

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

**REGIONAL MULTIPLE LISTING
SERVICE OF MINNESOTA, INC.,
d/b/a NORTHSTARMLS**

Civil No. 12-cv-00965-JRT-FLN

Plaintiff,

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
CONTEMPT FOR VIOLATIONS
OF PRELIMINARY INJUNCTION**

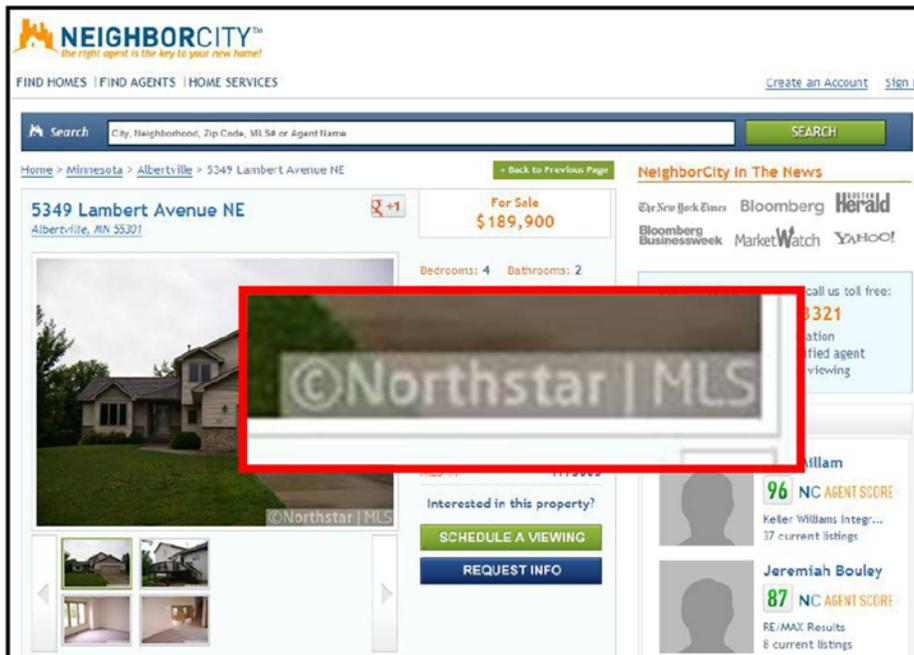
v.

**AMERICAN HOME REALTY
NETWORK, INC.**

Defendant.

I. INTRODUCTION

Defendant AHRN and its CEO Jonathan Cardella continue to display RMLS's copyrighted content on AHRN's website, in violation of the Court's September 27, 2012 Preliminary Injunction. A screenshot taken today, November 15, 2012, from AHRN's website containing just one of RMLS's copyrighted works (with the NorthstarMLS watermark) is shown below:



(Currently available at <http://www.neighborcity.com/property/5349-Lambert-Avenue-NE-Albertville-MN-55301-4173885-8158275/>.)

This amounts to contempt. This Court's September 27, 2012, preliminary injunction order was clear:

Defendant . . . [is] immediately and until further order of this Court **PRELIMINARILY ENJOINED** from engaging in any unauthorized copying, display, use, and/or public distribution of *Plaintiff's copyrighted photographic works, including, without limitation, the works covered by U.S. Copyright Reg. Nos. TX VA 1-432-912; VA 1-432-913; VA 1-432-914; and VA 1-432-917.*

(Dkt. 35, Mem. Op. and Order, at 27 (emphasis in italics added) ("Injunction Order").)

The Court explained the breadth of this injunction in the memorandum that accompanied its order:

The Court will issue a preliminary injunction prohibiting AHRN from copying *all current and future photographs . . . for which RMLS has a copyright. . .* Because of the widespread nature of AHRN's apparent copyright infringement and the threat of future infringement, the Court finds that an injunction enjoining the use of RMLS's *current and future copyrighted materials* is warranted.

(*Id.* at 26-27 (emphasis added).) In support of this decision, the Court noted: "The power to grant injunctive relief is not limited to registered copyrights, or even to those copyrights which give rise to an infringement action." (*Id.* at 26 (quoting *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994)).)

