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7 COUPONS, INC.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 COUPONS, INC.,
12 Plaintiff,
13 vs.
14 JOHN STOTTLEMIRE, and DOES 1-10,
15 Defendants.

Case No. 5:07-CV-03457 HRL

**MEMORANUM IN SUPPORT OF
COUPONS' MOTION TO DIRECT THE
PARTIES TO RETURN TO EARLY
NEUTRAL EVALUATION PURSUANT TO
ADR L.R. 5-2, and CIVIL L.R. 7.**

Date: January 27, 2009
Time: 10:00 a.m.
Courtroom: 2
Judge: Honorable Howard R. Lloyd

18
19 Plaintiff Coupons, Inc. believes the parties should resume their ENE session before
20 Harold McElhinny and so moves the Court to order that to occur. It is true that Stottlemire's
21 breach of the settlement agreement constrained Coupons to rescind its settlement offer, to
22 terminate the settlement agreement and to proceed to obtain a judgment against Stottlemire.
23 Coupons' belief is that short of a settlement, this judgment is necessary to repair the damage that
24 Stottlemire caused and to stop the damage he will continue to cause to Coupons in the
25 marketplace. But Coupons also believes that it's possible to repair the damage caused by
26 Stottlemire's breach short of taking this matter to judgment. Stottlemire could agree as part of an
27 exhumed settlement to make certain public statements that would correct the misimpression that
28

1 he caused by mixing his disclosure of confidential settlement terms with mischaracterizations of
2 the record and the parties' respective motivations and positions.

3 Mr. McElhinny, an experienced intellectual property trial attorney, would provide the
4 parties his guidance on Coupons' request that Stottlemire remedy his breach of the settlement
5 agreement. Coupons suggested that approach to Mr. Stottlemire, who specifically rejected
6 returning to ENE, threatening to make a motion for summary judgment to enforce the settlement.
7 Coupons fully expects that he will shortly make that motion.¹ To avoid additional court time over
8 wasteful motion practice, and in the hope that another ENE session would be productive, we
9 make this motion pursuant to Civil Local Rule 7, and ADR Local Rules 5-2 and 5-13.

10 **I. BACKGROUND FACTS AND ARGUMENT**

11 So that the Court can make a determination of the value of another ENE session, it's
12 important to understand the relevant background facts.

13 As previously communicated to the Court, Coupons and Stottlemire participated in what
14 then appeared as a successful ENE session with Harold McElhinny. The parties entered into a
15 settlement agreement at the ENE session. However, after the ENE session, but before the final
16 settlement agreement was fully executed and the case dismissed, Stottlemire materially breached
17 the agreement.

18 The settlement agreement explicitly provided that the settlement terms were to remain
19 confidential. He posted on his blog and disclosed to the press and bloggers in interviews a
20 confidential term of the settlement agreement (the dismissal with prejudice), that he beat Coupons
21 -- that he "kicked ass -- and that he paid no money to Coupons. Also improper, he combined his
22 improper disclosure of the settlement terms with inaccurate information apparently in order to
23 boast about his "victory and to misguide the market to believe that Stottlemire was right in his
24 view of the law, and that Coupons settled because it agreed with Stottlemire's assertions of the
25 legal vulnerability of Coupons' technology.

26 ¹ See accompanying December 5, 2008 Declaration of Neil A. Goteiner, who exchanged email
27 correspondence with Mr. Stottlemire over the period November 21 through November 26
28 regarding Mr. Stottlemire's breach, proposed procedures to repair the breach, and Mr.
Stottlemire's refusal on November 26 to return to ENE with Mr. McElhinny.

