

United States District Court,
S.D. New York.
RONNIE VAN ZANT, INC., et al., Plaintiffs,
v.
Artimus PYLE, et al., Defendants.

17 Civ. 3360 (RWS)

Signed August 23, 2017

Filed 08/28/2017

Attorneys and Law Firms

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OPINION AND ORDER

Sweet, D.J.

*1 This action was tried before the Court between July 11 and July 12, 2017. Based upon all the prior proceedings, the findings of fact, and conclusions set forth below, judgment will be entered in favor of Plaintiffs Ronnie Van Zant, Inc., Gary R. Rossington ("Rossington"), Johnny Van Zant, Barbara Houston, as the Trustee of the Allen Collins Trust, and Alicia Rapp and Carinna Gaines Biemiller, as the personal representatives of the estate of Steven Gaines (collectively, the "Plaintiffs"), granting a permanent injunction against Defendants Cleopatra Records, Inc. ("Cleopatra Records"), and Cleopatra Films (together with Cleopatra Records, "Cleopatra") and award of costs and attorneys' fees against Cleopatra and Artimus Pyle ("Pyle," and together with Cleopatra, the "Defendants"). In addition, Plaintiffs' motion for an adverse inference is granted, and Cleopatra's motions for summary judgment and judgment as a matter of law are dismissed as moot.

Findings of Fact

I. Lynyrd Skynyrd and 1977 Plane Crash

Lynyrd Skynyrd was a rock band formed in Jacksonville, Florida in the 1960s. (Tr. 8:4–19. [\[1\]](#)) The band's founding members were Ronnie Van Zant ("Van Zant"), Rossington, and Allen Collins ("Collins"). (Tr. 8:20–22, 69:25–70:1.) Pyle joined as the band's drummer in 1975. (Tr. 11:4–7, 70:2–6.) During the 1970s, Lynyrd Skynyrd became a popular band, selling millions of albums and writing classic songs such as "Sweet Home Alabama" and "Free Bird." (Tr. 10:2–11:2.) During this period, Van Zant was the band's lead singer and primary songwriter. (Tr. 11:12–24.) The band's final album, entitled "Street Survivor," was released in 1977. (Tr. 10:16–22.)

On October 20, 1977, the plane in which the band and its support team were traveling crashed in Mississippi. (Tr. 12:4–12.) As a result of the plane crash, Van Zant, Gaines, Gaines' sister, a member of the support crew, and the plane's two pilots died. (Tr. 12:4–13:2.) The remainder of the plane's passengers, including Rossington and Pyle, were critically injured but survived. (Tr. 14:9–21.)

In the aftermath of the crash, Rossington, Collins, and Van Zant's widow, now Judy Van Zant Jenness ("Jenness"), entered into what has since been termed a "blood oath," under which the three of them decided that no one would ever perform as Lynyrd Skynyrd again. (Tr. 15:4–24.) Gaines' widow, now Teresa Gaines Rapp ("Rapp"), and band keyboardist Billy Powell also witnessed the blood oath. (Tr. 15:14–17.) For ten years, former band members performed with other bands and under other band names, but no performances took place under the name "Lynyrd Skynyrd." (Tr. 15:25–16:6.)

II. 1988 Action and Consent Order

In 1987, to commemorate the ten-year anniversary of the crash, the band's surviving members reunited for a tribute tour to Lynyrd Skynyrd. (Tr. 16:7–18.) Jenness and the band members on the tribute tour disputed the use of the Lynyrd Skynyrd name, which culminated in a lawsuit, *Grondin et ano. v. Rossington et al.*, 690 F.Supp. 200, in which Jenness sought to enjoin the use of the band's name in performance (the “1988 Action”). (Tr. 16:23–17:15.) On October 11, 1988, the 1988 Action was resolved by the parties' entry into a Consent Order, Judgment, and Decree (the “Consent Order,” Pls.' Ex. 1). (Tr. 17:19–18:13.) Pyle, a defendant in 1988 Action and who was represented by counsel throughout the lawsuit and during the signing of the Consent Order, was one of the Consent Order's signatories; he described the aftermath of the Consent Order as everyone “on the same page” and everything was “copacetic,” although he also notated adjacent to his signature on the Consent Order the words “Under Protest.” (Consent Order, at 30; Deposition Transcript of Artemis Pyle dated June 20, 2017 (“Pyle Dep.”) 25:8–15, 29:2–21, 30:10–23, 34:13–16.)

*2 The Consent Order set forth, amongst many things, restrictions as to how the parties in the 1988 Action could use the name Lynyrd Skynyrd, the name, images and likeness of Van Zant and Gaines, or the history of Lynyrd Skynyrd. As relevant to the instant litigation, the Consent Order contained the following provisions:

- “[A]ll corporations owned or controlled by [any of the parties in the 1988 Action], and all agents, attorneys, employees, officers, directors, successors, assigns, and all others in concert or participation with them, are hereby jointly and severally permanently restrained and permanently enjoined from doing any of the following:

- “Using or purporting to authorize the use of the name ‘Lynyrd Skynyrd’ or any logos, trade or service marks associated with the name ‘Lynyrd Skynyrd,’ in the entertainment industry or otherwise, except as specifically authorized herein;” (Consent Order 1(ii))

- “Using the name, likeness, portrait, picture, performances or biographical material of Ronnie Van Zant ... or Steven Gaines ... for any purpose whatsoever, except as specifically authorized herein.” (Id. 1(iii).)

- “[The 1988 Action parties] shall have the right to use the words ‘Lynyrd Skynyrd’ as part of a name ... When the name ‘Lynyrd Skynyrd’ is followed immediately thereafter by, and includes, the calendar year at the time of such use The calendar year shall not be included in parentheses and shall be of a size, type, and prominence equal in all respects to the words ‘Lynyrd Skynyrd.’ ” (Id. 2(a) (the “Date Requirement”).)

- For purposes of live musical performances, either both Rossington and Collins must appear on stage together as active players for substantially the entire duration of the live performance, or Rossington or Collins must appear along with two of the following four musicians: Pyle, Leon Wilkeson, Billy Powell, or Ed King. (Id. 2(c) (the “Rule of Three”).)

- “Each of the [1988 Action parties] shall have the right to exploit his (or with respect to the Estates, the applicable decedent's) own respective life story in any manner or medium, including without limitation, in books or other print publications and in theatrical feature or television motion picture, without obligation, financial or otherwise, to any other party hereto. In such connection, each of the foregoing shall have the right to refer to ‘Lynyrd Skynyrd’ and related matters and to describe and portray his experience(s) with ‘Lynyrd Skynyrd,’ provided that no such exploitation of life state rights is authorized which purpose to be a history of the ‘Lynyrd Skynyrd’ band, as opposed to the life story of the applicable individual.” (Id. 3.)

- “There shall be no exploitation in whole or in part of the history of the Lynyrd Skynyrd band without the prior written approval of Rossington, Collins and [Van Zant's] Estate. In the event Rossington or Collins dies or is incapacitated, his respective estate or other legal representative shall be entitled to exercise the approval rights granted pursuant to [this paragraph.]” (Id. 4.)

- “No [defendant in the 1988 Action] shall make any use of the name, likeness, portrait, picture, or biographical material or Van Zant or of Gaines except pursuant to [certain enumerated conditions, such as record merchandising and particular tribute tours].” (Id. 5.)

*3 • “[Defendants in the 1988 Action] shall not be in violation of this Order if a third party fails to comply with the terms herein contained; provided that, upon learning of each such failure, the [1988 Action defendants] immediately notify [the 1988 Action plaintiffs] and ... immediately notify such third party of the applicable terms hereof and demand prompt compliance with all such terms. In no event shall the [1988 Action defendants] implicitly or through inaction authorize the violation of the terms hereof by any third party.” (Id. 26.)

- “This Court shall retain jurisdiction over this action and over the parties for the purpose of enforcing the

provisions hereof.” (Id. 33.)

- “An amount equal to actual and reasonable attorneys [sic] fees shall be award to the prevailing party in any proceeding brought to enforce the terms and conditions of this Order.” (Id. 34.)
- “The parties hereto may unanimously agree to amend their respective rights and obligations pursuant to this Order, without seeking further intervention of the Court, provided such shall be in a writing signed by all parties.” (Id. 37.)
- Provisions containing formulas detailing the respective parties' rights to royalties from Lynyrd Skynyrd music, merchandise, and other proceeds. (See id. 10–12, 14–16, 21.)

III. Consent Order Aftermath

Following the Consent Order, the surviving members of Lynyrd Skynyrd, including Pyle, continued to perform under the “Lynyrd Skynyrd” name. (Tr. 19:8–18; Pyle Dep. 34:3–24, 41:23–43:3, 104:18–105:16.) Pyle ceased performing with the surviving Lynyrd Skynyrd band in 1991, at which point he signed a termination agreement. (Tr. 19:19–25; Pyle Dep. 35:21–37:24; see Pls.' Ex. 61.)

While the conditions of the Consent Order were to distinguish between the pre-crash and post-crash band and avoid confusing the fans, not every provision has been consistently followed since 1988. (Tr. 24:16–19.) Since around 1992, the band has performed using the name Lynyrd Skynyrd but not in accordance with the Date Requirement provision of the Consent Order, a provision that stopped being followed after the still-performing band members asked Jenness and Rapp for permission, to which they acquiesced. (Tr. 24:20–25:5, 54:3–56:17.) The Rule of Three has not been followed since Collins' death in the early 1990s, a requirement made more difficult with the subsequent deaths of Leon Wilkeson and Billy Powell and departures of Pyle and Ed King. (Tr. 22:4–23:5.) In light of these facts, Jenness and the remaining band members agreed that the Rule of Three requirement would be satisfied by the presence of Rossington. (Tr. 23:6–12.) Royalty payments have also been modified over the years. (Tr. 53:1–3.)

