

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

BRAVADO INTERNATIONAL GROUP
MERCHANDISING SERVICES, INC.,
MASCOTTE HOLDINGS, INC. and LIVE
NATION MERCHANDISE, INC.,

Plaintiffs,

v.

JOHN DOES 1-100, JANE DOES 1-100,
and XYZ COMPANIES 1-100,

Defendants.

Case No.:

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR TEMPORARY RESTRAINING ORDER, ORDER
OF SEIZURE AND PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Defendant bootleggers (“Defendants”), and those acting in concert with them, will sell or attempt to sell bootleg T-shirts and other bootleg merchandise at concerts of the musical performers publically known as KANYE WEST and JAY-Z (the “Artists”) during the Artists’ current WATCH THE THRONE concert tour (the “Tour”). Defendants are present, or almost certainly will be present, in this district to sell, or attempt to sell, infringing merchandise in connection with the Artists’ concerts at The Izod Center in East Rutherford, New Jersey, on November 5 and 6, 2011. The bootleg merchandise will bear the Artists’ names, images, likenesses, logos and trademarks without legal authority. Indeed, plaintiffs have the exclusive right to sell and license the sale of merchandise bearing the Artists’ trademark in connection with concerts on the Tour.

As will be explained in greater length below, plaintiffs Bravado International Group Merchandising Services, Inc. (“Bravado”), Mascotte Holdings, Inc. (“Mascotte”) and Live Nation Merchandise, Inc. (“Live Nation”) (collectively “Plaintiffs”) are entitled to a temporary restraining order, an order permitting seizure of the bootleg merchandise, and ultimately a preliminary injunction prohibiting these illegal acts. By using the Artists’ names, images, likenesses, logos and trademarks without authorization defendants and their cohorts are violating section 43(a) of the Lanham Act (false designations of source and origin and unfair competition); N.J.S.A. § 56:4-1 (the New Jersey Fair Trade Act); N.J.S.A. § 56:8-2 (The New Jersey Consumer Fraud Act) and common law prohibitions against unfair competition. Indeed, such an application was granted by this Court on behalf of plaintiff Bravado earlier this year for the New Kids on the Block and the Backstreet Boys joint tour, and in 2009 for Nickelback’s concert tour and in 2008 for the New Kids on the Block concert tour. See Declaration of Ronald L. Israel, Esq. as Exhibits A-C.

Defendants can assert no defense to Plaintiffs' claims. Moreover, not only is each bootleg sale irretrievably lost to Plaintiffs, but the damage to Plaintiffs' and the Artists' goodwill through the distribution of inferior merchandise cannot be calculated or remedied. The only way that these bootleggers can be stopped is through issuance of a temporary restraining order and order of seizure followed by a preliminary injunction.

The public interest would be served by issuance of the relief requested, since the public interest generally favors the protection of legitimate property and contractual rights. In addition, the relief requested is the only method of protecting the public from confusion regarding inferior merchandise, including the infringing merchandise, which bears a false designation of origin. Such merchandise is created and sold by individuals accountable to no one, whether for payment of royalties, income or sales taxes, or for quality control. There is no potential harm to any legitimate interest of Defendants or any other persons if the requested relief is granted.

STATEMENT OF FACTS

Plaintiff Bravado is a corporation duly organized under the laws of the State of California with its principal place of business in New York. Plaintiff Mascotte is a corporation duly organized under the laws of the State of California. Mascotte has the exclusive trademark rights to the name, likeness and merchandise of the musical performer known as KANYE WEST, having obtained such rights from Kanye West. Plaintiff Live Nation is a corporation duly organized under the laws of the State of Delaware. Live Nation has the exclusive merchandising rights to the name, likeness and trademarks of the musical performer known as JAY-Z, having obtained such rights by contract from the trademark owner, Shawn Carter, who is publically known as Jay-Z ("Jay-Z").

The musical performer Kanye West, has used the KANYE WEST names and trademark since the 1990s to identify himself as a music artist, rapper, singer, songwriter, producer, actor,

artist, performer and entertainer in all phases of the entertainment industry and to distinguish himself from all other such artists. Kanye West has authorized Mascotte to grant to Bravado the **exclusive right** to distribute tour merchandise bearing the Kanye West's name, logos, likeness, images, artwork and trademarks on and in connection with various types of music-related merchandise sold and offered for sale in the vicinity of the Kanye West's concert performances on his current WATCH THE THRONE joint concert tour with the musical artist publically known as Jay-Z (the "Tour"). Kanye West and Jay-Z are referred to herein collectively as the "Artists".

The musical performer Jay-Z has used the JAY-Z trademark since the 1990s to identify himself as a music artist, rapper, singer, songwriter, producer, actor, artist, performer and entertainer in all phases of the entertainment industry and to distinguish himself from all other such artists. Jay-Z has authorized Live Nation as to grant to Bravado the **exclusive right** to distribute tour merchandise bearing Jay-Z's name, logos, likeness, images, artwork and trademarks on and in connection with various types of music-related merchandise sold and offered for sale in the vicinity of the Tour.

In other words, by license agreement between Bravado, Mascotte, Kanye West, Jay-Z and Live Nation Entertainment, Inc., **Bravado has been granted the exclusive rights** to distribute tour merchandise bearing the Artists' names, logos, likenesses, images, artwork and trademarks (collectively, the "Trademarks") on and in connection with various types of music-related merchandise sold and offered for sale in the vicinity of the Artists' concert performances on the Tour. The merchandise that will be offered for sale by Bravado at the Artists' concerts includes, without limitation, tour and program books, T-shirts, jerseys, sweatshirts, hats, stickers, accessories, posters and other merchandise (collectively, the "Tour Merchandise").

