

AUG 9 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES N. HATTEN, Clerk
By: *M. Johnson*
Deputy Clerk

MAID OF THE MIST CORPORATION
and MAID OF THE MIST STEAMBOAT
COMPANY, LTD.,

Plaintiffs

v.

CIVIL ACTION NO.
1:06-CV-714-ODE

ALCATRAZ MEDIA, LLC, ALCATRAZ
MEDIA, INC., and WILLIAM M.
WINDSOR,

Defendants

ORDER

This civil suit for injunctive relief is before the Court on Defendants' Motion for Summary Judgment [#146], Plaintiffs' Motion for Summary Judgment [#148], Defendants' Request for a Hearing [#223], Plaintiffs' Motion to Strike [#237], Defendants' Motion for Leave to File [#241], Defendants' Motion for Clarification and to Strike [#243], and Plaintiffs' Motion to Strike Affidavit [#250].

The parties to this action established a relationship in 2004 whereby Plaintiffs Maid of the Mist Corporation and Maid of the Mist Steamboat Company, Ltd. (hereinafter collectively referred to as "Maid" or "Plaintiffs") authorized Defendants Alcatraz Media, LLC, Alcatraz Media, Inc. (hereinafter collectively referred to as "Alcatraz")¹ to sell individual vouchers for tickets to ride Maid

¹Although only Alcatraz Media, LLC was involved in some of the alleged conduct, the Court will refer to the entities collectively for simplicity and because the Order applies to both entities.

of the Mist's Niagara Falls boats on their website. The relationship deteriorated after the inception of the 2005 Maid of the Mist season and Maid eventually notified Alcatraz that it would no longer honor Alcatraz vouchers after July 29, 2005. Alcatraz's decision to continue selling individual vouchers after July 29, 2005 despite the notice from Maid that those vouchers would not be honored gave rise to the instant tortious interference with business relations action. Maid seeks a permanent injunction against Alcatraz's future sale of Maid vouchers as well as attorney's fees and costs.

Alcatraz contends that it is entitled to summary judgment on Maid's tortious interference with business relations claim because Maid cannot establish that Alcatraz induced any potential Maid customers to discontinue or fail to enter into a business relationship with Maid. Alcatraz also contends that Maid has suffered no financial injury as a result of Alcatraz's actions.

Maid asserts that it is entitled to summary judgment because Alcatraz tortiously interfered in Maid's business relationship with its customers by continuing to sell Maid vouchers after July 29, 2005. Maid also seeks summary judgment with respect to Alcatraz's counterclaims alleging promissory estoppel, breach of contract, slander, and violation of the Georgia Fair Business Practices Act.

For the following reasons, Defendants' Motion for Summary Judgment [#146] is DENIED. Plaintiffs' Motion for Summary Judgment [#148] is GRANTED. Defendants' Request for a Hearing [#223] is DENIED. Plaintiffs' Motion to Strike [#237] is DISMISSED AS MOOT. Defendants' Motion for Leave to File [#241]

and Motion for Clarification and to Strike [#243] are DISMISSED AS MOOT. Likewise, Plaintiffs' Motion to Strike Affidavit [#250] is DISMISSED AS MOOT.

I. Factual and Procedural Background

Unless otherwise noted, the following facts are undisputed.² The Court derives the facts from the evidence received upon Plaintiffs' application for a preliminary injunction along with the parties' pleadings, depositions, and attachments and exhibits

²The Court finds that both parties have failed to comply with N.D. Ga. Local Rule 56.1(B)(1), which states:

A movant for summary judgment shall include with the motion and brief a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately and supported by a citation to evidence proving such fact. The court will not consider any fact: (a) not supported by a citation to evidence (including page or paragraph number); (b) supported by a citation to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's statement of undisputed facts.

Maid's Statement of Undisputed Facts is replete with improper citations to this Court's Order on Maid's motion for preliminary injunction rather than to evidence in the record. Alcatraz's Statement of Undisputed Facts contains few facts and is little more than a reactionary document listing the facts upon which Alcatraz disagrees with Maid. Nonetheless, the Court finds that it is possible to determine which facts are undisputed and has reconstructed the facts in this section of the order.

thereto.³

Plaintiffs Maid of the Mist Corporation and Maid of the Mist Steamboat Company, Limited, have operated boat tours in Niagara Falls since 1846. Maid of the Mist sold approximately 2.5 million tickets for its tours during the 2005 season.

In 2005, Maid sold tickets for its tours in three ways: (1) individual "walk-up" ticket purchases at Maid's box offices in Niagara Falls, New York, and Niagara Falls, Ontario; (2) vouchers available as part of a tour package sold by tour operators authorized by Maid; and (3) individual vouchers available through three internet resellers, specifically www.niagarafallstours.net, www.looktours.com, and www.vacationsmadeeasy.com.

In 2005, if a customer purchased a voucher for a ride on one of Maid's boats, the customer had to exchange that voucher for a

³In their Response to Maid's Statement of Material Facts [#221-2] Alcatraz repeatedly objects to Maid's reliance upon exhibits and testimony presented during the preliminary injunction hearing held before this Court on April 11, 2006. Specifically, Alcatraz argues that "preliminary findings of fact are not evidence nor binding on a decision on the merits." Defs.' Response to Pls.' Statement of Material Facts at ¶ 1. The Court agrees with Alcatraz that Maid may not rely on findings of fact from the preliminary injunction phase as support for their motion for summary judgment. However, that does not mean that the testimony and evidence presented at the preliminary injunction stage are not evidence that can be considered at the summary judgment phase. Federal Rule of Civil Procedure 65(a)(2) provides: "any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial." Accordingly, citations to and quotations from exhibits admitted as evidence at the preliminary injunction hearing are properly considered at this summary judgment phase if they would also be admissible at a trial on the merits.

ticket at one of Maid's box offices to gain entry to the boat ride. Maid tickets were issued on a "first-come-first-serve" basis at the box office, whether customers purchased their tickets at the box office or whether customers traded a pre-purchased voucher for a ticket at the box office. Tickets were date-stamped and could be used only on the date they were stamped. Customers could not make reservations for tours at a specific time.

Defendants Alcatraz Media, LLC, and Alcatraz Media, Inc., operate a ticket brokerage business through a web site, www.niagarafallstours.net.⁴ Defendant William Windsor ("Windsor") is the father of Alcatraz's owner and participates in the management of Alcatraz.

In July 2004, Alcatraz applied to Maid for credit for the purpose of selling individual vouchers for Maid tickets (as opposed to tour packages that include a voucher) on its website. Maid approved Alcatraz's credit application. Maid's letter stated, in part:

Thank you for returning the application for credit. We are pleased to offer your company credit with Maid of the Mist.

...
We look forward to serving you and your clients this coming season...

Windsor Dep., Ex. 3. This essentially established a credit arrangement under which customers could purchase vouchers from Alcatraz and pay Alcatraz directly. Maid would charge Alcatraz

⁴Alcatraz and its affiliates operate several websites in addition to this one, but www.niagarafallstours.net is the only website relevant to the instant action and will be referred to as Alcatraz's website.

the net rate price⁵ of \$9.65 for each adult voucher that was redeemed at its box offices. During the 2005 season, the regular price of an adult ticket for a Maid tour was \$11.50.

According to Defendants, in addition to the credit arrangement described above, Alcatraz provided Maid with a credit card authorization to assure that Maid would be paid for the vouchers Alcatraz sold on its website. This meant that when an Alcatraz customer arrived at the Maid ticket booth with an Alcatraz voucher, Maid either could charge Alcatraz's credit card for the customer's tour ride ticket or could send Alcatraz an invoice for that ticket and any others issued to Alcatraz customers during the invoice period.

Maid entered into similar arrangements with two other ticket brokerage companies, www.vacationsmadeeasy.com as well as www.looktours.com, for the sale of vouchers for the 2005 season.

