

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BALA BANGLES, INC.,

PLAINTIFF,

V.

THE PARTNERSHIPS AND UNINCORPORATED
ASSOCIATIONS IDENTIFIED ON SCHEDULE A,

DEFENDANTS.

CASE No.: 23-cv-16721

JUDGE FRANKLIN U. VALDERRAMA

MAGISTRATE JUDGE KERI L. HOLLEB HOTALING

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S *EX PARTE* MOTION FOR
ENTRY OF A TEMPORARY RESTRAINING ORDER, INCLUDING TEMPORARY
INJUNCTION, TEMPORARY ASSET RESTRAINT, AND EXPEDITED DISCOVERY**

Plaintiff, Bala Bangles, Inc. ("Bala" or "Plaintiff"), submits this Memorandum in support of its *Ex Parte* Motion for Entry of a Temporary Restraining Order, including a temporary injunction, a temporary asset restraint, and expedited discovery ("TRO").

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MEMORANDUM OF LAW

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff is requesting temporary *ex parte* relief based on an action for patent infringement, trademark infringement, counterfeiting, false designation of origin, violation of the Illinois Uniform Deceptive Trade Practices Act (UDTPA), and copyright infringement, against the defendants identified on Schedule A to the Complaint (the “Defendants”). As alleged in the Complaint, Defendants operate fully interactive, ecommerce Internet stores under the online marketplace accounts listed on Schedule A (the “Seller Aliases” or “Defendant Internet Stores”), using infringing and counterfeit versions of Bala’s federally registered patent, trademarks, and copyrights¹ (respectively – “Bala Design,” “Bala Trademarks” and “Bala Copyrights” – collectively, “Bala Intellectual Property (IP)”), by offering for sale and/or selling unauthorized, unlicensed, and counterfeit products (the “Counterfeit Bala Products” or “Counterfeit Products”). Defendants conduct a sophisticated counterfeiting operation targeting Illinois residents by operating ecommerce stores using one or more Seller Aliases, through which Illinois residents can purchase Counterfeit Bala Products. A logical relationship exists between the Defendant Internet Stores, established by uniquely shared identifiers, such as design elements and similarities of the Counterfeit Products offered for sale, suggesting that Defendants’ counterfeiting operation arises out of the same transaction, occurrence, or series of transactions or occurrences.

Plaintiff is forced to file this action to combat Defendants’ counterfeiting of its Bala Intellectual Property, as well as to protect unknowing consumers from purchasing Counterfeit Bala Products, and therefore respectfully requests that this Court issue an *ex parte* Temporary Restraining Order (“TRO”), which would: (1) temporarily restrain Defendants’ continued manufacture, distribution, offering for sale, and sale of Counterfeit Bala Products; (2) temporarily restrain Defendants’ assets to preserve Plaintiff’s right to an equitable accounting; and, (3) authorize expedited discovery allowing Plaintiff to inspect Defendants’ records

¹ True and correct copies of Plaintiff’s federally registered Patent, Trademarks, and Copyrights and were attached to the Complaint as Exhibits 1, 2, and 3, respectively.

relating to the Counterfeit Bala Products and Defendants' financial accounts.

II. STATEMENT OF FACTS

A. Plaintiff's Intellectual Property and Products

Founded in 2017, Plaintiff, Bala Bangles, Inc., is an innovator of fitness accessory products which have gained incredible popularity among consumers and the public since the brand launched. *See* Declaration of Maximilian Kislevitz ("Kislevitz Decl.") at ¶ 12. After appearing on the television show Shark Tank, brand recognition and brand awareness have soared, increasing exponentially year after year. *Id.* at ¶ 4. Bala has been featured in a variety of media outlets such as Vogue, NBC News, Forbes, CNN, Cosmopolitan, Health, and Shape, to name a few. Bala is the creator, marketer, licensor, and seller of all authorized products utilizing the Bala Design, Trademark, and Copyrights (referred to herein as the "Bala Products") internationally. *Id.* at ¶ 3. Bala Products can be purchased online at Bala ecommerce stores as well as in thousands of popular retailers, including Nordstrom, Saks, Dick's Sporting Goods, Pure Barre, Anthropologie, Urban Outfitters, and Equinox. *Id.* at ¶ 5.