Despite the plain language of the Court's Injunction Order and accompanying memorandum, AHRN continues to display RMLS's copyrighted photographs on its website, www.neighborcity.com. Specifically, from October 16, 2012 through October

23, 2012, RMLS identified merely an initial sample of more than 75 photographs in which it owns copyrights and which AHRN has copied and displayed on its website.

AHRN's conduct violates the Court's Injunction Order. It also calls into question the veracity of a declaration signed by AHRN's Chief Executive Officer, who stated that AHRN "has ensured that its data gathering process does not copy, display, or permit public distribution of any of the data or other materials which are the subject of the Court's Order." (Dkt. 44, Declaration of Jonathan Cardella ("Cardella Dec.") at ¶ 5.)

Because AHRN and its CEO are in contempt of this Court's Injunction Order, RMLS seeks appropriate remedies, as set forth below.

II. BACKGROUND

A. RMLS Sought and this Court Granted a Preliminary Injunction Prohibiting AHRN's Current Conduct.

On May 17, 2012, RMLS moved for a preliminary injunction prohibiting AHRN "from engaging in unauthorized copying, display, and distribution of RMLS's copyrighted material" until a final decision could be reached on the merits of RMLS's copyright infringement action. (*See* Dkt. 16 at 2.) At the July 9, 2012 hearing on that motion, counsel for RMLS made clear that it sought an order enjoining AHRN from infringing *all* of RMLS' copyrighted works, not just those registrations or works that had formed the original basis of the lawsuit:

MR. LITSEY: But what we're asking for, and just to be very clear, Your Honor, . . . we are asking for this Court not only to enjoin . . . any violation of the copyrights in the works at issue *but any other copyrights owned.*

...

So very specifically, *we're asking for an injunction that not only extends to the registered works before the Court, but that would also restrain any current and future violation of other copyrighted photographs.*

(Dkt. 33, July 9, 2012 Hearing Transcript (“Transcript”) at 28–29 (emphasis added).)

A few weeks after the hearing, on September 25, 2012, counsel for RMLS sent a letter to the Court, drawing its attention to an opinion recently issued in *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. Sept. 11, 2012). (Dkt. 34, Sept. 25, 2012, Letter.) The letter explained that the opinion was particularly relevant because it reiterated “the district court’s broad authority to issue injunctive relief for willful copyright infringement.” (*Id.*) Specifically, the *Capitol Records* opinion stated that:

a district court has authority to issue a broad injunction in cases where “a proclivity for unlawful conduct has been shown.” The district court is even permitted to “enjoin certain otherwise lawful conduct” where “the defendant’s conduct has demonstrated that prohibiting only un-lawful conduct would not effectively protect the plaintiff’s rights against future encroachment.”

Capitol Records, 2012 WL 3930988 at *6 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949); *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010)).

Two days later, on September 27, 2012, the Court entered its Injunction Order. (Dkt. 35.) That order reflected a clear understanding of the scope of RMLS’s request and granted that request, at least as to photographic works, agent remarks, and public remarks. As noted above, the Court preliminarily enjoined AHRN from infringing *any and all of RMLS’s copyrighted works*, then existing or thereafter created (not just those covered by the registrations identified in the complaint). (*Id.* at 27.) In making this

decision, the Court quoted the key passage from the *Olan Mills* case referenced by RMLS's counsel at the hearing. (*Id.* at 26.)

In light of RMLS's motion papers, counsel's argument at the hearing, and the follow-up correspondence, there can be no doubt about the scope of the relief RMLS sought: an order prohibiting infringement of *all* RMLS's copyrighted content. And in light of the plain language of the Court's Injunction Order, there can be no doubt about the relief the Court granted: an order prohibiting infringement of *all* of RMLS' copyrighted photographs, agent remarks, and public remarks.¹

B. The Declaration of AHRN's CEO Filed with the Court Contains Untrue Statements.

As part of its Injunction Order, the Court required AHRN to file a declaration from an officer confirming that it was in compliance with the terms of the Injunction Order "and that any copyrighted works belonging to RMLS subject to this injunction have been removed and deleted from www.neighborcitey.com and from any servers or other storage devices." (*Id.* at 28.) On October 16, 2012, AHRN's CEO, Jonathan Cardella, submitted a declaration to the Court that purported to confirm AHRN's compliance with the Order. (Dkt. 44.)

In his declaration, Cardella represented that each of the following statements is true and correct:

- AHRN removed the photographic works covered by the registrations at issue "within 72 hours of receiving notice of alleged infringement . . . and [has] not reposted those photographic works in any form since that time." (*Id.* ¶ 3.)

¹ The only part of RMLS's motion that the Court denied related to the "Compilation Content," which is not at issue in this instant motion.

- AHRN “is not engaging in any unauthorized copying, display, use and/or public distribution of [RMLS’] allegedly copyrighted ‘agent remarks’ and ‘public remarks.’” (*Id.* ¶ 4.)
- AHRN “has ensured that its data gathering process does not copy, display, or permit public distribution of any of the data or other materials which are the subject of the Court’s Order.” (*Id.* ¶ 5.)

The statements are not true now and were not true at the time AHRN filed Cardella’s declaration.

First, at least one—and maybe more—of the registered photographic works at issue in this case were still on AHRN’s website at the time of the July 9 hearing, nearly three months after RMLS filed its complaint. (*See* Dkt. 33 at 22–23 (emphasis added).) RMLS’s counsel specifically noted this fact at the hearing. (*Id.*) And this fact was subsequently confirmed in writing to AHRN’s counsel after the hearing, when AHRN’s counsel requested and was provided with a copy of the infringing photograph. (*See* Declaration of Calvin L. Litsey in Support of Motion for Contempt for Violations of Preliminary Injunction (“Litsey Dec.”) at Ex. A.)

Second, as explained below, based on an initial review, AHRN has continued to post and display at least 77 (and likely many more) additional photographs in violation of the Court’s Injunction Order.

C. **Despite the Court’s Injunction Order and AHRN’s Claim of Compliance, AHRN Continues to Infringe RMLS’s Copyrighted Content.**

Notwithstanding the clear language of the Court’s Injunction Order, and despite having filed a declaration of compliance with that order, AHRN continues to infringe RMLS’s copyrighted works, thereby flouting this Court’s authority. Between October

16, 2012—the date on which AHRN filed Cardella’s declaration—and October 23, 2012, RMLS discovered at least 77 of its copyrighted photographs on the *neighborcity.com* website. (See Declaration of Michael Bisping in Support of Motion for Contempt for Violations of Preliminary Injunction (“Bisping Dec.”) at ¶¶ 2–4 and Ex. A-1 through A-13; Ex. B; Ex. C-1 through C-4.) An internal investigation by RMLS confirmed that neither the agents who took the photographs nor the broker for which the agent works gave permission to AHRN to post these photographs on *neighborcity.com*. (*Id.* ¶ 5). RMLS, which is a joint owner of the copyrights in these photographs, also did not give AHRN any such permission. (*Id.*)

III. LEGAL STANDARD FOR CIVIL CONTEMPT

“One of the overarching goals of a court’s contempt power is to ensure that litigants do not anoint themselves with the power to adjudge the validity of orders to which they are subject.” *Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d 500, 504 (8th Cir. 2000). “A party seeking civil contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order.” *Id.* at 505; *see also U.S. v. Open Access Tech. Intern., Inc.*, 527 F. Supp. 2d 910, 912 (D. Minn. 2007). “However, the moving party does not need to show that the violation of the court’s order was willful.” *Open Access*, 527 F. Supp. 2d at 912 (quoting *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1243 (D. Minn. 2005)). “An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.” *McComb*, 336 U.S. at 191; *see also U.S. v. Ofe*, 572 F.2d 656, 657 (8th Cir. 1978). This means that “advice of counsel is not

a defense to a civil contempt proceeding.” *H.R. Bushman & Sons v. Spud Packers, Inc.*, No. 06-1638, 2008 WL 723707, at *5 (E.D. Mo. Mar. 14, 2008).

If the moving party satisfies its initial burden, the burden shifts to the alleged contemnor to show inability to comply. *Chicago Truck Drivers*, 207 F.3d at 505. To meet this burden, the alleged contemnor must do more than simply assert a present inability, but must instead establish: “(1) that they were unable to comply, explaining why categorically and in detail; (2) that their inability to comply was not self-induced; and (3) that they made in good faith all reasonable efforts to comply.” *Id.* at 506 (citations and quotations omitted).

Finally, “[i]t is well-settled that a court’s contempt power extends to non-parties who have notice of the court’s order and the responsibility to comply with it.” *Id.* at 507. Indeed, the Supreme Court has long recognized that a non-party to a suit may be “guilty of contempt for violation of an order of that court, made in such suit, and imposing a fine for such contempt.” *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 325 (1904); *see also SEC v. Homa*, 514, F3d 661, 674 (7th Cir. 2008) (“[A]n injunction binds not only the parties to the injunction but also non-parties who act with the named party” and courts “have the power to punish those who cooperate with those named in an injunction.”); *Indep. Fed’n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998) (“[A] nonparty may be held in contempt where the nonparty aids or abets a named party in a concerted violation of a court order.”).

IV. ARGUMENT

A. AHRN and Cardella Have Violated the Court's Preliminary Injunction Order.

RMLS has easily satisfied its burden of showing that AHRN and Cardella violated the Court's Injunction Order. As noted above, since the filing of the Cardella declaration, RMLS has identified 77 of its copyrighted photographs that have been displayed and distributed on AHRN's *neighborcity.com* website. No one with authority to do so gave AHRN permission to display and distribute these photographs.

In view of these actions, AHRN and Cardella have acted in contravention of the Court's Injunction Order, which preliminarily enjoins AHRN *and its officers* from "engaging in any unauthorized copying, display, use, and/or public distribution of Plaintiffs' copyrighted photographic works." (Dkt. 35 at 27.) There is nothing vague or ambiguous about this language, and the Court's Order (and the points RMLS raised in its briefs and at oral argument) serve only to crystallize its meaning: AHRN and its officers were enjoined from infringing *any* of RMLS's copyrighted works, regardless of whether those works are among the registered works at issue in this case. The Cardella declaration—which disingenuously claims compliance—only underscores the brazenness of AHRN's conduct and its business model of serial copyright infringement.

With respect to Cardella in particular, as mentioned above, "it is well-settled that a court's contempt power extends to non-parties who have notice of the court's order and the responsibility to comply with it." *Chicago Truck Drivers*, 207 F.3d at 507. Here, as CEO of AHRN, Cardella had the ability to control AHRN's actions to comply with the

Court's Injunction Order, as demonstrated by the statements in the declaration Cardella filed with the Court. Cardella's actions in disingenuously claiming compliance while at the same time knowingly allowing RMLS's copyrighted photographs to remain on the *neighborcity.com* website constitute a clear violation of the Court's Injunction Order and support a finding of contempt against Cardella as well as AHRN. *See id.* at 507-08 (affirming ability to hold non-party corporate officer liable for contempt for failing to direct corporation to comply with court order); *Ind. Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir.1998) ("a nonparty may be held in contempt where the nonparty aids or abets a named party in a concerted violation of a court order."); *Central States Pension Fund v. Wintz Props., Inc.*, 155 F.3d 868, 874 (7th Cir.1998) (affirming contempt sanction against both the corporation and its officer, even though the officer "was not a named party in the underlying litigation.").

If either AHRN or Cardella was confused about the scope of the preliminary injunction against it, either of them could have sought clarification. They did not. Instead, they proceeded in pursuit of their own interests in reckless disregard not only of the rights of RMLS, but also the authority of this Court.

B. AHRN and Cardella Cannot Justify Their Failure to Comply with the Court's Preliminary Injunction Order.

Because RMLS has shown, by clear and convincing evidence, that AHRN and Cardella violated the Court's Injunction Order, the burden shifts to them to show they were somehow unable to comply with the Injunction, despite good-faith efforts to do so. *Chicago Truck Drivers*, 207 F.3d at 506. They cannot meet this burden.

To comply with the Injunction Order, AHRN and Cardella needed to take a few simple steps. First, they needed to stop copying, displaying, using, and distributing photographs and other copyrighted content of RMLS. Copying, displaying, using, and distributing are affirmative acts—AHRN and Cardella simply needed to stop engaging in those acts.

Second, AHRN and Cardella needed to delete all copyrighted photographs of RMLS currently on AHRN's website, servers, storage devices, or otherwise in its possession. This is clearly an action that AHRN and its CEO had the power to perform. To the extent AHRN did not own or have permission to use copyrighted photographs of others, it was obliged to remove them or obtain permission to display them or risk violating the Court's Injunction Order. AHRN and Cardella certainly knew that would be the case with photographs that prominently feature the Northstar|MLS watermark. Yet they took no steps to remove nearly one hundred of these photographs.

Third, AHRN and Cardella needed to establish procedures "to prevent the unlawful copying, display, use, and/or public distribution of Plaintiffs' copyrighted works." (Dkt. 35 at 28.) This action was well within AHRN's and Cardella's power to perform. They needed to implement procedures to confirm that they had the rights to post any photographic content on the neighborcity.com website. The fact that AHRN continued to display copyrighted photographs of RMLS that clearly bore the NorthstarMLS watermark makes clear that neither AHRN nor Cardella implemented any such procedures.

RMLS anticipates that AHRN may argue that not all the photographs with the Northstar|MLS watermark are owned (in whole or in part) by RMLS and thus AHRN cannot determine whether particular photographs within the RMLS database are covered by the Court's Injunction Order. But this is no defense. Whether the photographs with the Northstar|MLS watermark are owned by RMLS or one of its broker participants, they are certainly *not* owned by AHRN and thus—absent consent from the copyright owner—AHRN and Cardella knew they were infringing *someone's* rights, if not those of RMLS. If AHRN cannot determine from the face of a photograph whether its copyright is owned in whole or in part by RMLS (and thus covered by the Court's Injunction Order), it should engage in due diligence to identify the owner. The solution is not to unlawfully use and display the photograph and later claim “we couldn't tell who the owner was.” *See McComb*, 336 U.S. at 191.

AHRN and its CEO have full control of the AHRN database and website. They are the ones responsible for adding content to and removing content from those platforms. As part of their business model, they are free to create their own photographs and are not required to “borrow” photographs from anyone. But instead, they have chosen to build a business founded on the copyrighted works of others. Thus, any claim that they were unable to comply with the Court's Injunction Order because they could not tell whether RMLS owns particular photographs is “self-induced” under the *Chicago Truck Drivers* test. For all of these reasons, AHRN and Cardella cannot meet their burden and should be held in contempt.

C. The Court Should Impose Penalties on AHRN and Cardella Sufficient to Coerce Their Compliance and Compensate RMLS.

“Civil contempt may be employed either to *coerce* the defendant into compliance with a court order or to *compensate* the complainant for losses sustained, or both.”

Chicago Truck Drivers, 207 F.3d at 505 (emphasis added). “Where compensation is intended, a fine is imposed, payable to the complainant.” *U.S. v. United Mine Workers*, 330 U.S. 258, 304 (1947).

At a minimum, the Court should award RMLS fees and costs spent bringing this motion. An “award of reasonable attorney’s fees and expenses incurred by [the aggrieved party] in seeking to enforce the decree is a form of compensatory relief that is well within a district court’s remedial discretion in civil contempt proceedings.” *Jake’s, Ltd. v. City of Coates*, 356 F.3d 896, 900 (8th Cir. 2004); *see also Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 630, 630-631 (8th Cir. 1984) (per curiam) (affirming award of \$10,000 in attorneys’ fees for litigating contempt motion); *Faegre & Benson, LLP*, 367 F. Supp. 2d at 1244, 1250 (awarding attorney’s fees “related to the bringing of this contempt motion” and \$37,139.20 in attorney’s fees for a previous contempt motion).

