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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

SUPERCCELL OY,

*Plaintiff*

v.

WWW.CLASHOFCLANSMERCH.COM,

*Defendant*

**CIVIL ACTION NO.**

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFF'S *EX  
PARTE* APPLICATION FOR 1) A  
TEMPORARY RESTRAINING  
ORDER; 2) AN ORDER  
RESTRAINING DEFENDANT'S  
WEBSITE AND DEFENDANT'S  
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**

**FILED UNDER SEAL**

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## GLOSSARY

<b>Term</b>	<b>Definition</b>
<b>Plaintiff or Supercell</b>	Supercell Oy
<b>Defendant</b>	www.clashofclansmerch.com
<b>Cloudflare</b>	Cloudflare, Inc., with an address of 101 Townsend Street, San Francisco, California 94107, and any and all affiliated companies, which operate a cloud-based web infrastructure platform, available at www.cloudflare.com, that enables capabilities to host static websites on a content delivery network
<b>NameCheap</b>	NameCheap, Inc., with an address of 600 E Washington St Ste 305, Phoenix, Arizona, 85034, and any and all affiliated companies, which operate an ICANN accredited domain name registrar and web hosting company, available at www.namecheap.com, that allows consumers to register domain names and create websites
<b>Epstein Drangel</b>	Epstein Drangel LLP, counsel for Plaintiff
<b>New York Address</b>	244 Madison Ave, Suite 411, New York, NY 10016
<b>Complaint</b>	Plaintiff's Complaint
<b>Application</b>	Plaintiff's <i>ex parte</i> application for: 1) a temporary restraining order; 2) an order restraining Defendant's Website (as defined <i>infra</i> ) and Defendant's Assets (as defined <i>infra</i> ) with the Financial Institutions (as defined <i>infra</i> ); 3) an order to show cause why a preliminary injunction should not issue; 4) an order authorizing bifurcated and alternative service; and 5) an order authorizing expedited discovery
<b>Ignatius Dec.</b>	Declaration of Markku Ignatius in Support of Plaintiff's Application
<b>Levine Dec.</b>	Declaration of Melissa J. Levine in Support of Plaintiff's Application
<b>Supercell Mark</b>	The mark covered by the U.S. Trademark Registration No. 4,911,561 for "SUPERCELL" for goods and services in classes 9, 16, 18, 20, 21, 25, 26 and 28
<b>Supercell Brand</b>	The leading global game development company known for its design and development of engaging multiplayer and social games, including, but not limited to: Brawl Stars, Clash of Clans, Hay Day, Boom Beach and Clash Royale
<b>Clash of Clans Game</b>	A mobile game where users, nicknamed "Barbarians," can customize villages, build armies and crush opponents, while simultaneously finding community through other players
<b>Clash of Clans Marks</b>	The marks covered by the U.S. Trademark Registration Nos. listed in Exhibit B to the Complaint
<b>Clash of Clans Works</b>	The works covered by the U.S. Copyright registrations

	listed in Exhibit C to the Complaint
<b>Clash of Clans IP</b>	Clash of Clans Marks and Clash of Clans Works
<b>Clash of Clans Products</b>	A variety of products featuring characters from the Clash of Clans Game using and/or sold in connection with the Clash of Clans Marks, including, but not limited to, apparel, keychains, stationery, accessories, backpacks, and plush toys
<b>Brawl Stars Game</b>	A multiplayer game that allows users to pick characters with special abilities, called “Brawlers,” to battle against other players using a combination of strategy and teamwork
<b>Brawl Stars Marks</b>	The marks covered by the U.S. Trademark Registrations listed in Exhibit D to the Complaint
<b>Brawl Stars Works</b>	The works covered by the U.S. Copyright registrations listed in Exhibit E to the Complaint
<b>Brawl Stars IP</b>	Brawl Stars Marks and Brawl Stars Works
<b>Brawl Stars Products</b>	A variety of products featuring characters from the Brawl Stars Game using and/or sold in connection with the Brawl Stars Marks, including, but not limited to, apparel, keychains, stationery, accessories, backpacks, and plush toys
<b>Supercell IP</b>	The Supercell Mark, Clash of Clans IP and Brawl Stars IP
<b>Counterfeit Products</b>	Products bearing or used in connection with the Supercell IP and/or products in packaging and/or containing labels and/or hang tags bearing the Supercell IP, and/or bearing or used in connection with marks and/or artwork that are confusingly or substantially similar to the Supercell IP and/or products that are identical or confusingly or substantially similar to the Clash of Clans Products and/or Brawl Stars Products
<b>Defendant’s Website</b>	Any and all fully interactive website held by or associated with Defendant, its respective officers, employees, agents, servants and all persons in active concert or participation with any of them, that it operates to communicate with consumers regarding its Counterfeit Products and/or through which consumers purchase Counterfeit Products for delivery in the U.S., including, without limitation, Defendant’s website located at <a href="http://www.clashofclansmerch.com">www.clashofclansmerch.com</a> along with the domain name associated therewith
<b>Infringing Domain Name</b>	<a href="http://www.clashofclansmerch.com">www.clashofclansmerch.com</a>
<b>Defendant’s Assets</b>	Any and all money, securities or other property or assets of Defendant (whether said assets are located in the U.S. or abroad)
<b>Defendant’s Financial</b>	Any and all financial accounts associated with or utilized

<b>Accounts</b>	by Defendant or Defendant's Website (whether said accounts are located in the U.S. or abroad)
<b>Financial Institutions</b>	PayPal Inc. ("PayPal"), Payoneer Inc. ("Payoneer"), PingPong Global Solutions, Inc. ("PingPong"), American Express Company ("American Express"), Mastercard Inc. ("Mastercard"), Apple Inc. payment services (e.g. Apple Pay) and Visa Inc. ("Visa").
<b>Third Party Service Providers</b>	Any third party providing services in connection with Defendant's Counterfeit Products and and/or Defendant's Website, including, without limitation, Internet Service Providers ("ISP"), back-end service providers, web designers, merchant account providers, any providing shipping and/or fulfillment services, website hosts, such as Cloudflare, Inc. ("Cloudflare"), domain name registrars, such as NameCheap, Inc. ("NameCheap") and domain name registries

## **I. INTRODUCTION**

Pursuant to and in accordance with the Federal Rules of Civil Procedure, Plaintiff submits this memorandum of law in support of its *ex parte* Application in light of Defendant's willful offering for sale and/or sales of Counterfeit Products.<sup>1</sup> Courts grant *ex parte* applications for relief in similar matters<sup>2</sup> and Plaintiff requests that the Court grant its Application.

