

**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

**BROTHER INDUSTRIES' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Table of Contents

	Page
FACTUAL BACKGROUND.....	5
LEGAL STANDARD.....	11
ARGUMENT.....	12
I. Plaintiffs are unlikely to succeed on the merits.....	13
a. Plaintiffs are unlikely to prove invalidity.....	13
b. Plaintiffs are also unlikely to succeed because they lack standing to bring their underlying declaratory judgment action.....	18
II. Plaintiffs do not demonstrate irreparable harm.....	20
III. The equities do not support extraordinary relief.....	23
IV. The public interest does not favor this injunction.....	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office</i> , 689 F.3d 1303 (Fed. Cir. 2012).....	19
<i>Beyond Blond Productions, LLC v. Heldman</i> , 479 F. Supp. 3d 874 (C.D. Cal. 2020)	23
<i>Canon Computer Sys., Inc. v. Nu-Kote Int’l, Inc.</i> , 134 F.3d 1085, 1088 (Fed. Cir. 1998).....	13
<i>Certain Ink Cartridges & Components Thereof</i> , Inv. No. 337-TA-565, 2012 WL 504881, Initial Determination (Feb. 13, 2012).....	9, 10
<i>Certain Toner Cartridges & Components Thereof</i> , Inv. No. 337-TA-740, Comm’n Op., 2011 WL 13352062 (Oct. 5, 2011).....	9
<i>Certain Toner Cartridges & Components Thereof</i> , Inv. No. 337-TA-740, Initial Determination, 2011 WL 2470590 (Jun. 1, 2011)	9, 10
<i>Certain Toner Cartridges & Components Thereof</i> , Inv. No. 337-TA-829, Initial Determination at 123 (Feb. 28, 2013)	6
<i>Certain Toner Cartridges, Components Thereof, & Systems Containing Same</i> , Inv. No. 337-TA-1174, Initial Determination, 2020 WL 5202646 (July 23, 2020)	5, 6, 10
<i>Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.</i> , 527 F.3d 1278 (Fed. Cir. 2008).....	20
<i>Curtin v. Virginia State Bd. of Elections</i> , 463 F. Supp. 3d 653 (E.D. Va. 2020) (Alston, J.).....	12
<i>Di Biase v. SPX Corp.</i> , 872 F.3d 224 (4th Cir. 2017)	12, 22
<i>Direx Israel, Ltd. v. Breakthrough Med. Corp.</i> , 952 F.2d 802 (4th Cir. 1991)	20
<i>Dror v. Kenu, Inc.</i> , No. 19-CV-03043-LB, 2019 WL 5684520 (N.D. Cal. Nov. 1, 2019).....	20
<i>Eyeticorp Corp. v. Unisys Corp.</i> , 155 F. Supp. 2d 527, 535 (E.D. Va. 2001)	13, 14

Fred Hutchinson Cancer Rsch. Ctr. v. BioPet Vet Lab, Inc.,
768 F. Supp. 2d 872 (E.D. Va. 2011)13, 24

Fred Hutchinson Cancer Rsch. Ctr. v. BioPet Vet Lab, Inc.,
2011 WL 1119565 (E.D. Va. Mar. 1, 2011).....13

Hybritech Inc v. Abbott Labs.,
849 F.2d 1446 (Fed. Cir. 1998).....13

JTH Tax LLC v. DM3 Ventures, Inc.,
2020 WL 6551214 (E.D. Va. Nov. 6, 2020).....20

JTH Tax, LLC v. Williams-Eton,
2020 WL 4708705 (E.D. Va. June 1, 2020)12, 24

League of Women Voters of N.C. v. N.C.,
769 F.3d 224 (4th Cir. 2014)12

Medcursor Inc. v. Shenzhen KLM Internet Trading Co.,
2021 WL 2493288 (C.D. Cal. June 10, 2021)23

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007).....19

Microsoft Corp. v. Biscotti, Inc.,
878 F.3d 1052 (Fed. Cir. 2017).....14, 16, 18

Microsoft Corp. v. SynKloud Techs., LLC,
484 F. Supp. 3d 171 (D. Del. 2020).....19, 20

Philips v. AWH Corp.,
415 F.3d 1303 (Fed. Cir. 2005).....15

PPG Indus., Inc. v. Guardian Industries Corp.,
75 F.3d 1558 (Fed. Cir. 1996).....13, 14

Prasco, LLC v. Medicis Pharm. Corp.,
537 F.3d 1329 (Fed. Cir. 2008).....20

RelaDyne Reliability Servs. Inc. v. Bronder,
2020 WL 5745801 (E.D. Va. Aug. 4, 2020).....22

Seiko Epson Corporation et al v. E-Z Ink Inc.,
1-18-cv-01338 (E.D. N.Y. 2018)10

Titan Tire Corp. v. Case New Holland, Inc.,
566 F.3d 1372 (Fed. Cir. 2009).....13

