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Kangaroo Manufacturing, Inc.
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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

<p>10 Kangaroo Manufacturing, Inc., a Florida corporation</p> <p>11</p> <p>12 Plaintiff,</p> <p>13 v.</p> <p>14 Amazon.com, Inc., a Delaware corporation</p> <p>15 Defendant.</p> <p>16</p>	<p>No.</p> <p>COMPLAINT AND DEMAND FOR JURY TRIAL</p>
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17 Plaintiff Kangaroo Manufacturing Inc. (Kangaroo) alleges:

18 **THE PARTIES**

19 1. Plaintiff Kangaroo Manufacturing, Inc. (“Kangaroo”) is a Florida
20 corporation with its principal place of business in Arizona.

21 2. Defendant Amazon.com, Inc. (“Amazon”) is a Delaware corporation with
22 its principal place of business in Washington.

23 **JURISDICTION AND VENUE**

24 3. This Court has diversity jurisdiction under 28 U.S.C. § 1332(a). The Parties
25 are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of
26 interest and costs.

1 same PDP.

2 13. Each PDP includes an Amazon Standard Identification Number (“ASIN”)
3 for the product—a unique ten character alpha numeric product identifier assigned by
4 Amazon.

5 **Universal Product Code (“UPC”)**

6 14. In addition to the ASIN, Amazon also requires the PDP to include a
7 Universal Product Code (“UPC”) or an alternative industry standard product identifier.

8 **“Fulfillment by Amazon” (FBA)**

9 15. Amazon offers “Fulfillment by Amazon” (“FBA”) service allowing retailers
10 to ship their product through Amazon fulfillment centers.

11 16. Amazon has fulfillment centers in Arizona, and, on information and belief,
12 Sale of unauthorized products made by Kangaroo and products sold by Kangaroo
13 authorized resellers have occurred in Arizona as a result of the Amazon FBA service.

14 17. A seller using the FBA service can choose to have its products tracked using
15 the UPC code.

16 18. On information and belief, products tracked by UPC code are comingled
17 with inventory of the same products from other sellers at the Amazon fulfillment centers.

18 19. On information and belief, Amazon is able to identify the original seller,
19 source and owner of the products using the FBA service.

20 **Amazon Storage/Fulfillment Fees**

21 20. For sellers using the FBA service, the product dimensions and weight are
22 captured for storage, fulfillment and billing purposes by Amazon.

23 21. Amazon has overcharged Plaintiff’s authorized resellers for storage and
24 fulfillment fees.

25 22. After deducting proper storage and fulfillment fees, Amazon is obligated to
26 remit the balance of the purchase price (if received by Amazon) to the seller.

1 **Amazon Regulation of Sales**

2 **Authorized Sales – Buy Box**

3 23. If more than one seller lists a product for sale under a particular PDP, the
4 seller with the best performance metrics and longest Amazon sales history is the default
5 seller. A “buy box” appears next to the default seller’s listing allowing customers to add
6 items to their shopping cart with a single click.

7 24. Control of the buy box as the default seller increases the sales of the default
8 seller on the PDP.

9 25. On information and belief, Amazon can reassign the buy box if Amazon
10 deems the default seller’s price “excessive”. This reassignment forces the seller to reduce
11 the price or lose the benefit of the buy box.

12 26. Counterfeiters often list their product on the PDP at a lower price than
13 genuine goods. In some cases, Amazon has allowed a counterfeiter to be assigned the
14 “buy box” and become the default seller for the PDP.

15 27. Amazon itself has listed products on the PDP at prices above the price
16 Amazon imposes on the default seller to retain the buy box.

17 28. Plaintiff has been damaged by improper administration of the buy box by
18 Amazon.

19 **Authorized Sales – Source Rating**

20 29. Bad reviews for the counterfeit products sold through the Amazon platform
21 can erode the price of genuine goods and damage the reputation of legitimate retailers.

22 30. By reassigning the UPC, Amazon can reallocate control of the PDP and
23 damage the reputation of legitimate retailers.

24 31. Amazon has interfered with sales of Plaintiff’s authorized resellers and
25 allowed sales of counterfeit products resulting in erosion of Plaintiff’s revenue and profits.

26 32. Plaintiff has been damaged by improper administration of the UPC and

1 source ratings by Amazon.

2 **Counterfeit Sales**

3 33. Amazon is aware counterfeiters are exploiting the Amazon platform to sell
4 unauthorized products. Unauthorized sales on Amazon have included products sold FBA
5 and products sold by Amazon itself.

