

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LIZZIE BORDEN BED AND BREAKFAST, LLC,)

Plaintiff,)

v.)

LEONARD PICKEL and DIVERSIFIED)
ADVENTURES, doing business as THE TRUE)
STORY OF LIZZIE BORDEN GIFT SHOP)
AND MUSEUM,)

Defendants.)

C.A. No. _____

Hearing Requested

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiff Lizzie Borden Bed & Breakfast, LLC has moved this Court for issuance of a Temporary Restraining Order and Preliminary Injunction pursuant to Fed.R.Civ.P. 65 enjoining Defendants Leonard Pickel and Diversified Adventures which are doing business as The True Story of Lizzie Borden Gift Shop and Museum (collectively "Defendants") from using the trademark LIZZIE BORDEN MUSEUM in their trade names, Internet domain <www.lizziebordenmuseum.com> and e-mail address lizziebordenmuseum@gmail.com.

II. PRELIMINARY STATEMENT

Plaintiff is the owner of the incontestable trademark registration LIZZIE BORDEN MUSEUM on the Principal Register. Plaintiff's registered trademark is used in connection with

a museum about the Borden murders¹ located in Fall River, Massachusetts. Plaintiff's LIZZIE BORDEN MUSEUM opened to the public on August 4, 1996. In the ensuing 12 years, visitors to the LIZZIE BORDEN MUSEUM have come from across the United States, including among them forensic scholars and historians as well as the general public. The LIZZIE BORDEN MUSEUM contains numerous displays of items and information relating to the Borden murders, the trial, the persons implicated in the murders and life in Fall River circa 1892, including a preeminent library of Borden murder materials. The LIZZIE BORDEN MUSEUM also features a gift shop with unique items for the museum visitors to commemorate their experience.

The LIZZIE BORDEN MUSEUM has been featured prominently in the local and national media. It has been featured on the A&E Network, The History Channel, the Montel Williams' Show and NBC's Today Show. The LIZZIE BORDEN MUSEUM is advertised by large signs on Interstate 195 located prominently near the national tourist attraction "Battleship Cove." Plaintiff's LIZZIE BORDEN MUSEUM has been featured in numerous newspaper and magazine articles over the years, including The Boston Herald, The Boston Globe, The Providence Journal, The Hartford Courant, The New York Times, Newsday (New York), The Wall Street Journal, Pittsburgh Post-Gazette, The Washington Post, The Miami Herald, The Chicago Tribune, St. Louis Post-Dispatch, The Denver Post, The Houston Chronicle, The Santa Fe New Mexican, Inside Bay Area (California), Oakland Tribune, USA Today, Time magazine, Travel magazine and others. Plaintiff has invested substantial time, effort and money to promote its trademark LIZZIE BORDEN MUSEUM in connection with its museum, gift shop and tourist venue.

¹ The Borden murders are one of the most widely known, yet unsolved crimes of the Victorian era. The Borden's daughter, Lizzie, was tried for the crimes and acquitted.

Plaintiff is the owner of United States Trademark Registration, No. 2,668,044, dated December 31, 2002, on the Principal Register for LIZZIE BORDEN MUSEUM for museum services in Class 41. The Application to register LIZZIE BORDEN MUSEUM was filed on February 2, 2001, based upon use dating back to August 4, 1996. Plaintiff's LIZZIE BORDEN MUSEUM trademark has been in continuous use and its registration has become incontestable.

Defendants are opening a competing museum dedicated to the Borden murders in Salem, Massachusetts. In connection with Defendants' museum, Defendants are using the confusingly similar and virtually identical names and marks THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, the Internet Domain name <www.lizziebordenmuseum.com> and the e-mail address lizziebordenmuseum@gmail.com. While Plaintiff claims no monopoly on the subject matter of Defendants' museum, it cannot permit its registered trademark to be wholly subsumed and infringed by Defendants' identical use in their names and marks, domain name and e-mail address.

Defendants have advertised the competing museum on their Internet website at <www.lizziebordenmuseum.com> and in print materials for the Salem, Massachusetts tourist industry. It is understood that Defendants will open shortly after August 4, 2008 – 116 years after the Borden murders and 12 years after the opening of the LIZZIE BORDEN MUSEUM.

