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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**NORTHERN CENTRAL
DISTRIBUTING, INC. dba YOSEMITE
HOME DECOR,**

Plaintiff

v.

**ROCKIE BOGENSCHUTZ, ROCKIE'S
CONTAINERS, LLC dba Y DÉCOR and
YOSEMITE DECOR,**

Defendants

CASE NO. 1:17-cv-01351-AWI-EPG

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR AN ORDER TO SHOW
CAUSE RE CONTEMPT**

(Doc. No. 27)

Before the Court is Plaintiff Northern Central Distributing, Inc.'s motion for Defendants to show cause why Defendants should not be held in contempt for violating the Court's prior order, the "Stipulation and Order re Preliminary Injunction."¹ Doc. No. 21 (hereafter referred to as "Stipulated Injunction"). The Stipulated Injunction ordered Defendants to refrain from certain practices, including using certain stock keeping unit ("SKU") numbers, photographs, and the word "Yosemite" in Defendants' business. For the following reasons, the motion will be partially granted.

¹ Plaintiff's motion is styled as a "motion for an order to show cause re contempt." Doc. No. 27. Defendants responded to the motion by filing an opposition, which argued that Defendants should not be held in contempt. See Doc. No. 38. Defendants also responded to the Court's order instructing Defendants to file supplemental opposition briefing, which Defendants did. See Doc. Nos. 45, 48-49. Therefore, with Defendants having been provided with notice of Plaintiff's motion and an opportunity to be heard (*i.e.*, to show cause), the Court treats Plaintiff's motion as a motion to hold Defendants in contempt.

1 **GENERAL BACKGROUND**

2 Plaintiff Northern Central Distributing, Inc. dba Yosemite Home Décor (“YHD” or
3 “Plaintiff”) is a home décor supplier. So too is Defendant Rockie’s Containers, LLC dba Y Décor
4 (“Y Décor”). One of Y Décor’s members is Defendant Rockie Bogenschutz.² Bogenschutz
5 previously worked for YHD before starting and working for Y Decor. This case is largely about
6 Y Décor and Bogenschutz (collectively “Defendants”) using without authorization Plaintiff’s
7 protected property, including Plaintiff’s photographs of home décor products and SKUs. In the
8 home décor industry, an SKU is a unique combination of numbers and/or letters used to identify a
9 seller’s product.

10 Plaintiff filed a motion for preliminary injunction against Defendants pursuant to
11 Fed. R. Civ. P. 65 that sought to enjoin Defendants from engaging in certain business practices,
12 including copyright infringement. See Doc. No. 6-2. Specifically, Plaintiff’s motion for
13 preliminary injunction sought to enjoin Defendants from (1) using Plaintiff’s unique SKUs to
14 market, advertise, or sell home decor products; (2) using Plaintiff’s photographs of home décor
15 products; and (3) inserting Plaintiff’s product manuals into Defendants’ product shipments. See
16 id. Attached to the motion for preliminary injunction were declarations and photographs that
17 purportedly showed Defendants engaging in the aforementioned practices.

18 Additionally, Plaintiff’s motion for preliminary injunction asserted that Bogenschutz
19 violated a prior settlement agreement entered into between him and Plaintiff that required
20 Bogenschutz to refrain from using the word “Yosemite” in the home décor industry. Id. at 2. The
21 motion for preliminary injunction expressly stated, however, that “[b]y this motion, Plaintiff does
22 not seek to enjoin Defendants from use of the name ‘Yosemite,’ as those actions are . . . currently
23 subject to resolution by the honorable Howard Broadman (Ret.).” Id. at 3:1-3.

24 A hearing was scheduled on Plaintiff’s motion for preliminary injunction, but the hearing
25 never occurred. Instead, Defendants and Plaintiff stipulated to and proposed to the Court a
26 “Stipulation re Preliminary Injunction and Order Thereon,” which was essentially a proposed

27 _____
28 ² The publicly-available California Secretary of State Statement of Information (Form LLC-12) filing for Rockie’s
Containers, LLC, dated November 3, 2017, identifies Bogenschutz as a member. *See*
<https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=201529410014-23152080> (accessed August 17, 2018).

1 stipulated injunctive order. The proposed stipulation was e-signed by counsel for Defendants and
2 Plaintiff. The Court accepted and adopted the proposed stipulation on January 8, 2018. See Doc.
3 No. 21; cf. Doc. No. 19 (“Stipulation Re Preliminary Injunction and Order Thereon”).

4 The Stipulated Injunction orders Defendants to refrain from certain business practices,
5 including the following:

6 1. Immediately refrain from using any stock keeping unit, model, or product
7 identifier (“SKU”) which is identical to a SKU being used by Plaintiff on or in
8 connection with the same, similar or competitive home fixture, furnishing or décor
9 product. Additionally, with the exception of the SKUs listed in Exhibit A, within
10 60 days of entry of this Order, Defendants will refrain from using any SKU which
11 is similar to a SKU which is in active use by Plaintiff on or in connection with the
12 same, similar or competitive home fixture, furnishing or décor product. For the
13 purpose of this provision, a SKU is “similar” if it has 3 or more consecutive
14 numbers or letters that are the same as consecutive numbers or letters in a SKU
15 being used by Plaintiff. For the purpose of this Order Plaintiff may prove “active
16 use” of a SKU by establishing Plaintiff has ordered, received, sold or distributed
17 the referenced home fixture, furnishing or décor product on or after June 1, 2017.
18 Defendants shall act in good faith to comply with this provision within 60 days, but
19 upon notice of any violation of this provision Defendants shall have 10 days to
20 correct the violation.

21 2. Immediately refrain from reproducing, distributing copies of, preparing
22 derivatives of, displaying, or aiding others in reproducing, distributing copies of,
23 preparing derivatives of or displaying, in whole or in part, any image, photograph,
24 drawing, artwork, catalog, or product literature in which Plaintiff has valid and
25 subsisting copyrights, and of which Defendant knows or has reason to know were
26 prepared by, with, or for the exclusive benefit of, Plaintiff (the “Prohibited Creative
27 Works”).

28 4. Immediately refrain from using, preparing, or distributing, in print or electronic
form, any advertising or marketing material, product manuals, owner’s manuals,
installation guides, warranty guides, product packaging, and packaging materials,
in connection with (i) the sale or advertising of home fixture, furnishing, or décor
products and (ii) the performance or advertising of the service of distributing home
fixture, furnishing, or décor products, that include any of Plaintiff’s Prohibited
Creative Works

5. Immediately refrain from distributing within, or importing into, the United
States any product having inserted into its packaging, or attached thereto, or in any
other way distributed therewith, any of Plaintiff’s product manuals, owner’s
manuals, installation guides, or warranty guides, or any material attached to or
included with Defendants’ product that uses the name “Yosemite.”

9. Immediately refrain from using the “Yosemite” name in any manner
whatsoever, including but not limited to Defendants’ employment advertisements,
fictitious business name filings, invoices, shipping materials, product manuals, bills
of lading, shipping containers, or in any other manner whatsoever.

15. Immediately recall or otherwise eliminate distribution of any of Defendants’
products which contain Plaintiff’s product manuals, owner’s manuals, installation

1 guides, or warranty guides, or any material attached to or included with
2 Defendants' product that uses the name "Yosemite," and within 15 days provide
3 Plaintiff with an inventory of product that has already been sold to the public
4 containing Plaintiff's product manuals, owner's manuals, installation guides, or
5 warranty guides, or any material attached to or included with Defendants' product
6 that uses the name "Yosemite," as well as evidence of the removal of all remaining
7 product manuals, owner's manuals, installation guides, or warranty guides, or any
8 material attached to or included with Defendants' product that uses the name
9 "Yosemite," from Defendants' product.

