UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERITAGE OF PRIDE, INC., *Plaintiff*, *v.* MATINEE NYC, INC., *et al.*, *Defendants*.	DOCKET NO. 14-cv-4165 (CM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR REARGUMENT AND RECONSIDERATION

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PRELIMINARY STATEMENT

Matinee NYC, Inc., Voss NYC Group Corp., Jake Resnicow, and Brandon Voss (collectively, "defendants") make this motion for reargument and reconsideration with respect to the Court's June 19, 2014 Preliminary Injunction Order and Amended Order issued June 20, 2014 (the "Injunction"). Defendants respectfully seek reconsideration based on the Court's Order and Memorandum Decision and Order (the "Opinion"; collectively with the Injunction, the "Order") for two reasons: First, the Opinion relied on a legal standard for likelihood of success on the merits in the context of a motion for preliminary injunctive relief that is inconsistent with that set forth by the Second Circuit Court of Appeals. Second, regardless of the legal standard applied, the Opinion's likelihood of success and showing of irreparable harm analyses were premised on material misapprehensions of, or unjustifiable inferences from, the facts of record.

LEGAL ARGUMENT

I. STANDARD FOR MOTION FOR RECONSIDERATION

Under Fed. R. Civ. P. 59(e) and Local Rule 6.3, motions for reconsideration may be granted where (1) the moving party can show an intervening change in the controlling law; (2) upon discovery of new evidence not previously available; or (3) on a showing of the need to correct a clear error of law or prevent manifest injustice. *In re Beacon Associates Litig.*, 818 F. Supp. 2d 697, 701-02 (S.D.N.Y. 2011) (granting motion for reconsideration); *see also Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 154 F.Supp.2d 696, 701 (S.D.N.Y.2001). Defendants seek reconsideration under the third category. In particular, a motion for reconsideration on such grounds will be granted where "the moving party can point to controlling decisions or data that the court overlooked." 3 *Motions in Federal Court* § 9:36.50 (3d ed.), *citing Analytical Surveys,*

Inc. v. Tonga Partners, L.P., 684 F.3d 36, Fed. Sec. L. Rep. (CCH) P 96903, Fed. Sec. L. Rep. (CCH) P 96936 (2d Cir. 2012). The key is whether the "controlling decisions or data" that the court overlooked "might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 256–57 (2d Cir.1995).

For the reasons set forth below herein, defendants meet the high standard for reconsideration. Either a shift in the legal standard on which the Order hinges, or a full appreciation of the facts of record in light of the procedural history, could reasonably be expected to change the outcome.

II. THE LEGAL TEST FOR LIKELIHOOD OF SUCCESS ON THE MERITS IS "SUBSTANTIAL LIKELIHOOD OF SUCCESS," NOT A SLIGHT ONE.

Throughout the Opinion, the Court explicitly acknowledged that the decision regarding both the irreparable harm and the existence of secondary meaning of Heritage's alleged marks were close calls; it nonetheless deemed those narrow margins sufficient grounds on which to base the issuance of a preliminary injunction, "one of the most drastic tools in the arsenal of judicial remedies and [one which] should not be routinely granted." *Malettier v. Dooney & Bourke, Inc.,* 340 F. Supp.2d 415, 428 (S.D.N.Y. 2004) (internal quotes omitted). Defendants submit that, in light of the drastic nature of a preliminary injunction, Second Circuit precedent in fact requires a plaintiff to meet a higher standard than the one the Court found plaintiff to have met in order to merit such dramatic relief. Because the Court repeatedly acknowledged the slimness of the margin by which Heritage prevailed on showing a likelihood of success and irreparable harm – despite being given more than ample opportunities to supplement that record – it appears that the Court should, in light of the applicable standard, revisit its decision to grant the injunction sought by Heritage.

