

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

3 BEES & ME INC.,

Plaintiff,

-against-

BESPORTBLE, BRITENWAY, BYONEBYE,  
CLISPEED, CYFIE, DEERBB, FUNPA,  
GLOSSRISE, HELY CANCY, HOUSE UR  
HOME, LES YEU, LIBOBO TOYS, LIOOBO,  
LITTOLO, MARPPY, MARXIAO SHOP,  
NEPDOME, PANZISUN, RAINTOAD,  
ROOCHL, SEISSO, SQSYQZ, STONISHI,  
TOYANDONA, WAKAUTO, WE&ZHE,  
XISHEEP, AND 58BH,

Defendants.

**Civil Action No.20-CV-5150 (LJL)**

**JURY TRIAL DEMANDED**

**FILED UNDER SEAL**

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S *EX PARTE* MOTION FOR  
ENTRY OF A TEMPORARY RESTRAINING ORDER, INCLUDING A TEMPORARY  
INJUNCTION AGAINST INFRINGEMENT, EXPEDITED DISCOVERY, AND  
SERVICE OF PROCESS AND NOTICE OF TRO BY E-MAIL**

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Plaintiff 3 Bees & Me Inc., by and through its undersigned counsel, hereby submits the following Memorandum of Law in support of its *ex parte* motion for entry of a temporary restraining order and preliminary injunction.

### **PRELIMINARY STATEMENT**

This is an action for patent infringement under 35 U.S.C. § 1, *et seq.*, over which this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a). All twenty-eight (28) Defendants are Amazon merchants who manufacture, import, distribute, market, offer to sell, and sell to consumers in the United States certain bathtub basketball toys on Amazon.com that infringe Plaintiff's design patent.

Plaintiff, which sells competing toys on the same Amazon marketplace to the same United States customers, has been, and is continuing to, suffer irreparable harm due to Defendants' infringement, including losing hundreds of thousands of dollars in revenue and almost ten percent of its market share, suffering irreversible price erosion that renders its patented toys unprofitable, and suffering damage to its reputation due to the inferior quality of Defendants' infringing toys which consumers now associate with Plaintiff.

To prevent this ongoing harm, Plaintiff asks this Court to temporarily: **(1)** enjoin Defendants from manufacturing, importing, distributing, marketing, offering to sell, and selling the infringing toys; and **(2)** restrain Amazon from allowing Defendants to market, sell, or offer to sell, the infringing toys.

Furthermore, Plaintiff requests that the Court grants this TRO *ex parte* because Amazon does not disclose the addresses of sellers on its marketplace without a court order and did not do so when Plaintiff requested. Nor does Amazon require its sellers to reveal their true legal names or addresses on their webpages to allow Plaintiff to identify their addresses. Such obstacles make it nearly impossible for Plaintiff to locate the Defendants in time (if at all) for a TRO hearing that

Plaintiff is requesting be expedited because of the ongoing irreparable harm to its business.

To ensure that Plaintiff is able to secure meaningful relief however, while also protecting the rights of Defendants, Plaintiff requests as part of this motion that this Court (3) authorize expedited discovery (i) *against Amazon* to disclose Defendants' contact information so that Plaintiff *can* provide notice to Defendants of this application, and (ii) *against all Defendants and Amazon* to disclose records relating to the manufacture and sale of the infringing products to allow Plaintiff to join additional parties who may be assisting Defendants in their infringement and allow Plaintiff the ability to freeze any assets derived from the sale of infringing toys.

Finally, Plaintiff requests that this Court (4) authorize service by email to expedite a hearing on this motion, and maintain a TRO pending notice to Defendants, regardless of the service authorized, to protect Plaintiff's rights pending a hearing. Courts in this Circuit have not hesitated to grant such injunctive relief, *ex parte*, where, as here, the need is clearly shown.

## STATEMENT OF FACTS

### I. The Business of 3 Bees & Me Inc.

Plaintiff is in the business of developing, marketing, selling, licensing, and distributing toys for children of all ages, including for toddlers, under the "3 Bees & Me" brand, a trademark registered with the United States Patent and Trademark Office ("PTO"). (Declaration of Jill Kiplyn Gillenwater ("Gillenwater ¶ \_\_") ¶ 3.) Among the toys that Plaintiff sells for toddlers are childhood favorites such as hand-sized miniature cars and airplanes that are brightly-colored and have friendly human characteristics such as big eyes and wide smiles. (*Id.* ¶ 4.) Plaintiff also sells teaching toys for toddlers such as basic building blocks or foam shapes of everyday objects that parents can use to teach their toddlers about their world. (*Id.* ¶ 5.)

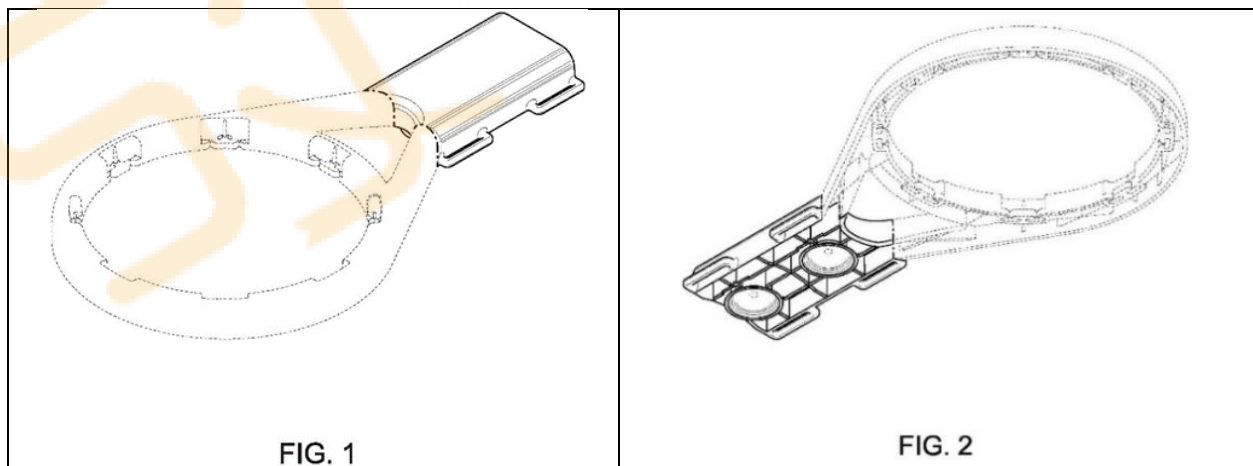
Plaintiff began its business by selling baby accessories to consumers in, 2014, when it launched its website, [www.3beesandme.com](http://www.3beesandme.com), on which consumers could purchase its products.

(*Id.* ¶ 6.) Plaintiff then expanded its business to selling children toys as well, on their website and on Amazon.com in September 2015. (*Id.* ¶ 7.) Since launching its business, Plaintiff has been very successful. (*Id.* ¶ 8.)

