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MEMORANDUM OF POINTS & AUTHORITIES

Plaintiffs OOO Brunswick Rail Management and Brunswick Rail Group Limited (collectively “Brunswick”) respectfully move the Court for an Order to Show Cause re Contempt of Court as to why Paul Ostling and his counsel Venable LLP (“Venable”) should not be found in contempt for violation of the Court’s February 3, 2017 Preliminary Injunction Order (“PI Order”). As established below, Mr. Ostling and Venable have violated Paragraph 1 of the PI Order, which enjoins and restrains them from destroying or disposing of evidence, and paragraph 3 of the PI Order, which enjoins and restrains them from disclosing Brunswick’s confidential, proprietary, and trade secret information to third parties. Brunswick files this motion concurrently with Brunswick’s Motion for Spoliation Sanctions, which is incorporated by reference.

I. INTRODUCTION

Motions for contempt, while extraordinary, are necessary to “protect[] the due and orderly administration of justice and [to] maintain the authority and dignity of the court.” *CBS Broadcasting Inc. v. FilmOn.com, Inc.*, 814 F. 3d 91, 98 (2d Cir. 2016) (alterations in original) (internal quotation marks omitted). This is one of those extraordinary instances in which a litigant and his counsel’s actions constitute such a clear violation of a court order that not addressing it would undermine the Court’s authority.

In January 2017, Brunswick faced immediate and irreparable harm in the form of Mr. Ostling’s continued disclosure of its confidential information and trade secrets to creditors adverse to Brunswick in its ongoing restructuring. To stop the immediate harm Mr. Ostling was causing and to ensure the information regarding Mr. Ostling’s misconduct would be preserved, Brunswick sought and obtained a temporary restraining order and preliminary injunction order—first from the U.S. District Court for the Northern District of California (the “California Court”) and then from this Court. In particular, this Court enjoined and restrained Mr. Ostling and “all those acting in concert or participation with him from”: (1) “destroying, or disposing of any evidence or other material, in any form, relating to this action and the issues raised herein”; (2)

violating a contractual and/or fiduciary duty of confidentiality by disclosing Brunswick's confidential information and trade secrets to a third party; and (3) communicating Brunswick's "confidential, proprietary or trade secret or inside information" to Brunswick's creditors, among others.

It has now become readily apparent from incontrovertible and highly-credible evidence—*inter alia*, testimony from Richard Sultanov, who is Mr. Ostling's former assistant and accomplice and Venable's client—that Mr. Ostling and Venable engaged in a pattern and practice of misconduct in willful violation of the Court's PI Order. *First*, Mr. Ostling has continued to disclose Brunswick's confidential information and trade secrets to Brunswick's creditor and counter-party in restructuring negotiations, Macquarie Renaissance Infrastructure Fund ("MRIF"), in disregard and defiance of the PI Order's prohibition on disclosing Brunswick's confidential information and trade secrets to Brunswick's counterparties. Critically, Mr. Ostling continued to provide Brunswick's confidential information and trade secrets to Denis Mosolov, MRIF's chief representative in restructuring negotiations against Brunswick, and to coordinate and plan with Mr. Mosolov MRIF's litigation and negotiating strategy concerning the Brunswick restructuring. These discussions occurred both in person and by phone. Mr. Ostling even went so far as to concoct a scheme by which his lawyers at Venable would communicate on Mr. Ostling's behalf with MRIF's counsel at Jones Day, in a thinly veiled attempt to circumvent the PI Order. In addition to discussing Brunswick's confidential information and trade secrets with MRIF, Mr. Ostling has further instructed Venable to have discussions with other Brunswick creditors, including PJT Partners through its counsel. This subterfuge was all orchestrated as an attempt to bypass the PI Order by having the prohibited communications made through their representatives rather than directly. Indeed, there is no dispute that these communications violated the PI Order because Mr. Ostling and his counsel specifically acknowledged that their desire to engage in such communications would violate the PI Order, when they attempted to have the PI Order rescinded. *See* Dkt. No. 137 at 16–17 (under seal).