In the Opinion, the Court relied on language in *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) to the effect that a party moving for preliminary injunctive relief must merely "make a showing that the probability of his prevailing is better than fifty percent" and found that meeting this just-above-the-line was "all Heritage must do at this juncture." The Second Circuit, however, has in the 30 years since *Abdul Wali* made it clear that a showing of 50.1% is not in fact a sufficient "probability" of likelihood of success on which to base an affirmative injunction such as the one issued here, i.e., one that does more than preserve the status quo.

For example, in *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013), the Court noted that a plaintiff "seeking a preliminary injunction must that will alter the status quo must demonstrate a **'substantial' likelihood of success** on the merits" (emphasis added), citing *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir.2004). Similarly, in *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), the Circuit taught that when the injunction sought will "provide the movant with… relief [that] **cannot be undone even if the defendant prevails at a trial on the merits, the moving party must show a "clear" or "substantial" likelihood of success**" *Id*. at 122-23 (emphasis added), quoting *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir.1996)). *See also, Rossini v. Republic of Argentina*, 453 F. App'x 22, 24 (2d Cir. 2011) (a movant seeking a "mandatory" injunction that will alter rather than maintain the status quo must meet the "rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits"); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir.2010) at n. 4.

The Second Circuit's standard thus requires that a party seeking **affirmative** relief – i.e., which in this case included an order compelling defendants to take down advertisements and

change their website logos – must convince the court "decidedly" that it has a "substantial" and "clear" likelihood of success on the merits, not merely establishing a slightly better than even probability of success on the merits as the Court found was shown here.[1]

Despite the Second Circuit's requirement, the application of this more lenient standard is woven throughout the Opinion. For example, regarding the question of secondary meaning, the Opinion discussed the five factors set forth in *Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339, 348 (S.D.N.Y. 1998). While none of these factors alone is dispositive in determining secondary meaning, Defendants respectfully submit that if the proper standard for evaluating them – particularly with respect to Factor 4 (Consumer Studies Linking the Mark to a Source) and Factor 5 (Length and Exclusivity of the Mark's Use) regarding which the Opinion acknowledged the decision was very close – had been applied, the outcome would be different.

Thus regarding the fourth *Tri-Star* factor – whether the movant has submitted reliable consumer studies establishing secondary meaning – the plaintiff here provided no more proof of a public link between the term NYC PRIDE and Heritage (or even an anonymous "single source") than a handful of Twitter posts and an article from Buzzfeed. The Court recognized that "to the extent this factor carries any weight at all, it . . . weighs **slightly** in Heritage's favor." "Slight" weight, however, is even more slight when measured against the "clear" or "substantial" standard of the Second Circuit.

Regarding the fifth factor, the length and exclusivity of use, i.e., Heritage's exclusive use of NYC PRIDE as a mark for itself and its events, the Court noted that "the question is especially

[1] Similarly, on the irreparable harm factor under the preliminary injunction standard, the Opinion states that "The question of irreparable harm dominated much of the preliminary injunction hearing, and **it is a close one**. However, while **the balance tips only slightly in Heritage's favor** on this point, it does tip in its favor." Opinion at 26.

close" and that "[t]here are . . . reasons to conclude that Heritage's marks are not exclusive, and at least one reason to conclude that they are." Opinion at 37. Applying the appropriate standard requiring the plaintiff prove its right to relief by clear or substantial proof, obviously Heritage **failed** to prevail on this critical factor. Indeed, despite prompting from the Court, plaintiff failed not only in its moving papers and its reply but even in its "supplemental reply" submissions to demonstrate the *sina qua non* of exclusive use. This would include proof that plaintiff made any effort whatsoever at policing its supposed mark (such as cease and desist letters, public notices or other indicia of enforcement other than those concerning this defendant) since the time it claims its exclusive use began. Such proof never appeared, and this failure alone should have been outcome-determinative in defendants' favor for purposes of the drastic measure of the issuance of a preliminary injunction.