Having established a relationship with Maid, Alcatraz began selling individual vouchers for Maid of the Mist tickets for the 2005 season. Alcatraz charged \$13.95 per adult voucher, \$2.45 more than the retail price an adult would pay for a ticket at Maid's box office and \$4.30 more than the price Alcatraz paid Maid for the voucher. According to Alcatraz, the price it charged for Maid vouchers was calculated to cover costs such as the cost of obtaining the vouchers from Maid, advertising, and paying service charges to credit card companies, and also to allow Alcatraz to make a profit.

⁵The net rate price represents a "wholesale" discount from Maid's retail rate of \$11.50 and was available to other brokerage companies and tour operators in addition to Alcatraz.

The manner in which Alcatraz listed the price of Maid vouchers on its website implied that Alcatraz was giving online customers a discount. For example, at the beginning of the 2005 season Alcatraz represented that the price of a voucher was \$18.95 but that website customers were eligible for a \$5.00 internet discount and therefore only paid \$13.95. Tr. of Prelim. Inj. Hr'g at 20:16-18. Alcatraz did not provide the retail price of Maid's tickets on its website, nor did it provide the retail price of Maid's tickets on the vouchers it sold. In addition to charging a higher price than Maid's retail price for adult vouchers, Alcatraz initially sold customers time-specific vouchers for rides on Maid of the Mist boats.

Problems arose between the parties after Maid began receiving complaints from customers who had purchased individual vouchers from Alcatraz for boat tours of Niagara Falls. According to Maid, these customers were arriving at the Maid box office with improper paperwork and Maid was having to send them away to return with proper paperwork. Maid asserts that customers were also irate when they realized that Alcatraz had charged them several dollars more for their vouchers than they would have had to pay for tickets at the Maid box office. Maid also asserts that customers who had purchased vouchers from Alcatraz thought that they had purchased tickets for a Maid tour at a specific time, and these customers were angry upon arriving at the Maid box office and learning that Maid does not issue tickets for tours at specific times.

As a result of these problems, Sandra Carlson, Assistant Controller for Maid, notified Alcatraz in writing on June 14,

2005, that it would not accept Alcatraz's vouchers sold after the end of June 2005. Alcatraz Dep., Ex. 33. Carolyn Ballard, an independent contractor who does business development work for Alcatraz, contacted Maid via email on June 14, 2005, to attempt to reach an agreement with Maid so that Maid would continue to accept individual vouchers sold by Alcatraz. Ballard implied in her email that Alcatraz hoped Maid would give it an opportunity to address issues Maid was having with Alcatraz before Maid terminated its credit arrangement with Alcatraz. Windsor Dep., Ex. 8; Alcatraz Dep., Ex. 34.

Carlson replied via email to Ballard on June 16, 2005, stating that Maid required Alcatraz to resolve certain issues in order to continue its credit arrangement with Maid. Specifically, Carlson told Ballard that Alcatraz would need to (1) ensure that its customers arrived at the Maid box office with the proper paperwork, (2) remove any reference to a tour at a specific time from the vouchers issued to Alcatraz customers for Maid tours, (3) charge no more for a tour ticket than Maid's retail price of \$11.50, and (4) clearly state Alcatraz's service charges on the www.niagarafallstours.net website. Windsor Dep., Ex. 8.

Ballard responded to Carlson's email on June 16, 2005. Ballard told Carlson that Alcatraz could not comply with Maid's requirements as to the price and the service charge Alcatraz asked customers to pay for individual vouchers for Maid tours. According to Windsor, Alcatraz would lose money if it charged only \$11.50 as Maid requested. Therefore, Alcatraz could not agree to those terms. Alcatraz Dep., Ex. 36.

Alcatraz and Maid subsequently reached an agreement regarding the paperwork problems, and Maid continued to accept Alcatraz vouchers. Alcatraz discontinued its practice of selling customers time-specific vouchers but did not lower its prices or state the specific amount of its service charges on its website or on the face of the vouchers. On June 22, 2005, Ballard spoke with Christopher Glynn, President of Maid. Later that day, Ballard described the call to Windsor in an email:

I just had a conference call with Christopher Glynn, Pres. and Bob Schull, Controller of Maid of the Mist. They have agreed to 'turn the clock back' and start all over. They even APOLOGIZED for the misunderstanding!

They will clean everything up and get us back on the system by tomorrow. I told them that we would do our best to get them back up on our websites shortly as well...we kissed and made up! (I told them I was humbled by their willingness to allow me to plead our case!)

. . . Turns out this all stems from one complaint: someone who claimed that they were charged \$40 for 2 Maid of the Mist tickets. . . .

So, we are back on the team but with kid gloves on. . . . I have the boss on our side...as long as we are good boys and girls, anyway!

Windsor Dep., Ex. 9.

However, on July 19, 2005, Maid again wrote Alcatraz because customer complaints had continued. The letter stated, in part:

The problems with the voucher seem to have been addressed and we appreciate your cooperation. However, we are still experiencing problems with pricing. Our President has witnessed customer dissatisfaction first-hand on his last two visits to the admissions area. These clients feel that they have been mislead [sic] and overcharged by Maid of the Mist as well as by Alcatraz. This is reflecting poorly on Maid of the Mist and it cannot continue.

In order to remedy this issue we require Alcatraz Media to clearly state on the [voucher] what the Maid of the Mist charges for the boat tour and the

amount of service charges that are added by your company.

Alcatraz Dep., Ex. 38. As a result, Alcatraz added some language regarding the booking fee to the vouchers. However, Alcatraz decided not to disclose Maid's retail rate or its own booking fee on the website or the vouchers.

On July 29, 2005, Maid notified Alcatraz that it must immediately stop selling vouchers. The letter stated, in part:

We believe that our desire for Alcatraz Media to eliminate the misleading website pricing of the Maid of the Mist Boat Tour has been clearly communicated on several occasions. Our admissions staff continue to receive complaints from patrons that purchased their E-vouchers from Alcatraz Media and feel they were over charged, misled, and taken advantage of. We find this customer feedback to be unacceptable and therefore request that you immediately discontinue the sale of [vouchers] for the Maid of the Mist Boat Tour and remove the tour from your website.

Rod Smith Dep., Ex. 26. On July 30, 2005, Maid posted a sign at its box offices that Alcatraz did not have authority to sell vouchers for Maid tickets and that Maid would not accept vouchers issued after July 29, 2005. When customers attempted to redeem vouchers purchased from Alcatraz, Maid employees explained that Alcatraz did not have authority to sell the vouchers. Maid employees also told some Alcatraz customers that Alcatraz was a "scam." See Rod Smith Dep., Ex. 24

Beginning on July 30, 2005, Maid kept a log of how many Alcatraz vouchers were presented at its box offices. Maid documented 1,802 vouchers that were sold before July 29, 2005 and redeemed after that date. Maid documented 894 vouchers that it did not honor based on the fact that they were sold by Alcatraz after July 29, 2005. Finally, Maid kept track of whether the

customers whose vouchers were not honored thereafter purchased tickets from Maid.

Maid's decision not to honor Alcatraz vouchers after July 29, 2005, resulted in a number of Alcatraz customers expressing confusion and anger with both Maid and Alcatraz. Alcatraz submits a declaration by one customer, Jeff Crist, who said that the Maid supervisor with whom he spoke about Maid's refusal to honor his Alcatraz voucher was "very rude" and "made me feel like we were ripping them off and that we had some how [sic] done something wrong." Crist Decl. at ¶¶ 14-15. Another Alcatraz customer whose voucher was not honored by Maid declared that he "felt like Maid should have honored our e-tickets and should have been more apologetic." Havens Aff. at ¶¶ 15-16.

On the other hand, Maid submits that several customers chose not to purchase tickets from Maid's box offices after Maid refused to honor their vouchers. Maid felt it necessary to give one particularly irate Alcatraz customer five complimentary vouchers for rides on Maid boat tours. Maid also alleges that it sold tickets to Alcatraz customers for below-retail prices to assuage them after Maid refused to honor their Alcatraz vouchers. Additionally, Maid asserts that it gave Alcatraz customers complimentary souvenirs in an effort to mitigate Alcatraz's damage to Maid's goodwill.

Despite the contentious relationship between the parties, Alcatraz never failed to pay Maid for tickets Maid issued based on Alcatraz vouchers. Even after Maid instructed Alcatraz to stop selling vouchers for rides on Maid's boats, Maid continued to send

Alcatraz invoices for tickets issued to Alcatraz customers whose vouchers were purchased before July 29, 2005.

