SHORT FORM ORDER **E-FILE** INDEX NO. 068379/2014

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

MICHAEL J. MEYER, individually and derivatively on behalf of 148 SOUTH EMERSON ASSOCIATES, LLC.,

Plaintiff,

and

MICHAEL MEAGHER & STEPHEN SMITH,

Nominal Plaintiffs,

-against-

148 SOUTH EMERSON ASSOCIATES, LLC and DREW DOSCHER,

Defendants.

DREW DOSCHER, individually; DREW DOSCHER, derivatively, on behalf of 148 SOUTH EMERSON ASSOCIATES, LLC; and DREW DOSCHER, derivatively, on behalf of 148 SOUTH EMERSON PARTNERS, LLC,

Third-Party Plaintiffs,

-against-

MICHAEL MEAGHER; STEPHEN SMITH; 148 SOUTH EMERSON PARTNERS LLC; THE SEAPORT GROUP LLC, and ALLAN POVOL, CPA; POVOL & FELDMAN, CPR, PC;

Third-Party Defendants.

ORIG. RETURN DATE: 8/10/16
FINAL SUBMITTED DATE: 9/28/16
MOTION SEQ#030; RRH

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The Petitioner-Plaintiff, Michael J. Meyer, by way of Order To Cause, seeks relief pursuant to Article 51 of the New York Civil Practice Law and Rules and Judiciary Law § 753 holding Defendant-Respondent, Drew Doscher, in contempt of Court for his willful violation of the March 16, March 29, April 22 and May 20, 2016 Orders of this Court, together with such other and further relief as the Court may deem just and proper. The Defendant-Respondent, Drew Doscher, opposes the Petition in all respects.

In making it's determination, the Court has considered all submissions:

1. Plaintiff's Order To Show Cause, Affirmation of Stephanna F. Szotkowski in Support, inclusive of Exhibits A through N;
2. Defendant's Affidavit, Affirmation of Michael J. Bowe In Opposition, inclusive of Exhibits A through T and Memorandum of Law in Opposition;
3. Affirmation of Stephanna F. Szotkowski In Further Support with Exhibits O and P and Memorandum of Law In Reply.

Plaintiff-Peitioner, Michael J. Meyer (hereinafter "Meyer" or "Plaintiff"), seeks an Order holding the Defendant, Drew Doscher (hereinafter "Doscher"or "Defendant"), in contempt for his failure to comply with this Court's Orders designated above. For purposes of reference all of the Orders were entered in the action assigned index no. 068379/2014 (the accounting action).

In rendering it's determination, the Court has also considered the decision of the Hon. Sandra Feuerstein, United States District Court Judge of October 19, 2016. Additionally, the Court has considered all orders issued in connection with the litigation involving "The Sloppy Tuna."

The genesis of the current petition occurred on May 31, 2016 when it is alleged the Defendant commenced an action against 148 South Emerson Associates, LLC ("Associates"), asserting claims for trademark infringement, and false designation of origin and unfair competition, in violation of sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a), respectively; trademark dilution in violation of the Federal Trademark Dilution Act ("FTDA") under section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c); and cybersquatting in violation of the Anticybersquatting Consumer Protection Act ("ACPA") under section 43(d) of the Lanham Act, 15 U.S.C. § 1225(d). In that action the relief sought was a preliminary injunction enjoining Associates (The Sloppy Tuna) from (a) using certain trademarks ("The Sloppy Tuna Marks") registered to an entity known as Montauk USA "in any manner, including, but not limited to, using or employing The Sloppy Tuna Marks in

connection with any goods, services, signage, decor, menus, employee clothing, marketing, advertising, merchandise, domain name, and/or social media, and (b) from making or employing any derivation or colorable imitation of the Sloppy Tuna Marks, or any mark confusingly similar thereto or likely to dilute the Sloppy Tuna Marks.

Montauk USA ("Montauk") is a Georgia limited liability company formed in 2010. Doscher was, at all relevant times, the sole member and owner of Montauk. Doscher and Meyer are the sole owners of 148 South Emerson Associates, LLC.

On or about April 14, 2011, Associates filed a Certificate of Assumed Name with the New York State Department pursuant to Section 130 of the New York General Business Law, indicating that it would be doing business as "The Sloppy Tuna." Doscher executed the certificate as a member of Associates.

Sometime in October of 2013, Montauk ostensibly entered into a license agreement with Associates ("the License Agreement"). According to that purported agreement, Montauk granted Associates a non-exclusive personal and non-transferrable license to use the service marks (The Sloppy Tuna Marks) in connection with services for the operation of The Sloppy Tuna, (a restaurant and bar located in Montauk, New York). That license agreement was executed on behalf of Montauk by Mark Horowitz, its manager. That licensing agreement was counter executed by Doscher as a member of Associates.