The Tour commenced in Atlanta, Georgia with performance on October 28 and 29, 2011. The majority of the Tour will take place in the United States and will include performances at major venues throughout the United States, including the Izod Center in East Rutherford, New Jersey on November 5 and 6, 2011 and at Boardwalk Hall in Atlantic City, New Jersey on November 19, 2011 (the “New Jersey Shows”). The United States portion of the Tour will conclude no earlier than December 16, 2011 in Tacoma, Washington.

Based on their experiences during prior tours, and given the Artists’ huge popularity, Plaintiffs believe that defendant bootleggers, and those acting in concert with them, will sell, and offer for sale, Bootleg Merchandise at the concerts during the Tour, including at the New Jersey Shows. At the Artists’ concerts on October 28 and 29, 2011 in Atlanta, Georgia and at the concert in Greensboro, North Carolina on October 30, 2011, Gary Gardner, Bravado’s tour manager for the Tour, observed bootlegging activities including individuals attempting to sell bootlegging merchandise that was similar to a legitimate, authorized t-shirt being offered for sale by the exclusive merchandiser. Mr. Gardner obtained samples of the bootleg merchandise. (See Certification of Gary Gardner at ¶ 4).

Based upon the immense popularity of the Artists, and upon the prior experiences of the Plaintiffs, the area surrounding the New Jersey concert venues, and as well as all other concert venues on the Tour, will be an impromptu vending site for professional bootleggers offering illegal merchandise for sale bearing the Artists’ trademarks. In order to protect its exclusive rights, Plaintiffs seek the injunctive relief described herein.

ARGUMENT

POINT I

THE SALE OF "BOOTLEG" MERCHANDISE VIOLATES PLAINTIFFS' EXCLUSIVE RIGHTS

Plaintiffs have the exclusive right to sell and license the sale of merchandise bearing the Artists' names, images and logos on the Artists' current Tour. The sale of counterfeit merchandise by Defendants violates these rights and must be enjoined. In addition, parties committing acts of trademark infringement and counterfeiting cause injury to the public by confusing consumers as to the source or origin of goods in the marketplace, providing another rationale for enjoining Defendants' actions. See e.g., Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 205 (2d Cir. 1979) ("The trademark laws are designed not only to prevent consumer confusion but also to protect the synonymous right of a trademark owner to control his product's reputation.").

A. Defendants Are In Violation Of Section 43(a) Of The Lanham Act

Courts, including this Court, have repeatedly held that the use of registered and unregistered names, images and logos of musical artists by bootleggers violates section 43(a) of the Lanham Act, 15 U.S.C. §1125(a). See temporary restraining orders and preliminary injunction orders attached to the accompanying Declaration of Ronald L. Israel, Esq. as Exhibits A through N and the cases listed in Appendices A and B attached hereto; see also SKS Merch, LLC v. Barry, 233 F. Supp. 2d 841, 847-848 (E.D. Ky. 2002) (unauthorized sale of merchandise bearing music artist Toby Keith's photograph, image, name, likeness, and/or logos violated section 43(a) of the Lanham Act); Winterland Concessions Co. v. Macintosh, Civ. A. No. 89-8342, 1992 WL 170897 (E.D. Pa. July 14, 1992) (sales of bootleg T-shirts bearing the names of various rock artists violates §43(a)); Billy Joel v. Various John Does, 499 F. Supp. 791, 792

(E.D. Wisc. 1980) (sale of unauthorized T-shirts bearing the name of the artist Billy Joel violates section 43(a) of the Lanham Act).

Section 43(a) is designed to prevent a wide range of conduct involving both registered and unregistered names, images and logos. Section 43(a) provides in pertinent part:

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which . . . is likely cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship or approval of his or her goods, services or commercial activities by another person, . . . shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

This broad prohibition against “unfair competition” covers not only confusion as to source or sponsorship between Defendants’ goods and Plaintiffs’ goods, but it also prohibits the misappropriation of the efforts of others. McKenney and Long, Federal Unfair Competition: The Lanham Act, §2:04 (1989). Section 43(a) codifies the principle enunciated by the Supreme Court in International News Service v. Associated Press that “a party cannot reap where it has not sown.” 248 U.S. 215 (1918); see also RH. Donnellev Corp. v. Illinois Bell Tel. Co., 595 F. Supp. 1202, 1206 (N.D. Ill. 1984) (“those who invest time, money and energy into the development of a product and its accompanying good will should be allowed to reap the advantages of their investment.”).

The elements of the claim for violation of Section 43(a) are: (1) that the mark is valid and protectable, and (2) that the defendant’s use of the mark is likely to cause confusion among the consuming public. Two Pesos, Inc. v. Taco Cabana, 505 U.S. 763, 769 (1992). This test is clearly met here. The Artists’ names, images and logos are strong protectable marks. Using the

traditional scale of marks from the generic to the arbitrary, Plaintiffs' marks are arbitrary: they do not describe the goods to which they are attached. Accordingly, they are entitled to the highest protection.

The likelihood of confusion is measured by the standard enunciated by Judge Friendly in Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961). Under this standard the Court should consider the following factors in determining the likelihood of confusion:

the strength of the mark, the degree of similarity between the marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.

Polaroid Corp., 287 F.2d at 495.

Judged by these factors, there is no defense to Defendants' use of the Artists' Trademarks. The Artists' names, images and logos are very strong marks. Defendant bootleggers will be copying these trademarks and images on this infringing merchandise and selling such merchandise at the Artists' concerts. The same items -- T-shirts and hats, together with other typical concert merchandise -- will be offered for sale by both the Plaintiffs and the bootleggers in the same areas on the same dates. Concertgoers will not "shop around," but will make purchases wherever convenient on their arrival at and departure from the concerts. Moreover, where, as here, Defendants are aware of the Plaintiffs' use of the marks, Defendants' intent is presumed to be in bad faith. See AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 344 (9th Cir. 1979) (deception may be presumed from the knowing adoption of a similar mark). Intentional copying of the Artists' mark makes a likelihood of confusion a certainty.

