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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 2020 Processing LLC,  
9

10 Plaintiff,

11 v.

12 True Auto LLC, et al.,  
13

14 Defendants.  
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No. 14-CV-00950-JAT

**ORDER**

16 Pending before the Court is Plaintiff 2020 Processing LLC's Motion to Enforce  
17 Settlement (Doc. 65). The Motion is fully briefed, including a Response by Defendant  
18 True Auto LLC ("True Auto") to the Motion to Enforce (Doc. 69), and a Reply by  
19 Plaintiff to that Response (Doc. 70). The Court now rules on this Motion.

20 **I. MOTION TO ENFORCE**

21 **A. Background**

22 This case arises out of a trademark and copyright dispute. Eventually, the parties  
23 began negotiating a settlement, and this Motion seeks enforcement of an alleged  
24 agreement to settle pursuant to LRCiv 83.7.

25 During negotiations, Defendant drafted and made a settlement proposal to Plaintiff  
26 on June 21, 2014. (Doc. 69, Ex. A). The draft proposed:

27 2) Within 30 days from the date of the Stipulation, True Auto will immediately  
28 remove the term TRUE AUTO PROTECTION from its website and from all  
marketing and advertising, including any electronic links on the web. The

1           foregoing promise is limited to the term TRUE AUTO PROTECTION and is not  
2           applicable to the term TRUE AUTO VEHICLE BREAKDOWN PROTECTION  
3           and True Auto may use the term TRUE AUTO VEHICLE BREAKDOWN  
4           PROTECTION in association with its goods and services.

5 (Doc. 69-3, ¶ 2). According to one of Defendant’s attorneys, Mr. Bumgardner, the June  
6 21 proposal’s only contemplated change was “to change the banner on the website  
7 (www.trueautoprotection.com) from ‘TRUE AUTO PROTECTION’ to ‘TRUE AUTO  
8 VEHICLE BREAKDOWN PROTECTION.’” (Doc. 69-2, ¶ 4). On June 23, 2014,  
9 counsel for Plaintiff responded with proposed revisions to the June 21 proposal. (Doc.  
10 69-4). The proposed revisions by Plaintiff’s counsel were as follows:

11           2) Within 30 days from the date of the Stipulation, True Auto will immediately  
12           remove the term TRUE AUTO PROTECTION from its website and from all  
13           marketing and advertising, including any electronic links on the web. The  
14           foregoing promise is limited to the term TRUE AUTO PROTECTION and is not  
15           applicable to the term TRUE AUTO VEHICLE BREAKDOWN PROTECTION  
16           and True Auto may use the term TRUE AUTO VEHICLE BREAKDOWN  
17           PROTECTION in association with its goods and services. True Auto may  
18           continue to use the URL address/domain of “trueautoprotection.com” and  
19           associated emails for forwarding purposes only for a period of six months from the  
20           date of this Stipulation, after which the URL address shall no longer be utilized. In  
21           no event shall the URL address/domain “trueautoprotection.com” be transferred or  
22           assigned to any other individual or entity.

23 (Doc. 69-4, ¶ 2). Mr. Bumgardner claims that during a phone call with Plaintiff’s counsel  
24 on June 27, 2014, he stated “True Auto will never accept any restrictions on the use of its  
25 domain name or email address.” (Doc. 69-2, ¶ 6). Mr. Bumgardner also alleges that he  
26 made Plaintiff’s counsel aware that Defendant rejected the June 23 counter proposal, and  
27 that Defendant would continue preparing for the impending preliminary injunction  
28 hearing if the domain name language was not removed. (Doc. 69-2, ¶ 6).

          Another of Defendant’s attorneys, Mr. Rastegar, alleges that during a July 22,  
2014, phone call with Plaintiff’s counsel he asked whether the “case would go away” if  
Defendant “[went] back to the old website banner”, to which Plaintiff’s counsel  
responded that it would “go a long way.” (Doc. 69-1, ¶ 3).

