

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BULLSEYEBORE, INC.,

Plaintiff,

v.

LANDBASE TRADING CO. LTD, et al.

Defendants.

CIVIL ACTION NO. 1:24-cv-00246-RDB

**MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Defendants wow-gogeros.com; butterfly-flowerss.com; amp-spring.com; autumn-beckon.com; beast-fox.com; recreationh.com; certainow.com; vofatiponal.com; olarglscal.com; slightly.com; oncondtitat.com; dawnaza.com; creampumpkin.com; begoniaclothing.com; purist-fish.com; fundamentak.com; rise-planet.com; rotayalbyte.com; densityg.com; by and through their attorneys Jacob Chen and Anthony Son, respectfully submit this memorandum of law in opposition to Plaintiff's motion for a preliminary injunction.

I. DEFENDANTS ARE NOT SUBJECT TO PERSONAL JURISDICTION

“To enter a judgment that adjudicates the rights of a party, a federal court must have personal jurisdiction over that party.” *Hawkins v. i-TV Digitális Távközlési zrt.*, 935 F.3d 211, 228 (4th Cir. 2019); *Evapco, Inc. v. Mech. Prods. Sw., LLC*, No. SAG-22-3375, 2023 U.S. Dist. LEXIS 11813, at *7 (D. Md. Jan. 23, 2023).

The reason why this Court lacks personal jurisdiction, and supporting sworn declarations, are laid out in full Defendants' motion to dismiss. (Doc. 31)

But to summarize, most of the Defendants have had 0 sales of allegedly infringing goods in Maryland. None of the Defendants have any physical presence or employees in Maryland. The only Defendants that have had any sales in Maryland are amp-spring.com and gorgeous.com. These domain names have sold all of two (2) allegedly infringing products in Maryland for USD \$42.51 and \$41.21 on January 5, 2024, and January 8, 2024, respectively. These isolated sales do not constitute a “regular course of sales” in Maryland which is the requisite grounds for establishing minimum contacts sufficient to justify the exercise of personal jurisdiction. *Williams v. Romarm, S.A.*, Civil Action No. TDC-14-3124, 2017 U.S. Dist. LEXIS 2919, at *3 (D. Md. Jan. 9, 2017); *see also De Simone v. VSL Pharm., Inc.*, Civil Action No. TDC-15-1356, 2017 U.S. Dist. LEXIS 22589, at *15 (D. Md. Feb. 16, 2017); *Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc.*, 888 F. Supp. 2d 691, 700 (D. Md. 2012).

II. PLAINTIFFS HAVE FAILED TO SHOW IRREPARABLE HARM

“A preliminary injunction is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit.” *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). Therefore, a plaintiff seeking a preliminary injunction must demonstrate that “he is likely to suffer irreparable harm in the absence of preliminary relief.” *Id.*

As stated in the accompanying declarations, Defendants were never served with a cease and desist or any notice of alleged infringement by Plaintiff prior to Plaintiff’s commencement of this action against Defendants. Defendants were not aware of this alleged infringement until Plaintiff commenced a lawsuit and sought a temporary restraining order freezing Defendants’ assets. Defendants immediately and permanently discontinued the sale of any of the allegedly infringing goods at issue in this case and will not resume said sales for the pendency of this action.

Such a declaration “is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 897, 97 L.Ed. 1303, 1309 (1953). Defendants’ declaration constitutes voluntary, public, and unequivocal intention to discontinue the alleged infringement, thereby absolving the need for injunctive relief. *See e.g., Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 72, 104 S. Ct. 373, 376, 78 L.Ed.2d 58, 63 (1983).