Defendant conducts business in the U.S. and other countries by means of Defendant's Website. (Levine Dec., ¶ 3). Through Defendant's Website – which prominently features the Supercell IP – Defendant offers for sale and/or sells Counterfeit Products, and markets, distributes and ships the Counterfeit Products to consumers throughout the world, including those in New York. (Ignatius Dec., ¶¶ 31-32; Levine Dec., ¶¶ 3-5, Ex. A). Sellers, like Defendant, often use evasive tactics like aliases, false addresses and other incomplete identification information to conceal their identities and avoid detection. (Levine Dec., ¶¶ 4, 15). Without Plaintiff's authorization or consent, Defendant was and/or currently is manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products to consumers located in the U.S., including New York, through Defendant's Website. (Ignatius Dec., ¶¶ 31-32; Levine Dec., ¶¶ 3-5, Ex. A). Defendant's actions have caused and will continue to cause irreparable harm to Plaintiff's goodwill and reputations as well as to the unassuming consumers who will continue to believe that Defendant's inferior Counterfeit Products are authorized, sponsored, approved, endorsed and/or licensed by Plaintiff, when, in fact, they are not. (Ignatius Dec., ¶ 35). Plaintiff's request for *ex parte* relief is particularly necessary because if

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

<sup>2</sup> See *In re Vuitton et Fils, S.A.*, 606 F.2d 1 (2d Cir. 1979) (holding *ex parte* temporary restraining orders are indispensable to the commencement of an action when they are the sole method of preserving a state of affairs in which the court can provide effective final relief); see also, e.g., *JLM Couture, Inc. v. Aimibridal, et al.*, No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018); *Ideavillage Products Corp. v. Dongguan Opete Yoga Wear Manufacturer Co., Ltd., et al.*, No. 17-cv-9099 (JMF), Dkt. 19 (S.D.N.Y. Nov. 27, 2017).

Defendant receives notice of this lawsuit, it is highly likely that it will transfer, conceal and/or destroy 1) the Counterfeit Products, 2) the means of making or obtaining such Counterfeit Products, 3) business records and 4) any and all other evidence relating to its infringing activities. (Levine Dec., ¶ 4). Moreover, Defendant will likely hide or dispose of its Assets. *Id.* Accordingly, and considering that it typically takes noticed Financial Institutions and/or Third Party Service Providers a minimum of five (5) days to locate, attach and freeze Defendant's Assets and/or Defendant's Financial Accounts, Plaintiff respectfully requests that the Court order bifurcated service specifically allowing enough time for the Financial Institutions and/or Third Party Service Providers to comply with the TRO before ordering service on Defendant.

## **II. STATEMENT OF RELEVANT FACTS**

The facts are contained in the factual declaration of Markku Ignatius and the attorney summarizing declaration of Melissa J. Levine, plus accompanying exhibits. *See* Ignatius Dec.; Levine Dec.; Complaint, Exs. A-F. In the interest of brevity, any factual discussion is contained in the legal analysis below.<sup>3</sup>

## **III. ARGUMENT**

### **A. THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANT**

Determining personal jurisdiction over a foreign defendant in a federal question case requires a two-step inquiry. First, courts must look to the law of the forum state to determine whether personal jurisdiction will lie. *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 168 (2d Cir. 2013) (citing *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007)). Second, if jurisdiction lies, the court then considers whether the district court's exercise of personal jurisdiction over a foreign defendant comports with due process protections established under the

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<sup>3</sup> Although Plaintiff acknowledges that it seeks multiple forms of relief, in the interest of brevity and with respect for the Individual Rules and Practices in Civil Cases of each District Judge in the S.D.N.Y., Plaintiff respectfully submits this memorandum of law in support of its Application. Plaintiff will promptly provide supplemental briefing on any issue should the Court request it.

United States Constitution. *See id.*; *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). As alleged herein, Defendant's unlawful counterfeiting and infringing activities subject it to long-arm jurisdiction in New York under N.Y. C.P.L.R. § 302(a)(1).<sup>4</sup> Furthermore, New York's exercise of jurisdiction over Defendant thereunder comports with due process.

**1. Defendant is Subject to Personal Jurisdiction Under N.Y. C.P.L.R. § 302(a)(1)**

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

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<sup>4</sup> Plaintiff respectfully submits that Defendant is also subject to jurisdiction under § 302(a)(3). *See Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 470 (S.D.N.Y. 2008). However, this alternative analysis is omitted for brevity.

In determining whether a party has “transacted business,” New York courts must look at the totality of the circumstances concerning the party’s interactions with, and activities within, the state. *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000). Whether the exercise of personal jurisdiction is permissible in the context of Internet activity is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Id.* Courts in this Circuit have regularly conferred personal jurisdiction on a given defendant based on that defendant’s operation of a fully interactive website through which consumers can access the site from anywhere and purchase products, as is the case with Defendant’s Website, and allow for customers all over the world to communicate with Defendant and view and purchase products, including Counterfeit Products, as demonstrated by Epstein Drangel’s purchase of Counterfeit Products from Defendant’s Website to the New York Address. (Levine Dec., ¶¶ 6-7, Ex. A); *see also Chloe*, 616 F.3d at 170.

Recently, in *American Girl, LLC v. Zembrka*, the Second Circuit exercised jurisdiction over a defendant that “purposefully availed itself of the privilege of conducting activities within New York and, thus, transacted business” by “accept[ing] orders with New York shipping addresses, sen[ding] confirmatory emails with New York shipping addresses containing commitments to ship to those New York addresses, and accept[ing] payments from a customer with a New York address.” *Am. Girl, LLC v. Zembrka*, 118 F.4th 271 (2d Cir. 2024). Despite the fact that the defendant cancelled the orders and refunded the customer, the Second Circuit held that the transaction itself was enough to satisfy Section 302(a)(1), ruling that “Section 302(a)(1) doesn't require a completed sale. It only requires a transaction.” *Id.*

This Circuit has exercised jurisdiction over defendants under § 302(a)(1) where such defendants regularly offer for sale and sell goods through online marketplaces, “even though

Defendants do not control their [] ‘storefront’ or its interactivity to the same extent that they control their own highly interactive website.” *Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co., LLC*, No. 15 Civ. 8459 (LGS), 2016 U.S. Dist. LEXIS 89149 \*7 (S.D.N.Y. July 8, 2016) (quoting *EnviroCare Techs., LLC v. Simanovsky*, No. 11-CV-3458(JS)(ETB), 2012 U.S. Dist. LEXIS 78088 \*8 (E.D.N.Y. June 4, 2012). Jurisdiction is proper “for internet sellers who use an internet storefront like Amazon,” when the Internet sellers are “commercial vendors who use it ‘as a means for establishing regular business with a remote forum.’” *Id.* at \*8. In *Lifeguard Licensing Corp.*, Judge Schofield held that a “website that does more than provide information about a product and allows customers to purchase goods online, is a ‘highly interactive website,’ which may provide a basis for personal jurisdiction under CPLR § 302(a).” *Id.* at \*7. (citing *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 170 (2d Cir. 2010) and *Grand v. Schwartz*, No. 15 Civ. 8779, 2016 U.S. Dist. LEXIS 61606 at \*3 (S.D.N.Y. May 1, 2016) (holding that interactive commercial websites provides support for jurisdiction pursuant to CPLR § 302(a)(1))).

In *EnviroCare Techs.*, the court held that “if a website is interactive and allows a buyer in New York to submit an order online, courts typically find that the website operator is ‘transacting business’ in New York and is therefore subject to the court’s jurisdiction.” 2012 U.S. Dist. LEXIS 78088 at \*9 (citing *Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000) (“Generally, an interactive website supports a finding of personal jurisdiction over the defendant.”)). Similarly, in *Chloe, supra*, the Second Circuit found that while the single act of shipping a counterfeit product might be sufficient to subject him to the jurisdiction of a New York court, it did not delve into such an inquiry as the defendant “operated a highly interactive website offering [counterfeit products] for sale to New York consumers.” *Chloe*, 616 F.3d 158, 170.