          On July 22, 2014, after the phone call, Defendant emailed Plaintiff a proposed

1 settlement agreement as follows:

2 1) Defendants will agree to remove the term TRUE AUTO PROTECTION from  
3 its website and from all marketing and advertising, including any electronic links  
4 on the web. Defendants may, however, use the term TRUE AUTO VEHICLE  
5 BREAKDOWN PROTECTION.

6 2) Defendants will not provide any service contracts or administration services for  
7 any program associated with or marketed under the term TRUE AUTO  
8 PROTECTION.

9 (Doc. 65, Ex. A). On July 23, 2014, Plaintiff's counsel responded by asking Mr. Rastegar  
10 to inquire whether Defendant would be willing to reimburse a portion of Plaintiff's  
11 attorneys' fees as part of the settlement. (Doc. 65 at 11). On July 28, 2014, Rastegar  
12 responded, saying "[True Auto] is not willing to make any payments to [Plaintiff]. He is  
13 willing to do items 1 and 2 listed below." (Doc. 65 at 10) ("items 1 and 2" referring to the  
14 paragraphs in the July 22 proposal). On July 29, 2014, Plaintiff's counsel responded,  
15 "[m]y client has accepted the proposed settlement offer, which I have incorporated into  
16 the attached stipulation and order for filing with the Court." (Doc. 65 at 10).

17 The stipulation attached to Plaintiff's July 29 email included the provisions from  
18 the July 28th offer, and further provided:

19 1) No later than ten business days following the entry of an Order approving this  
20 Stipulation, Defendants agree to remove the term/phrase TRUE AUTO  
21 PROTECTION from any website owned or utilized by Defendants and from all  
22 marketing and advertising, including any electronic links on the web. Defendants  
23 may, however, use the term TRUE AUTO VEHICLE BREAKDOWN  
24 PROTECTION; and

25 2) Defendants agree not to provide any service contracts or administration services  
26 for any program associated with or marketed under the term TRUE AUTO  
27 PROTECTION.

28 (Doc. 65, Ex. B). On July 31, 2014, in response to the July 29 stipulation, Defendant  
submitted a modified version of the stipulation. The modified stipulation provided:

a) No later than ~~ten business~~ thirty calendar days following the entry of an Order  
approving this Stipulation, Defendants agree to remove the term/phrase TRUE  
AUTO PROTECTION from any website owned or ~~utilized~~ controlled by  
Defendants and from all marketing and advertising, including any electronic links

1 on the web (provided Defendants control such marketing and advertising).  
2 ~~Defendants may, however, use the term/phrase TRUE AUTO VEHICLE~~  
3 ~~BREAKDOWN PROTECTION; and~~

4 b) Defendants agree not to provide any service contracts or administration services  
5 for any program associated with or marketed under the term/phrase TRUE AUTO  
6 PROTECTION; and

7 c) Notwithstanding anything in this Stipulation to the contrary 1) Defendants may  
8 use the term/phrase TRUE AUTO VEHICLE BREAKDOWN PROTECTION,  
9 and 2) Defendants may continue to use the domain trueautoprotection.com. Such  
10 use may include a website at this domain, sending and receiving emails from this  
11 domain, and using this domain in its marketing and advertising.

12 (Doc. 65, Ex. C). Following this modified stipulation, in an email dated August 4, 2014,  
13 Plaintiff's attorney rejected paragraph c.2 concerning use of the domain name  
14 trueautoprotection.com. (Doc. 65, Ex. A). However, Plaintiff's attorney stated that  
15 Plaintiff was agreeable to the other changes Defendant made. (*Id.*)

16 Plaintiff filed a Motion to Enforce Settlement based on its belief that a binding and  
17 enforceable settlement exists and should be enforced. (Doc. 65 at 6)

### 18 **B. Legal Standard**

19 "No agreement between parties or attorneys is binding, if disputed, unless it is in  
20 writing signed by the attorney of record or by the unrepresented party . . . [however] in  
21 the interests of justice the Court shall have the discretion to reject any such agreement."  
22 LRCiv 83.7.

