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November 10, 2021

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VIA ECF

U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: **In re Defcad, Inc., Odysee User xYeezySZN, Defcad User xYeezySZN, The Gatalog, Defcad User Freeman1337, Twitter User xYeezySZN, Phillip Royster – Case No. 21-2806**

Dear Honorable Court:

We represent Plaintiff-Respondent Everytown For Gun Safety Action Fund, Inc. (“Everytown”) and write in response to Defendants-Movants Defcad, Inc., Odysee User xYeezySZN, Defcad User xYeezySZN, The Gatalog, Defcad User Freeman1337, Twitter User xYeezySZN, Phillip Royster’s (together “Movants”) Emergency Motion for Administrative Stay requesting a stay of a November 5, 2021 district court order (“Emergency Motion”).

For the reasons discussed below, the Emergency Motion should be denied because:

- (1) the district court’s November 5, 2021 order (“Nov. 5 Order”) granting limited expedited discovery and subsequent November 9, 2021 order denying an emergency stay (“Nov. 9, Order”) are sound and not an abuse of discretion;
- (2) Movants will not be irreparably harmed since Defendants’ identities are not protected from disclosure by the First Amendment where Defendants have infringed upon Everytown’s registered trademark rights, and Everytown has no other means of verifying their identities;
- (3) Everytown has put forth sworn declarations in support of the likelihood of success on the merits of its trademark infringement, false designation of origin and trademark dilution claims;
- (4) Movants are using identical versions of the Everytown Marks in commerce over the Internet by advertising, promoting and distributing downloadable files for the manufacture of actual 3-D printed gun parts and accessories, where the files and/or the resulting gun parts and accessories bear the Everytown Marks (hereinafter “Infringing Products”);
- (5) Movants’ use of the Everytown Marks is not protected parody or artistic speech;

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- (6) the discovery sought is narrowly tailored and necessary for Everytown to proceed with its case, and Everytown will be harmed by a stay; and
- (7) the public interest weighs in favor of intellectual property rights holders being able to proceed with their *prima facie* claims of infringement.

I. The District Court’s Nov. 5 Order and Nov. 9 Order Are Not an Abuse of Discretion.

The district court’s decision to deny a stay should be reviewed for abuse of discretion. *United States v. Assa Co.*, 774 Fed. App’x 51, 51 (2d Cir. 2019) (“[w]e review a district court’s decision denying a motion to stay for abuse of discretion” (internal citations omitted)). “A court abuses its discretion when its decision rests on an error of law or on a clearly erroneous factual finding, *see, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990); *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir.2003), ‘or [when] its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions,” *id.* (internal quotation marks omitted); *see, e.g., Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir.2001).” *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010).

Here, the district court’s Nov. 9 Order denying a stay was supported by the sworn facts within the case record, and balanced the appropriate factors referenced in *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), later approved in *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010), and is grounded in Fed. R. Civ. P. 26.

Courts look to various factors to determine whether discovery should proceed despite objections raised about preserving a defendant’s anonymity including: (1) whether the plaintiff has made a *prima facie* showing on its claim(s); (2) whether the discovery requested is specific; (3) whether there are alternative means to obtain the requested information; (4) the need for the information to advance the claim; and (5) the objecting party’s expectation of privacy. *See, e.g., Arista Records*, 604 F.3d at 119. All five factors were evaluated by the district court in its Nov. 9 Order and all five factors weigh in Respondent Everytown’s favor.

First, the district court explicitly found that Everytown has alleged a *prime facie* case of trademark infringement. *See* ECF 38, 4. This finding was supported by the multiple sworn declarations and exhibits submitted by Everytown in support of its Application for Order to Show Cause (“Application”). *See* Declaration of Marcella Ballard (hereinafter “Ballard Decl.”), [ECF 15], ¶¶ 4-10; Declaration of Erin Galloway (hereinafter “Galloway Decl.”), [ECF 17], ¶¶ 4-62; Declaration of Matthew McTighe (hereinafter “McTighe Decl.”), [ECF 18], ¶¶ 4-40 (describing how Everytown has a strong likelihood of success on the merits of its claims, how



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the discovery sought is specific and narrowly tailored, and how Everytown does not have a means by which to verify or obtain any identifying information about the defendants distributing the Infringing Products).