Defendants admit knowledge of Plaintiff's earlier registration of LIZZIE BORDEN MUSEUM on the Principal Register. In spite of such knowledge, Defendants have adopted the confusingly similar names and marks THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM and THE TRUE STORY OF LIZZIE BORDEN as well as the identical <www.lizziebordenmuseum.com> domain name for their museum. Defendant's also use the

identical email address of lizziebordenmuseum@gmail.com. Defendants' use of THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and e-mail address lizziebordenmuseum@gmail.com in connection with a museum and tourist attraction is likely to create the false impression that the Defendants' services are endorsed by, affiliated with or sponsored by Plaintiff and its museum operated under the identical trademark LIZZIE BORDEN MUSEUM or that such services emanate from the Plaintiff.

Consumers associate the LIZZIE BORDEN MUSEUM trademark with a high-quality presentation of facts, artifacts and historical materials relating to the Borden murders. These consumers will likely be confused and Plaintiff undoubtedly will be irreparably harmed if the Defendants' use of LIZZIE BORDEN MUSEUM in its names and marks, domain name and e-mail address is allowed to continue.

Plaintiff has already experienced instances of actual confusion. On multiple occasions, visitors have questioned the Plaintiff's tour guides at the LIZZIE BORDEN MUSEUM about the connection between the LIZZIE BORDEN MUSEUM and the Salem, Massachusetts museum. Moreover, the Salem News newspaper, in an interview with Defendant dated July 25, 2008, referred to Defendants' business as the "new Lizzie Borden Museum" on multiple occasions. A Letter to the Editor of the Salem News, dated July 29, 2008, from a Salem resident suggests that Salem's tourists know very little about the city's history and will be misled as to the connection between Lizzie Borden and Salem, Massachusetts.

The confusion regarding the Defendant's names and marks THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and e-mail address

lizziebordenmuseum@gmail.com and the Plaintiff's LIZZIE BORDEN MUSEUM creates a significant risk of harm to Plaintiff because it cannot control the nature or quality of Defendants' services or the public perception of them, which Defendants freely admit has not been altogether positive. This negative reaction to Defendants' museum, coupled with the confusion regarding its affiliation to Plaintiff's LIZZIE BORDEN MUSEUM harms the goodwill established by the Plaintiff in its federally registered trademark LIZZIE BORDEN MUSEUM as a source of high quality museum services.

III. STATEMENT OF FACTS

The facts relevant to this motion are set forth in the Verified Complaint, submitted contemporaneously herewith and attached as Exhibit A.

IV. ARGUMENT

A. LIZZIE BORDEN MUSEUM IS ENTITLED TO A PRELIMINARY INJUNCTION ENJOINING DEFENDANTS' UNAUTHORIZED USE OF LIZZIE BORDEN MUSEUM

In this Circuit, a court deciding whether to grant a motion for a injunctive relief must consider four factors: (1) the likelihood of success on the merits; (2) the risk of irreparable harm to movant if the injunction is not issued; (3) how that harm compares to any harm the defendant faces if the injunction does issue, and (4) the effect (if any) of the court's ruling on the public interest. See, e.g., Nieves-Marquez v. Puerto-Rico, 353 F.3d 108, 120 (1st Cir. 2003). "The sine qua non of this four-part inquiry is likelihood of success on the merits." New Comm. Wireless Servs. v. SprintCom, Inc., 287 F.3d 1, 8 (1st Cir.2002). This is particularly true when the movant seeks a preliminary injunction on the basis of a trademark claim, since irreparable harm generally follows from infringement and the resolution of the other factors will depend upon likelihood of establishing infringement. See Borinquen Biscuit Corp. v. M.V. Trading Corp.,

443 F.3d 112, 115 (1st Cir.2006); I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 33 (1st Cir.1998). “[A]s a matter of public policy, trademarks should be protected against infringing uses...” Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir.2006).

Plaintiff’s request for a preliminary injunction is premised on the Lanham Act which protects registered trademarks, such as Plaintiff’s LIZZIE BORDEN MUSEUM. The Lanham Act expressly provides that the federal courts may enjoin infringing activities. 15 U.S.C. § 1116.