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008).....12

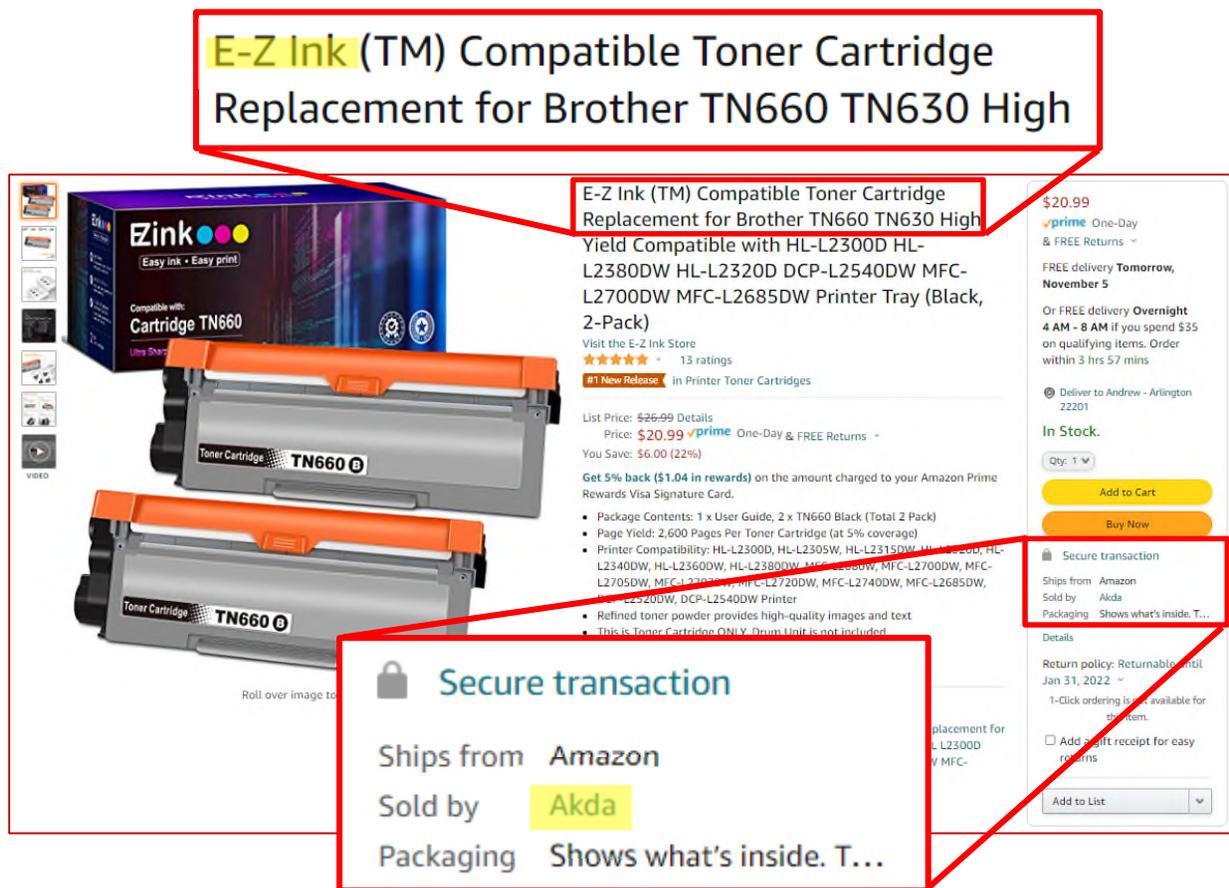
Wreal, LLC v. Amazon.com, Inc.,
840 F.3d 1244 (11th Cir. 2016)21

STATUTES

28 U.S.C. § 2201(a)19

BROTHER INDUSTRIES’ RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs are engaged in a brazen abuse of judicial process. Purveyors of unlicensed Chinese versions of Brother’s patented printer cartridges—in this case, the Brother TN-660 toner cartridge—they seek this Court’s emergency relief to get their products back on Amazon. But they neglect to tell the Court that they were each still selling these same versions of Brother’s products on Amazon when they filed this lawsuit, and are still doing so today. Indeed, weeks before they filed this action, Plaintiffs E-Z Ink and Akda had already re-listed their Brother-compatible TN-660 cartridge under a new Amazon Standard Identification Number or ASIN.¹



¹ <https://www.amazon.com/dp/B09GK6BNGX/> (attached as Exhibit A). Brother reserves the right to draw Amazon’s attention to the apparent relisting of this product in violation of Amazon policy.

The other Plaintiffs also maintain listings of Brother-compatible TN-660 cartridges that were simply never taken down.⁴

Regardless, any alleged harm Plaintiffs face here is of their own making. Having missed the deadline for participating in Amazon's Utility Patent Neutral Evaluation ("UPNE") process, Plaintiffs now seek this Court's equitable intervention to declare invalid a patent they do not deny infringing. Were it not for their missed deadline, their cartridges removed from Amazon through the UNPE process would still be listed right now, under their original ASINs, while the parties awaited the outcome of that process. Mot. Ex. 12 at 4. But Plaintiffs, who are familiar with the UPNE process from three recent cases against Brother,⁵ did not attempt to participate in this UPNE process until it was too late. The process has now ended, and Plaintiffs should not now be permitted to circumvent it through this misguided motion, for a host of reasons.

First, Plaintiffs have not shown a likelihood of succeeding in their invalidity claim. Their submission lacks sufficient comparisons of Claim 1 of U.S. Patent No. 8,867,932 (the '932 Patent) and U.S. Patent Application Publication No. 2007/0031158 (the '158 Publication) and expressly declines to provide claim constructions, instead relying on attorney say-so and observations of similar terminology in both documents. This does not provide the clear and convincing evidence necessary to overcome the '932 Patent's presumed validity and justify extraordinary emergency relief. We supply the missing analysis below, and it establishes the '158 Publication does not

⁴ See <https://www.amazon.com/dp/B08NK27ZZR/> (Lemero) (attached as Exhibit C); <https://www.amazon.com/dp/B08NV4J7N8/> (Lemero) (attached as Exhibit D); <https://www.amazon.com/dp/B08NG4D2KL/> (Imagetech) (attached as Exhibit E); <https://www.amazon.com/dp/B08SQHFBNX/> (Plenty Talent) (attached as Exhibit F).

⁵ See UPNE No. 7121605801 at (Oct. 8, 2020) (finding Brother likely to prove infringement by E-Z Ink branded TN660 cartridges) (attached as Exhibit G); UPNE No. 7526927771 at 2 (Mar. 3, 2021) (finding Brother likely to prove infringement by E-Z Ink brand TN227 cartridges) (attached as Exhibit H); UPNE No. 7683452351 at 1 (May 19, 2021) (finding Brother likely to prove infringement by E-Z Ink branded TN336 cartridges) (attached as Exhibit I).

anticipate Claim 1 of the '932 Patent. Claim 1 of the '932 Patent is directed to a *cartridge*, whereas the cited embodiments disclosed in the '158 Publication are directed to a *drum unit*.