Second, the district court noted the narrow scope of the Order and the discovery sought as discovery “regarding each Defendant’s true identity, including name, address, and email address[]” as well as discovery sought from Defcad regarding “the true identities of several anonymous accounts named as Defendants in the Complaint.” ECF 38, 2, and recognized that there was no alternative means to obtain the requested information. The information is needed in order for Everytown to advance its claims which the district court noted stating: “Plaintiff cannot effectively litigate its claims without obtaining the identities of the infringing parties.” ECF 38, at 4.

Lastly, in the Feb. 9 Order, the district court weighed any First Amendment rights of the Defendants to speak anonymously against the fact that a party cannot use the “First Amendment to encroach upon the intellectual property rights of others” in infringement cases. *See* ECF 38, at 3-4 (citing *Sony Music Entm’t Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *Arista Records*, 604 F.3d at 118). Accordingly, as the district court weighed the applicable *Arista* factors in its decision to deny Movant’s request for a stay, the court did not abuse its discretion and the Emergency Motion should be denied.

II. The Movants Will Not Be Irreparably Harmed by Disclosure of Their Identities Given They Have Infringed Upon Everytown’s Registered Trademark Rights, and Everytown Has No Other Means of Verifying Their Identities.

The cases cited by Movants in their Emergency Motion do not support their position, and do not point to any error of law in the district court’s Nov. 9 Order. The cases do not involve a trademark infringement action where a plaintiff seeks preliminary injunctive relief against semi-anonymous defendants operating on the Internet and social media under usernames and “handles” that do not reflect their true identities.

Sony Music Entm’t Inc. v. Does 1-40, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), cited by Movants, and relied upon by the district court, actually supports Everytown’s request for expedited discovery, and the Court’s Nov. 5 Order and Nov. 9 Order as it relates to defendants’ efforts to quash a subpoena seeking to obtain defendants’ identities in a copyright infringement action. In *Sony Music*, the defendants’ motion to quash was denied and the court held that the First Amendment did not bar an internet service provider’s disclosure of the defendants’ identities finding that “**such a person’s identity was not protected from disclosure by the First Amendment.**” *Sony Music Entm’t*, 326 F. Supp. 2d at 557 (emphasis added). As stated by the court, “[p]arties may not use the First Amendment to encroach upon the intellectual property

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rights of others.” *Id.* at *563 (citing *In re Capital Cities/ABC, Inc.*, 918 F.2s 140, 143 (11th Cir. 1990)). The five-factor test articulated in *Sony Music* has further been adopted by the Second Circuit – and courts have explicitly rejected the reasoning in *Dendrite* (discussed below) cited by Defendants.

Likewise, *Dendrite International, Inc. v. John Doe*, 342 N.J. Super 134 (App. N.J. 2001), a New Jersey state law case involving a defamation action is not applicable here because: (1) the claim in that action was not a trademark claim, (2) the action did not involve a request for immediate injunctive relief, but a motion to dismiss, (3) the plaintiff failed to set forth facts supporting a *prima facie* cause of action for defamation; and (4) the action is not precedential or binding upon this Court where the applicable standard of review has been articulated by the Second Circuit in *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010). Here, Everytown’s claims relate to trademark infringement involving a request for preliminary injunctive relief supported by multiple sworn declarations in support of the likelihood of success of the merits of Everytown’s claims.¹ As even the court in *Dendrite* recognized, if a plaintiff makes out a *prima facie* cause of action, expedited discovery can be appropriate, as is the case here. *Dendrite*, 342 N.J. Super 149-50 (noting how whether the plaintiff was entitled to expedited discovery largely turned on “whether [the defendants] statements were defamatory or not”). Unlike the anonymous defendants in *Dendrite*, the Movants in this action are not alleged to have merely posted an article or comment about Everytown, but instead have distributed and advertised to consumers downloadable files for the manufacture of 3-D printed gun parts and accessories, some of which unlawfully bear the Everytown Marks (“Infringing Products”) using *identical* copies of the Everytown Marks – an intellectual property violation.

