

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DELTA AIR LINES, INC.,)

Plaintiff,)

v.)

Case No.)

1:13-CV-03388-TCB)

JOHN WUNDER; BRIDGEWATER MARKETING,)
LLC dba TIER 3 PRODUCTIONS; TRAVEL CLUB)
MARKETING BROKERS, LLC; CLASSIC)
PROMOTIONS & PREMIUMS, INC.; JOHN)
VANGINHOVEN; JAMES CURTIS LEMLEY;)
NATIONWIDE TRAVEL PROMOTIONS; KING)
TRAVEL PROMOTIONS; AMERICAN TRAVEL)
SUPPLIERS; CHRISTI WIGLE; CHELSEE FLY;)
ROB FLY; ORBITAL PROMOTIONS; ORACLE)
TRAVEL PROMOTIONS; SB GLOBAL)
MARKETING, LLC; LAURENT HAZOUT; SARA)
BAYLISS; KESSLER CREATIVE, LLC; KEITH)
KESSLER; DINA KESSLER; MAIL TO YOU, LLC;)
MAILHOUSE, LLC; BRAD FRY; INFLUENCE)
DIRECT, LLC; ANDY RIDDLE; JEREMY)
CROSSLIN; NETWORK CONSULTING)
ASSOCIATES, INC.; JOHN ANDERSON; JODY)
RITTER; JOHN ELMER; ALLSTAR MARKETING)
DIRECT, LLC; AERIE DAVIS; GRAND)
INCENTIVES, INC.; JOSE MARTINEZ; GRACE)
MARTINEZ; JD & T ENTERPRISES, INC.; DELTA)
SKY REWARDS, LLC; PRESCIENT MARKETING,)
LLC; MEREDITH SARVER; AND)
JOHN DOES 1-50,)

Defendants.)

**PLAINTIFF DELTA AIR LINES, INC.'S MOTION FOR
TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, EX PARTE SEIZURE ORDER, AND
EXPEDITED DISCOVERY AND MEMORANDUM OF
FACT AND LAW IN SUPPORT THEREOF**

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Plaintiff Delta Air Lines, Inc. (“Delta” or “Plaintiff”) files this Motion for Temporary Restraining Order, Preliminary Injunction, Ex Parte Seizure Order, and Expedited Discovery and Memorandum of Fact and Law in Support Thereof and shows as follows:

FACTS

I. DEFENDANTS’ INFRINGEMENT: THE “TRAVEL CLUB” SCHEME

A. Overview of Infringing “Travel Club” Enterprise

1. Defendants’ Infringement – Generally

This lawsuit presents a textbook case of intentional trademark infringement by a well-organized ring of intellectual property pirates. (*See generally Exhibit A, Declaration of E. Alan Arnold (“Arnold Dec.”) and discussion below*). The defendants (collectively, “Defendants”) have illegally and in bad faith misappropriated for profit Delta’s protected name and marks, including, but not limited to, the venerable DELTA name/mark, Delta’s iconic WIDGET LOGO mark, and Delta’s famous SKYMILES mark (collectively, with Delta’s other registered marks, the “Delta Marks”). (*Id.*). Specifically, Defendants have manufactured, mailed, and are otherwise using and/or profiting from correspondence and other marketing materials that bear the Delta Marks and expressly and falsely purport to have been sent by Delta. (*See Sections I.B and I.C below*). The purpose of

Defendants’ fraudulent impersonation of Delta is to further their enterprise of selling “travel club” memberships pursuant to which members are promised (but do not receive) steep discounts in future travel expenses and other gifts and awards.¹ (*Id.*).

Defendants’ scheme involves a sophisticated web of participants and roles. (*Id.*). Every Defendant – all of whom are direct marketing and travel club scheme insiders – has both actual and constructive knowledge of the infringing, fraudulent, and illegal nature of their own and the other Defendants’ wrongful acts. (*Id.*). In some instances, the wrongdoers are separate entities working in concert, with each getting paid to carry out a particular portion of the overall scheme. (*Id.*). In other instances, the wrongdoers undertake a variety of infringing roles and are involved throughout the enterprise. (*Id.*). Defendants’ illegal acts have caused and are causing irreparable harm to Delta. (*Exhibit A, Arnold Dec. at ¶¶ 17-24*). On the basis of the facts and discussion set forth below, Delta respectfully requests that this Court grant the Proposed Order attached at Exhibit B.

2. Ubiquitous Nature of the Travel Club Scheme

As thousands of dissatisfied purchasers can attest, the travel club scheme is

¹ Defendants’ actions violate and infringe upon Delta’s trademark-related rights without regard to the nature or quality of the services and products they are selling. The questionable nature of their scheme, however, substantially increases the harm that Delta has suffered and continues to suffer.

both well-known and widespread. (*Exhibit C, Declaration of Paul F. Wellborn III* (“*Wellborn Dec.*”) at *Exhibit T thereto*² (*Sampling of Travel Club Scheme Warnings, Notifications, and Cases*)).³ Better Business Bureaus across the country have issued specific warnings about this scheme. (*Id.* at pp. 1, 64, 67, 68, 71, 74, and 75). Investigative television reporters have aired comprehensive exposés about this scheme and its participants. (*Id.* at pp. 11, 65, 78, and 79). Print journalists have written cautionary story after cautionary story. (*Id.* at pp. 70, 72, 73, 76, and 80). Travel-related web sites have similarly cautioned their members and visitors to beware of this scheme. (*Id.* at pp. 85). Defrauded individuals have posted countless complaints at consumer protection web sites (including many concerning the Defendants herein). (*Id.* at *Exhibit S thereto* at pp. 33, 34, 81, and 93). Airlines whose marks were previously pirated in *exactly* the same manner as are Delta’s Marks herein (including Delta itself) have filed well-publicized suits against the

² When used in relation to citation to an exhibit, “thereto” signals that the citation is to a sub-exhibit of one of the three main exhibits containing sub-exhibits: Exhibit A (Arnold Dec.), Exhibit C (Wellborn Dec.), or Exhibit D (Huhn Dec.).

³ “At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is ‘appropriate given the character and objectives of the injunctive proceeding.’ ” Levi Strauss & Co. v. Sunrise Intern. Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995).

wrongdoers. (*Id.* at *Exhibit W thereto*). State attorneys general and other governmental agencies have likewise stepped in to help combat scheme-related wrongdoers. (*Id.* at *Exhibit T thereto at pp. 15, 44, 81-84, and 86*).

3. Defendants' Efforts to Conceal Their Identities

The participating wrongdoers have gone to great lengths to prevent their identification. In the infringing direct mail materials giving rise to Delta's claims, the involved entities ***never*** provide their true names or identities and instead offer only an ever-changing array of toll-free phone numbers. (*Exhibit A, Arnold Dec. at ¶ 23 and Exhibits D-H thereto*). Moreover, the wrongdoers do business under a constantly shifting variety of fictitious names to further diminish the likelihood of their identification. (*Exhibit C, Wellborn Dec. at Exhibit U thereto (Chart of Sample Deceptive Acts)*). This Hydra-like nature of the enterprise also, by design, bolsters the bogus defense by any identified wrongdoers that they were mere "innocent patsies" who were unaware of the illegal acts of the real wrongdoers.