Second, there is no irreparable harm. Plaintiffs E-Z Ink and Akda have already engaged in self-help by relisting their banned listings on their own.⁶ The other Plaintiffs also continue to sell Brother-compatible TN-660 cartridges on their own, through other listings not disclosed in their motion or sworn declarations.⁷ And, even if Plaintiffs were no longer selling their cartridges on Amazon, that would be due to their missing the UPNE deadline.

Plaintiffs make much of Amazon's refusal to alter the UPNE response deadline. But they are not challenging infringement, and they acknowledge that invalidity could not have been argued during the UPNE process unless they *already* had a court order. Mot. 1. So, Plaintiffs would not have had a defense during the UPNE process even if they had responded on time. If Plaintiffs wished to use an invalidity defense, the time to race to court to seek an invalidity ruling would have been after being notified of the UPNE proceeding, not after losing that proceeding. Now, the status quo is that Plaintiffs' products are (supposed to be) delisted, and there is no basis to upset it through emergency injunctive relief.

Third, the equities are decidedly against Plaintiffs, who have provided in their pleadings and their motion information that is, at best, highly misleading and, at worst, verifiably false. A preliminary injunction would prolong Plaintiffs' ongoing game of whack-a-mole, hindering Brother from protecting its intellectual property rights through the proper channels at Amazon.

Finally, the public interest is not served by using the courts to undo private mistakes or assist illicit businesses, or promote false or misleading court filings.

⁶ See *supra* note 1.

⁷ See *supra* note 4.

FACTUAL BACKGROUND

I. The Plaintiffs

The aftermarket toner cartridge industry is rife with misconduct. In July 2020, the U.S. International Trade Commission (“ITC”) found in an action brought by Brother that a group of entities, including Plaintiff E-Z Ink,⁸ had “engaged in business practices deliberately designed to mask their identities,” “mak[ing] it difficult to enforce intellectual property rights against them.” *See Toner Cartridges 1174*, Initial Determination, 2020 WL 5202646, at *63. “Not only is it common for manufacturers and sellers of aftermarket toner cartridges to do business under more than one name,” the Administrative Law Judge observed, but “foreign aftermarket toner cartridge manufacturers have the capacity to replicate their operations so as to appear to be a new business in a matter of months.” *Id.* at *62. Thus, “[a]s found in previous investigations of this industry, ‘in the toner cartridge market, it is difficult to trace the origin of a particular import even when all of the players involved are operating honestly.’” *Id.* at *65 (quoting *Certain Toner Cartridges & Components Thereof*, Inv. No. 337-TA-829 (“*Toner Cartridges 829*”), Initial Determination at 123 (Feb. 28, 2013)).

So too here. Plaintiffs have come before this Court with a mix of claims either demonstrably false or at best questionable as to the most basic information about their locations and business affiliations, while simultaneously seeking this Court’s *equitable* relief.

Starting with Plaintiff “Zhuhaiikedamaoyiyouxiangongsi (Akda),” it claims “[i]ts principal place of business is located at Xiangzhouqunanpingkejigongyuyuanpingdongsilu13hao, sanqichangfangsilou416, Zhuhaishi, Guangdongsheng, China 519060.” Compl. ¶ 2. But this is

⁸ E-Z Ink was terminated from the litigation under a consent order. *Certain Toner Cartridges, Components Thereof, and Systems Containing Same*, Inv. No. 337-TA-1174 (“*Toner Cartridges 1174*”), Initial Determination, 2020 WL 5202646 at *4 (July 23, 2020).

not a real place. This obviously false information (most words do not have numbers in the middle of them) is on the first page of Plaintiffs’ first pleading in this action. It appears to be lifted from this entity’s Amazon page,⁹ where it is listed in apparent violation of Amazon’s requirement that sellers “[p]rovide accurate information to Amazon and our customers at all times.”¹⁰

Business Name:Zhuhaiaikedamaoyiyouxiangongsi
Business Address:
 Xiangzhouqunanpingkejigongyuyuanpingdongsilu13hao
 sanqichangfangsilou416
 Zhuhaishi
 Guangdongsheng
 519060
 CN

The other Plaintiffs write in the Complaint that they have principal places of business in the United States. Compl. ¶¶ 1, 3-5. But their counsel wrote to Amazon as part of the subject UPNE process that they were “based in China.” Mot. Ex. 4.

From: Larry Sandell lsandell@meimark.com
Subject: Re: [CASE 8923196091] [CASE 8793207781] Seller-supplied information for five entities being co-represented (Our ref 20126.0003) LS
Date: September 22, 2021 at 12:36 PM
To: patent-evaluation@amazon.com
Cc: Lei Mei mei@meimark.com
Bcc: Oleg Zoan oleg@ezink123.com

Dear Amazon Neutral Patent Evaluation Team,

Thank you for your prompt response.

We were aware of the three week deadline and believed that we had met that deadline.

However, it appears that time zone issues may have caused a discrepancy regarding the exact timing of the filing deadline. Our clients are based in China, and the time stamps on their copies of Amazon’s initial notice emails list August 31, 2021. Please find below image excerpts on the line corresponding email headers in our clients’ versions of Amazon’s initial notice emails. As may be observed, August 31, 2021 is listed on each. We also note that while Amazon’s initial emails recite the “within three weeks” deadline, they do not provide a specific date, a specific, or a specific time zone.

However, it appears that time zone issues may have caused a discrepancy regarding the exact timing of the filing deadline. Our clients are based in China, and the time stamps on their copies of Amazon’s initial notice emails list August 31, 2021. Please find

- 1. Reinstate the removed ASINs as soon as possible.
- 2. Initiate the Evaluation 8793207781 in response to the seller-information submission provided on September 21, 2021.
 - To the extent that the Evaluations proceedings have been delayed due to this issue, we would consent to making up that time by having the \$4,000 payment deadline be accelerated one day earlier.

