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Case No. 21-cv-8704 (PGG) (S.D.N.Y)

In the
United States Court of Appeals
for the
Second Circuit

IN RE DEFCAD, INC., ODYSEE USER XYEEZYSZN, DEFCAD USER
XYEEZYSZN, THE GATALOG, DEFCAD USER FREEMAN1337,
TWITTER USER XYEEZYSZN, PHILLIP ROYSTER.
Defendants-Petitioners

**PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
AND EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND STAY
PENDING CONSIDERATION OF THIS PETITION**

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INTRODUCTION AND SUMMARY

Petitioners urgently seek a writ of mandamus and an emergency administrative stay and stay pending petition of an *ex parte* discovery order entered by the district court without notice to *anyone* (the “Ex Parte Discovery Order”). The Ex Parte Discovery Order threatens to unmask the identity of anonymous internet users engaged in speech protected by the First Amendment to the United States Constitution. The unprecedented and unauthorized *ex parte* procedure used by Plaintiff-Respondent fundamentally violates the requirements of due process, and Defendants-Petitioners believe that Plaintiff’s *ex parte* attempts at unmasking are specifically calculated to result in harassment and intimidation of the individuals whose identities they are trying to uncover and thereby chill constitutionally protected speech.

In obtaining the Ex Parte Discovery Order, the Plaintiff failed to provide any of the Defendants notice of its application to the district court, notwithstanding that in its Complaint Plaintiff alleges that it has a street address for Defendant Defcad, Inc. (“Defcad”), email addresses for at least *some* of the anonymous parties, and Twitter addresses for still others. Yet, nowhere does Plaintiff allege that it tried to provide even *informal* notice of its application using these methods.

Further, the Ex Parte Discovery Order purports to provide for third party discovery without resort to the Fed. R. Civ. P. 45 subpoena process and all of its

attendant procedures and protections. In fact, it purports to bind not just specific non-parties that are not before the court, but also a generic category of “third party service providers” without specification. The Ex Parte Discovery Order is fundamentally lawless and coercive, as it orders third parties, in some instances an unlimited number of unidentified third parties, to provide information unmasking the anonymous defendants with literally no means for such parties to protect their anonymity.

Having been deprived of notice and therefore deprived of an opportunity to oppose the Ex Parte Discovery Order up front, Defendants scrambled to retain counsel and filed an Emergency Letter Motion below seeking to stay the Ex Parte Discovery Order to allow time to fully brief the issue, but the district court denied relief and also ignored the request for a stay pending appeal. Importantly, the district court entirely ignored the fact that the anonymous Defendants-Petitioners have retained counsel, have specially appeared, and are already before the court, thereby obviating any need to unmask them for the purpose of service of process. In such a context the threat of unmasking is purely and solely coercive.

Without an emergency stay pending appeal and a writ of mandamus to review the district court’s unprecedented and unauthorized order, the anonymous defendants will be unmasked and will have their First Amendment rights irreparably ripped from them.

STATEMENT

A. Background

On October 22, 2021, Plaintiff Everytown For Gun Safety Action Fund, Inc. (“Everytown”) filed a Complaint alleging federal and State trademark infringement type claims. (Complaint, ECF No. 1.)

In connection with its Complaint, Plaintiff sought an order to show cause setting forth briefing and a hearing for a preliminary injunction. (ECF No. 13.)

Importantly, the Complaint names as defendants several anonymous on-line user accounts that it describes as follows: Odysee User xYeezySZN; Defcad User xYeezySZN; The Gatalog; Defcad User Freeman1337; Twitter User xYeezySZN, and Odysee User TheGatalog-PrintableMagazines (the “Anonymous Defendants”). Plaintiff alleges that the Anonymous Defendant are among the infringers of their trademarks.

However, the crux of the dispute arises from allegations of activities that plainly constitute First Amendment protected speech. Everytown alleges in the Complaint that “Everytown is the largest gun violence prevention organization in the United States.” (Complaint ECF No.1 ¶ 45.) In fact, in describing its mission, Everytown portrays itself as the *number one* gun control advocacy group in the nation, holding rallies all over the country, selling t-shirts and placards, lobbying for and promoting gun control laws, and generally leading the way to restrict and

ban various firearms and firearms related parts and accessories. (Complaint ECF No. 1, ¶¶ 45-60.)

