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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SAMSUNG ELECTRONIC CO.,
LTD., a Korean corporation; and
SAMSUNG
TELECOMMUNICATIONS
AMERICA, LLC, a Delaware
corporation,

Plaintiffs,

vs.

EARLY BIRD SAVINGS, a company
operating from China; SHENZHEN
OKELER SCIENCE &
TECHNOLOGY CO., LTD., a
company operating in China,

Defendants.

CASE NO. 13-CV-3105-BEN (DHB)

ORDER:

**(1) GRANTING MOTION TO
DELAY PRELIMINARY
INJUNCTION HEARING**

**(2) EXTENDING TEMPORARY
RESTRAINING ORDER**

**(3) DIRECTING ADDITIONAL
BRIEFING**

[Docket No. 15]

Before this Court is a Motion to Delay the Preliminary Injunction Hearing and Extend the Existing Temporary Restraining Order or For Preliminary Injunction filed by Plaintiffs Samsung Electronic Co. Ltd. and Samsung Telecommunications America, LLC (collectively, "Samsung"). (Docket No. 15). For the reasons stated below this Court **GRANTS** the Motion to Delay and **GRANTS IN PART** the Motion to Extend the Temporary Restraining Order. The Motion for Preliminary Injunction is therefore **DENIED** without prejudice at this time.

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BACKGROUND

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2 This Court issued a Temporary Restraining Order (TRO) on January 7, 2014.
3 On January 21, 2014, this Court set a preliminary injunction hearing on January 28,
4 2014 and found good cause to extend the TRO until that date. (Docket No. 13).

5 Samsung filed the instant motion to delay on January 24, 2014. Samsung states
6 that Defendants, who are Chinese corporations, have not yet been formally served.
7 Peter Colosi, counsel for Samsung, has submitted a declaration relating Samsung's
8 efforts to serve Defendants. (Colosi Decl.) Samsung has begun the formal process of
9 serving Defendants under the Hague Convention, but counsel states that he has been
10 advised that this process is likely to take four to five months. (*Id.* at ¶ 1). Once
11 Samsung has provided translated documents to the Chinese government, the speed with
12 which Defendants are served is largely in the hands of that government and various
13 components of China's Ministry of Justice and court system. (*See id.*)

14 Counsel for Samsung informs this Court that his firm has been in contact with
15 individuals connected to Defendants, and have made them aware of the relevant court
16 documents and the preliminary injunction hearing date. Counsel spoke to an attorney
17 in Los Angeles, Qiang Djornbak, who claimed to represent Defendants, but who stated
18 that she was not authorized to accept service of documents or to appear in any capacity
19 representing Defendants in litigation. (*Id.* at ¶¶ 7-9). Ms. Djornbak has informed
20 Samsung's counsel that she could only negotiate regarding the asset freeze. (*Id.* at ¶ 7).
21 Counsel states that the firm has e-mailed copies of relevant case documents to
22 Defendants' known e-mail addresses, and to Ms. Djornbak. (*Id.* ¶ 11). Ms. Djornbak
23 asked Samsung's counsel not to send her litigation documents and told counsel to find
24 alternative ways to communicate with Defendants. (*Id.* ¶ 12). She stated that she is
25 not engaged to represent any party in the case, would "pass the word around" regarding
26 settlement plans, but "Otherwise, I am out. You directly deal with defendants." (*Id.*;
27 Colosi Decl. Ex. J). It is apparent to this Court that Samsung is making a good faith
28 effort to communicate information to Defendants and to properly serve them.

DISCUSSION

I. Extension of the Temporary Restraining Order

As a general rule, a court is authorized to issue a temporary restraining order lasting no longer than 14 days, and can extend the TRO for a like period for good cause. FED. R. CIV. P. 65. Rule 65(b)(3) requires that a court set a preliminary injunction hearing at the earliest possible time where a TRO was issued without notice.

