

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

LASER REPRODUCTIONS, INC., and	)	
CARY GREEN,	)	
	)	Case No. 04 C 1815
Plaintiffs,	)	
	)	
vs.	)	Magistrate Judge Martin C. Ashman
	)	
CONDE SYSTEMS, INC.,	)	
DAVID GROSS,	)	
ENGRAVING BY GFS, and	)	
HENRY GRIGGS	)	
	)	
Defendants.	)	

**NOTICE OF EMERGENCY MOTION**

**and**

**EMERGENCY MOTION FOR SANCTIONS**

To: Mr. Joshua A. Aldort  
Mr. James F. Smith  
Claussen Miller, P.C.  
10 South LaSalle Street  
Suite 1600  
Chicago, Illinois 60603-1098

Mr. Nicholas T. Peters  
Mr. Mark W. Hetzler  
Fitch, Even, Tabin & Flannery  
120 South LaSalle Street  
Suite 1600  
Chicago, Illinois 60603

Please take notice that on Wednesday, January 19, 2005, at 10:00 a.m., we will appear before the Honorable Magistrate Judge Martin C. Ashman or any other judge sitting in his stead in Room 1366 of the Dirksen Federal Courthouse, 219 South Dearborn Street, Chicago, Illinois

60604, and then and there present the following **EMERGENCY MOTION FOR SANCTIONS** of Plaintiffs LASER REPRODUCTIONS, INC., and CARY GREEN. By this motion, Plaintiffs seek sanctions against Defendants CONDE SYSTEMS, INC., and DAVID GROSS for the destruction of evidence and a breach of agreed-upon terms for the settlement of the present litigation.

Plaintiffs, LASER REPRODUCTIONS INC., (“Laser Reproductions”) and CARY GREEN (“Green”) move this Court for sanctions against Defendants CONDE SYSTEMS, INC., (“Conde”) and DAVID GROSS (“Gross”) for their intentional destruction of dolls that constitute significant evidence were this action to go to trial. Most significantly, the material destroyed by Defendants Conde and Gross constituted an integral and agreed-upon major component of the settlement agreement tentatively reached between the parties with the assistance of this Court. Finally, the destroyed materials also held the potential to prove possible misrepresentations by Defendants Conde and Gross that could well have led to a finding of contempt of this Court by these defendants.

The present action concerns soft sculpture dolls (“Keepsake Dolls”) upon which one can imprint the face of an individual, often a loved one. The dolls typically, but not necessarily, have a costume suitable for some significant event or characteristic of the individuals whose faces will appear on them. These include, for example, a bride and groom set of dolls, a jogger doll, and the like. Also, the dolls may take some desirable, nonhuman form which can hold the face of a person. These latter dolls include, for example, a teddy bear and a sunflower. Plaintiffs have obtained two copyright registrations on these dolls.

For a while, all of the defendants purchased Keepsake Dolls from Plaintiffs. Then, in about the year 2000, Defendant Conde told Plaintiffs to reduce the price significantly. If

Plaintiffs refused to take this action, then Conde said that it would have the dolls “knocked off” in China. True to its word and with the help of Defendants GFS and Griggs, Conde did just that. To do so, Conde chose to simply ignore Plaintiffs copyrights in the dolls. In fact, in preparing for this nefarious deed, Defendants Conde and Gross removed the copyright labels that Plaintiffs had placed on the dolls, although no longer required to do so by law. Removing Plaintiffs’ copyright notices from the dolls and then duplicating them constitute two separate violations of the copyright act, 17 U.S.C. §§ 101 *et seqq.* To promote their illegitimate copies, Defendants Conde and Gross placed pictures of both Plaintiffs’ and Defendants’ dolls on their website and in their catalogs. These actions constitute two further violations of the copyright act.

The use by Defendants Conde’s and Gross’ of pictures of Plaintiffs’ dolls to sell their fake dolls constitutes palming off, common-law unfair competition, an intentional violation of the Lanham Act (15 U.S.C. § 1125(a), and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seqq.*, and the Illinois Deceptive Trade Practices Act, 815 ILCS 510/1 *et seqq.* Removing Plaintiffs’ labels to hide the fact of Plaintiffs’ copyrights and to lead purchasers to believe that the dolls had their origin with Defendants amounts to “reverse palming off” and violations of the common law and the statutory sections cited above in this paragraph.