Importantly, among the missions Everytown most heavily emphasizes is seeking to ban what it hyperbolically refers to as: “assault weapons,” “high capacity magazines,” and “ghost guns.” (Complaint ECF No.1 ¶ 174.) Notably, notwithstanding the scary sounding and largely misleading names Everytown chooses to assign to these objects, Everytown cannot allege that they are anything other than broadly lawful to possess in most parts of the United States. In fact, it is plain that the broad legality of these items that it strongly dislikes is what appears to frustrate Plaintiff the most.

The trademark related allegations are essentially as follows. Everytown alleges that certain anonymous individuals and internet platforms have created and/or made available on-line 3D printable computer files that, when 3D printed, produce objects that display Everytown’s trademarks. But here is the twist – a twist essential to the defenses in this lawsuit, especially the First Amendment defenses. The objects alleged to display the Everytown trademarks when 3D printed are the very things Everytown *most* opposes. The Complaint alleges that the subject computer files will 3D print as: “assault weapons,” “high capacity magazines,” and “ghost guns” that display Everytown’s trademarks. (*See, generally*, Complaint, ECF No. 1 at ¶¶ 108-156.)

In fact, as evidence of this allegation, the Complaint cites to numerous on-line photographs and tweets that mock, goad, prod, and vilify Everytown using the very objects Everytown so very much despises and rails against publicly and politically. (*Id.*) Thus, the alleged use of Plaintiffs trademarks cannot be for the purpose of causing confusion, and it beggars belief that anyone would see the 3D printed parts and be confused into believing that they originated from Everytown. Rather, the purpose is plainly to criticize, parody, and disparage Everytown for its political activity.

And this is borne out in the Complaint. Everytown cannot and does not allege a single instance of actual confusion.

B. Procedural History

Plaintiff having made no attempt to provide any defendant notice of its application, on November 5, 2021, the district court entered an order to show cause setting forth a preliminary injunction hearing date of December 2, 2021, with defendants' opposition papers to be due a mere six days later, on November 11, 2021, while affording Plaintiff a generous 15 days to file its reply. (Order to Show Cause, ECF No. 30 at 2-3.). Oddly, the Order to Show Cause afforded Plaintiff *five* days to serve the papers on defendants, thereby potentially creating a situation where one or more defendants could be served as late as November 10, 2021, with

their opposition paper due the very next day. (*Id.* at 5.) Even in that case, Plaintiff still would have a generous 15 days to reply.

The Order to Show Cause also granted Plaintiff's application for substituted service by email and overnight courier using the electronic and physical addresses provided to the court *by Plaintiff* in its application. (*Id.* at 4.) Oddly, if Plaintiff was already aware of various means to serve at least some of the defendants, but merely needed permission from the court to effectuate formal service of process, then why could Plaintiff not have used those same physical and electronic addresses to provide *informal* notice of the application to at least some of the defendants in advance? Notably, not only is there nothing in the record to suggest that Plaintiff attempted to provide *any* kind of informal advance notice, but the record is devoid of anything to suggest that the district court required it or even suggested it. Yet the record is clear that the district court was aware of these physical and electronic addresses because the court was specifically asked to approve their use as a means of formal service. (*Id.*)

Most relevant to this Petition and Motion for a Stay pending the Petition is the material found on pages 3 and 4 of the Order to Show Cause, the district court's Ex Parte Discovery Order which provides as follows:

It is further ordered that any third party service provider providing services to Defendants, with the exception of Defendant Defcad, Inc., shall within seven days after being served with or receiving actual notice of this Order, provide to Everytown, via its

legal counsel, expedited discovery, including copies of all documents and records in such third party's possession or control relating to:

1. the true identities and addresses of Defendants, and the locations and identities of the relevant Defendants' operations, including without limitation identifying information associated with their seller accounts, online account, or bank, merchant, or payment processing account(s), and related financial accounts(s), or payment means by which Defendants have transacted the business complained of herein;
2. any and all known internet websites or online accounts owned or operated by Defendants, including but not limited to Twitter.com, Defcad.com, and Odysee.com accounts;
3. any and all documents related to the distribution of the Infringing Products; and
4. any and all known registered entities or businesses owned, registered, or used by Defendants related to Defendants' conduct at issue in this action.

