

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

E-Z Ink Inc.,  
Zhuhaiiaikedamaoyiyouxiangongsi (Akda),  
Imagetech Direct Inc., Lemeru, Plenty Talent  
Corp.,

Plaintiffs,

v.

Brother Industries, Ltd.,

Defendant.

Case No. 2:21-cv-00564-AWA-DEM

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

**Table of Contents**

I.	INTRODUCTION .....	1
II.	STATEMENT OF RELEVANT FACTS .....	1
	A. Relevant Timeline	1
	B. The '932 Patent	4
	C. The Prior Art—U.S. Publication No. 2007/0031158	4
III.	LEGAL STANDARD.....	6
IV.	ARGUMENT .....	7
	A. Plaintiffs are Entitled to a Preliminary Injunction	7
	1. Plaintiffs are Likely to Succeed Because Claim 1 of the '932 Patent Is Anticipated By U.S. Publication No. 2007/0031158	7
	a. The '158 publication is prior art	7
	b. Claim Construction	8
	c. The '158 publication discloses “[a] cartridge”	9
	d. The '158 publication discloses “a housing including a first side wall and a second side wall opposed to the first side wall in a longitudinal direction”	9
	e. The '158 publication discloses “a receiving unit configured to receive a driving force from outside, mounted at the housing, and configured to rotate around a first axis line parallel to the longitudinal direction	10
	f. The '158 publication discloses “a detected body mounted at the first side wall and including a detected part configured to be detected by a detecting unit,	11
	g. The '158 publication discloses “wherein the detected body is configured to advance outwards in the longitudinal direction with respect to the first side wall and is configured to retract inwards in the longitudinal direction with respect to the first side wall	11
	B. Plaintiffs Will Suffer Irreparable Harm If the Court Does Not Issue a Preliminary Injunction	13
	1. The Balance of Equities Favors Issuance of a Preliminary Injunction	16

2.	The Public Interest Favors Issuance of a Preliminary Injunction	17
C.	Any Bond Requirement Should Be Minimal	18
V.	CONCLUSION.....	18

**Table of Authorities**

**Cases**

*Beyond Blond Prods., LLC v. Heldman*,  
479 F. Supp. 3d 874 (C.D. Cal. 2020) ..... 15

*Blue Calypso, LLC v. Groupon Inc.*,  
815 F.3d 1331 (Fed. Cir. 2016)..... 8

*Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*,  
700 Fed. Appx. 251 (4th Cir. 2017)..... 14

*Henderson for Nat’l Labor Rel. Bd. v. Bluefield Hospital Co., LLC*,  
902 F.3d 432 (4th Cir. 2018) ..... 6

*Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*,  
174 F.3d 411 (4th Cir. 1999) ..... 18

*Hybritech Inc. v. Abbot Labs.*,  
849 F.2d 1446 (Fed. Cir. 1988)..... 7

*Kingston Tech Co., Inc. v. SPEX Techs, Inc.*,  
798 Fed. Appx. 629 (Fed. Cir. 2020)..... 7

*Medcursor v. Shenzhen KLM Internet Trading Co.*,  
No. 2:21-cv-02843, 2021 WL 2493288 (C.D. Cal. Jun. 10, 2021)..... 15, 16, 18

*Phillips v. AWH Corp.*,  
415 F.3d 1303 (Fed. Cir. 2005)..... 8

*Winter v. Natural Res. Def. Council, Inc.*,  
555 U.S. 7 (2008)..... 6

**Statutes**

35 U.S.C. § 102 (pre-AIA)..... 8

**Rules**

Fed. R. Civ. P. 65 ..... 18

## **I. INTRODUCTION**

Plaintiffs seek a preliminary injunction to preserve their ability to sell replacement printer cartridges on Amazon.com in the face of Defendant's invalid patent. Amazon is the world's largest online retailer. It provides a critical marketplace and platform for businesses to reach consumers. Plaintiffs are all sellers that utilize Amazon as their primary way to reach customers.

Through Amazon's Utility Patent Neutral Evaluation Procedure, Defendant has accused products sold by each of the plaintiffs of infringing claim 1 of U.S. Patent No. 8,867,932 (the '932 patent). Although Amazon's evaluation procedure permits accused sellers to challenge infringement allegations on the basis of noninfringement, it does not provide a way to show that the patents are invalid due to prior art. For such invalid patents, an accused seller must obtain a court order or a ruling from the Patent Trial and Appeal Board or International Trade Commission in order to maintain their products on the Amazon platform.