23 A federal district court's inherent authority allows it to enforce agreements that  
24 settle litigation before it. *See In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 957 (9th Cir.  
25 1994) ("This circuit also recognizes a trial court's inherent enforcement power."); *Calli v.*  
26 *Near*, 829 F.2d 888, 890 (9th Cir. 1987). State contract law governs whether the parties  
27 "reached an enforceable agreement settling the federal and state law claims." *Wilcox v.*  
28 *Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014); *see Botefur v. City of Eagle Point, Or.*, 7 F.3d  
152, 156 (9th Cir. 1993) ("a settlement agreement is governed by principles of state  
contract law . . . even where a federal cause of action is 'settled'").

In Arizona, "settlement agreements, including determinations as to the validity and

1 scope of release terms, are governed by general contract principles.” *Emmons v. Superior*  
2 *Court*, 192 Ariz. 509, 512 (Ariz. Ct. App. 1998) (citing *Hisel v. Upchurch*, 797 F.Supp.  
3 1509, 1517 (D. Ariz. 1992)). General contract principles require, at a minimum, an offer,  
4 an acceptance, consideration, and adequate specification of terms so that obligations can  
5 be ascertained to have an enforceable contract. *Rogus v. Lords*, 804 P.2d 133, 135 (Ariz.  
6 Ct. App. 1991). Arizona law requires a mirror image acceptance of an offer to  
7 consummate an agreement. *See Clark v. Compania Ganadera de Cananea, S.A.*, 385 P.2d  
8 691, 697 (Ariz. 1963). Thus, the addition of materially different terms to an agreement  
9 results in a purported acceptance instead being treated as a counteroffer containing the  
10 additional terms. *See United Cal. Bank v. Prudential Ins. Co. of Am.*, 681 P.2d 390, 422–  
11 23 (Ariz. Ct. App. 1983) (Citing *Clark*, 385 P.2d 691).

12 “It is well-established that before a binding contract is formed, the parties must  
13 mutually consent to all material terms. A distinct intent common to both parties must  
14 exist without doubt or difference, and until all understand alike there can be no assent.”  
15 *Hill–Shafer P’ship v. Chilson Family Trust*, 799 P.2d 810, 814 (Ariz. 1990) (en banc). “A  
16 manifestation of assent sufficient to conclude a contract is not prevented from doing so  
17 because the parties manifest an intention to memorialize their already made agreement in  
18 writing.” *Rennick v. O.P.T.I.O.N. Care Inc.*, 77 F.3d 309, 313–14 (9th Cir. 1996) (citing  
19 Restatement (Second) of Contracts § 27 (1981)). However, “if a party knows that the  
20 other intends no obligation to exist until the written agreement is made, the earlier  
21 manifestation does not constitute a contract.” *Rennick*, 77 F.3d at 314 (citing Restatement  
22 (Second) of Contracts § 27 comment b). For a court to enforce the non-executed contract,  
23 the court must be able to determine that there was a manifestation of mutual assent.  
24 *Johnson*, 967 P.2d at 612. Thus, the Court must look to the surrounding circumstances to  
25 determine whether the parties intended their non-executed agreement to be immediately  
26 effective. *Rennick*, 77 F.3d at 314; *see also Johnson*, 967 P.2d at 612.

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1           **C.     Analysis**

2           Plaintiff moves to enforce an alleged settlement agreement it entered with  
3 Defendant. Particularly, Plaintiff asserts that it entered into a binding contract with  
4 Defendant based on an email exchange from July 22, 2014 to August 4, 2014.

5           Plaintiff asserts that all of the required elements of a binding settlement are  
6 present. (Doc. 65 at 5). Plaintiff claims that the email dated July 28, 2014 constituted an  
7 offer by Defendant. (*Id.*) Furthermore, Plaintiff claims that it “accepted the offer . . . and  
8 incorporated the terms into a proposed stipulation.” (*Id.*) Thus, Plaintiff argues that an  
9 offer, acceptance, and consideration were present making the agreement, which was  
10 signed by attorneys of record, binding pursuant to LRCiv 83.7. (*Id.*)

11           Defendant does not dispute that the July 28 email was an offer. However,  
12 Defendant contends that Plaintiff did not accept the offer as tendered. (Doc. 69 at 10).  
13 Instead, Defendant argues that the stipulation attached to Plaintiff’s July 29 email  
14 contained material changes to the July 28 offer, making it a counteroffer. (Doc. 69 at 11).

