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6 Attorneys for Plaintiff
HIGEAR DESIGN, INC.

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 HIGEAR DESIGN, INC.,

12 Plaintiff,

13 v.

14 AMAZON.COM, INC.,

15 Defendant.

Case No. '16CV1110 LAB JLB

**PLAINTIFF HIGEAR DESIGN,
INC'S COMPLAINT FOR DESIGN
PATENT AND UTILITY PATENT
INFRINGEMENT, AND
TRADEMARK INFRINGEMENT**

JURY DEMANDED

16
17 Plaintiff HIGEAR DESIGN, INC. for its Complaint against Defendant
18 AMAZON.COM, alleges and states as follows:

19 **THE PARTIES**

20 1. Plaintiff HiGear Design, Inc. ("HiGear") is a corporation organized and
21 existing under the laws of the State of California with its principal place of business
22 in Mill Valley, California and a mailing address of P.O. Box 1113, Mill Valley, CA
23 94942.

24 2. Defendant AMAZON.COM, INC. ("Amazon") is a corporation
25 organized and existing, on information and belief, under the laws of the State of
26 Delaware, with its principal place of business at, on information and belief, 410 Terry
27 Avenue, Seattle, WA 98109.
28

JURISDICTION AND VENUE

3. This is a civil action for patent infringement arising under the Patent Laws of the United States, 35 U.S.C. §§ 1 *et seq.* This is also a trademark action arising under 15 U.S.C. § 1114 *et seq.* Subject matter jurisdiction is therefore proper under 28 U.S.C. §§ 1331 and 1338(a), as well as 15 U.S.C. § 1121(a).

4. This Court has personal jurisdiction over Amazon because Amazon has extensive minimum contacts with the State of California such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. Amazon has purposefully availed itself of the benefits of the California forum, and has continued selling products infringing HiGear's patents and trademarks despite clear notice and knowledge that the continued sales would harm the California company's intellectual property rights and competing line of products practicing the inventions. On information and belief:

a. Amazon has fulfillment centers in California employing nearly 5,000 employees, and reports it has over 10,000 employees statewide. Its sales in California are so extensive that the online sales tax effective September 15, 2012 was referred to as the "Amazon" tax, and generates hundreds of millions of dollars in sales tax revenue for California from Amazon each year for sales fulfilled to California residents; and

b. That tax is itself the result of a compromise between Amazon and California legislators whereby Amazon agreed to pour \$500 million into its California operations, provide 10,000 full-time jobs in California, and 25,000 more seasonal jobs.

5. This Court further has subject matter jurisdiction over the claims and causes of action asserted in this complaint pursuant to 28 U.S.C. § 1332(a) because this dispute is between citizens of complete diversity, including a California company with its principle place of business in California, and a Delaware company with its principle place of business in Washington, and the amount in controversy exceeds

1 \$75,000, exclusive of interest and costs.

2 6. Venue is proper in this judicial district under 28 U.S.C. sections 1391(b)
3 and (c) and 1400(b) because a substantial part of the events or omissions giving rise
4 to the claims occurred in the district; Plaintiff resides in this district; and the
5 Defendant resides in this district by virtue of being subject to personal jurisdiction in
6 this judicial district by, among others, its repeated availment and direction of its
7 activity toward this district, and selling infringing goods into this judicial district.

8 **FACTUAL BACKGROUND**

9 7. Through heavy investment and hard work, HiGear designed a unique
10 and highly useful type of travel pillow. The design is so aesthetically pleasing and
11 distinctive that HiGear pursued and obtained a design patent to protect against others
12 who may wish to sell what an ordinary observer would view as the same product. A
13 copy of HiGear's U.S. Design Patent, US D599,150, is attached to this Complaint as
14 **EXHIBIT 1** ("the '150 Patent").