6 34. Amazon has implemented infringement reporting procedures under which
7 Amazon may remove product listings for counterfeit product or remove access to an entire
8 PDP.

9 35. Amazon has continued to sell counterfeit goods on a PDP after removing or
10 disabling authorized sales by Plaintiff's authorized resellers.

11 36. The FBA service and Amazon regulation of sales allow Amazon to control
12 the PDP, product listing, price, and delivery.

13 37. Amazon has exercised control of the PDP, product listing, price, and
14 delivery in ways that damage Plaintiff and benefit Amazon.

15
16 **COUNT I**

17 **Trademark Infringement and False Designation of Origin**

18 38. Kangaroo owns U.S. federal trademark registrations for the KANGAROO
19 marks:

- 20 a. U.S. Trademark Registration Numbers 4,897,428 and 5,132,989 for
21 KANGAROO and design; and
22 b. U.S. Trademark Registration Numbers 4,936,937, 4,980,760 and
23 5,132,866 for KANGAROO MANUFACTURING and design.

24 39. Kangaroo also owns common law rights in the KANGAROO word mark.

25 40. KANGAROO is inherently distinctive as applied to Kangaroo's goods.
26 Moreover, the distinctiveness of the KANGAROO marks and KANGAROO word mark

1 has increased by virtue of Kangaroo's use and promotion of the marks and the resulting
2 secondary meaning among consumers as a source indicator for Kangaroo's goods.
3 Consumers recognize goods labeled with the KANGAROO marks as originating from
4 Kangaroo.

5 41. Amazon knowingly and willfully advertised and sold counterfeit goods on
6 PDPs containing the KANGAROO marks and KANGAROO word mark, including PDPs
7 for the emoji beach ball and the flamingo pool float.

8 42. Amazon knowingly and willfully used in commerce goods manufactured by
9 RINCO to fulfill orders for goods advertised and sold by authorized resellers for
10 Kangaroo.

11 43. On information and belief, Amazon intends to, and did in fact, confuse and
12 mislead consumers into falsely believing that Amazon listed emoji beach ball products
13 originated from, were licensed, sponsored, or approved by, or were somehow affiliated,
14 connected, or associated with Kangaroo.

15 44. Amazon's actions constitute trademark infringement in violation of 15
16 U.S.C. § 1114.

17 45. Amazon traded on the goodwill Kangaroo established in the KANGAROO
18 marks and delivered counterfeit goods to customers attempting to purchase genuine
19 Kangaroo products from authorized sellers, thereby directly and unfairly competing with
20 Kangaroo.

21 46. Amazon's conduct has caused actual confusion.

22 47. The foregoing conduct caused consumer confusion as to the origin,
23 sponsorship or approval of goods sold on the PDPs created by Kangaroo authorized
24 resellers and advertising Kangaroo products. Amazon's conduct constitutes unfair
25 competition in violation of 15 U.S.C. § 1125(a)(1)(A).

26

1 48. Amazon's conduct was willful and intentional and damaged the goodwill
2 and reputation of Kangaroo.

3 49. Amazon's actions were direct and proximate cause of damage to Kangaroo
4 including loss profits and loss of goodwill for which Kangaroo has no adequate remedy at
5 law.

6 50. Amazon's infringement interferes with Kangaroo's goodwill and customer
7 relationships and will substantially harm Kangaroo's reputation as a source of high quality
8 goods and services. Unless restrained, Amazon will cause irreparable injury to Kangaroo.
9 Amazon's wrongful conduct, and the damages resulting to Kangaroo, are continuing.
10 Accordingly, Kangaroo is entitled to injunctive relief. 15 U.S.C. § 1116(a).

11 51. Kangaroo is entitled to monetary damages under the Lanham Act, measured
12 by damages incurred by Kangaroo and Amazon's profit or gain. 15 U.S.C. § 1117(a).

13 52. Amazon's conduct was intentional and without foundation in law. Thus,
14 Kangaroo is entitled to an award of enhanced profits and damages against Amazon. 15
15 U.S.C. § 1117(a).

16 53. Amazon's acts make this an exceptional case. Thus, Kangaroo is entitled to
17 an award of attorneys' fees and costs. 15 U.S.C. § 1117(a).

18 WHEREFORE, Kangaroo prays for judgment:

- 19 A. Awarding actual damages.
20 B. Awarding enhanced damages.
21 C. Awarding preliminary and permanent injunctive relief.
22 D. Awarding costs and attorneys' fees in an amount to be determined.
23 E. Awarding such other and further relief as the Court deems proper.