Bala is the owner of the federally registered Bala Design, Bala Trademarks, and Bala Copyrights. *Id.* at ¶ 6. The Bala Products utilize the Bala Design and the Bala Trademarks, which: are inherently distinctive; identify products as merchandise originating from Bala; have been used exclusively and continuously; have never been abandoned; are valid, subsisting, and in full force and effect; and, qualify as famous marks under 15 U.S.C. § 1125(c)(1). *Id.* at ¶ 9. The Bala Copyrights cover numerous Bala Product images used for the marketing and promotion of Bala Products. *Id.* at ¶ 10. Bala has allotted hundreds of thousands of dollars monthly to the marketing and advertising efforts related to Bala Products and the Bala Intellectual Property. *Id.* at ¶ 13. Overall, Bala has expended substantial time, money, and resources developing and promoting the Bala Design, Trademarks, and Copyrights, which has resulted in millions of dollars in sales associated with Bala Products. *Id.* As a result, the Bala IP is widely recognized, and exclusively associated by consumers and the public as being products sourced from Plaintiff. *Id.* Bala has ensured that products bearing its IP are

manufactured to the highest quality standards. *Id.* As such, the recognition and goodwill associated with the brand is of incalculable and inestimable value to Bala. *Id.*

B. Defendants' Unlawful Activities

Significant counterfeiting has stemmed from the success of the Bala brand. *Id.* at ¶ 14. As a result, Bala implemented an anti-counterfeiting program that investigates suspicious ecommerce activity and online marketplace listings identified through proactive Internet sweeps. *Id.* Bala encountered numerous Defendant Internet Stores offering for sale, selling, and importing Counterfeit Bala Products. *Id.* Defendants are not authorized by Bala to use the Bala IP. *Id.* Furthermore, Defendants operate legitimate-looking Internet stores which bear remarkable similarities and utilize nearly-identical evasion techniques to conceal their identities and avoid enforcement efforts—utilizing online chat platforms and groups, and monitoring intellectual property infringement litigation alert websites—which all together establish a logical and interrelated relationship among the Defendants. *Id.* at ¶¶ 19-21.

i. Defendants Operate Similar Legitimate-Looking Internet Stores.

The online marketplace accounts and product listings of Defendants are designed to facilitate counterfeit sales by giving the impression to consumers that they are authorized retailers featuring genuine Bala Products. *Id.* at ¶ 16. The Defendant Internet Stores are designed to appear sophisticated and give the impression of authenticity, by: (1) accepting payment in U.S. dollars; (2) incorporating trustworthy features; (3) implementing security solutions consumers associate with authorized retailers, and (4) including authentic images and design elements. *Id.* Other notable common features include: images of product listings; stores' layout and appearance; listing descriptions; naming conventions for store names, listing names, and product titles; metadata; domain redirection and domain name registrations; shipping, payment, and check-out methods; general absence of identifying or contact information; and similarly priced goods. *Id.* at ¶ 19.

ii. Defendants Employ Various Tactics to Conceal Their Identities.

Defendants utilize evasive tactics to conceal their identities, including, among other things: 1) using multiple aliases and addresses to register online marketplace accounts in order to avoid detection, while operating a massive network of Internet Stores dealing in counterfeit products; 2) using privacy services that conceal their identities and contact information; 3) registering new domain names/online marketplace accounts under different aliases, abandoning accounts named in lawsuits; 4) transferring hosting of their websites to rogue servers, located outside the U.S., removing themselves from the reach of the Court, frustrating enforcement efforts of IP rights-holders; and 5) retaining anonymity by shipping counterfeit products in small quantities via international mail without a return address and/or using false information, thereby minimizing detection by U.S. Customs and Border Protection. *Id.* at ¶¶ 20-21.

