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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 19, 2014  
10 9:30 a.m.

11 Before:

12 HON. COLLEEN MCMAHON,  
District Judge

13 APPEARANCES

14 KIRKLAND & ELLIS  
15 Attorneys for Plaintiff  
16 BY: PHILLIP HILL  
CLAUDIA RAY

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: Hello everybody.

3 All right, have a seat. I have Mr. Resnicow's  
4 affidavit. It's not going to work. Sorry. It says in  
5 itty-bitty teeny weeny letters your client's name presents NYC  
6 Pride, in big letters. It's not going to work. That doesn't  
7 work for me.

8 I wanted to let you know that right off the bat. I  
9 have all of these other affidavits. I feel like I got into a  
10 family feud with Azealia Banks, who I know more about after I  
11 looked up her on the internet. I confess I needed to find out  
12 who she was, and I found out she apologized for what she said  
13 when she performed at LA Pride last week.

14 But I just can't help but think that I've gotten  
15 myself into one of these disputes. It's almost like there is a  
16 word that we all in this room know that we can't say that rap  
17 artists of another race say with great frequency about other  
18 people of their race, and that seems to be okay somehow  
19 culturally. I feel like I'm in the middle of the same thing.  
20 And it's a thing with which I am personally unfamiliar since I  
21 never heard of Azealia Banks until late last week.

22 Okay. Let me hear from the plaintiff and I will hear  
23 from the defendant, then I'm going to go finish an opinion.  
24 Basically what your people say, your sponsor people say is we  
25 don't want to get involved with anything controversial. That's

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1 basically what they say.

2 MR. HILL: Your Honor, I think the more fulsome  
3 explanation, the description of what they say is that they  
4 recognize there is value in NYC Pride as represented by  
5 Heritage that it has a certain reputation and standards that  
6 they have come to expect and that if NYC Pride --

7 THE COURT: They in fact use, in these carefully-  
8 worded, lawyer-drafted -- which is perfectly acceptable, I used  
9 to do it myself -- affidavits, NYC Pride to them means the  
10 events, not your organization, but the events that your  
11 organization sponsors during Pride Week.

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

13 THE COURT: That's what it sounds like to me.

14 MR. HILL: That's what they pay for when they become  
15 sponsors, they pay for the privilege of being called gold level  
16 sponsors, presenting sponsors, silver level sponsors and such,  
17 and that entitles them to be called official sponsors of NYC  
18 Pride.

19 THE COURT: First of all, clear up a fact for me. I  
20 know when the defendants first became a promotional partner was  
21 back in 2010. Did that continue in 2011, 2012, 2013? I can't  
22 really tell. There was this email that I think started all of  
23 this that came from your client to the defendants which  
24 basically said we got a better offer, the board would be  
25 foolish to turn it down, you can't be the Saturday night

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1 promotional partner. And that's 2014, and that suggests to me  
2 this was an ongoing relationship during that four-year period  
3 that preceded the sending of that email. Is that correct?  
4 They were, for the three intervening years, also a promotional  
5 partner?

6 MR. HILL: Your Honor, the relationship between  
7 Heritage of Pride and Mr. Resnicow and Matinee NYC continued I  
8 believe through June of 2011, then there was an on again, off  
9 again sort of relationship of cross promotions that went on,  
10 but it was not as official. I believe that the relationship  
11 that was signed in 2010 --

12 THE COURT: What does that mean, an on again, off  
13 again? I have to say that's something that is important to me,  
14 looking at the record. It was also very important in NYC Tri  
15 was the fact of the prior relationship, the fact that who the  
16 two organizations had some sort of affiliation and were happy  
17 to hold themselves out together to the public as walking hand  
18 in hand, and then that ended for whatever reason, at which  
19 point the offended organization, the dropped organization,  
20 began doing things to capitalize on the reputation of its  
21 former sponsoring organization. So that's why I am curious  
22 about what the tenor of the relationship was for that four-year  
23 period between these two entities.

24 MR. HILL: Your Honor, those facts are not fully  
25 developed and not in the record, but I'm happy to give the best

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1 understanding about that, which is there was an official  
2 relationship of cross promotion between Matinee NYC and  
3 Heritage that went through June of 2011, I believe, and then  
4 after that there was some continued implied relationships of  
5 cross promotion. And that's because Heritage of Pride is a  
6 very small organization with only two full-time staff members,  
7 so there's not a lot of official things going on. So they  
8 partnered with other people to help promote their events with  
9 other things, but it was also objected to going back to 2012  
10 from that email that you cited earlier.

11 THE COURT: What do you mean it was also objected to?

12 MR. HILL: The fact that the defendants in 2012 put  
13 forth an event called Matinee New York Pride 2012, that's in  
14 the record, that's one of the declarations from Jake Resnicow,  
15 that email was showing that there was also a dispute between  
16 the parties going back to 2012.

17 THE COURT: A dispute between the parties right off  
18 the bat, they didn't pay their sponsorship fee.

19 MR. HILL: That's right, your Honor. So there's been  
20 a course of dealing that shows they're not good partners for  
21 NYC Pride and for Heritage. The email about the conduct from  
22 2012 that Mr. Resnicow cites to is for categorically different  
23 conduct, but it's also still something that can be remedied  
24 through the court because it's still timely to bring a claim  
25 like that, but that's not what is at issue for the Court today.

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1           The infringements that we're citing are in Exhibit A,  
2           and those are the uses that are being complained about now,  
3           although we wouldn't represent that those are things that are  
4           off the table. But Heritage of Pride and NYC Pride have been  
5           engaged in trying to resolve this matter privately with  
6           Mr. Resnicow and the other defendants and it's been  
7           unsuccessful and ultimately escalated to the point where this  
8           lawsuit was necessary.

9           THE COURT: Okay.

10          MR. HILL: Your Honor, there's some other side issues  
11          that are in the declaration, but I won't tarry on them if you  
12          don't have any questions.

13          THE COURT: Go ahead.

14          MR. HILL: So I think the focus here for our side is  
15          really irreparable harm question, and I just would like to  
16          start by saying that to the extent that there is any questions  
17          on likelihood of success on the merits, we believe that we  
18          briefed the issues.

19          THE COURT: Let's deal with likelihood of success on  
20          showing irreparable harm. Because I have to say, that's the  
21          most troubling issue to me.

22          MR. HILL: Certainly, your Honor. And I will  
23          certainly address that, but I want to say the standard for  
24          preliminary injunction that the defendants put forth is the  
25          irreparable harm plus a substantial questions going to the

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1 merit, with the balance of hardships that tips suddenly in  
2 their favor. So for irreparable harm, which would be the  
3 fundamental question here, the evidence that was already  
4 contained in the pleadings and filings contain large amounts of  
5 evidence, plus in the scramble to get to the defendants --

6 THE COURT: Let's go through it. Tick, tick, tick,  
7 tick. If you were going to write the opinion, you would go  
8 tick, tick, tick, tick, tick, so what would you tick off?

9 MR. HILL: I think the first thing I would note is  
10 that although we had discussions about sponsors putting forth  
11 evidence for the Court, their need to do so didn't arise until  
12 yesterday, and we scrambled to get people to be able to sign  
13 declarations, and these are corporations. And many of them  
14 said they would like to help, and this is in the affidavit of  
15 Chris Frederick, but they wouldn't be able to get an approved  
16 statement. But we were able to get some, and I think that's  
17 suggestive of how much NYC Pride and Heritage of Pride and the  
18 events and their sponsorship means to those sponsors. So the  
19 very fact that they filed those affidavits is suggestive of  
20 what is at stake here in this litigation.

21 THE COURT: It certainly speaks to the good will that  
22 you have built up with your sponsors, that even on very short  
23 notice, several of them were willing to provide affidavits.

24 Now let's talk about the contents of the affidavits,  
25 because the fact of the affidavit doesn't show irreparable

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1 harm.

2 MR. HILL: That's right, your Honor. So the  
3 fundamental things here are for trading on good will and loss  
4 of control over the mark. And these are recognized harms, and  
5 the facts here support these claims. So the affidavits of the  
6 sponsors show what it means for them to be sponsoring NYC  
7 Pride, the standards they have come to expect. And even the  
8 fact that the mere perception in the marketplace that somebody  
9 is -- or that NYC Pride has deviated from the standards that  
10 they have come to know and expect would be something that they  
11 would have to have serious conversations about, and may even  
12 affect the ability to continue their sponsorship.

13 But another difficulty here is that the impressions  
14 that those sponsors get this year in less than two weeks now  
15 about the goings on of NYC Pride and how it's perceived by  
16 consumers will set up the expectations that they have for next  
17 year, because NYC Pride's primary events happen annually at the  
18 end of June, and that is where they have to make their  
19 impression on the consumers and the sponsors. So the  
20 impressions that they have at that point will determine the  
21 contributions that they make in the next year, the good will  
22 that they had with consumers over the next year, and also the  
23 amount of visibility of any efforts that they have with the  
24 LGBT community to repair that, because these are the most high  
25 profile events possibly in the world for the LGBT community.

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1           THE COURT: I understand that. That's why you get to  
2 have your events in the week of Stonewall and in Los Angeles  
3 they have to have it two weeks earlier. But is there some  
4 suggestion that the defendants put on like low quality events?

5           MR. HILL: With the trademark law, you don't have to  
6 have lower quality events but it has to be different quality  
7 events, so something other than what people have expected.

8           THE COURT: They're obviously not doing a family  
9 night, I get that, and you're doing a family night.

10          MR. HILL: They're also catering to a substantially  
11 narrower population.

12          THE COURT: Right, which you admitted yesterday, you  
13 do some events that are designed to cater to that population,  
14 too. It's not that you're dissing that population.

15          MR. HILL: Certainly not, and we wouldn't want that  
16 representation of all.

17          THE COURT: That's like the worst of all possible  
18 things.

19          MR. HILL: But when people buy weekend passes to get  
20 all access to NYC Pride's weekend slate of events, they expect  
21 events that cover the entirety of the LGBT population that  
22 celebrate those things.

23          Now if someone wanted to go an event that celebrates  
24 gay males, they're certainly entitled to do so, but when  
25 somebody buys an all-access weekend pass under the mistaken

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1 impression that they're buying from NYC Pride when in fact  
2 they're buying from the defendants, they get a different  
3 experience and a substantially narrower experience than they  
4 would otherwise expect.

5 And the perception of that event will then carry  
6 through to the next year, and the ability for Heritage of Pride  
7 to disabuse people of that notion is not as effective in  
8 remedying ex post because the amount of coverage of NYC Pride  
9 happens during June when they're actually running the events.  
10 And these things are not calculable, they're not susceptible to  
11 dollar figures that could be recompensed afterwards.

12 And the Chris Frederick declaration that he submitted  
13 yesterday also says that the sponsorship list is something that  
14 is very important to NYC Pride because it shows legitimacy both  
15 to other sponsors to the community abroad, it shows a range of  
16 acceptance to press and the public, and so it's much more than  
17 just mere dollars at stake when sponsorship is at stake.

18 And we also just can't know how sponsors are going to  
19 view these sorts of things. They may reduce their level of  
20 sponsorship. And we're not privy to those conversations. So  
21 the diminution of sponsorship amounts is something that we  
22 can't even really assess. And if they pull out completely,  
23 that's a harm that we can see in dollars, but it also has  
24 attendant non-monetary --

25 THE COURT: I get that. I understand.

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1           MR. HILL: I will move on then to loss of control in  
2 the marketplace. Again the sponsor declarations have said that  
3 what is valuable to them, and in fact two of the declarations  
4 are not of sponsors themselves but intermediaries to facilitate  
5 the relationship between corporate sponsorships and NYC Pride  
6 and Heritage of Pride. And so they are the ones who broker the  
7 relationship and they make the recommendations to sponsors to  
8 tell them who is a good choice to show your support for the  
9 LGBT community, how can you reach the most people?

10           And if those people think that it's a bad business  
11 decision or not as good of a business proposition or there's  
12 some question that a company might not want to be involved,  
13 then that alters the recommendations they make in private  
14 negotiations which can't be assessed by us. We don't see how  
15 that happens. So their impressions are very important as well.  
16 And the perception that they have that is acquired in the  
17 marketplace with consumers that then informs the decisions that  
18 the companies and the intermediaries use is also very important  
19 as well. So that is a loss of control in the marketplace that  
20 would be irreparable harm.

21           And they say there is value in the NYC Pride marks and  
22 the ability to actually control the marks. If NYC Pride was  
23 unable to say to sponsors that we have the right to call  
24 ourselves NYC Pride and you have the right to call yourself a  
25 sponsor of NYC Pride, but also had to say they couldn't stop

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1 anyone else from offering that same privilege, then the value  
2 proposition to people is not as great because there's not much  
3 scarcity. The ability to select the appropriate partners, the  
4 ability to get them to come and woo you for the ability to call  
5 themselves sponsors is something that is also a very important  
6 benefit of the rights that come with the trademark.

7 THE COURT: Okay.

8 MR. HILL: Now one other point that I wanted to make  
9 here, which is in this Court's decision in NYC Triathlon, it  
10 noted there was a consumer, one consumer who was actually  
11 confused and was actually a sophisticated consumer, and that  
12 was a letter.

13 Here we have multiple instances of actual confusion,  
14 and the difference between that case and this case that I think  
15 is relevant here is that the difference between the two people  
16 when they made the false connection in NYC Triathlon was the  
17 confusion in that case didn't lead to a negative view.

18 There was a possibility that there could be a negative  
19 view, but it didn't automatically lead to a negative perception  
20 of the company. Here there's evidence and that's cited in our  
21 verified complaint and cited in other parts of filing that the  
22 result of the confusion that we have evidence of and that we  
23 put forth results in a negative perception of NYC Pride, and is  
24 actually an affirmative thing that cuts at the good will that  
25 NYC Pride enjoys. So that makes it a more powerful case, at

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1 least in that respect.

2 Now next week literally millions of people will come  
3 to NYC Pride. They'll descend on the West Part of Manhattan  
4 to --

5 THE COURT: I think what you meant to say is literally  
6 millions of people will come to Pride Week --

7 MR. HILL: No, your Honor.

8 THE COURT: -- and they will attend events that are  
9 sponsored by NYC Pride, including the rally at Stonewall, the  
10 march, and a bunch of things that happen in between.

11 MR. HILL: Actually both of those statements are true.  
12 Millions of people will come to New York City to celebrate  
13 Pride Week and commemorate Stonewall. 2.375 million people,  
14 according to the sponsorship materials that were put in the  
15 declaration of Chris Frederick, show that the attendance for  
16 NYC Pride's events, for Heritage NYC Pride events, will be  
17 2.375 million. So those people will be coming to New York City  
18 specifically to attend NYC Pride events. That's the expected  
19 amount. And that is in the sponsorship materials. And those  
20 people are the ones who will ultimately be the arbiters of the  
21 perception that NYC Pride has for this year's NYC Pride events.  
22 Heritage only gets one shot each year to make an impression on  
23 consumers and sponsors.

24 THE COURT: But you do things other times during the  
25 year. I think the original gig with the defendants was for a

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1 New Year's Eve thing, right?

2 MR. HILL: Right. Heritage of Pride tried to expand  
3 its roster of events. There are things that occur throughout  
4 the year. But as your Honor mentioned yesterday, the march and  
5 the things that happen around the march are really the marquee  
6 events. It is exponentially larger and more visible and more  
7 widely attended and more widely reported about by third  
8 parties.

9 THE COURT: You get a lot of coverage.

10 MR. HILL: Those are the marquee, most important  
11 events, and anything else that happens throughout the year is  
12 substantially smaller.

13 Heritage Pride has fans on Facebook, has fans on  
14 Twitter, and they can be reached. But the focus of NYC Pride  
15 and the focus of their events is to celebrate events that  
16 happened 45 years ago in New York City the second to last  
17 Sunday in June. So this is the part where everything is the  
18 most visible and that's why this is the most important time,  
19 and this is why that conduct needs to be stopped before it  
20 causes damage that can't be calculated and can't be repaired.

21 THE COURT: Okay.

22 MR. HILL: If there are no further questions --

23 THE COURT: No, that's good. Thank you very much.

24 Now I will hear from Mr. Coleman.

25 MR. COLEMAN: Good morning, your Honor.

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1 THE COURT: Good morning.

2 MR. COLEMAN: A lot of speculation and a lot of  
3 connecting dots that aren't there from the supplemental  
4 materials. You have Mr. Frederick's declaration attaching a  
5 hearsay letter from a sponsor. We would say it would be a  
6 terrible thing if somebody -- if they were to benefit from an  
7 organization that was just throwing a party for the money. I  
8 don't know what relevance that has to this case, but I don't  
9 think it's admissible evidence. If they could get a  
10 declaration from that person subject -- first of all, I don't  
11 have to remind the Court, this was all delivered to us at six  
12 or after six last night. It wasn't filed a week ago.

13 THE COURT: Look, I hear you, and if I were inclined  
14 to be a stickler and really nasty, I would make a big point out  
15 of this. Frankly, I am sufficiently troubled by your client's  
16 behavior that I'm not going to make a big deal out of that.

17 MR. COLEMAN: Your Honor, I will address that whenever  
18 the Court feels she would like to do so. Brian Rossman's  
19 declaration says -- it's very significant, if NYC -- this is  
20 paragraph 6 in document number 23, if NYC Pride were to deviate  
21 from the standards that I know they employ, then it would be  
22 much more difficult for me to pitch sponsorship opportunities,  
23 et cetera, et cetera.

24 What are those standards? We haven't heard them yet.  
25 I think we all agreed that the Azealia singer issue is a wash,

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1 or if it's not, it certainly doesn't seem to --

2 THE COURT: It's a difficult for me to wrap my mind  
3 around.

4 MR. COLEMAN: Understood, your Honor. So if one of  
5 these declarations had said the standards they employ are A, B,  
6 C and D, and we depend on A, B, C and D because that's what our  
7 consumers are interested in, but these identical cookie cutter  
8 declarations look exactly like what you would expect someone to  
9 sign if they were told you don't really have to say anything,  
10 just help us out here, they don't add any content to the actual  
11 irreparable harm question. I understand that they're  
12 speculative, we understand that speculative harm can be the  
13 subject of preliminary relief, but it has still not been  
14 enunciated. There has been some discussion here --

15 THE COURT: There's been some discussion here about  
16 losing control of your mark.

17 MR. COLEMAN: That's right, your Honor. Is your Honor  
18 familiar with the press coverage of the gay pride parade?

19 THE COURT: Yes.

20 MR. COLEMAN: I would submit that it is very difficult  
21 to make a quality control argument based on what I think is  
22 widely understood to be a very wide open, far out, esoteric,  
23 eclectic event that is the essential event of the entire New  
24 York City Pride week.

25 THE COURT: It is, as I have referred to it elsewhere,

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1 an in-your-face declaration that we are out of the closet.

2 MR. COLEMAN: So it's hard to square that with a claim  
3 of loss of control over the mark when there -- it's not  
4 impossible, but in all the time that the plaintiff has had to  
5 prepare its papers and to supplement them, it has yet to show  
6 us a checklist, a licensee agreement, some user's guide,  
7 something that says as an official sponsor here is what you  
8 shall not do, here is what review we insist on, here's the  
9 level of quality that we -- nothing, nothing. We have the  
10 principal of the entity repeatedly swearing out affidavits or  
11 making declarations and they're silent on that topic.

12 So what does loss of control over the mark mean? It  
13 means loss of control over the ability to charge people to be  
14 official sponsors. That's not a trademark claim. That's just  
15 to get into the guide, to get onto the web site. That's fine,  
16 you can do that, you can make an organization, you can say  
17 we're official, but it doesn't make anyone else who uses the  
18 term NYC Pride or New York Pride a trademark infringer or an  
19 unfair competitor.

20 I wonder if it's possible for the Court to address  
21 specifically the concerns about what she has described as my  
22 client's behavior, because I believe I might be able to address  
23 them and I would like to at least try.

24 THE COURT: I think I made it abundantly clear, this  
25 is what the statement of facts at the beginning of my opinion

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1 will say, because it's written, it will say that these were  
2 people who had a pre-existing commercial relationship, that the  
3 commercial relationship was ended or interrupted by an email  
4 earlier this spring saying we can't use you as --

5 Do you want to listen to me to or talk the client?

6 MR. COLEMAN: I want to get facts from my client, your  
7 Honor.

8 THE COURT: Saying -- excuse me, you too, could have  
9 put in affidavits or put on oral testimony yesterday or prior  
10 to today. What is good for the goose is good for the gander.

11 MR. COLEMAN: I don't have the burden of proof.

12 THE COURT: You don't have the burden of proof. I  
13 told you they satisfied their burden of going forward.

14 Now let me tell you again what I glean from the record  
15 before me. Your client was disappointed to learn that it would  
16 not be able to be sponsor of one of the NYC Pride week events,  
17 and within days after learning that that decision was  
18 irrevocable, your client sent out a letter using what is  
19 actually their registered trademark, NYC Pride coming out of  
20 the C, the Y off the subway token, and their own letterhead  
21 coupled together equally large, which was a blatant, blatant  
22 act of unfair competition.

23 There was a protest. I gather there were discussions  
24 between the parties. Things seemed to have calmed down for a  
25 while, but the discussions, whatever they were, went nowhere.

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1 And suddenly, toward the end of May at least, your client began  
2 advertising and using promotional materials that included an  
3 absolutely confusingly similar logo to the 2014 NYC Pride  
4 official logo featured prominently in its advertisements, which  
5 could have had no purpose other than to suggest to the  
6 consumers that there was a connection between letter's events  
7 and your client. I consider that to be bad behavior.

8 MR. COLEMAN: Your Honor, I would submit that the  
9 record does not indicate an ongoing commercial relationship,  
10 and I'm prepared, contrary to every good trial practice, to  
11 offer my clients, either or both of them, to step on the  
12 witness stand and be questioned on that topic.

13 THE COURT: Come on, this is not a criminal case, this  
14 is not a case where the government has the entire burden of  
15 proof. They have met their burden of going forward. It's a  
16 civil case.

17 MR. COLEMAN: Your Honor --

18 THE COURT: Excuse me.

19 MR. COLEMAN: Sorry.

20 THE COURT: I once was a trial lawyer, too, and I was  
21 a pretty good one, and I knew how to win a case. And in a  
22 civil case I didn't sit silent when my opponent put on some  
23 pretty damning evidence and say well, they have the burden of  
24 proof. Guess what? I believe their evidence. Therefore, they  
25 satisfied their burden of proof unless you put something on.

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1 They have the ultimate burden of persuasion, but they have met  
2 their burden of going forward. If there's no other evidence in  
3 the record, that's the narrative I adopt.

4 MR. COLEMAN: Well, your Honor, two things. First of  
5 all, if there are no legal rights, then their behavior might be  
6 despicable, but it would not be actionable. And it is  
7 imminently clear there is no showing of harm, irreparable harm  
8 or otherwise, and no secondary meaning here, which we believe  
9 leaves the plaintiff with New York -- the New York unfair  
10 competition law.

11 Nothing changed since yesterday. There is no  
12 secondary meaning here. There is no irreparable harm. There's  
13 no meaning in the trademark. The entire concept of control  
14 over the mark is a red herring. There's no control over the  
15 mark exercised by the plaintiff.

16 There is no record, therefore there is no need to  
17 rebut the record. There is no record suggesting that there was  
18 an ongoing special relationship other than the testimony that  
19 was given from the well by my adversary two minutes ago.  
20 Nowhere in the record does it state there was an ongoing  
21 commercial relationship. On the contrary, there was a one-time  
22 previous --

23 THE COURT: If I have drawn an incorrect conclusion,  
24 then it is your job to correct me, and your testimony is no  
25 more persuasive to him than his is.

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1 MR. COLEMAN: Then I request to call my client.

2 THE COURT: Call your client. But don't tell me you  
3 have no burden, because you are the defendant. You're right,  
4 you do not have the ultimate burden of persuasion, but this is  
5 a civil case, not a criminal case.

6 MR. COLEMAN: Agreed, your Honor.

7 BRANDON VOSS,

8 called as a witness by the Defendants,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. COLEMAN:

12 THE COURT: You may inquire.

13 Q. Mr. Voss, I think the Court is well aware of your role in  
14 this case. You are obviously one of the defendants. Were  
15 there any -- was there an ongoing commercial relationship  
16 between the plaintiff in this case and any of the defendants at  
17 any time?

18 A. Well, there's two defendants, between -- I have never had a  
19 commercial relationship with --

20 Q. Try to speak up.

21 A. I never had a business relationship with Heritage of Pride  
22 until this year he reached out to me asking me -- he said he  
23 wanted to add a new slate of events. This is the first year  
24 doing a slate of events. He wanted the first time to do a  
25 Saturday night party. I have done Saturday night parties since

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Voss - direct

1 2009. I said great, let's do it. This is all phone call  
2 stuff, and that email, which is in the record, arrives to me  
3 saying I'm sorry, I opted to go with someone else.

4 Q. Can you repeat that?

5 A. He tells me I'm sorry, I got a better deal from somebody  
6 else, so I opted to go with somebody else.

7 THE COURT: Let me see if I understand this.

8 Will you sit down?

9 MR. MacMULL: Is it possible to turn up his  
10 microphone?

11 THE COURT: He needs to speak into it.

12 THE WITNESS: Sorry, I never been on a witness stand.

13 THE COURT: It's okay. It's terrible. I have done it  
14 twice.

15 Let me see if I understand what you're saying. You,  
16 Mr. Voss, have held a Saturday night party event during Pride  
17 Week for some years?

18 THE WITNESS: This what is I do for a living is throw  
19 events.

20 THE COURT: You're an event planner.

21 THE WITNESS: Correct.

22 THE COURT: Since 2009 you have done a Saturday night  
23 party on Pride Week?

24 THE WITNESS: Correct.

25 THE COURT: The plaintiff reached out to you sometime

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Voss - direct

1 earlier this year --

2 THE WITNESS: April.

3 THE COURT: -- and said we're interested in doing a  
4 Saturday night party for Pride Week.

5 THE WITNESS: Yes, I would like to add a slate of  
6 events to my -- so I could offer a weekend pass, which is why  
7 he so upset with us, because we also offer a weekend pass.  
8 This is the first time he wanted to offer a weekend pass. The  
9 call to me was let's do a weekend pass, great Chris, let's go  
10 do it together. That was the first professional interaction I  
11 ever had.

12 THE COURT: Okay.

13 THE WITNESS: My partner, however -- just so I can  
14 address the whole story, my partner, however, did one event  
15 with him in 2010, a New Year's Eve event. That's the only  
16 relationship he ever had with Mr. Frederick, and he, too, has  
17 done Pride parties since 2010, but we partner on certain  
18 events.

19 BY MR. COLEMAN:

20 Q. Mr. Voss, the one time that you were involved in an event  
21 with the plaintiff, were you given any guidelines or  
22 information as to how -- as to the quality or the nature or the  
23 standards for conducting that event?

24 A. Well, again, I have never been involved, me personally,  
25 with the plaintiff. My partner Jake has, but I can answer, I

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Voss - direct

1 know that.

2 Q. Can you answer based on first --

3 A. Yes, I know from firsthand knowledge there was no  
4 guidelines or standards.

5 Q. When you were approached about the event that you just  
6 testified he ended up not doing with you, was there any  
7 discussion of --

8 A. Yes -- no, there was not, but I will address this issue of  
9 me using the registered trademark. After we decided not to do  
10 the Saturday party, again via telephone call, he said there was  
11 this Robin concert, and said let's do the Robin concert  
12 together, I booked the artist -- said let's do it together,  
13 reached out to the artist, find out how much, give me the  
14 financials and we'll work out a deal, which I did.

15 I sent out a proposal to the artist, and I used his  
16 logo, but verbally -- in retrospect it was a mistake, but we  
17 had an understanding over the phone we were going to do this  
18 event together. So I used his logo next to my logo, and I  
19 apologize, I didn't realize I was infringing on trademark law,  
20 but he asked me to reach out to this artist on our behalf.

21 Q. When did that happen?

22 A. This happened --

23 THE COURT: Well, I know what the date of the letter  
24 is. I have seen the letter. It's in the exhibits. It  
25 happened then, right?

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Voss - direct

1 THE WITNESS: Yes, ma'am.

2 MR. COLEMAN: Your Honor, I called the witness to  
3 address the limited question. Unless the Court has additional  
4 questions or cross-examination --

5 THE COURT: Well, cross-examination is certainly the  
6 right of the plaintiff.

7 CROSS-EXAMINATION

8 BY MR. HILL:

9 Q. Mr. Voss, you weren't ever an official sponsor of NYC  
10 Pride, were you?

11 A. No, I was not.

12 Q. You were in discussions to be an official sponsor of a  
13 pride party during the NYC Pride weekend, isn't that right?

14 A. Correct.

15 Q. You did not receive that sponsorship, is that right?

16 A. No, because your client asked me to go and reach out and  
17 run the numbers.

18 Q. That's not exactly right, is it? Heritage of Pride told  
19 you they weren't interested in your services on March 3rd. You  
20 didn't reach out until March 16, isn't that right?

21 A. I don't recall the exact dates, I just know he called me  
22 and said do you want to do an event together? I said sure.

23 And he went with somebody else. That's what I just said.

24 Q. Well, that's not quite what you just said. What you just  
25 said --

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Voss - cross

1           THE COURT: I know what he just said. I got it. What  
2 he just said was you approached him first about a Saturday  
3 night concert, then said we're going to go with someone else,  
4 your email was we got a great offer, the board would be foolish  
5 not to go with this offer. He said I'm terribly disappointed,  
6 isn't there some way we can reverse that? Then the email chain  
7 goes silent.

8           Two weeks later there's a letter that uses his name,  
9 Mr. Voss, and your right now registered trademark reaching out  
10 to talent. He claims, he has testified under oath, I'm not  
11 sure why I wasn't told this last week, that that was  
12 precipitated by a telephone exchange with your client in which  
13 your client said okay, you can't do the Saturday night thing  
14 but maybe we can do some other concert. And there were some  
15 telephone conversations in that regard which led him to write  
16 the letter that I personally found quite offensive.

17           Now if I had this background information, should it be  
18 true, I would find it infinitely less offensive, but that's  
19 okay, we're now filling in the record. That's what this  
20 morning is for, to fill in the gaping holes in the factual  
21 record on both sides of the aisle.

22           So that's what you said, right? That's your story?

23           THE WITNESS: Yes.

24           THE COURT: And you're sticking to it?

25           THE WITNESS: That's the truth.

E6JTHREA

Voss - cross

1 THE COURT: Okay.

2 THE WITNESS: He never said to me you can use the  
3 mark, I admit that, but we were working on this together. It  
4 could be my mistake, I apologize, but we worked on together and  
5 I thought it would be to our advantage to get the talent  
6 together. From my phone call I thought it was okay.  
7 Afterwards he said Brandon, don't do that, and I said okay,  
8 Chris, and I never did it again.

9 Q. If I could get you to clarify the timing on that, after you  
10 sent the letter, then Heritage of Pride found out and then  
11 asked you not to?

12 A. Yes, he asked me to send the letter. He didn't say send  
13 the letter without my logo, he said send the letter. We worked  
14 with the same person, the letter was sent to him, I told  
15 Carmen, the talent agent, to send it to Chris. I wasn't hiding  
16 it.

17 Q. Did you have authorization to send that letter?

18 A. Yes, verbal authorization. He said find out how much and  
19 crunch the numbers and we'll run the event together. She  
20 ultimately declined and we ended up not doing the event.

21 Q. Did NYC Pride or anyone at NYC Pride review the letter?

22 A. No, but he never asked to review the letter. This was all  
23 very informal, just like every deal I had with him. I didn't  
24 know it was such a serious issue.

25 MR. HILL: I don't have any further questions for this

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Voss - cross

1 witness.

2 THE COURT: And you don't have any further questions  
3 of the witness?

4 MR. COLEMAN: No.

5 THE COURT: You can step down. Thank you, Mr. Voss.

6 MR. COLEMAN: I actually don't have any more to offer.

7 THE COURT: That's fine.

8 MR. COLEMAN: I want to address in the Court's  
9 original comments when your Honor came on to the bench about  
10 the change from the logo. Your Honor had expressed particular  
11 concern about the use of the current logo or something that  
12 looked a lot like the current logo on the web site.

13 THE COURT: I think that looks a lot like the current  
14 logo. I have to tell you, I got a call last night from Zach,  
15 my trusty law clerk, who said we got an affidavit from  
16 Mr. Resnicow, they're taking down the logo. I had visions that  
17 the box and anything that looked like the box was going to --  
18 or the orange box that looked like the orange box was going to  
19 disappear. Lo and behold, I came in this morning and read the  
20 affidavit. I will tell you I'm just a human being, this was my  
21 instant necessary response to seeing what had been put up in  
22 its place. Nice trick. Looks a lot like the old logo.

23 MR. COLEMAN: I'm referring to page 2 of the  
24 supplemental declaration.

25 THE COURT: Right.

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Voss - cross

1 MR. COLEMAN: Paragraph 6, there's no box at all.

2 THE COURT: Excuse me, this is where there's this  
3 itty-bitty, tweeny weeny print for your client's name and big  
4 mark, not the same font, but large letters, the largest letters  
5 in a rectangular space saying NYC Pride. I consider that to be  
6 confusingly similar.

7 MR. COLEMAN: Your Honor, to make it clear, there's no  
8 rectangular space. We excerpted a rectangular space that  
9 appears on the screen. The logo was itself contained within a  
10 colored box. That no longer is the case.

11 Moreover, my client is attempting to and is entitled  
12 to associate these events with New York City Pride week. Our  
13 argument has been all along there's no trademark to NYC Pride.  
14 So he's not interested, for purposes of interesting perspective  
15 participants in branding Brandon Voss and Jake Resnicow.  
16 That's like saying come to the baseball game. The baseball  
17 game is what of interest, not who owns the field. So we  
18 appreciate the Court's reaction, but this -- there's no --

19 THE COURT: I'm a consumer. I'm your average American  
20 consumer, that's all I am.

21 MR. COLEMAN: We appreciate that. We point out on  
22 page 45 on 48 and document 2-11, which is the depiction of the  
23 original logo. It's in an orange box, a multicolored box,  
24 virtually the same color scheme "NYC" is in clear letters then  
25 the word "Pride" in block letters. This just says the words

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Voss - cross

1 "NYC Pride" in block letters. Block letters are block letters,  
2 there is no contrasting box, which our understanding was the  
3 Court was referring to the logo, because we believe the record  
4 is clear and under the applicable legal standard that NYC Pride  
5 is not a protectable trademark as the plaintiff, but we made  
6 our point on that.

7           Nonetheless, we go back -- my only point therefore  
8 goes back to the factual record does not indicate quite the  
9 level of nastiness or unfairness or passing off that might have  
10 initially been the impression from a reading of the record.  
11 And moreover, we submit that the plaintiff has not even  
12 remotely demonstrated the existence of harm, the fact that a  
13 number of sponsors have said we imagine you must have some kind  
14 of standards, whatever they are, if someone else doesn't have  
15 those standards, we sure wouldn't want to affiliate with them.  
16 We would submit that doesn't cut it.

17           And this is not a technical point, it goes back to if  
18 these materials on harm had been submitted with the original  
19 application, we would have had an opportunity to develop  
20 responses from people to know. One thing I did hear from the  
21 well was a lot of sort of expert testimony about what consumers  
22 think. There's no evidence in the record --

23           THE COURT: There's no evidence at all in the record.  
24 I'm not that dumb. I won't take his word for it.

25           MR. COLEMAN: Nothing further, your Honor.

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Voss - cross

1 MR. HILL: Your Honor, we would like to call Chris  
2 Frederick, if you are willing to hear him.

3 THE COURT: Look, I have to say all of this should  
4 have been developed by both sides factually, every bit of it.  
5 Would that you have talked to the individual at your firm who  
6 was the actual author of the NYC Tri case, she would have told  
7 you what to do. Her name is Shireen Barday.

8 CHRIS FREDERICK,

9 called as a witness by the Plaintiff,

10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. HILL:

13 Q. Mr. Frederick, could you just please say what your  
14 responsibility is to NYC Pride.

15 A. I am the managing director at New York City Pride, Heritage  
16 of Pride.

17 Q. Could you relate to the Court the timing of this  
18 correspondence on March 3, 2014?

19 A. I reached out to Brandon this year probably around  
20 February, March, and said that I was thinking about wanting to  
21 do a Saturday night event. We had conversations. He said I'm  
22 working on some talent, I will let you know where it gets. I  
23 will send you a proposal. That was pretty much it.

24 Then we got an offer from an alternate event producer,  
25 Brandon had not sent me a proposal, so I decided to go with the

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Frederick - direct

1 alternate. It was a lot of money for us, for a nonprofit. So  
2 I sent an email to Brandon saying I don't think it's going to  
3 work out for this year. And that was the end of our  
4 conversations.

5 Q. What was -- with regard to working with Mr. Voss, when was  
6 the last conversation that you had with him?

7 A. The last conversation was after I had sent the email.  
8 Directly after that we had a phone conversation where he asked  
9 what happened, and I told him that we decided to go with the  
10 other producer, and that was the end of the conversations.

11 Q. You never had -- did you ever have any other conversations  
12 with him about producing an event?

13 A. No.

14 Q. What belief, if any, did you have about the status of the  
15 relationship with Mr. Voss as of March 3rd?

16 A. When I thought -- when I sent that email and we had that  
17 phone conversation directly after, that was the ending of our  
18 conversations.

19 MR. COLEMAN: Thank you.

20 THE COURT: Cross?

21 CROSS-EXAMINATION

22 BY MR. COLEMAN:

23 Q. Good morning. You just testified you were thinking of  
24 doing a Saturday night event. Was this something that Heritage  
25 had ever done before?

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Frederick - cross

1 A. For Saturday night, no.

2 Q. Why did you approach Brandon to do it?

3 A. Because Brandon and I had informal conversations last year  
4 about bringing talent in to Pride. He and I essentially worked  
5 with Warner Brothers to get Cher to appear at our events last  
6 year. He shouldered some of the cost, I shouldered a large  
7 bulk of the cost, along with travel. So we had that existing  
8 relationship that made me feel as though we could partner  
9 together for this year.

10 Q. But you got a better offer from another promoter, is that  
11 what you testified?

12 A. I got the only offer. Brandon didn't give me an offer.

13 Q. Did you give him an opportunity to make a counter offer?

14 A. No.

15 Q. You testified that the promoter who did make the offer to  
16 you -- how much money was it?

17 A. He gave us 200 tickets that we could sell on our own, which  
18 was roughly around -- we sold out of them, so we netted about  
19 10 or \$12,000.

20 Q. When did you sell the last ticket?

21 THE COURT: I'm not sure this has any relevance to  
22 anything that I have to decide.

23 Q. You testified that you sold out of all the tickets. Would  
24 it be fair to say then that nothing that my client did had any  
25 effect on the amount of tickets that you could sell?

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Frederick - cross

1 I'll withdraw the question.

2 Do you have any reason to believe that my client's  
3 promotion of its Saturday night event reduced your ticket  
4 sales?

5 A. I think that's inconclusive until after this hearing.

6 Q. And why do you believe that?

7 Let me first ask you, you did testify that you sold  
8 out of the tickets, right?

9 A. Out of the one class of tickets for that one party. We  
10 have four ticketed events, we have not sold out of our other  
11 events.

12 Q. But the only ones that --

13 A. No.

14 Q. Sorry?

15 A. No, their events compete with us throughout the whole  
16 weekend.

17 Q. That's why you brought this case, right?

18 A. Yes.

19 MR. COLEMAN: No further questions.

20 THE COURT: Any other questions?

21 MR. HILL: No redirect, your Honor, thank you.

22 THE COURT: Okay. Anybody else have anything to say  
23 to complete the factual record?

24 MR. COLEMAN: Nothing from defendant, your Honor.

25 MR. HILL: Nothing for the factual record, your Honor,

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1 for plaintiff.

2 THE COURT: Okay. Then let me get to work, I will  
3 have something to you. It may not be a complete opinion, it  
4 may be an order with an opinion to be completed overnight, but  
5 I will have something to you by the end of the day.

6 MR. HILL: Thank you, your Honor.

7 MR. COLEMAN: Thank you, your Honor.

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9

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