1 The facts are the exact opposite, to be developed in Stottlemire's threatened motion to
2 enforce the settlement he breached. To summarize:

- 3 1. Coupons filed this lawsuit in order to enforce its rights under the Digital
4 Millennium Copyright Act (DMCA) and state law to protect its business
5 and customer relationships from Stottlemire's efforts to traffic in software
6 intended to interfere with Coupons' system for distributing store coupons
7 over the Internet. Coupons was more interested in injunctive, as opposed
8 to monetary, relief, particularly in light of the fact that Stottlemire was
9 effectively judgment proof, with hundreds of thousands of dollars of
10 outstanding judgment liens (including an IRS judgment that would have
11 priority over any Coupons judgment) against him, no job and no
12 immediate prospect of a job.² Coupons was also already working on
13 changes to its system that would moot Stottlemire's circumvention
14 software, and did in fact install those changes.
- 15 2. Coupons, therefore, shortly after the case was filed, offered to settle the
16 lawsuit for only an acknowledgment of its right to protect its business and
17 customer relationships from Stottlemire's circumvention, with no payment
18 of money by Stottlemire. Coupons maintained an offer to settle the
19 lawsuit on terms requiring no payment by Stottlemire consistently
20 throughout the litigation.
- 21 3. Stottlemire rejected Coupons' offers to settle and throughout the case
22 made monetary demands on Coupons for what Stottlemire claimed was
23 malicious prosecution. He threatened to sue Coupons for this money after
24 the completion of Coupons' case against him. These demands started at \$1
25 million, went up to more than \$1.2 million, dropped to \$300,000, then rose
26 to a demand for \$2 million moments before the parties argued (on

27 ² Stottlemire reminded Coupons of these facts in an effort to persuade Coupons that he had no
28 incentive to settle. *See* Cusack Declaration submitted herewith.

1 November 4, 2008) Stottlemire’s motions to dismiss the Third Amended
2 Complaint and for sanctions. Coupons made it clear that it would never
3 pay any money to Stottlemire. Coupons therefore knew that even though
4 such a claim was frivolous, Coupons needed: (a) to establish certain legal
5 principles and facts to be able to send the right message to Stottlemire and
6 to the market about Coupons’ right to protect its software and intellectual
7 property, and (b) establish in the instant litigation a sufficiently clear
8 record that Stottlemire had breached the DMCA and Coupons’ common
9 law rights, in order to end quickly and efficiently Stottlemire’s threatened
10 subsequent suit. While Coupons understood that Stottlemire’s “malicious
11 prosecution lawsuit would be frivolous, Stottlemire’s mindset and
12 willingness to spend energy on it required this preparation in the instant
13 law suit to facilitate the speedy ending of the Stottlemire’s threatened
14 subsequent suit.

15 4. In the meantime, Stottlemire attempted to avoid his day of reckoning
16 through three separate motions to dismiss, a motion for summary
17 judgment, and two separate motions for sanctions. The motions made it
18 clear that the essential facts of the case were not disputed – Stottlemire did
19 intentionally create and distribute software for the purpose of
20 circumventing Coupons’ technology, in order to enable himself and others
21 to obtain coupons that they were not authorized to get. The main question
22 the Court grappled with was whether these facts could constitute a
23 violation of the DMCA and related state laws. The Court denied the
24 motion for summary judgment as premature and both motions for
25 sanctions on their merits. The Court granted in part and denied in part the
26 first two motions to dismiss, asking Coupons to clarify its allegations
27 under the DMCA and state laws. Coupons did so. The Court then denied
28 in full Stottlemire’s last motion to dismiss, ruling on November 6, 2008

1 that if Coupons' factual allegations were true, Coupons would establish
2 that Stottlemire violated both sections 1201(a) and 1201(b) of the
3 DMCA,³ and could be liable as well for trespass and unfair competition.
4 Because it was clear by that time that the essential facts were undisputed,
5 Coupons remained confident that it would prevail in the case.

- 6 5. Stottlemire made no more demands for a cash payment after the Court's
7 November 6, 2009 reasoned decision that Coupons had stated claims
8 against Stottlemire and before the ENE session. It was clear that the
9 Court's decision confirmed that he never had any basis for his alleged
10 damage claims.
- 11 6. Also significant to Coupons' decision to end the litigation was that
12 Stottlemire's circumvention method no longer worked. Since
13 approximately February of 2008 Coupons had implemented a technique
14 that trumped Stottlemire's circumvention method for finding and
15 removing the security features which prevent the unlimited printing of
16 Coupons' coupons.
- 17 7. There was therefore no reason to pursue Stottlemire past establishing
18 Coupons' settlement goals summarized above. With this Court's
19 November 6 ruling establishing that Coupons had a right to proceed to
20 protect its software and its relationships with its customers as Coupons
21 had pled its case, Coupons knew that Stottlemire's only possible long shot
22 defense – a legal one -- was officially dead.
- 23 8. The parties had repeatedly rescheduled the ENE until the Court could rule
24 on Stottlemire's successive – and ultimately unsuccessful -- challenges to
25