Second, in direct violation of the PI Order’s prohibition against destroying or deleting data from “any device,” Venable admits that in June 2017 it accessed and tampered with the Brunswick-owned cellphone and laptop that Brunswick issued to Mr. Sultanov as part of his employment and that was subject to multiple Court preservation orders. In so doing, Venable caused critical forensic evidence on the laptop to be destroyed — specifically, evidence proving that Mr. Ostling attempted to wipe these devices of all data. To be clear, there was no need for Venable to disregard the PI Order and create copies of the Brunswick-owned devices because they were already in Venable’s own possession since Venable originally received them from Mr. Sultanov in January 2017.

Brunswick recently learned Venable’s motivation for taking such unnecessary illegal actions. As set forth in Brunswick’s Motion for Spoliation Sanctions filed concurrently with this Motion for Contempt, by March 2017 at the latest, Venable had learned that Mr. Ostling had taken drastic measures to destroy all evidence of his misconduct, including frantically deleting emails from his personal email account and device, drowning Mr. Sultanov’s Brunswick-issued phone in soap and water to delete all data from the phone, instructing Mr. Sultanov to throw the device into the Moscow River in Russia, and hiring an IT firm to professionally delete all data on Mr. Sultanov’s Brunswick-owned laptop. To further conceal Mr. Ostling’s deliberate and willful spoliation, in June 2017, Venable disregarded the PI Order and hired an e-discovery vendor to access the Brunswick-owned devices and in so doing, altered and/or deleted critical forensic evidence of Mr. Ostling’s spoliation in the process.

Mr. Ostling’s and Venable’s conduct undoubtedly violated the PI Order and warrants a finding of contempt and the issuance of sanctions. Civil contempt sanctions are warranted where: (1) the underlying order is clear and unambiguous; (2) there is clear and convincing evidence of noncompliance with the order; and (3) the contemnors have not been reasonably diligent and energetic in attempting to accomplish what was ordered. Here, the Court’s PI Order could not be clearer or more unambiguous regarding what it prohibited, namely disclosing Brunswick’s confidential information and trade secrets to its adversaries (creditors and

counterparties) and the destruction of evidence. All Mr. Ostling and Venable had to do in order to comply was not to affirmatively disclose confidential information and trade secrets to Brunswick's counter-parties in the ongoing restructuring negotiations or to affirmatively destroy evidence. They did the opposite, in flagrant disregard for the authority of the Court and the integrity of the judicial process.

Mr. Sultanov has revealed Mr. Ostling's reason for engaging in the underlying misappropriation of Brunswick's confidential information and trade secrets and his subsequent flouting of the PI Order: Mr. Ostling had a tremendous personal financial incentive—he was promised a 5% ownership stake in his former employer Brunswick by MRIF and PJT if they were successful in taking control of the company. Heath Decl., Ex. 1 (Sultanov Decl. ¶ 3). Mr. Ostling's and Venable's machinations might have been successful in concealing their violations of the PI Order, but they did not count on Mr. Sultanov's admirable decision to come forward and inform the Court and Brunswick of these misdeeds.¹ Unlike the usual case in which a contemnor has violated a Court Order and/or committed spoliation through neglect or inaction, the violations of the PI Order by Mr. Ostling and Venable are the result of deliberate and intentional misconduct. Accordingly, the Court should issue meaningful and coercive sanctions that prevent future violations of the PI Order and that compensate Brunswick for the irreparable harm that Mr. Ostling's and Venable's violation of the PI Order and spoliation have caused.

¹ This Motion for Contempt and the Motion for Spoliation Sanctions are based on numerous incontrovertible sources of evidence, including Mr. Sultanov's sworn testimony and multiple other pleadings and documents. Brunswick is currently meeting and conferring with opposing counsel regarding a separate *Motion to Confirm Non-Privilege* with respect to multiple emails that have been voluntarily provided to Brunswick by Mr. Sultanov, and that provide further and corroborating support for his testimony. Although Brunswick does not believe these emails are privileged (for the reasons set forth in that motion), out of an abundance of caution it intends to submit these under seal for *in camera* review, and accordingly will not rely or otherwise reference those documents until the Court rules upon that forthcoming motion.