Counsel for Maid sent Alcatraz a cease-and-desist letter on August 5, 2005, threatening legal action if Alcatraz did not stop selling vouchers for Maid tickets. See Windsor Dep., Ex. 11. Mr. Windsor responded by e-mail to Maid's counsel at least three times. One e-mail stated: "Your letter is false, and your client knows it is false." Windsor Dep., Ex. 14; Rod Smith Dep., Ex. 24. A second e-mail stated:

This is just a courtesy note to advise you that we are filing complaints today with the Attorney Generals of New York and Ontario, the Niagara Parks Commission, and the Better Business Bureaus in Niagara Falls, New York and Ontario.

Windsor Dep., Ex. 14, Rod Smith Dep., Ex. 24. A third e-mail stated:

I am so disappointed that you have not called. We have secured the testimony of three customers who will testify to the slander, trade libel and various wrongs perpetrated by employees of Maid of the Mist. We have names, dates and times, and detailed comments. One of the Maid of the Mist supervisors even told a customer to call his bank and file a chargeback. I'm sure you know the various laws that violates. I'm afraid we're going to clean up in court against you. Wouldn't you rather just pay us a seven figure amount and accept that we will be selling maid [sic] of the Mist tickets forever? Write us a big fat check.

Windsor Dep., Ex. 14; Rod Smith Dep., Ex. 24. On August 9, 2005, Windsor wrote to the New York State Attorney General and the Ontario Attorney General and told them that Maid had breached a valid contract. Windsor also filed a formal complaint with the Better Business Bureau of South Central Ontario on August 9, 2005. Windsor Dep., Ex. 7.

Alcatraz continued to sell Maid vouchers. It was Alcatraz's position that it had a contract with Maid to sell individual vouchers for tours on Maid's boats. It was also Alcatraz's position that its agreement with Maid did not set a price it must charge customers for those vouchers. Although Alcatraz still charged \$13.95 per adult voucher on July 29, 2005, see Prelim. Inj. Hr'g, Ex. 24, Alcatraz changed the price it charged for an adult voucher several times over the following weeks and months. For example, on August 10, 2005, Alcatraz charged \$15.95 per adult voucher. Prelim. Inj. Hr'g, Ex. 12. On August 15, 2005, Alcatraz charged \$21.50 per adult voucher. Alcatraz Dep., Ex. 46. On August 18, 2005, Alcatraz charged \$9.95 per adult voucher. Prelim. Inj. Hr'g, Ex. 23. On August 19, 2005, Alcatraz charged \$21.50 per adult voucher. Alcatraz Dep., Ex. 47.

On August 12, 2005, Windsor wrote another e-mail to Maid's counsel stating:

We have a contract. I have previously faxed a copy to you. I will send another copy to you. You should ask for copies of all the emails from Maid of the Mist to us. Makes for interesting reading. The Maid of the Mist staff is slandering Alcatraz Media, as you well know from one where I provided the details to you, and turning away people who bought tickets MONTHS ago. You should consider the consequences of Maid of the Mist's activity of stealing money from people who have already paid and of denying [vouchers] from customers who paid Alcatraz Media. Alcatraz Media has complied and continue [sic] to comply with all terms of the contract with Maid of the Mist. Therefore, Alcatraz Media will continue to sell. Alcatraz Media has no intention of EVER stopping to sell Maid of the Mist tickets. I myself, personally, am busily preparing a new web site that will solely sell Maid of the Mist tickets. In addition, I, personally, am applying to Niagara Parks Commission for a contract to operate a boat ride at Niagara Falls, and I will do

everything in my power personally to see that Maid of the Mist loses the ability to operate at Niagara Falls or gets the competitor they so richly deserve.

Alcatraz Media is now providing form letters to all of our customers to enable them to quickly and easily file complaints with the Attorneys General and the Better Business Bureaus.

You have never responded to any of my many previous emails and faxes. Have you taken Alcatraz Media's settlement offer to your client? Alcatraz Media will settle for \$4 million and a long-term contract to sell for Maid of the Mist. Please extend that offer to your clients.

Windsor Dep., Ex. 15.

Maid persisted in its refusal to honor Alcatraz vouchers at its ticket booths. Several customers requested refunds from Alcatraz and/or disputed Alcatraz's charges with their credit card companies after Maid refused to honor individual vouchers they had purchased from Alcatraz. When requesting a refund from Alcatraz via email, at least one customer indicated that it was her understanding that Alcatraz's actions constituted fraud. Alcatraz believes it was Maid's employees who led this customer to believe that Alcatraz had committed fraud.

Maid filed a complaint requesting a temporary restraining order and injunctive relief in the Superior Court of Gwinnett County, Georgia on August 29, 2005. This complaint did not state a statutory basis for Maid's claim against Alcatraz. A hearing on the matter was set for October 28, 2005. Maid subsequently withdrew its motion because the 2005 season had ended, and it believed that Alcatraz had agreed not to sell vouchers for the 2006 season.

Between the 2005 and 2006 seasons, as a result of its poor experience with Alcatraz, Maid terminated its relationship with

the two other ticket brokerages that sold individual vouchers (www.vacationsmadeeasy.com and www.looktours.com). Maid had not received any customer complaints regarding either of the other ticket brokerages. Maid asserts that both of the other ticket brokerages charged the face value of the ticket (the price Maid charges), such that their booking fee was only the difference between the ticket price and the net adult rate for which the brokerage purchased it.

Some time on or before February 6, 2006, Alcatraz began selling e-tickets for Maid's boat tours for the 2006 season. As used in this Order, an e-ticket is different from a voucher in that a voucher is redeemed for a ticket by Maid at its box offices, whereas an e-ticket is redeemed for a ticket by Alcatraz itself.⁶ According to Windsor, Alcatraz planned to obtain tickets for which to redeem the e-tickets it issued either by buying them at Maid's box offices, buying them from another website, or buying gift certificates through Maid's corporate office. No evidence has been presented showing that Alcatraz ever did acquire any Maid tickets by any of these means, however.

In February 2006 and March 2006, Alcatraz still did not state Maid's ticket price or Alcatraz's booking fee on its website or on the printed e-tickets. On March 9 and 24, 2006, Alcatraz was

⁶"E-ticket" has been used interchangeably with "voucher" in some of the parties' communications. However, the Court uses "e-ticket" to refer only to a print-out that Alcatraz would redeem for a ticket. Everything sold by Alcatraz during the 2005 season was a voucher, whereas everything sold by Alcatraz during the 2006 season was an e-ticket.

charging \$21.50 per adult e-ticket. Prelim. Inj. Hr'g, Exs. 17, 18.

Maid filed an updated brief in support of its request for temporary restraining order in the Superior Court of Gwinnett County, Georgia on March 20, 2006. Based on a statement in Maid's updated brief that "Defendants have violated the Lanham Act and state unfair competition laws," Alcatraz removed the action to this Court on March 28, 2006. Alcatraz also answered the complaint on March 28, 2006, and asserted counterclaims alleging promissory estoppel, breach of contract, slander, and violations of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-391 et seq.