B. Hierarchy and Detail of the "Travel Club" Scheme

1. The Travel Fulfillment Company

The travel club scheme starts with a company – the "travel fulfillment company" – seeking to sell memberships in its travel club via the below-described

subterfuge. (*Id.* at Exhibit T thereto; see also Exhibit Q thereto (Tier 3 Complaint & Contract); Exhibit R thereto (Sample Vacation Fulfillment Contract); Exhibit S thereto (Various Web Sites for involved companies); Exhibit W thereto (Complaint against Defendant Classic Promotions and Premiums, Inc.); and Exhibit D, Declaration of Thomas M. Huhn (“Huhn Dec.”) and exhibits thereto (collectively, along with the other aforelisted documents and exhibits, the “Overview Materials”). These memberships cost thousands of dollars and promise deeply discounted rates for future travel. (*See Overview Materials generally*).

2. The Distributors

The travel fulfillment company contracts with numerous “distributors” to sell its memberships. (*Id.*). The distributors are agents of the travel fulfillment company and may even use the travel fulfillment company’s “Seller of Travel” license number in states where such certification is required. (*Id.*; Exhibit C, Wellborn Dec. at Exhibit S thereto at p. 21 (showing travel seller number for Defendant JD & T Enterprises, Inc.) and Exhibit R thereto (showing distributor’s use of that number)). Each distributor receives a member services web site branded with the distributor’s (fictitious) name that is, in fact, simply a gateway to the travel fulfillment company’s member services web site. (*Id.*; Exhibit C, Wellborn Dec. at Exhibit S thereto at p. 95 (Sample Distributor Web Sites)). The vehicle for membership sales

is an ongoing series of in-person group sales meetings. (*Id.*; *Exhibit D, Huhn Dec. and exhibits attached thereto*). These presentations often occur in hotel conference rooms and are offered by the various distributors repeatedly (up to 20 times a week or more for a single distributor in a single location) over the course of several weeks or months at revolving locations across the country. (*Id.*; *Exhibit D, Huhn Dec. and exhibits attached thereto*).

3. The Printer/Mailers

The most vital aspect of the travel club scheme involves the concerted efforts of the scheme participants to cause as many potential purchasers as possible to attend the distributors' sales presentations. (*Id.*). This is accomplished by massive wave after massive wave of blatantly misleading and infringing direct mail marketing campaigns to potential membership purchasers. (*Exhibit A, Arnold Dec. at ¶¶ 22-24 and at Exhibits D-H thereto*). In these campaigns, the wrongdoers use the Delta name and Marks to masquerade as Delta and to trade fraudulently upon the goodwill, fame, and credibility inherent in the Delta brand. (*Id.*). These bogus marketing materials (collectively, the "Infringing Correspondence") vary among several designs, including: (1) letters ("Letters") supposedly signed by a non-existent Delta Vice-President; (*Id. at Exhibit D*); (2) postcards ("Postcards") fraudulently purporting to have been sent by Delta as part of a fictitious Delta air-

travel promotion; (*Id. at Exhibit E*); (3) counterfeit Delta boarding pass vouchers (“Vouchers”); (*Id. at Exhibit F*); (4) counterfeit Delta checks (“Checks”); (*Id. at Exhibit G*); and (5) other letters (“Fly Letters”) bearing the Delta name/Mark; (*Id. at Exhibit H*). Upon information and belief, Defendants have collectively sent a substantial number of pieces of Infringing Correspondence. (*Id. at ¶ 22*).

The Infringing Correspondence **never** mentions its actual purpose (the sale of travel club memberships), and it **never** reveals the true names or identities of **any** of the travel club scheme participants. (*Id. at ¶ 23 and Exhibits D-H thereto*). Instead, each piece of Infringing Correspondence – which, again, **all fraudulently bear the Delta Marks and all of which (other than the Fly Letter) expressly purport to have been sent by Delta** – informs the recipient (the “Recipient/Victim”) that he has been selected to receive a “gift” or “award” of two round-trip Delta airfares. (*Id.*). The Infringing Correspondence directs the Recipient/Victim to call Delta at a specified toll-free number to claim his prize. (*Id.*). On the basis of this fraudulent bait – **the false promise of Delta airline tickets, coupled with the eminent trust and credibility inherent in Delta and its Marks** – a substantial number of Recipient/Victims call to claim their Delta tickets.

4. The Call-Center Schedulers

Incoming calls from Recipient/Victims to the specified toll-free numbers are

received and handled by call-center operators known as “schedulers.” (*See Overview Materials generally, including Exhibit C, Wellborn Dec. at Exhibit T thereto at p. 1 and Exhibit D, Huhn Dec.*). The scheduler asks a series of income and lifestyle-related questions to determine whether the responding Recipient/Victim qualifies as a potential travel club membership purchaser. (*Id.*; *Exhibit D, Huhn Dec. at ¶ 4*). Non-qualifying Recipient/Victims are told that they are not eligible to receive the prize (the Delta airfares) promised by the Infringing Correspondence. (*Id. and at Exhibit Q thereto*). Qualifying Recipient/Victims are told that, to claim their Delta tickets, they must attend a nearby travel-related sales meeting. (*Id.*; *Exhibit D, Huhn Dec. at ¶ 4*). The Recipient/Victims are not told that these conferences are, in fact, high-pressure sales presentations run by infringing distributors and conducted for the purpose of selling memberships that numerous state attorneys general, governmental agencies, and Better Business Bureaus deem to be worthless. (*Id.*).

5. The Award Fulfillment Company

If the Recipient/Victim attends a complete sales presentation and insists upon receiving the promised Delta airfares, the distributor gives the Recipient/Victim a written voucher that includes contact information for the supposedly “independent company” responsible for providing the promised Delta tickets (the “award

fulfillment company”). (*See Overview Materials generally, including Exhibit D, Huhn Dec. at ¶¶ 17-25 and Exhibits 3-10 thereto*). When the Recipient/Victim attempts to collect the promised tickets, however, he learns that he must ultimately pay expenses, taxes, and fees that often exceed the total value of the tickets and must navigate vague instructions and paperwork, in relation to which any error voids the award. (*Id.*, including *Exhibit D, Huhn Dec. at ¶¶ 17-25 and Exhibits 3-10*). If the Recipient/Victim does, in fact, make all of the payments demanded by the award fulfillment company and successfully navigates the paperwork labyrinth, he still finds that the absurdly broad limitations and restrictions on whatever airfare vouchers he does receive render them essentially worthless. (*Id.*).

6. Purchase by Recipient/Victim of Travel Club Membership

If the Recipient/Victim actually purchases a travel club membership, the Recipient/Victim is then directed to the travel fulfillment company. (*See Overview Materials generally, including Exhibit C, Wellborn Dec. at Exhibit R thereto (Sample Travel Club Membership Contract)*). When the Recipient/Victim attempts to book travel through this membership, however, he typically learns that the membership offers no meaningful discount and is, in fact, worthless. (*Id.*).

C. Defendants' Specific Enterprise Roles Herein

1. Tier 3 Productions, John Wunder, Travel Club Marketing Brokers, LLC, Delta Sky Rewards, LLC, Prescient Marketing, LLC, and Meredith Sarver

Bridgewater Marketing, LLC is headquartered in Phoenix, Arizona, is owned and run by John Wunder, and does business as Tier 3 Productions (“Tier 3”).