10 Doc. No. 21 ¶ 1-2, 4-5, 9, 15 (parentheticals in original).

11 The Stipulated Injunction also provides that sanctions, remedies, or penalties may be
12 imposed for future violations of the Stipulated Injunction:

13 The parties stipulate and agree that in order to deter any further damage to
14 Plaintiff's business, reputation and goodwill, the parties agree to the following
15 measure of sanctions for the violations of this Order, in addition to any other
16 remedies or penalties the Court deems just and proper for violations of this Court's
17 Order:

18 a. \$500 for each prospective violation of this ORDER by any Defendant or
19 anyone acting in concert with any Defendant having notice of the injunction.
20 Aradia Women's Health Center v. Operation Rescue, 929 F.2d 530, 532 (9th Cir.
21 1991) (prospective sanctions proper); Institute of Cetacean Research v. Sea
22 Shepherd Conservation Soc., 774 F.3d 935, 950 (9th Cir. 2014) (party liable for
23 contempt for encouraging or giving non-party means to violate injunction); and

24 b. An award of reasonable attorneys' fees and costs to Plaintiff for costs of
25 enforcement of this ORDER upon application to the Court and upon proof of any
26 material violation of this ORDER. Harcourt Brace Jovanovich Legal & Prof. Pub.,
27 Inc. v. Multistate Legal Studies, Inc., 26 F.3d 948, 953 (9th Cir. 1994) (attorney's
28 fees appropriately awarded for civil contempt).

29 Id. at 5:4-18 (citations in original).

30 After the Court entered the Stipulated Injunction, Plaintiff and Defendants filed their joint
31 scheduling report pursuant to Fed. R. Civ. P. 26(f). See Doc. No. 24. In the section of the report
32 titled "Summary of Uncontested and Contested Facts," the report states that the parties do not
33 dispute that Defendants used some of Plaintiff's SKUs and photographs:

34 The parties do not dispute that Defendants used the name "Yosemite" to compete
35 with Plaintiff and engaged in conduct including using Plaintiff's unique SKU
36 numbers and Plaintiff's photographs. The parties dispute whether Defendants'
37 conduct as alleged in the complaint was considered wrongful or unlawful.

38 Id. at 2:23-28.

1 Sixty-five days after the Court issued the Stipulated Injunction, March 15, 2018, Plaintiff's
2 counsel, Stephanie Borchers, emailed Defendants' counsel, Russell Ryan. In the email, Ms.
3 Borchers said Defendants were violating the Stipulated Injunction because Plaintiff's counsel
4 found multiple webpages displaying SKUs and photographs covered by the Stipulated Injunction.
5 Ms. Borchers identified a few webpages that she claimed violated the Stipulated Injunction; some
6 of the webpages were from y-décor.com and others were from third-party retail websites,
7 including amazon.com and walmart.com. Ms. Borchers implied in her email that y-décor.com was
8 a business website used and controlled by Defendants. Ms. Borchers said she would seek
9 penalties for Defendants' violations of the Stipulated Injunction if the violations were not cured.

10 Eleven days later, March 26, 2018, Ms. Borchers emailed Mr. Ryan and wrote, "no
11 changes to the website that I'm seeing." Doc. No. 27-3, at Ex. 5. In the email, Ms. Borchers
12 identified another webpage from y-décor.com that purportedly displayed one of Plaintiff's
13 photographs covered by the Stipulated Injunction. Ms. Borchers said she would pursue a motion
14 for contempt if the photographs did not come down from the websites immediately. Ms. Borchers
15 also acknowledged that Defendants may not control the content displayed on the third-party
16 websites.

17 On the same day, Mr. Ryan injured his feet and legs while hiking near the Oregon coast on
18 vacation. Mr. Ryan stated in his declaration that he underwent multiple surgeries shortly after the
19 accident, received medical instructions to not bear weight on his legs and feet for approximately
20 twelve weeks, and was prescribed with strong medications which "caused [him] to be unable to
21 engage in any meaningful work or meet with clients for an extended period." Doc. No. 42 ¶ 2.

22 Mr. Ryan further stated he underwent another surgery for his injuries on April 4, 2018, in
23 Fresno, California, and he stated that he was homebound for much of the next nine weeks,
24 wheelchair bound until around June 10, 2018, and was not able to "regularly check [his] emails or
25 correspondence for several weeks." Doc. No. 42 ¶¶ 2-3. Mr. Ryan also stated that due to his
26 injuries, he was unable to speak with his client, Bogenschutz, between the time of the accident,
27 March 26, 2018, and the filing of Plaintiff's motion to hold Defendants in contempt, May 8, 2018.
28 There are approximately forty-three days between March 26, 2018, and May 8, 2018.

1 On April 4, 2018, Mr. Ryan emailed Ms. Borchers and explained his injuries. In the email,
2 Mr. Ryan said he should be able to talk with Ms. Borchers the following week about Defendants'
3 alleged violations to the Stipulated Injunction. Mr. Ryan also said he did much of his work
4 remotely through a computer.

5 On April 6, 2018, Ms. Borchers emailed Mr. Ryan. In the email, Ms. Borchers said the
6 issue of the violations was an issue that Bogenschutz needed to handle, not Mr. Ryan. Ms.
7 Borchers said she was considering bringing a motion to hold Defendants in contempt.

8 Twenty days later, April 26, 2018, Ms. Borchers gave Mr. Ryan a letter that identified over
9 100 SKUs. In the letter, Ms. Borchers said the SKUs were being used by Defendants in violation
10 of the Stipulated Injunction. Ms. Borchers said some of Plaintiff's photographs covered by the
11 Stipulated Injunction were being used by Defendants on y-décor.com. Ms. Borchers said actual
12 damages had been suffered by Plaintiff due to Defendants' violations of the Stipulated Injunction.
13 Ms. Borchers said she would file in eleven days an application for an order to show cause why
14 Defendants should not be held in contempt for violating the Stipulated Injunction.

15 Later that day, Mr. Ryan emailed Ms. Borchers. In the email, Mr. Ryan said he was just
16 starting to do work since his accident and he would put as a priority the issue of the Defendants'
17 alleged violations of the Stipulated Injunction. Mr. Ryan said he had not had a chance to speak
18 with Bogenschutz since the day of Mr. Ryan's accident. Mr. Ryan said that the prior day, April
19 25, 2018, was his first day back to the office since his accident. Mr. Ryan said he was bound to a
20 wheelchair for the next six weeks and would do the best he could to address the issue of
21 Defendants' alleged violations of the Stipulated Injunction, but he also said his injuries were
22 affecting him.

23 One week later, May 3, 2018, Mr. Ryan emailed Ms. Borchers. In the email, Mr. Ryan
24 said he had been largely home-bound due to his injuries and had been able to go into the office
25 only once since his accident, and that one visit was for a staff appreciation luncheon. Mr. Ryan
26 asked Ms. Borchers to extend by ten days the deadline to address the alleged violations that Ms.
27 Borchers identified in her letter from April 26, 2018. Mr. Ryan indicated he needed the additional
28 ten days because he had been unable to meet with Bogenschutz.

1 The next day, May 4, 2018, Mr. Ryan emailed Ms. Borchers, following up on his earlier
2 request for the ten-day extension. In the email, Mr. Ryan said the Stipulated Injunction required
3 Plaintiff to give Defendants a list of Plaintiff's actively used SKUs. Mr. Ryan said he believed
4 Plaintiff had not provided such a list to Defendants. Mr. Ryan asked Ms. Borchers to provide the
5 list. Later that day, Ms. Borchers emailed Mr. Ryan, saying she would not extend more time to
6 Defendants to address the alleged violations identified in her letter from April 26, 2018.