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

Here, Epstein Drangel made test purchases from Defendant’s Website, specifying the New York Address as the shipping address. (Levine Dec., ¶ 7, Ex. A). Whether a defendant physically shipped Counterfeit Products into New York is not determinative of whether personal jurisdiction exists, as courts in this Circuit examine a given defendant’s online interactions with consumers in considering whether a particular defendant has transacted business in the forum state under § 302(a)(1). *See, Am. Girl, LLC*, 118 F.4th 271 (“Neither *Chloe* nor any of our other cases should be read as indicating that shipment is required to demonstrate a business transaction for § 302(a)(1) purposes.”); *Rolex Watch, U.S.A., Inc. v. Pharel*, 2011 U.S. Dist. LEXIS 32249, at \* 6 (E.D.N.Y. Mar. 11, 2011). Thus, Plaintiff demonstrated that Defendant sold and shipped Counterfeit Products directly to consumers in New York over the Internet, which demonstrates that they purposely availed themselves of the privileges of conducting activities in New York under the first prong of

the § 302(a)(1). See *Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 469 (S.D.N.Y. 2008) (collecting cases).

## **2. Exercising Personal Jurisdiction Over Defendant Comports with Due Process**

Asserting personal jurisdiction over Defendant also comports with the Due Process Clause of the U.S. Constitution, as Defendant has “certain minimum contacts ... such that maintenance of th[is] suit does not offend ‘traditional notions of fair play and substantial justice.’” *Calder v. Jones*, 465 U.S. 783, 788 (1984) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)). Defendant intentionally directed activity towards the New York market, thereby purposefully availing itself of “the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (U.S. 1985). See *Best Van Lines, Inc.*, 490 F.3d at 243; see also *Levine Dec.*, ¶¶ 3-4, 6-7, Ex. A.<sup>5</sup> Moreover, “as a practical matter, the Due Process Clause permits the exercise of jurisdiction in a broader range of circumstances of N.Y. C.P.L.R. § 302, and a foreign defendant meeting the standards of § 302 will satisfy the due process standard.” *Energy Brands*, 571 F. Supp. 2d at 469. Accordingly, Plaintiff respectfully submits that this Court has personal jurisdiction over Defendant in this action.

## **B. PLAINTIFF IS ENTITLED TO AN *EX PARTE* TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Here, an *ex parte* order is essential to prevent immediate and irreparable injury to Plaintiff. A temporary restraining order may be granted without written or oral notice to the opposing party or that party's counsel where “it clearly appears from the specific facts shown by affidavit . . . that immediate and irreparable injury, loss or damage will result to the applicant before the adverse

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<sup>5</sup> In *Am. Girl*, the Second Circuit held that exercising jurisdiction over the defendant comported with due process as the defendant, “ran the risk of being haled into court by offering for sale allegedly counterfeit items for which New York customers could order and pay.” *Am. Girl, LLC*, 118 F.4th 271. After balancing the interests at hand, the Court concluded that “New York has an exceptionally strong interest in protecting consumers and businesses in this state from the flow of counterfeit goods from abroad,” which “trumps the potential inconvenience of requiring foreigners to litigate in the courts of this State.” *Id.*

party or that party's attorney can be heard in opposition.” Fed. R. Civ. P. 65(b). Section 34 of the Lanham Act expressly authorizes this Court to issue *ex parte* restraining orders “with respect to a violation [of the Act] that consists of using a counterfeit mark in connection with the sale, offering for sale, or distribution of goods.” 15 U.S.C. § 1116(d)(1)(a).<sup>6</sup>

Once a violation of the Lanham Act is demonstrated, the issuance of an *ex parte* order is appropriate upon showing that: (i) the plaintiff will provide adequate security; (ii) any order other than an *ex parte* order is not adequate to achieve the purposes of 15 U.S.C. § 1114; (iii) the plaintiff has not publicized the requested *ex parte* order; (iv) the plaintiff is likely to succeed on showing that defendants are using counterfeit marks; (v) an immediate and irreparable injury will occur if such *ex parte* order is not granted; (vi) the materials to be seized will be located at the place identified in the application; (vii) the harm to the plaintiff in denying the application outweighs the harm to defendants in granting the order and (viii) if prior notice was given, defendants would destroy, move, hide or otherwise make such matter inaccessible to the court. 15 U.S.C. § 1116(d)(4)(B). As discussed below, Plaintiff meets each of the relevant criteria for the issuance of an *ex parte* temporary restraining order under the Lanham Act.<sup>7</sup>

An *ex parte* temporary restraining order is particularly warranted in cases, such as the instant one, involving an offshore counterfeiter who conceals its identity and engages in unlawful and harmful activities over the Internet to avoid revealing its actual location and identity. (Levine Dec., ¶¶ 4, 14-15). Defendant, who, upon information and belief, operates its business exclusively

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<sup>6</sup> Congress’ purpose for enacting such *ex parte* remedies was to ensure that courts were able to effectively exercise their jurisdiction in counterfeiting cases and to prevent counterfeiters given prior notice from disappearing or quickly disposing of infringing inventory or records relating to their counterfeiting and illegal actions. *See* Senate-House Joint Explanatory Statement on trademark Counterfeiting Legislation, 130 Cong. Rec. H12076, at 12080 (Oct. 10, 1984).

<sup>7</sup> Plaintiff has expressed its willingness to provide security in conjunction with the *ex parte* relief they seek. *See* [Proposed] Order, filed herewith. Plaintiff has certified that it has not publicized this Application. Ignatius Dec., ¶ 37. Also, since Defendant’s location and the location of the Counterfeit Products are unclear, Plaintiff is not requesting a seizure order in this Application. (Levine Dec., ¶¶ 4, 14-15).

over the Internet, knowingly and willfully offers for sale and/or sell Counterfeit Products through Defendant's Website. (Ignatius Dec., ¶¶ 31-32; Levine Dec., ¶¶ 3, 5). The covert nature of Defendant and its counterfeiting activities make any order other than an *ex parte* temporary restraining order an exercise in futility. The immediate and irreparable harm to Plaintiff's businesses and reputation, as well as to the goodwill associated with the Supercell IP, in denying its Application for an *ex parte* temporary restraining order greatly outweighs the harm to Defendant's interests in continuing to offer for sale and sell Counterfeit Products. (Ignatius Dec., ¶ 35).

"To obtain a preliminary injunction, a plaintiff must establish: '(1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly' in its favor.'" *Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 537 (2d Cir. 2005) (quoting *Federal Express Corp. v. Federal Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir. 2000)). The "standards which govern consideration of an application for a temporary restraining order... are the same standards as those which govern a preliminary injunction." *Local 1814, Int'l Longshoremen's Ass'n v. N.Y. Shipping Ass'n, Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992). Plaintiff meets the standard for a preliminary injunction and the Court should enter a temporary restraining order.

### **1. Plaintiff is Likely to Prevail on the Merits of Its Lanham Act Claims**

In order to establish a likelihood of success on trademark counterfeiting and infringement claims, a plaintiff must show: (1) that its marks are valid and entitled to protection, and (2) that defendants' use of plaintiff's marks is likely to cause confusion. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010). First, the U.S. Trademark Registration certificates submitted in conjunction with this Application provide *prima facie* evidence of both the validity of the Supercell

Mark, Clash of Clans Mark and Brawl Stars Mark as well as Plaintiff's ownership of the same. 15 U.S.C. § 1057(b). (Ignatius Dec., ¶¶ 7, 13, 21, Exs. B, D).

