UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-602

Caption [use short title]

Nike, Inc. v. Wu, et al.

Motion for: Leave to File Amicus Brief

Set forth below precise, complete statement of relief sought:

Leave to File Amicus Brief on behalf of
The Center for Anti-Counterfeiting and
Product Protection (A-CAPP) and The
American Apparel & Footwear Association

MOVING PARTY: Non-Party Amici Curiae

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Agricultural Bank of China

MOVING ATTORNEY: Lauren Emerson

OPPOSING ATTORNEY: Gary Stein

[name of attorney, with firm, address, phone number and e-mail]

Lauren Emerson, Leason Ellis LLP	Gary Stein, Schulte Roth & Zabel LLP
One Barker Ave, 5th FL, White Plains, NY 10601	919 Third Avenue, New York, NY 10022
914-821-9078 emerson@leasonellis.com	212-756-2441 Gary.Stein@srz.com

Court-Judge/Agency appealed from: Hon. Colleen McMahon, Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Lauren Emerson **Date:** June 5, 2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for The Center for Anti-Counterfeiting and Product Protection and The American Apparel and Footwear Association, certifies the following:

1. The full name of every party represented by the undersigned is The Center for Anti-Counterfeiting and Product Protection and The American Apparel & Footwear Association;

2. The Center for Anti-Counterfeiting and Product Protection has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

3. The American Apparel & Footwear Association has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

Date: June 5, 2020

/s/ Lauren Emerson
Lauren Beth Emerson
Robert M. Isackson
Cameron Reuber
Peter S. Sloane
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amicus Curiae

The Center for Anti-Counterfeiting and Product Protection (the "A-CAPP Center") and the American Apparel & Footwear Association (the "AAFA") respectfully move under Federal Rule of Appellate Procedure 29(a) for leave to file a brief as *amicus curiae* in support of Interested Party-Appellant in this case. A copy of the proposed brief is appended as an exhibit to this motion. Interested Party-Appellant has consented to this motion. The six Appellee banks represented by counsel have all consented to this motion.

The A-CAPP Center is an independent, interdisciplinary evidence-based research hub, based in the College of Social Science at Michigan State University and established over ten years ago. Given its focus on research, education, and outreach regarding e-commerce and brand protection, it has a strong interest in the questions presented here. The AAFA is a national trade association representing over 1,000 brands, retailers and manufacturers in the apparel and footwear industries. By working with policymakers and industry stakeholders, the AAFA helps protect its members' brands' reputation and intellectual property, and thus it too has a strong interest in the issues raised on appeal.

This case, in which Interested Party-Appellant has petitioned for an appeal of the Southern District of New York's Order, raises the question of whether a third party bank may be held in contempt for failing to comply with a court order freezing a counterfeiter's assets, as required by *Gucci America, Inc. v. Li*, 768 F.3d 122 (2d

Cir. 2014); *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013) and Federal Rule of Civil Procedure 65(d)(2)(C). The *amicus curiae* believe that the issues in this case are of paramount importance to deterring trademark counterfeiting. Depriving counterfeiters of their ability to utilize the U.S. banking system to transfer assets out of this country to foreign banks through those banks' American operations is essential to cutting off their funding to continue operating and enjoy the fruits of their ill-gotten financial gains. Counterfeiting is far from a victimless crime as it destroys the value of reputable American brands and robs consumers in the U.S. of their hard-earned dollars, while defective product can even threaten their health and safety. Counterfeiting is often tied to organized crime and its trafficking has been linked to other criminal activities such as money laundering, drugs smuggling, and financial fraud. A contrary ruling denying the asset freeze would allow counterfeiters to continue their financially motivated and destructive crimes unabated.

The *amicus curiaes'* proposed brief reflects their consensus that the District Court's decision denying Plaintiff-Appellant's motion to hold Defendant-Appellees in contempt warrants reversal not only because of legal errors, but because affirming the lower court's decision would rob rightsholders of one of the few effective tools they have in combatting counterfeiters and instead lay out a roadmap for criminals showing them precisely how to use New York branches of foreign banks to evade the reach of the law. As the internet has allowed counterfeiters to operate without respect to national borders and sell their fake wares virtually unimpeded to consumers in the U.S., so must the victims of their crimes turn to the safeguards afforded by our regulated banking system, as enforced by the federal courts, to remove that roadmap and the financial incentive for their criminal wrongdoing. The *amicus curiae* believe that the authorities and arguments presented in this brief will assist the Court in considering this appeal.

It is respectfully submitted that this motion for leave to file the attached *amicus curiae* brief should be granted.

Date: June 5, 2020

/s/ Lauren Emerson

Lauren Beth Emerson
Robert M. Isackson
Cameron Reuber
Peter S. Sloane
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amicus Curiae

AMICUS BRIEF

20-0602-cv

United States Court of Appeals

for the

Second Circuit

NIKE, INC., CONVERSE INC.,

Plaintiffs,

NEXT INVESTMENTS, LLC,

Interested Party Appellant,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* CENTER FOR ANTI-COUNTERFEITING AND PRODUCT PROTECTION AND AMERICAN APPAREL & FOOTWEAR ASSOCIATION IN SUPPORT OF APPELLANT AND REVERSAL

LAUREN BETH EMERSON
ROBERT M. ISACKSON
CAMERON REUBER
PETER S. SLOANE
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amici Curiae

– v. –

BANK OF CHINA, AGRICULTURAL BANK OF CHINA, BANK OF COMMUNICATIONS, CHINA CONSTRUCTION BANK, CHINA MERCHANTS BANK, INDUSTRIAL AND COMMERCIAL BANK OF CHINA LIMITED,

Appellees,

MARIA WU, DBA www.shoecapsxyz.com, LINHAI KE, DBA www.shoecapsxyz.com, STOREONLINESERVICE2012@GMAIL.COM, DBA www.freerunonlocker.co.uk, SERVICE2@AIREMAIL.NET, DBA www.footwearsuper.co.uk, LIN ZOE, DBA www.wholesalenfljerseyssale.com, COMMINUTETE MORE K.K., DBA www.wholesalenfljerseyssale.com, BRAKEHEMALT K.K., DBA www.nflofchina.com, DBA www.storeonlinesellnow.com, CUSTOMERSERVICENO1@HOTMAIL.COM, DBA www.dsmrecap.com, SERVICE3@LINKONLINEMAIL.COM, DBA www.d3classicshoes.co.nz, SERVICE1@WEBSEEMIAL.COM, DBA www.af1shox.com, BODON TRADING, DBA www.cheapkd5shoes.com, DBA www.freesrunsstore.com, ERIC LEE, DBA www.cheapkd5shoes.com, MEIJIN HUANG, DBA www.cheapkd5shoes.com, ZHIZHEN LI, DBA www.freesrunsstore.com, CHEAP NIKE FREE RUN TRADE CO. LTD., DBA www.nikefree4s.com, SERVICE@NIKEFREERUNS30.COM, DBA www.nikefreeruns30.com, NIKEFREEONLINE2012@HOTMAIL.COM, DBA www.freebuyshoes.com, DBA www.newfreeshoes.com, CHEN JINXING, DBA www.buywikionline.com, LINDAJERSEYS@GMAIL.COM, DBA www.lindajerseys.com, DBA www.linda-jerseys.com, ZHENG JIANGYANG, DBA www.great-wholesalejersyes.net, EXTENTBARGAIN K.K., DBA www.forjerseys.biz, DBA www.myspeto.com, BBBPPPKKK@YAHOO.COM, DBA www.nikefreeruns-factory.com, BI NING ZHUO, DBA www.freerunlinea.com, JIANG LILI, DBA www.cheapnikeairmaxmart.com, CUSTOMERSERVICE.LY@GMAIL.COM, DBA www.airmaxofficialshop.co.uk, DBA www.airmax90uksales.co.uk, SERVICE@KICKSLION.COM, DBA www.kickslion.net, KENDRICKVERY PT, DBA www.oykununsesi.com, DBA www.payfororder.com, WHOLESALEJERSEYCENTER@GMAIL.COM, DBA www.nfljerseyswebsite.com, MEION ONLINE STORE, DBA www.buyrealcheapjordans.com, DBA doing business as www.fashionpay.com, LESSSPAM42@GMAIL.COM, DBA www.authenticjordans.us., JINHUI ZHENG, DBA www.shopuq.com, ZHENG JINZHAO, DBA www.shopuq.com, SNEAKERS2013@GMAIL.COM, DBA www.max-2013.com, NIKEFAIR@MSN.COM, DBA www.cheapestlebron10.com, NIKEFAIR@MSN.COM, DBA www.cheapestlebron10.com, HOTAIRJORDAN13@GMAIL.COM, DBA www.hotairjordan13.com, SHAN PETER, DBA www.cheapukniketrainers.co.uk, ABC COMPANIES 1-100, JOHN DOES 1-100, BINGCHAO CHEN, QIAO QIN LIU, LINHAI KE, ADAM VICKERS, ALFRED LA MAR, ARETHA JOHNSON, AUSTIN GATES, BA FANG, BENJAMIN WILSON, BILL KING, BONNY LOPOSSER, BUNHON WONG, CAI CIGUI, CAI FENGWEI, CAI GUI LAN, CAI GUI YONG, CAI JINCAN, CAI LIMING, CANGANIC KONG, CATINA JOHNSON, CHANGQING LIN, CHANGYONG YANG, CHAOKEVIN LEBRON, CHEN

