

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____		)
TRENDY LLC and NATALIA	)	)
MARKETING CORP.,	)	)
	)	)
Plaintiffs,	)	)
	)	)
v.	)	)
	)	)
M3 GIRL DESIGNS, LLC,	)	)
	)	)
Defendant.	)	)
_____		)

Civil Action No. 1:10-CV-11566

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO TRANSFER**

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Plaintiffs Trendy LLC (“Trendy”) and Natalia Marketing Corp. (“Natalia Marketing”) (collectively referred to herein as “Natalia”) submit this memorandum in opposition to Defendant M3 Girl Designs, LLC’s (“M3 Girl Designs”) Motion to Dismiss, or in the alternative, Motion to Transfer.

### **INTRODUCTION**

The Court should deny M3 Girl Designs’ motion to dismiss because Natalia satisfies the “substantial controversy” standard for jurisdiction under the Declaratory Judgment Act established by the Supreme Court in MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007). Prior to filing this action, Natalia strongly believed that M3 Girl Designs would file a lawsuit against it for two reasons. First, M3 Girl Designs had sent two cease and desist letters, both of which accused Natalia’s bottle cap jewelry products of infringing M3 Girl Designs’ copyrights, trademark and other purported rights, demanded that Natalia cease selling its bottle cap jewelry and using its MAGNA-CAPZ trademark, and threatened to sue if Natalia did not comply with these demands. Second, in its most recent cease and desist letter dated September 3, 2010, M3 Girl Designs highlighted three lawsuits that it brought in December 2009 against other manufacturers and sellers of bottle cap jewelry, each of which it filed after sending two cease and desist letters. Numerous courts have upheld declaratory judgment jurisdiction in circumstances similar to those here.

The Court also should deny M3 Girl Designs’ motion to transfer this case to the Northern District of Texas. In the First Circuit, there is a strong presumption in favor of a plaintiff’s chosen forum, including in declaratory judgment actions. In this case, Texas is not more convenient than Massachusetts for all the parties and their witnesses. Natalia’s offices are in Massachusetts, Natalia’s six principal witnesses reside and work in Massachusetts, and most if not all of Natalia’s relevant documents are located in Massachusetts. Texas also is not more

convenient than Massachusetts for potential third-party witnesses called by either side. Both Natalia and M3 Girl Designs sell their jewelry products through numerous retailers with stores in Massachusetts, as well as in other states, including Texas. Thus, potential third-party witnesses who are employed by retailers of either party's goods may be located in Massachusetts, Texas, or other states. The locus of operative facts also weighs against transfer because Natalia designed and developed the accused products in Massachusetts, and it decided to adopt and use the accused trademark in Massachusetts. In sum, no factors weigh in favor of transfer, let alone any that are sufficient to overcome the strong presumption in favor of Natalia's choice of forum.

### **STATEMENT OF FACTS**

#### **I. Natalia's Documents and Witnesses**

Trendy and Natalia Marketing are Massachusetts companies, under common ownership and control, with a principal place of business at 170 High Street, Waltham, Massachusetts 02453. Natalia Marketing designs and manufactures jewelry and accessory products that it sells to wholesalers and retailers, and that Trendy sells on its website, [www.trendy-llc.com](http://www.trendy-llc.com), at trade shows, and directly to retailers. Trendy and Natalia Marketing collectively have 22 employees, 12 of whom work in their Massachusetts office and 10 of whom work in an office located in China. (Declaration of Constantine Kalemos ("Kalemos Decl.") ¶¶ 2-3.)

Natalia's jewelry products accused of infringement by M3 Girl Designs were designed and developed by employees located and working in Natalia's Massachusetts office. Natalia ships the jewelry products at issue to customers in the United States from its Massachusetts office. Natalia's decision to adopt and use the MAGNA-CAPZ trademark for bottle cap jewelry, as well as decisions regarding the nature and extent of use of that mark, all occurred or were directed from Natalia's Massachusetts office. Most, if not all, of the documents possessed by

Natalia that are potentially relevant to this case are located in its Massachusetts office. It is possible that some relevant documents may be located in its office in China. (Id. ¶¶ 4-5.)

Six principal witnesses for Natalia in this case work in its Massachusetts office:

Constantine Kalempos, Kathy Apizidis, Vanessa Deligianis, Fotoula Boustris, Julie Groth, and Denise Burris. These individuals possess the following knowledge:

- Constantine Kalempos is the Chief Executive Officer of Trendy and Natalia Marketing. He has knowledge concerning Natalia's business operations, bottle cap jewelry designs, MAGNA-CAPZ trademark, sales and marketing, and website.
- Kathy Apizidis is the President of Trendy and Natalia Marketing. She has knowledge concerning Natalia's business operations, bottle cap jewelry designs, MAGNA-CAPZ trademark, sales and marketing, and website.
- Vanessa Deligianis is a graphic designer working for Natalia Marketing. She has knowledge concerning Natalia's bottle cap jewelry designs, MAGNA-CAPZ trademark, sales and marketing, and website.
- Fotoula Boustris is a production manager working for Trendy. He has knowledge concerning Natalia's inventory, packaging, and shipping of bottle cap jewelry.
- Julie Groth is a customer service representative working for Trendy. She has knowledge concerning Natalia's customers, orders, and processes.
- Denise Burris is a customer service representative working for Trendy. She has knowledge concerning Natalia's customers, orders, and processes.