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COUNT II

Use of Counterfeit Trademarks

54. Kangaroo incorporates by reference the allegations of paragraphs 1 through 53 above.

55. The KANGAROO marks issued prior to first use by Amazon.

56. The KANGAROO marks are registered on the USPTO principal register.

57. Amazon sold emoji beach balls made and packaged with counterfeit KANGAROO marks.

58. The manufacturer of the emoji beach balls sold by Amazon was not authorized by Kangaroo to use the KANGAROO marks. Amazon is not selling genuine Kangaroo goods.

59. The marks used on the invoices and packaging for the emoji beach balls sold by Amazon are counterfeit marks under 15 U.S.C. § 1116(d)(1)(B).

60. Amazon, without Kangaroo's consent, used counterfeits or colorable imitations of the KANGAROO marks on product listings and product packaging in connection with advertising, offering for sale and selling an unauthorized emoji beach ball.

61. Amazon's conduct was likely to cause confusion, mistake or deception under 15 U.S.C. § 1117(b).

62. On information and belief, Amazon's conduct was intentional and willful. Amazon had repeatedly been informed by Kangaroo of the counterfeit products.

63. The spurious marks used by Amazon are identical with or substantially indistinguishable from the registered KANGAROO marks under 15 U.S.C. § 1127.

WHEREFORE, Kangaroo prays for judgment:

A. Preliminarily and permanently enjoining Amazon's sale of the emoji beach balls or any other Kangaroo products using counterfeit marks. 15 U.S.C. § 1116(1)(A).

1 B. Awarding three times Kangaroo's actual damages or three times Amazon's
2 profits, whichever is greater. 15 U.S.C. § 1117(b).

3 C. Awarding costs and reasonable attorneys' fees. 15 U.S.C. § 1117(b).

4 D. Awarding prejudgment interest. 15 U.S.C. § 1117(b).

5 E. In the alternative, awarding statutory damages of not less than \$1,000 or
6 more than \$200,000 per counterfeit mark per type of good sold, as the Court considers
7 just. 15 U.S.C. § 1117(c).

8 F. In the alternative, if use of the counterfeit marks was willful, awarding not
9 more than \$2,000,000 per counterfeit mark per type of good sold, as the Court considers
10 just. 15 U.S.C. § 1117(c).

11 G. Awarding such other and further relief as the Court deems proper.

12
13 **COUNT III**

14 **Copyright Infringement**

15 64. Kangaroo incorporates by reference the allegations of paragraphs 1 through
16 63 above.

17 65. Kangaroo owns the copyright in:

18 a. the design of the emoji beach balls (Ex. 1); and

19 b. the photographs used to advertise the emoji beach balls (Ex 2).

20 66. The Kangaroo copyrights were registered before infringement by Amazon
21 commenced.

22 67. Amazon infringed the Kangaroo copyrights by displaying images of and
23 distributing counterfeit emoji beach balls.

24 68. The photographs used to advertise the Amazon emoji beach ball products
25 are substantially similar to the copyrighted Kangaroo photographs

26 69. The Amazon emoji beach ball designs are substantially similar to the

1 copyrighted Kangaroo emoji beach ball designs.

2 70. On information and belief, Amazon's infringing conduct is intentional and
3 willful.

4 71. Amazon has caused damages to Kangaroo.

5 72. Amazon's infringing acts have caused, and will continue to cause,
6 irreparable injury to Kangaroo, and Kangaroo has no adequate remedy at law.
7 Accordingly, Kangaroo is entitled to an injunction, pursuant to 17 U.S.C. § 502, and an
8 order impounding any and all infringing materials, pursuant to 17 U.S.C. § 503.

9 73. Amazon's actions constitute copyright infringement. Kangaroo is entitled to
10 its actual damages and Amazon's profits. 17 U.S.C. § 504(a).

11 74. Alternatively, Kangaroo is entitled to elect statutory damages (instead of
12 actual damages and profits), including enhanced statutory damages due to Amazon's
13 willful infringement. 17 U.S.C. § 504(c).

14 75. Kangaroo is entitled to its attorneys' fees and cost. 17 U.S.C. § 505.

15 WHEREFORE, Kangaroo prays for judgment:

16 A. Declaring Amazon has willfully infringed Kangaroo's copyrights in
17 violation of 17 U.S.C. § 501.

18 B. Preliminarily and permanently enjoining Amazon from infringing
19 Kangaroo's copyrights.

20 C. Awarding Kangaroo:

21 a. Actual damages as well as all of Amazon's profits from acts of
22 copyright infringement pursuant to 17 U.S.C. § 504(a);

23 b. In the alternative, at Kangaroo's election, statutory damages for
24 Amazon's willful copyright infringement pursuant to 17 U.S.C. §
25 504(c).

