APPENDIX A

20-632 (L)
Waterkeeper All., Inc., v. Salt

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of August, two thousand twenty-two.

PRESENT:

GUIDO CALABRESI,
GERARD E. LYNCH,
RICHARD J. SULLIVAN,

Circuit Judges.

WATERKEEPER ALLIANCE, INC.,

Plaintiff-Appellee,

v.

JEFFREY SALT,

Appellant.[*]

Nos. 20-632 (L), 20-3007 (Con), 21-2523 (Con), 21-2623 (Con), 21-2684 (Con), 21-3042 (Con)

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[*] The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

FOR APPELLANT: JOSEPH A. VITA, The Law Office of Joseph A. Vita, Port Chester, NY.

FOR PLAINTIFF-APPELLEE: JASON L. LIBOU, Wachtel Missry LLP, New York, NY.

Consolidated appeals from orders of the United States District Court for the Southern District of New York (Nelson S. Román, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the district court on appeal in Nos. 20-632 and 21-2684 are **AFFIRMED**, and the appeals in Nos. 20-3007, 21-2523, 21-2623, and 21-3042 are **DISMISSED** for lack of appellate jurisdiction.

Appellant Jeffrey Salt appeals principally from an order of the district court holding him in civil contempt of court and directing his imprisonment (the "Third Contempt Order"). That order arises from an action commenced by Plaintiff-Appellee Waterkeeper Alliance, Inc. ("Waterkeeper") in February 2010 against Spirit of Utah Wilderness, Inc. ("SUW") for trademark infringement, breach of contract, and unfair competition under state and federal law. SUW is a former member organization of Waterkeeper, a network of environmental

organizations dedicated to protecting waterways worldwide; Salt is SUW's principal and officer.

On May 8, 2015, after SUW failed to respond to Waterkeeper's motion for summary judgment for over a year, the district court entered a default judgment against SUW and enjoined SUW and Salt from using Waterkeeper's marks (the "Default Judgment"). SUW and Salt did not comply, and in the four years after the entry of the Default Judgment, the district court twice held SUW and Salt in contempt for disregarding the Default Judgment, first in October 2017 (the "First Contempt Order"), and again in April 2019 (the "Second Contempt Order"). The First and Second Contempt Orders directed SUW and Salt to comply with the Default Judgment, provide a list of all instances in which they violated the Default Judgment, pay fines for their noncompliance, and respond to Waterkeeper's written interrogatories and document requests. SUW and Salt continued to disregard the Default Judgment and the First and Second Contempt Orders, prompting the district court to issue the Third Contempt Order directing Salt to surrender to the custody of the United States Marshal for the Southern District of New York on March 23, 2020, unless he purged himself of the contempt by complying fully with the Default Judgment and the First and Second Contempt

Orders. When Salt moved to alter or amend the Third Contempt Order under Rule 59(e) of the Federal Rules of Civil Procedure, the district court denied the motion as untimely and proceeded to consider the motion under Rule 60(b) and find that it was without merit.

On October 22, 2021, after granting fourteen extensions of Salt's surrender date in light of the Covid-19 pandemic and Salt's purported inability to travel due to various medical ailments, the district court ordered Salt to show cause why it should not issue a warrant for his arrest under 18 U.S.C. § 401. Salt responded with a letter claiming that he had complied with the "primary" obligations set forth in the district court's prior orders by ceasing to infringe on Waterkeeper's marks, Dist. Ct. Doc. No. 248 at 2; he also submitted financial documents and medical records purporting to demonstrate his indigency and various medical conditions that prevented him from complying with the remaining obligations. In November 2021, the district court found that Salt failed to establish good cause for his persistent noncompliance with its orders and issued a warrant for Salt's arrest. The district court nevertheless stayed the execution of the arrest warrant, with the most recent stay expiring on April 27, 2022. Salt also filed an emergency motion in this Court to stay the execution of the arrest warrant, which we denied.

On appeal, Salt challenges the district court's orders (1) holding him in contempt and directing his imprisonment, (2) denying his Rule 59(e) motion, (3) issuing the arrest warrant, and (4) declining his requests to substitute counsel. We review a district court's contempt findings and denial of a motion to alter, amend, or be relieved from a judgment for abuse of discretion, although our review of a finding of contempt is "more exacting than [the abuse-of-discretion] standard typically connotes." *Chevron Corp. v. Donziger*, 990 F.3d 191, 202 (2d Cir. 2021) (internal quotation marks omitted); *see also Devlin v. Transp. Commc'ns Int'l Union*, 175 F.3d 121, 131–32 (2d Cir. 1999) ("We review a district court's ruling on motions under [Rules 59 and 60] for . . . abuse of discretion.").

The district court did not abuse its discretion in imposing the Third Contempt Order. To demonstrate civil contempt, "a movant must establish that (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner." *Next Invs., LLC v. Bank of China*, 12 F.4th 119, 128 (2d Cir. 2021). All three elements are undoubtedly met here. The Default Judgment and the First and Second Contempt Orders clearly and unambiguously identified the exact steps required of Salt. For

instance, the First and Second Contempt Orders directed Salt to provide Waterkeeper and the district court "with a complete list identifying with specificity all instances in which . . . Salt has used [Waterkeeper's trademarks] after May 8, 2015," Dist. Ct. Doc. No. 135 at 9, as well as "answers to any . . . interrogatories and responsive documents" with respect to Salt's personal finances and compliance with the district court's orders, Dist. Ct. Doc. No. 160 at 10. Salt admits that he "has not complied to date" with either of these two obligations. Appellant's Br. at 13. Instead, he insists that the Covid-19 pandemic and his medical conditions excused his noncompliance. But the Default Judgment and the First and Second Contempt Orders were all imposed well before the outbreak of the Covid-19 pandemic in 2020, and before Salt developed the ailments that allegedly hospitalized him in 2021. Moreover, Salt has failed to submit any evidence demonstrating that his alleged medical conditions – such as "cough," "shortness of breath," "fever," "fatigue," and "dizziness," Appellant's Br. at 14 – were so severe that it was "factually impossible" for him to comply with the district court's orders in the five-year span between the entry of the Default Judgment and the imposition of the Third Contempt Order, *Badgley v. Santacroce*, 800 F.2d 33, 36 (2d Cir. 1986) (quoting *United States v. Rylander*, 460 U.S. 752, 757

(1983)). The district court therefore did not abuse its discretion in imposing the Third Contempt Order.

Nor did the district court abuse its discretion by denying Salt's Rule 59(e) motion. Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Rule 6(b)(2) further prohibits a court from extending the time to act under Rule 59(e). *See* Fed. R. Civ. P. 6(b)(2). Here, Salt did not file his Rule 59(e) motion until February 20, 2020 – twenty-nine days after the district court issued the Third Contempt Order. And while "[a]n untimely motion for reconsideration is treated as a Rule 60(b) motion," *Lora v. O'Heaney*, 602 F.3d 106, 111 (2d Cir. 2010), a request under Rule 60(b) may be granted only in "exceptional circumstances," *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009).