Furthermore, counterfeiters such as Defendants, frequently operate multiple payment processor and merchant accounts, including but not limited to one or more financial accounts operated through e-commerce platforms and payment processors such as PayPal, Inc., Payoneer, Inc., Stripe, Inc., LianLian Global Payments, ContextLogic d/b/a Wish.com, Amazon Payments, Inc., eBay, Inc., Etsy, Inc., DHGate, Inc., Shein, WhaleCo, Inc. d/b/a Temu, Joybuy, Walmart, Inc., and Alipay US, Inc. (collectively referred to herein as “Third-Party Payment Providers”), hiding behind layers of payment gateways, thereby allowing them to persist in their illegal operation without detection, and despite Plaintiff’s best enforcement efforts. *Id.* at ¶ 22. Upon information and belief, Defendants regularly move funds obtained by their infringement of Plaintiff’s IP, from the accounts associated with their online marketplaces – which are held by Third-Party Payment Providers – to offshore bank accounts, which fall outside the jurisdiction of this Court. *Id.*

III. ARGUMENT

Defendants’ purposeful and unlawful conduct is causing and will continue to cause irreparable harm to Plaintiff’s reputation and the goodwill associated with the Bala IP. 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 can be heard in

opposition. Fed. R. Civ. P. 65(b). Entry of a TRO is appropriate, as it would prevent ongoing injury to Plaintiff stemming from Defendants' wrongful use of the Bala Design, Trademark, and Copyrights and preserve the status quo until such time as a hearing can be held.

In the absence of an *ex parte* TRO, Defendants likely will register new online marketplace accounts under new aliases, modify registration data and content, change hosts, redirect traffic to other websites in their control, and move any assets from U.S.-based bank accounts to offshore bank accounts, outside the jurisdiction of this Court. Kislevitz Decl. at ¶ 22. Courts have recognized that civil actions against counterfeiters present special challenges that justify proceeding on an *ex parte* basis. *See Columbia Pictures Indus., Inc. v. Jasso*, 927 F. Supp. 1075, 1077 (N.D. Ill. 1996) (observing that "proceedings against those who deliberately traffic in infringing merchandise are often useless if notice is given to the infringers"). As such, Plaintiff respectfully requests that this Court issue the requested *ex parte* temporary restraining order.

This Court has original subject matter jurisdiction over these claims pursuant to provisions of the Patent Act, 35 U.S.C. § 1, *et seq.*, the Lanham Act, 15 U.S.C. § 1051, *et seq.*, 28 U.S.C. §§ 1338(a)-(b), and 28 U.S.C. § 1331; and, has jurisdiction over the claims in this action that arise under the laws of the State of Illinois pursuant to 28 U.S.C. § 1367(a). Venue is proper under 28 U.S.C. § 1391. This Court may also properly exercise personal jurisdiction over Defendants since they directly target business activities toward consumers in this Judicial District by operating Internet Stores, which directly offer for sale, and provide a platform through which Illinois residents can purchase Counterfeit Bala Products. *Christian Dior Couture, S.A. v. Lei Liu et al.*, 2015 U.S. Dist. LEXIS 158225, at *6 (N.D. Ill. Nov. 17, 2015) (personal jurisdiction proper over defendants offering to sell alleged infringing product to United States residents, including Illinois; no actual sale required).

A. Standard for Temporary Restraining Order and Preliminary Injunction

District Courts within this Circuit hold that the standard for granting a TRO and the standard for granting a preliminary injunction are identical. *See, e.g. Charter Nat'l Bank & Trust v. Charter One Fin., Inc.*, 2001 WL 527404, *1 (N.D. Ill. May 15, 2001) (citation omitted). A party seeking to obtain a preliminary injunction must demonstrate: (1) that its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and, (3) that it will suffer irreparable harm if the injunction is not granted. *See Ty, Inc. v. The Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). The Trademark Modernization Act of 2020 codified that a Plaintiff seeking an injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of infringement or a likelihood of success on the merits. Trademark Modernization Act of 2020, H.R. 6166A; PL 116-260, December 27, 2020, 134 Stat 1182. Therefore, the moving party need only show that its case has a likelihood of success on the merits and that no adequate remedy at law exists.