26

1 D. Awarding Kangaroo its costs, and reasonable attorneys' fees pursuant to 17
2 U.S.C. § 505.

3 E. Awarding such other relief as the Court deems proper.
4

5 **COUNT IV**

6 **Negligence**

7 **Improper Administration of Kangaroo UPC by Amazon**

8 76. Kangaroo incorporates by reference the allegations of paragraphs 1 through
9 75 above.

10 77. As required by Amazon, Plaintiff provided the UPC code for Plaintiff's
11 products on each Amazon PDP.

12 78. Amazon had a duty of reasonable care to properly administer the PDP
13 and/or the related UPC code. In breach of this duty of care, Amazon caused repeated
14 incidents of unauthorized sales damaging Plaintiff.

15 79. For example, Kangaroo manufactured an emoji beach ball sold by
16 authorized resellers under UPC 856082006009. Amazon had a duty to exercise
17 reasonable care in administering the Kangaroo UPC on PDPs of Kangaroo's authorized
18 resellers.

19 80. Amazon reassigned the PDP created by Kangaroo to a competitor, Rhode
20 Island Novelty Company ("RINCO") by changing the UPC code on the PDP page to the
21 RINCO UPC code.

22 81. Both Kangaroo and RINCO advised Amazon, in writing, of the error in the
23 UPC code. Amazon refused to correct the error.

24 82. Kangaroo only sold the emoji beach balls product to consumers through the
25 Amazon platform.
26

1 83. A counterfeiter listed an unauthorized product on the PDP for the Kangaroo
2 emoji beach ball. Kangaroo purchased all of the counterfeit product in order to prevent it
3 from entering the market and damaging Kangaroo's reputation.

4 84. Amazon has a policy of reimbursing purchasers who receive counterfeit
5 product. To receive reimbursement, the purchaser must return the counterfeit product to
6 Amazon. Amazon is then responsible to dispose of the counterfeit product.

7 85. Kangaroo returned \$11,000 of counterfeit product to Amazon and requested
8 a refund.

9 86. Amazon refunded only \$7,000 and claimed the balance of the product was
10 damaged in shipment and not eligible for the refund.

11 87. On information and belief, Amazon itself resold the counterfeit products.
12 Disposal of counterfeit products by sale on the PDP for Kangaroo products was
13 negligence per se.

14 88. Amazon breached its duty of reasonable care by selling and causing others
15 to sell counterfeit product on the PDPs created using the Kangaroo UPC.

16 89. Counterfeit sales resulted in loss of Kangaroo's revenue and profits.

17 90. Amazon's sale of counterfeit product and facilitation of third-party
18 counterfeiting was a proximate cause and cause in fact of damages to Kangaroo.

19 **Improper Control of Sales Prices by Amazon**

20 91. Amazon had a duty to exercise reasonable care in enabling sales on the
21 Amazon's platform by Kangaroo authorized resellers for items manufactured by
22 Kangaroo.

23 92. For example, Amazon required Kangaroo's authorized resellers to
24 repeatedly lower the price of a Kangaroo flamingo pool float below Amazon's price to
25 retain the buy box.

26 93. Amazon itself listed a flamingo pool float product on the Kangaroo

1 authorized reseller PDP at prices above the price of the authorized reseller's listing with
2 the buy box. The Amazon product was not authorized by Kangaroo.

3 94. Amazon breached its duty of reasonable care by selling competing products
4 at higher prices while preventing authorized sales by Kangaroo authorized resellers at the
5 same price.

6 95. Amazon breached its duty of reasonable cause by allowing and participating
7 in the sale of counterfeit products and in some cases allowing counterfeiters to be assigned
8 the buy box on PDPs for Kangaroo products in competition with the Kangaroo authorized
9 resellers.

10 96. Unauthorized and counterfeit sales by Amazon and others were the cause in
11 fact and proximate cause of damages to Plaintiff's revenue and profits.

12 **Improper Storage and Fulfillment Fees by Amazon**

13 97. Amazon had a duty when administrating the FBA service to exercise
14 reasonable care to determine storage and fulfillment fees imposed by Amazon.

15 98. Amazon breached its duty of reasonable care by imposing fees on
16 Kangaroo's authorized resellers based on the size and weight of counterfeit products.

17 99. By using incorrect dimensions and weights, Amazon has overcharged
18 Kangaroo's authorized sellers for storage and fulfillment fees under the FBA service.