(Id. ¶ 6.) It would impose a substantial burden and expense on Natalia if these witnesses are compelled to travel to Texas to provide deposition or trial testimony in this matter. (Id. ¶ 7.)

## **II. Natalia's Sales of Bottle Cap Jewelry in Massachusetts**

Natalia sells bottle cap jewelry products to numerous retailers in Massachusetts. Natalia sells bottle cap jewelry to Justice, a retailer with 18 stores in Massachusetts. (Id. ¶ 8, Ex. 1.)

Justice also offers Natalia's bottle cap jewelry for sale on its website, [www.shopjustice.com](http://www.shopjustice.com).

(Id.) Natalia also sells its bottle cap jewelry to 20 other retailers with at least 40 stores in

Massachusetts. (Id. ¶ 9.) In addition, Natalia sells bottle cap jewelry to Pepperell Braiding Co.,

a wholesaler located in Massachusetts that resells it to retailers, as well as wholesalers located in other states. In addition, Natalia sells bottle cap jewelry at trade shows conducted in Massachusetts and on Trendy's website. (Id. ¶ 10.)

**III. M3 Girl Designs' Sales of Bottle Cap Jewelry in Massachusetts**

M3 Girl Designs sells bottle cap jewelry products to numerous retailers located in Massachusetts. As described on its website, M3 Girl Designs' jewelry products are sold to and carried by 49 retailers with over 60 locations in Massachusetts. (Id. ¶ 11, Ex. 2.) M3 Girl Designs' bottle cap jewelry products also are sold through other retailers in Massachusetts not listed on its website. These other retailers include The Paper Store, which sells M3 Girl Designs' products at seven locations in Massachusetts. (Id. ¶ 12, Ex. 3.) M3 Girl Designs also has a product showroom and a sales representative in Massachusetts. (Id. ¶ 13, Ex. 4.)

**IV. Cease and Desist Letters Sent by M3 Girl Designs**

M3 Girl Designs sent two cease and desist letters that precipitated the filing of this declaratory judgment action. First, M3 Girl Designs sent a cease and desist letter dated December 9, 2009 to Confetti and Friends, a New York-based customer of Natalia ("December 9, 2009 Cease and Desist Letter"). (Id. ¶ 14, Ex. 5.) This letter claimed that certain jewelry sold by Natalia infringed M3 Girl Designs' copyrights:

In direct and willful violation of intellectual property rights secured (and being secured) by M3 Girl Designs, LLC, your business appears to be offering, manufacturing and selling infringing necklaces that are the same designs and structures created by M3 Girl Designs . . . . M3 Girl Design[s] owns all rights to Snap Caps® and the related jewelry designs through copyright and trademark rights . . . . Your company's sale of necklaces and jewelry using identical, or at least substantially similar . . . designs constitutes an infringement of valid rights held by M3Girl Designs.

(Id. ¶ 15, Ex. 5.) In the letter, M3 Girl Designs also claimed that Natalia's MAGNA-CAPZ trademark infringed its SNAP CAPS trademark:

Specifically, your business appears to be offering exact duplicates of certain M3Girl Snap Caps® designs, through your Magna-Capz products . . . M3Girl also has a registered trademark to Snap Caps®, which is being infringed by your website advertising.

(Id. ¶ 16, Ex. 5.)

In its December 9, 2009 Cease and Desist Letter, M3 Girl Designs demanded that Natalia and its customer cease selling the accused bottle cap jewelry and cease using the accused MAGNA-CAPZ trademark, and threatened to sue if its demands were not met:

My client is preparing to take appropriate legal action to prevent any further illegal and unfair business activities conducted by you or your website. You have five (5) business days to provide us with proof that you have ceased and desisted from all such competitive activities, and provide a full accounting for all unfair business actions since their inception. Further, we need proof that your website pages referring to the infringing bottle cap jewelry has ceased all offers to sell infringing products.

(Id. ¶ 17, Ex. 5.)

M3 Girl Designs sent a second cease and desist letter to Natalia's attorneys, which was dated September 3, 2010 ("September 3, 2010 Cease and Desist Letter"). (Id. ¶ 18, Ex. 6.) This letter again claimed that Natalia infringed M3 Girl Designs' copyrights and trademark:

It is our contention that Magna-Capz bottlecap designs are covered by our copyrights . . . . Thus, all the bottlecap jewelry designs offered by Trendy, LLC infringe one or more rights of M3Girl Designs . . . . M3Girl Designs owns all rights to Snap Caps® and the related jewelry designs through copyright and trademark rights . . . . M3Girl Designs has already filed three lawsuits against similarly-situated infringers.

(Id. ¶ 19, Ex. 6.) In the September 3, 2010 Cease and Desist Letter, M3 Girl Designs again demanded that Natalia cease selling the accused bottle cap jewelry and cease using the accused MAGNA-CAPZ trademark, and threatened to sue if its demands were not met:

My client is preparing to take appropriate legal action to prevent any further illegal and unfair business activities conducted by Trendy, LLC. You have five (5) business days to provide us with proof that you have ceased and desisted from all such illegal competitive activities, and provide a full accounting for all unfair business actions since their inception. Further, we need proof that Trendy, LLC website pages referring to the infringing bottle cap jewelry has ceased all offers to sell infringing products.

