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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

DC Media Capital

-v-

Sivan, Avi

INDEX NO. 600378/2007E

MOTION DATE

MOTION SEQ. NO. 010

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 THE ANNEXED DECISION AND ORDER.

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

Dated: 1/10/2012

J.S.C.

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: CIVIL TERM: PART 12

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DC MEDIA CAPITAL, LLC, d/b/a NEWTEK MEDIA CAPITAL,

Plaintiff,

Index Number 600378/2007E
Mot. Seq. Nos. 010, 011

-against-

AVI SIVAN, PREM RANCHANDANI, KURT STREAMS, SHOPFLASH INC. IGIA INC., JOHN DOE No. 1 through JANE DOE No. 25, the names of the last defendants being fictitious, the true names being unkown, it being intended to designate the agents of the aforesaid defendants,

Defendants.

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SHOPFLASH INC., IGIA, INC., and PREM RANCHAMDANI,

Third Party Plaintiffs,

-against-

DECISION AND ORDER

ROBERT HANINGTON, RYAN DALL AND ERIC CROUSE,

Third Party Defendants.

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For the Plaintiff and Third-Party Defendants:
Law Offices of Robert M. Brill, LLC
By: Anita M. Jaskot, Esq.
880 Third Ave., 13th fl.
New York, NY 10022
(212) 935-7900

For the Defendants/Third-Party Plaintiffs:
Law Offices of Leon S. Segen
By: Leon S. Segen, Esq.
10 East 40th St., 46th fl.
New York, NY 10016
(212) 889-0972

Papers considered in review of these e-filed motions and cross motion	**E-Filing Document Numbers**
Motion Sequence No. 010:	
Notice of motion, Segen affirmation and annexed exhibits 1 - 5	112 - 114
Jaskot affirmation in opposition and annexed exhibits A - B	115 - 115-2
Segen reply affirmation in further support and annexed exhibits 1 - 4	116 - 117
Gimpel reply affirmation in support and annexed exhibits 1 - 6	118 - 119
Motion Sequence No. 011:	
Notice of motion, Segen affirmation and annexed exhibits 1 - 3	120 - 123
Jaskot affirmation in support of adjournment	126
Notice of cross motion, memorandum of law and Jaskot affirmation with annexed exhibits A - F	127 - 128
Segen reply affirmation in further support and in opposition to cross motion and annexed exhibits 1 - 4	129 - 130

PAUL G. FEINMAN, J.:

The motions bearing sequence numbers 010 and 011, and the cross motion filed under sequence number 011, are all joined for purposes of this decision and order.[1]

In motion sequence number 010, defendants/third-party plaintiffs, Shopflash Inc., Igia Inc. and Prem Ramchandani move to compel plaintiff, DC Media Capital, LLC d/b/a Newtek Media, to provide all electronic documents obtained from three of defendants' computers by transferring the files to a flash drive provided by defendant for this purpose, to order plaintiff to cease any further review of the documents obtained from defendants' computers until defendants have had an opportunity to conduct a review for applicable privileges, and to vacate the note of issue and certificate of readiness until plaintiff complies with an alleged agreement between the parties related to outstanding discovery. Plaintiff opposes all branches of this motion.

In motion sequence number 011, defendants move, pursuant to CPLR 2221, to modify the court's prior order striking defendants' answer by substituting a less severe sanction in the interest of justice, and pursuant to CPLR 3126, to sanction plaintiff for its alleged discovery abuses by striking plaintiff's damages claims or, at minimum, prohibiting plaintiff from relying on any evidence regarding damages that has not been produced to defendants as of the date of this motion. Plaintiff opposes and cross-moves for sanctions against the five named defendants and their counsel, Leon Segen, Esq., in an amount not less than $6,000.00 for their allegedly frivolous conduct and motion practice, and for costs in the amount of $2,500.00. Plaintiff also

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[1]In motion sequence number 012, defendants' counsel, the Law Offices of Leon S. Segen, moved to be relieved as counsel for defendants in the main action and third-party action. Plaintiff opposed. However, on December 21, 2011, Segen e-filed a notice of withdrawal of this motion. The motion was permitted to be withdrawn by a decision and order, stamped by the Chief Clerk on December 22, 2011.

seeks to restrict defendants and their counsel from filing any future motions unless prior permission from the court has been obtained. Defendants and their counsel oppose the cross motion.

For the reasons provided below, defendants motions are each denied in their entirety and plaintiff's cross motion is granted solely to the extent provided herein.

Background

1. Procedural history - the main action

This action arises out of two sets of lending agreements between plaintiff and defendant, Shopflash, Inc., a company engaged in the business of developing and marketing consumer products for sale through television commercials and "infomercials." As the court has noted in prior orders, there is a long history of non-compliance with the court's discovery orders in this case. After commencement of this action on May 4, 2007, discovery was initially stayed due to defendants' filing of a motion to dismiss. Plaintiff cross-moved to have the discovery stay lifted and sought an order of preservation. On February 21, 2008, the justice previously assigned to this matter issued an order of preservation directing defendants to preserve all material and relevant evidence, making specific reference to particular types of electronically-stored information to be preserved (*DC Media Capital, LLC v Sivan*, Sup Ct, NY County, Feb. 21, 2008, Kapnick, J., index no. 600378/2007, interim decision and order, mot. seq. no. 1; Doc. 7).