Defendants have manufactured bootleg merchandise for the sole purpose of selling it at the concert venues. It is beyond dispute that Defendants have utilized, and will continue to

knowingly utilize, the Artists' protected Trademarks to deceive the public and create the appearance that Defendants' illegal merchandise is sponsored by or originated with the Artists and Plaintiffs. This is precisely the type of conduct Section 43(a) was designed to prevent.

B. Defendants Are Violating Plaintiffs' Right Of Publicity

Under New Jersey law, the "right of publicity signifies the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for commercial benefit." McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994); Prima v. Darden Restaurants, Inc., 78 F. Supp. 2d 337, 347 (D.N.J. 2000). The common law safeguards Plaintiffs' right to commercially exploit the name and likenesses of the Artists. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-76 (1977); see generally Winniger, Right of Identity; Right of Publicity and Protection for a Trademark's Persona, 71 Trademark Rptr. 193 (1981).

Plaintiffs have the **exclusive** right to control the commercial value of the name and likeness of the Artists on their current concert Tour and to prevent others from exploiting that value without permission. Defendants' use of the names, likenesses, logos and Trademarks of the Artists is undertaken to sell a product -- usually T-shirts or similar goods -- for commercial purposes and without any permission from Plaintiffs. While trademark laws protect the public from fraud, see McCarthy, Trademarks and Unfair Competition, Lawyers Cooperative Publishing Co., 1983, § 2, the right of publicity protects the interest of the individual in the exclusive use of his own identity. Restatement of Torts (Second), § 652(c), Tentative Draft No. 13 (1967) (emphasis added). The Right of Publicity may be and was validly transferred from the Artists to Plaintiffs, and Plaintiffs have standing to bring this action for violation of the Right of Publicity transferred to them. Winterland Concessions Co. v. MacIntosh, 1992 WL 170897, at

*10 (E.D. Pa. July 14, 1992) (holding that unauthorized printing on T-shirts of names, trademarks and likenesses of dozens of musical groups was a violation of the right of publicity).

The Plaintiffs have a very strong likelihood of success on a right of publicity claim. The recordings and personal appearances of the Artists enjoy the highest commercial success and popularity. Moreover, the Artists and Plaintiffs have embarked on a controlled program of merchandising. The injunctive relief sought by Plaintiffs is against the unauthorized appropriation of these rights and the unauthorized application of the Artists' names and likenesses to novelty merchandise.

C. Defendants Are Engaging In Unfair Competition

The common law prohibits unfair competition. See International News Service v. Associated Press, 248 U.S. 215 (1918) (“a party cannot reap where it has not sown.”). Unfair competition is demonstrated where the defendant, without permission, uses the names, likeness or trademarks owned or licensed to a plaintiff. Boston Professional Hockey Ass'n v. Dallas Cap and Emblem Mfg., 510 F.2d 1004, 1010 (5th Cir. 1974) (use of another's name or trademark is unfair competition). Therefore, common law unfair competition is evident in the instant case.

New Jersey law also prohibits unfair competition. See Duffy v. Charles Schwab & Co., 123 F. Supp. 2d 802, 815 (D.N.J. 2000). Specifically, New Jersey's unfair competition statute states “[n]o merchant, firm or corporation shall appropriate for his or their own use a name, brand, trade-mark, reputation or goodwill of any maker in whose product such merchant, firm or corporation deals.” N.J.S.A. § 56:4-1. New Jersey courts have described acts constituting unfair competition as follows:

the means used are dishonest, or that, by imitation of name or device, there is a tendency to create a confusion in trade, and enable the seller to pass off upon the unwary his goods as those of another, and thereby deceive the purchaser; or that, by false representation, it is intended to misled the public, and induce them

to accept a spurious article in the place of one they have been accustomed to.

Squeezit Corp. v. Plastic Dispensers, 31 N.J. Super. 217, 221-22 (App. Div. 1954); see also N.J. Optometric Ass'n v. Hillman-Kohan Eye-glasses, Inc., 144 N.J. Super. 411 (Ch. Div. 1976), aff'd, 160 N.J. Super. 81 (App. Div. 1978); Wellness Publ'g v. Barefoot, 2008 WL 108889, at *19-21 (D.N.J. Jan. 9, 2008) (describing in detail New Jersey's common law of unfair competition).

The aforesaid acts by Defendants as described above constitute the appropriation of Plaintiffs' names, brands, trademarks, reputations and goodwill in violation of New Jersey unfair competition law and the New Jersey Fair Trade Act.

D. Defendants Have Violated The New Jersey Consumer Fraud Act

The New Jersey Consumer Fraud Act states in part that “the act . . . by any person of any unconscionable commercial practice, deception, fraud . . . [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice” N.J.S.A. § 56:8-2. The aforesaid acts by Defendants constitute unconscionable commercial practices, deception, fraud, and misrepresentation in connection with the sale of merchandise in violation of the New Jersey Consumer Fraud Act.

POINT II

**PLAINTIFFS ARE ENTITLED TO A TEMPORARY
RESTRAINING ORDER, AN ORDER OF SEIZURE, AND A
PRELIMINARY INJUNCTION**

This action is aimed at bootleggers -- groups of individuals who manufacture counterfeit merchandise and sell it throughout the Artists' Tour. The only available remedy which can protect Plaintiffs and the Artists is injunctive relief, including an order of seizure.

A. A Temporary Restraining Order Is Appropriate

Under Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order (“TRO”) may be granted if there is a likelihood of success on the merits and irreparable injury has been shown. A TRO may be granted ex parte with sufficient reason. As explained above in Point I, Plaintiffs have demonstrated a likelihood of success on the merits. Defendants have violated Plaintiffs’ federal trademark rights and have also violated New Jersey’s unfair competition, consumer fraud and right of publicity laws.

