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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91247656
Party	Defendant MobileOffer, Inc.
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Date	05/04/2020
Attachments	Reply in Support of Motion for Partial Summary Judgment re Priority.pdf(259993 bytes) Declaration of Kurt Brendlinger.pdf(560687 bytes)

20, 2015 when Applicant's FREEBIRD mobile application first became available for download on the Apple iTunes Store.

A. There Is No Genuine Issue Of Material Fact That Applicant Began Bona Fide Use Of Its FREEBIRD Mark For Mobile Applications By November 20, 2015

The Board has previously held that the public display of a mobile application in association with a trademark on the Apple iTunes Store "constitutes bona fide use of a mark in the ordinary course of trade [for the mobile] application software under Section 45 of the Trademark Act." *Alexander Kronik v. Sayed Najem dba Social Network*, Cancellation No. 92058162, 2016 TTAB LEXIS 59, *17-18 (TTAB February 11, 2016) (citing *Bulman v. 2BKCO, Inc.*, 882 F. Supp. 2d 551, 556, 558 (S.D.N.Y. 2012) (stating that plaintiffs had used their marks in connection with their app and services since November 2011, the date the app became available for download by the public in the iTunes App Store); *Evans v. Hewlett-Packard Co.*, No. C 13-02477, 2013 U.S. Dist. LEXIS 115856, 2013 WL 4426359 (N.D. Cal. Aug. 15, 2013) (denying motion to dismiss infringement claim concerning app offered for sale and download on the HP App Catalogue, a web-based store operated by Hewlett-Packard Co. and wholly owned subsidiary Palm Inc.)). Applicant has shown, by the following unconverted evidence, that Applicant's bona fide use of its FREEBIRD mark for mobile application began on November 20, 2015 when Applicant's FREEBIRD mobile application first became available for download on the Apple iTunes Store.

First, Mr. Wentzel has testified by declaration that on November 13, 2015, Applicant uploaded its mobile application for iOS to the Apple iTunes Store. Declaration of Anthony Wentzel ("Wentzel Decl."), ¶ 11, Ex. 6. This testimony is corroborated by a copy of the Apple App Store Connect portal for Applicant's FREEBIRD mobile application which shows the non-editable build and upload history for the application going back to November 13, 2015. *Id.* This testimony is also corroborated by a screenshot of the current Apple App Store which displays a

non-editable 2015 copyright notice for Applicant's FREEBIRD mobile application that was generate by Apple when the mobile application was first uploaded. *Id.*, ¶ 16, Ex. 8. Opposer has not presented any evidence that contradicts these facts.

Second, Mr. Wentzel has testified that Applicant's FREEBIRD mobile application became available for nationwide download by November 20, 2015. Wentzel Decl., ¶ 12. Mr. Wentzel estimates this first availability date based upon his extensive experience in developing and launching other mobile applications. *Id.* Opposer has not contested Mr. Wentzel's estimated availability date or otherwise presented any evidence controverting these facts. Further, this estimated availability is consistent with other reported decisions addressing the lag time between upload and availability on the Apple App Store. *See Kelly Servs. v. Creative Harbor, LLC*, 124 F. Supp. 3d 768, 771 (E.D. Mich. 2015) (describing a three day delay from upload to availability for download on Apple App Store).

Third, Mr. Wentzel has testified that Applicant's FREEBIRD mobile application that was available for download on Apple's App Store as of November 20, 2015 displayed Applicant's FREEBIRD mark. Wentzel Decl., ¶¶ 10, 13 & 14, Exs. 5 & 7. This testimony is corroborated by the actual screenshots of Applicant's FREEBIRD mobile application as it existed on November 20, 2015 and the source code for the mobile application. *Id.* Opposer has not contested any of these facts.

Fourth, Mr. Wentzel has testified that when Applicant's FREEBIRD mobile application was introduced in November 2015, it included all of the features described in the goods listed in the Application. Wentzel Decl., ¶¶ 17 & 18, Exs. 5 & 9. This testimony is corroborated by exhibits to Mr. Wentzel's declaration showing these features. *Id.* Again, Opposer has not contested any of these facts.