After reviewing documents originally filed in the Superior Court of Gwinnett County, this Court issued a temporary restraining order on March 30, 2006, prohibiting Alcatraz from selling Maid vouchers or using Maid's name or image on its website. The Court modified the temporary restraining order on April 3, 2006 to allow Alcatraz to sell tour packages that include Maid vouchers through Gray Line Tours because it was clear that Maid was not opposed to such sales. The Court held an evidentiary hearing on Maid's request for preliminary injunction on April 11 and 12, 2006. At the conclusion of the hearing, the Court directed Maid to file proposed findings of fact and conclusions of law ("PFFCL") by April 19, 2006 and for Alcatraz to file a response by April 26, 2006. For the first time in its PFFCL, Maid identified the specific statutory basis of its claim against Alcatraz. Maid alleged two state law causes of action - tortious or intentional interference with business relations under Georgia

common law, and false or fraudulent advertising under O.C.G.A. § 10-1-421.⁷

Although this case was originally removed to this Court based on federal question jurisdiction under the Lanham Act, Maid did not assert any claims based on federal law. This Court retained subject matter jurisdiction over this action in diversity pursuant to 28 U.S.C. § 1332. All plaintiffs are diverse from all defendants.⁸ The amount in controversy in this action is derived from the monetary value to Maid of a permanent injunction against Alcatraz's future sale of individual Maid vouchers. See Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805, 807 (11th Cir. 2003) ("When a plaintiff seeks injunctive or declaratory relief, the amount in controversy is the monetary value of the object of the litigation from the plaintiff's perspective." (internal citation omitted)). Because Alcatraz's future sale of Maid vouchers threatens Maid's good will, the Court concludes that the value of the injunction to Maid derives from the value of Maid's good will. Maid has been operating tours at Niagara Falls for 161 years. Maid sold 2.5 million tickets for the 2005 season at \$11.50 per ticket, generating nearly \$29 million in revenue.

⁷Maid later withdrew its false advertising claim.

⁸Plaintiff Maid of the Mist Corporation is a New York corporation. Plaintiff Maid of the Mist Steamboat Company is an Ontario, Canada corporation. Defendant Alcatraz Media, LLC, is a California limited liability company that has a registered agent in Gwinnett County, Georgia and is authorized to transact business in Georgia. Defendant Alcatraz Media, Inc., is a Delaware corporation that has a registered agent in Gwinnett County, Georgia and is authorized to transact business in Georgia. Defendant William Windsor is a resident of Georgia.

The Court finds that the value of the good will of Maid as the exclusive operator of Niagara Falls tour boats serving millions of visitors per year is greater than \$75,000.00.

The Court granted Maid's motion for preliminary injunction on May 12, 2006, and enjoined Alcatraz from selling individual vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; from using Maid of the Mist's name or images to sell individual vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; from participating in schemes to attempt to sell individual vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; and from filing false reports with the Better Business Bureaus of New York and Ontario. The Court did not enjoin Alcatraz from selling tour packages through Gray Line Tours of Toronto, Gray Line Tours of Buffalo, Gray Line Tours of Niagara Falls, Gray Line Tours of New York, or Over the Falls Tours which include Maid of the Mist tickets or vouchers because Maid was not opposed to such sales.

II. Standard of Review

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In ruling on a summary judgment motion, the Court must view the evidence in a light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Further, the Court may not make credibility determinations, weigh

the evidence, or draw inferences from the facts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

To prevail in its motion for summary judgment, the moving party must show that the evidence is insufficient to establish an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party makes a sufficient showing, then the non-moving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). If the evidence supporting the non-moving party's claims is insufficient for a jury to return a verdict for the non-moving party, or is "merely colorable" or "not significantly probative," then the moving party is entitled to summary judgment. Anderson, 477 at 249. If, however, reasonable minds could differ as to the import of the evidence, and a reasonable interpretation of the evidence could lead to a verdict for the non-moving party, then summary judgment is inappropriate. Id. at 251-52.

III. Motions for Summary Judgment

Alcatraz argues in its Motion for Summary Judgment [#146] that it is entitled to summary judgment on Maid's sole remaining claim for tortious interference with business relations. Alcatraz contends that Maid has not submitted evidence sufficient to meet two of the four required elements of tortious interference with business relations. Specifically, Alcatraz contends that Maid cannot show that Alcatraz induced a third party to discontinue or

fail to enter into an anticipated relationship with Maid and that Maid cannot show that Alcatraz caused it financial injury.

Maid asserts in its Motion for Summary Judgment [#148] that it and not Alcatraz is entitled to summary judgment on its claim for tortious interference with business relations. Maid argues that it has submitted sufficient evidence to meet all four elements of the tort under Georgia law. Maid contends that it is entitled to permanent injunctive relief against Alcatraz on the basis of its tortious interference with Maid's business relations. Additionally, Maid asserts that it is entitled to summary judgment on Alcatraz's four counterclaims for breach of contract, promissory estoppel, slander, and violations of the Georgia Fair Business Practices Act.

A. Tortious Interference With Business Relations

Maid claims that Alcatraz intentionally interfered with Maid's business relations with its customers by continuing to sell vouchers for Maid tickets after July 29, 2005, the date on which Maid terminated its credit arrangement with Alcatraz.

To establish a claim of intentional interference with business relations, a plaintiff must prove that the defendant: "(1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury." Hayes v. Irwin, 541 F. Supp. 397, 429 (N.D. Ga. 1982). A claim of intentional interference with business relations exists for interference with prospective business

relations, in addition to existing ones. Id. However, "to establish a cause of action for interference with prospective business relations, the plaintiff must demonstrate that absent the interference, those relations were reasonably likely to develop in fact." Id. The Court will address the parties' arguments with respect to each of these elements below.

1. Acted Improperly and Without Privilege

Alcatraz contends that it had a contract with Maid to sell Maid vouchers for the 2005 season. Alcatraz asserts that Maid wrongfully ceased honoring Alcatraz's validly-issued vouchers after July 29, 2005.

Maid asserts that it was entitled to revoke Alcatraz's authorization to sell Maid vouchers via direct billing at any time. Maid submits that it did revoke Alcatraz's authorization to sell Maid vouchers via direct billing as of July 29, 2005. It is Maid's position that, because Alcatraz no longer had authorization to sell Maid tickets as of July 29, 2005, Alcatraz acted improperly and without privilege by continuing to sell tickets after that date.

In the context of a wrongful interference with business relations claim, "acting improperly" means utilization of "predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." Chong v. Reebaa Constr., Inc., 284 Ga. App. 830, 836 (2007). A defendant who acts "without privilege" is one who acts without "a legitimate or bona fide economic interest...or a legitimate

relationship...with the [plaintiff business]." Culpepper v. Thompson, 254 Ga. App. 569, 571-72 (2002). The defendant is "a stranger, interloper, or meddler" in the contract or business relationship. Id.

The parties' legal relationship prior to July 29, 2005 is the critical determining factor with respect to the question of whether Alcatraz was a "stranger, interloper, or meddler" after July 29, 2005. The Court finds nothing in the record to evidence a binding contract between the two parties for the 2005 season or thereafter. Instead, the evidence in the record shows that Maid authorized Alcatraz to sell individual vouchers via direct billing, and that Maid had the right to revoke that authorization at any time.

The entire exchange between the parties to establish a relationship was as follows. In July 2004, Alcatraz submitted a completed credit application to Maid of the Mist Corporation and Maid of the Mist Steamboat Company, Ltd. See Windsor Dep., Ex. 2. In the application, Alcatraz requested a credit line of \$10,000.00 per month from Maid and Alcatraz agreed to pay all amounts owed to Maid when due. See id. Alcatraz provided Maid with credit references and a sample voucher form. See id. On July 27, 2004, Midge Serrienne, Bookkeeper for Maid, wrote to Alcatraz to let it know the credit application had been approved. Windsor Dep., Ex. 3. The letter stated that Maid was "pleased to offer your company credit with the Maid of the Mist" and informed Alcatraz that Maid would bill Alcatraz every fifteen days for vouchers redeemed at the Maid box office. Id. The letter closed with the statement,

"We look forward to serving you and your clients this coming season." Id.

The next contact between Maid and Alcatraz was at the beginning of the 2005 season. On March 9, 2005, Maid emailed Mr. Windsor a copy of its Group Policy, its 2005 rates, and its 2005 schedule. Windsor Dep., Ex. 4. Maid of the Mist's Group Policy explicitly stated Maid's rules for vendors of vouchers for Maid tours. Item 3 on the Group Policy described the ways in which a vendor may pay Maid for tickets, including direct billing upon prior authorization. Id. Item 5 on the Group Policy clearly stated: "The Maid of the Mist reserves the right to withdraw billing and/or cheque privileges at any time." Id.

