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April 17, 2023

VIA ECF
Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Letter Brief, *Smart Study Co., Ltd. v. Acuteye-US, et al.* (Case No. 22-1810)

Dear Ms. Wolfe,

We represent Appellant[1] in the above-referenced appeal. Pursuant to the Court's Order dated April 10, 2023 (the "4/10 Order"), Appellant is hereby submitting a letter brief regarding the legal basis for this Court's exercise of appellate jurisdiction over the instant appeal.

A. Relevant Abbreviated Facts and Procedural History

Appellant brought the District Case, under seal, against fifty-eight (58) sellers on Amazon for trademark infringement, counterfeiting, false designation of origin, passing off and unfair competition, copyright infringement, and a related common law claim arising from Defendants' infringement of Appellant's trademarks and copyrighted works. When Appellant filed its Complaint in the District Court, Appellant simultaneously filed an *ex parte* Application requesting that the District Court seal the file, and issue: 1) a TRO restraining Defendants' Merchant Storefronts and Defendants' Assets with the Financial Institutions; 2) an order to show cause why a preliminary injunction should not issue; 3) an order authorizing bifurcated and alternative

[1] All capitalized terms, unless otherwise indicated, shall be given the definitions set forth in Appellant's brief (Dkt. 31) and A595-A599 (Dkt. 29).

service; and 4) an order authorizing expedited discovery. A68, A89, A128, A142. On July 9, 2021, the District Court granted Appellant's Application and entered the TRO. A224. On July 30, 2021, the Court then entered the PI Order against Defendants, mirroring the terms of the TRO, and extending through the pendency of the District Case.

Prior to filing its Motion, Appellant voluntarily dismissed five (5) Defendants from the District Case. On February 11, 2022, after their defaults were entered by the Clerk of the Court, Appellant filed the Motion for default judgment and a permanent injunction against all fifty-three (53) of the remaining Defendants (i.e., the Defaulting Defendants) due to their failure to answer or otherwise move by the requisite deadlines. A386, A395, A585, A660. During the pendency of Appellant's Motion, Appellant dismissed two (2) of the Defaulting Defendants from the District Case. On July 21, 2022, the District Court issued the Opinion & Order, and denied Appellant's Motion, given the District Court's finding that all of the Defaulting Defendants (i.e., the only Defendants left in the District Case) were not properly served and the Court therefore lacked personal jurisdiction over them. A937. The District Court then issued an order requesting that Appellant show cause why the case should not be dismissed. A965. On the following day, Appellant filed its Notice of Appeal of the Opinion & Order. A967.

B. <u>Legal Standard for Interlocutory Appellate Jurisdiction</u>

Pursuant to 28 U.S.C. § 1292(a)(1), courts of appeals have jurisdiction over: "[i]nterlocutory orders of the district courts of the United States. . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions". An order that has the practical effect of denying an injunction likewise may be appealable, but only if the litigant is able to show "that the order might have 'serious, perhaps irreparable, consequences' and that the order can be 'effectually challenged' only by immediate appeal." *Carson v. Am.*

Brands, 450 U.S. 79, 84 and 89 (1981) (finding denial of motion to enter consent decree met the foregoing test because any further delay in reviewing the refusal could compromise the ability to settle the case on the compromised terms, and because petitioners "asserted in their complaint that they would suffer irreparable injury unless they obtained that injunctive relief at the earliest opportunity. Because petitioners cannot obtain that relief until the proposed consent decree is entered, any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause them serious or irreparable harm"). As the Supreme Court has noted, "[t]his 'practical effect' rule serves a valuable purpose. If an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court. Lawful and important conduct may be barred, and unlawful and harmful conduct may be allowed to continue." *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018).