Second, a proper likelihood of confusion inquiry generally involves an analysis of the factors set forth in *Polaroid Corp. v. Polarad Elecs. Corp.* 287 F.2d 492, 495 (2d Cir. 1961). Yet, "where counterfeit marks are involved, it is not necessary to conduct the step-by-step examination of each *Polaroid* factor because counterfeit marks are inherently confusing." *Fendi Adele S.R.L. v. Filene's Basement, Inc.*, 696 F. Supp. 2d 368, 383 (S.D.N.Y. 2010) (internal citations omitted). Instead, "[t]he court need only determine the more fundamental question of whether there are items to be confused in the first place -- that is, whether the items at issue . . . are, in fact, counterfeit and whether [d]efendants sold those items, or offered those items for sale." *Id.* at 383 (internal citations omitted). Regardless, even if a *Polaroid* analysis were necessary, a straightforward application of the test demonstrates that likelihood of confusion exists in this case.

Because Plaintiff has shown that it is likely to prevail on its trademark counterfeiting and infringement claims, it has also shown that it likely will prevail on its claims for false designation of origin, passing off and unfair competition. *Richemont N. Am., Inc. v. Linda Lin Huang*, No. 12 Civ. 4443 (KBF), 2013 U.S. Dist. LEXIS 136790, at \*14-16 n.15 (S.D.N.Y. Sep. 24, 2013).

## **2. Plaintiff is Likely to Prevail on Its Copyright Act Claims**

Under 17 U.S.C. § 501(a), to show likelihood of success on the merits of a copyright infringement claim, a given plaintiff must demonstrate: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011) (internal quotation omitted). As detailed below, Defendant has infringed upon the Clash of Clans Works and Brawl Stars Works.

**a) *Plaintiff owns Valid Copyrights in the Clash of Clans Works and Brawl Stars Works***

With respect to ownership, “[a] certificate of registration from the United States Register of Copyrights constitutes prima facie evidence of the valid ownership of a copyright.” *Mint, Inc. v. Iddi Amad*, No. 10 Civ. 9395 (SAS), 2011 U.S. Dist. LEXIS 49813, at \*6 (S.D.N.Y. May 9, 2011); *see also* 17 U.S.C. § 410(c). Thus, Plaintiff’s certificates of registration for the Clash of Clans Works and Brawl Stars Works are *prima facie* evidence of the validity of the copyrights and the facts stated in such registrations. (Ignatius Dec., ¶ 15-16, 23-24, Exs. C. E).

**b) *Defendant Infringed the Clash of Clans Works and Brawl Stars Works***

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

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

A representative sample of comparisons of images from the Clash of Clans Game and Brawl Stars Game to Defendant’s Counterfeit Products illustrates that Defendant is copying one or more of the Clash of Clans Works and/or Brawl Stars Works by reproducing and/or displaying substantially similar, if not identical, imitations of the Clash of Clans Works and/or Brawl Stars Works either embodied in the Counterfeit Products themselves and/or in connection with the offering for sale and/or sale of Counterfeit Products. (Levine Dec., ¶ 5, Complaint, Ex. E). Defendant has taken the original and well-known elements of the Clash of Clans Works and Brawl Stars Works and used the same and/or elements thereof on Defendant’s Website. *Id.* Defendant’s

imitations of the Clash of Clans Works and Brawl Stars Works are virtually indistinguishable therefrom, which, coupled with Plaintiff's significant and widespread fame and marketing efforts for its Clash of Clans Game and Brawl Stars Game, show that Defendant unquestionably had "access" to the Clash of Clans Works and Brawl Stars Works. *See id.*; and *Mint, Inc.*, 2011 U.S. Dist. LEXIS 49813, at \*7. Plaintiff has demonstrated, at a minimum, "evidence of a reasonable possibility of access" through its widespread use of its Clash of Clans Works and Brawl Stars Works as well as the widespread distribution of the Clash of Clans Products and Brawl Stars Products. *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988). This demonstrates that Plaintiff's assertion of Defendant's access to the Clash of Clans Works and Brawl Stars Works is more than mere speculation.

Further, Defendant's infringing use of the Clash of Clans Works and Brawl Stars Works is clearly more than *de minimis*. Defendant has taken entire and/or core elements of the Clash of Clans Works and Brawl Stars Works and has used these, or nearly identical replicas thereof, in connection with the advertising, marketing, distribution, offering for sale and/or sale of the Counterfeit Products. In many instances, Defendant has directly copied one or more of the individual components of the Clash of Clans Works and/or Brawl Stars Works and has used such elements together on Defendant's Website. (Levine Dec., ¶ 5, Ex. A, Complaint, Ex. F). Thus, Plaintiff has established substantial similarity between the Clash of Clans Works and Brawl Stars Works and Defendant's imitations, and that Defendant copied the same. *See Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003). Thus, Plaintiff respectfully submits that it is likely to succeed on the merits of its copyright claims.

### **3. Plaintiff is Likely to Prevail on Its State Law Claims**

Since Plaintiff has shown a likelihood of success on its Lanham Act claims, Plaintiff has also shown a likelihood of success on its New York unfair competition and unjust enrichment

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

#### **4. Plaintiff Is Likely to Prevail on Its Cybersquatting Claim**

The Anticybersquatting Consumer Protection Act of 1996 (“ACPA”), which is an amendment to the Lanham Act, applies when a domain name registrant has a bad faith intent to profit by “cybersquatting” a domain name that is “identical or confusingly similar to or dilutive of the distinctive or famous mark of another.” 15 U.S.C § 1125(d). A Senate Report accompanying the APCA defined cybersquatters as, among other things, those who “register well-known marks to prey on consumer confusion by misusing the domain name to divert customers from the mark owner’s site to the cybersquatter’s own site”, and “target distinctive marks to defraud consumers, including to engage in counterfeiting activities.” *Lucas Nursey v. Grosse*, 359 F.3d. 806, 809 (6th Cir. 2004) (quoting S. Rep. No. 106-140 at 5-6 (1999)); *see also Diorama Trading Co., Inc. v. J Waller Thompson U.S.A., Inc.*, 2005 U.S. Dist. LEXIS 22830, at \*2-3 (S.D.N.Y. Sept. 6, 2005). Given that Defendant has registered and used at least one (1) domain name containing one of the Clash of Clans Marks, or at the very least, a mark confusingly similar thereto (i.e., the Infringing Domain Name), to divert consumers to Defendant’s Website where they sell Counterfeit Products, it is clear that Defendant is a cybersquatter under the ACPA.

To prevail on an ACPA claim, “a plaintiff must demonstrate that (1) its marks were distinctive at the time the domain name was registered; (2) the infringing domain names complained of are identical to or confusingly similar to plaintiff’s mark; and (3) the infringer has a bad faith intent to profit from that mark.” *Webadviso v. Bank of Am. Corp.*, 448 F. App’x 95, 97 (2d Cir. 2011). Considering the foregoing factors, for the reasons set forth *infra*, Plaintiff is likely to prevail on its ACPA claim.