Finally, the Apple App Store also displayed Applicant’s FREEBIRD mark for Applicant’s FREEBIRD mobile application as of November 20, 2015. Declaration of Mr. Kurt Brendlinger (“Brendlinger Decl.”), ¶ 5. And Mr. Brendlinger downloaded Applicant’s FREEBIRD mobile application from the Apple App Store around November 20, 2015, thus confirming that Applicant’s FREEBIRD mobile application was available for download at that time. *Id.*¹ Applicant was also at that time engaged in efforts to recruit sponsors to join Applicant’s FREEBIRD platform. *Id.*, ¶ 6. Bars and restaurants in the Los Angeles County and Orange County areas were the first sponsors to join the FREEBIRD platform commencing in January 2016. *Id.* Opposer has not contested any of these facts.

In sum, the uncontroverted evidence shows that Applicant’s first bona fide use of its FREEBIRD mark for mobile applications began by November 20, 2015 when Applicant’s FREEBIRD mobile application first became available for download on the Apple iTunes Store.²

B. Opposer Has Not Demonstrated Any Genuine Issue Of Material Fact Regarding Applicant’s Seniority For Mobile Applications

As the non-moving party, Opposer “must do more than simply show that there is some

¹ Opposer attempts to cast doubt on Applicant’s November 20, 2015 first use date because Applicant has not submitted evidence of actual downloads of its mobile application from the Apple iTunes Store. *See* Response, p. 7. The reason for this is simple – such download evidence is expensive to obtain from Apple and not required to prove Applicant’s actual bona fide use in view of the Board’s ruling in *Kronik*, 2016 TTAB LEXIS 59.

² While Opposer also attempts to challenge Applicant’s analogous trademark use evidence, Applicant has chosen to focus this Reply on Applicant’s first bona fide use evidence because Applicant does not need to prove earlier use in view of Opposer’s admission that it did not begin using its marks for mobile applications until May 31, 2016. The dates of Applicant’s analogous trademark use activities, which are also not contested by Opposer, are consistent with Applicant’s first bona fide use evidence and thus corroborate that first bona fide use. Thus, even if the evidence of those analogous use activities is determined to be insufficient to establish analogous trademark use, the evidence of those activities is still relevant to confirming Applicant’s seniority with respect to the use of its FREEBIRD trademark for mobile applications.

metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Opposer’s Response does not even create any metaphysical doubt as to Applicant’s seniority when it comes to mobile applications.

1. Opposer’s Hearsay Evidence Regarding “Launches” Does Not Create a Genuine Issue of Material Fact

Opposer heavily relies on hearsay publications describing “launches” of Applicant’s FREEBIRD mobile application which Opposer asserts to “clearly establish” that “Applicant did not launch its mobile application in November of 2015.” Response, p. 9; Exhibit 5 to Declaration of Lori T. Milvain. Even if this hearsay was considered, which it should not,³ these third-party hearsay descriptions of a “launch” of Applicant’s FREEBIRD mobile application do not refer to the first launch of Applicant’s FREEBIRD mobile application, but rather are reporting about Applicant’s later rollout efforts for the FREEBIRD platform in Los Angeles and Boston. *See* Brendlinger Decl., ¶¶ 5-11. Likewise, Applicant’s press release regarding the “official launch” of the FREEBIRD platform in Boston describes Applicant’s rollout efforts, not when Applicant’s FREEBIRD mobile application was first introduced. *Id.*, ¶ 10. These rollout efforts do not in any way contradict Applicant’s evidence establishing that Applicant’s first bona fide use of its FREEBIRD mark for mobile applications began by November 20, 2015 when Applicant’s FREEBIRD mobile application became available for download on the Apple iTunes Store.

2. The Filing Basis for the Application is Irrelevant

Opposer asserts that the intent-to-use filing basis for the Application evidences that Applicant did not begin using its FREEBIRD mark on November 20, 2015. Response, p. 9. But

³ Applicant objects to this hearsay evidence and requests that the Board disregard it. Fed. R. Evid. 802; *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 n.7 (TTAB 2009) (citing *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007)).

the filing basis for the Application is irrelevant. It is both accepted and common practice to file an application on an intent-to-use basis where, for example, specimens of use or a precise first use date are not available at the time an application is filed. As explained by James E. Hawes, Practitioner's Trademark Manual of Examining Procedure, Practice Tip § 901 (April 2003):

If the applicant is unsure as to whether or not use has occurred, probably the best course of action is to prepare a §1(b) application based upon a bone fide intent to use the mark in commerce. If it later turns out that use began before the application was filed, it is perfectly permissible to amend the application to allege a date of use prior to the filing date of the application at the PTO.