FED. R. CIV. P. 65(b)(3). This Court is aware that temporary injunctive relief has serious consequences, and that it is imperative to allow Defendants to address this Court as soon as possible to ensure that continued injunctive relief is proper. In the overwhelming number of situations, it is possible for a plaintiff to serve the defendant and for the parties to argue the motion for preliminary injunction, within 28 days. The short duration of the typical TRO ensures that extraordinary relief will not persist for long without a full hearing. However, there are special circumstances in the case at hand.

Where a plaintiff is unable to promptly serve a foreign defendant because the only proper means of serving defendants available to plaintiff cannot be completed within the usual deadlines, a court may extend the TRO until proper service can be completed. In *H.D. Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827 (7th Cir. 2012), the Seventh Circuit affirmed a district court's decision to extend a TRO beyond 28 days in similar circumstances. In *H.D. Michigan*, the district court extended the TRO until the defendants could be served with process under the Hague Convention, and issued a second extension while the parties prepared for the preliminary injunction hearing. *Id.* at 832. The *H.D. Michigan* defendants had actual notice of the hearing, but chose not participate and refused service. The Seventh Circuit found that when a TRO is extended beyond the 28-day limit without the consent of the enjoined party, "it becomes in effect a preliminary injunction that is appealable, but the order remains effective." *Id.* at 844 (citations omitted).

If a TRO were not permitted to remain in effect until a defendant is served under

1 the Hague Conventions, “Rule 65 would be inoperable against foreign defendants.”
2 *Almetals, Inc. v. Wickeder Westfalenstahl, GMBH*, No. 08-10109, 2008 WL 624067,
3 at *4 (E.D. Mich., Mar. 6, 2008). Given the length of time that it can take to serve a
4 foreign defendant, placing a 28-day maximum on the TRO in these circumstances
5 would effectively defeat injunctive relief because Defendants could simply wait for the
6 TRO to dissolve. *See id.* This does not appear to be the result intended by the Federal
7 Rules of Civil Procedure. *See id.* Furthermore, if a TRO could not be extended in this
8 narrow situation, it would reward defendants who are able to evade proper service and
9 undermine the authority of the courts.

10 This Court finds that an extension of the TRO is required by the interests of
11 justice. Defendants cannot evade this Court’s authority to grant injunctive relief in an
12 appropriate situation by refusing service until the normal deadline has expired. This
13 is especially true given that Defendants may now have actual notice of the proceedings,
14 and Samsung is making a good faith effort to formally serve Defendants. Dissolution
15 of the TRO is particularly improper here, where the dissolution would defeat the
16 purposes of the Order. Defendants would be able to remove their assets from this
17 jurisdiction and prevent this Court from awarding equitable relief. Samsung has
18 demonstrated that the likelihood of such actions by Defendants is substantial enough
19 to justify this Court’s continuing order to freeze assets.

20 **II. A Temporary Restraining Order is Appropriate**

21 Samsung was required to establish that 1) it is likely to succeed on the merits;
22 2) it is likely to suffer irreparable harm in the absence of preliminary relief; 3) the
23 balance of equities favor Samsung; and 4) an injunction is in the public interest. *See*
24 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 19 (2008). The four factors are
25 to be balanced, and if a threshold showing is made for each, “serious questions” going
26 to the merits and a balance of hardships that leans sharply toward the plaintiff can
27 support the issuance of an injunction. *Alliance for the Wild Rockies v. Cottrell*, 632
28 F.3d 1127, 1135 (9th Cir. 2011).

1 This Court has carefully reviewed the filings in this case, and finds that the
2 findings that initially justified the issuance of a TRO are still valid and are sufficient
3 to justify the extension of the TRO until such time as this Court is able to hear
4 argument on a preliminary injunction.

5 Samsung has demonstrated a likelihood of success on the merits. To prevail on
6 trademark infringement claims under the Lanham Act, a plaintiff must demonstrate
7 that it has a protectible ownership interest in the mark, and that a defendant's use of the
8 mark is likely to create consumer confusion. *Network Automation, Inc. v. Advanced*
9 *Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011). Samsung has produced
10 evidence that it has a protectible ownership interest in the "Samsung marks," which
11 have been recorded with the U.S. Patent and Trademark Office and which Samsung has
12 used for many years. Samsung has also provided significant evidence that consumers
13 are likely to be confused, as it has presented this Court with sworn declarations and
14 photographic evidence to support its claim that Defendants sell counterfeit goods
15 which are nearly identical to Samsung products and which bear near-identical Samsung
16 marks. It has also presented evidence that consumers have mistaken Defendants'
17 products for Samsung products.

