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

PRESENT: BARBARA R. KAPNICK Justice

PART 39

State of NY

- v -

Philip Morris

INDEX NO. 400361/97

MOTION DATE

MOTION SEQ. NO. 051

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/13/09

BARBARA R. KAPNICK J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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THE STATE OF NEW YORK and ANDREW M. CUOMO, Attorney General of the State of New York, for and on behalf of the PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC.; RJR NABISCO, INC.; RJR NABISCO HOLDINGS CORP.; R.J. REYNOLDS TOBACCO CO.; THE AMERICAN TOBACCO CO., INC.; AMERICAN BRANDS, INC.; BROWN & WILLIAMSON TOBACCO CORP.; LORILLARD TOBACCO COMPANY; LORILLARD INCORPORATED; LOEWS CORPORATION; UNITED STATES TOBACCO COMPANY; UST, INC.; B.A.T. INDUSTRIES, P.L.C.; BRITISH AMERICAN TOBACCO COMPANY, LTD.; BATUS HOLDINGS, INC.; THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC; and TOBACCO INSTITUTE, INC.,

Defendants.

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DECISION/ORDER
Index No. 400361/97
Motions Seq. Nos.
051 and 055

BARBARA R. KAPNICK, J.:

After extensive landmark national litigation concerning the marketing and advertising of cigarette products, defendant R.J. Reynolds Tobacco Company ("Reynolds") and several other cigarette manufacturers entered into a Master Settlement Agreement ("MSA" or the "Agreement") with the Attorneys General of forty-six states, including the Attorney General of the State of New York. The MSA provides, *inter alia*, that "[b]eginning 180 days after the MSA

Execution Date,[1] no Participating Manufacturer may use or cause to be used any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products." MSA § III(b).

> "Cartoon" is defined in the MSA as
>
> any drawing or other depiction of an object, person, animal, creature or any similar caricature that satisfies any of the following criteria:
>
> (1) the use of comically exaggerated features;
> (2) the attribution of human characteristics to animals, plants or other objects, or the similar use of anthropomorphic technique; or
> (3) the attribution of unnatural or extrahuman abilities, such as imperviousness to pain or injury, X-ray vision, tunneling at very high speeds or transformation.
>
> The term "Cartoon" includes "Joe Camel," but does not include any drawing or other depiction that on July 1, 1998, was in use in any State in any Participating Manufacturer's corporate logo or in any Participating Manufacturer's Tobacco Product packaging.

MSA § II(l).

The Agreement also provides that "[b]eginning July 1, 1999, no Participating Manufacturer may, within any Settling State, market, distribute, offer, sell, license or cause to be marketed, distributed, offered, sold or licensed (including, without limitation, by catalogue or direct mail), any apparel or other

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[1] "MSA Execution Date" is defined in MSA § II(aa) as November 23, 1998.

merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name." MSA § III(f).

Pursuant to MSA § VII(c) ("Enforcement of this Agreement"),

> (1) Except as provided in [certain subsections and an exhibit not relevant here], any Settling State or Participating Manufacturer may bring an action in the Court to enforce the terms of this Agreement (or for a declaration construing any such term ("Declaratory Order")) with respect to disputes, alleged violations or alleged breaches within such Settling State.
>
> (2) Before initiating such proceedings, a party shall provide 30 days' written notice to the Attorney General of each Settling State, to NAAG [the National Association of Attorneys General], and to each Participating Manufacturer of its intent to initiate proceedings pursuant to this subsection. The 30-day notice period may be shortened in the event that the relevant Attorney General reasonably determines that a compelling time-sensitive public health and safety concern requires more immediate action.
>
> (3) In the event that the Court determines that any Participating Manufacturer or Settling State has violated or breached this Agreement, the party that initiated the proceedings may request an order restraining such violation or breach, and/or ordering compliance within such Settling State (an "Enforcement Order").
>
> (4) If an issue arises as to whether a Participating Manufacturer has failed to comply with an Enforcement Order, the Attorney General for the Settling State in question may seek an order for interpretation or for monetary, civil contempt or criminal sanctions to enforce compliance with such Enforcement Order.
>
> * * *
>
> (6) Whenever possible, the parties shall seek to resolve an alleged violation of this Agreement by discussion pursuant to subsection XVIII(m) of this

> Agreement.[2] In addition, in determining whether to seek an Enforcement Order, or in determining whether to seek an order for monetary, civil contempt or criminal sanctions for any claimed violation of an Enforcement Order, the Attorney General shall give good-faith consideration to whether the Participating Manufacturer that is claimed to have violated this Agreement has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless such party has been guilty of a pattern of violations of like nature.