26 _____
27 ³ The Court explained that both sections 1201(a) and section 1201(b) of the DMCA were
28 applicable, notwithstanding prior amicus briefing from the Electronic Frontier Foundation
("EFF") on Stottlemire's behalf. EFF did not defend Stottlemire's conduct; rather it argued that
the claim should be adjudicated solely under section 1201(b) of the DMCA.

1 Coupons' lawsuit, the most recent being his motion to dismiss the third
2 amended complaint and his motion for sanctions.

3 9. At the November 13, 2008 ENE, only a week after the Court's ruling
4 made it clear that Stottlemire would have to face a probable judgment, the
5 independent evaluator, Harold McElhinny, an expert in intellectual
6 property law, gave the parties his expert evaluation of the merits of the
7 case. The case settled the same day.

8 10. The parties agreed to a confidentiality term to disclose no material term of
9 the settlement agreement, including the dismissal with prejudice.

10 11. After the parties reached and signed the terms of settlement at the ENE,
11 Stottlemire asked Coupons to indemnify Stottlemire for claims by
12 Coupons' customers against Stottlemire, presumably for interfering in
13 Coupons' customers' advertising campaigns and for theft of coupons.
14 Coupons declined to provide the indemnity.

15 12. Coupons believed that Stottlemire would respect the terms of the
16 confidentiality provision since he did not want it known that he – even
17 with the help of EFF -- had lost virtually all his legal arguments and that
18 he was compelled to give up his damage claims. Coupons was willing to
19 abide by the confidentiality agreement since the record of the settlement
20 coming so quickly after the Court's November 6 ruling, but without any
21 further mischaracterizations by Stottlemire, would suffice to give the
22 accurate signals to the market that Coupons would do what was necessary
23 to enforce its rights under the DMCA and the common law against anyone
24 who violated those rights.

25 13. Stottlemire, however, had a different plan. As Stottlemire was asking
26 Coupons for the indemnity, Stottlemire was breaching the settlement
27 confidentiality terms by commenting on it on his web site, and by
28 publishing his "ass kicking" of Coupons to the press and to bloggers. *See*

1 Exhibits A and B, attached to the Goteiner Declaration submitted
2 herewith.

3 14. Coupons immediately informed Stottlemire of his breach of the terms of
4 the agreement and that his conduct – abusing the settlement process by
5 using it to disclose confidential terms alloyed with serious
6 mischaracterizations – had injured and would continue to injure Coupons.
7 Coupons also provided a series of steps that Stottlemire could take to
8 correct the breach and repair the damage he caused to Coupons. These
9 steps would cost Stottlemire no money, and would simply require that he
10 state the above true facts on his web site and to all reporters/bloggers with
11 whom he spoke. Stottlemire, however, has refused to remedy his breach.
12 *See Goteiner Dec. ¶¶2-5.*

13 Stottlemire’s abuse of the settlement process therefore compelled Coupons to continue
14 with the litigation to establish its rights against Stottlemire and to discourage Stottlemire and
15 others like Stottlemire, who would interfere with Coupons’ software and relationships with
16 Coupons’ customers. While the continuation of the litigation and Stottlemire’s breach does not
17 warrant a status conference, it does warrant a monitored effort to reach a new settlement.

18 **II. CONCLUSION**

19 In conclusion, this Court should order the parties to return to ENE under Harold
20 McElhinny’s guidance.

21
22 Dated: December 5, 2008

FARELLA BRAUN & MARTEL LLP

23
24 By: /s/ _____
Neil A. Goteiner

25
26 Attorneys for Plaintiff
COUPONS, INC.