It is further ordered that Defendant Defcad Inc., and third parties Odysee, Inc. and Twitter, Inc. shall, within seven days after being served with or receiving actual notice of this Order, provide to Everytown, via its legal counsel, expedited discovery, including copies of all documents and records in such party's possession or control relating to:

1. the true identities and addresses of Defendants, and the locations and identities of the relevant Defendants' operations, including without limitation identifying information associated with their seller accounts, online account, or bank, merchant, or payment processing account(s), and related financial accounts(s), or payment

Firm”). The Emergency Letter Motion sought relief not just for Defcad but also for the as yet unrepresented defendants under a theory of *jus tertii*.

On Monday November 8, 2021, Defcad filed a Supplemental Letter in further support (ECF No. 32), and the Hartman Firm filed an Appearance of Counsel with a reservation of rights as to jurisdiction and venue and indicating the Hartman firm now represented six of the defendants.

Also on November 8, 2021, Daniel L. Schmutter of the Hartman Firm telephoned both of Plaintiff’s lawyer at the Venable law firm, left them voicemail messages, and then emailed them in an effort to meet and confer as to the Ex Parte Discovery Order. (See Declaration of Daniel L. Schmutter, Exhibit G.) Neither of Plaintiff’s lawyers responded.

On November 9, 2021, the Hartman Firm filed a Supplemental Appearance of Counsel indicating that the Hartman Firm now represented a seventh defendant. (ECF No. 36.) That same day, the defendants filed a Brief in Further Support of the Emergency Letter Motion to Stay the Ex Parte Discovery Order (ECF No. 35.) As of that filing, seven of the eight defendants, including five anonymous defendants, were moving the district court on an emergency basis to stay the Ex Parte Discovery Order to allow an opportunity for full briefing to protect their First Amendment rights to anonymous speech. The Brief also requested a stay pending appeal as required by Fed. R. App. P. 8.

Later that day, on November 9, 2021, the district court denied the Emergency Letter Motion. (ECF No 38.) In its three-and-a-half page opinion, the district court erroneously held that relief could not be granted because Defcad could not represent the interests of other parties. The court's Order disregarded that there were *seven* represented defendants moving for relief, including *five* anonymous movants, not merely Defcad. (*Id.*)

ARGUMENT

I. The Court Should Exercise Its Mandamus Authority To Vacate the Ex Parte Discovery Order that Threatens to Unmask Defendant Anonymous On-Line Speakers Engaged in First Amendment Protected Speech.

A. Mandamus Review Is Appropriate.

Although a writ of mandamus is an extraordinary remedy, it “has been used ‘both at common law and in the federal courts . . . to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.’” *In re City of New York*, 607 F.3d 923, 932 (2d Cir. 2010) (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This Court has recognized that “mandamus provides a logical method by which to supervise the administration of justice within the Circuit” in cases in which “a discovery order present[s] an important question of law.” *In re von Bulow*, 828 F.2d 94, 97 (2d Cir. 1987); *see also In re Nielsen*, No. 17-3345, Dkt. No. 171, at 1 (2d Cir. Dec. 17, 2017) (mandamus is

means by which the individual Defendants have transacted the business complained of herein;

2. any correspondence with the Defendants' seller accounts pertaining to Everytown's notice of infringement, including but not limited to, identifying the means and/or manner in which communications were made to the Defendants;
3. the number of times Defendants' Infringing Products were accessed or otherwise downloaded by the public; and
4. any complaints received related to Defendants' Infringing Products.

(*Id.* at 3-4.)

Importantly, the Ex Parte Discovery Order primarily seeks identifying information calculated to unmask the anonymous defendants.

Also, significant is that the Ex Parte Discovery Order purports to bind third parties over which the district court has no jurisdiction. While one section of the order is directed at defendant Defcad, the remainder is directed at specified non-parties Twitter and Odysee, and then one section is directed at *unspecified* non-parties referred to simply as “any third party service provider providing services to Defendants.” That could be anyone, and yet the court purports to exercise jurisdiction over such a potentially limitless category of persons.

