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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Sprint USA INC.

- v -

Casey Archer, et al.

INDEX NO. 604373/04

MOTION DATE 12/11/07

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, and the "So-Ordered" transcript dated December 20, 2007 (Claudette Gumbs, Reporter), which counsel for defendants is **directed** to order, it is hereby

ORDERED that plaintiff's order to show cause for an order holding defendants Casey Archer, Cory J. Perkins, Brent Smith and Interactive Card Solutions, LLC, also known as Interactive Card Technologies LLC, in contempt of court for violating the so-ordered stipulation of Settlement and Order, dated February 16, 2005, and assessing costs and fees, and punitive damages against defendants is denied. And it is further

ORDERED that the cross-motion by defendants to dismiss the application is granted. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
DEC 24 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/20/07

CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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SERIOUS USA, INC.

Plaintiff,

Index No. 604373/2004

-against-

CASEY ARCHER, CORY J. PERKINS, BRENT SMITH, AND INTERACTIVE CARD SOLUTIONS, LLC, also known as INTERACTIVE CARD TECHNOLOGIES LLC,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Serious USA, Inc. ("plaintiff") moves by order to show cause for an order holding defendants Casey Archer, Cory J. Perkins, Brent Smith (collectively, the "individual defendants") and Interactive Card Solutions, LLC, also known as Interactive Card Technologies LLC, ("ICT") in contempt of court for violating the so-ordered stipulation of Settlement and Order, dated February 16, 2005, and assessing costs and fees, and punitive damages against defendants.

By way of background, plaintiff allegedly developed a form of optical card technology to create CD/DVD "Cardz" for retail and corporate applications. The "Cardz" contain interactive content such as graphics, video clips and Internet hyperlinks. The "Cardz" have been sold to the general public in multiple countries, with sales in 2004 reaching over $4.5 million. Plaintiff expended millions of dollars in developing the "Cardz," including acquiring patent rights and obtaining various licenses.

In 2003, plaintiff hired the individual defendants. Archer was hired as plaintiff's Senior Vice President of Sales and Marketing in charge of corporate sales. Archer signed

an employment agreement (the "Agreement"), which contained non-compete and non-disclosure provisions. Perkins was hired as plaintiff's Chief Financial Officer, responsible for raising capital and overseeing plaintiff's financial operations. Smith was hired as plaintiff's Vice President of Premiums and Promotions to service and develop clients for plaintiff's gift card division. Perkins resigned in August 2004, and both Archer and Smith were terminated in October 2004.

According to plaintiff, the individual defendants used plaintiff's confidential and proprietary information while employed with plaintiff, in order to start ICT and compete with plaintiff. Thus, plaintiff sought a temporary restraining order and commenced an action against the individual defendants and ICT for, *inter alia*, misappropriation of plaintiff's trade secrets, breach of fiduciary duty and loyalty, and tortious interference with contract and prospective economic advantage. On December 28, 2004, this Court issued an order to show cause temporarily restraining defendants from operating ICT and revealing any of plaintiff's trade secrets, confidential information, or intellectual property, and soliciting any of plaintiff's clients from October 1, 2004 through October 1, 2005.

After oral argument was held on the temporary restraining order, the case was settled pursuant to a Stipulation of Settlement and Order (the "Settlement Order") dated February 16, 2005.[1]

Pursuant to the Settlement Order, defendants were prohibited from working in the interactive CD/DVD card industry through June 2, 2005; contacting and soliciting plaintiff's employees, clients, vendors, suppliers, and investors; and using any of

[1] Brent Smith is not a party to the Settlement Order.

plaintiff's confidential information for any purpose (Settlement Order ¶¶1-3). Paragraph 7 provides that plaintiff can move for Contempt of Court before this Court in the event defendants violated any provisions of such paragraphs.

Order to Show Cause

Plaintiff now contends that defendants have violated paragraphs 1 through 3 of the Settlement Order. In support, plaintiff submits the affidavits of its Chief Executive Officer ("CEO"), Executive Director of Strategic Business Development ("Executive Director"), and Chief Technology Officer ("Technology Officer"). Plaintiff also provides the affidavits of the inventor and former patent owner of certain optical cards David Wood; an investor, Anthony Meyer; and a former employee of Meyer Ventures LLC, Mathew Guliner.