Plaintiffs are seeking such an invalidity order through the filing of this lawsuit. Amazon, however, will not wait for this lawsuit to conclude before removing accused products. Indeed, Plaintiffs' products have already been removed from the Amazon marketplace due to Defendant's filings accusing Plaintiffs' products of infringing the '932 patent. Through this motion, Plaintiffs merely seek to maintain their ability to sell accused products until the dubious validity of the '932 patent has been resolved.

## **II. STATEMENT OF RELEVANT FACTS**

### **A. Relevant Timeline**

Plaintiffs are sellers that utilize the Amazon platform to sell their products. Xu Decl., ¶2; Zhu Decl., ¶2; Lin Decl., ¶2; Wu Decl., ¶ 2; Dai Decl., ¶ 2. Each plaintiff sells replacement printer cartridges on Amazon.com. Amazon.com is substantially the only sales channel through

which each Plaintiff sells their printer cartridges accused of infringement by Brother. Xu Decl., ¶4; Zhu Decl., ¶4. Lin Decl., ¶4; Wu Decl., ¶ 4; Dai Decl., ¶ 4.

On August 27, 2021, Defendant Brother Industries, Ltd. (also known as Brother Kogyo Kabushiki Kaisha) executed an Amazon Utility Patent Neutral Evaluation Agreement (“Evaluation Agreement”). Dkt. 1-2. By executing the agreement, Defendant “represent[ed] and warrant[ed] that it owns or has the right to enforce” the ’932 patent. *Id.* at 1. Additionally, Defendant “assert[ed] that listings identified by the Amazon Standard Identification Numbers (“ASINs”) in Exhibit 1 (“Products”) infringe the patent claim identified in Exhibit 1.” *Id.* The exhibit to the Evaluation Agreement identifies 15 ASINs and asserts that those ASINs infringe claim 1 of the ’932 patent. Fourteen out of the 15 Defendant-identified ASINs identify products sold by at least one of the plaintiffs. *Compare* Dkt. 1-2 with Ex. 1.

The Amazon Utility Patent Neutral Evaluation Procedure (“Amazon Evaluation Procedure”) provides that accused sellers must either (1) execute and return the Evaluation Agreement, along with an Exhibit 2, within 3 weeks or (2) have their listing of accused products removed from Amazon.com. Ex. 12 at ¶ 1. The Amazon Evaluation Procedure provides that products will be delisted from Amazon.com if seller does not comply. *Id.*

Plaintiffs received notice of the Evaluation Agreement in respective emails bearing August 31, 2021 time-stamps. Exs.7, 8, 9, 10, 11; *see also* Ex. 4. Thereafter, Plaintiffs returned their respective executed Evaluation Agreements to Amazon in an email dated September 21, 2021. Ex. 1. Despite having returned their executed Evaluation Agreements timely with respect to the timestamps and despite the lack of a clear, date certain deadline in Amazon’s initial emails, Amazon nonetheless delisted Plaintiff’s products. *See* Ex. 2. In response to Plaintiffs’ prompt inquiry regarding the delisting, *id.*, Amazon, on September 22, 2021, notified Plaintiffs

that the three-week deadline for responding had passed, and consequently, that the products were delisted and participation in an Evaluation proceeding was no longer an option. Ex. 3. Plaintiffs promptly responded that day, explaining that the alleged lateness was due to the time difference between China and the United States, re-requesting participation in the Amazon Evaluation, and seeking re-listing of their products on Amazon during the pendency of any such Evaluation. Ex. 4. Amazon countered by sending Plaintiffs a substantially identical email that did not appear to consider the time difference confusion, recited apparently pre-written form text, and concluded by stating, “Further correspondence on this topic, absent a court judgement, may not receive a response.” Ex. 5

While an earlier return of Plaintiffs’ executed Evaluation Agreements might have, perhaps temporarily, maintained Plaintiffs’ Amazon listings, Plaintiffs would not have been able to maintain their products’ listing or otherwise contest Brother’s Amazon filing by challenging the validity of Brother’s patent via such Evaluation procedure. Ex. 12 at ¶¶ 5-6.