Salt argues that the district court's denial of his motion construed as a Rule 60(b) request was an abuse of discretion because the district court (1) failed to consider the additional authorities and arguments presented by Salt's court-appointed counsel, and (2) erroneously ruled that a nonparty like Salt could be imprisoned for contempt of court. We disagree. Rule 60(c)(1) provides that "[a] motion under Rule 60(b) must be made within a reasonable time." Fed. R.

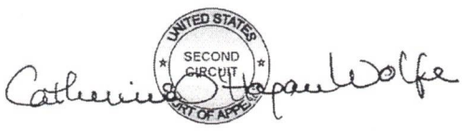
Civ. P. 60(c)(1). Salt, through his counsel, attempted to submit additional authorities and arguments on October 15, 2021, more than twenty months after the district court entered the Third Contempt Order on January 22, 2020, and more than eighteen months after counsel was first appointed to represent him in the civil contempt proceeding on March 24, 2020. On this record, we cannot say that the district court's refusal to consider the untimely supplement was an abuse of discretion. As to Salt's argument that the district court erred in imposing imprisonment on a nonparty for contempt of court, that argument had already been raised by Salt, decided by the district court, and rejected by us on appeal. *See Waterkeeper All., Inc. v. Salt*, 829 F. App'x 541, 543 n.2 (2d Cir. 2020) ("Salt argues in passing that the district court did not have the power to hold him in civil contempt as a non-party. This is not the case.").

As for the appeals raised in Nos. 20-3007, 21-2523, 21-2623, and 21-3042, we dismiss them for lack of appellate jurisdiction. Put simply, none of the orders challenged in those appeals constitutes a final decision under 28 U.S.C. § 1291; an appealable interlocutory order under 28 U.S.C. § 1292; or a collateral order subject to the collateral order doctrine, *see Funk v. Belneftekhim*, 861 F.3d 354, 362 (2d Cir. 2017). Moreover, because we can "conclusively decide" Salt's challenge to the

Third Contempt Order and denial of his Rule 59(e) motion without considering the other appeals, we decline to exercise pendent appellate jurisdiction to review the otherwise "non-appealable issue[s]." *Blue Ridge Invs., L.L.C. v. Republic of Argentina*, 735 F.3d 72, 83 (2d Cir. 2013).

We have considered Salt's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the orders of the district court on appeal in Nos. 20-632 and 21-2684, and **DISMISS** the appeals in Nos. 20-3007, 21-2523, 21-2623, and 21-3042 for lack of appellate jurisdiction.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WATERKEEPER ALLIANCE INC., Plaintiff, -against- SPIRIT OF UTAH WILDERNESS, INC., d/b/a GREAT SALT LAKEKEEPER, or GREAT SALT LAKE WATER KEEPERS, Defendant.	10-cv-1136 (NSR) OPINION AND ORDER

NELSON S. ROMÁN, United States District Judge:

Plaintiff Waterkeeper Alliance, Inc. ("Plaintiff" or "Waterkeeper") commenced this action asserting claims against Defendant Spirit of Utah Wilderness, Inc. ("SUW") and its officers for, *inter alia*, trademark infringement. Presently before the Court is Plaintiff's motion seeking to hold Defendant SUW, its officers, and Jeffrey Salt[1] ("Salt") in further contempt and for an order of imprisonment. For the following reasons, the motion is GRANTED.

BACKGROUND

The Court assumes familiarity with the long and protracted history of this action.

Plaintiff Waterkeeper is an environmental organization, which currently has approximately 330 worldwide member and affiliate organizations. Each member organization protects a watershed or water body. Waterkeeper uses the name "Waterkeeper" and other related marks containing the term "keeper" (the "Waterkeeper Marks" or "Marks"), including the marks Creekkeeper, Baykeeper, and Lakekeeper. Each member and affiliate organization obtains a license from Plaintiff to use the Waterkeeper Marks.

[1]Jeffrey Salt is a principal and officer of Defendant Spirit of Utah Wilderness, Inc.

Defendant SUW was a former member organization of Plaintiff. Jeffrey Salt ("Salt") is SUW's principal and SUW was granted a conditional license to use the Great Salt Lakekeeper name pursuant to a license agreement. Subsequently, Salt was arrested, prosecuted for assault, convicted and incarcerated. Because of this conduct and other irregularities, which violated the license agreement, Waterkeeper revoked SUW's license and membership, as well as Salt's right to continue to use the Waterkeeper Marks.

After revoking the license, Salt continued to use the Waterkeeper Marks, refer to himself as the Great Salt Lakekeeper, and use the email address, Jeffsalt@greatsaltlakekeeper.com. Plaintiff commenced this action alleging trademark infringement, unfair competition, and related New York State law claims in order to prevent SUW, its officers and Salt from continuing to use the Waterkeeper Marks. By Order, dated May 8, 2015 ("Default Judgment and Order" or "Initial Order") (ECF No. 100), this Court found that Salt had infringed upon Waterkeeper's Marks and enjoined SUW, its officers and Salt from, among other things:

> (a) using the "Waterkeeper Marks," as defined in paragraph 19 of the Complaint in this case, including the Marks and terms Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants thereof;
>
> (b) referring to Jeffrey Salt as the Great Salt Lakekeeper or the Executive Director of the Great Salt Lakekeeper, or any other similar reference; and
>
> (c) using or operating any email address, email list, electronic bulletin board, listserv, website, etc., that contains the infringing Waterkeeper Marks, including the Marks and terms Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants thereof, including any email with the suffix "@greatsaltlakekeeper.org".

(Default Order 100 at 10-11.) Salt did not comply with the Default Judgment and Order. He continued to refer to himself to as the Executive Director of the Great Salt Lakekeeper and to use the email domain suffix#@greatsaltlakekeeper.org. (*Id.*)

Plaintiff filed a motion to hold SUW, its officers and Salt in contempt of the Default Judgment and Order. By Order, dated October 2, 2017 ("Contempt Order" or "First Contempt Order") (ECF No. 135), the Court determined by clear and convincing evidence that SUW, its officers and Salt were in contempt and had violated the Initial Order. The Contempt Order directed Salt to:

> (a) immediately comply fully with the terms of the [Default Judgment and Order];
>
> (b) provide [Waterkeeper] and the Court with a complete list identifying with specificity all instances in which Mr. Salt has used the Waterkeeper Marks after May 8, 2015, including documents, correspondence, and on the internet, by November 2, 2017;
>
> (c) pay a $500 fine, plus a daily compliance fine of $100 per day for failure to comply with the [Default Judgment and Order] as well as [the Contempt Order]; and
>
> (d) pay a $700 fine for each future violation of the [Default Judgment and Order].

The Contempt Order, however, suspended the fines, conditioned upon Salt's complying with the prior Orders by November 2, 2017. (Contempt Order 9-10).