Subsequently, after a decision and order was issued on the motion to dismiss and cross motion, the case was assigned to this part, a preliminary conference was held and, on May 13, 2009, an order was issued setting forth the discovery schedule for this action (Doc. 18). Among other things, the parties were required to serve discovery demands by June 3, 2009, and conduct

all depositions by September 14, 2009. At the next compliance conference before the court, on July 15, 2009, another order was issued which extended defendants' time to serve discovery demands to July 29, 2009, and defendants were ordered to produce documents responsive to plaintiff's demands on or before August 14, 2009, or provide an affidavit stating that there were no responsive documents (Doc. 19). Thereafter, on September 3, 2009, plaintiff moved by order to show for relief under CPLR 3126 and 3124 against all defendants for defendants' failure to comply with discovery orders (Doc. 25, Signed order to show cause, seq. no. 002). The order to show cause was converted to an ordinary notice of motion, and while that motion was still pending, the parties returned to the court for their next compliance conference on September 9, 2009. At the conference, the court issued yet another order concerning plaintiff's outstanding discovery demands, noting that it was issued without waiving plaintiff's rights to the relief sought in the pending motion, but was designed as an attempt for defendants to mitigate their prior noncompliance (Doc. 27, Compliance conference order, Sept. 9, 2009). The order, among other things, detailed specific categories of documents that were to be produced by each defendant by the close of business on September 24, 2009, and expressly advised the parties that the dates provided therein were to be "strictly enforced and that the failure to comply with this court's order will result in the imposition of any appropriate sanction, including, but not limited to, monetary costs and sanctions, issue or defense preclusion, witness preclusion, and/or the complete or partial striking of a pleading" (*id.* at ¶ 6).

By decision and order dated October 21, 2009, plaintiff's motion for relief pursuant to CPLR 3124 and 3126 was granted on defendants' default to the following extent: (1) defendants' counterclaims and affirmative defenses were stricken; (2) defendants' answer was to be deemed

stricken unless at the December 2, 2009 compliance conference defendants could establish that they had complied with the court's May 13, 2009 and July 15, 2009 orders regarding document discovery; (3) defendants were required to pay plaintiffs $2,000.00 as costs related to making the motion and repeated compliance conferences for the same discovery; and (4) the issue of outstanding depositions was held in abeyance for the December 2, 2009 compliance conference (*DC Media Capital, LLC v Sivan*, Sup Ct, NY County, Oct. 16, 2009, Feinman, J., index no. 600378/2007, mot. seq. no. 2; Doc. 27). On November 19, 2009, a judgment was entered striking defendants' affirmative defenses and counterclaims and awarding plaintiff $2,000.00 costs (Doc. 33, Judgment).

Rather than bring proof of compliance with the outstanding court orders of May 13, July 25, September 9 and October 16, 2009, to the next compliance conference on December 2, 2009, defendants, through their counsel at the time, Moshe Mortner, Esq., moved to vacate the court's decision and order of October 16, 2009 and the November 19 judgment, pursuant to CPLR 2221, on the ground that defendants' default on the related motion was due to a reasonable excuse and defendants had meritorious defenses, and, pursuant to CPLR 3103, for a protective order with respect to certain document demands (Doc. 34, Notice of motion, seq. no. 003). Plaintiff cross-moved for an order enforcing the court's October 16, 2009 order, and to hold defendants in contempt of the order issued by the previously-assigned justice directing the preservation of all evidence, dated February 21, 2008. By decision and order dated May 15, 2010,[2] the court, after deeming it to be a motion to vacate under CPLR 5015, denied the portion of defendants' motion

[2] The decision is erroneously dated May 15, 2005, but the accompanying grey sheet is correctly dated May 15, 2010. The decision and order was entered in the office of the County Clerk on May 18, 2010.

seeking to vacate the October 16, 2009 decision and order and related judgment (*DC Media Capital, LLC v Sivan*, Sup Ct, NY County, May 15, 2010, Feinman, J., index no. 600378/2007, mot. seq. no. 3; Doc. 55). The court noted, "[t]hroughout the course of this litigation defendants have frequently been tardy in responding to plaintiff's discovery requests, wilfully disobedient of court orders and engaged in a pattern of dilatory defaults, which can only be seen as deliberate," but nonetheless accepted defendants' counsel's affirmation as setting forth a reasonable excuse for its default on the underlying motion (*id.* at 7). However, defendants' motion was nonetheless denied because they "utterly failed to establish the merits of their affirmative defenses and counterclaims" (*id.* at 8). The portion of defendants' motion for a protective order was granted only to the extent that where plaintiff's discovery demands did not indicate a time frame for responsive documents, the court required defendants to produce documents from the period of January 1, 2005, to the present, and otherwise denied (*id.* at 10). Plaintiff's cross motion was granted to the extent that the judgment entered by the Clerk of Court on November 19, 2009, striking the counterclaims and affirmative defenses and assessing $2,000.00 in costs to be paid to plaintiff remained in effect and, furthermore, defendants' answer was deemed stricken based on their willful, deliberate, and contumacious behavior (*id.* at 10; citing *Rocco v KCL Protective Services, Inc.*, 283 AD2d 317, 318 [1st Dept 2001]). However, the branch of plaintiff's cross motion seeking to hold defendants in contempt of the preservation order of February 21, 2008, was denied. Because the decision and order precluded defendants from contesting liability, but not the amount of damages, the parties were directed to complete discovery on the issue of damages within 90 days of entry of the order, plaintiff was required to file a notice of issue on or before August 20, 2010, and the parties were ordered to appear before the court for a final