On September 22, 2021, the same day of Amazon’s last communication on the matter, Plaintiffs’ counsel had the first of several conversations with Defendant’s counsel, seeking Brother’s cooperation in asking Amazon to proceed with the Amazon Evaluation despite the alleged lateness, or to otherwise permit relisting the accused products while the parties negotiated a mutually agreeable solution to the alleged infringement. Sandell Decl., ¶2. Defendants did not agree to Plaintiffs’ request. Ex. 6. As of the filing of this paper, Plaintiffs’ accused ASINs remain delisted from Amazon.com. Dai Decl., ¶ 7; Xu Decl., ¶ 9; Lin Decl., ¶ 8; Zhu Decl., ¶ 9; Wu Decl., ¶ 7.

On October 10, 2021, Plaintiffs brought this action to resolve issues surrounding the validity and enforceability of the ’932 patent, and correspondingly remove the restraints on

commerce that Defendant engendered through extra-judicial assertion of the '932 Patent. Dkt. No. 1. Defendants have actual notice of this lawsuit and have agreed to waive service. Dkt. No. 7.

**B. The '932 Patent**

The patent at issue, the '932 patent, is entitled “Cartridge and Image Forming Apparatus.” Dkt. 1-1. It discloses a “cartridge [that is] detachably attachable to an image forming apparatus.” *Id.* at Abstract. The cartridge includes side walls and may receive a driving force from a driving unit. *Id.*

The '932 discloses a way to detect whether a cartridge is new or old based on the detection of a “detected part.” *Id.* at 13:44-16:36. A detected body “advances outwards in the longitudinal direction” and also “retracts inwards in the longitudinal direction” in response to a driving force. *Id.* at Abstract. As a result, a detected part may be “detected by the detecting unit.” *Id.* Based on the detection of the detected part, the printer may determine whether an inserted cartridge is new or old. *Id.* at 16:4-20.

Claim 1 of the '932 patent, the claim that Defendant has asserted in its Amazon Evaluation Agreement (Dkt. 1-2 at 2), broadly claims a cartridge with three elements: (1) a housing; (2) a receiving unit; and (3) a detected body. '932 patent at Claim 1. Claim 1 further requires that the detected body is configured to advance outward and retract inward in the longitudinal direction with respect to the first sidewall. *Id.*

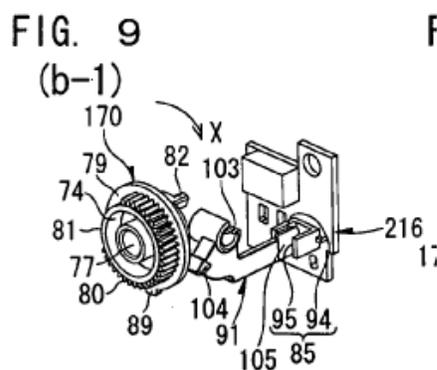
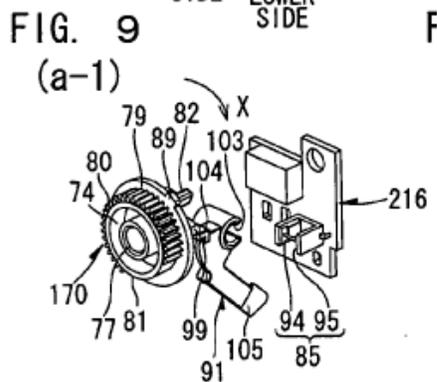
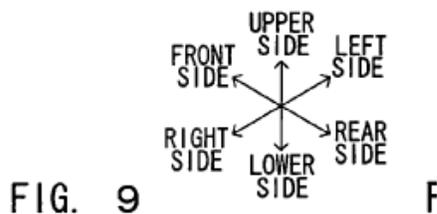
**C. The Prior Art—U.S. Publication No. 2007/0031158**

The prior art reference at issue, U.S. Publication No. 2007/0031158 (the '158 publication) is titled “Image Forming Apparatus, Image Forming Unit and Developer Cartridge.” The '158 publication is prior art, having been published more than 4 years before the earliest priority date of the '932 patent. *See* Section IV.A.1.a~~IV.A.1.a~~ below. The '158 publication is

one of Defendant's own publications, having "Brother Kogyo Kabushiki Kaisha" listed as the assignee on its face.