Further, as explained in the accompanying declarations of Gary Gardner, Alan Rebhun and Ronald Israel, Esq. Plaintiffs have established that consumers are likely to be confused by Defendants’ use of Plaintiffs’ Trademarks and by the bootleg merchandise that is similar to, but a lesser quality than the legitimate merchandise. “[I]rreparable harm is often presumed when a preliminary injunction is requested to enjoin a violation of the Lanham Act. Simply fulfilling the requirements of the statute or, in other words, fulfilling the first factor for an injunction to issue—showing a strong likelihood of success on the merits—is all that is needed for the Court to issue an injunction.” SKS Merch, 233 F. Supp. 2d at 845 (citations omitted). “Thus, in the context of a Lanham Act claim, a showing of likelihood of confusion as to sponsorship, approval, or association will itself establish the requisite likelihood of success on the merits and a risk of irreparable harm.” Id. Additionally, such confusion injures Plaintiffs’ goodwill because purchasers are likely to attribute the poor quality of the bootleg merchandise to the Plaintiffs and the sales of bootleg merchandise have a substantial adverse effect on Plaintiffs’ existing and projected interstate business. Plaintiffs would not be adequately compensated by money damages, and only injunctive relief will provide an adequate remedy. Plaintiffs have, therefore, satisfied the requirements for injunctive relief.

B. An Order Of Seizure Is Appropriate

In addition to the injunctive relief sought, it is necessary to seize all the subject goods manufactured, sold and/or distributed for sale by Defendants in order to render complete relief herein, prevent irreparable injury flowing to Plaintiffs as a result of Defendants' course of conduct in counterfeiting these items, and prevent these items from being destroyed or transferred to parties outside this litigation. Courts have repeatedly issued TROs and orders of seizure in advance of concerts to prevent the sale of bootleg merchandise. See e.g., Exhibits A through N to the Israel Declaration and the cases listed in Appendices A and B to this Memorandum.¹ This procedure is specifically authorized by statute. For example, section 44 of the Lanham Act (15 U.S.C. § 1116) specifically provides for injunctions "upon such terms as the court may deem reasonable" to prevent the infringement of registered trademarks and violations of section 43(a). 15 U.S.C. § 1116(a); see also 15 U.S.C. § 1118 (a court has the authority to order delivery, seizure and destruction of infringing counterfeit merchandise in violation of section 43(a) of the Lanham Act); 15 U.S.C. § 1126 (remedies for violation of registered trademarks also available for acts of unfair competition).

In virtually all of the cases cited herein where a wholly ex parte restraining order was awarded in the context of John Doe lawsuits, the courts have granted the ancillary remedy of seizure. In Moon Records v. Various John Does, 217 U.S.P.Q. (BNA) 46, 47-48 (N.D. Ill.

¹ A minority of courts have been reluctant to grant nationwide ex parte injunctions and seizure orders against John Doe bootleggers. See Plant v. Various John Does, 19 F. Supp. 2d 1316 (S.D. Fla. 1998); Brockum Co. v. Various John Does, 685 F. Supp. 476 (E.D. Pa. 1988); Brockum Int'l, Inc. v. Various John Does, 551 F. Supp. 1054 (E.D. Wis. 1982); Rock Tours, Ltd. v. Various John Does, 507 F. Supp. 63 (N.D. Ala. 1981). However these cases are factually distinguishable from the case at hand because in these cases the plaintiffs could not explain why there were unable to identify the defendants. Here it is quite clear that Plaintiffs are unable to identify the defendants because they flee when approached by Plaintiffs' staff or provide false names. See e.g. SKS Merch, supra, 233 F. Supp. 2d at 848-849 (distinguishing these cases).

1981), the court recognized that immediate and irreparable injury would ensue before defendants could be given notice and an opportunity to be heard and, therefore, authorized the United States Marshal “to seize and impound any and all infringing merchandise . . . in vicinity of the International Amphitheater, Chicago, Illinois.” Similarly, in SKS Merch, *supra*, 233 F. Supp. 2d 841, both the TRO and preliminary injunction issued by the court provided for the seizure of any infringing merchandise sold in vicinity of a musical performer’s concerts.

Moreover, under the traditional standard of Rule 65 of the Federal Rules of Civil Procedure, seizure orders should be granted. As described above, Plaintiffs have demonstrated a strong likelihood of success on the merits. In cases of trademark infringement and unfair competition such as this, the fact that there is a likelihood of confusion constitutes irreparable injury as a matter of law sufficient to satisfy the requirements of Rule 65(b)(1). Matter of Vuitton et Fils S.A., 606 F.2d 1, 4-5 (2d Cir. 1979). Absent injunctive relief, in advance of the bootleg sales, the bootleg sales will occur and the Defendants will disappear, making it impossible to remedy this ongoing violation of Plaintiffs’ rights.²

In Vuitton, the Second Circuit acknowledged that complete injunctive relief must be accorded to parties who face the anomaly whereby the products subject to the injunction may be transferred or destroyed prior to the enforcement of the injunction by a court of competent jurisdiction. The supporting declarations demonstrate that granting of the temporary restraining order and order of seizure would appear not only appropriate, but in fact are imperative in order for Plaintiffs to obtain any real remedy. While notice has traditionally been considered a part of procedural due process, the Supreme Court has recognized that “there may be cases in which a

² There is no harm to the defendants from the issuance of the injunction - the proposed order only authorizes the seizure of merchandise that violates the law.

creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.” Fuentes v. Shevin, 407 U.S. 67, 93 (1972).

