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9 Attorneys for Plaintiff
10 MerchSource, LLC

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

14 MERCHSOURCE, LLC,
15 Plaintiff,
16 v.
17 HYPER ICE, INC. and HYPERICE IP
18 SUBCO, LLC,
19 Defendants.

20 **CASE NO. 8:24-cv-1512**
21 **COMPLAINT**
22 **JURY DEMAND**

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1 For its Complaint against Defendants Hyper Ice, Inc. and Hyperice IP Subco,
2 LLC (collectively, “Hyperice” or “Defendants”), Plaintiff MerchSource, LLC
3 (“MerchSource”) through its counsel, alleges as follows:

4 1. MerchSource asserts these claims under the Declaratory Judgement
5 Act, 28 U.S.C. §§ 2201 and 2202, the Lanham Act, 15 U.S.C. §1125(a), and
6 pendant state law against Defendants for non-infringement of certain accused
7 massage guns sold by MerchSource under the SHARPER IMAGE® brand, and
8 violations of federal and state law by Defendants for its objectively baseless, bad
9 faith extra-judicial enforcement scheme that has, and is, causing significant and
10 irreparable harm to MerchSource.

11 **INTRODUCTION**

12 2. MerchSource is a leading consumer goods designer and developer,
13 offering products in numerous categories, including health and wellness. Selling
14 under several in-house and licensed brands, including SHARPER IMAGE®,
15 MerchSource is an innovator in percussion massage guns, its POWERBOOST®
16 line recognized as a highly rated, best-selling massager. MerchSource offers and
17 sells its POWERBOOST massagers through physical and e-commerce channels,
18 including Amazon.com, where it directly competes with percussion massagers
19 offered by Hyperice.

20 3. Defendants have pending against MerchSource in this Court an action
21 for patent infringement concerning related patents and the very same products at
22 issue here, *Hyper Ice, Inc. et al. v. MerchSource, LLC*, United States District Court
23 for the Central District of California, Case No. 8:24-CV-00410-JWH-DFM (the
24 “Action”). Despite the pendency of that action, MerchSource received notifications
25 from Amazon on or about June 18, 2024, that several SHARPER IMAGE®
26 percussion massage guns were delisted from amazon.com as a result of
27 “HYPERICE” submitting an extra-judicial complaint alleging infringement of U.S.
28 Patent No. 11,938,082 (the “’082 patent”)—a patent related to the utility patent

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1 asserted by Defendants in the Action. MerchSource was not afforded any due
2 process, prior notice, or other means to dispute the allegations, and Amazon is
3 demanding permission from Defendants or a court order to reactivate the listings.
4 Hyperice’s allegations of infringement made to Amazon are wholly without merit,
5 and objectively and subjectively baseless. Hyperice’s bad faith Amazon-related
6 activity has caused and continues to cause MerchSource significant harm from lost
7 good will and lost sales.

8 **PARTIES**

9 4. MerchSource is a limited liability company organized under the laws
10 of the State of Delaware and having its principal place of business in Irvine,
11 California.

12 5. On information and belief, Hyper Ice, Inc. is a corporation organized
13 under the laws of the State of California and having its principal place of business
14 in Irvine, California.

15 6. On information and belief, HyperIce IP Subco, LLC is a limited
16 liability company organized under the laws of the State of Delaware and having its
17 principal place of business in Irvine, California. On information and belief,
18 HyperIce IP Subco, LLC is controlled by, and is a wholly owned subsidiary of,
19 Hyper Ice, Inc. HyperIce IP Subco, LLC is listed on the website of the U.S. Patent
20 and Trademark Office as the owner of the ’082 patent.

21 **JURISDICTION AND VENUE**

22 7. This Court has original and exclusive jurisdiction over the subject
23 matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a), and 15 U.S.C.
24 § 1121. This Court has jurisdiction over supplemental or other related claims
25 pursuant to 28 U.S.C. §§ 1338 and 1367.

26 8. This Court has personal jurisdiction over Defendants because they
27 have their principal place of business in this District.

28 9. Venue is proper at least under 28 U.S.C. § 1391 because Defendants

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1 reside in this judicial district.