Like the '932 patent, the '158 publication discloses a way to determine whether a cartridge is new or old. '158 publication at ¶¶ 160-161. The '158 publication's printer does so based on the movement of a lever 91 and a detected portion 105 of the lever. *Id.* at ¶ 134. Through the movement of the lever 91 and detected portion 105 "laterally outward" (*Id.* at ¶ 150) and "laterally inward" (*Id.* at ¶ 152), the detected portion 105 blocks or does not block light in an optical sensor 85. *Id.* at ¶ 153. Based on the signals detected by the optical sensor, the printer is able to receive information regarding whether the cartridge is new or old. *Id.*

Fig. 9 of the '158 publication, reproduced in part below, depicts the optical sensor 85 and two positions of the lever 91 and detected portion 105. *Id.* at ¶ 139.



### III. LEGAL STANDARD

A plaintiff seeking preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Henderson for Nat'l Labor Rel. Bd. v. Bluefield Hospital Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018) (citing *Winter*). In patent law cases, if substantive issues arise that fall within the specific domain of patent law, precedent

from the United States Court of Appeals for the Federal Circuit governs. *Hybritech Inc. v. Abbot Labs.*, 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1988).

#### **IV. ARGUMENT**

##### **A. Plaintiffs are Entitled to a Preliminary Injunction**

##### **1. Plaintiffs are Likely to Succeed Because Claim 1 of the '932 Patent Is Anticipated By U.S. Publication No. 2007/0031158**

Plaintiffs are likely to succeed on its claim against Defendant that claim 1<sup>1</sup> of the '932 patent is invalid as anticipated by prior art. Complaint, Dkt. 1 at ¶ 37. As demonstrated by the claim chart attached to the complaint (Dkt. 1-3, the "Claim Chart") and further explained in detail below, U.S. Publication No. 2007/0031158 ("the '158 publication") anticipates<sup>2</sup> claim 1 of the '932 patent.

A patent claim is anticipated if each and every element of the claim is expressly or inherently disclosed in a single prior art reference. *Kingston Tech Co., Inc. v. SPEX Techs, Inc.*, 798 Fed. Appx. 629, 632 (Fed. Cir. 2020). The '158 publication disclosed every element of claim 1 long before the application that led to the '932 patent.

##### ***a. The '158 publication is prior art***

The '932 patent was filed as a continuation of application No. 13/075,157, which was filed on March 28, 2011. Assuming the '932 patent is entitled to claim priority to this application, it's earliest effective filing date would be March 28, 2011. The '158 publication was

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<sup>1</sup> As noted above, Defendant has only asserted claim 1 of the '932 patent in its Amazon Utility Patent Neutral Evaluation Procedure.

<sup>2</sup> The '158 publication, which is also assigned to Defendants, was not considered or disclosed during the prosecution of the '932 patent. Although Plaintiffs' complaint includes a claim of inequitable conduct, to simplify the issues for the Court, Plaintiffs have elected to focus on invalidity in this motion.

published on February 8, 2007, more than 4 years earlier. Thus, the '158 publication is prior art under at least pre-AIA<sup>3</sup> 35 U.S.C. § 102(b).

***b. Claim Construction***

Plaintiffs have applied, solely for purposes of this motion, the ordinary and customary meaning to the words of the claims. Claim terms are “generally given their ordinary and customary meaning.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (citations omitted). The Federal Circuit has recognized that in some cases, “the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Id.* at 1314.

Plaintiffs do not believe specific articulations for any claim terms are necessary for purposes of this motion because, as demonstrated below, the prior art anticipates the '932 patent under any reasonable construction. Indeed, the prior art reference applied here, the '158 publication, is one of Defendant's own and shows “Brother Kogyo Kabushiki Kaisha” as the assignee on its face. Dkt. 1-4 at 1. Accordingly, it uses the same/similar words to describe many of its disclosed features (e.g., side frame (claimed side wall); receiving portion (claimed receiving unit); detection portion (claimed detected part)). Thus, for many of the claim terms, Plaintiffs believe it is unnecessary to articulate or spell out constructions because the prior art reference, Defendant's own publication, uses the same words to describe the same features.

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<sup>3</sup> For claims with an effective filing date before March 16, 2013, the pre-AIA § 102(b) applies. See *Blue Calypso, LLC v. Groupon Inc.*, 815 F.3d 1331, 1341 n.4 (Fed. Cir. 2016).

Plaintiffs reserve the right to submit constructions as part of the Court's claim construction process or in the event Defendant proffers specific constructions in an effort to distinguish the '158 publication.

