

Federal Court



Cour fédérale

Date: 20181205

Docket: T-1887-17

Citation: 2018 FC 1198

Ottawa, Ontario, December 5, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

**LOUIS VUITTON MALLETIER S.A.; LOUIS  
VUITTON CANADA, INC. CELINE;  
CHRISTIAN DIOR COUTURE, S.A.,  
GIVENCHY S.A.**

**Plaintiffs**

and

**AUDREY WANG AKA NINI WANG AKA NI  
YANG; JOHN DOE AKA “MICHAEL”,  
CANADA ROYAL IMPORT & EXPORT CO.  
LTD.; COLLECTIVELY DOING BUSINESS  
AS NI FASHION, NIYANGBAZZA AND NI  
BAZZA, AND LIAN TONG COURIER  
SERVICE**

**Defendants**

**AMENDED ORDER AND REASONS**

[1] On January 17, 2018, the Defendants moved for an order setting aside the *Mareva* injunction granted by this Court on December 14, 2017, and granting damages against the

Plaintiffs in the amount of \$10,000. At the close of the hearing on February 28, 2018, the Defendants' motion was dismissed with brief oral reasons. The issue of cost was adjourned pending further submissions from the Defendants. Those submissions have now been received.

I. Background

[2] A brief chronological narrative of facts and the history of the proceeding will be useful to place the Defendants' motion in proper context.

[3] The Plaintiffs commenced this action against the Defendants by Statement of Claim on December 6, 2017. The Plaintiffs' claims are based on trademark infringement and passing-off of their registered trademarks and unauthorized production and reproduction of the Plaintiffs' copyrighted works.

[4] The Plaintiffs allege that the individual Defendants, Audrey Wang, also known as Nini Wang or Ni Yang [Ms. Wang], and her husband, Jun Yang also known as Michael Yang [Mr. Wang] [collectively the Wangs], have engaged, since as early as 2008, in ongoing, knowing, blatant infringement of the Plaintiffs' trademarks, and the Plaintiff Louis Vuitton's copyrights, through the importation, offer for sale and sale of counterfeit Louis Vuitton, Celine, Dior and Givenchy merchandise, including items marked with trademarks owned by and registered to the Plaintiffs and which substantially reproduced the copyright protected works of Louis Vuitton.

[5] On December 6, 2017, following a lengthy investigation, the Plaintiffs filed an *ex parte* motion seeking an Anton Piller order requiring the Defendants to permit entry into their business

premises and residence and a *Mareva* injunction freezing the Defendants' assets. The motion was made returnable at the next General Sittings in Vancouver.

[6] The object of an Anton Piller order is to secure the preservation of documents which are relevant to the suit and which could, if notice is given to the defendant of the impending suit, be destroyed in a bid to avoid such a suit. The name comes from a case that was heard by the English Court of Appeal, *Anton Piller KG v Manufacturing Processes Ltd. (1975)*, [1976] 1 Ch. 55 (Eng. C.A.), where the Court of Appeal held that a court had jurisdiction to make an order on an *ex parte* application to compel the defendant to allow the plaintiff to inspect its premises and remove or copy documents. The object of a *Mareva* injunction is the retention of sufficient assets to ensure that the plaintiff is not left with a hollow judgment if it succeeds in obtaining an order for damages at trial.

[7] On December 12, 2017, this Court granted the Plaintiffs' motion in part. The Defendants were ordered to permit entry into their premises to persons authorized for the purpose of searching for, identifying, inspecting, preserving, reproducing and removing into the custody of an Independent Supervising Solicitor [ISS] all material documents, items, devices, equipment, merchandise and any component thereof [the Anton Piller Order]. A *Mareva* injunction was denied, however, as there was insufficient evidence of a serious risk of dissipation of assets.

[8] The Anton Piller Order permitted entry into the Defendants' Parker Place Store, as well as the individual Defendants' residence [the Wang Residence].

[9] The Anton Piller Order was served on December 13, 2017 at both premises, on Ms. Wang at the Parker Place Store, and on Ms. Wang's mother at the Wang Residence. The Anton Piller Order was explained in detail to Ms. Wang by Paul Smith, designated as an ISS pursuant to paragraph 9(b) of the Anton Piller Order [the Store ISS]. Ms. Wang was given an opportunity to seek legal advice and provided with a list of potential lawyers' names and phone numbers for that purpose, but she declined to do so.

