

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<p>HERITAGE OF PRIDE, INC., <i>Plaintiff,</i></p> <p>v.</p> <p>MATINEE NYC, INC., <i>et al.,</i> <i>Defendants.</i></p>	<p>DOCKET NO. 14-cv-4165 (CM)</p>
<p>MATINEE NYC, INC., <i>Counterclaim Plaintiff,</i></p> <p>v.</p> <p>HERITAGE OF PRIDE, INC., <i>Defendant.</i></p>	

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION TO HOLD DEFENDANTS IN CIVIL CONTEMPT

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PRELIMINARY STATEMENT

Defendants Matinee NYC, Inc. (“Matinee”), FornabaioVoss Events, Inc. (incorrectly named as Voss NYC Group Corp.), Jake Resnicow and Brandon Voss (collectively, “defendants”) submit this memorandum of law in opposition to the motion by Heritage of Pride, Inc.’s (“plaintiff” or “HOP”) to hold defendants in civil contempt for their purported failure to comply with this Court’s Amended Preliminary Injunction Order (the “Order”).

Plaintiff’s motion should be denied for three reasons. One is that plaintiff falls far short of the high level proof necessary to establish contempt of court, even taking its submissions at face value. The second is that those submissions are not entitled to be so taken; the motion is, rather, premised on attenuated proofs – themselves consisting entirely of hearsay – involving marginal incidents of unintentional or indirect non-compliance. And third is that the record, as made whole upon defendants’ opposition submissions, demonstrates exhaustive efforts by defendants to comply with the Order even in the face of powerful commercial incentives to cut corners and focus on their own events – voluntarily going beyond its terms as a sign of their good faith, as set forth in part in the Declaration of Jake Resnicow Regarding Compliance with the Preliminary Injunction dated June 27, 2014 (Dkt. No. 49) (*see* Declaration of Joel G. MacMull dated July 18, 2014 (“MacMull Decl.”), Ex. 2).

Despite their efforts, detailed in defendants’ submissions, defendants did not achieve perfection in complying with the daunting scope of the Order. But the extensive effort they exerted to do so dwarfs plaintiff’s cherry-picked complaints – the obvious product of hours and hours of attorney time spent scouring the streets and the World Wide Web for missed handbills, stray tweets and improvidently undeleted thumbnails placed or published weeks before the Complaint was filed and over which defendants frequently had or have no control.

The great irony here is that – despite the fevered atmosphere of emergency, crisis and imminent doom plaintiff has at every juncture attempted to create – defendants learned of the purported 112 violations set forth in the motion for the **first** time on the morning of Saturday, June 28, 2014, at which time they acted immediately to investigate them and, where they had the ability to do so, to resolve them. It beggars common sense to believe that plaintiff could not have provided that notice either on an ongoing basis when discovered, or otherwise sufficiently soon enough to allow for resolution of the vast majority of oversights, crossed signals and miscommunications far in advance of the filing of this motion.

Plaintiff, however – having the barest legal support for its claim, and thus intent on reinforcing its misleading narrative based on defendants’ supposed bad faith – has been bent on motion practice over “non-compliance” no matter what defendants did or did not do. Acknowledging defendants’ efforts and good faith, much less the burden placed on them, in complying with the Order threatens, plaintiff knows, to vitiate the factual premise of that Order itself. Because, however, the record demonstrates that defendants have consistently exercised at least reasonable diligence in complying with the Court’s Order, plaintiff has not met its burden of showing civil contempt, and its application should be denied.

STATEMENT OF FACTS

After a hearing held over parts of two days on June 18 and 19th, 2014, the Court issued a preliminary injunction on June 19, 2014. (Dkt. No. 30.) The next day, the Court issued an amended preliminary injunction order. (Dkt. No. 32.) Within minutes, however, of defendants’ receipt of the Court’s initial preliminary injunction order late in the afternoon of June 19th, defendants had begun efforts to comply with its terms. (MacMull Decl., Ex. 2 at 2.) Over the next four days, and at the cost of thousands of dollars, defendants undertook scores of measures, many of them involving multiple steps, follow-through and other complications, to comply with

the Order (*see id.*), set forth briefly here and in detail within the declarations submitted in opposition to plaintiff's motion.

Defendants' diligence in complying with the Order is further evidenced by their actions on Sunday, June 22, 2014. That afternoon, plaintiff's counsel communicated with defendants' counsel by email and acknowledged the remedial steps defendants had undertaken in the proceeding days but noted the continued presence of terms prohibited under the Order on two websites operated by defendants. (*See Hill Decl., Ex. T.*) The email in fact stated that defendants' prior compliance was the reason plaintiff was surprised by this apparent oversight. (*See id.*) And indeed, **eight minutes** after the receipt of plaintiff's counsel's email, defendants' counsel responded with the following:

We've passed this along and will see to it that any omission is addressed immediately. Considering our clients' [c]onsiderable efforts to comply with the order we are certain that any non-compliance was unintentional or even the result of a third-party error or misunderstanding. In any event we will insure that all appropriate steps are taken to remediate.

(*Id.*) Even as this message was being read by plaintiff's counsel, defendants – themselves burdened with the need to coordinate compliance with the Order and the promotion of their own commercially critical events – dropped everything else and immediately went online to address the first of two omissions in compliance with plaintiff's request. (*See MacMull Decl., Ex. 2 at 5.*) The second correction was made shortly thereafter. (*See id.*) Defendants would hear nothing further from plaintiff with regard to these corrective measures.

On June 26, 2014, however, and this time without any direct notice to defendants, plaintiff wrote the Court twice on June 26th complaining of conduct which, plaintiff claimed, “violates, and establishes as pattern of disrespect for, the Court's Order.” (Dkt. Nos. 34, 40.) Defendants cannot say why plaintiff chose to seek judicial intervention concerning trivial

incidents of supposed non-compliance when, by its own admission, past attempts to resolve problems through informal means were entirely effective. Certainly that choice was made in the context of plaintiff's knowledge, per the advice of defendants' counsel two days earlier, that defendants intended to seek reconsideration of the Court's earlier rulings. (*See MacMull Decl.*, Ex 3.) Moreover, this approach was more consistent with "making a record" and reinforcing an impression that defendants were "bad actors" than with resolving actual compliance problems in a timely, efficient and cost-effective manner.