It is clear from the record that the relationship between Maid and Alcatraz was a credit relationship only. Maid pre-approved Alcatraz for direct billing and extended \$10,000.00 of credit per month to Alcatraz. This meant that Alcatraz was authorized to sell \$10,000.00 worth of Maid vouchers per month on credit, and Maid would send Alcatraz an invoice every fifteen days for the Alcatraz vouchers redeemed at its ticket booth. Maid's Group Policy explicitly informed Alcatraz that Maid had the right to revoke this credit authorization at any time. Revocation of the credit authorization meant nothing more than that Maid would no longer accept Alcatraz vouchers for which it had not been prepaid. There is no evidence in the record showing that Maid granted Alcatraz any kind of enduring or binding right to sell Maid tickets.

The evidence shows that Maid revoked Alcatraz's authorization to sell vouchers for Maid via direct billing on July 29, 2005.

After July 29, 2005, Alcatraz no longer had a relationship with Maid. When Alcatraz continued to sell individual vouchers for Maid tickets after July 29, 2005, Alcatraz acted without privilege, as a stranger or meddler in Maid's relationships with customers for its tour boat rides.

Despite notice from Maid that it was no longer authorized to sell vouchers for Maid tickets via direct billing as of July 29, 2005, Alcatraz continued to sell Maid vouchers after that date. In doing so, Alcatraz acted improperly by misrepresenting its status as an authorized dealer of Maid of the Mist tour tickets to online customers. Customers who purchased Alcatraz vouchers were understandably confused and upset when they arrived at the Maid box office and discovered they had purchased vouchers that were worthless.

The Court finds that Alcatraz acted improperly and without privilege in its practice of selling Maid tickets after July 29, 2005. As of that date, Alcatraz became a "stranger, interloper, or meddler" in the relationship between Maid and its customers and wrongfully interfered in that relationship by misrepresenting to Maid customers numerous times that it was authorized to sell vouchers for Maid tickets.

2. Purposely and With Malice With the Intent to Injure

Alcatraz argues that it had a contractual right to sell Maid vouchers and therefore did not act with malice or intent to injure by continuing to sell vouchers in accordance with that contract.

Maid contends that Alcatraz acted maliciously when it continued selling Maid tickets after July 29, 2005. Maid submits

Windsor's emails as evidence that Alcatraz had no intention of ever terminating its sale of Maid tickets and that Alcatraz hoped to interfere in and injure Maid's relationship with its customers. Maid also submits that Alcatraz's repeated alteration of the price of Maid vouchers on its website is evidence of Alcatraz's intent to injure Maid.

The term "with malice" is construed liberally for the purpose of a claim of tortious interference with business relations. The Georgia Supreme Court has held that "malicious" or "maliciously" generally means any unauthorized interference or any interference without justification or excuse. Luke v. DuPree, 158 Ga. 590, 596 (1924). In the specific context of tortious interference with business relations, "[t]he act is malicious when it is done with knowledge of the plaintiff's rights and with the intent to interfere with them. Personal ill will or animosity is not essential to a finding of malice." Hayes, 541 F. Supp. at 429 (internal citations omitted).

The Court finds that Alcatraz acted purposely and with malice with the intent to injure after July 29, 2005. Alcatraz had knowledge of Maid's rights respecting its customers and intentionally interfered with them. Prior to July 29, 2005, Maid informed Alcatraz that Alcatraz customers were surprised and unhappy when they arrived at Maid's box office and learned they had paid several dollars more per voucher than they would have had to pay at Maid's box office for a retail priced ticket. Alcatraz knew that this was causing problems for Maid and was negatively impacting its relationship with its customers. Maid asked Alcatraz to make both the Maid ticket prices and the Alcatraz

service charges clear to its customers. Alcatraz chose not to do so.

Prior to July 29, 2005, Alcatraz had a relationship with Maid and was authorized by Maid to serve as an intermediary between Maid and its customers by selling vouchers for Maid tickets. However, after July 29, 2005, Alcatraz was no longer an intermediary between Maid and its customers. Alcatraz had no privilege to interfere in Maid's relationship with its customers. Despite this, Alcatraz continued to sell Maid tickets it had been informed Maid would no longer honor. Alcatraz knew this would impact Maid's relationship with those customers in a negative way.

After July 29, 2005, Alcatraz also engaged in a practice of over- and under-pricing its vouchers for Maid tickets. In the three weeks following July 29, 2005, Alcatraz changed the price it charged for adult Maid vouchers from \$13.95 per voucher (\$2.45 higher than the Maid price of \$11.50) to \$15.95 per voucher, \$21.50 per voucher, \$9.95 per voucher, and back to \$21.50 per voucher. Alcatraz knew that this would create problems for Maid at its box office, just as it had created problems for Maid prior to July 29, 2005.

Finally, after Maid revoked Alcatraz's authorization to sell Maid vouchers via direct billing, Alcatraz informed Maid of its intent to "provid[e] form letters to all of our customers to enable them to quickly and easily file complaints with the Attorneys General and the Better Business Bureaus." Windsor Dep., Ex. 15. Windsor then filed complaints with the Attorneys General of New York state and Ontario and with the Better Business Bureau of South Central Ontario. The anticipated, intentional

effect of filing these complaints was a detrimental one on Maid's relationship with its current and future customers.

3. Induced a Third Party Not to Enter Into or Continue a Business Relationship with Plaintiff

Alcatraz argues that Maid has submitted no evidence to support its allegations that third parties discontinued or failed to enter into a relationship with Maid as a result of Alcatraz's actions. Alcatraz contends that Maid's only evidence of inducement relates to nine customers Maid alleges refused to buy tickets once they learned Maid would not honor their Alcatraz vouchers. Alcatraz contends that those nine customers were really four customers, and that the four customers in fact purchased Maid tickets and did not walk away from the Maid box office as Maid alleges.

Maid asserts that Alcatraz's sale of vouchers it knew would not be honored constitutes inducement of a third party not to enter into or continue a business relationship with Maid. Maid also points to Windsor's writing of a form letter for one customer which was filed with the Better Business Bureau and contends that this act likely turned that customer against Maid and induced him not to do business with Maid in the future.

The record shows that after July 29, 2005, Alcatraz sold 894 vouchers it had been notified would not be honored by Maid. Alcatraz knew or should have known that this would anger Maid customers. Alcatraz knew or should have known that some customers would take this anger out on Maid. Alcatraz also knew or should have known that some customers would choose not to enter into or

continue a business relationship with Maid after learning that the Alcatraz vouchers they had purchased were worthless.

The record clearly shows that this is exactly what transpired. Many Alcatraz customers expressed their anger to Maid when Maid declined to accept their Alcatraz vouchers at the Maid box office. Some customers were so angry that they chose not to enter into a business relationship with Maid and refused to buy tickets from Maid after learning that their Alcatraz vouchers were worthless. For example, customer Jeff Crist testified that he and his wife chose not to buy tickets from Maid after learning that their Alcatraz vouchers were worthless. Crist Aff. [#147-24] at ¶¶ 10-13. Customer Greg Havens also testified that he and his wife chose not to buy tickets from Maid after learning that their Alcatraz vouchers were worthless. Havens Aff. [#147-25] at ¶¶ 10-13.

Alcatraz argues that it did not induce Crist and Havens to discontinue their business relations with Maid. Instead, Alcatraz asserts that Crist and Havens decided not to buy Maid tickets because of the way Maid treated them at the box office. The Court does not find this argument persuasive. Although both Crist and Havens testified that they did not like the way Maid's staff treated them when they presented their Alcatraz vouchers, it is impossible to separate their negative feelings as a result of having purchased worthless vouchers from Alcatraz and their negative feelings as a result of Maid's refusal to honor those vouchers. Neither Crist nor Havens would have been in a situation of conflict with Maid staff had Alcatraz not first represented to

them that it was authorized to sell Maid vouchers and had Crist and Havens not purchased those vouchers as a result.

The record also supports an inference that more customers with Alcatraz vouchers would have walked away without buying tickets from Maid but for the unique nature of the service Maid provides. For example, one customer, Sharon Oestereich, submitted an affidavit that she decided not to buy Maid tickets after arriving at the Maid ticket booth and discovering that her pre-purchased Alcatraz vouchers were worthless. Oestereich Aff. [#171-2] at ¶¶ 8-10. However, later in the day Oestereich decided that her desire to ride the Maid boat was such that she was willing to return to the Maid box office and purchase new tickets to ride the boat. Id. at ¶¶ 11-12.