[10] Ms. Wang refused to provide her phone to the Store ISS as required under paragraph 19 of the Anton Piller Order, but did allow the search team to search the Parker Place Store and remove evidence. Numerous goods, packaging, bags, labels, tags and authenticity cards bearing the Plaintiffs' trademarks were located and removed by the Store ISS. The Plaintiffs were later able to confirm from photographs of a representative sample of such items that many of those items are counterfeit and not genuine merchandise of the Plaintiffs.

[11] The Anton Piller Order was also executed at the Wang Residence. As with the Parker Place Store, a wide variety of items appearing to be counterfeit were preserved, including approximately 330 small "man purses" with the Louis Vuitton pattern, 17 small black purses, and a range of records which appeared to relate to the purchase of merchandise from China. During the execution of the Anton Piller Order at the Wang Residence, a package addressed to Ni Ni Wang was delivered to the Wang Residence. It contained merchandise bearing a variety of different brand names, including items bearing trademarks of the Plaintiffs, several of which have been confirmed as counterfeit.

[12] Following the execution of the Anton Piller Order, the Plaintiffs filed a second motion seeking a *Mareva* injunction on an *ex parte* basis, relying upon two additional facts which came to the Plaintiffs' attention during the execution of the Anton Piller Order. First, Ms. Wang refused to deliver up her iPhone to the Store ISS, as required by the terms of the Anton Piller Order. The Plaintiffs claimed that Ms. Wang surreptitiously used her phone while the business premises were being searched to erase or remove evidence relevant to the Plaintiffs' claims, including WeChat conversations and publicly posted images of counterfeit items. Second, among the evidence the Plaintiffs preserved during the execution of the Anton Piller Order were a series of documents evidencing transfers of funds to China by one or more of the Defendants. The Plaintiffs alleged that the Defendants had the capability to transfer funds outside of the reach of this Court's jurisdiction, and had in fact done so in the past. In light of these new facts, a *Mareva* injunction was granted by Order dated December 14, 2017, essentially freezing the Defendants' assets.

[13] By further Order, dated January 17, 2018, this Court set a schedule for a motion to be filed by the Defendants regarding the review of the *Mareva* injunction. At the same time, the Anton Piller Order was continued as an interlocutory Order of the Court; Mr. Wang was substituted as a defendant for John Doe; and the issue of costs of the Plaintiffs' motions of December 12, 2017 and December 14, 2017 was adjourned to the hearing of the Defendants' motion. The Defendants took no steps to challenge the Anton Piller Order.

[14] On January 15, 2018, the Defendants filed a motion record seeking to overturn the *Mareva* injunction granted on December 14, 2018 on the grounds that there was no basis for an

*ex parte* motion to be brought, that the Plaintiffs did not make full and fair disclosure of all material facts, and that there was not sufficient evidence of a serious risk that the Defendants would dissipate assets before judgment. Ms. Wang filed an affidavit in support of the motion. She was cross-examined extensively over a two day period.

## II. Test to be Applied on a Motion to Set Aside a *Mareva* Injunction

[15] This is a hearing *de novo* in the sense that the Court may consider evidence which was not available to the judge who granted the *ex parte* order. In that regard, the onus of proving the entitlement to an injunction is on the Plaintiffs.

[16] The test to be applied in determining whether or not an ordinary injunction ought to be granted is a tripartite test: whether there is a serious issue to be tried, whether the plaintiff will suffer irreparable harm if the injunction is not granted, and whether the balance of convenience favours the plaintiff. The test for obtaining a *Mareva* injunction is similar to that for obtaining injunctions, with three qualifications. First, the applicant has a higher standard to meet. Instead of needing to show only a serious issue to be tried, the applicant needs to show a strong *prima facie* case. Second, the applicant must demonstrate a real risk that assets will be disposed of or dissipated, such that without the injunction, a judgment would be hollow. Third, the applicant must also establish that he or she would suffer irreparable harm if the injunction was not granted. A *Mareva* injunction is granted only sparingly and in the clearest cases.