**a) *The Clash of Clans Marks Were Distinctive When the Infringing Domain Name Was Registered***

In determining the strength of a mark, courts look to: “(1) inherent strength, resulting from the mark’s degree of inherent distinctiveness, usually measured on the ladder ranging from unprotectable generic marks to arbitrary, fanciful marks that enjoy the broadest protection, and (2) acquired strength, reflecting the degree of consumer recognition the mark has achieved.” *Tcpip Holding Co. v. Haar Communs. Inc.*, 244 F.3d 88, 100 (2d Cir. 2001). Not only are the Clash of Clans Marks arbitrary and inherently distinctive, but regardless, the Clash of Clans Marks have in fact acquired distinctiveness from being prominently used in connection with the Clash of Clans Products, which have achieved worldwide recognition. (Ignatius Dec., ¶¶ 25-28). *See Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986) (“registered trademarks are presumed to be distinctive and should be afforded the utmost protection”). Thus, the Clash of Clans Marks are strong, distinctive, and have been in continuous use for a substantial period of time, including prior to when the Infringing Domain Name was registered. (Ignatius Dec., ¶¶ 14, 25-28, Ex. B).

**b) *The Infringing Domain Name is Identical or Confusingly Similar to one of the Clash of Clans Marks***

For purposes of determining whether a domain name is identical or confusingly similar to a trademark under the ACPA, the Court must evaluate the domain and relevant mark(s) “without regard to the goods or services of the parties.” 15 U.S.C. § 1125(d)(1)(A). Courts have routinely found that additions of minor or generic words do not weigh against a finding of confusing similarity. *Omega S.A. v. Omega Eng'g*, 228 F. Supp. 2d 112, 127 (D. Conn. 2002) (collecting cases) (finding OMEGAWATCH.com and OMEGATIME.com to be confusingly similar to plaintiff’s marks Omega and O, and that a contrary result would “permit a cybersquatter to evade the scope of the statute merely by adding to a distinctive or famous mark a generic term or word”);

*see also Mattel, Inc. v. Internet Dimensions, Inc.*, 2000 U.S. Dist. LEXIS 9747 (S.D.N.Y. July 13, 2000) (finding the domain name barbiesplaypen.com to be confusingly similar to BARBIE in light of the use of plaintiff's trademark in the domain name, combined with the usage of the mark on the front page of that website). Here, Defendant registered and used the Infringing Domain Name, which contains one of the Clash of Clans Marks in its entirety, in connection with Defendant's Website, which prominently features the Supercell IP, and through which Defendant sells Counterfeit Products. Accordingly, based on these facts and the applicable case precedent, the Infringing Domain Name is unquestionably, at the very least, confusingly similar to one of the Clash of Clans Marks.

**c) *Defendant's Actions Are In Bad Faith***

"In assessing bad faith for purposes of ACPA, courts may consider the non-exclusive list of statutory factors outlined in 15 U.S.C. § 1125(d)(1)(B)." *Diesel S.P.A.*, 2016 U.S. Dist. LEXIS 2720, at \*19. Applying such factors, Courts have found that the registration of a trademark owner's mark for a commercial purpose, as part of a domain name through which counterfeit goods are sold constitutes bad faith. *See id.* Here, Defendant is, *inter alia*, using one of the Clash of Clans Marks in the domain names of Defendant's Website in an attempt to masquerade Defendant's Website as "authentic" sources of Clash of Clans Products. Therefore, Plaintiff respectfully asserts that the Court should hold that Defendant's actions are in bad faith, and Plaintiff is likely to succeed on its ACPA claim.

**5. Plaintiff is Entitled to a Presumption of Irreparable Harm**

Plaintiff is entitled to a rebuttable presumption of irreparable harm as it has shown that it is likely to succeed on the merits of its Lanham Act claims. On December 27, 2020, the Trademark Modernization Act of 2020 (codified as part of the Consolidated Appropriations Act, 2021, Pub.

L. 116-260) was signed into law. The Act, *inter alia*, amended the text of 15 U.S.C. § 1116(a) codified a rebuttable presumption of irreparable harm which, now reads in relevant part:

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

*See City of N.Y. v. Lopez*, No. 21 CV 7862 (JPO), 2021 U.S. Dist. LEXIS 243449 (S.D.N.Y. Dec. 21, 2021) (emphasis added); *Vans, Inc., et al. v. Walmart, Inc., et al.*, 21-cv-01876 (KES) Dkt. 65, \*23 (C.D. Cal. Mar. 31, 2022). Accordingly, since Plaintiff established that it is likely to succeed on the merits of its claims under 15 U.S.C. § 1125(a), Plaintiff is entitled to a presumption of irreparable harm.

#### **6. The Balance of Hardships Favors Plaintiff**

The balance of hardships unquestionably and overwhelmingly favors Plaintiff. Here, as described above, Plaintiff has suffered, and will continue to suffer, irreparable harm to its businesses, the value, goodwill and reputation built up in and associated with the Supercell IP and to its reputations as a result of Defendant's willful and knowing sales of substandard imitations of the Clash of Clans Products and Brawl Stars Products. (Ignatius Dec., ¶ 35). Any harm to Defendant would only be the loss of Defendant's ability to continue to offer its Counterfeit Products for sale, or, in other words, the loss of the benefit of being allowed to continue to unfairly profit from its illegal and infringing activities. "Indeed, to the extent defendants 'elect[] to build a business on products found to infringe[,] [they] cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.'" *Broad. Music, Inc. v. Prana Hosp., Inc.*, 158 F. Supp. 3d 184, 196 (S.D.N.Y. 2016) (internal citation omitted).

#### **7. Enjoining Defendant from Using the Supercell IP Will Serve the Public Interest**

The public interest will be served by the issuance of a temporary restraining order and

preliminary injunction, as “the public has an interest in not being deceived—in being assured that the mark it associates with a product is not attached to goods of unknown origin and quality.” *N.Y.C. Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 344 (S.D.N.Y. 2010). Here, the public has an interest in being able to rely on the high quality of the Clash of Clans Products and Brawl Stars Products. (Ignatius Dec., ¶¶ 25-28, 35). Since Defendant has willfully and knowingly inserted substandard Counterfeit Products into the marketplace, the public would benefit from a temporary restraining order and preliminary injunction halting any further sale and distribution of Counterfeit Products.

**C. PLAINTIFF IS ENTITLED TO AN ORDER 1) PREVENTING THE FRAUDULENT TRANSFER OF ASSETS AND 2) FREEZING DEFENDANT’S WEBSITE**

**1. Defendant’s Assets Must be Frozen**

Considering the nature of Defendant’s counterfeiting businesses, and Plaintiff’s showing that it has a high likelihood of succeeding on the merits of all of its claims, Plaintiff will be entitled to an equitable accounting of Defendant’s profits from its sales of Counterfeit Products. Plaintiff’s request for an asset freeze order granting Plaintiff information regarding the location of Defendant’s Assets, the attachment of Defendant’s Assets and an injunction preventing the transfer from or to Defendant’s Financial Accounts by the Financial Institutions and Third Party Service Providers is both necessary and appropriate, and is within this Court’s discretion to preserve Plaintiff’s right to the relief sought in the Complaint. *See* 15 U.S.C. § 1117(a).<sup>8</sup>

District courts have “authority to freeze those assets which could [be] used to satisfy an equitable award of profits.” *North Face Apparel Corp. v. TC Fashions, Inc.*, 2006 U.S. Dist. LEXIS 14226, at \*10 (S.D.N.Y. Mar. 30, 2006) (internal citation omitted). In doing so, a court

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

“may exempt any particular assets from the freeze on the ground that they [are] not linked to the profits of allegedly illegal activity.” *Id.* at \*11. The onus is on “the party seeking relief [from any such asset freeze] to ‘present documentary proof’” that its profits are not from such illegal activity. *Id.*