If the Court is satisfied that these conditions have been met, it must consider the harm the nonmoving party will suffer if preliminary relief is granted, as well as the public interest. The Court then weighs all of these factors, “sitting as would a chancellor in equity,” when deciding whether to grant the injunction. *Id.* This process involves engaging in what the Court has deemed “the sliding scale approach” – the more likely the plaintiff will succeed on the merits, the less the balance of harms need favor the plaintiff’s position. *Id.*

B. Plaintiff Will Likely Succeed on the Merits

Bala need only demonstrate a “better than negligible” chance of success on the merits of one of its claims. This is a standard the court has characterized as a “low requirement.” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA*, 549 F.3d 1079, 1096 (7th Cir. 2008).

i. Plaintiff Will Likely Succeed on Its Patent Infringement Claim

Plaintiff is the lawful assignee of all right, title and interest in and to the Bala Design Patent. Kislevitz Decl. at ¶ 8. Plaintiff has submitted extensive documentation, attached as Exhibit 4 to the Kislevitz Decl., that Defendants make, use, offer for sale, sell, and/or import into the United States for subsequent sale or use the

same products that infringe directly and/or indirectly the Bala Design Patent. The documentation submitted by Plaintiff shows that an ordinary observer would be deceived into thinking that the Counterfeit Products were the same as the Bala Products. *Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997, 1011 (N.D. Ill. 2010) (citing *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 672 (Fed. Cir. 2008)). Finally, Plaintiff has not licensed nor authorized Defendants to use the Bala Design. Kislevitz Decl. at ¶¶ 7, 15. Therefore, Bala will likely succeed on its patent infringement claim.

ii. Plaintiff Will Likely Succeed on Its Trademark Infringement Claim

A defendant is liable for trademark infringement if it, “without the consent of the registrant, use[s] in commerce...a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods...which such use is likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1). As such, a trademark infringement claim has three elements: (1) a mark is worthy of protection; (2) defendants are not authorized to use the mark; and (3) a likelihood of confusion.² See 15 U.S.C. § 1125(a); *Neopost Industrie B.V. v. PFE Int’l Inc.*, 403 F. Supp. 2d 669, 684 (N.D. Ill. 2005) (citation omitted).

Here, the Bala trademarks: are inherently distinctive; are registered with the United States Patent and Trademark Office on the Principal Register; have been continuously used; have never been abandoned; and are valid, subsisting, and in full force and effect. Kislevitz Decl. at ¶ 9. As such, the registrations constitute *prima facie* evidence of their validity and of Bala’s exclusive right to use the marks pursuant to 15 U.S.C. § 1057(b). Furthermore, Bala has not authorized Defendants to use the Bala Trademarks. *Id.* at ¶ 9. Plaintiff satisfies the third element of its Lanham Act claim in two ways: under the Seventh Circuit’s seven-factor likelihood of confusion test; and/or through the presumption of confusion inherent in the manufacture and distribution of counterfeit products. The Seventh Circuit’s seven enumerated factors include: (1) similarity between the marks in appearance and suggestion; (2) similarity of the products; (3) area and manner of

² Bala’s other claims arising out of Section 43(a) of the Lanham Act and the IL Uniform Deceptive Trade Practices Act are assessed under similar and/or identical standards.