7 Three days later, May 7, 2018, a paralegal working for Ms. Borchers, Rita Bell, went
8 online and took hundreds of screenshots of webpages that displayed SKUs purportedly covered by
9 the Stipulated Injunction. The webpages came from websites such as y-décor.com, amazon.com,
10 overstock.com, wayfair.com, homedepot.com, and walmart.com. Ms. Bell also took screenshots
11 of webpages on y-décor.com that displayed photographs of lighting fixtures purportedly covered
12 by the Stipulated Injunction.

13 The next day, May 8, 2018, Plaintiff filed its motion to hold Defendants in contempt for
14 violating the Stipulated Injunction. In the motion, Plaintiff argued that the SKUs and photographs
15 on the webpages that Ms. Bell took screenshots of on May 7, 2018,³ were covered by the
16 Stipulated Injunction. Plaintiffs argued that Defendants were responsible for the SKUs and
17 photographs being displayed on the webpages. Attached to Plaintiff's motion was, amongst other
18 things, a declaration from Ms. Bell and copies of the screenshots that she took of the SKUs and
19 photographs on the multiple webpages.

20 On May 21, 2018, Mr. Ryan emailed Ms. Borchers and asked to continue the hearing on
21 the motion to hold Defendants in contempt. In the email, Mr. Ryan said that since his accident
22 and due to his injuries, he had gone into his office only on April 25, 2018, and May 16, 2018. Mr.
23 Ryan said he had been able to do some work remotely but had been largely unable to meet with
24 clients. Mr. Ryan said the only attorney at his firm capable of assisting him in responding to the
25 motion to hold Defendants in contempt was his daughter, who was a first-year lawyer not
26 qualified to assist him on the matter.

27
28 ³ Hereafter, when this order refers to the "screenshots," it means the screenshots taken by Ms. Bell on May 7, 2018.

1 The next day, May 22, 2018, Plaintiff and Defendants stipulated to continue by two weeks
2 the hearing on the motion to hold Defendants in contempt. The stipulation stated that Mr. Ryan’s
3 “injuries are such that he needs additional time to prepare the opposition, and the Parties have
4 agreed to a continuance of the hearing in order to allow this additional time.” Doc. No. 33, at 2:3-
5 5.

6 On July 2, 2018, Defendants filed an opposition to Plaintiff’s motion to hold Defendants in
7 contempt. See Doc. No. 38. Attached to the opposition was a twenty-three-page declaration from
8 Bogenschutz and a four-page declaration from Mr. Ryan.

9 Plaintiff then filed a reply. See Doc. No. 43. The reply included declarations and
10 attachments that raised factual issues not squarely raised in the motion to hold Defendants in
11 contempt. On that basis, the Court ordered Defendants to file supplemental briefing addressing
12 some of the issues raised in Plaintiff’s reply. See Doc. No. 45. Defendants then filed
13 supplemental briefing (see Doc. No. 48), which included another declaration from Bogenschutz.
14 Finally, Plaintiff filed a response to Defendants’ supplemental briefing. See Doc. No. 50.

15 **PLAINTIFF’S MOTION**

16 *Plaintiff’s Argument*

17 Plaintiff argues that Defendants violated the Stipulated Injunction. Specifically, Plaintiff
18 argues that after the entry of the Stipulated Injunction, Defendants: (1) committed at least 486
19 violations of the Stipulated Injunction by using identical or similar SKUs — identical or similar to
20 the SKUs used by Plaintiff — on multiple websites, including Defendants’ website, y-décor.com,⁴
21 and third-party retail websites, such as amazon.com, overstock.com, homedepot.com,
22 wayfair.com, and walmart.com; (2) committed four violations of the Stipulated Injunction by
23 displaying four photographs covered by the Stipulated Injunction on Defendants’ website, y-
24 décor.com; and (3) committed two violations of the Stipulated Injunction by using the word
25 “Yosemite” on two of Defendants’ import shipments.

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28 ⁴ With respect to the SKUs displayed on y-décor.com, Ms. Bell’s screenshots showed sixty-seven SKUs displayed on
sixty-seven webpages on y-décor.com — i.e., one SKU displayed per webpage.

1 Plaintiff contends that because of Defendants’ foregoing 492 violations of the Stipulated
2 Injunction, Defendants should pay Plaintiff \$246,000 pursuant to the Stipulated Injunction, which
3 provides for a \$500 sanction per violation of the Stipulated Injunction.

4 Plaintiff also argues that Defendants should pay Plaintiff’s attorney’s fees and costs in
5 bringing the motion to hold Defendants in contempt, plus \$50,000 for every fifteen days that
6 Defendants fail to comply with the Stipulated Injunction, beginning from the date that the Court
7 enters an order granting Plaintiff’s motion to hold Defendants in contempt.

8 Plaintiff also argues that it “suffered known actual damages in the form of lost sales as a
9 result of Defendants’ violations” because a customer canceled a contract with Plaintiff due to
10 being confused by Defendants’ use of one of Plaintiff’s SKUs. As compensation for that alleged
11 lost sale, Plaintiff claims that Defendants should pay \$1,913 to Plaintiff, which is the amount of
12 the lost sale.

13 Finally, Plaintiff maintains that Plaintiff “repeatedly notified Defendants of the existence
14 of the various violations described above as a courtesy” and “Defendants have had an ample
15 opportunity to correct these violations.” Doc. No. 27-2, at 5:23-25.

16 Defendants’ Opposition

17 Y Décor and Bogenschutz jointly filed an opposition to Plaintiff’s motion. The opposition
18 argues that Defendants should not be held in contempt for a number of reasons.

19 First, Defendants argue that with respect to SKUs displayed on third-party websites,
20 Defendants do not control the content displayed on those third-party websites:

21 Y Décor does not ‘control’ any third party seller websites, including all of those
22 listed by Ms. Bell in her declaration such as Amazon.com, Homedepot.com,
23 Overstock.com, Walmart.com and Hayneedle. Y Décor cannot make additions or
24 revisions to any third party seller website; it only provides information to the third
party sellers and they create and maintain pages for product sales over which Y
Décor has absolutely no control.

25 Doc. No. 38:20-25 (emphasis in original). Further, in his declaration, Bogenschutz states that
26 “[a]ll we can do is to send in price and SKU changes [to the third-party retailer websites], which
27 we did at the time the preliminary injunction went into effect,” Doc. No. 41, at 2:18-20, and “[i]t is
28 not possible for Y Décor to force Amazon, Home Depot or other online retailers to remove the

1 items from their sites” Id. at 3:4-5. Bogenschutz also states in his declaration that “we sent
2 SKU changes into Amazon in late December 2017 or early 2018.” Id. at 2:20-21.

3 Second, Defendants argue that the SKUs displayed on y-décor.com as of May 7, 2018, did
4 not violate the Stipulated Injunction because Defendants did not use that website for marketing
5 and sales since the Stipulated Injunction went into effect. The opposition states,

6 The SKUs in question that the plaintiff lists as being in violation of the preliminary
7 injunction as they are found on Y-décor’s old website [*i.e.*, y-décor.com] were only
8 there for reference purposes only and ***not*** for marketing or sales to customers, so
9 the references to older SKUs on that website are not be [*sic*] a violation of the
10 preliminary injunction. . . . The fact that Ms. Bell observed these SKUs on Y-
Décor’s old website does not establish that Y Décor was selling these items and, in
fact, Y Décor does not sell any items from that website and have not since before
the preliminary injunction went into place. Further, that website does not even
allow such transactions.