Without speculating along these lines, however, defendants' response to the Court later that day merely noted that plaintiff's "sandbagging" tactic was disproportionate to the violations alleged and hardly constituted an efficient approach to satisfying plaintiff's concerns in a timely fashion. (Dkt. No. 35.) Indeed, the Court refused to schedule the conference requested by plaintiff, writing, "Look, why are you sending me letters? You know how to do this – bring a motion for contempt if you believe there is a violation of the order." (Dkt. No. 41.) Plaintiff interpreted this advice as permission to merely resubmit its complaints in the form of a letter transmitted after hours on June 26, 2014 but this time to style its letter as a "motion" which, citing neither statute, rule nor case, purported to set a return date for the next day! (Dkt. No. 44).

The following morning, Friday, June 27, 2014, the Court rejected plaintiff's demand for immediate disposition of a contempt motion on no notice, in part also because defendants' compliance report was due to be filed the same day, as it was.¹ (Dkt. No. 47). The Court went on

¹ Despite the Court's own words of the 27th – "due to be filed today" – plaintiff insists that defendants' compliance report was filed late. (*See Pl. Mem.* at 4, 6 n. 1.) The Court's reckoning of the date, however, rebuts plaintiff's odd refrain on this score. To the extent plaintiff, desperate to assign some sort of non-compliance to defendant, relies on the hour of that filing, it will not find what it wants there either. Under §§ 3.3 and 13.10 of the SDNY Electronic Case Filing Rules & Instructions (March 17, 2014 Ed.), absent the designation of a specific time in the Order

to state, in a Memo Endorsement of defendants' letter sent in response to the first missive from plaintiff, that, "I agree that a call to [defendants' counsel's] office would have been superior to a letter [to the Court] – if there were any contempt it would have to be dealt with by a motion on notice anyway." (Dkt. No. 48).²

Putting these two pieces of judicial advice together, plaintiff was faced with a choice: It could, on the one hand, take the inexpensive, cooperative and collegial approach of conveying information concerning any compliance problems to defendants' counsel as they became apparent – an approach which, whenever employed before, had resulted in immediate and unquestioning compliance with plaintiff's requests. Or, alternatively, it could gin up a fine exercise in training associate attorneys for success at a certain style of litigation by generating a full-dress contempt motion, returnable after the critical date in the litigation had passed but sufficient to remind all concerned "who is boss" in this litigation.

To plaintiff the choice between these two options was obvious. That day it filed its motion, recycling the same allegations contained in its letters to the Court. Like those letters, the motion utilized puzzling logic. Perhaps in an effort to paper over the obvious question of why plaintiff did not merely continue to request compliance directly from defendant rather than doing so indirectly through judicial intervention, it posited the following: The fact that such requests had resulted in instant results in the past demonstrated that any non-compliance that still continued to manifest itself must be a purposeful omission by defendants – even if plaintiff never actually notified defendants of its existence. Indeed, plaintiff completely omits to acknowledge,

defendants' deadline terminated at midnight. The report was filed seven hours before then. (*See MacMull Decl., Ex. 2.*)

² This is the endorsement that was hand-written by the Court on the actual document. The ECF transcription of this language, however, contains multiple errors which actually come close to reversing the meaning of the Court's words.

in this motion, the true nature of defendants' swift and energetic compliance with its counsels' request on June 22nd, employing that sneaky old friend of the legal profession – the passive voice – to grudgingly acknowledge that, on plaintiff's request to defendants but evidently through the hand of persons or agencies unknown, "the image was replaced." (*See* Hill Decl., Ex. Z at ¶ 8.)

Unable to resist the lure of gratuitous motion practice, plaintiff also undertook to have the best of both worlds and to take in turn defendant's request that plaintiff "just let us know" what problems may be discovered into a booby-trap. Thus it was at 9:53 a.m. on Saturday, June 28, 2014 that plaintiff's counsel emailed counsel for defendants "notice" of 112 alleged violations of the Order supposedly identified just that that morning. This email was accompanied by a large ZIP file attachment which, the email stated, contained "corroborating" material. (*See* Hill Decl., Ex. U.) Plaintiff demanded that defendants "provide assurances of specific and immediate actions that they will take **to more diligently comply** with the preliminary junction order beyond merely addressing the violations that we have been able to identify." (Hill Decl., Ex. U; emphasis added.)

Among the many faulty premises of this communication – if it is to be taken as anything other than a set piece for inclusion in plaintiff's subsequent revised motion – is that defendants' lawyers were or should have been at their desks at 9:53 on a Saturday morning or that, alternatively, the ZIP file attached to plaintiff's email could readily be opened, and its contents reviewed, from a smart phone. As it happened, the error of these presumptions was readily demonstrated by the "Out of the Office" automatic replies plaintiff's counsel received from two of the three lawyers working on defendants' case from the same firm which advised

correspondents that they were on vacation beginning that morning. (*See* Hill Decl., Ex. V.) The third lawyer was completely “offline.”³

Vacation notwithstanding, minutes after receiving plaintiff’s counsel’s Saturday morning email, defendants’ counsel had forwarded it to his clients and advised plaintiff that given the volume of the incidents alleged, defendants would need time to review them and respond. (*See* Hill Decl., Ex. U.) Plaintiff’s counsel replied (at 10:59 a.m.) with the cynical formulation – calculated, not to engender understanding or cooperation but solely as a set-piece for use in this motion – that defendants’ email constituted a statement by defendants that they deemed themselves exempt from any obligation to address a message raised for the first time on a Saturday – something no one ever said. (*See id.*)

While one of defendants’ vacationing attorneys was able to be “on-duty” and reviewed the email, defendants began, despite their own pressing schedule for that day, to address the issues listed by plaintiff in its email to the extent possible. (*See* Declaration of Brandon Voss dated July 18, 2014 (“Voss Decl.”) ¶ 14.) That night, defendants’ counsel wrote to plaintiff’s counsel, and, as part of a longer message, asked as follows:

One question: Do you read the injunction as mandating that our clients collect, replace or adjust all printed materials distributed before June 19th? If so, what language in the injunction are you relying on?

³ The third lawyer is defendants’ lead counsel, Mr. Coleman. He was not on vacation that Saturday morning, in the usual sense of the word. But he is a Sabbath observer whose religion requires abstention from work, including the use of appliances and electronic devices, from sunset on Friday until nightfall Saturday night. In the New York area at this time of year – near the summer solstice, when the day is longest – the Jewish Sabbath does not end until nearly 10:00 p.m. Thus plaintiff’s description of Mr. Coleman’s failure to respond to counsel’s emails until around this time as “ignoring” him is an unfortunate mischaracterization of the facts. (*See* Hill Decl., ¶ 29; Pl. Mem. at 4.)

(Hill Decl., Ex. W.) A short time later, defendants' counsel – who had received no response – nonetheless wrote again to plaintiff's counsel, as follows:

[O]ur understanding, per our clients, is that all the incidences of supposed violations referred to in your email, save one, involve pre-June-19th posters or other printed materials not under their custody or control or persons not under their control. This latter includes some who are promoting one or more of the many events utilizing the term NYC PRIDE which event or events have nothing to do with defendants. This should hardly come as a surprise considering that plaintiff has, as the record in this case has made clear, never policed its alleged mark except with respect to my clients.

The one exception I alluded to was an image one of the defendants failed to delete from a "second" Facebook account. It was removed this evening.

(Hill Decl. Ex. W.) Though condemning defendants for failing to respond immediately to plaintiff's emails (*see* Hill Decl., Ex. U), plaintiff's counsel did not reply to this Saturday night inquiry until almost 1:00 p.m. on Sunday. (*See* Hill Decl. Ex. W.) This response consisted entirely of rhetoric and blunderbuss, however, and otherwise speaks for itself to the extent it says anything at all. (*See id.*) Defendants' counsel then wrote as follows to plaintiff's counsel:

Phil,

Your email reads as if it is meant to set up a straw man by suggesting that I questioned whether remediation of pre-June 19th online marketing of any kind was required by the injunction, when it clearly was. Otherwise, it is hard to understand how you could say that my previous email, asking you about the distinction between remediation of online, as opposed to printed, materials, is ambiguous. After all, I wrote, "Do you read the injunction as mandating that our clients collect, replace or adjust all printed materials distributed before June 19th?" I am sure you recognize that the word printed is bracketed by underscores, which are meant as a way to emphasize a word. The word I emphasized was "printed."

The language that you quote utilizing the verbs "use" and "place" suggest present- or future **use** or **placement**, not merely receiving benefit from some past publication. Is it plaintiff's view that a handbill is being "used" by defendants even after it leaves their possession, custody or control? In fact, the very reason I asked about printed materials, not online materials, distributed prior to the order is because of the well-known axiom of "*Expressio unius*," etc. The injunction **specifies what defendants must do to remediate online advertising**, regardless

of when placed, but **does not say a thing concerning printed matter** that is already published. The level of detail concerning online promotion would have been completely unnecessary if “use” and “place” had the vague and all-encompassing meaning you ascribe to them.

This reading of the injunction is consistent with reality as well, providing further support for our view. While it is not too difficult to change online advertising and promotion comprehensively and almost immediately (at least when one is aware of it or has not forgotten about it), it would be literally impossible to recall all printed matter, out of many thousands of pieces, from every location in the city days or weeks after they were distributed. We thus read the order, sensibly, as requiring the defendants to do what is reasonable, indeed what is possible (as they have done), and not what is unreasonable or impossible.

Indeed, it would be one thing if the order explicitly required defendants to make “every reasonable effort” (or some such formulation) to remove all non-compliant printed materials from the New York area. That would have been daunting for our clients, with their limited budget and personnel; it may even have put them out of business for this weekend, which the court never suggested an interest in doing and indeed would have no reason to do. But if there were such a clause, the lawyers could dispute what is or is not “reasonable”. Indeed our clients have, we believe, done everything that is reasonable. But there is no such clause in the order. How, then, can plaintiff infer a literally impossible requirement – removing each and every print piece from circulation, without exception or qualification – into the injunction?

Nor can we agree with your suggestion that, where it was in fact reasonable or possible for defendants to remove posters, handbills, etc., despite being under no specific mandate to do so, their good faith effected a waiver of some right, acted as an expansion of the injunction or redounded to their detriment in some other way. This is akin to your argument before the weekend that our client's immediate remediation of one advertisement brought to their attention proves bad faith concerning non-remediation of the one not brought to their attention. In both cases plaintiff appears to take the position that defendants are not only damned if they don't, but are doubly damned if they do. If, however, you are aware of any legal authority to support the suggestion that defendants have, by collecting old versions of their posters when they could do so, obligated themselves to do so where it was impractical as well – “regardless of what the injunction says” – please share it with us.

Ultimately, however, as we have said and will say again upon the submission of admissible evidence, our clients made extraordinary efforts to take down whatever old printed materials they could as well as remediating any online promotion as soon as they either remembered it or had it brought to their attention.

Finally, regarding your remarks as to who is or is not under our clients' control as defined in the injunction and Rule 65(d)(2)(A), we are not going to have a spitting contest about the facts (notwithstanding the above legal discussion) by email. Our clients will hunt down anything else you have mentioned that is or may be under their control, however, and anything else that may yet be brought to their attention. Similarly, the suggestion that our clients have not made efforts to notify third parties concerning the injunction is factually incorrect. Notwithstanding the widespread publicity attending the order, including your client's press release, our clients made substantial efforts at advising interested parties of the terms of the injunction, as will be detailed in our opposition to plaintiff's pending motion.

We do not intend to litigate this dispute any further by correspondence, as surely you do not either. Again, however, we welcome any communication that could be helpful concerning practical issues of compliance with the preliminary injunction. Our clients remain eager in every respect to comply with the injunction as it actually is, though not as plaintiff imagines it.

(Hill Decl., Ex. X) (emphasis in original). True to form, plaintiff did not respond to the foregoing request for either legal or factual information to resolve any lingering problem.

Instead, plaintiff spent the next two days feverishly crafting a "new and improved" contempt motion. This monstrosity, bigger and badder than ever, starred the dubious "findings" of plaintiff's Saturday June 28th "investigation" in the form of a hearsay declaration by counsel. These were buttressed by plaintiff's belabored attempts to spin that weekend's communications among counsel so as to spread a specious gloss of contumaciousness on defendants' conduct and its lawyers' words, when in fact a plain reading of either demonstrates the exact opposite. The pages and pages of exhibits evidencing what are described as defendants' breaches of the Order consist, as explained below, largely of third-party conduct by persons over whom defendants exercised no control and who could not, by virtue of a Saturday morning email, reasonably be expected to have been contacted and, in the midst of their own lives, compelled by defendants to do anything at all, much less to undo things that had been done days or weeks beforehand.

LEGAL ARGUMENT

I. THE LEGAL STANDARD FOR A FINDING OF CIVIL CONTEMPT

“A contempt order is warranted only where the moving party establishes by **clear and convincing** evidence that the alleged contemnor violated the district court's edict.” *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (emphasis added). The movant must establish that “(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.” *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Technologies, Inc.*, 369 F.3d 645, 655 (2d Cir. 2004). A clear and unambiguous order is one that leaves “no uncertainty in the minds of those to whom it is addressed,” *Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114, 116 (2d Cir. 1988), who “must be able to ascertain from the four corners of the order precisely what acts are forbidden,” *Drywall Tapers, Local 1974 v. Local 530, Operative Plasterers Int'l Ass'n*, 889 F.2d 389, 395 (2d Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990). Any ambiguity or omission in the order must “redound to the benefit of the person charged with contempt.” *Id.* at 400.

HOP fails to satisfy its burden in proving contempt by defendants with respect to the Order. Plaintiff cannot demonstrate by clear and convincing evidence that defendants have been insufficiently diligent in complying with the Order in general. Nor does it show that the Order clearly and unambiguously placed on defendants responsibility to “disappear” printed materials disseminated, and outside their custody or control, prior to the date of the Order.

II. PLAINTIFF HAS NOT MET ITS BURDEN TO SHOW THAT DEFENDANTS ARE IN CONTEMPT OF THE PRELIMINARY INJUNCTION ORDER

A. Plaintiff Has Failed to Establish a Proper Evidentiary Basis for the Relief it Seeks.

The testimony of counsel is of no moment whatsoever and cannot be treated as a substitute for admissible evidence. *See Hollander v. Am. Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir. 1999) *abrogated on other grounds* (affirming district court’s decision striking attorney affidavit where the affidavit was “riddled with inadmissible hearsay, conclusory statements and arguments, and information clearly not made on the affiant’s personal knowledge”), citing *United States v. Private Sanitation Industry Ass’n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1084 (2d Cir. 1995). Yet such testimony is the only basis offered by plaintiff for the relief it seeks here, which is contained exclusively in the Declaration of Phillip Hill. Mr. Hill’s declaration does not even claim to be based on first-hand knowledge of any of the facts to which he testifies. Indeed, he testifies, under penalty of perjury, to facts that he cannot know, stating, for example, that “**Heritage** discovered, by its count, 112 violations of the Order on the Internet” and that “**Heritage** then investigated neighborhoods surrounding Defendants’ ‘Official Ticket Outlet[s]’ in Hell’s Kitchen and Chelsea.” (Hill Decl., ¶¶ 3, 26; emphasis added).

Moreover, “Heritage” is not only something other than the attorney-affiant; it is a corporation, not a person – and corporations cannot testify. If some person in the employ of Heritage “discovered” or “investigated,” that person must be the one to testify, to establish the *bona fides* of the facts to which he swears and, if necessary, to be subject to cross-examination at some juncture. If this someone was, in fact attorney Phillip Hill, he should say so – and so make himself available for questioning.⁴ But the Hill Declaration fails on all these scores, and it is

⁴ Defendants preserve for a later date whatever conflict of interest arguments may arise from plaintiff’s clarification.

well-established that a “court may strike portions of an affidavit that are not based upon the affiant’s personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements.” *Hollander*, 172 F.3d at 198. The Court should apply this standard and strike the Hill Declaration on these grounds. In any case, absent any admissible evidence on which to grant the exceptional relief sought here, this Court should deny the application.

B. Defendants Were Diligent in Their Efforts to Comply with the Order.

Where a party has made a “reasonably diligent” effort to comply with an order, it should not be held in contempt failing to “exhaust all means available” to achieve all the requirements set forth in that order. *Chao v. Gotham Registry, Inc.* 514 F.3d 280, 293 (2d Cir. 2008). Reasonable diligence requires only that the defendant “develop reasonably effective methods of compliance,” and “reasonably energetic compliance” requires the defendant “to energetically police the effectiveness of its compliance measures and, **when advised that such measures have fallen short, to modify them accordingly.**” *Zino Davidoff SA v. CVS Corp.*, Case No. 06 cv 15332 (RJS), 2008 WL 1775410, at *8 (S.D.N.Y. Apr. 17, 2008) (emphasis added). The record here is clear that defendants fulfilled these requirements.

In *Zino Davidoff SA*, the court denied a motion to find CVS in contempt of a preliminary injunction enjoining it from selling counterfeit Davidoff fragrance products despite undisputed violations of the court order, where CVS took reasonable measures to comply, and, upon receiving notice from Davidoff of continuing violations, modified its compliance efforts accordingly. *See id.* at *14. Following the entry of a temporary restraining order and prior to the entry of the preliminary injunction, CVS quarantined all products identified as counterfeit by plaintiff and switched to a different supplier. *See id.* at *8. The court held that it was reasonable for CVS to believe this effort would ensure substantial compliance. *See id.* When Davidoff’s investigators later found two items for sale at CVS stores – and **notified** CVS of this discovery –

CVS responded by hiring an investigator to inspect all of its stores over a period of approximately two months and by switching suppliers for a second time. *See id.* *3, *12. Following the inspection, Davidoff **again** notified CVS that its stores were continuing to sell counterfeit products, but this time did not offer any details. *See id.* at *9. CVS responded by issuing a product withdrawal of all previously-quarantined items and additional reminders to its employees. *See id.* at *12. After this product withdrawal, Davidoff was able to identify a single sale in violation of the court's preliminary injunction. *See id.* at *10. Evaluating CVS's conduct based on this record, which included multiple undisputed violations of the court's order, the court held that the progressive steps taken by CVS to comply with the order constituted reasonable diligence and denied Davidoff's motion to hold CVS in contempt. *See id.* at *12-13.

Here, defendants' efforts to comply with this Court's Order are comparable to those found reasonably diligent in *Zino Davidoff*. Just as CVS quarantined the items identified by Davidoff as counterfeit, defendants immediately began searching for and remediating prohibited uses under the Order. (*See* MacMull Decl., Ex. 2 at 2; Voss Decl., ¶¶ 3, 8-10.) And, although prior to any threat of litigation defendants had not maintained a record of their use of the terms subsequently prohibited under the Order (*see* Voss Decl., ¶ 3), they nevertheless immediately began attempting to recreate months of disparate marketing efforts to search for all such uses on the online platforms reasonably known to them and over which they had any control. (*See* MacMull Decl., Ex. 2 at 2; Voss Decl., ¶¶ 7, 9.) Defendants also alerted their entire registered user database – an email list of more than 75,000 subscribers, including all “official” Pride ticketholders – that defendants' events were **not** affiliated with HOP or its events. (*See* Voss Decl., ¶¶ 4-6; Declaration of Jake Resnicow dated July 18, 2014 (“Resnicow Decl.”) ¶¶ 3-4.) Moreover, defendants, in compliance with the Order, promptly changed their ticket-sales URL to

www.matineenyc.com and www.supremefestival.com; removed the term “NYC Pride” and other prohibited terms from innumerable pieces of artwork and online sources, including emails and websites, in some cases at considerable expense; and added disclaimers to artwork, online graphics and wherever else appropriate per the terms of the Order. (*See* Resnicow Decl., ¶¶ 3, 5-6; Voss Decl., ¶¶ 8-12.)

Indeed, the record in the litigation shows that defendants have consistently and transparently represented their methods for remediating the prohibitive uses identified in the Order to the Court and to plaintiff. (*See* MacMull Decl., Ex. 2; Hill Decl., Exs. T, W, Y.) Plaintiff never raised any objections to these measures, and indeed do not do so now – though they deem worthy of a contempt citation the inadequate results of those efforts. But here the methods employed by defendants were effective in achieving substantial compliance. (*See* MacMull Decl., Ex. 2; *see also generally* the Resnicow and Voss Decls.)

Plaintiff nonetheless argues that defendants “failed to take all reasonable steps to prevent violation of the Order” because, they say, defendants’ failure to make changes to “online webpages are ... inexcusable.” (Pl. Mem. at 7.) Defendants’ subjective view of what is or is not “excusable” is not, however, the applicable one on this motion. Nor is perfection the standard by which compliance is measured for civil contempt. *See Zino Davidoff SA*, 2008 WL 1775410, at *5. This is not a situation where plaintiff has shown, for instance, defendants had recourse to an index or system that would have enabled them instantaneously to recall and revise every online usage they had made of the prohibited words. Despite plaintiff’s assertion that these online uses could have been easily identified and cured, somehow plaintiff’s own “investigation” (the details of which are, again, shrouded by the vague nature of the hearsay declaration supporting plaintiff’s motion) failed to reveal more than a handful of such uses between June 19th and 9:52

a.m. on June 28th. In fact, Mr. Hill's initial contempt motion declaration of June 26th refers to a mere three online violations, one of which, however, and as discussed above, was entirely resolved the same day it was brought to defendants' attention on June 22nd. (See Hill Decl., Ex. Z ¶¶ 5, 13, 17, 21; MacMull Decl., Ex. 2 at 5.)

Indeed, if anything is "inexcusable" here it is plaintiff's tack, after finding defendants far too compliant in addressing reports of non-compliance almost immediately, to stop transmitting such reports and to "warehouse" violations for purposes of making this needless motion. Besides exhibiting a stunning degree of gamesmanship, plaintiff's engagement of this ploy eviscerates at least part of the relief sought in its motion, for "the overwhelming majority of courts in [the Second] Circuit strictly adhere to the general practice" of awarding reasonable costs and attorneys' fees in prosecuting the contempt "only where violation of a court order is found to have been willful," in that the contemnor had **actual notice**, was able to comply, and did not make a good faith effort to do so. See *Zino Davidoff SA*, 2008 WL 1775410, at *7 (citing cases where the Second Circuit has affirmed denials of requests for costs and attorneys' fees even where the efforts to comply were careless or displayed callous disregard); see also *Wella Corp. v. Wella Graphics*, 874 F. Supp. 54, 56 (E.D.N.Y. 1994).

Plaintiff had every opportunity to provide defendants with notice of any violation of which it was aware in a timely fashion prior to filing this motion. Each time plaintiff did so, defendants solved the problem. Determined nonetheless to file this motion and demonstrate its *bona fides* as aggressive, take-no-prisoners litigators, plaintiff schemed to simulate "notice" by springing a Saturday-morning email, containing an awkward attachment with over a hundred "violations" of varying legitimacy, on what turned out to be two vacationing lawyers and one having the temerity to disconnect from the Internet for a day.

Not counting this preposterous charade, however, to the extent plaintiff has submitted any admissible proof at all, it has certainly not provided any evidence that defendants – contumaciously or otherwise, online or off – ever knowingly disregarded either an incidence of non-compliance or even of claimed non-compliance prior to the filing of this motion. In contrast, defendants have been diligent and energetic in their efforts to comply with the Court’s Order, and there is no information in the record to suggest that defendants are not now currently in substantial compliance with that Order.

C. The Alleged Incidences of Non-Compliance Are Insignificant.

In evaluating the defendants’ conduct, “the court is not empowered to command, any more than it can pretend for itself to achieve, performance approximating perfection,” but rather, “is obliged ... to require substantial performance and due diligence.” *Zino Davidoff SA*, 2008 WL 1775410, at *5. “The failure to meet the strict requirements of an order does not necessarily subject a party to a holding of contempt” *Dunn v. N.Y.S. Dept. of Labor*, 47 F.3d 485, 490 (2d Cir.1995). In the context of this standard, defendants set forth below a summary of their explanations regarding the incidences of defendants’ supposed non-compliance with the Order that plaintiff has proffered, albeit not in admissible form as discussed in Section II.A above. No waiver of the inadmissibility of this submission is intended here or in the more detailed declarations submitted with this memorandum of law.

PLAINTIFF’S EXHIBIT	DEFENDANTS’ EXPLANATION OF PLAINTIFF’S EXHIBIT	CITATION TO THE RECORD
Exhibit A (Dkt. No. 55-1 pages 2 through 10)	Plaintiff’s Exhibit A consists of photographs of printed materials distributed prior to June 19, 2014, not addressed by the terms of the Preliminary Injunction Order	Hill Decl., Ex. X; Voss Decl., ¶ 15.
Exhibit A (Dkt. No. 55-1 pages 11	Pages 11 and 13 of plaintiff’s Exhibit A consist of exemplars of the “Papa Party” using the term “NYC Pride.” Notwithstanding plaintiff’s repeated insistence	Hill Decl., Ex. W; Voss Decl., ¶ 16.

through 13)	that the “Papa Party” is one of defendants’ events,” it is not. (Hill Decl., ¶¶ 15, 31.) Defendants have never had any control over the creative or marketing materials associated with the “Papa Party” event, nor any monetary interest in its outcome. The Voss defendants’ involvement with the “Papa Party” was limited to a cross-promotional arrangement with the “Papa Party” organizers.	
Exhibit A (Dkt. No. 55-1 page 12)	Page 12 of plaintiff’s Exhibit A consists of a t-shirt bearing the enjoined phrase “New York Pride 2014.” Following the Court’s June 19, 2014 initial injunction order, defendants instructed the independent contractors employed as their “street team” to discontinue wearing the t-shirt shown. Evidently this instruction was not followed by the worker shown, who was paid in advance and over whom defendants exercised no ongoing control.	Voss Decl., ¶ 17.
Exhibit B (Dkt. No. 55-2 and 55-3)	Plaintiff’s Exhibit B contains screen shots of images that were created prior to the injunction on June 12, 2014. Defendants removed them upon notice.	Voss Decl., ¶ 18.
Exhibit C (Dkt. No. 55-4)	<p>Plaintiff’s Exhibit C references screen shots of images showing the Facebook page created on behalf of “Supreme Festival,” not defendants.</p> <p>Page 2 of Exhibit C and its use of “NYC Pride” was the result of an error by a third-party contractor. While “NYC Pride” is used in the descriptive text, the artwork associated with the post bears the disclaimer “This Event is Not Affiliated With Heritage of Pride, Inc. or its NYC Pride Events,” as instructed by defendants.</p> <p>Page 3 of Exhibit C refers to the posting of a video that was made the morning of June 19, 2014 and prior to the Court’s initial Preliminary Injunction Order. Defendants removed it upon notice.</p>	Voss Decl., ¶ 19.
Exhibits D and E (Dkt. Nos. 55-5 and 55-6)	<p>Plaintiff’s Exhibits D and E reference screen shots of images obtained from the Facebook page of Brandon Voss.</p> <p>With respect to page 2 of Exhibit D, defendant Brandon Voss “tagged” certain Facebook Event Invites from the four events he was supporting over Pride weekend. Events “created” by others can be “tagged” by persons other than their creators. Tagged events then show up as a “post” in</p>	Voss Decl., ¶ 20.

	<p>the form of a link on the tagging party's Facebook page. In the process of complying with Mr. Voss's cross-promotional arrangement with the "Papa Party," whose advertising content he had no control over, he "tagged" their event invite for Friday, June 27, 2014, in the process inadvertently causing the term "NYC Pride 2014" to be displayed on his Facebook page. As set forth above, defendants have never had any control over the creative or marketing materials associated with the "Papa Party" event, nor any monetary interest in its outcome. Mr. Voss did not realize when "tagging" the "Papa Party" link that it utilized the words "NYC Pride 2014." It has since been removed.</p> <p>The remaining pages of Exhibits D and E are of posts or images that were posted before the Court's initial Preliminary Injunction Order, were inadvertently overlooked during defendants' remedial efforts to comply with the Preliminary Injunction Order. Defendants removed them upon notice.</p>	
Exhibits F and G (Dkt. Nos. 55-7 and 55-8)	Plaintiff's Exhibits F and G are screen shots of posts made before the Court's initial Preliminary Injunction Order, overlooked during defendants' remedial efforts to comply with the Preliminary Injunction Order. Defendants removed them upon notice.	Resnicow Decl., ¶ 8.
Exhibit H (Dkt. No. 55-9)	<p>Page 2 of plaintiff's Exhibit H is a screen shot of a "tweet" from the Twitter account belonging to defendant FornabaioVoss Events, Inc. ("Voss"), but administered mainly by a third-party agency. This vendor inadvertently utilized the phrase "NY Pride" in a June 24, 2014 tweet. Defendants deleted the tweet upon notice.</p> <p>Page 3 of Exhibit H is an instance of pre-Order artwork uploaded to the website of Voss. Following the Court's initial Preliminary Injunction Order, Mr. Voss instructed his web designer to replace the artwork. Defendants subsequently learned that the website's coding contains a "bug" that makes updating the page difficult. Consequently, updating the page to conform to the Order's requirements took longer than expected, but was ultimately updated.</p>	Voss Decl., ¶ 21.
Exhibit I (Dkt. No 55-10)	Plaintiff's Exhibit I consists of screen shots taken from Voss NYC Group Corp.'s Instagram account. The	Voss Decl., ¶ 22.

	postings identified in the exhibit were all made prior to June 19, 2014, were overlooked during defendants' remedial efforts to comply with the Order, and were removed upon notice.	
Exhibit J (Dkt. No. 55-11)	Plaintiff's Exhibit J references screen shots of posts made before the Court's initial Preliminary Injunction Order, were overlooked during defendants' remediation campaign to comply with the Order, and were removed upon notice.	Resnicow Decl., ¶ 8.
Exhibit K (Dkt. No. 55-12)	Plaintiff's Exhibit K consists of screen shots of posts made before the Court's initial Preliminary Injunction Order, were overlooked during defendants' remediation campaign to comply with the Order, and were removed upon notice.	Resnicow Decl., ¶ 8.
Exhibit L (Dkt. No. 55-13)	Plaintiff's Exhibit L consists of screen shots referring to the "Papa Party," not defendants' event. Defendants refer to the explanations for Exhibits A, D and E above.	Voss Decl., ¶ 23.
Exhibit M (Dkt. No. 55-14)	Plaintiff's Exhibit M references screen shots of Joshua Brickman's Facebook page. Defendant Resnicow instructed third parties, including informal and unpaid promotional "Ambassadors" such as Mr. Brickman, to delete any uses of prohibited terms following the Order. Evidently this instruction was not followed with respect to the examples shown, but defendants exercised no control over any person responsible for such postings.	Resnicow Decl., ¶ 9.
Exhibit N (Dkt. Nos. 55-15, 55-16 and 55-17)	Plaintiff's Exhibit N, namely, Dkt No. 55-15 pages 7 and 17; and Dkt No. 55-17 pages 2, 4 and 11 reference third party uses of images containing defendants' "Matinee event" and the prohibited term "New York Pride." Defendants instructed third-parties to remove their use of prohibited terms following the Order; however, the uses identified therein are by individuals who remain outside of defendants' control. With the exception of the specific pages identified above, plaintiff's complaint with, and/or the relevance of the additional pages contained within this exhibit is unknown and remains unexplained by plaintiff. (Hill Decl., ¶ 18.)	Resnicow Decl., ¶ 10.
Exhibit O (Dkt. No. 55-18)	Plaintiff's Exhibit O is a reference to a screen shot of a Facebook page created by third-party, "Rhea Litre." Contrary to plaintiff's accusation, "Rhea Litre" is not	MacMull Decl., Ex. 2 ; Resnicow Decl., ¶ 11.

	affiliated or a sponsor of Matinee’s Pride events. This fact is further supported by the small number of attendees reflected in the exhibit – 2 – whereas the “official” event lists over 1,000 attendees from a group of 38,000 invited guests. The “official event” Facebook page was updated on June 20, 2014 and contains a disclaimer and revised artwork which can be seen at https://www.facebook.com/events/114655058732957/	
Exhibit P (Dkt. No. 55-19)	Defendants’ submissions fail to explain the purported relevance of plaintiff’s Exhibit P. Defendant Resnicow does note, however, that the exhibit reflects no violations of the Order on its face and, in fact, contains modified artwork which was supplemented after June 19, 2014.	Resnicow Decl., ¶ 12.
Exhibit Q (Dkt No. 55-20)	Plaintiff’s Exhibit Q, which in turn makes reference to an email purportedly sent by Chris Ryan on June 26, 2014 containing prohibited terms (Hill Decl., Ex. Z ¶ 17), but which email itself is not a matter of record is of unknown relevance to defendants. (<i>See id.</i>) Defendants do however note that page 6 of the exhibit contains modified artwork omitting any reference to “NYC” or other variant further contains a disclaimer. This revised artwork was supplied to Mr. Ryan by defendant Resnicow following the issuance of the Order.	Resnicow Decl., ¶ 13.
Exhibit R (Dkt No. 55-21)	Plaintiff’s Exhibit R are screen shots of images taken from the website of Chris Ryan. As reflected on page 2 of the exhibit, the image was posted prior to the issuance of the Order. In any event, Mr. Resnicow supplied Mr. Ryan with corrected artwork on June 24, 2014, which is in part reflected in plaintiff’s Exhibit Q discussed above. Defendants have no control over the content posted by third parties, including Mr. Ryan.	Resnicow Decl., ¶ 14.
Exhibit S (Dkt. No. 55-22)	Plaintiff’s Exhibit S is a posting of a June 24, 2014 Facebook post by “Rufskin Headquarters,” an unrelated third party. Notwithstanding that defendants have no control over postings made by third parties, defendants understand that the post been removed.	Resnicow Decl., ¶ 15.

III. THE RECORD CONTAINS NO EVIDENTIARY BASIS TO SUPPORT PLAINTIFF'S ASSERTION THAT DEFENDANTS TREATED PRINTED MEDIA DIFFERENTLY FROM ONLINE MEDIA IN THEIR COMPLIANCE EFFORTS.

Plaintiff makes much of a fallacious “dispute” between counsel for the two sides as to whether the Order, which detailed the specific remedial measures required of defendants concerning online advertising only, nonetheless also required defendants to canvas the New York metropolitan area and recover every single handbill, poster or other printed material distributed prior to the Order. It cannot be stressed enough that this contretemps is, in fact, entirely academic. Defendants have established, in their respective declarations, that they withdrew, replaced or revised any printed materials of which they were actually aware that failed to comply with the Order. (*See* Voss Decl., ¶¶ 10-12.) Plaintiff, for its part, has submitted no evidence, even in admissible form like the rest of its “evidence,” to the contrary – i.e., that defendants every knowingly ignored non-compliant printed materials in their remediation efforts.