15 8. The advances utilized by the portable support pillow were such a novel
16 invention that HiGear was also awarded a utility patent for its invention, U.S. Patent
17 No. US 7,758,125 ("the '125 Patent"). A copy of the '125 Patent is attached as
18 **EXHIBIT 2**.

19 9. HiGear has been marketing and selling its unique HiGear travel pillows
20 since at least as early as March 14, 2008, and has gained significant market
21 recognition. The brand such products are sold under was awarded two U.S.
22 trademark registrations, to provide the broadest possible protection against
23 infringement and counterfeiting. This includes U.S. Reg. No. 3,544,788 for the
24 TRAVELREST word mark in Class 10 for "air pillows for medical purposes," a true
25 and correct copy of which is attached as **EXHIBIT 3** and incorporated herein by
26 reference. This also includes U.S. Reg. No. 4,482,893 for the TRAVELREST word
27 mark plus design in Class 10 for "air pillows for medical purposes," a true and correct
28 copy of which is attached as **EXHIBIT 4** and incorporated herein by reference.

1 10. TRAVELREST products regularly appear in Amazon's various lists of
2 #1 selling products.

3 11. Unfortunately, in the midst of this success, HiGear discovered that a
4 number of online sellers had begun selling infringing travel pillows through
5 Amazon's online store located at www.Amazon.com. In an effort to enforce its
6 patent and trademark rights, HiGear has patiently gone through Amazon's
7 infringement reporting platforms, including the repugnant procedure of paying
8 dozens of counterfeiters for one of their infringing products.

9 12. In the past 2 years alone, Amazon has listed approximately 30 known
10 infringing products with separate ASINs (Amazon's unique product number assigned
11 to each product, which Amazon also uses to group together different purchase options
12 for consumers interested in that particular product). Those ASINs, along with the
13 Seller Nickname and Order Date are listed in **EXHIBIT 5** hereto ("Accused
14 Products"). Many of these sellers list their counterfeit products under ASINs
15 assigned to genuine TRAVELREST travel pillows (for example, iResource's ASIN
16 B014KN94G8).

17 13. Exemplative copies of the notices of infringement provided to Amazon
18 for the Accused Products are attached as **EXHIBIT 6**. These counterfeit pillows use
19 the same stock copyrighted pictures as HiGear, for which the copyright belongs to
20 HiGear. They also use the same or modified versions of HiGear's travel pillow
21 instruction manuals, for which HiGear holds all copyright rights. The marketing and
22 promotional material included with these counterfeit pillows even employs the
23 TRAVELREST word and design marks for which HiGear enjoys two federally
24 registered trademarks. Examples of this blatant counterfeiting are shown in
25 **EXHIBIT 6**.

26 14. A fundamental flaw with Amazon's design, is that it is not adequate to
27 protect against repeat infringement by fundamentally the same seller in a timely and
28 efficient fashion, resulting in Amazon making substantial infringing sales at any

1 given time. Amazon has been notified of these repeat offenders.

2 15. Infringers simply serially create new seller accounts or ASINs and put
3 the exact same products up for sale again. This includes, for example,
4 DiamondMindMarketing, Amazon Warehouse Deals, Inc., and Xue Wen Wa. See
5 **EXHIBIT 5**.

6 16. Amazon does not remove these infringing sellers, ban them from selling
7 travel pillows, or employ other measures to eliminate such serial infringing sales –
8 instead, it continues to fulfill orders for these infringing products. And Amazon often
9 will not remove the listing for the infringing product without a required purchase of
10 the product being made by the IP owner, even when Amazon fulfills the orders for
11 the product from its own warehouses.

12 17. The net result is that an infringing travel pillow is almost always
13 available for purchase on Amazon, with Amazon and the infringing seller generating
14 revenue based on sales of these counterfeit travel pillow – revenue that rightfully
15 belongs to HiGear.

