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E-filing

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 **BRAVADO INTERNATIONAL GROUP)**
14 **MERCHANDISING SERVICES, INC.,)**

15 **Plaintiff,)**

16 **v.)**

17 **JOHN DOES 1-100, JANE DOES 1-100)**
18 **AND XYZ COMPANY,)**

19 **Defendants.)**

20 **CV Case No. 11 4244**

21 **MEMORANDUM OF POINTS AND**
22 **AUTHORITIES IN SUPPORT OF**
23 **EX PARTE APPLICATION FOR: A**
24 **TEMPORARY RESTRAINING**
25 **ORDER; SEIZURE ORDER;**
26 **AND ORDER TO SHOW CAUSE**
27 **REGARDING WHY A**
28 **PRELIMINARY INJUNCTION AND**
SEIZURE ORDER SHOULD NOT
ISSUE

FILED
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RICHARD W. HICKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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I. INTRODUCTION.

Plaintiff Bravado International Group Merchandising Services, Inc. ("Plaintiff") submits this Memorandum in support of its Ex Parte Application for: a Temporary Restraining Order; a Seizure Order; and an Order to Show Cause Regarding Why A Preliminary Injunction and Seizure Order Should Not Issue (the "Order"). Plaintiff seeks this Order to stop the sale at concerts of unauthorized merchandise, and seize the same here and nationwide, which bears the federally registered trademarks, servicemarks, likenesses, logos and/or other indicia of the group known as "METALLICA"¹ similar to ones granted by this Court and other Districts for prior **Metallica** tours and for other artist tours. See Brockum Company v. Does, Case No. 91-3551 FMS (N.D.CA 1991) (Judge Smith) (for Metallica's tour); Giant Merchandising v. Does, Case No. 03-cv-11213 RWZ (D. MA 2003) (Judge R. Zobel) (for Metallica's tour); and Giant Merchandising v. Does, Case No. 96-8759 WDK (VAPx) (C.D. CA 1996) (Judge Keller) (for Metallica's tour), as well as Steerpike Productions, Inc. v. Does, Case No. 07-02989 RMW (N.D.CA 2007) (Judge Whyte) (for the Police's tour) (obtained by other counsel); Giant Merchandising v. Does, Case No. 02-1508 CRB (N.D.CA 2002) (Judge Breyer) (for Paul McCartney's tour); Giant Merchandising v. Does, Case No. 98-2802 SC (N.D. CA 1998) (Judge Conti) (for Phish's 1998 tour); Giant Merchandising v. Does, Case No. C 95-3182 CAL (Judge C. Legg) (N.D. CA 1995) (for Bush's tour); Giant Merchandising v. Does, Case No. 94-1953 WHO (N.D. CA 1994) (Judge Orrick) (for the Eagles' tour); Giant Merchandising v. Does, Civil Action No. 93-2068 TEH (N.D. CA 1993) (Judge

¹ The Group has obtained for its "METALLICA" trademark US Federal Trademark Registrations, many incontestable, including: Registration No. 1819042 for use in connection with International Class ("IC) 025 clothing (incontestable); Registration No 2231065 (design) for use in connection with IC 025 clothing (incontestable); Registration No. 2213592 (design) for use in connection with IC 025 clothing (incontestable); Registration No 2504291 for use in connection with IC 025 clothing; Registration No. 3275659 (design mark), for use in connection with IC 025 clothing; Registration No 2198824 for use in connection with IC 016 paper products; Registration No. 3275658 for use in connection with IC 016 paper products; and Registration No. 2085137 for use in connection with IC 020 namely ornamental novelty buttons and ornamental novelty pins, among others. See Donnell Decl. ¶ 6.

1 Henderson) (for Jimmy Buffett's tour). See Exhibits to Certificate of Counsel filed concurrently
2 herewith. For the reasons stated below, such relief is warranted under the Lanham Act § 1051
3 et seq., F.R.C.P. Rule 65, Local Rule 65-1 and the All Writs Act.

4 **II. STATEMENT OF FACTS.**

5 On August 31, 2011 at the Moscone Center, in San Francisco, California, the group
6 "METALLICA" (the "Group") will perform. See the Declaration of Thomas Donnell ("Donnell
7 Decl.") and the Certificate of Counsel pursuant to F.R.C.P. Rule 65 of Cara R. Burns ("Counsel
8 Cert.") filed herewith. Defendants currently identified as Does, also referred to as "Bootleggers,"
9 are currently engaged in the manufacture and will continue to be engaged in the manufacture,
10 distribution and sale of unauthorized T-Shirts and other merchandise that bear the federally
11 registered trademarks, servicemarks, likenesses, logos and other indicia of the Group ("Infringing
12 Merchandise") at the concert in this District and will continue to do so at other sites on the tour.
13 Donnell Decl. ¶¶ 4-25.

14
15
16 Bootleggers have plagued previous tours by METALLICA from beginning of the tour and
17 also tours by other artists of the caliber of this Group. To combat this, Plaintiff has obtained from
18 this and other District Courts temporary restraining and seizure orders, and thereafter nationwide
19 seizure orders to seize the unlawful merchandise of such defendants as noted above. See Donnell
20 Decl. and the Certificate of Counsel and its Exhibits.