(Exhibit C, Wellborn Dec. at Exhibit S thereto at p. 29 (Arizona Corporation Commission Record for Bridgewater Marketing, LLC) and p. 96 (Arizona Secretary of State Registration of Trade Name “Tier 3”)). Among other roles and responsibilities in the travel club scheme giving rise to Delta’s lawsuit, Tier 3 offers turnkey marketing campaign management for certain distributors, including the design and printing of Infringing Correspondence; the mailing of Infringing Correspondence; the procurement of toll-free phone numbers and the staffing and operation of the related call center for responding Recipient/Victims; and the procurement and handling of the “gifts” or “awards” (*i.e.*, the supposed airfare vouchers) used to lure prospective purchasers to the advertised sales presentations. *(Id. at Exhibit Q thereto (Tier 3 Complaint containing sample Tier 3/Distributor Contract))*.

Tier 3’s services include the unusual niche of direct mail campaigns using hand-addressed envelopes and hand-signed letters. *(Id. at Exhibit S thereto at pp.*

35-44 (*Tier 3 Web Site*)). Moreover, Tier 3's experience includes extensive incentive campaigns involving the gift/award of roundtrip airfares. (*Id. at Exhibit Q thereto (Tier 3 Contract attached to Tier 3 Complaint at p. 6)*). In a recent lawsuit against third-parties for whom Tier 3 designed and implemented a direct-mail travel club campaign featuring an airline ticket giveaway to lure recipients to a series of the third-parties' travel club sales presentations, Tier 3's filings included a client contract that paints a detailed picture of Tier 3's services and business model. (*Id.*).

The roles and activities of Tier 3 and its principal John Wunder permeate the travel club scheme giving rise to Delta's lawsuit. As proved by the below-cited evidence, Tier 3 prepared and sent the Infringing Letters, which were hand-signed (on behalf of fictitious Delta Vice-Presidents), hand-addressed, and then mailed from Phoenix (all indicia of Tier 3's involvement). It is undisputed that Tier 3 owned toll-free phone numbers specified in the Infringing Letters and that Tier 3 was responsible for the maintenance and operation of the call center that fielded the calls from responding Recipient/Victims who believed they were calling Delta to claim their awarded airfares. (*Id. at Exhibit A thereto (Subpoena to Five9, Inc.); Exhibit B thereto (Five9, Inc. Subpoena Response); and Exhibit A, Arnold Dec. at Exhibit D thereto at pp. 1, 6, 7, 8, 11-21, 24, 26-32, 34-36, 39-42, 45-48, and 51 (Infringing Correspondence bearing Tier 3 toll-free numbers)*)).

Moreover, in relation to its provision of direct mail and call-center services, Tier 3 uses an ever-changing array of company names, including, among others, “Featured Travel.” At all times relevant to its liability herein, Tier 3 owned the toll-free customer contact number – (866) 232-2002 – specified on Featured Travel’s web site (featuredtravel.com). (*Id.* at *Exhibit A thereto (Subpoena to Five9, Inc.)*; *Exhibit B thereto (Five9, Inc. Subpoena Response)*; and *Exhibit S thereto at p. 97 (Featured Travel Web Site - Home Page)*). Tier 3 brazenly uses the Delta name and Marks on that web site to advertise its infringing direct-mail campaign. (*Id.* at *Exhibit S thereto at p. 98 (Featured Travel Web Site – “About Your Gift” Page)*).

Travel Club Marketing Brokers, LLC (“TCMB”) is yet another new Wunder-related company involved in the travel club scheme. TCMB was formed on September 26, 2013 and offers the same services as Tier 3 – turnkey marketing for travel club scheme distributors, including mailing, call center, and scheduling services. (*Id.* at *Exhibit S thereto at pp. 68-74*). The business address that TCMB provided to its web hosting company – 1601 N. 7th St., Suite 210, Phoenix Arizona 85006 – is the same as that of Market Development Partners, LLC, for whom John Wunder was and is the agent and manager. (*Id.* at *Exhibit L thereto (Bluehost Subpoena Response) (showing TCMB address)*; *Exhibit S thereto at p. 23 (Arizona Corporation Commission Record for Market Development Partners, LLC) (showing*

Wunder's involvement); and at p. 100 (*YellowPages.com Entry for Market Development Partners, LLC*)). Among other joint activities, TCMB owned and maintained web sites under certain of the company names used by Tier 3 to field incoming calls from Recipient/Victims responding to Infringing Letters, including "americantravelexpress.com" (for American Travel Express) and "featuredtravel.com" (for Featured Travel). (*Id. at Exhibit K thereto (Subpoena to Bluehost, Inc.); Exhibit L thereto (Bluehost Subpoena Response); and Exhibit S thereto at p. 32 (Postal Inspector E-mail identifying "American Travel Express" as the source of Infringing Letters)*). Like the Featured Travel web site, the American Travel Express web site flagrantly uses the Delta name and Marks to advertise its infringing direct-mail campaign. (*Id. at Exhibit S thereto at p. 101 (American Travel Express Web Site – "About Your Gift" Page)*)).

Delta Sky Rewards, LLC ("Sky Rewards") is a Wyoming corporation formed in September 2013 and is the ostensible sponsor of the infringing "Delta Sky Rewards" program advertised in Wunder's/Tier 3's Infringing Letters. (*Id. at Exhibit S thereto at p. 99 (Wyoming Business Division Record)*). Sky Rewards shares its principal business address – 109 W. 17th St, Cheyenne, Wyoming – with a host of other Wunder-related companies. (*Id. at p. 22, 24, 28, and 29 (Arizona Corporation Commission Records for Wunder companies Otriad Hospitality, LLC,*

Find Vacation Deals, LLC, Southwest Direct Mail, LLC, and Bridgewater Marketing (Tier 3), respectively).

Prescient Marketing, LLC (“Prescient”) is still another Wunder-related entity involved in yet another aspect of the travel club scheme. Prescient markets itself as the “premier broker” – including bulk mail and telephone services – for the recruitment of attendees at travel club sales presentations (i.e., distributor presentations). (*Id.* at Exhibit S thereto at p. 107 (Prescient Web Site – Home Page)). Prescient obtained Bulk Mail Permit 2001 on September 30, 2013 and immediately began sending Infringing Correspondence. (*Id.* at Exhibit X thereto (USPS FOIA Response) (showing ownership and issue date); Exhibit A, Arnold Dec. at ¶¶ 22-23; and Exhibit F thereto at pp. 1, 2, 5, 6, and 9-16 (Infringing Correspondence sent by Prescient with Bulk Permit No. 2001)).

The “Meredith Sarven” [*sic*] listed by the USPS as the responsible individual is, in fact, Meredith Sarver, an associate and employee of Tier 3 and John Wunder. (*Id.* at Exhibit B thereto (Five9, Inc. Subpoena Response) (listing Sarver as a contact at Aurion/Market Development/Tier 3 for the account containing the toll-free numbers advertised in Infringing Correspondence)); at Exhibit S thereto at p. 106 (Meredith Sarver “Linked-In” Page showing her employment at Aurion Marketing in Phoenix, Arizona); at p. 24 (Arizona Corporation Commission Record

listing Sarver as the Registered Agent for Wunder company “Find Vacation Deals, LLC”); at p. 25 (Arizona Department of State Record showing Aurion Marketing to be a trade name of Christie Street Holdings, LLC); and at p. 26 (Arizona Corporation Commission Record showing John Wunder to be the Agent and Manager/Member of Christie Street Holdings, LLC)).