Additionally, the record shows that Windsor filed a complaint with the Better Business Bureau of South Central Ontario that contained disparaging statements about Maid. Furthermore, Windsor wrote another letter to the Better Business Bureau for a customer, Bruce Lester. Windsor's complaints, which contained inaccurate and disparaging information as to the relationship between Maid and Alcatraz, may have induced customers who reviewed this complaint not to take a trip to Niagara Falls and not to ride Maid's boats.

Based on the foregoing evidence, the Court finds that Alcatraz induced third parties not to enter into or continue a business relationship with Maid.

4. The Plaintiff Suffered Some Financial Injury

Maid alleges that it suffered financial injury as a result of Alcatraz's actions. First, Maid contends that there were at least nine adult customers who purchased vouchers from Alcatraz and refused to buy Maid tickets at the box office when they learned that Maid would not honor the Alcatraz vouchers. Second, Maid submits that it had to sell tickets at less than face value to Alcatraz customers who had purchased vouchers from Alcatraz at a price lower than Maid's retail rate. Finally, Maid asserts that it was compelled to give customers complimentary tickets and souvenirs to assuage their anger, which was caused by Alcatraz's sale of worthless, overpriced vouchers.

Alcatraz contends that Maid suffered no financial injury as a result of Alcatraz's actions. Alcatraz submits that Maid's only evidence of financial injury is that "nine" customers refused to buy Maid tickets after Maid informed them it would not honor their pre-purchased Alcatraz vouchers. Alcatraz contends that these nine customers were really only four customers, named Ms. Oestereich, Mr. Corson, Mr. Zastrow, and Ms. Burgio. Alcatraz alleges that these four individuals in fact did buy tickets from Maid after their Alcatraz vouchers were not honored. In addition, Alcatraz contends that any other Alcatraz voucher customers who refused to buy tickets upon arrival at Maid's box office did so as a result of Maid's treatment of them and not as a result of Alcatraz's conduct. Finally, Alcatraz maintains that Maid cannot identify specific instances where it issued complimentary tickets or souvenirs to appease Alcatraz customers.

The parties disagree as to almost every fact in this case. The parties disagree with especial vehemence regarding Maid's alleged financial injury as a result of Alcatraz's intervention in the relationship between Maid and its customers. As a result, the Court has reviewed the record independently and finds that Maid suffered financial injury as a result of Alcatraz's actions.

The record shows that at least two customers, Mr. Crist and Mr. Havens, decided not to buy four Maid tickets after learning that their pre-purchased Alcatraz vouchers would not be honored by Maid. See Crist Aff. at ¶¶ 10-13; Havens Aff. at ¶¶ 10-13. The record also shows that Maid issued complimentary tickets to at least one customer, Richard Puglisi, in response to his anger over Maid's refusal to honor his Alcatraz voucher. Puglisi Aff. [#171-5] at ¶¶ 4-5. Finally, the record shows that Alcatraz gave at least two angry customers complimentary souvenirs to appease them after Maid refused to honor their Alcatraz vouchers. See Nugent Aff. [#147-16] at ¶ 11; Madden Aff. [#147-21] at ¶ 15. Alcatraz submits that it was Maid's choice to give away free tickets and souvenirs and that Alcatraz did not cause Maid this form of financial injury. However, the Court finds that Maid would not have been faced with these angry customers and would not have been in a position where it had to mitigate damage to its reputation and good will in this way had Alcatraz not first misrepresented itself to be an authorized seller of Maid vouchers after July 29, 2005. Although these financial injuries to Maid are minimal, they are sufficient for the purpose of Maid's claim of tortious interference with business relations.

5. Conclusion

The Court finds that there is no question of material fact with respect to Maid's claim that Alcatraz tortiously interfered with Maid's business relations. Maid has proven each of the four elements of tortious interference as a matter of law. Consequently, the Court hereby GRANTS Maid's Motion for Summary Judgment with respect to its tortious interference claim. The Court DENIES Alcatraz's Motion for Summary Judgment.

6. Relief

Maid does not seek money damages as a result of Alcatraz's tortious interference and instead seeks only a permanent injunction against future sale of individual vouchers and e-tickets for Maid tours by Alcatraz, as well as an award of attorney's fees and expenses.

Alcatraz argues that Maid has not shown tortious interference with business relations; therefore, Maid is not entitled to injunctive relief.

"The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n. 12 (1987). However, "[i]n addition to succeeding on the merits, a plaintiff must demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law." Siegel v. LePore, 234 F.3d 1163, 1213 (11th Cir. 2000) (internal quotation and citation omitted).

As discussed above, this Court finds that Maid has succeeded on the merits of its tortious interference claim. With respect to the two remaining elements required for a permanent injunction to issue, Maid argues that it will suffer irreparable damage to its reputation and goodwill if Alcatraz continues to sell vouchers for Maid rides in the future. Maid also submits that Alcatraz has expressed its intention to continue selling Maid vouchers. Maid argues that there is no adequate remedy at law here because the damage caused by Alcatraz to Maid's reputation and good will would be difficult, if not impossible, to calculate.

The Court finds that a permanent injunction is clearly appropriate in this case. Windsor's overtly hostile emails and Alcatraz's persistence in selling vouchers for Maid rides even after Maid informed Alcatraz it did not have authorization to do so indicate that Alcatraz would resume sale of Maid vouchers or e-tickets should the Court lift its preliminary injunction on such sales. The Court has no doubt as to Windsor's desire to inflict harm on Maid. Alcatraz's sale of Maid vouchers and e-tickets would have the same result now as it did before: angry customers at Maid's box office and irreparable injury to Maid's reputation and goodwill. Furthermore, the Court finds that legal damages would be inadequate here. The real injury caused by Alcatraz has not been to Maid's bottom line, but instead has been to Maid's reputation with its customers and with the other parties (such as the Better Business Bureaus and the Attorneys General of New York and Ontario) with whom Alcatraz has spoken about Maid. Consequently, Maid is entitled to a permanent injunction against

Alcatraz's sale of vouchers or e-tickets for rides on Maid's boats at Niagara Falls.

The Court hereby PERMANENTLY ENJOINS Defendants Alcatraz Media, LLC, Alcatraz Media, Inc. and William Windsor, and their affiliates⁹ from: selling individual¹⁰ vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; from using Maid of the Mist's name or images to sell individual vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; from participating in schemes to attempt to sell individual vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; and from filing false reports with the Better Business Bureaus of New York and Ontario. Defendants Alcatraz Media, LLC, Alcatraz Media, Inc. and William Windsor and their affiliates are not enjoined from selling tour packages through Gray Line Tours of Toronto, Gray Line Tours of Buffalo, Gray Line Tours of Niagara Falls, Gray Line Tours of New York, or Over the Falls Tours which include Maid of the Mist tickets or vouchers.

⁹This applies to all those acting in concert with Defendants or any of Defendants. This includes, but is not limited to: Reserve XL; Round America, LLC; Everybody Loves Travel, LLC; Reserve 123; Take 5 Tours; ZZ Tours; and those entities using Reserve XL software to sell tours as agents of Alcatraz.

¹⁰"Individual" refers to the fact that the voucher/e-ticket is sold by itself, as opposed to being a part of a tour package. This Order does not permit the enjoined parties to sell multiple "individual" vouchers or e-tickets together.

B. Alcatraz's Counterclaims

Maid contends that it is entitled to summary judgment with respect to each of Alcatraz's four counterclaims: promissory estoppel, breach of contract, slander, and violation of the Georgia Fair Business Practices Act. Alcatraz responds by arguing that genuine issues of material fact remain with respect to each of its counterclaims.

1. Promissory Estoppel

Alcatraz argues that in March 2005, Sandra Carlson of Maid orally promised Alcatraz that Maid would honor Alcatraz's vouchers for the 2005 season. Alcatraz contends that this promise was definite and certain, was independent of the credit agreement between the parties and was conditioned upon Alcatraz's sale of vouchers for Maid tickets. Alcatraz claims that Maid should have known that Alcatraz would rely on that promise and that in fact Alcatraz did rely on the promise to its detriment.