18 Samsung has also demonstrated that it is likely to suffer irreparable harm unless
19 preliminary injunctive relief is issued. Samsung argues that it has invested
20 considerable time and money in developing its products, and its investment is
21 jeopardized by the accused products. Samsung has argued that the sale of these
22 products harms their business reputation, sales, and goodwill, and that the sale of
23 counterfeit and infringing products hurts their ability to control the quality and safety
24 of goods bearing their mark. Samsung has produced evidence that consumers have
25 complained about Defendants' products, which they believe are Samsung products.

26 Samsung has demonstrated that the balancing of harms favors maintenance of
27 the TRO. Defendants would only be prevented from engaging in an activity which is
28 likely to constitute infringement and allows them to profit at the expense of Samsung

1 and the public. *See Shell Offshore, Inc. v. Greenpeace, Inc.*, 864 F. Supp. 2d 839, 851
2 (D. Alaska 2012) (“To the extent that the competing interests of Greenpeace USA are
3 illegal or tortious activities, the balance of equities undoubtedly tips to Shell”); *see also*
4 *DISH Network LLC v. DelVecchio*, 831 F. Supp. 2d 595, 601-02 (W.D.N.Y. 2011).

5 Samsung has also argued that an injunction would be in the public’s interest.
6 Given the showing on the merits, it would benefit the public to continue cessation of
7 sales of goods likely to cause consumer confusion. If the allegations are untrue, the
8 public will only have temporarily lost an opportunity to purchase from Defendants.

9 Samsung has made the necessary showing on all four factors. After balancing
10 the factors, this Court finds that the TRO is proper and should be extended.

11 CONCLUSION

12 This Court therefore **GRANTS** the Motion to Delay and Motion to Extend the
13 TRO. The TRO is **EXTENDED** until **May 26, 2014**. If Samsung wishes this Court
14 to order an additional extension of the TRO, it must file a motion to extend the TRO.
15 In its motion, Samsung must update the Court on its efforts to serve Defendants.

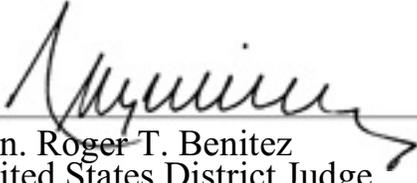
16 Samsung is **ORDERED** to inform this Court when Samsung has been able to
17 serve Defendants. Such notice must be filed as soon as possible, and no later than the
18 **next court day** after Samsung learns Defendants have been served. At that time, the
19 Court will schedule a prompt status conference to determine how quickly Defendants
20 can prepare to argue a preliminary injunction.

21 As this Court will not consider a motion for preliminary injunction without
22 giving Defendants an opportunity to respond, the Motion for Preliminary Injunction
23 is **DENIED** without prejudice at this time. In order to expedite consideration of this
24 matter, Samsung is **ORDERED** to file its Motion for Preliminary Injunction within
25 **two days** of receiving notice that Defendants have been served. If this Court has not
26 yet set a preliminary injunction hearing date, Samsung is **EXCUSED** from the
27 requirement that parties state the hearing date and time on the motion. Samsung should
28 clearly state that it is doing so pursuant to this Order.

1 Samsung is **ORDERED** to submit additional briefing to this Court regarding the
2 amount of assets which are frozen pursuant to the Temporary Restraining Order. If
3 appropriate, this Court will modify the TRO to change the amount of the bond. If
4 Samsung wishes to recommend an adjustment to the size of the bond, it may do so in
5 its briefing. The additional briefing is to be submitted to the Court no later than
6 **February 14, 2014.**

7 **IT IS SO ORDERED.**

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9 DATED: January 27, 2014

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12 Hon. Roger T. Benitez
13 United States District Judge
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