Pending before this Court is the lawsuit involving the bona fides, legality, validity, enforceability, and every other right, liability and/or obligation created as a result of the purported licensing agreement transaction.

Judge Feuerstein succinctly notes in her decision (2:16-CV-02741) that "by executing the licensing agreement on behalf of Associates, Doscher has bound Associates to pay his solely-owned Georgia company significant royalty payments for the use of the disputed trademarks." Yet, despite the fact that an action is pending before this Court involving the enforcement or non-enforcement of the licensing agreement, Doscher engaged litigation in a Georgia State Court, a Federal District Court in Georgia, and in the Eastern District Federal Court (prior to the case presided by Judge Feuerstein) and, of course, the case before Judge Feuerstein).

On January 29, 2015, Meyer, individually and derivatively on behalf of Associates, commenced an action against Montauk and Doscher in this Court (Meyer v. Montauk USA, LLC) seeking *inter alia*, judgment declaring that the licensing agreement is invalid and void *ab initio*. As noted, that January 29, 2015 action predates all of the extra territorial lawsuits

noted hereinabove.

The history of the extra territorial lawsuits began in the Court of the Honorable Joseph F. Bianco, United States District Court Judge, who remanded the action to this Court (Meyer v. Montauk USA, LLC, March 24, 2016).

As noted hereinabove, an action was commenced in the Northern District of Georgia again, concerning the enforceability of the licensing agreement. By Order dated January 19, 2016, the Northern District of Georgia, upon a Receiver's application, stayed the Georgia federal action pending the New York Court's determination of the validity of the licensing agreement in the trademark license action (pending before this Court).

On March 16, 2016 this Court issued an order (1) granting the Receiver authority to take immediate control over the management of and authority over the daily operations and financial management of The Sloppy Tuna until further order; (2) directing Doscher to surrender control over and access to the daily operations and financial management of The Sloppy Tuna to the Receiver; and (3) restraining Doscher from participating in the daily operations and financial management of, entering into contracts on behalf of, or entering the premises of The Sloppy Tuna, and **from interfering in any way with the Court-appointed Temporary Receiver in it's operations and management of the company, pending further order** (*emphasis added*).

Nevertheless, subsequent thereto counsel for Montauk (A.Todd Merolla) issued correspondence to Associates and the Receiver in the nature of a notice of termination of the license agreement. Despite the Court's Order, the letter indicated that the termination was effective immediately. That correspondence demanded that Associates accomplish de-identification procedures as specified in the purported agreement, cease using The Sloppy Tuna Mark, remove and change any signs, logos, and decor so as to distinguish the premises from it's former appearance (The Sloppy Tuna) related to the Mark, turnover all items containing use of the Mark as well as all existing inventory containing any of the Mark; immediately pay Montauk the full amount of all recurring fees and other charges purportedly due on the lease agreement through the date it completes the de-identification process. Compellingly, Mr. Merolla demands that the cost/charge due Montauk equals Seven Hundred Twenty Seven Thousand Six Hundred Twenty Three Dollars and Ninety Six Cents ($727,623.96). Additionally, despite this Court's Order, Mr. Merolla had the audacity to suggest the duly appointed Receiver had "usurped" control:

> In light of your appointment and usurpation[1] (**FN1**) of control of Associates, be advised that Associates may no longer use that domain name. Same for the Facebook page, Twitter account, and Instagram account - Associates is no longer permitted to use any of these social media accounts for THE SLOPPY TUNA (*emphasis added*).

This, despite this Court's Order prohibiting his client, Doscher, from interfering in any way with Mr. Russo, the Temporary Receiver, and his operation and management of the company.

Among other directives this Court noted on April 22, 2016:

> In order to minimize the impact of a Receiver's intervention, the Court brokered an arrangement between Mr. Doscher and Mr. Meyer, owners of The Sloppy Tuna. Mr. Meyer would hire a manager (Jessica Brantly) to be employed by The Sloppy Tuna with access to all financial matters as well as day to day operations. What occurred hereafter is worthy of remark. Mr. Doscher was heard, on audio tape, harassing, intimidating and otherwise frightening Mr. Meyer's manager, Ms. Brantly. His words wreaked of misogynistic, sexist remarks. His hostility was compellingly offensive. That audio tape... was played in open court and Mr. Doscher acknowledged an understanding of the Court's displeasure.

Thereafter, and subsequent to this Court's Order "not to interfere in any way," Doscher commenced yet another action in a Georgia State Court proceeding on April 26, 2016. The Georgia Court rebuffed Mr. Doscher's wholly owned Montauk USA's attempt to prosecute and restrain. The record, in relevant part notes:

> The Court: What did he (Justice Jerry Garguilo) say about interfering with the operation of the restaurants?