Despite acknowledging this critical failure of proof on a key issue,[2] however, the Opinion nonetheless states that "The other factors, however, tilt more decisively in Heritage's favor. On balance, I conclude that Heritage has demonstrated a likelihood—**not, perhaps, an overwhelming likelihood, but a likelihood**—of success in establishing that its marks carry secondary meaning." Opinion at 37-38. Defendants submit, however, that because the Order altered the status quo – not merely requiring that Defendants refrain from taking certain actions in the future, but mandating that they **actively** take steps to alter their advertising for the

[2] The Opinion acknowledges the widespread use of "NYC PRIDE" despite Heritage's desire for exclusivity: "[A]s Defendants have shown, and as Heritage concedes, throughout Pride Month—and especially during Pride Week—numerous commercial establishments use the phrase "NYC Pride" to describe events that they are sponsoring during the week-long celebration. Indeed, Heritage admits that, because NYC PRIDE is a descriptive mark, there would be no way to stop, say, a West Village watering hole from having an NYC PRIDE Happy Hour during the last week of June. And although Heritage has operated under the trade name NYC PRIDE for at least five years, and possibly longer, it has taken no steps until now to stop anyone else from using the phrase for commercial purposes." *Id.* at 37

remainder of the month of June – the Court should not have, under the applicable Second Circuit standard, been satisfied with its conclusion that Heritage met its burden of showing a likelihood of success on the merits.

In light of the Court's acknowledgment that, despite plaintiff's repeated opportunities to supplement the record, it had eked out little more a "better than even" chance of success on the merits, reconsideration under the correct "clear" or "substantial" test would mandate a different outcome – namely, a denial of the preliminary injunction.

III. THE OPINION MISAPPREHENDS KEY FACTS THAT BEAR DIRECTLY ON THE OUTCOME OF THE PRELIMINARY INJUNCTION MOTION CONCERNING THE ISSUE OF IRREPARABLE HARM.

The Opinion is premised on a number of facts that weighed heavily in the Court's analysis and conclusion. Defendants respectfully submit that under any evidentiary standard for finding a likelihood of success on the merits, and certainly under the "clear" or "substantial" evidence standards, reconsideration of the record is warranted because the Court appears to have overlooked material facts or made inferences not justified by the record and which were central to the outcome here. Given the plaintiff's burden of proof in general, and particularly when seeking a preliminary injunction as set forth in the previous section, defendants submit that upon reconsideration the Court will likely conclude that its earlier determinations should be revised.

This is true as well concerning the Court's factual determinations concerning what was arguably the most controversial issue considering by the Court in the course of oral argument: the patent lack of proof that Heritage would, if defendants were not enjoined, suffer irreparable harm. The paucity of evidence on this point was repeatedly recognized by the Court during argument; yet ultimately the Opinion concluded that there was irreparable harm because, it stated, defendants "seek out controversy" in their Gay Pride events whereas plaintiff's Gay Pride

events do not. Thus, the Opinion explains, any confusion in the minds of consumers or sponsors between "controversial" events sponsored by Matinee and, apparently, uncontroversial Gay Pride events sponsored by plaintiff would axiomatically harm the latter's goodwill (itself a commodity, i.e., the existence of secondary meaning, which – as set forth in the previous section – plaintiff fell far short of proving even exists).

The record, however, does not support the dichotomy suggested by the Opinion between events sponsored by "controversy-seeking" defendants as opposed to the uncontroversial ones licensed – and, the record shows, licensed without the slightest suggestion of quality control (which would be necessary to avoid controversy) – by plaintiff. In fact, it is not disputed that both plaintiff and defendants are in the business of promoting events tailored to the LGBT – Lesbian, Gay, Bisexual and Transgender – communities, largely parties and concerts, and, in the plaintiff's case, the Gay Pride Parade. This last event is hardly uncontroversial even within the LGBT community, as was discussed during oral argument. Such controversy, which the Court acknowledged, has arisen not only with respect to the ribald and extreme nature of the event but even, this year, in connection with a dispute within the LGBT community regarding inclusiveness in planning – an issue squarely within the plaintiff's control.[3]

[3] This particular issue became known to counsel for defendants only recently, based on a press report dated June 20, 2014, in which a leading LGBT publication, the *Advocate*, reported as follows:

> Bisexual activists and NYC Pride officials have reached an agreement on alleged bi erasure at New York's pride parade, after a gay man, a lesbian, and a transgender woman were named grand marshals — without anyone representing bisexuals.
>
> Since NYC Pride's announcement of Rea Carey, Jonathan Groff, and Laverne Cox as grand marshals, bisexual activists argued that their population had been snubbed, noting that marshals included representatives from the LGT community respectively, seemingly forgetting the B.

The only fact of record the Court could have relied on to make its finding of fact in this regard is the controversy concerning the statements by Azealia Banks, an artist engaged by defendants to perform at one of their events and who was alleged to have made comments that offended some component of the LGBT community. Plaintiff harped extensively on this small controversy, and the Court repeatedly stated on the record that it could not follow the internal political issues involved and was inclined to attach little significance to the dustup.

In the Opinion, however, the Court devotes substantial discussion to this controversy and concludes, with nothing more than the fact that defendants engaged her services, that defendants, unlike plaintiff, are "content to generate controversy. They have done so by selecting Azealia Banks to headline their principal concert event." Opinion at 28. The Court speculated that any prospective loss of goodwill from controversy surrounding a performer wrongly believed to be sponsored by Heritage "supports a finding of irreparable harm." *Id.* The record, however, does not does not support either these leaps of analysis or the finding that defendants are "content to generate controversy" merely because they declined to avoid some remote association of it by hiring Ms. Banks.

Indeed, that conclusion is incompatible with the record, which, as the Court acknowledged, contained unrebutted proof Ms. Banks has performed without incident at other Pride events. "Admittedly, those same sponsors appear to have had little difficulty sponsoring

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The *Advocate*, June 20, 2014 (found at http://www.advocate.com/bisexuality/2014/06/20/nyc-pride-and-bisexual-activists-reach-under-standing, June 26, 2014). Certainly, considering that plaintiff's "controversy" evidence – i.e., its hastily manufactured letters from sponsors – was, as discussed above, not even submitted by plaintiff until after the return date of the motion, defendants respectfully suggest that theyshould be permitted some latitude in placing this material before the Court. Alternatively, defendants request that the Court consider this report under the rubric, for reconsideration purposes, of "newly discovered" evidence.

Los Angeles' Gay Pride celebration – at which Azealia Banks appeared (and, according to internet reports, apologized for the remark than engendered the controversy) – so it would be difficult to infer that sponsors will cut their ties to Heritage and Pride Week." Opinion at 28. Defendants submit that, absence such a "difficult" inference, nothing in the record supports the Court's finding of irreparable harm, which should be revisited.

Finally, it is clear from both the Opinion and the Court's remarks during argument that the Court assigned great weight to what it perceived as defendants' "bad faith." The Opinion states, in relevant part:

> Heritage has more than amply demonstrated Matinee's bad faith. As explained above, since Heritage declined to enter into a promotional partnership venture in connection with this year's Pride Week events, Matinee has been systematically attempting to siphon off Heritage's public good will. I do not credit Brandon Voss's testimony that he and Christopher Frederick had conversations about a Friday night Pride Week concert featuring Robyn after their abortive effort to co-promote a Saturday night Pride Week concert, and I do not believe that Voss had any authority, or believed that he had any authority, to send the March 15 letter to Robyn's agent incorporating Heritage's registered trademark and trade name. I think, rather, that he was belatedly engaged in a desperate effort to come up with an event that Heritage might like to sign onto.

Opinion at 23. Defendants respectfully question both the conclusions of the Court quoted above and the facts in evidence on which the Court relies to reach those conclusions.

It should be noted at the outset that Opinion does not cite any evidence of record that corroborates the testimony of Mr. Frederick – other than that testimony – that in any way contradicts that of Mr. Voss. Nor does the Opinion cite any other indicia that could have informed its conclusion concerning the credibility of the respective witnesses; this was strictly a matter of "he said, she said" – hardly the stuff of "clear" or "substantial" evidence going to the merits. Yet the Court concludes, for example, that Mr. Voss lied under oath when he testified that he and Mr. Frederick had continued conversations about a Friday night event "featuring

Robyn" after Mr. Frederick dropped plaintiffs as potential co-sponsors after plaintiff received an offer it would not refuse from a competitor before Mr. Voss could prepare his proposal.

None of this testimony could have been anticipated by defendants because the entire issue of whether or not there was a subsequent conversation concerning a Saturday night event was not part of plaintiff's moving papers. Instead, it was raised, not on the reply, but tangentially, by way of plaintiff's post-reply raft of additional submissions authorized, over defendants' objection, by the Court. If, however, defendant had been given notice, as it should have been, that this disputed fact would be one on which the Court would hang so much weight concerning defendants' alleged bad faith, it could have prepared evidence to rebut plaintiff's testimony even in the few days it was given to respond to the order to show cause.

Defendants are aware, of course, that a motion for reargument is not the venue for submission of evidence that was, in theory, available beforehand, notwithstanding the lack of notice. What defendants can represent to the Court however, and what their counsel are duty bound to make a matter of record at least insofar as a proffer, is that defendants would and could have readily rebutted Mr. Frederick's testimony and that the Court's factual conclusion would, under the circumstances, have turned out entirely differently.[4] For purposes of this motion,

[4] Generally speaking, if given the opportunity, defendants could have introduced, and still would if permitted, duly authenticated evidence, including text messages, demonstrating that days after the March 3, 2014 email from Mr. Frederick to Mr. Voss informing the latter that Heritage had made another deal, Carmen Cacciatorie – the recipient of the letter sent by Mr. Voss concerning the Robyn offer and using the Heritage logo, on which the Court placed great weight) approached both Mr. Frederick and Mr. Voss seeking to advance the suggestion that the three of them collaborate on a Robyn concert and that the two subsequently discussed – by text message – the range of possibilities, including financial and logistical considerations. The latter exchange even included the following exchange after Mr. Christopher explained that one location they were discussing could not be used late at night due to noise regulations (emphasis added):

however, defendants submit that even absent the opportunity to present an adequate defense to a motion seeking extreme sanctions, the record fails to support any but the most subjective and, it is respectfully submitted, arbitrary choice of one self-interested witness's testimony over another's.

In light of the discussion above, which establishes plaintiff's obligation – in order to merit the granting of a preliminary injunction – to prove its entitlement to relief by "clear" and "substantial" evidence, the mere discretion of a judge sitting in equity to assess the credibility of witnesses, without more, cannot supply the evidence needed to support the Court's bad faith finding.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court grant the instant motion for reargument and reconsideration of the June 19 and June 20, 2014 Order and, in light of the legal and factual issues raised herein, dissolve or modify the same in the interest of justice.

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By: 
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Brandon: Ah, ok doesn't work there then. I may purs[u]e it elsewhere and **just bill it as a pride concert. Happy to collab** [*sic*] **if youre interested**

Chris: **If it's Friday I can do something** just not sat[urday]. She cant do sat or sun?

As late as March 14, 2014, in fact, the two continued discussing the event, with Mr. Frederick asking Mr. Voss to "keep [him] in the loop" regarding what Mr. Voss describes in writing to Mr. Frederick as a "Friday night pride concert." This "Friday night pride concert" ultimately did not go forward because Robyn declined the offer and, the evidence would show, for no other reason.

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