the video at the Court's request.</p>
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The motor of the accused product has an output shaft that is configured to rotate about a rotation axis:

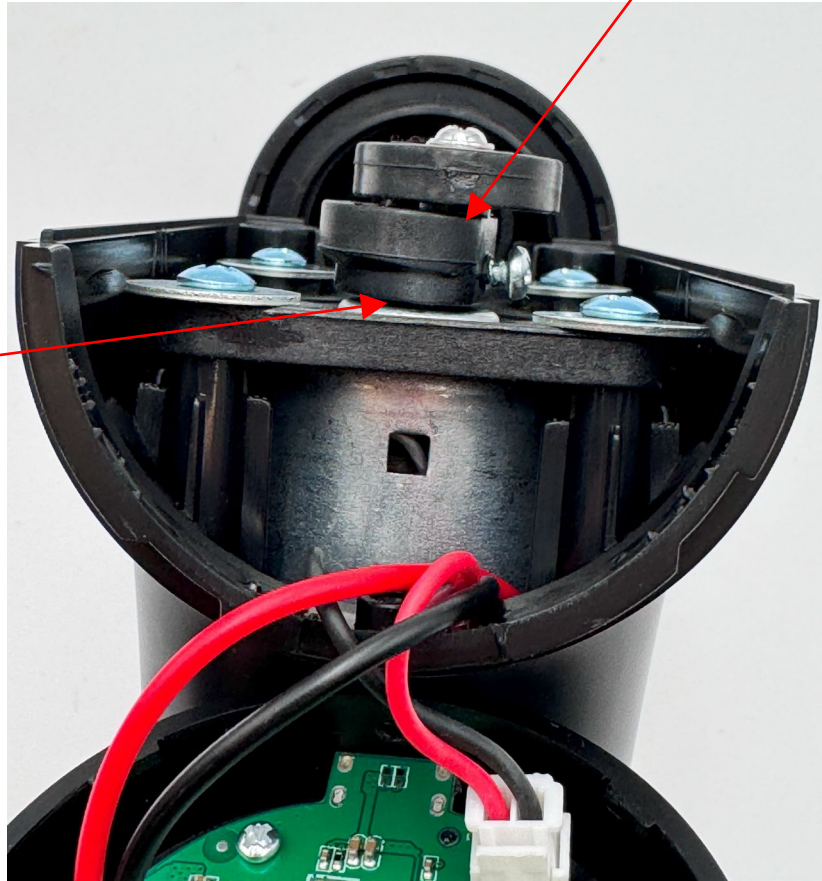
wherein the motor has an output shaft that is configured to rotate about a rotation axis, and



wherein the drive mechanism comprises:

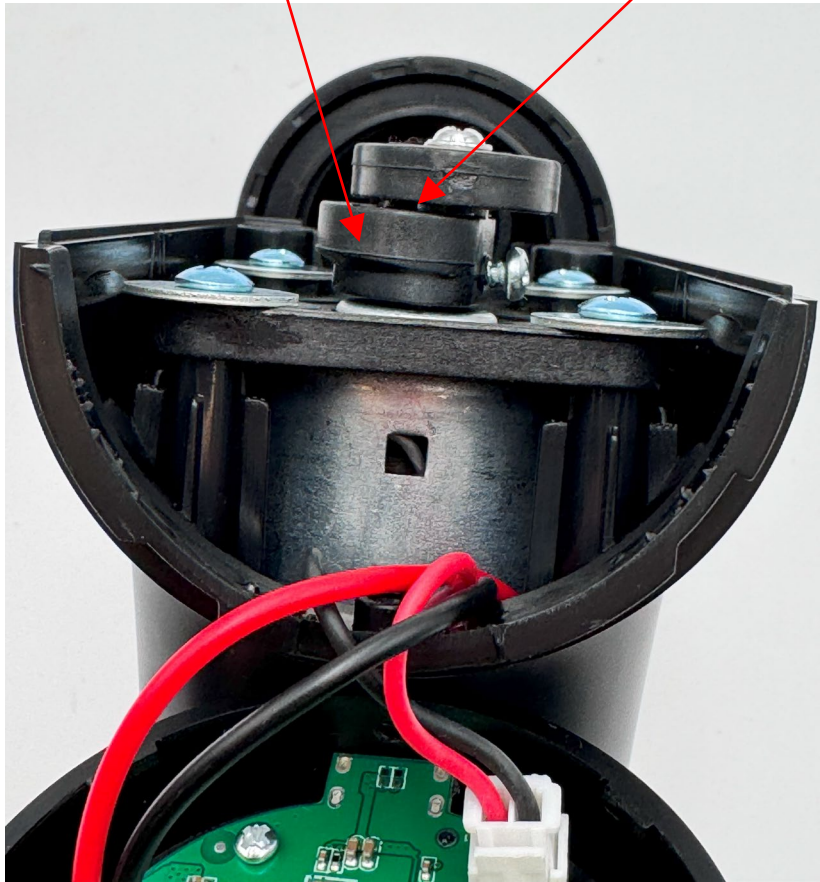
a flywheel operatively connected to the output shaft of the motor to rotate about a flywheel axis, the output shaft extending into the flywheel along the flywheel axis; and

The drive mechanism of the accused product comprises a flywheel operatively connected to the output shaft of the motor to rotate about a flywheel axis, the output shaft extending into the flywheel along the flywheel axis:




The drive mechanism of the accused product includes a crank pin extending from the flywheel, the crank pin being operatively connected to the piston:

a crank pin extending from the flywheel, the crank pin being operatively connected to the piston.



Claim Chart – U.S. Patent No. 12,213,933 – JQX (ASIN B0DGGKTJR5)

U.S. Patent No. 12,213,933	JQX (ASIN B0DGGKTJR5)
<p>1. A percussive massager comprising:</p>	<p>The accused product is a percussive massager:</p> <p>JQX Massage Gun, Deep Tissue Massager Gun for Pain Relief, Percussion Muscle Massage Gun for Athletes, Handheld Electric Back Massager with 30 Speed Levels & 9 Massage Heads</p> <p>Visit the JQX Store</p> <p>4.6 ★★★★★ (194) Search this page</p> <p>300+ bought in past month</p> 

The accused product has a housing:

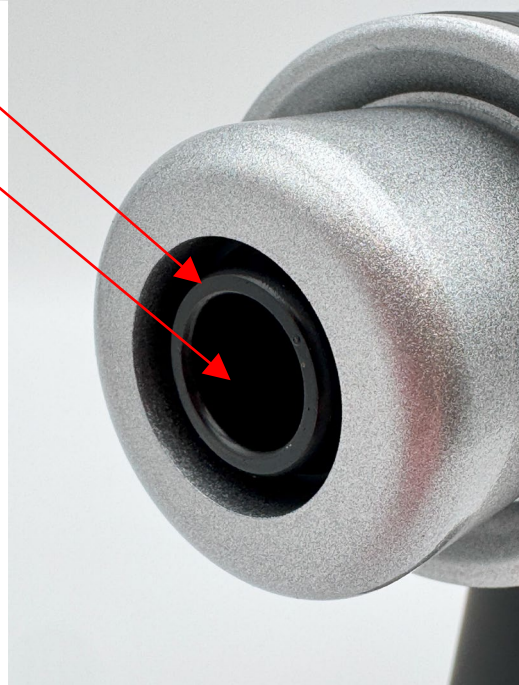


a housing;

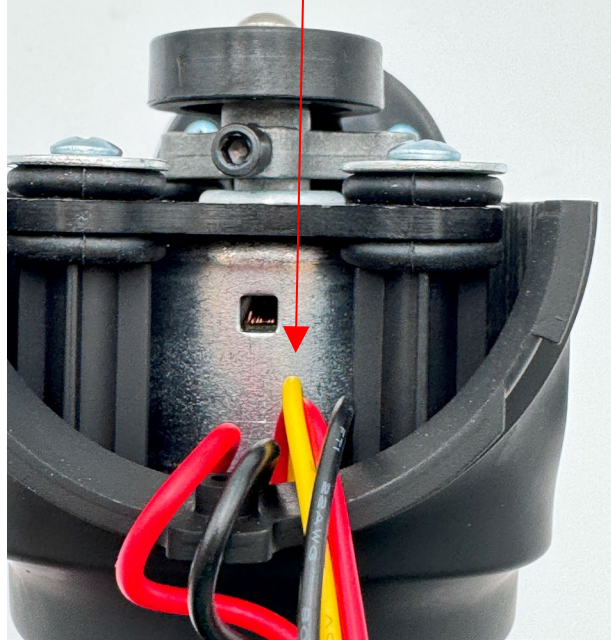
The accused product has a piston with a proximal end and a distal end. The proximal end of the piston is operatively connected to the drive mechanism as shown below. The distal end of the piston has a bore.