(Id. ¶ 20, Ex. 6.)

V. **M3 Girl Designs' Three Recent Lawsuits Against Other Sellers of Bottle Cap Jewelry**

In the September 3, 2010 Cease and Desist Letter, M3 Girl Designs highlighted the fact that it had brought three recent lawsuits “against similarly-situated infringers” in December 2009. (*Id.* ¶ 21, Ex. 6.) These lawsuits alleged infringement of M3 Girl Designs’ copyrights and SNAP CAPS trademark for bottle cap jewelry.

First, on December 8, 2009, M3 Girl Designs sued Lucky 11, Inc. and Kristen Almond in the U.S. District Court for the Northern District of Texas, alleging copyright infringement of its bottle cap jewelry designs (Count I) and misappropriation and unfair competition (Count II). (*Id.* ¶ 22, Ex. 7 – Complaint.) M3 Girl Designs filed this lawsuit after sending *two* cease and desist letters to Lucky 11. (Ex. 7 at ¶¶ 19-20.)

Second, on December 8, 2009, M3 Girl Designs sued Purple Mountain Sweaters and Carol-Ann Bishop in the U.S. District Court for the Northern District of Texas, alleging copyright infringement of its bottle cap jewelry designs (Count I), misappropriation and unfair competition (Count II), and trademark infringement and false designation of origin in violation of 15 U.S.C. §§ 1114 and 1125(a) (Counts III and IV). (*Id.* ¶ 23, Ex. 8.) M3 Girl Designs filed this case after sending *two* cease and desist letters to Purple Mountain Sweaters. (Ex. 8 at ¶ 20.)

Third, seven days later on December 15, 2009, M3 Girl Designs sued Blue Brownies, Charlotte Liles, and Krista Dudte in U.S. District Court for the Northern District of Texas, alleging copyright infringement of its bottle cap jewelry designs (Count I), misappropriation and unfair competition (Count II), and trademark infringement and false designation of origin in violation of 15 U.S.C. §§ 1114 and 1125(a) (Counts III and IV). (*Id.* ¶ 24, Ex. 9.) M3 Girl Designs filed suit after sending *two* cease and desist letters to Blue Brownies. (Ex. 9 at ¶ 22.)

Prior to filing this action, Natalia strongly believed that M3 Girl Designs would file a lawsuit against it for two reasons. First, M3 Girl Designs had sent two cease and desist letters, both of which accused Natalia of infringing its copyrights, trademark and other rights, demanded that Natalia cease selling its bottle cap jewelry products and cease using its MAGNA-CAPZ trademark, and threatened to sue if Natalia did not comply with these demands. Second, as set forth above, M3 Girl Designs had a recent history of bringing lawsuits against other sellers of bottle cap jewelry for alleged violations of M3 Girl Designs' copyrights and trademark, and in each case, M3 Girl Designs brought these suits after sending two cease and desist letters regarding the alleged infringements. (Id. ¶ 25.)

## ARGUMENT

### **I. M3 GIRL DESIGNS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE COURT HAS JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT**

#### **A. The Supreme Court's MedImmune Test for Declaratory Judgment Jurisdiction Applies to this Case**

The Declaratory Judgment Act provides in relevant part: "In a case of actual controversy within its jurisdiction . . . any court in the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Act's "actual controversy" requirement refers "to the type of 'Cases' and 'Controversies' that are justiciable under Article III." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007).

In MedImmune, the Supreme Court summarized the standard that applies to challenges to jurisdiction in declaratory judgment actions as follows:

Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Id. (quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)). The dispute must “be definite and concrete, touching the legal relations having adverse legal interests and that it be real and substantial and admit of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” Id. (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)).

Additionally, in MedImmune, the Supreme Court abrogated the Federal Circuit’s “reasonable apprehension of suit” test and expanded district courts’ ability to hear declaratory judgment actions involving intellectual property claims. Id. at 132 n.11; see also Sandisk Corp. v. ST Microelectronics, Inc., 480 F.3d 1372, 1380 (Fed. Cir. 2007) (“The Supreme Court’s opinion in MedImmune represents a rejection of our reasonable apprehension of suit test”); Vantage Trailers Inc. v. Beall Corp., 567 F.3d 745, 748 (5th Cir. 2009) (“Following MedImmune, the ‘reasonable apprehension of suit’ requirement no longer applies”); Surefoot LC v. Sure Foot Corp., 531 F.3d 1236, 1242 (10th Cir. 2008) (“In light of MedImmune’s direction, it seems to us clear that the test for declaratory judgment jurisdiction we set forth in Cardtoons is no longer good law”); Russian Standard Vodka (USA), Inc. v. Allied Domecq Spirits & Wine USA, Inc., 523 F. Supp. 2d 376, 381 (S.D.N.Y. 2007) (“The MedImmune standard is necessarily less rigorous than the ‘reasonable apprehension of imminent suit’ test; the party claiming that there was an actual controversy could not be sued in MedImmune, let alone prove that there was a ‘reasonable apprehension of imminent suit’”); Goldman v. West, 2007 WL 1989291, at \*3 (S.D.N.Y. 2007) (“Recent decisions of the Supreme Court and Federal Circuit have, however, changed the law with respect to the ‘reasonable apprehension’ test, in effect lowering the bar for a plaintiff to bring a declaratory judgment action”).