III. THE ASSET FREEZE MUST BE LIMITED TO THE SALES REVENUE OF THE ALLEGEDLY INFRINGING PRODUCTS

District courts generally do not have the authority to preliminarily restrain assets where a plaintiff seeks only a money judgment. *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308, 333, 119 S. Ct. 1961, 1975, 144 L.Ed.2d 319, 340 (1999). Plaintiff is only allowed to pursue such restraint because the Lanham Act permits plaintiff “subject to the principles of equity” to recover “defendant’s profits.” 15 U.S.C.S. § 1117. But for that reason, the injunction must be capped at Defendants’ profits. *See e.g. Awareness Ave. Jewelry LLC v. P’ship*, No. 8:23-cv-2-TPB-AAS, 2023 U.S. Dist. LEXIS 88241, at *4 (M.D. Fla. May 19, 2023) (“Because the moving Defendants have submitted evidence that their profits from the allegedly infringing activity have been minimal, the asset freeze ordered by the Court was overbroad.”); *Deckers Outdoor Corp. v. P’ships & Unincorporated Ass’ns Identified on Schedule A*, No. 13 C 07621, 2013 U.S. Dist. LEXIS 205985, at *5 (N.D. Ill. Oct. 30, 2013) (“where equitable relief is sought, the appropriate scope of prejudgment restraint must be limited only to what is reasonably necessary to secure the (future) equitable relief.”); *Vans, Inc. v. MSCHF Prod. Studio, Inc.*, 88 F.4th 125, 143 (2d Cir. 2023) (Where the Second Circuit upheld a district court’s injunction freezing a defendant’s

revenue from sale of allegedly infringing products); *Gucci Am. v. Bank of China*, 768 F.3d 122, 133 (2d Cir. 2014) (Holding that a plaintiff seeking an accounting of profits is “required to prove defendant's sales”).

Defendants’ total sales of allegedly infringing products is annexed herein as Exhibit A. The current total assets frozen vastly exceed the total *revenue*, and grossly exceed the total profits. Therefore, should the Court not dismiss the case for lack of personal jurisdiction, and should the Court grant Plaintiff’s motion, Defendants are entitled to a downward modification of the assets frozen to match the revenue from the sales.

The continued freezing of assets sought by Plaintiff is an “extraordinary relief” which would prevent Defendants “from operating aspects of their business not implicated by this lawsuit” and therefore lead to irreparable harm – to the Defendants. *Epic Tech., LLC v. Raleigh Startup Sols. LLC*, No. 5:23-CV-136-D, 2023 U.S. Dist. LEXIS 121781, at *17 (E.D.N.C. June 5, 2023).

IV. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS

Lastly, Defendants do not believe that Plaintiffs are likely to prevail.

First and foremost, as mentioned, Defendants are not subject to personal jurisdiction in Maryland and therefore this case should be dismissed for lack of personal jurisdiction.

But even putting that aside, there are serious concerns with respect to the underlying merits of Plaintiff’s case which warrant scrutiny.

Plaintiffs allege that it is “currently making” its products available to consumers through its website, and that “in anticipation of the launch to consumers” Plaintiff advertised and marketed its goods online. (Doc. 21, ¶17). But this is patently false. The reality is Plaintiff’s website,

www.bullseyebore.com does not sell any goods at all. Plaintiff is running a *kick-starter campaign* which allows people to *donate money* in exchange for *possibly* receiving items. As Kickstarter itself acknowledges being a supporter is “getting a front row seat to the creative process” and **“backing is not buying, and rewards are not guaranteed.”** See [Kickstarter FAQ](#). Kickstarter in fact openly acknowledges that creators are not required to finish projects, and creators have no obligation to ever ship or deliver any products. See [Kickstarter FAQ](#). Plaintiff has not sold *any* products to the general public and is not currently in the business of selling products to the general public. And Plaintiff *might never* sell any products to the general public. Plaintiff has been flirting with and talking about selling Bullseyebore since 2015 without having sold a single item. See [Popular Mechanics](#).

All products sold by Defendants were all sold under the label: “AlignDrill Pro.” Plaintiff in their motion for TRO presents no evidence that any of the products sold by Defendants actually contain “Bullseyebore” on the product itself or its packaging. (Doc. 7-11). Nor has Plaintiff produced any evidence that any of the AlignDrill Pro products sold used patented technology belonging to Plaintiff. In fact, Plaintiff’s motion for TRO does not contain an examination of a single item sold by any of the Defendants.