2 **HYPERICE’S INFRINGEMENT ACTION AGAINST MERCHSOURCE**

3 10. On or about January 16, 2024, Defendants filed an action for patent
4 infringement in the United States District Court for the District of Delaware,
5 captioned *Hyper Ice, Inc., et al v. MerchSource, LLC*, Case No. 1:2024-cv-00056.
6 Defendants accused numerous products, including but not limited to the
7 “Powerboost, Powerboost Deep Tissue, Powerboost Flex Pivot, Powerboost Pro+
8 Hot & Cold, and Powerboost Move percussion massagers,” of infringing U.S.
9 Patent No. 11,857,482 (the “’482 patent”) and U.S. Design Patent No. D956,253
10 (the “D’253 patent”).

11 11. On February 27, 2024, Defendants voluntarily dismissed the Delaware
12 action and commenced the related Action alleging that the “Powerboost,
13 Powerboost Deep Tissue, Powerboost Flex Pivot, Powerboost Pro+ Hot & Cold,
14 Powerboost Palm, and Powerboost Move percussion massagers” infringed the ’482
15 patent and D’253 patent.

16 **DEFENDANTS’ ’082 PATENT**

17 12. Defendants’ ’082 patent is related to, and a continuation of, the patent
18 application that issued as the ’482 patent, with the same title, inventors,
19 specification, and figures. A copy of the ’082 patent is included as Exhibit A.

20 13. The ’082 patent has 18 claims and two independent claims: claims 1
21 and 18. Claim 1 and its dependent claims require at least:

- 22 1. A percussive massager comprising:
 - 23 a housing;
 - 24 a piston having a proximal end and a distal end, the distal
end of the piston having a bore;
 - 25 a motor operatively connected to the proximal end of the
piston, wherein the motor is configured to cause the piston to
26 reciprocate at a first speed;
 - 27 a drive mechanism that controls a predetermined stroke
length of the piston; and
 - 28 a quick-connect system comprising the distal end of the

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1 piston and a first massaging head, wherein the quick-connect
2 system is configured to have a proximal end of the first
3 massaging head inserted into or removed from the bore while
4 the piston reciprocates the predetermined stroke length at the
5 first speed.

6 14. Claim 18 requires:

7 18. A method of assembling a percussive massager, the method
8 comprising:

9 operatively connecting a motor to a proximal end of a piston,
10 wherein the motor is configured to cause the piston to reciprocate at a
11 first speed, wherein a distal end of the piston has a bore,
12 providing a drive mechanism configured to control a
13 predetermined stroke length of the piston; and

14 providing a quick-connect system comprising the distal end of
15 the piston and a first massaging head, wherein a proximal end of the
16 first massaging head is configured to be inserted into or removed from
17 the bore while the piston reciprocates the predetermined stroke length
18 at the first speed.

19 15. Every claim of the '082 patent therefore requires at least both "a quick-
20 connect system" and configuring such that the massage head can be inserted or
21 removed "while the piston reciprocates the predetermined stroke length at the first
22 speed."

23 16. The '082 patent further defines "a quick-connect system" as follows:

24 Quick-connect system 600 includes a piston 602 that has a hollow-end
25 bore 608 for receiving the shaft 621 of a massaging head 620. Located
26 within the bore 608 of piston 602 is a cylindrical seat 604. Cylindrical
27 seat 604 retains a magnet 606. Magnet 606 is illustrated with its north
28 pole located flush with the seat and facing toward the opening in bore
608. Massaging head 620 includes a shaft 621 having a cylindrical
pocket 622 at the distal end. Located within the cylindrical pocket 622
is a magnet 624. Magnet 624 is positioned so that its south pole is
located at the distal end of shaft 621. Accordingly, when the shaft 621
of massaging head 620 is slid into opening in bore 608, the magnets
606 and 624 are attracted to one another and magnetically hold
massaging head 620 firmly in place.