BI JUAN, CHEN BINGCHAO, CHEN GUO JING, CHEN JIASHENG, CHEN JIN FENG, CHEN JINXING, CHEN JUN XIAN, CHEN KUN, CHEN LONGFEI, CHEN MIN, CHEN MINZHONG, CHEN QING WEN, CHEN SHUI LIAN, CHEN TAI SHAN, CHEN TONG, CHEN WEI ZHU, CHEN WEIZU, CHEN XICHENG, CHEN YU, CHEN YUANMING, CHEN ZAO JIE, CHEN ZHI JIE, CHEN ZUSONG, MINGJIN CHEN, SUZHEN CHEN, WEIFANG CHEN, CHENGFEI BEI, CHENYE YANG, CHEN YUANZHUO, CHRIS HEBERT, CHUNHAI SONG, CORTEZ SHORE, ANDREW CRESHNAW, DAI JIAN ZHONG, DANILO YAMBAO, DAVID STEVENS, DENG DONG FANG, DENG XIAO JUN, DIANTE JOHNSON, YI NA DING, DMMELI DUHAIME, DREW PIETAN, DSJF LAI, FAN ZHANGMU, FANG MING, FANG PING, FANG YONG, FANSKEL LEMUEL, FU JIAN SHAN, GAO HAI ZHU, GAO HUA YING, GAO MEI YING, GAO WEI, GREEN BROWN, GUANG ZHOU, GUI YONG CAI, GUO CHUNPENG, GUOFU ZHANG, GUOHONG ZHENG, HAIFENG XU, HAIMA XUAN, HAITIAN REN, DEFANG HAN, HANG CHEN, HAO LIN, HARVEY RHODES, HOLLY GASSER, HOWARD LINSA, HU GUO TIAN, HU LI PING, HU XIAN DI, HU XIU BI, HU XIU FENG, HUANG GUO, HUANG HAN LIANG, HUANG HE BIN, HUANG HUACAI, HUANG HUAYOU, HUANG HUI, HUANG JIAN PING, HUANG JINTIAN, HUANG JUYING, HUANG LIBIN, HUANG QIAO, HUANG SHU ZHEN, HUANG WENSHENG, HUANG XIAO, HUANG XIAOQIU, HUANG XIU, HUANG XIUYING, HUANG XIUZHU, HUANG YAMEI, HUANG YAN YING, HUANG YONG LIN, HUANG ZHAN, HUANG ZHI ZHEN, HUANGJIE WEI, HUIK, IMOGEN LOCKHART, JACK TABOR, JACK WU, JACK ZHANG, SMITH SMITH, JAMES DOUGLAS, JEAN SABUD, JESUS JIMENEZ, JIAN PING HUANG, JIAN YIN, JIAN ZHONG DAI, JIANG HUNYING, JIANG JUNYING, JIANG LIN, JIANG RONG RONG, JIANG XIN, JIANHAN XIE, JIANXIAN ZHENG, JIANYING CHEN, JIANYU TANG, JIE WANG, JIE WEI, JIM FRICKER, JINFENG ZHANG, JINGMEI ZHOU, JINHUI HUANG, JINHUI ZHENG, JINYING KE, JOE AUSTIN, JOHN PEIR, JOIN LIN, JORDAN BATTERS, JULIE LOCHHEAD, KATEILA SMITH, KATHY PEYTON, KAYLA MOORE, KE HAI HAI, KE TIANRONG, KERRY BOLTON, KRYSTIAN, KUN CHEN, KYLON BUTLER, LAI LI YING, LANG QING, LARRY RHODES, LATIN MALIN, LAUREN DARKE, LEO PAQUETTE, LI HAI DAO, LI HAIDAO, LI NING, LI QI MIN, LI RENFEN, LI YANGYANG, LI YAYUN, LI YU HONG, LI YUAN MAO YI YOU XIAN GONG SI, LIMING CAI, LIN BAO ZHU, LIN CHANGQING, LIN FANG, LIN FENGYING, LIN HUA CONG, LIN JI, LIN JIAN, LIN JUN DA, LIN LI-MEI, LIN MEI YING, LIN MEIQIN, LIN QINGFENG, LIN XIU YING, LIN ZHANG QING, FENGYUN LIN, LISU MOTOL, LIU GUI LAN, LIU KAI YANG, LIU MEIHUA, LIU QIAO QIN, LIU YIFEI, LIU ZHEN HU, LIU ZHENG BIN, LIU ZHI HONG, LIUYIFEI LIUYIFEI, LIZHU MA, LOUISA KORNBERGIN, LUO QIUHUA, LV HUIWU, LVZHONGTIAN, MABELLE WEIG, MALIK DAVIS, MAO GUANG YUAN, MARSHALL MATTHEW, MARTIN LESSMANN, MEILIAN HUANG, MEIXIA ZHENG, MEIYAN LIU, MELVIN SAUNDERS, MICHAEL MARCOVICI, MICHAEL VICK, MING FANG, MING YUAN MAO YI YOU XIAN GONG SI, MOTAO, JOHN MURRAY, NATORIOUS DOUGLAS, NIAN HUA, NIANHUA TANG, NICOL DUCHAINE, NIKOLAJ CHERNETS, NO BUH, OU KAI SEN, PAN BING HUANG, PANG NIAN, PEIR JUNCK, PHILLIP BELL, PIN PAI51, PING FANG, PING LI, QI MIN LI, QIAN SHUYING, QIAN XIANGONG, QIMING TRADE CO. LTD, QIN YAO, QING LANG, QING WEN CHEN, QINGSHI FANG, QUI JING, QUNAR LEE,