Under 15 U.S.C. § 1117(a) and 17 U.S.C. § 504(b), a plaintiff in an action arising thereunder is entitled to recover a defendant’s profits derived from the counterfeiting and/or infringement and/or plaintiff’s damages. *See Gucci Am. v. Bank of China*, 768 F.3d 122, 131-132 (2d Cir. 2014) (A copyright and/or trademark “infringer is required in equity to account for and yield up his gains to the true owner,” and “profits are then allowed as an equitable measure of compensation.”). Specifically, with respect to claims involving the infringement of federally registered copyrighted works and/or those arising under the Lanham Act, it has been established in this Circuit, as well as sister circuits, that district courts have the authority to issue a prejudgment asset restraint injunction in favor of plaintiffs seeking an accounting and/or another equitable remedy against allegedly infringing defendants. *Warner Bros. Entm’t Inc. v. Doe*, No. 14-CV-3492 (KPF), 2014 U.S. Dist. LEXIS 190098 (S.D.N.Y. May 29, 2014).

An asset freeze in the instant matter is unquestionably warranted because Defendant, who, upon information and belief, is manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling Counterfeit Products to U.S. consumers solely via the Internet, and accepting payment for such Counterfeit Products in U.S. Dollars through Financial Institutions, thereby causing irreparable harm to Plaintiff in the form of lost sales, loss of goodwill and loss of control of its reputation with licensees, retailers and consumers, and can, and most certainly have the incentive to, transfer and hide its ill-gotten funds if its assets are not frozen. (Ignatius Dec., ¶ 35); *see also Dama S.P.A. v. Doe*, No. 15-cv-4528

(VM), 2015 U.S. Dist. LEXIS 178076, at \*4-6 (S.D.N.Y. June 12, 2015).<sup>9</sup> Therefore, Plaintiff respectfully submits that this Court should exercise its inherent equitable power and freeze Defendant's Assets and Defendant's Financial Accounts to preserve Defendant's funds and ensure that a meaningful accounting of its profits can be made.<sup>10</sup>

## **2. Defendant's Website Must be Frozen**

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

## **D. PLAINTIFF IS ENTITLED TO AN ORDER AUTHORIZING BIFURCATED AND ALTERNATIVE SERVICE OF PROCESS BY ELECTRONIC MEANS**

Plaintiff respectfully requests that this Court issue an order granting them permission to serve Defendant via the following combination of electronic methods: 1) registered electronic mail and 2) website publication. For service by registered electronic mail, Plaintiff proposes using Outlook.com as well as Rmail ([www.rmail.com](http://www.rmail.com)), an online service that confirms valid proof of authorship, content, and delivery of an email, as well as the official time and date that the email was sent and received. (Levine Dec., ¶ 17). Along with service via email, Plaintiff respectfully requests that the Court, in its discretion, permit service via website publication.<sup>11</sup>

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<sup>9</sup> See also *supra* fn. 2.

<sup>10</sup> Upon the entering of an asset freeze, Plaintiff also requests that the Court Order Defendant and/or the Financial Institutions and/or the Third-Party Service Providers to immediately identify Defendant's Assets and Defendant's Financial Accounts and the respective current account or fund balances of the same.

<sup>11</sup> Publication on a website has been deemed appropriate service under Fed. R. Civ. P (4)(3) "so long as the proposed publication is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *National Association for Stock Car Auto Racing, Inc. v. Does*, 584 F. Supp. 2d 824, 826 (W.D.N.C. 2008) (quoting *Mullane*, 339 U.S. at 315-16).

Plaintiff submits that its requested methods of alternative service are warranted herein based, not only statutory authority, but also the practical facts and circumstances surrounding this case. Generally, counterfeiters like Defendant, have been known to use aliases, false addresses and other incomplete identification information to shield their true identities, and, in fact, Epstein Drangel was unable to locate any addresses, company names or other identifying information for Defendant. It is, however, imperative Defendant to have a current and operational e-mail address to operate Defendant's Website and conduct its business. (Levine Dec., ¶ 16).

**1. The Hague is Inapplicable, Thus Service via Email is Permissible and Necessary**

***a) Despite Its Reasonable Diligence, Plaintiff Was Unable to Locate Defendant's Address***

Plaintiff acknowledges that both the U.S. and China are signatories to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague"), however, where, as here, despite its reasonable diligence, Epstein Drangel was entirely unable to locate an address or company name for Defendant, and thus the Hague does not apply. *See Advanced Access Content Sys. Licensing Adm'r, LLC v. Shen*, No. 14 Civ. 1112 (VSB), 2018 WL 4757939, at \*7 (S.D.N.Y. Sep. 30, 2018). Here, without Defendant's address, it would be impossible to serve them via the Hague, and in fact, "Article 1 of the Hague Convention specifies that the Convention does not apply when the addresses of foreign defendants are unknown." *Microsoft Corp. v. John Does 1-21, 25-35, and 37-39*, No. 12-cv-01335, 2012 WL 5497946, at \*6 (E.D.N.Y. Nov. 13, 2012); *see also, SEC v. Lines*, 07 Civ. 11387, 2009 WL 3179503, at \*9-10 (S.D.N.Y. Oct. 2, 2009) (citing Convention done at the Hague, November 15 1965, 20 U.S.T. 361 (U.S.T.1969)).

"Courts in this Circuit have found an address is 'not known' if the plaintiff exercised reasonable diligence in attempting to discover a physical address for service of process and was

unsuccessful in doing so.” *Kelly Toys Holdings, LLC v. Top Dep’t Store*, 2022 U.S. Dist. LEXIS 154175, at \*19-21 (S.D.N.Y. Aug. 26, 2022) (quoting *Advanced Access Content Sys. Licensing Adm’r, LLC v. Shen*, No. 14-CV-1112 (VSB), 2018 U.S. Dist. LEXIS 169603, at \*7-8 (S.D.N.Y. Sep. 30, 2018)); *see also, e.g., Philip Morris USA Inc. v. Veles Ltd.*, No 06 CV 2988 (GBD), 2007 WL 725412, at \*3 (S.D.N.Y. Mar. 12, 2007) (court granted plaintiff’s request to serve defendants by email where an investigation did not uncover valid physical addresses for service of process).

As articulated in the Levine Dec., here, Defendant’s Website did not display a true and correct address or company name, and despite Epstein Drangel’s reasonable diligence, it was entirely unable to independently locate an address for Defendant. *See, e.g., Kelly Toys Holdings*, 2022 U.S. Dist. LEXIS 154175, at \*21 (holding plaintiff was not required to hire a private investigator in China to verify whether a physical address associated with a domain name is in fact authentic and that the extensive and multi-dimensional efforts taken established plaintiff exercised reasonable diligence in attempting to discover a physical address for service of process) (internal citations omitted); *Prediction Co. v. Rajgarhia*, No. 09 Civ. 7459 (SAS), 2010 U.S. Dist. LEXIS 26536, at \*2 (S.D.N.Y. Mar. 22, 2010) (finding plaintiff’s address was “not known,” and that the Hague Convention was thus inapplicable, where plaintiff had “actively, though unsuccessfully, attempted to obtain [Indian defendant’s] address in a variety of ways”).