Plaintiff's CEO attests that ICT's 2005 Business Plan, which was used to solicit a current investor of the plaintiff, was modified, but remains substantially similar to the plaintiff's 2003 business plan, in violation of the Settlement Order. ICT's 2005 business plan uses plaintiff's graphics of Best Buy and Disney, which are clients of the plaintiff; the CD/DVD cards that appear in the list of ICT's success stories are cards produced by plaintiff not ICT; ICT's "Pipeline of New Business Opportunities" comprises a list of jobs completed by the plaintiff and prospective clients who plaintiff to whom plaintiff has made formal presentations; ICT's "Case Study" is of plaintiff's client; documents provided to one of plaintiff's investors Andrew Meyer uses graphics relating to plaintiff's "Best Buy" client; and the client list defendant supplied to Meyer *on April 14, 2005* before the expiration of the temporary restraining order is a list of plaintiff's clients. Plaintiff did not discover such violations until August 2007, when Meyer informed

plaintiff about defendant's activities and gave plaintiff the documents verifying defendants' conduct. Plaintiff's CEO believes that plaintiff has suffered damages from the loss of investors and clients over the past two years, but finds difficulty in quantifying any losses at this juncture.

Plaintiff's Executive Director Edward H. Bohlke III attests that in August 2007, he learned from "one of [plaintiff's] investors" that *in early 2005*, the investor was contacted by defendants requesting financing. Thus, Bohlke contacted Meyer to determine whether ICT had approached him of his companies for financing. Meyer advised Bohlke that defendants contacted him or any in February and March 2005, and presented Meyer with an investment opportunity with ICT. The documents Meyer forwarded to Bohlke in August 2005 were submitted to Meyer by the defendants prior to the expiration of the temporary restraining order.

Meyer states that in *March 17, 2005*, he met with defendants Perkins and Archer to evaluate ICT as a candidate for financial investment by "Meyer Companies." One of Meyer Ventures LLC's Associates, Mathew Guliner, made the introduction. Perkins submitted materials that described ICT's business, including the Settlement Order, ICT's 2005 Business Plan, ICT PowerPoint Presentation dated February 2005, ICT's client list, and "Selected Success Stories" displaying cards that ICT claimed as its own. At this meeting, Perkins and Archer represented that they were former employees of plaintiff, that plaintiff was bankrupt, and that ICT was authorized to conduct business in the wallet-sized optical card field and sell wallet-sized non-round optical cards. Meyer declined the opportunity. In 2007, plaintiff's Executive Director Bohlke approached Meyer for financing and informed Bohlke of his meeting regarding ITC. Mr. Guliner's

affidavit confirms that he introduced Perkins and Archer to Meyer for the purpose of financing ICT in the interactive CD/DVD card industry.

In January and August 2007, plaintiff's Technology Officer Vincent Allen noticed CD/DVD cards for sale in connection with the movies "DaVinci Code"[2] and "Ghost Rider,"[3] branded as "iactivecard," a brand used by ICT. Upon investigation, Mr. Allen discovered that these cards were promotional DVD cards sold by ICT to Sony Pictures Entertainment. Mr. Allen purchased two cards and can produce them to the Court upon request.

According to David Wood, a former owner of certain patent applications, plaintiff purchased all right, title and interest in Wood's invention, the "Wood Patent Portfolio." In June 2007, defendant Perkins approached Wood about acquiring the rights to the Portfolio, and advised that he knew plaintiff had purchased some of the rights to the Portfolio. Perkins inquired as to whether Wood maintained any of the rights to the Portfolio, and if so, would be interested in selling them to Perkins and ICT. Thus, plaintiff contends, defendants continue to use plaintiff's confidential and proprietary information for their own means, in violation of paragraph 3 of the Settlement Order.