Notably, the Ex Parte Discovery Order seeks to compel third party discovery and yet does not invoke the Fed. R. Civ. P. 45 subpoena process, which is the sole

means under the Federal Rules of Civil Procedure for obtaining discovery from non-parties.

Unlike Rule 45, the Ex Parte Discovery Order includes no procedure protections or procedures for the target or the subject or the order.

Also unlike Rule 45, the Ex Parte Discovery Order requires no notice to the defendants as to whom has been served with the order and when. Accordingly, none of the defendants has any notice or means to object to any of the unmasking third party discovery.

Similarly, as it relates to Defcad, the Ex Parte Discovery Order provides no means for interposing any objection to the compelled unmasking discovery.

Also on Friday November 5, 2021, the day the Order to Show cause was entered by the district court and served on Defcad, Defcad retained its current lawyers. Facing a short seven day deadline (November 12, 2021) to, itself, produce the ordered unmasking discovery, but also realizing that unknown third parties could be served without notice to anyone and would be obligate to produce unmasking discovery also within the seven day timeframe, again, without notice to anyone, Defcad filed an Emergency Letter Motion to Stay the Ex Parte Discovery Order in order to allow Defcad and the other defendants to submit full briefing as the propriety of the order. (ECF No. 31.) The Emergency Letter Brief noted that other defendants were in the process of retaining the same law firm (the “Hartman

appropriate where a petition raises “a discovery question ... of extraordinary significance”).

B. The Court Should Vacate the Ex Parte Discovery Order as it was Entered Without Notice and Without Authority in the Law or Rules, and Threatens First Amendment Protected On-Line Speech.

1. The Ex Parte Discovery Order was Entered Without Notice and Therefore Violated Basic Due Process of Law

The Fourteenth Amendment provides in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. XIV, § 1.

Fundamental to Due Process is basic notice which affords an opportunity to be heard. In *Mullane v. Central Hanover Bank & Trust Company*, 70 S. Ct. 652, 657 (1950) the Supreme Court explained:

The fundamental requisite of due process of law is the opportunity to be heard. [Citation omitted] This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

See also Strike 3 Holdings, LLC v. Doe, 2019 WL 4752094, at *3-4 (E.D.N.Y. Sept. 30, 2019); *Cor Clearing, LLC v. Investorshub.com, Inc.*, 2016 WL 3774127 (N.D. Fla. May 11, 2016); *Solers, Inc. v. Doe*, 977 A.2d 941, 954 (D.C. 2009).

It is unfathomable how the district court did not at least require Plaintiff to

provide whatever informal notice was possible. The Plaintiff explicitly provided the district court with a physical address for Defcad, and email addresses for other defendants when it sought court approval to use those very addresses for formal service of process.

And yet at no point did the district court require the use of those same addresses for informal notice of the application.

And then once the Ex Parte Discovery Order was granted and seven of the eight named defendants asked the court to stay the order to allow them to be properly heard with full briefing, they were denied.

Such a procedure cannot comply with the requirements of Due Process, and the Ex Parte Discovery Order which seeks irreparable unmasking information should be vacated.

2. The Order Denying Defendants' Emergency Letter Motion for a Stay of the Ex Parte Discovery Order was Entered Based on An Egregious Error in Identifying the Movants

If nothing else, the Order below denying relief is fundamentally flawed because it is based on the incorrect belief that the only movant was Defcad. That is plainly false. By the time the district court entered its order denying relief, there were six represented defendants seeking relief, including four anonymous parties.

Therefore the denial of relief is fundamentally flawed and should be reversed.

3. The Ex Parte Discovery Order Should be Vacated Because the Anonymous Defendants are Already Joined in the Case and There is no Need for Unmasking to Effectuate Service

Four of the five anonymous defendants are represented by counsel and have specially appeared in the case. Although they assert lack of jurisdiction and improper venue in the Southern District of New York, and intend to file proper motions under Fed. R. Civ. P. 12(b)(2) and 12(b)(3), they are nevertheless, already before the court and represented by counsel. They need no longer be served with process. There is simply no need for unmasking in order for plaintiff to litigate this case.

As such the highly prejudicial Ex Parte Discovery Order should be vacated.