Applicant's filing of the Application on an intent-to-use basis is not inconsistent with the fact that Applicant was already using its FREEBIRD mark for its mobile application.

Moreover, as recognized in *Corporate Document Services, Inc. v. I.C.E.D. Management, Inc.*, 48 U.S.P.Q.2D 1477, 1479 (TTAB 1998), "an intent-to-use applicant is entitled to rely upon actual use, or use analogous to trademark use, prior to the constructive use date of the intent-to-use application." Opposer's assertion that an intent-to-use basis would somehow contradict evidence of an applicant's earlier actual use date is inapposite with the Board's directive in *Corporate Document Services, Inc.*

3. Opposer's Exhibit 4 Evidence is Irrelevant

The documents in Exhibit 4 to the Declaration of Lori T. Milvain that Opposer points to in an attempt to sow doubt about when Applicant's FREEBIRD mobile application first became available for download on the Apple iTunes Store is also irrelevant and unavailing.⁴ As explained

⁴ In pages 2-5 of its Response, Opposer mischaracterizes the documents in Exhibit 4 to the Declaration of Lori T. Milvain as showing certain events, actions, and/or dates, but there is no support in Ms. Milvain's declaration for any of these supposed actions, events, and/or dates. Moreover, Ms. Milvain's declaration does not establish any personal knowledge or other basis for her testimony regarding the content or meaning of any of these documents. The Board should disregard all of the mischaracterizations of documents found in pages 2-5 of Opposer's Response.

below and in the Brendlinger Decl., none of this “evidence” relates to when Applicant’s FREEBIRD mobile application became available on the Apple iTunes Store or otherwise contradicts Applicant’s evidence establishing a first bona fide use of its FREEBIRD mark for mobile applications on November 20, 2015:

- **Applicant’s Various Marketing Efforts** – Since Applicant first made its FREEBIRD mobile application available for download on the Apple iTunes Store on November 20, 2015, Applicant has been engaged in ongoing efforts to market and rollout its mobile application to users, sponsors, and investors. *See* Brendlinger Decl., ¶¶ 5-9. The May 14, 2016 Business Plan, August 23, 2016 agency services proposal and AdWords plan, the Facebook plan, and other marketing materials cited by Opposer are merely components of these ongoing efforts. *Id.*, ¶ 12(a), (e), (f), (g), (h), (i) & (k).
- **Applicant’s Privacy Statement** – Applicant has always had a privacy statement for its FREEBIRD mobile application since it was first made available for download on the Apple iTunes Store on November 20, 2015. Brendlinger Decl., ¶ 12(b). The May 21, 2016 privacy statement set forth in Opposer’s Exhibit 4 is merely the latest version of that privacy statement as of May 21, 2016. Indeed, this document states next to the date that it was “Last Updated: May 21, 2016” which evidences that it is not the original version of the privacy statement. *Id.*
- **Development of Applicant’s New Logo** – Applicant has always had a logo for its FREEBIRD mobile application since it was made available for download at the Apple iTunes Store on November 20, 2015. Brendlinger Decl., ¶ 12(c). In mid 2016, Applicant engaged a graphic designer to help with efforts to update its logo. *Id.* The June 22, 2016 invoice and proposed logo designs set forth in Opposer’s Exhibit 4 at pages 13-14 and 18-31 is related to this effort. *Id.* This particular graphic designer had not previously worked with Applicant so the reference to a “Round 1” is to the first set of proposed logo designs that were provided by this graphic designer. *Id.*
- **Mr. Wentzel’s Employment with Applicant** – As described in paragraphs 3-5 of the Wentzel Decl., Mr. Wentzel developed and released Applicant’s FREEBIRD mobile application while he was with his company EITC Productions, Inc. He became a full time employee of Applicant in August 2016. Brendlinger Decl., ¶ 12(d); Wentzel Decl., ¶ 1.
- **Applicant’s Letter to Investors** – Pages 46-49 of Exhibit 4 to the Declaration of Lori T. Milvain is a letter to Applicant’s investors providing updates about the company and its activities in the fourth quarter of 2016, including Applicant’s rollout efforts. Brendlinger Decl., ¶ 12(j). What is strikingly missing from this investor letter is any mention that Applicant’s FREEBIRD mobile application had just been introduced. *Id.* Had Applicant just introduced its FREEBIRD mobile application as Opposer suggests, that event would have been front and center in an update to investors. *Id.*