Thank you for your consideration. Please let me know if there is any additional information that I can provide.

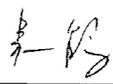
Best,
 Larry

⁹ https://www.amazon.com/sp?_encoding=UTF8&asin=&isAmazonFulfilled=1&isCBA=&marketplaceID=ATVPDKIKX0DER&orderId=&protocol=current&seller=A1VI7YD96N9NU&ssmPath= (attached as Exhibit J).

¹⁰ Amazon Seller Central, Selling Policies and Seller Code of Conduct at 1 (available at https://sellercentral.amazon.com/gp/help/external/G1801?language=en_US) (attached as Exhibit K).

Plaintiffs' declarations in support of their motion also are signed from China by the claimed heads of each company.

Executed on this 18th day of October, 2021, at Zhuhai, China.

By: 
Juan Wu

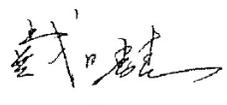
Executed on this 18th day of October, 2021, at Zhuhai, China.

By: Dong Ming Lin
Dong Ming Lin

Executed on this 18th day of October, 2021, at Shanghai, China.

By: Wyman Xu
Wyman Xu

Executed on this 18th day of October, 2021, at Zhuhai, China.

By: 
ShuChun Dai

In addition, Plaintiffs “Lemero” and “Plenty Talent Corp.” claim to be distinct corporate entities that happen to be next-door neighbors at a UPS Store in Mira Loma, California, where they share a pair of mailboxes next to each other. *See* Compl. ¶¶ 4, 5 (Lemero’s “principal place of business is located at 12523 Limonite Ave., Ste 440-2531 Mira Loma, CA 91710,” and Plenty Talent Corp’s “principal place of business is located at 12523 Limonite Ave. Ste 440-2532 Mira

Loma, CA 91710”) (emphases added). If so, this violates California law, which prohibits companies from using post boxes as business addresses.¹¹ Unfortunately, this is standard industry practice in the foreign aftermarket toner cartridge business. See *Toner Cartridges 1174*, Initial Determination, 2020 WL 5202646, at *63 (observing that knockoff cartridge firms evade detection by “operating their businesses from rented personal mailboxes at mail and shipping stores”).

But even this information is questionable. The name “Lemero” was trademarked in the United States in 2010 in connection with “filled toner cartridge for printers” by Zhuhai Seine Technology Co. Ltd., a company based in Xiangzhou District Zuhai, Guangdong, China, 519075.¹² Zhuhai Seine Technology or “Seine” is in turn affiliated with Ninestar, a collection of companies the ITC has noted “employ[s] complex business arrangements that make enforcement of U.S. intellectual property (“IP”) rights difficult.” *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740 (“*Toner Cartridges 740*”), Comm’n Op., 2011 WL 13352062, at *4 (Oct. 5, 2011); *Toner Cartridges 740*, Initial Determination, 2011 WL 2470590, at *14 (Jun. 1, 2011). With respect to Ninestar in particular, the ITC has noted that a variety of companies affiliated with Ninestar, “while perhaps technically separate entities, create an intricate array of confusingly similar subsidiaries,” and “are all plainly in the same business syndicate.” *Toner Cartridges 740*, Initial Determination, 2011 WL 2470590, at *14.

Plaintiff Lemero’s secretary, CFO, service agent, and director is Ninestar executive Weiming Dai (also known as “William Dai”).¹³ Plaintiff Plenty Talent’s secretary, CFO, service

¹¹ Instructions for Completing the Articles of Organization, Form LLC-1 at Item 3a. & 3b. (“Do not enter a P.O. Box address Address must be a physical address.”) (available at <https://bpd.cdn.sos.ca.gov/llc/forms/llc-1.pdf>) (attached as Exhibit L).

¹² LEMERO, Registration No. 3926971 (attached as Exhibit M).

¹³ LEMERO Corporate Statement of Information at 1-3 (May 22, 2020) (attached as Exhibit N); see also *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565 (Modification)

agent, and director is also Weiming Dai.¹⁴ And Lemero’s CEO and Director, and the declarant who submitted a sworn declaration in support of its motion, is ShuChun Dai, a person who is listed in the Wall Street Journal as a Deputy General Manager at Ninestar.¹⁵ The interconnected nature of these companies should not surprise Plaintiffs’ counsel, who previously represented Ninestar when it was investigated by the ITC on claims of infringing Epson’s ink cartridge patents—an investigation in which Weiming Dai was a testifying witness.¹⁶

Plaintiff “Imagetech Direct Inc.” also claims to be “a corporation duly organized and existing under the laws of New York.” Compl. ¶ 3. But no such entity is registered in New York.

And as noted above, Plaintiff “E-Z Ink, Inc.” is no stranger to the UPNE process. In just over a year, it has participated in three other UPNE proceedings that resulted in removal of its products due to infringement of Brother’s patents.¹⁷ E-Z Ink also has been twice sued for selling infringing printer cartridges since being formed just four years ago in 2017. *See Seiko Epson Corporation et al v. E-Z Ink Inc.*, 1-18-cv-01338 (E.D. Ny. 2018); *Toner Cartridges 1174*, 2020 WL 5202646. In both cases, E-Z Ink agreed to stop selling its accused toner cartridges rather than dispute infringement or validity of the asserted patents. *See Seiko*, ECF No. 58 (attached as Exhibit R); *Toner Cartridges 1174*, 2020 WL 5202646, at *4.

(“*Ink Cartridges*”), 2012 WL 504881, Initial Determination at *13 (Feb. 13, 2012) (identifying Weiming Dai as “William Dai”).

¹⁴ PLENTY TALENT CORP. Corporate Statement of Information at 1-3 (May 22, 2020) (attached as Exhibit O).

¹⁵ *See* Wall Street Journal, Ninestar Corporation Executive Profile at 1 (Nov. 4, 2021) (available at <https://www.wsj.com/market-data/quotes/CN/XSHE/002180/company-people/executive-profile/181942027>) (attached as Exhibit P).