QUNHONG KE, REBECA FOSBURGH, REN GUOYING, REN QING HUANG, REN ZHI JIE, REN ZHI MIN, REN ZHI TONG, REN ZHIMIN, RENE PALEY, RENFEN LI, RICK LI, DBA 163.CA Inc., ROBBIE CLARK, ROBERT SMITH, RONNY SEFFNER, ROY STOTTS, SACAJ BOXANGEL, SALE JORDANER, SAMANTA BANGAREE, SAN ZHANG, SANCHUN WU, SANDYC, SAN ZHANG, SAWYER LIN, SEBASTIAN SCHWARZ, SHANNON BENNETT, SHANSHAN GAO, SHAOTONG QIANG, SHEN QINGSHUI, SHENGZE YANG, SHI HUA, SHI SHAO LIAN, SHI SHENG XU, SHIJIE CHEN, SHINSAKU DROCK, SHIYU XU, SHURONG LIN, SMITH CHEN, SONG YONG GAN, SONG YONG JIN, STACY PEACOCK, STEFANO CECCONI, SUN JIN, SUQIN YANG, SURONG ZHU, TAMERRA BARRETT, TANG GUO, JIAN TANG YING, TANG NIANHUA, TANIESHA SYMISTER, TIANRONG KE, TIE NING ZHUO, TIFFANY JARVIS, TIM RHUDY, TIMOTHY SAULMON, TINGTING XIA, TODD AMIRA, TONG ZHENGGANG, TONI WU, TRACY DRIVER, WAGNER CHRIS, WANG BAO GUO, WANG BING YUAN, WANG FULONG, WANG JIE, WANG RU JUN, WANG XIANG, WANG XIN FEN, WANLU HUANG, WATER LIN, WEI HUANGJIE, WEIJIA YIN, WEN BEN ZHOU, WENG QING YUN, WENG QING ZHONG, WENG TIAN RONG, WENG XUE JING, WENG YANCHUN, WILLA WHARTON, WILLIAM CLARK, WINCHESTER DEAN, KEION WOODSON, WU JIU MEI, WU QINGFENG, WU SONG YE, WU XIUYAN, WU YAN, WU ZIQIANG, XIA LING QIN, XIANG YONG ZHENG, XIANGHANG003 LIN, XIAO LIN ZHENG, XIAO XIAO PING, XIAOFEI WANG, XIAOQING ZHANG, XIAOQIONG WU, XIAOSI FU, XIAOYUN WANG, XIE HAN ZHOU, XIN ZHANG, LIN XIONG, XIONGFEI TRADE CO. LTD, XU JIN TIAN, XU LI LI, XU LINYING, XU MIN FANG, XU SHI YI, XU WEIHAI, XU ZHI QIANG, YANG HAIQI, YANG HUI XIN, YANG JUN JIE, YANG LI, YANG LIN, YANG RONG'E, YANG SU QIN, YANQING ZHU, YE DONG, YEGENG TIAN, YIDA TRADE CO.,LTD, YONG LIN HUANG, YONG LIN LIN, YONG ZHENG, CONOR YOUNCOFSKI, YU BIN BIN, YU HANG, YU JIE, YU XIAN WU, YU XIAO, YU ZHI QIANG, YUAN XIAOYAN, YUANQIU CAI, YUE MANAGER, YURONG HUANG, YUYANG LV, ZELDA SPINGARN, ZENYU LIN, ZEYNAB BSTALVEY, ZHAN CUI BIN, ZHAN CUIBIN, ZHANG FENG CHUN, ZHANG FENG LAN, ZHANG FENG YU, ZHANG FENGCHUN, ZHANG GUOFU, ZHANG JIA FU, ZHANG JIU CHU, ZHANG SAN, ZHANG SANSAN, ZHANG SHAN, ZHANG WEI, ZHANG WEI PING, JUN ZHAO PU, ZHAO MIN GUI, ZHAO ZEYING, ZHENG JIAN FEN, ZHENG JIN HUI, ZHENG JIN TAO, ZHENG JIN ZHAO, ZHENG JINHUI, ZHENG LAN YING, ZHENG LIMEI, ZHENG SHI JIE, ZHENG WEN ZONG, ZHENG XIANG YONG, ZHENG YANG MEI, ZHENG YUEFEN, ZHENG ZHI HONG, IANYING ZHENG, ZHENGYU LIN, ZHEYU LIN, ZHI JIEREN, ZHIXIONG HUANG, ZHIYUAN DAI, ZHONG ZHENNING, ZHOU DADI, ZHOU KAI, ZHU FU, ZHUO TIE NING, ZHUO ZHEN, ZITA BINDER, ZUSONG CHEN, SECUREONLINEPAY@HOTMAIL.COM, DBA www.soccerumarket.com, UNIVERSITY JHUG LIMITED, DBA www.yes-shoe.com, DBA www.yesshoe.net, GUO JIANCONG, REN GUO YING, YAN LI FANG, YINGCHUN YUAN, YUAN YING CHUN,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for The Center for Anti-Counterfeiting and Product Protection and The American Apparel and Footwear Association, certifies the following:

1. The full name of every party represented by the undersigned is The Center for Anti-Counterfeiting and Product Protection and The American Apparel & Footwear Association;

2. The Center for Anti-Counterfeiting and Product Protection has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

3. The American Apparel & Footwear Association has no parent company and there is no publicly held corporation that owns 10% or more of its stock.

Date: June 5, 2020

/s/ Lauren Emerson

Lauren Beth Emerson
Robert M. Isackson
Cameron Reuber
Peter S. Sloane
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amicus Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Center for Anti-Counterfeiting and Product Protection ("A-CAPP Center") is an independent, interdisciplinary evidence-based research hub, based in the College of Social Science at Michigan State University. The A-CAPP Center focuses on research, education, and outreach designed to assist in protecting brands and products of all industries worldwide and was initially created over ten years ago. The A-CAPP Center is the only multi-disciplinary academic center of its kind studying issues of trademark counterfeiting and brand protection. The A-CAPP Center works closely with other academics, brand owners, government officials and law enforcement, as well as intermediaries to help study the problem of product counterfeiting through research and come up with best practices.

The brief and arguments raised by the A-CAPP Center represent the A-CAPP Center's views and research solely, and do not necessarily reflect those of Michigan State University. The A-CAPP Center has direct interest in the issues raised in this case for several reasons: it will impact the A-CAPP Center's research, particularly in regard to the issue of e-commerce, which affects the brand protection community with which the A-CAPP Center regularly engages. The A-CAPP Center has

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[1] The *amici* represent, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund this brief, and no person other than the *amici* or its counsel contributed money that was intended to fund this brief.

researched the impact of e-commerce on the issue of trademark counterfeiting from a variety of disciplinary foci. The A-CAPP Center believes that the issues in this case are of paramount importance in the fight against trademark counterfeiting because without the ability to freeze assets of counterfeiters held by banks foreign or otherwise, the opportunity gap for counterfeiters will not only remain, but will grow. A contrary ruling that would allow the counterfeiters to disperse of their proceeds would only fuel the problem in what is a financially-motivated crime.

The American Apparel & Footwear Association ("AAFA") is the national trade association representing apparel, footwear and other sewn products companies, and their suppliers, which compete in the global market. Representing more than 1,000 world famous name brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its nearly four million U.S. workers, and its contribution of more than $400 billion in annual U.S. retail sales.

Brand protection is one of three core pillars in AAFA's advocacy and stakeholder engagement. AAFA's Brand Protection Council focuses its efforts on the global war against counterfeit apparel, footwear, accessories, and other supplier products. Stolen intellectual property (IP) costs AAFA members billions in lost sales, damage to brand reputation, and substantial legal expenses. However, this is about more than just lost sales for brands. This is about knowing that the pajamas you bought your newborn will not result in a rash, but criminal enterprises do not invest in child safety. This is about knowing that the t-shirt you bought was sewn in an ethical factory, but a factory that ignores IP is likely to ignore worker safety, as well. This is about knowing that the water used to dye the jeans you are wearing was properly treated, but a fly-by-night factory does not care about the environment. This is about protecting both the American jobs, which are threatened by the sale of products that steal IP, and the U.S. consumers that buy those products.

The interests of AAFA members are directly and adversely impacted by the sale of counterfeit goods online. Because of the anonymity of online shopping and the inability to physically inspect goods before purchasing, combined with the "trusted" reputation of many online marketplaces, many consumers are deceived into purchasing counterfeit products when they have a good-faith belief they are purchasing genuine articles.