**b) *Service via Email is Permissible Under Fed. R. Civ. P. 4(f)(3)***

It is left to the Court’s discretion whether to authorize alternative service under Rule 4(f)(3). *See Elsevier, Inc. v. Siew Yee Chew*, 287 F. Supp. 3d 374, 377 (S.D.N.Y. 2018). Where service may be authorized by Rule 4(f)(3), Plaintiff need not attempt, and courts need not give preference to, means of service under Rule 4(f)(1) or 4(f)(2).” *Zuru (Singapore) PTE., Ltd. v. Individuals, Corps., Ltd. Liab. Cos., P’ships, & Unincorporated Ass’ns Identified on Schedule A Hereto*, 2022 U.S. Dist. LEXIS 195268, at \*2 (S.D.N.Y. Oct. 26, 2022) (*citing Restoration Hardware, Inc. v.*



*Lighting Design Wholesalers, Inc.*, No. 17 Civ. 5553, 2020 U.S. Dist. LEXIS 228149, at \*4 (S.D.N.Y. Dec. 4, 2020) (noting that "Rule 4(f) is not hierarchical" and service may be authorized under Rule 4(f)(3) "even if the method of service is in contravention of the laws of the foreign country" and thus precluded under 4(f)(2)); *see also Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 330 (S.D.N.Y. 2015) ("[s]ervice under subsection [4(f)] (3) is neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant."). In fact, as the Fifth Circuit recently confirmed, even where the Hague does apply, "[s]ervice pursuant to the Hague Convention listed in subsection (f)(1), does not displace subsection (f)(3), which permits service by other means." *Viahart, L.L.C. v. GangPeng*, No. 21-40166, 2022 WL 445161, at \*3 (5th Cir. Feb. 14, 2022).

**c) *The Exigent Circumstances Present Here Justify Alternative Service***

Plaintiff respectfully submits that the Court's conclusion in *Smart Study Co. v. Acuteye-U.S.*, No. 21 Civ. 5860 (GHW), 2022 WL 2872297 (S.D.N.Y. July 21, 2022) (hereinafter "*Smart Study*"), that "the Court need not determine whether the request was truly urgent because it does not matter. There is no exigent circumstances exception in Rule 4(f)(3)" (*Smart Study*, 2022 WL 2872297 at \*27) is directly belied by the 1993 Advisory Committee notes to Fed. R. Civ. P. 4, which specifically contemplate Rule 4(f)(3)'s use as an alternative to compliance with the Hague. The 1993 Advisory Committee Notes to Fed. R. Civ. P. 4 state, in relevant part, the following:

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

Fed. R. Civ. P. 4, Advisory Committee Notes, 1993 amendments.<sup>12</sup> In line with the Advisory Committee notes, recently, in an opinion read on the record in *FoxMind Canada Enterprises Ltd. v. Abctec, et al.*, 21-cv-5146 (KPF) (S.D.N.Y. July 14, 2022), Judge Failla found that the exigencies existing in that particular case counseled in favor of alternative service. Judge Failla held as follows:

Here the Court concludes that alternative service was necessary on the circumstances of this case. Although plaintiff did not attempt to serve the moving defendants before seeking alternative service, the Court has already explained that plaintiff harbored reasonable doubts about the veracity of the addresses affiliated with their Amazon user accounts. The Court, therefore, does not believe it appropriate to institute a requirement that plaintiff attempt service under the Hague Convention using information that it had reason to believe was erroneous. . . Beyond the questionable authenticity of these addresses, there were also the exigencies of the case, which counsel, in favor of alternative service, plaintiff initiated this suit on an emergency posture picking an ex parte TRO in the hopes of immediately thwarting the sale of allegedly counterfeit goods on online marketplaces. Any other strategy for instituting this action would have afforded the alleged counterfeiters an opportunity to evade enforcement of the trademark laws, thus obviating the release sought by plaintiff before the Court and before this Court had...a chance...to consider the merits of the claims.

Transcript of July 14, 2022 Telephone Conference, 21:11-22:10, a copy of which is attached to the Levine Dec. as Exhibit B.

Several federal district courts have likewise held that alternative service is appropriate where, as here, Plaintiff has demonstrated exigent circumstances justifying the urgent injunctive relief sought herein, making a quick and effective means of service necessary to prevent further irreparable harm to Plaintiff. *See e.g., Asia Cube Energy Holdings, LTD v. Inno Energy Tech Co.*, No. 20-cv-6203 (AJN), 2020 U.S. Dist. LEXIS 148012, at \*10 (S.D.N.Y. Aug. 17, 2020) (“[Plaintiff’s] pursuit of emergency relief bears on the question of whether judicial approval of

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<sup>12</sup> The Supreme Court in *Water Splash* noted that to ascertain the meaning of a treaty, courts “may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties”. *Water Splash*, 137 S. Ct. at 1511 (internal quotation marks omitted).

alternative means of service is warranted”); *Strabala v. Zhang*, 318 F.R.D. 81, 114 (N.D. Ill. 2016) (“Court-directed service pursuant to Rule 4(f)(3) is appropriate when, for example, ‘there is a need for speed that cannot be met by following the Hague Convention methods. . . .’”) (internal quotation omitted). Similarly, in *NBA*, the court held “[a] speedy method of service...was justified to ensure, among other reasons, that the funds gained by the allegedly infringing conduct would be recoverable.” *NBA Props. v. P’ships & Unincorporated Ass’ns*, 549 F. Supp. 3d 790, 797 (N.D. Ill. 2021), citing *Strabala*, 318 F.R.D. at 114, quoting 4B FED. PRAC. & PROC. CIV. § 1134 (4<sup>th</sup> ed.).

**d) Service is also Permissible Under Fed. R. Civ. P. 4(f)(2)(A)**

Pursuant to Fed. R. Civ. P. 4(f)(2)(A), service may occur at a place not within any judicial district of the U.S. “if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice . . . as prescribed by the foreign country's law for service in that country **in an action in its courts of general jurisdiction.**” Fed. R. Civ. P. 4(f)(2)(A) (*emphasis added*). “While this precise issue has not been explicitly ruled on by any other court in the Second Circuit, courts have appeared to implicitly accept that Rule 4(f)(2)(A) allows for service through any method...permitted by the recipient country.” *Dev. Specialists, Inc. v. Li (In re Coudert Bros. LLP)*, No. 16-CV-8237 (KMK), 2017 WL 1944162, at \*34-35 (S.D.N.Y. May 9, 2017); *see also Appel v. Hayut*, No. 20 Civ. 6265 (JPC), 2020 WL 7211212, at \*1 (S.D.N.Y. Dec. 7, 2020) (“Rule 4(f)(2)(A) on its face appears to allow, without limitation, service by mail if the recipient country so allows.”).