1 **ACCUSED PRODUCTS**

2 17. The foregoing MerchSource products accused of infringement in the
3 related action include the same products Defendants reported to Amazon as
4 infringing the '082 patent:

5 Amazon ASIN	Generic Description	Listing Title
6 B0BGRLDJB4	Powerboost Deep 7 Tissue Massager 8 Percussion Device	Sharper Image® Powerboost® Deep 9 Tissue Massager v2.0, Massage Gun 10 with 5 Attachments, Whisper Quiet, 11 Rechargeable Battery - Black
12 B0D2LZ158G	Powerboost Deep 13 Tissue Massager 14 Percussion Device 15 12mm	Sharper Image® Powerboost® 16 [Amazon Exclusive] Deep Tissue 17 Massage Gun, 5 Attachments, Quiet 18 Motor, Ergonomic Grip, 6-Speed 19 Lightweight Percussion Massager, 20 Full Body Muscle Recovery & Pain 21 Relief
22 B0BF3T1GLV	Powerboost Flex 23 Pivot Percussion 24 Massager	Sharper Image® Powerboost® Flex 25 Percussion Massager, 120° Pivot 26 Massage Gun, 6 speeds, 4 27 Attachments, Neck Back & Full 28 Body Massage, Compact Pain Relief, Portable Athlete Muscle Recovery, Gifts for Men
B0CD8V6MM6	Powerboost Deep Tissue Massager Percussion Device 12mm	Sharper Image® Powerboost® [Amazon Exclusive] Deep Tissue Massage Gun, 5 Attachments, Quiet Motor, Ergonomic Grip, 6-Speed Lightweight Percussion Massager, Full Body Muscle Recovery & Pain Relief
B0BFG72JWH	Powerboost Pro Hot and Cold	Sharper Image® Powerboost® Pro+ Hot & Cold Percussion Massager, Dual-Temperature Node, Soothing Heat & Cold Therapy, 6 Speed, 6 Attachments, Lightweight Portable Athlete Recovery, Travel Case

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Amazon ASIN	Generic Description	Listing Title
B09HGCMLR5	Powerboost Move Portable Percussion Massager	Deep Tissue Portable Percussion Massage Gun, Powerboost® Move by Sharper Image - Full Body, Back & Neck Muscle Massager with 4 Attachments - Handheld Rechargeable Electric Massage Gun for Athletes
B0B9FBD31Z	Powerboost Move Portable Percussion Massager	Deep Tissue Portable Percussion Massage Gun, Powerboost® Move by Sharper Image - Full Body, Back & Neck Muscle Massager with 4 Attachments - Handheld Rechargeable Electric Massage Gun for Athletes
B0CFWWJ2K5	Powerboost Palm	Sharper Image® Powerboost® Palm Portable Percussion Massager, 4 Attachments, Lightweight Travel, Whisper Quiet, Full Body Deep Tissue Tension Soreness Pain Relief & Recovery, USB-C Rechargeable Gift
B0CFWP1G12	Powerboost Pro Plus Hot and Cold Compact	Sharper Image® Powerboost® Pro+ Hot & Cold Compact Percussion Massager, Dual-Temperature Node, Soothing Heat & Cold Therapy, 6 Speed, 4 Attachments, Lightweight Portable Athlete Recovery, Travel Case

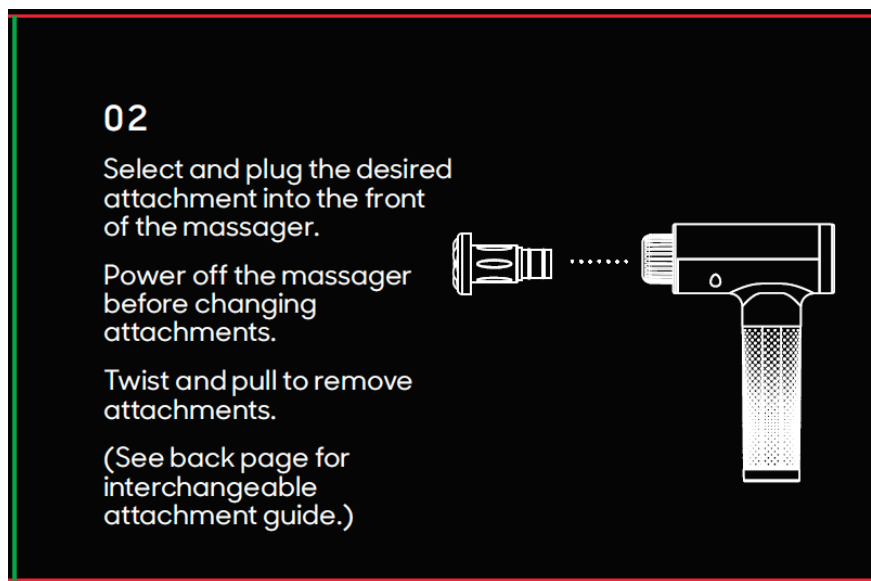
18. None of the Accused Products include the “quick-release system” required by every claim of the ’082 patent. In particular, the Accused Products do not have the required magnets to magnetically hold the massage head in place or equivalent structure. Instead, the Accused Products use friction to secure the massage head in place.