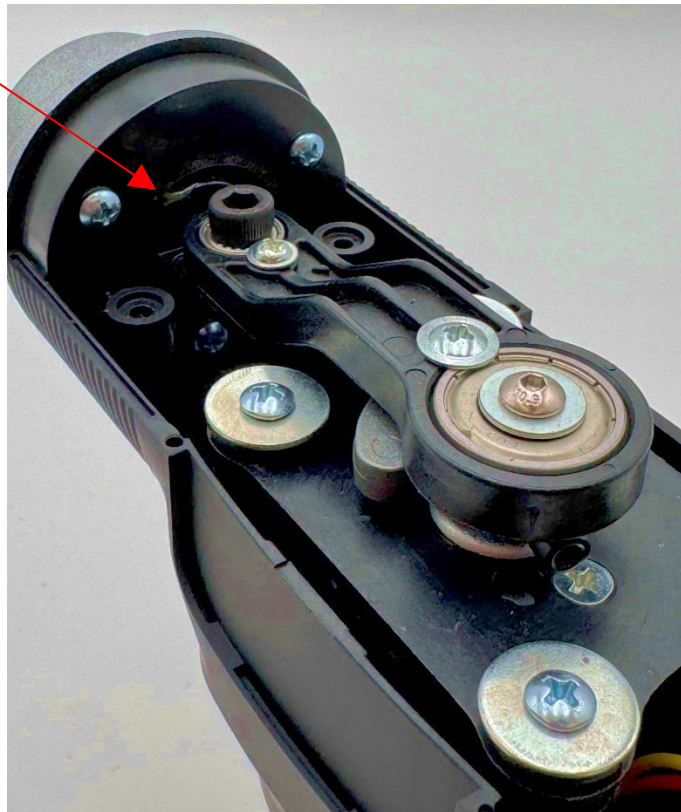
a piston having a proximal end and a distal end, the distal end of the piston having a bore.



The accused product has a **motor** operatively connected to the proximal end of the piston:



a motor operatively connected to the **proximal end of the piston**,



wherein the motor is configured to cause the piston to reciprocate at a first speed;

In the accused product, the motor is configured to cause the piston to reciprocate at a first speed.



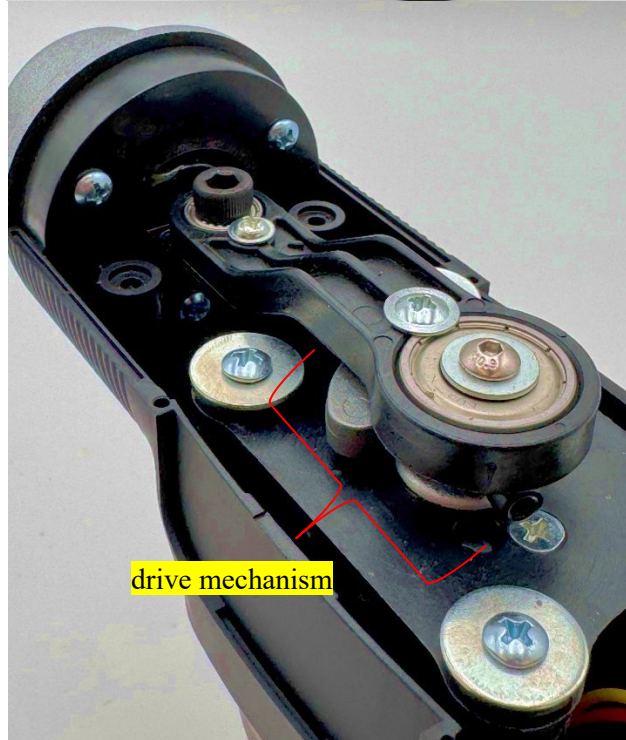
The accused product has a drive mechanism that is operatively connected to the piston. Thus, the drive mechanism determines a predetermined stroke length of the piston. The drive mechanism includes a crank pin and a flywheel powered by the motor.

piston

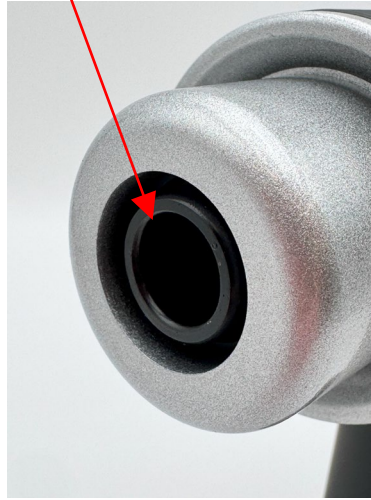


a drive mechanism that determines a predetermined stroke length of the piston; and

drive mechanism



The accused product has a quick-connect system comprising the distal end of the piston and a first massaging head:



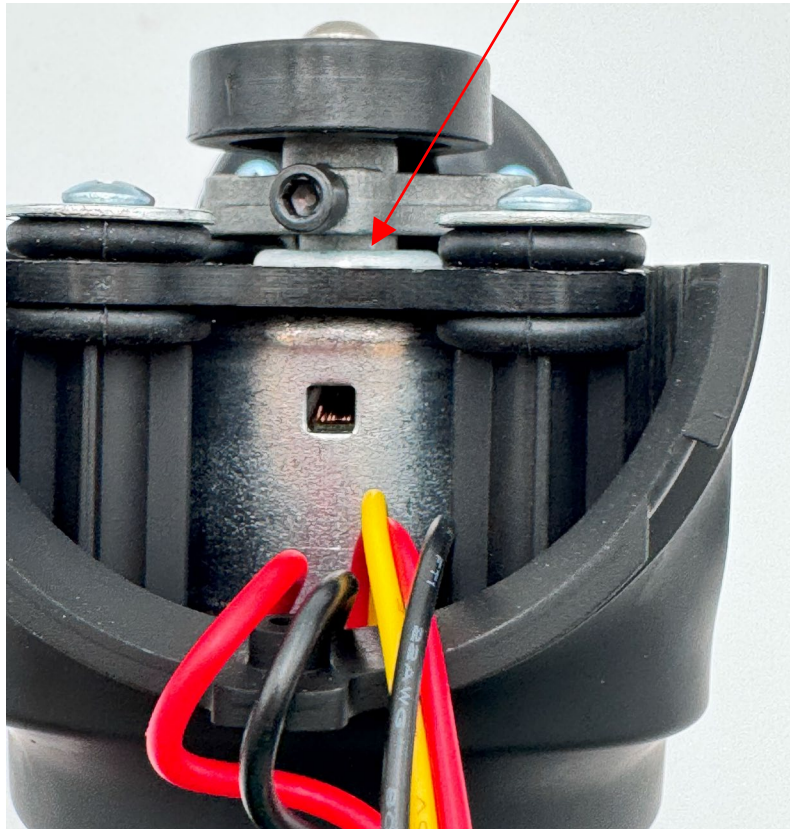
a quick-connect system comprising the distal end of the piston and a first massaging head,