1. Plaintiff Has A Reasonable Likelihood Of Succeeding On The Merits Of Its Federal Trademark Infringement Claim Under The Lanham Act

In order for Plaintiff to prevail on its claim of trademark infringement, it must show that: (1) Plaintiff owns a valid mark; and (2) the Defendants’ use of a similar name or mark is likely to confuse the consumer. Star Fin. Servs., Inc. v. AASTAR Mort. Corp., 89 F.3d 5, 9 (1st Cir.1996) (citations omitted). Plaintiff easily demonstrates a likelihood of confusion arising from Defendants’ use of confusingly similar names and marks and use of a domain name and e-mail address identical to Plaintiff’s incontestable registered trademark LIZZIE BORDEN MUSEUM for the same services, targeted to the same consumers.

a. LIZZIE BORDEN MUSEUM is a Valid Mark

Plaintiff’s predecessor in interest began using LIZZIE BORDEN MUSEUM in connection with museum services when it opened to the public in August 1996. The United States trademark registration for LIZZIE BORDEN MUSEUM issued on December 31, 2002 under U.S. Registration No. 2,668,044.² The LIZZIE BORDEN MUSEUM Registered Mark has a priority date that long predates Defendants’ first use, which began in 2008.

² Plaintiff’s registration on the Principal Register of LIZZIE BORDEN MUSEUM for museum services named after a historical, famous figure is not unique. Plaintiff is merely one in a long line of registrants of similar trademarks issued by the United States Patent and Trademark Office on the Principal Register for a museum named after a historical or famous person: SHOELESS JOE JACKSON MUSEUM AND BASEBALL LIBRARY (Reg. No. 3,406,140); JAMES MONROE MUSEUM (Reg. No. 3,164,683); SALVADOR DALI MUSEUM (Reg. No.

When a party seeks protection for a registered trademark, its burdens are lighter. Registration is “prima facie evidence of the validity of the registered mark.” 15 U.S.C. § 1115(a); Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir.2006); Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154, 161 n. 12 (1st Cir.1977) (explaining that “registration is prima facie evidence that the ... mark is distinctive per se”). The holder of a registered mark is entitled to a presumption that its mark is *distinctive*, i.e. strong. 15 U.S.C. § 1115(a); Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 120 (1st Cir.2006). If the registered mark has become incontestable through the owner's compliance with the applicable statutory formalities, as is the case here, the presumption is conclusive. 15 U.S.C. § 1115(b); Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir.2006).

In accordance with Sections 7(b), 22 and 33(a) of the Lanham Trademark Act, Plaintiff's LIZZIE BORDEN MUSEUM registration constitutes *prima facie* evidence of the validity of the registered mark and of the registration thereof, Plaintiff's ownership of the mark shown in said registration and Plaintiff's *exclusive* right to use the mark in commerce in connection with the goods and services named therein, without condition or limitation.

Based on the foregoing, Plaintiff owns a valid, incontestable mark.

b. There is a Likelihood of Confusion

The purpose of trademark law is “to prevent one seller from using the same ‘mark’ as – or one similar to – that used by another in such a way that he confuses the public about who really produced the goods.” Star Fin. Servs., Inc. v. AASTAR Mort. Corp., 89 F.3d 5, 8 (1st Cir.1996) (citations omitted). Consumer confusion may “jeopardize the commercial reputation of the senior (first) user, which might be tarnished by association with the junior (subsequent)

1,692,000); JUDY GARLAND MUSEUM (Reg. No. 2,053,653); MARGARET MITCHELL HOUSE & MUSEUM (Reg. No. 2,385,380); CHARLES M. SCHULTZ MUSEUM (Reg. No. 2,490,529); JIMMIE RODGERS MUSEUM (Reg. No. 2,561,534) and others.

user.” See Dialogo, LLC v. Santiago Bauza, 467 F.Supp.2d 115, 126 (D. Mass 2006)(citations omitted).

Once the validity of a mark is established, the test for infringement is the likelihood of consumer confusion. In determining whether a mark presents a likelihood of confusion with another mark, the Court must consider each of the following eight factors:

- (1) the similarity of the marks;
- (2) the similarity of the goods;
- (3) the relationship between the parties' channels of trade;
- (4) the relationship between the parties' advertising;
- (5) the classes of prospective purchasers;
- (6) evidence of actual confusion;
- (7) the defendant's intent in adopting its mark; and
- (8) the strength of the plaintiff's mark.

Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 120 (1st Cir.2006), citing, Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 1205 (1st Cir.1983). No singular factor is determinative; rather all factors must be evaluated in context and considering the circumstances in which the ordinary consumer will confront the conflicting mark. See Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 817 (1st Cir.1987).