19. None of the Accused Products are configured to allow the massage head to be inserted and removed while at a first speed. The Accused Products warn users to not attempt to insert or remove the head while the massager is operating.

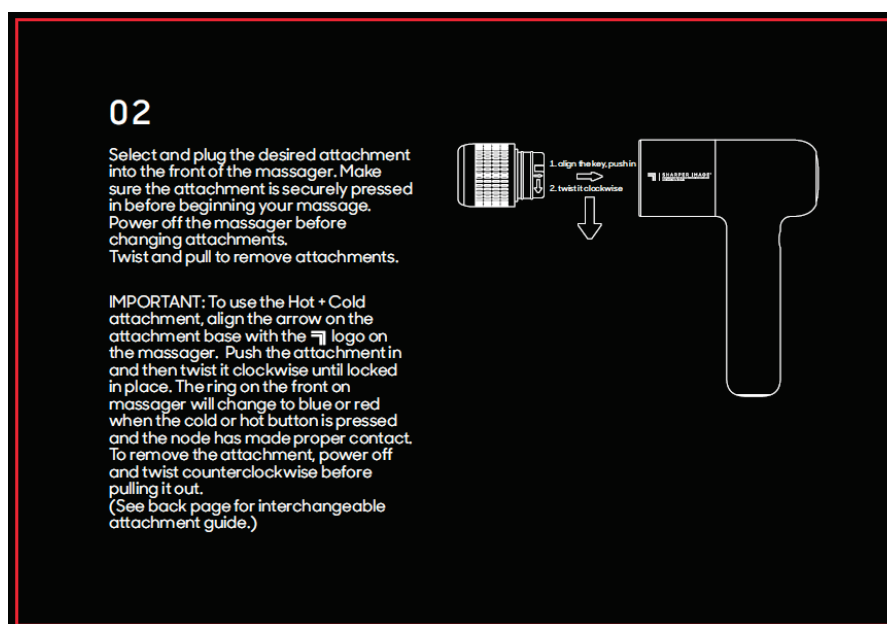
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1 Doing so may damage the device and/or injure the user. In particular, the manual
2 for the Accused Products instructs users to power off the device and to insert and
3 twist the head.

4 20. For example, the instruction manual from the Sharper Image®
5 Powerboost® Deep Tissue Percussion Massager instructs the users as follows:



16 21. In addition, the instruction manual from the Sharper Image®
17 Powerboost® Pro+ Hot & Cold Percussion Massager instructs the users as follows:



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DEFENDANTS’ BASELESS ASSERTION TO AMAZON

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2 22. On information and belief, sometime after the filing of this action
3 Defendants discovered a scheme on amazon.com in which it could have competing
4 products removed from amazon.com without any prior notice, due process, bond, or
5 substantive review of the merits of its assertion of infringement.

6 23. On information and belief, this scheme included first initiating
7 infringement assertions under Amazon’s Patent Evaluation Express Procedure
8 (APEX) that certain specified products infringed one of Defendants’ patents. On
9 information and belief, the initially specified products and sellers were chosen
10 because they were unlikely to respond to the APEX assertions, effectively resulting
11 in a default and removal of those initially accused products from amazon.com.