Maid asserts that Sandra Carlson made no oral promise to Maid. Maid submits in the alternative that even if Carlson did make an oral promise to Alcatraz, that promise is not enforceable as a matter of law because: (1) the agreement between the parties was reduced to writing in the form of the credit agreement; (2) the promise involved the promise of future performance; and (3) the purported promise is too indefinite and uncertain to be enforced.

Promissory estoppel is codified in Georgia as O.C.G.A. § 13-3-44(a), which states: "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of

the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." To prevail on a promissory estoppel claim, a plaintiff therefore must show that: (1) defendant made certain promises, (2) defendant should have expected that plaintiff would rely on such promises, (3) plaintiff did in fact rely on such promises to its detriment, and (4) injustice can be avoided only by enforcement of the promise. Canterbury Forest Ass'n v. Collins, 243 Ga. App. 425, 427 (2000).

The only evidence Alcatraz has submitted to support this counterclaim is the Windsor deposition.¹¹ The Windsor deposition contains testimony regarding a conversation between Windsor and Sandra Carlson in March 2005 about the logistics of selling vouchers for Maid tickets. Windsor testified that the following exchange occurred during the course of the conversation:

I said look, you know, on the basis of us working that way can we set this up for you and sale [sic] for this season and, you know, are we good to go? And she said yeah. I'm sure I did not say good to go but I said do we have your okay to go forward and sell Maid of the Mist for the 2005 season and she said yes but we need to send you the updated rates and the schedule and information and she, you

¹¹Alcatraz argues in its response to Maid's motion for summary judgment that the Carolyn Ballard deposition also contains evidence of an oral promise by Sandra Carlson that Alcatraz could sell Maid tickets for the 2005 season. However, Alcatraz never filed the Carolyn Ballard deposition with the Court and has not provided the Court with excerpts or quotations from the deposition. Additionally, Maid requested that Alcatraz file the Caroline Ballard deposition with the Court [#233], but Alcatraz never did so. Consequently, the Court cannot consider the Carolyn Ballard deposition as evidence to support Alcatraz's promissory estoppel counterclaim.

know, said that would be taken care of and that was the conversation.

Windsor Dep. at 81:11-19.

Examining the conversation in context, Windsor and Carlson spoke in March 2005, before the 2005 Maid of the Mist season had begun. Windsor and Carlson spoke for the purpose of ensuring that Alcatraz understood the proper paperwork to submit to Maid for billing purposes once the 2005 season began. There is no indication from either the context or the words exchanged that Maid intended to establish any kind of binding relationship with Alcatraz for the 2005 season.

Even if the Court were to construe Carlson's words as a promise by Maid, the promise would be at best a vague, indefinite promise that Alcatraz could sell Maid vouchers in the 2005 season, not for the duration of the 2005 season. The Georgia Court of Appeals has held that "[e]stoppel does not apply...to vague, indefinite promises." Mooney v. Mooney, 245 Ga. App. 780, 783 (2000).

Because the Court finds that Alcatraz has submitted no evidence showing Maid made a promise to Alcatraz, the Court finds that Alcatraz cannot prove the first required element of promissory estoppel under Georgia law. Consequently, the Court GRANTS Maid's Motion for Summary Judgment as to Alcatraz's promissory estoppel counterclaim.

2. Breach of Contract

Alcatraz asserts that there was an oral contract between Maid and Alcatraz, formed when Sandra Carlson of Maid told Alcatraz

that Maid would honor Alcatraz vouchers for the 2005 season. Alcatraz contends that Maid breached that contract when it stopped honoring Alcatraz vouchers as of July 29, 2005.

Maid argues that the only agreement between the parties was the written credit agreement. Maid contends that the credit agreement was terminable at the will of either contracting party. Maid submits that it lawfully terminated the credit agreement on July 29, 2005.

As discussed above, Alcatraz has not submitted any evidence to show that Maid made a promise to Alcatraz regarding Alcatraz's right to sell Maid vouchers. Without such a promise, there can be no oral contract between the parties. The Court agrees with Maid that the only agreement between the parties was the written credit agreement, which, as the Court discussed in section III.A.1 of this Order, was validly revoked by Maid as of July 29, 2005.

The Court hereby GRANTS Maid's Motion for Summary Judgment with respect to Alcatraz's breach of contract counterclaim.

3. Slander

Alcatraz asserts that Maid's statements to Alcatraz customers who attempted to use Alcatraz vouchers at the Maid box office constitute slander. Specifically, Alcatraz contends that Maid told numerous Alcatraz customers that Alcatraz is a "scam" when Alcatraz is not in fact a scam.

Maid contends that the statements its employees made to Alcatraz customers do not constitute slander because they were true, they were expressions of opinion, they were conditionally privileged, and they were not made with malice.

Georgia Code section 51-5-4(a) defines the tort of slander to include a statement "imputing to another a crime punishable by law," or, alternatively, a statement "making charges against another in reference to his trade, office, or profession, calculated to injure him therein." To be actionable, however, the statement must be false; truth is always a defense to slander. O.C.G.A. § 51-5-6; Williams v. Trust Co., 140 Ga. App. 49, 50 (1976).

Additionally, Georgia law recognizes certain communications as conditionally privileged, including "[s]tatements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned." O.C.G.A. § 51-5-7(3). Conditionally privileged statements cannot constitute slander unless they were uttered with actual malice.

The Merriam-Webster dictionary defines "scam" as "a fraudulent or deceptive act or operation." It is clear from the facts of this case that Alcatraz engaged in deceptive acts by representing to online customers that it was an authorized seller of Maid vouchers after July 29, 2005. Alcatraz also deceived customers by selling vouchers to them that it knew were worthless. Alcatraz's deception of its customers falls within the dictionary definition of the word scam. Maid's employees' statements to Alcatraz customers who had been deceived by Alcatraz and who believed they had purchased valid vouchers were true and do not constitute slander.

Even if the Court were to construe Maid's employees' statements to be false (or only partially true), the statements were conditionally privileged pursuant to O.C.G.A. § 51-5-7(3).

The elements of the conditional privilege defense are: "good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons." Amador v. Thomas, 259 Ga. App. 835, 837 (2003); see also Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 908 (2000).

The Court finds that all elements of the conditional privilege defense are present here. First, Maid's employees in good faith believed Alcatraz to be a scam. Every day in the days and weeks following July 29, 2005, they were faced with Alcatraz customers who had paid Alcatraz an amount higher than Maid's retail ticket price for individual vouchers that were no longer recognized by Maid. Second, Maid had a business interest to be upheld, as these were Maid's customers who wanted to ride Maid's boats, and Alcatraz had interfered in Maid's relationship with them. Customers who had purchased worthless Alcatraz vouchers were angry at Maid, even though it was not Maid's fault that they had purchased worthless vouchers. Third, the statements were limited in scope, were made on a proper occasion, and were published to proper person. Maid's employees only told a few of the 894 Alcatraz customers who attempted to redeem worthless vouchers that Alcatraz was a scam, and the statements were made only to Alcatraz customers who actually had been deceived by Alcatraz regarding its status as an authorized seller of Maid vouchers. Finally, there is no evidence in the record to show that Maid's employees made these statements with actual malice.

For the foregoing reasons, the Court finds that Alcatraz has failed to show there is an question of material fact with respect to whether Maid's employees slandered Alcatraz by calling it a

"scam." The Court hereby GRANTS Maid's Motion for Summary Judgment with respect to Alcatraz's slander counterclaim.

4. Violations of the Georgia Fair Business Practices Act

Alcatraz alleges that Maid violated the Georgia Fair Business Practices Act ("FBPA"), O.C.G.A. § 10-1-391 et seq., by making false representations that Alcatraz was a "scam" to Alcatraz customers and by discriminating against Alcatraz in mandating that Alcatraz raise ticket prices and requiring that Alcatraz make disclosures not required of other sellers of Maid tickets. Maid argues that the FBPA does not apply here, because Alcatraz's relationship with Maid is a wholly private transaction between merchants.