¹⁶ *See Ink Cartridges*, Ninestar’s Tentative Witness List (Sept. 1, 2011) (listing William Dai as Ninestar US’s Vice President) (attached as Exhibit Q).

¹⁷ *See supra* note 5.

II. Brother initiates UPNE proceedings to protect the '932 Patent.

On August 9, 2021, Brother submitted a formal request to participate in Amazon's UPNE program with respect to the '932 Patent.¹⁸ Its submission was backed by claim charts and invoices showing Plaintiffs selling infringing products on Amazon.com, identified by ASIN.¹⁹ Amazon appears to have notified Plaintiffs of Brother's UPNE filing on August 30, 2021, though Plaintiffs claim to have received the notice on August 31, 2021, because they are "based in China" (notwithstanding what is written in their Complaint). Mot. Ex. 4. Amazon's notice stated that Plaintiffs had three weeks to respond. Mot. Ex. 7.

Though they have participated in UPNE processes based on Brothers' patents in the past, and though they are aware that invalidity is not a defense during that process (*see* Mot. at 1), Plaintiffs took no action after receiving this notice until September 21, 2021. At 2:29 p.m. Eastern Time on that date, Plaintiffs' counsel attempted to respond to Amazon's August 31 UPNE notice. Mot. Ex. 1. But at 10:51 a.m. Eastern Time on September 21, Amazon had already confirmed to Brother that it was removing the reported ASINs because "none of the reported sellers have chosen to participate."²⁰ Plaintiffs emailed Amazon in protest, and Amazon repeated that the deadline had passed and that Plaintiffs could try to reach a resolution with Brother or respond with a judgment that the patent was valid or that their products do not infringe. Mot. Ex. 3.

Plaintiffs' counsel then contacted Brother's counsel threatening to file a declaratory

¹⁸ Email from Luke K. Pedersen to Amazon Neutral Patent Evaluation Team (Aug. 9, 2021) (attached as Exhibit S)

¹⁹ E-Z Ink Invoice (attached as Exhibit T); INKNI, Arthur Imaging, Lemero, and Valuetoner Invoice (attached as Exhibit U); E-Z Ink Claim Chart (attached as Exhibit V); Valuetoner Claim Chart (attached as Exhibit W); Arthur Imaging Claim Chart (attached as Exhibit X); INKNI Claim Chart (attached as Exhibit Y); Lemero Claim Chart (attached as Exhibit Z).

²⁰ Email from Amazon Neutral Patent Evaluation Team to Luke K. Pedersen at 1 (Sept. 21, 2021) (attached as Exhibit AA).

judgment action unless Brother requested that Amazon allow Plaintiffs to participate in the concluded UPNE process and to have Amazon reinstate the removed ASINs.²¹ Brother declined, noting Amazon's procedures do not permit such action, and confirming it had no intention of pursuing any legal action against Plaintiffs outside of Amazon's UPNE process. Mot. Ex. 6. Brother has taken no further action with respect to this matter.

Plaintiffs then brought the underlying declaratory judgment action.

LEGAL STANDARD

“A preliminary injunction is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit.” *JTH Tax, LLC v. Williams-Eton*, No. 2:20-CV-127, 2020 WL 4708705, at *2 (E.D. Va. June 1, 2020) (Wright Allen, J.) (quoting *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017)). It follows that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

“[A] preliminary injunction can be categorized as mandatory or prohibitory.” *Curtin v. Virginia State Bd. of Elections*, 463 F. Supp. 3d 653, 657-58 (E.D. Va. 2020) (Alston, J.) (citing *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 235 (4th Cir. 2014)). “Mandatory injunctions alter the status quo, [whereas] prohibitory injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.” *Id.* (citation and quotation marks omitted). “Consequently, mandatory injunctions are, in any circumstance, disfavored.” *Id.* (citation and quotation marks omitted). “Thus, the standard of review for granting a preliminary injunction

²¹ Email from Larry Sandell to Tommy Martin (Sept. 30, 2021) (attached as Exhibit AB).

is even more searching when where, as here, the relief requested is mandatory in nature.” *Id.* (citation and quotation marks omitted).

“[A]djudication of preliminary injunctions or TROs in a patent infringement case necessarily involves consideration of substantive issues regarding the patent. To the extent that 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.” *Fred Hutchinson Cancer Rsch. Ctr. v. BioPet Vet Lab, Inc.*, No. 2:10-CV-616, 2011 WL 1119565, at *2 (E.D. Va. Mar. 1, 2011) (Jackson, J.) (citing *Hybritech Inc v. Abbott Labs.*, 849 F.2d 1446, 1451 n.12 (Fed. Cir. 1998), and *Eyeticet Corp. v. Unisys Corp.*, 155 F. Supp. 2d 527, 535 (E.D. Va. 2001) (Morgan, J.)).

At the preliminary injunction stage, a patent enjoys the same presumption of validity as at any other stage of litigation. *Fred Hutchinson Cancer Rsch. Ctr. v. BioPet Vet Lab, Inc.*, 768 F. Supp. 2d 872, 875 (E.D. Va. 2011) (Jackson, J.) (citing *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1377 (Fed. Cir. 2009), and *Canon Computer Sys., Inc. v. Nu-Kote Int’l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998)). Thus, “at the preliminary injunction stage, a challenger’s evidence of invalidity must be ‘sufficiently persuasive that it is likely to overcome the presumption of patent validity.’” *EyeTicket Corp.*, 155 F. Supp. 2d at 542 (quoting *PPG Indus., Inc. v. Guardian Industries Corp.*, 75 F.3d 1558, 1566 (Fed. Cir. 1996)). The challenger’s evidence must raise a “substantial question” of invalidity. *Id.*

ARGUMENT

Plaintiffs do not meet the high bar for the emergency equitable relief they seek. They are unlikely to succeed on the merits of their invalidity claim because their submission is insufficient to prove anticipation, their anticipation claim fails on its merits, and they lack standing to bring their underlying declaratory judgment action against Brother in the first place. Plaintiffs also have

no risk of irreparable harm given they are selling Brother-compatible TN-660 cartridges on Amazon right now. And the equities and public interest cannot weigh in their favor given they put themselves in this situation by missing Amazon's deadline.