- **Applicant’s Continued Beta Testing** – As shown by Exhibit 6 to the Wentzel Decl., since Applicant first made its FREEBIRD mobile application available for download on the Apple iTunes Store on November 20, 2015, Applicant has continuously uploaded new versions and updates of its mobile application to the Apple iTunes Store. Wentzel Decl., ¶ 11 & 15, Ex. 6; Brendlinger Decl., ¶ 12(1). References to beta testing in the various documents cited by Opposer refer to beta testing of updates to the FREEBIRD mobile application before those updates were released on iTunes. *Id.*

All of Exhibit 4 to the Declaration of Lori T. Milvain is irrelevant to Applicant’s first bona fide use of its FREEBIRD mark for mobile applications on November 20, 2015.

II. CONCLUSION

There is no genuine issue of material fact that Applicant’s bona fide use of its FREEBIRD mark began on November 20, 2015 when the mobile application became available for download on the Apple iTunes Store. *Kronik*, 2016 TTAB LEXIS 59, *17-18. Opposer also admits that it did not begin using FREEBIRDS and  for its mobile application any earlier than May 31, 2016. Applicant is thus entitled to summary judgment that it is the senior user of FREEBIRD for mobile applications. Summary judgment on this issue in favor of Applicant is respectfully requested as it will clarify remaining issues for discovery and will properly frame the analysis of alleged likelihood of confusion with respect to Applicant’s Application Serial No. 87/121817 in view of Opposer’s other alleged trademark rights existing prior to November 20, 2015.

Dated: May 4, 2020

Respectfully Submitted,

/Benjamin B. Lieb/

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ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPLICANT’S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PRIORITY FOR MOBILE APPLICATIONS and support documents has been served on Tavistock Freebirds, LLC by forwarding said copy on May 4, 2020 via email to Lori T. Milvain at lmilvain@lseblaw.com.

/Benjamin B. Lieb/

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>TAVISTOCK FREEBIRDS, LLC,</p> <p style="text-align: right;">Opposer,</p> <p>v.</p> <p>MOBILEOFFER, INC.</p> <p style="text-align: right;">Applicant.</p>	<p>Opposition No. 91247656 Serial No. 87121817</p>
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**DECLARATION OF KURT A. BRENDLINGER IN SUPPORT
OF APPLICANT’S MOTION FOR SUMMARY JUDGMENT**

I, Kurt A. Brendlinger, declare as follows:

1. I am over the age of 21 and competent to make this declaration. The facts set forth in this declaration are based on my personal knowledge or a review of Mobileoffer Inc.’s corporate records.

2. I am the Chief Executive Officer of Applicant, Mobileoffer, in this proceeding. I am also a Partner of Santa Monica Capital Partners, LLC, an entrepreneurial merchant bank, where I am responsible for corporate and business development and strategy, capital raising, and seeking investment opportunities. In addition, I am the CEO of portfolio company, Digital Wellness LLC, that owns and operates Biggestloserclub.com. I previously was chairman of the board of NuRx Pharmaceuticals, a portfolio company of SMCP currently focused on developing three retinoid and rexinoid compounds for treatment in the oncology sector. I also served as Chief Financial Officer and a director of Santa Monica Media Corporation, a special purpose acquisition company. In addition, I served as Senior Advisor to 3 Ball Productions, one of the most successful and sought after reality television production companies in Hollywood with a track record of over 561 hours

of programming produced and delivering a combined audience of 26.2 million viewers a week. 3 Ball Productions' shows include The Biggest Loser, For Love or Money, Unanimous, Beauty and the Geek, Breaking Bonaduce, and others.

3. I have reviewed the Declarations of Anthony J. Wentzel and Julianne M. Patek and the exhibits to those declarations that were submitted in connection with Mobileoffer's Motion for Summary Judgment in the above-referenced opposition.

4. I have also reviewed the Declaration of Lori T. Milvain and exhibits to that declaration that was submitted in connection with Opposer Tavistock Freebirds LLC's Response in opposition to Mobileoffer's Motion for Summary Judgment in the above-referenced opposition.