II. STATEMENT OF FACTS

In the interest of judicial economy, Brunswick incorporates by reference the Statement of Facts submitted in its contemporaneously filed Motion for Spoliation Sanctions (“Spoliation Motion”). *See* Dkt. No. 192-1 at 6–20.

III. LEGAL STANDARD

Courts have the inherent power to enforce compliance with their lawful orders through civil contempt. *See Shillitani v. United States*, 384 U.S. 364, 370 (1966) (stating that “[t]here can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt”); *CBS Broadcasting Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 98 (2d Cir. 2016) (recognizing that a court’s contempt power serves to “protect the [] due and orderly administration of justice and [to] maintain[] the authority and dignity of the court”); *MacDermid, Inc. v. Salle*, 577 F. Supp. 2d 599, 601 (D. Conn. 2008) (stating that a courts have the inherent authority to hold a party in civil contempt); *In re MR Global Holdings, Ltd.*, 562 B.R. 41, 52 (Bankr. S.D.N.Y. 2017) (same); *In re Residential Capital, LLC*, 571 B.R. 581, 584 (Bankr. S.D.N.Y. 2017) (same). A court may impose civil contempt only where: (1) the underlying order is clear and unambiguous; (2) the proof of non-compliance is clear and convincing; and (3) the contemnor has not been reasonably diligent and energetic in attempting to accomplish what was ordered. *See EEOC v. Local 580*, 925 F.2d 588, 594 (2d Cir. 1991).

IV. DISCUSSION

Mr. Ostling and Venable clearly and unambiguously violated the PI Order by (1) having discussions with Brunswick’s creditors in which they disclosed its confidential information and trade secrets and (2) unilaterally accessing the Brunswick-owned devices and deleting evidence of Mr. Ostling’s spoliation. **First**, the PI Order clearly and unambiguously prohibits the conduct in which Mr. Ostling and Venable engaged. **Second**, there is clear and convincing evidence of their violations of Paragraphs 1 and 3 of the PI Order in the form of Mr. Sultanov’s first-hand knowledge, emails corroborating his personal knowledge, and Venable’s admission that it

accessed the Brunswick-owned devices. *Third*, rather than diligently seek to avoid violations of the PI Order, Mr. Ostling and Venable affirmatively engaged in prohibited behavior.

A. The PI Order Is Clear and Unambiguous

An order is “clear and unambiguous” if it “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.” *See Perez v. Danbury Hosp.*, 347 F.3d 419, 423 (2d Cir. 2003) (stating that an order is clear and unambiguous if it “leaves no uncertainty in the minds of those to whom [the order] is addressed”); *see also CBS Broadcasting Inc.*, 814 F. 3d. at 98 (finding an injunction conditioned on a violation of the Copyright Act was clear and unambiguous because the Plaintiffs’ exclusive rights under the Copyright Act were clear and unambiguous); *King v. Allied Vision, Ltd.*, 65 F. 3d 1051, 1058 (2d Cir. 1995) (holding party in contempt where it “supplied . . . false and misleading affidavits regarding its compliance with the Decree”); *In re MF Global Holdings Ltd.*, 562 B.R. 41, 53 (holding the injunction at issue was clear and unambiguous because it clearly stated what actions the court had enjoined and restrained the defendants from engaging); *Waterkeeper Alliance Inc. v. Spirit of Utah Wilderness, Inc.*, 2017 WL 4386376, at *3 (S.D.N.Y. Oct. 2, 2017) (holding the injunction was clear and unambiguous because it had “clear . . . parameters” as to “the conduct that it prohibited” and the parties to whom it applied); *Weston Capital Advisors, Inc. v. PT Bank Mutiara*, 667 Fed. Appx. 15, 17 (2d. Cir. 2016) (finding the order was clear and unambiguous because it “told appellants exactly what they must do....”).

The Court’s PI Order here could not have been more clear or unambiguous as to whom it was directed and what activity it prohibited. Foremost, the PI Order states in Paragraphs 1, 2, and 3 in no uncertain terms that it applied to Mr. Ostling and those acting in concert or participation with him. *See* Dkt. No. 53 at pp. 2-3. Any reasonable person (not to mention reasonable attorney) reading the PI Order would have understood that it applied to Mr. Ostling and Venable. Moreover, the PI Order also states in clear and unambiguous terms what behavior it prohibited—pertinent here, (1) in Paragraph 1, disclosing Brunswick’s confidential

information and trade secrets to—among other groups—its creditors and (2) in Paragraph 3, destroying or deleting information relevant on any devices. *See* Dkt. No. 53 ¶¶ 1 and 3.