Under MedImmune, a declaratory judgment plaintiff need only show a “substantial controversy” between the parties based on all the circumstances. That said, although it is not necessary, a plaintiff may satisfy the more lenient MedImmune standard by showing that it had a reasonable apprehension of suit based on the defendant’s conduct. Pharmanet, Inc. v. Datasci LLC, 2009 U.S. Dist. LEXIS 11661, at \*12 (D.N.J. Feb. 17, 2009).

Moreover, although MedImmune involved a patent claim, courts hold that it applies to other intellectual property claims such as trademark infringement, copyright infringement, and unfair competition. See, e.g., Surefoot, 531 F.3d at 1242 (reversing dismissal of trademark claim in declaratory judgment action – “Sure Foot ND offers no persuasive reason why the interpretation of the Declaratory Judgment Act’s terms depends on the nature of the intellectual property rights at issue”); Vantage Trailers, 567 F.3d at 748 (“A common framework for analysis applies to all patent, copyright, and trademark declaratory judgment suits.”).<sup>1</sup> Accordingly, the Supreme Court’s test for declaratory judgment jurisdiction in MedImmune applies to this case.<sup>2</sup>

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<sup>1</sup> Numerous district courts also have applied MedImmune in declaratory judgment actions brought to determine rights under the Lanham Act. See, e.g., Blue Athletic, Inc. v. Nordstrom, Inc., 2010 U.S. Dist. LEXIS 72615, at \*9-10 (D.N.H. July 19, 2010); Sinclair v. StudioCanal, S.A., 2010 U.S. Dist. LEXIS 51484, at \*9 (E.D. La. Apr. 29, 2010); Poly-America, L.P. v. Stego Indus., L.L.C., 694 F. Supp. 2d 600, 605-08 (N.D. Tex. 2010); Monster Cable Prods., Inc. v. Euroflex S.R.L., 642 F. Supp. 2d 1001, 1010-11 (N.D. Cal. 2009); Young v. Vannerson, 612 F. Supp. 2d 829, 838-46 (S.D. Tex. 2009); Amerimax Real Estate Partners, Inc. v. RE/MAX Int’l, Inc., 600 F. Supp. 2d 1003, 1008 (N.D. Ill. 2007); HIS IP, Inc. v. Champion Window Mfg. & Supply Co., 510 F. Supp. 2d 948, 955-56 (M.D. Fla. 2007).

<sup>2</sup> M3 Girl Designs cited MedImmune in its brief and does not appear to dispute that it applies here. See M3 Girl Designs’ Br. at 4. However, M3 Girl Designs nevertheless suggests that Natalia must satisfy the displaced “reasonable apprehension of suit” test. See id. at 6 (“the M3 Girl Design correspondence hardly constitutes a sufficient *immediate threat of litigation* to warrant the issuance of a declaratory judgment”) (emphasis added). As explained above, this is wrong. For this same reason, M3 Girl Designs’ reliance on Waters Corp. v. Hewlett-Packard Co., 999 F. Supp. 167 (D. Mass. 1998), is misplaced. See M3 Girl Designs’ Br. at 7. The Waters court applied the “reasonable apprehension of imminent litigation” standard, which was abrogated in MedImmune. It therefore is inapposite.

**B. Natalia Satisfies the MedImmune Standard Based on M3 Girl Designs' Accusations of Infringement, Threats to Sue, and Highlighting of Three Recent Lawsuits Against Other Sellers of Bottle Cap Jewelry**

Natalia easily satisfies the MedImmune test. As described above, before filing this action, Natalia strongly believed that M3 Girl Designs would file a lawsuit against it for two reasons. First, M3 Girl Designs had sent two cease and desist letters, both of which accused Natalia of infringing its copyrights, trademark and other rights, demanded that Natalia cease selling its bottle cap jewelry products and cease using its MAGNA-CAPZ trademark, and threatened to sue if Natalia did not comply with these demands. Second, M3 Girl Designs highlighted three lawsuits that it brought against other sellers of bottle cap jewelry within the last year for alleged violations of its copyrights and trademark, and in each case, M3 Girl Designs brought these suits after sending two cease and desist letters regarding the alleged infringements.

Numerous courts have upheld declaratory judgment jurisdiction where, as here, the defendants' cease and desist letters asserted infringement of their intellectual property rights, demanded that the plaintiff cease the allegedly infringing activity, and threatened a lawsuit to enforce their rights. See, e.g., PHC, Inc. v. Pioneer Healthcare, Inc., 75 F.3d 75, 79 (1st Cir. 1996) (jurisdiction proper in declaratory judgment action to uphold validity of trademark where defendant's letters stated that plaintiff's use of mark was "misleading, confusing, and will result in irreparable harm," threatened to seek recovery of damages and injunctive relief, and sought cancellation of plaintiff's mark); Arrowhead Industrial Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988) (even under old "reasonable apprehension of suit" standard, "[i]f defendant has expressly charged a current activity of the plaintiff as an infringement, there is clearly an actual controversy" for declaratory judgment jurisdiction); C&D Special Prods., Inc. v. Blackpowder Shooting Sports, Inc., 2005 U.S. Dist. LEXIS 32365, at \*5-12 (W.D. Ky. Dec. 7, 2005) (defendant's letter notifying plaintiff of "infringement" and demanding cessation of sales