The district court's ruling sets precedent that is detrimental to the brand protection efforts not just in the apparel and footwear sector, but across all industries. It signals that the United States is willing to continue to allow counterfeiters to profit from the sale of illegal and hazardous goods and, at the same time, limit a brand's ability to remove these goods from the marketplace. It is not enough to simply shut down the facilities that manufacture counterfeit goods. Instead, it is necessary to get to the main motivation driving these illicit operations – their financial assets. The counterfeiter's money is often the most effective enforcement tool because it takes away reward and incentive. If bad actors knew that their assets were vulnerable, even in foreign banks, it would have a major dissuasive effect on their criminal operations.

For this reason, it is critical for U.S. courts to be able to enforce orders that freeze the assets of counterfeiters held by foreign banks.

SUMMARY OF THE ARGUMENT

Counterfeiting is a low-risk, high-reward crime. The average counterfeiting scheme generates $1.4 million in revenue, with some earning as much as $80 million. *See* Jay Kennedy, *Product Counterfeiting Database: Insights Into Converging Crimes*, CENTER FOR ANTI-COUNTERFEITING & PRODUCT PROTECTION (A-CAPP CENTER) PAPER SERIES (Jan. 2019) at 5, http://a-capp.msu.edu/wp-content/uploads/2019/01/Converging-Crimes-FINAL-2.pdf.

Counterfeiting is so lucrative, in fact, that criminals use the proceeds to fund *other* illegal activities, including narcotics, human trafficking, and terrorism. *See generally* OECD, *Illicit Trade: Converging Criminal Networks*, OECD REVIEWS OF RISK MANAGEMENT POLICIES (Apr. 18, 2016), http://dx.doi.org/10.1787/9789264251847-en.

Counterfeiters evade justice through anonymity. *See* U.S. Dep't of Homeland Sec'y, *Combating Trafficking in Counterfeit and Pirated Goods: Report to the President of the United States* (Jan. 24, 2020) at 13, https://www.dhs.gov/sites/

default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf. Like the defendants in this case, a counterfeiter uses aliases and false information to obtain bank accounts to fund an illicit enterprise built upon a dissembling maze of e-commerce platforms. *See id.* at 12, 13. When one storefront is caught and enjoined, another pops-up to continue the operation, but not before first funneling the money generated thereby to a new account, often overseas. *See id.* at 28. Indeed, some counterfeiters—including some of the defendants here—set up their retail shops so that the U.S. consumer transfers funds directly to a foreign account. *See id.* at 38. Traditionally, U.S. government agencies including Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) have tried to keep pace by authorizing seizures and granting injunctive relief, but such measures alone can no longer stem the tide. *See id.* at 30. Counterfeiters can set up new shops with a few strokes of a keyboard. *See id.* at 13. Brand-owners should not be forced to play a time-consuming and expensive game of whack-a-mole because district courts are reluctant to make counterfeiting an unprofitable endeavor.

Following the money brings quick, decisive ends to criminal enterprises. The A-CAPP Center's research has shown that thwarting business-as-usual for counterfeiters creates enough friction to make counterfeiters reconsider whether the crime is worth the effort, let alone the risk. *See* Kennedy at 7 ("[M]itigating opportunities for product counterfeiting is one way of cutting off the flow of funds" to criminal groups using counterfeiting "to generate the cash needed to support their primary criminal activities."). Numerous cases have demonstrated that district courts can effect meaningful change by regulating the flow of cash, as well as, where justified, freezing a counterfeiter's monetary assets early on in a litigation. Such preliminary relief enables brand owners to bring (often uncontested) civil cases knowing that they stand to recoup at least some of their damages, and indeed expenditures, following adjudication of the merits.

Unfortunately, the district court's decision here blunts the best tool brand owners have to combat counterfeiting. If allowed to stand, it will facilitate rather than impede counterfeit activity in this country by supplying a roadmap as to how counterfeiters can structure their finances, particularly through New York banks, to evade the U.S. legal process yet reap the benefits of our open economy that exposes consumers to the risk of counterfeit sales. This Court, in reversing that decision, can send a clear message to brand owners that U.S. courts can supply practical and cost-effective protection against counterfeiting. Moreover, this Court can also put counterfeiters worldwide on notice that online counterfeiting is not a profitable enterprise in the United States.

ARGUMENT

I. Trademark owners face more challenges than ever before in the fight against counterfeiters

As with all enterprises, the advent of new technology changed the commercial landscape and process. In this case, it threatens to outpace the ability of brand owners to combat counterfeiting if the courts fail to adapt to the realities of today's marketplace. Before e-commerce gained a foothold in America, the hallmarks of counterfeit goods were readily obvious from their inferior quality and below-market pricing. Fakes were found at the local flea market, stadium parking lot, or a commercial locale known for selling fakes (like Canal Street in lower Manhattan). Candidly, buyers of counterfeit goods often intentionally sought them out in lieu of paying retail for genuine product, and haggling with the seller meant a face-to-face interaction between the consumer and seller prior to the counterfeits changing hands. Usually, there was plenty of stock hidden away in a backroom, truck, or warehouse. This notion seems quaint now.

Today, more unwitting consumers are exposed to counterfeit products that appear to be 100% genuine, often promoted with the same marketing materials as genuine products. Using credit cards or online merchant accounts (*i.e.*, "fintech"), consumers can order and pay for counterfeits with the click of a button and take delivery by U.S. mail, direct from the factory, without ever communicating with a counterfeiter or engaging in anything more than an online financial transaction.

Further, while counterfeits can originate from any country, including the U.S. and Canada, studies have shown that China and Hong Kong together export almost 92% of fake goods seized in the U.S. *See* U.S. Customs & Border Patrol, *Intellectual Property Rights Seizure Statistics, Fiscal Year 2019* (May 2020), at 12, https://www.cbp.gov/sites/default/files/assets/documents/2020May/FY%202019%20IPR%20Seizure%20Powerpoint%20FINAL%20PBRB%20APPROVED_0.pdf. While in the past, counterfeit goods were typically shipped to the U.S. by the least expensive means possible (for example, a cargo boat), recent advances in shipping logistics and online consumer delivery expectations have allowed businesses to move away from slow bulk shipping and, instead, economically deliver small parcels expeditiously by mail. *See id.* at 13.

In particular, small parcel delivery from China has expanded tremendously over the past decade due to two developments. First, in 2010, the U.S. Postal Service entered into a tri-lateral agreement with eBay GC and China Post that made shipping from China inexpensive. *See* USPS Release No. 10-058, *Tri-Lateral Shipping Alliance Signed with eBay GC and China Post* (May 28, 2010), https://about.usps.com/news/national-releases/2010/pr10_058.htm.[2] Second, in

[2] The USPS entered into a similar agreement with Hongkong Post in 2011. *See* USPS Release No. 11-037, *Postal Service Initiates ePacket Service with Hongkong Post* (Apr. 20, 2011), https://about.usps.com/news/nationalreleases/2011/pr11_037.htm.

2016, the Trade Facilitation and Trade Enforcement Act of 2015 went into effect making U.S. imports of $800 or less duty free. *See* Pub. L. No. 114-125, *codified as* 19 U.S.C. § 4301 *et seq.* The massive numbers of small parcels arriving in the U.S. each day makes it extremely difficult for U.S. Customs and Border Protection to inspect a meaningful number for counterfeits and, even if some are found, the vast majority do not encounter any significant impediments to delivery.

In sum, the ease of shopping online and the frictionless distribution enjoyed by counterfeiters provide a consequence-free environment for counterfeiters who can profitably flood any given branded market with counterfeits delivered from anywhere in the world using only a laptop and a shipping label maker. *And a bank*.

a. The Internet changed the nature and scope of counterfeiting.