Mr. Ostling and Venable undoubtedly understood that the PI Order applied to them and prohibited them from disclosing Brunswick’s confidential information and trade secrets and from destroying evidence. This is evident from the extremes in which Mr. Ostling and Venable engaged in order to continue to have discussions with Brunswick’s creditors regarding its restructuring efforts. *See* Sultanov Decl. ¶¶ 12-15. Further, that Venable previously indicated that it understood it was barred from accessing the Brunswick-owned devices is a clear indication that it understood the PI Order’s breadth. *See* Heath Decl., Ex. 34 at pp. 2-3.

B. There Is Clear and Convincing Evidence that Mr. Ostling and Venable Violated the Court Order

In the context of civil contempt, the clear and convincing standard requires “a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred.” *See Levin v. Tiber Holding Corp.*, 277 F. 3d 243, 250 (2d Cir. 2002); *King v. Allied Vision, Ltd.*, 65 F. 3d 1051, 1058 (2d Cir. 1995). Here, the uncontroverted evidence establishes with a reasonable certainty the Mr. Ostling and Venable failed to comply with the Court’s PI Order. *First*, Mr. Ostling and Venable violated the PI Order’s prohibition against disclosing Brunswick’s confidential information and trade secrets to Brunswick’s adversaries in the restructuring, including its creditors. Mr. Sultanov’s first-hand account establishes that Mr. Ostling and Venable had discussions with Mr. Mosolov, MRIF, and PJT Partners—either directly or through counsel—in which they disclosed highly-sensitive information regarding Brunswick’s restructuring, ongoing negotiations with Brunswick, and a strategy forward. *See* Heath Decl., Ex. 1 (Sultanov Decl. ¶¶ 12-15). The March 2017 emails in which Mr. Ostling recounts his discussions with MRIF beginning from early in March 2017 further corroborate and confirm Mr. Sultanov’s testimony. *See* Dkt. No. 121-3.

Second, Venable admits that it violated the PI Order’s prohibition against destroying or disposing of information on “all devices, electronic media, cloud storage, [and] telephones....” In

his July 14, 2017 declaration, Venable's lead counsel admits that on June 12, 2017 he caused an e-discovery vendor to access the Brunswick-owned devices in order to make a copy of these devices. *See* Dkt. No. 163-1 ¶¶ 4-5.

To be clear, this access and copying was an undoubted violation of the PI Order because in the very process of accessing the devices, Venable necessarily caused the deletion of critical metadata on those devices that would have evidenced Mr. Ostling's prior spoliation actions. It is well settled under federal law that the metadata existing on an electronic device may be critical in establishing trade secret misappropriation. Instructive here is the decision in *Nucor-Corp. v. Bell*, 251 F.R.D. 191, 192 (D.S.C. 2008), whose facts are nearly identical. In that case, an employer sued an employee for trade secret misappropriation. *Id.* at 193. Before the matter was removed to federal court, a state court had issued a preservation order. *Id.* at 194.

Notwithstanding that preservation order, the employee continued to access the work laptop that the employer had issued him. *See id.* In finding that the employee had intentionally spoliated evidence contained on his laptop, the court recognized that there was "little doubt that the data on [the employer-issued] laptop [was] relevant in a case involving ... misappropriation of trade secrets" because the defendant used the laptop as his primary work computer and "[t]he presence of confidential ... information on the laptop would tend to make it more probable that the defendant[] misappropriated ... trade secrets...." *See id.* at 197. The court further concluded that "[i]t would strain credulity to believe that [the defendant] did not know the laptop would contain relevant evidence...." *See id.* at 199.