<p>wherein the quick-connect system allows a proximal end of the first massaging head to be inserted into or removed from the bore while the piston reciprocates the predetermined stroke length at the first speed,</p>	<p>The quick-connect system of the accused product allows a proximal end of the first massaging head to be inserted into or removed from the bore while the piston reciprocates the predetermined stroke length at the first speed.</p> <p>Click to see Video</p> <p>Note: To the extent the Court is unable to open the link in the for the video, Plaintiffs will provide the Court with an alternative method to access the video at the Court's request.</p>
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wherein the motor has an output shaft that is configured to rotate about a rotation axis, and

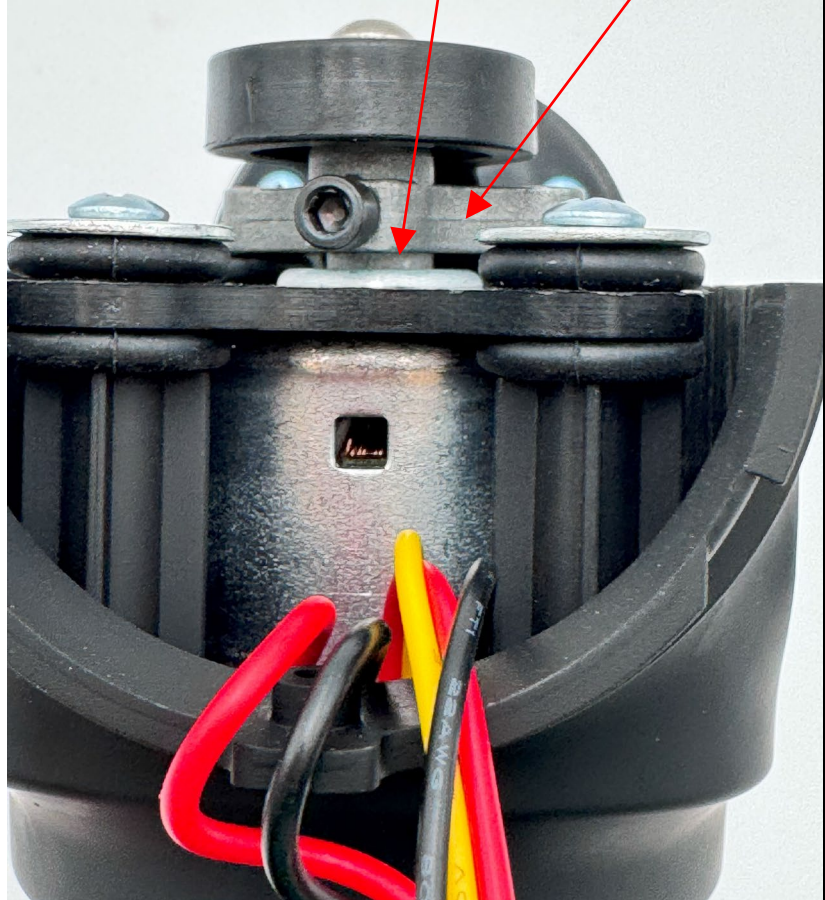
The motor of the accused product has an output shaft that is configured to rotate about a rotation axis:



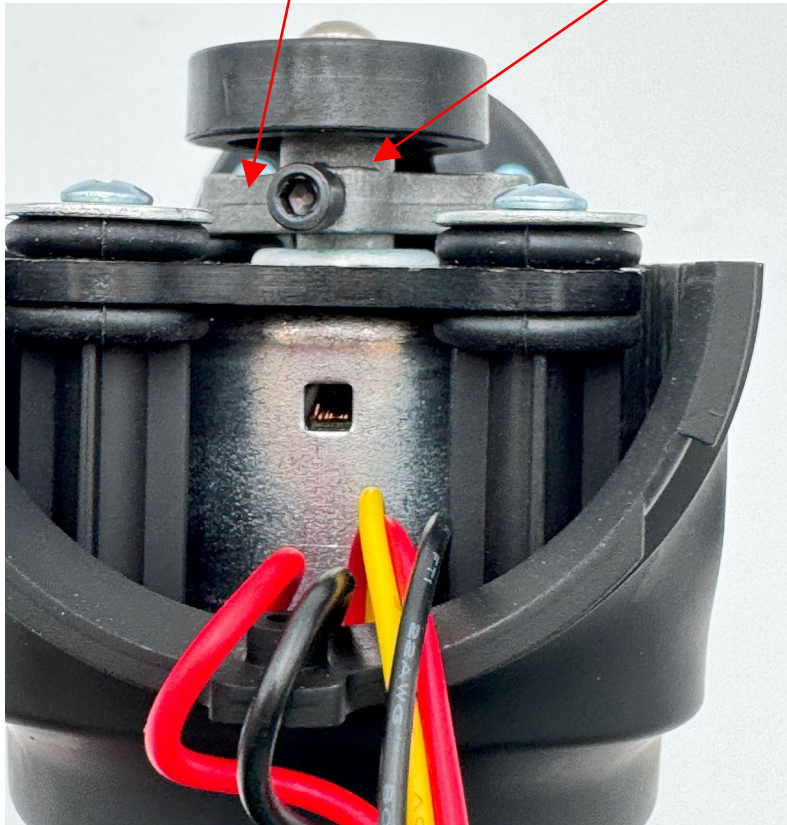
wherein the drive mechanism comprises:

a flywheel operatively connected to the output shaft of the motor to rotate about a flywheel axis, the output shaft extending into the flywheel along the flywheel axis; and

The drive mechanism of the accused product comprises a flywheel operatively connected to the output shaft of the motor to rotate about a flywheel axis, the output shaft extending into the flywheel along the flywheel axis:



The drive mechanism of the accused product includes a crank pin extending from the flywheel, the crank pin being operatively connected to the piston:



a crank pin extending from the flywheel, the crank pin being operatively connected to the piston.

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
FOXMIN D CANADA ENTERPRISES LTD., : Docket #21cv5146
 : 1:21-cv-05416-KPF
Plaintiff, :
- against - :
ABCTEC, et al., : New York, New York
 : July 14, 2022
Defendants. :
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE KATHERINE POLK FAILLA,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff: EPSTEIN DRANGEL LLP
BY: DANIELLE FUTTERMAN, ESQ.
60 East 42nd Street, Suite 1250
New York, New York 10165

For Defendants: DIAZ, REUS & TARG, LLP
BY: ZHEN PAN, ESQ.
100 S.E. 2nd Street, Suite 3400
Miami, Florida 33131

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

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E X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>	<u>Court</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

1

2

THE CLERK: Your Honor, this is in the matter of Foxmind Canada Enterprises Ltd. versus ABCTEC, et al. Counsel, please state your name for the record beginning with plaintiff.

MS. DANIELLE FUTTERMAN: Good morning, Your Honor, this is Danielle Futterman of Epstein Drangel on behalf of the plaintiffs.

HONORABLE KATHERINE POLK FAILLA (THE COURT): Good morning and thank you for appearing. And representing the moving defendants, this afternoon -- this morning, excuse me.

MR. ZHEN PAN: Good morning, Your Honor, Zhen Pan from the law firm Diaz, Reus & Targ, on behalf of the moving defendants.