Like narcotics, successfully marketing counterfeits pre-internet required a boots-on-the-ground approach such that brand-owners could defend against these attacks on their brand by working with local law enforcement to serve injunctions and restraining orders in marketplace raids. *See* Harley I. Lewin, *One Perspective on Anti-Counterfeiting: From T-Shirts in the Basement to Global Trade*, 101 TRADEMARK REP. 219, 221 (2011). By seizing landed counterfeit product in addition to cash proceeds, brand-owners could blunt, if not set back, the economic impact of counterfeiters in a practical, cost-effective, and efficient manner. Trap-buys and seizures were the most effective tools and inevitably produced enough information to leverage discovery into importer identities and distribution chains, inclusive of parties in the pipeline who could be criminally charged by the U.S. Attorney's Office in addition to sued civilly by the brand owners. *Id.* at 226-27. The theory of landlord liability also expanded the circle of businesses which could be held accountable for contributing to an environment where counterfeiting was able to thrive. In sum, brand-owners were equipped by the courts to avoid habitual victimization by the same counterfeiters.

Today, as with most things, the internet has fundamentally changed the nature and scope of the crime. Indeed, in 1999, e-commerce sales in the U.S. amounted to less than one-half of one percent (0.5%) of total retail sales (or about $15 billion). Thomas L. Mesenbourg, *Measuring the Digital Economy*, U.S. CENSUS BUREAU at 11 (2000), https://www.census.gov/content/dam/Census/library/working-papers/2001/econ/umdigital.pdf. Over the next two decades, internet sales grew year-over-year to meet growing consumer demand. By 2019, e-commerce sales in the U.S. had grown almost twenty-fold to around $600 billion or roughly one in ten of all retail sales nationwide. Wolf Richter, *Brick & Mortar Melts Down as Ecommerce Jumps by Most Ever*, WOLF STREET (Nov. 22, 2019), https://wolfstreet.com/2019/11/22/ecommerce-sales-jump-by-most-in-history-brick-mortar-melts-down/. Indeed, the recent COVID-19 crisis has dramatically accelerated the trend to online purchases as there are few other means to navigate stay-at-home orders, retail store closures, and social distancing requirements. *See* Jay Kennedy, *Buyer Beware: Counterfeit Markets Can Flourish During a Public Health Crisis*, THE CONVERSATION (Mar. 26, 2020), https://theconversation.com/buyer-beware-counterfeit-markets-can-flourish-during-a-public-health-crisis-134492. As such, with immediate access to online retailers located all over the world, American consumers are now accustomed to buying all manner of goods online. While most are familiar with domestic behemoths like Amazon, eBay, and Walmart, many are also purchasing goods from foreign online shopping sites like Alibaba, DHgate, Souq and Mercado Libre.

Just as cash-and-carry transactions have decreased since the turn of the millennium, so too has the offline component of the counterfeit trade. Where a counterfeiter would once have a backroom full of product to beseized along with a cash register or safe, the process has now evolved to mimic a typical online retail transaction: low-volume or "one-off" sales conducted entirely online, anonymously, with funds wired between financial institutions and counterfeit product drop-shipped to the buyer from parts unknown.

Today, brand owners have few backrooms to raid in the U.S., and few shipping containers to seize. The best trail to follow is a financial one. Indeed, unbeknownst to many American consumers, counterfeits are not just available on websites that intentionally market the counterfeit nature of their wares, à la www.counterfeits-r-us.com, but even reputable e-commerce websites have become havens for the sale of counterfeit goods. *See Chanel, Inc. v. The RealReal, Inc.*, No. 18-cv-10626-VSB, 2020 WL 1503422, at *14-15 (S.D.N.Y. Mar. 30, 2020). To be sure, e-commerce platforms, in the U.S. and abroad have diligently assisted brand owners by establishing all manner of reporting systems and takedown mechanisms to remove listings for counterfeits. However, such efforts do little to prevent counterfeit vendors, once caught, from simply re-opening virtual storefronts on the platform under a different alias as if the takedown had never happened. Doubtless, such e-commerce platforms can benefit all manner of legitimate businesses, large and small, by helping them market a new product globally. But the same process and technology also makes it easier for counterfeiters to identify which new products to target and copy. Indeed, a recent study by the U.S. Government Accountability Office found that an astounding about 40% of sample goods purchased on popular e-commerce websites were counterfeit. STAFF OF S. FIN. COMM., 116th Cong., *The Fight Against Fakes: How Statutory and Regulatory Barriers Prevent the Sharing of Information on Counterfeits*, at 11 (Nov. 7, 2019), https://www.finance.senate.gov/imo/media/doc/The%20Fight%20Against%20Fakes%20%20(2019-11-07).pdf.

Unfortunately, the convenience of online shopping for American consumers, and the ability of counterfeiters to take advantage of the internet to sell them fakes, outpace the development of effective measures for brand owners to police the unlawful practice. In fact, the lower court's decision here represents a large step *backward* in addressing this critical deficiency.

b. Modern technology enables stream-lined anonymous supply chains for counterfeits

Today, counterfeits are being trafficked through well-established supply chains in concert with online marketing, sales, and distribution networks. In addition to preserving anonymity, the ability of e-commerce platforms to aggregate data and reduce delivery costs for consumers provides a huge advantage over brick-and-mortar retailers. Production costs are low, billions of potential customers are available worldwide, transactions are convenient, and listing on well-known, reputable e-commerce platforms provides an air of legitimacy to the products offered. *See* U.S. DEP'T OF HOMELAND SEC'Y, *Combating Trafficking in Counterfeit & Pirated Goods: Report to the President of the United States* (Jan. 24, 2020), https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf.

Profitability aside, there is little risk of criminal prosecution or civil liability under current law enforcement and regulatory practices as sellers often use fictitious information when setting up online accounts. *See* Alana Semuels, *Amazon May Have a Counterfeit Problem*, THE ATLANTIC (Apr. 20, 2018), https://www.theatlantic.com/technology/archive/2018/04/amazon-may-have-a-counterfeit-problem/558482/. Further, even when the seller's identities are known, if they are in another country (and most are), they are largely outside the jurisdiction for criminal prosecution by U.S. law enforcement or civil liability to private parties. *See* Kari Kammel, *Examining Trademark Counterfeiting Legislation, Free Trade Zones, Corruption and Culture in the Context of Illicit Trade*, 28 MICH. STATE INT'L L. REV. 209, 214 (2020). Together, these advantages often immunize counterfeiters from accountability for the harm and losses their businesses create. *Cf.* Maarten Declaration, *Dkt*. 7, ¶¶ 20, 31 (moving a business's operations and assets "is easily achieved when operating […] over the Internet.").

Where counterfeiters once operated by coordinating manufacturing, shipping, importation, distribution and sales out of one or two countries, the internet has allowed them to outsource components of the enterprise to unrelated groups located all over the world. The only common denominator that harmonizes the international enterprise is the same one that pervades every business: finance. Every component of the counterfeiting process requires some manner of funding. Though counterfeiters are now operating without borders, the laws to hold them accountable remain national. Allowing brand-owners access to the fiscal data and mechanics of U.S. commercial transactions associated with counterfeit product sold in the U.S. is the only viable means to police an unlawful international enterprise through our courts of limited, territorial jurisdiction and often incompatible rules of law and regulation. Moreover, the timing of such access is critical to its efficacy as it is common practice for operators of websites selling counterfeit goods to shift or conceal their assets whenever they receive notice that a lawsuit has been brought against them by a brand owner. *See* Falsone Declaration, *Dkt*. 10, ¶ 15.

c. The harm caused by counterfeiters is extensive and growing.