12 24. On information and belief, once armed with APEX victories,
13 Defendants could take down additional products by simply representing to Amazon
14 that the additional products were materially identical to the products subject to the
15 prior APEX takedowns.

16 25. Sellers of these additionally accused products are not provided any
17 prior notice or copy of the assertions, and are not afforded any opportunity to
18 contest the assertions prior to having their products taken down. These sellers do
19 not have the ability to initiate APEX proceedings to counter or contest such
20 assertions. These sellers first learn of the assertions after the products have been
21 removed from amazon.com, and are generally informed that the patent owner’s
22 consent or a court order is required to reinstate the products.

23 26. On information and belief, Defendants also knew that Amazon’s
24 APEX proceedings are not available when there is a pending court case concerning
25 the patent and accused product.

26 27. On June 21, 2024, during the Scheduling Conference in the related
27 Action, Defendants’ counsel confirmed that Hyperice utilized the foregoing scheme
28 to remove MerchSource’s Accused Products from amazon.com.

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1 28. MerchSource’s products were removed from amazon.com without any
2 prior notice, due process, or substantive review of the merits of the claims.

3 29. On information and belief, on or prior to June 18, 2024, Brian Arnold,
4 Associate General Counsel and Head of Intellectual Property for Hyperice, sent to
5 Amazon a report falsely asserting that MerchSource’s Accused Products were
6 materially identical to products already removed from amazon.com and infringed
7 the ’082 patent.

8 30. The ’082 patent is related to the ’482 patent already at issue before this
9 Court. The ’082 patent has the same title, inventors, specification, and figures as the
10 ’482 patent. Claim 1 of the ’082 patent is only slightly different than claim 1 of the
11 ’482 patent, and both claims use the same language to describe the same structural
12 features.

13 31. Prior to submitting the report to Amazon, Defendants never asserted to
14 MerchSource that the Accused Products infringed the ’082 patent. Despite the
15 issuance of the ’082 patent months ago and during the pendency of the related
16 action, Defendants never contended that the Accused Products infringed the ’082
17 patent or sought an injunction *pendente lite* against these or any other products.

18 32. On information and belief, Defendants utilized the foregoing, extra-
19 judicial scheme to thwart MerchSource’s ability to generate revenue on
20 amazon.com and to harm MerchSource’s business relationships with Amazon and
21 MerchSource’s Amazon customers while avoiding judicial review of the
22 infringement allegations.

23 33. On information and belief, Defendants did this because they knew that
24 the Accused Products lacked one or more required elements of every claim of the
25 ’082 patent and therefore could not infringe that patent.

26 34. On information and belief, Defendants did this at least in part to apply
27 extrajudicial pressure on MerchSource to discontinue its legal defense against
28 Hyperice’s claims in the Action.

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1 **COUNT ONE – DECLARATORY JUDGMENT OF NON-INFRINGEMENT**
2 **OF THE '082 PATENT (28 U.S.C. §§ 2201 and 2202)**

3 35. MerchSource incorporates the preceding paragraphs as though fully set
4 forth herein.

5 36. The '082 patent requires a “quick-release system” and configuration to
6 insert/remove the massage head while the device reciprocates at a first speed. Claim
7 1 is illustrative:

- 8 1. A percussive massager comprising:
 - 9 a housing;
 - 10 a piston having a proximal end and a distal end, the distal
end of the piston having a bore;
 - 11 a motor operatively connected to the proximal end of the
piston, wherein the motor is configured to cause the piston to
reciprocate at a first speed;
 - 12 a drive mechanism that controls a predetermined stroke
length of the piston; and
 - 13 a quick-connect system comprising the distal end of the
piston and a first massaging head, wherein the quick-connect
system is configured to have a proximal end of the first
14 massaging head inserted into or removed from the bore while
15 the piston reciprocates the predetermined stroke length at the
16 first speed.

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19 37. In addition to other elements, the Accused Products do not include the
20 required “quick-connect system” and are not configured to insert or remove the
21 massage head while the piston reciprocates at a first speed, and MerchSource denies
22 that any of the Accused Products infringe any claim of the '082 patent.

23 38. On information and belief, Defendants represented to Amazon that the
24 Accused Products infringed one or more claims of the '082 patent and caused the
25 listings for those products to be removed from amazon.com.