Cross-Motion

In response, defendants Archer, Perkins and ICT cross move to dismiss plaintiff's motion on the grounds that (1) the Court lacks subject matter jurisdiction by reason of failing to bring a "special proceeding" as required by paragraph 7 of Settlement Order,

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[2] The DaVinci Code movie was released in *May 2006* (The Internet Movie Database, http://www.imdb.com/title/tt0382625/).
[3] Ghost Rider was released in *February 2007* (The Internet Movie Database, http://www.imdb.com/title/tt0259324/).

and failing to comply with CPLR 402 and 3014; (2) the application fails to state a cause of action, in that there is no complaint or petition alleging any separate causes of action in consecutively numbered paragraphs; (3) plaintiff's application lacks merit under the circumstances, in that plaintiff failed to establish the elements for civil contempt; (4) there is no factual or legal support for costs, fees, attorneys' fees, or punitive damages; and (5) plaintiff's unclean hands and malicious intent to keep defendants out of the industry, estop plaintiff from entitlement to any relief.

Under paragraph 7 of the Settlement Order, any claims that may have occurred prior to the filing date of said order, February 16, 2005, were released and forever discharged. Also, the complaint was withdrawn with prejudice and consequently, provides no basis for plaintiff's application or support for any matters that occurred after February 16, 2005. When defendants' counsel received a letter from plaintiff's counsel alleging such violations, counsel for defendants replied that he and ICT were willing to address the basis of the allegations. However, counsel for plaintiff did not respond.

Defendants contend that at the time of Meyer's one-time meeting with defendants, Meyer was not an "investor" in plaintiff's business. Archer and Guliner were acquaintances for several years before any dispute with plaintiff. When Guliner informed Archer that Meyer might be interested in hearing about ICT, Archer told Guliner that defendants were not allowed to compete with plaintiff until after June 2, 2005. In March or April, Archer and Perkins met with Guliner and Meyer and discussed ICT's plans. ICT deemed working with Meyer "Lab Work" to evaluate how an investment professional would value ICT's business proposition and did not consider this meeting a violation of the Settlement Order. To defendants' knowledge, neither Meyer

nor Guliner were involved in the CD/DVD industry. Because Guliner and Meyer were not "engaged in the interactive CD/DVD care industry" and did not fall within any of the categories of individuals precluded from contact by defendants, ICT fully believed the meeting to be acceptable. Defendants apologize if such Lab Work violated the Settlement Order. In addition, the purported contact was not prejudicial to the plaintiff, but beneficial when Meyer invested in plaintiff instead. And, plaintiff does not allege any damages resulting from defendants' one contact with Meyer made more than two and one-half years ago.

Guliner confirms that defendants Archer and Perkins advised him that the clients on the client list could not be engaged until after the non-compete agreement expired in June 2005, and that ICT would not be able to conduct business until after June 2005. Further, Perkins and Archer did not show any proprietary business strategy or intellectual property of plaintiff other than utilizing the interactive DVD cards for use in the gift card market.

Also, plaintiff's application fails to specify any proprietary material or allege that defendants misappropriated any such material, and any factual dispute on this issue should be resolved at a hearing pursuant to CPLR 409 and 410. Claiming a list of recognized retailers as a proprietary client is not intellectual property. Further, plaintiff offers no affidavit from any company claiming ICT did business before June 2, 2005. And, claiming that knowledge of Mr. Wood and his patents is the proprietary intellectual property of plaintiff lacks merit; since leaving plaintiff's employ, Perkins had no knowledge of plaintiff's relationship or intentions with Mr. Wood. When Perkins reviewed Mr. Wood's patents filings, which indicated no partnership with plaintiff,

Perkins contacted Mr. Wood in July 2007 for the first time. When Mr. Wood indicated his affiliation with plaintiff, Perkins invited Mr. Wood to consider ICT in the event he became dissatisfied with plaintiff. This one-minute conversation took place over two years ago after ICT was allowed to compete freely in the market.