2. Curtis Lemley and His Web of Involved Entities and Individuals, including Orbital Promotions, Oracle Travel Promotions, King Travel Promotions, American Travel Suppliers, Nationwide Travel Promotions, Christi Wigle, Chelsea Fly, and Rob Fly

Curtis Lemley (“Lemley”) and his web of related entities and individuals are involved in virtually every phase of the illegal acts giving rise to Delta’s claims. Lemley is the owner of at least three distributors – Nationwide Travel Promotions, King Travel Promotions, and American Travel Suppliers – **on whose behalf and with whose full knowledge and approval** Infringing Postcards were sent to lure Recipient/Victims to travel club sales presentations. (*Exhibit D, Huhn Dec. at ¶¶ 1-11; Exhibit C, Wellborn Dec. at Exhibit D thereto (Subpoena Response of Hilton Garden Inn) (regarding identity of sales presentation lessee); and Exhibit F thereto (Subpoena Response of DoubleTree by Hilton Hotel) (regarding the same)*). At these sales presentations (including numerous ones in and around Atlanta), these three companies – by and through Defendants Christi Wigle, Chelsea Fly, Rob Fly, and others – collected each attending Recipient/Victim’s Infringing Postcard (to

verify the invitation and identify the Recipient/Victim) and attempted to sell travel club memberships on behalf of Defendant Vacation Fulfillment. (*Id.*).

Lemley also owns and controls the involved “award fulfillment” companies (i.e., the companies supposedly in charge of supplying the two Delta tickets promised to attendees). (*Exhibit C, Wellborn Dec. at Exhibit Y (Lemley Chart showing his corporate web and ownership)*). These companies include Orbital Promotions and Oracle Travel Promotions. (*Id.*). Because Lemley’s modus operandi involves the frequent change of entity names, there are a number of identical predecessor entities as well, **all** of whom engaged in fraudulent conduct like that complained of herein. (*Id.*). These include Wonderland Incentives, Dynamic Premiums, and others. (*Id.*).

3. SB Global Marketing, LLC, Laurent Hazout, and Sara Bayliss

The Infringing Correspondence includes pieces sent via Bulk Mail Permit Number 2736. (*Exhibit A, Arnold Dec. at ¶¶ 22-23 and Exhibit E thereto at pp. 4, 5, 11, 12, 15, 17, 19, 21, 22, 24, 25, 28, 33, and 38*). At all pertinent times, this Permit Number has been assigned to and used by SB Global Marketing, LLC (“SB Global”). (*Exhibit C, Wellborn Dec. at Exhibit N (USPS FOIA Response)*). The responsible individuals associated with the mailing permit and through whom SB Global acts are Defendants Laurent Hazout and Sara Bayliss. (*Id. at Exhibits H*

(UPS Store #321 Subpoena Response) and J (UPS Store #2907 Subpoena Response) thereto (both showing the individuals associated with SB Global, for which those stores served as mail drops)).

4. Classic Promotions & Premiums, Inc. and John Vanginhoven

The Infringing Correspondence includes pieces sent via Bulk Mail Permit Number 3950. (*Exhibit A, Arnold Dec. at ¶¶ 22-23 and Exhibit F thereto at pp. 3, 37, and 32*). At all pertinent times, this Permit Number has been assigned to and used by Classic Promotions & Premiums, Inc. (“Classic Promotions”). (*Exhibit C, Wellborn Dec. at Exhibits M and N (FOIA Request and USPS Response, respectively)*). Classic Promotions is a Florida corporation that specializes in the printing and mailing of direct mail advertisements, including postcards, as well as the creation and execution of related “incentive programs” like the supposed ticket giveaway giving rise to Delta’s claims herein. (*Id. at Exhibit S thereto at pp. 60-62 (Classic Promotions’ Direct Mail Web Site) and pp. 63-66 (Classic Promotions’ General Web Site)*). The responsible individual associated with the permit and personally directing Classic Promotions’ wrongful and illegal acts is its president John Vanginhoven. (*Id. at Exhibit N (USPS FOIA Response) thereto and Exhibit S thereto at pp. 59 (Florida Division of Corporations Report)*).

The violations of Classic Promotions and Vanginhoven herein are aggravated by the fact that Classic Promotions and Vanginhoven are repeat intentional offenders. Classic Promotions and Vanginhoven have been **repeatedly** ordered by other major airlines to cease and desist from the **exact** type of infringing ticket-related campaigns now complained of by Delta. (*Id.* at Exhibit W thereto at pp. 135-136 (Continental Airlines Cease & Desist Letter dated 10/26/2007); at pp. 148-150 (United Airlines Cease & Desist Letter dated 4/24/2012); at pp. 155-161 (United Airlines Cease & Desist Letter dated 6/4/2012); and at Exhibit V thereto (Southwest Airlines Cease & Desist Letter dated 2/27/2012)). One major airline was even forced to sue Classic Promotions and Vanginhoven after they repeatedly breached their agreement to cease and desist from the use and sending of infringing promotional materials. (*Id.* at Exhibit W thereto (United Airlines, Inc. Complaint, Motion, and related documents)).

5. Kessler Creative, LLC, Keith Kessler, and Dina Kessler

The Infringing Correspondence includes numerous pieces sent via Bulk Mail Permit Number 584. (*Exhibit A, Arnold Dec. at ¶¶ 22-23 and Exhibit E thereto at pp. 1, 2, 6-10, 13-14, 20, 23, 26, 29, 30, 31, and 34-37*). At all pertinent times, this Permit Number has been assigned to and used by Kessler Creative, LLC (“Kessler Creative”). (*Exhibit C, Wellborn Dec. at Exhibit N thereto (USPS FOIA*

Response)). Kessler Creative specializes in the creation, printing, and mailing of direct mail advertisements, including postcards. (*Id. at Exhibit S thereto at p. 45 (Kessler Creative Web Site Page)*). The responsible individuals associated with Kessler Creative and through whom it is carrying out its wrongful acts are its owner/officers Keith and Dina Kessler. (*Id. at Exhibit S thereto at p. 46 (Florida Corporations Divisions Record)*).

6. Mail to You, LLC, Mailhouse, LLC, and Brad Fry

The Infringing Correspondence includes pieces sent via Bulk Mail Permit Numbers 1765 and 1767. (*Exhibit A, Arnold Dec. at ¶¶ 22-23; Exhibit F thereto at pp. 3, 4, and 7; and Exhibit G thereto at pp. 1-3*). At all pertinent times, these Permit Numbers have been assigned to and used by Mail to You, LLC (“Mail to You”) and Mailhouse, LLC (“Mailhouse”). (*Exhibit C, Wellborn Dec. at Exhibit N thereto (USPS FOIA Response)*). The responsible individual associated with the permit for both of these companies is Brad Fry, through whom these two companies are carrying out their illegal campaigns. (*Id.*). Fry is also the Operations Manager for Southwest Direct Mail, one of the many companies related to Defendant John Wunder. (*Id. at Exhibit S thereto at p. 58 (Brad Fry “Linked In” Page) and p. 28 (Arizona Corporation Commission Record)*). Moreover, Defendant Wunder is also the “organizer” of Mail to You. (*Id. at p. 57 (Wyoming Business Division Record)*).