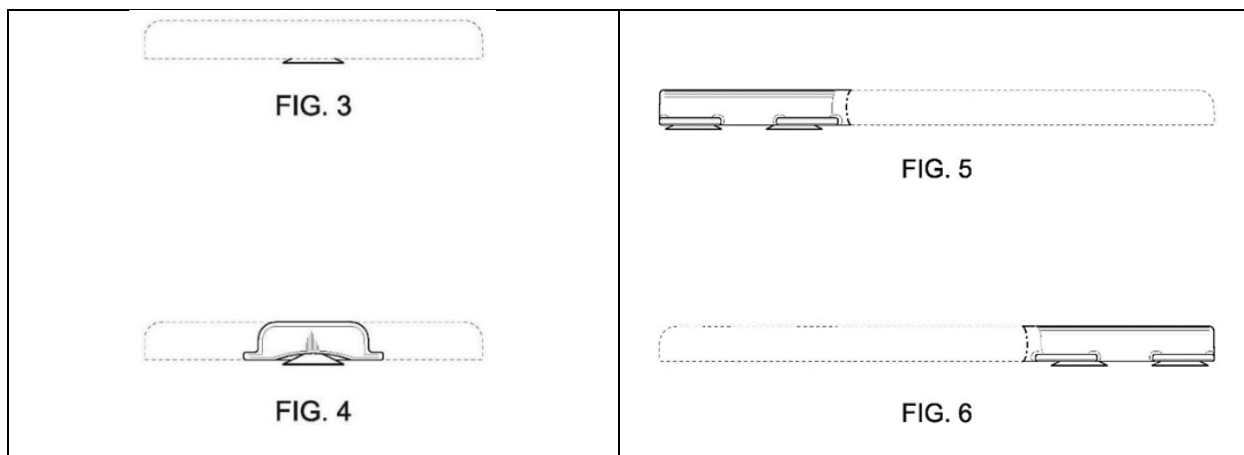
## II. The '087 Patent.

United States Patent No. D 884,087 S (the “’087 Patent”) was issued by the PTO to its inventor, Jill Kiplyn Gillenwater, on May 12, 2020. (*Id.* ¶ 9 & Ex. A.) Ms. Gillenwater assigned all rights to the ’087 Patent to Plaintiff on May 28, 2020, including rights to sue for past infringement. (*Id.* ¶ 10.)

The ’087 Patent is entitled “Bathtub Toy Fastener”, and discloses a design for an apparatus to fasten children’s bathtub toys to bathtub fixtures. (Gillenwater ¶ 11 & Ex. A.) The design utilizes a rectangular panel that approximates the footprint of a standard bathtub faucet with small rectangular rings on the side of the panels through which straps can be inserted and wrapped around the faucet, thus allowing a bathtub toy to remain stationary and held securely to the faucet. (*Id.*)







(See Ex. A, at Figs. 1-6.) The dashed portions of the figures are not claimed in the patent.

Plaintiff began selling bathtub toys containing its patented fasteners on September 17, 2017 when it manufactured and sold a bathtub basketball toy containing the patented fastener.

(*Id.* ¶ 13.) Plaintiff then started selling these toys on Amazon on October 23, 2017. (*Id.*) Images of toys sold by Plaintiff containing the design in the '087 Patent are shown below.



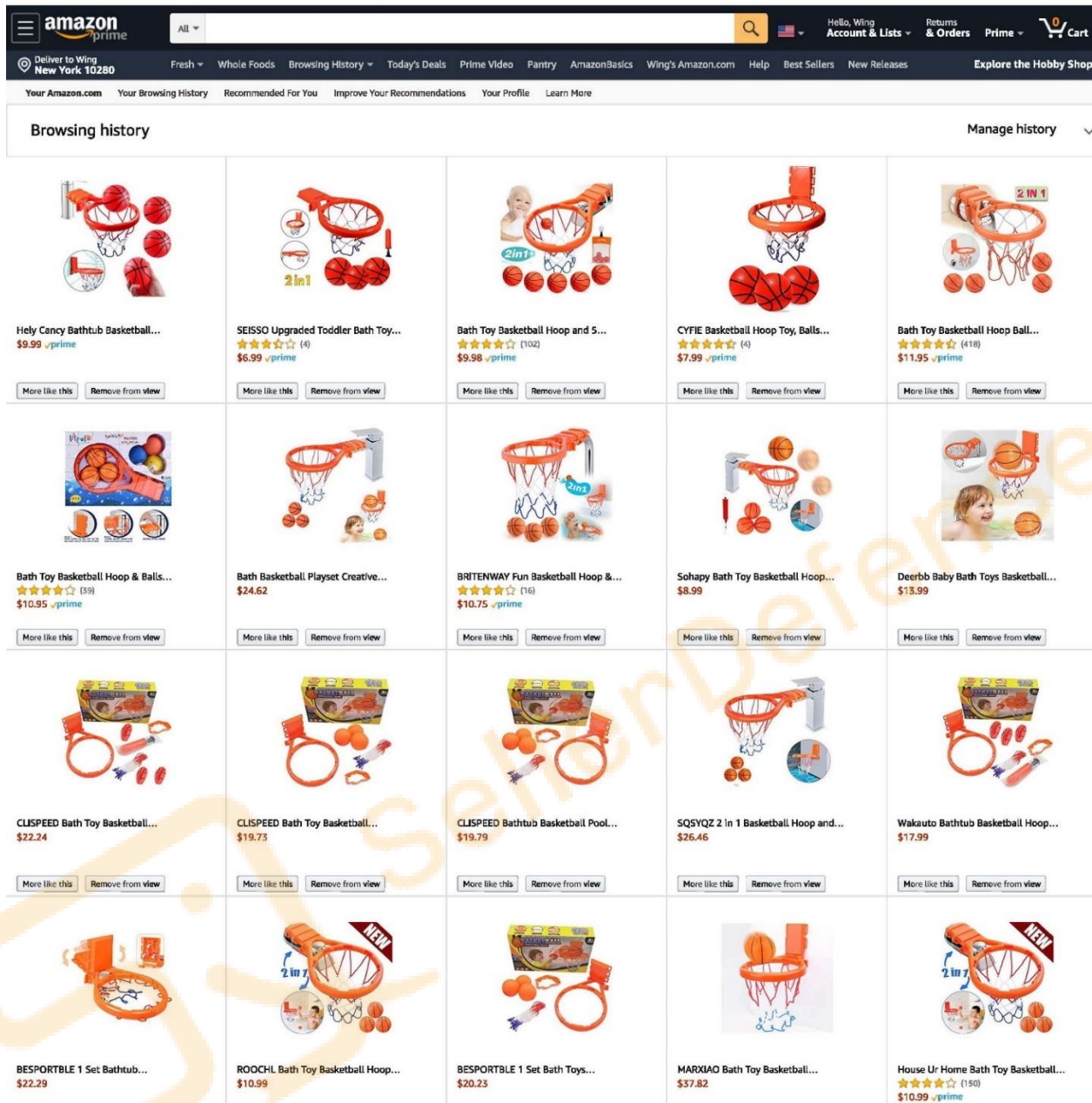
Plaintiff's toys containing these patented fasteners were very popular when they were first offered for sale because they addressed many of the major technical issues inherent in the designs of prior fasteners on the market. (*Id.* ¶¶ 14-21.)