***c. The '158 publication discloses "[a] cartridge"***

Claim 1 recites "[a] cartridge comprising" in its preamble. Assuming for purposes of this motion that the preamble of claim 1 is limiting, the '158 publication discloses a cartridge, as demonstrated in the Claim Chart. Specifically, the '158 publication discloses a developer cartridge and drum subunit, which together form a cartridge capable of being "removably mounted in an image forming apparatus body," i.e., a printer. '158 publication at Abstract, ¶ 62, Claim 1.

***d. The '158 publication discloses "a housing including a first side wall and a second side wall opposed to the first side wall in a longitudinal direction"***

As shown in the appended Claim Chart, the developer cartridge and drum subunit of the '158 publication includes a housing with a first side wall and a second side wall opposed to the first side wall in a longitudinal direction. Claim Chart at 2-5; '158 publication at Fig. 4 (annotated below). The '158 publication identifies the side walls as "a pair of *side frames 47* disposed in laterally opposed spaced relation." '158 publication at ¶ 127 (emphasis added).



Finally, the receiving portion is mounted “at the housing” as shown in Fig. 4, because the receiving portion is mounted at the side frame 47 of the drum subunit. *See* Claim Chart at 3.

***f. The '158 publication discloses “a detected body mounted at the first side wall and including a detected part configured to be detected by a detecting unit,***

The '158 publication discloses a “lever 91” and a “detected portion 105,” which correspond to the claimed “detected body” and “detected part.” As shown in Fig. 7 and described in paragraph 134 of the '158 publication, the lever 91 (i.e., the claimed detected body) is “supported swingably” about a lever support shaft that is “provided at an upper end of the side wall slot” that is located “in the left side frame 47.” '158 publication at ¶ 134. Because the left side frame 47 corresponds to the claimed “first side wall” and the lever 91 (the claimed detected body) is supported swingably about a shaft provided in that side frame, it is mounted “at the first side wall,” as claimed.

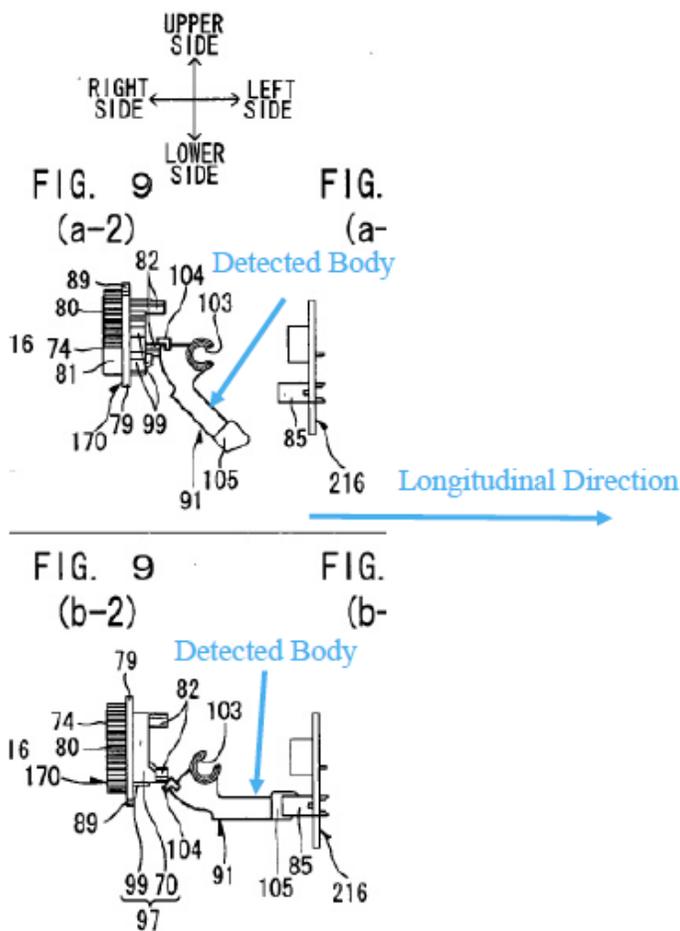
The “detected portion 105” is included as a part of the detected body, as claimed, because it is “formed at a third end of the lever 91.” '158 publication at ¶ 134.