These modifications were neither executed by agreement between the Consent Order parties nor sought from the Court. (Tr. 49:6–14.) To the extent that modifications were objected to, such objections were resolved. (Tr. 87:18–22, 98:13–15.) In the years following the Consent Order, Pyle has never objected to or taken action based on modifications made to the terms of the Consent Order, and has continued to receive royalty payments. (Tr. 23:15–17, 25:12–17; Pyle Dep. 34:22–24, 41:23–43:3, 65:1–23; 104:18–105:16.) Over the years, Plaintiffs have periodically brought injunction suits against Consent Order signatories, including Pyle, and third parties at actual or perceived breaches of the Consent Order's strictures. (Tr. 25:18–27:10, 97:24–98:12; see Pls.' Exs. 2–6.)

IV. Cleopatra's Film

Cleopatra Records is a Los Angeles-based independent record label founded in 1992. (Tr. 115:4–19; Deposition of Brian Perera dated June 9, 2017 (“Perera Dep.”) 8:21–22.) Cleopatra Records has a film component that, until around 2016, was run through an affiliate division, Cleopatra Films^[2], and today is run through an affiliate business, Cleopatra Entertainment LLC, which Brian Perera (“Perera”), founder, president, and co-owner of Cleopatra Records, also operates with the same employees and out of the same office.^[3] (Perera Dep. 9:10–14, 9:18–25, 13:19–14:8; Tr. 118:14–16; see Tr. 145:24–146:1 (describing the “Cleopatra entities” as having paid for the “plane crash film”).)

*4 In early 2016, Cleopatra decided to pursue making a feature-length film based on the 1977 Lynyrd Skynyrd plane crash (the “Film”).^[4] (Tr. 119:1–20.) Around that time, Perera hired Jared Cohn (“Cohn”), a director and screenwriter, to work on writing and directing the proposed Film. (Perera Dep. 7:22–25; Tr. 131:8–132:3; Defs.' Ex. 805.) Cohn was paid by Cleopatra and reported to Perera but was not a Cleopatra employee. (Tr. 180:16–21; Deposition of Jared Cohn dated June 26, 2017 (“Cohn Dep.”) 31:16–21.) Around the same time, Perera reached out and met with Pyle in Nashville, TN, to discuss the project; Pyle expressed interest in the Film, although there was no discussion as to Pyle's role, if any, in it. (Tr. 121:6–123:18.)

In June 2016, Cleopatra paid Pyle to fly out to Los Angeles to discuss his involvement with the Film. (Tr. 123:19–25, 124:12–22; Perera Dep. 42:13–43:15, 44:24–45:2.) Emails between Perera, Cohn, and Tim Yasui (“Yasui”), Cleopatra's vice president, establish that Pyle was being brought in to work on the script with Cohn, (Pls.' Ex. 15), take publicity photos, (Pls.' Ex. 17), and get video recordings of Pyle from which to create the Film's screenplay, (Pls.' Ex. 16).

On June 7, 2016, while meeting in Los Angeles, Pyle signed an agreement with Cleopatra that entitled him to

5% of the Film's net receipts, which would be "based on the story of Lynyrd Skynyrd's 1977 plane crash and the event surrounding it," on which he would receive a "Consultant" or "Co-Producer" credit; Pyle also contracted to narrate the Film, make a cameo appearance in the Film, and contribute an original song to the Film. (See Defs.' Ex. 9.) During this meeting, Pyle did not tell Perera about the Consent Order, but did inform him of the litigious history between those historically connected to Lynyrd Skynyrd and that, should Pyle's involvement with the Film imperil its production, Pyle would "rip ... up" the contract.^[5] (Tr. 128:12; see also Tr. 128:7-19; Perera Dep. 49:17-21, 50:2-51:18, 64:14-18, 150:13-151:12.) While Pyle was in Los Angeles, Cohn interviewed and video-recorded Pyle for eleven hours. (Tr. 142:23-143:6; Cohn Dep. 42:24-43:2.) Around the end of June 2016, Cleopatra put out press releases advertising Pyle's involvement as a co-writer and co-producer of the Film. (See Pls.' Exs. 49-50.)

V. Plaintiffs' Cease and Desist Letter

On July 15, 2016, Plaintiffs sent Cleopatra a cease and desist letter after learning through news articles that Cleopatra intended to produce a movie being co-written by Cohn and Pyle entitled "Free Bird" about Lynyrd Skynyrd and the 1977 plane crash.^[6] (See Pls.' Exs. 7-8; Defs.' Exs. 1, 55; Tr. 27:11-29:17.) In the letter, Plaintiffs requested a copy of the Film's script and noted various restrictions based on terms of the Consent Order. (See Pls.' Ex. 7.) On July 19, 2017, Cleopatra requested a copy of the Consent Order and declared its First Amendment right to make its film. (Defs.' Exs. 2-3.) On July 22, 2016, Plaintiffs mailed Cleopatra a copy of the Consent Order, which Cleopatra received shortly thereafter.^[7] (Tr. 134:8-15, 160:9-11; Defs.' Ex. 4; Pls.' Ex. 9.) Perera, Cohn, and Cleopatra's counsel, Evan Cohen ("Cohen"), read and discussed the Consent Order.^[8] (Cohn Dep. 13:17-23, 14:16-15:3, 16:13-22, 17:12-21; Perera Dep. 108:22-110:15.)

*5 On August 5, 2016, Cohn, in consultation with Perera, messaged Jenness over Facebook and invited her to Los Angeles to "talk about the movie project"; the goal was to determine a way to address the cease and desist letter Cleopatra had received. (Pls.' Ex. 10; see Tr. 31:2-33:1, 62:21-63:16, 89:18-20, 134:25-135:13; Cohn Dep. 99:7-9, 99:13-19, 104:5-13.) Jenness responded by Facebook message and requested Cleopatra to "send an email explaining and outlining [Cleopatra's] plans and how [Cleopatra] see[s] it involving [her]." (Pls.' Ex. 10.) After conferring with Cohen, Cleopatra chose not to respond. (Tr. 135:21-136:4; 221:1-223:25.) Neither Jenness, Rossington, nor Collins' estate discussed the Film further with Cleopatra. (Tr. 46:6-10, 91:22-25.)

VI. Cleopatra's Film Production Post-Cease and Desist

Following receipt of the cease and desist letter, Cleopatra continued to work on producing its Film, but stopped publically referring to Pyle as a writer or producer of the Film. (Tr. 141:16-142:4.) For almost the next year, Cohn wrote over a dozen drafts of the Film's script. (See Defs.' Exs. 301-317.) Evidence adduced established that Cleopatra involved Pyle in many aspects of its Film production process, although Pyle neither did any of the actual script writing nor had final control over the Film's content, which is maintained by Cleopatra. (See Tr. 139:9-10, 146:13-147:25; Pyle Dep. 88:19-21.)

Pyle regularly texted or called Cohn to relay historical information, sometimes directly, sometimes through intermediaries at Cleopatra, which Cohn would incorporate into his written work.^[9] (See Pls.' Exs. 20, 22, 25, 26; Cohn Dep. 22:8-22, 43:25-44:9.) Around August 8, 2016, Pyle received a copy of Cohn's fifteen page outline for the Film, which Pyle reviewed and offered "minor" comments, (Pls.' Ex. 22; see Pls.' Ex. 23; Cohn Dep. 63:16-64:14), and received copies of the Film's script in September, October, and November 2016, (see Pls.' Exs. 27, 28, 30; Tr. 169:3-6). Pyle discussed his notes and revisions with Cohn on at least some of these drafts. (See Pls.' Exs. 29, 31, 32; Tr. 197:9-24.) Cohn's script drafts continued to incorporate feedback from Pyle through early 2017 and the Film's filming.^[10] (See Pls.' Ex. 34; Tr. 200:15-20; Cohn Dep. 46:17-48:7.)

Cleopatra solicited Pyle's views on casting and costumes as well. Around February 2017, during the Film's casting and actor auditions, Pyle provided notes and thoughts, which Cohn viewed as "helpful." (Pls.' Ex. 34; see also Pls.' Exs. 33, 35; Tr. 204:15-23; Cohn Dep. 49:20-50:10.) In March 2017, Pyle discussed costuming selections with the Film's costume designer. (See Pls.' Exs. 37, 38; Tr. 212:16-18; Cohn Dep. 48:11-15.) In April 2017, Cleopatra paid for Pyle to fly to Los Angeles to participate in a table read with actors selected for the Film, during and after which Pyle provided feedback on the accuracy of the portrayals, feedback which Cohn incorporated into the Film's script. (See Pls.' Exs. 39-41; Tr. 214:23-215:11; Pyle Dep. 81:6-83:6; Cohn Dep. 58:12-59:21.)

Pyle has also provided video footage for a cameo appearance in Cleopatra's Film and worked on original music for the Film's soundtrack. (See Tr. 201:4-10, 216:10-25; Cohn Tr. 60:18-24; Pyle Dep. 76:19-25,

77:6–12.)

VII. Cleopatra's Film

*6 The Film's final script focuses principally on Pyle, his relationship with the Lynyrd Skynyrd band members, particularly Van Zant, and events during and immediately following the 1977 plane crash. (See generally Pls.' Ex. 13.) The script broadly includes: scenes of the band performing at a concert and playing well-known Lynyrd Skynyrd songs, (see id., at P000051–56); post-concert and general scenes of the band cavorting, (see id., at P000056–69, 81–84); flashbacks to when Pyle first met and joined the band, (see id., at P000084–91); and scenes just before, during, and shortly after the band's plane crash, (see id., at P000070–81, 91–155). As Pyle summarized it, the Film “was a compression of—of our life as a band.” (Pyle Dep. 103:16–17; see also Tr. 227:4–6 (noting that the Film is not a “life story”).)