The likelihood of confusion generated by the Defendants' use of THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and e-mail address lizziebordenmuseum@gmail.com, long after Plaintiff's first use, marketing and registration of LIZZIE BORDEN MUSEUM for museum services is readily established under this eight-factor test. Confusion is especially likely in light of the fact that Defendants' business name completely incorporates Plaintiff's registered mark and its domain name and email address exactly replicate Plaintiff's registered trademark for the exact same services in close geographical proximity.

(1) Plaintiff's LIZZIE BORDEN MUSEUM and Defendants' Names and Marks THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP AND MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, the Domain Name <www.lizziebordenmuseum.com> and the E-mail Address lizziebordenmuseum@gmail.com Are Virtually Identical

Plaintiff owns the incontestable trademark LIZZIE BORDEN MUSEUM on the Principal Register for museum services. In its registration, Plaintiff has properly disclaimed the term "MUSEUM," leaving LIZZIE BORDEN as the dominant, protectable portion of the mark. Defendants use the names and marks THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and the e-mail address of lizziebordenmuseum@gmail.com in connection with a proposed museum and public attraction.

The degree of similarity between the marks is determined by analyzing their sight, sound, and meaning. See Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 817 (1st Cir.1987). "[S]imilarity is determined on the basis of the total effect of the designation, rather than a comparison of individual features...." Pignons S.A. de Mecanique de Precision v. Polaroid Corp., 657 F.2d 482, 487 (1st Cir.1981); see also I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 43 (1st Cir.1998). However, less weight is given to the generic [disclaimed] portions of the parties' respective, composite marks. See e.g. Banff, Ltd. v. Federated Dep't Stores, Inc., 841 F.2d 486, 491 (2d Cir.1988); 4 McCarthy, § 23:49 ("If a common portion of the two conflicting marks is a public domain generic name, the emphasis of enquiry should be upon the confusing similarity of the nongeneric portion, with the ultimate issue determined by the confusing similarity of the total impression of both marks.").

The Plaintiff's registered mark LIZZIE BORDEN MUSEUM and the Defendants' THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF

LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and e-mail address lizziebordenmuseum@gmail.com are confusingly similar and virtually identical. It is indisputable – as can be seen from Defendants’ URL, <www.lizziebordenmuseum.com>, and e-mail address, lizziebordenmuseum@gmail.com – that LIZZIE BORDEN MUSEUM is the dominant portion of Defendants’ names and marks, as it is in Plaintiff’s registered trademark. Accordingly, LIZZIE BORDEN is the prominent, non-generic component of both the Plaintiff’s LIZZIE BORDEN MUSEUM trademark and Defendant’s TRUE STORY OF LIZZIE BORDEN GIFT SHOP AND MUSEUM and TRUE STORY OF LIZZIE BORDEN names and marks. The addition of other generic or descriptive matter does not change the overall commercial impression of Defendants’ use. Thus, in comparison, the terms LIZZIE BORDEN – the identical terms for which Plaintiff owns a registered protectable interest in the context of a museum – dominate the sight, sound and meaning of Defendants’ names and marks.

This factor weighs in favor of Plaintiff.

(2) The Parties’ Services Are Related

An owner of a trademark is afforded “protection against use of its mark on any product or service which would reasonably be thought by the buying public to have come from the same source.” Anheuser-Busch v. Caught-on-Bleu, 288 F.Supp.2d 105, 118 (D.N.H.2003), aff’d without op., 105 Fed. Appx. 285 (1st Cir.2004), cert. denied, 544 U.S. 920 (2006).

Plaintiff and Defendants are directly competing entities, each offering a museum, gift shop and tourist attraction concerning the Borden murders. There is no doubt that the parties’ services are related and this factor weighs in favor of Plaintiff.

(3), (4) & (5) The Parties' Channels of Trade, Advertising Methods and Class of Consumers are Identical

The relationship between the parties' channels of trade, the relationship between their advertising, and the classes of their prospective purchasers are normally considered together. See Beacon Mut. Ins. Co. v. OneBeacon Ins. Group, 376 F.3d 8, 19 (1st Cir.2004).

