



December 16, 2009

The Honorable John R. Tunheim
United States District Court
U.S. Courthouse, Suite 13E
300 South Fourth Street
Minneapolis, MN 55415

By ECF

Re: *Insignia Systems, Inc. v. News America Marketing In-Store, Inc., et al.*,
Case No. 04-4213 (JRT/AJB) – Request for Leave to File Motion for Reconsideration

Dear Judge Tunheim:

News America respectfully seeks leave to file a motion to reconsider the Court's September 30, 2009 order denying summary judgment (the "Order"). L.R. 7.1. Compelling circumstances justify this request because the Pamela Wesson declaration submitted by Insignia and relied on by the Court as a primary basis for denying summary judgment, was a sham declaration, disproven by her deposition, and concocted solely to defeat summary judgment. Additionally, Karl Ball's recent deposition testimony confirms that his declaration opposing summary judgment was based on hearsay and rank speculation which cannot defeat summary judgment.

News America argued that Insignia's antitrust and Lanham Act claims failed, in part, because there was no evidence that any CPG ceased or reduced its business with Insignia as a result of News America's alleged conduct. Insignia sought to overcome this crucial evidentiary gap by submitting the post-discovery declaration of Wesson, a former Sara Lee employee. Wesson's declaration states that in 2002, she was approached by an Insignia representative selling Insignia's POPSigns and that "Sara Lee proceeded to purchase the POPSign program." Wesson Decl. ¶6.¹ The declaration then asserts that in 2003, a News America representative, Michele Moody, approached Wesson, disparaged Insignia's POPSigns, "criticized Insignia's POPSign compliance rate," and warned Wesson that "Sara Lee would be throwing its money away on Insignia POPSigns because they were likely to be removed by NAM personnel and thus would be ineffective in promoting Sara Lee brands." *Id.*, ¶¶9-10. Wesson's declaration then concludes that "[b]ecause of Ms. Moody's statements" in 2003, Sara Lee "consequently stopped purchasing Insignia's products." *Id.*, ¶11.

The Court accepted Wesson's declaration as key evidence of supposed injury caused by News America's conduct, specifically citing the testimony above. Order, p.12. The Court did, however, allow News America to depose Wesson on the substance of her declaration, which occurred on November 24th *Id.*

¹ Copies of the Declarations and deposition excerpts cited herein have not been provided. If the Court would like copies of these exhibits, News America would be happy to supply them.

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Wesson's deposition exposed her declaration as a complete sham. The deposition and declaration testimony are not merely "inconsistent"; they are irreconcilable. At deposition, Wesson testified that Sara Lee only began using Insignia's POPSigns in 2006 (not 2002). This, of course, is after Moody supposedly disparaged Insignia's products and alone disproves causation. Wesson Deposition, 56:7-15, 79:7-81:4, 119:23-120:19. Wesson further testified that when she met with Moody, Sara Lee was not even purchasing any Insignia products, thereby negating her declaration that Moody's 2003 statements caused Sara Lee to stop doing business with Insignia. *Id.*, 125:9-12. In fact, Wesson even testified – contrary to her declaration – that once Sara Lee began using Insignia's products in 2006, she continued to recommend them to Sara Lee through the end of her employment (in 2007) and that her "perception of the [Insignia] program didn't change." *Id.*, 105:25-106:7. Wesson's admissions cannot possibly be squared her declaration.

These compelling revelations – which were not known to News America or the Court when summary judgment was denied – fatally undercut and disprove the supposed facts upon which the Order was based. As such, Wesson's declaration was merely a "sham" that cannot create a disputed issue of fact on summary judgment as a matter of law. *American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 111 (8th Cir. 1997); *In re CitX Corp., Inc.*, 448 F.3d 672, 678 (3rd Cir. 2006) (affidavit cannot create a disputed fact on summary judgment when disavowed by subsequent deposition testimony). Even worse, when News America's counsel inquired about the circumstances of the creation of Wesson's declaration, Insignia's counsel asserted the attorney-client privilege and instructed Wesson not to answer (even though she admits Insignia's lawyers, who drafted the declaration, were not her lawyers when it was created). Wesson Deposition, 11-18.

Insignia's only other evidence of supposed injury was the declaration of its employee, Karl Ball. On summary judgment, the Court cautioned that Ball's declaration "could conceivably be considered hearsay" and deferred ruling on its admissibility until trial. Order, p.14. However, Ball's recent deposition confirms that his declaration was based entirely on multiple layers of CPG hearsay and speculation, which cannot defeat summary judgment. *Brooks v. Tri-Systems, Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005).²

With these revelations and under these troubling circumstances, News America should at least be given an opportunity to seek reconsideration. *See Rexam, Inc. v. USWA*, 2006 WL 2530384 (D. Minn., Aug. 31, 2006); *see also, Paul Oil Co., Inc. v. Federated Mut. Ins. Co.*, 154 F.3d 1049, 1051 (9th Cir. 1998) (affirming trial court's reconsideration of summary judgment denial where new evidence revealed that affidavit upon which order relied was a sham).

Respectfully submitted,



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² Ball's only non-hearsay evidence of supposed injury was his testimony that Insignia's business from P&G declined after a meeting in which P&G's Anita Scharfenberger showed him a copy of the letter she received from News America's Dominick Porco. But, at deposition, Ball admitted that Scharfenberger expressed anger at News America – not Insignia – as a result of the letter and dismissed its veracity.