Plaintiff filed a second motion to hold SUW and Salt in contempt and for sanctions, alleging that SUW, its officers and Salt continued to disobey this Court's prior orders. Following an evidentiary hearing, the Court issued an order, dated April 5, 2019 ("Second Contempt Order") (ECF No. 160), wherein it concluded that Plaintiff established by clear and convincing evidence that SUW, its officers and Salt have continued to violate the Default Judgment Order and the Contempt Order. Plaintiff adduced evidence that despite being served with notice of the Court's prior orders, SUW and Salt continued to violate them by publicly referring to himself as the "Great Salt Lakekeeper" and "Lakekeeper" on Linkedin.com and on Salt's website, greatsaltlakekeeper.org. Evidence was further adduced that Salt testified at a State of Utah legislation committee hearing where he publicly identified himself as "the Director of Great Salt Lakekeeper and Friends of Utah Lake." Subsequent media coverage of the Utah legislation

committee hearing referred to Salt as "Director of the Great Salt Lakekeeper" on the basis of Salt's statements.

Plaintiff further demonstrated that SUW, its officers and Salt failed to provide Waterkeeper or the Court with a list of the instances in which he violated the Default Judgment and Order, as required by the Contempt Order. SUW and Salt also failed to pay fines they were required to pay under the Contempt Order. Salted continued to violate the two prior orders by continuing to use the email address "jeffsalt@greatsaltlakekeeper.org" subsequent to the date of the orders. SUW and Salt continued to violate the prior orders by continuously maintaining the website "greatsaltlakekeeper.org." Significantly, Plaintiff demonstrated that SUW and Salt's continued violation of the prior orders caused and continued to cause Plaintiff harm.

Plaintiff now brings a third motion for contempt seeking the imposition of additional fines and imprisonment of Salt for SUW and its officers continued violations of Plaintiff's trademark and for their continued disregard of this Court's three prior orders, inclusive of two orders wherein Defendant and Salt were deemed in contempt. Plaintiff's counsel avers that SUW and Salt have continued to blatantly violate all three prior orders of this Court in the following respects:

(a) SUW and Salt did not file with the Court and provide to Plaintiff a complete list identifying with specificity all instances in which they have used the Waterkeeper Marks after May 8, 2015, including in documents, correspondence and on the internet;

(b) SUW and Salt did not pay the fines the Court ordered and did not provide an Affidavit or otherwise allege that he had insufficient funds to pay the fines;

(c) SUW and Salt did not respond to the interrogatories and document request which were served upon Salt as an officer of SUW;

(d) SUW and Salt failed to provide Plaintiff with a list of his infringements of Waterkeeper's registered trademarks as required by the First Contempt Order;

(e) Salt has continued to refer to himself as the Great Salt Lakekeeper on his website;

(f) As set forth in the Estrin declaration, on the current State of Utah registration for SUW, Salt lists himself as SUW's registered agent and states that SUW is doing business as the "Great Salt Lakekeeper"; and

(g) Salt continues to refer to himself publically as the Great Salt Lakekeeper on his LinkedIn website page.

Plaintiff submits evidence in support of its application.

RELEVANT LAW

It is well settled that "courts have inherent power to enforce compliance with their lawful order[sic] through civil contempt." *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006) (quoting *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966). The purpose of civil contempt is to ensure a party's future compliance with court orders, and to compensate victims of contempt for harms sustained as a result thereof. *See Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir. 1996); *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1062 (2d Cir. 1995). "A party may be held in civil contempt for failure to comply with a court order if '(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.'" *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004). It need not be established that the violation was willful. *Id.* at 655 (citing *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984)). All three conditions for contempt of this Court's prior three Orders have been met in this case.

"An order is 'clear and unambiguous' where it is 'specific and definite enough to apprise those within its scope of the conduct that is being proscribed' or required." *Natl. Basketball Ass'n v. Design Mgt. Consultants, Inc.*, 289 F. Supp. 2d 373, 377 (S.D.N.Y. 2003). Further, a clear and unambiguous order "leaves 'no uncertainty in the minds of those to whom it is

addressed,' who 'must be able to ascertain from the four corners of the order precisely what acts are forbidden.'" *King v. Allied Vision, Ltd.,* 65 F.3d at 1058 (internal citations omitted). The Court's prior orders are clear and unambiguous. They were specific and definite enough to put SUW and Salt on notice that they were prohibited from using Waterkeeper's trademarks.

The law is clear, any sanction imposed on a civil contemnor should be calculated to advance the goals of coercing future compliance with the Court's order, or to compensate the plaintiff, the party harmed, for losses stemming from the contemnor's past noncompliance. *United States v. United Mine Workers*, 330 U.S. 258, 303–04 (1947); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979); *Perfect Fit Indus. v. Acme Quilting Co.*, 673 F.2d 53, 56–57 (2d Cir. 1982). When the purpose of the sanction is coercive, the district court has broad discretion to design a remedy that will bring about compliance. *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 673 F.2d at 57 (internal citations omitted).

While courts must judiciously exercise their authority in imposing the least restrictive and intrusive sanctions so as not to unnecessarily harm a contemnor (*see Spallone v. United States*, 493 U.S. 265, 276 (1990)), a court may nonetheless utilize all sanctions at its disposal which are reasonably likely to coerce the contemnor of not only the need for compliance but to achieve full compliance. *See S.E.C. v. Margolin*, No. 92 Civ. 6307, 1996 WL 447996, at *5 (S.D.N.Y. Aug. 8, 1996). In a civil contempt proceeding such sanctions may include a conditional jail term. *Hutto v. Finney*, 437 U.S. 678, 690–91 (1978) (citing *United States v. United Mine Workers*, 330 U.S. 258, 305 (1947)); *Time Warner Cable of New York City v. U.S. Cable T.V., Inc.*, 920 F.Supp. 321, 328 (E.D.N.Y. 1996).

ANALYSIS

In support of its application, Plaintiff submits documentary evidence that demonstrates Salt has registered SUW with the State of Utah Division of Corporations and Commercial Code, as a non-profit corporation. The registration indicates that SUW shall be conducting business as, among other names, "Great Salt Lake Watershed Council," "Great Salt Lakekeeper," and "Great Salt Lake Water Keepers." Additionally, a copy of Salt's "Linkedin" page indicates that he publically represents himself as "Jeff Salt owner, Comics Aeroplane, Great Salt Lakekeeper."

The proffered evidence is sufficient for the Court to conclude by clear and convincing evidence that SUW, its officers and Salt have continued to disobey this Court's prior orders, have failed to purge themself of contempt from this Court's prior orders, and have failed to cease using the Waterkeeper's trademarks. Significantly, Plaintiff has demonstrated that the threat of monetary sanctions, as previously imposed by the Court, has failed to persuade, or more appropriately, coerce SUW, its officers and Salt of its legal obligation to comply with this Court's prior orders (Default Judgment and Order, Contempt Order and Second Contempt Order), to cease further infringing on Plaintiff's trademarks. Accordingly, Plaintiff has demonstrated entitlement to the relief requested.