While Chinese law is silent with respect to the specific situation of foreign litigants serving Chinese companies and individuals,<sup>13</sup> China’s courts of general jurisdiction do have statutory

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<sup>13</sup> Also, the trend in China is towards facilitating service by more efficient means, including electronic means. *See* the Declaration of Danielle S. Futterman filed in *Spin Master Ltd. v. Chakaruna* 4169, *et al.*, No. 22-cv-553 (JPC) (S.D.N.Y. 2022) at Dkt. 43 (“*Spin Master* Declaration”), Ex. A at ¶¶ 11-19, Exs. 16-17. As to PRC Article 90, email

authority for electronic service in both foreign and domestic cases.<sup>14</sup>

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

## **2. Service by Electronic Means Comports with Due Process**

Service on Defendant by electronic means also comports with due process, as it is “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover*

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service on a resident domestic defendant in a case before a Chinese court is allowed with consent, although what constitutes consent is not expressly defined in Chinese laws and regulations. *See Smart Study*, Dkt. 98 at ¶ 13. Moreover, it should be noted that when service is attempted on a Chinese defendant pursuant to Article 2 of the Hague, that service can be accomplished by e-mail pursuant to Chinese law. When a party attempts service through China’s Central Authority (i.e., The Ministry of Justice), the foreign forwarding party sends the request for service to the Central Authority of China, which refers the document to the competent court. The court will serve the document directly to the addressee or the person who is entitled to receive the document. Where direct service is impracticable in some cases, other methods may be employed in accordance with the Civil Procedure Law. *See China-Central Authority and Practical Information*, Hague Conference on Private International Law, <https://www.hcch.net/en/states/authorities/details3/?aid=243> (last visited Aug. 5, 2022). Accordingly, since the Central Authority serves through the Chinese courts and the Chinese courts are statutorily authorized to serve via e-mail, if proceeding by way of the Hague, a Chinese defendant may inevitably end up being served by e-mail in the end, thereby lending further support to the propriety of service via email in the first instance, and that service via e-mail is in fact prescribed by Chinese law.

<sup>14</sup> First, under Article 90 (formerly Article 87) of the PRC Civil Procedure Law, electronic service is permitted on a Chinese defendant if consent has been obtained.<sup>14</sup> *See e.g. Hangzhou Chic Intelligent Tech. Co.*, 2021 WL 1222783, at \*11 (“Subject to the consent of the person on which a procedural document is to be served, the document may be served by way of facsimile, **electronic mail** or any other means through which the receipt of the document may be acknowledged, with the exception of judgments, rulings and mediation statements...” (emphasis added)); *Smart Study*, Dkt. 98 at ¶¶ 13, 20-21. Further, and most relevantly, Article 274 of the PRC Civil Procedure Law contains the service methods that are applicable and permissible when there is an international case, and there is an occasion to serve documents internationally (i.e., when a Chinese litigant is serving a foreign – for example, an American – defendant). *Smart Study*, Dkt. 98 at ¶¶ 14, 21-26, Ex. 6; *Spin Master Declaration*, Ex. A at ¶¶ 21-22. Pursuant to Article 274 (formerly Article 267) of the PRC Civil Procedure Law (“PRC Article 274”), in foreign-related or international cases<sup>14</sup>, Chinese courts may serve by email **without complying with the Hague mechanism(s)**, with or without consent. *Id.*; Article 274(7) (*emphasis added*). In addition to Article 274, under the doctrine of “deemed service” (视为送达, in Chinese), a Chinese court may find that service has been achieved even if a foreign defendant does not return a service receipt or fails to defend the action in court, if it can be inferred from the circumstances that the defendant has become aware of the litigation. *Smart Study*, Dkt. 98 at ¶¶ 15, 28-31; *Spin Master Declaration*, Ex. A, ¶¶ 21-22.

*Bank & Trust Co.*, 339 U.S. 306, 309 (1950); *see also Zanghi v. Ritella*, 2020 WL 589409, at \*6 (S.D.N.Y. Feb. 5, 2020) (judicial approval of service via email is generally supported by facts indicating that the person to be served will likely receive the documents); *Pearson Educ. Inc. v. Doe I*, 18-CV-7380, 2019 WL 6498305, at \*3 (S.D.N.Y. Dec. 2, 2019) (“Email service has also repeatedly been found by courts to meet the requirements of due process.” (internal citation omitted)). This Court held the bar is met where, as here, Defendant engaged in online business and regularly communicated with customers via email. *Animefunstore*, 2020 WL 2097624 (Dkt. 81); *see also Sulzer*, 312 F.R.D. at 332 (service through email was appropriate where the “email address in question is listed prominently on [defendant’s internet homepage...[,] [the defendant] presumably relies at least partially on contact through [its email] to conduct overseas business, and it is reasonable to expect [defendant] to learn of the suit against it through this email address.”); *Kaneka Corp. v. Purestart Chem Enter Co.*, 16-CV-4861 (MKB)(SIL), 2017 WL 11509784 at \*9 (E.D.N.Y. Oct. 17, 2017) (email service appropriate where defendant conducted its business through email.”). Moreover, in *NBA*, the court held that “email was a more reliable method of service...because Defendant’s email address was verified by the sales platform, while their physical addresses were not.” *NBA Props.*, 549 F. Supp. 3d at 797; *see also Restoration Hardware, Inc.*, 2017 WL 11509784, at \*23 (finding that in light of the evidence that the defendant was associated with certain electronic email accounts, due process was “easily satisfied”). Accordingly, Plaintiff respectfully submits that service by e-mail under Rule 4 is the most effective means to ensure Defendant is reasonably apprised of this action.

#### **E. PLAINTIFF IS ENTITLED TO AN ORDER AUTHORIZING EXPEDITED DISCOVERY**

Additionally, Plaintiff respectfully requests that the Court order expedited discovery from Defendant, Financial Institutions and Third Party Service Providers regarding the scope and extent

of Defendant's counterfeiting and infringing activities, as well as Defendant's account details and other information relating to Defendant's Financial Accounts, Assets and/or Defendant's Website and/or Financial Accounts with the Third Party Service Providers, including, without limitation any and all websites, including, without limitation, those owned and operated, directly or indirectly, by the Third Party Service Providers and the Financial Institutions.

Generally, a party may not seek discovery prior to a Rule 26(f) conference unless authorized by a court order. Fed. R. Civ. P. 26(d)(1). In the past, Courts in this District have often applied a four-factor test to determine when expedited discovery may be granted,<sup>15</sup> but now apply a more flexible "good cause" test to examine "the discovery request . . . on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding circumstances." *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326 (S.D.N.Y. 2005) (internal citation omitted). Regardless of which test, Plaintiff has established that it is entitled to the expedited discovery requested for good cause shown. *See id.* at 327; Ignatius Dec., ¶ 35.

#### **F. PLAINTIFF'S REQUEST FOR A SECURITY BOND IN THE AMOUNT OF \$5,000 IS ADEQUATE**

In determining the amount of the bond that a moving party must post, this Court is "vested with wide discretion." *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). Plaintiff respectfully submits the provision of security in the amount of \$5,000 is sufficient. *Rovio Entertainment Ltd. and Rovio Animation OY v. Best Baby and Kid Store, et al.*, No. 17-cv-4884-KPF (S.D.N.Y. June 28, 2017).<sup>16</sup>

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<sup>15</sup> *See Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs., Ltd.*, No. 94 Civ. 5620 (JFK), 1994 U.S. Dist. LEXIS 18457, at \*7 (S.D.N.Y. Dec. 28, 1994).

<sup>16</sup> Moreover, this Court has gone as far as to hold that no security bond is necessary in similar circumstances. *See Mattel, Inc. v. 86755, et al.*, No. 18-cv-8825-RJS-JSR (S.D.N.Y. Oct. 4, 2018) (The Hon. Richard J. Sullivan held that no security bond was necessary because "it strikes me almost as fairly arbitrary.")

#### IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that its Application be granted *ex parte* in its entirety.

Dated: April 2, 2025

Respectfully submitted,

EPSTEIN DRANGEL LLP

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