C. A Temporary Restraining Order and Order of Seizure, Without Notice, Are Available To Enjoin Activities Of Persons Whose Identities Are Unknown and Where There is a Significant Risk of Destruction of Property

The circumstances demonstrate that Plaintiffs are entitled to an order of seizure without notice to Defendants. Federal courts have repeatedly approved this ex parte procedure in cases, such as the present one, where there is a significant risk that the Defendant will hide or destroy the bootleg merchandise if given notice of the impending seizure. See, e.g., Vuitton v. White, 945 F.2d 569, 575-76 (3d Cir. 1991); Century Home Entertainment, Inc., 859 F. Supp. 636, 638 (E.D.N.Y. 1994). In fact, “the weight of authority around the country appears to favor the granting of ex parte seizure orders in trademark counterfeiting cases.” McCarthy on Trademarks and Unfair Competition, 4th Ed., J. Thomas McCarthy, § 30:34.

If Defendants receive notice before any seizure of the bootleg merchandise is attempted, there is a significant possibility that they will simply remove their merchandise to a secure location and wait until the next concert, saddling Plaintiffs with yet more needless expense and requiring constant investigative efforts. Thus, the requested ex parte seizure order is warranted here.

Plaintiffs also seek to move ex parte because they are attempting to stop the bootleg activities of Defendants whose identities are presently unknown. Indeed, the identities of the individual bootleggers will not be known until they are stopped and the goods seized, and even then the bootleggers often refuse to give their real identities. Rule 65 of the Federal Rules of Civil Procedure authorizes this Court to grant a temporary restraining order coupled with an order of seizure against the unidentified Defendants. Subsequently, after the Defendants are served and their infringing goods seized, the Defendants will be identified to the court by proof

of service (assuming they provide their true identities). The Court will then have grounds to preliminarily enjoin the Defendants, and those acting in concert with Defendants, for the remainder of the Artists' Tour. Federal courts throughout the country have enjoined John Doe bootleggers in this fashion. See SKS Merch, supra, 233 F. Supp. 2d 841; Exhibits A through N to the Israel Declaration and the cases listed in Appendices A and B to this Memorandum. In each of these cases, the action was commenced against John and Jane Doe defendants and a temporary restraining order and seizure order was issued. See also Moon Records v. Various John Does, 217 U.S.P.Q. (BNA) 46, 47 (N.D. Ill. 1981):

The problem regarding identity of defendants will be met by requiring copies of the complaint and this restraining order to be served on all persons from whom the infringing merchandise is seized on February 26, 27, 28 and March 1, 1981. These persons will be asked to reveal their names so that they can be added as parties to the lawsuit and appear in court to contest the seizures at the hearing on March 2, 1981. Moreover, [plaintiff] will be required to post a bond to cover any additional damages that may be incurred.

The temporary restraining order and order of seizure must not only issue against John and Jane Does, but must be issued without notice. As a practical matter, it is impossible to give notice to defendants whose identity is not yet known. Moreover, the Lanham Act specifically contemplates that a temporary restraining and seizure order against infringing merchandise may be had on ex parte application. 15 U.S.C. § 1116(d) authorizes an ex parte restraining order where, in addition to the traditional requirements for injunctive relief: (1) an order other than an ex parte seizure order is not adequate; (2) the applicant has not publicized the requested seizure; and (3) the person against whom seizure would be ordered would destroy or otherwise make inaccessible to the court the infringing materials. 15 U.S.C. § 1116(d)(4)(B).

Moreover, Rule 65(b) of the Federal Rules of Civil Procedure also permits the Court to grant the requested relief ex parte. As the court stated in Matter of Vuitton et Fils, S.A., 606 F.2d 1, 4-5 (2d Cir. 1979):

Assuming that all of the other requirements of Rule 65 are met, the Rule by its very terms allows for the issuance of an ex parte temporary restraining order when (1) the failure to issue it would result in “immediate and irreparable injury, loss or damage” and (2) the applicant sufficiently demonstrates the reason that notice “should not be required.” In a trademark infringement case such as this, a substantial likelihood of confusion constitutes, in and to itself, irreparable injury sufficient to satisfy the requirements of Rule 65(b)(1) Here, we believe that such a likelihood of product confusion exists. The allegedly counterfeit Vuitton merchandise is virtually identical to the genuine items. Indeed the very purpose of the individuals marketing the cheaper items is to confuse the buying public into believing that it is buying the true article.

While the defendants in the Vuitton cases could be identified, the bootleggers here are as yet unidentified. Here, the only effective remedy is an ex parte TRO and seizure order. Unless an injunction issues without notice, no injunction is possible: the identities of the Defendants will not be determined until the goods are seized. Moreover, even if notice was given, the Defendants would simply move their operations to avoid the injunction and the jurisdiction of this Court.

D. Plaintiffs Are Entitled To A Nationwide Preliminary Injunction

The illegal acts to be enjoined here are a concerted action of many individuals acting together. As demonstrated in the accompanying declarations, the Defendants in this action are manufacturing and distributing their infringing goods at various locations on the concert Tour. Identical bootleg T-shirts and other merchandise have been found at several locations at previous concerts of the Artists, indicating that the infringers go from one concert to another to sell their merchandise. Clearly, a nationwide preliminary injunction against Defendants and those acting

in concert with them is appropriate and required if Plaintiffs are to realize meaningful relief from Defendants' repeated and migratory infringing activity.

Nationwide injunctions are expressly authorized by the Lanham Act which provides that "Any such injunction granted upon hearing, after notice to the defendant, by any district court of the United States, may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found. . . ." 15 U.S.C.A. § 1116(a); see also SKS Merch, supra, 233 F. Supp. 2d at 850 (noting that federal courts have invoked the Lanham Act to grant nationwide injunctions). Once the Defendants have been served in this district, the Court acquires personal jurisdiction over them. Fed. R. Civ. Pro. 4. Each time there is a seizure pursuant to the preliminary injunction the requirement of notice to the person against whom the relief operates will be satisfied. Once the preliminary injunction is issued it will be served on anyone selling bootleg merchandise at concerts on the Tour. The bootleggers, therefore, will have notice of the injunction at the concert and when their goods are seized.³ Clearly, a nationwide preliminary injunction against Defendants and those acting in concert with them is appropriate and required if Plaintiffs are to realize meaningful relief from Defendants' bootlegging activity.

At the hearing on the preliminary injunction, this Court should enjoin all of Defendants' activities during the entire Tour. Absent such a nationwide injunction, complete relief here would be impossible to achieve. Plaintiffs would have to seek separate temporary restraining

³ To the extent that it is difficult or impractical for any of the bootleggers whose goods are seized to come to this district to contest the applicability of the injunction, Plaintiffs have no objection to that challenge being heard in a local federal court. Plaintiffs will waive any objections to the location of any action contesting the applicability of the preliminary injunction to a particular bootlegger.

orders at every location on the Tour. As a practical matter, such a series of lawsuits is impossible and cost-prohibitive, and would in any event result in a terrible waste of the resources of both the parties and of the federal courts.

The multi-district territorial scope of the requested preliminary injunction is fully within the court's authority. See Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., 747 F.2d 844, 850 (3d Cir. 1984) (affirmance of a District Court order enjoining activities that violated Section 43(a) of the Lanham Act would have nationwide effect). Professors Wright and Miller have stated that "there is no doubt that if the court has personal jurisdiction over the parties, it has the power to order each of them to act in any fashion or in any place." 11 Wright & Miller, Federal Practice and Procedure, § 2945 at 402. The same holds true for non-parties who act in concert with the parties. The many cases listed in Appendices A and B to this Memorandum, and to the Israel Declaration as Exhibits A through N attest that injunctions of this scope have been granted in Federal District Courts throughout the United States, including in this District.

It is well settled that an injunction issued by a federal district court having in personam jurisdiction operates continuously and perpetually upon parties to the action throughout the United States. Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451 (1932); Kesler v. Eldred, 206 U.S. 285, 288 (1907); Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co., 232 U.S. 413, 417 (1914). In Leman, the Supreme Court considered a contempt proceeding against a party to a permanent injunction granted in the District of Massachusetts. The Court held that a party to the injunction "could not escape the decree by removing from, or staying without, the District of Massachusetts Disobedience [of the injunction] constituted contempt of the court which rendered the decree, and was none the less contempt because the act was committed outside the district, as the contempt lay in the fact, not in the place, of the disobedience to the

requirement.” Leman, 284 U.S. at 451-52. Thus, the Court in Leman recognized the necessity of dispensing with the requirement that a court maintain physical control over a party to bind that party to a federal district court’s injunction. The Court labeled the federal district court’s extraterritorial injunctive binding power “one of the decencies of civilization that no one would dispute.” Leman, 284 U.S. at 454. The Court added:

The decree . . . bound the respondent personally. It was a decree which operated continuously and perpetually upon the respondent in relation to the prohibited conduct. The decree was binding upon the respondent, not simply within the District of Massachusetts, but throughout the United States.

Id. at 451; see also Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., 747 F.2d 844, 850 (3d Cir. 1984) (affirmance of a District Court order enjoining activities that violated Section 43(a) of Lanham Act would have nationwide effect, while affirmance only under the state claim would prevent Defendant’s activity only as it relates to the state).

The circuit courts have diligently enforced the extraterritorial power of the federal district courts. The Seventh Circuit has relied on Leman, noting that “[t]raditional injunctions are not registrable under [28 U.S.C.] § 1963 . . . because that would be pointless: they act in personam nationwide.” Pacific Reinsurance Management Corp. v. Fabe, 929 F.2d 1215, 1218 (7th Cir. 1991). In Stiller v. Hardman, 324 F.2d 626 (2d Cir. 1963), the Second Circuit held that an Ohio district court could enforce and punish a violation of an injunction that it issued though the actual violation took place in New York. The Stiller court arrived at this holding by looking to the binding authority of Supreme Court decisions which the Second Circuit interpreted as holding that the “mandate of an injunction issued by a federal district court runs throughout the United States Violation of an injunctive order is cognizable in the court which issued the injunction, regardless of where the violation occurred.” Id. at 628.

The district courts have also enforced their extraterritorial injunctive power. In Fleming v. Gray Mfg. Co., 352 F. Supp. 724, 726 (D. Conn. 1973), the United States District Court for the District of Connecticut used its powers in equity to protect the plaintiffs from the defendant's disposal of assets not yet attached and located in New York. The Fleming court held that once it had personal jurisdiction over a party, it could order the party to do or refrain from doing certain acts in other states. See Harvey Shae Yatta, National, Multi-District Preliminary Tour Injunctions: Why the Hesitation? 40 IDEA: J. L. & Tech. 195 (2000) (such national injunctions "are essential to the protection" of trademarks and the courts should acknowledge that "without national, multi-district preliminary injunctions, bootleggers will remain a dominant force.").

The long history and robust extraterritorial enforcement of district courts' injunctive powers support Plaintiffs' assertion that this Court may enforce an injunction it issues throughout the United States regardless of where a violation of the injunction may occur.

POINT III

THIS COURT'S POWERS TO ENFORCE ITS INJUNCTIONS THROUGHOUT THE UNITED STATES IS BINDING ON THOSE PARTIES IN ACTIVE CONCERT OR PARTICIPATION WITH THE ENJOINED PARTIES

The bootlegging operation to be enjoined here is a concerted action of many individuals acting together with the Defendants to be named in the preliminary injunction. As demonstrated in the accompanying declarations, the nature and quality of the merchandise indicates a concerted operation. The quality of the merchandise indicates a large manufacturing operation that is distributing its goods at various locations on the Tour. Identical T-shirts have been found at several locations on the Tour, indicating that the bootleggers go from one location on the tour to another to sell their merchandise.

Pursuant to Federal Rule of Civil Procedure 65(d), the persons bound by injunctive or restraining orders include the parties to the action and their (1) officers and employees; (2) agents; (3) attorneys; (4) and those persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise. The scope of the necessary legal relationship, for purposes of Rule 65(d), is not to be narrowly restricted. In Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945), the Supreme Court held that Rule 65(d) was intended to embody “the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control.” See also Marshak v. Treadwell, 595 F.3d 478, 486 (3d Cir. 2009); Rockwell Graphics Systems, Inc. v. DEV Industries, Inc., 91 F.3d 914, 919 (7th Cir. 1996); Day Companies, Inc. v. Patat, 440 F.2d 1343 (5th Cir. 1971) (injunction covers non-parties who “have knowingly been in complicity” with parties); see generally, 11 Wright & Miller, Federal Practice and Procedure § 2956. Thus, the court may enjoin all participants of the bootlegging operation of which any Defendants actually served are members. Moreover, the Lanham Act specifically authorizes that an injunction granted under Section 43(a) may be served against parties wherever they are found in the United States. See 15 U.S.C. § 1116.

The circuit courts and district courts have liberally applied Federal Rule of Civil Procedure 65(d) to find various persons, not parties to an action in which an injunction was issued, bound by the terms of the injunction. In Reich v. United States, 239 F.2d 134 (1st Cir. 1956), a physician not a party to an original injunction prohibiting the use of an “orgone energy accumulators,” was found in contempt of an injunction for acting in concert with an enjoined party. The physician had been put on notice by mail of the injunction. The First Circuit noted that even if a person is not served with a copy of the injunction he is still bound by its terms

provided he has actual knowledge of the injunction. Likewise, in Doyne v. Saettele, 112 F.2d 155 (8th Cir. 1940), the court held that proper service of process was not required to bind a non-party to an injunction provided the non-party had actual knowledge of the injunction.

In the instant case, those acting in concert or participation with the Defendants served in this district will be personally served with the TRO/preliminary injunction at concerts around the country. In this way, they will receive actual notice of the injunction as required by Federal Rule of Civil Procedure 65(d). These additional parties will be fully identifiable by virtue of the wares they sell. It is counsel's experience, and the experience of Plaintiffs' security personnel that merchandise having the same make and design finds its way to concert venues throughout the country; the bootlegger who hawks homemade wares at a single venue is the exception. Plaintiffs have trained security personnel working on its behalf to identify the major bootleggers. Often, the bootleggers and security are mutually identifiable from working past tours. Testimony has been offered from Plaintiffs' Tour Manager, Alan Rebhun, who is responsible for monitoring illegal bootleg sales during the Tour, that the same bootleggers show up concert after concert and year after year, and that the same make of unauthorized merchandise appears at venue after venue. There is no doubt that the same scenario will be presented during the Artists' current Tour; Plaintiffs need the relief requested herein to gain a foothold against this tide of illegal activity.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' application for a temporary restraining order, order of seizure, and preliminary injunction.

Respectfully submitted,
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By _____


RONALD L. ISRAEL

Dated: October 31, 2011

APPENDIX "A"

UNITED STATES DISTRICT COURT - EX PARTE SEIZURE ORDERS

MULTI-DISTRICT INJUNCTIONS

Brockum Company, Svengali Merchandising, Inc., et al. v. Christopher Clayton, et al., Case No. C 88-3519 (NHP) (D.N.J. 1988), before Hon. Nicholas Politan, involving tour of "Aerosmith."

Brockum Company and Third Stage Tours, Inc. v. Glen Scott, et al., Case No. 87-2597 (D.N.J. 1987), before Hon. John W. Bissell, involving tour of "Boston."

Brockum Company v. Eddie Brandt, et al., Case No. 89 CIV 579 (N.D.N.Y. 1989), before Hon. Thomas J. McAvoy, involving tour of "Cinderella."

Brockum Company, Don Dokken, et al. v. Tom Jackson, et al., Case No. CV 87-3767 (E.D.N.Y. 1987), before Hon. Reena Raggi, involving tour of "Dokken."

Brockum Company and D.D. Productions, Ltd. v. John Does, et al., Case No. 87 Civ. 4635 (PKL) (S.D.N.Y. 1987), before Hon. Peter K. Leisure, involving tour of "Duran Duran."

Brockum Company, Bludgeon Riffola, Ltd., et al. v. John H. Lawson, et al., Case No. 87 CV 1312 (N.D.N.Y. 1987), before Hon. Howard G. Munson, involving tour of "Def Leppard."

Brockum Company, Boneglide Pty. Ltd., et al. v. Keith Bussy, et al., Case No. C 88-1476 (D.N.J. 1988), before Hon. Nicholas Politan, involving tour of "INXS."

Brockum Company and TTC Touring Corp. v. Ronald Burke, et al., Case No. 88 CIV 1440 (S.D.N.Y. 1988), before Hon. Richard J. Daronco, involving tour of Michael Jackson.

Brockum Company, Judas Priest, a joint venture, et al. v. Albert Banks, et al., Case No. 88-3301 (HLS) (D.N.J. 1988), before Hon. H. Lee Sarokin, involving tour of "Judas Priest."

Brockum Company v. Sean Joseph Campbell, et al., Case No. SA-89-CA-0172 (W.D. Tex. 1989), before Hon. H.F. Garcia, involving tour of "Metallica."

Brockum Company and Monsters of Rock Company v. Phillip Beaudet, et al., Case No. 88-0982 (S.D. Fla. 1988), before Hon. William M. Hoeveler, involving "Monsters of Rock" tour.

Brockum Company and Promoproductions, Inc. v. John Does, et al., Case No. 88 02000 FFF (C.D. Ca. 1988), before Hon. Ferdinand F. Fernandez, involving tour of "Pink Floyd."