CONCLUSION

For the reasons stated above, Plaintiff's motion to hold Spirit of Utah Wilderness, Inc., its officers and Jeffrey Salt in contempt and for an order of imprisonment is GRANTED upon a finding by clear and convincing evidence that said entity and individuals have violated this Court's Default Judgment and Order, Contempt Order and Second Contempt Order. Accordingly, it is hereby ORDERED:

That Plaintiff serve a copy of this Opinion and Order, upon Defendant Spirit of Utah Wilderness, Inc., its officers and Jeffrey Salt by regular mail and certified mail, and additionally upon Jeffrey Salt by personal service, within thirty (30) days hereof;

That Jeffrey Salt, as an officer and principal of Spirit of Utah Wilderness, Inc. shall surrender to United States Marshal for the Southern District of New York, located at 300 Quarropas Street, White Plains, New York, on March 23, 2020 by 2:00 pm to be incarcerated until such time as they purge themselves of the contempt;

Defendant Spirit of Utah Wilderness, Inc. and Jeffrey Salt may purge themselves of contempt prior to March 23, 2020, provided they demonstrate the following:

1. Defendant Spirit of Utah Wilderness, Inc., its officers and Jeffrey Salt make any and all necessary changes to any of its publications, website (including Linkedin page(s)) and corporate filings to ensure they are not infringing on any Waterkeeper Marks (trademarks);

2. Immediately comply fully with the terms of the Default Judgment and Order, dated May 8, 2015;

3. Immediately comply fully with the terms of the Opinion and Order, dated October 2, 2017, which, *inter alia*, requires:

    a. Defendant Spirit of Utah Wilderness, Inc., its officers and Jeffrey Salt to provide Plaintiff and the Court with a complete list identifying with specificity all instances in which they have used the Waterkeeper Marks after May 8, 2015 to date, including in documents, correspondence and on the internet;

    b. Defendant Spirit of Utah Wilderness, Inc., its officers and Jeffrey Salt pay a $500 fine, plus a daily non-compliance fine of $100 per day for failure to comply with the Default Judgment and Order, dated May 8, 2015. The daily non-compliance fine shall be applied from May 8, 2015 through October 2, 2017; and

    c. Defendant Spirit of Utah Wilderness, Inc., its officers and Jeffrey Salt pay a $700 fine for each violation occurring from October 3, 2017 through December 5, 2019 (the filing of Plaintiff's third Contempt motion).

The Clerk of the Court is respectfully directed to terminate the motion at ECF No. 168, and to mail a copy of this Order to Defendant(s) at the last know address as listed on the docket.

Dated: January 22, 2020
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WATERKEEPER ALLIANCE INC.,

Plaintiff,

-against-

SPIRIT OF UTAH WILDERNESS, INC., d/b/a GREAT SALT LAKEKEEPER, or GREAT SALT LAKE WATER KEEPERS,

Defendant.

10-cv-1136 (NSR)
OPINION & ORDER

NELSON S. ROMÁN, United States District Judge:

Before the Court is a motion by non-party Jeffrey Salt ("Salt") seeking to amend or alter the Court's Order entered January 22, 2020 holding Defendant Spirit of Utah Wilderness, Inc. ("SUW"), its officers, and Salt in civil contempt. (ECF No. 176.) Plaintiff, Waterkeeper Alliance, Inc. ("Plaintiff" or "Waterkeeper") opposes the motion on the basis that Salt has failed to demonstrate entitlement to the relief requested. For the following reasons, Salt's motion is DENIED.

BACKGROUND

The Court assumes familiarity with the long procedural history of this action. In February of 2010, Plaintiff commenced this action against Defendant SUW alleging trademark infringement, unfair competition, and related New York State law claims. (Complaint ("Compl.") ECF No. 1.) Plaintiff is an environmental organization which has used the name "Waterkeeper" and other related marks containing the term "keeper" since 1999. (*Id.*) Plaintiff purportedly has member organizations who obtain a license from Plaintiff to use the Waterkeeper marks. (*Id.*)

Defendant SUW was formerly a member organization of Plaintiff whose license was revoked. (*Id.*)

On December 4, 2014, Plaintiff moved by Order to Show Cause for a default judgment against all named Defendants. (ECF Nos. 83 & 84.) By Default Judgment dated May 8, 2015, this Court enjoined SUW and its officers, agents, directors and employees, including Salt, from using the "Waterkeeper Marks" as defined in paragraph 19 of the Complaint, including the marks and terms Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants of the aforementioned terms. (ECF No. 100.) Salt and SUW were specifically enjoined from deploying those marks in conjunction with any email address, email list, electronic bulletin board, list-serve, website, etc. (*Id.* at 10.) Salt was also enjoined from referring to himself as the "Executive Director of the Great Salt Lakekeeper" or as the "Great Salt Lakekeeper. (*Id.*)

On July 27, 2016, Plaintiff filed a motion to hold Salt in contempt for violating the Default Judgment after Plaintiff discovered that Salt continued to refer to himself as the Executive Director of the Great Salt Lakekeeper and continued to use the email @greatsaltlakekeeper.org. (ECF Nos. 120 & 122.) In response, Salt filed two declarations on behalf of himself and Defendant. (ECF Nos. 125 & 126.) On October 2, 2017, this Court granted Plaintiff's motion and held Salt in contempt ("Contempt Order"). (ECF No. 135). The Contempt Order commanded Salt to (1) immediately comply with the terms of the Default Judgement; (2) provide Waterkeeper and the Court with a complete list identifying with specificity all instances in which Salt had used the Waterkeeper marks; (3) pay a $500 fine, plus a daily compliance fine of $100 per day for failure to comply with the Default Judgment Order and the Contempt Order; and (4) pay a $700 fine for each future violation of the Default Judgment order. (*Id.*) The Contempt Order, however, upon

the condition of Salt's compliance with the Default Judgment and Contempt Order, suspended the fines. (*Id.*)

On February 8, 2018, Waterkeeper filed a motion for sanctions and to hold SUW and Salt in further contempt, alleging that Salt continued to disobey the Court's prior orders. (ECF No. 147.) The Court held an evidentiary hearing regarding Waterkeeper's motion wherein Waterkeeper's General Counsel testified. (ECF No. 160.) Based upon credible testimony and the exhibits proffered, this Court issued an order ("Second Contempt Order") holding that Salt continued to violate the Default Judgment and failed to comply with the Contempt Order by (1) publicly referring to himself as the "Great Salt Lakekeeper" and "Lakekeeper" on Linkedin.com and on his website, greatsaltlakekeeper.org; (2) failing to provide Waterkeeper or the Court with a list of the instances in which he violated the Default Judgment; (3) failing to pay the fines as required under the Contempt Order; (4) continuing to use the email address jeffsalt@greatsaltlakekeeper.org subsequent to the date of the orders; and (5) continuously maintaining the website "greatsaltlakekeeper.org." (*Id.*) Based on the Court's findings, Salt was directed to (1) post a statement on his website, related LinkedIn accounts, and any other places that describe his work or employment history that states he has no right to use the trademarks of the Waterkeeper Alliance; (2) pay the fines set forth in the Contempt Order within 45 days, or serve a detailed affidavit detailing his personal finances; and (3) answer any interrogatories or document requests issued by Waterkeeper. (*Id.*)

On December 5, 2019, Waterkeeper filed a motion seeking to hold SUW, its officers, and Salt in further contempt and for an order of imprisonment. (ECF No. 168.) Waterkeeper submitted with its motion documentary evidence that demonstrates Salt registered SUW with the State of Utah Division of Corporations and Commercial Code as a non-profit corporation. (ECF No. 171.)