The unbridled proliferation of counterfeits in the online marketplace directly harms—and unfairly competes against—the many legitimate companies that produce, sell and distribute genuine goods. The costs include lost profits, employee layoffs, and diminished incentives to innovate. The International Chamber of Commerce (ICC), together with the International Trademark Association (INTA), commissioned a study that estimated counterfeit goods displaced roughly half a *trillion* dollars of sales of legitimate companies in 2013 and forecasts that displacement to more than double by 2022 at its current pace. *See* Frontier Economics, *The Economic Costs of Counterfeiting and Piracy* at 8 (Jan. 2017), https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf. That lost revenue will not only enrich criminals and fund all manner of crimes against humanity like terrorism, human, and drug trafficking, but also cost law-abiding citizens jobs. *Id*. In 2013, those lost jobs were estimated to be between 2 and 2.6 million, globally. The forecast for 2022 was between 4.2 to 5.4 million (*see id*.), but that was before the world faced a pandemic whose uncertain end projects well into the future. Moreover, counterfeits are often dangerous; even seemingly innocuous items like footwear can contain harmful chemicals. *See, e.g.*, American Apparel & Footwear Association, Restricted Substance List (RSL), https://www.aafaglobal.org/AAFA/Solutions_Pages/Restricted_Substance_List.aspx (21st ed. 2020).

Real-world social and economic devastation aside, counterfeiters also damage the legitimate brands they rip-off. When brand owners expend the time and resources necessary to build a brand capable of commanding a premium price over its competitors, a failure to realize that premium only stands to de-incentivize innovation as brand owners are less likely to invest in the creation of something a counterfeiter will simply be able to copy and pirate with minimal effort and expense. This is especially true for small and medium sized businesses, which do not have the same financial resources as more established brands. Not only must these businesses weather the reputational and image harm caused by consumers who may think the poor-quality knockoff they purchased is genuine, but the revenue and resource expenditures from continually monitoring e-commerce platforms for counterfeits, performing test- and trap-buys, and sending takedown notices can exceed the actual losses suffered from sales lost to counterfeiters. *See, e.g.,* Jay Kennedy, *Proposed Solutions to the Brand Protection Challenges and Counterfeiting Risks Faced by Small and Medium Enterprises (SMEs)*, 11 J. APPLIED SEC'Y RESEARCH, 450-68

(Sept. 8, 2016); Julia Bourke, *Are Small Businesses the Most Impacted by the Global Counterfeit Market?*, RED POINTS ANTI-COUNTERFEIT AND ANTI-PIRACY BLOG (Mar. 31, 2017), https://blog.redpoints.com/en/small-businesses-and-the-global-counterfeit-market; Lewis Wallace, *Selfie Stick iPhone Case Gets Counterfeited Before it Even Exists,* CULT OF MAC (Jan. 8, 2016), https://www.cultofmac.com/405933/selfie-stick-iphone-case-gets-cloned-before-it-even-exists. Further, as brand owners become more disillusioned with America's ability to protect its home-grown brands in favor of shielding foreign counterfeiters from accountability under the auspices of respecting foreign banking laws, so also wanes consumer confidence in the American marketplace and its ability to market genuine goods.

II. Reliably Enforceable Account Freezes and Access to Bank Data is Vital to Combat the Growing Threat of Online Counterfeiting – Follow the Money

America's counterfeiting problems are manageable, but not if decisions like the one made by the lower court here are allowed to stand. Over the past ten years, the A-CAPP Center's has focused some of its research on counterfeiting in the area of situational crime prevention to understand (1) how counterfeiters operate—whether in brick and mortar stores or in the online space—and (2) how to curb their operations. *See generally* CENTER FOR ANTI-COUNTERFEITING & PRODUCT PROTECTION, *Breaking New Ground in the Global Fight Against Product*

Counterfeiting: A Look at the A-CAPP Center's First Ten Years as a Strategy Leader (2018), http://a-capp.msu.edu/ten-year-report/. Situational crime prevention theory teaches that counterfeiters will continue their illicit activities if their relevant accounts are not effectively frozen because the benefit of their crime and financial gain will outweigh any risk.

In other words, it is imperative that brand owners be able to successfully petition the courts to reach and preserve the financial assets of counterfeiters. Whether they perform their part of unlawful commercial transactions wittingly or unwittingly, banks such as the appellees here are not mere disinterested bystanders. Rather, they constitute a vital link in the counterfeit supply chain and profit directly from the sale of counterfeit goods (as the fees charged for their services arise from servicing, and are paid from, the revenues generated from unlawful trade). Research on property crime suggests that criminals will pursue opportunities where a motivated offender and a target suitable for victimization come together within a space that is poorly policed. *See* Lawrence E. Cohen & Marcus Felson, *Social Change and Crime Rate Trends: A Routine Activity Approach*, AM. SOCIOLOGICAL REV., 588-608 (vol. 44, no. 4, Aug. 1979). As such, policing routine activity associated with crime (like financial transactions) can effect meaningful deterrence. *See* R.V. Clarke, *"Situational" Crime Prevention: Theory and Practice*, 20 BRIT. J. CRIMINOLOGY 136 (Apr. 1, 1980). For example, the Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-1957 (1986), greatly impacted drug trafficking organizations by creating meaningful obstacles to their enjoyment of narcotics revenues. Removing access to channels used to funnel profits forced Colombian cartels to turn to fringe black-market launderers, a process that took a significant toll on their earnings.

Here, banks, and foreign banks specifically, are the last remaining, feasible location for counterfeiters to store their earnings. *See generally* OECD, *Trends in Trade in Counterfeit and Pirated Goods*, OECD ILLICIT TRADE (Mar. 18, 2019), www.oecd-ilibrary.org/trade/trends-in-trade-in-counterfeit-and-pirated-goods_g2g9f533-en. Accordingly, that is where anti-counterfeiting efforts must be concentrated as it is the only feasible point of vulnerability. Banks are ideally situated to act as guardians of reputable trade in this manner, combatting counterfeiting by cutting off access to funds. Instead, the lower court decision is dismissive of the banks' involvement in the enterprise, deeming its role in these crimes to be merely "providing routine banking activities."

This characterization overlooks two critical points. *First*, at its core, counterfeiting is a financially-motivated crime. Counterfeiters do not care about consumers and whether the products they make and sell provide any consumer benefit (or even whether it has the potential for harm)—they only care about the money. Were it not for the so-called routine service the banks supply in transferring their funds, counterfeiters would not have any incentive to commit the crime. Therefore, activities that are undertaken in furtherance of such crimes (such as funneling illegally obtained profits into new accounts to avoid detection) should not be so readily discounted as tangential (or "routine") to the underlying criminal misconduct.

Second, disrupting the more routine elements of a crime is often a highly effective means of preventing its reoccurrence. Routine Activity Theory teaches this very point. *See, e.g.*, Cohen & Felson; *see also* George T. Adams, Jr., *Virtual Communities as Guardians Against Product Counterfeiting in the Athletic Footwear Industry*, CENTER FOR ANTI-COUNTERFEITING & PRODUCT PROTECTION (June 2016), http://a-capp.msu.edu/wp-content/uploads/2018/05/Virtual-Communities-Athletic-Footwear_FINAL.pdf. Financially motivated crimes like counterfeiting are committed by rational actors. If a counterfeiting venture's profitability declines so as to not justify the risk or expense, like all such business endeavors, it ceases. Accordingly, when convinced that counterfeit goods are being traded in U.S. commerce, district courts simply *must* act to preserve and pursue the proceeds from the unlawful sales with the same confidence and tenacity they bring to bear on other unlawful activities like narcotics and terrorism. Indeed, the judicial groundwork for such actions already exists in this Circuit. In *Gucci*, this Court held that asset-freeze orders were particularly important for plaintiffs "seeking an accounting against allegedly infringing defendants in Lanham Act cases," and that the district courts have the express authority to issue asset-freeze orders. *Gucci Am., Inc. v. Bank of China*, 768 F.3d 122, 131-32 (2d Cir. 2014) (vacated and remanded for the district court to consider specific personal jurisdiction and comity). Put simply, by granting brand owners access to freeze funds that counterfeiters generated from the sale of fake product, the district courts can level the playing field and cause counterfeiters to evaluate whether the costs of the crime outweigh its benefits.