Moreover, in *John Doe v. Cahill*, 884 A.2d 451 (Del. 2005), the claim at issue did not involve a Lanham Act violation, but another defamation action concerning an action in Delaware State Court that is not precedential or binding. Most notably, the facts in *Cahill* are not analogous and involved statements made by an anonymous user on a message board that were critical of Patrick Cahill’s “performance as a City Councilman of Smyrna”, a public figure. *Cahill*, 884 A.2d at *454. Movants are not engaging in similar criticism of an elected official here.

Lastly, *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343 (E.D.N.Y. Feb. 5, 2010), is similarly inapposite as involving a bankruptcy claim and messages posted on message boards about the plaintiff, not an action involving the infringement of intellectual property. As recognized in *In re Rule 45 Subpoena*, courts have consistently found that disclosure of identifying information of anonymous individuals engaged in infringing conduct is warranted. 2010 WL 2219343, at *7

¹ Memorandum of Law in Support of Order to Show Cause (hereinafter “Memo of Law”), pg. 11-20; Ballard Decl., ¶¶ 4-10; Galloway Decl. ¶¶ 4-62; McTighe Decl. ¶¶ 4-40

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(citing *Elektra Entm't Grp., Inc. v. Does 1-9*, No. 04-cv-2289, 2004 WL 2095581, at *5 (S.D.N.Y. Sept. 8, 2004) (denying motion to quash third party discovery of personal identifying information of anonymous users in copyright infringement claim where allegation was meritorious, the request was specific, and there was an absence of alternative means to obtain subpoenaed information). Accordingly, the cases cited in Movant's Emergency Motion and Writ are inapposite, and weigh against any finding of irreparable harm in this case.

III. Everytown Has Established More Than a *Prima Facie* Showing.

Everytown has shown a strong likelihood of success on the merits of its claims – a burden higher than a *prima facie* showing required in a pleading. Everytown has put forth sworn evidence that it owns valid registered trademark rights, and that the Movants used identical versions of the Everytown Marks in commerce without Everytown's consent in a manner that is likely to cause confusion. Memo of Law at 12-16. Everytown has also put forth evidence that it is likely to succeed on the merits of its claim under N.Y. Gen. Bus. Law 360-1 based upon dilution by tarnishment. *Id.* at *17-20. The Movants have not disputed the validity of the Everytown Marks, do not dispute that the Movants are unauthorized to use the Everytown Marks, and do not dispute that the Movants are using *identical* versions of the Everytown Marks on goods within a similar industry to Everytown.

In Bloomberg, L.P. v. John Does 1-4, 2013 WL 4780036, at *3 (S.D.N.Y. June 26, 2013), a trademark infringement action involving anonymous internet infringers, the court similarly found that the plaintiffs had made a *prima facie* showing on their claims where the defendant used the plaintiff's registered trademark "without consent on blogs" likely to cause confusion sufficient to satisfy the *Sony Music* standard involving a motion for expedited discovery. 2013 WL 4780036, at *3. **Where "[p]laintiffs have alleged what appears to be meritorious trademark infringement claims and must identify [d]efendant's identity in order to litigate those claims" a defendant is only entitled to "minimal expectation of privacy."** 2013 WL 4780036, at *4; *see also Next Phase Distrib., Inc. v. John Does 1-27*, 284 F.R.D. 165, 171 (S.D.N.Y. 2012) (granting expedited discovery); *Cengage Learning v. Doe 1*, 2018 U.S. Dist. LEXIS 239799, at *11-12 (S.D.N.Y. Jan. 17, 2018) (granting expedited discovery in copyright and trademark infringement claim). Accordingly, Everytown has made a sufficient *prima facie* showing of actionable harm sufficient to outweigh any of the defendants' allegations of a First Amendment right to speak anonymously in this trademark infringement case.

IV. The Movants have Used the Everytown Marks in Commerce as Source Identifiers.

The Movants' use of the *identical* Everytown Marks in connection with the Infringing Products is unauthorized use in commerce. Everytown's theory concerning "use in commerce" is not "novel" as Defendants' suggest. Congress's power to register trademarks is derived from the

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Commerce Clause of the United States Constitution. *See* U.S. Const., Art. 1, § 8, cl. 3. The Lanham Act defines “use in commerce,” in relevant part, as:

(1) on goods when-

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce

See 15 U.S.C. § 1127.

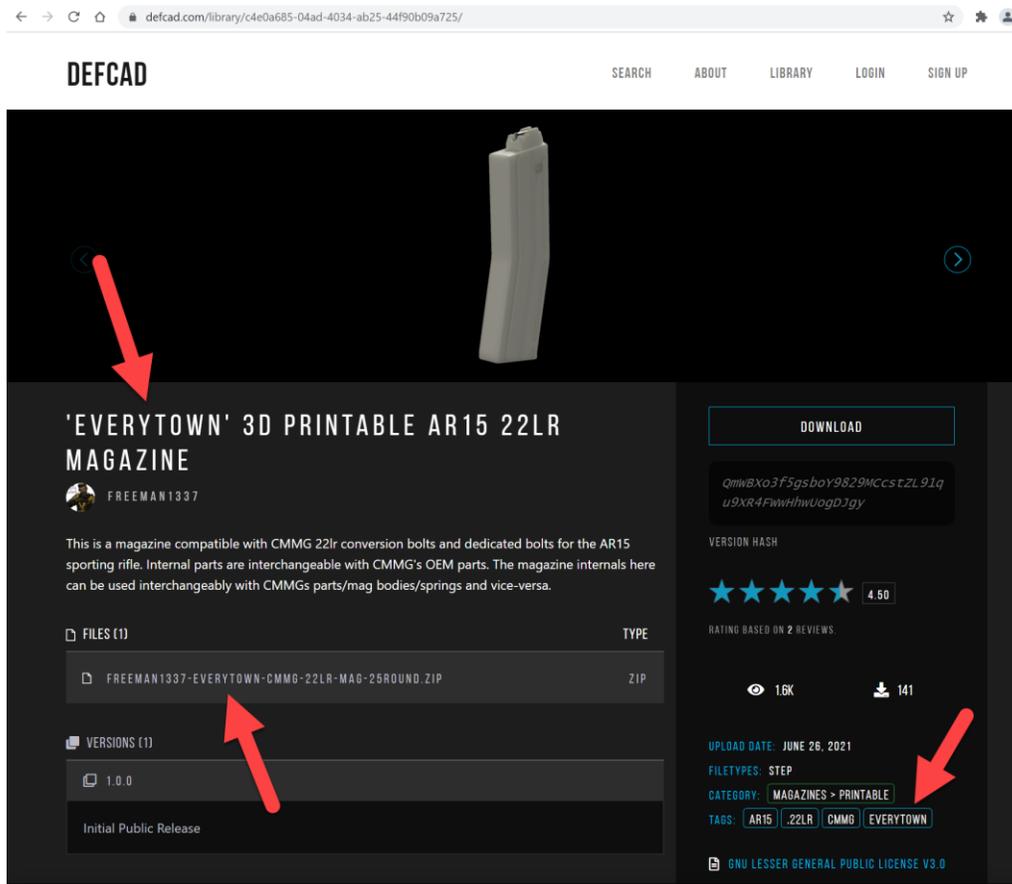
Courts within the Second Circuit have repeatedly found that the scope of “use in commerce” within the Lanham Act is “broad and has a sweeping reach”. *See Planned Parenthood Federation of Am., Inc. v. Bucci*, 1997 WL 133313, at *3 (S.D.N.Y. Mar. 24, 1997). “Use in commerce” under the Lanham Act constitutes “all commerce which may lawfully be regulated by Congress.” *See Franchised Stores of New York, Inc. v. Winter*, 394 F.2d 664, 669 (2d Cir. 1968) (citing 15 U.S.C. § 1127). Further, “[t]he history and text of the Lanham Act show that ‘use in commerce’ reflects Congress's intent to legislate to the limits of its authority under the Commerce Clause, rather than to limit the Lanham Act to profit-seeking uses of a trademark.” *See United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 92 (2d Cir. 1997) (discussing how use of the identical mark between two groups in connection with non-profit political activities can constitute use in commerce for purposes of the Lanham Act).

Activities constituting “use in commerce” can be: (1) activities a defendant takes which affect a plaintiff’s ability to offer its services in commerce; and (2) activities a defendant takes on the internet using a mark as a source identifier. *See Planned Parenthood Federation of Am., Inc. v. Bucci*, 1997 WL 133313, at *3 (S.D.N.Y. Mar. 24, 1997) (discussing a defendant’s use of the PLANNED PARENTHOOD trademark in a website URL). “When an alleged infringing mark is used on the internet, the use is clearly a ‘use in commerce’ that can be regulated by the Lanham Act under the Constitution.” MCCARTHY’S ON TRADEMARKS & UNFAIR COMPETITION (5th Ed.) § 25:54:50 (collecting cases).

Movants’ Infringing Products are being distributed and transported as downloadable files for the manufacture of 3-D printed gun parts and accessories on the Internet. Under the Nice Classification, downloadable image files, and graphics, as well as downloadable computer programs, and downloadable software applications constitute goods under International Class 9.

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As demonstrated in Everytown's supporting declarations, the Movants are displaying the Everytown Marks as source identifiers in connection with the Infringing Products. Photographic excerpts from the Galloway Decl. filed by Everytown in support of its Application are below demonstrating examples of the Movants' uses of the Everytown Marks as source identifiers in connection with the Infringing Products.



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Moreover, to the extent that Movants' distribution of the Infringing Products is considered a "service" for purposes of the Lanham Act, courts have found that "communicating ideas and purveying points of view is . . . a service subject to the controls established by trademark law." See *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 90 (2d Cir. 1997) (discussing non-profit services). Here, the Movants are advertising their services through their product listings on Defcad, Odyssee and Twitter and their services are thus rendered in commerce over the Internet.

Courts have also found that just because a defendant was not "selling" a product, did not mean that the use of a trademark did not constitute "use" in commerce. See *Planned Parenthood Federation of Am., Inc. v. Bucci*, 1997 WL 133313, at *3 (S.D.N.Y. Mar. 24, 1997) (citing *MGM–Pathe Communications v. Pink Panther Patrol*, 774 F. Supp. 869 (S.D.N.Y.1991) (holding that a group formed to offer the free service of protecting gay individuals from assault was subject to § 1114)). Whether the Movants' Infringing Products are available for "sale" is not dispositive as to the issue of "use in commerce" or commercial use for purposes of the Lanham Act (see 15 U.S.C. § 1114(a)(a) (describing various "uses" including "sale, offering for sale, distribution, or advertising" as infringing uses)). The Infringing Products downloadable in connection with Movant Defcad, Inc.'s platform were "sold" as a subscription fee was required in order to access those files. See, e.g., Green Decl. ¶¶ 30-31.

The Movants' argument is similar to the arguments made by the defendant in *Planned Parenthood* that were rejected by the court. In that case a defendant was using the website

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www.plannedparenthood.com in order to display materials about a book entitled *The Cost of Abortion*. The defendant did not receive any money from the books sales, and no personal profit. The court reasoned that the defendant's conduct in that case satisfied the requirement of 15 U.S.C. § 1114 "in a variety of ways" as (1) it related to advertisement and distribution of *The Cost of Abortion* book, (2) the defendant was offering his own services concerning the anti-abortion movement, but was using the plaintiff's mark in connection with those services over the Internet, and (3) defendant's conduct may have resulted in users being unable to access plaintiff's services or website.

Like in *Planned Parenthood*, Movants' use of the Everytown Marks is "use in commerce" even if the Infringing Products are available mostly for free download as the "nature of the Internet itself" makes Defendants' use of the Everytown Marks "use in commerce" and Defendants' unauthorized use of the Everytown Marks "affects [Everytown's] ability to offer [its] services [and goods] in commerce. *See, e.g., OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176, 186 (W.D.N.Y. 2000) ("[T]he national, and even international, nature of the Internet itself makes defendants' use of plaintiffs' trademark as a domain name a 'use in commerce' for purposes of the Lanham Act.") (citing *Planned Parenthood Fed'n of Am. v. Bucci*, 1997 WL 133313, at *3 (S.D.N.Y. Mar. 24, 1997), *aff'd* 152 F.3d 920 (2d Cir. 1998)); *see also Talent Mobile Dev., Inc. v. Headios Grp.*, Civ. No. 16-cv-0464, 2017 WL 6940548 (C.D. Cal. Oct. 2017) (granting partial summary judgment on trademark infringement claims after finding the defendant's free downloadable application was likely to be confused with the plaintiff's free downloadable application). Thus, Defendants' unauthorized use of the Everytown Marks is "use in commerce" for purposes of the Lanham Act.

V. The Movants' Use of the Everytown Marks Is Not Artistic Free Speech or Protected Parody.

The Movants' conduct is not defensible as a parody, or artistically relevant to the Infringing Products as the Movants have used the *identical* Everytown Marks without any additions, subtractions, commentary, or other source identifiers to distribute and advertise the Infringing Products. To be considered parody, the Defendants' use of the Everytown Marks must both call to mind and differentiate itself from the original. *Cliff Notes, Inc. v. Bantam Doubleday Dell Pub. Grp. Inc.*, 886 F.2d 490 (2d Cir. 1989) ("A parody must convey two simultaneous—and contradictory messages: that it is the original, but also that it is not the original and is instead a parody."); *see also Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 113 (2d Cir. 2009)("[a] parody relies upon a difference from the original mark...in order to produce its desired effect.")(citation omitted). "The heart of any parodist's claim...is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's work...The comment must have some 'critical bearing on the substance or style of the original composition.'" *Harley Davidson, Inc. v. Grottanelli*, 164 F.3d

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806 (2d. Cir. 1999) (rejecting parody defense where defendant's use made no comment on the plaintiff's mark and "simply use[d] it somewhat humorously to promote his own products and services").

The Movants' use of the *identical* Everytown Marks without any additions, subtractions, commentary or other source identifiers falls woefully short of such requirements and cannot be considered parody. Courts have rejected parody arguments when presented with similar scenarios to Defendants' conduct. *See e.g., Nat'l Acad. of TV Arts & Scis., Inc. v. Multimedia Sys. Design, Inc.*, No. 20-cv-7269, 2021 WL 3271829, at *5 (S.D.N.Y. July 30, 2021) (rejecting parody defense because "a secondary work that simply appropriates material from an existing work without directing its criticism at the copied work itself is not parody" (internal citation omitted)); *Gucci Shops, Inc. v. R. H. Macy & Co., Inc.*, 446 F. Supp. 838, 839-40 (S.D.N.Y. 1977) (granting preliminary injunction and rejecting parody defense because "[t]he fact that the offending product was intended only as a joke was of no consequence" when except for the addition of the letter "H," Defendant's use of the GUCCHI GOO mark was identical to Plaintiff's registered GUCCI mark); *Planned Parenthood*, 1997 WL 133313, at *8 (rejecting parody argument and granting preliminary injunction where defendant, who ideologically opposed Planned Parenthood's mission and sought to present opposing viewpoint used domain name "plannedparenthood.com," because plaintiff's PLANNED PARENTHOOD Mark and the domain name used by Defendant were "nearly identical").

The cases cited by the Movants do not support an alternate conclusion. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009) cited by the Movants in favor of their argument rejected a parody defenses to Lanham Act claims for trademark dilution where the marks at issue were "Charbucks" and "Starbucks" – a scenario where the alleged diluter took greater pains to modify the plaintiff's trademark than the Movants did here. Likewise, *Rogers v. Grimaldi*, 994, 999 (2d Cir. 1989), cited by the Movants, is inapplicable to the Movants' conduct as it concerns First Amendment rights in the titles of expressive works. In *Rogers*, the court found that where a title of a movie bearing a part of a celebrity's name was artistically relevant to the content of the movie about that celebrity, First Amendment protection was found. Such facts and circumstances are not present here where the Movants have used Everytown's *identical* trademarks as source identifiers for the Infringing Products that were not movies, plays, works of art, or similar expressive works.

Likewise, the facts of *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007), cited by the Movants, are also dissimilar to the circumstances of this case. The Court found parody where a defendant modified a plaintiff's trademark from "LOUIS VUITTON" to "CHEWY VUITON" in connection with dog toys. In that case the defendant modified the plaintiff's original trademark and did not just place the identical mark on their own products, again, like the Movants have done in this case. The other cases cited by the Movants

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are likewise similarly unsupportive of their Emergency Motion. *See* 1-2, at *21 (citing *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003) (a case analyzing copyright infringement involving photographs depicting Barbie toys nude, frazzled looking, and in dangerous situations), *Lyons P'ship v. Giannoulas*, 179 F.3d 384 (5th Cir. 1999) (a case evaluating parody in the context of a chicken mascot with a “Barney” look-a-like side-kick in the context of performance art at sporting events), and *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32 (1st Cir. 1987) (a case finding a parody where the defendant’s alleged use of a mark occurred within an article inside a magazine, not on the cover, was labeled as “humor” and “parody” and the trademark was not used to “identify or promote goods or services to consumers”).