11 Doc. No. 38, at 18:18-21, 18:24-19:2 (emphasis in original).

12 Third, Defendants argue that a “2016 Agreement” entered into by the parties prior to this
13 case carves out a caveat to the Stipulated Injunction which allows Defendants to use certain SKUs
14 even if the SKUs are covered by the Stipulated Injunction.

15 Fourth, Defendants argue that with respect to the photographs displayed on y-décor.com as
16 of May 7, 2018, Defendants “never knowingly used any product photographs owned by the
17 plaintiff.” Doc. No. 41, at 22:3-4.

18 Fifth, Defendants argue that Y Décor “does not ship under the name ‘Yosemite Décor’ and
19 has no knowledge regarding such shipping containers being shipped under the name ‘Yosemite
20 Décor’ and certainly did not order shipments in 2018 (or, for that matter, receive shipments in
21 2018) under the name ‘Yosemite Décor.’” Id. at 22:22-25.

22 Sixth, Defendants argue that evidence does not exist of customer confusion caused by
23 Defendants’ alleged violations of the Stipulated Injunction, the alleged international shipments
24 bearing the name “Yosemite,” or Plaintiff’s alleged ownership of the photographs that were
25 displayed on y-décor.com.

26 Seventh, Defendants argue that they were not notified of the alleged violations identified in
27 Plaintiff’s motion until after the motion was filed. In a related vein, Defendants also argue that the
28

1 Court cannot grant the motion until after conducting an evidentiary hearing or trial on the issue of
2 Defendants' contempt.⁵

3 Legal Standard

4 "Civil contempt . . . consists of a party's disobedience to a specific and definite court order
5 by failure to take all reasonable steps within the party's power to comply." Inst. of Cetacean
6 Research v. Sea Shepherd Conservation Soc'y, 774 F.3d 935, 945 (9th Cir. 2014). When there has
7 been contempt, a court can levy contempt sanctions pursuant to its inherent powers. Cooke v.
8 United States, 267 U.S. 517, 539 (1925). The inherent powers of federal courts are those that "are
9 necessary to the exercise of all others." Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644,
10 648 (9th Cir. 1997) (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)). "The
11 district court has wide latitude in determining whether there has been contemptuous defiance of its
12 order." Hook v. Arizona Dep't of Corr., 107 F.3d 1397, 1403 (9th Cir. 1997). "The most common
13 utilization of inherent powers is a contempt sanction levied to 'protect the due and orderly
14 administration of justice' and 'maintain' the authority and dignity of the court." Primus Auto. Fin.
15 Servs., Inc., 115 F.3d at 648 (quoting Cooke, 267 U.S. at 539).

16 In addition to the Court's inherent powers, Congress gave the Court the "power to punish
17 by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other,
18 as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18
19 U.S.C. § 401; see also United States v. Powers, 629 F.2d 619, 624 (9th Cir. 1980).

20 For issuance of a contempt order to be proper, the party alleging contempt must establish
21 "(1) that [the accused party] violated the court order, (2) beyond substantial compliance, (3) not
22 based on a good faith and reasonable interpretation of the order, (4) by clear and convincing
23 evidence." Labor/Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Transp. Auth., 564 F.3d 1115,
24 1123 (9th Cir. 2009) (citing In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10 F.3d

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27 ⁵ In his declaration, Bogenschutz stated that "I only sell products and goods through [Y Décor] and not individually,
28 so I do not understand why I have been personally named as a defendant." Doc. No. 41, at 1:25-27. However,
because Defendants' arguments and citations did not address the issue of whether Bogenschutz is shielded from
liability, the Court does not make any findings on the issue here.

1 693, 695 (9th Cir. 1993)). Additionally, the violated order must be “specific and definite.” FTC v.
2 Enforma Natural Prods., Inc., 362 F.3d 1204, 1211 (9th Cir. 2004).

3 “A contemnor in violation of a court order may avoid a finding of civil contempt only by
4 showing it took all reasonable steps to comply with the order.” Kelly v. Wengler, 822 F.3d 1085,
5 1096 (9th Cir. 2016). “If a violating party has taken ‘all reasonable steps’ to comply with the
6 court order, technical or inadvertent violations of the order will not support a finding of civil
7 contempt.” Gen. Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986) (citations
8 omitted). But “[f]ailure to comply need not be intentional” in order for a contempt order to be
9 proper. Id. at 1379 (citing McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Perry v.
10 O’Donnell, 759 F.2d 702, 705 (9th Cir. 1985)).

11 Additionally, an alleged contemnor may defend against a finding of contempt by
12 demonstrating a present inability to comply. See United States v. Ayres, 166 F.3d 991, 994 (9th
13 Cir. 1999) (citing United States v. Rylander, 460 U.S. 752, 757 (1983)). The burden of showing
14 the inability to comply falls on the alleged contemnor. National Labor Relations Board v. Trans
15 Ocean Export Packing, Inc., 473 F.2d 612, 616 (9th Cir.1973) (“[O]ne petitioning for an
16 adjudication of civil contempt does not have the burden of showing that the respondent has the
17 capacity to comply.”). “Ability to comply is the crucial inquiry, and a court should weigh all the
18 evidence properly before it determines whether or not there is actually a present ability to obey.”
19 Ayres, 166 F.3d at 994 (citations omitted).

20 Discussion

21 I. Contempt

22 The Court concludes that Defendants violated the Stipulated Injunction beyond substantial
23 compliance even though Defendants had the ability to comply.

24 1. SKUs

25 The Stipulated Injunction orders Defendants to refrain from using SKUs that are
26 “identical” or “similar” to the SKUs used by Plaintiff. Specifically, the Stipulated Injunction
27 states that Defendants shall “immediately refrain from using” identical SKUs and “refrain from
28 using” similar SKUs “within 60 days of entry of [the Stipulated Injunction].” Doc. No. 21 ¶ 1.

1 The Stipulated Injunction also states that “upon notice of any violation [of SKUs] Defendants
2 shall have 10 days to correct the violation.” Id.

3 a. Third-Party Websites

4 With respect to the SKUs displayed on the third-party websites (*i.e.*, websites other than y-
5 décor.com), the Court has not been provided with clear and convincing evidence that Defendants
6 used or controlled the SKUs on those websites as of or after May 7, 2018 — the day that Ms. Bell
7 observed and took screenshots of the SKUs on the websites. Although Plaintiff’s motion claims
8 that the SKUs on the third-party websites existed because of Defendants, Bogenschutz said in his
9 declaration that he contacted the third-party retailers before the Stipulated Injunction went into
10 effect and requested that the third-party retailers change the SKUs. Plaintiff has not presented
11 clear and convincing evidence to show otherwise. Additionally, Plaintiff has not presented any
12 evidence that Defendants were responsible for the SKUs displayed on the third-party websites as
13 of May 7, 2018.⁶ Therefore, based on the evidence before it, the Court does not find that
14 Defendants used the SKUs on the third-party websites in violation of the Stipulated Injunction.
15 See Ayres, 166 F.3d at 994 (noting that an alleged contemnor may defend against a finding of
16 contempt by demonstrating a present inability to comply).

17 b. Y-décor.com

18 In his declaration, Bogenschutz conceded that y-décor.com is Defendants’ website.
19 Further, Defendants did not dispute that the sixty-seven SKUs on y-décor.com (as shown in Ms.
20 Bell’s screenshots) were in fact displayed on y-décor.com as of May 7, 2018. Bogenschutz
21 effectively admitted that the SKUs were displayed on y-décor.com as of May 7, 2018, when he
22 said that he caused many of the SKUs to be removed from y-décor.com following the filing of the
23

24 ⁶ Without providing much detail or convincing supporting evidence, Plaintiff argues that Defendants control content
25 on one or more of the third-party websites. The Court cannot make this finding. While the Court understands that
26 certain third-party retail websites, such as amazon.com, allow sellers to list, describe, and sell their products on such
27 websites, Plaintiff has not provided the Court with clear and convincing evidence that the SKUs on the third-party
28 websites were “used” by or controlled by Defendants. Further, in Plaintiff’s reply, Plaintiff appears to abandon its
argument concerning the SKUs displayed on at least one third-party website, amazon.com. See Doc. No. 43, at 11:28-
12:3 (“Accordingly, Plaintiff respectfully requests this Court order the Defendants to immediately restrain from using
Plaintiff’s SKUs and pay sanctions, excluding the violations occurring on Amazon, for their continued use of
Plaintiff’s SKUs and copyrighted photographs.”).