of accused products, coupled with evidence that defendant told plaintiff's customers that it would sue the plaintiff, established declaratory judgment jurisdiction in patent action); Russian Standard Vodka, 523 F. Supp. 2d at 379, 383-84 (holding jurisdiction proper under MedImmune in declaratory judgment action for non-violation of the Lanham Act based on future statements about the origin of Stolli vodka where defendant's cease and desist letter accused plaintiff of unfair competition and false advertising and defendant's press release announced that it would explore legal remedies); Goodkind Pen Co. v. Bic Corp., 2001 U.S. Dist. LEXIS 15595, at \*9-11 (D. Me. Oct. 2, 2001) (recommending denial of motion to dismiss a declaratory judgment claim for non-infringement of trademark based on letter accusing plaintiff of infringement and demanding that it cease use of accused mark); Blue Athletic, 2010 U.S. Dist. LEXIS 72615, at \*2, \*11-12 (jurisdiction proper in declaratory judgment action for non-infringement of trademark based, in part, on letter accusing plaintiff of infringement and demanding cessation).

Moreover, courts routinely deny motions to dismiss declaratory judgment actions where, as here, a defendant brought recent lawsuits against third parties to enforce the same claims made by the defendant against the declaratory judgment plaintiff. For example, in Micron Tech., Inc. v. Mosaid Tech., Inc., 518 F.3d 897 (Fed. Cir. 2008), the Federal Circuit held that jurisdiction was proper in a patent declaratory judgment action where the defendant's cease and desist letters strongly suggested that the plaintiff should license its technology, and the defendant had sued other major DRAM manufacturers for patent infringement after they did not take licenses:

Indeed, the record supports a judgment that the dispute between Micron and MOSAID is a case and controversy within the purview of declaratory judgment jurisdiction. Beginning in 2001, after receiving several threats itself, Micron watched MOSAID sue each of the other leading DRAM manufacturers.

Id. at 901. Similarly, in Association for Molecular Pathology v. U.S. Patent and Trademark Office, 669 F.3d 365 (S.D.N.Y. 2009), the court denied motions to dismiss a declaratory

judgment action for non-infringement of a patent where the defendant's prior lawsuits against other parties "serve[d] as evidence of [defendant's] willingness to assert its rights granted by the patent-in-suit against others." *Id.* at 389-90. That court reasoned as follows:

The Defendants have asserted their right to preclude others from engaging in BRCA1/2 genetic testing through personal communications, cease and desist letters, licensing offers, and litigation. The result, as alleged by the Plaintiffs and supported by affidavits, is the widespread understanding that one may engage in BRCA1/2 testing at the risk of being sued for infringement liability by Myriad. *This places the Plaintiffs in precisely the situation that the Declaratory Judgment Act was designed to address . . . .*

*Id.* at 390 (emphasis added).

Courts also have denied motions to dismiss declaratory judgment actions where, as here, the defendant *highlighted its prior lawsuits against third parties* for similar claims in a cease and desist letter sent to the plaintiff. *See Pharmanet*, 2009 U.S. Dist. LEXIS 11661, at \*12 (denying motion to dismiss where defendant's cease and desist letter highlighted five lawsuits it had brought against other competitors for patent infringement within two years preceding the plaintiff's declaratory judgment action for non-infringement of patent); *Crutchfield New Media, LLC v. Charles E. Hill & Assocs., Inc.*, 2007 U.S. Dist. LEXIS 33264, at \*2-6 (S.D. Ind. May 4, 2007) (upholding declaratory judgment jurisdiction where patentee sent a letter to the plaintiff with copies of pleadings from prior lawsuits filed by the patentee and a summary of them).

Given M3 Girl Designs' strong appetite for litigation evidenced in December 2009 and the fact that M3 Girl Designs highlighted its suits against other alleged infringers in a letter to Natalia, the argument that its December 9, 2009 and September 3, 2010 Cease and Desist Letters did not create a "substantial controversy" between the parties strains credulity.

M3 Girl Designs essentially makes only one argument for dismissal. It asserts that after accusing Natalia of infringing its intellectual property rights, demanding that Natalia cease selling the accused products and using the accused trademark, threatening to sue Natalia, and

highlighting three recent lawsuits that it brought against others, M3 Girl Designs assuaged any fear of potential litigation by including the following statement in the Cease and Desist Letters:

If you disagree with M3 Girl Designs' request or our right to demand that you cease and desist all sales activities related to these infringing products, please contact us so that we can discuss the issue further and clarify your views.

M3 Girl Designs' Br. at 1, 5-8; Exs. 3, 4. According to M3 Girl Designs, this statement negates everything else said in the letters and any perceived threat based on its lawsuits against others.