19 100. Amazon's conduct inflated the selling expenses of Kangaroo resellers and
20 was a cause in fact and proximate cause of damages to Kangaroo.

21 WHEREFORE, Plaintiff prays for judgment:

- 22 A. Awarding actual damages in an amount to be determined.
23 B. Awarding specific performance of the applicable Amazon policies relied
24 upon by Kangaroo and its authorized resellers.
25 C. Awarding costs and attorneys' fees in an amount to be determined.
26 D. Awarding such other and further relief as the Court deems proper.

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COUNT V

Unjust Enrichment

101. Plaintiff incorporates by reference the allegations of paragraphs 1 through 100 above.

102. Plaintiff conferred unintended benefits on Amazon which in equity and good conscience Amazon should not retain.

103. Amazon has been unjustly enriched by the conduct alleged, including:

- a. overcharging for storage and fulfillment;
- b. selling unauthorized and counterfeit products, including emoji beach balls and the flamingo pool float;
- c. miss-assigning the UPC code and PDP control and diverting sales from Plaintiff's authorized resellers while continuing to receive fees on the unauthorized sales;
- d. enabling sales of unauthorized products and receiving fees on the unauthorized sales; and
- e. forcing Plaintiff's authorized sellers to reduce prices to retain the buy box while continuing to charge prices for unauthorized Amazon listings above the reduced price imposed by Amazon to retain the buy box.

WHEREFORE, Plaintiff prays for judgment:

- A. Awarding restitution damages.
- B. Awarding punitive damages.
- C. Awarding costs of suit.
- D. Awarding such other and further relief as the Court deems proper.

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COUNT VI

(Unfair Competition)

104. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 103 above.

105. By enabling unauthorized sales on the PDP pages created by Plaintiff's authorized resellers, Amazon diverted sales and associated revenue from Plaintiff to competitors or counterfeiters.

106. Amazon earned fees related to the sales by unauthorized competitors and counterfeiters.

107. On information and belief, Amazon itself actually sold counterfeit products in direct competition with Plaintiff.

108. Amazon's conduct trades on Plaintiff's goodwill and constitutes unfair competition.

109. Amazon's conduct is contrary to honest practice in commercial matters and constitutes palming off and unfair competition.

110. Amazon's conduct is the proximate cause of actual damages to Kangaroo.

111. Amazon's conduct is willful and intentional warranting damages measured by Amazon's profits and Plaintiff's actual damages, as well as punitive damages.

WHEREFORE, Plaintiff prays for judgment:

- A. Awarding actual damages.
- B. Awarding punitive damages.
- C. Awarding costs of suit.
- D. Awarding such other and further relief as the Court deems proper.

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1 **COUNT VII**

2 **Tortious Interference with Prospective Contract**

3 112. Plaintiff incorporates by reference the allegations of paragraphs 1 through
4 113 above.

5 113. Kangaroo had an established history of successful sales by authorized
6 resellers on the Amazon platform and a reasonable expectation of future business
7 relationships arising on the Amazon platform.

8 114. Amazon improperly and purposefully interfered with Plaintiff's business
9 expectancies by:

- 10 a. blocking authorized sales;
- 11 b. altering the UPC codes and PDP control to enable sales of
12 unauthorized products;
- 13 c. fulfilling purchase orders intended for Plaintiff's authorized resellers
14 through FBA with product from competitors or counterfeiters;
- 15 d. actually selling counterfeit product; and
- 16 e. forcing authorized sellers to reduce their prices to retain the Buy Box.

17 115. Amazon's conduct is the proximate cause of damages to Kangaroo.

18 116. Amazon damaged Kangaroo's reputation and impermissibly interfered with
19 Kangaroo's revenue from authorized retail sales.

20 117. Amazon has no privilege or justification for such interference and Amazon's
21 conduct is wrongful.

22 118. Amazon's conduct warrants an award of punitive damages.

23 119. As a direct and foreseeable result of Amazon's actions, Kangaroo has been
24 damaged.

25 WHEREFORE, Plaintiff prays for judgment:

- 26 A. Awarding actual damages.

- 1 B. Awarding punitive damages.
- 2 C. Awarding costs and attorneys' fees in an amount to be determined.
- 3 D. Awarding such other and further relief as the Court deems proper.
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5 **JURY DEMAND**

6 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Kangaroo hereby
7 demands a trial by jury.

8 DATED this 12th day of June, 2017.

9 FENNEMORE CRAIG, P.C.

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11 By: /s/ Ray K. Harris
12 Ray K. Harris
13 Attorneys for Plaintiff
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