7. Influence Direct, LLC, Andy Riddle, and Jeremy Crosslin

The Infringing Correspondence includes a piece sent via Bulk Mail Permit Number 1520. (*Exhibit A, Arnold Dec. at ¶¶ 22-23 and Exhibit E thereto at p. 18*). At all pertinent times, this Permit Number has been assigned to and used by Influence Direct, LLC (“Influence Direct”). (*Exhibit C, Wellborn Dec. at Exhibit N (USPS FOIA Response)*). Influence Direct specializes in the printing and mailing of direct mail advertisements, including postcards. (*Id. at Exhibit S thereto at pp. 53-54 (Influence Direct Web Site)*). The Influence Direct web site even includes a picture of a sample “award of two airlines tickets” postcard using another major airline’s mark, upon information and belief, without authorization. (*Id. at p. 53*). The responsible parties for Influence Direct’s infringing campaigns include its CEO Andy Riddle and its COO Jeremy Crosslin, who are directing, carrying out, and/or otherwise authorizing these illegal acts. (*Id. at p. 103 (Influence Direct Web Site Bio Page)*).

8. Network Consulting Associates, Inc., John Elmer, John Anderson, and Jody Ritter

The Infringing Correspondence includes pieces sent via Bulk Mail Permit Number 78. (*Exhibit A, Arnold Dec. at ¶¶ 22-23 and Exhibit H thereto at pp. 1-2*). At all pertinent times, this Permit Number has been assigned to and used by Network Consulting Associates, Inc. (“NCA”). (*Exhibit C, Wellborn Dec. at*

Exhibit N (USPS FOIA Response)). NCA specializes in the creation, printing, and mailing of direct mail advertisements, including postcards. (*Id.* at *Exhibit S thereto at pp. 48-51*). The responsible individual associated with the permit is John Elmer. (*Id.* at *Exhibit N thereto (USPS FOIA Response)*). The other responsible individuals at NCA include its President John Anderson and Vice-President Jody Ritter. (*Id.* at *Exhibit S thereto at p. 47 (Florida Division of Corporations Record)*). These three individuals are responsible for NCA's infringing acts.

9. Allstar Marketing Direct, LLC and Aerie Davis

The toll-free numbers advertised in the Infringing Postcards include (888) 211-0378. (*Exhibit A, Arnold Dec. at Exhibit E thereto at pp. 12 and 24*). At all relevant times, this number has been owned and used by Allstar Marketing Direct, LLC ("Allstar") and its principal Aerie Davis. (*Exhibit C, Wellborn Dec. at Exhibit P thereto (Ringcentral Subpoena Response) and Exhibit S thereto at p. 80 (Virginia Corporation Commission Record)*). A former employee recently reported that Allstar and Davis "sen[t] out millions of post cards with FAKE LOGO'S [sic] such as Delta Airlines" and directed the call center operators to "lie and pretend we were working for [Delta]." (*Id.* at *Exhibit S thereto at p. 81 ("Ripoff Report" on Allstar and Davis)*).

10. Grand Incentives, Inc., Jose Martinez, and Grace Martinez

Grand Incentives, Inc. (“Grand Incentives”) is an award fulfillment company involved in the supply of the Delta airfares supposedly awarded to Recipient/Victims who attend a sales presentation. (*Exhibit D, Huhn Dec. at ¶ 23 and Exhibits 6.1 and 6.2 thereto (Award Fulfillment Brochure)*). The principals of Grand Incentives are Jose Martinez (President) and Grace Martinez (Vice-President), through whom the company is carrying out its illegal acts. (*Exhibit C, Wellborn Dec. at Exhibit S thereto at p. 79 (Florida Corporations Division Record)*). The Grand Incentives web site brazenly features Delta Marks (Delta’s name and WIDGET LOGO) and claims that Grand Incentives was designated and selected by Delta as a Delta “partner.” (*Id. at Exhibit S thereto at p. 77*). This is an outright lie. No partnership or any other contractual or business relationship exists between Grand Incentives and Delta. (*Exhibit A, Arnold Dec. at ¶ 17*).

11. JD & T Enterprises, Inc. dba Travel to Go dba Vacation Fulfillment

The travel fulfillment company – i.e., the company whose travel club memberships are being knowingly sold via rampant infringement upon Delta’s Marks – is California corporation JD & T Enterprises, Inc. (“JDT”) dba Travel to Go dba Vacation Fulfillment (“JDT”). (*Exhibit R, (Sample “Vacation Fulfillment” Distributor/Member Contract identifying Vacation Fulfillment’s California Seller of*

Travel Number as 2040261); Exhibit C, Wellborn Dec. at Exhibit S thereto at p. 21 (California DOJ Seller of Travel Site) (showing JDT's "Travel to Go" trade name and the same registration number identified above); at p. 104 (USPTO TESS Search Results for "Vacation Fulfillment" showing Travel to Go as the Registrant); and at p. 105 ("Travel to Go" branding on Vacation Fulfillment Web Site)). JDT allows its agent distributors to use JDT's California "Seller of Travel" ("CST") Number as they act on behalf of JDT to solicit sales. (*Id.*). JDT is, among other causes and theories, vicariously liable for the acts of its infringing agent/distributors, of which JDT had and has actual knowledge. JDT is also liable under a theory of contributory infringement on the basis of its knowledge of and participation in the infringing travel club enterprise/scheme. Finally, JDT also has constructive knowledge of the infringement and the other fraudulent conduct of those acting on its behalf and, without regard to its scienter, is being unjustly enriched, to the substantial detriment of Delta.

ARGUMENT

I. DELTA IS ENTITLED TO A TEMPORARY RESTRAINING ORDER PROHIBITING DEFENDANTS FROM CONTINUING TO INFRINGE UPON THE DELTA MARKS VIA THEIR TRAVEL CLUB SCHEME.

Rule 65 of the Federal Rules of Civil Procedure authorizes the Court to enter a temporary restraining order ("TRO") when it appears that the plaintiff is entitled to

the relief demanded, and such relief consists of restraining an act the continuance of which would produce injury to the plaintiff during the pendency of the litigation. See Fed. R. Civ. P. 65(b). To satisfy the requirements for a TRO, the movant must establish: (1) a substantial likelihood of succeeding on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is granted; and (4) that the requested injunction would not harm the public interest. See, e.g., Statewide Detective Agency v. Miller, 115 F.3d 904 (11th Cir. 1997); Nnadi v. Richter, 976 F.2d 682 (11th Cir. 1992); Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154 (11th Cir. 1990); Computer Currents Publ'g. Corp. v. Jaye Comms., Inc., 968 F. Supp. 684 (N.D. Ga. 1997). These are the same four factors also used in determining the propriety of a preliminary injunction, which remains in place throughout the pendency of the litigation. Gold Coast Publications, Inc. v. Corrigan, 42 F.3d 1336, 1343 (11th Cir. 1994). In the present case, each of these factors demands the grant of the requested TRO.