THE COURT: Thank you very much, I appreciate both of you participating in this conference on somewhat short notice. And as I often do, I'll sort of begin by apologizing for oral decisions. They are a little bit of a pain to sit and listen through, but it is easier for me and it will get your matter resolved more quickly.

So in a moment I'm going to begin to read an oral decision with respect to the motion to dismiss brought by what is not 30 moving defendants, and before

I do so you're welcome to take a moment and mute your phones and I'll try very hard not to be interrupted. With that, I will begin, thank you.

This is an oral decision on a motion to dismiss, and to begin I note that plaintiff, Foxmind Canada Enterprises Ltd. is the owner of a trademark for Pop Its which covers a children's bubble popping toy, and in recent years plaintiff's Pop It toys have spiked in popularity due, in part, to publicity garnered on social medial platforms such as TikTok. In this case, plaintiff has sued over 90 China-based Amazon merchants for selling products that allegedly infringe on the Pop It mark. Plaintiff has also brought six additional related cases levying substantially identical allegations against dozens more online retailers.

Currently, a preliminary injunction is in place that enjoins defendants in all of these actions from engaging in further counterfeiting activity that restrains Amazon and other third parties from providing services to defendants, and that freezes defendants' assets associate with their merchants' storefronts. Thirty of the defendants in this action, and I will refer to them collectively as the moving defendants, have moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(5) for insufficient service of process.

And let me just pause for a moment to note that this matter or this motion was initially brought on behalf of 34 defendants, but I'm advised that plaintiff has subsequently voluntarily dismissed the claims against four of the defendants, and with the parties' indulgence I will not read into the record the 30, the names of the 30 moving defendants, the parties know who they are.

Two of these moving defendants, ACBERY, A-C-B-E-R-Y, and ANZIR, A-N-Z-I-R, have separately moved to dismiss under Federal Rule of Civil Procedure 12(b)(2) alleging a lack of personal jurisdiction. And for the reasons that I'm now about to explain, this Court denies the moving defendants' motion to dismiss except with respect to defendant ANZIR over whom the Court concludes it does not possess personal jurisdiction.

So I'll begin with a brief recitation of the relevant procedural history, and on June 10th of 2021, plaintiff filed a complaint in this case asserting causes of action for trademark counterfeiting, trademark infringement, false designation of origin in violation of New York's Unfair Competition Law, all of which stem from plaintiff's allegations of widespread counterfeiting and trademark infringement on the Amazon marketplace.

Along with the case initiating documents,

1 plaintiff filed an ex parte application for emergency relief
2 and for alternate service to permit service of defendants
3 via email. That same day, this Court granted plaintiff's
4 application for a temporary restraining order, or TRO,
5 which, among other things, enjoined defendants from engaging
6 in further infringing and counterfeiting conduct, froze
7 defendants' user accounts and merchant storefronts on
8 websites such as Amazon, and froze defendants' assets
9 located at any financial institution. The TRO also
10 authorized plaintiff to serve defendants via deliver of,
11 number one, PDF copies of this order together with the
12 summons and complaint or, number two, a link to a secure
13 website, including Nutstore, a large mail link created
14 through ourmail.com, and via website publication through a
15 specific page dedicated to this lawsuit accessible through
16 IPcounselorslawsuit.com, where each defendant would be able
17 to download PDF copies of the order together with the
18 summons and complaint, and all papers filed in support of
19 plaintiff's applications seeking this order to defendants'
20 email addresses to be determined after having been
21 identified by Amazon. I'm quoting from page 9 of the
22 temporary restraining order.
23

24 In seeking alternative service, plaintiff
25 represented that all defendants were located in China, that

1
2 they are limited to correspondence by email and, further,
3 that none of the defendants have disclosed their mailing
4 addresses. I'm quoting here from docket entry number 16 at
5 pages 19 through 21. And as discussed in more detail below,
6 the moving defendants strenuously contest the unavailability
7 of their mailing addresses.

8 Six days later, on June 16th of 2021, plaintiff
9 informed the Court that it had not obtained defendants'
10 email addresses as necessary to effectuate service by the
11 means ordered by the Court because Amazon and other third
12 party service providers have not yet complied with the
13 Court's expedited discovery order. The Court thus
14 extended the TRO and adjourned the show cause hearing
15 to permit plaintiff additional time to serve
16 defendants. On June 30, 2021, plaintiff effectuated service
17 of the summons, the complaint, the TRO, the supporting
18 papers and the June 16, 2021, order on each defendant in
19 accordance with the alternative method of service authorized
20 by the TRO.

21 Thereafter, on July 8th of 2021, plaintiff and
22 counsel purporting to represent several defendants, appeared
23 at the show cause hearing. Counsel for the moving defendants
24 did not appear at this conference, but the following day on
25 July 9th of 2021, the Court entered a preliminary injunction

1
2 or a PI, which extended the injunctive relief which had
3 previously been granted in the TRO through the pendency of
4 this litigation as to all defendants. Plaintiff served a
5 copy of the PI order on July 12th of 2021 using the
6 alternative method of service authorized by the TRO and the
7 PI orders. And more than a month after the entry of the PI
8 on August 19th of 2021, the moving defendants filed a letter
9 communicating their intention to move to dismiss the
10 complaint on the grounds of insufficient service of process
11 and lack of personal jurisdiction.

12 Plaintiff filed a letter opposing the moving
13 defendants' motion on August 24, 2021, and on September 14th
14 of 2021, the Court held a pre-motion conference to discuss
15 this contemplated motion after which the Court set a
16 briefing schedule. The moving defendants filed their motion
17 to dismiss and supporting papers on November 12th of 2021.
18 Plaintiff filed its opposition papers on December 17th of
19 2021, and briefing on the motion was completed when the
20 moving defendants filed their reply brief on January 7th of
21 2022.

22 So beginning first with the motion to dismiss for
23 improper service of process, under Federal Rule of Civil
24 Procedure 12(b)(5) the Court observes that the moving
25 defendants have argued for dismissal, claiming that it is

appropriate because defendant was obligated -- I'm sorry, because plaintiff was obligated and yet failed to effectuate service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. I will call that the Hague Convention for short. The moving defendants also contend that plaintiff misrepresented the bases for seeking alternative service in its ex parte application. And so let me talk about the law in this area.

In Federal Rule of Civil Procedure 12(b)(5) provides for dismissal of a complaint for insufficient service of process. In considering such motion, the Court is directed to look at matters outside the complaint to determine whether it has jurisdiction. There are many cases for this proposition, one of them is *George versus Professional Disposables International, Inc.*, 221 F.Supp.3d 428 (S.D.N.Y. 2016).

Here, the moving defendants have submitted declarations representative of each moving defendant and from Zhen Pan, which include materials supporting the veracity of their publicly listed addresses on the Amazon website. The moving defendants have also attached to their reply submission additional declarations from three moving defendants. They have also attached to their briefing in

1
2 this motion publicly available articles about Amazon's
3 process for verifying sellers' addresses.

4 Plaintiff has submitted the affidavit of Ms.
5 Futterman outlining plaintiff's efforts to locate defendants
6 physical addresses in advance of their application for
7 alternative service, and this Court considers materials just
8 listed as appropriate in the analysis it's about to
9 undertake.

10 Once a defendant moves to dismiss under Rule
11 12(b) (5) the plaintiff bears the burden of establishing that
12 service was sufficient. I'm quoting here from the Second
13 Circuit's summary order in *Khan v. Khan*, 360 Fed.Appx. 2
14 (2010), and "in deciding a 12(b) motion the Court must look
15 to Rule 4 which governs the content, issuance and service of
16 a summons." I'm quoting here from *DeLuca v. AccessIT Group,*
17 *Inc.*, 695 F.Supp.2d 54 (S.D.N.Y. 2010). "In relevant part,
18 Rule 4(f) from the Federal Rules of Civil Procedure permits
19 service of process on individuals in foreign countries
20 through three means, number one, any international agreed
21 means of service that is reasonably calculated to give
22 notice such as those authorized by the Hague Convention on
23 the service abroad of judicial and extrajudicial documents;
24 number two, a method that is reasonably calculated to give
25 notice, including as the foreign authority directs in

1
2 response to a letter rogatory or letter of request or;
3 number three, by other means not prohibited by international
4 agreement as the Court orders."