1 Plaintiff’s motion to hold Defendants in contempt. Further, Defendants did not dispute that the
2 sixty-seven SKUs were identical or similar to Plaintiff’s actively used SKUs.

3 Defendants argue that the sixty-seven SKUs on y-décor.com did not violate the Stipulated
4 Injunction because the SKUs were used by Defendants only for “reference” purposes, not for sales
5 or marketing. Doc. No. 38, at 9:18-21. While that characterization may be true, it has little
6 relevance to the Stipulated Injunction. The Stipulated Injunction does not carve out a caveat that
7 allows Defendants to use the SKUs for reference purposes — especially when the use occurs on a
8 publicly-available website that consumers and other market participants can easily access. Rather,
9 the Stipulated Injunction orders Defendants to refrain from any commercial use of the SKUs. See
10 Doc. No. 21 ¶ 1. Plaintiff’s motion for preliminary injunction — which was the genesis of the
11 Stipulated Injunction — focused on the marketplace confusion that was allegedly caused by
12 Defendants using Plaintiff’s SKUs. That confusion can arise even from Defendants using the
13 protected SKUs for “reference” purposes on y-décor.com.⁷ For this reason, the Stipulated
14 Injunction plainly states that Defendants shall “refrain from using” the SKUs.

15 The Stipulated Injunction does make a distinction between SKUs that are “similar” or
16 “identical” to the SKUs used by Plaintiff. See id. But here, that distinction is not terribly
17 important with respect to the sixty-seven SKUs found by Ms. Bell. Even assuming all sixty-seven
18 SKUs were “similar” (as opposed to “identical”), the use of the SKUs on y-décor.com still
19 violated the Stipulated Injunction. First, the Stipulated Injunction covers SKUs that are “similar”
20 to Plaintiff’s “active[ly] used” SKUs. Id. The Stipulated Injunction says that “active use” may be
21 shown by “establishing Plaintiff has ordered, received, sold or distributed the referenced home
22 fixture, furnishing or décor product on or after June 1, 2017.” Id. Plaintiff has sufficiently shown
23 that that the SKUs found by Ms. Bell on y-décor.com were similar to (if not identical to) SKUs
24 “actively used” by Plaintiff. For example, a customer service manager for Plaintiff, Lynae
25 Edralin, said in her declaration that the sixty-seven SKUs were either identical or similar to
26 Plaintiff’s actively used SKUs. Doc. No. 27-5 ¶ 4; id. at Exs. 1-2. Second, the Stipulated

27 ⁷ Defendants’ opposition claims that there has been no evidence presented of customer confusion. Arguably, there
28 has. Regardless, the Stipulated Injunction enjoins the “use” of the covered SKUs and photographs regardless of
whether the use causes customer confusion. See Doc. No. 21.

1 Injunction gave Defendants a sixty-day grace period to change “similar” SKUs and an additional
2 ten-day notice period to change “similar” and “identical” SKUs. By the time Ms. Bell observed
3 the sixty-seven SKUs on y-décor.com on May 7, 2018, the grace period for “similar” SKUs and
4 the notice period had expired.⁸

5 Bogenschutz also claims in his declaration that many of the SKUs on y-décor.com were
6 changed after the filing of Plaintiff’s motion to hold Defendants in contempt, but this claim cuts
7 against Defendants. The claim highlights that Defendants failed to make the changes in time and
8 establishes that Defendants controlled and had the ability to change the SKUs displayed on y-
9 décor.com.

10 Defendants also point to Y-Décor’s “current” website, AAdecor.com, and claim that they
11 have used that website since before the entry of the Stipulated Injunction. See Doc. No. 38, at
12 9:12-16. But this claim does not change the fact that Defendants used, controlled, and displayed
13 contumacious SKUs on y-décor.com as of May 7, 2018.

14 Defendants refer to a “2016 Agreement” that was allegedly entered into by Bogenschutz
15 and Plaintiff prior to this case, and Defendants suggest that the 2016 Agreement carves out a
16 caveat to the Stipulated Injunction which allows Defendants to use certain SKUs even if the SKUs
17 are covered by the Stipulated Injunction. Defendants have failed to persuade or explain to the
18 Court how the 2016 Agreement creates a caveat or exception to the Stipulated Injunction. The
19 Stipulated Injunction — which was negotiated, drafted, and proposed to the Court by Defendants
20 and Plaintiff — says nothing of the 2016 Agreement. Therefore, the Court rejects Defendants’
21 2016 Agreement arguments insofar as the arguments relate to the SKU violations of the Stipulated
22 Injunction.

23 Defendants also claim that they were not notified of the SKU violations until after Plaintiff
24 filed the motion to hold Defendants in contempt. This claim is unpersuasive. First, Ms. Borchers
25 repeatedly raised the issue of Defendants’ violations with Mr. Ryan. For example, on March 15,
26 2018, Ms. Borchers raised the issue in an email to Mr. Ryan by explaining that there were “SKU’s
27

28 ⁸ Plaintiff’s counsel’s letter from April 26, 2018, began the running of the ten-day notice period.

1 in violation of the order” on certain webpages on y-décor.com. Doc. No. 27-3. Ms. Borchers
2 invited Mr. Ryan to call and discuss the matter. Ms. Borchers warned that Plaintiff would perhaps
3 “seek the penalties set forth in the court’s order to . . . eliminate the other violations.” Id. The
4 email was sent eleven days before Mr. Ryan’s accident and fifty-four days before Plaintiff filed
5 the motion to hold Defendants in contempt. About three weeks later, on April 6, 2018, Ms.
6 Borchers again emailed Mr. Ryan about the alleged violations. About three weeks after that, on
7 April 26, 2018, Ms. Borchers provided Mr. Ryan with a letter that identified the SKUs that were
8 allegedly being used by Defendants in violation of the Stipulated Injunction. The letter stated that
9 contempt proceedings would be moved for in eleven days. Thus, there is no question that Ms.
10 Borchers repeatedly raised the issue of the SKUs displayed on y-décor.com and future contempt
11 proceedings well before Plaintiff filed the motion to hold Defendants in contempt.

12 Defendants also contend that they were not put on notice of the violations even though
13 their counsel was notified. “[A]n attorney is his client’s agent, and that the agent’s knowledge is
14 imputed to the principal even where . . . the agent does not actually communicate with the
15 principal, who thus lacks actual knowledge of the imputed fact. This principal applies to the
16 attorney-client relationship.” Herman v. Los Angeles Cty. Metro. Transportation Auth., 71 Cal.
17 App. 4th 819, 828 (1999) (citations omitted); see also Seacall Dev., Ltd. v. Santa Monica Rent
18 Control Bd., 73 Cal. App. 4th 201, 204–05 (1999) (“As a general rule, however, the negligence of
19 an attorney is imputed to the client.”); Powell v. Goldsmith, 152 Cal. App. 3d 746, 750 (1984)
20 (“As was stated in Northern Natural Gas Co., v. Superior Court, 64 Cal. App. 3d 983, 992 (1976),
21 ‘an agent is under a duty to inform his principal of matters in connection with the agency which
22 the principal would desire to know about. Even if he fails to do so, the principal will in most cases
23 be charged with such notice. As against a principal, both principal and agent are deemed to have
24 notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care
25 and diligence, to communicate to the other.’”).