The Georgia FBPA prohibits "unfair or deceptive acts or practices in the conduct of consumer transactions." O.C.G.A. § 10-1-393. A suit brought under the FBPA "must serve the public interest and implement the purpose of the FBPA- the end to unfair or deceptive acts or practices in the public consumer marketplace." Zeeman v. Black, 156 Ga. App. 82, 84 (1980).

The Court finds that Alcatraz's FBPA claims do not serve the public interest or implement the purposed of the FBPA. In fact, Alcatraz's FBPA claims directly contravene the FBPA. Alcatraz's FBPA claim against Maid is premised upon the notion that Alcatraz should be able to charge its customers ten dollars or more above the retail ticket price for vouchers to ride on Maid's tour boats and that Alcatraz should not have to reveal Maid's retail price to its customers. It is also Alcatraz's assertion that Maid should

not be allowed to warn consumers that Alcatraz overcharged them or sold them worthless vouchers. This is simply not the situation the Georgia legislature contemplated when it enacted the FBPA. Consumers of Maid tickets are protected from unfair or deceptive acts if Alcatraz's claims are denied, not the other way around.

The Court concludes that Alcatraz cannot state a claim under the Georgia FBPA as a matter of law. Consequently, Maid's Motion for Summary Judgment is GRANTED with respect to Alcatraz's FBPA counterclaim.

C. Attorney's Fees and Expenses

Maid asserts that it is entitled to attorney's fees and expenses pursuant to O.C.G.A. § 13-6-11. Alcatraz responds by arguing that Maid failed to include a request for attorney's fees and expenses as a result of stubborn litigiousness in its complaint. Alcatraz also argues that the question of whether Maid is entitled to attorney's fees and expenses is a question for the trier of fact, which Alcatraz asserts is the jury here.

O.C.G.A. § 13-6-11 permits an award of attorney's fees "where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." "Bad faith warranting an award of attorney fees must have arisen out of the transaction on which the cause of action is predicated, as opposed to the resulting litigation." SCQUARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347, 1369 (N.D.Ga. 2006) (internal quotation and citation omitted).

The Court rejects Alcatraz's argument that Maid failed to properly plead its O.C.G.A. § 13-6-11 claim for attorney's fees

and expenses. Count II of Maid's complaint is entitled "Based on Defendants' Bad Faith Actions, Maid Is Entitled to Attorney's Fees and Costs." Compl. [#1-2] at 14. The first full paragraph of Count II states: "Defendants have acted, or failed to act, in bad faith, have been stubbornly litigious and/or have caused Maid unnecessary trouble and expense. Accordingly, Maid is entitled to recover attorney's fees and costs of litigation pursuant to O.C.G.A. § 13-6-11." Id. at ¶ 75. Maid could not have stated its O.C.G.A. § 13-6-11 claim any more clearly.

The Court also rejects Alcatraz's argument that Maid's request for attorney's fees and expenses must be decided by a jury. There are no issues of fact remaining in this case for determination by a jury. The Court holds that Maid is entitled to judgment as a matter of law on all claims.

Furthermore, the Court finds that Alcatraz's and Windsor's behavior following Maid's July 29, 2005 termination of Alcatraz's credit authorization was clearly stubbornly litigious. From Mr. Windsor's emails threatening to sue Maid and seeking four million dollars in damages, to the complaints filed with the Attorneys General and Better Business Bureaus, to Alcatraz's treatment of Maid customers who sought refunds for the Alcatraz vouchers they were unable to redeem at Maid's box office after July 29, 2005, the Court finds it was Alcatraz's and Windsor's stubbornly litigious actions that gave rise to this litigation. This is a straightforward, simple case that Alcatraz and Windsor have unduly complicated and prolonged as a result of harboring hostile personal feelings against Maid. It is and always has been obvious

that Alcatraz has no right to force Maid to accept it as its agent for ticket sales.

Accordingly, the Court GRANTS Maid's Motion for Summary Judgment with respect to Maid's O.C.G.A. § 13-6-11 claim for attorney's fees and expenses.

V. Other Motions Pending

Alcatraz requested a hearing on the summary judgment motions [#223]. Maid opposed Alcatraz's request and argued that all necessary evidence is before the Court. The Court finds that a hearing is not necessary and hereby DENIES Alcatraz's request.

Maid has filed a Motion to Strike or, in the Alternative, Motion to Strike Portions of the Declarations of William Windsor, Heriberto Rios and Susan Molck [#237]. These declarations were filed in support of Alcatraz's response in opposition to Maid's motion for summary judgment. Because the Court finds that these declarations were not necessary for deciding the parties' motions for summary judgment, the Court DISMISSES AS MOOT Maid's Motion to Strike.

Alcatraz has filed a Motion for Clarification and Motion to Strike the Declarations of Sandra Carlson, Vanik Aloian, James Lampman, Rose Devereaux and Holly Drouin [#243]. Because the Court finds that these declarations were not necessary for deciding the parties' motions for summary judgment, the Court DISMISSES AS MOOT Alcatraz's Motion to Strike.

Maid also recently filed a Notice of Objection and Motion to Strike the Reply Affidavit of Brian Raley [#250]. Maid argues that Brian Raley's affidavit, submitted as an attachment to

Alcatraz's reply [#249] to Maid's response to Alcatraz's Motion for Clarification or Motion to Strike [#243], is procedurally barred because it was improperly filed. Just as the Court deems Alcatraz's Motion for Clarification and Motion to Strike to be moot, the Court deems Maid's Motion to Strike to be moot. Raley's affidavit is not necessary for deciding the parties' motions for summary judgment. The Court hereby DISMISSES AS MOOT Maid's Motion to Strike.

VI. Conclusion

For the foregoing reasons, Defendants' Motion for Summary Judgment [#146] is DENIED. Plaintiffs' Motion for Summary Judgment [#148] is GRANTED. The Court hereby PERMANENTLY ENJOINS Defendants Alcatraz Media, LLC, Alcatraz Media, Inc. and William Windsor, and their affiliates ¹² from: selling individual¹³ vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; from using Maid of the Mist's name or images to sell individual vouchers, tickets, and/or e-tickets for Maid of the Mist boat rides; from participating in schemes to attempt to sell individual vouchers, tickets, and/or e-tickets for Maid of the

¹²This applies to all those acting in concert with Defendants or any of Defendants. This includes, but is not limited to: Reserve XL; Round America, LLC; Everybody Loves Travel, LLC; Reserve 123; Take 5 Tours; ZZ Tours; and those entities using Reserve XL software to sell tours as agents of Alcatraz.

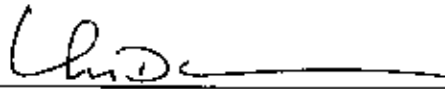
¹³"Individual" refers to the fact that the voucher/e-ticket is sold by itself, as opposed to being a part of a tour package. This Order does not permit the enjoined parties to sell multiple "individual" vouchers or e-tickets together.

Mist boat rides; and from filing false reports with the Better Business Bureaus of New York and Ontario. Defendants Alcatraz Media, LLC, Alcatraz Media, Inc. and William Windsor and their affiliates are not enjoined from selling tour packages through Gray Line Tours of Toronto, Gray Line Tours of Buffalo, Gray Line Tours of Niagara Falls, Gray Line Tours of New York, or Over the Falls Tours which include Maid of the Mist tickets or vouchers.

With respect to Maid's O.C.G.A. § 13-6-11 claim for attorney's fees and expenses, the Court DIRECTS Maid to file an itemization of its claim for attorney's fees and expenses within twenty days of the date of this Order. Alcatraz shall have twenty days thereafter to respond with any objections. Maid shall then have ten days to reply. The Clerk is DIRECTED to resubmit the file immediately thereafter.

Defendants' request for a hearing on the summary judgment motions [#223] is DENIED. Plaintiffs' Motion to Strike [#237] is DISMISSED AS MOOT. Defendants' Motion for Leave to File [#241] and Motion for Clarification and to Strike [#243] are DISMISSED AS MOOT. Plaintiffs' Motion to Strike Affidavit [#250] is DISMISSED AS MOOT.

SO ORDERED, this 8 day of August, 2007.


ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE