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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 HERITAGE OF PRIDE, INC.,
4 Plaintiff,

5 v. 14 CV 4165 (CM)

6 MATINEE NYC, INC., et al.,
7 Defendants.

8 -----x
New York, N.Y.
9 June 18, 2014
10 10:30 a.m.

11 Before:

12 HON. COLLEEN MCMAHON,
District Judge

13 APPEARANCES

14 KIRKLAND & ELLIS
15 Attorneys for Plaintiff
16 BY: PHILLIP HILL
JOSEPH LOY

17 GOETZ FITZPATRICK
Attorneys for Defendants
18 BY: RONALD COLEMAN
19 BRIAN FARKAS
JOEL MacMULL

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1 (In open court, case called)

2 THE COURT: Okay. Have a seat.

3 So gentlemen at the front table, it's your nickel. Do
4 me the favor of assuming that I am thoroughly familiar with
5 your papers, okay?

6 MR. HILL: Thank you, your Honor.

7 As mentioned, my name is Phillip Hill, and I'm a
8 junior associate at Kirkland.

9 THE COURT: There's no such thing as a junior
10 associate. You're a lawyer.

11 MR. HILL: My name is Phillip Hill --

12 THE COURT: Of Kirkland & Ellis.

13 MR. HILL: Of Kirkland & Ellis. We are pro bono
14 counsel for Heritage of Pride, Inc., which is a nonprofit
15 organization that operates under the trade name NYC Pride and
16 who since 1984 has been charged with the responsibility for
17 organizing New York City's --

18 THE COURT: It's really confusing, you now say 1984 in
19 your very belated, and I think for your purposes, entirely
20 unnecessary trademark registration, you say 2011. There's a
21 reason for that, I assume.

22 MR. HILL: Yes, your Honor, the federal trademark
23 registration is for the combination word, mark, and logo. The
24 application said at least as early as 2011.

25 THE COURT: You mean the logo small N, Y that looks

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1 like the old subway token Y, C with the word "pride" emanating
2 out of it, that logo, that's what you registered?

3 MR. HILL: That's correct.

4 THE COURT: Because that was one of my questions,
5 because that's not the logo that you're using to promote your
6 2014 events.

7 MR. HILL: That's correct.

8 THE COURT: You aren't using anything that looks like
9 that registered trademark.

10 MR. HILL: That correct, your Honor, the rights that
11 we claim or that Heritage of Pride claims are the common law
12 rights in the use of the term NYC Pride.

13 THE COURT: So all you did was register a trademark
14 that's not relevant of this case in order to manufacture
15 federal jurisdiction when your real claims, your common law
16 claims and LGBT claims, all of which should have been
17 adjudicated next door, right?

18 MR. HILL: No, your Honor.

19 THE COURT: Then what's your federal claim? You had
20 to register your trademark to get into federal court, and as
21 far as I can tell -- nothing to do with the merits of your
22 claim, you went out of your way to manufacture federal
23 jurisdiction. But what you are essentially here arguing, and
24 certainly where you have the stronger arguments, are state law
25 claims.

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1 And you had no right to come to a federal court --
2 notwithstanding the Lanham Act's protection of unregistered
3 marks, you had no right to come into federal court until you
4 registered something. But you didn't register the words NYC
5 Pride, you admit that, and you didn't register anything that
6 looks like what they're using, which is that rectangle with the
7 same kind of print that you're using on your 2014 logo, which
8 doesn't look anything look like what you registered, and the
9 2014 with the little stars on either side, which isn't in what
10 you registered.

11 So why shouldn't I conclude that all you've done here
12 is to manufacture non-existent federal jurisdiction and send
13 you across the street where you should have gone in the first
14 place, and you shouldn't be afraid to go because you have got
15 some decent common law claims?

16 MR. HILL: Your Honor, there's a couple of responses
17 to that. First, we didn't manufacture this controversy. The
18 applications were in process since before --

19 THE COURT: But you didn't register anything that
20 they're using. You admit that you didn't register the words
21 "NYC Pride," right?

22 MR. HILL: We registered a word and design mark, which
23 actually under the federal --

24 THE COURT: And they're not using that mark, right?

25 MR. HILL: Your Honor, actually this year in March

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1 Brandon Voss and Voss NYC did send a letter on letterhead
2 prominently displaying that very logo to a talent agent.

3 THE COURT: One letter. The rest of their stuff all
4 looks like your -- you admit that all your stuff for this year
5 2014 has a little stars on it and "NYC" in block letters and
6 outlined in bold and then it's clear inside and "Pride" in
7 block letters entirely colored in, right? It's a rectangle.
8 That's your logo for this year, right?

9 MR. HILL: That's the logo we're using this year.

10 THE COURT: Right. And it didn't look like the 2013
11 logo. That's your logo for this year, and that's not what you
12 registered, correct?

13 MR. HILL: That is correct.

14 THE COURT: Thank you. You can move on.

15 MR. HILL: Well, the scope of federal rights, your
16 Honor, is not just per se what is in the registration, it's
17 about how it's used in the marketplace. And so it is broader
18 than just --

19 THE COURT: I'm more interested in your state claims.
20 I'm not sure I'm going to keep the case, I may kick you out,
21 but if you have a claim here, I think it's a state claim.

22 MR. HILL: Your Honor, if you would like me to focus
23 on the state claims, I am happy to do so. The common law marks
24 that --

25 THE COURT: I have to remind you that the first words

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1 out of your mouth were yes, we registered something, but our
2 real claims are common law claims. That the first thing that
3 man took down.

4 MR. HILL: Sorry, your Honor, I may have misspoke.

5 THE COURT: Fine.

6 MR. HILL: Also the Lanham Act doesn't just protect
7 federal marks, federally registered marks.

8 THE COURT: I know that. I'm aware of that. I told
9 you that. I said that.

10 MR. HILL: So that would be the basis for a federal
11 claim.

12 THE COURT: Okay.

13 MR. HILL: Your Honor, for the common law marks, what
14 this case really is about for a trade name for the registered
15 mark and the common law marks is really about the defendants
16 who were seeking to license, did license in some of their
17 cases, and sought to license but failed to license the NYC
18 Pride marks.

19 THE COURT: You never signed a trademark license with
20 them. You never signed a franchise agreement with them. I
21 wouldn't apply licensee estoppel in your case, so we can forget
22 about licensee estoppel.

23 But let's talk about what they really did. This is a
24 narrative of your case. Once upon a time there was an outfit
25 called Heritage of Pride that sponsors and organizes and

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1 arranges for some of the preeminent events of Pride Week; not
2 all of the events of Pride Week, lots of events of Pride Week
3 done by lots of different people and lots of different
4 locations, but some of the preeminent events, including the
5 Pride Parade, which is the event of events, is organized by
6 Heritage of Pride. And Heritage of Pride has over the time
7 acquired a bunch of sponsors, corporate sponsors for these
8 events, and put money into advertising its events. Some its
9 events are free, some of its events you have to buy tickets to.
10 It has a web site. The web site has a domain name and they
11 invent a logo every year. This year's logo I already
12 described. And for some years prior to this year, the
13 defendants had some sort of recognition from you, from your
14 organization, as being -- I want to get it exactly right --
15 promotional partner, as a promotional partner.

16 MR. HILL: Your Honor --

17 THE COURT: Let my finish my narrative, then you can
18 tell me what is wrong with my narrative.

19 A promotional partner of your organization. This
20 year, for some reason or other, possibly having to do with some
21 political correctness issue in the LGBT movement, of which I'm
22 not really aware, you decided that you didn't want them to be
23 your promotional partner. That was communicated to them. And
24 they decided to get back at you by advertising the events that
25 you had decided you didn't want to be a promotional partner of

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1 under a confusingly similar logo trade dress style, and they
2 invented a domain name that looks almost exactly like yours,
3 and what they tried to do for the last two or three months was
4 pass themselves off as you. Is that your narrative?

5 MR. HILL: There's a couple of spots there that might
6 be worth correcting, your Honor. The first is that they
7 also -- Matinee NYC and Jake Resnicow were also licensed to be
8 the official New Year's Eve Party of NYC Pride. So it's more
9 than a promotional partnership, it was to be an actual official
10 event of the NYC Pride. I think that the facts of this case --

11 THE COURT: Where in the record is that license
12 agreement?

13 MR. HILL: That is located as Exhibit A to the
14 affidavit of Chris Frederick.

15 THE COURT: Okay, keep going.

16 MR. HILL: Another thing is that the facts of this
17 case suggest that there is intent to deceive. There is a
18 concerted effort --

19 THE COURT: Did I say otherwise? On the contrary, my
20 passing off scenario admits of only one inference. Passing off
21 is attempt to deceive. I didn't say that -- I asked you if
22 that was the factual narrative.

23 MR. HILL: Your Honor, they don't necessarily have to
24 rise to the level of passing themselves off as an organization
25 called NYC Pride, although they varyingly do that. They also

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1 have engaged in a program of suggesting sponsorship with NYC
2 Pride. They don't have pass themselves off as being NYC Pride
3 under the --

4 THE COURT: They're passing themselves off as a
5 promotional partner of NYC Pride, which is what they have been
6 in the past.

7 MR. HILL: Correct, or a sponsor or affiliate or that
8 their events are connected NYC Pride, that's right.

9 THE COURT: When I was a junior associate, and I was
10 once, we called those passing off claims.

11 MR. HILL: Your Honor, with all due respect, I believe
12 that passing off has a very narrow meaning.

13 THE COURT: It has a much broader meaning than you
14 think. They're trying to deceive the public about who they are
15 and what their affiliation is with you. They're trying to look
16 like you.

17 MR. HILL: Your Honor, I'm willing to accept that
18 definition, that's fine.

19 THE COURT: Okay. Keep going. So my question is: Is
20 that not your narrative?

21 MR. HILL: Your Honor, that's some versions of the
22 narrative.

23 THE COURT: If I were going to write a statement of
24 facts that was going to be highly persuasive in your favor,
25 isn't that the statement of facts you would write?

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1 MR. HILL: We would be willing to adopt the statement
2 of facts. That's certainly the case. The defendants have
3 engaged in a program of creating things that look similar to
4 taking shelter under a descriptive argument. And so their
5 arguments are that what they're using is not suggestive of
6 sorts, and we would take issue with that as well. And so I
7 think a fulsome explanation of the facts would also address the
8 description of arguments presented under that.

9 And if I may, your Honor, the licensee estoppel, even
10 if we don't apply that in its most strict sense, the fact that
11 the defendants have recognized the validity of the NYC Pride
12 marks, even the common law marks and the registered marks in
13 the past, would be suggestive of the fact that they knew NYC
14 Pride, the term, as having secondary meaning, and so that would
15 undercut their primary argument on merits.

16 THE COURT: It's so interesting because you enter into
17 this -- I'm looking at your Exhibit A about the New Year's Eve
18 event in 2011, and here's your letter of agreement, and it says
19 name and logo, Heritage of Pride and Dance on the Pier are
20 trademark names. It doesn't say NYC Pride is a trademark name.
21 In fact, can't we agree, without regard to their
22 characterization of things, that the phrase NYC Pride
23 appears -- will appear all over town next week?

24 MR. HILL: Yes, your Honor.

25 THE COURT: And you will not have entered into

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1 agreements with 99.44 percent of the people who use those
2 words.

3 MR. HILL: I don't know if we would make that
4 representation, your Honor, but with a descriptive mark, the
5 public always retains the ability to use marks in a descriptive
6 sentence. So that the mere words "New York Pride" appear
7 in the public does not undercut the value of the mark or its
8 validity, because when a mark -- when a descriptive marks come
9 into play, the terms themselves have a primary meaning, which
10 is describing the goods or services, but when somebody comes
11 in --

12 THE COURT: And you don't think I should find it
13 interesting that before you had this tête-a-tête with these
14 people and they began behaving badly and you decided suddenly
15 that you needed to register a trademark at the date of the
16 registration, I know when you filed it, you don't think I
17 should -- it should be meaningful to me that in your earlier
18 happy dealings with them you made no claim to NYC Pride as a
19 trademark name?

20 MR. HILL: Your Honor, we can't speak for the
21 representations of counsel in the past, but that letter, the
22 references to Dance on the Pier and Heritage of Pride, those
23 are actually federally registered trademarks, and the letters
24 that are included in the exhibits of both the defendants and
25 the plaintiffs show that the counsel at the time period when

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1 they were in these discussions believed wrongly in order to
2 enforce a trademark claim there needs to be a federal
3 registration.

4 THE COURT: But I guess my point is your complaint --
5 your client's lawyer believed wrongly that you needed to
6 federally register, it registered Heritage of Pride and it
7 registered Dance on the Pier, but apparently it didn't think
8 NYC Pride was worth protecting because it didn't register NYC
9 Pride, right?

10 MR. HILL: Your Honor, on the state of the facts that
11 we have, the rebranding of NYC Pride -- of Heritage as NYC
12 Pride occurred at least as early as December 2009, and that's
13 what the application said. So that was --

14 THE COURT: It said May 2011.

15 MR. HILL: That's what the trademark application said,
16 but it was at least as early as. So the facts developed show
17 that there was a rebranding prior to May 5th, 2011, and having
18 a registration dated for a specific date does not foreclose
19 proving an earlier date by clear and convincing evidence, which
20 I believe -- or we believe the evidence here shows that at
21 least as early as 2010, Heritage of Pride affirmatively
22 represented to sponsors and to others that they were called NYC
23 Pride, and in fact had promotional items distributed at NYC
24 Pride events at least as early as 2006.

25 And so the investigation that the trademark attorney

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1 did in order to get the registration claimed at least as early
2 as 2011 but didn't foreclose showing it. And Heritage of Pride
3 is a nonprofit organization, and so it wasn't necessary for
4 them at that time to prove up the absolute earliest date that
5 they had. And we might still come up with additional evidence
6 as this case unfolds that shows even earlier than 2006, but
7 through the course of these pleadings and the filings we have
8 presented the evidence that shows using commerce as early as we
9 can find, 2009 first, then 2006 in the response and affidavits.

10 THE COURT: Okay.

11 MR. HILL: Your Honor, I think you talked a little bit
12 about licensee estoppel arguments, which if they don't apply in
13 their most strict sense then they at least are suggestive of
14 validity. And so the only arguments that the defendants really
15 put forth deal with the argument that NYC Pride is so
16 descriptive and so widely used that no one could possibly
17 achieve secondary meaning in it. And the evidence that they
18 put forth is not competent to undercut that.

19 THE COURT: You don't think?

20 MR. HILL: I don't think so, your Honor, and there are
21 three reasons for it. First, several of their exhibits, E and
22 F, deal with the term "pride" by itself. In fact, in their
23 opening sentence of their brief they ask: Is "pride" property?
24 And that's not the question before the Court, and Heritage of
25 Pride would not claim to own "pride" itself.

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1 THE COURT: That's good, because it's definitely not.

2 MR. HILL: So E and F are irrelevant before the Court.

3 THE COURT: E and F?

4 MR. HILL: That would be the affidavit of --

5 THE COURT: The argument that you own "pride" and you
6 can't, I agree, you're not trying to say you own "pride."

7 MR. HILL: Correct. So the declaration of --

8 THE COURT: Shorthand for "gay pride," as it was
9 called in 1970 and 1971, 1972 and '73 when all these things
10 started happening. You weren't here, I was.

11 MR. HILL: That's mostly correct, your Honor, but when
12 this first started -- and this isn't in the briefs but we're
13 happy to provide this, if necessary, when the Gay Pride
14 Movement started right after Stonewall, the term was Gay
15 Liberation, and it wasn't until Brenda Howard afterwards
16 decided to go with "pride" to change the mindset and it became
17 a week event.

18 THE COURT: Very early on.

19 MR. HILL: That's correct. Now so Exhibits E and F to
20 the Grace Meeder declaration, which the defendants offer as
21 evidence of third-party use is irrelevant to the questions
22 before the Court. That's claiming "pride" in and of itself.

23 The vast majority of their remaining exhibits use the
24 terms NYC Pride in their descriptive sense, which as by the
25 very nature of the descriptive marks, anyone is entitled to use

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1 the terms NYC Pride or New York Pride in a primarily
2 descriptive way, so long as it doesn't invoke the secondary
3 meaning of a source indicator, and we believe that the
4 defendants have indeed used it as a source indicator.

5 THE COURT: So you acknowledge that everybody in town
6 who wants to have a concert at a bar, a party on a pier next
7 week, an event of some sort, could call it NYC Pride Cocktail
8 Party, NYC Pride Fiesta, and you would have no ability to stop
9 that?

10 MR. HILL: That's not precisely correct, your Honor,
11 the words NYC Pride are geographically descriptive and
12 descriptive of the subject matter of an event. A company could
13 not call themselves NYC Pride because that invokes use as source
14 indicator, but they could say we have events that are New York
15 City --

16 THE COURT: Wait a minute, I am a bar in the West
17 Village, and I decide that next week on Wednesday night, as
18 part of Pride Week, I'm going to have a huge party on a rooftop
19 bar and I'm going to call it Cocktails on the Roof, NYC Pride
20 Cocktails on the Roof. That happens all over town. You know
21 that happens all over town. They have cited to examples of its
22 happening all over town during Pride Week.

23 But you acknowledge that that's okay, that the problem
24 here is their suggesting that they are somehow affiliated with
25 you, which my bar in the West Village which has a rooftop which

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1 wants to do cocktails on the roof next Wednesday night is not
2 suggesting that it's affiliated with you, it's doing something
3 during Pride Week in New York City.

4 MR. HILL: Your Honor, I would have to see the
5 presentation of this hypothetical, because the definition of
6 trademark law or the primary concern of trademark law is manner
7 of use. The manner of the use determines the creation of
8 rights and the mark and infringement of that mark.

9 THE COURT: But people have been sponsoring NYC Pride
10 events for years. You haven't sued any of them.

11 MR. HILL: Your Honor --

12 THE COURT: It's the first time you sued. Now I
13 understand why you sued them, they've behaved very badly. But
14 for all these years, let's say since 2009, that you have been
15 rebranding -- that your client has been rebranding itself as
16 NYC Pride, it has not sent cease and desist letters to every
17 bar in town that hangs a NYC Pride party Saturday night at
18 10 o'clock sign in the window.

19 MR. HILL: Your Honor, the trademark law does not
20 impose on trademark owners the obligation of enforcing their
21 rights as against every single use that is out there.

22 THE COURT: But you haven't enforced your right
23 against any user until now, not one, not one single person.
24 Trademark law does impose upon you an obligation to enforce
25 your rights.

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1 MR. HILL: That's right, your Honor.

2 THE COURT: You can't just ignore them for years and
3 then suddenly decide "Oops."

4 MR. HILL: Your Honor, that's not the case here. We
5 didn't brief this.

6 THE COURT: You should.

7 MR. HILL: It wasn't a defense that the other side put
8 forth, so we didn't respond to it here, but it doesn't require
9 that there be a filed lawsuit in order to enforce your rights.

10 THE COURT: Sorry?

11 MR. HILL: You don't have to file a lawsuit.

12 THE COURT: That's true. Have you sent a single cease
13 and desist letter to anyone?

14 MR. HILL: Yes, your Honor. We know that Heritage of
15 Pride contacted advertisers or magazines saying they should
16 alter --

17 THE COURT: I'm shocked that you wouldn't have put
18 that evidence in front of me. That's like Litigation 101. And
19 they did make the argument. And even if they didn't make the
20 argument, you have an affirmative obligation to show that
21 you're entitled to relief and a fairly high bar to cross,
22 likelihood of success on the merits.

23 Well, they did in fact argue that have you made no
24 efforts in the past to enforce your rights. I don't see a
25 response to that. If you sent out a thousand cease and desist

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1 letters to this one and that one in the past, that would be a
2 useful fact for me to know. It's not in your papers.

3 MR. HILL: Your Honor, with all due respect, want of
4 secondary meaning for failure to plead is a burden on the
5 defendants to prove.

6 THE COURT: They have come forward. They have met
7 their burden of coming forward. I will tell you that. You
8 have the ultimate burden of persuasion on your right to relief.
9 Therefore, you have to convince me that you have acquired this
10 secondary meaning. And you know what the factors are, because
11 I discussed them in what was a much easier case, the New York
12 Triathlons case, a much easier case. And notwithstanding the
13 descriptive nature of that mark, because there was only one
14 race that was run every year that was called the NYC Triathlon,
15 and there wasn't the kind of uses of that name that they have
16 shown in their papers. Maybe they have only shown 13 instances
17 of it, but they have come forward. You have the burden of
18 demonstrating that you are entitled to injunctive relief. It's
19 your burden. It doesn't shift to them. They have raised the
20 defense. They have put in some evidence. If you decided that
21 wasn't enough evidence, okay, but I might decide differently,
22 and I'm the trier of fact.

23 MR. HILL: Your Honor, the responses that we had to
24 those arguments were saying that their evidence is not
25 competent to show failure to police.

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1 THE COURT: But it does show failure to police.

2 MR. HILL: Not necessarily, your Honor.

3 THE COURT: If that's your argument, you lose on that
4 argument. Do you have a better argument?

5 MR. HILL: If I may explain, your Honor.

6 THE COURT: You can explain all you want. Answer my
7 question. This is something junior associates should learn:
8 Always answer the judge's question. Do you have a better
9 argument?

10 MR. HILL: Yes, your Honor.

11 THE COURT: Because I'm not persuaded by this one.

12 MR. HILL: The vast majority, or all the examples that
13 they provided, according to their declaration, come from a
14 single source, which is Noise magazine. The Second Circuit has
15 made it clear that in order for evidence of third-party use to
16 be relevant to the question of strength or validity. There has
17 to be a demonstration of recognition in the marketplace. So
18 these small, one-time, one-off events, which are actually not
19 really competitive with Heritage of Pride, because the
20 multi-day slate of events, those things are not related to --

21 THE COURT: There are a hundred thousand such one-off
22 events all over town during the same week. Collectively,
23 collectively they represent a tremendous amount of competition
24 with your events.

25 Now I asked you a question. I said have you sent a

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1 single cease and desist letter? Have you done anything in the
2 past to protect this mark until these very bad behaving people
3 who got mad at you, because you cut them off, started their bad
4 behavior? And your answer was yes. You said yes. Well, show
5 me. I'm shocked to hear it. It's not in the record. That's
6 your better argument, counsel. That's your better argument.
7 We have in fact protected our mark, we have in fact told people
8 to stand down. If that's true. I don't know if it's true. I
9 can't accept your say so.

10 MR. HILL: That's right, and we didn't brief that, but
11 if it would help the Court, we're happy to brief that issue and
12 turn it very quickly.

13 Turning to just another argument that hopefully the
14 Court will find relevant to this question is that Heritage of
15 Pride is a nonprofit organization that serves to help
16 underrepresented sexual minorities in New York City. They're
17 not eager to press claims against people who also seek to help
18 those people.

19 THE COURT: I'm not moved by that argument. You have
20 some obligation to protect your trademark. All right? I am
21 unmoved by the fact that because you are a not for profit for
22 an underserved minority group, you're not eager to bring
23 lawsuits against other underserved minority groups. You have
24 the same obligations as General Motors to protect your
25 trademark. What have you done to protect it? Politically

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1 correct arguments don't move me; other arguments will move me,
2 do move me. Their bad behavior, for example, moves me.

3 MR. HILL: If I may step outside of the filings that
4 the Court has had, we do know that NYC Pride has contacted
5 magazines and article authors about changing the
6 representations that are in the magazines, and one of the party
7 promoters that the defendants cite, Josh Wood, was contacted in
8 the past about changing his use, to which he complied. So
9 there is evidence, and we can provide more of it if necessary,
10 and we can develop those facts as well.

11 Another point on this argument, your Honor, is that
12 the defendants' use this year is categorically different than
13 any other use out there in the marketplace.

14 THE COURT: Well, there we're getting back to my
15 articulation of the scenario that you present, which is you cut
16 them off, they proceed to use a logo that looks just like your
17 special 2014 logo, they adopt a domain name that looks
18 suspiciously like your domain name. That's certainly what I
19 would be emphasizing if I were standing where you're standing.

20 MR. HILL: That's right, your Honor. And so the
21 exhibits that they present from the past are very different
22 from what they're doing today, and that is the reason why this
23 lawsuit happened.

24 If there were -- if they were only doing what everyone
25 else was doing, then the need for relief might not be as

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1 pressing, and under the 24/7 Fitness case, mark owners don't
2 have to go after every conceivable infringement.

3 THE COURT: You don't have to go after every
4 conceivable, you have to go after somebody.

5 MR. HILL: This is the first instance where someone
6 has actually come together to put forth a multi-day slate of
7 outdoor events with a large attendance with headlining
8 performers and bills them collectively. This is the first time
9 that has been offered, and it's the first time it's been
10 enforced.

11 THE COURT: You can't stop someone from doing that.
12 Your issue is that they have done it under a logo that looks
13 suspiciously like yours.

14 MR. HILL: That's right, your Honor. And so it's the
15 manner of use in conjunction with the services that gives rise
16 to the trademark infringement that's here. So the Polaroid
17 factors would question: Are the uses in the marketplace
18 similar? And among those other factors, how similar are the
19 services that are going on?

20 THE COURT: I have to tell you, I have no sense of
21 what it is that they're doing. I know there's this one concert
22 that they're sponsoring, which some of the people associated
23 with Heritage of Pride find offensive, but I don't -- can you
24 describe more fulsomely what it is that they're proposing to do
25 next week?

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1 MR. HILL: Certainly, and we prepared some
2 demonstratives that might be helpful in illustrating this
3 argument, if I may approach, your Honor.

4 THE COURT: Okay.

5 MR. HILL: These are largely culled from the pleadings
6 that have been filed, but the defendants' misconduct is
7 ongoing, so we have some additional things that have happened
8 since this suit has been filed. We have a declaration that
9 we're willing to file if necessary so the Court may view it.

10 THE COURT: You're here to put on evidence, put on
11 your evidence.

12 MR. HILL: So your Honor, if you turn to tab 1, page
13 1, you will see this is an email from May 31st, 2014. We have
14 culled out some of the things going on. And you will see that
15 there are four events that are happening that the defendants
16 are offering under the name Supreme Festival Brandon Voss and
17 Jake Resnicow present New York Pride 2014, then using a logo
18 NYC Pride 2014. And these are for multi-day events happening
19 on June 27, 28, and 29, which are the exact days of NYC Pride's
20 official events that are the main events that NYC Pride puts
21 on.

22 So it's this use, this multi-day outdoor mass
23 attendance headlining performance, that has caused NYC Pride to
24 seek relief in the court today, because this use is
25 categorically different from anything that Brandon Voss or Voss

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1 NYC or any other defendants have done in the past. It's
2 different from anything that the defendants put forth in their
3 affidavits, and the affirmative misrepresentations contained in
4 these examples and in the rest of the filings show that there
5 is a pressing need today.

6 And also going to the delay argument that they make,
7 which is really their only other substantive argument, this use
8 occurred two weeks before filing suit, one week before filing
9 suit, shortly after filing suit, and even on Monday of this
10 week. So if you flip through just the first section, we have
11 June 2nd, 2014 that's about a week before filing suit. We have
12 June 12, which is shortly after filing suit. And then we also
13 have June 16, which was on Monday. And they're all
14 substantially the same thing, and they're at various email
15 addresses claiming to be something called NYC Pride 2014, or
16 calling themselves NYC Pride by itself.

17 Going back, if you could, your Honor, to page 2.

18 THE COURT: In particular on multiple instances they
19 do so using, as I keep saying, a logo that looks suspiciously
20 virtually identical to the one that you are using to promote
21 your events for next week, which is to say "NYC" in block
22 letters outlined in white and clear on the inside, "Pride" in
23 all white block letters in a rectangle.

24 MR. HILL: That's right, your Honor. And also I want
25 to point out that in the first image that we have here, that

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1 logo that you just identified is right next to the title logo
2 for their event, Supreme Festival. In fact, NYC Pride is
3 larger than their logo.

4 THE COURT: It is, and it's in bright orange to call
5 your attention to it. It's maybe the second thing that you
6 would look at if you looked at this.

7 MR. HILL: The first thing you would look at is who
8 the sender would be if you opened the email, then this thing at
9 the top of the page shows that the sender would be viewed as
10 NYC Pride as the name, not the email address. Then they would
11 open up the email and they could see nycpride2014@gmail.com and
12 see the images.

13 Then at the bottom of the first image you see an
14 organization called NYC Pride with a business address of 21
15 East 21st Street, which is the Matinee NYC address that they
16 used in previous emails. So this use that we have here, this
17 recent use that only happened weeks before we filed suit, is
18 categorically different than anything that ever occurred
19 before.

20 THE COURT: I would tend to agree.

21 MR. HILL: So your Honor, if we could turn also to the
22 tab 2, we have web sites from the defendants. This is their
23 Supreme Festival web site at www.supremefestival.com --

24 MR. COLEMAN: May I be heard, with all due respect?

25 THE COURT: You may not. You may sit down until he's

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1 done.

2 Go ahead.

3 MR. HILL: Thank you, your Honor. This is an update
4 to the web page, because the previous email on June 16 showed
5 that events were sold out, or at least the weekend passes were
6 sold out, and the web site was updated to include that graphic
7 image. And on that web page the NYC Pride logo occurs twice.

8 THE COURT: Twice, not once, but twice, in bright
9 orange.

10 MR. HILL: And right next to Supreme Festival, but
11 also larger than that. And flipping through that exhibit is
12 just the same orientation on the various pages that they have.

13 THE COURT: Let me ask you a question. If you were
14 crafting an injunction at this late date, given that Judge
15 Keenan did not see fit to grant your application for a TRO,
16 what would it look like?

17 MR. HILL: Your Honor, we recognize that's a very
18 difficult question.

19 THE COURT: One hopes you have an answer.

20 MR. HILL: Your Honor, we put forth in the order to
21 show cause for preliminary injunction a series of requirements
22 here. And if you could -- if you would turn to page 2 of Tab
23 3, the last page, you will see the defendants have put on
24 events, single-day events, and described their events in ways
25 that are much more descriptive.

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1 THE COURT: Page 2 of tab 3?

2 MR. HILL: Right. The very last page, your Honor,
3 it's entitled -- or the top of the page says Defendants 2014
4 and Defendants Previous Years. You will see what the
5 defendants have actually done in the past, which is feature
6 Matinee in very large letters, and then use New York Pride in
7 smaller font in the spots where they're actually indicating the
8 time and place.

9 Given the conduct --

10 THE COURT: You keep going back to the merits. I
11 asked you a question. If you were going to craft an injunction
12 today -- I know what you wrote in your papers originally, that
13 was ten days ago, and you were hoping to get a TRO and you
14 didn't get a TRO. If you were crafting an injunction today,
15 what would it look like?

16 MR. HILL: Well, we have a couple of different options
17 that we think would be useful. The first is the one that's in
18 the TRO or in the order to show cause itself, which prevents
19 the defendants from using the marks NYC Pride, New York Pride,
20 those terms specifically, plus anything else that's confusingly
21 similar.

22 And it's broad and it's difficult because we recognize
23 that people are entitled to use their marks descriptively, but
24 based on the conduct the defendants have done so far, we can't
25 trust them to know the difference between a descriptive use and

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1 a mark use. In fact, in their prior correspondence with
2 counsel that concluded on May 5 that they represented that they
3 knew they had to use the marks only in a descriptive sense and
4 then went forward with the emails in the first tab. We can't
5 trust them to do that.

6 So the strictest and I think most descriptive
7 injunction that could be provided would be the one that we
8 provided in the order to show cause, and that might also
9 include a disclaimer if they were to use the terms New York
10 Pride. Administratively, the simplest solution might be for
11 the defendants to submit, in the short time that they have,
12 revised advertising and promotions. That way, within a very
13 short time period, Heritage of Pride could say whether they
14 believe it's objectionable or not, and then maybe we could seek
15 relief through the Court or some sort of judgment.

16 THE COURT: No, you don't get it. This is not going
17 to happen. Pride Week starts Sunday. This so going to happen
18 tomorrow if it's going happen. If you're going to get an
19 injunction, it's going to be entered tomorrow and will be clear
20 on its face.

21 Do you want them to have to drop the email name? Do
22 you want them to have to change their domain name? Do you want
23 them to have to plaster all of their advertising with a big
24 sign that says not affiliated with or sponsored by NYC Pride,
25 Heritage of Pride? What do you want as a remedy in the next --

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1 that will work for you for the next six or seven days?

2 MR. HILL: We would welcome that solution.

3 THE COURT: I'm trying to figure out what solution you
4 think would be effective.

5 MR. HILL: Let's start with the first steps, which I
6 think would apply to any injunction that this Court would
7 grant, which would be they should immediately remove or take
8 down the references that have been cited here in the filings
9 and briefs and anything similar to those. And then in short
10 order, they would be allowed to put up new promotional efforts,
11 and those would be things that do not invoke the sponsorship
12 relationship.

13 And we could provide suggested things about what the
14 suggested distance might be between the named events and any
15 descriptive use of New York City Pride. We provided in
16 Exhibit X to the affidavit of Chris Frederick showing a bunch
17 of uses that Heritage of Pride does not object to showing that
18 people can in fact advertise their events without invoking the
19 trademark sense of NYC Pride.

20 THE COURT: I have got to tell you, I'm not interested
21 in seeing you next week. I have other things to do. I have
22 cases to try, I have fish to fry, I have opinions to write. So
23 I don't wish to be the ongoing arbiter on a daily basis of
24 whether these people are -- their advertisements meet some
25 criterion of we're not going overboard, we're really good guys,

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1 we want to show the world that we can use a descriptive mark.
2 I want an injunction that I can enter that is clear in its
3 terms, that requires them either to cease doing stated things
4 or to do stated things that will correct the misimpression that
5 you believe they have given to the marketplace.

6 MR. HILL: So the clearest direction then, I would
7 return to the preliminary injunction that we offered in the
8 order to show cause. So immediately they should take down
9 anything with the pieces we identified and anything similar,
10 and they also be precluded from using the phrases together NYC
11 Pride, New York Pride and similar things. Where they need to
12 use things that might be similar to NYC Pride or New York Pride
13 in a purely descriptive sense, they should include a disclaimer
14 saying -- they are of sufficient size and prominence to say
15 they're not affiliated with the official NYC Pride events.

16 Just to be clear, this request is not -- this doesn't
17 exemplify the belief that Heritage of Pride has with other
18 people's usage. People can still use the terms NYC Pride or
19 New York City or Pride to describe their events. But because
20 of the defendant's conduct here, they shouldn't be given the
21 benefit of the doubt, and with the short time period, a
22 stricter preliminary injunction order would be justified such
23 that they shouldn't be allowed to use those words together, and
24 then would have to include a disclaimer.

25 We could also modify the preliminary injunction later

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1 on if necessary to allow them --

2 THE COURT: Later on there's going to be a permanent
3 injunction hearing, and later on there's going to be a trial on
4 the merits. That's later on. I'm only concerned about next
5 week.

6 MR. HILL: So we would stand on that preliminary
7 injunction order, but a more lenient formulation that might sit
8 better with principles of free speech and the ability for
9 people, the use descriptive marks would be something that
10 allows them to -- or that would be more specific, but we don't
11 have the time now to specify the relative sizes of fonts and
12 locations of the page and that kind of specificity. So I think
13 that that kind of injunction might be something that we would
14 save for a later date, if at all. So we still stand on the
15 preliminary injunction directions that we have in the order to
16 show cause, modified as the Court sees fit.

17 THE COURT: All right. Let me hear from your
18 opponent.

19 MR. HILL: Thank you, your Honor.

20 THE COURT: You will never convince me that your
21 client has not behaved badly here. It's not possible.

22 MR. COLEMAN: All right, your Honor. I will, however,
23 convince that you there's nothing that they have done that
24 entitles the plaintiff to the relief they sought.

25 THE COURT: See this?

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1 MR. COLEMAN: No, I don't.

2 THE COURT: You don't see this?

3 MR. COLEMAN: No, your Honor.

4 THE COURT: This is not your client's emails or
5 advertising?

6 MR. COLEMAN: I don't know, your Honor. To prepare
7 for this hearing I only considered the matters that are of
8 record.

9 THE COURT: Excuse me, this is a hearing. At hearings
10 you can offer evidence, you can put matters in the record, you
11 can offer witnesses on the witness stand.

12 MR. COLEMAN: Your Honor, no evidence was offered. We
13 have a submission by counsel, unauthenticated, and his
14 testimony from the well.

15 THE COURT: Fine. I am prepared to look at these. If
16 your client wants to get on the stand and swear -- because your
17 client is way behind the eight ball on this one where I'm
18 concerned. So if your client wants to get on the stand and
19 swear to me that these are not actual photographs of actual
20 things that appear on their web sites and in emails they sent
21 out, I'm prepared to listen. Failing that --

22 MR. COLEMAN: To be fair, your Honor, because the
23 Court considered the characterization of this evidence from
24 counsel, perhaps the Court will at least consider my
25 characterization of the evidence as incomplete. The date stamp

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1 on at least one of these is yesterday's date. I would have
2 been quite pleased to receive notice from my adversaries of
3 their intention to offer additional evidence even at 3 o'clock
4 in the morning. I'm an attorney, I'm a litigator, I'm prepared
5 to deal with that. At 8 o'clock --

6 THE COURT: I am so indifferent to this that you can
7 go on for an hour and waste all of your time.

8 MR. COLEMAN: It matters, your Honor, because --

9 THE COURT: Doesn't matter to me.

10 MR. COLEMAN: Well, your Honor, with all due respect,
11 Exhibit 3 is plucked from -- we stood here and listened to the
12 plaintiff explain manner of use, but Exhibit 3 doesn't
13 demonstrate manner of use, it demonstrates selected clips. We
14 don't know what the entire screen looked like. My client
15 represented to me it would be impossible -- it would be
16 impossible -- under trademark, you do not look at a trademark
17 out of context.

18 THE COURT: You have had this since the order to show
19 cause was signed. It's exactly the same. Don't tell me you're
20 looking at something that you haven't seen before. In
21 Exhibit A to the affidavit of -- or Exhibit A to the complaint
22 and the affidavit of Mr. Frederick verifying the complaint,
23 there is exactly the same screen shot. So don't tell me --
24 don't come in here and try to convince me that they have done
25 something terrible by representing to me that the same screen

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1 shot was shown yesterday.

2 If your client, which was under no injunction, no
3 temporary restraining order, wants to get on the stand and say
4 this isn't a screen shot from yesterday, he is welcome to do
5 so. But don't tell me that this very picture of this logo
6 hasn't been before me for a week, because it has been.

7 Now let's move on to something that is actually
8 relevant instead of your whining about not having notice.

9 MR. COLEMAN: Your Honor, I will, at the outset, offer
10 by way of compromise that our client will immediately cease the
11 use of this logo, which arguably is --

12 THE COURT: Arguably? It's virtually identical to
13 their logo.

14 MR. COLEMAN: It's virtually identical to a logo which
15 is not demonstrated to have any secondary meaning.

16 THE COURT: That's for me to decide.

17 MR. COLEMAN: And it's for me to assert, your Honor.
18 And we submit, as we did in our opposition --

19 THE COURT: And even if it didn't have secondary
20 meaning, under the unfair competition law of the State of New
21 York and the New York general business law, using their logo or
22 something confusingly similar and virtually identical to their
23 logo which has demonstrated actual confusion is enjoined
24 without regard to whether it has any secondary meaning or not.
25 New York unfair competition law does not require a

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1 demonstration of secondary meaning.

2 MR. COLEMAN: That would be true, but they're seeking
3 a preliminary injunction and have not proved harm. And I would
4 point out that whatever negotiations there were between the
5 parties to work out a deal -- and I'm not intimately familiar
6 with the facts, and they're not of record, I think counsel for
7 plaintiff doesn't necessarily know the facts either.

8 One thing that was not apparent -- one thing that
9 doesn't come across in any of the plaintiff's submissions was a
10 concern about quality control, that if -- unlike all the
11 trademark infringement cases that are cited in their briefs,
12 the concern inevitably has been if the public thinks that this
13 is genuine X -- your Honor, the Superbowl -- everyone on earth
14 knows that this is the Superbowl of the gay rights movement.
15 Everybody knows what the Superbowl is, but God forbid you try
16 to run a Superbowl party in your bar, in your restaurant, they
17 will come down on you like white on rice. It's impossible.
18 It's an extreme example.

19 THE COURT: It's an extreme example because you know
20 the NFL is not down on every bar in New York that has a
21 Superbowl party. You can't walk down Ninth Avenue without
22 tripping over signs saying watch the Superbowl here, Superbowl
23 party.

24 MR. HILL: But when the NFL comes into a court like
25 this to decide that they're a bad actor, they submit an

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1 affidavit as big as a football demonstrating the ones they did
2 stop. That is not here.

3 THE COURT: That's true. That's a mistake on their
4 part.

5 MR. COLEMAN: My only point there is irreparable harm,
6 because Second Circuit has made it clear that the mere
7 existence of a trademark right prima facie that has been shown
8 on a preliminary basis to have infringed no longer leads to
9 presumption of irreparable harm. I ask, and I don't believe
10 the defendants in their reply and the plaintiff in his reply
11 has answered: What is the irreparable harm? We're merely
12 saying people might think it's an official event. What's an
13 official event? This is not an official event claim of action,
14 it's a trademark cause of action or unfair competition.

15 If you're going to go into unfair competition under
16 New York law or common law or under general business
17 obligations law, then you need to show the harm. They need to
18 show how consumers are being misled. The consumers are
19 looking at these and they're seeing perhaps a familiar logo,
20 which we submit is at least a fact question not amenable to
21 determination on this record, we argue that consumers think is
22 part of the NYC Pride community. Just like on St. Patrick's
23 Day, everyone has a leprechaun. There are symbols that go with
24 certain events. And what plaintiffs have done is to fail to
25 meet their burden to show a likelihood of success in convincing

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1 the Court.

2 And by the way, they had plenty of time to put their
3 evidence together. We had three days. They have failed to
4 demonstrate not the red herring that the consumer thinks that
5 it has to do with this particular plaintiff, but that the
6 consumer thinks that there is one particular organization that
7 doles out the right to use NYC Pride or New York Pride, which
8 is in fact not the case. There is arguably a perception out
9 there that there is an official sponsorship concept, and if you
10 want get into the --

11 THE COURT: Indeed your client has participated in
12 that in the past. Your client has entered into agreements with
13 the plaintiff --

14 MR. COLEMAN: Absolutely.

15 THE COURT: -- agreeing to be a promotional partner --

16 MR. COLEMAN: That's right.

17 THE COURT: -- accepting that there is some kind of
18 official sponsorship.

19 MR. COLEMAN: Right. But as the Court noted, there is
20 nothing in their -- either about NYC Pride as a trademark, nor
21 do these agreements purport to be licenses. And if they were
22 licenses, there are no quality control -- there are no -- at no
23 point has plaintiff enunciated what would be the consumer harm
24 if the consumer went to one of these events and got there and
25 it was a dance party but it wasn't an official dance party,

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1 what would be the harm?

2 THE COURT: Look, I will say this, I am not part of
3 LGBT community, I therefore do not quite understand what it is
4 that so incensed someone in the community about your client's
5 concert, artist, advertising, what have you, that caused them
6 to decide that they didn't want you to be a promotional partner
7 this year.

8 MR. COLEMAN: I think I do know, and I think it was
9 described by plaintiff's counsel. It's called competition.
10 What he said differs from all the past uses is that this year
11 my clients have offered a slate of events. That's encroaching
12 on his territory, so all the sudden the trademark becomes
13 important to him because no one else is allowed to have a slate
14 of events until they call it the other thing.

15 But because the event is NYC Pride, anyone who puts on
16 a slate of events, anyone who makes the investment to put on a
17 slate of events is entitled to call it the NYC Pride slate of
18 events. Should they use this logo which looks a lot like the
19 logo which is the, quote, official logo? I don't know whether
20 they should or shouldn't, but my client is willing to walk out
21 of this courtroom today with a commitment that they will stop
22 doing so, just because it's obviously a problem. It's
23 obviously a problem and it's not necessary for my client to
24 continue to do business. That's what it is. It was as much as
25 admitted by the plaintiff. It's one thing for one person to

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1 have a one-off dance party, but if you're going to offer four
2 different events, then maybe they'll have to do theirs better,
3 maybe they will have to do it better, faster, cheaper. The
4 Lanham Act is not about protecting parties from competition.

5 THE COURT: That is absolutely true. But counsel for
6 the plaintiff has admitted he's not trying to stop your client
7 from running a series of events, what he's trying to do is stop
8 your clients from running a series of events under his logo
9 with the suggestion that you are part of his client's series of
10 events.

11 Your client's name is Matinee, right?

12 MR. COLEMAN: Yes.

13 THE COURT: Funny how teeny weeny your client's name
14 is in all of these advertisements and screen shots. I would
15 think that your client would want to be known by its name, but
16 apparently it wants to be known by some other name.

17 MR. COLEMAN: Actually, your Honor, I would submit
18 what it wants to be known as is as promoters of sell-out
19 events, and the way they sell out events is associating them
20 with the overall event that is taking place in the city, which
21 is NYC Pride. It is entirely amenable to speculation, which is
22 what we're doing here.

23 THE COURT: You're sure the overall event is NYC Pride
24 as opposed to Pride Week? The overall event, which is to say
25 all of the events taken together in a week to celebrate the

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1 LGBT community and its coming out of the closet and becoming
2 part of the mainstream of society, which is why the word
3 "pride" was used instead of "liberation" at a very early point
4 in its history.

5 So isn't it Pride Week that is the overall event? And
6 Heritage of Pride runs a number of subevents during the course
7 of the week, including the biggest one, which is the parade,
8 which is really what it's all about. And those events it runs
9 under a logo using a name NYC Pride.

10 MR. COLEMAN: That's all true, but what the plaintiff
11 has failed to demonstrate is that consumers care who is running
12 the event. Even if this were under New York State law, the
13 non-secondary -- if that is what we're going to resort to, to
14 the non-secondary meaning claim of misappropriation, there
15 still has to be something to be appropriated. And we submit
16 that NYC Pride has become, and it was far before the plaintiff
17 rebranded itself -- and I think that's very telling, what
18 happened was the event grew, the event became known, the events
19 that they were so damn good at running and promoting and doing
20 everything, the good stuff that plaintiff had done took on a
21 life of its own, and plaintiff decided he was going to
22 manage -- he was going to be in charge of the phrase and he
23 would also be in charge of the revenue. Nothing was going to
24 happen unless it came through him and was licensed through his
25 organization, not because of a quality issue, not because

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1 consumers might get there and it turns out that Guy Lombardo is
2 playing instead of whatever is in this year, and therefore
3 they're going to be disappointed because only Heritage knows
4 how to put on a great gay day dance party in New York City, but
5 because the toll has to be paid. Not even New York
6 misappropriation law requires that or endorses that. New York
7 misappropriation law goes back to the consumer protection and
8 they have not enunciated a public interest here.

9 Finally, if I may, your Honor, there was some
10 suggestion in both the written submissions and in the oral
11 argument that the ads submitted by the defendants, which all
12 come from one magazine, are single source. They're not a
13 single source. The magazine runs advertising for multiple
14 sources. And I have not actually heard, except with respect to
15 the idea that there's a slate of events, which I don't see why
16 that's a material distinction, I'm looking at Exhibit H, Cruise
17 into NY Pride. That's commercial. They're not saying -- we're
18 the New York Pride Cruise, we're not saying this is the New
19 York Pride Dance, this is rather a series of events during New
20 York Pride.

21 Again, my clients are willing to concede, not on the
22 issues and not for purposes of liability, but given we're
23 trying to craft a solution here, to back off on the use of this
24 look-alike logo. But beyond that, we believe there have been
25 some misrepresentations, I think -- I assume they were

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1 errors -- about the nature of our clients' domain name, which
2 was not as described on the same email address that's been used
3 for several years without any objection.

4 The only thing that has changed is this year our
5 clients refused to pay the toll or were not permitted to pay
6 the toll for whatever internal or bilateral issues may have
7 come among them. I'm glad the Court has the same interest in
8 it or lack thereof as the attorneys I'm sure do as well,
9 focusing on the legal issues. Whatever it was, that is not a
10 good enough reason to demand a toll. And with all due respect,
11 we submit that's all plaintiff is really seeking to do here.

12 THE COURT: Okay. So let's talk about irreparable
13 injury, which can't be presumed.

14 MR. HILL: I believe these arguments are addressed in
15 our response brief and our opening brief as well, but to
16 highlight them here, we recognize there is no presumption of
17 irreparable harm for trademark law, you have to prove it. This
18 New York Second Circuit has recognized that loss of good will
19 is a recognizable harm.

20 THE COURT: No question it's a recognizable harm.
21 What's the proof that you're losing good will as a result of
22 this?

23 MR. HILL: I think among the strongest evidence would
24 be this actual confusion evidence that's in the complaint,
25 talking about Azealia Banks. Heritage of Pride, Inc. is an

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1 organization that represents the entire LGBT community, and to
2 have a poor selection like that of someone --

3 THE COURT: Forgive me, I don't know who Azealia Banks
4 is.

5 MR. HILL: Your Honor, we provided in Exhibit L to the
6 complaint some background information about this debate.
7 Azealia Banks, to summarize those articles, is an artist in New
8 York who provided some -- or who made some homophobic
9 statements against a prominent blogger, Perez Hilton. She
10 called him, if I could use the words, a messy faggot, and was
11 unapologetic afterward, and created an uproar, in which the
12 exhibits that we included in Exhibit L, the response from GLAD,
13 which is another gay rights organization, saying they shouldn't
14 have used -- or that Azealia Banks was wrong to make these
15 comments.

16 In the complaint we have -- we show there was an
17 association between the defendant's events and Heritage of
18 Pride events in a online blog called Brooklyn Vegan, then
19 tweets from people who aware of NYC Pride and know the history
20 of NYC Pride and know the headliners from previous years, and
21 they were upset about the choice of Azealia Banks.

22 THE COURT: This sounds like what I read in this
23 morning's Times about Metropolitan Opera canceling the
24 simulcast of Death of Klinghoffer. It's the same story.

25 MR. HILL: I only heard the broad strokes of that.

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1 THE COURT: It's the same thing. You have a community
2 of people in some organizations, some Jewish organizations, not
3 all Jewish people, but who are offended by the opera Death of
4 Klinghoffer. And the Anti-Defamation League prevailed upon the
5 Met to cancel the whole opera. They didn't cancel the whole
6 opera, but they're not going HD, which according at that Fox
7 and this morning's newspaper, at least it will stop the
8 dissemination of this purportedly anti-Semitic work more
9 broadly than the walls of the Metropolitan Opera House and out
10 into the rest of the world. I guarantee you that is going to
11 lead to weeks of blogging about the pros and the cons and the
12 merits. Somebody has already probably threatened to not give
13 money and someone will withdraw a contribution because of this,
14 and it will go on and on and on and on.

15 This sounds no different to me. There's a segment of
16 the LGBT community who finds this particular performer to be
17 offensive as a result of some incident. Okay. And that
18 segment of people in that segment of the LGBT community, which
19 is a huge community and broadly representative of lots of
20 different people with lots of different interests, are blogging
21 about the fact that this performer is a bad choice of performer
22 to perform during Pride Week, and that is it. You have no
23 other evidence of any sort of harm other than this. I call
24 this a politically correct controversy over somebody that is of
25 interest to some segment of the community that undoubtedly has

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1 as many supporters as distracters.

2 MR. HILL: You've articulated something that is not
3 just an effect on the consumers themselves, but also about the
4 sponsors who associate themselves, who paid for the privilege
5 of calling themselves associated with NYC Pride, companies like
6 Coke, Piels, Wal-Mart even, companies we included in the
7 exhibits to the complaint as well, and they, too, like to
8 associate themselves --

9 THE COURT: Have they complained? Have they
10 threatened to withdraw their sponsorship? Do they know who
11 Azealia Banks is?

12 MR. HILL: Your Honor, I can't speak to what the
13 sponsors --

14 THE COURT: There's no indication that your sponsors
15 are going to walk. There's a controversy out there in the
16 world about this person who made an offensive statement. I
17 find the statement offensive. But okay, the Rolling Stones
18 have made very many offensive statements in the course of their
19 40 years on stage. I would be hard pressed to conclude that
20 because some blogger in Brooklyn took great offense at a
21 statement that the Rolling Stones made that it would cause
22 irreparable injury to your organization if the Rolling Stones
23 were to be part and parcel of the defendants' concert series
24 next week.

25 MR. HILL: Your Honor, two points in response to that,

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1 at least. Brooklyn Vegan is not just a Brooklyn-oriented
2 magazine or web blog, it has a wide reach around the country,
3 so it's not a simple misunderstanding.

4 But the point of a preliminary injunction is to
5 prevent that harm from happening. So the fact that sponsors
6 haven't walked away is good, because the preliminary injunction
7 can be effective to prevent them from doing that, from Heritage
8 having to suffer that harm before they could get relief, which
9 is irreparable.

10 THE COURT: But there has to be some evidence that
11 you're actually going to suffer harm.

12 MR. HILL: Your Honor, in the exhibits that we have
13 collected for articles about NYC Pride in Exhibit B to the
14 complaint, we have articles from -- talking about companies
15 like Time Warner Cable and Coca-Cola who associate themselves
16 with NYC Pride because it is a good -- it shows that they are a
17 company that cares about the LGBT population, that cares about
18 the things that NYC Pride stands for and promotes. And so the
19 association between NYC Pride and Azealia Banks and the poor
20 choice that was made to vet that performer indicates that that
21 would diminish the value to the sponsors in seeking the
22 approval or affiliation with NYC Pride.

23 Now there are other harms that we can talk about, I
24 think the actual confusion is strong evidence of it as well,
25 but people who are coming, the millions -- the literal millions

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1 of people who are coming --

2 THE COURT: Coming to town next week.

3 MR. HILL: -- to attend the official NYC Pride events
4 by being confused will suffer several harms. Among them are
5 the fact that the defendants' events cater solely to the gay
6 male population. Their entire slate of events is for the gay
7 male population, whereas the NYC Pride events celebrate all the
8 diversity of the LGBT community, and they have different
9 parties that celebrate lesbians and transgender people.

10 THE COURT: They have different events. Some of
11 events are for somebody, and some events are for subsets of the
12 community. So it's not like your events -- like you don't have
13 any events that cater principally to gay males.

14 MR. HILL: That's right.

15 THE COURT: And so they have events that cater
16 principally to gay males. You do the same thing. They don't
17 have -- apparently they don't have other events that cater to
18 transsexuals, or they don't have other events that cater to
19 lesbians, or they don't have other events that cater to bi.
20 But you have male events, they have male events. So male
21 events is obviously not something that is offensive to you.

22 MR. HILL: No, your Honor, but what the harm is,
23 because opposing counsel talked about the competing nature of
24 the events, someone who is confused and goes to the defendant's
25 events instead of Heritage of Pride's is not only going to not

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1 know who the source is, but they are also going to get a
2 substantially narrower experience than they have come to expect
3 from buying a multi-day pass to Heritage of Pride events. They
4 expect a LGBT community, but instead they're only going to get
5 for-profit gay male targeted dance parties. And that will be a
6 thing to go to the consumer protection aspect of trademark
7 law, that they have an expectation of what they're going to get
8 when they arrive to go to an NYC Pride event and the harm that
9 comes from that confusion.

10 THE COURT: I have to say, that's interesting, but you
11 haven't put a single solitary witness on the stand or submitted
12 an affidavit from a witness to indicate that, to prove that.
13 You assert that, but where is the proof?

14 Look, once upon a time I was a litigator, and if
15 somebody had plopped this case into my lap, there are all kinds
16 of interesting things that I could have done with it. I could
17 have had a historian of the gay rights movement up here to
18 explain the genesis of the name NYC Pride and how "pride" came
19 to be and the association between those two things, great
20 evidence of secondary of meaning. I would have had a witness
21 who would have testified based on, I don't know, market surveys
22 or whatever about expectations of what is supposed to happen,
23 what people are expecting when they go to Heritage of Pride
24 events during Pride Week. You can say they're expecting
25 something, but that's not evidence.

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1 MR. HILL: Your Honor, the documents that we have in
2 the response show that of the Facebook fans that NYC Pride has
3 on their official NYC Pride web page, the split is 52 percent
4 female to approximately 47 percent male. So it's a primarily
5 female demographic on Facebook. This is the preliminary
6 injunction, the facts are still being developed, but the fact
7 that the defendants put on --

8 THE COURT: But you haven't done much to develop the
9 facts taken in discovery in the last ten days. You have
10 certainly known this has been going on for a couple of months.

11 Yes, it's a preliminary injunction. A preliminary
12 injunction is an extraordinarily remedy. It's an extraordinary
13 remedy. There is a -- it is not something that you get with a
14 de minimis quantum of proof. You have to establish that you
15 are likely to succeed on the merits and that you are likely to
16 suffer irreparable injury, which once upon a time was easy in a
17 trademark case, but now it's not. Now it's become hard.

18 MR. HILL: Your Honor, a couple of points in response
19 to that. First is that Heritage of Pride is an a nonprofit
20 organization. We are pro bono counsel. So we don't have the
21 means of Coca-Cola or the Superbowl or the NFL, as the other
22 side --

23 THE COURT: I'm not holding you to expending the kind
24 of money that the NFL expends, although my experience, and I
25 have some personally with large firms and pro bono cases, is

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1 that they throw a tremendous amount of resources into them.

2 But I would think if this was an issue of importance
3 in the LGBT community, if keeping Heritage of Pride pure and
4 untainted were a matter of importance to the LGBT community,
5 you would have people who would be coming forward and wanting
6 to help you. You would have people who would want to be giving
7 evidence. I cannot say -- I cannot hold to you a lesser
8 standard of proof because you are a 501(c)(3). I can't do
9 that. There's not a separate set of rules for 501(c)(3)s for
10 getting a preliminary injunction.

11 MR. HILL: We believe the evidence we selected is very
12 strong in showing that there is likely to be confusion, and
13 that the harms that result from that are the kinds of harms
14 that this Court and the Second Circuit have recognized. I can
15 represent to the Court that we would have the ability to put
16 such evidence forward if that would be necessary, but the
17 nature of this hearing was not totally clear to us going
18 forward that we could put on evidence here.

19 THE COURT: I am horrified. I am mystified. Did you
20 pass the bar exam? A hearing on an application for a
21 preliminary injunction requires you to put in the proof that is
22 needed in order for you to obtain relief.

23 First of all, had you called my chambers and asked or
24 sent a letter, you would have gotten back a snappy little
25 response from me that would have said if you have evidence, you

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1 better bring it to the hearing, because if you don't bring it
2 to the hearing, it ain't going to be proved. But beyond that,
3 I just find it incomprehensible that any lawyer in New York,
4 but certainly at a firm as eminent and extraordinary as
5 Kirkland & Ellis, would not understand that at a preliminary
6 injunction hearing you lay bear your proof, you prove your
7 case.

8 MR. HILL: Your Honor, if I may, we did call chambers
9 and found that we only had 30 minutes scheduled here.

10 THE COURT: I don't know who said that. Who said
11 that? Did someone in my chambers say that? Absolutely the
12 most ridiculous thing I ever heard. This is a preliminary
13 injunction hearing.

14 Zach, did somebody tell them that?

15 LAW CLERK: What was the --

16 THE COURT: Diana, did you tell them they had 30
17 minutes? I set aside the whole day.

18 LAW CLERK: It was on the calendar for 30 minutes.
19 They asked about if they could bring witnesses and
20 demonstratives, I said yes. I said if you want to go beyond
21 30, I'm sure the judge would be okay with that, but we don't
22 have all the time in the world.

23 THE COURT: I'm sorry, my bad. We screwed up. I'm
24 prepared to sit here -- I will sit here on the bench, you go
25 back to the office, you get your evidence, you bring it in.

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1 We'll keep going this afternoon. I'm quite serious. Because
2 we screwed up. We screwed up. This is a preliminary
3 injunction hearing. I obviously need to tell the people who
4 work for me that a preliminary injunction hearing involves
5 laying bear your proof, as Jimmy O'Neill, my senior law clerk
6 set aside the entire day for this, but we screwed up. We told
7 you the wrong thing. I will take responsibility for that, and
8 I will give you an opportunity to put in your evidence.

9 MR. HILL: We appreciate that. I don't mean to be
10 throwing anyone under the bus here. We tried to construct our
11 presentation of evidence to fit within the time constraints we
12 knew, but we have a large amount evidence in our briefs.

13 THE COURT: You're going to rely on the record?

14 MR. HILL: I would have to confer with my client.

15 THE COURT: Because I'm prepared -- I will give you a
16 day, I will give you tomorrow, I will cancel everything else
17 because we screwed up.

18 MR. HILL: If I may, your Honor, confer?

19 THE COURT: Sure.

20 (Pause)

21 MR. HILL: Your Honor, we're willing to -- if you're
22 able to hear us tomorrow, we could put forth some more evidence
23 if you were available. We also would like to reach out to
24 opposing counsel to discuss the matter further in the meantime.
25 Is there availability tomorrow? The nature of this, it's very

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1 time compressed, so we would like to still be able to maintain
2 the schedule that we have so far to the extent we're able.

3 THE COURT: I don't understand what that means, the
4 schedule we have so far to the extent we're able.

5 MR. HILL: To be able to get back in court to be able
6 to get relief with sufficient time.

7 THE COURT: I'm trying to accommodate that. I really
8 am. But I admit that my chambers made a terrible, terrible
9 mistake and misled you, and I apologize for that. So I have to
10 give you more time. So if you want to come in at 9:30 tomorrow
11 morning, be here at 9:30 tomorrow morning. I will kick
12 everything else off the calendar.

13 MR. HILL: Your Honor, we would accept that, thank
14 you.

15 Are there any further questions that we can address
16 today?

17 THE COURT: Well, look, you should be able to figure
18 out from the tenor of my questions what the issues are that are
19 of concern to me, and so should they. I think that there is --
20 their expropriation -- and I'm not using that word
21 inadvisably -- their expropriation of the logo for this year's
22 events is outrageous and despicable. It violates the common
23 law of the State of New York. It violates the general business
24 law of the State of New York. Whether it's a trademark
25 violation or not presents a much closer question, but it is

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1 certainly problematic and suggestive of an association under
2 the Lanham Act, and I have real issues with it. I have real
3 issues with it.

4 And I came in here inclined under New York law and the
5 common law to issue some sort of injunction. I'm not sure
6 quite what sort of injunction. So I have concerns about
7 likelihood of success on the secondary meaning issue. I have
8 concerns about showing of irreparable harm. And that's partly
9 my lack of familiarity with the matters that you placed before
10 me. This is not exactly like Coca-Cola where people are
11 threatening a boycott.

12 Anyway, I am going to get to work, but I will -- we
13 have already come a long way, but I will see you in the morning
14 with my apologies.

15 MR. HILL: Thank you, your Honor.

16 MR. COLEMAN: Your Honor, could we be heard briefly on
17 this?

18 THE COURT: Sure. It sounds like they want to talk to
19 you.

20 MR. COLEMAN: And we'll talk.

21 THE COURT: That's a good idea.

22 MR. COLEMAN: And I will reiterate that we have
23 conceded the logo issue, so perhaps if that's where the Court
24 is inclined, maybe that will do the job.

25 Because there was a lot of talk about this Azealia

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1 Banks business, one thing that is not in the record is any
2 suggestion that under the quality control standards exercised
3 by the plaintiff that would have never happened.

4 THE COURT: I'm sorry?

5 MR. COLEMAN: There's no evidence in the record that
6 there are specific quality control standards that would have
7 prevented a performer --

8 THE COURT: That would have prevented a controversial
9 performer within the LGBT community from performing at one of
10 their events?

11 MR. COLEMAN: Right.

12 THE COURT: I think that's not true. I think that's
13 not true. But okay.

14 MR. COLEMAN: Okay, your Honor.

15 THE COURT: I accept your assertion, but I think they
16 have -- Okay.

17 MR. COLEMAN: I would submit as well that it is not
18 for the plaintiff to define what is to be the politically
19 correct stance of --

20 THE COURT: That is a problem here. This is not a
21 consumer seeking to boycott Coca-Cola, this is a different
22 thing, and that's why when I listened to the argument. The
23 first thing that came into my mind was the Arts section of the
24 New York Times this very day with a dispute within a particular
25 community about the artistic versus the political merit of

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1 presenting a particular opera.

2 MR. COLEMAN: Your Honor, as to the issue of
3 additional evidence, the Court had made the invitation, but we
4 take exception to it. There has been ample opportunity to make
5 their case. My clients are not getting free legal services.

6 THE COURT: I don't disagree with you, and I am
7 prepared to listen to anything that your clients have to say or
8 anything your clients want to put in. Truly I am. In the
9 sense the question that was asked was a little silly, but I
10 walked right into it by saying you could have called my
11 chambers, only to find out they were misled.

12 MR. COLEMAN: Your Honor, on that issue, though, the
13 evidence that the Court has noted, the absence of, could have
14 been submitted by way of affidavit, and it wasn't.

15 THE COURT: I know that.

16 MR. COLEMAN: So I don't understand why --

17 THE COURT: I don't understand why it wasn't submitted
18 in response to your arguments, because I disagree with you that
19 you didn't make particular arguments.

20 MR. COLEMAN: My point then being when you make an ex
21 parte TRO application and fail, and then you go to court and
22 have two opportunities -- you have an, in addition to your
23 original moving papers, an opportunity for reply, and the Court
24 makes it crystal clear to you that you pretty much failed,
25 except maybe one issue with the logo --