I. Plaintiffs are unlikely to succeed on the merits.

Plaintiffs are unlikely to win on the merits of their invalidity claim because (a) their filing is insufficient to show anticipation, (b) their anticipation claim is affirmatively wrong, and (c) they lack standing to bring their underlying declaratory judgment action.

a. Plaintiffs are unlikely to prove invalidity.

Plaintiffs did not satisfy their burden of producing sufficient evidence to overcome the presumption of validity of the '932 Patent. *EyeTicket Corp.*, 155 F. Supp. 2d at 542 (quoting *PPG Indus., Inc.*, 75 F.3d at 1566). Plaintiffs' evidence does not raise a "substantial question" of invalidity, as required to show a likelihood of success on the merits. *Id.* Rather, Plaintiffs did the bare minimum to support their invalidity allegation by setting forth a single, exemplary ground of anticipation of a single claim in view of the '158 Publication. Mot. at 9-13. Plaintiffs left out any claim construction analysis, expert testimony, or any other evidence except attorney argument. Further, the ground of alleged invalidity set forth by Plaintiffs is substantively flawed and fails to disclose each and every element of Claim 1 of the '932 Patent as arranged in the claim. *Microsoft Corp. v. Biscotti, Inc.*, 878 F.3d 1052, 1068 (Fed. Cir. 2017) (finding that, to anticipate the claimed invention, a prior art reference must "disclose all elements of the claim within the four corners of the document," and it must "disclose those elements 'arranged as in the claim'") (internal citations omitted). Thus, Plaintiffs fail to show a likelihood of success on the merits of their invalidity claim.

1. Plaintiffs' anticipation claim is insufficient.

Plaintiffs' alleged ground of anticipation does not properly apply bedrock claim construction principles. Plaintiffs contend they applied the ordinary and customary meaning to

the words of the claims. Mot. at 8. Yet, Plaintiffs are silent as to what ordinary and customary meaning they applied. Plaintiffs unilaterally determine that “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.” Mot. at 8. This is not the legal standard.

“[W]ords of a claim are generally given their ordinary and customary meaning.” *Philips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (citation and internal quotation marks omitted). “[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Id.*

Here, Plaintiffs are silent as to the identity of a person of ordinary skill in the art as well as the meaning such a person would give the relevant claim terms. They quote a portion of *Philips* out of context in support of this lapse. Mot. at 8. The Federal Circuit did note in *Philips* that “[i]n 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 (emphasis added). But it continued: “In such circumstances, general purpose dictionaries may be helpful.” *Id.* And it recognized that, “[i]n many cases that give rise to litigation, however, determining the ordinary and customary meaning of the claim requires examination of terms that have a particular meaning in a field of art.” *Id.* (emphasis added).

Plaintiffs assume based on attorney say-so that this case is one of the “some” and not the “many.” But they put forward no evidence supporting that position. And, even if correct, Plaintiffs

have pointed to no dictionaries in support of their ordinary and customary meaning, nor have they stated what the ordinary and customary meaning might be, as required under *Philips*.

The '158 Publication and '932 Patent's use of similar words is not evidence they use those words in the same way or with the same meaning in each disclosure. It is also not evidence that the meaning of those terms would be readily apparent to a lay person. Rather, both the '158 Publication and '932 Patent use terms that have a particular meaning in a field of art: image forming apparatus (e.g., a laser printer) and developer cartridges (e.g., toner cartridges) that are removably mounted in the image forming apparatus. *See, e.g.*, '158 Publication, ¶ [0003]; '932 Patent, 1:13-15.

Thus, Plaintiffs fail to set forth evidence that could be used to establish necessary components of claim construction, including applying the ordinary and customary meaning of claim terms. Without such evidence, Plaintiffs' anticipation claim is not likely to overcome the presumption of validity.

2. Plaintiffs' anticipation claim is also invalid on its merits.

In addition to providing no claim construction evidence, Plaintiffs' alleged ground of anticipation substantively fails to raise a substantial question of invalidity. To anticipate the claimed invention, a prior art reference must "disclose all elements of the claim within the four corners of the document," and it must "disclose those elements 'arranged as in the claim.'" *Microsoft*, 878 F.3d at 1068 (internal citations omitted).

Claim 1 of the '932 Patent recites:

A cartridge comprising:

a housing including a first side wall and a second side wall opposed to the first side wall in a longitudinal direction;

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; and

a detected body mounted at the first side wall and including a detected part configured to be detected by a detecting unit,

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.

(emphasis added). Each of the elements recited in Claim 1 is part of the claimed cartridge. Thus, Claim 1 of the '932 Patent is directed to a cartridge, not to any other parts of an image forming apparatus.

Plaintiffs contend that “a housing including a first side wall and a second side wall opposed to the first side wall in a longitudinal direction” is taught by the “pair of side frames 47” in the '158 Publication. Mot. at 9-10. But Plaintiffs’ anticipation ground is fatally flawed as the “pair of side frames 47” is part of the *drum unit*, not the *cartridge*.

Plaintiffs’ annotated Figure 4 shows the error in their mapping of the “pair of side frames 47” to the claimed “first side wall” and “second side wall.” As shown by the red box added below around the cartridge, nothing Plaintiffs point to is on the cartridge at all, as required by Claim 1 of the '932 Patent.

added); ¶ [0127] (“the *drum subunits 46 each include a pair of side frames 47* disposed in laterally opposed spaced relation, and a center frame 48 held between the side frames 47”) (emphasis added); ¶ [0142] (“the side frames 47 of the drum subunit 46”). In contrast, Claim 1 of the ’932 Patent is directed to only the cartridge.