5 In turn, Federal Rule of Civil Procedure 4(h)
6 provides that services of process on foreign business
7 entities, such as the moving defendants here, may be made
8 using the same methods outlined in 4(f)(1) and 4(f)(3) among
9 other provisions. Despite the Court's authorization of
10 alternative service in the TRO order and something that was
11 confirmed in the PI order, the moving defendants argue that
12 the Hague Convention has mandatory application to this case.
13 And after careful consideration of those arguments, the
14 Court determines that the alternative method of service
15 employed in this case was appropriate.

16 So let me speak for a moment about the Hague
17 Convention. And, generally speaking, service on a foreign
18 defendant pursuant to the Hague Convention is mandatory when
19 the defendant resides in a country known as the signatory to
20 the Hague Convention. That was identified or noted in the
21 Supreme Court's 1988 decision in *Volkswagen*
22 *Aktiengesellschaft*, 486 U.S. 694. And the US State
23 Department advises that the Peoples Republic of China is,
24 indeed, a signatory to the Hague Convention. The Hague
25 Convention, itself, provides for several alternate methods

1 of service, a service through the central authority of
2 member states, service through consular channels, or service
3 by mail if the receiving state does not object, a then
4 fourth, service pursuant to the internal laws of the state.
5 And I'm quoting here from *Burda Media, Inc. v. Viertel*, 417
6 F.3d 292 (2d Cir. 2005). "The Court finds that plaintiff
7 reasonably attempted to locate the moving defendants'
8 addressees. On that point, the Hague Convention, itself,
9 recognizes that it shall not apply where the address of the
10 person to be served with the document is not known."

12 And so the parties' first disagreement in this
13 case relates to whether the moving defendants' addresses
14 were known. Courts in this circuit have found an address is
15 not known if the plaintiff exercised reasonable diligence in
16 attempting to discover a physical address for service of
17 process and was unsuccessful in doing so. I'm quoting here
18 from *Advanced Access Content Systems Licensing Administrator*
19 *Ltd. v. Shen*, an unreported decision from my colleague,
20 Judge Broderick, contained at 2018 WL 4757939. "And here
21 the moving defendants argue that plaintiff cannot establish
22 that it exercised reasonable diligence to discover the
23 moving defendants' addresses and that it made affirmative
24 representations in an ex parte application in its ex parte
25 application to the Court for alternative service when it

1 said that all defendants are limited to correspondence by
2 email and that none have disclosed their mailing addresses."

3
4 And so to rebut plaintiff's statements in the TRO
5 application, the moving defendants have submitted
6 declarations from their representatives affirming that at
7 the time the suit was filed valid addresses for all moving
8 defendants were publicly accessible on their Amazon user
9 accounts. They furthermore explain that the addresses of 18
10 of the moving defendants were verified by procedures
11 developed by Amazon. And in defendants' Exhibits B and C
12 there is discussion of Amazon's address verification
13 procedures and which, according to the moving defendants,
14 began at least as early as 2020 and involved address
15 verification postcards. I won't go into further detail
16 because I know the parties are aware of it.

17 But in light of this evidence, the moving
18 defendants argue that plaintiff's failure to specifically
19 investigate each of the addresses associated with their user
20 accounts mandates service under the Hague Convention. Now
21 in response, plaintiff concedes that it incorrectly stated
22 in its memorandum of law in support of the application for
23 alternative service that none of the defendants disclosed
24 their mailing addresses. However, what they meant to, what
25 I am told they meant to rely on was the sworn statement in

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2 Ms. Futterman's declaration which averred that all
3 defendants failed to disclose an accurate or complete
4 address or any other contact information on their respective
5 user accounts or merchant storefronts on Amazon. The Court
6 is, therefore, satisfied that plaintiff did not make
7 intentional representations in its papers seeking ex parte
8 emergency relief though it, of course, cautions plaintiff
9 and plaintiff's counsel to be more careful in their
10 submissions to the Court.

11 Plaintiffs respond on the merits of this motion
12 that it was justified in seeking alternative service because
13 merchants on Amazon, including moving defendants, have been
14 known to use aliases, false addresses and other incomplete
15 identifying information to shield their true identities.
16 Plaintiff claims that the investigation it conducted prior
17 to filing its motion for alternative service lends credence
18 to the unreliability of the addresses affiliated with the
19 moving defendants' user accounts.

20 Of particular relevance, during this investigation
21 plaintiff's counsel took screenshots of the addresses
22 displayed on certain defendants' merchant's storefronts,
23 several of which were facially incomplete or pointed to
24 clearly fake addresses in the United States. One moving
25 defendant had the address Broward, Pompano Beach, Florida,

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2 it was incomplete, but it also contradicts the defendants'
3 current declaration stating that its sole place of business
4 is in Fujian, China.

5 In addition, this defendant is supposedly one of
6 the verified defendants who represents that it completed a
7 postcard to verify the accuracy of its address. Likewise,
8 plaintiff took screenshots of the user accounts for some of
9 the other moving defendants who, one of whom has, or both of
10 whom displayed the same address in Lawrenceville, Georgia,
11 which conflicts with their current declarations representing
12 a place of business in China. And also, one of these
13 entities is another of the verified defendants who
14 supposedly participated in Amazon's verification process.

15 As part of their reply submission, the moving
16 defendants submitted declarations from each of these
17 representatives in which they represented that the addresses
18 associate with their Amazon merchant accounts were
19 inadvertently changed by US vendors who were retained so
20 that these defendants could obtain approval for selling
21 children's toys in the United States. Even if this Court
22 were to credit that explanation, it does not change the
23 fact that plaintiffs encountered incorrect or misleading
24 information at the time it sought to discover the
25 moving defendants' addresses.

1
2 But so besides reviewing these user accounts,
3 plaintiff was also involved in using its counsel's, it's
4 office in Beijing to review the addresses of those
5 defendants located in China. The Beijing office's review
6 disclosed that several of the China based addresses were
7 incomplete and that's directly relevant to this motion. The
8 Beijing office advised plaintiff that the addresses for at
9 least three of the moving defendants were incomplete for
10 lacking building or unit numbers.

11 This Court is sympathetic to plaintiff's argument
12 concerning the unreliability of the physical addresses
13 affiliated with the moving defendants' Amazon user accounts.
14 Besides the questionable accuracy of the information that
15 appeared on certain of defendants' user accounts, the
16 publicly available addresses appear to have been a moving
17 target as plaintiffs investigatory findings suggest that the
18 addresses for certain of the moving defendants, including
19 some of the verified defendants, changed after plaintiff
20 performed its investigation. To this extent, the moving
21 defendants' declarations attesting to the genuineness of the
22 addresses that presently appear on their user accounts
23 cannot retroactively dispel the concerns that plaintiff had
24 over the many addresses it located that were clearly fake or
25 incomplete.

1
2 All of that said, plaintiff does not represent
3 that it inspected every one of the moving defendants'
4 addresses as it claims only that it's reviewed the addresses
5 of many, emphasizing the term many, of the moving defendants
6 displayed on their merchant storefronts ostensibly revealed
7 the unreliability of the details reflected thereon.