The registration indicated that SUW would be conducting business as, among other names, "Great Salt Lake Watershed Council," "Great Salt Lakekeeper," and "Great Salt Lake Water Keepers." (*Id.*) Additionally, a copy of Salt's LinkedIn page indicated that he publicly represented himself as "Jeff Salt owner, Comics Aeroplane, Great Salt Lakekeeper." (*Id.*) On January 22, 2020, the Court issued an order finding this evidence sufficient to conclude that SUW, its officers, and Salt were continuing to disobey its prior orders ("Imprisonment Order"). (*Id.*) The Court ordered Salt to surrender to the United States Marshal on March 23, 2020 to be incarcerated until he purged himself of the contempt. (*Id.*) On February 20, 2020, Salt filed the instant motion to amend or alter the Court's Imprisonment Order. (ECF No. 176.)[1] Plaintiff filed an opposition on March 13, 2020. (ECF No. 180.)

Since this motion has been filed, the Court has granted Salt fourteen extensions to the deadline for his surrender. (ECF Nos. 183, 187, 189, 194, 201, 205, 209, 213, 218, 225, 227, 231, 234, & 239.) The extensions were due to the COVID-19 pandemic, as well as Salt's inability to travel due to purported medical issues. As of the date of this Order, Salt has failed to comply with the Court's Contempt Order and Second Contempt Order by failing to (1) provide Waterkeeper and the Court with a complete list of all instances in which Salt used the Waterkeeper Marks; (2) serve on Plaintiff's counsel a detailed affidavit describing his personal finances; and (3) provide answers to interrogatories and document requests. Salt has also failed to provide medical documentation detailing his inability to travel. The Court's last endorsement directed Salt to

[1] On October 15, 2021, counsel for Salt filed a letter bringing the present motion to the Court's attention and attempting to supplement it with additional arguments and case law. (ECF No. 240.) As this letter was filed more than a year after the Court's January 22, 2020 contempt order, it is untimely and will not be considered. *See* Fed. R. Civ. P. 60(c)(1). *See Reese v. McGraw-Hill Cos.*, 293 F.R.D. 617, 625 (S.D.N.Y. 2013) ("Plaintiffs' motion to file a supplemental memorandum in support of its Rule 60(b)(2) motion is essentially a second motion pursuant to Rule 60(b)(2). It was submitted well over a year after the issuance of this Court's Order dismissing the case and is dismissed as untimely.").

comply with its Orders by October 15, 2021 or surrender to the United States Marshal by October 18, 2021. (ECF No. 239.) Salt did not comply or surrender.

LEGAL STANDARD

District Courts may employ Rule 59(e) when they need to "correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (citing *Collision v. Int'l Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994)). A Rule 59(e) motion should not be used to "advance 'new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for re-litigating issues already decided by the Court.'" *American ORT, Inc. v. ORT Israel*, No. 07 Civ. 2332(RJS), 2009 WL 233950 at *3 (S.D.N.Y. Jan. 22, 2009) (citing *Grand Crossing L.P. v. U.S. Underwriters Ins. Co.*, No. 03 Civ. 5429(RJS), 2008 WL 4525400, at *1 (S.D.N.Y. Oct. 6, 2008)).

Rule 59(e) provides "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. R. 59(e). The clock for a Rule 59(e) motion begins once the Court's order has been issued. *See In re Bear Stearns Cos., Inc. Sec. Derivative, and ERISA Litig.*, 08 MDL No. 1963, 2011 WL 321142, at *6 (S.D.N.Y. Feb. 1, 2011) (measuring the timeliness of a Rule 59(e) motion beginning with the date the orders at issue were made); *Wiesner v. 321 West 16th St. Assocs.*, 2000 WL 1585680, at *2 (S.D.N.Y. Oct. 25, 2000) ("In this case, the time period began running as of [the] date of the entry of the order denying the preliminary injunction."). Further, Federal Rule of Civil Procedure 6(b)(2) expressly prohibits time extensions to file a motion under Rule 59(e), even when a litigant is *pro se*. *See Corines v. Am. Physicians Ins. Trust*, 615 F. App'x 708, 708 (2d Cir. 2015) ("A district court is not empowered to extend the time to file a Rule 59(e) motion."); *see also Hill v. Napoli*, No. 6:09-CV-6546-MAT, 2014 WL 6750515, at *1 (W.D.N.Y. Dec. 1, 2014) (refusing to expand Rule 59(e)

time period for a *pro se* plaintiff as his status "does not exempt him from compliance with relevant rules of procedural and substantive law.") (internal citations and quotation marks omitted).

However, "[a]n untimely motion for reconsideration is treated as a Rule 60(b) motion." *Lora v. O'Heaney,* 602 F.3d 106, 111 (2d Cir. 2010); *see also Sigmen v. Colvin,* No. 13-0268, 2015 WL 5944254, *3 (E.D.N.Y. Oct. 13, 2015) (considering an untimely motion for reconsideration pursuant to Rule 59(e) as a Rule 60(b) motion)[2]. Rule 60(b) provides that

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). This rule "strikes a balance between serving the ends of justice and preserving the finality of judgments." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) (internal citations omitted).

The Second Circuit has instructed that "Rule 60(b) provides 'extraordinary judicial relief' that may be granted 'only upon a showing of exceptional circumstances.'" *Harrison v. N.Y.C. Admin. For Children's Servs.*, No. 02 Civ.947 RCC RLE, 2005 WL 2033378, at *1 (S.D.N.Y. Aug. 23, 2005) (quoting *Nemaizer*, 793 F.2d at 61). "The burden is on the moving party to demonstrate that it is entitled to relief, and courts '[g]enerally . . . require that the evidence in support of the motion to vacate a final judgment be highly convincing.'" *Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic*, 864 F.3d 172, 182 (2d Cir.

[2] This is also true for Local Rule 6.3 motions for reconsideration. *Miller v. Norton*, No. 04-CV-3223 (CBA), 2008 WL 1902233, at *1 (E.D.N.Y. Apr. 28, 2008) ("[A] motion pursuant to Federal Rule of Civil Procedure 59(e) and/or Local Rule 6.3 . . . would be untimely. Therefore, his motion will be treated as one made pursuant to Federal Rule of Civil Procedure 60(b).").