15           In the stipulation however, Plaintiff made two notable changes to the original  
16 terms as set forth in the July 22 email. First, Plaintiff included a ten day deadline in  
17 which Defendant would have to remove the term TRUE AUTO PROTECTION from its  
18 website. Second, it expanded the set of websites from which Defendant was to remove  
19 the term/phrase TRUE AUTO PROTECTION (originally it was just the website  
20 Defendant owned, but the stipulation included websites Defendant “utilized”). (Doc. 65  
21 at 15). Defendant rejected both of these alterations.

22           Plaintiff’s addition to the stipulation, which would require Defendant remove the  
23 term/phrase TRUE AUTO PROTECTION from websites it utilized, materially altered  
24 the scope of the proposed agreement. Based on the correspondences, it appears  
25 Defendant’s intentions in negotiation were limited to potential changes to its website. For  
26 example, Defendant’s “only contemplated change was to change the banner on the  
27 website (www.trueautoprotection.com).” Also, Defendant’s counsel asked whether the  
28 case would go away if Defendant’s website went back to the old banner. Furthermore,

1 Defendant expressly rejected the added language, replacing “utilized by [True Auto]”  
2 with “controlled by [True Auto].”

3 By introducing the “utilized by” language, Plaintiff enlarged the scope of the  
4 agreement to websites which are not owned or controlled by Defendant. For example, a  
5 website utilized by the Defendant could potentially include a search engine not under  
6 Defendant’s control. If such a website contained the term/phrase TRUE AUTO  
7 PROTECTION, Defendant would be in violation of the alleged agreement. Based on  
8 Defendant’s actions throughout negotiation leading up to the proposed stipulation and its  
9 response to the stipulation, it is evident that Defendant did not intend to expand the  
10 agreement to cover any websites it did not own or control. Thus, the Court finds that the  
11 stipulation attached to plaintiff’s July 29 email was not a mirror image acceptance of the  
12 offer. Therefore, the Court finds that the stipulation attached to the July 29 email was a  
13 counteroffer.

14 In response to the July 29 counteroffer, Defendant reviewed and modified the  
15 stipulation. (Doc. 65, Ex. C). Defendant added a third provision which preserved its use  
16 of the domain trueautoprotection.com. (*Id.*) In the June 21 proposal, Plaintiff made clear  
17 that it did not intend to allow continued use of said domain name beyond some relocation  
18 period, in this case six months. (Doc. 69-4, ¶ 2). Thus, the addition of the third provision  
19 by Defendant was a material alteration to the agreement and not a mirror image  
20 acceptance. Therefore, the modified stipulation attached to Defendant’s July 31 email  
21 rejected the July 29 counteroffer and constituted a new counteroffer. In response to this  
22 counteroffer, Plaintiff conceded some of the modifications, such as changing the ten  
23 business day requirement to a thirty calendar day requirement and changing the word  
24 “utilized” to “controlled.” (Doc. 65, Ex. A). However, in the same email, Plaintiff’s  
25 counsel explicitly rejected language in the third provision. (*Id.*) Plaintiff’s response was  
26 therefore another counteroffer, which was never accepted.

27 Based on the foregoing, the Court finds that no binding agreement was created at  
28 any point during the correspondences at issue, nor was there a clear mutual assent

1 between the parties as to the terms of settlement. The Court recognizes a series of  
2 counteroffers and rejections resulting in no enforceable settlement agreement. Therefore,  
3 the Court denies Plaintiff's Motion to Enforce Settlement.

4 **II. CONCLUSION**

5 Based on the foregoing,

6 **IT IS ORDERED** that Plaintiff's Motion to Enforce Settlement (Doc. 65) is  
7 DENIED.

8 Dated this 25th day of November, 2014.

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James A. Teilborg  
Senior United States District Judge