The instant action, which was brought by plaintiffs The State of New York and the then Attorney General of the State of New York, for and on behalf of the People of New York (the "State"), was resolved pursuant to a Consent Decree and Final Judgment dated December 23, 1998 (the "Consent Decree"), signed by the Hon. Stephen G. Crane, who approved the MSA "in all respects". Consent Decree § VIII.A.

Under the terms of the Consent Decree, Reynolds and the other manufacturers are permanently enjoined, from "using or causing to be used within the State of New York any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products." Consent Decree § VI.B.

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[2] Pursuant to Section XVIII(m) ("Designee to Discuss Disputes"), "[w]ithin 14 days after the MSA Execution Date, each Settling State's Attorney General and each Participating Manufacturer shall provide written notice of its designation of a senior representative to discuss with the other signatories to this Agreement any disputes and/or other issues that may arise with respect to this Agreement."

Each Participating Manufacturer, including Reynolds, is also permanently enjoined from "marketing, distributing, offering, selling, licensing or causing to be marketed, distributed, offered, sold, or licensed (including, without limitation, by catalogue or direct mail), within the State of New York, any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name." Consent Decree § VI.D.

The Consent Decree further provides that:

> Jurisdiction of this case is retained by the Court for the purposes of implementing and enforcing the Agreement and this Consent Decree and Final Judgment and enabling the continuing proceedings contemplated herein. Whenever possible, the State of New York and the Participating Manufacturers shall seek to resolve any issue that may exist as to compliance with this Consent Decree and Final Judgment by discussion among the appropriate designees named pursuant to subsection XVIII(m) of the Agreement. The State of New York and/or any Participating Manufacturer may apply to the Court at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement of this Consent Decree and Final Judgment... For any claimed violation of this Consent Decree and Final Judgment, in determining whether to seek an order for monetary, civil contempt or criminal sanctions for any claimed violation, the Attorney General shall give good-faith consideration to whether: (a) the Participating Manufacturer that is claimed to have committed the violation has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless that party has been guilty of a pattern of violations of like nature; and (2) a legitimate, good-faith dispute exists as to the meaning of the terms in question of this Consent Decree and Final Judgment. The Court in any case in its discretion may

> determine not to enter an order for monetary, civil contempt or criminal sanctions.

Consent Decree § VII.A.

In addition, the Consent Decree provides that "[i]n any proceeding which results in a finding that a Participating Manufacturer violated this Consent Decree and Final Judgment, the Participating Manufacturer or Participating Manufacturers found to be in violation shall pay the State's costs and attorneys' fees incurred only by the State of New York in such proceeding." Consent Decree § VII.D.

The current enforcement proceeding arises from a marketing campaign to promote Reynolds' Camel cigarette brand. The campaign, "The Farm-Free Range Music", included a website, www.thefarmrocks.com, an audio CD entitled, *The Farm-Free Range Music: Fresh Picked Music*, Volume I (the "CD"), which was sent to customers by mail,[3] and a gatefold advertisement in the November 15, 2007 40th Anniversary issue of *Rolling Stone* magazine.

The gatefold in the magazine contained four pages of Reynolds' advertising and five pages of *Rolling Stone* editorial content.

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[3] The CD was accompanied by a 28-page color booklet highlighting eleven independent music artists, including most prominently the band Bayside.

The four advertising pages included a collage of photographs displaying images of, *inter alia*, (i) a red tractor with wheels made of film reels and an engine containing a film projector; (ii) radios, speakers and television sets growing out of the ground; (iii) flying radios with propellers; and (iv) an eagle carrying a mirror with a protruding hand.

The five editorial pages entitled "Indie Rock Universe", contained different categories of independent rock music labels and bands, in the semblance of a spiral notebook, accompanied by hand-drawn illustrations of, *inter alia*, UFOs, a rocket-powered guitar, planets (including an "Animal Planet"), and a bagpiper.

There is no dispute that "Reynolds did not prepare, or preview, the five pages of illustrations entitled 'Indie Rock Universe' that appeared in the November 15, 2007 Fortieth Anniversary issue of *Rolling Stone*", and that "[t]he editorial staff of *Rolling Stone* determined the graphics and look and feel of the five pages of illustrations entitled 'Indie Rock Universe.'" See, Stipulation of the parties dated September 18, 2008.

Plaintiffs, however, contend that: (i) the *Camel Farm* advertisement that appeared in the November 15, 2007 issue of *Rolling Stone*, as well as the website, which contained images

similar to those found in the advertisement, violated the prohibition contained in §§ VI.B. of the Consent Decree relating to the use of Cartoons; and (ii) the distribution of the CD violated the prohibition contained in § VI.D. of the Consent Decree relating to the distribution of Brand Name merchandise.