This type of linguistic gamesmanship has been rejected by the First Circuit and other courts when used as a means to avoid declaratory judgment jurisdiction, even before MedImmune. See EMC Corp. v. Norand Corp., 89 F.3d 807, 811-12 (1st Cir. 1996) (refusing to dismiss declaratory judgment action where cease and desist letter threatened to "turn the matter over to" litigation counsel "for action" and urged a "preliminary business discussion," "perhaps avoiding this matter escalating into a contentious legal activity" – First Circuit rejected defendant's argument that its letter was merely an invitation to engage in a licensing discussion); Phillips Plastics Corp. v. Kato Hatsujou Kabushiki Kaisha, 57 F.3d 1051, 1053 (Fed Cir. 1995) ("one who may become liable for infringement should not be subject to manipulation by a patentee who uses careful phrases in order to avoid explicit threats").

For these reasons, the Court should deny M3 Girl Designs' motion to dismiss.<sup>3</sup>

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<sup>3</sup> In its cease and desist letters, M3 Girl Designs accused Natalia of infringing rights in pending patent applications. See Exs. 5, 6. Based on this, Natalia included a request for a declaration of non-infringement of patents in Count V of its Complaint. M3 Girl Designs has confirmed that no patent has issued from the U.S. Patent and Trademark Office. See M3 Girl Designs' Br. at 2-4. Accordingly, Natalia will voluntarily dismiss Count V without prejudice to reassert it if M3 Girl Designs obtains a patent.

**II. M3 GIRL DESIGNS' MOTION TO TRANSFER SHOULD BE DENIED BECAUSE NO FACTORS WEIGH IN FAVOR OF TRANSFER TO THE NORTHERN DISTRICT OF TEXAS**

The Court also should deny M3 Girl Designs' motion to transfer this case to the Northern District of Texas. 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." As the movant, M3 Girl Designs has the burden to establish that a transfer is warranted. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); The Holmes Group, Inc. v. Hamilton Beach/Proctor Silex, Inc., 249 F. Supp. 2d 12, 17 (D. Mass. 2002). "The considerations affecting transfer to or dismissal in favor of another forum do not change simply because the first-filed action is a declaratory judgment action." Elecs. for Imaging, Inc. v. Coyle, 394 F.3d 1341, 1348 (Fed. Cir. 2005).

There is a "*strong presumption*" in favor of the plaintiff's choice of forum. Coady v. Ashcraft & Gerel, 223 F.3d 1, 11 (1st Cir. 2000) (emphasis added); see also Trans Nat'l Travel v. Sun. Pac. Int'l, 10 F. Supp. 2d 79, 81 (D. Mass. 1998) ("in any evaluation of a motion to transfer under Section 1404[a], the plaintiff's choice of forum is entitled to great weight and shall not be lightly disturbed"); RF Techs. Corp. v. Applied Microwave Techs., Inc., 369 F. Supp. 2d 24, 34 (D. Me. 2005) (same). This is particularly so where, as here, the plaintiff resides in the forum state. See Auto. Eur., L.L.C. v. Conn. Indem. Co., 2002 U.S. Dist. LEXIS 5249, at \*4 (D. Me. Mar. 28, 2002) ("a plaintiff's choice of forum is entitled to great weight, particularly where, as here, the plaintiff is a resident of the district in which the action was brought."); Forum Fin. Group v. President of Harvard College, 173 F. Supp. 2d 72, 92 (D. Me. 2001) ("[T]he evidence presented by Defendant must weigh heavily in favor of transfer before this Court will disturb Plaintiff's choice of this forum – especially since this is Plaintiff's home forum.").

Other factors to consider include: “(1) the relative convenience of the parties; (2) the convenience of the witnesses and location of documents; (3) any connection between the forum and the issues; (4) the law to be applied; and (5) the state or public interest at stake.”

Transcanada Power Marketing, Ltd. v. Narragansett Elec. Co., 402 F. Supp. 2d 343, 352 (D. Mass. 2005). Courts also may consider “the possibility of consolidation,” Coady, 223 F.3d at 11, and whether one party possesses greater financial resources. Reebok Int’l Ltd. v. Dunkadelic, Inc., 2004 U.S. Dist. LEXIS 3167, at \*12-13 (D. Mass. Mar. 2, 2004).

M3 Girl Designs has failed to meet its burden to overcome the “strong presumption” in favor of Natalia’s choice of forum based on these factors. There is no evidence that Texas is a more convenient forum for the parties and their witnesses. Natalia is headquartered in Massachusetts; it does not have offices in Texas. In considering the convenience of the witnesses and location of documents, all six principal witnesses for Natalia reside and work in Massachusetts. And most, if not all, of potentially relevant documents for Natalia are located in Massachusetts. Further, M3 Girl Designs has a product showroom and sales representative in Massachusetts. Thus, the availability of witnesses and documents is possibly in favor of Massachusetts because, although Natalia and M3 Girl Designs each intend to rely on documents and witnesses in their respective home states, some of M3 Girl Designs’ witnesses and documents may be located in Massachusetts. Moreover, there is no evidence that Natalia has greater financial resources than M3 Girl Designs – both have similar numbers of employees.