26 As already discussed, Mr. Ryan was notified of the alleged violations before the motion
27 was filed. The Court understands that Mr. Ryan suffered serious injuries on March 26, 2018, that
28 affected to some degree his ability to work. But the evidence shows that Mr. Ryan had the ability

1 — before Plaintiff filed the motion — to reach out to his clients to discuss the alleged violations.
2 For example, Mr. Ryan had the ability to repeatedly email Ms. Borchers on and after April 4,
3 2018, concerning the alleged violations to the Stipulated Injunction. Mr. Ryan also had the ability
4 to email Ms. Borchers while Mr. Ryan was away from his office.⁹ Mr. Ryan also had the ability to
5 visit his office on April 25, 2018, to attend a staff appreciation luncheon. In light of these facts,
6 the Court rejects the argument that Defendants were not put on notice of the violations.

7 In sum, the sixty-seven SKUs displayed on y-décor.com as of May 7, 2018, constitute
8 sixty-seven violations of the Stipulated Injunction.

9 2. Photographs

10 With respect to the four photographs of the lighting fixtures that were allegedly “taken
11 from Plaintiff’s 2017 product catalog” and displayed on y-décor.com as of May 7, 2018, the
12 Stipulated Injunction states in Paragraph 2 that Defendants shall:

13 2. Immediately refrain from reproducing, distributing copies of, preparing
14 derivatives of, displaying, or aiding others in reproducing, distributing copies of,
15 preparing derivatives of or displaying, in whole or in part, any image, photograph,
16 drawing, artwork, catalog, or product literature in which Plaintiff has valid and
subsisting copyrights, and of which Defendant knows or has reason to know were
prepared by, with, or for the exclusive benefit of, Plaintiff (the “Prohibited Creative
Works”).

17 Doc. No. 21 ¶ 2 (parenthetical in original).

18 In Paragraph 4, the Stipulated Injunction identifies certain content encompassed by the
19 term, “Prohibited Creative Works,” including the photographs contained in YHD’s 2017 Catalog,
20 so long as the photographs are not manufacturer photographs:

21 c. The 2017 Photographs (as defined in the Complaint, but excluding any
22 photographs not created by or at the direction of Plaintiff, i.e., manufacturer
photographs);

23

24 e. The 2017 Catalog or any image, photograph, drawing, artwork contained therein
25 (as defined in the Complaint but excluding any photographs not created by or at the
direction of Plaintiff, i.e., manufacturer photographs)

26
27 _____
28 ⁹ Copies of several email correspondences between Mr. Ryan and Ms. Borchers were provided to the Court. The Court observes that on at least one of Mr. Ryan’s emails, the email signature stated that the email was sent from Mr. Ryan’s iPhone.

1 Id. ¶ 4.

2 Bogenschutz declared that he received the photographs from the manufacturer of the
3 lighting fixtures:

4 Y Décor has never knowingly used any product photographs owned by plaintiff. Y
5 Décor takes its own product photographs or obtains photographs from
6 manufacturers. Y Décor received the photos referenced in the declaration of Lynae
7 Edralin . . . from the general manager of the manufacturer Z Alba (also known as
8 Scullume) who is known as “Cap” and was told that these were manufacturer
photos. . . . Both Y Décor and the plaintiff purchase products such as the lights
depicted in Exhibits 3 and 4 of Ms. Edralin’s declaration from the same
manufacturers who provide stock photographs for use by its customers, including Y
Décor and the plaintiff.

9 Doc. No. 41 ¶ 15.

10 Therefore, based on the evidence before it,¹⁰ the Court is not convinced that the
11 photographs of the lighting fixtures are covered by the Stipulated Injunction, which expressly
12 excludes manufacturer photographs.

13 Additionally, another issue relevant to Paragraph 2 of the Stipulated Injunction is whether
14 Defendants “kn[ew] or ha[d] reason to know [the photographs] were prepared by, with, or for the
15 exclusive benefit of, Plaintiff,” which is required in order for the photographs to be covered by
16 Paragraph 2 of the Stipulated Injunction. Doc. No. 21 ¶ 2. Based on the foregoing statement from
17 Bogenschutz’s declaration that the photographs were received from the manufacturer, the Court is
18 not convinced that Defendants knew or had reason to know the photographs were “prepared by,
19 with, or for the exclusive benefit of” Plaintiff.

20 Thus, the Court does not conclude that Defendants violated the Stipulated Injunction with
21 respect to the photographs of the lighting fixtures.

22 3. “Yosemite”

23 The Stipulated Injunction orders Defendants to not use the word “Yosemite” on or with
24 Defendants’ shipments:

25 5. Immediately refrain from distributing within, or importing into, the United
26 States any product having inserted into its packaging, or attached thereto, or in any

27 ¹⁰ Plaintiff has not presented the Court with clear and convincing evidence that the photographs were not from the
28 manufacturer. Plaintiff argues that it filed copyright applications for registration of the photographs with the United
States Copyright Office in September 2017, but that does not answer the question of whether the photographs were
created by or at the direction of Plaintiff.

1 other way distributed therewith, any of Plaintiff's product manuals, owner's
2 manuals, installation guides, or warranty guides, or any material attached to or
3 included with Defendants' product that uses the name "Yosemite."

4 9. Immediately refrain from using the "Yosemite" name in any manner whatsoever,
5 including but not limited to Defendants' employment advertisements, fictitious
6 business name filings, invoices, shipping materials, product manuals, bills of
7 lading, shipping containers, or in any other manner whatsoever.

8 15. Immediately recall or otherwise eliminate distribution of any of Defendants'
9 products which contain Plaintiff's product manuals, owner's manuals, installation
10 guides, or warranty guides, or any material attached to or included with
11 Defendants' product that uses the name "Yosemite," and within 15 days provide
12 Plaintiff with an inventory of product that has already been sold to the public
13 containing Plaintiff's product manuals, owner's manuals, installation guides, or
14 warranty guides, or any material attached to or included with Defendants' product
15 that uses the name "Yosemite," as well as evidence of the removal of all remaining
16 product manuals, owner's manuals, installation guides, or warranty guides, or any
17 material attached to or included with Defendants' product that uses the name
18 "Yosemite," from Defendants' product.

19 Doc. No. 21 ¶¶ 5, 9, 15.

20 Ms. Edralin said in her declaration that she "received an alert from its international trade
21 database that two separate shipping containers were being imported in to the United States under
22 the name "YOSEMITE DÉCOR." Ms. Edralin said that she determined that the shipments were
23 for Defendants based on the consignee address and shipper information. Doc. No. 27-5 ¶ 8. Ms.
24 Edralin also said that "containers under the name 'Yosemite Décor' entered the United States for
25 shipment to what I know to be Y Décor's warehouse address[es]" at specific addresses in
26 Springdale, Arkansas or Fresno, California on "May 7, 14, 20, 28, and June 11," 2018. Doc. No.
27 43-2 ¶ 4.

28 However, Bogenschutz said in his declaration that Defendants stopped using the name
"Yosemite" since the entry of the Stipulated Injunction. Further, Bogenschutz stated that he
discovered that one of his suppliers, TopHome Stainless Steel Product, had shipped to Defendants
using the word "Yosemite," but that was a mistake of the supplier, not Defendants. Bogenschutz
provided the Court with copies of emails exchanged between Bogenschutz and the supplier in
which the supplier appears to acknowledge the mistake. See Doc. 49-3. Thus, based on the
evidence before it, the Court does not conclude that Defendants violated the Stipulated Injunction

1 with respect to the word “Yosemite” being displayed on the shipments identified in Plaintiff’s
2 motion.¹¹

3 II. Due Process for Contempt Order

4 Defendants argue that Plaintiff’s motion cannot be granted without the Court first
5 conducting an evidentiary hearing. The Court disagrees.

6 “[C]ivil contempt ‘may be imposed in an ordinary civil proceeding upon notice and an
7 opportunity to be heard.’” United States v. Ayres, 166 F.3d 991, 995 (9th Cir. 1999) (citing Int’l
8 Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 (1994). “[C]ivil contempt
9 sanctions, or those penalties designed to compel future compliance with a court order, are
10 considered to be coercive and avoidable through obedience, and thus may be imposed in an
11 ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor
12 proof beyond a reasonable doubt is required.” Bagwell, 512 U.S. at 827. The Ninth Circuit has
13 said that a “district court ordinarily should not impose contempt sanctions solely on the basis of
14 affidavits.” Peterson v. Highland Music, Inc., 140 F.3d 1313, 1324 (9th Cir. 1998). And the
15 Supreme Court has stated that “[f]or a discrete category of indirect contempts, . . . civil procedural
16 protections may be insufficient” and “[c]ontempts involving out-of-court disobedience to complex
17 injunctions often require elaborate and reliable factfinding.” Bagwell, 512 U.S. at 833–34.

18 Nonetheless, the Ninth Circuit has repeatedly held “that finding a party in civil contempt
19 without a full-blown evidentiary hearing does not deny due process of law to a contemnor.” Ayres,
20 166 F.3d at 995 (citations omitted). This is particularly true where the contempt “involve[es]
21 *discrete, readily ascertainable acts*, such as turning over a key or payment of a judgment.”
22 Bagwell, 512 at 833–34 (emphasis added). See also Ayres, 166 F.3d at 995 (“Because civil
23 contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for
24 such sanctions have been required. Thus civil contempt ‘may be imposed in an ordinary civil
25 proceeding upon notice and an opportunity to be heard.’”) (citing Bagwell, 512 U.S. at 827, 831);
26 Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d 1449, 1458 (9th Cir. 1996) (noting

27 ¹¹ Some of the declarations in support of Plaintiff’s motion raise the issue of product manuals bearing the name
28 “Yosemite” being included in Y Décor’s shipments. Because the issue was not raised in YHD’s supporting points and
authorities (and touched on only tangentially in the reply), the Court does not tackle the issue here.

1 that despite the lack of an evidentiary hearing, the “parties had ample notice and an opportunity to
2 respond to the possibility that the court would find them in contempt”).

3 In Ayres, for example, the Ninth Circuit affirmed the district court’s contempt sanctions —
4 which were issued without an evidentiary hearing or trial — where notice was given, briefing was
5 submitted, and the “issue of contempt was effectively uncontroverted.” United States v. Ayres,
6 166 F.3d 991, 995–96 (9th Cir. 1999). The Ninth Circuit explained that “where ‘the affidavits
7 offered in support of a finding of contempt are *uncontroverted*, we have held that a district court’s
8 decision not to hold a full-blown evidentiary hearing does not violate due process.’” Ayres, 166
9 F.3d at 995 (quoting Peterson v. Highland Music, Inc., 140 F.3d 1313, 1324 (9th Cir. 1998))
10 (emphasis in original); see also Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d
11 1449, 1459 (9th Cir. 1996); Jerry’s Famous Deli, Inc. v. Papanicolaou, 383 F.3d 998, 1004–05
12 (9th Cir. 2004).

13 Here, Defendants were provided with notice of Plaintiff’s motion and an opportunity to be
14 heard. Defendants submitted to the Court a sixteen page memorandum of points and authorities in
15 opposition to Plaintiff’s motion (see Doc. No. 38); a twenty-four page declaration from
16 Bogenschutz in opposition to the motion, which included fourteen pages of exhibits (see Doc. No.
17 41); a four page declaration from Mr. Ryan in opposition to the motion, which included eleven
18 pages of exhibits (see Doc. No. 42); a nine page supplemental memorandum of points and
19 authorities in opposition to the motion (see Doc. No. 48); and a six page supplemental declaration
20 from Bogenschutz in opposition to the motion, which included twenty pages of exhibits (see Doc.
21 No. 49). This briefing and evidence from Defendants constituted an opportunity for Defendants to
22 be heard.

23 The Court considered Defendants’ briefing and evidence, as well as the briefing and
24 evidence from Plaintiff. Based on that briefing and evidence alone, the Court finds that the issue
25 of Defendants’ contempt with respect to the sixty-seven SKUs is a “discrete, readily ascertainable
26 act[.]” Int’l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 833–34 (1994), that is
27 “uncontroverted.” Ayres, 166 F.3d at 995. Ms. Bell said in her declaration that she observed the
28 contumacious SKUs displayed on Defendants’ website on May 7, 2018. Doc. No. 28 ¶ 1.

1 Attached to Ms. Bell’s declaration were copies of the screenshots of the SKUs displayed on y-
2 décor.com. Similarly, Ms. Edralin said in her declaration that she also “observed several instances
3 of [Defendants] using SKUs that are identical or similar to those used by YHD.” Doc. No. 27-5 ¶
4 4. Ms. Edralin’s declaration attached an exhibit that listed the “SKUs [Ms. Edralin] observed
5 Defendants using that are identical to those used by [Plaintiff]” and “similar to those used by
6 [Plaintiff].” Id.

7 In the briefing and evidence submitted by Defendants, Defendants did not dispute that the
8 sixty-seven SKUs were displayed on y-décor.com on May 7, 2018. Defendants did not dispute
9 that Defendants were responsible for the SKUs on y-décor.com as of May 7, 2018. Defendants
10 did not dispute that Defendants were capable of removing the SKUs from y-décor.com.
11 Defendants did not refute that the SKUs were identical to or similar to the SKUs actively used by
12 Plaintiff. Instead, Defendants argued that the SKUs did not violate the Stipulated Injunction
13 because the SKUs were only used for reference purposes, but, as explained above, this argument is
14 unavailing.

15 Thus, based on the briefing and evidence submitted to the Court, it is uncontroverted that:
16 (1) Defendants used and displayed the sixty-seven SKUs on y-décor.com as of May 7, 2018; (2)
17 the SKUs were protected by the Stipulated Injunction; and (3) Plaintiff’s counsel provided
18 Defendants’ counsel with notice of the violations of the Stipulated Injunction. Conducting an
19 evidentiary hearing will not change any of the foregoing uncontroverted facts.¹² If Defendants had
20 evidence to controvert any of the foregoing facts, then Defendants should have raised the evidence
21 in their briefing and affidavits.

22 III. Sanctions

23 Plaintiff argues that Defendants should be ordered to pay a fine of \$246,000 for
24 committing 492 violating of the Stipulated Injunction (*i.e.*, \$500 per violation). The Stipulated
25 Injunction states that the Court may order sanctions in the amount of “\$500 for each prospective
26 violation” of the Stipulated Injunction, with the purpose of the sanctions being to “deter any
27

28 ¹² The Court finds the facts about the SKUs on y-décor.com uncontroverted even when accepting Defendants’
assertions as true.

1 further damage to Plaintiff’s business, reputation and goodwill.” Doc. No. 21, at 5. The Stipulated
2 Injunction also says the Court may order additional “remedies or penalties the Court deems just
3 and proper” for violations of the Stipulated Injunction. Id.