The *Nucor-Corp.* court specifically identified some of the categories of metadata that could be altered or permanently destroyed if an electronic device was accessed:

- *Items in Unallocated Space*—When a user "deletes" a file, that file is not actually removed from the computer's hard drive. Rather, the file is marked as "unallocated space," giving the computer permission to overwrite the file with new data. When that file is overwritten with new data, it is permanently lost and unrecoverable. [The experts] agreed, that *data in unallocated*

space is lost every time a computer is turned on or shut down, when a program is installed or de-installed, when a user runs a program, or virtually any time anything happens on a computer. It is inevitable that a substantial amount of data in unallocated space was lost because defendants continued to use the computer while under a duty to preserve evidence.

- *Event Logs*—The Windows XP operating system maintains event logs that record what actions are taken on a system, what programs were run, any problems the system encounters, any network connections, and other information. *As a user continues to [access and] use a computer, the system event logs create new entries and displace the oldest entries, making those displaced entries unrecoverable.* In this case, defendants [access and] use [over a period of eight days], *caused the loss of over 1,564 event log entries. Id.*
- *Restore Points*—Windows XP automatically generates “restore points” that allow a user to undo some later changes made to the system. Windows generates the restore points periodically and provides a picture of the system registry. *As a result of defendants' [access and] use of the laptop . . . , approximately twelve restore points were lost.*

See id.

The risk that this sensitive and critical metadata could be destroyed was clearly of concern for the California Court when it *explicitly instructed Venable not to access the Brunswick-owned devices in order to preserve this exact type of information.* *See Brunswick* 2017 WL 67119 at *2 (duty extended to relevant data on device, including metadata); *Nucor-Corp.*, 251 F.R.D. at 199 (same); *Brown v. Certain Underwriters at Lloyds, London*, No. 16-cv-02737, 2017 WL 2536419 at *3 (E.D. Penn. June 12, 2017) (same). Likewise, the preservation of the forensic metadata on the Brunswick-owned devices was an important part of this Court’s PI Order that required Mr. Ostling and Venable specifically not to destroy or dispose of “any evidence or other material, in any form” on “all devices, electronic media, cloud storage, [and] telephones....”

Venable's disregard of these preservation orders necessarily caused relevant metadata on these devices to be deleted and/or modified: in order to create the purported "forensic images," Venable and its vendor would have had to power on and access the Brunswick-owned device; in so doing, it would have permanently deleted items contained in the Brunswick-owned devices unallocated (or "slack") space, event logs, restore points, and other metadata that would have revealed the actions that were previously taken to obfuscate the trade secret misappropriation. *Nucor*, 251 F.R.D. at 197–98. Indeed, it is widely recognized that merely accessing electronic devices can alter or delete relevant metadata. *See Koncelik v. Savient Pharms., Inc.*, 2009 WL 2448029 at *2 (S.D.N.Y. Aug. 10, 2009) (noting that parties could "destroy[] electronic information by 'performing routine backup procedures'"); *Nucor*, 251 F.R.D. at 197–98 (acknowledging that "mere continued [access] and use of the computer resulted in the alteration or loss of data" including items in unallocated space, event logs, and restore points).

In this regard, Venable's admission that it accessed the Brunswick-owned devices fully aware of these consequences is clear and convincing evidence that it violated the Court's PI Order. *See CBS Broadcasting Inc.*, 814 F. 3d at 99 (holding that the defendant's admission that it deployed a system that the court's injunction prohibited was clear and convincing evidence of non-compliance). Moreover, this is not an instance of inadvertent or negligent access of the device; Venable expressly represented that it would hold the devices as officers of the court and would not allow any access without Court approval. *See Heath Decl.*, Ex. 31.

C. Mr. Ostling and Venable Made No Attempt to Comply with the PI Order

Courts recognize that orders which require a party to do nothing are among the easiest with which to comply. *See In re Residential Capital, LLC*, 571 B.R. at 586 (holding that because the permanent injunction "only required her to *refrain* from doing something, rather than *affirmatively* to perform an action, it is easier to find that the violation of the Permanent Injunction, which required only inaction, was willful" (emphasis in original)); *see also Patsy's Brand, Inc. v. I.O.B. Realty*, 2002 WL 1988200 at *3 (S.D.N.Y. Aug. 27, 2002) (trebling

damages when it held a party in contempt for violating an injunction that only required the party to refrain from copyright infringement and no other actions were necessary).

Mr. Ostling and Venable did not have to take any affirmative steps in order to comply with the PI Order; rather they only needed to refrain from engaging in the prohibited improper behavior. Instead, **they took affirmative steps** to circumvent the Court's PI Order, in disregard of their obligations. Specifically, as discussed in Brunswick's Spoliation Motion (*see* Section III.F), Mr. Ostling and Venable continued to disclose Brunswick's confidential information and trade secrets to Brunswick's creditors after the Court issued the PI Order. In order to attempt to obfuscate their misconduct, they conducted their communications through Venable and the respective attorneys for Brunswick's creditors. *See id.*; *see also* Sultanov Decl. ¶¶ 12-15. It is entirely unclear why Mr. Ostling and Venable believed that channeling clearly prohibited communications to Brunswick's counter-parties through their lawyers would be permissible, given the PI Order's unambiguous language that it applied to "all those acting in concert or participation with" Mr. Ostling. Dkt. No. 53 at 2.

Likewise, all Venable had to do to comply with the Court's PI Order on preservation was to do nothing: not to access the devices and destroy evidence. *See* Dkt. No. 53. Instead, it took affirmative steps to access the devices, likely destroying evidence of Mr. Ostling's past spoliation. Venable undoubtedly knew and intended that by accessing the Brunswick-owned devices, it risked altering or permanently deleting relevant metadata **because the California Court explicitly explained to Venable that turning on these devices could likely cause other "automatic[] erasure" of evidence**, "for instance, . . . emails [and related metadata] that [Mr.] Sultanov . . . moved to the[] trash folder" *Brunswick*, 2017 WL 67119 at *1. Despite being fully aware and informed of the risk, Venable disregarded the judicial orders and unilaterally accessed the Brunswick-owned devices, causing the spoliation.

Equally troubling is Venable's purported reason for accessing the devices: to "preserve (and prevent any inadvertent or other loss, destruction, or deletion) all data on the Devices." *See* Dkt. No. 163-1 ¶ 4. There was no need to copy the Brunswick-owned devices in order to

preserve them because the devices—by Venable’s own words—were “shipped ... to [Venable’s] office in San Francisco and *immediate steps were taken to ensure that no one would access the Devices*” in order to maintain them “*in the exact same condition as they were received.*” *Id.* (emphasis added). Venable had physical custody of the Brunswick-owned devices, which had already been preserved and there was nothing to do other than to refrain from accessing them. There was simply no valid reason for Venable to suddenly access and copy the devices *six months later* purportedly in order to “further” preserve them. Venable was required to *leave them alone* but instead they decided to take affirmative steps and neatly spoliage the data.

Because Mr. Ostling and Venable took affirmative steps to violate the PI Order, they did not act diligently in attempting to avoid a violation of the PI Order. Moreover, Mr. Ostling’s and Venable’s affirmative violations and misconduct warrant a finding that the violation was willful. *See, e.g., Patsy’s Brand, Inc.*, 2002 WL 1988200, at *3 (finding willful contempt where injunction only required the party to refrain from copyright infringement and no other actions were necessary).

V. **BRUNSWICK IS ENTITLED TO SANCTIONS**

The purpose of civil contempt proceedings is to coerce the contemnor into compliance or to compensate the moving party. *See CBS Broadcasting Inc.*, 814 F. 3d at 101 (a “court’s interest in protecting the integrity of [an order] justifies any reasonable action taken by the court to secure compliance”); *Chere Amie, Inc. v. Windstar Apparel, Corp.*, 175 F. Supp. 2d 562, 566 (S.D.N.Y. 2001) (“Civil contempt is designed to coerce a reluctant party to obey a court’s directive.”); *Huber v. Marine Midland Bank*, 51 F. 3d 5, 10 (2d Cir. 1995) (stating that civil contempt is coercive rather than punitive in nature). A court should calculate sanctions in such a manner to coerce future compliance with the court’s orders and to compensate the injured party for losses resulting from the contemptuous conduct. *See Chere Amie, Inc.*, 175 F. Supp. 2d 567 at 566 (“The purpose of civil contempt proceedings is coercive and compensatory rather than punitive.”). A court has broad discretion to fashion a remedy that will bring a contemnor into compliance. *Id.*; *CBS Broadcasting Inc.*, 814 F. 3d at 102 (awarding \$90,000 in fines at \$10,000

per day for the defendant's past violations of the injunction where the defendant was a repeat offender, had a history of "aggressively pushing the bounds of the Injunction" and where future noncompliance was a "well-founded concern").