Pyle is the main character of the Film, although Van Zant has much of the dialogue and the remaining band members, including Gaines and Rossington, are featured and have dialogue. (See generally Pls.' Ex. 13.) Portions of the script are historically inaccurate, either because the chronology of events depicted is incorrect, such as instances of Van Zant's infidelity or a scene of Van Zant breaking a glass bottle over a person's head the night before the plane crash, or because of factual inaccuracy, such as Pyle encountering an alligator after fleeing from the plane crash wreckage.^[11] (Pyle Dep. 95:20–97:7, 97:22–101:22.)

Cleopatra intends to place cards in the Film's opening credits to indicate that the film was not authorized by Lynyrd Skynyrd or any current or former member of Lynyrd Skynyrd. (Tr. 146:7–12.)

The Film is, overall, a film about Lynyrd Skynyrd. This finding is based on a number of factors: a review of the Film's script as detailed above, which exclusively tells a portion of the band's history through the lens of Pyle; Cleopatra's regular and factually-focused interactions with Pyle throughout the film-making process; Cleopatra's repeated selection of film titles that evoke the Lynyrd Skynyrd legacy, noted both above and below; and the Court's overall finding of Perera as an unreliable witness whose answers and demeanor evinced an attempt by the Film's makers and producers to evade the Consent Order upon its receipt.^[12]

VIII. Plaintiffs' Instant Action

On April 23, 2017, Variety released a news article about Cleopatra's Film, now entitled “Street Survivors: The True Story of the Lynyrd Skynyrd Plane Crash,” around which time Plaintiffs became aware that Cleopatra had continued with its Film production.^[13] (Tr. 38:7–20, 90:8–23; see Pls.' Ex. 11.) Principal filming began on April 24, 2017. (Cohn Dep. 13:25–14:3.) Plaintiffs initiated the present action on May 5, 2017. (Tr. 38:25–40:1.)

*7 On May 9, 2017, in response to Plaintiffs' lawsuit, Cleopatra mailed Pyle a letter to modify the contract with Pyle, limit his title to “a historical consultant,” and avoid violating the Consent Order. (Tr. 237:21–25; see also 240:5–25; Pls.' Ex. 58.) The May 9 letter stated that the prior June 2016 agreement between Cleopatra and Pyle was to be “void ab initio” and that, actually, Pyle had agreed back in June 2016 to provide historical information for the Film for a set sum of \$2,500, a fee which Cleopatra proceeded to issue to Pyle that same day. (Pls.' Ex. 58; see Pls.' Ex. 59.) Cleopatra viewed acquiring Pyle's signature on this document as “fairly urgent.” (Pls.' Ex. 57.)^[14]

Principal photography of Cleopatra's Film wrapped up in mid-May 2017.^[15] (Cohn Dep. 23:12–13.) Sometime in mid-May 2017, following the end of filming, Cohn switched cell phone providers and, consequently, acquired a new cell phone. (Cohn Dep. 23:2–20.) Although certain data on Cohn's old phone was backed-up, such as pictures, other data was not preserved, such as Cohn's text messages, including those sent and received from Pyle. (Cohn Dep. 23:21–24:16.)

IX. Plaintiffs' Lynyrd Skynyrd Film, Country Music Television Project, and Other Prior Works About Lynyrd Skynyrd

Plaintiffs are currently developing their own film about Lynyrd Skynyrd, though the process is still in early stages. (Tr. 34:12–16, 83:6–13.) Back in February 2017, two film producers presented Plaintiffs with an outline of the project, though the outline has yet to be approved and next steps are still forthcoming. (Tr. 34:17–35:4, 82:23–83:2, 83:22–25; see Pls.' Ex. 14.)

Rossington, Jenness, and Johnny Van Zant, Van Zant's brother, are also working with Country Music Television (“CMT”) on a documentary film about Lynyrd Skynyrd entitled “If I Leave Here Tomorrow: A Film About Lynyrd Skynyrd,” which will be focused on Van Zant and his relationship with the Lynyrd Skynyrd band members. (See Pls.' Ex. 67; Tr. 84:26–87:14.)

In the years following the signing of the Consent Order, there have been many different books, television shows, and radio programs about Lynyrd Skynyrd. (See, e.g., Defs.' Ex. 62 at 266:22–268:13; Tr. 78:3–21) At times, signatories to the Consent Order such as Pyle have been interviewed for such projects. (See, e.g., Tr. 75:5–6, 77:7–10.)

Prior Proceedings

Plaintiffs filed their Complaint on May 5, 2017, alleging a violation of the Consent Order and seeking a permanent injunction as to Cleopatra's film (First Cause of Action) and an award of attorneys' fees (Second Cause of Action). (Dkt. No. 18 (the "Complaint").) On June 12, 2017, Plaintiffs' request for a temporary restraining order and preliminary injunction was denied. (Dkt. No. 11.) Expedited discovery proceeded.

On June 30, 2017, Plaintiffs requested the Court issue an adverse inference sanction against Defendants for spoliation of text message evidence between Cohn and Pyle. On July 1, 2017, Cleopatra moved to dismiss the Complaint and for summary judgment. On July 11, 2017, Cleopatra's motion to dismiss was denied.

Evidence was presented on July 11 and 12, 2017. Final arguments and submissions were made on July 26, 2017; Plaintiffs' and Cleopatra's outstanding motions were heard and marked fully submitted the same day.

Conclusions of Law

I. Plaintiffs are Entitled to An Adverse Inference

*8 [1] As an initial matter, Plaintiffs have moved, either pursuant to Federal Rule of Civil Procedure 37(e) or the Court's inherent authority, that the Court draw an adverse inference with respect to the unpreserved text messages between Cohn and Pyle lost when Cohn switched phones in Hay 2017. This showing has been met.[16]

[2] [3] [4] Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Federal Rule of Civil Procedure 37 (e)(1) permits a court to sanction a party "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." Where the party that failed to preserve the electronically stored information ("ESI") "acted with the intent to deprive another party of the information's use in the litigation," the Court may "instruct the jury that it may or must presume the information was unfavorable to the party" or "dismiss the action or enter a default judgment." Fed. R. Civ. P. 37(e)(2). The duty to preserve extends to "any documents or tangible things (as defined by Rule 34(a)) ... 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'" *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (citations omitted) (the parties "must not destroy unique, relevant evidence that might be useful to an adversary"). Factors that the court considers include: (1) whether the party acted willfully, negligently, or in bad faith; and (2) the prejudice suffered by the party seeking the discovery. See *John Bo Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1176 (2d Cir. 1988)).

[5] Cleopatra argues that it cannot be sanctioned for the actions Cohn, a non-party, took and whose phone, Cleopatra contends, was not within their control. However, the "concept of 'control' has been construed broadly." *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 & n.19 (S.D.N.Y. 2007) (quoting *Marc Rich & Co. v. United States*, 707 F.2d 663, 667 (2d Cir. 1983), and collecting cases), *aff'd sub nom. Gordon Partners v. Blumenthal*, No. 02 Civ. 7377 (LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007). Documents are considered to be under a party's control "if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement." *In re NASDAQ Mkt. Makers Antitrust Litig.*, 169 F.R.D. 493, 530 (S.D.N.Y. 1996) (citation omitted).

*9 Here, while Cohn is a non-party, his text messages were, practically speaking, under Cleopatra's control. Cohn was contracted by Cleopatra to work on the Film, and the evidence has established that he worked closely with Cleopatra for over the past year. Over the course of the instant litigation, Cohn has participated by providing documents and took a deposition sought by Plaintiffs during discovery.[17] As has been found relevant in other cases determining the relationship between a party and non-parties, Cohn also has a financial interest in the outcome of this litigation, since he is entitled to a percentage of the Film's net receipts, which would be zero should Plaintiffs prevail. See *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y. 1992) (finding that a company had legal control over documents in possession of non-party, unaffiliated sub-licensing company because of the cooperative relationship between the two); (Defs.' Ex. 805 at 2). In sum, while determining practical control is not an exact science, "common sense" indicates

that Cohn's texts with Pyle were within Cleopatra's control, and in the face of pending litigation over Pyle's role in the Film, should have been preserved. *GenOn Mid-Atl., LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 355 (S.D.N.Y. 2012) (finding that while a party possessed no legal control over non-party's documents, there was "little doubt that [the third-party] would have complied with a timely request by [Plaintiff] to preserve its information").

Cleopatra next contends that Plaintiffs have not established Plaintiffs issued Cohn a valid subpoena for the text messages and, therefore, there cannot be sanctions for Cohn's noncompliance. Defendants are correct that under Fed. R. Civ. P. 45(c)(2)(A), subpoenas for document production must have production locations within 100 miles of where the person "resides, is employed, or regularly transacts business in person." Plaintiffs have not established that Cohn works or resides anywhere but California, and the subpoena issued for him required production in New York; it is also unestablished that Defendants were willing to accept service of the subpoena on Cohn's behalf.

However, what the rules require is independent of a proper subpoena and simply that the lost information "should have been preserved," and there has been no dispute that the missing texts would have been relevant to the instant matter. Fed. R. Civ. P. 37(e); see *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) ("Even without a discovery order, a district court may impose sanctions for spoliation."). Moreover, unlike the cases Cleopatra has cited in support its position, Plaintiffs have tried repeatedly—albeit unsuccessfully—throughout this expedited litigation to access these documents. *Contra Goonewardena v. N.Y. Workers Comp. Bd.*, No. 09 Civ. 8244 (RA), ---F.Supp.3d ----, ----, 2017 WL 2799171, at *16 (S.D.N.Y. June 28, 2017) (rejecting prejudice from spoliation and sanctions where during "discovery [the other parties] never asked for the evidence later shown to have been spoliated"). Plaintiffs may very likely have attempted, with greater success, to acquire Cohn's texts with Pyle; after learning the texts were destroyed, however, such opportunity was foreclosed.