8 Considering Amazon's verification procedures, the
9 Court cannot rule out the possibility that at least some of
10 the verified defendants had legitimate addresses affiliated
11 with their user accounts at the time of plaintiff's
12 investigation. And just thinking ahead, as these
13 verification procedures improve, the Court will expect a
14 move detailed or a more granular approach to reviewing the
15 addresses of the putative defendants in further IP cases
16 brought by plaintiff's counsel. But with that said, and in
17 the circumstances of this case, the Court believes that
18 plaintiff did exercise reasonable diligence in attempting to
19 locate the physical addresses of the moving defendants.

20 With regard to the 12 non-verified defendants, the
21 Court fully credits plaintiff's concerns regarding the
22 voracity of these listed addresses, the information
23 reflected on these user accounts were not verified or was
24 not verified, excuse me, and there was no mechanism in place
25 for plaintiff to corroborate these addresses during its

1 investigation. Plaintiff harbored valid doubts concerning
2 the forthrightness of the information furnished by these
3 third party merchants on Amazon, its concerns so prominent
4 that it seems to have motivated Amazon to implement these
5 verification procedures in the first instance. The Court
6 does not believe that the law compels plaintiff to attempt
7 to effectuate service under the Hague Convention using
8 address information that it has a reasoned basis to believe
9 it's faulty.
10

11 So with respect to the remaining 18 or 19 -- no,
12 18 verified defendants, the Court does not believe that
13 Amazon's verification procedures fully address plaintiff's
14 concerns about the validity of the information posted on
15 these user accounts. For instance, at the time of
16 plaintiff's investigation, at least two of the verified
17 defendants posted US addresses that were demonstrably false,
18 and six of the verified defendants attest to receiving their
19 verification postcards from Amazon after the filing of this
20 suit, which means that their addresses could not have been
21 verified at the time plaintiff undertook its investigation.

22 The Court additionally notes that 11 of the
23 verified defendants received their verification postcards in
24 May of 2021, just one month prior to plaintiffs filing this
25 lawsuit, and assuming that at least some portion of

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2 plaintiff's investigation of the over 90 defendants sued in
3 this case, which number is multiplied when you consider the
4 6 related actions, but considering that some portion of the
5 investigation took place more than a month prior to filing
6 suit, these addresses very well may not have been verified
7 at the time of the investigation.

8 So in the circumstances of this case which include
9 a suit against a voluminous number of defendants operating
10 online storefronts, a significant portion of whom posted
11 demonstrably incurred address information in a space where
12 false information is known to abound, the Court concludes
13 that plaintiff exercised reasonable diligence in attempting
14 to locate the moving defendants' addresses.

15 A second argument from the defense is that
16 plaintiff's motion was premature because it did not first
17 attempt service under the Hague Convention, but the
18 Court concludes that plaintiff was not required to
19 attempt to serve the moving defendants by another means
20 prior to moving for alternative service under Rule 4(f)(3).
21 As mentioned above, Federal Rules of Civil Procedure 4(f)
22 enumerates three possible ways to effect service abroad,
23 only two of which are relevant here, and that would be Rule
24 4(f)(1) which is the methods authorized under the Hague
25 Convention, and 4(f)(3) which permits service by other means

not prohibited by international agreement as the Court orders.

Under Rule 4(f)(3), a Court may fashion means of service on an individual in a foreign country so long as the ordered means of service is not prohibited by international agreement and comports with constitutional notions of due process. I quote here from my colleague Kimba Woods' decision in *SEC v. Anticevic*, 2009 WL 361739 (S.D.N.Y. 2009), "And in that regard it is well established that there is no hierarchy among the subsections in Rule 4(f). Rule 4(f) is neither a last resort nor extraordinary relief, it is merely one means among several which enables services of process on an international defendant."

I'm quoting here from *Advanced Aerofoil Technologies, AG v. Todaro*, a decision from Judge Carter of this district in 2012, contained at 2012 WL 299959. "The decision of whether to order service of process under Rule 4(f)(3) is committed to the sound discretion of the District Court."

This was noted in *United States v. Lebanese Canadian Bank*, 285 F.R.D. 262 (S.D.N.Y. 2012). "And so under Rule 4(f)(3) a plaintiff is not required to attempt service through the other provisions of Rule 4(f) before it may order service pursuant to Rule 4(f)(3). That being said, in

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2 evaluating whether alternative service is necessitated,
3 Courts in this circuit have generally required a showing
4 that the plaintiff has reasonably attempted to effectuate
5 service on the defendants, and showing that the
6 circumstances are such that the Court's intervention is
7 necessary." And I am quoting here from the *Lebanese*
8 *Canadian Bank* decision I just mentioned.

9 That said, these considerations guide the exercise
10 of discretion and they are not akin to an exhaustion
11 requirement. Here the Court concludes that alternative
12 service was necessary on the circumstances of this case.
13 Although plaintiff did not attempt to serve the moving
14 defendants before seeking alternative service, the Court has
15 already explained that plaintiff harbored reasonable doubts
16 about the veracity of the addresses affiliated with their
17 Amazon user accounts. The Court, therefore, does not believe
18 it appropriate to institute a requirement that plaintiff
19 attempt service under the Hague Convention using
20 information that it had reason to believe was
21 erroneous.

22 Beyond the questionable authenticity of these
23 addresses, there were also the exigencies of the case,
24 which counsel, in favor of alternative service,
25 plaintiff initiated this suit on an emergency posture

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2 picking an ex parte TRO in the hopes of immediately
3 thwarting the sale of allegedly counterfeit goods on
4 online marketplaces. Any other strategy for
5 instituting this action would have afforded the
6 alleged counterfeiters an opportunity to evade
7 enforcement of the trademark laws, thus obviating the
8 release sought by plaintiff before the Court and
9 before this Court had considered, a chance, excuse me,
10 to consider the merits of the claims.

11 Going to this point, the Court is persuaded by
12 the several cases in this district that have
13 considered the length of time required for service
14 under the Hague Convention as weighing in favor of
15 permitting alternative service. And these include *OC Global*
16 *Partners, LLC, v. Adaime*, from Judge Liman, reported or
17 contained at 2022 WL 769328, and *In re: GOG*, contained at
18 287 F.R.D. and I have a pinpoint cite at page 266.

19 In addition, this Court finds that the means of
20 alternative service authorized by the Court did not violate
21 any international agreement or offend due process
22 principles. As noted, the Court permitted service by
23 delivery of a PDF copy of the TRO, together with the summons
24 and complaint, or a link to a secured file sharing website
25 to defendants' email addresses as identified by Amazon.

This means of service on a Chinese defendants is not prohibited by any international agreement. China has objected to service by postal channels under Article 10 of the Hague Convention, but Courts within this district have held that this objection does not encompass service by email and, further, that service by email is not prohibited by any international agreement.

As one case for that proposition I cite to Judge Preska's decision in *Mattel, Inc. v. AnimeFun Store*, 2020 WL 2097624. "Second, for method of service to satisfy the strictures of due process, it must provide notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections."

I quote here from the Second Circuit's 2006 decision in *Luessenhop v. Clinton County*, 466 F.3d 259. "In service by email alone comports with due process where a plaintiff demonstrates that the email is likely to reach the defendant."

I'm quoting here from Judge Engelmayer's decision in *FTC v. Pecon Software Ltd.*, 2013 WL 4016272. "And these standards are met here, as the moving defendants engaged in online business and regularly communicated with customers by email, indeed there is no

question that service by email was effective in this case.” After transmitting the summons, complaint, TRO and other relevant documents to the moving defendants via email plaintiff received registered receipts confirming that the service emails and documents annexed thereto were sent to, delivered to, and received by all of the moving defendants. The Court, therefore, has no doubt that service by email sufficed to apprise the moving defendants of the initiation of this litigation and provided them with an opportunity to participate and, as a result, alternative service using the moving defendants’ email addresses comports with due process.