16 18. The result goes beyond just supplanting an authorized sales when a
17 counterfeit sale is provided. The damage spreads to other consumers through
18 negative customer reviews from the consumers buying these knockoffs. For
19 example, on March 31, 2016 a “1 star” review was posted for a TRAVELREST
20 pillow ASIN on Amazon, stating the following regarding a recent counterfeit
21 “TRAVELREST” pillow from Xue Wen Ya: “Cheaply made junk arrived damaged
22 from China. No response from seller XUE to rectify problem. Unfortunately I
23 suggested the product to many other folks before getting this junk.” This negative
24 review then discourages others reviewing it from purchasing authentic patented
25 TRAVELREST pillows. The disappointed customer is also not providing the word
26 of mouth they would otherwise provide if they had received a satisfactory non-
27 counterfeit pillow. Even further, many consumers do not pay attention to the reasons
28 for specific negative reviews, but are instead deterred or discouraged from purchase

1 simply by the presence of low star ratings, given the competitive marketplace where
2 perception is power.

3 19. The infringers have exploited Amazon's policy, and Amazon has not
4 adapted to the changing marketplace so as to avoid vicarious, contributory and
5 indirect infringement. For example, on information and belief, Amazon employs no
6 IP address match process for repeat violators. Instead, Amazon makes substantial
7 sales of infringing goods, while appearing to address infringement.

8 20. Despite repeated demands to Amazon to take action to stop this
9 counterfeiting scheme perfected on its online store, nothing has changed.

10 21. Amazon is acting as a retailer and dealer in the infringing products.

11 22. Amazon is directly liable for the infringing offers for sale, including
12 counterfeit sales using ASINs created for genuine TRAVELREST pillows, as well as
13 their own ASINs. Amazon is liable directly regardless of whether the individual
14 partners of Amazon are also liable. Amazon has offered no response as to why the
15 Accused Products are not infringing, and the continued deliberate indifference in
16 continuing to allow these Accused Products on its online store by the same seller
17 using what, on information and belief, is the same IP address, makes Amazon's
18 infringements willful.

19 23. Accordingly, to protect HiGear's valuable patents and trademarks from
20 online exploitation, HiGear brings this suit.

21 **FIRST CLAIM FOR RELIEF**

22 **PATENT INFRINGEMENT OF U.S. PATENT NO. D599,150**

23 24. HiGear realleges all allegations in this Complaint as if stated herein.

24 25. On September 1, 2009, United States Patent Number D599,150 entitled
25 "Portable Support Pillow," was duly and legally issued to HiGear, who has the right
26 to enforce this patent.

27 26. Defendant has sold or exposed for sale articles of manufacturer to which
28 the '150 Patent applies.

1 27. Defendant has infringed and continues to infringe the '150 Patent by
2 using, selling, offering for sale, importing, and/or actively inducing others to use
3 products that infringe one or more of the patented design(s) in the '150 Patent, and is
4 thus liable for patent infringement pursuant to 35 U.S.C. §§ 271 and 289 et seq. The
5 Accused Products so resemble the '150 Patent, including Claim 1, that in the eye of
6 an ordinary observer, giving such attention as a purchaser usually gives, the visual
7 appearance of the two designs are substantially the same.

8 28. Defendant is also liable for patent infringement because it actively
9 induced these sellers on its online site to continue selling the Accused Products even
10 after Amazon unequivocally knew of the '150 Patent, having received multiple
11 notices of infringement from HiGear. Amazon acted in a manner that encouraged
12 these sellers to infringe on the '150 Patent. Amazon has even purported to open,
13 inspect and repackage such items. *See* **EXHIBIT 6**.

14 29. Specifically, although Amazon maintains the power under its Conditions
15 of Use to remove whatever products it wishes to from its online store, and revoke
16 user rights, has a detailed infringement notice program to accomplish that removal,
17 and indeed removes products continuously on this basis, it continues to allow
18 infringing products to be easily redirected and sold on its online store and, on
19 information and belief, generates substantial profits from those sales.