Brockum Company and Touring By Moonlight, Ltd. v. Bridgette Halson, et al., Case No. 88-2039 (DRD) (D.N.J. 1988), before Hon. Dickinson R. Debevoise, involving tour of Robert Plant.

Brockum Company v. Michael Adams, et al., Case No. 88 CIV 7148 (CSH) (S.D.N.Y. 1988),

before Hon. Charles S. Haight, involving tour of "Van Halen."

Brockum Company, Whitesnake Productions Overseas, Limited, et al. v. Robert Blake, et al., Case No. 88-0524 (JWB) (D.N.J. 1988) before Hon. John W. Bissell, involving tour of "Whitesnake."

Brockum Company v. John Does, et al., Case No. 90-2144 (NHP) (D. N.J. 1990), before Hon. Nicholas Politan, involving tour of Phil Collins.

Brockum Company v. John Does, et al., Case No. 90-3634 (NHP) (D. N.J.) 1990), before Hon. Nicholas Politan, involving tour of Billy Idol/Faith No More.

Brockum Company v. John Does, et al., Case No. 90-4423 (NHP) (D. N.J. 1990), before Hon. Nicholas Politan, involving tour of "AC/DC."

Brockum Company v. John Does, et al., Case No. 90-44b72 (NHP) (D. N.J. 1990), before Hon. Nicholas Politan, involving tour of "Poison/Warrant."

Brockum Company v. John Does, et al., Case No. 91-2742 (JFK) (S.D.N.Y. 1991), before Hon. John F. Keenan, involving tour of "Jane's Addiction."

Brockum Company v. John Does, et al., Case No. 91-524 (JPS) (E.D. Wis. 1991), before Hon. J.P. Stadtmueller, involving tour of "Guns N'Roses."

Giant Merchandising, Inc. v. John Does 1-100, et al., Case No. 92-2315 (NHP) (D.N.J. 1992), before Hon. Nicholas Politan, involving tour of "Genesis."

BCL Finance (Ireland) Limited v. Kevin King, et al., Case No. 92-2844 (NHP) (D.N.J. 1992), before Hon. Nicholas Politan, involving tour of "Guns N' Roses."

Giant Merchandising, Inc. v. John Does 1-100, et al., Case No. C-1-92-456 (S.D. Oh. 1992), before Hon. Carl B. Rubin, involving tour of Jimmy Buffett.

APPENDIX "B"

UNITED STATES DISTRICT COURT - EX PARTE SEIZURE ORDERS

TRADEMARK CASES - Musical Group or Performer Names,
Concert Vicinity - National Multi-District Seizure
Orders

1. Halford, et al. v. Various John Does, et al., Case No. 80-3802 (S.D.N.Y. 1980).
2. Billy Joel, et al. v. Various John Does, et al., Case No. 80-3411 (S.D.N.Y. 1980).
3. Alex Van Halen, et al. v. Various John Does, et al., Case No. 80-1341 (W.D. La. 1980).
4. Frank Zappa, et al. v. Various John Does, et al., Case No. 80-2938 (E.D.N.Y. 1980).
5. Rikie Lynn Metlock, et al. v. Various John Does, et al., Case No. 81-6231 (S.D.N.Y. 1981).
6. Dave Hlubek, et al. v. Various John Does, et al., Case No. 80-6083 (S.D.N.Y. 1980).
7. Patrick Henry Travers, et al. v. Various John Does, et al., Case No. 81-274 (D. Ariz. 1981).
8. Rock Tours, Ltd. v. Gary Roach, et al., Case No. 81-0838 (C.D. Cal. 1981).
9. Roadrunner Productions, Ltd., et al. v. Various John Does, et al., Case No. 81-3208 (S.D.N.Y. 1981).
10. Showtime Marketing, Inc. v. Various John Does, et al., Case No. 81-C-1830C (N.D. Okla. 1981).
11. BCLF International v. Various John Does, et al., Case No. 81-957 (N.D.N.Y. 1981).
12. Triumph, et al. v. Various John Does, et al., Case No. 814147 (N.D. Cal. 1981).
13. Ron Boutwell Enterprises v. Various John Does, et al., Case No. 81-34 (S.D.N.Y. 1981).
14. BCLF International v. Various John Does, et al., Case No. 80-1569 (W.D. La. 1980).
15. Richie Blackmore, et al. v. Various John Does, et al., Case No. 811-275-PEX-WEC (D. Ariz. 1981).
16. Alex Van Halen, et al. v. Various John Does, et al., Case No. 80-905 Civ. (M.D. Fla. 1980).
17. Visual Artists and Galleries Association, Inc., et al. v. Various John Does, et al., Case No. 80-Civ. 4487 (S.D.N.Y. 1980).

18. George Alper, et al. v. Various John Does, et al., Case No. Civ 80-2938 (E.D.N.Y. 1980).
19. Tommy Shaw, et al. v. Various John Does, et al., Case No. 80 Civ 722 (S.D.N.Y. 1980).
20. Roadrunner Productions, Ltd., et al. v. Various John Does, et al., Case No. 1-2439 (E.D. Pa. 1981).
21. Hastings, Clayton, Tucker & Craiq, et al. v. Various John Does, et al., Case No. 81 Civ 7308 (S.D.N.Y. 1981).
22. Entertainers Merchandise Management Corp. v. Various John Does, et al., Case No. 82-1113A (N.D. Ga. 1982).
23. Entertainers Merchandise Management Corp. v. Various John Does, et al., Case No. 83-3416 (E.D. Pa. 1983).
24. Rock Merchandise, Inc. v. Various John Does, et al., Case No. 84 C10838 (N.D. Ill. 1984).
25. Rock Merchandise, Inc. v. Hensley, Case No. 82-561-C (W.D.N.Y. 1982).
26. Winterland Concessions Company, d/b/a Winterland Productions and Rod Stewart v. Thomas Gibson, et al., Case No. 93-1496 (W.D. Pa. 1993).