Plaintiff and Defendants are directly competing entities and thus, operate in identical channels of trade. Plaintiff and Defendants both advertise their museums via their respective websites and general advertising directed to tourists in Massachusetts as well as people interested in historical events.

Moreover, the close proximity of Plaintiff's and Defendants' respective businesses tends to increase the likelihood of confusion. See Wild Willy's Holding Co., Inc. v. Palladino, 436 F.Supp.2d 65 (D. Me. 2006). Defendant's Museum is located only an hour's drive or so from Plaintiff's LIZZIE BORDEN MUSEUM.

Accordingly, the similarity of the parties marketing, channels of trade and prospective consumers weighs in favor of Plaintiff.

(6) Actual Confusion

In order to prevail, a plaintiff does not have to show actual confusion; mere likelihood of confusion is sufficient. See Volkswagenwerk Aktiengesellschaft v. Wheeler, 814 F.2d 812, 818 (1st Cir.1987). Actual confusion is, however, often taken to be the most persuasive possible evidence that there is a likelihood of confusion; even a minimal demonstration of actual confusion may be significant. See Boustany v. Boston Dental Group, Inc., 42 F.Supp.2d 100, 110 (D.Mass.1999).

In spite of the fact that Defendants' museum has yet to open its doors, Plaintiff has already experienced instances of actual confusion. Visitors to the Plaintiff's LIZZIE BORDEN

MUSEUM have inquired about the relationship with the Defendants' Salem museum. Moreover, local residents and news outlets have confounded the two museums, calling the Defendants' enterprise the "new Lizzie Borden Museum." Accordingly, actual confusion is already occurring before Defendants' have even opened for business.

This factor alone is sufficient to find in favor of Plaintiff.

(7) Defendants Intent

It is well established that good faith is not a defense to trademark infringement. Star Financial Services, Inc. v. AASTAR Mortgage Corp., 89 F.3d 5, 11 (1st Cir. 1996)(citations omitted). The reason is clear: if potential purchasers are confused, no amount of good faith can make them less confused. While bad faith is not required to find a likelihood of confusion, evidence of a Defendant's bad faith is probative in finding a likelihood of confusion. See Id at 12.

In the present case, there is no doubt that the Defendants had both constructive and actual notice of Plaintiff's LIZZIE BORDEN MUSEUM registered trademark before Defendants commenced use. Plaintiff owned its United States Trademark Registration prior to Defendants' first use of its mark. These registrations are, in fact, constructive notice of the world of Plaintiff's trademark rights. 15 U.S.C. § 1072.

Defendants' have also admitted having actual knowledge of Plaintiff's trademark rights, yet, notwithstanding Defendants' actual knowledge, they knowingly incorporated that protected mark into their business names and marks. Defendants also use the identical Domain name <www.lizziebordenmuseum.com> and identical e-mail address lizziebordenmuseum@gmail.com. Defendants' have not avoided creating confusion using THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP AND MUSEUM or THE TRUE STORY OF

LIZZIE BORDEN by merely adding descriptive and generic terms. A presumption of bad faith may arise, where, as here, the infringer adopts a mark with knowledge of the Plaintiff's mark for competing services in the same market, sold to indiscriminate or unsophisticated purchasers. See R.J. Toomey Co. v. Toomey, 683 F.Supp. 873 (D. Mass. 1998)

Defendants knowingly and intentionally entered the Massachusetts tourist and public attraction market offering a service in connection with names and marks nearly identical to that of Plaintiff, an established and successful enterprise. Defendants adopted THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and e-mail address lizziebordenmuseum@gmail.com with knowledge of Plaintiff's registered trademark rights and the intention of suggesting an association, affiliation or sponsorship with the well-known and well-regarded LIZZIE BORDEN MUSEUM.

(8) Strength of Plaintiff's Mark

The final factor to be considered in the consumer-confusion analysis is the strength of the Plaintiff's mark. Plaintiff owns an incontestable mark registered on the Principal Register. Registration of a mark is considered "prima facie evidence of the validity of the registered mark," and the holder is entitled to a presumption that its marks are *distinctive*, i.e. strong. 15 U.S.C. § 1115(a); Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 120 (1st Cir.2006); Quabaug Rubber Co. v. Fabiano Shoe Co., 567 F.2d 154, 161 n. 12 (1st Cir.1977); Perfection Fence Corp. v. Fiber Composites, LLC, 2005 WL 353017 (D. Mass. 2005)(While the mark PERFECTION FENCE is laudatory and descriptive, registration entitles it to the presumption of strength for the likelihood of confusion analysis). This presumption of distinctiveness can not be rebutted with evidence of descriptiveness once the mark becomes

incontestable.³ 15 U.S.C. § 1115(b); Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir.2006).