III. Analysis

A. *Strong Prima Facie Case*

[17] The Defendants do not take issue that the first factor has been met by the Plaintiffs. In fact, counsel for the Defendants acknowledged at the hearing of the motion that the Plaintiffs have made a strong case, particularly against Ms. Wang. The Plaintiffs produced eight affidavits in support of their motion dated December 6, 2017 seeking an Anton Piller Order and a *Mareva* injunction. They produced two additional affidavits in support of their motion filed on December 14, 2017 for an order that Ms. Wang appear before the Court for a contempt hearing and to renew their request for a *Mareva* injunction.

[18] The ten affidavits provide detailed and compelling evidence of infringement and passing-off of the Plaintiffs' registered trademarks by the Wangs, as well as unauthorized production and reproduction of the Plaintiffs' copyrighted works. It is important to note that there was no cross-examination of the Plaintiffs' affiants and that their evidence stands uncontradicted.

[19] The Plaintiffs have established through their affidavit evidence a strong *prima facie* case that Ms. Wang, with the assistance of her husband and using their business as a front, blatantly and repeatedly offered for sale and sold "Louis Vuitton" and other counterfeit merchandise on numerous occasions in their store or online.

B. *Risk of Dissipation of Assets*

[20] In the face of the overwhelming evidence, the Defendants focused their submissions instead on the second factor. This is not surprising as the overriding consideration for granting a *Mareva* injunction is the real or genuine risk of assets being removed from the jurisdiction of the Court or dissipated by a defendant to avoid the possibility of judgment. Evidence of a threat to arrange assets to defeat judgment or for the purpose of avoiding judgment is key: *Marine Atlantic Inc v Blyth et al (1993)* 113 DLR (4th) 501(FCA) at paragraph 9.

[21] The Defendants submit that the Plaintiffs failed to provide the Court with an accurate picture of their business practices and, in particular, failed to make proper inquiries regarding the Defendants' use of money transfers. According to the Defendants, it would have been clear on proper review of the financial documents seized during the search of their premises that the Defendants were using money transfers in the ordinary course of business. I disagree.

[22] Documents located during execution of the Anton Piller Order at the Wang Residence show a large volume of international money transfers to China. Ms. Wang states at paragraph 22 of her affidavit that she "does not believe" that the money transfers relate to brand name luxury goods; however, she offers no evidence to establish that these money transfers were in fact related to legitimate business. The waybill and other evidence adduced by the Plaintiffs suggest that at least some of the transfers were likely related to the purchase of counterfeit goods. In any event, even if the transfers were made for legitimate personal or business reasons, they show the ease in which the Defendants can transfer funds internationally. The Defendants have the



capability to transfer funds outside of the reach of this Court's jurisdiction and have done so in the past. The Plaintiffs need not demonstrate that Ms. Wang was in the process of specifically transferring assets out of the jurisdiction to avoid the effect of the potential judgment, given that the Plaintiffs' claim had not yet been instituted at the time of such transfers. The risk of dissipation is compounded by Ms. Wang's professed anger with the laws of Canada and spontaneous threat of moving her family elsewhere during the execution of the Anton Piller Order.

[23] This brings me to the issue of Ms. Wang's credibility. As noted earlier, the Plaintiffs have a strong *prima facie* case of infringement, involving significant and ongoing importation, offer for sale and sale of counterfeit merchandise. Throughout her affidavit, Ms. Wang attempts to portray herself as an innocent person. She states that her written English is not as strong as her spoken English and that she has had little experience with the legal system and lawyers. Moreover, although she acknowledges at paragraph 16 of her affidavit that she was approached in 2009 by people representing various luxury brands and was warned to stop selling infringing products or face legal action, she adds that she did not think that anyone would mistake the merchandise she was selling for luxury goods.

[24] I am not swayed by Ms. Wang's professed naivety and lack of sophistication. The depth and sheer breadth of the uncontradicted evidence produced by the Plaintiffs would suggest that the Defendants have knowingly and repeatedly engaged in dishonest conduct akin to fraud and theft. A negative inference is drawn against the Defendants from what can best be described as

the surreptitious nature of the activity carried out by the Defendants and their prior history of trademark infringement dating back almost a decade.

[25] The evidence before me would suggest that Ms. Wang likely deleted WeChat messaging records from her iPhone and removed images of counterfeit goods linked to Ms. Wang's NiBazza WeChat Account or directed someone to do so. Prior to the execution of the Anton Piller Order, Ms. Wang arranged with Christine Li Zhou, a paralegal employed by ~~Plaintiffs' law firm~~ in Vancouver, that she would attend the Parker Place Mall on December 13, 2017 using her WeChat messenger application. However, when the content of Ms. Wang's iPhone was searched, it did not contain the messages which Ms. Wang exchanged with Ms. Li Zhou, either on December 13, 2017, or any earlier dates.

[26] It appears that images of counterfeit goods which were posted by, or linked to, Ms. Wang's NiBazza WeChat account were all removed on December 13, 2017, sometime after Ms. Zhou exchanged WeChat messages with the NiBazza Account just prior to execution of the Anton Piller Order, and before 11:00 pm. Even if these images were not removed personally by Ms. Wang, the Anton Piller Order prohibited the Defendants from notifying any other party of the action or the Anton Piller Order execution. No plausible explanation has been provided by the Defendants to account for the deletion of the information. On the evidence before me, spoliation appears to have been committed by Ms. Wang.

[27] From paragraphs 22 to 54 of their written submissions, the Plaintiffs have listed numerous contradictions in Ms. Wang's testimony in cross-examination. These include: (i)

contradictions regarding Ms. Wang's WeChat profile; (ii) contradictions regarding her possession of counterfeit packaging and goods found at the premises during the execution of the Anton Piller Order; (iii) Ms. Wang's claim that she was at the Parker Place Mall, not the Wang Residence, prior to the execution of the Anton Piller Order; (iv) contradictions regarding Ms. Wang's signature; (v) contradictions regarding Facebook messages taken from the HTC tablet obtained from the Wang residence; (vi) contradictions regarding sales from the Parker Place Mall; and (vii) evidence of willingness to avoid legal requirements. Taken as a whole, I conclude that Ms. Wang is at best a stranger to the truth.

[28] The evidence and exhibits before the Court, especially items taken from Ms. Wang's residence, and excerpts from online and cell phone records, indicate a person with specific knowledge of and familiarity with the world of counterfeit goods. By way of example, Ms. Wang admitted to an investigator that at least on one occasion she simply walked away from counterfeit merchandise when she was confronted at the Canada-United States border. Moreover, the Defendants have repeatedly obscured their sale of counterfeit items by keeping them out of the sight of average consumers, and by displaying "some real products" to show customers that they were buying authentic products. It is in no way credible for Ms. Wang to now suggest that she was unaware that the goods she was selling were not genuine. A particularly damning piece of evidence is a business card from a business in China seized from the Wang's residence with the handwritten words "Fendi" and "knock off".

[29] The Plaintiffs have also shown that Ms. Wang has not been diligent in adhering to the *Mareva* injunction. Ms. Wang conceded during the cross-examination that she had spent some of

the \$3,000 in cash from her house without notifying the Plaintiffs. When asked about whether this money was spent, Ms. Wang was evasive, eventually refusing to answer if the money was spent, and if so, on what. Contrary to the terms of the *Mareva* injunction, the Defendants did not advise the Plaintiffs that she had and then spent the money, in addition to the amounts withdrawn from the bank for the purpose of living expenses.

[30] Ms. Wang admitted to withdrawing funds from a number of her accounts after December 18, 2017 when served with the *Mareva* injunction, without providing any notice to the Plaintiffs or accounting for these withdrawals. Ms. Wang also acknowledged that she had earned approximately \$2,500 from sales at the Parker Place Store and has spent that money “mostly for living expenses”. These amounts were dissipated without notice to the Plaintiffs, or an accounting of total expenditures permitted by the *Mareva* injunction.

[31] Ms. Wang attempted to minimize these breaches in her cross-examination; however this simply demonstrates a cavalier attitude on the part of Ms. Wang towards the obligations imposed by the *Mareva* injunction.

[32] Ms. Wang’s conduct provides a sufficient basis for this Court to conclude that there is a real risk that the Defendants have and may dissipate their assets in the future if not restrained. Acting in a manner that fails to appreciate the significance of the obligations placed upon a party by the Court, or evidences a willingness to frustrate the legal process, is a further factor supporting the granting of a *Mareva* injunction: *Soleil Hospitality Inc v Louie*, 2009 BCSC 1442 at paragraphs 10-11.