C. <u>Appellate Jurisdiction Is Warranted Due to Threat of Substantial, Irreparable Injury</u>

Here, as noted *supra*, Appellant filed its initial Application under seal, and on an *ex parte* basis, due to, among other things, the likelihood that Defendants—offshore counterfeiters, who are known to conceal their identities and engage in unlawful activities over the Internet to avoid revealing their actual locations and identities—would transfer, conceal and/or destroy 1) the Counterfeit Products, 2) the means of making or obtaining such Counterfeit Products, 3) business records, and 4) any and all other evidence relating to their infringing activities. See A-24, A-104, A-128, A-224, A-240. Finding that Appellant was entitled to the TRO and PI Order in order to prevent immediate and irreparable injury to Appellant, the District Court entered the same, thereby restraining Defendants' Merchant Storefronts and Defendants' Assets with the Financial Institutions, enjoining Defendants from engaging in their infringing conduct, and preventing Third Party Service Providers from providing services to Defendants, among other things. *See* A-224,

A-240. In the Opinion & Order, despite its prior findings, the District Court denied Appellant's Motion, including its request for a permanent injunction. Although the District Court did not yet dissolve the PI Order or dismiss the case, such a dissolution and dismissal was imminent—as evidenced by the District Court's issuance of an order to show cause why the case should not be dismissed[2]—and it was, and remains, critical that the Opinion & Order be immediately appealable prior to any such dissolution and/or dismissal, which would unequivocally alter the status quo preserved by the TRO and PI Order, thereby thwarting Appellant's enforcement efforts, and the very reasons why Appellant brought the District Case under seal, and moved for the Application on an *ex parte* basis.

Consequently, this case is clearly distinguishable from those where the appellants had not previously moved for injunctive relief. *See, e.g., Switzerland Cheese Assn., Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (petitioners had not filed motions for preliminary injunctions nor had they alleged that a denial of their motions would cause irreparable harm); *see also Cuomo v. Barr*, 7 F.3d 17 (2d Cir. 1993) ("Although failure to seek preliminary injunctive relief below is not a per se bar to an appeal under Section 1292(a)(1). . . that failure must be taken into account in assessing any claim of a 'serious, perhaps irreparable, consequence' from the denial of injunctive relief"). Here, Appellant's request for, and the District Court's entry of, the TRO and PI Order demonstrate that the denial of Appellant's request for a permanent injunction, and the dismissal of the District Case, would in fact cause Appellant irreparable harm. As noted above, unlike in *Frutiger v. Hamilton Cent. Sch. Dist.*, 928 F.2d 68 (2d Cir. 1991), which was cited in the 4/10 Order, the District Court's imminent

[2] Appellant had no choice but to appeal the Opinion & Order rather than respond to the District Court's order to show cause, given that it was clear that due to the implications and sheer breadth of the Opinion & Order, the dissolution of the PI Order and/or dismissal was imminent.

dissolution of the PI Order due to the District Court's finding that it lacked personal jurisdiction over Defaulting Defendants would alter rather than stay the status quo maintained as a direct result of the entry of the TRO and PI Order. Further, unlike in *Prince v. Ethiopian Airlines*, the Opinion & Order affected all of the remaining Defendants and Appellant's claims.

The facts of this case are akin to *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 839 F.2d 69, 75 (2d Cir.) wherein the Court noted that there was "also a persuasive showing of specific and irreparable harm which will result from a failure to exercise appellate jurisdiction at this juncture, which is likely to render ineffectual any relief that might result from an appeal from a final judgment in the litigation pending below." If Appellant is required to wait to appeal until after a final order dissolving the PI Order and/or dismissing the District Case is issued, the appeal of any such order would be an exercise in futility, given, among other things that the restraint on Defaulting Defendants' Assets and Merchant Storefronts would be lifted, thereby impeding Appellant's ability to collect or act on any judgment in the event of a successful appeal. Appellate review after a final decision would be wholly ineffective since Defaulting Defendants' ability to use (or misuse) Defendants' Assets would not be "recapturable". *In re Feit & Drexler, Inc.*, 760 F.2d 406, 412 (2d Cir. 1985) (declining to dismiss appeal "since opportunities to use and enjoy the property during the pendency of the action would not be recapturable" and as such, the order appealed from had "serious and irreparable consequences"). Consequently, Appellant respectfully submits that the Opinion & Order, which had the practical effect of denying Appellant's request for a permanent injunction, can only be "effectually challenged" by immediate appeal; otherwise, Appellant is certain to suffer the irreparable harm that justified the entry of the TRO and PI Order in the first instance.

We thank the Court for its time and attention to this matter.

Respectfully submitted,

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