4 Beyond what the Stipulated Injunction says, the Court has authority to order remedial
5 sanctions and coercive fines for civil contempt. See Shell Offshore Inc. v. Greenpeace, Inc., 815
6 F.3d 623, 628–30 (9th Cir. 2016) (“A court may wield its civil contempt powers for two separate
7 and independent purposes: (1) ‘to coerce the defendant into compliance with the court’s order’;
8 and (2) ‘to compensate the complainant for losses sustained.’”) (citing United States v. United
9 Mine Workers of Am., 330 U.S. 258, 303 (1947)); Ahearn ex rel. N.L.R.B. v. Int’l Longshore &
10 Warehouse Union, Locals 21 & 4, 721 F.3d 1122, 1130 (9th Cir. 2013). “Because civil
11 compensatory sanctions are remedial, they typically take the form of unconditional monetary
12 sanctions; whereas coercive civil sanctions, intended to deter, generally take the form of
13 conditional fines.” Shell Offshore Inc., 815 F.3d at 628–30.

14 “If the award is both compensatory and coercive the district court should specify the
15 amount awarded under each theory based on the above standards and split payment of the award
16 between [the complainant] and the court accordingly.” Gen. Signal Corp. v. Donallco, Inc., 787
17 F.2d 1376, 1380 (9th Cir. 1986). “Moreover, in determining how large a coercive sanction should
18 be[,] the court should consider the character and magnitude of the harm threatened by continued
19 contumacy, and the probable effectiveness of any suggested sanction.” Donallco, Inc., 787 F.2d at
20 1380 (citations omitted). “If the fine, or any portion of the fine, is coercive, it should be payable
21 to the court, not [the complainant].” Id.

22 Here, the Stipulated Injunction, including the provision for “\$500 for each prospective
23 violation,” was stipulated to and proposed to the Court by Defendants and Plaintiff. In some
24 ways, the Stipulated Injunction is akin to a settlement agreement between Defendants and Plaintiff
25 because the Stipulated Injunction was negotiated, drafted, and stipulated to by the parties. See
26 Fed. Trade Comm’n v. Enforma Nat. Prod., Inc., 362 F.3d 1204, 1218 (9th Cir. 2004) (“As a
27 consent decree is no more than a settlement that contains an injunction, the same rule should apply
28 to a stipulated preliminary injunction, which is essentially a proposed injunction that reflects a

1 temporary settlement.”) (citations omitted). For the same reason, the Stipulated Injunction is also
2 akin to a consent decree, which is a “court decree that all parties agree to.” *Decree*, Black’s Law
3 Dictionary (10th ed. 2014).

4 As it pertains to Plaintiff’s motion, the \$500-per-violation provision of the Stipulated
5 Injunction is capable of serving remedial purposes. See Doc. No. 21, at 5:4-5 (“. . . in order to
6 deter any further damage to Plaintiff’s business, reputation and goodwill . . .”). The provision
7 imitates a liquidated damages provision in a contract, which is a “provision that determines in
8 advance the measure of damages if a party breaches the agreement.” *Liquidated-Damages Clause*,
9 Black’s Law Dictionary (10th ed. 2014). Cf. *Twentieth Century-Fox Film Corp. v. Dunnahoo*,
10 637 F.2d 1338, 1340 (9th Cir. 1981) (noting that the validity of a liquidated damages provision in
11 a consent decree is not determined under state contract law).

12 In light of the fact that the Plaintiff and Defendants agreed to the \$500-per-violation
13 provision, the Court finds that \$500 per violation is an appropriate remedial award to Plaintiff for
14 Defendants’ sixty-seven violations of the Stipulated Injunction, for a total award of \$33,500. See
15 *Nehmer v. U.S. Dep’t of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007) (“It is well
16 established that the district court has the inherent authority to enforce compliance with a consent
17 decree that it has entered in an order, to hold parties in contempt for violating the terms therein,
18 and to modify a decree.”); *id.* (“That the district court preserves such inherent authority
19 presupposes that it, and not a party before it, is the principal and proper arbiter with the
20 responsibility to interpret the decree and oversee the litigation. . . . [A] party . . . cannot dictate the
21 meaning of the decree to the court or relieve itself of its obligations under the decree without the
22 district court’s approval.”); *S.E.C. v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) (“The use of
23 consent decrees encourages informal resolution of disputes, thereby lessening the risks and costs
24 of litigation. A consent decree offers more security to the parties than a settlement agreement
25 where the only penalty for failure to abide by the agreement is another suit.”) (citations omitted);
26 *Plough, Inc. v. Kreis Labs.*, 314 F.2d 635, 639 (9th Cir. 1963) (“A consent judgment was entered
27 into by the parties. We are required to and do respect it, and we are bound, as are the parties to it,
28 by the law of the case.”); *United States v. McAdam*, 599 F. App’x 305–306 (9th Cir. 2015) (“The

1 district court awarded liquidated damages to the United States under the terms of the consent
2 decree, which provided for liquidated damages not to exceed \$80,000 in any calendar year for
3 failure to comply. The district court did not abuse its discretion by using an amount negotiated by
4 the parties as compensation for McAdam’s continued contemptuous conduct.”).

5 IV. Attorney’s Fees and Costs

6 Plaintiff argues that it should be awarded its attorney’s fees and costs pursuant to the
7 Stipulated Injunction, which says that attorney’s fees and costs incurred in enforcing the
8 Stipulated Injunction may be awarded to Plaintiff. Doc. No. 21, at 5. “Attorneys’ fees frequently
9 must be expended to bring a violation of an order to the court’s attention.” Perry v. O’Donnell,
10 759 F.2d 702, 705 (9th Cir. 1985). Accordingly, the Ninth Circuit has said “the trial court should
11 have the discretion to analyze each contempt case individually and decide whether an award of
12 fees and expenses is appropriate as a remedial measure.” Id.; see also Biocell Labs., Inc. v. Biocell
13 Research Labs., Ltd., 85 F.3d 634 (9th Cir. 1996); Donovan v. Burlington N., Inc., 781 F.2d 680,
14 682 (9th Cir. 1986).

15 The attorney’s fees and costs provision in the Stipulated Injunction was designed to “deter
16 any further damage to Plaintiff’s business, reputation and goodwill.” Doc. No. 21, at 5. Thus, the
17 attorney’s fees provision is capable of serving both remedial and coercive purposes. Here, like
18 with the \$500-per-violation provision, the Court finds that awarding Plaintiff its reasonable
19 attorney’s fees and costs is an appropriate remedial award to Plaintiff. The Court orders Plaintiff
20 to file by September 4, 2018, a memorandum of fees and costs with supporting affidavits
21 concerning Plaintiff’s fees and costs expended in relation to Plaintiff’s motion to hold Defendants
22 in contempt. The memorandum should be mindful that the motion is granted only in part and the
23 applicable rate for attorney’s fees is the prevailing rate for comparable attorneys in the
24 “community.” See Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1110 (9th Cir. 2014).
25 Defendant may file by September 18, 2018, an opposition to Plaintiff’s memorandum of fees and
26 costs.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to hold Defendants in contempt is granted in part and denied in part;
2. Defendants are held in civil contempt of Court for violating the Stipulated Injunction;
3. Pursuant to the Stipulated Injunction and this Court's authority to impose remedial sanctions for civil contempt, Defendants are sanctioned jointly and severally \$500 per violation for the sixty-seven violations to the Stipulated Injunction identified above, for a total of \$33,500.00, to be paid to Plaintiff within thirty days of this order;
4. Plaintiff shall file by September 4, 2018, a memorandum of fees and costs with supporting affidavits concerning Plaintiff's enforcement of the Stipulated Injunction, and Defendants may file by September 18, 2018, an opposition to Plaintiff's memorandum of fees and costs.

IT IS SO ORDERED.

Dated: August 21, 2018



SENIOR DISTRICT JUDGE