4. The Ex Parte Discovery Order Should be Vacated Because the Anonymous Defendants are Have a Fundamental First Amendment Right to Engage in Anonymous Speech

The anonymous defendants have a First Amendment right to engage in anonymous speech without being unmasked. *See Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, (S.D.N.Y. 2004); *In re Rule 45 Subpoena Issued To Cablevision Systems Corporation Regarding IP Address 69.120.35.31*, 2010 WL 2219343 (E.D.N.Y. 2010); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Intern., Inc. v. Doe No. 3*, 342 N.J. Super. 134, (N.J. App. Div. 2001); U.S. Const. Amend. I.

The standard to be applied to justify unmasking an anonymous on-line

speaker varies slightly from case to case but they all largely follow the test from *Dendrite* which requires as follows:

(1) the plaintiff undertake efforts to provide the anonymous posters with notice and provide reasonable opportunity to oppose; (2) the plaintiff identify and set forth the exact statements purportedly made by each anonymous poster that the plaintiff argued constituted actionable speech; (3) the plaintiff set forth a prima facie case against the anonymous defendants by producing evidence for each element of the cause of action; and (4) the court balance a defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the defendant's identity.

The Plaintiff has not come close to this standard. No notice was provided. Neither the plaintiff nor the district court made any attempt to balance the need for unmasking against the defendants' First Amendment rights. In fact, since these defendants have now specially appeared in the case through counsel it is hard to see what need there is at all to unmask them in order to litigate Plaintiff's claims – certainly nothing that would outweigh fundamental First Amendment rights. *See, e.g., Highfields Capital Management, L.P. v. Doe*, 385 F. Supp. 2d 969 (2005); *Malibu Media, LLC v. Doe*, 2015 WL 6116620 (S.D.N.Y. 2015).

Further, Plaintiff has not made a prima facie showing of trademark liability. Critically, this case is not a run-of-the-mill trademark counterfeiting case of the

sort where requests for expedited discovery are routinely granted. *See e.g., Cengage Learning, Inc. v. Doe 1*, No. 18-CV-403 (RJS), 2018 WL 2244461, at *1 (S.D.N.Y. Jan. 17, 2018). In this case, there are serious questions on the merits of Plaintiff's underlying theories, and Defendants should be heard on these issues before the Court orders expedited discovery.

Defendants are likely to succeed as to the trademark infringement and dilution claims. This is because Defendants are engaged in expressive political speech, in this case, comment, criticism, and mockery of Everytown and its mission to criminalize the 3D printing of gun parts. The marks are alleged to appear on the very gun parts Everytown says it vigorously opposes. This activity is entitled to First Amendment protection. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Lyons P'ship v. Giannoulas*, 179 F.3d 384 (5th Cir. 1999); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987).

Defendants' alleged use of Everytown's marks is non-confusing parody of the sort permitted in, for example, *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 434 (S.D.N.Y. 2016). It is not confusing to put Everytown's marks on goods that Everytown literally seeks to criminalize - no

reasonably prudent consumer would expect 3D printed gun parts or files related thereto to come from Everytown any more than a reasonably prudent consumer would expect hypothetical sex toys with “Moral Majority” written on them come from the Moral Majority.

Plaintiff relies on a novel theory of use in commerce under the Lanham Act, which requires that a defendant "in connection with any goods or services, or any container for goods, uses in commerce any word" that creates a likelihood of confusion. *See* Lanham Act, 15 U.S.C. § 1125(a)(1). Plaintiff is arguing that the free sharing of information, i.e., computer instructions, enabling a person to fabricate an article bearing the trademark of another is use in commerce. In some cases, Plaintiff is arguing that merely printing a gun part oneself and affixing the trademark of another to the part is trademark use in commerce. These are novel theories.

Notably, without one of the needs that might ordinarily warrant pre-litigation unmasking applying here, Plaintiff cannot come close to satisfying its burden in this regard.

5. The Ex Parte Discovery Order Should be Vacated Because it Employs an Utterly *Ad Hoc* Third Party Procedure Not Tethered To Fed. R. Civ. P. 45

There is no authority for the district court to have allowed an *ad hoc* process for third party discovery untethered from the Federal Rules of Civil Procedure.