a. Timely Asset Freezes Assist Brand Protection Efforts

District courts regularly call upon U.S. banks to freeze accounts relevant to online counterfeiting schemes. *See, e.g., True Religion Apparel v. Lei*, No. 11-cv-8242 (S.D.N.Y. Mar. 12, 2012) (order granting default judgment and permanent injunction); *Philip Morris USA Inc. v. Jiang*, No. 11-cv-24049 (S.D. Fla. Dec. 12, 2011) (order granting application for entry of preliminary injunction); *Tory Burch LLC v. Yong Sheng Int'l Trade Co., Ltd*, No. 10-cv-9336, 2011 WL 13042618 (S.D.N.Y. May 13, 2011) (order granting default judgment and permanent injunction). This approach has met with great success. *See, e.g.,* Jeffrey A. Lindenbaum & David Ewen, *Catch Me If You Can: An Analysis of New Enforcement Measures and Proposed Legislation to Combat the Sale of Counterfeit Products on the Internet*, 32 Pace L. Rev. 567, 570 (2012) ("[B]rand owners, through these lawsuits, have taken advantage of the expedited default proceedings to quickly disable mass quantities of counterfeit websites, and interrupt the flow of funds to these sites. With relatively minimum investment, brand owners can make a noticeable impact on the volume of existing counterfeit websites, and quickly move on to the next group of sites."); *see also id*. at 593–94, 598; *Deckers Outdoor Corp. v. DOES 1-100*, No. 12-cv-10006, 2013 U.S. Dist. LEXIS 6404, at *16 (N.D. Ill. Jan. 16, 2013) (granting preliminary injunction for the purpose of freezing Paypal accounts associated with defendants' websites, without which relief the defendants would be able to continue to sell counterfeit products and move money from such sales to offshore accounts); *Tory Burch LLC v. Doe*, No. 12-cv-7163, 2012 WL 4581409, at *6 (N.D. Ill. Oct. 2, 2012) (granting a preliminary injunction for the purpose of freezing Paypal accounts associated with defendants' websites); *Oakley, Inc. v. The Partnerships*, No. 14-cv-7714, 2014 WL 12573678, at *3 (N.D. Ill. 2014) (granting a preliminary injunction for the purpose of restraining and enjoining funds and accounts under the control of banks and payment processors); *Luxottica USA LLC, v. The Partnerships,* No. 14-cv-9061, 2015 WL 38186222, at *4, (N.D. Ill. 2015) (granting a permanent injunction and freeze of all Paypal accounts linked to defendants); *CCA and B, LLC v. Babeeni Vietnam Company Limited, et al.*, No. 19-cv-02859, 2019 WL 7491499, at *5-6 (N.D. Ga. 2019) (ordering financial institutions and payment processers to attach and freeze all funds in any accounts owned by defendants).

That same successful approach can be applied to the present situation if this Court will simply dispense with the flawed and, frankly, illogical argument that U.S. banks and non-U.S. banks should be treated differently in terms of disclosure requirements and compliance with U.S. court orders, especially when there is no meaningful difference whatsoever in terms of the services they provide to counterfeiters and their participation in the illicit enterprise. Many foreign sellers do not have a financial nexus to the United States, making it difficult for brand owners to obtain financial information and subject all parts of the transaction to U.S. law enforcement efforts. However, when that nexus is found (*e.g.*, via trading counterfeit goods in U.S. commerce and using the American banking system to facilitate transfer of funds abroad), brand owners must be empowered to act to preserve their interests *before* that nexus evaporates.

b. The Efficacy of U.S. Asset Freezes Affects Positive Change By Reducing Criminal Behavior

When U.S. Customs began to seize large container shipments, business as usual got expensive and counterfeiters pivoted to small, individual package shipments. Russell Jacobs & Venkat Balusubraman, *On-Line Sales of Counterfeit Goods and The Universal Postal Union: The Little Known Aggravator*, THE BRAND PROTECTION PROFESSIONAL, Sept. 2019, 12-15, https://joom.ag/DLJe/p12 (discussing the e-commerce sale of counterfeits); OECD & EUIPO, *Misuse of Small Parcels for Trade in Counterfeit Goods: Facts and*

Trends (Dec. 12, 2018), at 11, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/Trade_in_fakes_in_small_parcels/Trade_in_Fakes_in_Small_Parcels_en.pdf (discussing how small parcel shipments of counterfeits effect customs enforcement). Similarly, once U.S. courts made a concerted effort to freeze domestic assets, counterfeiters shifted away from U.S.-based banks and financial institutions, like Western Union, PayPal, and Mastercard, to off-shore or foreign banks, like many of the banks in this case. *See, e.g.*, Erika Kinetz, *AP Exclusive: Chinese Banks a Haven for Web Counterfeiters*, The Associated Press, http://apnews.com/bed34dcc75894955a4a2e9f3f7a790bf (May 7, 2015).

Accordingly, the next logical step is to make meaningful progress toward tracking and seizing the funds exchanged in the illicit trade of counterfeits in U.S. commerce *regardless of where that paper trial ultimately leads*. To do otherwise not only invites counterfeiters to operate with little fear of, or respect for, U.S. law, but also invites foreign countries who harbor counterfeiters to craft banking laws that deliberately facilitate the transfer of wealth from U.S. citizens and U.S. brand owners to foreign counterfeiters via unlawful means. Put simply, U.S. courts can no longer indirectly facilitate counterfeiting by allowing other countries to shield account holders from U.S. laws and thereby profit in the process. *See, e.g.,* Roxanne Elings, *Combating Counterfeiting Online: Follow the Money*, World Trademark

Review, https://www.worldtrademarkreview.com/combating-counterfeiting-online-follow-money (last accessed June 4, 2020) ("It has been well documented by documents obtained from several online counterfeiting cases that over 90% of proceeds from the sale of counterfeits online go back to China and Hong Kong.").

c. Foreign banks who knowingly participate in U.S. commerce must be made to timely comply with the U.S. judicial process.

While some foreign banks readily cooperate with U.S. court orders when made aware of their potential involvement in an unlawful enterprise, *see, e.g.*, *Gucci Am., Inc. v. Curveal Fashion*, No. 09-cv-8458, 2010 WL 11506401, at *2 (S.D.N.Y. May 13, 2010) (documenting the compliance of the Royal Bank of Scotland WorldPay), others flatly refuse. Indeed, when served with U.S. court orders, some banks choose to litigate to the hilt as if they themselves were being accused of counterfeiting, employing one dilatory tactic after another, often delaying compliance for years. *See, e.g.*, Kinetz, *supra* (discussing the response of Chinese banks to U.S. court orders to freeze funds, including protestations that the banks do not support counterfeiting and have broken no laws); Minning Yu, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 Fordham L. Rev. 2987, 3009-3018 (2013) (discussing response of Chinese banks to U.S. court orders to freeze funds, such as claims that compliance of U.S. court orders would violate Chinese law); *see also* Eleanor Ross, *Increasing United States-China Cooperation on Anti-Corruption: Reforming Mutual Legal Assistance*, 86 Geo.

Wash. L. Rev. 839, 849-851 (2018) (discussing the current framework for dealing with requests under the US-Chinese mutual legal assistance treaty, including provisions allowing for the refusal of assistance); Gail Kent, *The Mutual Legal Assistance Problem Explained, The Center for Internet and Society*, http://cyberlaw.stanford.edu/blog/2015/02/mutual-legal-assistance-problem-explained (discussing the length of time required in US and UK mutual legal assistance requests).