Further, ICT's 2005 Business Plan is similar to that of the plaintiff's because both are in the same industry, but nothing in the 2005 Business Plan is confidential or proprietary. The 2005 ICT Business Plan did not contain any of plaintiff's confidential or protected information; such Business Plan was modified and cleared of all of plaintiff's graphics. In addition, the 2005 Business Plan states that any and all contact with clients on the list in the Business Plan will not take place until after June 2, 2005. Further, looking at the pagination and quality of the paper, it is clear that the "Success Stories" therein were not part of the 2005 Business Plan or PowerPoint presentation provided to Meyer. In any event, ICT's 2005 Business Plan and PowerPoint plan were drafts that have been defunct for over two years. Perkins created both plans from his house well after he resigned from plaintiff and the Settlement Order does not restrict ICT from having these plans. The list of "New Business Opportunities" is merely a list of Fortune 500 companies that most businesses would list as an opportunity. And, Archer had relationships with most of the companies before his employment with plaintiff.

The products released by ICT regarding the "DaVinci Code" and "Ghost Rider" were solicited and delivered many months after the June 2, 2005 expiration date. It is not possible that ICT could have released a product for these titles as they were released in 2006 and 2007, respectively. Moreover, neither plaintiff nor ICT claim these CD/DVD cards as their own, but essentially produce the content experienced when such cards are

played. ICT and Serious are both interactive marketing agencies and ICT creates the content, audio, video, games and other content stored on the CD/DVD; ICT values the creativity not the type of CD or DVD card. Thus, it is the content on the disc that is unique and protected, not the disc itself.

With respect to plaintiff's sales strategies, when employed with plaintiff, plaintiff's sales strategies were on selling interactive sports trading cards to large retailers, and not on marketing and selling CD/DVD cards to accompany movie releases. Bohlke never devised a specific strategy targeting Sony Pictures, and plaintiff cannot claim strategies used by Archer such as cold calling as their own proprietary strategy. ICT created promotional CDs for Sony in November 2005, six months after the Settlement Order expired.

The CD/DVD card that plaintiff claims to own is publicly available at almost any electronics retailer and thousands of companies around the world manufacture rectangular CD/DVDs.

In opposition, plaintiff argues that the general release provisions do not contradict or mitigate paragraphs 1 through 3, and are specifically enforceable under paragraph 7. Further, paragraph 7 does not state that a Special Proceeding as defined by CPLR Article 4, which ordinarily pertains to non-parties, must be commenced. Judiciary Law §756, which governs applications to punish for contempt, permits such applications to be brought by motion or order to show cause. And, pursuant to CPLR 103(c) this Court has the discretion to convert plaintiff's application to a "special proceeding."

Plaintiff points out that defendants solicited one of plaintiff's investors in March 2005, by using a business plan that was copied from plaintiff's business plan, by using

plaintiff's client list, and by taking credit for work done by and belonging to plaintiff. The paperwork defendants sent to Meyer is dated two months before the injunctions in paragraphs (1) and (2) expired. Defendants' intentional violation of the Settlement Order warrants punitive damages. Further, plaintiff was aware of other actions taken by defendants concerning different people and different facts over a year ago, but did not pursue such matters since it did not possess any supporting documentary evidence.

In reply, defendants argue that there is no caselaw holding that a contempt application may be brought in the absence of a complaint or petition, and Judiciary Law 756, which permits a contempt by way of a motion in the context of a pending action, is not to the contrary.

Analysis

The Court first addresses the alleged procedural deficiency. Paragraph 7 of the Settlement Order provides:

> In the event that the Responding Defendants violate any provision of paragraphs 1 through 3 . . . [plaintiff] shall be entitled to bring a special proceeding for contempt against the Responding Defendants.

The Settlement Order permits plaintiff to pursue a contempt order against the defendants by commencing a "special proceeding." However, paragraph 7 also provides that said special proceeding "shall be treated as related to this Action . . . ." Although CPLR 304 and 402 governs the manner in which special proceedings shall be brought, Judiciary Law § 753 also authorizes the Court to punish a party for civil contempt. Judiciary Law provides for a contempt order as follows:

> "A neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:
>
> * * * * *
>
> "3. A party to the action ... or other person, ... for any ... disobedience to a lawful mandate of the court."

Therefore, since plaintiff's contempt proceeding shall be "treated as related to this Action" plaintiff is not required to bring such a proceeding pursuant to CPLR 302 and 402.

In any event, the Court has discretion to convert plaintiff's application to a "special proceeding" pursuant to CPLR 103(c), which provides:

> If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs.

It cannot be contested that this Court has jurisdiction over the parties pursuant to paragraph 7 of the Settlement Order. Further, conversion of plaintiff's instant proceeding to a special proceeding is not prejudicial to the defendants. Thus, even assuming plaintiff was required to commence a special proceeding for contempt, a conversion of the instant order to show cause to a special proceeding would be warranted in the interest of justice. Thus, plaintiff's instant application is not procedurally barred.

Turning to the merits of plaintiff's application, the Court finds that contested issues regarding defendants' noncompliance with the Settlement Order precludes a

finding of civil contempt (*see Sentry Armored Courier Corp. v New York City Off-Track Betting*, 75 AD2d 344, 429 NYS2d 902 [1st Dept 1980] [where the issue regarding violation of order was sharply disputed on a good faith basis, contempt should not issue]).

Civil contempt has as its aim the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right (*State of New York v Unique Ideas,* 44 NY2d 345 [1983]).

In order for plaintiff to demonstrate that defendants are guilty of civil contempt, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed" (*State of New York v Unique Ideas,* 44 NY2d 345, *supra*, *citing Pereira v Pereira,* 35 NY2d 301). Furthermore, plaintiff must show that defendants had knowledge of the court's order and that defendants' violation of the subject order prejudiced a right of the plaintiff (*see State of New York v Unique Ideas,* 44 NY2d 345, *supra*, citing Judiciary Law, § 753, subd. A).

The terms of the Settlement Order at issue herein were clear and unambiguous.

Paragraph 1 of the Settlement Order provides:

> 1. Up and until . . . June 2, 2005, the Responding Defendants shall not . . . work for or associate in any manner or in any capacity with any entity, company or business . . . that is engaged in the interactive CD/DVD card industry.

Paragraph 2 of the Settlement Order provides:

> 2. Up and until . . . June 2, 2005, the Responding Defendants shall not . . . contact: (I) any of [plaintiff's] clients set forth in Exhibit A hereto; (ii) any of [plaintiff's] . . .. current or future employees; or (iii) any of [plaintiff's] business agents or advisors, shareholders, investors, vendors, or suppliers concerning any business opportunity.

Paragraph 3 of the Settlement Order provides:

> 3. At no time shall Responding Defendants use or transfer to others any of [plaintiff's] intellectual property, including, but not limited to, [plaintiff's] marketed products . . . [plaintiff's] licenses, business strategies, supply methods, sales methods and processes, [plaintiff's] patents and strategies to acquire patents and other rights, and [plaintiff's] confidential information and trade secrets . . . .

The record indicates that defendants Archer and Perkins formed ICT, a company in the CD/DVD industry. However, there is no indication that ICT performed any business in this industry before June 2005. Indeed, ICT's 2005 Business Plan indicates that it will not contact any of the potential clients until after June 2005.

With respect to paragraph 2, it is uncontested that defendants contacted Meyer in March or April 2005, before the expiration of prohibition period. However, it is also uncontested that Meyer was not an investor, employee, business agent or advisor, shareholder, vendor or supplier of the plaintiff at this time. At the time of defendants' contact with Meyer, neither Meyer nor Guliner were involved or "engaged in the CD/DVD card industry." Further, plaintiff's speculation that defendants must have

contacted other such individuals is insufficient to establish that defendants breached paragraph 2 of the Settlement Order.

With regard to paragraph 3, the client list provided to Meyer was prospective in nature, and defendants made clear that such prospective clients would not be contacted until after June 2005. Moreover, plaintiff failed to establish that defendants' possession of the names on the prospective client list are trade secrets of the plaintiff. Protection will not attach to customer lists where such customers are readily ascertainable from sources outside the former employee's business unless the employee has stolen or memorized the customer lists" (*Repair Tech Inc.*, 2005 NY Slip Op 51233[U], *5; *see also Atmospherics, Ltd. v. Hansen,* 269 AD2d 343, 343 [2000]). The record is unclear as to whether defendants Archer and Perkins stole or memorized the clients on the client list, or had relationships with such clients independent from their employment with plaintiff.