Moreover, the detected portion 105 is “configured to be detected by a detecting unit,” as claimed for two reasons. First, it is disclosed in the '158 publication as a “detected” portion. Second the '158 publication says that it performs the function: “to be detected by an optical sensor 85.” *Id.*

***g. The '158 publication discloses “wherein the detected body is configured to advance outwards in the longitudinal direction with respect to the first side wall and is configured to retract inwards in the longitudinal direction with respect to the first side wall***

The '158 publication discloses that the detected body performs this broadly claimed task, that of moving outward and retracting inward in the longitudinal direction. As shown in Fig. 9 of the '158 publication, reproduced and annotated below and in the Claim Chart, the detected

body 91 moves in the longitudinal direction (towards the right of the image) to allow the detected portion (the claimed detected part) to be detected by the optical sensor 85 (the claimed detecting unit).



The '158 publication further discloses that the detected body moves in both directions, i.e., it both (1) “advances outwards” as claimed and (2) “retracts inwards” as claimed. First, the '158 publication states that the detection portion is moved “upward and *laterally outward.*” by way of the lever 91. '158 publication at ¶ 150 (emphasis added). Then, the detected portion moves “downward and *laterally inward.*” when the “lever 91 is *returned* to the normal state.” '158 publication at ¶ 152. Thus, the lever 91 and detected portion 105 (the claimed detected

body and part, respectively) are published in pictures and in words to move both laterally outward and laterally inward, which correspond to the claimed function of advancing outward and retracting inward.

**B. Plaintiffs Will Suffer Irreparable Harm If the Court Does Not Issue a Preliminary Injunction**

If the Court does not issue a preliminary injunction, Plaintiffs will suffer irreparable harm in the form of (1) unquantifiable lost sales opportunities and (2) loss of product ranking in Amazon's marketplace and associated loss of consumer goodwill.

First, Plaintiffs will suffer unquantifiable loss of sales if its products remain delisted. On Amazon, sales opportunities are intimately linked with product ratings and how those products are ranked on the Amazon storefront. Dai Decl., ¶ 5; Xu Decl., ¶ 5; Lin Decl., ¶ 5; Zhu Decl., ¶ 5; Wu Decl., ¶ 5. A first-page ranking will perform orders of magnitude better than a second-page ranking. Dai Decl., ¶ 5; Xu Decl., ¶ 5; Lin Decl., ¶ 5; Zhu Decl., ¶ 5; Wu Decl., ¶ 5. Similarly, a first-item ranking will perform orders of magnitude better than items ranked lower than the first item, although those other items may also be on the first page. Dai Decl., ¶ 5; Xu Decl., ¶ 5; Lin Decl., ¶ 5; Zhu Decl., ¶ 5; Wu Decl., ¶ 5. This is the case likely because many consumers do not browse multiple pages worth of items before making a purchasing decision. Before being delisted, Plaintiffs' products were all ranked on the first page for the search term "TN660." Dai Decl., ¶ 7; Xu Decl., ¶ 9; Lin Decl., ¶ 8; Zhu Decl., ¶ 9; Wu Decl., ¶ 7. The same search today returns no hits for any of Plaintiffs' delisted products and instead diverts consumers to buying the same/similar product from competitors. Dai Decl., ¶ 7; Xu Decl., ¶ 9; Lin Decl., ¶ 8; Zhu Decl., ¶ 9; Wu Decl., ¶ 7. The longer Plaintiffs' products remain excluded from Amazon, the more consumers will be diverted away from purchasing their products. Dai Decl., ¶ 8; Xu Decl., ¶ 10; Lin Decl., ¶ 9; Zhu Decl., ¶ 10; Wu Decl., ¶ 8. If the products are reinstated

too late, it's difficult to know how long it will take for the reinstated products to return to their original ranking/spot or even if the products will regain their ranking at all. Dai Decl., ¶¶ 9-10; Xu Decl., ¶¶ 11-12; Lin Decl., ¶¶ 10-11; Zhu Decl., ¶¶ 11-12; Wu Decl., ¶¶ 9-10.

Indeed, absent a preliminary injunction, Plaintiffs will have to wait until the conclusion of this litigation to have their products relisted. Only at that point can Plaintiffs even *begin* to regain their lost ranking. The Amazon Utility Patent Neutral Evaluation Procedure permits only two defenses other than non-infringement, (1) invalidity based on a finding by a court, the Patent Trial and Appeal Board (PTAB), or the International Trade Commission (ITC) and (2) sale of the seller's accused products more than one year before the relevant asserted patent. *See* Ex. 12, ¶5, Introductory paragraph. (requiring a "finding by the court" to show that a patent is invalidated by prior art). Aside from these two defenses, "[a]rguments regarding, for example, *invalidating prior art will not be accepted.*" *Id.* (emphasis added). As a result, Plaintiffs would have to wait until the end of this lawsuit—years or at least many months—to obtain the "finding by a court" required by Amazon's evaluation procedure because the procedure does not accept arguments regarding invalidating prior art.