2017) (quoting *Kotlicky v. U.S. Fid. & Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987)). A Rule 60(b) motion may not be used "to relitigate issues already decided." *Maldonado v. Local 803 I.B. of T. Health & Welfare Fund*, 490 F. App'x 405, 406 (2d Cir. 2013).

DISCUSSION

I. Salt's Rule 59(e) Motion is Untimely

Here, the Imprisonment Order was issued on January 22, 2020. (ECF No. 171.) Under Rule 59(e), Salt was required to file his motion on or before February 19, 2020. Salt did not file his motion until February 20, 2020. (ECF No. 176.) Therefore, Salt's motion is untimely.

II. Salt Has Not Shown Exceptional Circumstances

The Court has considered Salt's motion under Rule 60(b). Salt has not advanced any meaningful basis to grant his motion to amend the Court's Imprisonment Order. Salt makes three arguments: (1) the Court lacked personal jurisdiction over Salt; (2) Plaintiff filed false and fraudulent claims; and (3) the Court erred in applying the law when it held Salt in civil contempt. However, Salt has raised these alleged facts and arguments in his previous Rule 59(e) motion dated October 30, 2017, (ECF Nos. 137 & 138), which the Court denied (ECF No. 151).

For his second argument, Salt alleges Plaintiff committed fraud by (1) misrepresenting the facts by claiming SUW continues to use the names Great Salt Lake Water Keepers and Great Salt Lakekeeper when it cancelled the registration years ago, and (2) misrepresenting the existence of a license agreement with SUW for the use of the name Great Salt Lakekeeper. (ECF No. 176 at 14-15.) While fraud is actionable under Rule 60(b), Plaintiff's allegations have already been considered and ruled on by this Court. Salt admits in his motion that "the Court [was] already aware of these actions taken by [SUW] because Mr. Salt provided the Court with this information as part of his motion to intervene in this case." (*Id.*) Additionally, as discussed above, this

information was also included in his previous Rule 59(e) motion, (ECF No. 138 at 5-6), which the Court dismissed (ECF No. 151.) As Rule 60(b) motions cannot be used to relitigate issues already decided, Salt's motion must be dismissed.

CONCLUSION

For the foregoing reasons, Salt's motion to alter or amend the judgement is DENIED. The Clerk of Court is kindly directed to terminate the motion at ECF No. 240.

Dated: October 21, 2021
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WATERKEEPER ALLIANCE INC.,

Plaintiff,

-against-

SPIRIT OF UTAH WILDERNESS, INC., d/b/a GREAT SALT LAKEKEEPER, or GREAT SALT LAKE WATER KEEPERS,

Defendant.

10-cv-1136 (NSR)
DEFAULT JUDGMENT AND ORDER

SPIRIT OF UTAH WILDERNESS, INC., d/b/a GREAT SALT LAKEKEEPER, or GREAT SALT LAKE WATER KEEPERS,

Counterclaimant,

-against-

WATERKEEPER ALLIANCE INC.,

Counterdefendant.

NELSON S. ROMÁN, United States District Judge:

On February 11, 2010, Plaintiff Waterkeeper Alliance, Inc. ("Waterkeeper"), initiated this action against Defendant Spirit of Utah Wilderness, Inc. ("SUW"), alleging trademark infringement, unfair competition, and related New York State law claims. Before the Court is Plaintiff's application for the entry of a default judgment against SUW, based on SUW's failure to appear by counsel. For the following reasons, Plaintiff's application is GRANTED.

1

Copies mailed ~~faxed~~ to Spirit of Utah 5/8/15
Chambers of Nelson S. Román, U.S.D.J.

I. BACKGROUND

The following facts are taken from Plaintiff's Complaint and the parties' submissions on this motion, as noted.

Plaintiff is an environmental organization. (Compl. ¶ 21.) Waterkeeper and its predecessor have used the name Waterkeeper and other related marks containing the term "keeper" ("the Waterkeeper Marks") since 1999, including the marks Creekkeeper, Baykeeper, and Lakekeeper. (Compl. ¶ 18.) Waterkeeper has approximately 200 member organizations, and each member organization has obtained a license from Waterkeeper to use the Waterkeeper Marks. (Compl. ¶ 16.)

In 2001, Great Salt Lake Audubon ("GLSA") applied to become a member organization of Waterkeeper and to use the name Great Salt Lakekeeper; its application was approved. (Compl. ¶ 23.) At the time that GLSA became a member organization, Jeffrey Salt was the Executive Director of GLSA. (Compl. ¶ 23.) Waterkeeper and GLSA entered into a series of license agreements, recognizing Waterkeeper's ownership of the Lakekeeper mark (the "Mark") and providing that GLSA, as the licensor and user of the Mark, would not attack the title of owner to the Mark or attack the validity of the license. (*See* Compl. Ex. A.) In 2004, the license agreement was assigned de facto to Defendant SUW, and the parties continued to operate and conduct their business in accordance with the agreement. (Compl. ¶ 26.)

In October 2008, the Waterkeeper Relations Committee ("WRC"), a committee of the Waterkeeper Board, voted to recommend that the Waterkeeper Board revoke SUW's license and membership after Defendant violated the terms of its license agreement and failed to adhere to Waterkeeper's mandated quality standards. (Compl. ¶ 27.) WRC notified SUW of its decision in November 2008. (Compl. ¶ 28.) On December 18, 2008, the Waterkeeper Board informed SUW

by telephone call to Jeffrey Salt that the Board had voted to revoke SUW's license and membership. (Compl. ¶ 29.) SUW, however, has continued to make unauthorized use of the Waterkeeper Marks, including the Lakekeeper mark. (Compl. ¶¶ 29, 34.) Plaintiff has alleged that SUW's conduct constitutes willful and intentional infringement. (*See* Compl. ¶¶ 43-46.)\

Plaintiff initiated the instant action on February 11, 2010. Following the completion of discovery, the Court held a pre-motion conference on March 6, 2014. At the conference, SUW's counsel advised the Court of their intention to move to withdraw as counsel. The Court granted counsel's motion to withdraw on April 11, 2014. (*See* ECF No. 54.) After granting SUW additional time in which to find new counsel, the Court gave Defendant a deadline of September 19, 2014, to appear by counsel. SUW failed to do so, and instead Jeffrey Salt filed a motion to intervene, which was denied. (*See* ECF No. 86.) Plaintiff filed an application for the entry of a default judgment in October 2014. (*See* ECF Nos. 66- 68.) The Court issued an order to show cause on November 17, 2014. (ECF No. 76.) A show-cause hearing was held on December 4, 2014, and Defendant failed to appear.

II. DEFAULT JUDGMENT STANDARD

Rule 55 of the Federal Rules of Civil Procedure governs default judgments. The rule states, in pertinent part: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise the clerk must enter the party's default." Fed. R. Civ. P. 55(a). In a case where the plaintiff's claim is not for a sum certain, the party must also apply to the court for a default judgment. Fed. R. Civ. P. 55(b). The decision as to whether to enter a default judgment is left to the "sound discretion of a district court." *Palmieri v. Town of Babylon*, 277 F. App'x 72, 74 (2d Cir. 2008).

III. ANALYSIS

Adjudication on the merits, rather than the entry of judgment based on a default, is generally preferred. *See Pecarsky v. Galaxiworld.com, Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001) ("A clear preference exists for cases to be adjudicated on the merits."); *U.S. Fidelity and Guar. Co. v. Petroleo Brasileiro S.A.*, 220 F.R.D. 404, 406 (S.D.N.Y. 2004). However, "where a corporation repeatedly fails to appear by counsel, a default judgment may be entered against it pursuant to Rule 55." *Securities & Exchange Comm'n v. Research Automation Corp.*, 521 F.2d 585, 589 (2d Cir. 1975); *see also Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 192 (2d Cir. 2006). This is because "[i]t is settled law that a corporation may not appear in a lawsuit against it except through an attorney." *Grace*, 443 F.3d at 192.

This Court granted the motion of SUW's former counsel to withdraw from representation in April 2014. (*See* ECF No. 54.) Since then, SUW has repeatedly been instructed that a corporation must be represented by counsel and cannot appear pro se. Despite receiving multiple extensions of time in which to find new counsel, SUW has failed to do so. (*See* ECF Nos. 55, 60.) At a pre-motion conference on September 4, 2014, SUW was granted a final extension of time in which to secure counsel and was ordered to appear by counsel by September 19. Plaintiff again failed to meet its deadline. Instead, SUW attempted to circumvent the Court's order by assigning SUW's alleged interest in the marks at issue to Mr. Salt himself on September 19. (*See generally* Potential Intervenor's Mot. to Intervene as of Right, ECF No. 61.) The agreement assigning SUW's interest to Mr. Salt appears to have been executed for the purposes of circumventing the rule that a corporation must be represented by counsel and the Court's deadline for appearance by counsel. (*See* ECF No. 86 at 2 ("As discussed during the October 29th conference, the Court finds that the alleged assignment of interest by SUW to Mr. Salt is nothing

more than a blatant attempt to circumvent the rule that a corporation must be represented by counsel.").)

"[S]uch cavalier disregard for a court order is a failure, under Rule 55(a), to 'otherwise properly defend as provided by these rules.'" *Shapiro, Bernstein & Co. v. Continental Record Co.*, 386 F.2d 426, 427 (2d Cir. 1967) (quoting Fed. R. Civ. P. 55(a)); *see also* Eagle Associates v. Bank of Montreal, 926 F.2d 1305, 1310 (2d Cir. 1991). SUW has now failed to appear by counsel for over a year, in violation of this Court's orders, and its failure to do so has ground the litigation to a halt. It is clear that Defendant has failed to "otherwise properly defend," within the meaning of Rule 55.

A. Liability

SUW's default establishes its liability in this case. Rule 54 dictates that "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). In fashioning relief, the Court "accept[s] as true all of the factual allegations of the complaint, except those relating to damages." *Au Bon Pain Corp. v. Artect*, Inc., 653 F.2d 61, 65 (2d Cir. 1981); *see also Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 108 (2d Cir.1997) ("[A] default judgment deems all the well-pleaded allegations in the pleadings to be admitted."); *Cotton v. Slone,* 4 F.3d 176, 181 (2d Cir.1993); *Time Warner Cable v. Barnes,* 13 F.Supp.2d 543, 547 (S.D.N.Y.1998) ("Upon entry of a default judgment . . . a defendant admits every well-pleaded allegation of the Complaint except those relating to damages." (internal quotation omitted)). Thus, the Court looks only to whether Plaintiff has provided adequate support for the relief that it seeks. *See Credit Lyonnais Sec. (USA), Inc. v. Alcantara,* 183 F.3d 151, 155 (2d Cir.1999); *see also Gucci Am., Inc. v. Tyrrell-Miller*, 678 F. Supp. 2d 117, 119 (S.D.N.Y. 2008).

"To succeed on its Lanham Act claims, [a Plaintiff] must show that it has a valid mark that is entitled to protection under the Lanham Act and that [the Defendant's] actions are likely to cause confusion with [Plaintiff's] mark." *The Sports Authority, Inc. v. Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d Cir.1996) (citing *Gruner + Jahr USA Publ'g v. Meredith Corp.*, 991 F.2d 1072, 1075 (2d Cir.1993)); *see also Lorillard Tobacco Co. v. Jamelis Grocery, Inc.*, 378 F.Supp.2d 448, 454 (S.D.N.Y.2005); *Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 286 F.Supp.2d 284, 287 (S.D.N.Y.2003).

Plaintiff asserts that Waterkeeper, "itself or through its predecessors in interest, owns and has continuously used the mark LAKEKEEPER since 2002 and WATERKEEPER since 1999." (Compl. ¶ 18.) Waterkeeper is also the owner of a federal registration for the mark WATERKEEPER, and until recently owned a federal registration for the mark LAKEKEEPER. (Compl. ¶ 19.) The registration for the Lakekeeper mark was cancelled on January 4, 2010, due to an administrative error, but Waterkeeper has since refiled its trademark registration application for the Lakekeeper mark. (Compl. ¶ 19.) "[A] mark registered by its owner shall be *prima facie* evidence of the registrant's exclusive right to use the mark in commerce on the product." *Gruner + Jahr USA Pub., a Div. of Gruner + Jahr Printing & Pub. Co. v. Meredith Corp.*, 991 F.2d 1072, 1076 (2d Cir. 1993). Thus, Plaintiff has satisfied the requirement that it have a valid mark entitled to protection under the Lanham Act.

In order to satisfy the second prong, Plaintiff must show likelihood of confusion. Plaintiff alleges that Defendant's unauthorized use of the Waterkeeper Marks "has caused, is causing and will continue to cause confusion and mistake in the marketplace and deception of the public as to the source, endorsement or sponsorship" of SUW's work and/or any affiliation between the parties. (Compl. ¶ 35.) Accepting the allegations made in the Complaint as true, the Court finds

that Plaintiff has alleged sufficient facts to demonstrate the existence of a likelihood of confusion based on SUW's unauthorized use of the Waterkepeer Marks.

Similarly, Plaintiff has alleged sufficient facts to support its New York common law trademark infringement and unfair competition claims. "To prevail on a claim of common law trademark infringement, plaintiff must establish that its mark is valid and legally protectible and that another's use of a similar mark is likely to create confusion as to the origin of the product." *Horn's, Inc. v. Sanofi Beaute, Inc.*, 963 F. Supp. 318, 328 (S.D.N.Y. 1997) (citing *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V.*, 17 F.3d 38, 43 (2d Cir. 1994). As for the unfair competition claim, the essence of such a claim is "the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origin of the goods." *Horn's*, 963 F. Supp. at 328. As discussed *supra*, Plaintiff has satisfactorily alleged that it has a valid and legally protectable mark, that there is unauthorized (and thus bad faith) use of the mark by Defendant, and that a likelihood of confusion arises from SUW's use of the Waterkeeper Marks.