There need not be a finding of willfulness to impose sanctions. *See Chere Amie, Inc.*, 175 F. Supp. 2d at 567 (citing *Manhattan Indus., Inc. v. Sweater Bee By Banff*, 885 F.2d 1, 5 (2d Cir. 1989)). However, the Court may consider whether a contemnor acted willfully in determining the appropriate sanction and whether a harsher sanction is warranted. *See id.*; *see also In re Residential Capital, LLC*, 571 B.R. at 586 (finding the contemnor's violations of the court's permanent injunction to be willful and recommending that she be referred to the U.S. Attorney for criminal contempt and holding that because the permanent injunction "only required her to *refrain* from doing something, rather than *affirmatively* to perform an action, it is easier to find that the violation of the Permanent Injunction, which required only inaction, was willful" (emphasis in original)); *Patsy's Brand, Inc. v. I.O.B. Realty*, 2002 WL 1988200, at *3 (S.D.N.Y. Aug. 27, 2002) (trebling damages when it held a party in contempt for violating an injunction that only required the party to refrain from copyright infringement and no other actions were necessary).

Here, a reasonable outcome is that the Court should award monetary sanctions in the amount of \$10,000 per future violation of the PI Order in order to coerce Mr. Ostling and Venable to refrain from any further violations. Moreover, in order to compensate Brunswick for bringing and litigating its contempt motion, the Court should award Brunswick its attorneys' fees and costs incurred in bringing its Motions for Contempt and for Spoliation Sanctions. *See Southern New England Telephone Co. v. Global NAPs, Inc.*, 624 F. 3d 123, 146 (2d. Cir. 2010) (awarding attorneys' fees and costs incurred in bringing civil contempt proceedings for spoliation and violation of the court's order); *MacDermid, Inc. v. Selle*, 577 F. Supp. 2d 599, 604 (D. Conn. 2008) (awarding attorneys' fees and costs incurred in bringing its motion for contempt).

Moreover, in order to compensate Brunswick for Mr. Ostling and Venable's continued disclosure of Brunswick's confidential information and trade secrets to its creditors, the Court should require Mr. Ostling and Venable *to produce all communications it has had with MRIF, PJT Partners, their respective counsel, and any other creditors in which they discuss Brunswick, the restructuring, and any confidential information, proprietary, or trade secret information of Brunswick*. To the extent that such communications have already been spoliated, Mr. Ostling and Venable should be required to provide a sworn detailed log identifying each communication, all sender and recipient information, and the contents of that communication. Only by knowing what information Mr. Ostling and Venable disclosed can Brunswick take the appropriate remedial steps to prevent any further harm.

As for Venable's unlawful access of the Brunswick-owned devices in order to conceal Mr. Ostling's spoliation, there is no way to fully compensate Brunswick for the lost data, as the damage has been done and is likely irreversible. *See Nucor*, 251 F.R.D. at 197-98 (recognizing that the continued access and use of a computer could result in the permanent destruction of critical metadata). In this regard, Brunswick requests meaningful sanctions that would place Brunswick in the same position as if it could establish that Mr. Ostling spoliated data on the Brunswick-owned devices. Brunswick requests that the Court issue the sanctions consistent with the sanctions requested in Brunswick's Motion for Spoliation Sanctions that include (1) terminating sanctions and/or (2) evidentiary sanctions. *See Motion for Spoliation Sanctions at Section V.C.1-6*.

VI. CONCLUSION

For the above reasons, Brunswick respectfully requests that the Court issue the requested Order to Show Cause re Contempt of Court as set forth in this Motion.

Dated: November 15, 2017

Respectfully Submitted,

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CERTIFICATION

I hereby certify that on November 15, 2017, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

By: /s/ Michael C. Tu

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