Plaintiffs will suffer an unquantifiable loss because there is no reliable method to predict how Plaintiff's products would rank if they were not delisted (i.e., whether they would gain or lose rank over time). Nor is there a reliable method to calculate where Plaintiff's products will rank after the lawsuit concludes. Nor is there a reliable method to predict the lost sales opportunities that resulted from the delisting and rank loss when compared to the products previous rank and how that rank might change over time. Unquantifiable monetary damages is a classic category of irreparable harm. *See e.g., Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 Fed. Appx. 251, 263 (4th Cir. 2017) (citing unavailable for

“unquantifiable” monetary damages as an example of irreparable harm in the context of monetary damages).

Second (and related to the first point above), Plaintiffs will suffer irreparable injury by way of loss of product ranking in Amazon’s marketplace and associated loss of consumer goodwill. The loss of product ranking and associated goodwill itself constitutes an irreparable injury that is separate from the related, unquantifiable monetary loss addressed in the previous paragraph. As noted above, Plaintiffs’ products were all ranked on the first page of Amazon’s search results for the keyword “TN660” before being delisted. Sales are now being diverted to other Amazon listed suppliers, resulting in loss of customers. And, it is difficult to know how long it will take to regain the delisted products’ ranking or even if such rankings can be regained at all. As a result, Plaintiffs’ will suffer significant reputational loss in the form of its lost rankings and the associated loss of customers and Amazon reviews. Courts have found loss of Amazon rankings is itself an irreparable injury. *See, e.g., Beyond Blond Prods., LLC v. Heldman*, 479 F. Supp. 3d 874, 887 (C.D. Cal. 2020) (finding “likelihood of irreparable harm” in the context of Amazon videos where the plaintiff alleged injuries such as “**reputation**, advertising efforts, **loss of customers, ranking and reviews**, termination as a repeat offender, [and] **goodwill**.”) (emphases added). For example, in *Medcursor*, the Court specifically addressed the harm associated with delisting an Amazon product and found “that Plaintiffs’ product delisting, if left unchecked, will likely result in nonquantifiable damages relating to **lost business opportunities on Amazon, including product placement disadvantages such as losing Plaintiff’s previously held first-page status**. *Medcursor v. Shenzhen KLM Internet Trading Co.*, No. 2:21-cv-02843, 2021 WL 2493288 at \*10 (C.D. Cal. Jun. 10, 2021) (emphasis added).

Recognizing loss of Amazon listing status as an irreparable injury is important. Indeed, as the court in *Medcursor* noted, “Amazon’s online sales account for half of **all** online sales.” *Medcursor v. Shenzhen KLM Internet Trading Co.*, No. 2:21-cv-02843, 2021 WL 2493288, at \*10 (C.D. Cal. Jun. 10, 2021) (italic emphasis in original, bold added). The *Medcursor* court recognized the “irreparable harm in the form of account deactivation from this **critical platform**,” i.e., Amazon.com, and found that such harm “has been shown likely [and] constitutes a sufficient likelihood of irreparable harm to support issuing a preliminary injunction.” *Id.* (emphasis added). Here, Plaintiffs’ products are not only “likely” to be delisted but have **already been delisted** from Amazon as a result of Defendant’s actions. And, well more than half of Plaintiffs’ sales are on Amazon. Dai Decl., ¶ 4; Xu Decl., ¶ 4; Lin Decl., ¶ 4; Zhu Decl., ¶ 4; Wu Decl., ¶ 4.

Absent a preliminary injunction Plaintiffs will suffer irreparable injury as their products can be expected remain delisted until this action is finally concluded.

### **1. The Balance of Equities Favors Issuance of a Preliminary Injunction**

The balance of equities tips in favor of Plaintiffs in this case because they will be irreparably harmed unless Defendant is restrained from asserting the ’932 patent through Amazon’s extrajudicial processes and ordered to retract their infringement complaints against Plaintiffs. In the unlikely event the ’932 patent is found to be not invalid *and* Defendant can prove infringement, Defendant’s injuries may be readily compensated by monetary damages.