20 30. Amazon knew that if it did not remove the Accused Products, and use
21 the information available to it about the sellers to stop reposting of the infringing
22 products, the natural and likely consequence was their continued sale on its online
23 store. Amazon intended for sales of these Accused Products to continue on its online
24 store. Amazon knew or should have known that those acts would cause the sellers to
25 continue infringing the '150 Patent, Amazon having received multiple and detailed
26 notices of the infringement.

1 31. Defendant's infringement of the '150 Patent has caused and continues to
2 cause damage to HiGear in an amount to be determined at trial but exceeding
3 \$75,000.

4 32. Defendant's infringement of the '150 Patent has caused and will
5 continue to cause immediate and irreparable harm to HiGear for which there is no
6 adequate remedy at law, unless this Court enjoins and restrains such activities. This
7 includes the harm from Amazon's failure to remove negative consumer reviews of
8 knockoff products purporting to review genuine patented TRAVELREST pillows,
9 despite demand to do so; Amazon should be ordered to remove such misleading
10 reviews.

11 33. Defendant knew of the '150 Patent prior to the filing of this lawsuit.

12 34. Defendant's infringement of the '150 Patent was willful and deliberate,
13 was objectively reckless due to the high likelihood that its actions constituted
14 infringement of a valid patent, and knew or should have known of this objectively-
15 defined risk because the risk was so obvious. Thus, HiGear is entitled to enhanced
16 damages pursuant to 35 U.S.C. § 284, and costs incurred prosecuting this action.

17 35. Plaintiff is further entitled to the total profit on the Accused Products
18 pursuant to, *inter alia*, 35 USC § 289.

19 **SECOND CLAIM FOR RELIEF**

20 **PATENT INFRINGEMENT OF U.S. PATENT NO. 7,758,125**

21 36. HiGear realleges all allegations in this Complaint as if stated herein.

22 37. On July 20, 2010, United States Patent Number 7,758,125 entitled
23 "Portable Support Including a Pillow," was duly and legally issued to HiGear, who
24 has the right to enforce this patent.

25 38. Defendant has infringed and continues to infringe the '125 Patent by
26 using, selling, offering for sale, importing, and/or actively inducing others to use
27 products that infringe one or more of the claims in the '125 Patent, and is thus liable
28 for patent infringement pursuant to 35 U.S.C. § 271. The Accused Products infringe

1 at least Claims 1 and 12 of the '125 Patent.

2 39. Defendant is also liable for patent infringement under 35 U.S.C. § 271
3 because it actively induced these sellers on its online site to continue selling Accused
4 Products even after Amazon unequivocally knew of the '125 Patent, having received
5 written notice of infringement from HiGear. Amazon acted in a manner that
6 encouraged these sellers to infringe on the '125 Patent.

7 40. Specifically, although Amazon maintains the power under its Conditions
8 of Use to remove whatever products it wishes to from its online store, has a detailed
9 infringement notice program to accomplish that removal, and indeed removes
10 products continuously on this basis, it simply refused to take any action with respect
11 to preventing these sellers from relisting the Accused Products, continuing to allow
12 them to be easily redirected and sold on its online store and, on information and
13 belief, generating substantial profits from those sales.

14 41. Amazon knew that if it did not remove the Accused Products, the natural
15 and likely consequence was their continued sale on its online store. Amazon intended
16 for sales of these Accused Products to continue on its online store. Amazon knew or
17 should have known that those acts would cause the sellers to continue infringing the
18 '125 Patent, Amazon having received multiple and detailed notices of the
19 infringement.

20 42. Defendant's infringement of the '125 Patent has caused and continues to
21 cause damage to HiGear in an amount to be determined at trial but exceeding
22 \$75,000.

23 43. Defendant's infringement of the '125 Patent has caused and will
24 continue to cause immediate and irreparable harm to HiGear for which there is no
25 adequate remedy at law, unless this Court enjoins and restrains such activities. This
26 includes the harm from Amazon's failure to remove negative consumer reviews of
27 knockoff products purporting to review genuine patented TRAVELREST pillows,
28 despite demand to do so; Amazon should be ordered to remove such misleading

1 reviews.