For these reasons, the moving defendants’ moving to dismiss for improper service is denied, and the Court turns now to the motion of defendants, ACBERY and ANZIR under Rule 12(b)(2) to dismiss the claims against them for lack of personal jurisdiction.

And so turning to that, on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the Court has jurisdiction over the defendant. I’m quoting here from the Second Circuit’s decision in *MetLife Insurance Co. v. Robinson-Ceco Corp.*, 84 F.3d 560, “And if, as here, a Court does not conduct an evidentiary hearing on the issue of personal

jurisdiction, the plaintiff need only make a prima facie showing that the Court possesses personal jurisdiction over the defendant."

I'm quoting here from *DiStefano v. Carozzi North America Inc.*, 286 F.3d 81 (2d Cir. 2001), "When a plaintiff makes that showing through an averment of facts that if credited by the alternate trier of fact would suffice to establish personal jurisdiction over the defendant, plaintiff's jurisdictional allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor."

I quote here from this Court's decision in *Elsevier v. Grossman*, 77 F.Supp.3d 331 (2015), "And where a Court does not hold an evidentiary hearing on the jurisdictional question, it may, nevertheless, consider matters outside the pleadings." And here the Court considers the declarations of Wen Juan Shih (phonetic), a representative of ACBERY, Xia Wang (phonetic), a representative of ANZIR, as well as the Futterman declaration which provides additional information concerning these defendants' contacts with the foreign state.

And so turning to those contacts, to determine whether the exercise of personal jurisdiction is proper, this Court conducts a two-part inquiry. It first looks at

whether there is a basis for personal jurisdiction under the laws of the foreign state in (inaudible) New York, and that process is outlined in the case of *Licci ex rel. Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. 2013). "Plaintiff exerts jurisdiction under two provisions of New York's Long Arm Statute, Sections 302(a)(1) and 302(a)(3) and the New York Civil Practice Law and Rules, as well as the Federal Long Arm Statute which is Federal Rule of Civil Procedure 4(d)(2).

So turning first to New York's Long Arm Statute, 3(a)(1), 302(a)(1), excuse me, provides that a Court may exercise personal jurisdiction over any non-domiciliary through a person or through an agent transacts any business within the state so long as the cause of action arises from that transaction. And so under this provision a Court may exercise personal jurisdiction over a non-domiciliary if two conditions are met. First, the non-domiciliary must transact business within the state; second, the claims against the non-domiciliary must arise out of that business activity.

And Section 302(a)(1) is a single act statute. By that I mean that proof of one transaction in New York is sufficient to invoke jurisdiction even though the defendant never enters New York, so long as the defendant's activities

were purposeful and there is a substantial relationship between the transaction and the claim asserted.

I'm quoting her from the New York Court of Appeals decision in *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 (1988), "And pursuant to Section 301(a)(3) of New York's Long Arm Statute, a Court may exercise jurisdiction over a non-domiciliary who commits a tortious act without the state causing injury to a person or to property within the state. This provision applies only to a defendant that either regularly does or solicits business or engages in other persistent course of conduct or derives substantial revenue from goods used or consumed for services rendered in the state or, number two, expects or should reasonably expect that the acts of consequences in the state and derives substantial revenue from interstate of international commerce."

And then, finally, the Federal Long Arm Statute, Rule 4(k)(2), allows Federal Courts to exercise personal jurisdiction, if plaintiff's cause of action arises under the Federal Law the defendant is not subject to the jurisdiction of the Courts of general jurisdiction of any one state and the defendant's total contacts with the United States, as a

whole, are sufficient to confer the Court with personal jurisdiction without offending due process.

And I quote here from a Southern District decision of 2020, *Astor Chocolate Corp. v. Elite Gold Ltd.*, 510 F.Supp.3d 108. "In this circuit to meet that second requirement, the plaintiffs need to certify that to their knowledge the foreign defendant is not subject to jurisdiction in any other state. Once plaintiff establishes a statutory basis for jurisdiction, the plaintiff must demonstrate that the exercise of that jurisdiction comports with due process." This is recognized by the Second Circuit in the case of *Charles Schwab Corp. v. Bank of America Corp.*, a 2018 decision contained at 883 F.3d 68.

And the constitutional analysis under the Due Process Clause consists of two separate components, the minimum contacts inquiry and the reasonableness inquiry. They are discussed in the *Licci* case that I mentioned earlier, the minimum contacts inquiry examines whether the defendant has sufficient contacts with the foreign state to justify the Court's exercise of personal jurisdiction, the reasonableness inquiry examines whether the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice, and that is whether it is

reasonable to exercise personal jurisdiction under the circumstances of the particular case.

As part of that second inquiry, the Court considers first the burden that the exercise of jurisdiction will impose on the defendant; second, the interest of the foreign state in adjudicating the case; third, the plaintiff's interest in obtaining convenient and effective relief; fourth, the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and, fifth, the shared interests of the states in furthering substantive social policies. These factors are set forth and discussed in the Second Circuit's 2000 decision of *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158. "And while due process is distinct from a statutory basis for personal jurisdiction, the Second Circuit noted that it would be the rare case where personal jurisdiction was proper under New York's Long Arm Statute but not under a due process analysis." That discussion is contained in the Circuit's 2015 decision, *Eades, E-A-D-E-S, versus Kennedy, PC, Law Offices*, 799 4.3d 161.

Now, turning first to defendant, ACBERY, and apologies if I've mangled that name, the ST represents that it completed only one sale of the allegedly infringing product at issue in this case in New York, and that one sale

1 was to plaintiff's investigator. ANZIR, on the other hand,
2 represents that it has sold no such products in New York.
3 And so turning first to defendant, ACBERY, this Court finds
4 that Section 302(a)(1) of New York's Long Arm Statute
5 authorizes personal jurisdiction because ACBERY transacted
6 business within New York and plaintiff's causes of action
7 arise from this business.
8

9 With respect to the transacting business prong,
10 ACBERY operates an Amazon merchant storefront through which
11 consumers in New York can purchase ACBERY's products, and as
12 reflected by the checkout page that plaintiff included in
13 its TRO application, ACBERY used its Amazon merchant
14 storefront to communicate with consumers, to accept orders
15 and to advertise, sell and ship allegedly counterfeit
16 products to New York. These features render ACBERY's
17 storefront on Amazon a highly interactive website which type
18 of platform Courts have repeatedly found to satisfy the
19 transacting business prong of Section 302(a)(1). And one
20 example in which this is discussed is my colleague Judge
21 Ramos' decision in *Poof-Slinky, LLC v. A.S. Plastic Toys*
22 *Co.*, 2020 WL 5350537.

23 The Court additional finds that there exists a
24 direct nexus between ACBERY's sale of allegedly counterfeit
25 merchandise on its Amazon storefront and plaintiff's causes

1
2 of action. Indeed, ACBERY admits that it sold an allegedly
3 infringing produce in New York which satisfies Section
4 302(a)(1)'s requirement that the defendant engage in a
5 single act of selling counterfeit goods in New York.

6 To be clear, ACBERY notes that the sole sale was
7 instigated by plaintiff's investigator and argues from this
8 fact that personal jurisdiction cannot be based on a forum
9 contact manufactured by plaintiff. This Court acknowledges
10 that there is not uniformity on this issue and that the
11 Second Circuit has expressly left open the question of
12 whether a sale of the counterfeit items to plaintiff's
13 investigator or agent by itself constitutes an act of
14 trademark infringement, and that was something that was left
15 open in the *Chloe* case I mentioned earlier.