concurrent use; (4) degree of care likely to be exercised by consumers; (5) strength of complainant's mark; (6) actual confusion; and, (7) intent of the defendants to palm off their products as that of another. *AutoZone, Inc. v. Strick*, 543 F.3d 923, 929 (7th Cir. 2008). No one factor is dispositive, but the similarity of the marks, actual confusion, and the defendant's intent are "particularly important." *Id.* All seven factors weigh heavily in Bala's favor. First, Defendants' use of Plaintiff's Bala Trademarks is identical in appearance, and done so in a manner, which suggests to the consumer, that the source or origin of the Counterfeit Bala Products is Bala. Kislevitz Decl. at ¶ 17. Second, Defendants' Counterfeit Bala Products are intentionally designed to look identical or similar to genuine Bala Products. *Id.* Third, both Plaintiff and Defendants advertise and sell their products via the Internet in the same area and identical manner. *Id.* Fourth, potential consumers purchasing Bala Products are diverse, with varying degrees of sophistication, likely to have difficulty distinguishing genuine Bala Products from Counterfeit Bala Products. *Id.* Fifth, the Bala Trademarks have become famous, distinctive, and internationally recognizable; they signify to consumers that the Bala Products come from Plaintiff and are manufactured to the highest quality standards. *Id.* at ¶ 13. Finally, evidence of actual consumer confusion is not required to prove that a likelihood of confusion exists, particularly given the compelling evidence that Defendants are attempting to "palm off" their goods as genuine Bala Products. *CAE, Inc. v. Clean Air Eng'g, Inc.*, 267 F.3d 660, 685 (7th Cir. 2001); *see also Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 960 (7th Cir. 1992) (the Seventh Circuit has found that "plaintiff need not show actual confusion in order to establish likelihood of confusion."). Additionally, the Seventh Circuit has held that where "one produces counterfeit goods in an apparent attempt to capitalize upon the popularity of, and demand for, another's product, there is a presumption of a likelihood of confusion." *Microsoft Corp. v. Rechanik*, 249 F. App'x 476, 479 (7th Cir. 2007).

iii. Plaintiff Will Likely Succeed on Its Copyright Infringement Claim.

To establish copyright infringement under 17 U.S.C. § 501, a plaintiff must prove two elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *JCW*

Investments, Inc. v. Novelty, Inc., 482 F.3d 910, 914 (7th Cir. 2007). Moreover, copyright protection extends to “derivative works,” or “work[s] based upon one or more preexisting works. . . , or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101. Here, Plaintiff is the owner of the Bala Copyrights and the federal registrations are *prima facie* evidence of the validity of the copyrights. 17 U.S.C. § 410 . The copyrighted images have been used by the Defendants without authorization, and such use is identical or nearly identical to the registered images. *See* Kislevitz Decl., Exhibit 4 (showing screenshot evidence of defendant’s use of the copyrighted images). As Bala has shown ownership of the copyrights and copying by the defendants, it is likely to succeed on its copyright infringement claim.

C. There is no Adequate Remedy at Law, and Plaintiff Will Suffer Irreparable Harm in the Absence of Preliminary Relief

As Bala has shown a likelihood of success on the merits, Bala is entitled to a rebuttable presumption of irreparable harm under the Trademark Modernization Act. However, it is worth noting that courts frequently find that irreparable harm exists in intellectual property infringement cases. Irreparable harm has been demonstrated when “remedies available at law, such as monetary damages, are inadequate to compensate for [that] injury.” *Robert Bosch LLC v. Pylon Manufacturing Corp.*, 659 F.3d 1142, 1148 (Fed. Cir. 2011). Here, Plaintiff is likely to suffer two primary forms of irreparable harm: (1) loss of goodwill and (2) reputational harm. Kislevitz Decl. at ¶ 24. Each of these harms, independently, constitutes irreparable harm and offers a basis on which preliminary relief should issue. *See, e.g., Aria Diagnostics, Inc. v. Sequenom, Inc.*, 726 F.3d 1296, 1304 (Fed. Cir. 2013) (“[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm.”) (internal quote and cites omitted). Defendants’ infringement erodes and devalues Plaintiff’s rights in the Bala IP, thereby risking injury to Plaintiff’s goodwill and reputation and interfering with Plaintiff’s ability to exploit its IP. *See, e.g., Otter Prods. v. Anke Group Indus. Ltd.*, 2:13-cv-00029, 2013 WL 5910882, at *2 (D. Nev. Jan. 8, 2013) (absent the requested TRO, plaintiff was likely to suffer “irreparable injury . . . in the form of (a) loss of control over its

intellectual property rights; (b) loss of consumer goodwill; and (c) interference with [plaintiff's] ability to exploit [its IP]."); *see also Nike, Inc. v. Fujian Bestwinn Industry Co., Ltd.*, 166 F.Supp.3d 1177, 1178-79 (D. Nev. 2016). Defendants' infringement of the Bala IP from the sale of Counterfeit Products is likely to cause consumer confusion with genuine Bala Products, resulting in harm to Plaintiff's reputation and goodwill. If consumers come to associate the Counterfeit Products with Plaintiff, the loss of brand confidence and reputational harm would be substantial. *Id.* As established by the Federal Circuit: "[h]arm to reputation resulting from confusion between an inferior accused product and a patentee's superior product is a type of harm that is often not fully compensable by money..." *Reebok Int'l Ltd. v. J Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994); *see also Tuf-Tite, Inc. v. Fed. Package Networks, Inc.*, 2014 WL 6613116, at *8 (N.D. Ill. Nov. 21, 2014) (quoting and relying on *Reebok* in finding irreparable harm).

A causal nexus exists between Defendants' infringement and each of the irreparable harms that Plaintiff is suffering. *Apple Inc. v. Samsung Elecs. Co.*, 735 F.3d 1352, 1364 (Fed. Cir. 2013). Here, Defendant's infringing use of the Bala Design in the Counterfeit Products is the substantial reason for consumer demand of the Counterfeit Products. *See PCT Int'l Inc. v. Holland Elecs. LLC*, 2015 WL 5210628, at *23-24 (D. Ariz. Sept. 8, 2015), *ajf'd*, 2016 WL 4373941 (Fed. Cir. Aug. 16, 2016) ("The Federal Circuit has explained that when the products at issue are 'relatively simple,' in the sense that they have a small number of features, the causal nexus requirement is easier to satisfy because the infringing feature has a large impact on demand for the products").

Finally, because Defendants reside in the People's Republic of China or other foreign jurisdictions with no U.S. presence, any monetary judgement is likely uncollectable. *See Robert Bosch, LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011) (reversing denial of permanent injunction where the likely availability of monetary damages was in question, citing *02 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 2007 WL 869576, at *2 (E.D. Tex. Mar. 21, 2007) where "all three defendants are foreign corporations and

that there is little assurance that [plaintiff] could collect monetary damages.”). Furthermore, other district courts have found that money damages were insufficient in similar cases involving foreign infringers. *E.g.*, *Aevoe Corp. v. AE Tech Co., Ltd.*, 2012 WL 760692, at *5 (D. Nev. Mar. 7, 2012) (“[A] finding of irreparable harm was not clearly erroneous because it also found that since AE Tech is a foreign corporation, money damages would be insufficient.”); *Otter Prods.*, 2013 WL 5910882, at *2 (“because [Defendant] has no presence in the United States, it may be difficult or impossible for [Plaintiff] to enforce a monetary judgment”); *Bushnell, Inc. v. Brunton Co.*, 673 F.Supp.2d 1241, 1263 (D. Kan. 2009) (“the prospect of collecting money damages from a foreign defendant with few to no assets in the United States tips in favor of a finding of irreparable harm”); *Nike*, 166 F.Supp.3d, at 1179 (“[B]ecause [Defendant] has no presence in the United States, it may be difficult or impossible for [Plaintiff] to recover a money judgement. . .”).

The Seventh Circuit has “clearly and repeatedly held that damage to a trademark holder’s goodwill can constitute irreparable injury for which the trademark owner has no adequate legal remedy.” *Re/Max N. Cent., Inc. v. Cook*, 272 F.3d 424, 432 (7th Cir. 2001) (citing *Eli Lilly & Co. Natural Answers, Inc.*, 233 F.3d 456, 469 (7th Cir. 2000)). Irreparable injury “almost inevitably follows” when there is a high probability of confusion because such injury “may not be fully compensable in damages.” *Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc.*, 560 F.2d 1325, 1332 (7th Cir. 1977) (citation omitted). “The most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendants’ goods.” *Int’l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1092 (7th Cir. 1988). As such, monetary damages are likely to be inadequate compensation for such harm. *Ideal Indus., Inc. v. Gardner Bender, Inc.*, 612 F.2d 1018, 1026 (7th Cir. 1979).

Defendants’ unauthorized use of the Bala Design, Trademarks, and Copyrights has and continues to irreparably harm Plaintiff through diminished goodwill and brand confidence, damage to Plaintiff’s reputation, loss of exclusivity, and loss of future sales. Kislevitz Decl. at ¶¶ 19-23. The extent of such harm,

and the possible diversion of customers due to loss of brand confidence, are both irreparable and incalculable, thus warranting an immediate halt to Defendants' infringing activities through injunctive relief. Furthermore, Defendants' willful infringements deprive Plaintiff of the ability to control the creative content protected by its Bala IP; devalues the Bala brand by associating it with inferior quality goods; and undermines the value of its IP by creating the impression that infringement may be undertaken with impunity. Accordingly, Plaintiff has satisfied the Court's standard for granting preliminary relief by establishing that there is no adequate remedy at law and that Plaintiff will continue to suffer irreparable harm in the absence of such relief.

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

Plaintiff has demonstrated (1) a likelihood of success on the merits, (2) no adequate remedy at law, and (3) the threat of irreparable harm if preliminary relief is not granted. The Court must next consider the potential harm that Defendants could suffer if preliminary relief is granted, balancing such harm against the irreparable harm Plaintiff will suffer if relief is denied. *Ty, Inc.*, 237 F.3d at 895. As willful infringers, Defendants are entitled to little equitable consideration. "When considering the balance of hardships between the parties in infringement cases, courts generally favor the [intellectual property] owner." *Krause Int'l Inc. v. Reed Elsevier, Inc.*, 866 F. Supp. 585, 587-88 (D.D.C. 1994). This is because "[o]ne who adopts the [intellectual property] of another for similar goods acts at his own peril since he has no claim to the profits or advantages thereby derived." *Burger King Corp. v. Majeed*, 805 F. Supp. 994, 1006 (S.D. Fla. 1992) (internal quotation marks omitted). Therefore, the balancing of harms "cannot favor a defendant whose injury results from the knowing infringement of the plaintiff's [intellectual property]." *Malarkey-Taylor Assocs., Inc. v. Cellular Telecomms. Indus. Ass'n.*, 929 F. Supp. 473, 478 (D.D.C. 1996). Defendants are knowingly using Bala IP in order to profit from sales of Counterfeit Bala Products. Thus, the balance of equities tips decisively in Plaintiff's favor. As such, equity requires Defendants be ordered to cease their unlawful conduct.

E. Injunctive Relief is Necessary to Protect Public Interest

Courts in this circuit have upheld the importance of protecting intellectual property. *See, Erickson v.*

Trinity Theatre, Inc., 13 F.3d 1061, 1073 n. 11 (7th Cir. 1994) (“public policy strongly favors the protection of copyrights); *PPG Indus., Inc. v. Guardian Indus. Corp.* 75 F.3d 1558, 1567 (Fed. Cir. 1996) (“strong public policy favor[s] the enforcement of patent rights.”); and *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 469 (7th Cir. 2000) (“the public interest is served by the injunction because enforcement of the trademark laws prevents consumer confusion.”). Thus, the inquiry is “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. 1998). Here, not only does the public have an interest in the functioning of its patent, trademark, and copyright systems and in encouraging fairness in business, but it also has an interest in consumer safety and protection from harm. Currently, the public is under the false assumption that Plaintiff has granted a license or authorization to the Defendants. Injunctive relief is necessary to protect consumers from inferior quality products, and to dispel the public confusion created by Defendants’ actions.

IV. THE EQUITABLE RELIEF SOUGHT IS APPROPRIATE

The Patent Act authorizes courts to issue injunctive relief “in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283. In addition to this Court’s inherent authority to issue injunctive relief, the Lanham Act authorizes courts to issue injunctive relief “according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark” 15 U.S.C. § 1116(a).. Furthermore, 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. The facts in this case warrant such relief.

A. Temporary Restraining Order Immediately Enjoining Defendants’ Unauthorized and Unlawful Use of Plaintiff’s Intellectual Property is Appropriate

Plaintiff requests a temporary injunction requiring Defendants to immediately cease all use of the Bala Design, Trademarks, and Copyrights, and/or substantially similar marks, on or in connection with any

products listed on all Defendant Internet Stores. Such relief is necessary to stop the ongoing harm to the Bala Intellectual Property and associated goodwill, as well as the ongoing harm to consumers, and to prevent the Defendants from continuing to benefit from their unauthorized use of the Bala Design, Trademarks, and Copyrights. Many courts have authorized immediate injunctive relief in similar cases involving unauthorized use of intellectual property and counterfeiting. *See, e.g., Viacom International Inc. v. The Partnerships*, No. 21-cv-04219 (N.D. Ill. Aug. 25, 2021), and *Metallica, a California General Partnership v. The Partnerships*, No. 21-cv-04709 (N.D. Ill. Sept. 9, 2021).