Additionally, it is uncontested that defendants also supplied Meyer with a list of clients, ICT's 2005 Business Plan, and "Success Stories" which included CD/DVD cards created by the plaintiff. The record indicates that CD/DVD interactive cards is, in and of itself an "industry" and that there are many manufacturers of such interactive cards.

It is further uncontested that defendants contacted Woods, from whom plaintiff acquired rights to utilize certain technologies in connection with its interactive cards. However, defendants maintain that their search of public patent filings did not reveal any connection to the plaintiff, and that defendants had no knowledge of plaintiff's relationship with Woods. Once defendants learned that plaintiff was affiliated with

Wood, defendants did not pursue Wood further. Notably, defendant's contact with Wood took place nearly two years after the Settlement Order expired.

In addition, it is unclear whether ICT's 2005 Business Plan contained plaintiff's intellectual property. Although defendants provided Meyer with its 2005 Business Plan, it is unclear as to whether such submission included the "Selected Success Stories" page that plaintiff claims contains photographs of plaintiff's CD/DVD cards. However, ICT's 2005 Business Plan includes a photograph of the "Best Buy/Disney" graphic, and the Best Buy/Disney case study, which plaintiff claims are its clients.

In addition, plaintiff failed to specify the strategies defendants' purportedly utilized that constitute plaintiff's intellectual property. In conclusory fashion, plaintiff claims that defendants marketed to Sony Pictures Entertainment by utilizing plaintiff's strategies. According to defendants, however, Archer employed methods such as "cold calling, prospecting, appointment setting, [and] pitching" to target Sony Pictures, and plaintiff failed to establish how such strategies violate plaintiff's intellectual rights. Moreover, it is undisputed that ICT created promotional CDs for Sony Pictures in November 2005, after the expiration of the prohibition period, and plaintiff failed to allege any facts indicating that defendant utilized any of plaintiff's intellectual property in the process.

Thus, defendants' use of the Best Buy/Disney partnership example and case study appears to support a finding that defendants utilized plaintiff's intellectual property in violation of paragraph 3 of the Settlement Order.

However, plaintiff failed to sufficiently allege and the record fails to indicate that defendants' actions prejudiced any right of the plaintiff. Meyer is currently one of

plaintiff's investors. Plaintiff's CEO's conclusory "belief" that plaintiff's "business has to have suffered as a result of defendants' behavior" (David Brown Affidavit, ¶10), is plainly insufficient. Thus, a finding of contempt is unwarranted under the circumstances.

Nor is an award of punitive damages warranted under the circumstances (*Ross v Louise Wise Servs. Inc.*, 8 NY3d 478, 489 [2007] ["Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations"]). Contrary to plaintiff's contentions, there is no showing that defendants "consistently" disregarded the Court's order to such a degree that a criminal indifference to defendants' civil obligations may be implied.

Furthermore, in light of defendants' counsel attempt to resolve these issues with counsel for plaintiff prior to the commencement of this proceeding, costs and fee are unwarranted.

In light of the foregoing, defendants' cross-motion to dismiss plaintiff's application is granted on the ground that plaintiff failed to establish the elements of civil contempt.

Therefore, based on the foregoing, it is hereby

ORDERED that plaintiff's order to show cause for an order holding defendants Casey Archer, Cory J. Perkins, Brent Smith and Interactive Card Solutions, LLC, also known as Interactive Card Technologies LLC, in contempt of court for violating the so-ordered stipulation of Settlement and Order, dated February 16, 2005, and assessing costs and fees, and punitive damages against defendants is denied. And it is further

ORDERED that the cross-motion by defendants to dismiss the application is granted. And it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 20, 2007

Hon. Carol Robinson Edmead, J.S.C.