16 But in light of this disagreement, this Court has
17 considered both sides of the issue, and it is persuaded by
18 the decisions in this District that have found purchases
19 made to an agent of a plaintiff to suffice for
20 jurisdictional purposes under Section 302(a)(1). The *Poof-*
21 *Slinky* case which I mentioned earlier found that point,
22 other cases finding that include *Cartier v. Seah*, 598
23 F.Supp.2d 422, and *Mattel v. Adventure Apparel*, 2001 WL
24 286728.

25 As I noted earlier, the Second Circuit has made

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2 clear that Section 302(a)(1) is a single act statute and
3 proof of one transaction in New York is sufficient to invoke
4 jurisdiction so long as the activities here were purposeful
5 and there is a substantial relationship between the
6 transaction and the claim asserted, and the Court finds
7 those to be satisfied.

8 The Court finds, in particular, that plaintiff has
9 adequately alleged personal jurisdiction with respect to
10 ACBERY and because it has found Section 302(a)(1) to confer
11 statutory basis for personal jurisdiction, it does not
12 consider the alternative bases for personal jurisdiction
13 that are argued by plaintiff.

14 Turning next to the constitutional analysis, the
15 Court first finds that plaintiff has asserted sufficient
16 minimum contacts on the part of ACBERY to satisfy the tenets
17 of due process and the existence of these minimum contacts
18 exist for substantially the same reasons ACBERY meets the
19 requirements of New York's Long Arm Statute, namely, the
20 operation of a highly interactive Amazon storefront through
21 which it communicates with and sells products to New York
22 consumers and, in fact, has done so.

23 "And the Second Circuit has observed that when a
24 plaintiff has made a threshold showing of a defendant's
25 minimum contact, the exercise of jurisdiction is favored

1 unless the defendant presents a compelling case that the
2 presence of some other considerations would render
3 jurisdiction unreasonable." I'm quoting here from the
4 *Robinson-Ceco* case I quoted earlier, but here this Court
5 finds that it is reasonable to exercise personal
6 jurisdiction over ACBERY because plaintiff has made
7 convincing showings on three of the relevant factors.
8 In particular, plaintiff has a strong interest in
9 obtaining relief for the alleged trademark
10 infringement; number two, this suit which has
11 proceeded against 90 defendants or more and relates to
12 several other actions involving identical conduct by scores
13 of additional entities poses the most sufficient path for
14 resolving the dispute; and, three, the substantive policies
15 embodied in Federal Trademark Law all weigh in favor of the
16 Court's exercise of personal jurisdiction in this case.

17
18 In contrast, however, the Court finds that it does
19 not possess personal jurisdiction over defendant ANZIR. It
20 is differently situated in at least one critical respect, it
21 has not sold a single infringing product in New York. And so
22 the Court will discuss each of plaintiff's proffered bases
23 for jurisdiction in turn.

24 First, plaintiff asserts personal jurisdiction
25 under 302(a)(1) of the Long Arm Statute which the Court has

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2 already discussed with respect to defendant ACBERY, but
3 although ANZIR operates a fully interactive Amazon
4 storefront that operates identically to ACBERY, ANZIR has
5 not sold a single infringing product in New York. And this
6 lack of sales (inaudible) plaintiff's showing that ANZIR has
7 purposely engages in business in New York and that there is
8 a substantial relationship between the transaction and the
9 claim asserted. There is no single transaction that can
10 serve as the jurisdictional hook.

11 Separately and second, plaintiff asserts
12 personal jurisdiction under 302(a)(3) of New York's Long
13 Arm Statute, and under this provision New York Court may
14 exercise jurisdiction over nonresidents that commit
15 tortious acts outside of New York but cause injury inside
16 the state. But here plaintiff has failed to establish that
17 ANZIR's alleged trademark infringement caused injury in
18 New York for purposes of this provision.

19 So the Court's determining whether there is
20 injury in New York sufficient to warrant 302(a)(3)
21 jurisdiction must generally applied a situs of injury test
22 that asks them to locate the original event which caused
23 the injury. This test is discussed in the *DiStefano* case I
24 mentioned earlier. And the Second Circuit has held that
25 where the original event, for purposes of Section

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2 302(a)(3) -- has held, excuse me, let me say that again,
3 it has held that the original event for purposes of this
4 provision occurs where the first effects of the torts that
5 ultimately produced the final economic injury is located.
6 And in trademark cases, the first effects are typically
7 felt where the trademark owner resides and conducts
8 business. That's discussed in the case of *Panacea*
9 *Solutions, Inc. v. Roll*, a 2006 decision contained at 2006
10 WL 3096022, and cases for this proposition are also
11 collected in Judge Oetken's decision in *Alibaba Group*
12 *Holding Ltd. v. Alibabacoin Foundation*, 2018 WL 2022626.

13 So on this logic, the Court concludes that the
14 situs of injury for purposes of Section 302(a)(3) is
15 plaintiff's place of incorporation which is in Canada and
16 not in New York. And so plaintiff has not demonstrated the
17 existence of an injury in New York sufficient to confer
18 jurisdiction under Section 302(a)(3).

19 Plaintiff cites two cases for the idea that the
20 injury requirement can be satisfied by threatened harm
21 resulting from actual or potential confusion and deception
22 of internet users in New York State, and those cases are
23 discussed at page 13 of plaintiff's opposition. But both
24 of those cases involve plaintiffs who were incorporated in
25 New York, and thus entailed a different situs of injury

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2 analysis.

3 One of the cases, the *Energy Brands* case,
4 expressly affirmed the principle just stated, that in
5 trademark cases the tort occurs where the passing off
6 occurs, that is where the customer purchases the
7 defendant's goods in the mistaken belief that they are the
8 trademark owner's product. But here ANZIR has not sold any
9 infringing product in New York and that is in stark contrast
10 to the defendant in *Energy Brands* who made several sales of
11 allegedly infringing goods in New York, and the defendant in
12 *American Network*, which signed up six New York subscribers
13 after displaying allegedly infringing advertising. So
14 neither of the cases cited by plaintiff alters the Court's
15 conclusion that ANZIR's tortious conduct did not cause an
16 injury in New York for purposes of Section 302(a)(3).

17 Finally, plaintiff relies on the Federal Long Arm
18 Statute for case two as a basis for exercising jurisdiction
19 over ANZIR and the Court rejects this argument to trigger
20 that provision a defendant must not be subject to
21 jurisdiction in any state's courts of general jurisdiction.
22 But even if ANZIR is not subject to jurisdiction in New
23 York, plaintiff has not provided evidence that ANZIR is
24 similarly not subject to jurisdiction in each of the other
25 49 states and, therefore, plaintiff has not demonstrated a

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2 statutory basis for this Court's exercise of personal
3 jurisdiction over ANZIR and the defendant's motion to
4 dismiss as it pertains to defendant ANZIR is granted.

5 And so with my deepest thanks for having you sit
6 through all this, let me recapitulate and note that for the
7 reasons I've just outlined the moving defendants' motion to
8 dismiss is denied except insofar as it relates to ANZIR's
9 motion to dismiss for lack of personal jurisdiction and that
10 motion is granted.

11 For next steps in this matter, I am directing the
12 moving defendants who remain in the case to file an answer
13 to the complaint within two weeks of the date of this oral
14 decision and I would ask the parties to prepare and file a
15 joint status letter and a case management plan within three
16 weeks, three weeks of the date of this oral decision.

17 With that, that's all I have to cover, so I do
18 thank you, again, for listening to this oral decision, we
19 are adjourned. Thank you very much.

20 (Whereupon the matter is adjourned.)
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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Foxmind Canada Enterprises Ltd. versus ABCTEC, et al., Docket #21cv5146, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: July 25, 2022