Finally, the Court also finds that Plaintiff's breach of contract claim is grounded in sufficient factual allegations. Plaintiff alleges that the license agreement between the original parties was a valid and binding contract. (Compl. ¶¶ 38-39.) This agreement was assigned de facto to SUW. (Compl. ¶¶ 26, 77.) In December 2008, Waterkeeper notified SUW of the decision to revoke SUW's license and membership for failure to abide by the quality standards of Waterkeeper, as required by the agreement. (Compl. ¶ 78.) By ratifying the terms of the agreement, Defendant agreed to cease use of the Waterkeeper Marks or any variants thereof upon its termination. (Compl. ¶ 79.) SUW has continued to use the marks at issue without

authorization or approval, thus breaching the contract and causing Waterkeeper to suffer damages. (Compl. ¶¶ 80-82.)

B. Injunctive Relief

"A court may issue an injunction on a motion for default judgment provided that the moving party shows that (1) it is entitled to injunctive relief under the applicable statute and (2) it meets the prerequisites for the issuance of an injunction." *Pitbull Prods., Inc. v. Universal Netmedia, Inc.*, No. 07 Civ. 1784, 2007 WL3287368, at *5 (S.D.N.Y. Nov. 7, 2007); *see also Gucci America, Inc. v. Tyrrell-Miller*, 678 F. Supp. 2d 117, 120 (S.D.N.Y. 2008). Section 34 of the Lanham Act gives district courts "the power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable," thus satisfying the first prong of the inquiry. 15 U.S.C. § 1116; *see also Tyrrell-Miller*, 678 F. Supp. 2d at 120.

In order to satisfy the second prong, the requesting party "must demonstrate (1) actual success on the merits and (2) irreparable harm." *Gucci Am., Inc., v. Duty Free Apparel, Ltd.*, 286 F. Supp. 2d 284, 290 (S.D.N.Y. 2003). "[D]efendant['s] default constitutes an admission of liability," and thus Plaintiff has established actual success on the merits and met the first prerequisite for an injunction. *See Gucci America, Inc. v. MyReplicaHandbag.com*, No. 07 Civ. 2438, 2008 WL 512789, at *5 (S.D.N.Y. Feb. 26, 2008); *see also Gucci America, Inc. v. Tyrrell-Miller*, 678 F. Supp. 2d 117, 120 (S.D.N.Y. 2008). "When in the licensing context unlawful use and consumer confusion have been demonstrated, a finding of irreparable harm is automatic." *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 42 (2d Cir. 1986.) Thus, Plaintiffs have also demonstrated the second prerequisite for an injunction.

C. Costs and Attorney's Fees

Plaintiff requests an award for attorney's fees under the Lanham Act. Section 35(a) of the Lanham Act allows for an award of attorney's fees to a prevailing party in "exceptional cases." See 15 U.S.C. § 1117(a). The Second Circuit has limited the exceptional cases warranting an attorney's fees award to those "evidencing fraud, bad faith, or willful infringement." *Prot. One Alarm Monitoring, Inc. v. Exec. Prot. One Sec. Serv.*, LLC, 553 F. Supp. 2d 201, 207. (E.D.N.Y. 2008); *see also Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 166 F.3d 438, 439 (2d Cir. 1999). Taking the allegations in the Complaint as true, Plaintiff has set forth that SUW's infringement was willful, and thus an award of attorney's fees is appropriate. Additionally, "[c]ourts generally award costs to prevailing parties in cases involving violations of the Lanham Act." *Prot. One Alarm Monitoring*, 553 F. Supp. 2d at 210 (citing *Tri-Star Pictures, Inc. v. Unger*, 42 F. Supp. 2d 296, 306 (S.D.N.Y. 1999) and 15 U.S.C. § 1117(a)). As a result of SUW's default, Waterkeeper has prevailed in the instant case and is therefore entitled to recover reasonable out-of-pocket litigation costs.

IV. CONCLUSION AND DECREE

Accordingly, Plaintiff's application for a default judgment is granted. The Clerk of the Court is directed to docket an entry of default based on SUW's failure to appear by counsel.

It is hereby ordered and adjudged that a final default judgment be entered in in favor of the Plaintiff Waterkeeper Alliance, Inc., and against the Defendant Spirit of Utah Wilderness, Inc., d/b/a Great Salt Lakekeeper or Great Salt Lake Water Keepers.

It is further ordered and adjudged that Defendant Spirit of Utah Wilderness, Inc., d/b/a Great Salt Lakekeeper or Great Salt Lake Water Keepers, and its officers, agents, servants,

employees, and attorneys, and all persons in active concert and participation with it, including but not limited to Jeffrey Salt, are hereby restrained and enjoined from:

(a) using the "Waterkeeper Marks," as defined in paragraph 19 of the Complaint in this case, including the Marks and terms Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants thereof;

(b) referring to Jeffrey Salt as the Great Salt Lakekeeper or the Executive Director of the Great Salt Lakekeeper, or any other similar reference;

(c) using any other name or marked owned by Waterkeeper Alliance in a manner which is likely to cause confusion as to the source or sponsorship of Defendant's business and/or services, including but not limited to manufacturing, distributing, marketing, advertising, promoting, or otherwise distributing in digital or paper form, any correspondence, email, books, papers, pamphlets, paraphernalia, or merchandise that uses any of the Waterkeeper Marks, including the Marks and terms Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants thereof;

(d) using or operating any email address, email list, electronic bulletin board, listserv, website, etc., that contains the infringing Waterkeeper Marks, including the Marks and terms Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants thereof, including any email with the suffix "@greatsaltlakekeeper.org";

(e) effecting assignments or transfers, forming new entities or associations, or using any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in this Order; and

(f) assisting, inducing, aiding or abetting any other person or business entity in engaging in or performing any of the activities referred to in the preceding lettered paragraphs.

It is further ordered and adjudged that, pursuant to 15 U.S.C. § 1118, Defendant Spirit of Utah Wilderness, Inc., d/b/a Great Salt Lakekeeper or Great Salt Lake Water Keepers, and its officers, agents, directors, and employees, and all persons in active concert and participation with it, including but not limited to Jeffrey Salt, is ordered to deliver up for destruction all materials, labels, signs, prints, wrappers, receptacles, articles, advertisements, and promotional materials in its possession or control, or in the possession or control of its officers, agents, servants, employees, and attorneys, bearing the Waterkeeper Marks, Lakekeeper, Waterkeeper, Great Salt Lakekeeper, Great Salt Lake Water Keepers, and/or variants thereof, or any marks likely to cause confusion therewith, or referring thereto.

It is further ordered that this matter is referred to Magistrate Judge Lisa M. Smith for an inquest regarding attorney's fees and costs.

Dated: May 8, 2015
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge