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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CITY OF NEW YORK,

Case No. 19-cv-2731 (LLS)

Plaintiff,

-against-

BALLYHOO MEDIA, INC.,

Defendant.
-----X

~~[PROPOSED]~~

L L S

STIPULATION, CONSENT DECREE, AND ORDER OF DISMISSAL

WHEREAS, on or about March 27, 2019, the City of New York ("**City**") commenced the above-captioned action ("**Action**"), by filing a complaint ("**Complaint**") [ECF Doc. No. 4] asserting claims against Ballyhoo Media, Inc. ("**Ballyhoo**") under §§ 22-35, 32-662, and 42-551 of the New York City Zoning Resolution ("**ZR Restrictions**") and for common law and statutory public nuisance in connection with a vessel operated by Ballyhoo in waterways in and around New York City ("**Vessel**");

WHEREAS, by Order entered in the Action on April 19, 2019 [ECF Doc. No. 27], as modified by the Amended Order entered on May 2, 2019 [ECF Docket No. 32], the Court granted the City's motion for a preliminary injunction to the extent reflected in said Order and Amended Order;

WHEREAS, in its Answer filed in the Action [ECF Doc. No. 39], Ballyhoo has asserted counterclaims against the City ("**Counterclaims**");

WHEREAS, on or about June 20, 2019, the New York State Legislature passed Bill No. S6541-A/A8290-B, which was signed into law by the Governor on or about August 20, 2019, creating a new section 43-a of the Navigation Law, prohibiting vessels from operating, anchoring, or mooring in the navigable waters of the state while operating a digital billboard or other type of billboard that uses flashing, intermittent, or moving lights ("**§ 43-a**");

WHEREAS, each of the City and Ballyhoo (each a "**Party**," and collectively the "**Parties**") wishes to fully and finally resolve all claims asserted in the Action with prejudice, and to provide for compliance with applicable laws, including the ZR Restrictions and § 43-a;

WHEREAS, in consideration of the mutual covenants, representations, and provisions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby conclusively acknowledged, the Parties wish to enter into this stipulation ("**Agreement**") as of October 7, 2019 ("**Agreement Date**") and to submit it to the Court to be so-ordered as a stipulation, consent decree, and order of dismissal;

WHEREAS, Ballyhoo presently intends, promptly following the so-ordering of this Agreement, to temporarily relocate the Vessel to Florida, without prejudice to its right to return to any waterway located outside the State of New York at any time;

NOW, THEREFORE, IT IS HEREBY AGREED:

1. FILING; EFFECTIVE DATE.

(a) Upon the execution of this Agreement by the Parties and the City's receipt of the Confession in accordance with Section 5 herein, the City shall cause the Agreement to be filed with or otherwise submitted to the Court with a request that it be so-ordered.

(b) This Agreement shall be effective upon its so-ordering and entry by the Court (the date of entry referred to herein as the "**Effective Date**").

2. INJUNCTION.

(a) Ballyhoo shall not display or operate, on any waterway located in the State of New York:

(i) any sign that uses (A) light emitting diode technology, or (B) flashing, intermittent, or moving lights; or

(ii) within 1,500 feet of the City's shore, any sign that directs attention to a profession, business, commodity, service or entertainment conducted, sold or offered elsewhere than upon the premises of the vessel and is not accessory to use on such vessel.

For purposes of this Section 2(a), the term "waterway" carries its broadest meaning and includes, without limitation, the following: East River, Harlem River, Hudson River, Upper New York Bay, Newark Bay, Arthur Kill/Kill Van Kull, Narrows, Lower New York Bay, Jamaica Bay, Long Island Sound, and Atlantic Ocean. For the avoidance of doubt, the terms of this Agreement shall not apply to conduct occurring on any waterway located outside of the State of New York.

(b) Nothing in this Agreement shall be deemed to authorize any violation of law or to waive, impair, or otherwise prejudice (i) any City authority or power to enforce the law, including without limitation the ZR Restrictions and § 43-a, in connection with conduct occurring after the Effective Date; or (ii) any City right or claim to any available remedy for any act or omission of Ballyhoo, including without limitation any public nuisance created by Ballyhoo, occurring after the Effective Date.

3. RELEASES.

(a) Upon the so-ordering and entry of this Agreement and the City's receipt of the Confession in accordance with Section 5(a) of this Agreement, the City knowingly and voluntarily waives and releases all claims, charges, debts, demands, sums of money, penalties,

finances, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, rights, obligations, losses, liabilities, costs, expenses, attorneys' fees, and demands of any kind whatsoever, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, asserted or unasserted, hidden or concealed, matured or unmatured, material or immaterial, whether in law, admiralty or equity, or of any other type or in any other capacity against Ballyhoo existing at any time up to and including the Effective Date, including without limitation all claims asserted in the Action; provided, however, that this release does not include (i) any taxes (and related charges) that might be owed by Ballyhoo to the City; or (ii) any liability based upon the obligations created by this Agreement.

(b) Upon the so-ordering and entry of this Agreement, Ballyhoo knowingly and voluntarily waives and releases all claims, charges, debts, demands, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, rights, obligations, losses, liabilities, costs, expenses, attorneys' fees, and demands of any kind whatsoever, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, asserted or unasserted, hidden or concealed, matured or unmatured, material or immaterial, whether in law, admiralty or equity, or of any other type or in any other capacity against the City existing at any time up to and including the Effective Date, including without limitation all claims asserted in the Action; provided, however, that this release does not pertain to tax refunds or overpayments that might be owed by the City to Ballyhoo.

4. COURT JURISDICTION; CONTEMPT FOR BREACH.

(a) To ensure that the requirements of this Agreement are implemented, the Court will retain jurisdiction of this action to enforce the terms of this Agreement for a period of three years from the Effective Date. The Complaint and Counterclaims shall be dismissed with prejudice upon the Court's approval of this Agreement, subject only to the District Court's retention of jurisdiction described in this Section 4.

(b) If Ballyhoo has breached any term of Section 2 of this Agreement, the City shall be entitled to move for an order finding Ballyhoo in contempt. In the event that the Court issues an order of contempt, Ballyhoo consents to the award of remedies including, without limitation, the disgorgement of any and all profits realized by Ballyhoo in connection with the conduct underlying the finding. Nothing in this Section 4(b) shall be deemed to limit or otherwise prejudice the City in seeking any other remedy for any breach of this Agreement and/or violation of any applicable law or court order.

(c) Any failure by Ballyhoo to comply with Section 2 of this Agreement will, and shall be deemed to, cause immediate and irreparable injury to the City.

(d) Ballyhoo shall require compliance with this Agreement by its officers, employees, assigns, and/or successors. The City shall require compliance with this Agreement by its departments, divisions, officials, representatives, officers, employees, assigns and/or successors.

5. CONFESSION OF JUDGMENT; FILING.

(a) Simultaneously with the execution of this Agreement, Ballyhoo shall execute and deliver to the New York City Law Department (“**Law Department**”) a confession of judgment in the form attached hereto as Exhibit A (“**Confession**”). The Confession shall be held in escrow by the Law Department, and may be released by the Law Department from escrow only upon (i) a Default (as that term is described in Section 5(b)), and (ii) the City’s compliance with the terms of Section 5(b), 5(c), 5(d), and 5(e) of this Agreement.

(b) Any failure by Ballyhoo to comply with any provision of Section 2 of this Agreement shall constitute an event of default (“**Default**”). If the City has a good faith basis to assert the existence of a Default, the City shall provide notice to Ballyhoo, in accordance with Section 6 of this Agreement, stating the nature of, and facts and circumstances giving rise to, the Default (including the date, time and location of each alleged infraction), together with any documentary support that is within the City’s possession, custody or control supporting its position (“**Notice of Default**”). The City may in the Notice of Default request information in Ballyhoo’s possession, custody or control that is reasonably necessary to verify the existence of a Default (“**Request for Information**”).

(c) Ballyhoo may respond to the Notice of Default by delivering to the City, so as to be received within thirty (30) days of the Notice Date (as that term is defined in Section 6 of this Agreement), responsive information (including information responsive to any Request for Information) sufficient to demonstrate that Ballyhoo did not breach Section 2 as set forth in the Notice of Default (“**Response**”).

(d) In the event that Ballyhoo fails timely to respond to the Notice of Default in accordance with Section 5(c), the City may file the Confession or otherwise cause the Confession to be entered and/or docketed without further notice.

(e) In the event that Ballyhoo delivers a Response in accordance with Section 5(c) and the City makes a good faith determination that Ballyhoo is in Default, the City may, upon five (5) business days’ advance written notice to Ballyhoo, file the Confession or otherwise cause the Confession to be entered and/or docketed. Ballyhoo shall have the right to challenge, move for relief from, set aside and/or vacate the filing of the Confession or any judgment entered thereon solely on the basis that a Default has not occurred.

(f) The remedies available to the City and Ballyhoo under this Section 5 shall be in addition to any other remedy provided for under this Agreement or ordered by the Court. Nothing in this Section 5 shall be deemed to limit or otherwise prejudice the City or Ballyhoo in seeking any other remedy for any breach of this Agreement and/or violation of any applicable law or court order.

6. NOTICES. Any notice or other delivery provided for under this Agreement shall be deemed proper if it is sent by next-day delivery and email (where an email address is supplied) as follows, which contact information shall be changed upon written notice provided by any Party in accordance with this Section 6.

For the City:

New York City Law Department
100 Church Street
New York, NY 10007
Attn: Brian T. Horan, Esq.
bhoran@law.nyc.gov

For Ballyhoo:

Adam Shapiro
Ballyhoo Media, Inc.
1111 Brickell Bay Drive
Suite 2302
Miami, FL 33131
adam@ballyhooboats.com

And

Herrick, Feinstein LLP
Attn: Michael Berengarten, Esq.
Attn: Scott Ross, Esq.
2 Park Avenue
New York, NY 10016
mberengarten@herrick.com
sross@herrick.com

Notice or other delivery made in accordance with this Section 6 shall be deemed effective on the day after it is sent (“**Notice Date**”).

7. NO ADMISSION OF LIABILITY. The execution, delivery and acceptance of this Agreement does not constitute and shall not be construed as an admission of liability or wrongdoing whatsoever on the part of any Party, and no portion of this Agreement can be used as an admission of any liability or wrongdoing in any legal or administrative forum.

8. NON-WAIVER. Any failure or delay on the part of any Party in (i) insisting upon strict performance of any term, condition, or covenant under this Agreement; (ii) exercising any right, power, remedy, or privilege under this Agreement; or (iii) delivering any notice pursuant to this Agreement, shall not operate as or constitute a waiver of any term, condition, covenant, right, power, remedy, or privilege under this Agreement.

9. AUTHORIZED SIGNATURES. Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each of the Parties represents and warrants that the execution and delivery

of the Agreement and the performance of such Party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such Party.

10. REPRESENTATION BY COUNSEL. Each of the Parties acknowledges that it has been represented by counsel throughout the negotiation of this Agreement, that it has carefully reviewed each of this Agreement's terms with counsel, that it fully understands each of the terms of this Agreement, and that it is entering into this Agreement freely.

11. NO CONSTRUCTION AGAINST DRAFTING PARTY. No provision of, or exhibit or other attachment to, this Agreement shall be construed against or interpreted to the disadvantage of any Party by any court or other governmental or judicial authority by reason of such Party having or being deemed to have structured or drafted such provision, exhibit, or attachment.