Plaintiffs concede in the September 18, 2008 Stipulation that "[t]he State does not contend in this action, and has no evidence, that Reynolds is continuing to take any actions in New York to violate the MSA and/or Consent Decree in connection with the *Camel Farm* campaign." Plaintiffs have also stipulated that

> [t]hough the State does contend that it was injured by Reynolds' alleged violation of the Consent Decree, the State will not introduce any evidence, that the State, or any resident of the State, suffered any specific, compensable harm as a result of the publication of the *Camel Farm* ad in the November 15, 2007 Fortieth Anniversary issue of *Rolling Stone*, or as a result of any other use of *Camel Farm* imagery (e.g. website, adult-only facility *Camel Farm* events, direct-mail piece including audio CD "Fresh Picked Music Vol. 1").

Plaintiffs now move for an order:

(1) directing defendant Reynolds to comply with Consent Decree §§ VI.B. and D.;

(2) permanently enjoining Reynolds from using, causing the use of or permitting third parties to use Cartoons in the advertising, promotion and marketing of its *Camel* brand "The Farm-

Free Range Music" campaign through any media, including but not limited to direct mail events, the website, www.thefarmrocks.com, and any other website within the State of New York;

(3) directing Reynolds to take all necessary steps to ensure that any person with whom it has contractual relations, including *Rolling Stone* magazine or its publisher, Wenner Media LLC, its advertising agencies and any other third parties to cease using and/or distributing any of the Cartoons at issue here to advertise or market Reynolds' cigarettes within the State of New York;

(4) directing Reynolds to collect and remove all remaining issues of the November 15, 2007 40th Anniversary edition of *Rolling Stone* magazine containing the prohibited advertisements from all retail locations in New York and from any website accessible from New York;

(5) permanently enjoining Reynolds from distributing *The Farm-Free Range Music: Fresh Picked Music Volumes I and II* audio CDs and/or any other brand name merchandise in the State of New York;

(6) directing Reynolds to pay a civil sanction to the State of New York in the amount of $100 per violation, including but not limited to for each issue of the November 15, 2007 40th Anniversary edition of *Rolling Stone* magazine sold within New York and each of the CDs that was distributed within New York, the final amount to

be determined at a hearing, pursuant to § VII.A. of the Consent Decree;

(7) directing Reynolds to run one full page anti-smoking message, approved by the Attorney General, in *Rolling Stone* magazine for each *Camel Farm* advertisement that ran in the magazine in New York; and

(8) directing Reynolds to pay the State of New York's costs and attorneys' fees pursuant to § VII.D. of the Consent Decree.

Pursuant to Stipulation and Scheduling Order dated January 9, 2008, so-ordered by the Hon. Charles E. Ramos, the parties previously agreed that after the close of discovery, the instant motion would be scheduled for an evidentiary hearing.[4]

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[4] Similar applications have been brought in at least eight other states. At least three courts have determined after evidentiary hearings that Reynolds violated the MSA, although they adopted different factual findings.

In *State of Washington v R.J. Reynolds Tobacco Co.*, the Court of Appeals of the State of Washington, Division One, in an Opinion filed on July 13, 2009, affirmed the Finding of Facts and Conclusions of Law of the lower court (William J. Downing, J.) dated June 2, 2008, made after an evidentiary hearing, to the extent that the court determined that Reynolds is not liable for the *Rolling Stone* editorial content. However, the Court of Appeals also determined that "[i]mages in the Camel Farm photo collage violate the plain language of the MSA", noting that "[r]adios and televisions and speakers do not naturally fly through the air or grow out of the ground like flowers" and that "[t]ractors do not naturally float," and remanded the case to the lower court to address the issue of appropriate remedies for Reynolds' violation of the cartoon ban and to award the State its attorneys' fees below and on appeal.

An evidentiary hearing was also held in *Commonwealth of PA v Philip Morris, Inc.*, Court of Common Pleas for Philadelphia County, First Judicial District of Pennsylvania, Trial Division-Civil. In a decision dated May 12, 2009, the court (William J. Manfredi, J.) similarly found that the images on the advertising pages are

Defendant Reynolds has cross-moved[5] for an order:

(1) pursuant to CPLR § 3211(a)(1) and (7) dismissing plaintiffs' enforcement action in its entirety; and

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"cartoons and constitute the type of advertising which Reynolds agreed would be prohibited under the MSA and Consent Decree". However, the court further determined that

> b) The entire 9 page section, which included the undisputed advertising pages (1,3,4 and 9), and the so-called *Rolling Stone* editorial content with the undisputed cartoons (2,5-8), clearly formed an integrated whole, with common elements and themes, and would have been understood as such by any reasonable consumer; (footnote omitted) and
>
> c) Even if Reynolds had no knowledge of the so-called editorial content which is specifically sought to have its advertising completely envelope, the only reasonable reading of the Consent Decree and the MSA is that Reynolds had an affirmative duty to insure that its advertising was not integrally linked with prohibited cartoon images, particularly where the advertising was placed with the specific purpose of exploiting a thematic link between the activities sponsored in the advertising and the subject of the editorial content, which duty Reynolds failed to perform.