By way of specific example, in *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 126–28 (2d Cir. 2014), the New York branch of the Bank of China was served with subpoenas in a trademark infringement suit brought by Gucci, Balenciaga, Yves Saint Laurent and other luxury brands seeking information regarding defendants' accounts. *Gucci America, Inc., et al. v. Weixing Li, et al.*, 135 F.Supp.3d 87, 91-92 (S.D.N.Y. 2015). When the bank refused to turn over documents within its control located in China, plaintiffs moved to compel that production as well as compliance with an asset freeze of accounts with links to the counterfeit operations that had been implemented as part of a preliminary injunction. The bank not only contested plaintiffs' motion, but actually moved the court to change its prior orders directing the bank to freeze assets located in Chinese accounts. Even after the plaintiffs prevailed on both motions, the bank did not fully comply. Instead, it moved for reconsideration, lost again, and withheld documents for seven of nine accounts causing the court to issue sanctions daily for civil contempt. On appeal, this Court remanded for further consideration the issue of whether the district court could properly exercise specific personal jurisdiction over the bank to compel compliance with its orders, but otherwise specifically affirmed that, *if properly exercised*, the district court was wholly empowered to freeze a defendant's accounts located in China. Ultimately, despite numerous orders, the bank stonewalled until the case settled, with coercive fines compounding to over $1,000,000. *Gucci Am., Inc. v. Weixing Li*, No. 10-cv-4974 (S.D.N.Y. filed Apr. 8, 2016) (letter from Robert Weigel, Counsel to Gucci Am. Inc., to Judge J. Sullivan); see also *Tiffany (NJ) LLC v. Forbse*, No. 11-civ-4976, 2015 WL 5638060 (S.D.N.Y. Sept. 22, 2015) (wherein non-party foreign banks objected to asset restraints at the preliminary injunction stage, unsuccessfully appealed the denial of their motion, and then proceeded to fight a post-judgment asset restraint to no avail); *Gucci Am., Inc. v. Curveal Fashion*, No. 09-cv-8458, 2010 WL 11506401 (S.D.N.Y. May 13, 2010), *adopted* No. 09-cv-8458 (S.D.N.Y. May 28, 2010) (wherein a non-party foreign bank challenged a subpoena for documents based on an alleged conflict with foreign law, failed to produce the documents the documents even after the court carefully considered and rejected those arguments, and was ultimately found to be in civil contempt); *Cf. In re Sealed Case*, 932 F.3d 915, 920–22 (D.C. Cir. 2019) (affirming district court's contempt order over arguments that compliance with document requests would violate Chinese law and US/Chinese treaty law).

Such obstructive tactics add years and significant expense to what should be routine enforcement actions, making brand owners' burdens that much greater. Indeed, it is one thing for a bank to resist freezing the accounts of a customer who is deemed innocent until proven guilty, but quite another for a bank to not only enable an account holder found liable for willful infringement to *continue* infringing but to also actively aid and abet that counterfeiter in realizing the profits earned thereby.

If U.S. brand owners stand any chance of protecting their intellectual property as the planet continues its evolution into an e-commerce-oriented society, U.S. courts ***must*** require that all banks, foreign *and* domestic, facilitating e-commerce transactions involving U.S. consumers meaningfully participate in the judicial process should evidence come to light establishing the illegality of those transactions. *See* Qingxiu Bu, *Extraterritorial Jurisdiction Vis-à-Vis Sovereignty in Tackling Transnational Counterfeits: Between a Rock and a Hard Place?*, 100 J. PATENT & TRADEMARK OFF. SOC'Y 69, 94 (2018) (arguing that foreign banks gain privileges from operating a branch in New York, which give rise to commensurate and reciprocal obligations). Any refusal to do so should be held to demonstrate, at best, a lack of respect for U.S. law and the authority of U.S. courts to adjudicate criminal matters and civil disputes involving U.S. commerce. At worst, it should be held to demonstrate a willful complicity in assisting counterfeiters to evade justice. Either way, non-compliance should be sanctioned to compel immediate compliance.

III. In the Absence of Consistent, Readily Enforceable Relief, Crime will Not Abate and Many U.S. Businesses Will Suffer

As the U.S. government has explained in its amicus brief in the *Gucci v. Li* case (cited *supra*), "[e]nforcing the Lanham Act is of special importance because the United States has a strong, continuing interest in keeping counterfeit goods out of the domestic marketplace. Counterfeiting is *not* simply a violation of a private citizen's property rights, but also entails a significant risk to public health and safety involving products as diverse as medications, food products, automobile and aircraft parts, as well as key components of national defense systems. Apart from its interests in the specific statute at issue, the United States has a strong interest in maintaining a litigation system that provides for timely and fair opportunities for parties to obtain evidence that lies outside their control, and in securing the good-faith participation of entities that choose to do business in the United States." Brief for the United States of America as Amicus Curiae Supporting Plaintiffs-Appellees at 25, *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014) (No. 11-cv-3934), 2014 WL 2290273; *see also id.* at 21 ("As banks headquartered in China, they are subject to general regulation and enforcement by China; they have also chosen, however, to do business in the United States and have thereby subjected themselves to American regulatory and judicial authority.").

The federal government has long recognized the need to exercise personal jurisdiction over foreign banking activities which threaten to undermine the nation's economic and political system. For example, the Patriot Act of 2001 was enacted, among other purposes, "to provide a clear national mandate for subjecting to special scrutiny those foreign jurisdictions, financial institutions operating outside of the United States, and classes of international transactions or types of accounts that pose particular, identifiable opportunities for criminal abuse." Pub. L. No. 107-56, 115 Stat. 296 (2001); *see also* 31 U.S.C. § 5318; David Chaikin, *A Critical Examination of How Contract Law is Used by Financial Institutions Operating in Multiple Jurisdictions*, 34 MELB. U. L. REV. 34**,** 41 (2010) (examining the extraterritorial reach of the Patriot Act as illustrated by § 319, which empowers U.S. courts to seize funds deposited by a foreign bank at a U.S. bank where it is alleged that the foreign bank holds illicit funds for a customer in accounts outside the U.S.). In a connected economy, the failure to eradicate the financial means by which counterfeiters are able to operate in the U.S. is tantamount to letting narcotics trafficking, terrorism and financial frauds prey unimpeded upon law-abiding citizens.

Brand ownership and the rule of law both vitally depend on asset-freeze orders such as those at issue here. By preventing criminals from profiting from their crimes, the costs of committing crime increase, thereby strengthening deterrence. Should crime prevention techniques be applied unequally, however, (*e.g.*, as between U.S. and non-U.S. banks) criminals will simply take the path of least resistance. Accordingly, when given cause to believe the counterfeiting activity is underway, it is *imperative* that U.S. courts issue and readily enforce orders freezing assets pending disposition of a case, including foreign bank accounts when they have jurisdiction to do so. Otherwise, counterfeiters will continue their criminal activity undeterred, foreign banks will continue profiting from the willful infringement of U.S. intellectual property, and right holders will continue to lose faith in the justice system's ability to protect American interests from action taken on this country's soil when proof of wrongdoing by foreign actors is established.

CONCLUSION

Based on the foregoing, this Court should closely scrutinize the decision of the lower court and reverse the judgment of the United States District Court for the Southern District of New York as sought by the Appellant.

Date: White Plains, New York
June 5, 2020

Respectfully submitted,

<u>/s/ Lauren Emerson</u>

Lauren Beth Emerson
Robert M. Isackson
Cameron Reuber
Peter S. Sloane
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32 and Circuit Rule 29.1, I certify the following: This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6920 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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/s/ Lauren Emerson

Lauren Beth Emerson
Robert M. Isackson
Cameron Reuber
Peter S. Sloane
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 5, 2020

/s/ Lauren Emerson

Lauren Beth Emerson
Robert M. Isackson
Cameron Reuber
Peter S. Sloane
LEASON ELLIS LLP
One Barker Avenue, Fifth Floor
White Plains, New York 10601
Tel: (914) 288-0022
Fax: (914) 288-0023
emerson@leasonellis.com
isackson@leasonellis.com
reuber@leasonellis.com
sloane@leasonellis.com

Attorneys for Amicus Curiae