Plaintiff's have an irrebuttably distinctive mark, by virtue of its incontestable status as a federally registered trademark. Resolution of this factor in Plaintiff's favor gives its LIZZIE BORDEN MUSEUM mark the wide berth of protection granted by the Lanham Act to prohibit others from trading upon the goodwill that has been built in the mark by the Plaintiff.

(9) Conclusion

Not one of the eight factors weighs in Defendants' favor. Defendants' unauthorized use of LIZZIE BORDEN MUSEUM in its confusingly similar and virtually identical THE TRUE STORY OF LIZZIE BORDEN GIFT SHOP & MUSEUM, THE TRUE STORY OF LIZZIE BORDEN, Domain name <www.lizziebordenmuseum.com> and e-mail address lizziebordenmuseum@gmail.com meets the First Circuit's "likelihood of confusion" test for trademark infringement under Sections 32(1) of the Lanham Act.

2. The Plaintiff is Suffering Irreparable Harm

Once Plaintiff establishes a likelihood of succeeding on the merits of its trademark infringement claim, irreparable injury is presumed as a matter of law. See Commerce Bank & Trust Co. v. TD Banknorth, Inc., 554 F.Supp.2d 77, 87 (D. Mass. 2008); Camel Hair & Cashmere Inst. v. Assoc. Dry Goods Corp., 799 F.2d 6, 14-15 (1st Cir.1986); see also Perfumanía, Inc. v. Perfulandia, Inc., 279 F.Supp.2d 86, 103-104 (D. P.R. 2003) ("By its very

³ Even when the United States Patent and Trademark Office's decision to register a mark depends on the applicant's proof of secondary meaning under Section 2(f), the holder is still entitled to a presumption that its mark is distinctive and merits protection. See 15 U.S.C. § 1115(a). In that instance, however, the presumption is not that the mark is inherently distinctive, but, rather, that the mark is valid because it enjoys secondary meaning. See Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112, 115 (1st Cir.2006), citing, Arrow Fastener Co. v. Stanley Works, 59 F.3d 384, 393 (2d Cir.1995). Additionally, once the mark becomes incontestable there may be no assertion of a defense or claims that the mark is merely descriptive. 15 U.S.C. § 1115(b); Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189 (1985).

nature, trademark infringement results in irreparable harm because the attendant loss of profits, goodwill and reputation cannot be satisfactorily quantified.”). Plaintiff has demonstrated a likelihood of success on its claim. Therefore, Plaintiff is entitled to injunctive relief.

Even without the presumption, Plaintiff is suffering irreparable harm. Irreparable injury occurs to a trademark owner when it has lost control of its reputation and goodwill by another’s use of a confusingly similar name or mark. See McNeil-PPC, Inc. v. Merisant Company, 2004 WL 3316380 (D. P.R. 2004). Plaintiff faces irreparable damage to its own goodwill and reputation associated with the LIZZIE BORDEN MUSEUM trademark should Defendants provide inferior services. Plaintiff cannot control the quality or public perception of Defendants’ museum, nor its historical accuracy.

Money damages cannot wholly compensate Plaintiff for its injuries because the injuries involve incalculable harm to Plaintiff’s goodwill, reputation and relationship with present and prospective customers. Based on the foregoing, this factor also favors the issuance of a preliminary injunction.

3. The Balance of Hardships Weighs In Favor of Plaintiff

In weighing the balance of harms resulting from the granting or denial of a preliminary injunction in a trademark infringement case, it is generally true that the “harm to the defendant flowing from an injunction where infringement appears likely is entitled to less consideration than other harms. See Commerce Bank & Trust Co. v. TD Banknorth, Inc., 554 F.Supp.2d 77, 88 (D. Mass. 2008). Plaintiff here has demonstrated a likelihood of consumer confusion, and that showing “is enough to place the weight of public interest concerns in favor of granting the injunction.” See Boustany v. Boston Dental Group, Inc., 42 F.Supp.2d 100, 113 (D.Mass.1999).