Lastly, Cleopatra argues that Plaintiff have not shown prejudice because Plaintiffs could in theory have acquired the text messages from Pyle and because Defendants have produced a large number of other documents, rendering the missing messages cumulative. As to Pyle, who has made minimal appearance and has not produced any documents in this litigation, Plaintiffs have represented that they sought Pyle's messages to no avail, a credible claim; moreover, given the timeframe sought by the parties for this matter, this is sufficient effort. As to the messages themselves, while Cleopatra has produced much evidence during the discovery process, none speak directly to an important piece of this puzzle that would have been covered by the texts: the quality of interaction between Pyle, the Consent Order's signatory, and Cohn, the principal writer and singular director of the Film, a relationship that evidence established was principally developed through text messages. (Cohn Dep. 22:8–22, Pyle Dep. 46:15–47:4.) Without those messages, the precise nature and frequency of those communications cannot be verified.

*10 Lastly, Cohn's actions with regard to the text messages—getting a new phone after Plaintiffs brought the instant action and managing to back-up pictures but, somehow, not text messages, (see Cohn Dep. 23:1–24:16)—evinced the kind of deliberate behavior that sanctions are intended to prevent and weigh in favor of an adverse inference. See *West*, 167 F.3d at 779 (holding that "sanction[s] should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party" (citations and internal quotation marks omitted)). Accordingly, an adverse inference as to the missing Cohn text messages will be presumed against Cleopatra.

II. Plaintiffs are Not Entitled to A Missing Witness Charge

[6] Plaintiffs seek a missing witness adverse inference because Cohn did not testify at trial. Plaintiffs argue that Cleopatra failed to call Cohn to testify and concealed Cohn's presence during the trial proceedings from the Court. Even if language employed by Cleopatra's counsel during trial was artfully crafted[18], none of Plaintiffs' arguments warrant the adverse inference they seek.

[7] [8] [9] "A missing witness charge ... to infer that the testimony of an uncalled witness might have favored a specified party is appropriate if production of that witness is peculiarly within the power of the other party." *United States v. Mittelstaedt*, 31 F.3d 1208, 1216 (2d Cir. 1994) (citing *United States v. Nichols*, 912 F.2d 598, 601 (2d Cir. 1990)) (internal alterations and quotation marks omitted). A court is to consider "all the facts and circumstances bearing upon the witness's relation to the parties, rather than merely on physical presence or accessibility." *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 432 n.10 (2d Cir. 1999) (quoting *United States v. Torres*, 845 F.2d 1165, 1170–71 (2d Cir. 1988)). "Whether a missing witness charge should be given lies in the sound discretion of the trial court." *Torres*, 845 F.2d at 1170–

71(citations omitted).

Nothing presented has established that Cohn was peculiarly in the control of Cleopatra, and the fact that Cleopatra chose not to call him does not affect that. Moreover, Plaintiffs had the ability to depose Cohn, which they did, and the deposition of which was admitted into evidence. A missing witness charge is not merited in such circumstances. See *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 9194 (CM), 2010 WL 11043081, at *3 (S.D.N.Y. Feb. 25, 2010) (noting that “ability of [opposing counsel] to use its own time to call (by subpoena or by deposition)” the missing witness weighs against a missing witness charge); accord *Cameo Convalescent Ctr., Inc. v. Senn*, 738 F.2d 836, 844 (7th Cir. 1984) (observing that “the justification for the missing witness instruction diminishes with the availability of the tools of discovery” and rejecting missing witness charge when opposing party “relied upon and quoted extensively from the depositions of missing witnesses”) (citing E. CLEARY, *McCormick on Evidence* § 272, at 657(2d ed. 1972)).

III. Plaintiffs are Entitled to A Permanent Injunction

Plaintiffs contend that Pyle, as a signatory to the Consent Order, is bound by its provisions; that Cleopatra acted in concert or participation with Pyle in producing Cleopatra's motion picture, in turn binding Cleopatra to the Consent Order; and that the production of Cleopatra's motion picture was in violation of the Consent Order. In response, Cleopatra has made counterarguments attacking each link in Plaintiffs' syllogism.

*11 [10] “To obtain a permanent injunction, a plaintiff must succeed on the merits and ‘show the absence of an adequate remedy at law and irreparable harm if the relief is not granted.’” *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) (quoting *N.Y.S. Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)). Based on the aforementioned findings of fact and as discussed below, Plaintiffs have established their case, adequately responded to each of Cleopatra's arguments, and are entitled to judgment in their favor.

1. Pyle is Bound by the Consent Order

[11] Cleopatra has argued that, although it is uncontested that Pyle signed the Consent Order, by writing next to his signature the words “Under Protest,” he rendered his signature nonconsensual and, therefore, is not bound to the Consent Order's provisions. In support, Cleopatra points to a handful of state-level authority for the proposition that signing “under protest” on a document does not constitute actual assent.[19] (See Pls.' Ex. 1.)

[12] Cleopatra's argument and supporting authority are not persuasive. First, as even Cleopatra's cases make clear, in the context of common law contractual assent, the presence of a phrase like “under protest” does not singularly turn a signatory into a non-signatory: what matters is the context surrounding the inclusion and whether a “contemporaneous explanation” supported its presence, *Bergenline Prop. Grp.*, 2015 WL 7428755, at *4 n.2 (quoting *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J.Super. 252, 266–267, 749 A.2d 405 (App. Div. 2000), a factor that courts in this state also consider. See *Miller v. N.Y.C. Health & Hosp. Corp.*, No. 00 Civ. 140 (PKC), 2004 WL 1907310, at *13 (S.D.N.Y. Aug. 25, 2004) (rejecting that an agreement was signed under duress when “Signed Under Protest” was written above the signature line when objecting party “raise[d] no argument concerning the circumstances” underlying the signature).

The factual circumstances establish that Pyle's inclusion of the notation “Under Protest” does not render Pyle's signature nonconsensual. Pyle signed the Consent Order while represented by counsel; furthermore, Pyle has acknowledged that the Consent Order reflected that the parties to the 1988 Action were in agreement as to its terms, he has accepted payments under the Consent Order for many years, and has never personally contested that he is not bound by the Consent Order's conditions. As such, the evidence supports the conclusion that there was a “meeting of the minds” at the time the Consent Order was signed, and the circumstances here foreclose Cleopatra's ability to argue that Pyle is not bound by the strictures of the Consent Order. *Schurr v. Austin Galleries of Ill., Inc.*, 719 F.2d 571, 576 (2d Cir. 1983) (citations omitted) (“Under New York contract is a meeting of the minds of the parties.”); cf. *Donovan v. Penn Shipping Co.*, 536 F.2d 536, 536 (2d Cir. 1976) (rejecting plaintiff's ability to contest a remittitur signed “under protest” after Accepting said remittitur).

2. Cleopatra Can Be Bound by the Consent Order

*12 [13] Cleopatra next argues that, even if Pyle is bound by the Consent Order, Cleopatra cannot be because Cleopatra is a non-signatory to the Consent Order and a non-party to the underlying 1988 Action. Specifically, Cleopatra has argued there is a distinction between an enforcing court's powers in the context of enforcing an injunction versus enforcing a consent decree. Such a divide has no support in law, and Cleopatra can be bound by the Consent Order.

[14] [15] [16] [17] A court's power to enforce provisions of consent orders comes principally from the All Writs Act, 28 U.S.C. § 1651(a), which “empowers Courts to issue extraordinary writs ‘as may be necessary or appropriate to effectuate and prevent the frustration of an order it has previously issued.’” *United States v. Int'l Bhd. of Teamsters*, 907 F.2d 277, 280 (2d Cir. 1990) (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)). The sweep of the Act is wide: “The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, encompasses even those who have not taken any affirmative action to hinder justice.” *N.Y. Tel. Co.*, 434 U.S. at 174, 98 S.Ct. 364. In the Second Circuit, the All Writs Act has been affirmed when used to prevent the circumvention of a court's previous order, see *Sheet Metal Contractors Ass'n of N. N.J. v. Sheet Metal Workers' Int'l Ass'n*, 157 F.3d 78, 82–83 (2d Cir. 1998) (finding All Writs Act the proper basis for injunction of nonparty to the original order), and “makes no distinctions between parties and nonparties,” *Int'l Bhd. Of Teamsters*, 266 F.3d at 50. Consent orders and decrees are enforced like other court orders. *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (citations omitted) (“Consent decrees are subject to continuing supervision and enforcement by the court. A court has an affirmative duty to protect the integrity of its decree. This duty arises where the performance of one party threatens to frustrate the purpose of the decree.” (citation and internal alternations omitted)).

Cleopatra relies on language from *Ass'n for Retarded Citizens of Conn., Inc. v. Thorne*, 30 F.3d 367 (2d Cir. 1994), to argue that consent orders only bind those who voluntarily agree to them, which Cleopatra undisputedly did not do with respect to the Consent Order. See *id.* at 370 (“While a district court has authority to enforce a judicially-approved consent decree against the parties to it, a district court that enforces the decree against a nonparty acts beyond its jurisdiction and thus beyond the scope of the All Writs Act.”). However, *Thorne's* facts and holding are inapposite to the instant case.

In *Thorne*, the Second Circuit overturned a district's court decision to join a previous non-party as a defendant to a litigation years after a final order was entered by the district court, the effect of which would have made the non-party subject to every provision of the previously-entered consent decree. See *id.* at 368.

The *Thorne* court made its opinion pointedly narrow, “conclud[ing] only that the district court's decision to add [the non-party] to this suit after a final consent judgment had already been entered was not authorized by the All Writs Act.” *Id.* at 373. *Thorne's* holding was based on facts distinct those presented here. Plaintiffs are not seeking to add Cleopatra as a party to the 1988 Action or to bind Cleopatra to every provision of the Consent Order.

*13 By contrast, in subsequent Second Circuit authority, *In re Egri*, 68 Fed.Appx. 249, 256 (2d Cir. 2003), the circuit court affirmed a district court's grant of a permanent injunction under the All Writs Act that prevented non-signatory residents of a town from challenging the validity of a consent decree between the town and an electric company. The *Egri* Court rejected comparisons to *Thorne* by noting that “unlike the district court in [*Thorne*], here the district court ‘has sought not to bind [non-party] appellants to the consent decree, but to enjoin them from acts that would frustrate the consent decree's operation on parties that are bound to the decree.’” *Id.* at 255 (quoting *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL–CIO*, 266 F.3d 45, 50 (2d Cir. 2001)). “[A]n injunction that merely seeks to enjoin behaviors that could frustrate the operation of a consent decree are authorized by the All Writs Act, even if the injunction operates against non-parties.” *Id.* at 256.

Such is the situation here. The Consent Order dictates, amongst many things, parameters for the signatories' use of the name Lynyrd Skynyrd, the band's story, the band's music, and the name, likeness, or history of Van Zant or Gaines; its terms prohibit those “in concert or participation with” the signatories from violating these portions of the Consent Order's strictures. (See Consent Order at 1–2.) If there was a violation of the Consent Order by Pyle, it is within the power of the Court to enjoin those acting in concert with him, not “to force non-parties to abide by the terms of that order,” but “insofar as [it is] essential to the implementation of that order.” *In re Egri*, 68 Fed.Appx. at 256; see also *United States v. Mason Tenders Dist. Council of Greater N.Y.*, 205 F.Supp.2d 183, 189 (S.D.N.Y. 2002) (enjoining non-signatories to consent decree under the All Writs Act and noting that those enjoined were not “bound to the strictures of the [Consent Decree], an action that would be outside the district court's discretion” but rather were “enjoined from acts that would frustrate the Consent Decree's operation on parties that are bound by the decree—an act well within the district court's discretion”); *Bear U.S.A., Inc. v. Kim*, 71 F.Supp.2d 237, 246, 248 (S.D.N.Y. 1999) (enjoining third-party manufacturer who acted “in active concert” with defendant bound by previous court order from distributing infringing products after being informed of court order), *aff'd*, 216 F.3d 1071 (2d Cir. 2000). For a Consent Order to be effective, it must provide protection against those who would seek to undermine its terms;

without meaningful protection, such an order is just a piece of paper and “ain't no good for nothing else.” LYNRYD SKYNYRD, Saturday Night Special, on NUTHIN' FANCY (MCA Records 1974); see also *Bear U.S.A.*, 71 F.Supp.2d at 246 (“Learned Hand explained that a judgment binds not only the parties, but also ‘a person not a party ... when he has helped to bring about ... an act of a party [forbidden by the judgment].” (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930))).

3. Defendants Have Violated the Consent Order

[18] Cleopatra next argues that, even if Pyle and Cleopatra are bound to terms of the Consent Order, Defendants actions do not constitute a violation of its terms. First, Cleopatra contends that Cleopatra could only have violated the Consent Order after learning of its terms, after which Cleopatra claims that it ameliorated the harm; second, Cleopatra attempts to house its use of Van Zant and Gaines' names and likenesses as protected as “nominative fair use.” These arguments are unavailing.

Given the terms of the Consent Order and Plaintiffs' allegations, to establish that Defendants violated the Consent Order's terms, Plaintiffs need to show that Cleopatra (1) had knowledge of the Consent Order and (2) acted “in concert or participation” with a Pyle to use the “name, likeness, portrait, picture, performance or biographical material of Ronnie Van Zant [] or Steven Gaines [].” (Consent Order 1(iii)); see *In re Baldwin–United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 339 (2d Cir. 1985) (“Although Rule 65 does not apply to injunctions issued under the All–Writs Act against non-parties whose actions would impair the court's jurisdiction, we do not abandon the requirements that an injunction be specific and definite enough to apprise those within its scope of the conduct that is being proscribed and that those subject to the injunction receive appropriate notice of its terms.” (internal citation omitted)); *Vuitton et Fils S. A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) (requiring that plaintiff prove that non-parties to consent order were aware of order's provisions before enjoining defendants).

*14 Here, as described above, the facts have established that Cleopatra was aware of the Consent Order and its provisions, at the latest, by July 2016. [20] See Findings of Fact Section V supra. In the time between then and the start of the instant litigation, evidence established that Cleopatra and Pyle continued to adhere to their June 2016 contract: Pyle was filmed for a cameo appearance and wrote original music for the Film. Moreover, while not the final say on creative decisions in the Film, Pyle was repeatedly consulted throughout the whole production process, providing advice about the Film's script, casting, and costumes that the internal Cleopatra communications establish were both solicited and used by Cleopatra. See Findings of Fact Section VI supra. In the aftermath of the cease and desist letter, while Cleopatra may have stopped outwardly referring to Pyle as a co-producer, and Pyle may not himself have penned the final script, the evidence presented has shown that Cleopatra's Film was made, throughout 2016 and 2017, with the participation of Pyle. [21]

Cleopatra's consultations with Pyle were important because the Film incorporates, in substantive part, the depictions of Van Zant, Gaines, and the rest of the Lynryd Skynyrd band, as well as major bits of their history. Cleopatra argues that their Film is Pyle's story, as no part of the Film depicts the history of Lynryd Skynyrd without Pyle and which is permitted under the terms of the Consent Order. (See Consent Order 3.) To an extent, this is true: there is no doubt that Pyle plays a central role in the Film. However, the inverse of Cleopatra's claim is true too: no part of the Film depicts Pyle outside his time with Lynryd Skynyrd. As such, there is also no doubt that the Film is a film about the Lynryd Skynyrd band. As the facts have demonstrated, none of the Defendants received the requisite authorization under the terms of the Consent Order in depiction of Van Zant or Gaines or in the use of the Lynryd Skynyrd name, and therefore all have violated the Consent Order. [22]

4. Plaintiffs Have Shown Irreparable Harm

[19] Lastly, Cleopatra has argued that, even if the Consent Order were violated, a permanent injunction would still be inappropriate because Plaintiffs have not shown irreparable harm caused by the production of Cleopatra's Film. As a preliminary matter, is not clear that such a requirement exists with regard to injunctions issued under the All Writs Act, as “in fashioning an injunction under the [All Writs Act], a court is not constrained to follow the requirements of Rule 65.” *Am. Booksellers Ass'n, Inc. v. Houghton Mifflin Co.*, No. 94 Civ. 8566 (JFK), 1998 WL 436364, at *2 (S.D.N.Y. July 28, 1998) (citations omitted); see *In re Baldwin–United Corp.*, 770 F.2d at 339 (“We do not believe that Rule 65 was intended to impose ... a limit on the court's authority provided by the All Writs Act to protect its ability to render a binding judgment.”). But see *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472, 474 (6th Cir. 2004) (noting that the traditional standards for obtaining injunctive relief includes a showing of irreparable harm, but in the context of an injunction granted “under state law” and citing to precedent addressing preliminary injunctions). Rather, “all that is necessary is that the

injunction under the All Writs Act be 'necessary or appropriate' to prevent the frustration of a court's previous remedial order." *Federated Conservationists of Westchester Cty., Inc. v. City of Yonkers*, 117 F.Supp.2d 371, 384 (S.D.N.Y. 2000) (citation omitted), *aff'd*, 26 Fed.Appx. 84 (2d Cir. 2002). As discussed above, enjoining the production of Cleopatra's Film is necessary to prevent the terms of the Consent Order from being violated.

*15 In any event, Plaintiffs have demonstrated proof of irreparable harm.^[23] The creation of the Consent Order, and in particular the provisions restricting the use of the name, likeness, and biography of Zant and Gaines, demonstrate in part a desire to preserve and protect the memory of deceased husbands and friends. The evidence has not established that required authorizers under the Consent Order have given approval to the way Cleopatra has chosen to tell the story of Van Zant, Jenness' dead husband, or the band member's band. To the extent that those who bargained for the right to have a say in how such memories are sustained, the "loss of control over one's reputation is neither 'calculable nor precisely compensable' " *U.S. Polo Ass'n, Inc. v. PRL USA Holdings, Inc.*, 800 F.Supp.2d 515, 540 (S.D.N.Y. 2011) (quoting *Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 95 (2d Cir. 1985)), *aff'd*, 511 Fed.Appx. 81 (2d Cir. 2013). Furthermore, as to the legacy of friends and loved ones, the "emotional damages are difficult to quantify" and the remedy cannot be found to be monetary. *Grondin v. Rossington*, 690 F.Supp. 200, 204 (S.D.N.Y. 1988). Lastly, this latest attempt by Pyle to evade the Consent Order's requirements, now with assistance by Cleopatra but previously with others, itself creates "palpable" irreparable injury, and it is likely that Plaintiffs will continue to be frustrated in their attempt to enforce the Consent Order absent a permanent injunction. *Experience Hendrix, LLC v. Chalpin*, 461 F.Supp.2d 165, 169 (S.D.N.Y. 2006).

5. Cleopatra's Affirmative Defenses Are Unavailing

Cleopatra has put forward several affirmative defenses to negate liability even if the Film would otherwise have been in violation of the Consent Order: specifically, that Plaintiffs' claim is barred by the doctrines of laches or unclean hands, or that Plaintiffs' sought-after injunction would impose unconstitutional prior restraint of protected speech on Cleopatra in violation of the First Amendment of the U.S. Constitution. Each of Cleopatra's defenses fails.

i. Laches

^[20] Cleopatra has argued that the doctrine of laches prohibits Plaintiffs from obtaining the equitable relief they seek. Specifically, Cleopatra contends that Plaintiffs knew that Cleopatra was producing the Film back in July 2016 when Plaintiffs first sent Cleopatra the cease and desist letter, received correspondence from Cleopatra in August 2016 indicating Cleopatra intended to continue making the Film, and then unreasonably waited until May 2017 to bring the instant action, by which point Cleopatra had spent over a million dollars in production costs. Plaintiffs respond that in 2016 they were led to believe that filming had stopped and, furthermore, that no significant financial expenditures occurred until after Plaintiffs had provided notice to Cleopatra of the Consent Order.

^[21] ^[22] Laches protects defendants when a plaintiff has "unreasonably and inexcusably delays in seeking an injunction, and the defendant is prejudiced by that delay." *Nat'l Council of Arab Ams. v. City of N.Y.*, 331 F.Supp.2d 258, 265 (S.D.N.Y. 2004) (citing *Perez v. Danbury Hosp.*, 347 F.3d 419, 426 (2d Cir. 2003)). The question of laches is one "primarily addressed to the discretion of the trial court which must consider the equities of the parties." *Beacher v. Estate of Beacher*, 756 F.Supp.2d 254, 277 (E.D.N.Y. 2010) (quoting *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 30, 31, 72 S.Ct. 12, 96 L.Ed. 31 (1951) (per curiam)); *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994) ("The inquiry is a factual one. The determination of whether laches bars a plaintiff from equitable relief is entirely within the discretion of the trial court.").

*16 As neither element of laches has been established by the facts, this argument must fail. As to the first element, Plaintiffs delay in bringing its action in 2017, while not grounded in a flawless reading of the exchanges between Cleopatra and Plaintiffs in 2016, was not unreasonable. Cleopatra points to its reply letter to the initial cease and desist, which includes language strongly affirming Cleopatra's right to make its film independent of the existence of the Consent Order. (See Defs.' Ex. 3.) Cleopatra's response, however, was sent before Cleopatra had received and read the terms of the Consent Order, which was sent by Plaintiffs shortly thereafter.

Once in context, the August 2016 communication between Cleopatra and Plaintiffs, through Jenness—the Facebook message exchange—takes on a different light. When Cleopatra requested to chat with Jenness about the movie project, shortly after receiving the Consent Order, it would have been reasonable from

Plaintiffs' perspective to construe the message as an attempt by Cleopatra to work with Plaintiffs to reach an accommodation to permit the Film be made within the now-understood Consent Order parameters. After hearing no response from Cleopatra after Jenness requested additional information about the project, Plaintiffs could reasonably have thought the Film's project was aborted, an understanding only disturbed after reading the news about the commencement of filming Cleopatra's film in May 2017, established at trial as the next major press release on the Film. This is excusable delay.

Cleopatra points to *New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989), to support its laches argument, but such authority is inapposite. In *New Era*, the Second Circuit found that laches barred a plaintiff from seeking an injunction for a copyright infringement because plaintiff had known, definitively and years earlier, of an allegedly infringing book's publication in the United States because of a defiant letter by defendant refusing to discuss the infringement, had pursued injunction relief against the same defendant in other countries, and only then brought suit in the United States after defendant had printed thousands of copies. *Id.* at 584. After considering the facts, the court found such delay "unconscionable." *Id.* at 585.

Aside from the *New Era* defendants and the Defendants here both having sent defiant letters to the opposing side at some point, the differing facts warrant different results. Unlike the situation in *New Era*, Plaintiffs' receipt of Cleopatra's defiant letter preceded Cleopatra's understanding of the Consent Order and shaded by the successive messaging with Jenness to discuss work on the Film in the context of the Consent Order. The evidence presented here makes clear that Plaintiffs threatened or brought legal action quickly, and twice, upon reading news of Cleopatra's Film, and that the instant suit was brought in May 2017 not because Plaintiffs deviously sought to pounce on Defendants only after the Film was made, but rather because of a reasonable misunderstanding as to whether further action was needed to halt the its production. *Seelmagineering, Inc. v. Van Klassens, Inc.*, 851 F.Supp. 532, 535 (S.D.N.Y. 1994) (rejecting laches defense where delay of several years prior to the commencement of an action based, in part, on plaintiff's belief that competitor had complied with cease and desist letter, even after competitor had sent defiant response letter), *aff'd* in relevant part, 53 F.3d 1260 (Fed. Cir. 1995). None of these actions rises to the level of unconscionability.

Even, *arguendo*, were Plaintiffs' delay to be unreasonable, the second laches element is also not met. The facts have shown that, in terms of financial expenditure, Cleopatra spent the lion's share of the approximately \$1.2 million producing the Film in the time following Plaintiff's cease and desist letter and deliverance of the Consent Order. (See Defs.' Ex. 13 (showing the majority of costs by Cleopatra in April and May 2017).) Cleopatra was aware of the strictures of the Consent Order, was aware that Plaintiffs were ultimately likely to bring suit, and nevertheless persisted in the Film's production; a balance of these equities requires rejecting a laches defense.^[24] See *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F.Supp. 706, 716 (S.D.N.Y. 1987)(rejecting a finding of prejudice where "defendants were informed within weeks of plaintiff's disapproval of their poster" and "presented no evidence that, even if they had acknowledged any awareness of plaintiff's reaction, they would in any way have modified their subsequent actions").

ii. Unclean Hands

*17 ^[23] Cleopatra has argued that, even if Plaintiffs' action were timely, it would still be barred under the doctrine of unclean hands. Specifically, Cleopatra claims that as other signatories of the Consent Order have been violating other provisions of the Consent Order—such as the Rule of Three, Date Requirement, or being involved in film projects Cleopatra contends are substantively similar to Cleopatra's Film—it would be unfair to require Cleopatra to abide by provisions under the same contract.

^[24] ^[25] ^[26] The doctrine of unclean hands "closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 129 (2d Cir. 2009) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945)). Unclean hands is a narrow doctrine, and "applies only where the misconduct alleged as the basis for the defense 'has immediate and necessary relation to the equity that [plaintiff] seeks in respect of the matter in litigation.'" *Specialty Minerals, Inc. v. Pluess–Staufner AG*, 395 F.Supp.2d 109, 112 (S.D.N.Y. 2005) (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245, 54 S.Ct. 146, 78 L.Ed. 293 (1933)); see also *Warner Bros., Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 334 (2d Cir. 1983) (holding that plaintiff's alleged false accusation of copyright infringement did not bar relief in trademark infringement claim). "Typically, courts that have denied injunctive relief due to plaintiff's unclean hands have found plaintiff guilty of truly unconscionable and brazen behavior." *Gidatex, S.r.l. v. Campaniello Imports, Ltd.*, 82 F.Supp.2d 126, 131 (S.D.N.Y. 1999)(collecting cases). "Application of the 'unclean hands' doctrine rests with the discretion of

the court, which is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' " *Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F.Supp. 969, 969–70 (S.D.N.Y. 1992)(quoting *Keystone Driller Co.*, 290 U.S. at 245, 54 S.Ct. 146).

It is clear that Plaintiffs have not precisely followed the letter of the Consent Order's edicts. For example, it is uncontested—and even readily admitted by Plaintiffs—that there have been modifications to the Consent Order over the years, such as to the Rule of Three and the Date Requirement, changes that were made without a formal writing signed by all the parties as required by the Consent Order. As the Consent Order is the basis for Plaintiffs' claim, conduct under the Consent Order bears relation to the equity Plaintiffs seek.

[27] [28] What is not clear is that Plaintiffs should be barred from bringing the instant claim for these alterations. What "is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts." *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, 13 F.Supp.2d 430, 445 (S.D.N.Y. 1998) (quoting *Project Strategies Corp. v. Nat'l Comm'n Corp.*, 948 F.Supp. 218, 227 (E.D.N.Y. 1996)). In evaluating whether unclean hands should be applied, "[t]he relative extent of each party's wrong upon the other and upon the public should be taken into account, and an equitable balance struck." *Project Strategies Corp.*, 948 F.Supp. at 227 (citation omitted).

Upon inspection, Plaintiffs' conduct does not rise to the level of "unconscionable" action justifying the foreclosure of their right to seek equitable relief. *Keystone Driller*, 290 U.S. at 240, 54 S.Ct. 146. The modifications done by Plaintiffs over the years have been narrowly-tailored and reasonable, such as adjusting the Rule of Three as former members of the original Lynyrd Skynyrd band became unable to perform. All the while, the facts have established that Plaintiffs have been focused on sustaining the spirit of the Consent Order's underlying "blood oath," preserving the integrity of the Lynyrd Skynyrd band's and members' story and music, by seeking injunctions against those perceived to be improperly using their contracted-for rights to tell their history. Furthermore, under the Consent Order, Pyle has benefited financially for years without complaint, and the fact that he has never sought to enforce any perceived breaches of the Consent Order's terms, even when the changes Cleopatra highlights today took place, speaks to the immateriality of such changes. To bar Plaintiffs' claim today for actions that were, at worst, sloppily enacted but apparently uncontroversial, would "thereby leav[e] two wrongs unremedied." *Project Strategies Corp.*, 948 F.Supp. at 227 (citation omitted). Equity is not served by such an outcome.

*18 Lastly, Cleopatra's argument that other films and projects related to Lynyrd Skynyrd, such as the CMT documentary, have been permitted to be made and should merit a finding of unclean hands is unavailing. The CMT film, along with the many other Lynyrd Skynyrd works that Cleopatra has detailed in its briefings and which Plaintiffs have not sought injunctions over, are fundamentally different in at least one crucial respect: they have not been established as violating the terms of the Consent Order. Books and films are permitted to be written about Lynyrd Skynyrd, and if done in concert with parties to the Consent Order, can incorporate use the name and history of Lynyrd Skynyrd as part of a telling of each individual's life story or with certain Consent Order signatories' permission. Cleopatra has not established that any of their other identified Lynyrd Skynyrd projects had Consent Order signatories acting in concert with the project producers and contributing content to the degree that Pyle was involved in contributing to Cleopatra's Film or did not have the requisite permissions under the Consent Order. See Findings of Fact Section IX supra. Pyle's involvement in Cleopatra's particular and unauthorized Film, unlike other projects, places it outside the Consent Order's permissible bounds.

iii. First Amendment Rights

[29] Lastly, Cleopatra contends that to enjoin its publication of its Film would violate its constitutionally protected right to free speech under the First Amendment of the U.S. Constitution. As the Consent Order is a private agreement that is narrowly-tailored to protect the bargained-for rights of its signatories, with whom Cleopatra chose to do business, this argument fails.

The First Amendment to the Constitution states, in relevant part: "Congress shall make no law ... abridging the freedom of speech." U.S. CONST., amend. I. As between private parties, however, courts have consistently found that an individual has the ability to "contract away his right to engage in what otherwise might be considered protected ... speech." *JA Apparel Corp. v. Abboud*, 682 F.Supp.2d 294, 317 (S.D.N.Y. 2010); see also *Snepp v. United States*, 444 U.S. 507, 509 & n. 3, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (affirming agreement to limit otherwise protected speech as part of employment with government agency); *Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1315 (8th Cir. 1991) ("By entering into the franchise agreement, however, Cablevision effectively bargained away some of its free speech rights.... Cablevision cannot now invoke the first amendment to recapture surrendered rights."); *In re George F. Nord*

Bldg. Corp., 129 F.2d 173, 176 (7th Cir. 1942) (“Certainly, one who has been a party to a proceeding wherein a consent decree has been entered and who has been a party to that consent, is in no position to claim that such decree restricts his freedom of speech. He has waived his right and given his consent to its limitations within the scope of that decree.”); *Perricone v. Perricone*, 292 Conn. 187, 205 n.18, 972 A.2d 666, 679 (2009)(collecting cases stating the same).[\[25\]](#)

In support of their claim, Cleopatra principally argues authority that address two factual postures. First, there are opinions that reject blanket free speech infringements as to the news organizations based on government action on the grounds of secrecy or privacy. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996); *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986). Second, there are opinions rejecting free speech infringements arising from defamation claims that are found to be “so vague and imprecise” as to make it impossible to “fairly determine what future speech is permitted.” *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 239 F.3d 172, 178 (2d Cir. 2001); see also *Superior Films, Inc. v. Dep't of Educ. of State of Ohio, Div. of Film Censorship*, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329 (1954); *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963).

*19 Neither of these factual strands is persuasive because none of them address the facts as established here. The injunction sought by Plaintiffs in the instant action is grounded in a private contract between signatories to the Consent Order, of which Pyle was one and under which he waived certain rights.[\[26\]](#) Insofar as the Consent Order limits the actions of those acting “in concert or participation” with the Consent Order's signatories, the limitations are narrow and specific, including, *inter alia*, limiting the use of the “name, likeness, portrait, picture, performance or biographical material of [Van Zant] or [Gaines],” (Consent Order at 2), and, as applicable only to the signatories, preventing “exploitation in whole or in part of the history of the Lynyrd Skynyrd band” without certain prior written approvals, (Consent Order at 6). These are not blanket prohibitions and are not vague or imprecise prohibitions; an individual could read the Consent Order and understand what actions are or are not permissible under its strictures.

These are strictures that Pyle agreed to and which Cleopatra, upon receiving the Consent Order, became aware of. Prohibiting Cleopatra from making a particular movie in a particular fashion is not the kind of restraint that courts have designed prior restraint, the kind that “den[ies] use of a forum in advance of actual expression ... in which the exercise of such authority was bounded by precise and clear standards.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Cleopatra has not been blanket prohibited from making a movie about Lynyrd Skynyrd, about producing a movie about the 1977 plane crash while hiring actors to play Van Zant and Gaines, or from producing a movie that includes Pyle. Rather, Cleopatra is prohibited from making its movie about Lynyrd Skynyrd when its partner substantively contributes to the project in a way that, in the past, he willingly bargained away the very right to do just that; in any other circumstance, Cleopatra would be as “free as a bird” to make and distribute its work.[\[27\]](#) *LYNYRD SKYNYRD, Free Bird*, on *PRONOUNCED 'LĒH- NĒRD 'SKIN-NĒRD* (MCA Records 1973); see *Homeworx Franchising, LLC v. Meadows*, 09 Civ. 11 (DAK), 2009 WL 211918, at *1–2 (D. Utah Jan. 26, 2009) (finding non-signatory to a contract bound by contract's terms as part of a joint enterprise with signatory, even when infringement would otherwise have violated free speech rights) (citing *Paragould Cablevision*, 930 F.2d at 1315). The First Amendment is not infringed by such private and voluntary decisions, and the Court has the authority to protect those previously bargained-for rights. See *Conclusions of Law Section III. 2 supra*.

IV. Plaintiffs' Action Against Pyle is Moot

*20 The evidence adduced has established that Pyle is not in possession of the Film and has no legal right to distribute or release it. (See Tr. 146:13–147:25.) As such, Pyle is unable to comply with the relief Plaintiffs seek, namely to prevent the production, distribution, and display of the Film. (See Complaint 82.) Accordingly, the injunction relief sought under the Complaint's First Cause of Action must be dismissed as to Pyle as moot. See *Blackburn v. Goodwin*, 608 F.2d 919, 925 (2d Cir. 1979) (holding that since defendant “does not have the official capacity necessary to enable him to comply with the injunctive relief sought ... the claim for declaratory relief is now moot”); *Doe v. Coumo*, No. 08 Civ. 8055 (LAP), 2009 WL 3123045, at *5 (S.D.N.Y. Sept. 29, 2009) (“Doe's claims in his proposed SAC would fail since none of these proposed defendants is in a position to grant Doe the relief he seeks. Therefore, Doe's claims for injunctive and declaratory relief would be moot”).

V. Plaintiffs are Entitled to Attorneys' Fees and Costs

[\[30\]](#) [\[31\]](#) Plaintiffs request that they be awarded reasonable attorneys' fees should they prevail in the instant action. The Second Circuit has found that: “Under New York law, a contract that provides for an award of reasonable attorneys' fees to the prevailing party in an action to enforce the contract is enforceable if the

contractual language is sufficiently clear.” *Metro Found. Contractors, Inc. v. Arch Ins. Co.*, 551 Fed.Appx. 607, 610 (2d Cir. 2014) (quoting *NetJets Aviation, Inc. v. LHC Comms., LLC*, 537 F.3d 168, 175 (2d Cir. 2008)). Furthermore, “it is appropriate for the court also to award the reasonable costs of prosecuting the contempt, including attorney’s fees, if the violation of the decree is found to have been willful.” *Vuitton et Fils S. A.*, 592 F.2d at 130 (citing *W. E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 664–65 & n.5 (2d Cir. 1970)).

[32] Here, the language of the Consent Order with regard to attorneys’ fees is clear: “An amount equal to actual and reasonable attorneys’ fees shall be awarded to the prevailing party in any proceeding brought to enforce the terms and conditions of this order.” (Consent Order 34.) As established by the facts above, Defendants were aware of the restrictive provisions of the Consent Order by July 2016 and continued to make their film, in clear disregard, until the instant action. Accordingly, Plaintiffs are entitled to an award reasonable attorneys’ fees and costs.

Conclusion

Based on the findings of fact and conclusion of law set forth above, Plaintiffs have met their burden of proof with regard to their claim for a permanent injunction against Cleopatra and for reasonable attorneys’ fees and costs as to Defendants. Accordingly, judgment will be entered in favor of Plaintiffs, and Defendants’ outstanding motions for summary judgment and judgment as a matter of law are dismissed as moot.

The parties are directed to jointly submit a proposed redacted version of this Opinion and Order consistent with the Protective Order entered in this case, (Dkt. No. 9), to be filed publically or to notify the Court that none are necessary within one week of receipt of this Opinion and Order.

It is so ordered.

Footnotes

[1]

All citations to “Tr.” refer to the trial transcript. References to deposition transcripts which include portions to which a party has objected indicates the objection has been overruled.

[2]

Perera testified that he is not aware of or transacted business through an entity entitled Cleopatra Films. (See Perera Dep. 11:19–12:20; Tr. 118:22–24.) Documentary evidence demonstrates that such an entity in fact did exist in 2016 and, at minimum, was receiving legal representation at the time of Plaintiffs’ first cease and desist letter, discussed *infra*. (See Defs.’ Exs. 2–3 (noting that Cleopatra Records was “d/b/a/ Cleopatra Films”).) While the precise legal relationship between the two entities was not adduced at trial, Perera’s recollection is incorrect.

[3]

Perera co-owns Cleopatra with his wife. (Perera Dep. 8:2–14.)

[4]

Perera’s gossamery explanation that he believed it “a good idea to make a movie about the Lynyrd Skynyrd plane crash” because he saw “lots of Behind the Music,” “felt it would be a good historical document to release a movie about a rock band on a plane, because it seems like there is some interest in movies ... about a plane,” and that “including a rock band on the plane would definitely be of interest,” suggests there might be something more to the Film’s origin story. (Tr. 119:5–12.)