B. Preventing the Fraudulent Transfer of Assets is Appropriate

Courts have the inherent authority to issue a prejudgment asset restraint when plaintiff's complaint seeks relief in equity. *Animale Grp. Inc. v. Sunny's Perfume Inc.*, 256 F. App'x 707, 709 (5th Cir. 2007). In addition, Plaintiff has shown a strong likelihood of succeeding on the merits of its patent, trademark, and copyright infringement claims; therefore, Plaintiff is entitled, "subject to the principles of equity, to recover . . . defendant's profits." 15 U.S.C. § 1117(a)(1). Plaintiff requests an *ex parte* restraint of Defendants' assets so that Plaintiff's right to an equitable accounting of Defendants' profits from sales of Counterfeit Bala Products is not impaired. If such a restraint is not granted in this case, Defendants may disregard their responsibilities and fraudulently transfer financial assets to overseas accounts before a restraint is ordered, making it easy to hide or dispose of assets, which will render an accounting by Plaintiff meaningless. Plaintiff's Complaint seeks, among other relief, that Defendants account for and pay to Plaintiff all profits realized by reason of Defendants' unlawful acts. Therefore, this Court has the inherent equitable authority to grant Plaintiff's request for a prejudgment asset freeze to preserve the relief sought.

C. Plaintiff Is Entitled to Expedited Discovery

The United States Supreme Court has held that "federal courts have the power to order...the discovery of facts necessary to ascertain their competency to entertain the merits." *Vance v. Rumsfeld*, 2007 WL 4557812, *6 (N.D. Ill. Dec. 21, 2007) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351,

98 S. Ct. 2380 (1978)). Furthermore, courts have broad power over discovery and may permit discovery in order to aid in the identification of unknown defendants. *See* Fed. R. Civ. P. 26(b)(2); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). Plaintiff respectfully requests expedited discovery to discover the email addresses and other identifying information, and the bank and payment system accounts Defendants use for their counterfeit operations. This request is limited to including only what is essential to prevent further irreparable harm. Without this information, Plaintiff would not know the entities upon whom to serve the Order; and discovery of these accounts, so they can be frozen, is necessary to ensure Defendants' activities are contained. *See, e.g., Decker's Outdoor Corporation v. The Partnerships, et al.*, No. 15-cv-3249 (N.D. Ill. April 4, 2015) (unpublished).

V. A BOND SHOULD SECURE THE INJUNCTIVE RELIEF

The posting of security upon issuance of a TRO or preliminary injunction is vested in the Court's sound discretion. *Rathmann Grp. v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989); Fed. R. Civ. P. 65(c). Because of the strong and unequivocal nature of Plaintiff's evidence of counterfeiting, infringement, and unfair competition, Plaintiff respectfully requests that this Court require Plaintiff to post a bond of no more than Ten Thousand U.S. Dollars (\$10,000.00). *See, e.g., Monster Energy Co. v. Chen Wensheng*, 136 F. Supp. 3d 897, 910-11 (N.D. Ill. 2015).

VI. CONCLUSION

Defendants' counterfeiting operations are significantly injuring Bala's business, its Bala brand, consumers, and the general public. Without entry of the requested relief, Defendants' infringement and deceptive use of Plaintiff's Bala Design, Trademarks, and Copyrights will continue to lead prospective consumers to believe that Defendants' Counterfeit Bala Products have been manufactured by or emanate from Bala, when in fact, they have not. In view of the foregoing, and consistent with previous similar cases, Plaintiff respectfully requests that this Court enter a Temporary Restraining Order.

Dated: December 21, 2023

Respectfully submitted,

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