Indeed, defendants asked, through counsel, a simple question: what is plaintiff's legal authority for its assertion that the Order required defendants to affirmatively collect, without limitation or otherwise, previously published printed material – let alone that it did so “clearly” and “unambiguously,” as plaintiff maintains. (*See* the entire inquiry by defendants' counsel *supra* at 8-10.) Defendants' counsel asked the question because it goes to the extent to which his clients may or may not have been in compliance despite their best efforts. Plaintiff, however, took the inquiry not as an opportunity for discussion, reflection or analysis but as an “opening” or “admission” to conduct – a knowing refusal to address non-compliant printed matter – that there is no evidence **ever** took place.

Plaintiff, nonetheless, sees a golden opportunity in defendants' raising the question. Its efforts to capitalize on that opportunity, however, are incoherent, per this from their memorandum in support of the motion:

Defendants apparently understood [that collection of printed materials did fall under the Order] when they undertook their compliance actions, and when making prior statements to the Court. Paragraph 3 of Mr. Resnicow’s Declaration lays out, under penalty of perjury, “specific instances of defendants’ compliance” and Paragraph 4 states expenses incurred, including costs for “replacement and redistribution of hard copy media throughout New York over the last seven days.” (Dkt. No. 49.) Unless Defendants’ position is that they first violated the Order by distributing hard copy materials *after* June 19, then claimed expenses incurred in replacing and redistributing *those* hard copy materials, then Mr. Resnicow’s declaration can only be read to mean that the Defendants’ understood their alleged compliance consisted, in part, of replacing and redistributing hard copy media distributed prior to June 19. Further, if such actions were merely gratuitous, then they would have no business being included as an undifferentiated component of Defendants’ compliance costs, along with mandatory costs such as web designers and printing.

(Pl. Mem. at 8.) Whatever might be distilled from this Byzantine “reasoning” is entirely irrelevant because – as the above excerpt admits – according to Mr. Resnicow’s Declaration, defendants “replace[d] and redistribute[ed] hard copy media throughout New York.” (MacMull Decl., Ex. 2 ¶ 4.) Defendants did so whether the strict terms of the Order required it or not. Plaintiff has no evidentiary basis to dispute this testimony. Yet it insists on harping on this issue – just not to the extent of actually answering the legal question that first raised it.

Moreover, if resolution of the question raised by defendants’ counsel did indeed have some relevance to the facts here, it cannot be denied that defendants raised, at the very least, a reasonable interpretation of the Order – if only because plaintiff has consistently failed to even **try** and rebut it based on the Order itself. As such, any reliance defendants may have placed on that interpretation precludes a contempt finding. As the Second Circuit has stated:

If, as we believe to be the case here, the law relied on by the party seeking contempt is ambiguous in its application to the challenged conduct, contempt will not lie. *See, e.g., Rajah Auto Supply Co. v. Grossman*, 207 F. 84 (2d Cir. 1913) (per curiam) (affirming denial of contempt motion where plaintiff’s case was too doubtful on the facts and the law to warrant contempt); *United States ex rel. IRS v. Norton*, 717 F.2d 767, 774 (3d Cir. 1983) (“[A]ny ambiguity in the law should be resolved in favor of the party charged with contempt.”); *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir. 1991) (stating prudential rule that ambiguities in

court orders should be read in light favorable to party charged with contempt); *cf. Vertex Distrib. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982) (explaining that party should not be held in contempt if his actions appear based on a good faith and reasonable interpretation of the order).

Chao v. Gotham Registry, Inc. 514 F.3d at 292; *see also Wella Corp.*, 874 F. at 56 (no contempt as to default judgment was found where defendants' change of business name was confusingly similar to plaintiff's but still constituted reasonable diligence because it was a reasonable interpretation of the terms of the court order).

The Court should pay no heed to what is on this record an entirely academic question, much less a question plaintiff refuses to answer even as it asks the Court to deem its conclusory response the correct one. Plaintiff's patent inability to defend its position on the question, however, suggests that if defendants' relied on their counsel's view of the matter, they may not only be exempt from sanction because that interpretation was reasonable – they may be entirely compliant because that interpretation was correct.

IV. ANY SANCTION IMPOSED SHOULD BE COMPENSATORY AND NOT COERCIVE IN NATURE

Plaintiff's application seeks both coercive and compensatory sanctions for the purported violation of the Court's order. (*See* Pl. Mem. at 9-10.) As stated above, plaintiff has not carried its burden of showing civil contempt, and therefore no sanctions are appropriate. Even per plaintiff's view that defendants did knowingly act in contempt of the Order, however, it would be entitled only to compensatory sanctions under the law.

Because the "purpose of 'coercive sanctions' is to coerce the defendant into compliance with the court's order," they are not warranted where, as here, the defendant is currently in compliance and is not likely to violate the court's orders in the future. *Indep. Living Aids, Inc. v. Maxi-Aids, Inc.*, 349 F. Supp. 2d 509, 518 (E.D.N.Y. 2004). The record is unrebutted here that defendants are currently in compliance with the Court's Order: (i) all prohibitive use in this


lawsuit has previously been terminated or been taken down immediately upon notice (with the exception of previously published printed materials); (ii) no new prohibitive use has appeared on defendant's websites since June 19, 2014; and (iii) defendants continue to engage in good faith efforts to comply with the Court's Order. Nor is there any evidence before the Court on which to base a finding that defendants are likely to violate the Court's Order in the future. For this reason, coercive sanctions are not warranted.

Therefore, should defendants be found in contempt, only compensatory damages should be considered, which are to be determined by actual damages, established by either proof of injury to the plaintiff, or by the amount of profits derived by defendant from the violation. *See Manhattan Industries, Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 5-6 (2d Cir. 1989). Here, plaintiff's application is entirely silent as to the actual damages it has sustained as result of defendants' violations, much less any proof that defendants have gained from their alleged misconduct.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny plaintiff's motion for an order of civil contempt.

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