21 Plaintiff easily meets the required showing and there is no defense to the claims brought by
22 Plaintiff. Plaintiff is the exclusive licensee of the Group, and the sole merchandiser for the
23 Group's authorized merchandise which will be sold during the Group's tour. Donnell Decl. ¶ 4.
24 Plaintiff has therefore demonstrated a substantial likelihood that it will succeed on the merits. The
25 Infringing Merchandise harms Plaintiff and the public in numerous ways. Each sale of Infringing
26 Merchandise by Defendants is an irrecoverably lost sale for Plaintiff. Absent the relief requested
27 herein, Plaintiff's monetary losses could aggregate in the hundreds of thousands of dollars.
28

1 Moreover, the loss and damage to the goodwill of both Plaintiff and the Group, through the
2 distribution of inferior merchandise which will necessarily be seen as associated with them, cannot
3 be calculated or remedied. Donnell Decl. ¶¶ 14-23; Counsel Cert. ¶¶ 6-20.

4 The public interest will be served by issuance of the relief requested. The public interest
5 favors the protection of property/contractual rights. There is no potential harm to any legitimate
6 interest of Defendants if the requested relief is issued. In addition, the relief requested here is the
7 only proven method of protecting Plaintiff's rights and the public from inferior merchandise,
8 merchandise which bears a false designation of origin and created and sold by the Defendants,
9 who are accountable to no one, whether for payment of royalties, sales taxes, or for quality
10 control. Donnell Decl. ¶¶ 16-24.

12 The need for an ex parte order is manifestly evident. Defendants' actions are completely
13 unauthorized, and Defendants have both the means and motivation to destroy vital evidence before
14 a noticed hearing and avoid service. Similar orders have been obtained to protect the rights of
15 merchandisers against bootleggers and their unauthorized goods. In response to these orders,
16 although thousands of bootleggers have been served, no defendant bootlegger has ever appeared
17 since apparently they know their activities are unlicensed and unlawful. See Counsel Cert.
18 Accordingly, Plaintiff requests that this Court issue the requested order.

20 **III. ARGUMENT**

21 **A. DEFENDANTS SHOULD BE ENJOINED FROM SELLING, DISTRIBUTING,**
22 **AND MANUFACTURING INFRINGING MERCHANDISE.**

23 An action for a preliminary injunction will be granted if the moving party can show either
24 a combination of a probability of success on the merits and the possibility of irreparable injury; or
25 that serious questions are raised and the balance of the hardships sharply tips in the movant's
26 favor. Apple Computer v. Formula International, 725 F. 2d 521, 523 (9th Cir. 1984). Another test
27 recognized in this circuit is the so called "traditional test" which permits the moving party to
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1 satisfy its burden by demonstrating: 1) a string likelihood of success on the merits; 2) that the
2 balance of irreparable harm favors the movant; and 3) that the public interest favors granting the
3 injunction. Regents of University of California v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984).

4 Whichever is applied, Plaintiff meets this standard.

5 **1. There Is A Substantial Likelihood That Plaintiff Will Prevail On**
6 **The Merits Because Defendants Have Violated Section 1125(a).**

7 Courts have repeatedly held that the use of registered and unregistered names, images and
8 logos of musical artists by bootleggers causes irreparable injury and violates section 43(a) of the
9 Lanham Act. Brockum Co. v. Blaylock, 729 F.Supp. 438, 444 (E.D. Pa. 1990) (there is no
10 necessity under §43(a) that the marks in question be registered); SKS Merch, LLC v. Barry, 233 F.
11 Supp. 2d 841, 853-854 (E.D. Ky 2002) (sales by Doe Defendant Bootleggers of merchandise
12 bearing the unregistered marks of the artist Toby Keith violates section 1125 (a) and a nationwide
13 seizure order was issued); Winterland Concessions Co. v. Sileo, 528 F.Supp. 1201 (N.D. Ill.
14 1981), mod. on other grounds, 735 F.2d 257 (7th Cir. 1984); Nice Man Merchandising, Inc. v.
15 Logocroft, Ltd., 23 U.S.P.Q. 2d 1290 (E.D. Pa. 1992) (use of the names, trademarks, logos and
16 likenesses of musical groups on defendants' merchandise without permission from plaintiff
17 merchandiser "is likely to cause confusion, to cause mistake and to deceive. Such confusion and/or
18 deception will continue to result in immediate and irreparable injury to plaintiff.")

19
20
21 The purpose of the Lanham Act is "to protect persons engaged in . . . commerce against
22 unfair competition" and "to prevent fraud and deception in such commerce." 15 U.S.C. §1127.
23 This broad prohibition against "unfair competition" covers not only confusion as to source or
24 sponsorship between Defendants' Infringing Merchandise and Plaintiff's merchandise, it also
25 prohibits the misappropriation of the efforts of others. See R.H. Donnelly Corp. v. Illinois Bell
26 Telephone, 595 F.Supp. 1202, 1206 (N.D. Ill. 1984) ("those who invest time, money
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1 and energy into the development of a product and its accompanying good will should be allowed
2 to reap the advantages of their investment"); Boston Athletic v. Sullivan, 867 F.2d 22, 33 (1st
3 Cir. 1989) ("a party cannot reap where it has not sown").

4 To establish a violation of section 43(a) "a plaintiff must demonstrate (1) that it is the prior
5 owner of the trademark, and (2) that the defendant adopted a trademark that is the same or
6 confusingly similar, so that consumers likely will be confused about the proper origin of the goods
7 or services, such that a consumer is likely to believe that defendant's goods or services are being
8 sold with the consent or authorization of the plaintiff, or that defendant is affiliated with or
9 connected to the plaintiff." Ocean Bio-Chem, Inc., 741 F. Supp. at 1554 (citation omitted); Nassau
10 v. Unimotorcyclists Soc. of America, Inc., 59 F. Supp. 2d 1233, 1236, (M.D. Fla. 1999); New
11 West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1201 (9th Cir. 1979) (for purposes of
12 injunctive relief, it is not necessary to show actual confusion or deception, but merely the
13 likelihood of such). These elements are clearly present here. The merchandise are goods, the
14 Defendants travel from state to state and effect the sale of Plaintiff's merchandise during the tour
15 and, because the use of Plaintiff's marks, there is the false designation which is likely to confuse.

16
17
18 The Ninth Circuit has identified various factors to consider when determining whether a
19 likelihood of confusion exists: (1) the type of mark, (2) the similarity of the marks, (3) the
20 similarity of the parties' products or services, (4) the similarity of the parties' retail outlets and
21 customers, (5) the similarity of the advertising media used, (6) the defendant's intent, and (7) the
22 actual confusion engendered by the parties' uses. Judged by these factors, Defendants' have
23 violated the Lanham Act and there is no excuse of Defendants' use of Plaintiff's marks. The
24 trademarks, as well as the trademarks, servicemarks, likenesses, logos, and other indicia of the
25 Group licensed to Plaintiff are strong marks, known to literally millions of members of the public.
26 Defendants are using the same exact marks as Plaintiff and selling their unlawful products at the
27 Group's performances. Using the traditional scale of marks from the generic to the arbitrary, the
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1 Group's marks are arbitrary in that they do not describe the goods to which they are attached but
2 instead provide identification, thus they have acquired secondary meaning and are incontestable.
3 Defendant Bootleggers will be copying the trademarks, likenesses, logos, and other indicia of the
4 Group, therefore there can be no doubt as to consumer confusion. Donnell Decl. ¶¶ 11-24. Since
5 Defendants are aware of the Group's use of their trademark, there is a presumption of bad faith.
6 See AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 354 (9th Cir. 1979) (deception may be presumed
7 from the knowing adoption of a similar mark).

8
9 It is clear that the sale of unauthorized, bootleg T-shirts and other merchandise bearing the
10 names, logos or likenesses of well-known performers or groups constitutes a violation of §43(a) of
11 the Lanham Act. SKS Merch. supra, Nice Man Merchandising, 23 U.S.P.Q. at 1292 ("the use of
12 well-known performers' names and likenesses upon novelty merchandise without the performers'
13 authorization constitutes a violation of § 43(a)"); Winterland Concessions Co. v. Creative Screen
14 Design Ltd., 214 U.S.P.Q. 188 (N.D. Ill., 1981). As set forth by the District Court in Brockum
15 Co. v. Blaylock: Defendant [Bootlegger] cannot obtain a "freeride" at the [exclusive licensee's]
16 expense. Its shirts are designed to take advantage of the efforts and expenditures of the plaintiff
17 and benefit from the goodwill associated with the Rolling Stones, their 1989 tour, and the
18 promotion of the event created or undertaken by the plaintiff and the Rolling Stones. Such
19 unlicensed use of the Rolling Stones' name would permit the defendant to reap where it had not
20 sown. Boston Athletic Ass'n v. Sullivan, 867 F.2d 22, 33 (1st Cir. 1989). Defendant's argument
21 that the T-shirt in question merely celebrates an "event" is circular reasoning, at best, given the
22 fact that there would be no "event" to celebrate, were it not for the hard work and financial outlay
23 provided by the plaintiff. 729 F. Supp. at 444.

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25
26 Defendants have manufactured Infringing Merchandise for the sole purpose of selling it at
27 the Group's concerts. It is beyond dispute that Defendants have and will continue to knowingly
28 utilize Plaintiff's marks to deceive the public and create the appearance that Defendants' Infringing

1 Merchandise is sponsored by or originated from Plaintiff or the Group, and Plaintiff has no control
2 over the quality of the merchandise. Defendants' sale of Infringing Merchandise is intended to
3 "free ride" on the trademarks, servicemarks, likenesses, logos, and other indicia the Group, that
4 have acquired value through the extensive efforts of the Group. This is precisely the conduct
5 Section 43(a) was designed to stop.

6 **2. Defendants Have Violated Section 1114.**

7 Under 15 U.S.C. § 1114, Plaintiff must show that Defendants have used the registered
8 trademark: (1) without consent; (2) in connection with the sales of goods; and (3) where such use
9 was likely to cause confusion or to deceive purchasers as to the source or origin of the goods.
10 Golden Door, Inc., v. Odisho, 437 F.Supp. 956, 962-63 (N.D. Cal. 1977), aff'd 646 F.2d 347 (9th
11 Cir. 1980), overruled on other grounds. 287 F. 3d 866 (9th Cir. 2002).

12 Plaintiff is likely to prevail on its § 1114 claim, for the same reasons that it is likely to
13 prevail on its claim under § 1125(a). New West Corp. v. NYM CO. of California, 595 F. 2d at
14 1201. ("The likelihood of confusion test also is used for claims of trademark infringement under
15 15 U.S.C. 1114.). Since the Defendants use the federally registered mark on Infringing
16 Merchandise and sell such goods at the very places where the Group will be performing, there can
17 be no doubt as to the confusion and intent of the Defendants.

18 **3. Defendants Have Violated Plaintiff's Right of Publicity.**

19 California Civil Code §3344(a) provides: Any person who knowingly uses another's name,
20 voice, signature, photograph of likeness in any manner, on or in products, merchandise or goods or
21 for the purposes of advertising or selling, or soliciting purchases of products, merchandise, goods
22 or services without such person's prior consent, shall be liable for any damages sustained by
23 persons injured as a result thereof. This Civil Code Section expressly provides that its remedies
24 are cumulative and in addition to any provided by law.
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1 There is also a common law right to privacy recognized in California which provides
2 protection against "appropriation for defendant's advantage, of the plaintiff's name or likeness."
3 Eastwood v. Superior Court, 139 Cal. App. 3d 409, 416 (1983); Zacchini v. Scripps-Howard
4 Broadcasting Co., 433 U.S. 562, 575-76 (1977). Violation right to privacy is demonstrated by: 1) a
5 defendant use of plaintiff's name or likeness; 2) the defendant's use of plaintiff's identity is for
6 defendant's commercial adverts; 3) plaintiff has not consented to the use; and 4) resulting injury.
7 Eastwood v. Superior Court, 149 Cal.App.3d at 417. To plead a cause of action under §3344, in
8 addition to the elements for violation of privacy rights, one must plead a knowing use of the name
9 or likeness. Id. Here, Plaintiff possesses the exclusive right to exploit the names, likenesses and
10 logos of the Group under its exclusive license and the right to prevent others from exploiting them
11 without permission. Defendants' use of the trademarks, servicemarks, likenesses, logos, and other
12 indicia of the Group is undertaken to sell a product -- usually T-shirts or similar merchandise -- for
13 commercial advantage and without any permission from Plaintiff. This sale will occur at the
14 concerts where the Group will perform; constituting knowing use. Accordingly, every sale by
15 Defendant Bootlegger violates the California rights to publicity and privacy.
16
17

18 **B. Plaintiff Will Suffer Irreparable Injury.**

19 Irreparable injury is presumed in the case of trademark infringement and Lanham Act
20 violations. Camel Hair and Cashmere v. Associated Dry Goods, 799 F.2d 6, 13 (1st
21 Cir.1989)("There is considerable authority for the view that the irreparable injury requirement is
22 satisfied once it is shown that the defendant is wrongfully trading on the plaintiff's reputation.") E.
23 Remy Martin & Co. v. International Imports, Inc., 756 F. 2d 1525, 1530 (11th Cir. 1985); SKS
24 Merch, LLC, 233 F. Supp. 2d at 847 (although irreparable injury is presumed once infringement is
25 shown, "Plaintiffs have independently established that they will be irreparably harmed absent a
26 Preliminary Injunction enjoining the sale of bootleg merchandise related to Toby Keith throughout
27 the nation."); Nice Man Merchandising v. Logocroft, Ltd., *supra*; Hard Rock Cafe Licensing v.
28

1 Pacific Graphics, 776 F. Supp. 1454, 1463 (W.D. Wash. 1991) (“in trademark infringement or
2 unfair competition actions, once the plaintiff establishes a likelihood of confusion, it is ordinarily
3 presumed that the plaintiff will suffer irreparable harm.”).

4 As set forth in the Donnell Declaration, Plaintiff will be irreparably harmed by the
5 continuing sales by the Bootleggers. These peddlers appear at each venue, rarely have
6 identification or keep records of their sales. In addition, irreparable injury is shown by the fact that
7 Plaintiff has no control over the Infringing Merchandise or its quality, and, accordingly, will suffer
8 a loss of goodwill due to sales of inferior Infringing Merchandise.
9

10 **C. The Threatened Injury to Plaintiff Outweighs Potential Harm to Defendants.**

11 Plaintiff has demonstrated that the threatened injury to Plaintiff outweighs the potential
12 harm to the Defendants. Hard Rock Cafe, 776 F. Supp. at 1463 (valuable “Hard Rock Café” logo
13 symbolizes the goodwill connected with [plaintiff’s] business and that good will should not be
14 jeopardized by placing it in the hands of [defendants].”) Any inconvenience to Defendants will be
15 merely economic, consisting of lost profits from distribution of the illegal, Infringing Merchandise
16 (and a bond will be posted by Plaintiff). Plaintiff will be seizing Infringing Merchandise from
17 those Bootleggers at the concert venues. Those in active concert with, or assisting the bootlegging
18 are also violating the Lanham Act and must be enjoined. F.R.C.P. Rule 65.
19

20 **D. The Public Interest Will Be Served By Issuance Of The Injunction.**

21 Plaintiff can show that the public interest is furthered by issuance of a preliminary
22 injunction. Indeed, one of the essential purposes of the Lanham Act is to protect the consuming
23 public from being misled as to the source of goods:
24

25 While plaintiff is injured when consumers purchase [defendant's merchandise]
26 believing it to be [plaintiff's merchandise], consumers, too are being directly
27 victimized. An injunction is thus in the public interest; only if the distribution of
28 [defendant's goods] is stopped can further fraud be avoided.

Corning Glass Works v. Jeannette Glass Co., 308 F. Supp. 1321, 1328 (S.D.N.Y.), aff'd, 432 F.2d

1 784 (2d Cir 1970). Public interest is especially strong when a federal statute expressly forbids the
2 conduct in question. Here, Defendants act in flagrant disregard of the laws. In sum, Plaintiff is
3 entitled to injunctive relief.

4 **VI. PLAINTIFF IS ENTITLED TO EX PARTE RELIEF CONSISTING OF A**
5 **TEMPORARY RESTRAINING ORDER AND A SEIZURE ORDER.**

6 **A. The Order Is Necessary To Combat Defendants' Activities.**

7 Courts have issued temporary restraining order and orders of seizure in advance of
8 concerts to stop the sale of Infringing Merchandise. See Counsel Cert. and Exhibits thereto. This
9 procedure is specifically authorized by statute; 15 U.S.C. §1116 provides for injunctions "upon
10 such terms as the court may deem reasonable" to prevent violations of Lanham Act. See, In re
11 Vuitton et Fils, S.A., 606 F.2d 1, 4 (2d Cir. 1979) and cases cited therein (court has inherent power
12 to issue seizure orders); Universal City Studios, v. Kamma Industries, 217 U.S.D.Q. 1162 (S.D.
13 Tex. 1982). See also Counsel Cert.

14 Moreover, the Lanham Act specifically contemplates that a temporary restraining and
15 seizure order against Infringing Merchandise may be had by ex parte application. Section 1116 (d)
16 authorizes ex parte orders where, in addition to the traditional requirements for injunctive relief:
17 (1) an order other than an ex parte seizure order is not adequate, (2) the applicant has not
18 publicized the requested seizure, and (3) the person against whom seizure would be ordered would
19 destroy or otherwise make inaccessible to the court the infringing matters. 15 U.S.C.
20 §1116(d)(4)(B).²

21
22
23
24
25 ^{2/} In addition, in enacting the Trademark Counterfeiting Act of 1984, Congress in no way intended
26 to change existing case law and precedent under Rule 65, the traditional equitable powers of a
27 District Court under the Lanham Act, which has long been interpreted by numerous courts
28 throughout the country to authorize the issuance of ex parte seizure orders involving unregistered
trademarks. The legislative history of the Act makes clear that it was not intended to supersede or
negate the line of cases beginning with In Re Vuitton, 606 F.2d 1, 4 (2d Cir. 1979), and the
protection they provide.

1
2 In the instant case, defendants are as yet specifically unidentified. It is clear from the
3 nature of their activities that they will be present in this jurisdiction only long enough to sell their
4 unauthorized goods. After the unauthorized goods are sold, they will promptly disappear. Even if
5 Defendants received notice and were served with a proposed temporary restraining order, it is
6 highly unlikely that they would voluntarily comply and not sell their goods. See Donnell Decl.
7 and Counsel Cert. Simply stated, there is no other means of preventing the Defendants from
8 destroying Plaintiff's legitimate business without a seizure order.
9

10 A Court of Equity must be flexible and must be willing to issue an injunction appropriate
11 under the particular circumstances of the case. See the All Writs Act, 28 U.S.C. § 1651 which
12 broadly authorizes Federal Courts to issue "all writs necessary or appropriate in the aid of their
13 respective jurisdiction and agreeable to the usages and the principles of law." Since there is no
14 other remedy available to Plaintiff to prevent irreparable injury, this Court has the power to order
15 the seizure of illegal merchandise as an exercise of its inherent power to obtain and retain
16 jurisdiction in the matter. In Joel v. Does, 499 F. Supp. 791 (E.D. Wisc. 1980), the Court stated:
17

18 Were the injunction to be denied, Brockum would be without any legal means to
19 prevent what is clearly a blatant infringement of their valid property rights. While
20 the proposed remedy is novel, that in itself should not weigh against its adoption by
21 this Court. A Court of Equity is free to fashion whatever remedies will adequately
22 protect the rights of the parties before it. Id., at 792.

23 **B. Rule 65 of The Federal Rules Of Civil Procedure And the Lanham Act Provide**
24 **Authority For The Ex Parte Relief Plaintiff Seeks.**

25 Rule 65 of the Federal Rules of Civil Procedure permits the issuance of an ex parte
26 temporary restraining order when failure to issue such an order would result in "immediate and
27 irreparable injury, loss, or damage," and the movant demonstrates why notice should not be
28 required. The irreparable harm from Defendants selling and distribution activities has been shown.
It will continue to mount until Defendants are enjoined. Since Defendants have the temerity to

1 conduct blatantly unlawful activities, making a business of selling infringing articles, and have an
2 economic interest in continuing their unlawful actions, there is no reason to believe they will
3 voluntarily stop.

4 The Court in Vuitton, supra, found that immediate and irreparable injury existed because
5 of the substantial likelihood of confusion created by the itinerant Bootleggers selling their
6 unauthorized goods and that plaintiff had shown why notice should not be given:

7 [A]lthough this Court has frowned upon temporary restraining orders issued
8 even without telephone notice there are occasions when such orders are to be
9 countenanced. In our judgment, this case is just such an occasion. [***]
10 Assuming that all of the other requirements of Rule 65 are met, the Rule by
11 its very terms allows for the issuance of an ex parte temporary restraining
12 order when (1) the failure to issue it would result in "immediate and
13 irreparable injury, loss or damage" and (2) the applicant sufficiently
14 demonstrates the reason that notice "should not be required." In a trademark
15 infringement case such as this, a substantial likelihood of confusion
16 constitutes, in and to itself, irreparable injury sufficient to satisfy the
17 requirements of Rule 65(b)(1). [* * *] If notice is required, that notice all too
18 often appears to serve only to render fruitless further prosecution of the
19 action. This is precisely contrary to the normal and intended role of notice,
20 and it is surely not what the authors of the rule either anticipated or intended.
21 606 F.2d at 4-5.

22 **C. It Is Appropriate To Issue A TRO And Search Order To Enjoin Activities Of Persons
23 Whose Identities Are Presently Unknown.**

24 Plaintiff is proceeding to stop the bootlegging activities of Defendants whose identities are
25 presently unknown. Courts have long recognized that known adversaries may be designated as
26 "John Does" until plaintiff is able to specifically identify them. See SKS Merch, supra, Bivens v.
27 Six Unknown Names Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971);
28 John Hancock Mutual Life Ins. Co. v. Central National Bank in Chicago, 555 F. Supp. 1026 (N.D.
Ill. 1983). Plaintiff need not await the consummation of the threatened injury to obtain preventive
relief. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979); Anderson v.
Hooper, 498 F. Supp. 898 (D.N.M. 1980). Indeed, any assertion to the contrary would constitute a
conceptual rejection of provisional remedies available to a party who has sustained or is in

1 immediate danger of sustaining a direct injury. Flast v. Cohen, 392 U.S. 83 (1968); Babbitt, supra,
2 442 U.S. at 298.

3 In circumstances similar to the facts herein, many federal courts have issued temporary
4 restraining and seizure and impoundment orders to enjoin various Doe Defendants from
5 manufacturing, distributing, selling and otherwise commercially exploiting infringing merchandise
6 associated with the tours of musical performing artists. In each case, an ex parte order was issued
7 against unidentified defendants, originally designated as Does, to prevent the sale and to seized of
8 merchandise bearing the names, logos and trademarks of artists represented by the plaintiff in
9 those actions. See Counsel Cert. and Exhs thereto.

11 In Billy Joel v. Does, supra, held that although the court does not favor unknown
12 defendants and may not have in personam jurisdiction, in the case of Bootleggers:

13 I am convinced that the requested injunction [and seizure order] should issue in the
14 present case. ... The problem of the defendants' identifies is met, I believe, by the fact
15 that copies of the summons, complaint, and restraining order itself will be served on all
16 persons from whom Billy Joel merchandise is seized on the night of the concert. These
17 parties will be asked to reveal their names so that they can be added as parties to the
18 law suit. [* * *] [w]ere the injunction to be denied, plaintiffs would be without any
19 legal means to prevent what is clearly a blatant infringement of their valid property
20 rights. 499 F. Supp. at 792.

21 If courts failed to recognize "Doe" Defendants, clever wrongdoers could (and will) easily
22 conceal their true identities until a statute of limitations run out, or, as here, they could leave
23 Plaintiff with no practical recourse for violations of their rights. Moon Records, 217 U.S.P.Q. 39
24 (N.D. Ill. 1981) ("the problem regarding the identity of the defendants will be met by requiring
25 copies of the complaint and the [order] to be served upon all persons from whom infringing
26 merchandise is seized..."). Consistent with F.R.C.P Rule 4(j), Plaintiff's process servers will make
27 every reasonable effort to further identify the Defendants for purposes of amending the pleadings.

28 It has been the repeated experience of Plaintiff and Plaintiff's counsel that most, if not all,
of the Bootleggers are persons extremely experienced with selling Infringing Merchandise. Most

1 are not neophytes, but rather somewhat sophisticated businessmen who operate in stealth to thwart
2 the legitimate rights of Plaintiff. Bootleggers travel around the country from venue to venue
3 selling their counterfeit wares. Many defendants even have the audacity to print the entire tour
4 schedule of Group on the back of the bootleg T-shirts which they sell. Any person found selling a
5 shirt bearing the entire tour schedule can fairly be said to be "aiding and abetting, or acting in
6 active concert with," served Defendants who have sold similar shirts at other concerts.

7
8 **V. A MULTI DISTRICT TOUR INJUNCTION AND ORDER OF SEIZURE**
9 **ENJOINING DEFENDANTS' CONDUCT ACROSS THE COUNTRY IS BOTH**
10 **NECESSARY AND PROPER.**

11
12 **A. Courts Have Issued Nationwide Injunctions and Seizure Orders.**

13 It has been shown by the declaration submitted in this matter that the sale of Infringing
14 Merchandise by the Defendants is in violation of the Lanham Act and causes deception to the
15 public. As such, all remedies under the Lanham Act are appropriate and have regularly been
16 exercised by many courts across the country in factual and legally identical circumstances. The
17 multi-district relief sought in Plaintiff's request for a preliminary injunction and order of seizure
18 has been granted in numerous cases in other jurisdictions across the country. See Counsel Cert. It
19 is specifically authorized by statute. Section 1116 provides for enforcement and service "anywhere
20 in the United States where [Defendants] may be found." 15 U.S.C. § 1116(a). See Counsel Cert.
21 and Donnell Decl. Further, F.R.C.P. Rule 65 provides that an order granting injunctive relief binds
22 the named parties, those related to the named parties and those in active concert or participation
23 with them who receive actual or other notice of an order even if beyond the territorial limits of the
24 district court enjoining said activity. F.R.C.P. 65(d). See, Nintendo of America v. NTDEC, 822 F.
25 Supp. 1462, 1466, 1468 (D. Ariz. 1993) (the Court issued a worldwide injunction requiring
26 defendants to deliver up infringing goods for destruction); Golden Door, Inc., supra, 437 F.Supp.
27 968 ("plaintiff's market area, and hence, sphere of reputation, are nationwide. Accordingly, it is
28 entitled to nationwide protection against confusion and dilution. The scope of the injunction must

1 therefore be nationwide”); The Five Platters, Inc. v. Purdie, 419 F. Supp. 372 (D. Md. 1976) (“the
2 Lanham Act provides for nationwide enforcement of injunctions”); Benson v. Paul Winley Record
3 Sales Corp., 452 F. Supp. 516 (S.D.N.Y. 1978).

4 The Propriety of such a multi-district order has long been established by numerous district
5 courts throughout the country, as explained herein and at length by the 5th Circuit in
6 Waffenschmidt v. Mackay, 763 F.2d 711 (1985).

7
8 Non-parties who reside outside the territorial jurisdiction of a district court may be
9 subject to that court's jurisdiction if, with actual notice of the court's order, they
10 actively aid and abet a party in violating that order. This is so despite the absence
11 of other contacts with the forum. [* * *] Courts do not sit for the idle ceremony of
12 making orders and pronouncing judgments, the enforcement of which may be
13 flouted, obstructed, and violated with impunity, with no power in the tribunal to
14 punish the offender. [Federal] courts, equally with those of the state, are possessed
15 of ample power to protect the administration of justice from being thus hampered
16 or interfered with. *Id.*, at 714, 716 (citations omitted).

17 Two decisions address issues raised by this action. SKS Merch, LLC v. Barry, *supra*, and
18 Plant v. Does, 19 F. Supp.2d 1316 (S.D. Fla. 1998). In both cases, Plaintiffs sought nationwide
19 injunctions and seizure orders to enforce the rights of artist during a nationwide tour. The district
20 court in SKS Merch, after careful review the Plant decision, as well as other adverse decisions,³
21 decided to grant a nationwide injunction to seize unauthorized goods on essential three grounds.

22 First, the Court in SKS Merch noted that Plaintiff in Plant failed to attempt to identify any
23 defendants. As set forth in the Donnell Declaration and the Certificate of Counsel, Defendants will
24 appear at a tour of this magnitude, and have always appeared in all past actions filed in this Circuit
25 (and well as nationwide), and, more specifically appeared at the *very first concert of the prior*

26
27 ^{3/} Two other known cases where similar relief was denied: Brockum Intern'l v. Various
28 John Does, 551 F. Supp. 1054 (E.D. Wisc. 1982) (decided soon after enactment of § 1116 (d)
stating these issues are best left to local authorities); Brockum Co. v. Various John Does, 685 F.
Supp. 476 (E.D. Pa. 1988) (decided shortly after the 1116 took effect: the Court granted the local
TRO and order of seizure, but declined to issue a national order because plaintiff had made an
adequate showing that (1) the order requested would be carried out properly, and (2) it was the
only realistic way to control the problem). For reasons set forth in SKS Merch and in the
Certificate of Counsel, these cases should not be controlling.

1 *Metallica* tours. See Certificate of Counsel, and Exhibits thereto. Experience has shown these
2 Defendants do appear at these types of concerts and to require Plaintiff to wait would seriously
3 impede its rights. The merchandise will be taken and a bond will be posted. The harm to Plaintiff,
4 however, is irreparable. The SKS Merch Court recognized what has been the modus operandi of
5 these Bootlegger Defendants – that they fail to carry identification, they are well aware the goods
6 they sell are unauthorized, and they flee when approached by authorized individuals. Id., at 849.
7 The person who ends up suffering is that of the plaintiff merchandiser, who has no other recourse.
8 Although the plaintiff in SKS Merch waited for several performances before seeking injunctive
9 relief, Plaintiff here requests that it should not wait so long; with each performance it will be
10 harmed, the bootlegging will continue and the only one who will gain, and gain momentum, will
11 be the defendants.
12

13 Second, the Court in Plant was concerned that no “procedural means” existed to issue and
14 enforce the injunction. The Court in SKS Merch held section 1116 permits such injunctions. See
15 also above.
16

17 Third, concerns about service raised in Plant are addressed here as they were in SKS
18 Merch; their names may be added after service has taken effect (if preferably legitimate ones are
19 provided). Because the goods are the same from location to location, this represents a concerted
20 effort and therefore they are on notice.
21

22 **B. The Court Will Have Jurisdiction Over The Defendants and Those Acting In
23 Concert With Them.**

24 Once the Defendants have been served at the concerts, this Court acquires personal
25 jurisdiction over them. F.R.C.P. Rule 4. See John Hancock Mutual Life Ins. Co. v. Central Nat'l
26 Bank, 555 F. Supp. 1026 (N.D. Ill. 1983) (service of process under Rule 4 confers jurisdiction on
27 this Court even with respect to John Doe defendants). At the hearing on the preliminary
28 injunction, this Court should enjoin all the Bootlegging activities during the entirety of the

1 Group's nationwide tour. Absent such a nationwide injunction, complete relief here would be
2 impossible to achieve; separate orders would have to be sought at every location on the tour. As a
3 practical matter, such a series of lawsuits is impossible, and would in any event result in a terrible
4 waste of the parties' and the federal courts' resources. As a result, this Court, and many others,
5 have issued nationwide preliminary injunctions and seizure orders to stop bootlegging. See
6 Counsel Cert. and Donnell Decl. In addition, 15 U.S.C. § 1116, specifically provides for
7 enforcement of this Court's orders in other districts.
8

9 The nationwide injunction will be effective against all persons involved in Defendants'
10 Bootlegging operation. Pursuant to F.R.C.P. Rule 65, an order granting injunctive relief will bind
11 not only the actual named parties to an action, but also "their officers, agents, servants, employees
12 and attorneys and those persons in active concert or participation with them who receive actual
13 notice of the Order by personal service or otherwise." F.R.C.P. Rule 65(d). Vuitton, Et Fils, S.A.
14 v. Carousel Handbags, 362 F.2d 339, 344 (9th Cir. 1979) (a court may bind parties to preserve its
15 ability to render a judgment in a case over which it has jurisdiction); McGraw Edison Co. v.
16 Performed Line Products, 362 F.2d 339, 344 (9th Cir.) cert. denied, 385 U.S. 919 (1966) (non-
17 parties may be found in contempt of an injunction if they have actual notice of the Order, and aid
18 and abet in its violation). Thus, the Court may enjoin all participants in the Bootlegging operation
19 of which served Defendants are members.
20

21 The Bootlegging operation to be enjoined here is a concerted action of many individuals
22 acting together with the Defendants to be named in the preliminary injunction. The nature and
23 quality of merchandise seized indicates a concerted operation. Indeed, for each tour of an artist,
24 Plaintiff's employees frequently observe the same individuals selling Infringing Merchandise at
25 each of the artist's tour dates. The quantities of such merchandise indicates a large manufacturing
26 operation or operations that distribute its goods at numerous, if not all, locations on previous tours.
27 Identical shirts have been found at several locations on other tours, indicating that the Bootleggers
28

1 go from one location on the tour to another to sell their merchandise. Therefore, any relief granted
2 to Plaintiff must continue throughout the tour and operate against these Defendants in order to be
3 effective. Donnell Decl. ¶¶ 11-20.

4 Each time there is a seizure pursuant to the order, the requirement of notice to the person
5 against whom the relief operates will be satisfied. Once the preliminary injunction is issued it will
6 be served on anyone selling Infringing Merchandise on the tour. They will therefore have notice
7 of the injunction at the concert and when their goods are seized. A nationwide preliminary
8 injunction against Defendants, those acting in concert with them and others is appropriate and
9 required if Plaintiff is to obtain relief from Defendants' concerted unlawful acts.
10

11 **C. The Order Binds Those Who Participate in the Defendants Unlawful Conduct**
12 **Beyond the Territory of this Court.**

13 By an appropriate bond placed with this Court by Plaintiff, Defendants always have the
14 right to be heard and are guaranteed a source of recovery for any wrongdoing whatsoever to them.
15 The only effective way for Plaintiff to obtain relief is to have this Court enter a preliminary
16 injunction and seizure order, the mandate of which will be respected across this country. If the
17 relief is not granted, Defendants will continue to use the names and goodwill associated with the
18 Group and Plaintiff who has spent many years, and vast sums of money to cultivate.
19

20 It is believed that all seizures will be effected upon Bootleggers selling substantially
21 identical shirts throughout the country and will be through a concerted operation. See Donnell
22 Decl. However, in the unlikely event that any individuals spontaneously decide to print their own
23 "homemade" shirts, such individuals would be violating Plaintiff's rights and would be subject to
24 suit in any event. Seizure of such shirts, if any existed, would be virtually identical to seizure
25 under a local order issued in that district. Such a local order would not afford them any greater
26 notice or due process. Moreover, requiring Plaintiff to continue to go from court to court
27 throughout the tour would be to impose a great burden upon both Plaintiff and the judicial
28

1 resources of the federal courts. However, to avoid even a theoretical question, Plaintiff will waive
2 any objections to venue and transfer the action. Indeed, as to the national seizure orders granted to
3 Plaintiff, no defendant bootlegger has appeared in any action or has made any challenges to any
4 bond posted by Plaintiff. See Counsel Cert.

5 **D. Defendants Have A Full And Fair Opportunity To Be Heard.**

6 Although it is not known at this time whether any Defendants will appear before the Court on
7 the return date to oppose the requested relief, given our experience, it is doubtful that any will do
8 so. However, they certainly have that opportunity. Plaintiff would welcome such appearances for
9 it would permit it to identify the bootleggers, take discovery from them, discover their printing
10 sources and pursue them for money damages. The proposed Order will provide that a person who
11 wishes to challenge the seizure has the opportunity to file a motion with this or any other Court
12 requesting a hearing within a certain number of days subsequent to the seizure. This gives any
13 defendant a full and fair opportunity to be heard, while the merchandise, the critical piece of
14 evidence, is preserved. However, without the proposed nationwide injunction and seizure order,
15 Plaintiff will be forced to file separate civil actions in the United States District Courts around the
16 country at an estimated expense of well over \$600,000.00 in legal fees and costs. Thus, it would
17 be inequitable to place such an enormous and unnecessary burden on Plaintiff whose rights are
18 clear and who evidence a remedy that works. Based on the foregoing, Plaintiff respectfully
19 requests that its application be granted in all respects.
20
21

22 **IV. CONCLUSION**

23 Based on the foregoing, Plaintiff respectfully requests that its application be granted in all
24 respects.
25

26 Dated: August 29, 2011

Respectfully submitted,

27 By: /s/ Cara R. Burns, Esq. _____

28 Cara R. Burns, Attorneys for Plaintiff.