In *State of Ohio v R.J. Reynolds Tobacco Co.*, Court of Common Pleas, Franklin County, Ohio - Civil Division, the Court (David W. Fais, J.) similarly determined in a Decision dated July 30, 2008, issued after a hearing, that "Reynolds violated the injunction when it 'used' or 'caused to be used' the Cartoons in the November 15, 2007 *Rolling Stone* editorial because it was so intertwined with the Camel® brand advertisement that it was used to promote Camel® cigarettes." The Court also found that "Reynolds had an absolute duty and responsibility to take steps to ensure that it did not violate the injunction, because the 'responsibility to comply with a court order is placed directly upon the party against whom the order is rendered.'" However, Judge Fais distinguished the content on the editorial pages from the content on the advertising pages, and determined (as the lower court had in Washington) that the photographic collage on the advertising pages did not constitute a Cartoon within the meaning of the MSA.

[5] The cross-motion was separately filed under motion sequence number 055.

(2) pursuant to the MSA and Consent Decree, ordering that after the dismissal of this action, plaintiffs be directed to negotiate in good faith with Reynolds over whether and how the MSA and Consent Decree apply to the *Rolling Stone* editorial pages and the compact disc mailing at issue.

Defendant Reynolds argues that this enforcement proceeding must be dismissed on the grounds that: (i) the State failed to provide 30-days' written notice before filing suit, as required by MSA § VII(c)(2); (ii) the State failed to engage in pre-suit consultation and negotiation, as required by MSA § VII(c)(6) and Consent Decree § VII.A; and (iii) the State failed to first seek the issuance of an Enforcement Order, as defendant contends is required under MSA §§ VII(c)(3) and (4).

However, plaintiffs have moved for relief based solely on alleged violations of the Consent Decree, which unlike the MSA, does not contain a 30-day notice requirement, but rather authorizes the State to apply to the Court "at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement" of the Consent Decree. Moreover, there is no dispute that the parties have had substantial opportunities to meet and discuss this dispute to no avail.[6]

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[6] NAAG first sent a letter dated November 21, 2007 to Reynolds addressing its concern with respect to the magazine advertisement.

Accordingly, this branch of Reynolds' cross-motion to dismiss is denied.[7]

Reynolds alternatively argues that the State is seeking punitive sanctions in violation of New York contempt law. Specifically, defendant argues that plaintiffs are improperly requesting non-compensatory monetary fines which may be awarded only in the context of a criminal contempt proceeding.

"A stipulation entered into between parties is incapable of expanding a court's power to impose punishments for civil and criminal contempt pursuant to the provisions of Judiciary Law § 753 and § 750 respectively." *Department of Housing Preservation and Development of the City of New York v Deka Realty Corp.*, 208 AD2d 37, 42 (2nd Dep't 1995).

> Insofar as civil contempt is concerned, the purpose of a fine is to compensate. The fines that may be imposed for a civil contempt are found in Judiciary Law § 773. The statute provides for two types of awards: one where actual damage has resulted from the contemptuous act in

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[7] Other courts have also rejected this argument. *See, e.g., State of Washington v R.J. Reynolds Tobacco Co.*, Superior Court of Washington, King County (William J. Downing, J.), Order dated April 4, 2008 ("I do believe that it was contemplated that the State could at any time bring a motion for enforcement and obtain relatively quick review of whatever issues might be brought before the Court."); *State of Maryland v Philip Morris Inc.*, Circuit Court, Baltimore City (Roger W. Brown, J.), Decision/Order dated June 23, 2008 ("The Consent Decree does not contain the requirement set forth in the MSA that the parties provide 30 days written notice of their intent to seek an enforcement order from the Court. Compare MSA § VII(c) with Consent Decree § VI.A.")

> which case an award sufficient to indemnify the aggrieved party is imposed, and one where the complainant's rights have been prejudiced but an actual loss or injury is incapable of being established. In that situation, the fine is limited to $250, plus the complainant's costs and expenses (Judiciary Law, § 773, as amd. by L. 1977, ch. 437, § 8).
>
> "In either case, unlike fines for criminal contempt where deterrence is the aim and the State is the aggrieved party entitled to the award (citations omitted), civil contempt fines must be remedial in nature and effect (citation omitted). The award should be formulated not to punish an offender, but solely to compensate or indemnify private complainants" (*State of New York v. Unique Ideas*, 44 N.Y.2d 345,... [1978]).

Department of Housing Preservation and Development of the City of New York v Deka Realty Corp., *supra* at 43. *See also, Mine Workers of Am. v Bagwell*, 512 US 821 (1994); *Corrado v Corrado*, 18 AD3d 599 (2nd Dep't 2005).

The State of New York's request in this action for civil sanctions in the amount of $100 per violation bears no rational relation to any actual loss or injury and must, therefore, be stricken.[8] *See, Willner v Willner*, 145 AD2d 236 (2nd Dep't 1989)

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[8] Courts in Connecticut, Washington, Maryland, Pennsylvania and Ohio have struck other states' identical requests for $100 per violation sanctions. *See, State of Connecticut v Philip Morris*, Superior Court of Connecticut, Judicial District of Hartford (Michael R. Sheldon, J.), decision dictated on the record on March 26, 2008 ("I'm satisfied that what the limit of the power of the Court to grant any relief would be here in this proceeding, initiated in this case where criminal contempt is not sought and the process by which to achieve criminal contempt has not been pursued is civil sanctions, non-punitive sanctions."); *State of Washington v R.J. Reynolds Tobacco Co.*, Superior Court of Washington, King County (William J. Downing, J.), Order dated April 4, 2008 ("The motion to strike is granted in that [n]o recovery can be had in this civil proceeding of a punitive sanction, such as the requested

which determined that a liquidated damages clause in a stipulation was not a reasonable measure of the probable actual loss which would be incurred in the event of a breach of that agreement, but rather a penalty, and was thus unenforceable as a matter of law.

Plaintiffs, however, argue that it remains in the Court's discretion to ascertain what kind of harm was done to the People of the State of New York and to the public health activities of the State, and to compensate the State accordingly.

It is well settled that "[w]hile damages may not be determined by mere speculation or guess, evidence that, 'as a matter of just

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relief of $100 per November 15, 2007 *Rolling Stone* magazine distributed in Washington."); *State of Maryland v Philip Morris Inc.*, Circuit Court, Baltimore City (Roger W. Brown, J.), Decision/Order dated June 23, 2008 ("The State's seeking of a flat $100 fine per magazine, direct mail cd, and website visit, at this stage, bears no relation to the harm incurred by the State and is clearly meant to punish RJR for past violations and to encourage future compliance. Because punitive sanctions are not appropriate under a Motion to Enforce a Consent Decree, the request for $100 per violation is therefore stricken. This Court reserves the right to levy monetary and any other appropriate sanctions to counter any harm caused by whatever damages the State can prove."); *Commonwealth of Pennsylvania v Philip Morris, Inc.*, Court of Common Pleas of Philadelphia, First Judicial District (William J. Manfredi, J.), June 25, 2008 transcript ("We can assume the $100 an issue, $100 Internet site provision of their request is not something the Court would find."); and *State of Ohio v R.J. Reynolds Tobacco Co.*, Court of Common Pleas, Franklin County, Ohio (David W. Fais, J.), Decision dated July 30, 2008 ("[T]he State's multi-million dollar request for sanctions cannot be upheld as a remedial, compensatory civil contempt sanction.")

and reasonable inference', shows their existence and the extent thereof will suffice, even though the result is only an approximation (citation omitted)." *Cristallina v Christie, Manson & Woods Intl*, 117 AD2d 284, 295 (1st Dep't 1986). *See also, Spectra Audio Research, Inc. v Chon*, 62 AD3d 561 (1st Dep't 2009).

Here, however, it appears that the only damages which may be determined without resorting to mere speculation or guess are plaintiffs' attorneys' fees and costs.[9] Thus, in the event that this Court finds, after an evidentiary hearing, that Reynolds violated the Consent Decree, plaintiffs' recovery for its actual loss or injury shall be limited to attorneys' fees and costs.

Counsel shall appear for a conference in IA Part 39 on December 9, 2009 at 11:00 a.m. to discuss the possibility of settlement and, if necessary, to schedule the evidentiary hearing.

This constitutes the decision and order of this Court.

Date: October 13, 2009

FILED
OCT 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK J.S.C.

[9] Counsel for plaintiffs reiterated on the record on January 26, 2009 that the State has no evidence of specific compensable harm sustained by the State.