2 44. Defendant knew of the '125 Patent prior to the filing of this lawsuit.

3 45. Defendant's infringement of the '125 Patent was willful and deliberate,
4 was objectively reckless due to the high likelihood that its actions constituted
5 infringement of a valid patent, and knew or should have known of this objectively-
6 defined risk because the risk was so obvious. Thus, HiGear is entitled to enhanced
7 damages pursuant to 35 U.S.C. § 284, and costs incurred prosecuting this action.

8 **THIRD CLAIM FOR RELIEF**

9 **TRADEMARK INFRINGEMENT**

10 **LANHAM ACT (15 U.S.C. § 1114, 1125)**

11 46. HiGear realleges all allegations in this Complaint as if stated herein.

12 47. HiGear is the owner of two federal trademark registrations for its HiGear
13 TRAVELREST trademark, U.S. Registration Nos. 3,544,788 and 4,482,893.

14 48. Amazon listed counterfeit products under the ASINs for TRAVELREST
15 pillows, and sold and offered for sale other TRAVELREST counterfeit travel pillows,
16 and/or competing travel pillows that contain TRAVELREST branded promotional
17 and marketing materials in the product packaging. Amazon has not taken substantial
18 action to prevent recurring counterfeit goods from being sold on its website.

19 49. Amazon failed to remove all such products from its shopping site despite
20 the authority to do so, and clear notice of trademark infringement, and has continued
21 to allow such sales far beyond any reasonable time needed for action.

22 50. As a result, Defendants have engaged in the use in commerce of
23 HiGear's registered trademarks and the HiGear brand in connection with the sale,
24 offering for sale, distribution, or advertising of goods and/or services. This use is
25 likely to cause confusion, mistake or deception as to affiliation, connection or
26 association of these counterfeit and competing travel pillows with the TRAVELREST
27 mark and HiGear, and also to cause confusion, mistake or deception as to the origin,
28 sponsorship, or approval of the unauthorized goods. The goods are competing travel

pillows, sold on the same platform, to the same group of consumers, often using the same ASIN, and the mark used is identical (often including the registered design mark itself, in addition to the word mark TRAVELREST)

51. HiGear is informed and believes, and on that basis alleges that this infringement was done willfully, intentionally, maliciously, and deliberately, and in bad faith infringed HiGear's marks.

52. As a direct and proximate result, HiGear has suffered compensatory and consequential damages in an amount to be proven at trial.

53. Amazon is selling counterfeited knockoffs of TRAVELREST pillows. This case qualifies for enhanced damages, attorneys' fees and trebling of actual damages and profits pursuant to 15 U.S.C. § 1117.

54. HiGear's remedies at law are not adequate to compensate for injuries inflicted by Defendant, accordingly, HiGear is entitled to temporary, preliminary and permanent injunctive relief. This includes the harm from Amazon's failure to remove negative consumer reviews of knockoff products purporting to review genuine patented TRAVELREST pillows, despite demand to do so; Amazon should be ordered to remove such misleading reviews.

55. Further, Amazon has been unjustly enriched by adoptively willful or willfully blind attempt to trade off the HiGear brand. As a result of this willful infringement, HiGear is entitled to Amazon's profits on the sales and other revenues derived from the HiGear branded products.

FOURTH CLAIM FOR RELIEF

UNFAIR COMPETITION

LANHAM ACT (15 U.S.C. § 1125), COMMON LAW,

CAL. BUS. & PROF. CODE § 17200 ET SEQ.

56. HiGear realleges all allegations in this Complaint as if stated herein.

57. Defendant has engaged in unfair competition by the acts alleged herein.

58. Defendant's acts and omissions alleged above constitute unfair business

1 practices because the harm of these business practices outweighs the utility, if any, of
2 these business practices, and are unscrupulous and injurious to consumers.