VI. The Discovery Sought is Narrow and Necessary to Advancing the Action, and Everytown Will Be Harmed by A Stay.

Everytown’s sworn declarations also demonstrate that the limited discovery sought is narrow, and necessary to advance the action. Where the discovery requested would lead to “identifying information” that would allow the plaintiff to serve the defendant, such discovery has been deemed appropriate. *See, e.g., Bloomberg*, 2013 WL 4780036, at *3 (finding expedited discovery requested sufficiently specific where information sought related to a defendant’s identity, like email addresses, and IP addresses); *Cengage Learning*, 2018 U.S. Dist. LEXIS 239799, at *12,19-20 (finding expedited discovery reasonable where plaintiff sought names, addresses, and online account information of infringers).

Everytown has no means by which to verify the identity of any of the Movants using the Internet platforms Defcad, or Odysee.com. Everytown is currently in possession of one email address through which it believes some of the defendants *might* be related. The email address was obtained by Everytown through multiple steps involved with one of the Movant’s www.linktree.com pages, but Everytown has not been able to confirm or verify that the email address is *in fact* associated with the Defcad or Odysee user accounts at issue because the email address was not obtained by Everytown through those accounts. A detailed explanation of that investigation process is contained within the Declaration of Erin Galloway, which depicts screenshots of Everytown’s investigative efforts into the email address that might be associated with some of the Movants. Galloway Decl. ¶¶ 32-33.

Further, Everytown does not have *any* identifying information or email for three of the defendants, and thus has no way in which to serve those defendants. Galloway Decl. ¶¶ 61-62; Ballard Decl. ¶¶ 6-10. In similar situations, where a plaintiff has been unable to obtain information from another party which would be in possession of such information, the expedited discovery information has been found necessary to advance the plaintiff’s claims. *See, e.g., Bloomberg*, 2013 WL 4780036, at *4; *see also Strike 3 Holdings, LLC v. Doe*, 2020 U.S. Dist.

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LEXIS 158201, at *9-10 (S.D.N.Y. Aug. 31, 2020)(granting expedited discovery where plaintiff sought limited and specific information of infringer, such as name and addresses, and there were no alternative means to uncovering defendant's identity). Defcad and Odysee.com accounts do not provide identifying information through which Everytown can otherwise identify the Defendants. Everytown previously served Defcad with a notice of infringement in this case, which was ignored. Galloway Decl. ¶¶ 52-55. As demonstrated in Everytown's Affidavit of Service filed on November 9, 2021, it has only served the Nov. 5 Order on third parties Twitter, Inc. and Odysee, Inc., entities which would be in possession of the narrow discovery sought.

Additionally, Everytown would require information about the Movants' true identities in the event the district court grants Everytown's request for a preliminary injunction. Everytown would need to be able to monitor the Movants' compliance with any injunction, and would not be able to do so if the Movants were able to proceed anonymously.

Accordingly, the expedited discovery that the district court has currently ordered is the only means by which Everytown can advance its claims and the Emergency Motion to stay the discovery respectfully should be denied.

VII. The Public Interest Weighs Against A Stay

Courts have repeatedly found that the public interest weighs in favor of expedited discovery of personal identifying information where a defendant is operating anonymously over the internet to infringe a rights holder's intellectual property. *See Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004) (denying motion to quash discovery of identifying information of Joe Doe defendants in copyright infringement action); *Streamlight, Inc. v. Gindi*, No. 18-cv-987 (NG), 2018 WL 8967042, at *2 (E.D.N.Y. Apr. 23, 2018); *Bloomberg, L.P. v. Doe*, No. 13-cv-01787 (LGS), 2013 WL 4780036, at *3-4 (S.D.N.Y. June 26, 2013); *Next Phase Distrib.*, 284 F.R.D. at 171-72. The Movants' Emergency Motion cites no case law to the contrary in a situation where a rights holder has made a prima facie claim for infringement, and has no other means by which to obtain the identifying information.

For the reasons discussed above, the Movants' Emergency Motion should be denied.

Respectfully submitted,

/s/Marcella Ballard

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