In a further effort to misappropriate for themselves the entire market for the Keepsake Dolls, Defendants Conde and Gross published untrue statements to the effect that they, and not Plaintiffs, had developed the idea of and later created the process for imprinting the photographs on the dolls’ faces. These falsehoods constitute further violations of the common and statutory law set forth in the prior paragraph.

In February 2003, the undersigned attorney wrote to Defendants Conde and Gross, informing them of the copyrights mentioned above. In response, Defendants placed a phone call to Plaintiffs' attorney and attempted to justify their actions. Naturally, the attorney strongly suggested to Defendants that they obtain legal counsel. In an apparently hopeful sign, Defendants subsequently, in 2003, did remove the infringing dolls from their website with the two-word explanation of "temporarily discontinued." However, just in time for the Christmas 2003 shopping season, Defendants fully resumed their illegal activities.

As a result, Plaintiffs filed the instant action in March 2004. They followed this step by causing Defendants' internet service provider to remove the images from the website of Defendant Conde.

Defendants Conde and Gross then obtained the entry of a discovery protective order premised upon their stated desire to settle. The parties then exchanged Rule 26(a)(1), Fed.R.Civ.P., information and, based on this, Plaintiffs included Defendants GFS and Griggs in the litigation. At the suggestion of Plaintiffs' attorney, the Honorable Judge Matthew F. Kennelly referred the instant action to the Honorable Magistrate Judge Martin C. Ashman for mediation.

Accordingly, in a settlement conference held on November 1, 2004, and presided over by Judge Ashman, the parties reached an apparent settlement. (See Exhibit A.) The terms of the settlement included the following:

(1) Defendants would agree to the entry against them of a permanent injunction prohibiting the repetition of the complained-of activities.

(2) The parties would enter into a monetary settlement, which would remain confidential.

(3) Defendants, who had represented that they had completely stopped selling, advertising or shipping the dolls, would provide whatever dolls they had remaining in stock to Plaintiffs.

(4) Defendants Conde and Gross would issue to its customers a recall of all pertinent dolls to its customers. Defendants Conde and Gross would refund its customers the purchase price for the dolls. An agreed-upon, "suitable" letter would set forth the terms of the recall to Defendants' customers.

At the conclusion of the November 1, 2004, mediation session, the parties were to work together to finalize the settlement agreement. They also agreed to jurisdiction over the present action by the Magistrate Judge.

Accordingly, Plaintiffs' counsel prepared the initial drafts of the settlement papers (Exhibit B) and forwarded them to counsel for all Defendants'. After discussions over these papers, Plaintiffs prepared revised editions. At the previous status hearing on this matter before this Court on December 7, 2004, the Magistrate Judge provided guidance on outstanding issues that still separated the parties in their efforts to reach a final settlement.

In light of the above, Plaintiffs' counsel prepared a further set of settlement papers. He forwarded these to Defendants' counsel on January 6, 2005. In response, the various counsel for the different defendants returned documents to the undersigned counsel for Plaintiffs. In particular, Mr. Aldort, counsel for Defendant Conde and Gross, forwarded the papers containing his suggested revisions on January 11, 2005. His proposed CONSENT ORDER is attached as Exhibit C.

The next day, January 12, 2004, Plaintiffs' undersigned counsel held an extensive telephone discussion with Mr. Aldort in an effort to reach a complete settlement of the litigation.

Obviously, the discussion centered on the changes to papers desired by Mr. Aldort. After discussing the proposed revisions for exactly one hour and forty minutes, Mr. Aldort informed the undersigned counsel of the unbelievable (only, it is actually too believable) that *Defendants Conde and Gross had unilaterally, and contrary to the understanding to the parties since the November 1, 2004, settlement achieved in this Court, destroyed their inventory of remaining dolls.*

Plaintiffs' undersigned counsel found this admission absolutely dumbfounding. He expressed to Mr. Aldort his very strong view that it constituted a breach of faith and a violation of the settlement previously reached between the parties. Furthermore, waiting for one hour and forty minutes into the discussion to inform him of this breach was totally inexcusable and resulted in a total waste of all of the time and effort expended to that moment.