But the Court should go further. Just as RMLS was harmed by AHRN’s initial infringement, it has been harmed by AHRN’s ongoing infringement. And AHRN and its CEO have willfully ignored the clear requirements of federal copyright law and this Court’s orders: neither the threat of a lawsuit, nor the filing of a complaint, nor the entry

of a preliminary injunction, nor even the threat of a motion for contempt² has caused AHRN or Cardella to change their business practice of blatantly infringing RMLS's copyrights. Something more than an award of fees is needed to bring AHRN's and Cardella's attention to the rule of law and to coerce them to comply. Otherwise, they will continue to violate RMLS's rights and this Court's decisions with impunity.

If RMLS were to sue over the 77 RMLS-owned photographs discovered last month on AHRN's website, and assuming those photographs were registered with the Copyright Office,³ it would be entitled to *minimum* statutory damages of \$58,750. *See* 17 U.S.C. § 504(c). *Maximum* statutory damages—available upon a finding of willful infringement, which AHRN's conduct surely was—would exceed \$11 million. *Id.*

RMLS suggests the Court use the low-end of this spectrum as a starting point from which to assess a compensatory and coercive fine against AHRN and its CEO. For example, it would be well within this Court's authority to base a contempt award on fifty percent of the minimum amount of statutory damages prescribed in the Copyright Act—a

² As required by the Local Rules, RMLS contacted AHRN prior to bringing this motion, informed AHRN of its basis, and attempted to resolve the dispute without the assistance of the Court. Even after October 25, 2012, the date the meet and confer conference took place, AHRN continued to display the infringing photographs on its website.

³ RMLS registers updates to its database on a quarterly basis, and its most recent application was received by the Copyright Office on October 9, 2012. (*See* Bisping Dec. at ¶ 6.) Accordingly, it is likely that the 77 photographs were registered at the time of infringement or were registered after infringement but within the three-month safe harbor period codified at 17 U.S.C. § 412. *See Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 2012 WL 3711513, at *10 (D. Md. Aug. 24, 2012) (citing *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 283–84 (4th Cir. 2003) (holding that registration of compilations is “sufficient to provide copyright protection to the underlying works which those [compilations] encompassed.”)).

total of \$28,875—and then assess a \$1,000 per day fine against AHRN and Cardella until they comply with the Court’s Injunction Order. *See, e.g., Jake’s, Ltd.*, 356 F.3d at 902 (discussing difference between civil and criminal remedies for contempt and noting that civil fines compensate an injured party and can be “avoided or purged by coming into compliance with the court’s injunctive decree”); *see also BMG Music v. Perez*, 952 F.2d 318, 320 (9th Cir. 1991) (“Because the district court imposed a sanction of \$10,000 for each violation of the preliminary injunction, an amount no greater than statutory damages for the resulting copyright infringement, the district court did not abuse its discretion in setting the amount of sanctions.”); *Denny Mfg. Co., Inc. v. Drops & Props, Inc.*, 2011 WL 941358, at *9 (S.D. Ala. March 17, 2011) (“In fashioning an equitable remedy to compensate Denny for DP’s violation of the injunction, the Court adopts as a guideline, the statutory damages provision under the Copyright Act.”); *Yash Raj Films (USA), Inc. v. Bobby Music Co. & Sporting Goods, Inc.*, 2006 WL 2792756, at *14 (E.D.N.Y. Sept. 27, 2006) (using statutory damage provision of Copyright Act as basis for penalty where defendant violated preliminary injunction and granting plaintiff \$30,000 per the defendant’s eleven violations). As demonstrated by the authority above, the compensatory and coercive penalty RMLS seeks against AHRN and Cardella for violation of the Court’s Injunction Order is both appropriate and justified in this case.

V. CONCLUSION

There is no question that AHRN and Cardella have violated this Court’s preliminary injunction order, despite the clarity of that order and despite their ability to comply with that order. The Court should hold AHRN and Cardella in contempt; it

should assess a civil fine against them, to be paid to RMLS as compensation for the harm caused by their actions; and it should award RMLS costs and fees incurred in bringing this motion. The Court should also impose against AHRN and Cardella a daily fine, to be paid to the Court, unless and until they comply with the Court's Injunction Order and remove from the neighborcity.com website all of RMLS's copyrighted photographs, agent remarks, and public remarks.

Dated: November 15, 2012

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