FN1. Usurp- To take possession without legal claim. To seize and hold in possession by force without right. To seize or exercise authority wrongfully. Webster's Dictionary, 11th Edition.

Mr. Merolla: He said he can't interfere with the operations.[2] **(FN2)**

The Court: In addition, the point they make about the signage and the expense associated with unwinding all that, you know, I didn't hear your client say we'll pay all that. We'll pay all that.

You need to talk to the judge up there, and you also need to consider that issue as well. Would you do that? [3] **(FN3)**

Mr. Merolla: Your honor, I respectfully disagree.

The Court: I know you do. And I really appreciate the way you said 'respectfully.' It was nice of you to say that. I can't wait to hear what you tell your client when you walk out the door. But, in any event, I am denying the motion. . . .

Again, in the face of this Court's direction to not interfere, Doscher commenced an action in federal court that was assigned to Judge Feuerstein and asserted claims for trademark infringement, and for false designation of origin and unfair competition, in violation of federal statutes. In that action, Mr. Doscher's wholly owned LLC (Montauk U.S.A.) sought injunctive relief enjoining and restraining The Sloppy Tuna a/ka/ Associates from using, on or in connection with the manufacture, sale, importation, exportation, purchase, order, offer for sale, distribution, transmission, advertisement, display and promotion of any products or services relative to The Sloppy Tuna. As noted, Montauk USA sent a demand directing Associates to immediately recall any and all infringing goods and any other packaging, containers, advertising, or promotional material or other matter that displays The Sloppy Tuna Mark or other marks that are identical or substantially similar. Furthermore, Montauk USA sought an order requiring Associates to deliver to it for destruction any and all infringing goods as well as any other packaging, containers, advertising or promotional material as well as to account to it for any and all profits derived

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FN2. Mr. Merolla specifically, in response of the Court's inquiry succinctly states: "He (Doscher) can't interfere with the operations."

FN3. The Judge tells Mr. Merolla: "You need to talk to the judge (Hon. Jerry Garguilo) up there," yet despite the sagacious suggestion, Mr. Merolla essentially states I don't think so.

by Associates and all damages sustained.

Judge Feuerstein denied the latest petition and imposed Federal Rules of Civil Procedure 41(d) costs against Montauk USA. The Court noted, "although Rule 41(d) does not explicitly provide for an award of attorney's fees as part of 'costs,' the weight of authority in this circuit supports such an award....The purpose of Rule 41(d) is to prevent forum-shopping within the federal court system and serves the broader purpose of penalizing a plaintiff for re-filing the very suit he has previously dismissed." Justice Feuerstein also noted:

> Contrary to plaintiffs' contentions, defendant is entitled to an award of costs and attorneys' fees against Montauk pursuant to Rule 41(b) because, *inter alia*, this action is based on, and includes, some of the same claims Montauk raised in the Georgia State Action and Montauk has neither demonstrated that there was a good reason for it to dismiss the Georgia State Action nor that it is financially unable to pay the reasonable costs incurred by Associates in defending the Georgia State Action.

It is quite compelling that Justice Feuerstein noted:

> Furthermore, "the forum-shopping that Rule 41(d) is intended to guard against what occurs when a plaintiff voluntarily dismisses the initial suit and refiles the same action in another court . . . because the plaintiff believes he may capture more favorable law in the second venue than the first." *citation omitted*. Given the facts, *inter alia*, (1) that Montauk voluntarily dismissed the Georgia State Action only two (2) days after the hearing in which the Georgia State Court, *inter alia*, denied its application for a temporary restraining order preventing Associates from using the Sloppy Tuna Marks and directed its counsel to contact the New York State Court to ascertain if Judge Garguilo considered the commencement and prosecution of the Georgia State Action to constitute interfering with the operations of the

> restaurant in violation of his March 16, 2016 order; [4](**FN4**) and (2)commenced this action seeking, *inter alia*, essentially the same injunctive relief sought in the Georgia State Action approximately one (1) month later, it appears that Montauk has engaged in the type of forum-shopping and vexatious litigation against which Rule 41(d) is intended to protect.

Doscher attempts to persuade the Court that the commencement and prosecution of the claims cited hereinabove were not meant to interfere with the operation of The Sloppy Tuna nor meant to disobey this Court's directive. In part, Doscher suggests that under federal law the prosecution of the claim was mandatory in order to avoid a waiver of it's rights to trademark protection. What Doscher fails to address is that two (2) invitations were available to him in order to avoid allegations of contempt. More particularly, this Court's March 16, 2016 Order prohibited interference in any way with the Court-Appointed Temporary Receiver in his operation and management of the company, pending further order of the Court (*emphasis added*). Nothing prevented Doscher from seeking relief from the prohibition in connection with the prosecution of it's trademark rights.[5] (**FN5**) Additionally, as noted above, the Judge presiding in the Georgia State proceeding suggested communication with this Court. That suggestion was ignored.

The suggestion that Doscher's actions did not prejudice the Plaintiff is disputed. The costs associated with defending the questioned petitions in other courts, the energy expended, the costs incurred in bringing the instant petition, suggest prejudice to the Plaintiff. Plaintiff claims that Doscher's actions in other courts were aimed at disrupting the business in violation of the mandate.

Section 753 of the Judiciary Law notes in relevant part:

> A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil

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FN4. Mr. Merolla never complied with the direction of that Court to inquire with this reporting court as to whether or not the commencement and prosecution of the Georgia State Action did indeed constitute interfering with the operations of the restaurant in violations of this Court's March 16, 2016 Order.

FN5. Had Doscher expressed concerns in the nature of laches and/or estoppel, this Court would have attempted to resolve same by way of stipulation and waiver.

> action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
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> 1. An attorney, counselor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

The remedy of civil contempt serves as a vindication for parties who have been "harmed by a contemnor's failure to obey a court order." *Department of Housing Preservation Development of City of New York v. Deka Realty Corp.*, 208 A.D.2d 37, 42, 620 N.Y.S.2d 837 (2nd Dept. 1995); Judiciary Law, 753.

The records produced in the various courts arguably reflect an end run around this Court's orders. This Court, upon all submissions, deems and finds that conduct amounting to contumacious conduct has been *prima facie* shown.

The Court further **ORDERS** the appearance of A. Todd Merolla, Esq., with counsel. Mr. Merolla has appeared before the Court presenting himself as a duly licensed attorney at law in the State of New York. Mr. Merolla is expected to address the question of whether his colloquy before the State Court in Georgia, demonstrates a civil contempt of Court.

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. #030) by the plaintiff, which seeks an order, inter alia, pursuant to Judiciary Law §753 holding the defendant, Drew Doscher, in contempt of court for failure to comply with orders of the Court dated March 16, 29, April 22, and May 20, 2016 is hereby decided to the extent that the parties shall appear for a Hearing to be held on January 9 & 10, 2017 at 11:00 a.m. in Part 48 at the courthouse located at One Court Street, Riverhead, New York 11901. The STAY previously imposed under this index number is temporarily suspended pending the resolution and/or/determination of this petition; and it is further

ORDERED that the Hearing shall not be adjourned without the express consent of

the Court, and the parties shall ensure the attendance of their prospective witnesses on the hearing date and shall exchange, pursuant to the applicable provisions of the CPLR, all documentary evidence to be presented at the Hearing; and it is further

ORDERED that Plaintiff shall promptly serve a copy of this Order upon defendant Drew Doscher and A. Todd Merolla, Esq. by personal service pursuant to CPLR §308(1) or (2) and First Class Mail, and by First Class Mail upon their attorney(s) if represented by counsel, and shall promptly thereafter file the affidavit(s) of such service with the Suffolk County Clerk and provide a copy of said affidavit(s) of service at the Hearing.

To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with the contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the movant's rights (see Jud Law §753(A)(3); *McCain v Dinkins*, 84 NY2d 216, 616 NYS2d 335 [1994]; *Galanos v Galanos*, 46 AD3d 507, 846 NYS2d 654 [2d Dept 2007]; *Gloveman Realty Corp. v Jefferys*, 29 AD3d 858, 815 NYS2d 687 [2d Dept 2006]; *Raphael v Raphael*, 20 AD3d 463, 799 NYS2d 108 [2d Dept 2005]). Punishment for civil contempt is addressed to the sound discretion of the motion court and the movant bears the burden of proving such contempt by clear and convincing evidence (*see Chambers v Old Stone Hill Road Assocs.*, 66 AD3d 944, 889 NYS2d 598 [2d Dept 2009]; *Wheels America New York, Ltd v Montalvo*, 50 AD3d 1130, 856 NYS2d 247 [2d Dept 2008]; *Dankner v Steefel*, 41 AD3d 526, 838 NYS2d 601 [2d Dept 2007]).

Questions of fact regarding whether or not the accused's alleged offense was "calculated to, or actually did, defeat, impair, impede or prejudice the [movant's] rights" must be resolved by clear and convincing evidence at an evidentiary hearing (see Jud Law 770; *Szalkiewicz v Szalkiewicz*, 60 AD2d 855, 401 NYS2d 4 [2d Dept 1978]; *Schulman v Schulman*, 52 AD2d 635, 382 NYS2d 557 [2d Dept 1976]). Here, the motion and opposition papers present questions of fact, whether Doscher's acts as well as the acts of Mr. Merolla constitute a civil contempt as contemplated by Judiciary Law §753.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: November 16, 2016

HON. JERRY GARGUILO, JSC