5. I understand that Opposer has taken the position in its Response that Mobileoffer did not begin offering its FREEBIRD mobile application on the Apple iTunes Store by November 20, 2015. This assertion is false. As detailed in the Declaration of Anthony J. Wentzel, Version 0.9 of MobileOffer's FREEBIRD mobile application for iOS was uploaded to the Apple iTunes Store on November 13, 2015. I recall instructing Mr. Wentzel to proceed with that upload when we determined that the initial beta testing for the FREEBIRD mobile application that took place in early November 2015 was successful. I downloaded the FREEBIRD mobile application from the Apple iTunes Store when it first became available for download about one week later. I vividly recall that Mobileoffer's FREEBIRD trademark was displayed in the Apple iTunes Store at that time because this was the crowning achievement in Mobileoffer's efforts to date to offer its FREEBIRD platform for public use.

6. The FREEBIRD platform allows users of the FREEBIRD mobile application to receive credits for transportation to sponsor destinations such as bars, entertainment venues, retailers, restaurants, and private events when they use transportation service providers such as

Uber. When Mobileoffer began offering its FREEBIRD mobile application for download in November 2015, Mobileoffer was already engaged in efforts to recruit sponsors to join the FREEBIRD platform. Bars and restaurants in the Los Angeles County and Orange County areas were the first sponsors to join the FREEBIRD platform commencing in January 2016.

7. Mobileoffer's strategy for rolling out its FREEBIRD platform is similar to that used by Uber. When the Uber mobile application was first available for download, it was not possible to actually use the Uber mobile application throughout the United States because Uber first needed to recruit the drivers who would drive the consumers who used the mobile application. In turn, drivers were not inclined to join the Uber platform because no one was using the Uber mobile application. To overcome this problem, Uber utilized a market-by-market rollout plan where it focused on promoting its Uber mobile application in limited regions in order to build awareness and widespread use. The Uber system was first promoted for use in the San Francisco area. Once a critical mass of drivers and consumers was established in the San Francisco market, Uber began promoting its system in New York City and so on.

8. Once Mobileoffer had created sufficient liquidity in terms of initial sponsors on the FREEBIRD platform and initial consumer adoption, Mobileoffer was able to hire a public relations firm to begin outreach of earned media and increased its digital marketing (i.e., Google, Facebook) spend focused on consumer awareness and use. As Mobileoffer's liquidity continued to increase, it undertook specific marketing efforts to rollout the FREEBIRD platform within certain geographic regions. For example, in 2017, Mobileoffer expended at least a half million dollars in advertising and other efforts to rollout the FREEBIRD platform in the Los Angeles area. The goal of this rollout was in to add at least 100 sponsors in the Los Angeles region to the FREEBIRD platform. Simultaneously, Mobileoffer developed a completely new version of its FREEBIRD

platform including a Version 2.0 of the FREEBIRD mobile application. This new version of the FREEBIRD platform was introduced in the Los Angeles area in early 2017 for beta testing. As shown by Exhibit 6 to the Declaration of Anthony J. Wentzel, Version 2.0 of the FREEBIRD mobile application was uploaded to the Apple iTunes Store on March 4, 2017. One of the events that MobileOffer hosted in connection with the rollout in Los Angeles was a Halloween event in downtown Los Angeles on October 31, 2016. The event was promoted by a company called Future Party and included sponsors such as Bumble. Mobileoffer's FREEBIRD trademark and a download link was prominently placed on all consumer facing marketing for that event. That night Mobileoffer added several hundred consumer downloads of the FREEBIRD mobile application and over 200 independent rides to the event.

9. Around January 2017, Mobileoffer began efforts to rollout the FREEBIRD platform in the Boston area. The goal of these efforts was to add at least 100 sponsors in the Boston area to the FREEBIRD platform within the year. To support these efforts, Mobileoffer hired a salesperson in Boston and focused digital marketing on the Boston area. By early 2018, the rollout in Boston was determined to be successful. The new version of the FREEBIRD platform was then introduced in Boston to test its functionality before Mobileoffer issued a press release in early April 2018 announcing that the FREEBIRD platform had been "officially launched" in Boston.