26 39. As a result of Defendants’ actions, Amazon delisted the Accused
27 Products.

28 40. An actual and justiciable case or controversy exists as to whether the

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1 Accused Products infringe the '082 Patent.

2 41. This Court can declare the rights of the parties.

3 **COUNT TWO – LANHAM ACT VIOLATION (15 U.S.C. §1125(a))**

4 42. MerchSource incorporates the preceding paragraphs as though fully set
5 forth herein.

6 43. Defendants’ statements to Amazon constituted a false or misleading
7 description of fact, or false or misleading representation of fact, that misrepresented
8 the nature, characteristics, qualities, or geographic origin of MerchSource’s
9 Accused Products and commercial activities.

10 44. The sale of MerchSource’s Accused Products affects interstate
11 commerce.

12 45. Defendants’ statements were intended to promote Defendants’
13 products over MerchSource’s Accused Products, and to influence the purchasing
14 decisions by consumers on amazon.com by excluding the competing MerchSource
15 Accused Products from amazon.com.

16 46. The statements to Amazon deceived Amazon into believing that the
17 Accused Products are materially identical to other products and that the Accused
18 Products infringe the '082 patent.

19 47. Defendants’ deception had a material effect on purchasing decisions
20 because MerchSource’s Accused Products were delisted on amazon.com.

21 48. MerchSource has been damaged as a result of Defendants’ actions and
22 is entitled to all the relief offered under the Lanham Act.

23 **COUNT THREE – TORTIOUS INTERFERENCE WITH EXISTING AND**
24 **PROSPECTIVE ECONOMIC ADVANTAGE (Common Law)**

25 49. MerchSource incorporates the preceding paragraphs as though fully set
26 forth herein.

27 50. MerchSource has an economic relationship with Amazon that provides
28 MerchSource with the probability of future economic benefit. With knowledge of

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1 this relationship and the intent to disrupt it, Defendants made an objectively
2 baseless and bad faith assertion that the Accused Products infringe the '082 patent.

3 51. On information and belief, Defendants' assertion was made in bad
4 faith. Defendants knew they were unable to prevail on a claim for patent
5 infringement in a real court, and knew that they would not prevail if they initiated
6 an APEX proceeding for MerchSource's Accused Products. On information and
7 belief, Defendants instead made a false extra-judicial assertion to Amazon that
8 MerchSource's Accused Products are the same as products subject to an unrelated
9 APEX proceeding knowing such false statement would result in the removal of the
10 Accused Products from amazon.com without any due process, prior notice, or
11 consideration of the merits or whether the sale of the Accused Products would, in
12 fact, be an act of infringement of the '082 patent.

13 52. Defendants made these assertions with full knowledge that none of the
14 Accused Products have the required "quick-connect system" or configuration to
15 insert or remove the massage head while the piston reciprocates at a first speed.

16 53. Defendants' objectively baseless and bad faith extra-judicial assertion
17 caused the actual disruption of MerchSource's relationship in selling the Accused
18 Products on amazon.com and, as a result, economic harm to MerchSource.

19 54. As a direct and proximate result of Defendants' objectively baseless
20 and bad faith extra-judicial assertion, MerchSource sustained injury to its economic
21 relationship with amazon.com.

22 **COUNT FOUR – UNFAIR COMPETITION (Cal. Bus. & Prof. Code § 17200)**

23 55. MerchSource incorporates the preceding paragraphs as though fully set
24 forth herein.

25 56. Defendants' objectively baseless and bad faith assertion of patent
26 infringement made to remove MerchSource's listing of the Accused Products on
27 amazon.com constitutes unlawful and unfair business practices in violation of
28 § 17200 et seq. of the California Business and Professions Code.

1 h. An award of attorneys' fees and costs incurred in bringing this
2 Counterclaim; and

3 i. Such other and further relief as may be just and proper.
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5 Dated: July 9, 2024

Respectfully submitted,

6 RENNER OTTO

7 /s/ Kyle B. Fleming

8 Kyle B. Fleming

9 An attorney for MerchSource LLC
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