In view of the facts, transferring this case to Texas would simply *shift*, rather than *eliminate*, the inconvenience. Transfer is inappropriate in this situation. See Reebok Int’l, 2004 U.S. Dist. LEXIS 3167, at \*11 (denying motion to transfer Reebok’s declaratory judgment action for non-infringement of defendant’s trademark where “transferring the action to Maryland would

simply shift, rather than eliminate, the inconvenience”); The Holmes Group, 249 F. Supp. 2d at 17-18 (denying transfer where convenience of parties and witnesses and location of documents was neutral between Massachusetts and Virginia – “Transfer of venue is inappropriate, however, where its effect merely shifts the inconvenience from one party to another”).

No other relevant factors weigh in favor of transfer to the Northern District of Texas. There is no other action pending in the Northern District of Texas with which this matter can be consolidated. Additionally, Massachusetts has at least as great an interest in this case as Texas because Natalia is headquartered and incorporated in Massachusetts, both Natalia and M3 Girl Designs sell their bottle cap jewelry through a large network of retailers and to customers in Massachusetts, and any ruling in this case will affect both parties’ operations in Massachusetts.

The law to be applied in this case also does not favor transfer to the Northern District of Texas. The governing law is (1) the Copyright Act, which applies to Count I of Natalia’s Complaint for a declaration of non-infringement of M3 Girl Designs’ copyrights and Count II for a declaration of invalidity of M3 Girl Designs’ copyright registrations, and (2) the Lanham Act, which applies to Natalia’s claims for non-infringement of M3 Girl Designs’ trade dress and trademarks in Counts III and IV of the Complaint. To date, M3 Girl Designs has not brought any counterclaims against Natalia. But if it did, federal preemption law may apply if M3 Girl Designs asserts counterclaims under state law based on areas covered exclusively by the federal copyright and patent laws. In any event, this Court is perfectly capable of resolving all these issues – and M3 Girl Designs does not and cannot argue otherwise.

In addition to the factors analyzed above, courts may look to the locus of the operative facts in deciding a motion to transfer. See, e.g., Edens Techs., LLC v. Kile, Goekjian, Reed & McManus, PLLC, 671 F. Supp. 2d 170, 175 (D. Me. 2009); McFarland v. Yegen, 699 F. Supp.

10, 15 (D.N.H. 1988). This factor weighs against transfer here because the allegedly infringing products were designed and developed in Massachusetts, not Texas. Alt. Recording Corp. v. BCD Music Group, Inc., 2009 U.S. Dist. LEXIS 45815, at \*11 (S.D.N.Y. May 7, 2009) (denying transfer of trademark and copyright action, in part, because defendant failed to establish that products were created in Texas; explaining, in weighing the “locus of operative facts” factor, that “[t]he operative facts in infringement cases usually relate to the design, development and production of an infringing product”); AEC One Stop Group, Inc. v. CD Listening Bar, Inc., 326 F. Supp. 2d 525, 527 (S.D.N.Y. 2004) (operative facts weighed in favor of transfer because accused software was designed and developed in California).<sup>4</sup>

M3 Girl Designs makes several flawed arguments in support of its motion to transfer. First, it raises the specter that M3 Girl Designs’ young owners will be required to travel to Massachusetts for depositions, which will “interfere with their school schedules and any commitments to M3 Girl Designs.” M3 Girl Designs Br. at 16, 18. To alleviate any such concerns, if depositions of them prove necessary, Natalia would conduct them in Texas, as is customary when parties are deposed. The same is true for other depositions of M3 Girl Designs’ employees in Texas. In the same way, Natalia would expect any depositions of its employees to take place in Massachusetts. This procedure is common practice.

Second, M3 Girl Designs states that third-party witnesses may be located in Texas where retailers carry the parties’ products. See M3 Girl Designs’ Br. at 18-19. However, what M3 Girl

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<sup>4</sup> This action also should not be transferred because the allegedly infringing products were sold in Massachusetts, the original venue for this action centering on claims of trademark infringement. See Alt. Recording, 2009 U.S. Dist. LEXIS 45815, at \*12 (“in trademark infringement cases,” “the locus of operative facts weighs in favor of maintaining the original venue where the defendant sells the allegedly infringing products in that forum”; denying transfer of trademark and copyright action from New York to Texas, in part, because products were sold in the original venue of New York, as well as throughout the United States); American Eagle Outfitters, Inc. v. Tala Bros. Corp., 457 F. Supp. 2d 474, 477 (S.D.N.Y. 2006) (similar).

Designs conveniently ignores and fails to discuss is that potentially relevant third-party witnesses, including its own designated sales representative for the northeast territory of the United States, are located in *Massachusetts*. M3 Girl Designs sells its bottle cap jewelry through over 49 retailers with over 60 store locations in Massachusetts. Natalia also sells its bottle cap jewelry through 18 Justice stores and 20 other retailers with at least 40 stores in Massachusetts. Thus, potential third-party witnesses from retailers are located in *both Massachusetts and Texas*. Additionally, the parties sell their bottle cap jewelry to retailers in numerous other states, and thus third-party witnesses may be located elsewhere. The location of potential third party witnesses does not favor a transfer.

Third, M3 Girl Designs contends that Massachusetts has no meaningful connection to this case. See M3 Girl Designs' Br. at 12, 20. As explained above, this is not true given that Natalia is headquartered in Massachusetts, both Natalia and M3 Girl Designs sell their products through an extensive network of retailers and to customers in Massachusetts, and any ruling in this case would affect the parties' operations and sales of products in Massachusetts.