“In the Fourth Circuit, the following equitable factors are appropriate for a district court to consider when assessing a disgorgement of a defendant's profits under the Lanham Act: (1) whether the defendant had the intent to confuse or deceive, (2) whether sales were diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off.” *Universal Furniture Int'l, Inc. v. Collezione Europa, USA, Inc.*, 599 F. Supp. 2d 648,

661 (M.D.N.C. 2009).

Given that Plaintiff has not yet begun selling any products, there can be no diversion of sales. Moreover, Defendants' use a different name: "AlignDrill Pro". Defendants did not intend to confuse or deceive, and this is not a case of palming off. In fact, in most of Plaintiff's submission in support of their TRO, there are no visible signs of Plaintiff's mark at all. *See e.g.* (Doc. 7-11, 1-2, 5-6, 8-9, etc.). A customer could easily look at Defendants' website, and placed an order for an AlignDrill Pro product, without once seeing or noticing a "Bullseyebore" trademark. As for the "public interest", given Plaintiff's long history of having never sold any products at all, it is possible that it is Plaintiff that is attempting to run a lucrative scam by publishing alluring photos and videos, soliciting donations, squatted on its mark and copyright, and are now seeking to make money via litigation rather than through the actual sale and shipment of any of its products. All of these factors weigh against disgorgement of profits.

In addition, the Copyright Act may preempt Plaintiff's Lanham Act claims. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29, 123 S. Ct. 2041, 2045, 156 L.Ed.2d 18, 28 (2003); *Logan Developers, Inc. v. Heritage Bldgs., Inc.*, No. 7:12-CV-323, 2013 U.S. Dist. LEXIS 140909, at *8 (E.D.N.C. Sep. 30, 2013). In *Logan Developers*, plaintiff Logan Developers ("Logan") designed a line of houses which defendant Heritage Building ("Heritage") then copied and sold, as well as advertised on its own website as belonging to Heritage. There, the Eastern District of North Carolina held that although Heritage copied Logan's designs, and then passed it off as their own product, Logan's Lanham Act claim was pre-empted by the Copyright Act, and therefore was subject to dismissal.

With respect to Plaintiff's Copyright claims, the Copyright Act permits a copyright owner

to recover “any profits of the infringer that are attributable to the infringement.” *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 519 (4th Cir. 2003). The infringer then may prove “either that part or all of those revenues are ‘deductible expenses’ (i.e., are not profits), or that they are ‘attributable to factors other than the copyrighted work.’” *Id* at 520. Here, all of Defendants’ (very small) profits are the product of the fact that Defendants had a product for sale, whereas Plaintiffs do not (and may never have). Had Defendants used a different set of photos or videos, there may have been no difference in sales. Defendants reiterate that the page on which the products sold identified the products as “AlignDrill Pro.” Whereas Plaintiff does not sell any goods at all.

Lastly with respect to Plaintiff’s patent claims, Plaintiff on their motion for injunctive relief do not include any evidence as to and concerning any of Defendants’ goods. “The burden is on the party seeking injunctive relief to demonstrate its entitlement to an injunction.” *SAS Inst., Inc. v. World Programming Ltd.*, No. 5:10-CV-25-FL, 2016 U.S. Dist. LEXIS 79234, at *3 (E.D.N.C. June 17, 2016). Plaintiff has presented this Court with no evidence whatsoever as to and concerning the nature of Defendants’ products, and whether or not they use any of Plaintiff’s novel or non-obvious improvements.

V. CONCLUSION

For these reasons, including the lack of personal jurisdiction, the total actual sales by Defendants, and the specific unique facts of this case, including that Plaintiff does not sell any products to the general public, and that Plaintiff is not in danger of any irreparable harm because Defendants have voluntarily ceased and discontinued the sale of any allegedly infringing goods, Defendants request that the Court deny Plaintiff’s request for an injunction. To the extent the

Court were to grant an injunction, the injunction must be very narrow and limited to address the actual harm that Plaintiff, who does not even sell any products to the general public, would suffer as a result of Defendants' discontinued sales.

Respectfully Submitted,

Dated: March 21, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 21, 2024, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's electronic case filing system. Any other counsel of record will be served by first class mail.

/s/ Anthony H. Son
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