NORTH CAROLINA GUILFORD COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23-CVS-2481
ITG BRANDS, LLC, Plaintiff, v. WILL SPENCER, THE WINSTON CUP MUSEUM, LLC, and JKS MOTORSPORTS, INC., Defendants,	**REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR CONTEMPT**

I. Defendants willfully violated the Court's orders.

Mr. Spencer and the Museum's primary argument is that they did not "willfully" violate the Court's orders. They did.

The Court ordered Mr. Spencer not to "make any defamatory or disparaging statements . . . in social media." (ECF 40 adopting the Mediated Agreement at ECF 38.1). Contrary to the Court's order, Defendants reposted a video on social media that began as follows:

> There are some things you got to know about Will Spencer and the Winston Cup Museum before we get going. If you're a race fan you've probably seen the articles about the Winston Cup Museum having to close on December 16th, 2023, and maybe you've seen the stuff about the lawsuits surrounding it the questionable at best United States judicial system has allowed a large company to bully this guy into closing his Museum.

"'[W]illfulness' denotes an act done purposely and without justification or excuse." *State v. Breathette*, 202 N.C. App. 697, 705, 690 S.E.2d 1, 6 (2010) (citations

and quotations omitted). Defendants conduct does not amount to a "close call" or any type of good-faith misunderstanding. Defendants were ordered not to defame or disparage ITG in social media. Rather than follow the Court's directive, Defendants defamed and disparaged ITG in social media. There is no justification or excuse for Defendants' violation of the Court's order, and they should be held in contempt.

II. Defendants waived their rights under N.C. Gen. Stat. § 5A-11 and the First Amendment.

Defendants also argue that they cannot be held in criminal contempt because their conduct is protected by N.C. Gen. Stat. § 5A-11(b). This statute exempts communications from the Court's general criminal contempt power unless the communication "presents a clear and present danger of an imminent and serious threat to the administration of criminal justice." *Id.* While not argued, the First Amendment also protects communications from the Court's general contempt powers. *See, e.g.*, *Ford v. Jurgens, Jr.*, No. 20 CVS 4896, 2020 WL 2553242, at *1 (N.C. Super. May 06, 2020).

That said, "a person sui juris may waive practically any right he has unless forbidden by law or public policy." *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949). Specifically, regarding First Amendment and related rights, "the law permits parties to knowingly and intelligently waive their constitutional rights." *Est. of Barber v. Guilford Cnty. Sheriff's Dep't*, 161 N.C. App. 658, 664, 589 S.E.2d 433, 437 (2003) (First Amendment rights waived in settlement agreement restricting speech).

In this case, Defendants knowingly and voluntarily entered into the Mediated Agreement and waived their right to free expression. *Est. of Barber*, 161 N.C. App. at 664, 589 S.E.2d at 437. Defendants then knowingly and voluntarily consented to the entry of the Mediated Agreement as a Court order "enforceable pursuant to the Court's general contempt power" (ECF 40)—thus waiving whatever rights they had under N.C. Gen. Stat. § 5A-11(b) or otherwise to avoid the Court's contempt power for violation of the Mediated Agreement. Because Defendants voluntarily waived their defenses against the exercise of the Court's contempt power, their arguments under N.C. Gen. Stat. § 5A-11(b) are not well taken.

III. Defendants have not purged their contempt.

Defendants last argue, incorrectly, that they purged their contempt by removing the disparaging video. "Civil contempt is, of course, an order entered to preserve the rights of private parties and to compel obedience to orders and decrees." *MetLife Grp., Inc. v. Scholten*, 273 N.C. App. 443, 450, 849 S.E.2d 61, 66 (2020) (quotations omitted). Under the Mediated Agreement, ITG has a right not to have its reputation disparaged and defamed by Defendants on social media. Taking down a disparaging video after the video has been viewed over 150,000 times does not preserve ITG's right not to be disparaged and defamed because the damage to ITG's reputation has already been done. Under these circumstances, a retraction is the appropriate purge condition.

Multiple courts have ordered retractions to purge contempt after the contemptor published a statement in violation of a court order. Compelled retraction

is especially appropriate where, like here, (i) the parties bargained for the right not to have their reputations tarnished through disparaging statements; (ii) the parties had the agreement entered as a court order; and (iii) the contemptor proceeded to disparage anyway. *See Codexis, Inc. v. EnzymeWorks, Inc.*, No. 3:16-CV-00826-WHO, 2018 WL 1536655, at *7 (N.D. Cal. Mar. 29, 2018).