Fourth, M3 Girl Designs argues that a transfer to the Northern District of Texas will result in judicial economy because that court purportedly has "extensive experience" with the claims in this case. See M3 Girl Designs' Br. at 10. Once again, this is wrong. There is no evidence that the Northern District of Texas has considered any copyright and trademark claims brought by M3 Girl Designs against other parties *on the merits* of those claims.<sup>5</sup> Moreover, even

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<sup>5</sup> The documents submitted by M3 Girl Designs in Exhibits 1-5 attached to its brief are stipulations, statements, and orders having nothing to do with any consideration of the merits of each case. Exhibit 1 is a Final Consent Judgment entered in M3 Girl Designs' lawsuit against Blue Brownies. Exhibit 2 is a Stipulation of Dismissal with prejudice in M3 Girl Designs' lawsuit against Lucky 11. Exhibit 3 is a one-page Defendant's Statement in M3 Girl Designs' lawsuit against Lucky 11. Exhibit 4 is an Order granting a motion to withdraw a plea to jurisdiction in M3 Girl Designs' lawsuit against Blue Brownies. Exhibit 5 is a one-page Order Granting Withdrawal of Defendants' Motion to Transfer Venue in M3 Girl Designs' lawsuit against Blue Brownies.

ignoring this, the Northern District of Texas has no experience with *Natalia's products and MAGNA-CAPZ trademark* accused of infringement. Simply put, there is no evidence to support M3 Girl Designs' claim that litigating this case in Massachusetts will result in a "reinvention of the wheel – avoiding a duplication of efforts already conducted by the Northern District of Texas." M3 Girl Designs' Br. at 11.

In Pharmanet, the district court rejected the same argument made by M3 Girl Designs. In that case, a declaratory judgment defendant moved to transfer the case to the District of Maryland on the ground that the defendant had filed other lawsuits based on the same patent in that district and thus one of the judges in Maryland had "obtained a unique knowledge of the relevant facts as well as the applicable law." Pharmanet, 2009 U.S. Dist. LEXIS 11661, at \*47. The defendant contended, as M3 Girl Designs does here, that "trying this matter in New Jersey would be a needless waste of time and expense because it would force this Court to acquire knowledge of the matters in controversy which has already been acquired by Judge Garbis in Maryland." Id. The court found this argument unpersuasive and denied a transfer, stating:

The argument concerning prior and existing suits in the District of Maryland related to the '827 Patent is equally unavailing. The fact that a Judge of that Court has presided over cases concerning the '827 Patent in the past does not dictate that all litigation pertaining to this patent must be adjudicated by him. As Plaintiffs argue, despite the fact that the Judge may have some familiarity with the '827 Patent several years ago, he has no knowledge of Plaintiffs' potentially infringing product.

Id. at \*49.

Fifth, M3 Girl Designs argues that the Northern District of Texas would have greater familiarity "with claims brought by Plaintiffs under Texas state law." M3 Girl Designs' Br. at 11. As an initial matter, Natalia did not bring any claims under "Texas state law." Its claims for non-infringement and invalidity of M3 Girl Designs' copyrights (Counts I and II) do not implicate state law. And Natalia's claims for non-infringement of M3 Girl Designs' trademark

and any alleged trade dress are governed by the Lanham Act. To the extent these claims could implicate state law, such claims would arise under *Massachusetts law*, not Texas law, because the design and development of Natalia's bottle cap jewelry occurred in Massachusetts and the decision to adopt and use Natalia's trademark was made in Massachusetts.

Even assuming, *arguendo*, that Texas common law applied to trade dress and trademark claims, this limited application of Texas law would not support a transfer. There is no difference between trademark and trade dress claims under Texas common law and the Lanham Act – the relevant standards are the same. P.A.W. Safety Charities v. Petco Animal Suppliers, Inc., 2000 U.S. Dist. LEXIS 3110, at \*12 (N.D. Tex. Mar. 15, 2000) (“The elements of trademark infringement under Texas common law are identical to those under federal trademark law”); Waples-Platter Cos. v. General Foods Corp., 439 F. Supp. 551, 583-84 (N.D. Tex. 1977) (“This Court will, therefore, treat the claim of federal, state and common law [trademark] infringement as raising the same issue”); Marathon Mfg. Co. v. Enerline Prods. Corp., 767 F.2d 214, 217 (5th Cir. 1985) (“As a general rule, the same facts which would support an action for trademark infringement would also support an action for unfair competition”). Because Texas state law follows the Lanham Act, M3 Girl Designs' argument is a red herring.

In sum, no factors weigh in favor of a transfer to the Northern District of Texas. M3 Girl Designs has failed to overcome the “strong presumption” in favor of Natalia's choice of forum, and its motion to transfer should be denied.

### **CONCLUSION**

For the foregoing reasons, Natalia respectfully requests that the Court deny M3 Girl Designs' Motion to Dismiss, or in the alternative, Motion to Transfer.

TRENDY LLC and NATALIA MARKETING  
CORP.

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/s/ Eric D. Levin

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Dated: November 18, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on November 18, 2010, I served a copy of the foregoing document through the ECF filing system on counsel of record for Defendant M3 Girl Designs, LLC.

/s/ Eric D. Levin\_\_\_\_\_

Eric D. Levin