In response, Mr. Aldort offered the opinion that it was "no big deal" and that the settlement remained on track. Plaintiffs' counsel clearly stated that this was unbelievable considering that it constitutes a breach of faith *and* vitiated one of the essential terms of the proposed settlement. In fact, the CONSENT ORDER proposed by Mr. Aldort and forwarded to Plaintiffs' counsel the previous day (Exhibit C) still contained, in paragraph B, the requirement that "*Defendants . . . CONDE and GROSS, shall, within two (2) weeks from the entry of this CONSENT ORDER and at their own cost, deliver to Plaintiffs LASER REPRODUCTIONS and GREEN all Dolls in their possession that are the same or substantially the same as any of the Dolls of the Copyrights of Plaintiffs LASER REPRODUCTIONS and GREEN.*" (Emphasis added.)

Plaintiffs' counsel directly stated that Defendants' action had simply "busted the deal." Further, he was offended that Mr. Aldort had wasted his own time and his clients' resources.

Mr. Aldort offered to provide an affidavit from his client Mr. Gross. Plaintiffs' counsel responded in amazement that Mr. Aldort thought that this would have any effect whatsoever in light of the repeated falsehoods emanating from this individual and in light of the flagrant breach of the well settled terms of the CONSENT ORDER.

Finally, Plaintiffs' counsel made two observations for the future handling of this matter. First, since Defendants Conde and Gross had breached the settlement apparently reached earlier by depriving Plaintiffs of an important aspect of their bargain, they may wish to increase their monetary offer. Second, all the previous time in negotiating a deal that Defendants had secretly killed was simply wasted as was Plaintiffs' financial resources that they had to expend for their attorney to engage in these wasted settlement efforts. Accordingly, Plaintiffs' counsel told Mr. Aldort that such waste would not recur. He would no longer spend hours with the knowledge that Defendants would likely break any further deal. Accordingly, Plaintiffs' counsel said that Mr. Aldort could propose any settlement offer he and his clients thought appropriate and that such offer would be taken to Plaintiffs for their acceptance or refusal.

Mr. Aldort, on the following day, sent by e-mail and regular mailed the letter attached as Exhibit D. First, Mr. Aldort makes the completely incorrect statement, "You have indicated that Laser Reproductions ("Laser") is no longer willing to settle this dispute due to *Conde's inadvertent destruction* of its remaining inventory of approximately 115 Keepsake dolls." (Emphasis added.) This is simply not true. The undersigned counsel simply said that he was not going to waste valuable time negotiating a deal that already had died. As a further observation, how the destruction of the dolls can be characterized as "inadvertent" simply eludes Plaintiffs.

Then Mr. Aldort's letter attempts to excuse the behavior by saying, "The destruction was done to preclude the inadvertent sale of Conde's remaining inventory." How a sale can be

inadvertent also defies rational thought. Why could the dolls not have simply been placed in a locked container, perhaps offsite from Defendants' premises, or even sent to Defendants' counsel in Chicago? The absurdity of this position can be seen from the fact that Defendants Conde and Gross only had 115 dolls to protect and turn over to Plaintiffs. In comparison, Defendants GFS and Griggs have retained possession of approximately 3000 dolls without incident.

Then Mr. Aldort makes the astonishing assertion, "Please advise your client that the destruction of the dolls was not done to breach the draft settlement agreement, but to comply with the spirit of the agreement." Defendants purposefully destroying the dolls and thus breaching one of the essential and bargained-for terms of the agreement cannot in any normal use of language be considered as "comply[ing] with the spirit of the agreement."

As seen from above, Defendants Conde and Gross have committed the following transgressions:

First, they have breached the settlement agreement reached over two and one-half months ago with the direct assistance of this Court.

Second, by keeping secret their perfidious action, they have caused Plaintiffs' counsel to waste vast amounts of time pursuing a settlement agreement that they had already purposefully destroyed.

Third, they have engaged in the spoliation of evidence that will seriously frustrate Plaintiffs' efforts to prepare this case for trial.

The third issue above requires some discussion. Obviously, all of the accused dolls constitute discoverable evidence in this case. Their destruction well after the commencement of this action constitutes the intentional spoliation of evidence. This evidence cannot be replaced. Without more, it deserves the severest sanction of this Court.

However, the matter proves even more egregious than the above suggests. The monetary terms of the settlement agreement depended upon the numbers of dolls sold by the various defendants. In particular, the numbers of dolls sold by Defendants Conde and Gross depended upon their assertion that their entire supply of infringing dolls came from Defendants GFS and Griggs.

However, Plaintiffs have several good reasons to believe that Conde and Gross have at least one or more additional suppliers of infringing dolls contrary to their repeated assertions. Accordingly, Plaintiffs have made various inquiries to various individuals concerning the dolls sold by Conde and Gross. In particular, Plaintiffs' counsel has made various verbal and written inquiries to counsel for Defendants GFS and Griggs concerning the nature of the dolls they supplied to Defendants Conde and Gross. The e-mail attached as Exhibit E shows the extensive questionnaire sent to counsel for GFS and Griggs. (These defendants have very forthrightly provided extensive responses to the questions.) Mr. Nicholas Peters, of Fitch, Even, Tabin, and Flannery, Counsel for Defendants GFS and Griggs, has informed the undersigned counsel for Plaintiffs that he has, in fact, discussed Plaintiffs' desire for this information with counsel for Defendants Conde and Gross. The destruction of evidence by Defendants Conde and Gross followed.

Unlike the phoenix, the destroyed dolls cannot rise up from their ashes. However, this Court cannot allow such contumacious behavior to go unpunished. See the recent decision of the Magistrate Judge Patricia A. Hemann in the case of *In re: Texlon Corporation Securities Litigation*; Case No. 5:98CV2876 and *Haman v. PriceWaterhouseCoopers, LLP*, No. 1:01CV1078, (N.D. Ohio, Eastern Division, 2004). In that important case with very large *ad*

*damnums*, the Magistrate Judge has recommended a default judgment against Defendant PriceWaterhouseCoopers for discovery fraud including spoliation of evidence.

In light of the intentional destruction and spoliation of evidence, Plaintiffs seek the following sanctions:

- (A) A default judgment on liability against Defendants Conde and Gross;
- (B) A permanent injunction against Defendants Conde and Gross prohibiting further violations of Plaintiffs Laser Reproductions' and Green's rights;
- (C) A temporary restraining order or preliminary injunction prohibiting the further destruction of any discoverable material in this action;
- (D) An order expediting discovery in favor of Plaintiffs to prevent the further destruction of evidence in this action;
- (E) An order removing the "Attorneys' Eyes Only" provision of the Protective Order entered on July 9, 2004, so that Plaintiffs can assist their counsel in this action. (Otherwise, the Protective Order will remain in effect to prevent use of any designated material for any purpose other than this litigation.) This assistance has become particularly necessary in light of the spoliation of evidence effected by Defendants Conde and Gross;
- (F) A finding that Defendants Conde and Gross have breached the settlement agreement reached in this action;
- (G) An order holding Defendants Conde and Gross in contempt of this Court; and
- (H) An award of all attorneys' fees and costs incurred in this action by Plaintiffs from November 1, 2004, to the present. These attorneys' fees and costs were necessitated by the negotiations for a settlement which Defendants Conde and Gross have intentionally prevented and by the present motion for sanction.

This Court must preserve its integrity and processes. It must enforce the Federal Rules of Civil Procedure. As a consequence, it should award to Plaintiffs the sanctions listed above.

Respectfully submitted,

Eugene F. Friedman  
One of Plaintiffs' Attorneys

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January 17, 2005

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing paper and its attachments was served on Defendants CONDE SYSTEMS, INC., and DAVID GROSS by faxing a copy to their attorneys Mr. Joshua A. Aldort and Mr. James F. Smith, Claussen Miller, P.C., 10 South LaSalle Street, Suite 1600, Chicago, Illinois 60603-1098, fax no. (312) 606-7777, and on ENGRAVING BY GFS, and HENRY GRIGGS by faxing a copy to their attorneys Mr. Nicholas T. Peters, and Mr. Mark W. Hetzler, Fitch, Even, Tabin & Flannery, 120 South LaSalle Street, Suite 1600, Chicago, Illinois 60603, fax no. (312) 577-7007 on January 17, 2005.

Eugene F. Friedman