12. ENTIRE AGREEMENT; AMENDMENT; CHOICE OF LAW.

(a) This Agreement contains all terms and conditions agreed upon by the Parties with respect to the subject matter hereof. Every representation, warranty, and covenant made prior to or contemporaneous with this Agreement is merged into this Agreement, and in entering into the Agreement no Party is relying on any other statement, representation or warranty, written or oral, as inducement or consideration for entering into this Agreement.

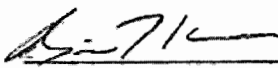
(b) Neither this Agreement nor any provision hereof may be waived, amended, discharged, or terminated except by instrument in writing signed by the Parties.

(c) This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York, without regard to its conflicts of law principles.

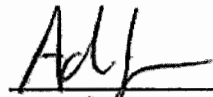
13. COUNTERPARTS. This Agreement may be executed in counterparts, and when each Party has signed and delivered (including without limitation by e-mail) at least one such counterpart, each counterpart shall be deemed an original and, when taken together with other signed counterparts, shall constitute one Agreement which shall be binding upon and effective in accordance with its terms as to all Parties.

IN WITNESS WHEREOF, this Agreement is executed by the Parties as of the Agreement Date.

CITY OF NEW YORK
Georgia M. Pestana
Acting Corporation Counsel
of the City of New York

By: 
Brian T. Horan
Assistant Corporation Counsel
100 Church Street, 20th Floor
New York, NY 10007

BALLYHOO MEDIA, INC.

By: 
Adam Shapiro
CEO

IT IS SO ORDERED this 7th day of October 2019.

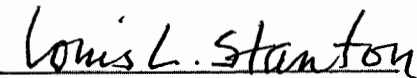

UNITED STATES DISTRICT JUDGE

EXHIBIT A
TO STIPULATION, CONSENT DECREE,
AND ORDER OF DISMISSAL

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

-----X
CITY OF NEW YORK,

Plaintiff,
-against-

**AFFIDAVIT OF JUDGMENT
BY CONFESSION**

BALLYHOO MEDIA, INC.,

Defendant.
-----X

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

ADAM SHAPIRO, being duly sworn, deposes and says:

1. Ballyhoo Media, Inc. (“Ballyhoo”) is a corporation organized and existing pursuant to the laws of the State of Florida, with a principal place of business located at 1111 Brickell Bay Drive, Suite 2302, Miami, FL 33131.

2. I am the Chief Executive Officer of Ballyhoo. I am duly authorized to make this Affidavit of Confession by Judgment (“Confession”) on behalf of Ballyhoo.

3. Ballyhoo hereby confesses judgment in favor of the City of New York (“City”) for the sum of \$100,000 and hereby authorizes the City, its agents and assigns to enter a judgment for that sum against Ballyhoo.

4. This Confession of Judgment is executed pursuant to New York Civil Practice Law and Rules 3218 for the purpose of securing the City against a contingent liability arising out of the facts set forth below.

5. Beginning in October 2018, Ballyhoo displayed advertising signs on a vessel it operated in waterways in and around New York City. In March 2019, the City commenced the action entitled *City of New York v. Ballyhoo Media, Inc.*, United States District Court, Southern District of New York, Case No. 19-cv-2731 (“Federal Court Action”). The City’s Complaint in the Federal Court Action asserted claims, *inter alia*, under §§ 22-35, 32-662, and 42-551 of the New York City Zoning Resolution. On these claims, the City sought, *inter alia*, the recovery of civil penalties in the amount of up to \$25,000 per violation (“Civil Penalty Claims”).

6. In order to resolve, *inter alia*, the City’s claims asserted in the Federal Court Action, Ballyhoo is freely, knowingly, and voluntarily entering into a stipulation with the City to resolve the Federal Court Action (“Agreement”), a copy of which is attached hereto. The Parties are agreeing that the Agreement will be submitted to the United States District Court with