[5]

Pyle testified that, at the June 2016 meeting, he described the Consent Order to Perera and that, while Pyle did not have a copy of the Consent Order, he advised Perera one was on file in New York; it appears that, at that time, Pyle did not state the details about the restrictions resulting from the Consent Order’s existence. (See Pyle Dep. 62:14–64:5.)

[6]

Perera stated that the choice of the title “Free Bird” had nothing to do with the Lynyrd Skynyrd song but, rather, was because of “an airplane in the sky and a bird.” (Tr. 163:20–21.) Such an explanation is not credible.

[7]

At the time of receipt of the Consent Order around July 22, 2016, Cleopatra has spent approximately \$7,000 in the development of its Film. (See Tr. 171:13–172:23, 175:14–177:20; Pls.' Ex. 53.)

[8]

Perera testified at trial that he neither recalled providing a copy of the Consent Order to Cohn, (Tr. 180:22–181:2), the contents of the Consent Order, (Tr. 134:11–15, 160:9–22), and the cease and desist letter, (Tr. 160:23–161:22). Given the inconsistencies of this testimony in conjunction both with Perera's prior testimony and other admitted testimonial evidence, that version of the events is not credible.

[9]

Phone calling and texting were Pyle's principal media of communication because Pyle does not own or know how to use a computer and does not send or receive email messages, practices corroborated by the evidence. (See Pyle Dep. 45:18–46:7.)

[10]

Cohn contends that he did substantive independent research for the Film, although he did not recall whether he maintained notes on any of that research, aside from Cohn's initial meeting with Pyle. (See Cohn Dep. 32:5–35:21; see also Tr. 188:3–12.) At minimum, no substantive evidence of independent research by Cohn has been presented, in which circumstances Cohn's claim is difficult to accept but true.

[11]

Other aspects of the script are less concretely inaccurate, such as the depiction of the 1977 plane crash pilots consuming alcohol prior to the flight, although the Federal Aviation Administration's post-crash report did not identify drugs or alcohol use by the pilots in the report's toxicology findings. (Compare Pls.' Ex. 62, at P001128, with Pls.' Ex. 13, at P000078.)

[12]

As such, Perera and Cohn's contentions that Pyle was repeatedly solicited for information to “make him feel good,” (Cohn Dep. 49:11), or to “keep everything friendly and positive and move things along,” (Tr. 199:14), are not accepted.

[13]

Perera explained that he selected the new title “Street Survivors” because it was “just another good title,” not because of any connection to the identically named Lynyrd Skynyrd album title. (Tr. 164:18.) The title was changed because of the initial cease and desist letter. (See Tr. 138:18–20.) As the Film is, in major part, about a plane crash, the title appears to have been selected to evoke the emotional impact of the band.

[14]

Other actions were taken following the instigation of Plaintiffs' lawsuit to extricate Pyle's involvement from the Film, such as editing the Film's listing on the Internet Movie Database website to remove Pyle's name as a co-writer in June 2017. (Compare Pls.' Ex. 54, and Pls.' Ex. 55, with Pls.' Ex. 56; see Tr. 231:19–22.)

[15]

Cleopatra's filming and production costs for its Film up to around the instant action are approximately \$1.2 million. (See Defs.' Ex. 13; Tr. 145:24–146:1.)

[16]

Defendants argue that the recent amendments to Fed. R. Civ. P. 37(e) and its advisory notes limit a court's ability to exercise inherent powers to remedy spoliation. However, even after the 2015 amendments, courts have continued to recognize powers to sanction the destruction of evidence outside of Rule 37(e) because “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” *CAT3, LLC v. Black Lineage, Inc.*, 164 F.Supp.3d 488, 497 (S.D.N.Y. 2016) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)); see also *Hsueh v. New York State Dep't of Fin. Servs.*, No. 15 Civ. 3401 (PAC), 2017 WL 1194706, at *4 (S.D.N.Y. Mar. 31, 2017) (collecting cases). As Rule 37(e) does apply here, however, there is no need to rely on such powers.

[17]

Even without a subpoena, the validity of which Cleopatra has contested and which is discussed infra.

[18]

Cleopatra's counsel's comments were always truthful, though, in retrospect, not directly aligned as responses to Plaintiff's counsel's queries or the discussion before the Court. (Compare Tr. 104:6–105:10 (stating, after discussing whether Cohn was previously present in a video-fed testimony room, that “he's [Cohn] not present” in the room), with Tr. 168:19–169:2 (acknowledging the next day that Cohn had been in the room earlier but left just before testimony began and the earlier statement was made).)

[19]

Cleopatra has cited three cases in support: *Bergenline Prop. Grp., LLC v. Coto*, No. A-0259-14T2, 2015 WL 7428755, at *4 (N.J. Super. Ct. App. Div. Nov. 10, 2015) (affirming a trial court's finding of no meeting of the minds after a party repeatedly rejecting lease agreement and then notating “signing under protests”); *Ex parte Wright*, 443 So.2d 40, 42 (Ala. 1983) (failing to find a “meeting of the minds” when new employment contracts were signed “under protest and under duress”); *Church Mut. Ins. Co. v. Kleingardner*, 2 Misc.3d 676, 680–81, 774 N.Y.S.2d 265 (Sup. Ct. 2003) (finding similar but in the context of applying the New York Uniform Commercial Code).

[20]

While in theory Pyle was responsible under the terms of the Consent Order to inform any party with whom he worked about the strictures of the Consent Order, (see Consent Order 26), it is unestablished and, given Pyle's fickle devotion to the terms of the Consent Order in the past, (see, e.g., Pls.' Exs. 4, 6), unlikely that the Consent Order's details were discussed with Cleopatra prior to Plaintiffs' 2016 cease-and-desist letter.

[21]

Cleopatra's letter to Pyle on May 9, 2017, to void their 2016 contract and pay Pyle under the title “Historical Consultant” does nothing to eliminate all the assistance Pyle had to that point provided in support of the Film and its production or that, while providing assistance, Pyle was set to receive a percentage of the Film's net receipts. See Findings of Fact Sections IV, VIII supra.

[22]

Cleopatra argues that their Film is protected under the fair use doctrine. However, the affirmative defense is irrelevant because Plaintiffs claim is not under trademark law, but rather contract law. Even, *arguendo*, such an affirmative defense were applicable, it still must fail, as the facts established indicate that Defendants' use of the Lynyrd Skynyrd name and history here was not done in good faith. See *Kelly–Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013) (a successful fair use defense to a trademark infringement claim requires a defendant to prove that the use was made (1) other than as a mark, (2) in a descriptive sense, and (3) in good faith).

[23]

The parties have disputed Plaintiffs' seriousness and commitment to making their own film about Lynyrd Skynyrd—in which case, Plaintiff argues, Cleopatra's film might cause confusion and financial harm to Plaintiffs' film. As Cleopatra noted, however, there is reasonable likelihood that Cleopatra's film would rather boost the sales of Lynyrd Skynyrd music and ticket sales for any subsequent movies about the band; whether there would or would not be confusion has not been established by either party. The economic interplay between the two is irrelevant however, since the dispute is does not need resolution to establish the irreparable harm wrought by the production of the Film in violation of the Consent Order.

[24]

Cleopatra's cited Second Circuit authority are unavailing. In *Allens Creek/Corbetts Glen Pres. Grp., Inc. v. West*, 2 Fed.Appx. 162, 165 & n.1 (2d Cir. 2001), the court accepted a laches defense expressly because of a delay both by plaintiff in bringing a lawsuit and delay in moving for an injunction after bringing suit. Cleopatra can only argue a delay in the former here. And in *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996), the court affirmed the application of a laches defense where plaintiff waited five years after learning of the infringing advertising campaign while defendant continued to air commercials. The facts available to Cleopatra here as to Plaintiffs' knowledge and period of delay are meaningfully dissimilar.

[25]

Cf. *Erie Telecomm., Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1096 (3d Cir. 1988) (holding that constitutional rights “may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver” and that “volition and understanding are deemed to be, and indeed have been held to be, present, where parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and engaged in other contract negotiations”).

[26]

Cleopatra has argued that Pyle, by signing the Consent Order “under protest,” did not waive his First Amendment rights. However, as described above, the circumstances surrounding and following Pyle's signing of the Consent Order indicates that he knew at the time for what he had bargained and he was satisfied. See Conclusions of Law Section III. 1 *supra*. Cleopatra's cited authority, *Marinaccio v. Boardman*, No. 02 Civ. 00831 (NPM), 2005 WL 928631 (N.D.N.Y. Apr. 19, 2005), demonstrates that in circumstances where a person clearly expresses objections to his attorney before signing something “under protest” and the waiver is otherwise not “very clear,” finding waiver is disfavored. See *id.*, 2005 WL 928631, at *16. No such ambiguity exists here.

[27]

Authority put forward by Cleopatra to argue that Cleopatra did not waive its First Amendment rights do not address the present situation where a Consent Order which clearly prohibits acting in concert or participation with signatories in particular fashions was known to Cleopatra. *Novalogic, Inc. v. Activision Blizzard*, 41 F.Supp.3d 885 (C.D. Cal. 2013), addresses the relationship between a private contract and its impact on a third party. However, the *Novalogic* court could not find how the contract's provisions had an impact on third-parties or subsequent licensing agreements; here, the Consent Order explicitly envisions prohibitions on signatories' interactions with third-parties. See *id.* at 903. And *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 595 (6th Cir. 2016), discusses whether an individual can waive the public's right to court filings when sealing documents; the openness of the courts is not in question here.

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