A. Delta Is Likely To Succeed On The Merits Of Its Case.

Delta's likelihood of success on the merits of its claims, including trademark infringement, is a virtual certainty. See 15 U.S.C. § 1125(a) (The Lanham Act) and 15 U.S.C. § 1125(c) (the Federal Trademark Dilution Act of 1995). Defendants' intentional piracy of the Delta Marks is legally and factually indefensible.

1. Defendants Have Committed Trademark Infringement.

Trademarks are protected by federal law against infringement by use of identical or colorable imitations of the mark which are “likely to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1114(1). The central inquiry is whether there is a “likelihood of confusion . . . [i.e.] a likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question.” Mushroom Makers, Inc. v. R.G. Barry Corp., 580 F.2d 44, 47 (2nd Cir. 1978), cert. denied, 439 U.S. 1116 (1979). The Eleventh Circuit has developed a seven-factor test for determining whether there is a likelihood of confusion: (1) the strength of the plaintiff’s mark; (2) the similarity between the plaintiff’s mark and the infringing mark; (3) the similarity between the products or services offered by the plaintiff and defendant; (4) the similarity of the sales methods; (5) the similarity of the advertising methods; (6) the defendant’s intent; and (7) whether actual confusion has occurred. Alliance Metals, Inc. of Atlanta v. Hinely Industries, Inc., 222 F.3d 895 (11th Cir. 2000). In the present matter, these factors show that confusion is a virtual certainty.

a. The Delta Marks Are Strong.

The degree of protection extended to a given mark depends upon the Court’s determination of the mark’s strength. John H. Harland Co. v. Clarke Checks, Inc.,

711 F.2d 966, 973 (11th Cir. 1983). Strong marks are given more extensive protection. Id. Courts reason that the more well-known the mark, the deeper the impression it creates upon the public. Freedom Savings & Loan Assn. v. Way, 757 F.2d 1176, 1182 (11th Cir. 1985). The factors to consider in assessing the strength of a mark include its fame and the length, exclusivity, continuity, and geographic scope of the plaintiff's use of the mark. See generally, Turner Greenberg Assocs., Inc. v. C&C Imports, Inc., 320 F. Supp. 2d 1317, 1332 (S.D. Fla. 2004).

Here, the Delta Marks are exceptionally strong and are entitled to maximum protection. Delta is one of the world's largest commercial airlines, generating over 36 billion dollars in annual revenue. (*Exhibit A, Arnold Dec. at ¶ 4*). Delta offers air travel to more destinations than any other global airline, with carrier service to 330 destinations in 65 countries on six continents. (*Id.*). Delta serves more than 160 million customers each year. (*Id.*). Delta has invested billions of dollars in advertising and marketing in order to build the fame, reputation, and goodwill of the Delta Marks, both in the United States and abroad. (*Id. at ¶ 10*). These famous and incalculably valuable Marks are instantly and uniquely recognizable worldwide as symbols of the goodwill, high reputation, and high-quality inherent in Delta's air transportation and its other travel-related services. (*Id. at ¶¶ 5-10*). Moreover, because the name "Delta" represents an "arbitrary" mark given the nature of Delta's

business, the mark is considered especially strong, and entitlement to protection is presumed. Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp.2d 1293, 1311 (N.D. Ga. 2008).

b. Defendants Are Using Delta’s Actual Name And Marks.

As the similarity between the existing and infringing marks increases, so, too, does the likelihood of confusion. Alliance Metals, 222 F.3d at 907. Where the infringed-upon marks and the infringing marks are *identical*, no further similarity-related analysis is required. Such is the case in the present matter. Defendants are using the actual Delta name and Marks to masquerade as Delta. (*Exhibit A, Arnold Dec. at ¶¶ 20-23 and at Exhibits D, E, F, G, and H thereto*).

c. The Involved Services/Products Are Identical.

The natures of the competing services/products are likewise identical. Delta’s primary business activity involves the provision of air travel to its customers (*i.e.*, the sale of tickets). (*Id. at ¶ 4*). Defendants’ infringement involves their literal impersonation of Delta in relation to a supposed giveaway of Delta airfares. (*Id. at ¶¶ 18-24 and at Exhibits D, E, F, G, and H thereto*). Moreover, the ultimate purpose of the infringement – the sale of potentially worthless memberships for discounted travel and vacations – directly overlaps with Delta’s offer of legitimate discounted travel and vacations through the **sole** travel agency authorized to identify

itself as a corporate affiliate of Delta: MLT, Inc., a wholly-owned Delta subsidiary doing business as “Delta Vacations.” (*Id.* at ¶ 21).

d. The Involved Marketing Channels Are Identical.

If a plaintiff and a defendant both use the same advertising media, a finding of likelihood of confusion is more probable. AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1542 (11th Cir. 1986). “The greater the similarity in advertising campaigns[,] the greater the likelihood of confusion.” Carnival Corp. v. SeaEscape Casino Cruises, Inc., 74 F. Supp.2d 1261, 1267 (S.D. Fla. 1999). In masquerading as Delta, Defendants send the Infringing Correspondence to the Recipient/Victims by direct mail via the United States Postal Service. (*Exhibit A, Arnold Dec. at ¶¶ 18-23 and Exhibits D-H thereto*). Among other means, Delta also uses the United States Postal Service to advertise its air transportation services and to communicate with its customers. (*Id.* at ¶ 10). The advertising channels are thus identical, again guaranteeing a likelihood of confusion.

e. The Involved Sales Mediums Are Identical.

The sales medium factor also weighs solely in Delta’s favor. The Infringing Correspondence directs each Recipient/Victim to claim his Delta airfares by calling a specified toll-free number. (*Id.* at ¶¶ 10 and 23 and *Exhibits D-H thereto*). Delta offers this same sales medium – toll-free phone numbers – by which Delta

customers can purchase tickets, receive technical assistance, and receive various other forms of customer service. (*Id.* at ¶ 10).

f. Defendants Are Attempting In Bad Faith To Capitalize On Delta's Business Reputation And Goodwill.

If a defendant adopts a plaintiff's mark with the intent of obtaining benefit from the plaintiff's business reputation, "this fact alone may be sufficient to justify the inference that there is confusing similarity." Carnival Corp., 74 F. Supp. 2d at 1268 (emphasis added). Such is undeniably the case in the present matter. Each and every piece of Infringing Correspondence adopts Delta's famous Marks and/or expressly purports to have originated with Delta. (*Exhibit A, Arnold Dec. at ¶ 23 and Exhibits D-H thereto*). Defendants' Letters are signed by a fictitious Delta Vice-President. (*Id. at Exhibit D thereto*). Defendants' Postcards purport to advertise fictitious Delta promotions and giveaways. (*Id. at Exhibit E thereto*). Defendants' Vouchers include faux boarding passes supposedly sent by Delta. (*Id. at Exhibit F thereto*). Defendants' Checks include bogus checks that appear to be – but are not – sent by Delta and negotiable toward the purchase of Delta airfares. (*Id. at Exhibit G thereto*). In short, in every piece of Infringing Correspondence, Defendants pretend either to be Delta or to be authorized by Delta to trade upon the enormous credibility and goodwill inherent in the Delta name and Marks. This flagrant trademark piracy, coupled with the unseemly reputation of the travel club

scheme, yields but one valid and inescapable conclusion – that each and every Defendant has acted knowingly and in bad faith.

g. Defendants’ Infringement Is Causing Actual Confusion.

“Although evidence of actual confusion is not necessary to a finding of likelihood of confusion, it is nevertheless the best evidence of likelihood of confusion.” Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 263 (5th Cir. 1980) (emphasis added). Even as Delta was attempting to identify the various Defendants, repeated instances of *actual* consumer confusion were occurring. Numerous Recipient/Victims, believing that Delta was indeed the source of the Infringing Correspondence, called or e-mailed Delta’s reservations and/or customer services departments regarding the supposed giveaway of Delta airfares. (*Exhibit A, Arnold Dec. at ¶ 24*). At least one customer who received a Check and believed it to be authentic presented that counterfeit instrument in person at a Delta ticket counter expecting to receive a \$1,229.00 credit toward the purchase of her ticket. (*Id.*). This actual confusion will no doubt continue unless Defendants are enjoined.

2. Defendants Have Tarnished Delta’s Famous Mark.

Tarnishment is a special form of trademark infringement resulting from the unauthorized and improper association of a famous mark with an inferior or offensive product or service. Tarnishment is recognized as a form of dilution and is

actionable under section 43(c)(1) of the Lanham Act. To prevail on a trademark tarnishment claim, the trademark owner must show that: (1) its mark is famous; (2) the defendant is making a commercial use of the mark; (3) the defendant's use began after the mark became famous; and (4) the trademark owner will suffer negative associations through defendant's use of the mark. Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000). Under the Lanham Act, the requirements to prove dilution under section 43(c) are less stringent than the requirements to prove infringement under section 43(a). Clinique Labs, Inc. v. Dep Corp., 945 F.Supp. 547, 561 (S.D. N.Y. 1996). As was the case with Delta's infringement claim, each of the determinative factors demand a finding that Delta is likely to prevail on the merits of its tarnishment claim.

a. The Delta Marks Are Famous.

To determine whether a mark is distinctive and famous, a court considers the following non-exclusive factors:

(A) the distinctiveness of the mark; (B) the duration and extent of the use of the mark; (C) the duration and extent of advertising and publicity of the mark; (D) the geographical extent of the trading area in which the mark is used; (E) the channels of trade for the goods or services with which the mark is used; (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought; (G) the nature and extent of use of the same or similar marks by third-parties; and (H) whether

the mark was registered under the Act of March 3, 1881 or the Act of February 20, 1905 on the principal register.

15 U.S.C. § 1125(c)(1). Here, for all the reasons set forth above at Argument, Section I.A.1 in relation to the strength of the Delta Marks, those Marks – which have been in use for decades in connection with Delta’s nationwide and worldwide advertising of its air transportation and other related travel services – are also “famous” under the dilution prong of the Lanham Act.

b. Defendants Are Making Commercial Use Of The Delta Marks.

The voluminous examples of Defendants’ Infringing Correspondence attached to Exhibit A - Arnold Declaration at Exhibits D-H thereto are proof positive of Defendants’ wrongful use of the Delta Marks in conjunction with their travel club scheme.

c. The Infringing Use Occurred After The Marks Became Famous.

The marks “DELTA” and “DELTA AIR LINES” and Delta’s WIDGET LOGO were registered more than 50 years ago and have been in widespread and continuous use by Delta at all times thereafter. (*Exhibit A, Arnold Dec. at Exhibits A, B, and C thereto*). These Marks accordingly were famous long before Defendants pirated them in 2013 in support of Defendants’ travel club scheme. Indeed, Defendants clearly chose to infringe upon the Delta Marks because they are famous.

d. Delta Will Suffer Serious Negative Associations From The Defendants' Use Of The Delta Marks.

The harm resulting from tarnishment of a famous mark relates primarily to damage to the mark's positive associational value. Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497, 507 (2nd Cir. 1996); Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 43 (2nd Cir. 1994). This damage is especially severe when the mark is used in an "unwholesome" or "unsavory" context. Hormel, 73 F.3d at 507. It is difficult to imagine a more harmful infringing use in the context of Delta's business than Defendants' piracy of the Delta Marks to promote the disreputable travel club scheme described herein.

B. Defendants' Continuing Infringement Will Result In Irreparable Injury To Delta.

"[A] sufficiently strong showing of likelihood of confusion [caused by trademark infringement] may by itself constitute a showing of ... [a] substantial threat of irreparable harm." McDonald's Corp. v. Robertson, 147 F.3d 1301 (11th Cir. 1998) (emphasis added). The injury resulting from infringement or tarnishment causes the plaintiff to lose the benefit of the marks' function as a distinctive and positive identifier of the plaintiff and its services. Id. As a result, the value of the mark is greatly impaired, and re-establishment of the lost value is difficult if not impossible. Id. It is generally recognized in trademark infringement cases that: (1)

there is no fully adequate remedy at law to redress infringement; and (2) infringement by its nature causes irreparable harm. Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018 (11th Cir. 1989).

C. Delta’s Continuing Injuries In The Absence Of A TRO Outweigh Any “Injuries” The Defendants Might Claim If The TRO Is Granted.

Contrary to the permanent and irreparable injury to Delta and the Delta Marks caused by Defendants’ ongoing trademark piracy, the possibility of injury to any legitimate interest of Defendants by this Court’s issuance of the requested TRO is nonexistent. Without regard to the nature and extent of their respective roles in the travel club scheme giving rise to Delta’s lawsuit or their related scienter in relation to those violations, **no Defendant** is authorized to use the Delta Marks. (*Exhibit A, Arnold Dec. at ¶¶ 17-21*). Any claim by a Defendant that he/it will somehow be damaged by being enjoined from using the Delta Marks is frivolous.

D. The Requested TRO Serves The Public Interest.

In cases involving trademark infringement, courts have a duty to protect both the rights of trademark owner and the right of the public to be free from confusion, deception, and mistake resulting from the infringement. Kason Industries, Inc. v. Component Hardware Group, Inc., 120 F.3d 1199, 1207 (11th Cir. 1997). The blatantly fraudulent nature of Defendants’ use of the Delta Marks in connection with their travel club scheme underscores the necessity of the injunctive relief requested

by Delta. Each infringing use of the Delta Marks by Defendants represents yet another attempt by Defendants to confuse and mislead a responding Recipient/Victim. The actual confusion that has already occurred emphasizes even more the necessity of quick and decisive action to halt Defendants' ongoing fraud and infringement.

II. DELTA IS ENTITLED TO AN *EX PARTE* SEIZURE ORDER.

Once a violation of the Lanham Act is demonstrated, the issuance of an *ex parte* seizure order is appropriate upon a showing that: (i) the person obtaining the order will provide adequate security; (ii) an order other than an *ex parte* seizure order is not adequate to achieve the purposes of 15 U.S.C. § 1114; (iii) the applicant has not publicized the requested seizure; (iv) the applicant is likely to succeed in showing the defendant used a counterfeit mark; (v) an immediate and irreparable injury will occur if such seizure is not ordered; (vi) the materials to be seized will be located at the place identified in the application; (vii) the harm to the applicant in denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered; and (viii) if the applicant were to proceed on notice to the defendant, the defendant or persons acting in concert with defendant would destroy, move, hide, or otherwise make such matter inaccessible to the court. 15 U.S.C. § 1116(d)(4)(B).

Where, as here, each of the statutory elements is satisfied, it is an abuse of discretion to deny an ex parte seizure order. Vuitton v. White, 945 F.2d 569, 575-76 (3rd Cir.1991) (discussing the legislative history of § 1116(d) that “ex parte seizures ... [are] a necessary tool to thwart the bad faith efforts of fly by night defendants to evade the jurisdiction of the court”); Lorillard Tobacco Co. v. Bisan Food Corp., 2004 WL 1682766 (3rd Cir. 2004) (to same effect).

In granting plaintiff an ex parte seizure order, one district court stated that notice of the restraining order without seizure:

would be likely to result in the disappearance of the counterfeit FILA goods and related records, or the “dumping” or transfer of the counterfeit goods to unknown third parties jeopardizing plaintiff’s ability to prevent irreparable injury, to stop distribution of counterfeit FILA products, and to determine the source and extent of the defendants’ dealings.

Fimab-Finanziaria Maglificio v. Kitchen, 548 F. Supp. 248, 250 (S.D. Fla. 1982).

Perceiving the unfortunate reality of this situation, the covert nature of counterfeiting activities, and the vital need to establish an economic disincentive for trademark counterfeiting, district courts throughout the United States now regularly issue ex parte seizure orders. A sample seizure order, which was issued by this Court in a similar intellectual property/infringement-related case, is attached hereto at Exhibit E.

Delta meets each of the criteria for issuance of a seizure order. Delta has indicated the willingness and ability to provide a bond. (*See Delta's Proposed Order at Exhibit B*). Delta has not publicized the requested seizure and, in relation to its pending motion, has already shown Defendants' public and commercial use of the Delta Marks and the irreparable harm flowing therefrom. Through its investigation and research, Delta has gathered evidence tending to show the likely location of any Infringing Correspondence not yet sent and the likely location of business records showing the extent of each wrongdoer's involvement in the infringing scheme. (*See discussion of the various Defendants above*). Finally, given the blatantly fraudulent nature of Defendants' trademark piracy, an order other than an ex parte seizure order is not adequate to achieve the purposes of 15 U.S.C. § 1114. Defendants have no legally-cognizable interest whatsoever in continuing to possess or use any form of Infringing Correspondence. Were Delta to provide notice beforehand of its demand for Infringing Correspondence and all underlying documents/information, Defendants would likely destroy, move, hide, or otherwise make such matter inaccessible to the Court.

III. DELTA IS ENTITLED TO EXPEDITED DISCOVERY.

District courts have broad power to permit expedited discovery allowing a plaintiff to take early depositions and to require early document production in

appropriate cases. See, Fed. R. Civ. P. 30(b) and 34(b). Expedited discovery may be granted upon a showing of “good cause” by the moving party. Arista Records, LLC v. Does 1-7, Civ. Act. No. 3:08-cv-18 (CDL), 2008 WL 542709 at *1 (N.D. Ga. Feb. 25, 2008). “Good cause” in this context includes the need by a plaintiff claiming infringement, in absence of other reasonable sources or means, to identify and obtain other “basic information” about the infringers. Id. Such information includes – as Delta now seeks – defendants’ locations and legal status, especially when – as is the case herein – there is a concern over the possibility of spoliation of evidence. United Parcel Service of America, Inc. v. John Does 1-10, Civ. Act. No. 1-03-cv-1639, 2003 WL 21715365 at *1 (N.D. Georgia, June 13, 2003).

Delta is being irreparably and inarguably harmed by Defendants’ illegal use of the Delta Marks in their travel club scheme. To contain the ongoing infringement, Delta must therefore, without delay, identify and find those wrongdoers who have not yet been named and/or located. The requested discovery is the only means by which Delta can accomplish this. Delta’s need for expedited discovery is especially vital given the measures that Defendants have taken to conceal their identities, the revolving door of disposable and fictitious entity names they have used, and the other deceptive tactics in which they have engaged. (*Exhibit C, Wellborn Dec. at Exhibit U thereto*). The discovery requested in Delta’s

Proposed Order has been carefully limited to include only what is essential for Delta to identify and locate any remaining wrongdoers and to prove its entitlement to immediate injunctive relief against them.

CONCLUSION

For the foregoing reasons, Delta respectfully requests that its Motion for Temporary Restraining Order, Preliminary Injunction, Ex Parte Seizure Order, and Expedited Discovery be GRANTED on the terms set forth in the Proposed Order attached hereto at Exhibit B, with such relief to include:

- (a) The prohibition via a temporary restraining order of Defendants' further use of or infringement upon the Delta name and Marks;
- (b) The seizure of all infringing materials, including any unsent Infringing Correspondence, in the possession, custody, or control of Defendants, along with any documents showing or tending to show the identities of other infringers and the nature and extent of the infringement by any Defendant;
- (c) An order to show cause why a preliminary injunction should not issue;
- (d) Expedited discovery;
- (e) The award to Delta of its attorneys' fees and costs incurred in bringing this Motion; and
- (f) Such other and further relief as this Court deems just and proper.

Respectfully submitted this 9th day of December, 2013.

WELLBORN, WALLACE & WOODARD, LLC

/s Paul F. Wellborn III

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DELTA AIR LINES, INC.,)

Plaintiff,)

v.)

Case No.)

1:13-CV-03388-TCB)

JOHN WUNDER; BRIDGEWATER MARKETING,)
LLC dba TIER 3 PRODUCTIONS; TRAVEL CLUB)
MARKETING BROKERS, LLC; CLASSIC)
PROMOTIONS & PREMIUMS, INC.; JOHN)
VANGINHOVEN; JAMES CURTIS LEMLEY;)
NATIONWIDE TRAVEL PROMOTIONS; KING)
TRAVEL PROMOTIONS; AMERICAN TRAVEL)
SUPPLIERS; CHRISTI WIGLE; CHELSEE FLY;)
ROB FLY; ORBITAL PROMOTIONS; ORACLE)
TRAVEL PROMOTIONS; SB GLOBAL)
MARKETING, LLC; LAURENT HAZOUT; SARA)
BAYLISS; KESSLER CREATIVE, LLC; KEITH)
KESSLER; DINA KESSLER; MAIL TO YOU, LLC;)
MAILHOUSE, LLC; BRAD FRY; INFLUENCE)
DIRECT, LLC; ANDY RIDDLE; JEREMY)
CROSSLIN; NETWORK CONSULTING)
ASSOCIATES, INC.; JOHN ANDERSON; JODY)
RITTER; JOHN ELMER; ALLSTAR MARKETING)
DIRECT, LLC; AERIE DAVIS; GRAND)
INCENTIVES, INC.; JOSE MARTINEZ; GRACE)
MARTINEZ; JD & T ENTERPRISES, INC.; DELTA)
SKY REWARDS, LLC; PRESCIENT MARKETING,)
LLC; MEREDITH SARVER; AND)
JOHN DOES 1-50,)

Defendants.)

**RULE 7.1 CERTIFICATE OF
COMPLIANCE WITH LOCAL RULE 5.1**

This is to certify that the foregoing was prepared using 14 point Times New Roman font and accordingly complies with Local Rule 5.1. This certificate is given in compliance with Local Rule 7.1(D).

This 9th day of December, 2013.

WELLBORN, WALLACE & WOODARD, LLC

/s Paul F. Wellborn III

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