10. The BusinessWire article (pages 4-5 of Exhibit 5 to the Declaration of Lori T. Milvain) is a reprint of Mobileoffer's press release announcing the official launch of the FREEBIRD platform in Boston. As explained above, when this press release was issued, the FREEBIRD mobile application had been available for download at the Apple iTunes Store since November 2015 and was already in use. The statement that "Freebird Rides was tested successfully throughout Los Angeles and Orange County, CA in fall 2017, and for the last several weeks in

Boston before its official launch today” refers to the testing of the new version of the FREEBIRD platform described above.

11. The other two articles attached as Exhibit 5 to the Declaration of Lori T. Milvain also appear to refer to Mobileoffer’s rollout efforts in Los Angeles and Boston that I have describe above. The article from the Long Beach Post (pages 1-3 of Exhibit 5 to the Declaration of Lori T. Milvain) was not created by Mobileoffer but accurately describes that the FREEBIRD platform started in 2015 and appears to refer to Mobileoffer’s rollout efforts in Los Angeles in 2017 that I describe above. The statement “did not launch until June 2017” appears to refer to when the new version of the FREEBIRD platform was introduced in the Los Angeles area. The other article from verdictfoodservice.com (pages 6-10 of Exhibit 5 to the Declaration of Lori T. Milvain) was not created by Mobileoffer but appears to be promoting Mobileoffer’s press release regarding its rollout efforts in Boston that I describe above.

12. I have been asked by counsel to respond to Opposer Tavistock Freebirds LLC’s characterizations of the documents attached as Exhibit 4 to the Declaration of Lori T. Milvain:

a. Pages 1-2 of Exhibit 4 to the Declaration of Lori T. Milvain is a Mobileoffer business plan dated May 14, 2016. Opposer has not described the relevance of this document. However, to the extent that Opposer is intending to imply that Mobileoffer had not yet begun offering its FREEBIRD mobile application, that implication is false. This business plan is simply a part of Mobileoffer’s ongoing business activities and efforts to generate interest by additional funders well after Mobileoffer first made its FREEBIRD mobile application available for download at the Apple iTunes Store in November 2015.

b. Pages 3-12 of Exhibit 4 to the Declaration of Lori T. Milvain is a Mobileoffer privacy statement for the FREEBIRD mobile application. This is not the first

version of MobileOffer's privacy statement. As stated on the top of page 3, it was "Last Updated: May 21, 2016". Mobileoffer has always had a privacy statement for its FREEBIRD mobile application since it was first made available for download on the Apple iTunes Store in November 2015.

c. Pages 13-14 and 18-31 of Exhibit 4 to the Declaration of Lori T. Milvain is a June 22, 2016 invoice and proposed logo designs from a graphic designer named Danielle Vogel. These documents relate to efforts to update Mobileoffer's original logo which was already existing. Ms. Vogel had not previously worked with Mobileoffer so her reference to "Round 1" in these documents means that it is to the first set of proposed logo designs she has provided to Mobileoffer for consideration. Mobileoffer has always had a logo for its FREEBIRD mobile application since it was made available for download at the Apple iTunes Store in November 2015.

d. Pages 15-17 of Exhibit 4 to the Declaration of Lori T. Milvain is Mobileoffer's draft employment agreement for Mr. Anthony Wentzel. As stated in the Declaration of Anthony J. Wentzel, he began working with Mobileoffer while he was with EITC Productions, Inc. and he was still with EITC when the FREEBIRD mobile application was first made available for download on the Apple iTunes Store in November 2015. Mr. Wentzel became an employee of Mobileoffer in August 2016 and is currently Mobileoffer's Chief Technology Officer.

e. Pages 32-35 of Exhibit 4 to the Declaration of Lori T. Milvain is an agency services proposal from MeringCarson and AdWords plan that was received by Mobileoffer around August 2016. Opposer asserts that Mobileoffer "executed" this proposal around August 20, 2016, but there is nothing in this proposal showing that Mobileoffer executed

anything. Opposer also asserts that Mobileoffer “created” the AdWords plan on this same date, but this assertion is not accurate either. The AdWords plan was included with the proposal from MeringCarson. As noted above in paragraph 8, this agency services proposal relates to Mobileoffer’s efforts to engage a public relations firm to begin outreach of earned media and increase its digital marketing spend focused on consumer awareness and use. This was well after Mobileoffer first made its FREEBIRD mobile application available for download at the Apple iTunes Store in November 2015.