compliance conference on July 28, 2010 (*id.* at 11). The court noted that, if warranted, it would entertain a further motion for additional monetary costs and/or sanctions pursuant to Rule 130 (*id.*).

By notice dated June 10, 2010, defendants Avi Sivan, Prem Ramchandani, Shopflash, Inc. and Igia, Inc. substituted Mark Gimpel, Esq. as their counsel (Doc. 57). Thereafter, defendants moved, by order to show cause filed June 14, 2010, for the following relief: (1) to stay the part of the court's May 15, 2010 decision and order requiring defendants to satisfy all outstanding discovery demands related to damages by no later than June 16, 2010; (2) to set July 16, 2010, as the due date for the above-mentioned discovery responses; and (3) to extend the time within which defendants could file a motion to reargue the court's May 15, 2010 decision and order to July 16, 2010 (Doc. 59, Signed order to show cause, mot. seq. no. 005, dated June 15, 2010). The court granted defendants' motion only to the extent that defendants' time to comply with the May 15, 2010 decision and order regarding discovery was extended to the "close of business" on July 16, 2010, and it was otherwise denied (*DC Media Capital, LLC v Sivan*, Sup Ct, NY County, June 30, 2010, Feinman, J., index no. 600378/2007, mot. seq. no. 005; Doc. 63).

On July 16, 2010, but after "the close of business" according to the e-file receipt available from the NYSECF, defendants' counsel uploaded defendants' "responses and objections to plaintiff's first notice of discovery and inspection" (Docs. 64 - 68). Although these responses suggest that documents were produced to plaintiff, it is not clear if this production was actually given to plaintiff at the time the responses were e-filed. The parties returned to court for a compliance conference on July 28, 2010, to discuss outstanding discovery. There, a stipulated order was issued directing the following: (1) defendants were to provide responses to plaintiff's

counsel to certain inquiries made at the July 28, 2010 compliance conference; (2) defendants' counsel was to provide a privilege log; (3) defendants' counsel was to provide requested details concerning a computer, laptop and all other electronic devices; and (4) the parties agreed to meet and confer with plaintiff's electronic discovery expert during the week of August 16, or the following week depending on the expert's availability (Doc. 70, Compliance conference order, dated July 28). The responses described above were due on or before August 4, 2010, and the order extended the deadline for completion of paper discovery to October 1, 2010, depositions to December 3, 2010, and the note of issue to January 14, 2011, while scheduling a pre-trial certification conference for December 8, 2010 (*id.* at 2). The order, once again, expressly indicated that all deadlines were firm and could not be extended without permission of the court (*id.*).

On August 18, 2010, defendants' attorney e-filed affidavits from each of the three individual defendants providing information about the "electronic devices" used by the defendants and their employees or agents (Doc. 72 - 74). The affidavit of Kurt Streams, states that he used one computer during "the period relevant to this case," which was purchased in or around January 2005, and that he "never deleted files relevant to this case from that or any other computer" (Doc. 74, Streams affid. at ¶¶ 2-3). The affidavits of Prem Ramchandani and Avi Sivan each contain identical lists of computers "whose existence was previously disclosed to plaintiff," and are based on information provided by Sonia Makiling, "our office manager" (Docs. 72 - 73, Ramchandani and Sivan affids. at ¶ 2). Also on August 18, 2010, defendants e-filed their "first notice of discovery and inspection" (Doc. 75, Defendants' first demands).

On October 5, 2010, defendants filed a motion for leave to renew their previous motion,

dated December 1, 2009, to vacate the court's decision and order of October 16, 2009, and the November 19, 2009 judgment (Doc. 79, Notice of motion, seq. no. 007, dated Oct. 5, 2010). In support of this motion, defendants submitted "new facts" in the form of affidavits from the three individual defendants attesting to the merits of defendants' defenses against plaintiff's causes of action and to the validity of defendants' counterclaims (Doc. 78, Defendants' memo. of law, seq. no. 007, at 2-3). Defendants argued that a reasonable justification for defendants' failure to submit this evidence on the underlying motion existed because defendants' prior counsel mistakenly proceeded under CPLR 2221, which they claim does not require an affidavit of merit, and because the court converted the motion to one under CPLR 5015 and denied it because an affidavit of merit was lacking, without affording counsel the opportunity to supplement defendants' papers (*id.* at 3). They also contended that even if the court did not find a reasonable justification, their motion should be granted "under a longstanding line of First Department cases that permit a court to grant a motion to renew in the interest of justice even where the reasonable justification element is not satisfied" (*id.* at 3).