Under these circumstances, compelled retraction is the only way to preserve "what the parties bargained for, and made enforceable through the [court order]." *Id.* (ordering that defendants shall "take all reasonable steps within five days of this Order to retract the 2/7/18 Press Release and all statements containing content that is substantially similar to that Press Release, using the exact same channels for the retraction through which the Press Release was originally published or distributed. It is FURTHER ORDERED that in the same retraction, they shall simultaneously publish to all recipients of the Press Release the following statement: "EnzymeWorks has been ordered by the United States District Court for the Northern District of California to retract its prior statements and press releases pertaining in any way to the settlement of the lawsuit filed against it by Codexis, Inc. The Court has found EnzymeWorks's prior statements on the matter were made IN VIOLATION OF A COURT ORDER, and the Court has found EnzymeWorks and its founder Junhua "Alex" Tao IN CONTEMPT OF COURT as a result of those prior statements."); *Oxford Cap. Illinois, L.L.C. v. Sterling Payroll Fin., L.L.C.,* No. 01 C 1173, 2001 WL 1491521, at *10 (N.D. Ill. Nov. 26, 2001) (ordering retraction to purge contempt associated with Court approved agreement); *Ahmed v. Kifle*, No. 1:12-CV-02697-SCJ,

2015 WL 11199148, at *2 (N.D. Ga. Mar. 24, 2015) (ordering compelled retraction to comply with prior order); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 782 F. Supp. 243, 252 (S.D.N.Y. 1992) (ordering a "complete retraction and apology to Judge Lacey to be sent to all persons and organizations either copied in the January 10, 1992 letter or listed in the affidavit above as having been sent a copy of the January 10 letter"); *In re Dunn*, 85 Neb. 606, 124 N.W. 120, 123 (1909) (contempt could be purged by retraction).[1]

These holdings make sense. It is well established that "as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages." *Allen v. Pioneer Press Co.*, 40 Minn. 117, 124, 41 N.W. 936, 938 (1889).

Here, ITG bargained for the right not to be defamed and disparaged, the parties had the Mediated Agreement entered as an order of the Court; and the Mediated Agreement is now enforceable under the Court's general contempt power.

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[1] ITG recognizes that several courts have shown hostility toward forced retraction. *See* Equitable relief—Right of reply and compulsory retraction—Compulsory retraction, 2 Law of Defamation § 9:92 (2d ed.). However, even these decisions recognize that retraction "is merely a form of relief in specie, a sort of equitable replevin ordering that the defendant, rather than pay damages, return what it actually took, that is, the plaintiff's reputation." *Id*. Moreover, no court has found that compelled retraction is unconstitutional. *Id*.

Importantly, the decisions hostile to compelled retraction are distinguishable. To ITG's knowledge, no court has had any concerns compelling retraction to force a contemptor (like Defendants in this case) to comply with a court order against disparagement that the contemptor freely and voluntarily entered into.

Defendants, unfortunately, chose to continue their false narrative that ITG bullied them into submission—flatly violating ITG's court ordered right not to be disparaged. To preserve ITG's bargained for rights, removal of the posts is not sufficient. The reputational harm that ITG tried to prevent has already been done considering that the video was viewed more than 150,000 times prior to removal. Defendants should be compelled to retract the disparagement to preserve ITG's court-ordered right against defamation and disparagement before their contempt can be purged.

IV. Defendants continue to play the victim.

Defendants contend that they want to "move on from ITG," yet they continue to play the false victim. For example, Defendants have claimed in multiple public posts that the financial costs to rebrand is too much—thus they are going to auction all of their Winston Cup related cars and memorabilia. *See* Affidavit of Glen Tibbits ¶ 19, filed contemporaneously with this reply brief. That is objectively false. Just one of the cars, a Dodge Daytona, is estimated to sell for more than $750,000 at auction. *Id.* ¶ 20. Considering that Defendants could sell one car to pay for all of the rebranding, financial constraints are not the issue. Defendants want to perpetuate public sympathy at the expense of ITG's bargained for rights under the Mediated Agreement.

Defendants also continued to sell Winston branded merchandise following the Mediated Agreement, including to children. *Id.* ¶ 21. Although the souvenirs at issue facially contain 2003 copyrights—thus potentially making them "historical artifacts" that Defendants can sell under the Mediated Agreement—ITG is concerned that

these souvenirs may be counterfeit reproductions made after 2003. *Id.* Specifically, many of the items, such as the bumper stickers with Winston branding—appear brand new and not like twenty-year-old "historical artifacts." *Id.*

ITG reserves its right to protect its marks and goodwill and to ensure that its products are marketed responsibly. ITG will exercise its rights through court proceedings or otherwise, if, for example, it receives further indication that the souvenirs Defendants sold were counterfeits manufactured after 2003. That said, ITG is not looking to increase litigation with Defendants, and it has not yet sought judicial intervention against Defendants' other questionable conduct.

The matter before the Court, however, is not questionable. Defendants conduct is a serious violation of the Mediated Agreement—and Defendants should be held in contempt for the same.

Respectfully submitted, this the 29th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Rule 7.8 of the General Rules of Practice and Procedure for the North Carolina Business Court in that it (excluding the caption, any index, table of contents, or table of authorities, signature blocks, and required certificates) contains no more than 3,750 words, as determined by the word count feature of Microsoft Word.

This, the 29th day of December, 2023.

/s/ Daniel L. Colston
Daniel L. Colston

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served on all parties to this action pursuant to the Court's ECF system.

This, the 29th day of December, 2023.

/s/ Daniel L. Colston
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