3 59. Defendant's acts and omissions alleged above constitute unlawful
4 business practices because Defendants' conduct is forbidden by multiple laws,
5 including but not limited to 15 U.S.C. § 1125(a), as well as the common laws, laws of
6 the State of California and laws of the United States.

7 60. Defendant's acts and omissions alleged above constitute fraudulent
8 business practices because consumers are likely to be deceived.

9 61. Defendants' wrongful acts are compounded by its improper failure to
10 remove negative consumer reviews of knockoff pillows posted under the ASINs of
11 patented TRAVELREST pillows.

12 62. As a direct and proximate cause, HiGear has suffered compensatory and
13 consequential damages in an amount to be proven at trial, and is entitled to disgorge
14 Defendant's profits. This damage includes loss of goodwill and dilution of its
15 TRAVELREST brand.

16 63. Further, as such, HiGear's remedies at law are not adequate to
17 compensate for injuries inflicted by Defendants. Accordingly, HiGear is entitled to
18 preliminary and permanent injunctive relief. This includes the harm from Amazon's
19 failure to remove negative consumer reviews of knockoff products purporting to
20 review genuine patented TRAVELREST pillows, despite demand to do so; Amazon
21 should be ordered to remove such reviews

22 64. Amazon is selling counterfeited knockoffs of TRAVELREST pillows.

23 65. HiGear is informed and believes, and on that basis alleges that
24 Amazon's actions were adoptively willful, willfully blind, intentional, malicious,
25 deliberate and in bad faith, such that punitive damages are justified and reasonable, at
26 an amount to be proved at trial, and so as to also qualify for enhanced damages and
27 attorneys' fees pursuant to 15 U.S.C. § 1117.
28

PRAYER

WHEREFORE, Plaintiff demands the following relief:

1. A judgment in favor of Plaintiff HiGear and against Amazon on all counts;
2. A preliminary and permanent injunction from design patent, patent and trademark infringement, including removal of infringing sales and negative reviews that, due to the infringement, were incorrectly posted referencing TRAVELREST pillows.
3. Damages in an amount to be determined at trial, with such damages enhanced and/or trebled for willful infringement;
4. For infringement of HiGear' design patent and trademarks, Defendants' total profits under *inter alia* 35 U.S.C. § 289 and 15 U.S.C. § 1117(a);
5. Exemplary and punitive damages;
6. Pre-judgment interest at the legally allowable rate on all amounts owed;
7. Costs, expenses and fees;
8. An order finding that Defendant's infringement of the patents-in-suit and trademarks has been willful and trebling the damages awarded to Plaintiff, as provided by 35 U.S.C. § 284 and 15 U.S.C. § 1117(b);
9. A declaration that this is an exceptional case and award Plaintiff its attorneys' fees incurred in prosecuting this action, as provided by *inter alia* 35 U.S.C. § 285 and 15 U.S.C. § 1117(a)/(b);
10. Statutory damages as allowed by law against all Defendants;
11. Pre-judgment interest at the legally allowable rate on all amounts owed against all Defendants;
12. Such other and further relief as this Court may deem just and proper.

1 Dated: May 9, 2016

MINTZ LEVIN COHN FERRIS GLOVSKY &
POPEO

2
3 By: s/Andrew D. Skale

4 Andrew D. Skale, Esq.
Ben L. Wagner, Esq.

5 Attorneys for Plaintiff
6 HIGEAR DESIGN, INC.

7
8 **DEMAND FOR JURY**

9 HiGear demands trial by jury on all issues triable as a matter of right at law.

10
11 Dated: May 9, 2016

MINTZ LEVIN COHN FERRIS GLOVSKY &
POPEO

12
13 By: s/Andrew D. Skale

14 Andrew D. Skale, Esq.
Ben L. Wagner, Esq.

15 Attorneys for Plaintiff
16 HIGEAR DESIGN, INC.