Third party discovery must take place pursuant to a Rule 45 subpoena. Rule 45 contains substantial procedural protections for both the third party target of the subpoena and the subject of the subpoena, including interposing objections, motions to quash, etc. The Ex Parte Discovery Order contains none of these protections. It merely purports to bind third parties not before the Court such as Twitter and Odyssee. There is no law or court procedure that authorizes such an order, nor is there law or rule that authorizes a court to issue an order to an unnamed category of targets over which it has no jurisdiction, such as “third party service providers” as this Ex Parte Discovery Order purports to do. Such an order is literally limitless and therefore should be vacated.

II. The Court Should Issue an Administrative Stay and Stay Pending this Petition or the Rights of the Anonymous Speakers Will be Irreparably Lost.

A stay pending petition is necessary in this case. “The four factors to be considered in issuing a stay pending appeal are well known: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote omitted) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Here, each factor weighs in

favor of staying the Ex Parte Discovery Order pending review pursuant to the within Petition.

The factors to be considered for granting a stay are: (1) likelihood to succeed on the merits; (2) irreparable injury to the moving party; (3) likelihood of substantial injury or other party; and (4) the public interest. *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote omitted) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Here each factor favors a short stay to allow full briefing of the expedited discovery issue.

A. Irreparable Harm to the Anonymous Defendants

As explained above, the anonymous defendants have a First Amendment right to engage in anonymous speech without being unmasked. *See Sony Music Entertainment Inc. v. Does* 1-40, 326 F.Supp.2d 556, (S.D.N.Y. 2004); *In re Rule 45 Subpoena Issued To Cablevision Systems Corporation Regarding IP Address 69.120.35.31*, 2010 WL 2219343 (E.D.N.Y. 2010); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite Intern., Inc. v. Doe No. 3*, 342 N.J. Super. 134, (N.J. App. Div. 2001).

Once the identity of the Anonymous Defendants is revealed, it cannot be undone. The harm would be irreparable.

B. Likelihood of Success on the Merits of this Petition.

Defendants have a substantial likelihood of success on the merits of the discovery dispute. To grant expedited discovery, the Court must evaluate whether (1) plaintiff is suffering irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted. *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 13 F. Supp. 2d 417, 420 (S.D.N.Y. 1998). *See also 3M Company v. HSBC Bank USA, N.A.*, No. 16 Civ. 5984 (PGG), 2016 WL 8813992 at *1 (S.D.N.Y. Oct. 12, 2016) (applying a flexible standard of reasonable and good cause).

Point I, *supra*, sets forth the merits of the Petition and the likelihood of success warranting a stay.

As fully briefed above, this case is not a run-of-the-mill trademark counterfeiting case of the sort where requests for expedited discovery are routinely granted. In this case, there are serious questions on the merits of Plaintiff's underlying theories, and Defendants should be heard on these issues before the Court orders expedited discovery.

Defendants are likely to succeed as to the trademark infringement and dilution claims. This is because Defendants are engaged in expressive political speech, in this case, comment, criticism, and mockery of Everytown and its mission to criminalize the 3D printing of gun parts. The marks are alleged to appear on the *very* gun parts Everytown says it vigorously opposes. This activity is entitled to First Amendment protection. As explained above Defendants' alleged use of Everytown's marks is non-confusing parody, and thus it is not confusing to put Everytown's marks on goods that Everytown literally seeks to criminalize - no reasonably prudent consumer would expect 3D printed gun parts or files related thereto to come from Everytown.

Plaintiff's novel theory briefed in Point I, *supra*, regarding use in commerce under the Lanham Act. Plaintiff is arguing that the free sharing of information, i.e., computer instructions, enabling a person to fabricate an article bearing the trademark of another is use in commerce. In some cases, Plaintiff is arguing that merely printing a gun part oneself, and affixing the trademark of another to the part, is trademark use in commerce. These are novel theories.

There are also serious questions here regarding personal jurisdiction over all defendants. As will be set forth in defendants' forthcoming motion to dismiss, none of them has any connection with the State of New York or this

district, and in fact, Defcad has a policy to not permit the sending of *any* files into New York. Indeed, Plaintiffs have not alleged a single act of infringement (i.e., receipt of a file or production of a finished part) by any New York resident.