Defendants cannot complain that they will suffer irreparable injury if a Preliminary Injunction is issued because they misappropriated Plaintiff's LIZZIE BORDEN MUSEUM mark with full knowledge of the trademark rights of Plaintiff. Even if Defendants complain that they will be harmed if Plaintiff's requested injunctive relief is granted, any harm Defendants could conceivably sustain is far outweighed by the harm to Plaintiff if Plaintiff's requested relief is denied. In balancing hardships, courts generally place little weight on injuries that parties bring upon themselves through blatant misconduct. See Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc., 143 F.3d 800, 806 (3d Cir.1998) ("The self-inflicted nature of any harm suffered by [trademark infringer] also weighs in favor of granting preliminary injunctive relief.").

On this basis, the balance of hardships favors Plaintiff.

4. An Injunction Will Serve The Public Interest

Consumer confusion is contrary to the public interest. See Telerep Caribe, Inc. v. Zambrano, 146 F.Supp.2d 134 (D. P.R. 2001). In trademark cases, the public interest almost always favors the granting of otherwise "appropriate injunctions." See Boustany v. Boston Dental Group, Inc., 42 F.Supp.2d 100, 113 (D.Mass.1999)(citations omitted).

Plaintiff has demonstrated likelihood of success on the merits of its claims and irreparable injury. The public will undoubtedly be harmed if Defendants are permitted to continue to deceive or confuse the public as to the origin or sponsorship of their Salem Museum. The issuance of an injunction will protect the public from the deceptive and confusing use of Plaintiff's LIZZIE BORDEN MUSEUM registered trademark. Based on the foregoing, this factor also favors the issuance of a preliminary injunction.

V. CONCLUSION

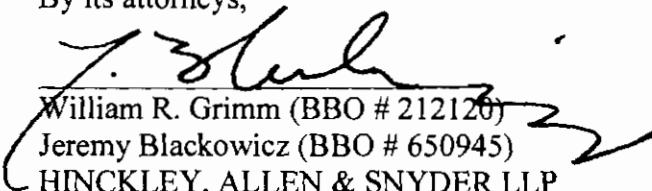
For the reasons discussed above and as set forth in the Verified Complaint, this Court should grant Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, and, thereafter, a Preliminary Injunction should be issued, restraining Defendants, their agents, servants, employees, officers and directors, and all other persons in active concert, privities or participation with them pending the final hearing and determination of this action, from:

- (a) using in any form or manner LIZZIE BORDEN in whole or in part in or in connection with any trade name, trademark, service mark, domain name or email address for museum services, tourist attractions or products to be sold in such venues;
- (b) expressly or impliedly representing itself or its services as being affiliated in any manner with Plaintiff or as authorized, sponsored, or endorsed by or otherwise connected with the LIZZIE BORDEN MUSEUM;
- (c) engaging in any conduct which will cause or is likely to cause confusion, mistake or misunderstanding as to the source, affiliation, connection, or association of Defendants or their products or services with Plaintiff or its services; and
- (d) otherwise infringing upon the trademark rights of Plaintiff or unfairly competing with Plaintiff in any manner whatsoever.

Respectfully submitted,

LIZZIE BORDEN BED AND BREAKFAST, LLC

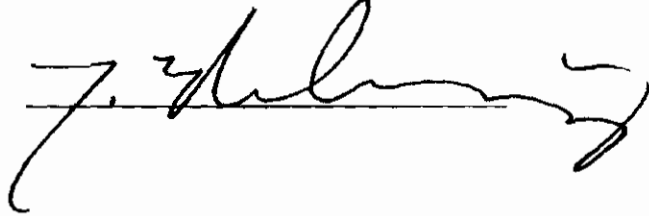
By its attorneys,


William R. Grimm (BBO # 212120)
Jeremy Blackowicz (BBO # 650945)
HINCKLEY, ALLEN & SNYDER LLP
28 State Street
Boston, Massachusetts 02109
(617) 345-9000

Dated: August 6, 2008

CERTIFICATE OF SERVICE

I, Jeremy Blackowicz, hereby certify that on this 6th day of August 2008, a copy of this document, filed with the United States District Court for the District of Massachusetts, will be duly served upon Defendants in connection with service of the Summons and Complaint

A handwritten signature in black ink, appearing to read "J. Blackowicz", is written over a horizontal line.