More importantly, from a design perspective, Plaintiff's patented fasteners looked nothing like the prior designs in the marketplace, which used anything from grooves carved into the base of a toy, nylon strings, or suction cups that were either exposed or covered with a decorative mask. Examples of some of these prior art designs are shown below:

Prior Designs Sold in the Marketplace	
<p><b><i>Built-In Groove Design sold by Kidskit</i></b></p> 	<p><b><i>Suction Cup Design sold by Cyfie</i></b></p> 
<p><b><i>Suction Cups covered with Mask by Skip Hop</i></b></p> 	<p><b><i>String Design sold by WDDH</i></b></p> 

### III. Defendants' Infringing Activities.

Plaintiff's bathtub toys containing these fasteners were very popular when they were first launched. For example, from March 1, 2018 to February 28, 2019, Plaintiff sold 23,225 bathtub basketball toys resulting in approximately \$343,349.00 in annual sales. (*Id.* ¶ 21, 27 & Ex. D.) Because of their popularity however, infringers inevitably started appearing on Amazon beginning in February 2019, and have been appearing on Amazon.com on a regular basis. (*Id.* ¶ 22.) Excerpted below are only some of the infringing toys currently available on Amazon that Plaintiff's attorneys were able to locate on Amazon. (Declaration of Oleg A. Mestechkin ("Mestechkin ¶ \_\_") ¶¶ 3-4.)



Plaintiff's attorneys identified at least twenty-eight (28) sellers who sold and/or are selling toys containing Plaintiff's patented designs. The names of those sellers, the Amazon Standard Identification Numbers (ASINs) for their infringing toys, and images of the infringing toys from their Amazon pages are collected in Exhibit C.

A side-by-side comparison between the fasteners used in the bathtub basketball toys sold by those sellers and those used by Plaintiff shows that the fasteners are near duplicates in


appearance, and that those designs clearly infringe the '087 Patent. (Mestechkin ¶¶ 16-28.)

**Plaintiff's Patented Fastener:**



Defendants' Infringing Designs		
(1) BESPORTBLE 	(2) BRITENWAY 	(3) BYONEBYE 
(4) CLISPEED 	(5) CYFIE 	(6) DEERBB 
(7) FUNPA 	(8) GLOSSRISE 	(9) HOUSE UR HOME 
(10) LES YEU 	(11) LIBOBO TOYS 	(12) LIOOBO 
(13) LITTOLO 	(14) MARPPY 	(15) MARXIAO SHOP 
(16) NEPDOME 	(17) PANZISUN 	(18) RAINTOAD 
(19) ROOCHL 	(20) SEISSO 	(21) SQSYQZ 
(22) STONISHI 	(23) TOYANDONA 	(24) WAKAUTO 
(25) WE&ZHE 	(26) XISHEEP 	(27) 58BH 



Defendants' Infringing Designs		
(28) HELY CANCY 		

#### IV. Irreparable Harm to Plaintiff from Defendants' Infringement.

The impact of Defendants' infringing sales on Amazon has been devastating to Plaintiff's business. For example, for the year prior to any infringers entering the market (March 1, 2018 to February 28, 2019), Plaintiff sold 23,225 bathtub basketball toys containing its patented fasteners, resulting in approximately \$343,349.00 in annual sales. (Gillenwater ¶ 27.)

For the same 1-year period *after* infringers entered Amazon (March 1, 2019 to February 28, 2020) Plaintiff sold only 7,775 units, resulting in only \$106,784.00 in sales – a reduction in annual sales of 15450 Units (–67%) and revenue of \$236,565.00 (–69%). (*Id.* ¶ 28.)

Metric	3/1/18 - 2/28/19	3/1/19 - 2/28/20	Metric Change	% Change
<b>Units Sold</b>	23,225 Units	7,775 Units	–15450 Units	–67%
<b>Revenue Earned</b>	\$343,349.00	\$106,784.00	–\$236,565.00	–69%

Further, Plaintiff's sales of bathtub basketball toys with its patented fasteners has been steadily declining with the entry of more infringers on the market. For example, whereas before any infringers appeared on Amazon, Plaintiff was selling about 2000 toys per month, Plaintiff currently is selling only 268 units per month. (*Id.* ¶ 30.)

Even assuming no further decline in sales due to infringement, Plaintiff will, based on its current rate of 268 sales per month, sell only 3216 units per year and earn only \$32,127.00 in annual revenue (based on a sales price of \$9.99 that Plaintiff has had to reduce in order to compete with lower prices offered by most of the infringers). These figures would represent a decline in sales of 20,009 units (–86%) and in revenue of \$311,222.00 (–90%). (*Id.* ¶¶ 31-32.)

<b>Metric</b>	<b>Pre-Infringement Annual Sales (3/1/18 - 2/28/19)</b>	<b>Projected Annual Sales Based on May 2020 Sales</b>	<b>Metric Change</b>	<b>% Change</b>
<b>Units</b>	23,225 Units	3,216 Units	–20,009 Units	–86%
<b>Revenue</b>	\$343,349.00	\$32,127.00	–\$311,222.00	–90%

This loss of sales has reduced Plaintiff’s market share for bathtub basketball toy hoops by approximately nine percent (9%) in the bathtub basketball toy market (comprised of all bathtub basketball toy hoops regardless of fastener type). (*Id.* ¶¶ 37-38.)

Moreover, Plaintiff’s loss in sales and market share due to the Defendants’ sale of infringing products appears to be related, in part, to the sales prices offered by the Defendants. For example, Defendant Cyfie offers its infringing toys for \$7.59, Defendant Seisso offers its infringing toys for \$6.99, and Defendant Marppy offers its infringing toys for \$9.98. (*Id.* ¶ 40.)

Because Amazon is primarily an online retailer and consumers cannot normally physically view and inspect the products before making their purchase, the offer of these drastically lower prices is a powerful driver of sales to those merchants and away from other merchants who may be offering similar products at higher prices. (*Id.* ¶ 41.)

The presence of these infringers offering knockoffs of Plaintiff’s patented toys at prices that are anywhere from 33% to 50% lower than Plaintiff’s prices forced Plaintiff to reduce the price of its bathtub basketball toy hoops from \$14.95 to \$9.99 just in order to compete – a reduction of more than thirty-three percent (33%) of its original sales price. (*Id.* ¶ 42.)

Moreover, because Defendants’ bathtub toys and their fasteners are cheaper in quality than Plaintiff’s patented bathtub toys and fasteners, Plaintiff is concerned that consumers will mistakenly confuse Defendants’ infringing bathtub toys with Plaintiff’s bathtub toys and mistakenly believe that Plaintiff’s bathtub toys are of cheap quality because the fasteners in

Defendants' bathtub toys are indeed cheaper in quality than Plaintiff's bathtub toy fasteners. (*Id.* ¶¶ 45-47.) The creation of this negative marketplace impression will, no doubt, negatively impact the reputation of Plaintiff's company as a manufacturer of quality products. (*Id.* ¶ 48.)

Finally, Defendants' infringement has affected Plaintiff's long-term plans for growth. (*Id.* ¶ 49.) Plaintiff has built its reputation as a provider of toys for all age groups. (*Id.* ¶ 49.) Based on its experiences and customer research showing that its customers are typically busy parents with children in different age groups, Plaintiff has built its business around the one-stop shop concept. (*Id.* ¶ 50.)

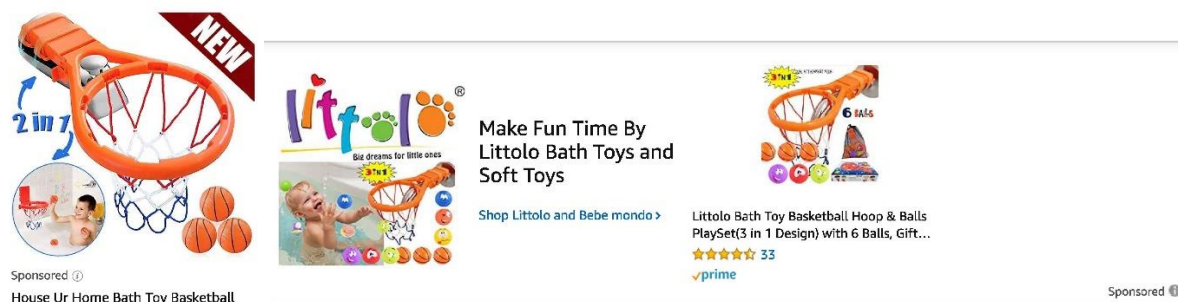
That concept works best when a particular merchant is the only provider of a unique item because unique items are often hot items which customers seek out. Once they find that item, it has been Plaintiff's experience that busy customers will remain on a website and round out their purchases with other items. (*Id.* ¶ 51.)

Without the benefit of a unique item, Plaintiff's plans to market itself as a one-stop shop has less potential and will force Plaintiff to have to rethink its long-term marketing and growth plans. (*Id.* ¶ 52.)

## **V. Defendants' Activities Are Directed to Customers in New York.**

There is little doubt that Defendants direct their infringing activities to residents of New York because they all operate online stores on Amazon that are available to customers in New York. For example, Plaintiff's attorneys were able from computers located in New York, to find Defendants' Amazon webpages offering infringing toys for sale. (Mestechkin ¶¶ 3-4.)

Further, Plaintiff's attorneys discovered in their searches from New York computers that some of these Defendants, including House Ur Home and Littolo, used Amazon's sponsored products advertisement program to promote their infringing toys. (*Id.* ¶ 7.)



Amazon’s sponsored product program allows a seller to display their products to consumers numerous times in display results even though, normally, their products would be featured only once in a list of search results.<sup>1</sup> Moreover, a seller is able to select a targeted state (or states) on which its search results will appear to be “sponsored”. Since Plaintiff’s attorneys were able (from New York computers) to see some of these Defendants’ products numerous times in sponsored search results, these Defendants specifically promoted their products to New York residents. (*Id.* ¶¶ 8-10.)

Lastly, Plaintiff’s attorneys were able to purchase infringing toys from computers in New York and have them shipped by Amazon to a New York address. (*Id.* ¶¶ 11-12.)

## VI. The Interrelation of Defendants’ Infringing Activities.

When Plaintiff compared the images of some of the infringing toys used on Defendants’ Amazon webpages, Plaintiff found that some of the images of the products were all the same, leading Plaintiff to suspect that perhaps the Defendants were in fact the same entity, or working together. (Mestechkin ¶ 6.) For example, the images used by Defendants Toyandona, Xisheep, Panzisun and Nepdome are the same. (*Id.*) The images used by Defendants Besportble, Clispeed, Deerbb, Glossrise, Raintoad, Stonishi, and Wakauto are the same. (*Id.*) The images used by

<sup>1</sup> See Amazon’s Sponsored Products page at <https://advertising.amazon.com/solutions/products/sponsored-products>.)



FunPa, Les Yeu, Libobo Toys and SQSYQZ are the same. (*Id.*)

To confirm this suspicion, Plaintiff purchased samples of Defendants' products from their Amazon stores and compared them side-by-side. (*Id.* ¶¶ 12-13.) The basketball hoops and the fastener devices for all of the toys obtained from Byonebye, Britenway, Libobo Toys, Littolo, Marppy, Cyfie and Besportble all appeared to be identical, including the shapes, colors, weight, and overall quality of the toys. (*Id.* ¶ 14.) There is thus a strong likelihood that these toys came from the same source, further confirming the suspicion that Defendants are part of the same enterprise and/or working together.

## **VII. Plaintiff's Efforts to Locate the Infringing Defendants.**

To prepare possible cease and desist letters to the twenty-eight (28) Defendants named in this action, Plaintiff and Plaintiff's attorneys attempted to identify Defendants' physical addresses by reviewing the information contained in Defendants' Amazon stores. (Mestechkin ¶ 29.) Those attempts were unsuccessful because Amazon does not require its sellers to identify their true legal names on their seller pages, nor does Amazon require that the seller provide addresses for consumers to make direct contact with the sellers. (*Id.* ¶ 30.)

Plaintiff's attorneys then conducted internet searches for these Defendants and were not able to find any contact information for these Defendants. (*Id.* ¶ 31.) At most, Plaintiff's attorneys were able to find these Defendants selling their infringing toys on other websites, such as Wamart.com, Target.com and eBay, but those websites also did not display the true legal names for the sellers or their contact information. (*Id.* ¶ 32.)

When Plaintiff's attorneys attempted to identify addresses by inspecting the return addresses for the packages in which the toys were shipped, the only return addresses that were listed were for Amazon Fulfillment Facilities in Kentucky and Nevada. (*Id.* ¶ 33.)



Plaintiff's attorneys then contacted Amazon to complain about the infringement of some of the Defendants here but received no feedback from Amazon whatsoever, including no information by which Plaintiff could contact the sellers directly. (*Id.* ¶¶ 33-34.)

The only feedback that Plaintiff's attorney received in response to their Amazon inquiry was from one of the sellers, Toyandona, directly, who promised to stop selling *their* infringing toys but never made their contact information available. (*Id.* ¶ 35.) Plaintiff strongly suspects that Toyandona is the same seller who also sells under the seller names Xisheep, Panzisun and Nepdome because of the similarity of the images used to sell their toys. (*Id.* ¶ 36.)

## ARGUMENT

Rule 65(b) of the Federal Rules of Civil Procedure provides that the Court may issue an *ex parte* temporary restraining order where immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. Fed. R. Civ. P. 65(b). Here, an *ex parte* temporary restraining order is appropriate to prevent ongoing irreparable harm because (a) the sheer number of infringers (28) and difficulty in locating any of the Defendants' contact information will make providing notice so time-consuming (if not impossible) as to render any injunctive relief, whenever it is eventually granted, moot, and (b) Defendants will simply open different Amazon seller accounts to sell their infringing toys and continue harming Plaintiff if placed on notice of this application. Many courts have recognized that civil actions against infringers present special challenges that justify proceeding on an *ex parte* basis. *See, e.g., In re Vuitton et Fils, S.A.*, 606 F.2d 1 (2d Cir. 1979)

(noting that *ex parte* restraining orders are appropriate where “giving the defendant notice of the application for an injunction could result in an inability to provide any relief at all”).<sup>2</sup> As such, Plaintiff requests that this Court issue the requested *ex parte* temporary restraining order.

#### **I. This Court May Exercise Personal Jurisdiction over Defendants.**

Before a court can enter a preliminary injunction against a litigant, personal jurisdiction over that party must be “clearly established.” *Weitzman v. Stein*, 897 F.2d 653, 658–659 (2d Cir. 1990). This court has personal jurisdiction over Defendants here because Defendants sell the accused infringing products to New York residents on the Amazon.com marketplace. It is well-settled that in “litigation arising under federal statutes that do not contain their own jurisdictional provisions, federal courts are to apply the personal jurisdiction rules of the forum state, provided that those rules are consistent with the requirements of due process.” *Penguin Group (USA) Inc. v. American Buddha*, 609 F.3d 30, 35 (2<sup>nd</sup> Cir. 2010). Here, the forum state is New York.

New York’s long-arm statute provides, in relevant part, that a court may exercise specific personal jurisdiction over a non-domiciliary who “transacts any business within the state or contracts anywhere to supply goods or services in the state.” CPLR Section 302 (a)(1). To establish personal jurisdiction under CPLR Section 302 (a)(1), a plaintiff must show that: (1) defendant purposefully availed himself of the privilege of doing business in the forum state such that the defendant could foresee being brought into court there; and, (2), plaintiff’s claim arises out of or is related to the defendant’s contacts with the forum state.” *Aqua Products, Inc. v. Smartpool, Inc.*, No. 04CV5492GBD, 2005 WL 1994013, at \*5 (S.D.N.Y. Aug. 18, 2005).

Where a defendant sells goods through storefronts on Amazon.com and these sales are

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<sup>2</sup> See also *Spin Master v. Alvy, et al.*, No. 19-cv-3452 (LGS) (S.D.N.Y. May 28, 2019), Dkt. 30; *JLM Couture, Inc. v. Aimibridal, et al.*, No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018); *Ideavillage Prods. Corp. v. Dongguan Opete Yoga Wear Mfr. Co., Ltd., et al.*, No. 17-cv-9099 (JMF), Dkt. 19 (S.D.N.Y. Nov. 27, 2017).

the basis of an infringement claim, courts in this Circuit have found that the requirements of CPLR Section 302 (a)(1) are sufficiently met to assert personal jurisdiction over the defendant. *See, e.g., Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co., LLC*, No. 15 Civ. 8459 (LGS), 2016 WL 3748480, at \*3 (S.D.N.Y. July 8, 2016) (finding “jurisdiction over Defendants” in trademark infringement case where “Complaint also alleges that Defendants sold goods that were shipped to New York via Amazon.com”).<sup>3</sup>

Here, Plaintiff provides sworn testimony that Defendants purposefully availed themselves of the privilege of doing business in New York by selling infringing toys through Amazon.com that customers in New York can purchase and have delivered to addresses in New York. For example, Plaintiff provides sworn testimony that its attorneys were able from computers located in New York to find Defendants’ infringing products offered for sale on Amazon and that some of these search results were specifically promoted by Defendants to Plaintiff’s attorneys in New York through Amazon’s Sponsored Products Program. (Mestechkin ¶¶ 3-5.) Plaintiff provides sworn testimony that its attorneys were able from computers in New York to purchase Defendants’ accused products on Amazon and have those products shipped to their offices in New York. (*Id.* ¶¶ 12-13.) Plaintiff has, therefore, established that Defendants have purposefully availed themselves of the privilege of doing business in New York.

To complete its showing on personal jurisdiction, Plaintiff need only show that its claims arise out of this conduct by Defendants. To that end, Plaintiff alleges in its Complaint that its claim for patent infringement arises from Defendants’ sales and marketing of the toys that it is

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<sup>3</sup> See also *EnviroCare Techs., LLC v. Simanovsky*, No. 11-CV-3458, 2012 WL 2001443, at \*3 (E.D.N.Y. June 4, 2012) (concluding that jurisdiction existed where defendants in infringement case sold “allegedly infringing goods ... online through [their] Amazon storefront and the goods were shipped to New York by Amazon”); *Leroi, Inc. v. Csc3c, Inc.*, No. 5:15-CV-0565 (GTS/DEP), 2016 WL 4997228, at \*5-7 (N.D.N.Y. Sept. 19, 2016) (same).

selling on Amazon to these same residents of New York. (Compl. ¶¶ 26-28, 48-51.) Thus, Plaintiff has established personal jurisdiction over Defendants based on their marketing and sales of infringing toys to New York residents on Amazon.com.

## **II. Plaintiff Can Establish Its Entitlement to a Temporary Restraining Order.**

The standard for granting a temporary restraining order and a preliminary injunction are identical. *See, e.g. Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. New York Shipping Ass'n, Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992). To obtain a TRO or a preliminary injunction, a movant “must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that [preliminary relief] is in the public interest.” *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018).

### **A. Plaintiff Will Likely Succeed on Its Patent Infringement Claim.**

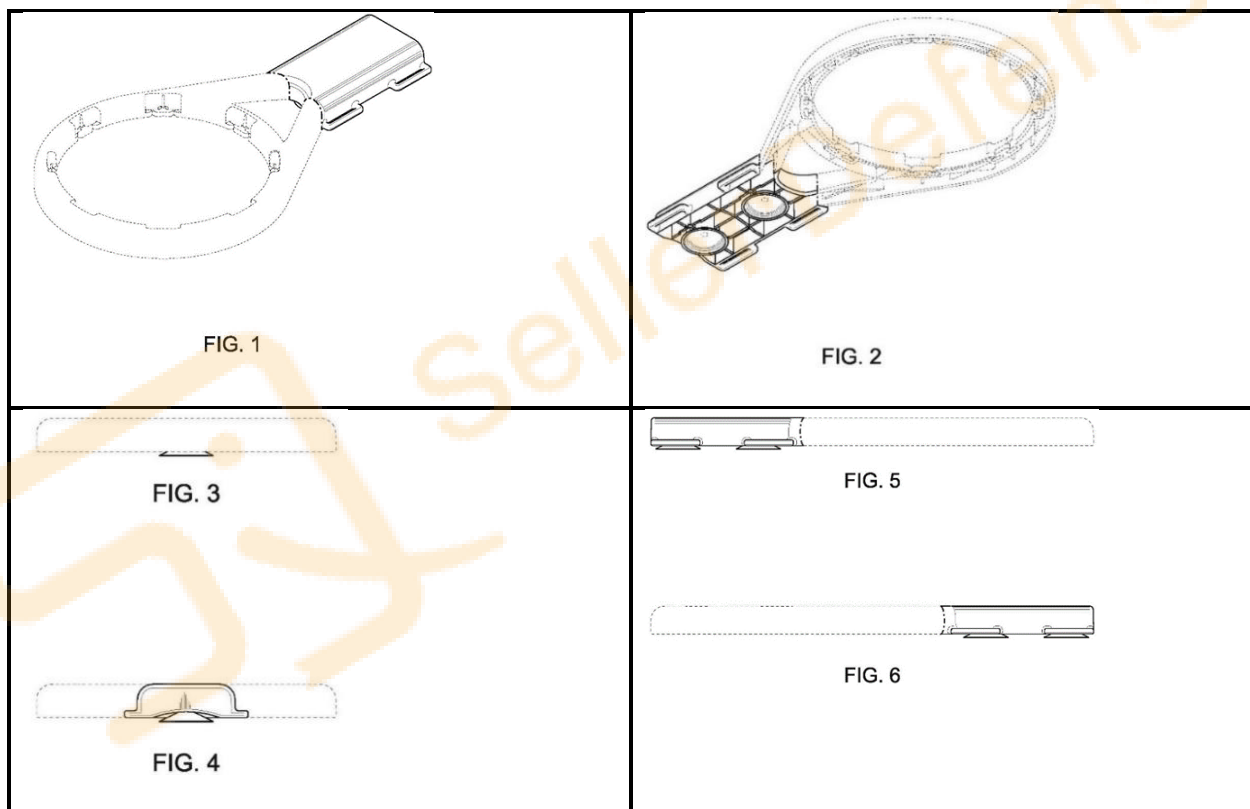
“Determining design patent infringement involves two steps.” *HR U.S. LLC v. Mizco Intern., Inc.*, No. CV-07-2394 (DGT)(JO), 2009 WL 890550, at \*9 (E.D.N.Y. Mar. 31, 2009) (citing *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1577 (Fed. Cir. 1995)).

First, the Court must construe the design patent's claim. *Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277 (Fed. Cir. 2002). “A design patent's claim is limited to what is shown in the application drawings.” *HR U.S. LLC*, 2009 WL 890550, at \*9 (citations omitted). Courts need not attempt to provide a detailed verbal description of the claimed design, since the illustration of the design is its own best description. *See Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008).

Second, the Court must compare the claim as properly construed with the accused design to determine whether they are “substantially the same.” *See Elmer*, 67 F.3d at 1577. The standard for determining design patent infringement is whether “an ordinary observer, familiar with the

prior art designs, would be deceived into believing that the accused product is the same as the patented design.” *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1295 (Fed. Cir. 2010).

Here, the '087 Patent needs little construction. (Mestechkin ¶¶ 20-21.) The figures in the '087 Patent disclose designs for device that fastens a toy, for example, a bathtub basket toy hoop, to any standard bathroom fixture. The patented fastener is comprised of a rectangular panel that approximates the shape of the top of a standard bathtub faucet. The panel also has small rectangular rings placed on the side of the panel through which straps can be inserted and wrapped around the faucet. Below are images disclosed in the Patent (*see* Ex. A.)



A comparison between the patented designs and the accused designs pursuant to the ordinary observer test, and in light of the prior art designs, leaves little doubt that the patented and accused designs are substantially the same and that Defendants' designs infringe.

Below are images of the prior art designs, which must be taken into account when

determining the similarity of Plaintiff's patented designs with Defendants' infringing designs:

Prior Designs Sold in the Marketplace	
<p><b><i>Built-In Groove Design sold by Kidskit</i></b></p> 	<p><b><i>Suction Cup Design sold by Cyfie</i></b></p> 
<p><b><i>Suction Cups covered with Mask sold Skip Hop</i></b></p> 	<p><b><i>String Design sold by WDDH</i></b></p> 

Taking these prior designs into account when comparing Plaintiff's patented designs with Defendants' infringing designs leads to the clear conclusion that "an ordinary observer could easily confuse" Plaintiff's designs with Defendants' designs, and *vice versa*. *Jack Schwartz Shoes, Inc. v. Skechers, U.S.A., Inc.*, 233 F. Supp. 2d 512, 514 (S.D.N.Y. 2002).<sup>4</sup>

<sup>4</sup> See also *Catalina Lighting*, 295 F.3d at 1287 (jury properly found that appellant's lamp was "substantially the same" as patented lamp and thus met "ordinary observer" test); *Etna Prods. Co., Inc. v. Q Mktg. Group, Ltd.*, No. 03-3805, 2004 WL 1769794, at \*9 (S.D.N.Y. Aug. 4, 2004) ("Simply looking at the two mirrors reveals that the [defendant's] [m]irror is a virtual duplicate of the design depicted in the [plaintiff's] patent.")



**Plaintiff's Patented Fastener:**



Defendants' Infringing Designs		
(1) BESPORTBLE 	(2) BRITENWAY 	(3) BYONEBYE 
(4) CLISPEED 	(5) CYFIE 	(6) DEERBB 
(7) FUNPA 	(8) GLOSSRISE 	(9) HOUSE UR HOME 
(10) LES YEU 	(11) LIBOBO TOYS 	(12) LIOOBO 
(13) LITTOLO 	(14) MARPPY 	(15) MARXIAO SHOP 
(16) NEPDOME 	(17) PANZISUN 	(18) RAINTOAD 
(19) ROOCHL 	(20) SEISSO 	(21) SQSYQZ 
(22) STONISHI 	(23) TOYANDONA 	(24) WAKAUTO 
(25) WE&ZHE 	(26) XISHEEP 	(27) 58BH 



Thus, there is no serious question that Plaintiff will be able to succeed on the merits of its patent infringement claim. (Mestechkin ¶¶ 16-28.)

B. There Is No Adequate Remedy at Law and Plaintiff Will Suffer Irreparable Harm in the Absence of Preliminary Relief.

As discussed in the declaration of Plaintiff's President, the damages to Plaintiff's business "has been devastating". (Gillenwater ¶ 27.) For example, Plaintiff has lost significant market share (*id.* ¶¶ 37-38), Plaintiff has had to lower the prices on its products to compete that it may never be able to restore (*id.* ¶¶ 39-44), Plaintiff's reputation has been harmed by association with Defendants' toys, which are of inferior quality (*id.* ¶¶ 45-48), and Plaintiff has had to amend its business plans because those plans were dependent on Plaintiff being the exclusive provider of toys with its patented fastener (*id.* ¶¶ 49-52). As the Federal Circuit has held "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm." *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (citations omitted). Thus, Plaintiff has established irreparable harm.

C. The Balancing of Harms Tips in Plaintiff's Favor.

The Federal Circuit has stated that the fact that an injunction might harm an infringer by, for example, putting an alleged infringer out of business "cannot justify denial of that injunction." *Windsurfing Int'l Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986). Courts in this Circuit have also explained that "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). Given the likelihood of irreparable harm to Plaintiff, the balance of equities here clearly supports an injunction even if Defendants could assert arguments that their businesses would be harmed (which they cannot).

D. Issuance of the Injunction Is in the Public Interest.

In patent infringement cases, there is a “strong public policy favoring the enforcement of patent rights.” *See PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996). However, “the focus of the district court’s public interest analysis should be whether there exists some critical public interest that would be injured by the grant of preliminary relief.” *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1458 (Fed. Cir. 1988).

The mere fact that the allegedly infringing product may offer some benefit to consumers, without more, is not a “critical public interest” that precludes issuance of a preliminary injunction. *Blackberry Limited v. Typo Products LLC*, No. 14–cv–0002, 2014 WL 1318689, at \*13 (N.D. Cal. Mar. 28, 2014).

Moreover, if that were a defendant’s justification, the availability of the Plaintiff’s patented product would more than protect the public’s interest in having the accused products available to them. Thus, the public interest in protecting valid patents outweighs any purported benefit to consumers by having the availability of the infringing product. *See, e.g., Blackberry*, 2014 WL 1318689, at \*13.

**III. Entry of a TRO Without Notice is Appropriate.**

Rule 65(b) of the Federal Rules of Civil Procedure provides that a court may issue a temporary restraining order *without notice* where facts show that the movant will suffer immediate and irreparable injury, loss, or damage before the adverse party can be heard in opposition. *See, e.g., In re Vuitton et Fils, S.A.*, 606 F.2d 1 (2d Cir. 1979).

Such a situation could exist where a defendant is likely to destroy or move infringing goods prior to a hearing. *See Century Home Entertainment, Inc. v. Laser Beat, Inc.*, 859 F. Supp. 636, 638 (E.D.N.Y. 1994) (“Based upon affidavits and a memorandum of law submitted by Plaintiff, this Court found that Defendants were in possession of illegally made copies of

Plaintiff's videocassettes and that there was good cause to be concerned that tapes might be destroyed or moved and that copying would continue.”).

Another situation could exist where it would be difficult (or impossible) to identify the names and addresses of the Defendants in time to provide them with notice of a hearing. *See, e.g., Talavera Hair Products, Inc. v. Taizhou Yunsung Electrical Appliance Co., Ltd.*, No. 18-CV-823-JLS (JLB), 2018 WL 3413866, at \*3 (S.D. Cal. May 10, 2018) (granting *ex parte* temporary restraining order in part where the “Court agrees that it is impossible for Plaintiff to provide notice to those Defendants for whom it does not have any contact information”).

Here, both situations exist to justify the need for *ex parte* relief. First, Plaintiff has made diligent efforts to locate the true legal names and addresses for these Defendants to try and serve them with notice, including reviewing Defendants' Amazon webpages, researching on the internet, inspecting the product packaging and return labels of the infringing toys shipped by the Defendants, and asking Amazon directly – all to no avail. (Mestechkin ¶¶ 29-35.)

Meanwhile, Plaintiff continues to suffer ongoing harm to its sales, market share, reputation, and business plans. (Gillenwater ¶¶ 27-52.) If Plaintiff is required to wait until all of the Defendants are identified and served – which could take many months and may not even be possible without discovery – Plaintiff will no doubt suffer harm from which it may never recover. And, this does not even account for the real possibility that other infringers will enter the market pending this process, which will necessitate additional efforts to notify these new defendants, and endless amendments of the pleadings to add these additional defendants.

Therefore, *ex parte* relief is appropriate for these reasons alone.<sup>5</sup>

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<sup>5</sup> As will be discussed below, in order to protect the due process rights of Defendants by entry of an *ex parte* order, Plaintiff is also requesting immediate discovery from Amazon to provide contact information for the named Defendants, including email addresses, and to allow Plaintiff to serve Defendants by email to provide faster and more certain notice of a hearing.

Second, there is a strong likelihood that Defendants will move their infringing inventory to new storefronts on Amazon under different names, or to other websites, if they are given advanced notice of any hearing. This is because Amazon allows sellers to open numerous accounts to sell the same goods, meaning that any seller can simply open new accounts to sell infringing toys if an existing account is enjoined, or move their operations to another existing account which has no apparent connection to the enjoined account.

In fact, many of the Defendants here appear to have multiple seller accounts on Amazon on which they sell their infringing toys. (See Mestechkin ¶¶ 6-7.) This means that if the Defendants here are given advanced warning of a hearing, they could easily close down the accused seller accounts and move their operations to a Defendant seller account which has not yet been notified or to a completely new account that is set up after notice is received.

As discussed in the declaration of Oleg Mestechkin, an attorney who has been involved in dozens of cases involving internet infringers, the main reason for having multiple accounts is to avoid being shut down if one seller is sued because that seller could just divert its operations to the other sellers.<sup>6</sup> (*Id.* ¶ 6.) Such a result would render a hearing fruitless since it would stop only the noticed Defendants and not the new sellers who have replaced the noticed Defendants. See, *In re Vuitton*, 606 F.2d 1; *Century Home*, 859 F. Supp. at 638. Thus, *ex parte* relief is proper on this grounds as well. See, e.g., *Spin Master v. Alvy, et al.*, No. 19-cv-3452 (LGS) (S.D.N.Y. May 28, 2019), Dkt. 30.<sup>7</sup>

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<sup>6</sup> When moving for *ex parte* relief, “Plaintiff need not show that a particular Defendant would not adhere to a TRO but rather only that someone like the Defendant would be likely to hide or destroy the evidence of his infringing activity.” *Century*, 859 F. Supp. at 638-39 (E.D.N.Y. 1994), citing *In re Vuitton et Fils S.A.*, 606 F.2d 1; *First Technology Safety Systems, Inc. v. Depinet*, 11 F. 3d 641 (6th Cir. 1993).

<sup>7</sup> See also *JLM Couture, Inc. v. Aimibridal, et al.*, No. 18-cv-1565-JMF, Dkt. 18 (S.D.N.Y. Feb. 21, 2018); *Ideavillage Prods. 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).