Expedited discovery on the schedule ordered by the Court is also unduly burdensome to Defcad. The court, by an *ex parte* order served by email on Friday, November 5, to Oppose Plaintiff's Motion for Preliminary Injunction by Thursday, November 11. The Court's Order of Friday requires Defendants to produce documents in response to sweeping requests at the same time. This is unduly burdensome. See *Citigroup Inc. v. AT&T Inc.*, No. 16-cv-4333 (KBF), 2016 WL 8794472 at *1 (S.D.N.Y. Sept. 1, 2016) (denying aggressive expedited discovery schedule where the burden on the Defendant outweighs the benefit to the Plaintiff because of aggressive litigation deadlines).

Plaintiff has not demonstrated that it would be harmed absent the expedited discovery. Expedited discovery in counterfeiting cases is sometimes granted to enable the plaintiff to detect other acts of infringement, but in this case, the alleged acts of infringement are occurring over publicly viewable databases, Plaintiff has already detected those acts, and it is attempting to address whatever harm those acts in a preliminary injunction motion. Where the infringing behavior is public, and has already been detected by the Plaintiff,

there is no cause for expedited discovery. *See Citigroup Inc.*, 2016 WL 8794472 at *2 ("However, plaintiff's motion for preliminary injunction displays a familiarity with the extent of defendants' conduct that is currently public and thus, possibly, leading to public confusion. Plaintiff has not advanced any evidence to suggest that imminent further developments in defendants' "thanks" program will harm plaintiff in a manner that is distinct from the alleged harm plaintiff has suffered/is suffering to date, which is the subject of plaintiff's motion for a preliminary injunction.")

Thus, Defendants are likely to prevail on this Petition.

C. Plaintiff Will Not Suffer Harm from a Stay

Plaintiff will not suffer any harm by staying the Ex Parte Discovery Order to allow this Petition to be heard — briefing and a hearing Defendants were denied by the *ad hoc ex parte* process below. Because Plaintiff chose not to attempt even informal notice, Defendants were denied any opportunity to oppose Plaintiff's application. Yet, Plaintiff cannot claim that it would be prejudiced by a stay to allow this Court to consider this Petition. Plaintiff has yet to identify a single instance of infringement (i.e. access) or confusion by members of the public. Not one.

D. The Public Interest Favors a Stay to Protect First Amendment Activity

Because the potential unmasking of the anonymous defendants implicates serious issues under the First Amendment and threatens to chill free and anonymous speech, the public interest plainly favors a stay.

As such, the four factors strongly support Defendants' Motion for Stay Pending the Petition.

The foregoing is not a full statement of Defendants' positions on the matters addressed, but it is clear that there are serious questions on the merits of both Plaintiffs' underlying theories of infringement, and its request for expedited discovery. The Defendants deserve to be heard before the Court orders discovery. Accordingly, Defendants respectfully request that this Court stay the Ex Parte Discovery Order pending review by this Court.

CONCLUSION

For all the reasons above, Defendant-Petitioners respectfully request that this Court enter an administrative stay by November 10, 2021, an order staying the district court's November 5, 2021 Ex Parte Discovery Order pending this Petition, and grant the Petition for a Writ of Mandamus vacating the order.

The specific stay sought is as follows:

1) Staying expedited discovery; 2) Ordering Plaintiff to disclose on whom service of the November 5, 2021 order to show cause with expedited discovery has been attempted; 3) Ordering any third parties who have been served with the November 5, 2021 order to show cause to refrain from releasing any information until further order of the Court; and 4) Ordering Plaintiff to serve this Court's order on any third party on whom service of the order to show cause has been attempted.

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Attorneys for Defendants-Petitioners

By: s/DANIEL L. SCHMUTTER
DANIEL L. SCHMUTTER

DATED: November 10, 2021

WORD COUNT CERTIFICATION

I certify that this Petition complies with the word limit requirements in Second Circuit Local Rule 27.1 and Federal Rule of Appellate Procedure 27(d)(2) because this Petition contains 5,472 words, which is less than 7,800 words.

s/DANIEL L. SCHMUTTER
DANIEL L. SCHMUTTER