For anticipation, “a prior art reference must disclose all elements of the claim within the four corners of the document, and *it must disclose those elements arranged as in the claim.*” *Microsoft Corp.*, 878 F.3d at 1068 (internal citations omitted) (emphasis added). Claim 1 of the ’932 Patent recites “[a] cartridge comprising: a housing including a first side wall and a second side wall opposed to the first side wall in a longitudinal direction.” Plaintiffs’ alleged ground of anticipation fails to point to any elements on a cartridge, which is where the “first side wall” and “second side wall” are arranged according to Claim 1 of the ’932 Patent. Thus, Plaintiffs have failed to set forth evidence raising a substantial question of validity and have not shown a likelihood of success on the merits of invalidity.

b. Plaintiffs are also unlikely to succeed because they lack standing to bring their underlying declaratory judgment action.

Plaintiffs’ invalidity claim is also unlikely to succeed because it is raised here via an underlying declaratory judgment action for which Plaintiffs lack standing. In declaratory judgment actions, the plaintiff must show that “a case of actual controversy” exists to establish subject matter jurisdiction sufficient to maintain an action in federal court. 28 U.S.C. § 2201(a). “[T]he question in each case is whether the facts alleged, under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Microsoft Corp. v. SynKloud Techs., LLC*, 484 F. Supp. 3d 171, 177 (D. Del. 2020) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)). Plaintiffs are not likely to establish that a case or controversy existed at the time

they filed their declaratory judgment action.

“In an action for a declaratory judgment of non-infringement or invalidity of a patent, the plaintiff must show ‘(1) an affirmative act by the patentee related to the enforcement of his patent rights and (2) meaningful preparation to conduct potentially infringing activity.’” *Microsoft*, 484 F. Supp. 3d at 177 (quoting *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1318 (Fed. Cir. 2012)). Brother has made no statements threatening or implying a threat to sue Plaintiffs for infringement. Brother said as much in its one letter responding to Plaintiffs’ request to ask Amazon to grant an exception to the UPNE deadline. Mot. Ex. 6 (“We do not believe that Brother now intends or at any time in the past has intended to file such a lawsuit.”). The only affirmative act Plaintiffs can point to is Brother’s filing of the UPNE with Amazon. This alone cannot be sufficient to find a case or controversy. Otherwise, anytime any entity files an infringement takedown claim with a retailer, it would be creating automatic standing for a declaratory judgment action. *Compare Dror v. Kenu, Inc.*, No. 19-CV-03043-LB, 2019 WL 5684520, at *1 (N.D. Cal. Nov. 1, 2019) (defendant followed Amazon infringement takedown with a letter to the plaintiff stating it “will not hesitate to seek prompt and effective judicial relief should this matter be pressed further”).

Further, the “immediacy and reality” requirement for a case or controversy can be viewed through the lens of standing. *Microsoft*, 484 F. Supp. 3d at 177 (quoting *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 (Fed. Cir. 2008)). To establish standing, the plaintiff must allege (1) an injury-in-fact, i.e., a harm that is “concrete and actual or imminent, not conjectural or hypothetical,” (2) that is “fairly traceable” to the defendant’s conduct, and (3) redressable by a favorable decision. *Id.* (quoting *Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1291 (Fed. Cir. 2008)). The first two elements fail here. There is no injury-in-fact, because

Plaintiffs have relisted on Amazon their Brother-compatible TN-660 cartridge under another ASIN. And Plaintiffs' injury is traceable to their failure to meet Amazon's UPNE deadline.

II. Plaintiffs do not demonstrate irreparable harm.

“[I]rreparable harm must be neither remote nor speculative, but actual and imminent.” *JTH Tax LLC v. DM3 Ventures, Inc.*, No. 3:20-CV-176, 2020 WL 6551214, at *3 (E.D. Va. Nov. 6, 2020) (Lauck, J.) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). Plaintiffs' alleged harm is neither.

First, there is serious doubt Plaintiffs' harm is “actual.” Plaintiffs' brief and sworn affidavits fail to disclose that they are *currently* selling Brother-compatible TN-660 cartridges under a different ASIN with a first-page ranking on Amazon. *See supra* notes 1 and 2.

Second, Plaintiffs' delay in bringing this motion also militates against a finding of irreparable harm. “A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.” *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). “Indeed, the very idea of a preliminary injunction is premised on the need for speedy and urgent action to protect a plaintiff's rights before a case can be resolved on its merits.” *Id.* Plaintiffs have shown no such need for speed.

Plaintiffs were notified of the UPNE proceeding on August 30 (by Amazon's telling) or August 31 (by their telling). Mot. Exs. 5, 7-11. Either way, they knew as of that notice that they would need to act or incur the consequences of inaction. They were familiar with the UPNE process from going through it three times since 2020. And, critically, they do not challenge infringement and acknowledge they would not have been able to challenge validity of the '932 Patent—the claim raised in this motion—during the UPNE process. Mot. at 1; Mot Ex. 12 at ¶¶ 5-6. So, Plaintiffs knew or should have known by August 31, 2021, that Amazon would likely

take down their reported products unless they obtained an invalidity finding from a court. Yet, Plaintiffs took no action to obtain an invalidity decision from a court until after Amazon had already made its final decision.