C. *Irreparable Harm*

[33] Finally, when applying for the *Mareva* injunction, the Plaintiffs established that the dissipation of assets would have the effect of hampering or defeating their ability to realize on any judgment that they may obtain. The Defendants have adduced no evidence to suggest otherwise. They submit that the evidence preserved as a result of the Anton Piller Order gave the Plaintiffs “the means to assess the state of the Defendants’ assets”. However, while the Plaintiffs have access to certain financial records, they had no way of ascertaining if those records reflect the full scope of the Defendants’ assets.

[34] For the above reasons, the Defendants’ motion to set aside the *Mareva* injunction is dismissed.

[35] The Defendants’ claim for damages shall also be dismissed as it is premised on the Defendants establishing that the *Mareva* injunction was improperly obtained. ~~They~~ They failed to do so. Any damages they may have suffered are the natural consequences of the order freezing their assets.

IV. Costs

[36] In their written representations, the Plaintiffs requested solicitor-client costs of the Defendants’ motion, as well as the costs of the Plaintiffs’ motions of December 6, 2017 (seeking an Anton Piller Order and *Mareva* Injunction) and December 14, 2017 (renewing their request for a *Mareva* Injunction). At the hearing, Plaintiffs’ counsel indicated that they were seeking

costs in the six figures. On consent of the parties, an adjournment was granted to provide the Defendants an opportunity to file responding costs submissions.

[37] The matter was delayed as a result of the Wangs' decision to dismiss their lawyer and act on their own behalf and the Defendants' motion for leave to allow Ms. Wang to represent the corporate Defendant, Canada Royal Import & Export Co. Ltd. [Canada Royal]. The motion was ultimately dismissed by Prothonotary Ring during case management.

[38] Given the passage of time and that the Defendants were not represented by counsel, the Plaintiffs were directed to file written representations setting out the basis for the costs requested, along with a draft Bill of Costs. The Wangs and newly-appointed counsel for Canada Royal filed written representations in response on August 13, 2018.

[39] The Plaintiffs submit that solicitor-client costs are justified given their success on the three motions, the amount of work involved, the volume of material and, more particularly, the additional expense incurred arising from the reprehensible conduct of the Defendants, which unduly complicated and lengthened the proceedings.

[40] The Defendants submit that the issue of costs should be decided after the trial on the merits. In the alternative, they submit that the Plaintiffs failed to meet the criteria to award solicitor-client costs. According to the Defendants, there is no substantial evidence to show that they were selling counterfeit merchandise that infringed the Plaintiffs' trademarks, that they

acted improperly or that Ms. Wang gave false evidence or failed to comply with Orders of the Court.

[41] I start with the principle that ordinarily costs should follow the event. The Plaintiffs were substantially successful on their first motion, notwithstanding that a *Mareva* injunction was denied. The Plaintiffs were completely successful on their second motion and in opposing the Defendants' present motion. In the circumstances, I conclude that the Plaintiffs should be awarded costs of the three motions. The issues raised then are: (a) what is the appropriate quantum of costs; and (b) whether costs should be payable forthwith.

[42] In terms of quantum, the overriding principle is that a cost award must be fair and reasonable. Further, it is settled case law that solicitor-client costs are granted in exceptional circumstances where a party's conduct is shown to be reprehensible, scandalous or outrageous and deserving of reproof or rebuke (*Microsoft Corp v Cerrelli*, 2007 FC 1364 at paragraph 5).

[43] The Plaintiffs' two motions were brought *ex parte* and were consequently not opposed. In the circumstances, there is no basis to award solicitor-client costs against the Defendants with respect to these two motions. However, bearing in mind the amount of work involved and the result of the motions, I conclude that a lump sum award in excess of the middle of Column III of Tariff B should be awarded.

[44] Different considerations apply to the Defendants' motion to set aside the *Mareva* injunction. I agree with the Plaintiffs that the Defendants' conduct in bringing the motion was

tainted by bad faith. Ms. Wang gave evidence, under oath and on cross-examination, which in several respects was clearly false—such as that she did not conduct business using the NiBazza WeChat account, or that she had purchased only 6 or 7 counterfeit items—and in other respects is internally inconsistent—such as the evidence she has provided of the sales from the Parker Place Store. In other respects, the evidence provided by Ms. Wang is false without clear purpose—such as her denial that she was served with the *Mareva* injunction on December 18, 2017. There is also a reasonably strong basis to conclude that Ms. Wang, or someone acting on her instructions, deleted or removed relevant evidence from her electronic devices and from the NiBazza WeChat profile after the execution of the Anton Piller Order. Ms. Wang’s choice to adduce false and inconsistent evidence, coupled with her willingness to ignore the Anton Piller Order—likely for the purpose of removing or erasing evidence—have created substantial additional difficulty in the execution of both the Anton Piller Order and *Mareva* injunction, and in the Plaintiffs’ ability to respond to the Defendants’ motion.

[45] In light of Ms. Wang’s refusal to admit obvious facts, the Plaintiffs have been forced to review evidence in fine detail, and in some cases to adduce supplementary evidence to clarify minor factual points, to be able to clearly demonstrate Ms. Wang’s inconsistencies and refute her “story”. In addition, a significant amount of time was spent cross-examining Ms. Wang.

[46] By conducting themselves this way, the Defendants caused substantial delay and costs to the Plaintiffs. The conduct of the Defendants was so improper and outrageous such that elevated costs are justified with respect to the Defendants’ motion, but not solicitor-client costs.



[47] The Plaintiffs have produced a bill of costs seeking solicitor-client costs of \$182,309.50 and disbursements of \$98,707.72 for the three motions. For the sake of simplicity, I am prepared to award the Plaintiffs costs as claimed for their first motion, their appearance at the execution of the Anton Piller Order, and for the second motion for a *Mareva* injunction, assessed roughly at the upper end of Tariff B, and fixed in the amount of \$27,000.00. This amount as well as related disbursements shall be paid to the Plaintiffs in the cause, rather than payable forthwith, as the merits of the Plaintiffs' action has yet to be finally determined.

[48] As for costs of the Defendants' motion, I consider an amount of \$44,000.00, representing roughly 50% of the Plaintiff's solicitor-client costs, to be appropriate. While this approach is imprecise, the calculation of lump sum awards is "not an exact science, but reflects the amount the Court considers to be a reasonable contribution to the successful party's actual legal fees" (*Conorzio del prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at paragraph 8). This amount along with disbursements shall be paid forthwith and in any event of the cause: see rule 401(2) of the *Federal Courts Rules*, SOR/98-106.

**ORDER**

**THIS COURT ORDERS that:**

1. The motion is dismissed.
2. The *Mareva* injunction granted by Order on December 14, 2017 is continued on an interlocutory basis.
3. The Defendants shall pay costs of the Plaintiffs' motions, dated December 6, 2017 and December 14, 2017, hereby fixed in the amount of \$27,000, plus disbursements of \$71,835.81, in the cause.
4. The Defendants shall pay costs of their motion, dated January 17, 2018, hereby fixed in the amount of \$44,000, plus disbursements of \$26,871.91, in any event of the cause.
5. Each of the Defendants shall serve on the Plaintiffs an Affidavit detailing all of their assets [valued at \$1000 or more], whether the assets are in or outside Canada, whether in their own name or not and whether solely or jointly owned, on or before January 15, 2019.

"Roger R. Lafrenière"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1887-17

**STYLE OF CAUSE:** LOUIS VUITTON MALLETTIER S.A.; LOUIS VUITTON CANADA, INC.; CELINE; CHRISTIAN DIOR COUTURE, S.A.; GIVENCHY S.A. v AUDREY WANG AKA NINI WANG AKA NI YANG; JOHN DOE AKA “MICHAEL”; CANADA ROYAL IMPORT & EXPORT CO. LTD.; COLLECTIVELY DOING BUSINESS AS NI FASHION, NIYANGBAZZA AND NI BAZZA, AND LIAN TONG COURIER SERVICE

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** FEBRUARY 28, 2018

**ORDER AND REASONS:** LAFRENIÈRE J.

**DATED:** NOVEMBER 28, 2018

**AMENDED** **DECEMBER 5, 2018**

**APPEARANCES:**

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