#### **IV. The Equitable Relief Sought Is Appropriate.**

##### **A. A Temporary Restraining Order Immediately Enjoining Defendants' Infringement of Plaintiff's Patent Is Appropriate.**

Plaintiff requests a temporary injunction requiring the Defendants and Amazon to immediately cease all sales, offers to sell, marketing and advertising of the accused toys which infringe Plaintiff's '087 Patent in connection with Defendants' Amazon.com stores. Such relief is necessary to stop the ongoing, irreparable harm to Plaintiff and to prevent the Defendants from continuing to benefit from their unauthorized use of the designs patented under the '087 Patent. Courts in this Circuit have not hesitated to issue such orders temporarily enjoining infringers and the online marketplaces on which they sell, including Amazon. *See, e.g., Cisco Systems, Inc. v. Shenzhen Tianheng Networks Co.*, No. 19-CV-06609, 2019 WL 8584614, at \*3 (E.D.N.Y. Nov. 29, 2019) ("Immediately upon receipt of this Order . . . Amazon . . . shall disable and be restrained from providing any services . . . in relation to any Cisco-marked product")

##### **B. Plaintiff Is Entitled to Expedited Discovery.**

The Supreme Court has held that "federal courts have the power to order, at their discretion, the discovery of facts necessary to ascertain their competency to entertain the merits." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Thus, a district court has wide latitude in determining whether to grant a party's request for discovery. *See Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985) ("a district court has considerable latitude in determining the scope of discovery").

Plaintiff respectfully requests expedited discovery on two primary topics. First, Plaintiff seeks discovery from Amazon to disclose the contact information of the Defendant sellers, including their email addresses. Plaintiff seeks discovery on this topic in order to provide notice to Defendants of this application. In particular, Plaintiff seeks discovery of email addresses in

conjunction with its request under Rule 4(e) to serve Defendants by email. As discussed further below, email service is the fastest way to provide notice to Defendants and is considered to be reliable enough to comport with due process.

Second, Plaintiff seeks discovery from all Defendants and Amazon to disclose records relating to Defendants' manufacture and sale of the infringing products to allow Plaintiff to join additional parties who may be assisting Defendants in their infringement and allow Plaintiff the ability to locate any assets derived from the sale of infringing toys. This discovery is limited to include only what is essential to prevent further irreparable harm. Under Federal Rule of Civil Procedure 65(d)(2)(C), this Court has the power to bind any third party who is in active concert with the Defendants that is given notice of the order to provide expedited discovery in this action. Fed. R. Civ. P. 65(d)(2)(C). As Defendants appear to be engaging in many deceptive practices in hiding their identities and accounts, Plaintiff's requested TRO may have little meaningful effect if the parties which assist Defendants are also not identified so that they can be eventually brought before this Court for appropriate relief. Thus, Plaintiff respectfully requests that expedited discovery be granted.

C. Service of Process by E-mail Is Warranted.

Pursuant to Federal Rule of Civil Procedure 4(f)(3), Plaintiff requests this Court's authorization to serve the Complaint, the Temporary Restraining Order, and other relevant documents by e-mail to the e-mail addresses identified by Amazon as being associated with the Defendants. Plaintiff submits that providing notice via e-mail is reasonably calculated under all circumstances to apprise Defendants of the pendency of the action and afford them the opportunity to present their objections.

Federal Rule of Civil Procedure 4(f)(3) allows Courts to authorize service of process by any means not prohibited by international agreement as the Court directs. *Rio Props., Inc. v. Rio*

*Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002); *see also S.E.C. v. Anticevic*, No. 05-CV-6991 (KMW), 2009 WL 361739, at \*3 (S.D.N.Y. Feb. 13, 2009) (same). The Ninth Circuit in *Rio Properties* held, “without hesitation,” that e-mail service of an online business defendant “was constitutionally acceptable.” *Id.* at 1017. The Court reached this conclusion, in part, because the defendant conducted its business over the Internet, used e-mail regularly in its business, and encouraged parties to contact it via e-mail. *Id.*

Similarly, a number of Courts, including the District Courts in New York, have held that alternate forms of service pursuant to Rule 4(f)(3), including e-mail service, are appropriate and may be the only means of effecting service of process in these situations. *See e.g., Dama S.P.A. v. Doe*, No. 15-cv-4528 (VM), 2015 U.S. Dist. LEXIS 178076, at \*6-7 (S.D.N.Y. June 12, 2015); *AW Licensing, LLC v. Bao*, No. 15-CV-1373, 2015 U.S. Dist. LEXIS 177101, at \*18-19 (S.D.N.Y. April 1, 2015).

Rule 4 does not require that a party attempt service of process by other methods enumerated in Rule 4(f) before petitioning the court for alternative relief under Rule 4(f)(3). *Rio Props.*, 284 F.3d at 1014-15. As the *Rio Properties* Court explained, Rule 4(f) does not create a hierarchy of preferred methods of service of process. *Id.* at 1014. To the contrary, the plain language of the Rule requires only that service be directed by the court and not be prohibited by international agreement. There are no other limitations or requirements. *Id.* Alternative service under Rule 4(f)(3) is neither a “last resort” nor “extraordinary relief,” but is rather one means among several by which an international defendant may be served. *Id.*; *see also Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329, 330 (S.D.N.Y. 2015). As such, this Court may allow Plaintiff to serve the defendants via electronic publication and/or e-mail.

#### **V. Plaintiff’s Request For Five Hundred Dollar Security Bond Is Proper.**

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 that a security bond of \$500.00 is proper in this case because of the certainty of Plaintiff’s infringement claims, the devastating damage the accused infringers have caused to Plaintiff’s business and revenues, the fact that Plaintiff has not sought any kind of asset restraint to interfere with Defendants’ sale of other products on Amazon, the fact that Plaintiff will more than likely have to file additional lawsuits or motions because some of the accused infringers will likely transfer their operations to new Amazon storefronts, and Plaintiff is taking all possible measures to provide notice to Defendants as soon as possible so they can be heard on this application. *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.”).

### CONCLUSION

Plaintiff’s business, its bathtub basketball toys with their patented fasteners, and consumers are being irreparably harmed. Without entry of the requested relief, the sale of infringing bathtub basketball toys will continue to cause Plaintiff unrecoverable financial losses, loss of market share, and harm to reputation. Without entry of the requested relief, the sale of infringing bathtub basketball toys will lead prospective purchasers and others to believe that Defendants’ products have been manufactured by or originate from Plaintiff. Therefore, entry of an *ex parte* order is necessary to protect Plaintiff’s design patent, to prevent further harm to Plaintiff and the consuming public, and to preserve the *status quo*. In view of the foregoing and consistent with previous similar cases, Plaintiff respectfully requests that this Court enter a Temporary Restraining Order in the form submitted herewith and set a status hearing before the expiration of the Temporary Restraining Order at which hearing Plaintiff intends to present a motion for preliminary injunction.



Dated: July 2, 2020  
Brooklyn, New York

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on July 6, 2019, I served the foregoing document by hand-delivery upon the Clerk of the Court.



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