Third, it is unclear whether Plaintiffs' desired injunction would even return them to Amazon. Amazon's most recent communication with Plaintiffs said, "If the sellers provide a judgment that Brother Industries's [sic] asserted patent is invalid, or that products including theirs do not infringe its claims, we may reinstate their listing."²² Mot. Ex. 5. Plaintiffs will not obtain a judgment that the '932 Patent is invalid without winning their underlying declaratory judgment action (which will not happen for the reasons explained in the prior section). And Plaintiffs are not challenging infringement. So, taking Amazon at its word, Plaintiffs likely cannot obtain the relief they seek through this motion.²³

To be sure, this Court has acknowledged that "[h]arms to a party's market share, reputation, and workforce constitute irreparable injury." *RelaDyne Reliability Servs. Inc. v. Bronder*, No. 2:20-CV-377, 2020 WL 5745801, at *3 (E.D. Va. Aug. 4, 2020) (Wright Allen, J.). But Plaintiffs' harm (which they have mitigated) occurred when they failed to timely participate in Amazon's UPNE process, causing *Amazon* to remove the reported ASINs. Any resultant harm is of Plaintiffs' own making; if Plaintiffs had timely participated, their products would not have been delisted until

²² Amazon's UPNE Procedure uses more ambiguous language than its emails with Plaintiffs' counsel. See Mot. Ex. 20. at 3 ("Arguments regarding, for example, invalidating prior art will not be accepted; the only way Sellers can show invalidity/unenforceability is by presenting a court, Patent Office, or ITC order finding an asserted patent claim invalid or unenforceable.").

²³ Plaintiffs also ask that Brother be ordered "to retract their infringement complaints against Plaintiffs." Mot. 16, 19. But Plaintiffs fail to show such an order would accomplish anything a. Amazon's UPNE process does not provide a retraction mechanism *after* the neutral evaluator has issued a decision on infringement. Mot. Ex. 20 at 3 ("There is no process for reconsideration of the Evaluator's decision, though either side may appeal to Amazon by providing a court order that conflicts with the Evaluator's decision concerning invalidity or infringement.").

the UPNE process was complete. Mot. Ex. 12 at 4. Plaintiffs' missed deadline is not an appropriate basis for emergency injunctive relief against Brother. *Di Biase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017) (rejecting preliminary injunction where plaintiffs' harm was due to their failure to purchase insurance using an HRA account and noting that, "[g]iven the extraordinary nature of the remedy, a preliminary injunction is not warranted where, as here, the moving parties have not shown that they availed themselves of opportunities to avoid the injuries of which they now complain").

Plaintiffs' responsibility for their situation is a key distinction between this case and the two cases Plaintiffs cite.

In *Medcursor*, after initially finding the plaintiff's claims too conclusory during the TRO proceeding, the court found the factor in the plaintiff's favor based on two concrete harms. The first was that the plaintiff sold its products almost exclusively on Amazon and, as had happened previously, the defendants' infringement notice would likely result in the deactivation of the plaintiff's seller account. *Medcursor Inc. v. Shenzhen KLM Internet Trading Co.*, 2021 WL 2493288, at *10 (C.D. Cal. June 10, 2021). The second was lost business opportunities on Amazon including the loss of the plaintiff's first-page status. *Id.* Neither harm applies here. Plaintiffs' delisted products are (supposed to be) delisted because Plaintiffs missed a deadline. Plaintiffs have never had their seller accounts removed from Amazon due to any action by Brother. *Id.* And Plaintiffs are still selling Brother-compatible TN-660 cartridges on Amazon, with a first-page ranking.

In *Beyond Blond Productions*, the defendants asserted copyright and trademark infringement claims against videos uploaded by the plaintiff to Amazon Prime Video Direct, and Amazon took the videos down, refusing to relist them unless the defendants withdrew their claim.

Beyond Blond Productions, LLC v. Heldman, 479 F. Supp. 3d 874, 879 (C.D. Cal. 2020). The plaintiff then sought a preliminary injunction, and the court found it likely there was no infringement. *Id.* at 881-88. The court then found irreparable harm would occur if the defendants did not withdraw their takedown notifications, including reputation, advertising efforts, loss of customers, ranking and reviews, termination as a repeat offender, and goodwill. *Id.* at 888. Here, again, there is no infringement defense. And, to the extent Plaintiffs face similar harms (which they do not because they have relisted the products), it is because they did not timely participate in the UPNE process.

III. The equities do not support extraordinary relief.

The equities here are lopsided. Plaintiffs have come to this Court with a combination of false and misleading claims about their businesses. That is not a basis for emergency equitable relief in their favor.

“Any remedy in equity must lessen Plaintiffs’ hardship without exposing Defendants to undue harm.” *JTH Tax*, 2020 WL 4708705, at *4. And, “[i]njunctive orders that ‘alter rather than preserve the status quo’ are disfavored.” *Id.* (citation and alterations omitted). Here, again, Plaintiffs need no remedy in equity to lessen their self-induced hardship given they have been able to relist their Brother-compatible TN-660 cartridge under a new ASIN, with a first-page ranking. An injunction would reward Plaintiffs’ failure to meet their UPNE deadline and their failure to assert any invalidity claim until the UPNE process had completed. Brother, meanwhile, would be penalized for following the UPNE process and would suffer the ongoing harm of Plaintiffs’ infringement of the ‘932 Patent—currently presumed valid.

IV. The Public Interest Does Not Favor This Injunction.

“[T]here is a strong public interest in preserving the rights of patent holders.” *Fred*

Hutchinson, 768 F. Supp. 2d. at 883. There should likewise be a strong public interest in permitting patent holders to protect those rights through efficient private mechanisms like Amazon's UPNE process and in encouraging sellers of accused products to participate in those mechanisms before coming to court. The public interest cannot be in encouraging infringement, undoing private slipups, or permitting parties to misdescribe fundamental facts in federal court.

CONCLUSION

The Court should deny Plaintiffs' motion.

Respectfully submitted,

/s/ Andrew T. George
Andrew T. George

Andrew T. George (Va. Bar No. 88389)
Luke K. Pedersen*
Thomas C. Martin (Va. Bar No. 75159)
Andrew D. Wilson
Sam Kassa*
Eileen F. Hyde*
BAKER BOTTS L.L.P.
700 K St NW
Washington, DC 20001
Tel.: 202-639-7764
luke.pedersen@bakerbotts.com
andrew.george@bakerbotts.com
tommy.martin@bakerbotts.com
andrew.wilson@bakerbotts.com
sam.kassa@bakerbotts.com
eileen.hyde@bakerbotts.cm

Attorneys for Brother Industries, Ltd.