The parties stipulated to adjourn defendants' motion to renew so that it was not marked as fully submitted until December 7, 2010, the day prior to the case's scheduled pre-trial certification conference (Doc. 80, Oct. 12 stip.). At the December 8, 2010 conference, yet another discovery order was issued providing the following: (1) the end date for depositions was extended to April 30, 2011; (2) the parties were given until May 30, 2011, to complete all outstanding discovery; (3) defendants were required to produce all outstanding bank documentation by February 28, 2011; (4) plaintiff was to file a note of issue by June 6, 2011; and (5) a pre-trial certification conference was to be held May 11, 2011 (Doc. 88, Compliance

conference order, dated Dec. 8, 2010). As with previous orders, the order expressly stated that all deadlines were firm and could not be extended without permission of the court (*id.*).

By decision and order dated February 17, 2011, the court denied defendants' motion to renew (*DC Media Capital, LLC v Sivan*, Sup Ct, NY County, Feb. 17, 2011, Feinman, J., index no. 600378/2007, mot. seq. no. 007; Doc. 90). In doing so, the court stated that defendants' failure to present the newly provided affidavits on the underlying motion to vacate was "either an example of their ongoing lack of regard for the litigation, or their attorney's misunderstanding of law [but] [n]either of these justifies a do-over simply because defendants have now realized that their attitude of noncompliance and inattentiveness has resulted in a judgment issued on default against them" (*id.* at 5).

It appears from the record that defendants retained new counsel to prosecute the third-party action on or around October 31, 2011 (Doc. 144, exs. 1-2, Retainer agreement). Although it is not clear precisely when it happened, new counsel, Leon S. Segen, Esq., at some point began representing defendants in connection with the main action, as evidenced by Segen's now withdrawn motion to withdraw as counsel (Doc. 142, Notice of motion, seq. no. 012, dated Dec. 7, 2011). Based on the attorneys listed on the order from that date, Segen did not appear at the conference held on December 8, 2010, before the court, although defendants' other attorney, Gimpel, did appear (Doc. 88, Comp. conf. order, dated Dec. 8, 2010). However, at the next scheduled conference on May 11, 2011, no attorney appeared on behalf of the defendants. The conference was therefore adjourned and was eventually held on May 25, 2011. There, the parties raised certain discovery issues related to the production of electronically-stored information ("ESI") from defendants' computers, but the court refused to further extend the date on which

plaintiff had to file its note of issue beyond the June 6, 2011 date provided in the December 8, 2010 order.

Defendants then moved by order to show cause, signed June 2, 2011, to compel plaintiff to: (1) answer defendants' discovery demands; (2) return three computers turned over by defendants in discovery; and (3) "s[e]parately turn over all information taken from the three computers without prior inspection so as to permit defendants prior review for privilege etc.[,] subject to the agreement between the parties" (Doc. 106, Signed order to show cause, seq. no. 008, dated June 2, 2011). Oral argument on the order to show cause was held on June 6, 2011, and the court issued an oral decision denying the motion without prejudice for the reasons stated on the record (*DC Media Capital, LLC v Sivan*, Sup Ct, NY County, June 6, 2011, Feinman, J., index no. 600378/2007, mot. seq. no. 008; Doc. 110; *see also* Doc. 132, Transcript of June 6 proceedings). The court began by describing the case's "very long and tortured history of non-compliance with discovery orders ..." (Doc. 132, Trans. at 2). Pertaining to the first branch of the order to show cause, the court noted that the demands defendants sought to compel plaintiff to respond to may have been served as late as May 9, 2011 (*id.* at 4). Whether or not plaintiff had sufficiently responded, the court deferred any possible preclusion remedy for a later determination to be made by the trial judge. The court reminded the parties of what it expressly conveyed to them at the December 8, 2010 conference and resulting order - that the court's supervision of discovery in this matter was to end on June 6, 2011, when plaintiff was to file its note of issue. The parties were free to decide if they wanted to accommodate each other so that the case could get tried with proper discovery, but because the parties had "ignored every other Court order ... there[was] no point in ... making any further orders" (*id.* at 5). The second branch

of the order to show cause seeking return of the computers was deemed academic based on plaintiff's representation that the computers had been turned over (*id.* at 4). As to the remaining branch, which sought to compel plaintiff to turn over information extracted from defendants' computers, the court could not discern from defendants' papers what exactly it was requesting. To the extent that plaintiffs had extracted information from the computers, the court noted that it could be considered "work product" (*id.* at 5). The court could not recall ever sanctioning any agreement where defendants were required to direct the wholesale turnover of its computers, as it typically only would order such relief as a last resort (*id.* at 6). Later that day, plaintiff filed the notice of issue without a jury and certificate of readiness (Doc. 109). On June 10, 2011, defendants' attorney, Segen, filed a demand for a trial by jury "of the factual damage issues involved in the complaint" (Doc. 111).

2. The third-party action

By decision and order dated July 28, 2010, this court directed a hearing to determine whether the third-party defendants were properly served with process. The matter was referred to Judicial Hearing Officer Stanley L. Sklar, who issued his report on December 15, 2010, finding that service had been sufficient (Doc. 97). The third-party plaintiffs, who are also defendants in the main action, successfully moved without opposition to confirm JHO Sklar's report and recommendation (*see DC Media Capital, LLC v Sivan*, Sup Ct, NY County, Aug. 18, 2011, Feinman, J., index no. 600378/2007, mot. seq. no. 009; Doc. 125). The third-party defendants were directed to answer the third-party complaint within 20 days of the date of entry of the decision and order and all of the parties in the main action and the third-party action were ordered to appear for a compliance conference "in order to set forth a discovery schedule and

ready the entire matter for trial, on Wednesday, October 12, at 2:15 p.m...." At the October 12, 2011, "preliminary conference," the third-party plaintiffs were represented by Segen and the third-party defendants were represented by Anita Jaskot, Esq., the attorney for plaintiff in the main action. A preliminary conference order was issued providing new dates for exchanging discovery demands, and requiring the completion of depositions of all parties by February 12, 2012 (Doc. 141). The order states that the note of issue is to be filed by July 30, 2012.

Analysis

1. Defendants' motion under motion sequence number 010

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under CPLR Article 31, the party seeking disclosure may move to compel compliance under CPLR 3124. In general, a party moving under CPLR 3124 should at least be able to demonstrate that a disclosure notice was properly served on the other side and that it has not been satisfied (Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3124.1).

By notice of motion dated June 24, 2011, defendants, through Segen, moved to compel plaintiffs to "download onto the flash drive previously provided all documents downloaded from defendant[s'] computers," to "stop and desist from reviewing said documents obtained from defendants' computers until defendants have had an opportunity to review said documents for any privilege that may pertain," and to vacate the certificate of readiness "until plaintiff complies with its agreement and ethical duties" (Doc. 112, Notice of motion, seq. no. 010, dated June 24, 2011).

The materials at issue in defendants' motion are electronic files extracted from defendants

computers that had apparently "crashed" by plaintiff's experts. According to emails submitted by defendants between plaintiff's attorney, Anita Jaskot, Esq., and defendants' former attorney, Mark Gimpel, Esq., three "inoperable" computers were turned over by defendants to plaintiff's expert in October of 2010 so the expert could determine whether any data was recoverable (Doc. 119, ex. 6, Oct. 18 email). Prior to turning over the computers, there had been discussion between the attorneys about privilege review. For example, on October 17, 2010, Gimpel suggested that after plaintiff's expert had processed the computers, he would have the opportunity "to screen the content for privilege and other discoverability issues" (Doc. 119, ex. 5, Oct. 17 email). In response, Jaskot suggested to Gimpel that if it turned out that materials were recoverable from the computers, they could address production issues at that time (Doc. 119, ex. 6, Oct. 18 email). Plaintiff's expert was eventually able to extract data from the computers, but there is no record of any formal agreement between the parties or their attorneys regarding privilege review.

There is no indication of any discussion related to the computer production at the parties' next compliance conference with the court on December 8, 2010. Further, in addition to the court's order issued at that conference contains an express notice that a parties' failure to raise any outstanding discovery issues at the subsequent compliance conference is deemed a waiver of the right to that discovery (Doc. 115-2, ex. B, Dec. 8, 2010 order). The order also scheduled a pre-trial certification conference for May 11, 2011. On that date, however, defendants' attorney failed to appear and the conference was adjourned to May 25, 2011. There is no record of any further discussion between the parties' attorneys regarding the computers until defendants' current attorney, Segen, emailed Jaskot on May 31, 2011, at 7:39 a.m., asking when could he

expect the return of the three "computers, turned over voluntarily by Mr. Gimpel, and any information retrieved from said computers subject to agreement, as well as the answers to defendants' First Set of Demands?" (Doc. 114, ex. 2, May 31 email). The same day, apparently before Jaskot had responded to his inquiry, Segen e-filed a proposed order to show cause under motion sequence number 008 seeking the same matters stated in Segen's May 31 email. That motion was denied on the record by the court on June 6, 2011, where it was noted that defendants' computers had been returned. The court notes that the December 8, 2010 order had set June 6, 2011 as the deadline for plaintiff to file the note of issue, and on that date, the note of issue was indeed filed.

The instant motion does not purport to seek to renew or reargue the court's decision issued on the record on June 6, 2011, notwithstanding that it seeks essentially the same relief as the prior motion. The same emails submitted as exhibits on the prior motion are again submitted in support of the instant motion. Even setting aside the procedural impropriety of defendants' failure to move pursuant to CPLR 2221, the court holds that defendants have failed to demonstrate sufficient reasons why it should depart from the determination it made on June 6, 2011. As the court said at that time, although the parties are free to attempt to come to an agreement among themselves to attempt to facilitate additional discovery before trial, there is no reason why the court should issue additional orders where the parties have ignored every other discovery order issued in this case thus far. Perhaps not surprisingly, defendants ignored that portion of the court's June 6 decision and brought the instant motion. Defendants' motion should be denied for the further reason that they have failed to include with their motion papers an affirmation of good faith, as required by 22 NYCRR 202.7 (a) for all motions related to

discovery (*see Pezhman v Dept. of Educ. of the City of New York*, 79 AD3d 543, 544 [1st Dept 2010; citing *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]). Accordingly, defendants' motion, filed under sequence number 010, is denied in its entirety.

2. Defendants' motion sequence number 011

a. Modify court's prior order

In motion sequence number 011, defendants seek to modify, pursuant to CPLR 2221, the court's prior order striking defendants' answer by substituting a less severe sanction in the interest of justice. The notice of motion does not specify whether relief is being sought under CPLR 2221 (d), as a motion for leave to reargue, or under CPLR 2221 (e), as a motion for leave to renew. Rather, defendants contend that CPLR 2221 specifies a motion to modify as one that may be brought under that section and does "not impose restrictions on the broad power of the court to modify its own previously issued orders to serve the interest of equity and justice" (Doc. 121, Segen affirm. at ¶ 8). Defendants ask the court to modify the sanction previously imposed "at least to the extent of the sanctions imposed by the Court in *Mendoza v Highpoint Assoc.*, 83 AD3d 1 (1st Dept 2011)."

Defendants also argue that since the court denied defendants' motion to renew, circumstances have changed which make it "fundamentally unfair to leave the complete striking of their answer in place" (Doc. 121, Segen affirm. at ¶ 8). The changed circumstances include the following: (1) checks unavailable when the renewal motion was made are now available; (2) the supplemental affidavit of Kurt Streams, the C.F.O. of the defendant corporations, which indicates that the newly available checks support what Streams said in his previous affidavit

without the benefit of these checks - that defendants did not divert any monies; and (3) the affidavits of defendants Avi Sivan and Prem Ramchandani stating that defendants invested and lost over $1,000,000 in the transaction at issue (*id.*).

Defendants' notice of motion, however, does not specify which of the court's many prior decision and orders that it is seeking to modify in the interest of justice. Based on the arguments set forth in Segen's supporting affirmation, the court presumes that the prior motion to renew that defendants ask the court to modify is motion sequence number 007, which was decided by decision and order dated February 17, 2011.

Defendants seek to avoid the requirements of CPLR 2221 (e), applicable to motions for leave to renew, by labeling their motion as one seeking to modify under CPLR 2221 (a). However, as the motion is based upon "new facts" not offered on the prior motion to renew, the court deems it as a motion to renew under CPLR 2221 (e) (*see McCoy v Metropolitan Transp. Auth.*, 75 AD3d 428, 430 [1st Dept 2010] [deeming motion made under CPLR 2221 (a) as one seeking reargument under CPLR 2221 (d)]). The "new facts" that defendants rely upon consist of checks that were "unavailable" when defendants' first renewal motion was made. However, defendants fail to specify how these "unavailable" checks are "now available." Defendants' bank records have been the subject of plaintiff's discovery demands and numerous orders issued by the court, such as the one issued at the compliance conference on September 9, 2009 (Doc. 27). Yet, it appears that no efforts were made to obtain these documents until after February 17, 2011, when the court denied defendants' previous motion to renew the court's decision and order of May 15, 2010, which sought to vacate the court's decision and order of October 16, 2009, which, among other things, deemed defendants' answer stricken unless they demonstrated compliance

with the court's outstanding discovery orders. Thus, defendants cannot establish that they exercised the requisite "due diligence in making their first factual presentation" (*Prime Income Asset Mgmt. v American Real Estate Holdings LP*, 82 AD3d 550, 551-552 [1st Dept 2011]).

Even assuming arguendo that CPLR 2221 (a) allows this court to modify its prior orders to serve the interest of equity and justice, defendants have not convinced the court that it should do so in this case. As the court stated in its decision and order of February 17, 2011, defendants' repeated noncompliance with discovery demands "is either an example of their ongoing lack of regard for the litigation, or their attorney's misunderstanding [of] the law. Neither of these justifies a do-over simply because defendants have now realized that their attitude of noncompliance and inattentiveness has resulted in a judgment ... against them" (*see DC Media Capital, LLC v Sivan*, Sup Ct, NY County, Feb. 17, 2011, Feinman, J., index no. 600378/2007, mot. seq. no. 007; Doc. 90).

Defendants' reliance on *Mendoza v Highpoint Assoc.*, 83 AD3d at 1, is misplaced. That case held that the fact that defendant was precluded from presenting evidence at trial on liability did not affect its right to move for summary judgment (*id.* at 6). In doing so, the Appellate Division, First Department, noted that a "preclusion order preventing evidence at trial on liability is unlike the striking of an answer, which effectively resolves a claim against the nondisclosing defendant" (*id.* at 7). This decision simply has no bearing on the issues at hand in defendants' motion. Accordingly, this branch of defendants' motion is denied in its entirety.

b. Defendants' motion sequence number 011 - Sanctions under CPLR 3126

CPLR 3126 provides a nonexclusive list of penalties that a court may apply where a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court

finds ought to have been disclosed ..." In addition to the relief sought by defendants under CPLR 2221, they also move to impose sanctions upon plaintiff under CPLR 3126 for plaintiff's alleged "discovery abuses by striking plaintiff's damage claims or at minimum prohibiting plaintiff from relying on any evidence regarding damages that was not produced as discovery as of the date of this motion ..." (Doc. 120, Notice of motion).

In support for this branch of defendants' motion, Segen submits an affirmation in which he alleges plaintiff's attorney improperly examined the contents of defendants' computers in violation of a discovery agreement entered into with Gimpel, defendants' former attorney, and in violation of defendants' attorney-client privilege (Doc. 121, Segen affirm. at ¶ 9). As proof, Segen refers to his affirmation, Gimpel's affirmations, and related exhibits that were submitted by defendants in connection with motion sequence number 010. In addition, defendants claim that plaintiff has "completely failed to respond to discovery [demands] regarding damages" that were served by Gimpel on August 18, 2010, by Segen on May 9, 2011, and by defendants' first attorney, Moshe Mortner, Esq. at an unspecified time. Although Segen acknowledges that plaintif's attorney produced to Mortner a compact disc containing responsive material, he lists several categories of information that were allegedly demanded but not found in plaintiff's production. Segen does not specify from which set of discovery demands these categories of materials come from, or whether defendants have previously brought any issues related to plaintiff's alleged noncompliance with defendants' discovery demands to the court's attention.

In opposition, plaintiff argues that the court has already addressed issues related to the production of defendants' computers in its decision made on the record on June 6, 2011, which denied defendants' motion, filed under sequence number 009, to compel plaintiff to turn over the

documents extracted from defendants' computers by plaintiff's expert. Further, plaintiff contends that this branch of defendants motion is duplicative of the relief requested in defendants' other pending motion, filed under sequence number 010. Plaintiff next argues that it has complied with all discovery requests that defendants have served, producing "... hundreds[,] if not thousands of documents, and turn[ing] over to defendants the computer servers upon their request" (Doc. 127-1, Jaskot affirm. at ¶ 17). Plaintiff claims that defendants' prior counsel never raised any issues concerning the sufficiency of plaintiff's document production, and, as such, defendants' ability to raise any objections has been waived (*id.* at ¶ 17). In support, plaintiff refers to the court's December 8, 2010 discovery order, which expressly provides that a party's failure to raise issues related to any outstanding discovery at the subsequent compliance conference is "deemed a waiver of the right to that discovery" (Doc. 127-4, ex. C, Dec. 8, 2010 order).

Defendants have not demonstrated that plaintiff has engaged in a pattern of noncompliance with this court's orders warranting the drastic relief sought in defendants' motion. The court has already addressed defendants' allegations of plaintiff's misconduct concerning the production of materials extracted by plaintiff's expert from defendants' "crashed" computers in connection with defendants' prior motions and, thus, it need not address these matters again. Further, defendants do not point to any court order that plaintiff has violated. Although Segen sets forth, in general terms, descriptions of discovery demands that plaintiff has allegedly not complied with, he does not indicate when, if at all, these particular demands were actually made and whether defendants raised any objections to the sufficiency of plaintiff's responses. Thus, defendants have not met their burden of clearly demonstrating plaintiff's failure

to comply with its discovery obligations and that any such failure was "willful, contumacious or in bad faith" (*see Pezhman v Dept. of Educ. of the City of New York*, 79 AD3d 543, 544 [1st Dept 2010] [denying sanctions where plaintiff "failed to carry her burden of clearly demonstrating that defendants' failure to comply with disclosure obligations was willful, contumacious or in bad faith"]). Accordingly, the branch of defendants' motion seeking sanctions under CPLR 3216 is denied in its entirety.

Although the issue was not raised by plaintiff, the court also notes that denial of this branch of defendants' motion would be warranted by defendants' failure to file an affirmation of good faith as required by 22 NYCRR 202.7 (*id.* at 544; citing *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]).

3. Plaintiff's cross motion under sequence number 011 for sanctions

Under 22 NYCRR 130-1.1, the court, "in its discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct ...." In addition, the court may impose financial sanctions upon any party or attorney in a civil action who engages in frivolous conduct (22 NYCRR 130-1.1). Under 22 NYCRR 130-1.1 (c), conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
(3) it asserts material factual statements that are false.

In determining whether conduct is frivolous, the court may consider, among other things: (1) the "circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct;" and (2) "whether or not the conduct was continued

when its lack of legal or factual merit was apparent, should have been apparent, or was brought to the attention of counsel or the party" (*id.*).

In support of its cross motion under sequence number 011, plaintiff argues that defendants' motion is frivolous in that it is completely without merit in law, cannot be supported by a reasonable argument for a modification of the court's February 2011 decision and order, and was filed primarily to harass plaintiff (Doc. 128, Plaintiff's memo. of law at 4). Plaintiff contends that defendants' motion merely repeats arguments that defendants have previously raised and have been rejected by the court. As a result of defendants' alleged pattern of frivolous behavior, plaintiff argues that in addition to ordering defendants' and their attorney to pay plaintiff's costs and sanctions, the only way to prevent defendants from engaging in further frivolous motion practice is for the court to issue an order restricting defendants from filing any further motions unless permission from the court has been obtained (*id.* at 6).

In opposition to the cross motion, defendants simply reemphasize the four contentions presented in support of their motion: (1) that plaintiff has not produced evidence to support that the individual defendants stole money from the corporate defendants' bank accounts that were used in connection with the two informercial projects at issue; (2) plaintiff's fraud cause of action, "on which all the others depended, is legally and factually groundless" (Doc. 129, Segen affirm. at ¶ 3 [2]); (3) plaintiff's attorney, Jaskot, "knowingly and unethically breached her agreement with prior counsel and violated attorney-client privilege when she reviewed the content of materials on defendants' computers ..." (*id.* at ¶ 3 [3]); and (4) plaintiff has not "turned over even the most basic documents responsive to defendants' discovery demands regarding damages despite repeated requests to do so" (*id.* at ¶ 3 [4]).

In considering whether defendants have engaged in frivolous conduct, the court begins by reviewing some of the relevant procedural history. The court issued a decision and order on October 16, 2009, granting on defendants' default plaintiff's motion for sanctions based on defendants failure to comply with the court's discovery orders to the extent that defendants were required to pay plaintiff $2,000 as costs and defendants answer was deemed stricken unless at the December 2, 2009 compliance conference defendants established that they had complied with the court's discovery orders from May 13, 2009, and July 15, 2009. The day before the December 2 conference, defendants moved to vacate the judgment entered on November 19, 2009, as a result of the October 16 decision and order, which was denied by the court's decision and order dated May 15, 2010. The May 15 decision also granted plaintiff's cross motion to the extent that defendants' answer was stricken, and ordered the completion of discovery on the issue of damages by June 16, 2010. By decision and order dated June 30, 2010, the court extended defendants' time to comply with plaintiff's discovery demands. In October of 2010, defendants moved to renew their prior motion to vacate that was denied by the court's May 15, 2010 decision and order, which itself was denied by the court's February 17, 2011decision and order. Thus, the motion filed under sequence number 011 is defendants' third attempt to avoid the consequences of its repeated failures to comply with this court's orders regarding discovery. Now, based on documents that should have been produced many years ago under the court's orders but, without explanation, were only sent to plaintiff's counsel on August 5 or 6, 2011, defendants once again seek to have the court grant them the same relief that has already been denied by the court in multiple decisions and orders.

In this context, not only is defendants' contention that the "interest of justice" requires the

court to modify its prior decisions completely without merit, it must be viewed as "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure" plaintiff. Even assuming arguendo that these documents form a sufficient basis for questioning the merits of the allegations made in plaintiff's complaint, defendants offer no explanation whatsoever for the extensive delay in their production. As such, plaintiff is entitled to recover from defendants and their attorney, Segen, the costs and reasonable attorney's fees incurred by plaintiff in opposing defendants' frivolous motions under 22 NYCRR 130-1.1, in the amount of $2,500.00. In addition, given that defendants and their attorney's continued frivolous conduct and repeated willful disregard for this court's orders even after sanctions have been levied against them, the court finds that nothing short of a sanction in the amount of $5,000.00 against defendants and $2,500 against defendants' attorney, will deter defendants from engaging in future frivolous conduct. Because these sanctions should sufficiently deter future frivolous conduct by the defendants and their counsel, Segen, the branch of plaintiff's cross motion seeking to preclude defendants from filing any further motions without obtaining permission from the court is denied.

Accordingly, it is

ORDERED that defendants' motion, filed under sequence number 010, is denied in its entirety; and it is further

ORDERED that defendants' motion, filed under sequence number 011, is denied in its entirety; and it is further

ORDERED that plaintiff's cross motion, filed under sequence number 011, is granted to the extent that defendants shall compensate plaintiff's counsel $2,500.00 as attorney's fees in

answering these two motions within 20 days of service of a copy of this order together with notice of its entry; and it is further

ORDERED that the branch of the plaintiff's cross motion which seeks monetary sanctions pursuant to 22 NYCRR 130-1.1 is granted to the extent that the court having determined that Leon Segen, Esq., counsel for defendants, has engaged in frivolous conduct as defined in Section 130-1.1 (c) of the Rules of the Chief Administrator as set forth above and that sanctions should be awarded, and having found that the amount of sanctions to be awarded is appropriate as set forth above, it is now therefore

ORDERED that plaintiff's cross motion for sanctions is granted and defendants' counsel Leon Segen, Esq., without any charge to his client, is hereby sanctioned in the amount of $2,500.00, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210; and it is further

ORDERED that written proof of the payment of this sanction be provided to the Clerk of Part 12 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Lawyer's Fund and against said counsel in the aforesaid sum; and it is further

ORDERED that, in accordance with 22 NYCRR 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection; and it is further

ORDERED that the court having determined that defendants have engaged in frivolous

conduct as defined in Section 130-1.1 (c) of the Rules of the Chief Administrator as set forth above and that costs should be awarded, and having found that the amount of sanctions to be awarded is appropriate as set forth above, it is now therefore

ORDERED that plaintiff's motion for sanctions is granted and the defendants are hereby sanctioned by this court in the amount of $5,000.00, and shall deposit said amount with the County Clerk (Room 141 B), together with a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance; and it is further

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 12 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against defendants in the aforesaid sum.

This constitutes the decision and order of the court.

Dated: January 10, 2012
New York, New York

J.S.C.

(2012 Pt 12D&O_ 600378_2007_010_011_012_daz[mot2modify_mtc_sanct_xmot])