f. Pages 36-40 of Exhibit 4 to the Declaration of Lori T. Milvain is a Facebook marketing plan from HawkeMedia that was received by Mobileoffer. Opposer asserts that plan was created on August 31, 2016, but this plan does not bear any dates. Opposer also asserts that this document was created by a “related” entity but HawkeMedia is not related to Mobileoffer. As with the agency services proposal at pages 32-35, this Facebook marketing plan relates to Mobileoffer’s efforts to engage a marketing firm to begin outreach of earned media and increase its digital marketing spend focused on consumer awareness and use. This was well after Mobileoffer first made its FREEBIRD mobile application available for download at the Apple iTunes Store in November 2015.

g. Page 41 of Exhibit 4 to the Declaration of Lori T. Milvain is a Mobileoffer is an email template that MobileOffer created for its rollout efforts described above. It was intended to be sent to potential sponsors. Opposer wrongly asserts that this was an “advertisement”. Opposer also wrongly asserts that Mobileoffer “ran” this supposed “advertisement” on September 29, 2016, but this document does not bear any date or state if or when this email template was circulated.

h. Page 42 of Exhibit 4 to the Declaration of Lori T. Milvain is a conference

call agenda that was created by HawkeMedia and sent to MobileOffer in advance of a conference call in October 2016. The agenda lists a discussion topic about “a generous estimate for when the app will be ready for a fully marketed launch”. Opposer wrongly asserts that this statement refers to a “launch” of Mobileoffer’s FREEBIRD mobile application. Actually, the topic is referring to a discussion about when the then current version of the FREEBIRD mobile application would be sufficiently bug-free so that it would make sense to begin significant investing in marketing efforts directed to potential consumers. As shown by Exhibit 6 to the Declaration of Anthony J. Wentzel, since the FREEBIRD mobile application was first made available for download on the Apple iTunes Store in November 2015, MobileOffer regularly updates the FREEBIRD mobile application and uploads those updates to the Apple iTunes Store. Many of these updates were to fix bugs that had been identified in the mobile application.

i. Pages 43-45 of Exhibit 4 to the Declaration of Lori T. Milvain are copies of pages from a marketing package that Mobileoffer created for its rollout efforts that I describe above. This marketing package was intended to be given to potential sponsors. Opposer asserts that this marketing package was created on December 20, 2016, but this document does not bear any date. These pages describe the FREEBIRD platform as being new because sponsors who are unfamiliar with the FREEBIRD platform would consider it to be a new way of bringing in customers.

j. Pages 46-49 of Exhibit 4 to the Declaration of Lori T. Milvain is a letter to MobileOffer’s investors providing updates about the company and its activities in the fourth quarter of 2016. The letter refers to the Halloween 2016 event described above and the new version of the FREEBIRD platform described above. There is no mention of any

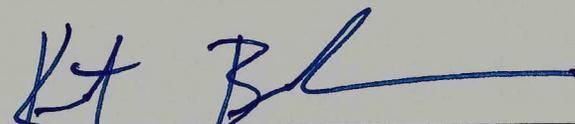
introduction of the FREEBIRD mobile application in this update because the mobile application had been available for download in the Apple iTunes Store since November 2015 and was already in use. Investors were already aware of these facts.

k. Page 50 of Exhibit 4 to the Declaration of Lori T. Milvain is a Mobileoffer is a page from a generic PowerPoint overview on the company that also outlines Mobileoffer's rollout plans that I described above. The dates stated in this document are prospective as of the time that this PowerPoint was created around October 2016 so is not necessarily accurate as to when events actually occurred.

l. Mobileoffer has continuously developed and uploaded updates of its FREEBIRD mobile application to the Apple iTunes Store since it first made its FREEBIRD mobile application available for download on the Apple iTunes Store in November 2015. The uploads are shown in Exhibit 6 to the Declaration of Anthony J. Wentzel. The references to beta testing in the various documents in Exhibit 4 to the Declaration of Lori T. Milvain refer to the beta testing of updates to FREEBIRD mobile application before those updates were updated to the Apple iTunes Store. It was and continues to be Mobileoffer's practice to beta test each version of its FREEBIRD mobile application before it is released to the public. As described in Mr. Wentzel's declaration, the very first version of the FREEBIRD mobile application was beta tested in early November 2015 before it was made available for download in the Apple iTunes Store on November 20, 2015.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 4, 2020


Kurt A. Brendinger