The *Medcursor* court addressed this exact issue of Amazon delisting and found the balance of equities tipped in favor of the delisted entity and favored “ordering Defendants to retract their patent infringement notice so that Plaintiff’s products may be relisted.” *Medcursor*, 2021 WL 2493288 at \*11. This was so because “Defendants’ injuries may be compensated by damages.” *Id.* The same is true here. There is simply no need to permit Defendant to remove

Plaintiffs' products from the marketplace, thereby eroding Plaintiffs' goodwill and reputation when any alleged harm Defendant may suffer can be redressed by monetary damages.

## 2. The Public Interest Favors Issuance of a Preliminary Injunction

The public interest is benefitted by granting a preliminary injunction. As noted above, there can be little dispute that Amazon is a critical platform that accounts for a large percentage of online sales. But the Amazon Utility Patent Neutral Evaluation Procedure permits only limited ways for an accused infringer to challenge the validity of a patent: (1) invalidity based on a finding by a court, the Patent Trial and Appeal Board, or the International Trade Commission and (2) sale of the seller's accused products more than one year before the relevant asserted patent. Ex. 12, ¶5. Thus, for prior-art-based invalidity challenges, an accused infringer must invalidate the patent in court, the PTAB, or ITC and may not submit those invalidity arguments to Amazon. In the interim, the accused infringer's products are delisted from Amazon, either immediately or after the accused infringer has exhausted its non-infringement defense, if any, in Amazon's extrajudicial Evaluation forum. Such delisting occurs regardless of the patent's validity. Effectively, the accused infringer must face loss of the entire Amazon marketplace on a mere allegation that its product infringes an invalid patent unless it has a powerful noninfringement defense.<sup>4</sup> Amazon offers no recourse in such situations. The accused infringer must either obtain a judgment, or as requested here, a preliminary injunction.

The public interest strongly favors granting a preliminary injunction because it is the *only* way for an accused infringer to show invalidity and avoid (or reverse) Amazon's delisting of its products when faced with a patent of dubious validity. The public has an interest in maintaining

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<sup>4</sup> Amazon's extrajudicial procedure is skewed in favor of patentees, as it *requires* an explanation from the evaluator for a finding of noninfringement but *prohibits* an explanation for a finding of infringement. Evaluation Procedure, Ex. 12 at ¶ 5.

a free, full, and fair marketplace. The public also has an interest in preserving market competition and avoiding improper restraints on trade with little recourse, especially where, as here, at least the extrajudicially asserted patent claim is rendered invalid by the patentee's own prior art reference that the patentee failed to submit to the USPTO in obtaining the asserted patent. The *Medcursor* court, which addressed this very issue, agreed, stating: “[g]iven the ubiquity of Amazon shopping to the general public, the public has an interest in a full and fair online marketplace.” *Medcursor*, 2021 WL 2493288 at \*12.

### **C. Any Bond Requirement Should Be Minimal**

Rule 65(c) of the Federal Rules of Civil Procedure states that “[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). In circumstances where “the risk of harm is remote, or that the circumstances otherwise warrant it,” a nominal bond amount may be appropriate. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999).

Plaintiffs submit that a nominal bond would be appropriate in this case based on the strength of Plaintiffs' showings of invalidity.

### **V. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction enjoining Defendant, and its officers, directors, employees, agents, subsidiaries, attorneys, and all persons in active concert or participation with Defendant, from issuing patent notices or otherwise imposing any restraints on commerce against Plaintiffs through the extrajudicial assertion of U.S. Patent No. 8,867,932 during the pendency of this

lawsuit, and to order Defendant to retract the pending Amazon Neutral Evaluation Procedure for the '932 patent.

Dated: October 19, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing is being electronically filed with the Clerk of Court using the CM/ECF system on October 19, 2021:

- PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION;
- MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION;
- [PROPOSED] ORDER GRANTING PRELIMINARY INJUNCTION;
- Declaration of Laurence M. Sandell in Support of Plaintiffs’ Motion for Preliminary Injunction—and Exhibits 1-12 thereto; and
- Declarations of Wyman Xu, Haibo Zhu, Shuchun Dai, Juan Wu, and Dong Ming Lin, respectively

The forgoing was (or shall be) served on Luke K. Pedersen, Esq., and Thomas C. Martin, Esq., counsel for Brother Industries, Ltd, by email to Luke.Pedersen@BakerBotts and Tommy.Martin@BakerBotts, respectively, on October 19, 2021.

/s/ Krystyna Colantoni  
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MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION  
(CASE NO.2:21-CV-564)